# Submission to the Senate Standing Committee on Education and Employment: Inquiry into Proposed Amendments to the Fair Work Act ("Ensuring Integrity")

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Thank you to the members of the Committee for the invitation to appear to discuss the provisions and likely impacts of proposed amendments to the Fair Work Act, as codified in the so-called "Ensuring Integrity" Bill 2019.

The Centre for Future Work is a research institute based in Sydney and associated with the Australia Institute, conducting and publishing research into a range of labour market, employment, and related issues. We are independent and non-partisan. Our research is publicly available at http://www.futurework.org.au/.

Our Centre has conducted considerable original research into collective bargaining regulation, practices, outcomes and benefits in Australia. I will refer to some of that research in the course of my submission, and I encourage members of the Committee to consult our cited publications for more detail.

## Provisions of the Proposed Legislation

As an economist (not a lawyer), I will focus most of my comments on the likely economic effects of the Bill, as well as discussing the economic and labour market context within which the Bill is being advanced. However, I would like to briefly address several concerns with the substance of the legislation.

The general effect of the proposed amendments to the Fair Work Act will be to extend the circumstances under which Federal Court actions can be taken to remove union officials, leaders or delegates from their posts (Schedule 1 of the Bill); place union

organisations under court administration, disabling their normal governance structures (Schedule 3); and deregister union organisations, thus prohibiting their continued operation entirely (Schedule 2). The scope under which these actions can be prosecuted, and the community of possible intervenors who can initiate such actions, would both be widened. An additional provision empowers the Fair Work Commission to prevent amalgamations (and potentially other structural changes) by union organisations (Schedule 4).

Together, these measures would provide more opportunity for government and employers to interfere with union leadership, organisation, decision-making and activity – up to and including taking over or banning unions entirely. They would open new possibilities for outside interests (including employers) to interfere with the operation, activity and governance of unions – including by launching frivolous action intended solely to harass and distract unions from their core mission.

The potential grounds for these sanctions are both vague and extensive. Union representatives could be disqualified for seemingly minor offences, including civil offences, and including actions that have nothing to do with their roles in their unions. The grounds on which hostile governments, employers, or other interests could bring actions against unions are similarly broad and vague. The new laws could be used to dismiss union leaders (including elected leaders) and ban unions on the basis of activities (like peaceful industrial action) that would be considered normal and legitimate in most industrial countries. And when confronted by the prospect of deregistration, the onus of proof is placed on unions to somehow prove that such actions would be unjust – a reversal of normal due process.

The introduction of this Bill has been framed in public discourse as responding to supposed "misconduct" on the part of trade unions and trade union officials. But it is not clear what that misconduct is. Proponents of the Bill speak ominously but vaguely about patterns of "recidivism" and a "culture of lawlessness," as justification for the extraordinary interventions and penalties it contemplates. But details are scarce. Moreover, in the Australian context of labour laws that are already unusually intrusive and restrictive (compared to other industrial jurisdictions), claims of supposed union "criminality" must be viewed critically and skeptically. When union activities that would be considered both normal and legitimate in most countries are prohibited (including things like organising strikes, encouraging workers to join, collecting dues, protesting, opposing employer measures deemed unfair, displaying union symbols and flags, and so on), a perverse and self-fulfilling dynamic is set in motion: by defining normal union activity as criminal, unions automatically become criminal organisations, thus seemingly justifying still further intrusions, restrictions, and penalties. I have not seen any evidence of any pattern of genuinely illegal or illegitimate activity among Australian unions that could possibly justify the tailor-made, arbitrary, far-reaching and punitive measures contemplated in this Bill. And no credible argument has been made that

existing legal remedies (through both industrial laws and the courts) for genuine misconduct are somehow inadequate.

The measures proposed in this Bill would seem quite clearly to violate international labour and human rights norms and conventions. The submission to this Inquiry prepared by the International Centre for Trade Union Rights (ICTUR) on behalf of the Australian Council of Trade Unions (ACTU) puts the point powerfully, finding "no precedent for the degree of state interference in the functioning and establishment of trade unions in comparable industrialised liberal democracies."[1]

The broad and vague grounds for sanction, and the intensity of the proposed penalties, also are far out of proportion with provisions regulating private businesses and their executives and directors. Private businesses regularly engage in all kinds of serious fraudulent, illegal and dangerous behaviour: ranging from routine theft of workers' wages and superannuation contributions, to toleration of dangerous health and safety conditions (resulting in preventable deaths of workers), to manipulative marketing and financial practices (such as those exposed in the recent Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry). Government has not responded to these acts by dissolving key businesses, disqualifying their executives, or preventing their amalgamation. Clearly there is a double-standard at work in the intensity with which perceived misconduct on the part of unions versus businesses is exposed and punished.

Supporters of the legislation claim that since the Federal Court already possesses many of these powers, these new rules are not so extraordinary; their purpose is merely to clarify and extend those existing powers. That might be partially true (although some of the grounds for sanction are new, and open unions to new bases for intervention and sanction). But the fact that *existing* processes already restrict and harass the operations of trade unionism hardly justifies their *expansion* – especially when those processes are already undermining the operation of an essential and productive institution in society: trade unionism and collective bargaining.

## The Economic and Labour Market Context of the Bill

It seems ironic, but these far-reaching new intrusions into union activity are being contemplated at a moment in history when the size, activity and influence of unions has already been curtailed substantially – and when the negative consequences of that curtailment for Australia's economic and social performance are steadily becoming more visible and costly.

[1] Daniel Blackburn and Ciaran Cross, "Research Paper by the International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions: Submission on the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019," July 2019, p.3.

By several indications, wage determination and income distribution in Australia have been substantially skewed in recent years. Let me briefly summarise several dimensions of Australia's current labour market malaise, with reference to previous published from our Centre which discusses these aspects in more detail.

*Stagnant Wages:* Since 2013 Australia has experienced the slowest sustained growth in nominal wages since the end of the Second World War. Nominal wages, variously measured, have grown by only around 2% per year on average since 2013. That is barely sufficient to match the ongoing growth of consumer prices – implying a multi-year stagnation in real wages and living standards.[2]

*Weak Consumer Spending and Economic Growth*: This historic weakness in wage growth has contributed to the significant deterioration in Australian macroeconomic conditions visible in recent quarters. Real consumer spending increased by just 1.4% in the year ending in the June 2019 quarter – the weakest in six years. Consumer spending is clearly held back by weak wage increases. Since consumer spending accounts for over half of all GDP, the stagnation of wages is having a negative impact on continued economic growth and job-creation.

*Shrinking Labour Share of Total GDP*: Labour productivity has continued to grow in Australia, albeit unevenly, even though real wages have been effectively constant for six years. The combination of flat real wages and growing productivity has caused a further decline in the share of total GDP which is paid to workers in the form of wages, salaries and superannuation contributions. That share declined to just 46.75% of GDP in the 2018-19 financial year – the lowest since the 1950s, and down by a cumulative total of over 11 percentage points since the mid-1970s. The shrinking share of GDP going to workers contrasts vividly with the growing share of national income received by corporations and financial investors; it is also associated with widening income inequality.[3]

*Growing Insecurity of Work*: A profound and multidimensional shift has occurred in the nature of employment relationships in Australia over the past generation. The traditional "standard employment relationship" (typified by a permanent full-time waged job, with normal entitlements such as superannuation and paid leave) has become much less common, replaced by positions which embody various dimensions of insecurity: including part-time work, casual jobs, temporary positions, labour hire,

[2] For more detail on the weakness of wage growth, its economic consequences, and potential remedies, see our reports: Andrew Stewart, Jim Stanford, and Tess Hardy, eds., *The Wages Crisis in Australia: What It Is and What To Do About It* (Adelaide: University of Adelaide Press, 2018), 340 pp.; and Jim Stanford, *Kick-Starting Wage Growth: What the Commonwealth Government Could do NOW*, June 2019.

[3] For further detail on the causes and consequences of the decline in labour's share of GDP, please see our recent research symposium, with peer-reviewed contributions featured in the August 2018 edition of the *Journal of Australian Political Economy*, by Frances Flanagan, Jim Stanford, David Peetz, Margaret Mackenzie, and Shaun Wilson.

independent contractor and freelance jobs, and most recently short-term "gigs" mediated through digital platforms. Our research indicates that less than half of employed Australians still possess one of those "standard" jobs; the majority are employed in jobs which embody some dimension of insecurity and precarity, which are now pervasive features of the labour market.[4] The growth of insecure work is relevant to the present Inquiry because workers in these precarious positions have very little bargaining power to independently negotiate wage increases (making them more dependent on unions and collective bargaining to achieve those goals). Moreover, stronger trade unions have greater capacity to place limits on the application of precarious work practices through collective bargaining. Therefore, the decline of collective bargaining is both a cause and a consequence of the growth of precarious work.

*Rapid Erosion of Collective Bargaining*: Recent statistics from the Commonwealth government have confirmed a startling and rapid decline in collective bargaining activity in Australia, rooted particularly in private sector workplaces. Since 2013, the number of current enterprise agreements in effect in private sector workplaces has fallen by over half, and the number of workers covered by those agreements has plunged by over 800,000 (or over 40%). The share of private sector workers covered by a current enterprise agreement has declined to under 12%. The looming disappearance of collective bargaining in the private sector has been a major factor in the unprecedented weakness in wage growth during the same period; it also clearly reflects the already strong restrictions on union activity already imposed by current labour law.

*Other Manifestations of Declining Trade Union Activity*: Union membership has declined steadily in recent decades as a share of total employment, falling to around 14% of employees at present (and less than 10% of employees in the private sector). In my judgment this long decline is largely due to a hostile legal and economic environment, which prevents workers from effectively exercising their right to form unions and bargain collectively. The decline in membership has undermined the resources and bargaining power of unions, and thus contributed to the rapid erosion of collective bargaining. With fewer workers in unions, and more restrictions on strikes, the frequency of industrial action has also declined dramatically (although, perversely, employer-led lock-outs have become more common).[5]

These and other indicators paint a daunting portrait of a labour market in which workers are already experiencing a profound and structural erosion of their bargaining power. The consequences of that rebalancing include weak wage growth, wider inequality, a loss of stability and security, and a fragmentation of work. Those trends, in

[4] See our report *The Dimensions of Insecure Work: A Factbook*, by Tanya Carney and Jim Stanford, April 2018.
[5] For more discussion of the decline in industrial activity and its impact on wage growth, see our report: Jim Stanford, *Historical Data on the Decline in Australian Industrial Disputes*, January 2018.

turn, undermine aggregate demand and job-creation in the macroeconomy, and likely negatively affect productivity growth.

## Australia's Poor Respect for Basic Labour Rights

By the standards of other industrial democracies, Australia's industrial relations and labour law regimes already embody an unusually interventionist and repressive approach to regulating and limiting basic labour rights and freedoms. For various historical and political reasons, Australian labour law is characterised by a high degree of state intervention and regulation of union activity, collective bargaining, collective action (including work stoppages), and even free expression. Detailed prescriptions and prohibitions enshrined in legislation, and implemented by the precedents set by industrial commissions, already severely restrict the operation of normal trade union activity here, in a manner far outside of the norms of practice in other industrial democracies.

There are various indications of the growing extent to which Australia's existing labour and industrial relations practices fall outside the bounds of international norms. Australia has been criticised repeatedly at the International Labour Organisation for violations of basic labour standards and charters – including some of which Australia has officially endorsed.

Another indicator of Australia's relatively poor respect for basic international rights and freedoms was provided recently by a new index of basic labour rights that was developed by the World Economic Forum (based in Geneva) as part of its annual economic competitiveness rankings. The Forum developed a quantitative index of respect for labour rights as part of a broader score it assigned to different countries for labour market competitiveness. The Forum's rationale is that respect for basic rights (including freedom to assemble, to organise, to free expression, and to strike), and rights to due process, are indicators of a sustainable and fair legal and institutional environment which is good for business. Regular observance of these rights will contribute to more stable institutions, and stronger economic performance – by granting workers free and fair opportunity to advocate and mobilise for a share of the economic wealth they help to produce.

The Forum's scores and ranking are instructive (see Table 1). A total of 26 OECD countries are included within the Forum's index. Australia ranked 22nd on that list (fifth from the bottom), just one place ahead of the United States. This reflects the severe restrictions on union activity, industrial action and free expression currently in effect in Australia. In my judgment, the extraordinary and arbitrary measures contained in this Bill (including the power to summarily dismiss elected union leaders from their roles, and to ban unions entirely) will certainly suppress Australia's ranking (and

international reputation) even further. It is quite possible that if these measures are implemented, Australia would fall below the U.S. in future editions of this ranking.[6]

**Table 1**
**Labour Rights and Union Organising:**
**International Evidence**

| | Labour Rights | | Union Density | |
|---|---|---|---|---|
| | **Score** | **Rank** | **Percent[1]** | **Rank** |
| **Austria** | 100.0 | 1 | 26.9 | 8 |
| **Finland** | 100.0 | 1 | 64.6 | 4 |
| **Iceland** | 100.0 | 1 | 85.5 | 1 |
| **Sweden** | 99.0 | 4 | 66.1 | 3 |
| **Italy** | 97.9 | 5 | 34.4 | 7 |
| **Norway** | 97.9 | 5 | 52.5 | 6 |
| **Belgium** | 94.8 | 7 | 54.2 | 5 |
| **Germany** | 94.8 | 7 | 17.0 | 17 |
| **Denmark** | 94.8 | 7 | 67.2 | 2 |
| **Netherlands** | 93.8 | 10 | 17.3 | 15 |
| **Ireland** | 91.8 | 11 | 24.2 | 10 |
| **Canada** | 90.7 | 12 | 26.3 | 9 |
| **Switzerland** | 90.7 | 12 | 15.7 | 19 |
| **Portugal** | 90.7 | 12 | 16.1 | 18 |
| **France** | 89.7 | 15 | 7.9 | 26 |
| **Japan** | 89.7 | 15 | 17.1 | 16 |
| **New Zealand** | 84.5 | 17 | 18.7 | 13 |
| **Israel** | 82.5 | 18 | 23.4 | 12 |
| **Spain** | 81.4 | 19 | 13.9 | 21 |
| **United Kingdom** | 80.4 | 20 | 23.5 | 11 |
| **Chile** | 76.3 | 21 | 17.7 | 14 |
| **Australia** | **75.3** | **22** | **14.5** | **20** |
| **United States** | 67.0 | 23 | 10.3 | 23 |
| **Korea, Rep.** | 58.8 | 24 | 10.1 | 24 |
| **Mexico** | 56.7 | 25 | 12.5 | 22 |
| **Turkey** | 53.6 | 26 | 8.6 | 25 |

Source: Author's calculations from International Trade Union Confederation, World Economic Forum, and OECD data as described in text.
1. 2017 or most recent.

[6] The WEF ranking is reported in Klaus Schwab (ed.), *The Global Competitiveness Report 2018* (Geneva: World Economic Forum, 2018), 671 pp., https://www.weforum.org/reports/the-global-competitveness-report-2018. For more discussion of the WEF ranking, and the correlation between respect for basic labour rights and the presence and activity of unions, please see our report by Jim Stanford, *Union Organising and Labour Market Rules: Two Sides of the Same Coin*, June 2019.

## The Likely Economic Effects of the Proposed Amendments

The legislative amendments proposed in this Bill have been advanced at a point in history when Australia's labour market is already characterised by growing imbalance, polarisation, and stagnation. But these amendments address an "issue" – supposed misconduct by unions – that has no material bearing on any of those pressing problems. I cannot possibly see a circumstance in which any of these amendments would have any measurable economic and labour market impact: whether on productivity, on wage determination, or on employment. At best, these proposals constitute a distraction from those more urgent labour policy matters. At worst, they would achieve an incremental worsening of the deeper problems and imbalances which are contributing to Australia's generally poor labour market performance.

The measures contained in this Bill would have important and negative practical impacts on the functioning and governance of trade unions. They would result in the allocation of still more union resources to a variety of regulatory, surveillance, and legal processes and procedures that have no direct relationship to their core function as agents for the collective representation of working people. This misallocation of resources occurs in the context of the critical under-resourcing of unions and collective bargaining in Australia, which is a consequence of the uniquely restrictive and union-hostile legal framework governing industrial relations here. In my judgment, this under-resourcing of unions and collective bargaining has been a key cause of the rapid disappearance of collective bargaining, especially in the private sector.

The Bill would also facilitate the direct interference with and suppression of normal trade union activity, up to and including taking control of or banning union organisations altogether. The harassment and suppression of normal union activity would contribute incrementally to the continuing decline of unions and collective bargaining in Australia – thus exacerbating the negative economic consequences of that trend (including wage stagnation). The claims of some proponents of the Bill that it would in fact lead to a strengthening of collective bargaining (by clamping down on "lawlessness" and enhancing "public confidence") are frankly ludicrous; the practical and symbolic attack on unions and unionism embodied in this bill can only damage the already-shaky prospects for collective representation and bargaining in Australia's increasingly one-sided labour market.

In sum, by restricting and interfering with union activity, misallocating more union resources to surveillance and regulatory functions, and exposing unions to more harassment from hostile employers and governments, this Bill would accelerate the decline in collective representation and bargaining that is already damaging Australia's economic and social well-being. It would thus incrementally exacerbate the problems of wage stagnation, insecure work, and inequality described above.

That being said, while noting these negative practical effects, I judge the motivations and effects of this Bill to be primarily symbolic and ideological. They are aimed at further vilifying an institution – trade unionism – that in other industrial democracies is valued as a normal, positive feature of life. The goal also seems in part to continue a war-by-proxy against the union movement's partisan political allies. These measures would contribute to further needless polarisation and politicisation of industrial relations discourse policy. These are lamentable and avoidable outcomes, but they will not in and of themselves have any measurable impact on Australia's economy. From the perspective of Australia's current labour market difficulties, this Bill is irrelevant.

## Concluding Remarks

I would ask the indulgence of Committee members to conclude with several somewhat more personal observations. Since attaining my Ph.D., I have accumulated 25 years of professional experience as an applied labour market policy economist. I have worked in several different countries, and for many different organisations (including international organisations). In that time I have become familiar with the wide range of approaches taken to industrial relations and collective bargaining policy and law in different parts of the world. Mine is a diverse and fascinating discipline, one in which the insights gained from comparative international research seem especially rich.

However, I must stress that since arriving in Australia, I have been struck by the unusual intensity of vitriol and polarisation which seems to characterise virtually all discussions of industrial relations and labour policy. I have never encountered another industrial country in which the existence and legitimacy of trade unionism faces such unrelenting, systemic hostility and vilification. This hostility arises from multiple quarters: including most of the business community, much of the commercial media, and sections of politics. This divisive and inflammatory approach is embodied in the amendments that are before you: both their specific content, and the broader political and rhetorical context within which they have been devised and advanced.

Unions and union activity are already weaker in Australia than in most other industrial economies (measured by many indicators, such as union density, collective bargaining coverage, and the incidence of industrial action). In my judgment this reflects the generally unfavourable legal and regulatory climate for unions and collective bargaining that already prevails here. However, Australian unions receive more attention on the front pages of newspapers, and in the speeches of politicians and business leaders, than any other country I have worked in. And most of that attention, of course, is negative. The prominence of union-related issues in public discourse and the legislative agenda here is far out of proportion with the economic influence of unions and collective bargaining – which is diminishing (sadly, in my view). For a country where trade unions now have such a limited and circumscribed role in economic affairs, unions and union leaders certainly capture a lot of attention and air time.

This hostility from business, government and the media to unions in Australia is worse even than in the United States, where unions (which, of course, are even weaker than in Australia) are mostly ignored, not constantly attacked. And in most of the industrial world, in contrast, trade unions and the institutions of collective bargaining are accepted as normal, legitimate, and positive features of modern industrial society. While heated debates occur, of course, over the nature of labour law and industrial relations policy, there is generally agreement – reaching across political perspectives and economic constituencies – that workers not only have a fundamental right to organise, but also that their doing so makes society stronger and healthier.

I have thought long and hard about why these discussions become so dysfunctional in the Australian context. I think it is partly attributable to the close association of industrial relations issues to specific party labels in the realm of politics. Arguments on one side or the other regarding labour and industrial relations policy thus become quickly and deeply associated with ongoing partisan competition in Parliament. Hence attacks on unions serve a role as a proxy for attacking the Labor Party, and this artificially elevates the importance of these issues on the agenda of other parties and constituencies who have their own, different reasons for disagreeing with the Labor Party. In other countries, where labour policy is not so fully and immediately degraded to a divisive partisan conflict, there is more room for constructive dialogue; and a broader range of stakeholders is prepared to acknowledge the value of healthy collective representation and collective bargaining, which can then be understood beyond the bifurcated lens of partisan politics.

There are surely other factors behind the uniquely divisive nature of industrial relations policy discourse in Australia. But there is no denying that both the amount of attention devoted to these issues, and the vitriol with which the discussion is carried on, are far out of proportion to the real economic importance of the immediate measures being proposed. It is hard to fathom that in an economic context marked by unprecedented stagnation in wages, growing polarisation of income and opportunity, and a looming potential recession, the measures contemplated in this Bill have somehow become the top labour market priority of the country's government.

In this context, these proposed amendments to the Fair Work Act, which launch yet another broadside against the autonomy, credibility, and effectiveness of trade unionism, are lamentable. Australia's labour market badly needs more balance, inclusion, and negotiation – not more polarisation, vitriol, and rhetorical conflict.