



Fair Work Amendment (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

Senate Education and Employment Legislation Committee

Submission by Unions NSW

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Introduction

1. Unions NSW is the peak body for trade unions and union members in NSW and has over 65 affiliated unions and Trades and Labour Councils representing approximately 600,000 workers across the State. Affiliated unions cover the spectrum of the workforce in both the public and private sector.
2. The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (Cth) (**the Bill**)¹, provides excessive and unnecessary external oversight of the leadership, staffing and internal operations of registered trade unions. It confers significant power to the Minister, employers and broader corporate interests to interfere with the democratic operation of trade unions.
3. The legislation is unnecessary; the Government has not justified the wide sweeping changes. The 'integrity' the Bill seeks to ensure is already captured by existing legislation, including the *Fair Work Act 2009*, the *Fair Work (Registered Organisations) Act 2009* as well as internal union rules and democratic processes.
4. In 2017 Unions NSW made a submission opposing the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017. The 2017 bill did not receive the support of the Parliament. The Government has made cosmetic and minor changes to the 2017 bill and has presented it to the Parliament. The 2019 Bill remains a significant threat to the operation of trade unions and hampers their ability to effectively represent their members.
5. Unions NSW asks the Senate Committee to recommend the rejection of the Bill in its entirety.
6. Unions NSW supports the submissions made by the Australian Council of Trade Unions and other unions to this inquiry.

Schedule One – Disqualification from office

7. Schedule One of the Bill looks specifically at the disqualification of individuals holding office in a registered organisation.

¹ References to legislation refer to the Fair Work (Registered Organisation) Amendment (Ensuring Integrity) Bill 2019, unless stated otherwise.

8. The Bill's amendments expand the grounds for automatic disqualification. The Bill also provides the Federal Court with the power to make disqualification orders against a union official following an application from the Minister, the Commissioner or a person with a sufficient interest. A person of sufficient interest may include an employer or political opponent. Applications can be based on six grounds. If the grounds are met, the Court must make a disqualification order unless they consider the making of such an order would be unjust².
9. It is worth noting the Bill's proposal for disqualification from holding office is already dealt with in Union Rules governed by the Fair Work Commission and or the NSW Industrial Relations Commission. Union Rules ensure integrity and transparency by regulating the behaviours of union officials, including the removal from office of officials in circumstances such as gross neglect of duty in the conduct of office.

Automatic disqualification

10. The existing legislation provides limited circumstances under which a person can be automatically disqualified. The Bill's amendments expand the grounds for automatic disqualification to include a conviction for an offence punishable on conviction by imprisonment for five years or more³.
11. The conviction refers to any Commonwealth, State or Territory or international law. There is no requirement for the conviction to be related to industrial relations or the work of the union in any way. The inclusion of automatic disqualification on these grounds are too broad and are not adequately related to the operation of the union.

Designated Finding

12. The Bill introduces the term *designated findings* to define a broad category of offences which can be used to make an application for disqualification against a union official. *Designated findings* capture findings in any civil proceedings against a person in relation to a contravention of a civil penalty or remedy in the *Fair Work Act 2009*, *Registered Organisation Act 2009*, *Building and Construction Industry (Improving Productivity) Act 2016*, *Work Health Safety Act 2011* or State and Territory OHS legislation⁴.

² Sch 1, item 11, proposed s 221-223

³ Sch 1, item 8, proposed s 212(aa)

⁴ Sch 1, item 2, proposed s 9C(1)

13. The Bill stipulates designated findings can be considered by the Federal Court to be grounds to make an order for the disqualification of union officers, the cancellation of union registration, and/or used as grounds for the Fair Work Commission to prevent the amalgamation of trade unions⁵.
14. The threshold for an individual to have a *designated finding* made against them is low and does not accurately reflect the severity in which it can be applied in the Bill. Under the *Fair Work Act*, a union official who does not return an expired Right of Entry Permit directly to the Commission seven days after it has expired faces a civil penalty of up to 60 penalty units⁶. Under the proposed Bill, a finding in relation to this simple administrative oversight is now considered grounds for disqualification as a union official⁷. Further, if a substantial number of officials who are also members (the exact number required is not defined in the Bill) have a finding made against them in relation to the late return of an expired permit, this could be considered grounds for the deregistration of the union⁸.
15. Under the *Registered Organisations Act*, an organisation must lodge their financial report with the Fair Work Commission within 14 days of their general meeting. Late lodgement could result in the organisation facing a civil penalty of up to 300 penalty units⁹. A finding against the organisation would also be considered a *designated finding* under the proposed Bill and could be used as a ground to prevent an amalgamation from occurring¹⁰.

Retrospectivity

16. Item 17 of Schedule 1 of the Bill restricts the Court to considering only conduct engaged in after the commencement of the Schedule when determining whether a ground for disqualification has been met. This is important to ensure the law is not retrospective and office holders are not punished for actions they did not know the consequences of at the time.

⁵ Definition: Sch 1, item 11, proposed s 9C(1);
Disqualification: Sch 1, item 2, proposed s 223(1-3);
Cancellation of registration: Sch 2, item 4, proposed s 28E;
Amalgamation: Sch 4, item 7, proposed s 72E

⁶ *Fair Work Act*, s 517(1)

⁷ Sch 1, item 11, proposed s 223(1)(a)

⁸ Sch 2, item 4, proposed s 28E

⁹ *Registered Organisations Act*, s 268

¹⁰ Sch 4, item 7, proposed s 72E

17. The protection against retrospectivity however is undermined by the reference to right of entry as a ground for disqualification. The Bill stipulates an officer having a right of entry refused, revoked or suspended is a ground for disqualification¹¹. In applying for a right of entry permit, a union official is required to disclose all prior offences including those now defined by the Bill as *designated offences*. Under these amendments a refused, revoked or suspended right of entry could be used against an individual or union to trigger a disqualification application. Any application for disqualification based on right of entry, would allow for all relevant conduct outlined in a right of entry application or decision, regardless of when it was committed, to be considered as grounds for disqualification.
18. Under the Bill's amendments a right of entry decision could be used maliciously as a tool to disqualify a union official from holding office. This may have the unintended consequence of deterring union officials from applying for or renewing their right of entry, out of fear of the broader ramifications of a negative decision.
19. The Bill has the potential to be misused as a coercive mechanism to prevent union officials from accessing a legal right to access workplaces and speak to union members. The inclusion of right of entry decisions as a ground for disqualification undermines Item 17 of Schedule One, which specifically seeks to remove retrospectivity from the commencement of the Schedule.
20. When considering if a disqualification would be unjust the Court may consider 'any other matters the Court considers relevant'¹². A union official's actions prior to the commencement of the Bill could be taken into account. This undermines the Bill as it allows unions and union officials to be punished for actions they did not know the consequences of at the time they were committed.

Interaction with dually registered organisation

21. The Bill sets out new offences in relation to standing for or holding office when disqualified.¹³ The Bill creates a new offence if a disqualified official 'exercises the capacity to significantly affect the financial standing or other affairs of an organisation or a part of an organisation'¹⁴ or 'gives directions ... to the committee of

¹¹ Sch 1, item 11, proposed s 223(6)

¹² Sch 1, item 11, proposed s 222(2)(b)(iii)

¹³ Sch 1, item 11, proposed s 226

¹⁴ Sch 1, item 11, proposed s 226(3)(b)(i)

management of an organisation or part of an organisation¹⁵.

22. It is unclear how these new offences will interact with union structures that have dual registration at the Federal and State level. For example, some unions in NSW operate as dually registered organisations. They are federally registered as a state branch of the federal union and they are also registered as a union in their own right in the NSW system. Under this structure, many unions have two separate entities (the federal branch and the state union) which have a common elected leadership and staff. The state registered union is subjected to the relevant state industrial laws that regulate registered organisations. If a union official is disqualified from holding office under this Bill, they may step down from their position in the federal branch yet continue to be an official in the state registered union. Under the proposed s226, maintaining a position in the state registered union would be considered an offence, punishable by up to 2 years imprisonment.

23. The Bill effectively punishes union officials who seek to exercise their right to hold office under relevant state legislation. This is a significant overreach of the legislation and is illustrative of why transplanting corporations law into the *Registered Organisations Act* is ill conceived and not fit for purpose.

Reverse onus of proof

24. If a ground for disqualification has been satisfied, before making an order, the Court must determine that it 'does not consider it would be unjust to disqualify the person¹⁶'. Under the current legislation, the court is required to be 'satisfied that the disqualification is justified' before ordering disqualification¹⁷. The Bill reverses the onus of proof. It requires a union official to stand before a court and justify their role within their union. This is despite the fact they have been elected into the position by the union members they represent. There is no justification for this significant shift in the onus of proof, yet it will have a significant impact on the treatment of unions and their elected representatives before the courts. The reverse onus of proof is particularly concerning, given the low threshold required for disqualification.

¹⁵ Sch 1, item 11, proposed s 226(3)(b)(ii)

¹⁶ Sch 1, item 11, proposed s 222(2)(b)

¹⁷ Registered Organisations Act, s 307A

Expanded standing

25. The Bill provides that an application for a disqualification order can be made by the Commissioner, the Minister or a person with significant interest¹⁸. A person of 'significant interest' is not defined by the legislation and could include an employer, employer representative, corporate players in the broader industry or supply chain, political opponents and/or opposing candidates in a union election. The Bill provides no safeguards against frivolous and/or vexatious applications. Unions and union officials could find themselves tied up in expensive, time consuming litigation, used as a tool by opponents to undermine union work.
26. The Bill does not provide limits on who an application can be made against. While the Court is able to consider whether an individual should be disqualified from holding or standing for office, there is no requirement for that individual to currently hold or even be intending to hold office. This further expands the potential for employers or political opponents to tie unions up in unwarranted litigation for the purpose of undermining their work.
27. The expanded restrictions this Bill places on office holders is not restricted to employees of unions. The RO Act definition of *office holder* is broad and could include committee of management members or honorary positions within the union¹⁹. Often in unions these positions are filled by active and long-term members of the union who hold positions as part of the democratic and representative nature of their union. They include nurses, early childhood educators, construction workers, hospitality workers and teachers. They undertake mandatory financial officer training and development to ensure they are able to meet the requirements of the union rules and relevant legislation, but they are not industrial professionals and their work is generally voluntary. These members may now be exposed to prison sentences for up to 2 years if they hold an honorary position after being disqualified. Active participation in your union should not be discouraged by potential prison sentences.

¹⁸ Sch 1, item 11, proposed s 222(1)

¹⁹ Registered Organisations Act, s 9

Schedule Two – de-registration

28. Schedule Two of the Bill expands the grounds under which a court can make orders to deregister an organisation and provides the court with additional powers to make alternative orders in lieu of full deregistration.

Grounds for Federal Orders

29. The grounds for deregistration outlined in Schedule 2, Division 3 of the Bill set out five broad and contradictory grounds for the deregistration of a union.

Conduct of affairs of organisation

30. The Bill outlines a broad set of 'conduct of affairs' of the organisation or part of the organisation as a grounds for deregistration or alternative orders.

31. Of particular concern is the proposed s 28C(1) which establishes a grounds for deregistration if the organisation has conducted affairs in a manner that is: "(i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or a class of members; or (ii) contrary to the interests of the members of the organisation or part as a whole".

32. This ground runs contrary to the nature of diverse, democratically run organisations like unions. It is impossible to simultaneously meet the interests of members collectively and individually. The nature of unions requires them to balance the needs and interests of individuals against those of the broader collective. How effectively a union is able to do this, is determined by the membership of the union through union elections and internal decision making bodies. The proposed ground 28C(1)(b) is ill conceived and is not suitable for the collective and democratic nature of unions.

33. Unions assist members with thousands of workplace issues each year. As an example of how the amendment could be inappropriately applied; a union member who joined the union a month ago may call the union requesting assistance with a workplace injury claim which happened six months ago. The issue is highly technical and will require legal representation. The member wants the union to assist. When considering what action the union takes it must make a decision based on what is the fairest use of collective resources. The union will take into consideration the likelihood the matter will succeed, the implications or precedence of a positive (or negative) result for other union members and what resources will need to be

invested. In this example, the union has a process to determine these factors which leads to a decision not to allocate resources to the members' legal case. This is an example of the union acting in the interests of the collective membership. Despite this, under the proposed amendments, the decision to not allocate resources could be used as a grounds under 28C(1) to cancel of the union's registration.

Multiple findings against members

34. The Bill provides a ground for deregistration if multiple designated findings are made against a substantial number of members. The minimum number of members required to meet the threshold of 'substantial' is not defined in the Bill.

35. Under the current legislation there are limited circumstances under which a Court can order the deregistration of a union. They are limited to financial mismanagement, continued failures to comply with the Fair Work Commission order or damaging, unlawful industrial action. The Bill proposes an expansion to also include minor administrative offences contained within the Fair Work Act and Registered Organisations Act.

36. The ability to deregister a union based on findings against members is not about restricting the actions of union officials. This provision holds unions accountable for the actions of thousands of individual members. A union may be de-registered as a result of the actions of a group of members, even if the union and its officials had made attempts to stop members from committing a designated offence.

Obstructive industrial action

37. Obstructive industrial action is outlined as a ground for deregistration or other order²⁰. Under the existing legislation the ground is met if members engage in unprotected industrial action that affects a federal system employer or the provision of public services²¹.

38. The Bill includes the 'organising' of industrial action as a ground for de-registration, even if the action is not carried out²². In order to take protected industrial action the *Fair Work Act* requires union members to go through a detailed process of balloting members and approval through the Fair Work Commission. This generally requires unions to undertake organising to ascertain whether members are prepared to take

²⁰ Sch 2, item 4, proposed s 28G

²¹ Registered Organisations Act, s 28

²² Sch 2, item 4, proposed s 28G

action, decide what type of action members would like to take, inform the membership of possible action and reasons for action and inform members of the vote on a protected action ballot. All this planning and organising takes place before the action is considered 'protected' under the law. As such, almost all industrial action could at some point be considered a ground for deregistration as a result of this Bill's expanded definition of 'obstructive' industrial action to include the organising of action.

39. Only a class of members or group in the organisation need to have taken part in the organising or taking of the industrial action, which then has consequences for the entire organisation and membership.

Alternative orders

40. If the Court finds a ground has been met, the Court is empowered to make an order to deregister a union or to make alternative orders. Alternative orders can include the disqualification of certain officers, which is in addition to the disqualification powers outlined in Schedule One of the Bill²³.
41. The Court is also empowered to suspend the rights and privileges of the organisation and its members²⁴. This includes restricting the rights of union members to take protected industrial action or the rights of unions officials to access union members on site by exercising their right of entry. This is an excessive measure, particularly considering an order can be made against the entire union, including all its branches, even if the grounds have only been met because of the actions of one group or class of members (the minimum size of which has not been defined for the Bill).
42. Restricting the ability of union members to take protected industrial action will have a significant impact on the bargaining power of the affected workers. An application for alternate orders can be made by any person with significant interest, including employers. There are no safeguards within the Bill to prevent employers from using this legislation as another means to undermine union collective action and power in negotiations around pay and conditions.

²³ Sch 2, item 4, proposed s 28M

²⁴ Sch 2, item 4, proposed s 28P

Retrospectivity

43. Similar to orders made in relation to disqualification of officials, when considering if a deregistration or alternative order is just, the Court must consider 'any other matters the Court consider relevant'. There is no restriction placed on the timing of these other 'relevant' matters, meaning actions and the Court can consider events prior to the commencement, effectively making the legislation retrospective²⁵.

Onus of proof

44. If the grounds for deregistration are met, the organisation must satisfy the Court that it would be unjust to cancel its registration. If the organisation does not satisfy the Court, the registration must be cancelled²⁶. Similarly to the disqualification of officials, the legislation has shifted the burden of proof onto the organisation. In this instance, if grounds have been established against a union, it must stand before the Court and justify its very existence. In considering if the deregistration is unjust, the Court must have regard to the best interests of the members as a whole²⁷. The idea that a court would decide what is in the best interests of union members, when considering whether or not to effectively abolish a union, is offensive and misplaced. Unions are democratic organisations whose membership hold the leadership accountable through elections, internal union structures and union rules which have been approved by the Fair Work Commission.

Schedule Three – Dysfunction

45. Schedule Three provides the Federal Court with the power to make a declaration that a union is dysfunctional, followed by orders to place a union or part of a union into administration. The declaration can be made following an application from the Commissioner, the Minister, the organisation, a member of the organisation or any other person having a sufficient interest in the organisation²⁸.

Declaration of dysfunction

46. A declaration of dysfunction can be made on the basis that one or more officers have engaged in financial misconduct, officers have acted in their own interests rather than the interests of members as a part or whole, or the organisation has conducted

²⁵ Sch 2, item 4, proposed s 28J

²⁶ Sch 2, item 4, proposed s 28J

²⁷ Sch 2, item 4, proposed s 28J(1)(b)(iii)

²⁸ Sch 3, item 4, proposed s 323(1)

affairs that are discriminatory against a member or class or members or are contrary to the interests of the members of the organisation or part as a whole²⁹. The grounds for dysfunction are highly dependent on the actions of individuals within unions. The ability to place a union into administration because of the actions of an individual officer is extreme and unnecessary. The grounds also capture minor administrative errors concerning the financial operation of the union. For example, if a union was late in filing their financial reports to the Registered Organisations Commission (ROC), this could be used as a ground to claim the union is dysfunctional under the proposed section 323(3)(b). Due to the onerous reporting requirements to the ROC, which are subject to high penalties for failure to comply, Unions have had to devote many resources to ensuring deadlines are met. Human error does not equate to dysfunction

47. As outlined above in response to Schedule Two of the Bill, a ground for dysfunction that requires a union to dually operate in the interests of the collective and individual members runs contrary to the nature of diverse, democratically run organisations like unions. The nature of unions requires them to balance the needs and interests of individuals against those of the broader collective.

48. A declaration of dysfunction can also be made if the court is satisfied that officers of the organisation have contravened designated laws on multiple occasions, have repeatedly failed to fulfil their duties as officers of the organisation or part of the organisation, or misappropriated funds³⁰.

49. It is not clear what the legislation is trying to capture when it refers to officers who have 'repeatedly failed to fulfil duties'³¹. The duties of a union officer are broad and open to interpretation. This ground could be open to abuse by disgruntled former members and employers to make applications against unions and disrupt their work.

Orders

50. If the Court declares the union is dysfunctional, it may make an order requiring the union to appoint an administrator or report to the Court about the operation of the

²⁹ Sch 3, item 4, proposed s 323(3)

³⁰ Sch 3, item 4, proposed s 323(4)

³¹ Sch 3, item 4, proposed s 323 (4)(c)

union. The Court may also set elections for the union³².

51. If the court appoints an administrator to the union, union officers including employees are required to work with the administrator and provide all relevant information³³.

Failure to comply with this section of the Bill is a strict liability offence of 120 penalty units³⁴. The penalty for this offence has more than doubled since the 2017 drafting of the Bill where the penalty was 50 penalty units³⁵. No explanation has been provided for the significant increase in the penalty.

52. The ability for the court to appoint administrators to a union and set elections undermines the ability for unions to run as democratic and independent organisations. The threshold for allowing administrators to take over the running of the union is far too low.

Retrospective

53. There is no time limit placed on Schedule Three. When considering a declaration, the Court is free to consider actions which took place prior to the commencement of the Bill. This raises serious concerns about how the Bill could be used by employers and political opponents to threaten and undermine the work of unions.

Schedule Four – Amalgamations

54. Schedule Four of the Bill places additional restrictions on the amalgamation of unions, requiring them to meet a public interest test. This test requires the Full Bench of the Fair Work Commission to consider the unions' record of compliance with the law. Additionally, the Commission must take into account the impact the amalgamation will have on employers in the industry. If the Fair Work Commission determines the amalgamation does not meet this test, the amalgamation cannot continue, regardless of the results of the membership ballot.

55. The Bill's amendments to the approval process of amalgamations are politically motivated. There is no similar requirement for corporations to meet such a broadly

³² Sch 3, item 4, proposed s 323A

³³ Sch 3, item 4, proposed s 323G

³⁴ Sch 3, item 4, proposed s 323 G(3)

³⁵ Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2018, Sch 3, item 4, proposed s 323 G

interpreted 'public interest test', which extends to a record of legal compliance.

56. In order for the Commission to allow an amalgamation, it must consider the unions' compliance record events. This includes assessing whether a *designated finding* has been made against the organisation; the organisation has been found to be in contempt of court in relation to a designated law, the union (or part of the union) has organised or engaged in unprotected industrial action or an officer is disqualified from officer while holding office³⁶.

57. The events considered in a compliance record are incredibly broad and cover relatively minor administrative offences. Further, the compliance record considers events which occurred before the commencement of the Act³⁷. The retrospective nature of the Bill places an unfair burden on unions seeking to amalgamate. These unions are being punished for actions and events, they were not aware of the consequences of at the time they were committed.

58. Prior to approving an amalgamation, the Commission must also consider whether it is in the public interest, including how it impacts employers³⁸. An amalgamation of a union or its internal structures should not be based on how whether it is in the interests of employers. Considering the interests of employers when deliberating if a union can amalgamate restricts the free and democratic operation of unions. Further, it completely undermines the very purpose of unions, which is to represent the interests of members, which in industrial organisations sit in stark opposition to the interests of employers.

Application across branches

59. The Bill specifically defines part of an organisation to include branches of the organisation³⁹. Grounds for the disqualification of officers, cancellation of registration and the placing of the organisation into administration, can all be based on the actions of a part of the union. If a ground is established the Court can apply orders across the entire union, including separate branches.

³⁶ Sch 4, item 7, s72E

³⁷ Sch 4, item 13, cl 3

³⁸ Sch 4, item 7, proposed s 72D(3)

³⁹ Sch 3, item 1, proposed s 6

60. This does not take into account the structure of unions and their branches. For many unions, state branches operate autonomously from each other and from the federal union, with separate elected leadership and committees of management. For example, if a *designated finding* were to be made against a union or official from a branch in NSW, this could provide an employer with the grounds to successfully make an application to intervene in the union affairs of all state branches, even if those branches were not aware of or had no involvement in the actions of the NSW branch.

Conclusion

61. The Ensuring Integrity Amendment Bill 2019 is dangerous. It places increased and unchecked powers in the hands of employers and political opponents of unions to unnecessarily interfere with the work of unions who are already subject to heavy regulation. The increased restrictions this Bill places on the operation and work of unions is unjustified and is politically motivated. To increase the punitive environment for unions to operate is contrary to the interests of the working people of Australia. Unions NSW recommends the Parliament vote against the introduction of this Legislation.