Australian
Manufacturing
Workers' Union
NATIONAL OFFICE
AMWU

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Committee Secretary
Senate Education and Employment Committees
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Via email: eec.sen@aph.gov.au

To the Secretary,

Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

The Australian Manufacturing Workers' Union (AMWU) represents over 70,000 workers who create, make and maintain in every city and region across Australia. The workers that we represent, including the hundreds of rank and file members who serve on our national, state and industry governing councils, will be adversely affected by the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (the Bill).

The AMWU is run by its members – it always has been and always will be – but the Bill make the role of our workplace leaders, who give up their time to improve the wages and conditions of their workmates, even more precarious. The Bill has the potential to bar long standing members for running for office, even in a volunteer capacity, and frustrate the democratic will of the AMWU membership when they choose the leadership of their union.

In addition, the Bill will make it harder for the AMWU to improve the working lives and communities of our members and their families. The Bill allows politicians and big business to exert undue interference on union affairs. They are designed to allow external actors make it harder for unions to fight successful campaigns, win improvements in pay and conditions and achieve a fairer society.

The Bill achieves this by setting the bar to commence legal proceedings so low that a series of unintentional administrative errors, misunderstandings or minor infractions are sufficient. Once those grounds are established, significant sums of members money and resources will be wasted on legal proceedings which attack our officials, workplace leaders or the future of our union. The only reason that the Bill has been drafted like this is to give employers a new avenue to frustrate unions in their efforts to achieve better wages and conditions for their members and to undermine the collective bargaining process.

A key flaw in the Bill is the failed attempt to provide equivalence with the penalties for breaches of corporate laws by big businesses. There are two ways in which this has failed – firstly, there are several key aspects of the Bill that have no comparison in corporate law, either because the standing provided in the Bill is not matched in the corporate world, or because the penalties that are available for similar offenses are not aligned.

Secondly, and more importantly, it is a false equivalence to say that unions and corporations should be regulated in the same way. The leaders of large corporations are highly paid employees, the

oversight provided by highly paid professional board members. When corporations breach corporate law to generate more profit or avoid compliance requirements, the beneficiaries of those breaches are the leaders, board and shareholders. The parties that lose are the employees (wage theft), customers (see, Banking Royal Commission), suppliers (phoenixing), community (tax avoidance) or the environment. Where unions breach industrial laws, the beneficiaries are the workers (equal pay, superannuation) and the community (Green bans, Medicare, etc.).

The AMWU opposes the Bill and supports and incorporates the submission of the ACTU to this inquiry. We believe that Bill is bad for workers, will make it harder for workers to win fair improvements to their pay and condition and allow for an unreasonable level interference in union affairs by big business and politicians.

Undue influence in union affairs

New definitions from the basis of the amendments proposed in the Bill. The Bill defines "**Designated findings"** as *wider criminal finding* as well any civil penalty breaches (*designated offences*), regardless of the seriousness of the offence. These findings can be held against officers or the Union.

The threshold for a finding of a "designated finding" is disconcertingly low and captures even procedural breaches of the *Fair Work Act 2009, Building and Construction Industry (Improving Productivity Act) Act, Work Health and Safety Act 2011 and any State or territory OHS Act.* [1]

The potential impact of the *designated finding* held against an official or the Union, whether the entire organisation or just part of it, can include orders for the disqualification of union officers and the cancellation of union registration. [2] Simple administrative errors are enough for a designated finding to be made. For example, under the *Registered Organisations Act*, a Union conducting elections is required to lodge certain prescribed information with the Registered Organizations Commission on a particular day[3]. Failure to do so even by a day results in a civil penalty of up to 60 penalty units. Late lodgment under this Bill would lead to a ***designated finding*** can be used as a ground for deregistering the union.[4]

The Bill also broadens the categories of persons who can make application against a union official to include the Minister, the Commissioner or a person with sufficient interest. Such a person is not defined. It leaves open the door for employers, employer representatives, corporate interests, political or opposing union activist from making an application and disrupting union efforts and campaigns for better conditions and wages.

The Bill does not provide any safeguards against nuisance applications or limit a disqualification application being brought against an individual not currently holding office or intending to hold office. Unions will find themselves engaged in expensive, time consuming litigation, a tactic made available under the Bill to delay and will blunt the effectiveness of unions in performing their core work and disrupt their work representing workers.

[1] Schl 1, s9C (1)
[2] Sch 1, proposed s223(1-3), Sch 2- s28
[3] Registered Organizations Act 2009 – s189
[4] Schl 1 section 28E

Expansion of disqualification regime – Federal Court orders

The Bill expands the grounds under which the Court can make orders to disqualify a union. It provides the court with additional powers to make ***disqualification orders*** following an application from the Minister, the Commissioner or a person with sufficient interest. Again, this category of person remains undefined and broad[5].

The grounds for disqualification in the Bill include a "**fit and proper person**" test[6] and five broad grounds for the deregistration of a union. This allows the court to consider refusal, revocation or suspension of entry permits, civil or criminal findings against the person, or *any other* event the Court considers relevant, a remarkably broad sweep. It includes the findings of a government agency as grounds for disqualification for not being a fit and proper person[7].

The breadth of the test is particularly concerning in the context of a government agency as it encompasses behaviour that does not relate directly to the work that a union official undertakes. For example, an official issued with a notice for failure to pay child support by the Department of Human Services can be found be a not fit and person [8]. This is also the case for failure to pay a parking fine. This is a potentially gross overreach into the private affairs and conduct of officials that has nothing to do with the work that they do, representing workers. Given the highly political and media visibility of the work that unions undertake, it is possible that government agency contraventions may be used to obstruct union work.

The Bill provides that the Federal Court may make an order disqualifying an official holding office if the Court is satisfied that a ground for disqualification applies in relation to the person and *"does not consider that it would be unjust to disqualify the person".*

This is different from the current regime which requires that the court is satisfied that the disqualification is justified[9]. The Bill shifts the onus of proof onto the defendant to satisfy the court why the order is unjust, essentially requiring a union official to appear before a court and explain why they should be allowed to retain their elected position because an administrative error or procedural oversight. This will inevitably result in union funds being drown down in costly litigation, another front that Unions will be spending time and resources on instead of carrying out their work.

Conduct of the affairs of Union

The Bill contains a broad brush of criteria as grounds for de-registration and **alternative orders**, a new variant of policing measures. One of those grounds for deregistration is where officers of the union or part of the union have acted in their own interests or part rather than in the interests of the member or part of the membership.

The affairs of the union include the internal management, governance and proceedings – its business model, including structure and how it operates and its transactions. This is completely contrary to the rationale of democratically run unions, whereby the balancing of various interests

[5] Schl 2 – proposed section 28A
[6] Schl 1- proposed section 223 (5)
[7] Schl 1 – proposed 223(6)(d)
[8] Child Support (Registration and Collection) Act 1988 – Sec 78A
[9] Registered Organisations Act s307A

within the membership is how a union operates day to day. The internal governance mechanisms of a union operate to ensure that all members interests are balanced, which invariably means that there will always be members who do agree with a consensus position that a Union arrives at.

For example, the AMWU is an amalgamated Union of comprising of other trade unions. The amalgamation covered a disparate range of industries from the metal trades and engineering, print, to food manufacturing, vehicles and manufacturing. The governing rules of the union reflect the broad ranging membership base that makes up the AMWU, with divisions created to represent the interests of the various membership cohorts.

As workplaces and the Australian workforce have changed so has the type of members the Union comprises of. For example, the Vehicle Division of the union is a distinct entity under the rules of the AMWU with its own specific leadership structure and budget. The decline of the vehicle industry in Australia has led to a decline in the number of vehicle manufacturing members. Conversely the rise of food manufacturing in Australia has led to a greater proportion of food workers making up the AMWU's membership, altering the make-up of the membership base and effecting the voting rights of members.

Considering these changes, the AMWU has been actively working to further democratise the operation of the Union by dissolving divisions and improving the voting rights of all members within the Union. The rule changes proposed abolish existing offices for officials in various divisions, make redundant union staff positions and invariably will affect the interests of some, but not all members. It is an exercise in balancing the needs of the collective against the needs of an individual or a cohort of members. This process was the basis of discussion and debate over a period of 5 years, building consensus, traversing across deeply held membership interests and values. The outcome was a change to the rules of the AMWU, voted and endorsed by the union's membership. This is a democratic process and the consequent rule changes were applied for and approved by the Fair Work Commission[10].

Similarly, decisions regarding the allocation of resources for campaigns or industrial outcomes are affected by multiple factors within a Union. As noted earlier the AMWU's food membership base has grown in proportion to the overall membership. Women are represented in larger numbers in food industry than the other industries covered. Issues such as maternity leave entitlements, carer's leave, or domestic violence leave are a more pressing concern for this cohort of membership has led to a greater awareness amongst the broader membership driving a natural change to the strategy of the union. Decisions made about funding campaigns on these entitlements, prioritising these issues means operational decisions are made that may not be agreeable to all the members, all the time. There will be a member, or members, who are put out regardless of the needs of the collective membership.

As a democratic organisation, where AMWU members vote on the strategy and direction of the Union, the changes in membership invariably will result in different priorities for members. The democratic processes of the union necessarily balance the interests of members against the needs of the collective body, as it evolves. This experience in true of the AMWU and other unions.

[10] Fair Work Act- s159

In the context of organisational changes, endorsed and voted for by the membership, the grounds for disqualification or alternative orders may be inappropriately applied. A member or a group of members resistant to change may seek to apply to the Federal Court to either disqualify the Union or seek alternative orders stopping the rule changes on the basis that the conduct of the affairs of the organisation have been unfairly prejudicial or in unfairly discriminatory to that member[11]. It fetters the abilities of unions to make internal union reform to improve viability, governance and democratic participation, impossible.

For a single member aggrieved by the internal processes of the Union, the proposed ground 228 (1) (b) presents a mechanism to create a nuisance through the courts. It is akin to a single disgruntled share holder filing an application to stop an investment decision or a bank customer doing the same to prevent a bank from making an operational decision.

Opening the door to court processes or alternative orders seeking on decisions about workers issues is an unwarranted interference in internal union process, which by their nature are democratic and endorsed by the majority.

The bill provides for deregistration or alternative orders if multiple designated findings are made against a substantial number of members[12]. Substantial is not defined in the Bill. These proposed grounds dramatically expand the existing regime for deregistration, to include minor administrative offences in the Fair Work Act and the Registered Organisations Act. What this means is that the action of a minority of the membership, whether an administrative fault or more serious offence, will have a direct impact on the organisation.

A Union is made up of members, not officials or employees. Members may at times act outside of the collective interest of the Union, or even against the interests of their fellow members. Internal governance rules of the Union can call out and censure this behaviour as it arises, however the manner in which these provisions of the Bill operate mean that regardless of what effort the Union leadership or officials undertake to prevent members from acting in a manner contravening a "designated finding", the whole of the membership will be penalised for the crimes of a few.

<u>Obstructive industrial action</u>
Obstructive industrial action is a ground for deregistration or alternative orders. Under the current legislation the ground is met only if members engage in unprotected industrial action that affects a federal system employee. [13]

Protected industrial action is permissible under the Fair Work Act where it satisfies the criteria set out in the Act and once granted by the Commission upon application. Preparation for the taking of protected industrial action requires members and union officials engaging discussions and planning what the nature of the protected action will be, the duration of the protected industrial action and the strategic use of it as a tool. The operation of 28G captures the **very organising** in the lead up to the application for protected action as required by the Fair work Act.

[11] Sch 2, proposed s 28C(1)
[12] Sch 2 – proposed s2E
[13] Sch 2- proposed s28G

Under the Fair Work Act, the Fair Work Commission has the power to make orders terminating protected industrial action if an employer can satisfy the Commission the protected industrial action may cause significant economic hardship to the employer. [14]

The grounds for obstructive industrial action are a significant and unneeded expansion of the ability of employers to scuttle the taking of protected action in the planning stages. In the situation where enterprise bargaining may have stalled, and members are in discussions about the taking or protected action, employer may make an application on the grounds that the organising of industrial action is having or likely to have a substantial adverse effect of the safety, health or welfare of the community or part of the community. This is an excessive measure, particularly given that the orders sought can be made against the entire union, including all its branches.

Where the grounds are made for the grounds of deregistration, the Union must front the court and make the case as it why it is unjust to cancel its registration. If it fails to do so, the registration **must b**e cancelled. There is no discretion here on the court to make a finding that the deregistration is unwarranted. The onus of proof is on the union, requiring the Union to explain why they should be allowed remain a democratically elected entity. To add insult to injury, the Bill requires the Court to consider the best interests of the members, which now sits in judgement over a membership based, collective that is a Union.

Union governance is democratically mandated by its members. These provisions undermine the capacity of unions to represent their workers at the frontlines of protecting their wages and conditions if they are instead spending time and money in litigation for the multiple compliance regimes that unions are required to adhere to.

Our history of fighting for change

Most of the industrial benefits that Australian workers enjoy today came about through industrial action that would contravene our current industrial laws which severely hamper workers' right to strike. The eight-hour day, the five day week, superannuation, equal pay for women, annual leave, workplace health and safety – all of these were fought for and won by unions who listened to their members and campaigned improve their working lives.

Unions have a long history of undertaking industrial action to make Australia a better place for everyone. Much of the industrial action undertaken in support universal health care, nurse-Patient ratios, class sizes in schools, Green Bans and even shipping bans to pressure apartheid-era South Africa were in contravention of the laws which existed at the time, and which are in place now. If the Bill is to become law, it would mean workplace leaders who organised industrial action to protect vital Australian institutions like Medicare would risk lifetime bans from the leadership of their union.

It is important to recognise that unions, as not for profit social institutions and political organisations with leaders elected from and by members have always had a role in changing society for the better. This important role is supported by the weight of historical evidence as outlined above. Direct action to bring about long-term, positive, sustainable changes to society is a vital aspect in a vibrant democratic society, even if some of those actions may not fit within the rules of the day.

[14] Fair Work Act s, 423

We draw these issue to the attention of the committee because it is important to understand why the penalties set out in the Bill are disproportionate to the offenses and inappropriate when applied to unions (who seek to create social goods, like higher wages, better conditions and a fairer and more equal society) as opposed to corporations (who seek to create private wealth through the exploitation of workers or resources and the extraction of economic rents).

Below are some more detailed examples where members of the AMWU have taken actions which would be "designated findings" as defined by the Bill. Actions which would be considered grounds for the exclusion of individuals involved and potentially the deregistration of the union.

Steel Tube Pipe, Newcastle, 2000

Prior to the establishment of General Employee Entitlements and Redundancy Scheme (GEERS) in 2001, workers who were owed unpaid wages, redundancy, long service leave, annual leave and other entitlements when their employer went into receivership were considered behind secured creditors like banks. As such, in most instances of corporate collapse workers often got little of the money owed to them, and if they did they had to wait for an extended period before receiving it.

One such event occurred in November of 2000 when Steel Tube Pipe in Newcastle went into receivership owing $3.3 million to its workers in unpaid entitlements. Upon finding out that the workers had been transferred between 40 shell companies with no assets without their knowledge (thus giving them practically no chance of securing any of their unpaid entitlements) the workers went on strike and set up pickets to prevent any of the work that they had done from leaving the site.

In addition to the completed work that was on hand, there were also a small number of high value projects that were not complete, but that could secure a significant sum for the business which could be used to pay off the main secured creditor, the National Australia Bank (owed $10 million). As such, the workers were requested to return to work in order to finish the projects so that they could be sold. The workers refused to undertake any more work unless their unpaid entitlements could be guaranteed.

The actions taken by these workers were illegal. They were refusing a direction to work, they prevented access to a work site and were undertaking unprotected industrial action. Despite all of this, it was clearly in the workers best interests to break those laws. Without their actions, they would have effectively been working for free to pay off their bosses debts.

As a result of their actions, agreements were reached that saw the workers receive part of their entitlement, the projects were completed and the administrators were able to sell the goods and receive more money than they otherwise would have had access to, without the cooperation of the workers. Ultimately, actions like this led to the establishment of GEERS (now the Fair Entitlements Guarantee) so that workers are no longer placed in this position. Without illegal action taken by the workers at Steel Tube Pipe which highlighted the inequity of the system, this important safety net may never have been established.

Equal pay

In 1972 the Australian Industrial Relations Commission granted the ACTU's application for the "equal pay for equal value" principle. This meant that all working people in Australia would be paid the same for the same work done, regardless of gender. The decision was a culmination of a long history of illegal and lawful industrial action by unions, working women and men to dismantle the idea that a woman's worth for the same work was less than that of a man and should be paid at less value. It also dismantled the idea that a working woman was taking a man's job, a common and deeply held belief at the time.

Calls for equal pay in Australia have been made as long as there have been working women in Australia. They work in manufacturing industries, textiles, clothing metal trades printing and vehicle, not just the traditionally women dominated caring and service industries, making up 25% of the workforce in these sectors. This holds true even today[15]. It was the workers in these sectors that persisted in the battle for equal pay.
In 1907 Justice Higgins in the Harvester judgment set a minimum working living wage on the cost of a man supporting his wife and three children. A woman's minimum wage was set at 54% of that rate on the accepted wisdom that men were the main breadwinners and women should be supported by men.

The reality of this was tested during the world wars and the depression. Women's participation in the workforce grew to 800,000 women during World War I. To attract women to the workforce, the wage rate was set at 60% of the minimum living wage. Despite the fact that employers needed and wanted women to work, they objected to paying more than the pre-war rate of 54% and went to the high court to prevent this. Although they did not succeed, the practice of setting the rate for women at a percentage of the men's wage persisted for decades after the war.

There was huge resistance to women entering into any spheres outside the home including unions with many union members voting against the entry of women into their union. This was the case with the Amalgamated Engineering Union (AEU) – this was more than a simple reflection of sexist attitudes at the time but also a real fear that as women's rates were lower than men, employers would hire women undercutting wages and causing unemployment amongst men. In 1942 the AEU permitted women into the union and went on to participate in strikes protecting wage rates for skilled trades in engineering, for both women and men.

Women were expected to return to the home once the war ended. In one Sydney factory the Sheet Metal Workers Union (SMWU) women members were faced with a pay cut to pre-war rates. The men threatened to strike to support the women and management sacked the women in retaliation. The men refused to work until the women were reinstated.

Momentum was building and in in 1962, the Commonwealth Industrial Gases (CIG) in Melbourne announced a replacement of 30% of the its workforce with women on the 75% pay rate, essentially undercutting the men's rates of pay. The predominantly AEU members at site resolved to agree to the employment of the women on the condition that it would be on the full rate of pay. The workers went on strike when management would not accept their claim.

These strikes led to the first set of regulations set by the Women's Employment Board mandating for equal pay for the "skilled trades" work for welders, setting the precedent for equal pay for equal

[15] Australian gender equality scorecard –November 2018 at page 16

value. By the 1970's AEU claimed equal pay for 72,000 women process workers launching a case in the Commission. Employers refused to abide by the decision and AEU members engaged in local strikes that resulted in the equal pay for all women in the industry.

These strikes, illegal actions built a movement for a fairer society involved breaking unjust laws to make better laws and create better conditions for all workers. This also meant unions had to grapple with dissenting views within their own rank and file. The abolition of the male wage and female wage to a minimum **adult wage, unconnected to gender,** is testament to the type of change that union work can bring about, delivering on the goals of working people to achieve a fairer and more just society.

Unions serve a different function to companies

Unions are made up of individuals, becoming members of a collective, to work towards common purpose, a social good. Leaders in the union movement are elected into positions and the core values of unions are to listen to their members to take action on the concerns raised. These individuals volunteer their time to improve the wages and conditions of their co-workers, the families of those workers and their communities they live in. Members fight for better wages and conditions through their union because they believe that better working conditions improve society and equality.

Companies are not like unions. They are built to generate profits for owners and shareholders and thereby create wealth for private individuals. Employees of large corporations are paid for their time to ensure that the company performs, and profits are made. Companies are subject to the Corporations Act to regulate and the behaviour and duties of company directors and unions are also governed by the Fair Work (Registered Organisations) Act.

The current legislative framework to govern the behaviour of unions works similarly to that applied to the Companies. The Bill proposes a new range of grounds for disqualifying officials and officers of Unions that is far beyond the regime that operates for companies.

The thin grounds upon which a union officer may be disqualified, such as for a government agency contravention, or for a civil penalty breach incurred because of an administrative error is too broad and will result in union resources and members money being spent unduly high compliance burden rather than participating in union work.

Conclusion

The Bill will make it harder for workers to win fair improvements to their wages and conditions. It does this by attempting to drown unions in red tape and giving employers and politicians unreasonable influence over union business.

The AMWU opposes the Bill and recommends that it be rejected.