

20 June 2018

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email: [REDACTED]

Dear [REDACTED]

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

On behalf of the resources and energy industry, we have prepared and attached an updated briefing for your consideration regarding the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* which is presently before the Parliament.

The passing of this Bill would make a material difference to the proper democratic function of the current Australian workplace relations system.

Trade unions and registered employer groups alike (**Registered Organisations**) enjoy special rights and privileges under Australia's workplace and taxation laws. It is in the national interest to ensure the standards and transparency to which they are held is aligned to those of corporations.

In summary, your support of the Bill is sought for the following reasons:

- It facilitates restoration of regulatory balance and, in turn, regeneration of public confidence in relation to the conduct and operations of Registered Organisations in Australia;
- It improves the ability of an independent arbiter to take appropriate action against Registered Organisations and their officers who fail to meet standards that their members and the community rightfully expect;
- It reinstates a conventional public interest test to apply to Registered Organisations seeking to amalgamate, ensuring amalgamations are in the interests of employers, employees and the broader Australian community; and
- It ensures that all Registered Organisations and their officers consistently operate according to the very laws that empower them with special privileges.

We strongly urge that the next time this Bill comes before the Senate for consideration, you use your vote to support this important legislation and better safeguard the Australian community from misconduct, fraudulent and/or anti-competitive behaviours by officers of Registered Organisations.

Yours faithfully,



Amanda Mansini
Director, Workplace Relations

About Australian Resources and Energy Group, AMMA

Australian Resources and Energy Group, AMMA, is the national representative for Australia's resources, energy and supply industry employers.

For 100 years AMMA has worked closely with our national policy makers in support of our vision for Australia to be an attractive place to invest, do business and contribute to the national wellbeing.

In contrast to registered trade union and employer organisations (**Registered Organisations**) that are currently subject to lower governance and reporting standards as companies, AMMA is incorporated as a company and is regulated by the Australian Securities and Investments Commission (**ASIC**).

AMMA and its members benefit from the greater discipline associated with the higher standards required under the *Corporations Act 2001*.

Based on our experiences since 1918, it is AMMA's view that all Registered Organisations and their members would greatly benefit from higher governance and reporting standards starting with those measures included in the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (Ensuring Integrity Bill)*.

The Ensuring Integrity Bill is good Australian policy

The Ensuring Integrity Bill is a necessary step to restore regulatory balance and, in turn, regenerate public confidence in relation to the conduct and operation of Registered Organisations in Australia. It is consistent with a number of salient recommendations arising in the Final Report of the Royal Commission into Trade Union Governance and Corruption.

The Bill will ensure adequate transparency and accountability of Registered Organisations and their officers who hold a position of privilege. It will also guarantee the democratic function of Registered Organisations, by ensuring the leadership of Registered Organisations act lawfully and with integrity.

This will protect the best interests of Registered Organisation members, Australian employers and employees, as well as the wider national interest, by ensuring Australia's reputation as a place to invest and do business is not damaged by repeated unlawful or anti-competitive behaviour of influential Registered Organisations.

It is important to recognise that the measures within the Ensuring Integrity Bill would apply equally to all Registered Organisations in Australia – including trade unions and employer groups.

Why focus on Registered Organisations

Registered Organisations enjoy special rights and privileges under Australia's workplace and taxation laws. It is therefore in the national interest to ensure the standards and transparency to which they are held is closer aligned to those of corporations.

Ensuring transparency and accountability of Registered Organisations and officers who hold a position of privilege within these organisations protects the best interests of their members and the wider community.

Key reasons why AMMA considers the standards of governance and accountability of Registered Organisations (and their officials) to be critically important include:

- a) Registered Organisations are trading and employing entities, holding significant monies on behalf of their members and receiving substantial tax concessions;
- b) The community interest in the effective governance and accountability of Registered Organisations is substantial;

- c) Providing the individual members of Registered Organisations with strong determination and/or influence of the structuring and rules of their organisations ensures consistency, rigour, integrity and accountability; and
- d) A failure to demonstrate effective accountability within Registered Organisations, which can be highly influential, damages Australia's reputation as a place to invest and do business.

It is for these reasons that AMMA believes the measures within the Ensuring Integrity Bill are balanced, reasonable and necessary steps to begin to lift the standards and accountability of all registered organisations closer to community expectations.

What the Ensuring Integrity Bill does

The Ensuring Integrity Bill contains four main features:

1. The ability for the independent regulator, the Registered Organisations Commission, as well as the Australian Government Minister for Employment and other persons of 'sufficient interest', to apply for an officer of a Registered Organisation to be disqualified from office;
2. The ability for the independent regulator, the Registered Organisations Commission, as well as the Australian Government Minister for Employment and other persons of 'sufficient interest', to apply for a Registered Organisation to have their registration cancelled;
3. The ability for the Federal Court to declare a Registered Organisation to be 'dysfunctional' and to place them into effective administration; and
4. The reinstatement of a conventional public interest test to apply to proposed amalgamations of Registered Organisations.

Importantly, while the first three measures provide capacity for various parties to apply for orders, it would remain entirely within the jurisdiction of the Federal Court (an impartial and independent judicial body) to rule on such matters based on the evidence before it. This would avoid any risk of excessive or arbitrary interference in the free functioning of Registered Organisations.

The merits of each of these four features of the Bill are outlined in the following:

Disqualification from office

The threat of being potentially disqualified from office, or at the very least having to defend their actions before a Federal Court, is an important safeguard to ensure individuals in the privileged positions of officials are incentivised to demonstrate a level of appropriate behaviour and accountability that their members and the broader community are entitled to expect.

Unfortunately under the current laws, officials of some Registered Organisations have repeatedly and without remorse breached the industrial laws of the land. From AMMA's perspective, it is abundantly clear that the millions of dollars in fines that have been issued are not sufficient deterrent to such bad behaviour. Some Registered Organisations in fact consider such fines a simple "cost of doing business" and nonchalantly absorb the fines and penalties accrued by officers in the course of law breaking behaviour.

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 special rights and privileges under Australian industrial law.

The Bill does include balanced protections for officers accused of poor behaviour and facing disqualification, in so far as that disqualification can only be ordered where misconduct relates specifically to their duties as an officer of a Registered Organisation.

Cancellation of registration

This provision of the Ensuring Integrity Bill seeks to ensure that Registered Organisations and their members adhere to a reasonable standard of behaviour as expected by the wider Australian community.

It would, for example, provide that repeated failure to adhere to Australia's workplace laws may see a Registered Organisation faced with an application to have its registered status cancelled if the Federal Court judges the evidence to warrant such action.

Under the current *Fair Work (Registered Organisations) Act 2009*, cancellation of the registration of an organisation, regardless of their compliance record, is a lengthy and costly process. This has led to extraordinary instances where judicial members have publicly expressed their frustration at the repeated lawbreaking of one Registered Organisation in particular, the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**), and the ineffectiveness of the pecuniary penalties currently available to the Courts in deterring such behaviours.

As recently as 5 September 2017, a Federal Circuit Court judge condemned the behaviour of the CFMMEU in a judgement related to breaches of the Fair Work 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.

The long history of lawlessness of some unions such as the CFMMEU continues unabated to this day. Recent examples include the action commenced last month against the CFMMEU and three of its representatives concerning alleged contraventions of the unlawful picketing provisions relating to an alleged blockade of two Melbourne sites in May 2017. In another matter, the CFMMEU and one of its officials were fined \$51,300 for abusing and threatening construction workers on the Gorgon LNG Project in Western Australia, pursuant to a Federal Court judgment handed down on 14 June 2018.

This latest fine has brought the CFMMEU to the concerning milestone of reaching \$15 million worth of fines since 2005, with around 80 officials still facing court on some 44 matters. That the CFMMEU has reached this amount of penalties and remains undeterred demonstrates there is a clear need for further protections to be in place to effectively deter militant and unlawful behaviour.

The Ensuring Integrity 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 capacity of the Federal Court to make alternative orders where it considers the cancellation of registration would be unjust, strikes this balance.

The Bill 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

Registered Organisations enjoy the privileged position of being exempt from income tax by virtue of their status. That there have been examples of significant and in some cases fraudulent financial mismanagement, played out largely in the media, is disturbing to say the least.

The Ensuring Integrity Bill seeks to address the public concern over cases of financial mismanagement and fraud by Registered Organisations, such as the Health Services Union case,

by providing the Federal Court with capacity to declare a Registered Organisation to be dysfunctional or otherwise incapable of functioning effectively and in the interests of their members, and to place the organisation into effective administration.

Such measures would likely only ever be used in circumstances of the most serious nature and come with important conditions and protections to strike the right balance between ensuring legitimate governance and transparency for member protection and the continued operation of an organisation for its stated purpose.

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.

The Australia public interest should be considered for proposed mergers

The fourth area of the Ensuring Integrity Bill relates to reinstating a public interest test for all proposed mergers of Registered Organisations in Australia. Of the four key measures including in the Bill, this particular measure has received the greatest attention among the Parliament, media and broader community over the past 18 months due to implications it would have had, if passed before 27 March 2018, for the merger of Australia's self-proclaimed most militant, lawless trade unions.

Unfortunately, the Ensuring Integrity Bill did not pass in time for appropriate consideration of the Australian public interest to apply to the formation of the now CFMMEU – a highly militant union with more than \$300 million in combined assets and \$146 million in annual revenues.

It is AMMA's strong view that this must not be allowed to occur again. That there is currently no capacity for the interests of the Australian public to be considered over proposed amalgamations of highly-influential registered organisations - some of which turn over the types of revenues, hold the types of asset bases, and exact the type of market power more commonly associated with large companies - is a blight on Australia's otherwise free, transparent and democratic society.

It should be noted that consideration of the Australian public interest commonly exists in most areas of Australia's legal system. Indeed, the Australian public interest was relevant to Registered Organisation mergers for decades prior to its express removal by the Rudd Government. The public interest test in the Ensuring Integrity Bill would apply to all Registered Organisations, trade union and employer organisations alike, and would have the immediate impact of:

- balancing the freedom of Registered Organisations to operate without unnecessary interference with consideration of the legitimate interests of the Australian public;
- safeguarding the Australian public against mergers of Registered Organisations that would threaten the community, Australia's economy and living standards;
- incentivising compliance with Australian workplace laws as a pre-condition of expanded power and influence; and
- clarifying that disruption, militancy and lawlessness is not tolerated within the Australian workplace relations landscape.

Law-abiding Registered Organisations would have no difficulty complying with a public interest test.

In AMMA's view, this measure like all provisions of the Ensuring Integrity Bill is critical to regenerating public confidence in the conduct and operation of Registered Organisations in Australia, and providing our courts and regulators with the tools and powers necessary for appropriate and effective regulation of all such organisations, which play an important and at times very powerful role in the nation's economic and social development.