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WHY THERE IS NO CORPORATE EQUIVALENCE TO THE ENSURING INTEGRITY BILL

Disqualification of company directors v office holders of unions

Court-ordered disqualification

Under the bill, the Minister or any person 'with a sufficient interest' – which could include employers or employer organisations – can apply to the court to disqualify a person from holding office in a union.

No equivalent provisions exist for corporations. If the same applied to companies, the Minister, a disgruntled former board member or any other person 'with a sufficient interest', like a union, could apply to the Court for orders disqualifying a person from managing corporations.

For example, this could allow unions standing to bring disqualification proceedings against a director of a company where the union was pursuing an industrial issue such as systematic wage theft – just as the Ensuring Integrity Bill might allow employers standing to bring proceedings against an officer of a union who represents their employees.

The Fair Work (Registered Organisations) Act already provides for the court to order that a union officer who contravenes the Act be disqualified, as there is for company directors who contravene the Corporations Act.

The Bill expands the grounds for disqualification of union officers to be much broader than for company directors. As well as conduct pertaining to their duties as a union officer, a court can disqualify a union officer for conduct entirely unrelated to their union role.

No equivalent provisions exist for corporations. Directors of companies that recklessly expose workers to risk of serious illness or injury or death, or that engage in systematic wage theft, are not exposed to disqualification, but a union officer could twice be caught driving while their licence is disqualified and be exposed to disqualification.

Automatic disqualification

The Fair Work (Registered Organisations) Act already provides for the *automatic disqualification* of union officers who commit offences:

- involving fraud or dishonesty (as there is for company directors);
- relating to the formation, registration or management of a union (as there is for company directors who commit similar offences relating to companies); or
- involving the intentional use of violence or damage or destruction of property (no equivalent for company directors).

The Ensuring Integrity Bill will go further than the Corporations Act by automatically disqualifying union officers who commit *any* offence punishable upon conviction by imprisonment a period of five years or more, even if the conduct is entirely unrelated to their union duties.

No equivalent provisions exist for corporations. A director of a company that recklessly exposes workers to risk of serious illness or injury or death (which is punishable by five years' imprisonment under the model work health and safety laws) is not automatically disqualified.

New offence for continuing to hold office etc while disqualified

If the new offence in the Ensuring Integrity Bill of a disqualified person continuing to hold office or influence a union was applied to companies, the penalty (and prison time) for the offence of a disqualified person continuing to hold office or influence a company would be double what it is today.

Winding up of company v deregistration of unions (and 'alternative' orders)

Under the bill, the Minister or any person 'with a sufficient interest' – which could include employers or employer organisations – can apply to the court to deregister a union or for other extreme and intrusive orders.

No equivalent provisions exist for corporations. If the same applied to companies, the Minister, an employee or any other person 'with a sufficient interest' could apply to the Court to wind up a company or impose one of these other orders.

For example, this could allow unions standing to apply to wind up a company which was involved in wage theft or dangerous work practices – just as the Ensuring Integrity Bill could allow employers standing to apply to deregister a union they're in dispute with.

The Fair Work (Registered Organisations) Act already provides for a wide range of circumstances in which the Court can order that a union be deregistered, including:

- the continued breach of a modern award, an order of the FWC or an enterprise agreement by the union or its members;
- unlawful industrial action by the union or its members that prevents, hinders or interferes with the activities of an employer or provision of a public service;
- a failure by the union or its members to comply with orders to stop unprotected industrial action, or other orders under the Fair Work Act; or
- a failure by the union to comply with legislation, guidelines or rules relating to financial matters.

The Ensuring Integrity Bill significantly expands these grounds. Most of the grounds in the Ensuring Integrity Bill have no ready equivalent to the grounds for winding up a company in the Corporations Act.

There are no provisions in the Corporations Act that specifically and directly allow for companies to be wound up due to a history of non-compliance with the law by them or their shareholders. Therefore, a company can repeatedly put workers lives at risk, commit wage theft, illegally dump toxic chemicals or produce dangerous products and not be wound up.

On the other hand:

- A union like the Nurses Union (ANMF) could have its registration cancelled if a group of members take unprotected industrial action to protest unsafe staffing ratios in a hospital or aged care facility.
- A union that fails to comply with an order made under the Fair Work Act could be exposed to an application for deregistration. This could be minor in nature. For example, the Fair Work Commission could order the union to attend a series of bargaining meetings with a company and the union could fail to attend one of those meetings.

If the Ensuring Integrity Bill provisions really applied to companies, then the Court could, instead of winding up the company, restructure it so that:

- A director was disqualified from holding office for a period the Court thinks fit;
- Certain shareholders were excluded from the company;
- The rights, privileges or capacities of the company were suspended for a period the Court thinks fit, including restricting and controlling the funds and property of the company.

This means that even if the grounds for deregistration of a union were equivalent to the grounds for winding up a company, there are a whole range of other extreme and intrusive orders that the Court can make in relation to a union that are not available in relation to a company. Although the Ensuring Integrity Bill refers to these orders as 'alternative' orders, they can in fact be applied for in their own right and not only as an alternative to deregistration.

Administration of companies v administration of unions

Under the bill, the Minister or any person 'with a sufficient interest' – which could include employers or employer organisations – can apply to the court to place a union under administration.

No equivalent provisions exist for corporations. Not even the regulator can apply to place a company into administration; only the company itself, a liquidator or a party entitled to enforce a security interest in the company's property.

If the Ensuring Integrity Bill really applied to companies, the regulator, the Minister, a disgruntled former board member or any other person 'with a sufficient interest' could apply to the Court to place a company under administration.

For example, this could allow unions, as persons with a 'sufficient interest', standing to apply to place a company with whom they are in an industrial dispute under administration – just as the Ensuring Integrity Bill could allow employers standing to apply to do the same to a union they're in negotiations with.

The Fair Work (Registered Organisations) Act already provides for the Court to make remedial orders to reconstitute a union or branch that has ceased to function effectively, much like the Corporations Act provides for an administrator to be appointed to a company that is insolvent and no longer able to meet its debts.

The Ensuring Integrity Bill provides for a very broad range of circumstances in which a union can be placed under administration, which have *no* equivalent in corporations law.

These grounds relate to the conduct of union officers. There is *no* means by which the conduct of a company director can lead to the company being placed under administration.

If the Ensuring Integrity Bill really applied equally to companies, then a company could be placed under administration when:

- Directors acted in their own interests rather than in the interests of the members as a whole;

- Affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole;

- Directors engaged in financial misconduct, for reasons including but not limited to:
  - Breach of general duties in relation to the financial management of companies;
  - Misuse of funds;
  - False accounting;
  - Failure to fulfil duties in relation to financial reporting ;

- The Court has declared that the company 'has ceased to function effectively', which it could declare for reasons including but not limited to:
  - History of non-compliance with corporate by directors;
  - Directors having misappropriated company funds;
  - Directors repeatedly failing to fulfil their duties as directors.

Currently, company directors can engage in a wide range of law breaking and misconduct and the company is still permitted to self manage. A union officer, on the other hand, could fail to ensure the union's financial reports were filed with the regulator on time and expose the union to being placed under administration or a range of other intrusive orders.

A company that is insolvent can be placed under administration. Under the Ensuring Integrity Bill, a far broader untested concept of a union that has 'ceased to function effectively' means that a union can be placed under administration or subjected to a range of other intrusive orders by the Court.

Competition test for company merger v public interest test for amalgamation of unions

Currently there is no equivalent public interest test for companies seeking to merge. If the Ensuring Integrity Bill really applied to companies, then a 'public interest test' would be imposed on all company mergers or acquisitions, under which a tribunal would be required to block a merger or acquisition if:

- The respective companies, their directors and members had a record of not complying with the law, including the director's personal criminal record that is unrelated to their company role; or

- The tribunal forms the view that the merger or acquisition is not 'otherwise in the public interest', taking into account the existing competition test, the impact on employers *and employees* in the industry or industries concerned and 'any other matters it considers relevant'.

A new process for a company merger or acquisition would be imposed, whereby the proposed merger or acquisition must be:

- Approved by the board of directors of all companies; then

- Approved by a ballot of shareholders of all companies, conducted by the Australian Electoral Commission; and, then

- Approved by a tribunal, who must hold at least three hearings, one for each aspect of the 'public interest test' described above, and one to ensure the other procedural requirements listed above have been met.

A wide range of parties would have a right to oppose the merger or acquisition in the tribunal, and the tribunal would be required to take into account their views:

- Other companies in the industry or industries concerned or that may otherwise be affected by the proposed merger;
- The regulator;
- The Minister (federal and state or territory);
- Any other person 'with a sufficient interest', which could include a union who represents the interests of the workers employed by the companies or employed in the industry generally.

If the tribunal determined that the merger is not in the public interest, companies aggrieved by that decision would have no ordinary right of appeal. The decision could only be reviewed by way of judicial review by the Federal Court.