Submission to the Senate Education and Employment Legislation Committee

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

September 2017

AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

AMMA is Australia's national resources industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 99 years, AMMA's membership spans the entire resource industry supply chain: exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to those industries.

AMMA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

The resources industry is, and will remain, a major pillar of the national economy. Its success will be critical to what Australia can achieve as a society in the 21st Century and beyond.

The Australian resources industry directly generates over 8% of Australia's GDP. In 2015-16, the value of Australian resource exports was $157.1 billion. This is projected to increase to $232 billion in 2020-21[1]. It is forecast that Australian resources will comprise the nation's top three exports by 2018-19. Approximately 50% of the value of all Australian exports is from the resources industry.

Australia is ranked number one in the world for iron ore, uranium, gold, zinc and nickel reserves, second for copper and bauxite reserves, fifth for thermal coal reserves, sixth for shale oil reserves and seventh for shale gas reserve.

AMMA members across the resources industry are responsible for a significant level of employment in Australia. The resources extraction and services industry directly employs 222,300 people. Adding resource-related construction and manufacturing, the industry directly accounts for 4% of total employment in Australia. Considering the significant flow-on benefits of the sector, an estimated 10% of our national workforce, or 1.1 million Australians, are employed as a result of the resources industry.

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[1] Office of the Chief Economist – Resources and Energy quarterly publication

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EXECUTIVE SUMMARY

The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (RO Bill) is a necessary step to restore balance and regenerate public confidence in relation to the conduct and operation of trade unions in Australia. AMMA supports the passage of the RO Bill with limited (if any) modifications and without delay.

Consistent with a number of salient recommendations in the Final Report of the Royal Commission into Trade Union Governance and Corruption, the RO Bill will assist with bringing registered organisations that enjoy special rights and privileges under taxation and workplace laws into closer alignment with basic standards applicable to corporations.

The ability of an independent arbiter to take appropriate action against registered organisations and their officials, where they fail to meet standards that their members and the community rightfully expect of them, ought not be of concern to registered organisations. That the *Fair Work (Registered Organisations) Act 2009* (RO Act) does not currently facilitate this oversight in a clear and consistent way is, in AMMA's view, an anomaly when compared to governance arrangements applying to other organisations.

Likewise, the difficulties encountered and magnified in the media arising from the Health Services Union dysfunction, and the challenges in dealing with this effectively under the existing framework, is extremely concerning. The public perception of significant amounts of members' money being used for purposes other than their effective representation is damaging to all registered organisations and Australia's reputation as a good place to invest. An effective mechanism for oversight and the clear capacity to appoint an independent administrator to protect the interests of members where malfeasance occurs is overdue.

AMMA has been a vocal advocate of the introduction of a public interest test to ensure that where registered organisations wish to amalgamate, and as a consequence assert greater influence over parts of Australian industry and the nation's economy, that the interests of the public be considered. It is not unfair or unreasonable for the Australian public, employers and employees to expect that registered organisations and officials consistently operate according to the very laws that empower them with special privileges. It is also reasonable that parties with a demonstrable interest in the outcome are afforded the opportunity to be heard.

AMMA supports the introduction of this public interest test, and provides additional comments detailed in this submission in relation to:

- clarifying that submissions include the provision of evidence;

- clarifying the relationship between proposed subsection 72D and the definitions in proposed subsection 72E;
- linking criteria related to cancellation of registration to the public interest test.

Introduction

1. AMMA welcomes the opportunity to make this submission to the Senate Education and Employment Legislation Committee supporting passage of the Fair Work Amendment (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (**RO Bill**).

2. In AMMA's view, more effective regulation and accountability of registered organisations is warranted. Ensuring adequate transparency and accountability of registered organisations and officials who hold a position of privilege within these organisations protects the best interests of their members.

3. The Explanatory Memorandum for the RO Bill sets out the basis on which the Government has sought to respond to community concern, as well as the Final Report of the Royal Commission into Trade Union Governance and Corruption (Royal Commission). AMMA supports these steps taken to implement recommendations 36, 37 and 38, following the exhaustive process undertaken by the Royal Commission and the reasoned recommendations arising from it.

4. The introduction of a public interest test for registered organisation amalgamations, a safeguard to the national interest, is not dissimilar to that already applicable to corporations. Specifically, the requirement to demonstrate that an amalgamation will not substantially lessen competition and, by extension, be contrary to the interests of the Australian public. This delivers on an election commitment from the Coalition Government and has long been supported by AMMA.

5. AMMA supports these reasons for change, and as set out, would support bringing the governance of unions and employer organisations even more closely into alignment with duties of corporations, where practicable to do so.

6. These amendments complement the establishment of an independent Registered Organisations Commission (**ROC**), established by the *Fair Work Amendment (Registered Organisations) Act 2016*.

7. AMMA has confined this submission to the four main features of the Bill:

   a) the ability for an officer of a registered organisation to be disqualified from office by the Federal Court;
   b) the ability of the Federal Court to de-register registered organisations in certain circumstances;
   c) the ability to send dysfunctional registered organisations into administration;
   d) the requirement for the Fair Work Commission (**FWC**) to consider whether an amalgamation between two registered organisations would be in the public interest.

AMMA is not a Registered Organisation

8. In contrast to the union and employer organisations that will be affected by the RO Bill, AMMA is incorporated as a company, and reports to the Australian Securities and Investments Commission (**ASIC**).

9. AMMA and its members benefit from the discipline associated with the higher standards required under the *Corporations Act 2001*, and based on our experience since 1918, all trade union and employer association members should benefit from oversight from ASIC.

Proper Governance and Compliance

10. AMMA considers the governance and accountability of registered organisations (and their officials) to their members and the wider community is of no less importance than that of a corporation to their shareholders because:

    a) unions and employer organisations are substantial trading and employing entities, hold significant monies on behalf of their members and receive tax concessions;

    b) the community interest in the effective governance and accountability of registered organisations is substantial;

    c) whilst unions and employer organisations are democratic organisations, and it is important their members have some determination over the structuring and rules of their organisations, as with corporations, the wider public interest demands consistent and properly enforced standards to protect rigor, integrity and accountability;

    d) a failure to demonstrate effective accountability damages Australia's reputation as a place to invest and do business.

11. It is for these reasons that AMMA considers that:

    a) registered organisations should be subject to the same rules and held to the same standards that apply to corporations;

    b) the duties, responsibilities and accountabilities of officers of registered organisations should be equivalent to those required of company directors;

    c) penalties for a failure of union and employer organisation officials in their duties should be the same as those that would apply to equivalent officers of corporations;

d) deliberate and persistent breaches of Australia's industrial laws are not acceptable from registered organisations or their officials;

e) where rights, privileges and protections are afforded to registered organisations and their officials (for example, the right to apply for and be granted rights of entry onto a premises), breaches of the legislation that affords those very rights should have consequences.

Disqualification from Office

12. Schedule 1 of the RO Bill adopts recommendations made by the Royal Commission, in particular that:

    a) an additional prescribed offence which is punishable by five or more years imprisonment upon conviction be included;

    b) a strict liability offence should be created where a person who is disqualified from holding office continues to hold office (or influence affairs) in a registered organisation;

    c) a court should be permitted to disqualify an official from holding office on application from the regulator upon analysis by the courts of certain criteria.

13. These additional safeguards which have been recommended after an exhaustive investigative process conducted by the Royal Commission are supported as sound measures to ensure that individuals in the privileged positions of officials have demonstrated a level of appropriate behaviour and accountability that their members and the broader community are entitled to expect.

14. AMMA notes that the introduction of a series of definitions within the legislation, including "designated findings", "designated laws" and "wider criminal findings", are appropriately tailored to issues of criminality, or civil penalty or remedy provisions commonly found in Australia's workplace relations framework and associated legislation. Given that officials are empowered to a large degree by legislation such as the *Fair Work Act 2009* (**FW Act**), it is only appropriate that they be obliged to comply with other elements of it.

15. Unfortunately, some registered organisations (and officials) have repeatedly and without remorse breached the industrial laws of the land, and from AMMA's perspective, it is abundantly clear that the millions of dollars in fines that have been issued are an insufficient disincentive.

16. That individuals retain the right to hold office in circumstances where they do not meet a reasonable standard of behaviour is not in the interests of members of registered organisations. It also falls short of community expectations about who

should hold positions of influence and control within organisations who enjoy rights and privileges under Australian industrial law.

17. AMMA observes that the ability to apply for disqualification orders extends to the Registered Organisations Commissioner, the Minister and a person with a sufficient interest. The Explanatory Memorandum outlines where the meaning of sufficient interest has previously been interpreted.

18. There ample case law considering not only interpreting a party who may have a sufficient interest, but also the rationale why it is appropriate, in the interests of justice and fairness, that such persons be provided an opportunity to be heard where there interests may be effected. This applies irrespective of whether that person is a party to proceedings. This is an existing element of the FW Act which has been subject of significant FWC consideration. There are many examples where non-parties have sought and been granted standing.[2] It is an anomaly that the equivalent ability to be heard does not exist in the *Fair Work (Registered Organisations) Act 2009* (**RO Act**), which the RO Bill rectifies.

19. AMMA considers that the Bill contains appropriate safeguards by way of a two-step assessment by the Federal Court, in that:

    a) a ground under proposed section 223 exists; and

    b) the court does not consider it unjust to disqualify the person having regard to specific circumstances.

20. The RO Bill further contains additional safeguards for officials who may be subject to disqualification orders in that particular findings will only constitute grounds for disqualification where the finding relates to the purported performance of their duties in relation to a registered organisation.

21. The complimentary offence relating to the holding of office while a person is not entitled to do so is consistent with that which applies in a corporate setting.

Cancellation of Registration and Alternative Orders

22. Schedule 2 of the RO Bill relates to the circumstances where the Federal Court may de-register or otherwise sanction a registered organisation. This part of the Bill allows the ROC, the Minister or person with sufficient interest, to apply for the cancellation of registration of a registered organisation. The same class of applicants may also apply for "alternative orders" from the Federal Court. Such alternative orders (being an alternative to cancellation of registration) include:

[2] For example, DOF Management Australia Pty Ltd v MUA [2016] FWC 3792.

a) disqualification of certain officers;

b) exclusion of certain members;

c) suspension of rights and privileges of the registered organisation and later consideration of the question of cancellation.

23. The RO Bill goes on to determine the grounds on which the Federal Court may make cancellation or alternative orders, which provide a balance to the more drastic step of cancellation of registration.

24. Again, the RO Bill is seeking to ensure that registered organisations and their members adhere to a reasonable standard of behavior, and any failure to do so may see the registration cancelled, or, having regard to the nature of the circumstances, some other order which in the judgement of the Court is appropriate. That the conduct of officers or persons who otherwise exert influence and control over the registered organisation be attributed to that organisation is consistent with the standards applied to corporations.

25. Under the current RO Act the ability to cancel the registration of an organisation, regardless of their compliance record, is considered both a lengthy and costly process.[3] Certainly there are rational policy arguments that a person be entitled to have their industrial interests represented by the association of their choosing. However, by virtue of being registered, organisations and their officials are empowered with rights and privileges beyond an ordinary member of the public. Accordingly, a failure to act in the interests of their members and comply with the laws of the land, should have consequences.

26. As recently as 5 September 2017, a Federal Circuit judge condemned the behaviour of the Construction, Forestry, Mining and Energy Union (CFMEU) in a judgement related to breaches of the FW Act. Judge Vasta said:

> *It beggars belief that the CFMEU believe that they can act in a manner where they are the ones who dictate who can or cannot work on a construction site.*
>
> *The Parliament is the only entity that sets the law in this country and the Parliament is directly responsible to the people of this country. It seems that the CFMEU feel that they can usurp Parliament and that they can set the law in this country. There is no place for such an attitude in Australian society".*[4]

27. The RO Bill recognises that there is a balance between sanctioning officials and adversely impacting members of the registered organisation who may not have been involved in the activities which may form the grounds for cancellation. The Final Report by the Royal Commission observed that in the main, unlawful conduct

[3] Final Report of Royal Commission into Trade Union Governance and Corruption, Volume 5, Chapter 8, para 35.
[4] Australian Building And Construction Commissioner v Dig It Landscapes & Ors [2017] FCCA 2128 para 55-56

was attributed to officials and not members of the registered organisation (in that context, the CFMEU).[5]

28. The capacity of the Federal Court to make alternative orders where it considers the cancellation of registration would be unjust, strikes this balance. It ensures appropriate remedial action in relation to conduct which would be grounds for cancellation of registration can be taken, while not disproportionately affecting members, officials or parts of registered organisations not involved in the relevant activity.

Administration of Dysfunctional Organisations

29. Registered organisations enjoy the privileged position of being exempt from income tax by virtue of their status. That there has been significant financial mismanagement and maleficence, played out largely in the media, is disturbing to say the least. While previous amendments to the RO Act have made some significant progress towards addressing mismanagement, the RO Bill seeks to address the difficulties most recently encountered by certain parts of the Health Services Union by:

    a) providing the Federal Court with the capacity to declare a registered organisation to be dysfunctional or otherwise incapable of functioning effectively; and

    b) providing the Federal Court the capacity to deal with registered organisations subject to a declaration, including placing them into effective administration.

30. The RO Bill also affords the registered organisation the opportunity to "make good" the circumstances of the declaration, with the Federal Court having oversight of these activities. Again, there is an effort to find a balance between ensuring legitimate governance and transparency for member protection and the continued operation of an organisation for its stated purpose.

31. As with corporations, where an independent arbiter can no longer be satisfied those charged with the oversight of an organisation established to pursue the interests of its membership and funded from the pockets of such members, it is a community expectation that steps be taken to protect the interests (and financial contributions) of such members. These amendments are in keeping with aligning the governance arrangements of registered organisations with those of corporations.

[5] Final Report of Royal Commission into Trade Union Governance and Corruption, Volume 5, Chapter 8, para 34.

32. These provisions complement introduction of the ROC, which provides a dedicated inspectorate to ensure transparency and accountability for registered organisations.

Public Interest Test

33. The RO Bill introduces a public interest test, an election commitment of the Coalition Government which AMMA has consistently supported. Registered organisations should be treated like any other business.

34. AMMA considers that it is reasonable to expect and require registered organisations to comply with the laws of the land or face consequences when they do not. This principle applies to other elements of Australian society.

35. The consequences of unlawful behaviour which disrupts industry is magnified in industries like the resources sector where major project sites are often targeted due to time-critical targets, and industrial might is exercised irrespective of whether it is lawful.[6]

36. The RO Act does not currently contain a public interest test. In AMMA's submission, it should. The impact that the behaviour of organisations has on the Australian community, economy and citizens is absolutely relevant to whether they should be permitted to effectively monopolise employee representation across multiple industries and in the process potentially impact significant market sectors. We expect no less from corporations. The Australian Competition and Consumer Commission (**ACCC**) is charged with ensuring that corporations seeking to merge will not have the effect of substantially lessening competition, which in turn will adversely impact the Australian consumer.

37. This is based on the assumption that a corporation may exercise its market power to the detriment of the Australian consumer. Where the ACCC considers that an acquisition is likely to substantially lessen competition, the ACCC can apply to the Court to stop the acquisition.[7]

38. The proposed public interest test would operate to compel the FWC to consider whether or not an amalgamation of two registered organisations would be in the public interest. Where it is found that the proposed amalgamation would not be in the public interest, the amalgamation does not take effect.

[6] See, for example, dispute in relation to Pluto LNG project: CFMEU agreed penalties. Woodside Burrup Pty Ltd v Construction, Forestry, Mining & Energy Union [2001] FCA 949

[7] Fact Sheet: What you need to know about: the ACCC's approach to merger reviews including local markets, April 2014, pg1, *Competition and Consumer Act 2010* (Cth), s50.

39. As is right and proper, given the consequences of a decision as to whether an amalgamation does or does not meet the public interest, a Full Bench is convened to apply the public interest test.

40. In order to properly apply the test, the legislation appropriately requires the FWC to fix a hearing for submissions in relation to the matters mentioned in proposed subsection 72D(1) and to take measures to ensure transparency of the process. In the event that the FWC does not consider that the registered organisation does not have a record of complying with the law, then a secondary analysis as to whether the amalgamation is otherwise in the public interest will occur.

41. Proposed subsection 72C identifies the persons eligible to make submissions in relation to the matters contained in proposed subsection 72D(1) or whether the amalgamation is in the public interest, which properly identifies those parties likely to hold an interest but also facilitates parties who have sufficient interest. It is crucial that there be a clear understanding of who may inform the FWC in their exercise of discretion.

42. The FW Act already contains in it a general ability for the Commission to inform itself in relation to proceedings before it.[8] It has routinely accepted submissions from parties who have demonstrated a sufficient interest in matters subject to Commission proceedings. There are also a number of specific provisions were persons effected are granted the right to be heard. For example, s426(6) states:

426 FWC must suspend protected industrial action—significant harm to a third party

……

(6) The FWC may make the order only on application by:

(a) an organisation, person or body directly affected by the protected industrial action other than:

(i) a bargaining representative for the agreement; or

(ii) an employee who will be covered by the agreement; or

(b) the Minister; or

(ba) if the industrial action is being engaged in in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State; or

(bb) if the industrial action is being engaged in in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory; or

(c) a person prescribed by the regulations.

[8] *Fair Work Act 2009* (Cth) s590

43. Such examples are not limited to the FW Act and can be found in various legislative contexts. It is a common circumstance in proceedings where persons with sufficient interest and not parties to the proceedings themselves are granted the right to be heard to inform the decision makers of relevant factors. This occurs through legislation expressly granting such a right, and otherwise. It is a fundamentally accepted principal.

44. Where there are significant consequences for particular employees, employers, industries and the nation, procedural fairness dictates that those with a sufficient interest should be able to provide such information to allow the decision maker to properly exercise discretion. It is an anomaly within the RO Act as compared with the FW Act and other legislative contexts. The RO Bill proposes to address this accordingly.

45. AMMA considers that reference to submissions in proposed subsection 72C is likely to include the production of evidence in support of any submissions proposing to be made. However, for the avoidance of doubt, AMMA suggests specific reference to evidence supporting submissions be included in this provision.

46. AMMA supports the admirable intent envisaged in proposed subsection 72D which it considers is aiming to:

    a) create a degree of guidance for the ultimate decision makers (the Full Bench) as to whether an amalgamation is in the public interest;

    b) determine circumstances when an amalgamation would not be in the public interest;

    c) where the circumstances dictating a finding that the amalgamation is not in the public interest do not exist, require the decision makers to turn their mind to other matters relevant to the public interest, including the impacts on employees and employers in the industries concerned;

    d) permit the decision makers to have regard to any other matter that they consider relevant.

47. Proposed subsection 72E defines a "compliance record event" for organisations, and specifies that such events for an organisation includes findings against persons while they were officers of organisations (and in some cases, were purporting to perform functions in relation to the organisation). In these circumstances, the use of the term "existing" organisation in proposed subsection 72D(2) may be unnecessary, as the consideration as to whether the organisation has a record of complying with the law will occur before any date for amalgamation is fixed. Alternatively, clarifying proposed subsection 72E to ensure the definition is clear may warrant consideration.

48. That the public interest test is applied at any time after an application is lodged under s43 or s44 and prior to the FWC fixing an amalgamation date is a reasonable and pragmatic approach given the intent of its application. The considerations that form part of the public interest test do not cease to be relevant at a particular point in time. The flexibility for the FWC to conduct this assessment at any point in the amalgamation application proceedings makes sense, as it allows the FWC to manage its conduct of proceedings efficiently and effectively while implementing the policy intent of the legislation.

49. The amendments to the RO Act as proposed in Schedule 2 of the RO Bill do provide greater capacity to withdraw the privileges of any registered organisation, should circumstances warrant it, by cancelling their registration. Under that Schedule, the determination of grounds for cancellation of registration or alternative orders exist in relation to an organisation that is an amalgamated organisation, reference to the organisation includes the de-registered organisation in relation to the amalgamation.

50. AMMA suggests where the conduct of the registered organisation proposing to be amalgamated is such that there are grounds to suggest that the registration of the organisation should/would be cancelled, that the amalgamation would not be in the public interest. To allow an amalgamation to proceed, only for the amalgamated organisation's registration to be cancelled, would not be in the interests of the organisations in question, its members or the Australian public.