Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

Submission by the Australian Council of Trade Unions to the Senate Education and Employment Legislation Committee of the Australian Parliament Inquiry into the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019*

ACTU Submission, 9 September 2019
ACTU D. No 37/2019

Contents

ABOUT THE ACTU

1. Since its formation in 1927, the Australian Council of Trade Unions (**ACTU**) has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years the ACTU has played the leading role in advocating in the Fair Work Commission (**FWC**), and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

2. The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 1.6 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

INTRODUCTION

3. The ACTU is strongly of the view that the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* (Cth) (**Bill**) should not be passed.

The foundations of the Bill are unsound

4. The Government describes the Bill's purpose as being to respond to community concern and the recommendations of the Final Report of the Royal Commission into Trade Union Governance and Corruption (**Royal Commission**) to ensure the integrity of registered organisations and their officers, for the benefit of members.[1] Specifically, the Government claims that the Bill will combat the 'culture of lawlessness' of some organisations and officers identified by the Royal Commission, ensure more acceptable minimum standards of behaviour and accountability for officers and promote democratic governance in the interests of members of registered organisations.[2] However, on proper analysis of the Bill, several problems with these claims are immediately apparent.

5. **First**, the Bill is **politically motivated**. The Bill is unsupported by policy. There are no evidence-based policy objectives supported by a proper policy development process, including no stakeholder consultation or independent research or inquiry. Australian unions are already subjected to a much higher degree of state regulation of their affairs than their counterparts in comparable overseas countries.[3] For every amendment, there is either no evidence of an extant problem that the amendment is addressing, or the claimed evidence is unsound. The Bill is simply a political tool to shut down unions.

6. **Second**, the Bill is **bad for workers**. If unions are shut down, who will stand up to the powerful on behalf of workers? All Australian workers benefit from the work of unions. This Bill will make it harder for working people to be protected at work and to raise their living standards.

7. **Third**, the Bill **targets all unions**. Much of the commentary around the Bill suggests that the Bill only targets unions or union officers who repeatedly or deliberately act unlawfully, "where there

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1 Explanatory Memorandum, p *i*.
2 Explanatory Memorandum, pp *ii*.
3 Anthony Forsyth, 'Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model', (2000) 13 *Australian Journal of Labour Law*.

is an ingrained culture of lawlessness".[4] *This claim is false*. Only *one* finding of unlawful conduct, which could be for a minor or technical (rather than a deliberate or serious) breach, is required to trigger a disqualification application (proposed ss 223(1), (2), (4) and (5), and the ground in proposed s 223(2) requires only *two* findings). Only *one* finding of non-compliance with an order or injunction or unprotected industrial action is required to trigger an application to cancel an organisation's registration or for one of the 'alternative' orders (proposed ss 28F and 28G, and the ground in proposed s 28E only requires *two* findings). The same is true for a standalone or concurrent application for one of the alternative orders, including an officer disqualification application. The claim that the Bill "creates a graduated penalty regime where administration or de-registration is a 'last resort' option where an organisation has systemic problems of dysfunction or law-breaking"[5] is simply not true. It is also contrary to the Parliamentary Joint Committee on Human Rights (**Joint Committee**) recommendation that the Bill be amended to make cancellation of registration a last resort option.

The Government and business groups have suggested that we need not be concerned by the extremely low bar that the Bill sets to trigger these very serious applications because "The court would invariably take into account the fact that the Parliament has created a penalty regime in which breaches of industrial laws are subject to the relevant sanctions that apply to such breaches, with the more serious sanction regime reserved only for situations where the usual sanctions or remedies have proven to be ineffective".[6] The Minister has even gone so far as to say that "the idea that this bill "as it is drafted and presented to this parliament, would allow for deregistration for such minor or isolated instances of unprotected, unlawful industrial action is patently absurd".[7] And yet as noted, the Bill, as currently drafted, does in fact allow for *one* instance of industrial action or other unlawful conduct to ground an application for disqualification of an officer, cancellation of an organisation's registration or other extreme orders.

If ultimately the Government does not want the Court to exercise its discretion to impose heavy-handed sanctions on unions and union officers that do not have a record of repeated lawful conduct, then it would not subject those unions and union officers to a real prospect of

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4 Submission of the Business Council of Australia to this inquiry, page 8.
5 Submission of the Business Council of Australia to this inquiry, page 7.
6 Submission of the Business Council of Australia to this inquiry, page 7.
7 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 July 2019, 44–5, 75–7 (Christian Porter).

expensive, time consuming litigation that diverts their resources from the important work they do on behalf of their members. The claim that the existing protections against frivolous and vexatious claims in the Federal Court and the Fair Work Commission would protect against this sort of litigation is also misleading, because an application where a ground is made out but the Court declines to make an order would never meet the test for those protections to apply. The problem is that the bar to establish a ground is far too low. The reach of the Bill extends beyond organisations that have a record of repeated unlawful conduct.

8. **Fourth**, the Bill has no **corporate or political equivalent**. The claim that the Bill simply applies consistent standards to industrial organisations as apply to corporations is false. Despite the Government's rhetoric that, In re-introducing the Bill, the Government has 'listened to stakeholders' to ensure that its provisions 'as closely as possible' align with the standards that apply to companies and their directors,[8] the 2019 Bill continues to impose more onerous standards and procedures on industrial organisations that it does on companies—or politicians. And yet, in the face of criminal and unethical conduct, endless breaches by financial institutions and the recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, the Government has only acted on eight of the 54 recommendations directed at it to reform that sector.

9. **Fifth, unions are not companies.** The very premise that companies and industrial organisations should be treated the same is flawed in any event. One of the fundamental problems with the approach adopted by the Bill is a failure to recognise key differences between the two in terms of their nature, purpose and resourcing, as well as the special way that industrial organisations are dealt with in international law.[9] In the Australian regulatory context, the corporate identity of a registered organisation is more akin to that of an incorporated association than that of the breadth of corporations covered by the *Corporations Act 2001* (Cth) (**Corporations Act**). Incorporated associations are a closer institutional model, especially given that the majority of office holders in registered organisations are volunteers. The imposition of a regulatory regime on industrial organisations that entails standards and burdens that exceed those of either incorporated associations or commercial corporations gives no recognition to the practicalities

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8 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 289–91 (Christian Porter).

9 See, especially: *International Covenant on Civil and Political Rights*, Article 22(1) and (2); *International Covenant on Economic, Social and Cultural Rights*, Article 8(1)(a); *Freedom of Association and Protection of the Right to Organise Convention 1948*, No. 87, Article 3 and 98, Article 2 (ratified by Australia in 1973); and, also, the *ILO Declaration on Fundamental Principles and Rights at Work*, Article 2(a).

of the organisational structure of industrial organisations as non-profit, member-based institutions that are primarily run by volunteers.[10]

Forsyth undertook a comprehensive comparison of unions and companies in terms of their reasons for existence, the purposes they serve, the interests created in their members, and the role and functions of those who manage them, which revealed substantial differences between the two types of organisations in all these areas. He concluded that the framework for the regulation of corporations cannot simply be transposed upon unions, given these fundamental differences.[11]

10. **Sixth**, the Bill is **anti-democratic** and **inconsistent with international human rights law**. The Joint Committee found that *every Schedule of the Bill is incompatible with the right to freedom of association*.[12] Australia already has one of the most restrictive set of regulations on industrial organisations among democratic nations. This extreme new law would place Australia even further outside the rest of the industrialised world and more aligned with authoritarian, undemocratic countries.[13] A comparative overview of the regulation of industrial organisations in countries with commensurate levels of economic and industrial development found that there is *no precedent for the degree of state interference in the functioning and establishment of unions in comparable industrialised liberal democracies*, but did find similar 'draconian measures' in some authoritarian regimes in which independent unions are suppressed or entirely prohibited.[14]

11. The ACTU supports a legislative regime that promotes the autonomous operation of accountable, democratic and effective unions that are member-governed. Such a legislative regime is consistent with international obligations that guarantee the organisational autonomy of industrial organisations and that Australia has voluntarily adopted and is obliged to meet in domestic law and practice.[15] The ILO Committee on Freedom of Association has warned that,

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[10] See by contrast, for e.g., *Associations Incorporation Act 2009* (NSW) (**AI Act**), Part 4 – Management of Associations and Part 8 – Enforcement Provisions, Division 2 – Offences.

[11] Anthony Forsyth, 'Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model', (2000) 13 *Australian Journal of Labour Law.*

[12] Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017). The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15

[13] Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, July 2019.

[14] Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, July 2019, 3.

[15] See, especially: *International Covenant on Civil and Political Rights*, Article 22(1) and (2); *International Covenant on Economic, Social and Cultural Rights*, Article 8(1)(a); *Freedom of Association and Protection of the Right*

'Legislative provisions which regulate in detail the internal functioning of workers' and employers' organizations pose a serious risk of interference by the public authorities' and that restrictions on the principle of organisational autonomy should have 'the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations.'[16] The amendments proposed by the Bill allow excessive political, corporate and regulatory interference in the democratic functioning and control of industrial organisations, with no true objective other than political gain.

12. **Seventh**, most of the amendments proposed by the Bill **go well beyond the recommendations of the Royal Commission** and highlight the political motivation for the Bill. To the limited extent that the Bill implements the recommendations of the Royal Commission, it is not faithful to the recommendations, although in most respects the Bill deals with matters not recommended or directly recommended against.

13. Importantly, the Royal Commission does not provide a sound basis for the recommendations that the Bill does adopt. The Royal Commission fundamentally misunderstood the nature and purpose of registered organisations. The Royal Commission took an unduly narrow view of unions as servicing organisations in the nature of legal service providers or agents in employment negotiations. The broader representative function of unions—to build workers' collective voice and power in society, in respect of not only employment issues but broader social, political and economic issues—was not considered by the Royal Commission and would appear not to have been understood at all. The Royal Commission did not understand the nature of the institutions with which it was dealing and the context in which they operate. As a result, the importance of the democratic and autonomous functioning and control of industrial organisations, as recognised in international law[17] and in Parliament's intention in enacting the *Fair Work (Registered Organisations) Act 2009* (Cth) (**Registered Organisations Act**),[18] was missed. The Bill replicates the misconstruction of industrial organisations that characterised the approach of the Royal Commission. This misconstruction is particularly

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to Organise Convention 1948, No. 87, Article 3 and 98, Article 2 (ratified by Australia in 1973); and, also, the *ILO Declaration on Fundamental Principles and Rights at Work*, Article 2(a).

16 ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, Fifth (revised) Edition, 2006, paragraph [369], as quoted in the Explanatory Memorandum to the Bill, p *vii-viii*.

17 See, especially: *International Covenant on Civil and Political Rights*, Article 22(1) and (2); *International Covenant on Economic, Social and Cultural Rights*, Article 8(1)(a); *Freedom of Association and Protection of the Right to Organise Convention 1948*, No. 87, Article 3 and 98, Article 2 (ratified by Australia in 1973); and, also, the *ILO Declaration on Fundamental Principles and Rights at Work*, Article 2(a).

18 Registered Organisations Act, s 5(3).

evident to the extent that the Bill purports to transplant aspects of the regulatory regime of corporations into that of industrial organisations.

14. **Eight**, the claim that the Bill is justified because of a 'culture of lawlessness' identified by the Royal Commission is unsupported by evidence. The Government says that the Royal Commission 'uncovered numerous examples of some organisations and officials repeatedly flouting industrial and other laws'.[19] The Royal Commission made 93 referrals for further investigation into possible breaches of criminal and civil laws. Only a handful of prosecutions, and even fewer convictions, have resulted, relating to a very limited number of unions. There is no evidence of endemic 'lawlessness'.

    Corruption or financial misconduct, while rare, arises in all organisational contexts. These are serious issues that require appropriate responses. In the union movement, these issues, which arose mostly in the context of the Health Services Union (**HSU**), were considered in the Royal Commission and have already been the subject of significant legislative responses from both the former Labor and current Coalition Governments. As such, there are already means by which these issues can be addressed under the criminal law and the existing legislative framework for industrial organisations.

15. **Ninth**, the amendments are inconsistent with Parliament's stated intention in enacting the Registered Organisations Act, as set out in s 5. Section 5(3) in particular says that the standards set out in the Registered Organisations Act are intended to 'encourage members to participate in the affairs of organisations to which they belong' and to 'provide for the democratic functioning and control of organisations.' The amendments will have the anti-democratic effect of discouraging members to participate in the governance structures of the registered organisations to which they belong. Research suggests that member participation and internal democracy are key determinants of union growth at the workplace,[20] and it is that workplace growth that ultimately determines the future of unions. In other words, it is in unions' own interests that they ensure that processes are internally democratic.

16. **Finally**, the current registration system for industrial organisations (and associated scheme for cancellation of registration) is premised on the compact established at the commencement of

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19 Explanatory Memorandum, p *v*.

20 David Peetz and Barbara Pocock, 'An Analysis of Workplace Representatives, Union Power and Democracy in Australia' (2009) 47(4) British Journal of Industrial Relations 623.

the conciliation and arbitration system in 1904, under which industrial organisations submitted to registration and the attendant high-level of regulation of their internal affairs in exchange for institutional recognition of their role. The benefits of registration included union right of entry, 'ownership' of awards, and standing to bring proceedings on behalf of the members they were entitled to represent in proceedings. Over time the benefits of registration have reduced, and the regulatory compliance costs have increased, to the point that we are already seeing a rise in both employer and employee unregistered industrial organisations. The Bill further erodes that balance and may lead more unions to question the value of remaining federally-registered organisations subject to the disciplines of the *Fair Work Act 2009* (Cth) (**Fair Work Act**) and Registered Organisations Act frameworks.[21]

[21] See the Australian Institute of Employment Rights submission to this inquiry, 12, citing Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016), 814-815 and 833-814.

Overview of the Bill

17. **Schedule 1** significantly expands the regime for the disqualification of persons from holding office in registered organisations. These amendments interfere with the principle of free elections within industrial organisations. They are unsupported by policy and go beyond the recommendations of the Royal Commission. Equivalent standards are not imposed on officers of corporations or incorporated associations, or elected members of the Australian Parliament.

18. **Schedule 2** significantly expands the regime for the cancellation of registration of an organisation and a range of far-reaching 'alternative' orders. These amendments interfere with principle of organisational autonomy of industrial organisations. They are unsupported by policy and are not based on any recommendations of the Royal Commission. They find no genuine equivalent in the regulation of corporations and, to the extent that they do transplant aspects of corporation regulation, they do so in a way that fails to recognise fundamental differences between corporations and industrial organisations.

19. **Schedule 3** significantly expands the existing regime for the administration of 'dysfunctional' organisations. These amendments fundamentally change the nature of the existing regime, which provides for a remedial scheme to be imposed by the Court for the benefit of members in limited circumstances, to provide for punitive measures to address alleged wrongdoings by officers. The amendments are unsupported by policy and are not based on any recommendations of the Royal Commission. Indeed, the HSU demonstrated that the existing scheme already functions as it should.[22] Again, recourse is made to the regulation of corporations to justify the amendments, but again, the provisions are not equivalent, nor are the nature and purpose of the entities that the respective regimes seek to regulate.

20. **Schedule 4** significantly expands the matters that the FWC must be satisfied of before an amalgamation of registered organisations can take effect. The current amalgamations regime, consistent with the principle of organisational autonomy and democracy, is determined by the wishes of the organisations' members, as expressed in a ballot conducted by the Australian Electoral Commission (**AEC**). The amendments impose a range of additional requirements, including the consideration of political and corporate interests, that are irrelevant to the merits of the amalgamation from the perspective of the organisations' members and their best interests. The amendments are unsupported by policy and are not based on any recommendations of the Royal Commission. They have no equivalent in corporations law.

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22 We refer the Committee to the HSU's submission to this inquiry.

SECTION 9C: KEY CONCEPTS

21. The Bill introduces two key concepts that underpin the various Schedules in the Bill: 'designated finding' and 'designated law'.[23] A 'designated finding' is, in summary, a finding that a person has committed a criminal offence against a 'designated law', or has contravened, or been involved in a contravention, of a civil remedy or civil penalty provision of a 'designated law'. A 'designated law' is, in summary, an industrial or work health and safety law.

22. A designated finding, or certain findings in respect of designated laws, against officers, organisations or members can variously ground disqualification orders, cancellation of the organisation's registration or other wide-reaching 'alternative' orders, the imposition of an administrative scheme including the appointment of an administrator, or the refusal of an amalgamation between existing registered organisations. Given these significant consequences, it is concerning how broadly these concepts are defined. In particular, that:

    a) a finding against particular officers, a small class of members, or a part of an organisation, can in various ways be counted against the whole of the organisation, such that 'the many will be punished for the crimes of a few';

    b) the finding can relate to a minor or technical breach, such as an organisation failing to lodge its records and accounts on time);[24]

    c) the breaches themselves already carry with them penal consequences to which the harsh consequences introduced by this legislation will be added; and

    d) the finding can provide a ground for one of these orders regardless of the best interests of the members or the ability of the officer, organisation or amalgamation under scrutiny to serve those interests.

23. It is also notable that, generally, neither a civil nor criminal contravention of an industrial law nor a work health and safety law are grounds for these sorts of orders against a company or company director.

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[23] Schedule 1, Item 2, s 9C.
[24] For e.g., Registered Organisations Act, ss 233(2), 237(1), 268, 293J(1) and (2).

Case study – Corporate non-compliance with workplace laws

Corporate non-compliance with industrial and work health and safety laws by companies and company directors is rife. Yet we don't see the same measures being applied in the case of designated findings and contraventions of designated laws by companies and company directors as we do for contraventions of the same laws by unions and union officers.

Industrial laws

The FWO conducts intelligence-led audits targeting industries with high concentrations of known or suspected non-compliance with industrial laws. For example:

a) An FWO audit of the fast food, restaurants and cafes industries revealed a non-compliance rate of 72%.[25]

b) An FWO audit of the textile, clothing and footwear industries found a non-compliance rate of 48%. The FWO considers that workers in these industries are particularly vulnerable to exploitation due to a high proportion are mature-aged migrant women, who face cultural and linguistic barriers to understanding and inquiring about their workplace entitlements, an unverified number are outworkers, who work away from business premises (often at home) at the end of long and complex production supply chains - and are therefore difficult to identify, or 'hidden', and the pressure on domestic businesses to remain cost-competitive in the context of reduced import tariffs, and increasing competition from overseas manufacturers.[26]

c) The FWO is currently conducting a compliance campaign focussing on businesses in the retail and hair and beauty industries across Queensland, New South Wales and Victoria, in part in response to low compliance rates identified in their 'National Hair and Beauty Campaign 2012-2013'.[27] That campaign found 55% of employers to be in contravention of industrial laws, with compliance rates ranging from 21% in the Australian Capital Territory to just 59% in Queensland.[28]

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25 https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/fast-food-restaurants-and-cafes-campaign

26 Fair Work Ombudsman, *Textile, Clothing and Footwear Compliance Phase Campaign Report*, January 2019, 5.

27 https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/east-coast-retail-hair-and-beauty-campaign

28 Fair Work Ombudsman, *National Hair and Beauty Campaign 2012-13 Final report*, July 2013.

d) The FWO is working with the National Union Workers (**NUW**) to strengthen the procurement activities within the charity sector, because workers (often vulnerable workers) are frequently wrongly engaged by charities or intermediaries as independent contractors to raise funds for the charity.[29]

e) The FWO also worked with the NUW, and the Australian Workers' Union, in its investigation into workplace arrangements along the Harvest Trail. The investigation found that over half of businesses in the industry were breaching industrial laws, but as Fair Work Inspectors were unable to assess and determine the full extent of underpayments in many cases due to issues such as poor record-keeping, cash payments and a transient workforce, the FWO believes the full extent of worker underpayments is significantly higher than this.[30]

Work health and safety laws

The meat processing industry is an industry that poses high risk to workers.[31] Meat processor JBS Australia Pty Ltd (JBS Australia) is a classic example of an employer in the industry with a poor track record on work health and safety. In August of this year, JBS Australia pleaded guilty to a contravention of work health and safety law and was fined $90,000 after a workers' hand was severed in a horrific workplace accident.[32] The accident occurred when a chain the worker had wrapped around his wrist became entangled with a piece of machinery, which dragged him in and his left wrist and hand was torn from his arm. Only one year earlier, JBS Australia pleaded guilty to another contravention and was fined $20,000, again in an accident involving a worker's arm being dragged into a machine. In this incident the worker suffered a laceration to her arm which required surgery.[33] In 2016, the company pleaded guilty to yet another contravention of work health and safety law, this time in relation to a worker who suffered second and third degree burns to both legs from the knees down after falling into a tub filled with 82 degree water.[34]

Midfield Meat International Pty Ltd (**Midfield Meat**) is another meat processing industry employer with an appalling work health and safety history. A guilty plea and fine of $95,000 in March of this

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29 https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/charity-collection-inquiry

30 Fair Work Ombudsman, *Harvest Trail Inquiry 2018: A report on workplace arrangements along the Harvest Trail*, 4.

31 Amber Fatima, Almas Hamid, Syeda Fatima & Zirwa Khalid, 'Occupational health and safety in a meat processing industry', 2016 *World Journal of Dairy & Food Sciences*, 11.

32 https://www.worksafe.vic.gov.au/news/2019-08/meat-processor-fined-90000-after-hand-amputation

33 http://safetynews.com.au/jbs-australia-pty-ltd/

34 https://www.examiner.com.au/story/6205196/jbs-safety-failure-leaves-worker-seriously-burnt/

year followed after two workers, one of whom suffered fractured ribs, were hit by a forklift at its Warrnambool abattoir.[35] The accident was the latest in a string of horrendous incidents. In 2017, Midfield Meat pleaded guilty and was fined $47,000 after a worker at the same workplace sustained serious head injuries.[36] In 2016, Midfield Meat was forced to fund a $100,000 Qfever education campaign after exposing four vaccinated workers to high-risk areas of the abattoir, which led to them contracting the debilitating bacterial disease.[37] WorkSafe was preparing to lay three charges against the company, but rather than face court Midfield Meat offered WorkSafe an enforceable undertaking to invest in the education campaign. Between 2003 and 2011, Midfield Group companies paid more than $120,000 in a series of safety-related fines and associated court-ordered costs, including one after a 17-year-old trainee severed three fingers and a thumb while cutting hocks in 2006.[38] In 2008, a 17-year-old was killed by a knife wound to the eye while working as a slicer in the boning room, also at the Warrnambool abattoir. While the coroner did not make any findings in relation to work practices at Midfield Meat, the coroner did find that the scene was not properly preserved after the accident, which meant that the specific knife he was using at the time was unable to be identified, and paramedics encountered difficulties accessing the worker due to the room set up.[39]

How this non-compliance is treated for industrial organisations vs companies

Under the Bill, contraventions of industrial and work health and safety laws such as those described above can lead to, for industrial organisations:

a) officers being disqualified (s 223(3));

b) an organisation's registration being cancelled or one of the so-called 'alternative' orders (s 28C(1)(c)); and

c) an amalgamation with another organisation being refused (s 72E(1)(a)).

If the officers were personally found liable for the conduct (for example, under s 550 of the Fair Work Act or common law principles of accessorial liability, or for contravention of an officer duty under work health and safety laws), then under the Bill the officer contraventions could lead to:

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35 https://www.worksafe.vic.gov.au/news/2019-08/meat-processor-fined-90000-after-hand-amputation
36 https://www.worksafe.vic.gov.au/prosecution-result-summaries-enforceable-undertakings
37 https://www.worksafe.vic.gov.au/prosecution-result-summaries-enforceable-undertakings. See also https://www.weeklytimesnow.com.au/agribusiness/midfield-meats-four-unvaccinated-workers-exposed-to-qfever/news-story/fe185c9752f2ce61a3c4f939f2bc01d4
38 https://www.theage.com.au/national/victoria/risking-life-and-limb-to-feed-the-nation-20110129-1a93c.html
39 Inquest into the Death of Sharga Amos Taite, 2008/3598, 17 October 2014.

a) disqualification of the officers (s 223(1)(a));

b) an organisation's registration being cancelled or one of the so-called 'alternative' orders (s 28C(1)(c));

c) an administrator being appointed or other court-ordered scheme imposed (s 323(4)(a)); and

d) an amalgamation with another organisation being refused (s 72E(2)(a)).

Company directors may be disqualified for contraventions of corporate laws, but not in relation to contraventions of industrial or work health and safety laws. There is no direct mechanism for a company to be wound up or placed under administration or have a merger refused due to a history of non-compliance with law by the company, its directors or the members.

SCHEDULE 1: DISQUALIFICATION FROM OFFICE

24. Schedule 1 of the Bill drastically expands the regime for the disqualification of persons from holding office in registered organisations. First, by introducing a new ground for automatic disqualification from office. Second, by significantly expanding the grounds for disqualification from office by court order. Third, by expanding who has standing to apply for such an order. Finally, by introducing a new criminal offence for continuing to hold office or influence in an organisation while disqualified. These amendments allow a degree of corporate, political and regulatory interference in the democracy and autonomy of industrial organisations that is unparalleled internationally and finds no equivalent in respect of corporations or incorporated associations. The amendments are unsupported by policy and go beyond the recommendations of the Royal Commission.

The existing disqualification regime

25. There are four mechanisms for removal of an officer of a registered organisation under the existing provisions of Registered Organisations Act:

    1) **Automatic disqualification:** A person who is convicted of one of the following 'prescribed offences' is excluded from holding office in a registered organisation without leave of the Court for five years.[40] A prescribed offence is an offence:

        a) involving fraud or dishonesty (as for company directors);[41]

        b) relating to the formation, registration or management of a union (as for company directors who commit similar offences relating to companies);[42] or

        c) involving the intentional use of violence, or damage or destruction to property (no equivalent for company directors).[43]

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40 Registered Organisations Act, s 215.
41 Registered Organisations Act, s 212(a) cf Corporations Act, s 206B(1)(b)(ii).
42 Registered Organisations Act, s 212(b)-(c) cf Corporations Act, s 206B(1)(a)-(b)(i).
43 Registered Organisations Act, s 212(d).

2) **Disqualification by court order:** The Court may order that an officer of an industrial organisation who contravenes a civil penalty provision of the Registered Organisations Act be disqualified[44] (as for company directors who contravene the Corporations Act[45]).

3) **Removal under the organisation's rules:** The Registered Organisations Act requires organisations to have rules for the removal of persons from office.[46] This provision retains member control for the removal of officers in accordance with the organisation's own rules and is consistent with the nature of industrial organisations as membership-based democratic organisations.

4) **Removal by court order:** Notably also, the Court has the power to remove persons from office by declaring offices vacant and appointing an administrator to arrange the conduct of fresh elections if the organisation or branch has ceased to exist or function effectively, or an office is vacant, and there are no effective means under the rules of the organisation or branch by which it can be reconstituted or enabled to function effectively, or to fill the vacant office or position.[47]

26. Schedule 1 of the Bill significantly expands the first and second of these mechanisms for disqualification, which currently largely align to the disqualification scheme for company directors. Schedule 2 of the Bill also creates a fourth mechanism for court-ordered disqualification of an officer (under proposed s 28M, discussed under Schedule 2 below).

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[44] Registered Organisations Act, ss 307A and 310, allow the Federal Court to disqualify a person who has contravened a civil penalty provision of the Registered Organisations Act on application by the Commissioner or the Fair Work Commission General Manager (or a person authorised in writing by either).

[45] For e.g., Corporations Act, s 206C.

[46] Registered Organisations Act, s 141(b)(iii) and (c).

[47] Registered Organisations Act, s 323(1) to (2). See, e.g., *Health Services Union, in the matter of Health Services Union* [2009] FCA 829.

Expanded regime for automatic disqualification

27. Schedule 1 expands the definition of 'prescribed offence', for the purposes of the automatic disqualification mechanism, to include 'an offence under a law of the Commonwealth, a State or Territory, or another country, punishable upon conviction by imprisonment for life or a period of five years or more'—whether or not a custodial sentence is imposed, and whether or not the conduct was engaged in in the course of performing functions in relation to the organisation.[48]

28. The Government says that this change 'reflects provisions in the Corporations Act which also provide for the automatic disqualification of company directors where they are convicted of serious forms of misconduct'.[49] This claim is misleading. No equivalent provision disqualifying a person for conviction of a general category of offence applies to company directors (or indeed to incorporated associations). As outlined above, the current scheme for automatic disqualification of officers of industrial organisations is already largely equivalent to that of company directors:

Fair Work (Registered Organisations) Act s 212 (current)	**Corporations Act s 206B**
(a) an offence under a law of the Commonwealth, a State or Territory, or another country, involving fraud or dishonesty and punishable on conviction by imprisonment for a period of 3 months or more	(1)(b) an offence that: (ii) involves dishonesty and is punishable by imprisonment for at least 3 months
(b) an offence against various provisions of the Registered Organisations Act relating to elections, amalgamation ballots, criminal breaches of statutory officer duties and reprisals against whistle blowers[50]	(1)(b) an offence that: (i) is a contravention of this Act and is punishable by imprisonment for a period greater than 12 months

48 Schedule 1, Item 8, s 212(aa).
49 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 289–91 (Christian Porter).
50 Registered Organisations Act, ss 51, 72, 105, 185, 191, 193(2), 194, 195, 199, 202(5), 290A and 337BE.

(c) any other offence in relation to the formation, registration or management of an association or organisation	(1)(a) an offence that: (i) concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation; or (ii) concerns an act that has the capacity to affect significantly the corporation's financial standing
(d) any other offence under a law of the Commonwealth, a State or Territory, or another country, involving the intentional use of violence towards another person, the intentional causing of death or injury to another person or the intentional damaging or destruction of property	No equivalent
Ensuring Integrity Bill ***New s 212(aa) (proposed)***	
an offence under a law of the Commonwealth, a State or Territory, or another country, punishable on conviction by imprisonment for life or a period of 5 years or more	*No equivalent*

29. There is no general category of offence that automatically disqualifies a company director, equivalent to that proposed by Schedule 1. 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 (nor liable to an application for disqualification by court order). Nor is there any equivalent condition for nomination to the Senate or the House of Representatives (the *Australian Constitution* only bars from nomination candidates who have been convicted and are under sentence, or subject to be sentenced, for any office punishable by imprisonment for one year or longer).[51] Imposing these standards for officers of industrial organisations is thus

[51] *Australian Constitution*, s 44(ii). For examples of politicians who have fallen foul of the law for the same reasons they seek political office: a preparedness to pursue their beliefs despite the fact that they may not be the views

disproportionate to the existing standards for both holding public office and holding office in a corporation.

30. As the offence grounds *automatic* disqualification, there is no capacity for a court to assess whether the offence bears any relationship to the person's effectiveness in their role as an officer. As noted by the Joint Committee, which found that Schedule 1 is likely to be incompatible with the right to freedom of association, 'The expanded basis for criminal offences to constitute a ground for either mandatory [i.e. automatic] or discretionary [i.e. court-ordered] disqualification also raises a concern that some of these offences may be unrelated to a person's capacity of suitability to perform functions in union office'.[52]

31. We do not argue for any special dispensation from the criminal law for union officers, but this additional sanction, over and above the processes of the ordinary criminal law, is concerning, in part because the subversion of organisational democracy which is inherent in the disqualification of a leader of an industrial organisation constitutes a major interference with freedom of association and ought to be contemplated only in the most serious cases (if at all).[53] The ILO Committee on Freedom of Association has said that a law which generally prohibits access to trade union office because of *any* conviction—the nature of which is not such as to be prejudicial to the exercise of trade union functions—is incompatible with the principles of freedom of association.[54] The Joint Committee found that the measure is likely to be incompatible with the right to freedom of association.[55]

32. The inclusion of offences under a law of another country is problematic, particularly given that a prescribed offence is a ground for automatic disqualification. Automatic disqualification allows no discretion for a court to assess whether there is an equivalent offence under Australian law or whether such an offence is punishable by an equivalent penalty. The effect is that a person may be held to a standard that does not reflect the expectations of the Australian community as reflected in our legal system. Where the current definition of

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of the government of the day, see: Ian Holland, 'Crime and Candidacy' (Current Issues Brief No 22, Parliamentary Library, Parliament of Australia, 2002-3).

[52] Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 120. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

[53] Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, July 2019, 8.

[54] ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, Fifth (revised) Edition, 2006, paragraphs [421]-[424].

[55] Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 120. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

prescribed offence includes offences under a law of another country, it is limited to particular types of offences.[56] This limitation is important, because it ensures that the provision does not inadvertently import a standard that is not relevant or acceptable to the Australian legal system. For example, there are 70 United Nations member states that criminalise same-sex consensual sexual acts[57]—acts which have been lawful in Australia for almost 25 years.[58] In Fiji, organising a meeting in a public place (which includes all buildings other than private dwellings) without a permit is punishable by imprisonment by up to five years and thus would fall within the expanded definition of 'prescribed offence' in the Bill.[59] This law has been used to harass union officers in Fiji.[60]

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56 Involving fraud or dishonesty (Registered Organisations Act, s 212(a)) or involving the intentional use of violence towards another person, the intentional causing of death or injury to another person or the intentional damaging or destruction of property (Registered Organisations Act, s 212(d)).

57 Lucas Ramón Mendos, *State-Sponsored Homophobia*, 13th ed, ILGA World, 2019, 15.

58 *Human Rights (Sexual Conduct) Act 1994* (Cth), s 4.

59 *Public Order Act*, Ordinance 15 of 1969, Act 19 of 1976, s 8.

60 See, e.g., https://www.abc.net.au/radio-australia/programs/pacificbeat/simmering-tensions-in-fiji-as-unions-accuse-police-of-harassment/11065662

Expanded regime for court-ordered disqualification

33. Schedule 1 also significantly expands the existing regime for disqualification by court order,[61] by expanding who has *standing* to apply for a disqualification order and the *grounds* on which an order can be made. In so doing, it allows an unparalleled level of political, corporate and regulatory interference in the democratic functioning and control of industrial organisations.

Standing

34. Currently, applications for disqualification orders can be brought by the Registered Organisations Commissioner (**Commissioner**), the General Manager of the Fair Work Commission, or a person authorised in writing by either.[62] The amendments provides that an application for a disqualification order can be brought by the Commissioner, the Minister or a 'person with sufficient interest'.[63] The latter could include an employer or employer organisation, a disgruntled member or former member, a competing candidate in an internal election, or even a business within the supply chain that is not in the relevant industry.[64]

35. The disqualification regime recommended by the Royal Commission only gave standing to bring an application for a disqualification order to the registered organisations regulator, which is the case in respect of court-ordered disqualification of company directors.[65] The granting of standing to persons with sufficient interest creates an opportunity for undue corporate interference in the function and control of unions. The granting of standing to the Minister, in addition to the regulator, increases the prospect of political interference in the affairs of an industrial organisation. No policy justification has been offered as to why the Minister should have standing in addition to the Commissioner, nor why standing should be cast so broadly.

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61 Schedule 1, Item 11, Chapter 7, Part 4, Division 3 (which replaces the existing regime in s 307A, repealed by Item 11).

62 Registered Organisations Act, s 310.

63 Schedule 11, Item 11, s 222(1). Currently disqualification applications can only be brought by the Commissioner, the General Manager, or a person authorised in writing by either: Registered Organisations Act, s 310(1).

64 The Explanatory Memorandum notes at paragraph [33] that '"Sufficient interest" has been interpreted as an interest beyond that of an ordinary person and includes those whose rights, interests or legitimate expectations would be affected by the decision'.

65 Corporations Act, ss 206C-206EB; *Australian Securities and Investments Commission Act 2001* (Cth), s 12GLD; *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**), s 86E, and cl 248 of Schedule 2 (the Australian Competition and Consumer Commission, the Director of Public Prosecutions or the regulator may also bring applications under the latter Act).

36. As noted, no equivalent provisions exist for corporations. Only the Australian Securities and Investments Commission (**ASIC**) can apply for a court order disqualifying a company director[66] (or a current or former member or officer, if given leave of the Court and subject to strict conditions to protect against excessive litigation).[67] If the Bill applied to companies, a union would potentially have 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 Bill might allow an employer standing to bring proceedings against an officer of a union who represents their employees. It is not difficult to foresee the potential for these provisions to be misused as leverage by employers and employer organisations in their dealings with unions, even without a court application actually being filed.

37. The Registered Organisations Act jurisdiction is generally a 'no costs' jurisdiction where parties, in most circumstances, bear their own legal costs. An order for costs is difficult to achieve as the applying party needs to demonstrate that the other party acted vexatiously or without reasonable cause.[68] The broad standing provisions for court-ordered disqualification, combined with the wide-ranging grounds, means that persons holding office could be subject to significant burdensome litigation. This prospect is a disincentive for members to participate in an organisation's democratic processes and stand for office and diverts the organisation's resources away from their primary function of advancing and protecting their members' interests. Anyone familiar with the history of industrial organisations would be aware of the relatively high incidence of litigation, particularly for employee organisations. Any increase to the options for intervention for ulterior purposes should be addressed with much more circumspection than has been applied to the drafting of the Bill.

Grounds

38. Despite the Government's claim that it has listened to stakeholders and aligned the standards for officers of industrial organisations with those that apply to company directors,[69] the respective regimes for court-ordered disqualification are also not equivalent in respect of the

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66 With the exception of disqualification under s 86E, and cl 248 of Schedule 2, of the Competition and Consumer Act, the former of which is on application by the Australian Competition and Consumer Commission or the Director of Public Prosecutions, and the latter by the regulator.

67 See, for e.g., Corporations Act, s 237(2), which deals with derivative actions commenced by a member or former member or officer of former officer of a company on behalf of a company.

68 Registered Organisations Act, s 329.

69 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 289–91 (Christian Porter).

grounds for disqualification. The grounds in the Bill for the disqualification of officers of industrial organisations are broader than the grounds for disqualification of company directors, in several respects:

a) The definition of 'designated finding' and 'designated law' extends beyond the Registered Organisations Act, which deals with the formation, registration and management of industrial organisations (as the Corporations Act does for companies), to general industrial and work health and safety laws (proposed ss 223(1)-(3));

b) The definition of 'designated finding' includes *involvement in* a contravention of a civil penalty provision (i.e. accessorial liability) (proposed ss 223(1)(a) and (3)(a)), which finds no equivalent in the Corporations Act;

c) The contempt grounds in proposed ss 223(1) and (2) have no equivalent in the Corporations Act (nor the *Australian Constitution*—Derryn Hinch was convicted of contempt of court in 2013 and was a member of the Australian Senate from 2016 to 2019);

d) The fit and proper person ground in proposed s 223(5) has no equivalent in the Corporations Act.

39. Proposed s 223(1)(a) provides a ground for disqualification if the person has had a 'designated finding' made against them. That is, in summary, a finding that a person has committed a criminal offence against, or has contravened, or been involved in a contravention, of, a civil remedy or civil penalty provision of, an industrial law or work health and safety law. On its face, this provision looks similar to s 206C of the Corporations Act, which provides a ground for disqualification for contravention of certain civil penalty provisions under that Act. Likewise, proposed s 223(3)(a)(i), which provides a ground for disqualification if more than one 'designated finding' is made against an organisation in relation to conduct engaged in while that person is an officer of the organisation, looks similar to s 206E of the Corporations Act, which provides a ground for disqualification if the person has at least twice been an officer of a company that has contravened the Corporations Act.

40. However, these provisions would in fact only be equivalent if 'designated findings' were restricted to contraventions of the Registered Organisations Act. It is the Registered Organisations Act, which deals with the formation, registration and management of industrial organisations, that is the equivalent of the Corporations Act for companies. By extending the range of contraventions that can ground a disqualification order to industrial laws and work

health and safety laws, the court-ordered disqualification regime in the Bill goes beyond that applicable in the corporate context. For example, the 'designated findings' might relate to conduct that contravenes an FWC order to stop unprotected industrial action,[70] regardless of whether or not the union members considered that such action was in their best interests, or to a failure to give 24 hours' notice of entering a workplace to investigate a suspected contravention of a work health and safety law, because the union officer knows that if they give the requisite notice the employer will hide the evidence.[71] On the other hand, directors of companies that engage in systematic wage theft as part of their business model, or that recklessly expose workers to risk of serious illness or injury or death, are not exposed to disqualification.

70 Fair Work Act, s 421(1).
71 Fair Work Act, s 494(1)(b).

Case study – Non-compliance with workplace laws by company director

Just last month, the Federal Circuit Court ordered the director of A & S Wholesale Fruit and Vegetables Pty Ltd to pay $30,000 for his involvement in contraventions of the Fair Work Act by the company including underpaying three workers $132,956.[72]

In May of this year, the director and owner of Entire Shopfitting Pty Ltd pleaded guilty to a contravention of Victoria's work health and safety law and was fined $30,000 without conviction, following the tragic and avoidable death of a worker who fell more than two metres from an unguarded mezzanine floor at a worksite at Maidstone in Melbourne's west.[73]

These directors do not face any consequences under the Corporations Act, and neither of them appear on the Australian Securities and Investment Commission's register of persons disqualified from managing a company. Under the Bill, union officers who contravene the same laws faces disqualification from office (s 223(1)(a) and 223(3)). Their contraventions can also lead to cancellation of the organisation's registration or another extreme 'alternative order' (s 28C(1)(c)), the imposition of an administrator or other court-ordered scheme (s 323(4)(a)) or the refusal of an amalgamation with another union (s 72E(2)(a)).

41. One of the difficulties with the grounds for court-ordered disqualification is that they conflate a wide range of types of conduct that are in reality incomparable but that are, under the Bill, subject to the same penalty of disqualification. The definition of 'designated finding' means that even trivial contraventions of industrial or work health and safety laws can be grounds for disqualification.[74] A 'designated finding' could include minor or technical contraventions such as a failure to return a right of entry permit within seven days upon expiry and other routine aspects of industrial law.[75] These contraventions are an entirely different class of legal infraction to serious criminal offences such as the intentional use of violence or causing of death or injury,[76] and are unjustifiable as grounds for disqualification.

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72 https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/july-2019/20190708-a-s-wholesale-penalties-media-release-final

73 https://www.worksafe.vic.gov.au/news/2019-05/company-director-fined-after-fall-death

74 Schedule 1, Item 11, proposed ss 223(1)(a) and 223(3)(a)(i)

75 Fair Work Act, s 517(1).

76 Schedule 1, Item 11, proposed s 223(6)(e)(i).

42. The potential for a person to be disqualified from a leadership position—with personal, financial, and career implications—following a minor or technical contravention of civil law, is excessive, grossly disproportionate and 'wholly disrespects the principles of freedom of association, which require that the State ought normally to refrain from intervention in the free choice of leadership by union members'.[77] We recall also that officers who commit serious criminal offences,[78] or civil contraventions in relation to the management of registered organisations,[79] are already liable to disqualification.

43. The Joint Committee found that the scope and extent of the limitation on holding union office goes beyond what is permissible as a matter of international human rights law and concluded that the proposed disqualification regime is likely to be incompatible with the right to freedom of association.[80] International labour law supervisory mechanisms have stated that:

> The right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, *it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders* or in the conduct of the elections themselves.[81]

The Joint Committee noted that the right to freedom of association may be subject to permissible limitations provided certain conditions are met.[82] Generally, to be capable of justifying a limitation on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective. Further, international covenants expressly provide that no limitations are permissible on the right to freedom of association if they are inconsistent with the guarantee of freedom of association and the right to collectively organise contained in ILO Convention No. 87.[83]

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77 Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, July 2019, 7.

78 Registered Organisations Act, s 215.

79 Registered Organisations Act, s 307A.

80 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 121. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

81 ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, Fifth (revised) Edition, 2006, paragraph [391] (emphasis added).

82 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 116. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

83 Article 22(3) of the International Covenant on Civil and Political Rights and article 8 of the International Covenant on Economic, Social and Cultural Rights.

44. The Statement of Compatibility with Human Rights (**Statement of Compatibility**) identifies the objective of the amendments as 'improving the governance of registered organisations and protecting the interests of members'.[84] It points to the recommendations of the Royal Commission, which noted that a person against whom a civil penalty has been imposed for a contravention of the statutory duties cannot be disqualified under the current disqualification provisions.[85] The Joint Committee considered that this is a legitimate objective for the purposes of international human rights law,[86] but noted that while the Royal Commission recommendations may highlight perceived gaps in the current regulation, they do not address whether the basis and breadth of the proposed grounds are effective to achieve that objective.[87] In any event, there is now provision in the Registered Organisations Act for a person who has contravened a civil penalty provision, including of the statutory duties, to be disqualified.[88]

45. The Statement of Compatibility further says that the expanded disqualification regime will 'support public order by ensuring the leadership of registered organisations act lawfully',[89] but supporting public order is not a legitimate objective of legislative provisions which regulate in detail the internal functioning of industrial organisations. Industrial law is not the appropriate legislative vehicle to achieve this objective. Recourse to 'public order' as justification for the provisions belies their true purpose, which is to impede unions in the performance of their legitimate functions. That performance may occasionally necessitate the disruption of the 'public order' to advance the interests of working people (for example, through protest or strike action). There are already laws that deal with 'public order' issues. The FWC can suspend or terminate protected industrial action if it causes or threatens significant economic harm, or threatens to endanger the life, the personal safety or health, or the welfare, of the population or of part of it, or to cause significant damage to the Australian economy or an important part of it, or to cause significant harm to a third party not involved in the bargaining process. There are also a variety of criminal and common law sanctions available for disruptions to public order.

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84 Explanatory Memorandum, p *viii*.
85 Ibid.
86 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 116. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.
87 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 119. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.
88 Registered Organisations Act, s 307A.
89 Explanatory Memorandum, p *ix*.

46. The Joint Committee found that there are insufficient safeguards to ensure that the amendments constitute a proportionate limitation. The conduct that could result in disqualification is extremely broad and includes contraventions of industrial laws that are less serious in nature and contraventions related to the taking of unprotected industrial action.[90] As an aspect of the right to freedom of association and the right to collectively bargain, the right to strike is protected under international law. The existing restrictions on taking industrial action under Australian law have been consistently criticised by international supervisory mechanisms as going beyond what is permissible.[91] The proposed grounds could lead to the disqualification of an officer for conduct that is protected as a matter of international law, and as such the measure further limits the right to strike.

47. The Joint Committee noted that, where a union has engaged in more than one of a broad range of contraventions of industrial law, the entire elected leadership could be subject to disqualification. That an individual may be disqualified from office on grounds for which they personally may bear little meaningful responsibility or accountability is, as described by the International Centre for Trade Union Rights (**ICTUR**), 'extraordinary'. While there is a kind of 'defence' if the officer can prove that they took reasonable steps to prevent the conduct, there is no positive requirement on the applicant to establish that 'the officer sanctioned the conduct, failed to appropriately supervise the conduct, or was even aware of the conduct.'[92]

48. The Joint Committee further noted that an elected leadership can be disqualified for contraventions of the union regardless of whether the union members agreed to participate in the conduct which lead to the 'designated finding' or contempt of court, and whether they considered this conduct was in their best interests. This aspect of the amendments raises further questions about a rational connection to pursuing the stated objective of protecting the

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90 See, e.g., Fair Work Act, s 421.

91 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (23 June 2017) [29]-30]: 'The Committee is also concerned that the right to strike remains constrained in the State party (art. 8). The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action'. See, also, ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 103rd ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 101st ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 99th ILC session, 2009; ILO CEACR, *Individual Observation Concerning the Right to Organise and Collective Bargain Convention*, 1949, (No. 98), Australia, 99th session, 2009. See also, UNCESCR, *Concluding Observations on Australia*, E/C.12/AUS/CO/4 (12 June 2009) 5.

92 Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, July 2019, 7.

interests of members, where members may be of the view that taking particular action, such as industrial action, is in the interests. The Joint Committee found that in this respect, the disqualification regime may have a very extensive impact more broadly. It is unclear how the breadth and impact of the amendments is rationally connected to the stated objective of 'improving the governance of registered organisations and protecting the interests of members', and whether the amendments are the least rights-restrictive way of achieving this objective as required in order to be a proportionate limitation on human rights.[93]

49. A ground for disqualification will also apply if, having regard to a range of specified events, the Court considers that the person is not a fit and proper person to hold office:

a) The events include the refusal, revocation or suspension of an entry permit by the Fair Work Commission or other relevant tribunal.[94] The Statement of Compatibility emphasised that the procedure for disqualification will be 'administered and supervised by the Federal Court, an impartial and independent judicial body from which appeals to a Full Federal Court and the High Court are available',[95] but this ground can be established by a decision of a non-judicial officer to refuse, revoke or suspend a permit.

   In addition, the grounds for refusal, revocation or suspension are extremely broad, which further expands the grounds for disqualification under the Bill to capture potentially trivial issues. The FWC can refuse to issue an entry permit if the FWC considers that the official is not a fit and proper person, taking into account a failure to complete training about the rights and responsibilities of an office holder, and any other matter that the FWC considers relevant.[96]

b) The events also include a finding, in any criminal or civil proceedings against the person, *or in any action against the person by a government agency*, that the person engaged in conduct involving fraud, dishonesty, misrepresentation, concealment of material facts or a breach of duty.[97] Some of these grounds are already covered by the existing legislation. An officer can already be automatically disqualified for offences involving fraud and

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93 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017*(28 November 2017), 117-121. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

94 Schedule 1, Item 11, proposed s 223(6)(a)-(c). The relevant authority for work health and safety entry permits differs between jurisdictions, but it is generally a tribunal.

95 Explanatory Memorandum, p *viii*.

96 Fair Work Act, s 513(1)(a), (g).

97 Schedule 1, Item 11, proposed s 223(6)(d).

dishonesty (this is a ground for automatic disqualification),[98] and disqualified by court order for breaching of one of their statutory duties[99] or for contravening one of several civil penalty provisions in the Registered Organisations Act prohibiting false or misleading statements[100] or concealing documents relevant to an investigation.[101]

The potential for an officer to be disqualified for conduct substantiated by a finding of a government agency rather than a judicial finding is deeply concerning,[102] particularly given the highly politicised nature of the Registered Organisations Commission (**ROC**) that was exposed by the media tip off of the police raids on the Australian Workers' Union in October 2017. However, even where the requisite finding is a judicial finding, it applies whether or not a conviction was recorded or a sentence imposed.

c) Another relevant event is a finding, in any criminal proceeding against the person, that the person has engaged in conduct involving the intentional use of violence towards another person, the intentional causing of death and injury to another person or the intentional damaging or destruction of property.[103] The Registered Organisations Act already provides for a person who commits such an offence to be automatically disqualified, if the person is sentenced to a term of imprisonment (including if the sentence is suspended).[104] This condition is important because, under international human rights law and the right to freedom of association, an offence leading to disqualification must be sufficiently serious to call into question the integrity of the person and their capacity to properly exercise of trade union functions.[105] While damage and destruction to property can be serious, it can equally be potentially quite a trivial matter. This ground applies even if no conviction was recorded or no sentence imposed, or whether the conduct was entirely unrelated to the person's union office. For example, the judge could make a factual finding that the person engaged in conduct involving damage to property, but the person could be acquitted for another reason such as because they had a defence.

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98 Registered Organisations Act, s 212(a), 215.
99 Registered Organisations Act, s 307A. The duties are contained in Registered Organisations Act, ss 285-288.
100 Registered Organisations Act, ss 52(3), 104(3), 175, 176, 192(3), 198(8), 233(3), 237(3), 267, 337(1).
101 Registered Organisations Act, s 337AC.
102 Schedule 1, Item 11, proposed s 223(6)(d) a finding 'in any action against the person by an agency of the Commonwealth or a State or Territory'.
103 Schedule 1, Item 11, proposed s 223(6)(e)(i).
104 Registered Organisations Act, ss 212(d), 213(c), 215.
105 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) [422].

The Joint Committee found that the expanded basis for criminal offences to constitute a ground for discretionary disqualification raises a concern that some of these offences may be unrelated to a person's capacity or suitability to perform functions in union office.[106] International supervisory mechanisms have cautioned that legislation providing for disqualification from holding trade union office on the basis of *any* offence—the nature of which is not such as to be prejudicial to the exercise of trade union functions—is incompatible with the principle of freedom of association.[107] This problem also applies to the corporate impropriety ground.[108]

d) The final event is a finding, in any criminal proceeding against the person, that the person has committed an offence that is punishable by imprisonment for two years or more—again, whether or not a conviction was recorded or a sentence imposed and, again, whether or not the conduct was in any way related to the person's union office. For example, under the Bill, a union officer could be exposed to a disqualification application if convicted for:
    - being twice caught driving while their licence is disqualified;[109]
    - entering into, or offering to enter into, a commercial surrogacy arrangement;[110]
    - engaging in shoplifting;[111]
    - engaging in joy riding;[112]
    - self-administering cannabis or possessing a prohibited drug.[113]

50. No equivalent 'fit and proper person' test is imposed on company directors, nor on officers of incorporated associations under state legislative regimes, nor holders of Australian Business Numbers (**ABN**) (despite the widespread abuse of the ABN system identified by The Treasury's Black Economy Taskforce[114]). The notion that the ASIC would bring an application or that a court would disqualify the director of a company because of a road safety offence incurred in their private life is inconceivable.

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106 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 120. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.
107 ILO, *Digest of decisions and principle of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) [422].
108 Schedule 1, Item 11, proposed s 223(4).
109 *Road Safety Act 1986* (Vic), s 30 (see Schedule 1, Item 11, proposed s 223(6)(e)(ii)).
110 *Surrogacy Act 2010* (NSW), s 8; *Surrogacy Act 2010* (Qld), s 56 (see Schedule 1, Item 11, proposed s 223(6)(e)(ii)).
111 *Crimes Act 1900* (NSW), s 117 (see Schedule 1, Item 11, proposed s 223(6)(e)(ii)).
112 *Crimes Act 1900* (NSW), s 154A (see Schedule 1, Item 11, proposed s 223(6)(e)(ii)).
113 *Drug Misuse and Trafficking Act 1985* (NSW), ss 10, 12 (see Schedule 1, Item 11, proposed s 223(6)(e)(ii)).
114 The Treasury, *Black Economy Taskforce Final Report*, October 2017.

51. The Government relies on 'numerous examples of some organisations and officials repeatedly flouting the law' uncovered by the Royal Commission as justification for the proposed amendments to the disqualification regime.[115] As discussed earlier in this submission, this claim is based on the number of referrals from the Royal Commission for investigation into possible breaches of criminal and civil laws and does not take into account that in the overwhelming majority of cases, subsequent investigations did not result in prosecutions, let alone convictions. In any event, the grounds on which a person can be disqualified under the Bill are far broader than 'repeatedly flouting the law'.

52. According to ICTUR, the breadth of grounds find no comparison in any industrialised liberal democracies.[116] Throughout Europe, the US and Canada, the election of union officers is largely free from state interference on almost any grounds. Exceptions to this position, in France, the US and the UK, are concerned only with serious crime and serious financial crime. These provisions already have an equivalent in Australia's existing disqualification regime—although the existing Australian framework covers a wider range of offences, and less serious offences, than in most comparable countries. More far-reaching systems for the disqualification of union officers only find parallels in States with weaker democratic traditions, including Turkey and Brazil (the latter provisions date back to 1943, and are a legacy of the Vargas dictatorship).

53. The expansive range of grounds is a significant overreach and invites undue political, corporate and regulatory interference in the democratic and autonomous functioning and control of industrial organisations, contrary to international human rights law and without precedent in the regulation of corporations (or incorporated associations).

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115 See, e.g., Explanatory Memorandum, p *i*.

116 Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', International Centre for Trade Union Rights on behalf of Australian Council of Trade Unions, July 2019, 9-10.

Orders

54. The Minister has sought to argue that the extremely broad standing provisions and grounds for disqualification are tempered by the requirement that the Court be satisfied that it would not be unjust to disqualify the person in the circumstances, and suggested that this requirement would prevent the law from being 'weaponised'.[117] However, as noted by the Joint Committee, the Court's discretion in determining that it would not be unjust to make such an order does not address the breadth of the grounds for disqualification that the Court will apply.[118] The scope for persons with sufficient interest to bring a disqualification application is determined by the breadth of the grounds. Even if the Court ultimately decided that disqualification would be unjust and declined to make the order, the union and the officer have still been forced to expend significant resources on the litigation. That is in addition to the potential for the threat of a disqualification application to alter the power dynamics, and be used as leverage, in collective bargaining negotiations and employment disputes.

55. The Statement of Compatibility identifies the objective of the expanded disqualification regime as 'improving the governance of registered organisations and protecting the interests of members'.[119] Yet the 'interests of members' is a stark omission from what the Court is required to consider in determining whether it would be unjust to make the disqualification order. There is no attempt in the crafting of the provisions to link the grounds for disqualification to the interests of members.

56. Proposed new s 222(2) provides that the Court may make an order disqualifying a person from holding office in an organisation 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 formulation is different from the current regime,[120] the Corporations Act regime[121] and the regime recommended by the Royal Commission,[122] each of which empower the Court to make a disqualification order if a ground is made out and 'the Court is satisfied that the disqualification is justified'. While the formulation in the Bill does not change the legal onus of

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117 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 July 2019, 44–5, 75–7 (Christian Porter).

118 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 120. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

119 Explanatory Memorandum, p *viii*.

120 Registered Organisations Act, s 307A.

121 Corporations Act, ss 206C-206EEA.

122 Royal Commission Report, volume 5, paragraph [190].

proof, it has the *practical* consequence of effectively shifting the onus onto the defendant to satisfy the Court why the order is unjust if a ground is made out. No explanation is provided for why the amendment is formulated in this way.

Commencement

57. A key element of the rule of law is that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs to comply with them.[123] It follows that laws should not retrospectively change legal rights and obligations. Retrospective laws do not give individuals organisations time to adjust their practices; they cannot guide action and are unlikely to achieve their behaviour modification policy objectives.[124] Further, retrospective laws that expose individuals and organisations to previously unknown sanctions can cause a number of practical difficulties to organisations, including reputational damage, disruption to organisational planning processes, and consequences from increased regulatory complexity and compliance costs (including litigation).[125]

58. The general effect of the commencement provisions in this Schedule is that the Court is not permitted to have regard to events and conduct that occurred prior to the commencement of the Schedule in determining whether a ground is established. However, there are two ways in which the Schedule applies retrospectively. First, once a ground is established, there is no temporal limit on what the Court can have regard to in determining whether it would be unjust to make the disqualification order. Second, because one of the grounds is the refusal, revocation or suspension of an entry permit, where the refusal, revocation or suspension is based on events and conduct that occurred prior to commencement the Bill effectively allows retrospectivity. This effect is contrary to the legislative intention that the Bill does not apply retrospectively in regard to when a ground is met.

59. If the Government is genuine about the purpose of this Bill being to modify behaviour, it would not have included these retrospective elements of the Bill. Only known consequences can change behaviour. We note further that the Government has not allowed enough time to

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123 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Interim Report*, ALRC Report 127 (Interim) July 2015, 250.
124 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Interim Report*, ALRC Report 127 (Interim) July 2015, 251-2.
125 Ibid.

assess the effect of the recent significant increases to penalties for civil contraventions of special industrial laws that apply in the building and construction industries, which are yet to be applied.[126] The Government's stated purpose in re-establishing the Australian Building and Construction Commission and increasing these penalties was to provide an effective deterrent to unlawful conduct in the building and construction industries. The Government is now relying on that same rationale to justify further regulation in the form of this Bill, without a proper assessment of the effect of the previous round of legislative reform. Indeed, a recent review of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (**BCIIP Act**) found that the full effects of the higher maximum penalties available under the BCIIP Act are unlikely to be observable until sufficient enforcement actions have been finalised and penalties imposed pursuant to the BCIIP Act.[127]

Offences in relation to standing for or holding office while disqualified

60. The ACTU supports the submission of the Queensland Law Society to this inquiry in relation to the proposed s 226 offences and the application of strict liability.[128]

126 *Building and Construction Industry (Improving Productivity) Act 2016* (Cth).
127 Department of Jobs and Small Business, *Review of the Building and Construction Industry (Improving Productivity) Act 2016*, October 2018, page 41.
128 Schedule 1, Item 11, proposed s 226.

SCHEDULE 2: CANCELLATION OF REGISTRATION AND ALTERNATIVE ORDERS

61. Schedule 2 expands the grounds upon which the Court can cancel the registration of an industrial organisation and enables the Court to make a range of extreme and intrusive 'alternative orders'. This Schedule is not based on any findings or recommendations of the Royal Commission and is contrary to the recommendations of the Royal Commission. The Royal Commission did not even contemplate any expansion to the existing cancellation regime, and commented on the number of grounds upon which an application for cancellation can be made under the Registered Organisations Act as it currently stands.[129]

62. The Government's rhetoric around the Bill points to the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) as justification for this extreme legislation. Aside from the self-evident fact that making laws that apply to all (i.e. to all registered organisations) to address the alleged behaviour of one is not good law making, the Royal Commission specifically considered cancellation of the (then) CFMEU's registration and did not recommend it, in part for the obvious reason that 'Cancelling the registration of the whole union may have a disproportionate effect on union members who have not been involved in illegal activity'.[130] This view is consistent with that of the ILO Committee of Freedom of Association, which has said that 'to deprive thousands of workers of their trade union organisation because of a judgement that illegal activities have been carried out by some leaders and members constitutes a clear violation of the principles of freedom of association'.[131]

63. The Government claims that the amendments in Schedule 2 'have the sole objective of protecting the interests of members and promoting public order by ensuring an organisation is administered lawfully'.[132] It is difficult to comprehend how the interests of members are served by cancellation of the registration of the whole union, particularly when not all members or officers have been involved in the relevant conduct, or where the members have themselves decided that the conduct (such as the taking of industrial action) is in their interests. The Joint

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129 Royal Commission Report, volume 5, paragraph [27].
130 Royal Commission Report, volume 5, paragraph [34].
131 ILO Digest of the decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (5th edition) (2006, International Labour Organisation, Geneva), 140, paragraph [692]. See, also, Compilation of the decisions of the Committee on Freedom of Association, 6th ed, 2018, paragraph [995].
132 Explanatory Memorandum, *xi*.

Committee found that, even if these are legitimate objectives, the breadth of the proposed grounds and lack of appropriate safeguards mean that the amendments may be incompatible with the right to freedom of association.[133]

64. The Government says that the grounds for cancellation reflect the powers in the Corporations Act for the court to wind up a business.[134] However, the regime for the cancellation of registration of an organisation contained in the Bill is far more expansive than the regime for the winding up of companies in the Corporations Act. Further, where the Bill does seek to transpose elements of the Corporations Act regime into the Registered Organisations Act, it has been done without proper consideration of the fundamental differences between companies and industrial organisations. These issues are further discussed below.

65. In any event, the wisdom of an expanded cancellation regime is questionable. The ICTUR warns that similarly oppressive measures internationally have exacerbated industrial conflict and created instability and unpredictability in industrial relations.[135] Deregistered unions are unlikely to 'roll over and die', as noted by the Royal Commission in cautioning against deregistration as an option in respect of the (then) CFMEU.[136]

The existing cancellation regime

66. As noted by the Royal Commission, there are already a number of grounds on which an application to cancel the registration of an organisation can be brought.[137] Australia's extensive regime for the punitive deregistration of industrial organisations is unique among industrialised liberal democracies, and already incompatible with the right freedom of association.[138]

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133 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017*(28 November 2017), 127. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

134 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 289–91 (Christian Porter).

135 Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, July 2019, 15.

136 Royal Commission Report, volume 5, paragraph [37].

137 Royal Commission Report, volume 5, paragraph [27].

138 Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, July 2019, 14. See, also, Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 125 (paragraph 2.96). The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

67. There are currently four mechanisms for cancellation of an organisation's registration under the Registered Organisations Act:

1) **Court order for certain conduct of the organisation or members:** Under the existing Registered Organisations Act, an organisation, the Minister or a 'person interested' can apply to the Court for an order cancelling the registration of an organisation if:

   a) The organisation, or a substantial number of members, in relation to continued breach of an award, enterprise agreement or FWC order, has prevented or hindered the achievement of Parliament's intention in enacting the Registered Organisations Act or of an object of the Registered Organisations Act or the Fair Work Act;[139]

   b) The organisation, or a substantial number of the members of the organisation (or of a section or class), has engaged in unprotected industrial action that has prevented, hindered or interfered with the activities of an employer or the provision of any public service, or that has had, is having or is likely to have a substantial adverse effect on the safety, health or welfare of the community or a part of the community;[140] or

   c) The organisation, or a substantial number of members of the organisation (or a section or class), has not complied with certain injunctions or orders under the Fair Work Act.[141]

2) **Court order for failure to comply with financial management requirements:** In addition, the Commissioner can apply to the Court for an order cancelling registration on the ground that the organisation has failed to comply with a court order made following an investigation by the Commissioner which found that the union or branch has contravened the Registered Organisations Act or guidelines or rules relating to financial matters.[142]

3) **FWC order on technical grounds, by application:** The FWC may cancel registration, on application by the organisation, a person, interested, or the Minister, on the ground that:

   a) The organisation was registered by mistake;[143]

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139 Registered Organisations Act, s 28(1)(a).
140 Registered Organisations Act, s 28(1)(b)-(c).
141 Registered Organisations Act, s 28(1)(d).
142 Registered Organisations Act, s 28(1A).
143 Registered Organisations Act, s 30(1)(b)(i).

b) The organisation is no longer effectively representative of its members;[144] or

c) The organisation is not free from control by, and improper influence from, an employer or employer organisation (for unions).[145]

4) **FWC order of its own motion:** The FWC may cancel registration on its own motion on technical grounds (e.g. if the organisation is defunct, or has fewer than 50 members).[146]

Expanded cancellation regime

68. Schedule 2 expands the cancellation regime by extending standing to apply for an order to the Commissioner, and significantly expanding the grounds on which an order can be made and the range of orders available.

Standing

69. Standing to apply for the winding up of a company is generally limited to the regulator, the company or persons directly involved in the company such as a member, director, creditor, contributory or liquidator.[147] In contrast, the proposed amendments give standing to apply for cancellation of an organisation's registration not only to the regulator but also to the Minister or any person with sufficient interest, which potentially could include another union, an employer or employer organisation, or a business in the supply chain.

70. The Minister or a 'person interested' already have standing to apply for a cancellation order on some of the existing grounds in the Registered Organisations Act, but those grounds are much narrower, and there is no capacity to apply for one of the so-called 'alternative orders' (which can in fact be applied for directly without the need for there to be a concurrent application for cancellation). The combination of these broad standing provisions, the extensive grounds, and the wide range of orders available, creates significant opportunity for political, corporate and

144 Registered Organisations Act, s 30(1)(b)(ii).
145 Registered Organisations Act, s 30(1)(b)(iii).
146 Registered Organisations Act, s 30(1)(c).
147 See, e.g., Corporations Act, ss 234, 459P, 462 and 464.

regulatory interference in the democratic functioning and control of organisations and for the diversion of union resources into burdensome litigation.

71. 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 the alternative 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 Bill could allow employers standing to apply to cancel the registration of a union that they are in dispute with.

Grounds

72. As with Schedule 1, the grounds for cancellation or the alternative orders in Schedule 2 conflate a range of types conduct and subjects them to the same range of sanctions. These sanctions can equally be applied for serious criminal offences (s 28D) as for minor or technical contraventions of industrial or work health and safety laws (ss 28C(1)(c), 28E or 28F), and for the conduct of the organisation as for conduct of individual officers (s 28C) or of members of a part or class of the organisation (ss 28E–28G).

73. In the case of serious criminal matters and corruption, action should be taken against those responsible under the appropriate criminal laws. However, the definition of 'designated finding' and 'designated law' means that even trivial contraventions of industrial or work health and safety laws, such as a failure to attend a bargaining meeting in accordance with a FWC bargaining order, can be grounds for cancellation or the alternative orders.[148] For less serious offences, or in the case of minor or technical non-compliance with industrial or work health and safety laws, the rationale for serious punitive action against a union and its entire membership, through deregistration, is 'highly questionable.'[149]

74. ICTUR's international comparative analysis identified only one state with analogous legislation, being Turkey—'a state notorious for its repressive and authoritarian legal-political culture and

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148 Fair Work Act, s 233 (see Schedule 2, Item 4, proposed ss 28C(1)(c), 28E, 28F.

149 Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', The International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, July 2019, 14.

a serious record of trade union and human rights violations'.[150] However, even under the Turkish law, a clear distinction is preserved between acts committed by the organisation (arising from which the sanction is against the organisation) and acts committed by individual officers (arising from which the sanction is only against the officers concerned). Notably, this is the approach that the Royal Commission recommended as preferable to cancellation of registration.[151] This is also the approach preferred by the ILO Committee on Freedom of Association, which has said:

> If it was found that certain members of a trade union had committed excesses going beyond the limits of normal trade union activity, they could have been prosecuted under specific legal provisions and in accordance with normal judicial procedure without involving the suspension and subsequent dissolution of an entire trade union.[152]

75. The Joint Committee noted that, because many of the grounds for cancellation could relate to less serious contraventions of industrial law or to taking unprotected industrial action, 'it is unclear how the cancellation of union registration would necessarily be in the interests of members or would guarantee the democratic functioning of the organisation'.[153] For example, union members may have democratically decided to take unprotected industrial action and hold the view it is in their best interests to do so.

76. In respect of those grounds that can pertain to unprotected industrial action,[154] the Joint Committee again noted that the restrictions on taking industrial action in Australian law have been subject to serious criticisms by international treaty monitoring bodies, and concluded that cancelling the registration of unions for such conduct further limits the right to freedom of association.[155] Those existing restrictions on industrial action already provide the State, employers and businesses with a range of mechanisms to stop both protected and unprotected industrial action. With industrial action in Australia at historic lows, and very low compared to

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150 Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', The International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, July 2019, 18.

151 Royal Commission Report, volume 5, 406, paragraph [38].

152 ILO Digest of the decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (5th edition) (2006, International Labour Organisation, Geneva), 140, paragraph [693]. See, also, Compilation of the decisions of the Committee on Freedom of Association, 6th ed, 2018, paragraph [995].

153 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 123. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

154 Schedule 2, Item 4, proposed ss 28C(1)(c), 28E, 28F, 28G.

155 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 124. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15

other industrial countries,[156] there is no justification for the additional mechanisms provided by Schedule 2 (both cancellation and the 'alternative' orders) are necessary.

77. The grounds in proposed ss 28C(1)(a) and (b), which relate to the affairs of the organisation in terms of member interests, are much wider in their potential application than in the provisions of the Corporations Act upon which they are ostensibly modelled.[157] The equivalent grounds in the Corporations Act do not extend to the interests of the members of the organisation *or part* as a whole. For most widely representative unions, it is almost a daily duty to conduct affairs in a manner that may arguably discriminate between members or classes of members or part of the organisation. For example, a decision whether to press for and accept a flat rate pay increase instead of a percentage pay increase involves discrimination in favour of the lower-paid members. Almost every contested negotiation—be it about a pay structure, about a redundancy selection process, about conditions of employment or trade-offs—involves the sometimes difficult elevation of the interests of one group of members over those of another. There are many legitimate reasons for why union leadership may adopt courses that on some points of view fall short of being in the best interests of a member or 'a part' of the current membership base because the majority have decided another course of action in accordance with the union's democratic processes. The Bill will open such decisions to challenge and ventilation in court rather than through the organisation's internal democratic processes, in accordance with the organisation's rules.

78. Where the Corporations Act provisions extend to the interests of 'a member or members', they are designed to protect the interests of minority shareholders. The nature of the interest of a shareholder in a company is very different to that of a union member in their union. Cases under the relevant Corporations Act provisions have dealt with conduct such as common directors of companies in a group of companies entering into transactions that benefit one company, or the group of companies, at the expense of another, including uncommercial loans or share purchase agreements.[158] The most common remedy for 'oppressive' conduct in the corporations context has not been winding up but an order that the majority shareholders buy out the minority shareholders at a fair evaluation. Nothing in the Second Reading Speech or the Explanatory Memorandum to the Bill indicates that the different character of the interests

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156 Jim Stanford, 'Briefing Note: Historical data on the decline in Australian industrial disputes', The Australia Institute and the Centre for Future Work, 30 January 2018.

157 Explanatory Memorandum, paragraph [97].

158 *Jenkins v Enterprise Gold Mines NL* (1992) 6 ACSR 539; *Re Spargos Mining NL* (1990) 3 ACSR 1.

of members of corporations on one hand (i.e. shareholders) and members of unions on the other (i.e. working people and volunteers) is understood or addressed. The consequence is likely to be extremely intrusive and disruptive in the affairs of industrial organisations.

79. Further, the functions of union officers are broader than those of company directors. Company directors are responsible for ensuring that companies are properly managed and are accountable to shareholders in general meetings. Union officers also have overall responsibility for management of the union, including financial administration, but beyond this overarching role their functions are very different from company directors and more diverse. Because of the primary purpose of unions being to advance member industrial and social interests, their primary duties and functions pertain to the provision of industrial representation and services. The powers and functions of union officers thus extend far beyond financial management. Practical problems may arise if corporate notions of officer conduct are transposed to the union context, given the myriad of competing interests in a union that a union officer must balance, such as in enterprise bargaining or an industrial dispute. What might be considered 'risk taking' in a corporate context is a necessary aspect of the decision-making discretion that union officers require.[159]

80. These provisions will open a 'Pandora's Box' of litigious opportunities for legal service providers to market to disaffected membership groups or factions within organisations (let alone the Minister, Commissioner or other persons who may have 'sufficient interest' such as employers or employer organisations) to use court processes to canvass dissent, disrupt a union's functioning, and divert its resources into litigation. These are toxically loaded provisions inimical to the stable and reasonably autonomous conduct of a union's primary functions. Their inclusion in this form demonstrates the remoteness of the architecture of this legislative model from the day-to-day experience of union administration and industrial realities.

81. Further, in respect of the Corporations Act provisions, there is no reverse onus of proof and the exercise of the power is not mandatory. By contrast, under the Bill, if the Court finds that a ground set out in the application is established and *the organisation* does not satisfy the Court that it would be unjust to cancel its registration, the Court *must* cancel the registration.[160] The notion that a failure to conduct the affairs of an organisation in the interests of some members

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159 Anthony Forsyth, 'Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model', (2000) 13 *Australian Journal of Labour Law*, 16.

160 Schedule 2, Item 4, proposed s 28J(1).

should lead to the cancellation of registration—a measure with serious consequences for the representation of those very same members—is self-evidently absurd.

82. A ground for cancellation or an organisation's registration exists if officers of the organisation have acted in affairs of the organisation in their own interests rather than in the interests of the members (proposed s 28C(1)(a)). There is an equivalent ground in Schedule 3, but that ground requires 'a *substantial* number' of the officers to have acted in this way. It is nothing short of bizarre that there is a higher bar for the Court to order a remedial scheme (such as the appointment of an administrator) than to cancel an entire union's registration, given that deregistration is the most serious sanction available.

83. Several of the grounds pertain to the organisation or members' compliance with designated laws, or orders and injunctions made under 'designated laws'.[161] There are no equivalent provisions in the Corporations Act that specifically and directly allow for companies to be wound up due to a history of non-compliance with law by the company, its directors or members (i.e. shareholders).[162] Therefore, a company can repeatedly rip off consumers, put workers lives at risk, illegally dump toxic chemicals or produce dangerous products and not be wound up (note that the FWO has found that nearly 40 per cent of businesses previously found to be in breach of industrial laws were still underpaying workers or failing to provide them with payslips or keep proper employee records within three years[163]).[164] The Commonwealth Bank, for example, was only last year fined $700 million for admitted contraventions of laws designed to stop money laundering and terrorism financing, including its failure to refer more than 53,000 reports of deposits of $10,000 or more to Australia's financial intelligence agency.[165]

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161 Schedule 2, Item 4, proposed ss 28C(1)(c), 28E and 28F.

162 Under s 461(h) of the Corporations Act, the Court may order the winding up of a company if the Australian Securities and Investment Commission (**ASIC**) has stated in a report prepared under Division 1 of Part 3 of *Australian Securities and Investments Commission Act 2001* (Cth) that, in its opinion it is in the interests of the public, of the members, or of the creditors, that the company should be wound up. These reports may deal with certain contraventions. Under s 461(k) of the Corporations Act, the Court may order winding up if the Court is of opinion that it is just and equitable that the company be wound up. Under s 232 of the Corporations Act, the conduct of a company's affairs, or an actual or proposed act or omission by or on behalf of a company etc, can be grounds for an order under s 233 which can include an order under s 233(1)(a) that the company be wound up, but such an order can generally only be applied for by a member of the company. Equivalent provisions in incorporated association legislative regimes operate along similar lines.

163 Fair Work Ombudsman, *National compliance monitoring campaign #2*, November 2018.

164 E.g. offences under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) or the *Work Health and Safety Act 2011* (Cth) (and equivalent State and Territory legislation).

165 See, e.g. https://www.smh.com.au/business/banking-and-finance/cba-to-pay-700m-for-breaching-money-laundering-terrorism-financing-laws-20180620-p4zmlv.html

84. By contrast, a union could have its registration cancelled if small groups of members take unprotected industrial action *on one occasion* (even where there has been no contravention recorded in proceedings against the members,[166] where the action was organised but not taken, or where the part or class of members involved in the action was only a small fraction of the whole). Even the ground pertaining to serious criminal offences by the organisation (s 28D) has no equivalent for companies. For example, companies can be—and often are—convicted of serious criminal offences under work health and safety legislation and continue to trade.[167]

Fact Check

The Nurses Union could have its registration cancelled for protesting unsafe staffing ratios

The Government has said that the Bill does *not* allow for a single or isolated instance of unauthorised industrial action to give rise to a court decision to deregister a whole organisation, citing the example of nurses in a nursing union protesting patient-to-nurse ratios.[168]

The Government's claim is false. There are several ways in which unprotected industrial action could ground an application for deregistration of a union like the Nurses Union.

1. Proposed s 28G provides a ground for cancellation of an organisation where the organisation, or a substantial number of members of the organisation, a part of the organisation, or a class of members, have organised or engaged in unprotected industrial action that prevents, hinders or interferes with the activities of an employer or public service, or that has a substantial adverse effect on the safety, health or welfare of the community or a part of the community.

Industrial action to protest unsafe nursing staff ratios would only be protected industrial action if it is support of a claim in relation to a proposed enterprise agreement that is about matters pertaining to the employment relationship (note that Australia has been heavily criticised by the ILO for this restriction as inconsistent with our obligations under international law).

166 Fair Work Act, s 421 (see Schedule 2, Item 4, proposed ss 28E, 28F and 28E).
167 E.g. *Work Health and Safety Act 2011* (Cth), ss 30 to 33 (and equivalent State and Territory legislation).
168 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 July 2019, 44–5, 75–7 (Christian Porter).

It is highly likely that the industrial action would prevent, hinder or interfere with the activities of the employer, because that is the very nature of industrial action (proposed s 28G(2)(a)(i)). Further, many hospitals are a public service, so the action might also constitute a ground under proposed s 28G(2)(a)(ii). And because of the nature of nursing work, it is possible the industrial action could have an adverse effect on the safety, health or welfare of a part of the community (e.g. patients at that hospital) per s 28G(2)(b).

2. Proposed section 28F provides a ground where the organisation, or a substantial number of members of the organisation, a part of the organisation, or a class of members, has failed to comply with an order or injunction made under a designated law.

The Fair Work Act is a designated law. The FWC could make an order that the industrial action stop and the union or members could deliberately or inadvertently fail to comply with that order.[169] Orders to stop industrial action are not difficult to obtain.[170]

3. Proposed section 28E provides a ground where 'designated findings' have been made against a substantial number of the members of the organisation, a part of the organisation, a class of members.

A designated finding includes a finding that a person has contravened or been involved in a contravention of a civil remedy provision of the Fair Work Act.

If the FWC made an order that the unprotected industrial action stop and the members contravened that order, that would be a contravention of the civil remedy provision in s 421(1) of the Fair Work Act. If there is a second designated finding against members this ground would be triggered.

In summary, the Government's claim that cancellation would require the Nurses Union to engage in "systemic unlawful behaviour"[171] is false:

1. Proposed section 28G only requires one instance of 'obstructive industrial action';

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169 E.g. Fair Work Act, ss 418, 420, 424.

170 If the FWC is unable to determine an application under s 418 of the Fair Work Act to stop unprotected industrial action within two days, it must issue an interim order under s 420 until it can.

171 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 July 2019, 44–5, 75–7 (Christian Porter)

2. Proposed section 28F only requires one failure to comply with an order or injunction under a designated law; and

3. Proposed section 28E only requires two designated findings against the union or members.

85. The proposed grounds allow the actions of what may be a very small part of an organisation, its officers or its membership to be sheeted home to the whole of the membership with orders for cancellation of registration, or the suspension of rights and privileges, and so on.[172] It is difficult to conceptualise any way in which such an outcome could be fair to, or properly serve the interests of, members who may find themselves denied certain or all of the benefits of representation by a registered organisation because of conduct in which they had no involvement. In this context, the differences between an industrial organisation (being the free association of persons for the purpose of advancing their industrial, social, economic and political interests) and a company (being an association of persons for the purpose of generating profit) are critical.

Grounds 28C, 28G and 28H – Evidential provision

86. Proposed new ss 28C(5), 28F(2) and 28G(3) effectively compound the reverse onus of proof in s 28J(1)(b) and 28L(2)(b) by making 'a finding of fact in proceedings in any court' admissible as prima facie evidence of the application to the grounds, thereby converting any such finding into a rebuttable presumption of the fact. This presumption of the prima facie existence of material facts by the use of a finding of fact 'in any court proceeding' is without regard to whether the proceeding was between the same or related parties or any one of them; or was subject to similar qualifications to those which apply to issue estoppel or *res judicata* in civil proceedings generally and indeed in proceedings about corporations.

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[172] Noting also Schedule 2, Item 4, proposed ss 28C(5), 28F(2) and 28G(3). This approach may be contrasted to the approach taken by the courts to the liability of unions for the action of its members or part of the union, for example branches – see, e.g. *GTS Freight Management Pty Ltd v TWU* (1990) 33 IR 26 and *GTS Freight Management Pty Ltd v TWU* (1990) 95 ALR 195.

Orders

87. International supervisory mechanisms have recognised the importance of registration as 'an essential facet of the right to organize since that is the first step that workers' or employers' organizations must take in order to be able to function effectively, and represent their members adequately.'[173] They have stated that 'the dissolution of trade union organizations is a measure which should only occur in extremely serious cases', noting the serious consequences for the representation of workers'.[174]

88. Where a ground for cancellation exists, the Court has a discretion not to cancel the registration of an organisation in circumstances where that cancellation would be unjust. The Government claims that this ensures that cancellation 'remains a measure of last resort'.[175] This claim is false. Rather, once a ground for cancellation is established, the Court *must* cancel registration unless the organisation can convince the Court that it will be unjust to do so. As noted by ICTUR:

> This form of sanction is deeply alarming. Not only is it practically unheard of in industrialised liberal democracies, but the section makes the 'nuclear option' of deregistration the default response, rather than a last resort following the exhaustion of alternative responses … such a legal structure is highly questionable from both a policy and an international law perspective.[176]

This perspective is consistent with the views of the ILO Committee on Freedom of Association, which has said:

> In view of the serious consequences which dissolution of a union involves for the occupational representation of workers, the Committee has considered that it would be preferable…that such action were taken only as a last resort, and after exhausting all other possibilities with less serious effects for the organisation as a whole.[177]

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173 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [295].

174 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 127. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

175 Explanatory Memorandum, p *xi*.

176 Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, July 2019, 15.

177 ILO Digest of the decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (5th edition) (2006, International Labour Organisation, Geneva), 137, paragraph [678].

The Joint Committee recommended that, in order to improve the human rights compatibility of the proposed cancellation regime, the Court's proposed powers be amended so as to only be available to be exercised as a matter of last resort, where it is in the best interests of the members.[178] While the Court is required to consider the best interests of members in deciding whether it would be unjust to cancel registration, this is only one factor it must take into account.

89. Further, as noted, the reverse onus of proof and mandatory exercise of the Court's power in proposed s 28J are not present in the equivalent provisions of the Corporations Act; or in comparable incorporated association regimes.[179]

90. Schedule 2 also enables the Court to make a range of so-called 'alternative' orders, which in fact can be made either as alternatives to cancellation of registration or as orders applied for in their own right, without a concurrent application for cancellation. These orders can have far-reaching intrusion into the democratic and autonomous functioning and control of organisations.[180] Proposed s 28M provides a new and additional avenue for the disqualification of persons from holding office in a registered organisation that again goes well beyond the disqualification regime proposed by the Royal Commission. Proposed s 28BN allows the Court to exclude certain members from eligibility of a union. Proposed s 28P allows the Court to suspend, or give directions as to the exercise of, any rights, privileges and capacities of the organisation or members or part thereof, including the right to take protected industrial action, and despite the organisation's own rules. In combination with the broad range of grounds on which these orders can be made, they contravene Australia's international obligations regarding organisational autonomy and are proposed despite ongoing criticism of Australia for failing to comply with its international obligations in respect of non-interference in industrial organisations and particularly in respect of the right to strike.

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178 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 127. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

179 For e.g., Corporations Act, s 461 (or s 232) and AI Act, s 63.

180 Although a similar power to proposed s 28M already exists s 28(4) of the Registered Organisations Act, and to proposed s 28P in s 29(2), Schedule 2 significantly expands the grounds on which such an order can be made.

Commencement

91. As with Schedule 1, the general effect of the commencement provisions is that the Court is not permitted to have regard to events and conduct that occurred prior to the commencement of the Schedule 2 in determining whether a ground is established. However, once a ground is established, there is no temporal limit on what the Court can have regard to in determining whether it would be unjust to make the disqualification order. This provision undermines the principle against retrospectivity, which is a key element of the rule of law.[181]

[181] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Interim Report*, ALRC Report 127 (Interim) July 2015, 250.

SCHEDULE 3: ADMINISTRATION OF 'DYSFUNCTIONAL' ORGANISATIONS ETC

92. Schedule 3 of the Bill significantly expands the existing regime for the administration of 'dysfunctional' organisations, in three ways.[182] First, standing is extended to include the Minister and the Commissioner. Second, the remedial scheme that can be ordered now explicitly includes the appointment of an administrator (with associated facilitative provisions regarding appointment, remuneration and so forth). Third, and most significantly, the range of grounds on which the Court can make a declaration leading to the imposition of an administrative scheme is much broader.

93. The existing provisions provide for a remedial scheme to be imposed by the Court for the benefit of members, where there are no effective means under the organisation's own rules to address the circumstance.[183] Schedule 3 dramatically and fundamentally changes the nature of the provisions to essentially provide for punitive measures to address alleged wrongdoings by an organisation or its officers or members.

94. The policy rationale for the amendments in Schedule 3 is difficult to ascertain. They do not appear to address any deficiencies in the existing legislation. The amendments are not based on any findings or recommendations of the Royal Commission. Indeed, the effective use of the existing regime to enable parts of the HSU that were affected by serious corruption and maladministration to return to full health demonstrates that the existing regime is already working as it should.[184]

The existing administration regime

95. The Registered Organisations Act already provides for the Court to make remedial orders to reconstitute a union or branch that has ceased to exist or 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. Historically, these provisions have functioned to address

182 Explanatory Memorandum, paragraph [157].
183 Registered Organisations Act, ss 323(1) and (2).
184 We refer the Committee to the HSU's submission to this inquiry.

both technical lacunae (e.g. insufficient office holders) and governance dysfunction (e.g. serious maladministration).

96. Under the existing provisions, a member, organisation or any other person having sufficient interest can apply to the Court for a declaration that a part of the organisation has ceased to function effectively and there are no effective means under the rules of the organisation by which it can be reconstituted or enabled to function effectively, or that an office or position is vacant and there are no effective means to fill the office or position.[185] The Court may then approve a scheme for the taking of action by the organisation or its officers to redress the situation giving rise to the declaration.[186] The Court is not permitted to make the order unless it is satisfied that the order would not do substantial injustice to the organisation or any member.[187] The case of the HSU, outlined in the HSU's submission to this inquiry, demonstrates how these provisions function.

97. The HSU case tells us some important things about the existing legislation and the amendments proposed in the Bill. **First**, the existing administration regime already gives the Court significant powers, discretion and flexibility in dealing with most of the officer conduct contemplated by expanded grounds. The difference is that the thrust of the current provisions is to provide support to a union or branch when it becomes, for whatever reason, unable to look after its own affairs. In making the orders, the Court was not required to make any findings of wrongdoing—that was a task for other bodies and mechanisms, including civil proceedings for compensation under the Registered Organisations Act, and criminal proceedings. By contrast, the Bill focusses on misconduct and wrongdoing, and in so doing radically changes the nature of the provisions from remedial to punitive. This issue is discussed further below under 'Declarations'.

98. **Second**, the discretion already conferred on the Court is wide enough to allow the Court to make the types of facilitative orders for the operation of an administrative scheme proposed in the Bill. For example, in the HSU matters the Federal Court made orders for the appointment of an administrator (proposed s 323A(2)(a)), a timetable for elections (proposed s 323A(2)(d)), the functions of the administrator (proposed s 323F), and an order directing an individual former office holder to assist the administrator (proposed s 323G).

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185 Registered Organisations Act, s 323(1).
186 Registered Organisations Act, s 323(2).
187 Registered Organisations Act, s 323(4).

99. **Third**, the HSU East case involved both the branch of the federally-registered union and the counterpart state-registered union. The scheme was only able to work because NSW introduced mirror provisions into its state industrial relations legislation. In cases involving counterpart federal and state unions or branches, the proposed provisions will be of limited use unless orders can be made in relation to both.

100. **Fourth**, the HSU case demonstrates the lack of need for other aspects of the Bill. The officers involved were held to account under existing criminal and civil processes, which rendered them either excluded from holding office under the existing automatic disqualification regime or liable to a disqualification order for contraventions of the civil penalty provisions of the Registered Organisations Act. In any event, all officers were removed by the Court under the existing administration regime. The funds and property of the branch were placed under external control until the branch was able to be returned to the control of the members.

101. **Finally**, and most importantly, the HSU was effectively reconstituted and returned to its members. Had the Bill been enacted at the time, it is possible that the HSU would have had its registration cancelled altogether, leaving its members without representation. The HSU story demonstrates both the effectiveness of the current regime and the danger of the extreme expansion of the cancellation regime.

Expanded administration regime

Standing

102. Under the Bill, the Court can order that an administrative scheme be imposed on a registered organisation following an application by the organisation, a member, the Commissioner, the Minister or a person with sufficient interest.[188] The Minister has sought to argue that the Registered Organisations Act already allows an application by a person with

[188] Schedule 4, Item 4, proposed s 323(1).

sufficient interest,[189] but it is the operation of these broad standing provisions *in conjunction with the expanded grounds upon which a declaration can be made* that is concerning.

103. Further, the extension of standing to the Minister and the Commissioner is significant because it changes the nature of the regime from one in which the organisations and its members may seek recourse to assist an organisation or branch to get back on its feet, to one in which parties external to the organisation are entitled to seek to impose a scheme onto an organisation or its members, regardless of their wishes. It is a crucial part of the way in which Schedule 3 shifts the administration regime from a remedial to a punitive one.

104. The standing provisions allow a far greater degree of external interference in the functioning and control of industrial organisations than of companies, with no policy justification, and despite the value placed on the organisational autonomy of industrial organisations in international law.[190] Under the Corporations Act, an administrator can only be appointed by a liquidator, a secured party or the company itself.[191] If these standing provisions applied to companies, the regulator, the Minister, or any 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 (with all company directors removed from office)—just as the Bill could allow employers standing to apply to do the same to a union they're in negotiations with.

Declarations

105. By allowing for industrial organisations to be placed into administration, Schedule 3 limits the right to freedom of association and in particular the right of unions to organise their internal administration and activities and to formulate their own programs without interference.[192] International supervisory mechanisms noted that '[t]he placing of trade union organizations

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189 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 July 2019, 44–5, 75–7 (Christian Porter).

190 See, especially: *International Covenant on Civil and Political Rights*, Article 22(1) and (2); *International Covenant on Economic, Social and Cultural Rights*, Article 8(1)(a); *Freedom of Association and Protection of the Right to Organise Convention 1948*, No. 87, Article 3 and 98, Article 2 (ratified by Australia in 1973); and, also, the *ILO Declaration on Fundamental Principles and Rights at Work*, Article 2(a).

191 Corporations Act, ss 436A to 436C. In rare circumstances, an administrative-type scheme can be imposed by order of the court: see, e.g., Corporations Act, s 233.

192 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 128. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

under control involves a serious danger of restricting the rights of workers' organizations to elect their representatives in full freedom and to organize their administration and activities'.[193]

106. Like the preceding Schedules, Schedule 3 conflates a number of divergent circumstances as grounds that can lead to a union or branch being placed into administration, ranging from the mundane (e.g. a branch that has ceased to exist or an office is vacant[194]), to aspects of union democracy (e.g. assessing the conduct of the affairs of the organisation or branch[195]), to the conduct of officers, ranging from criminal conduct (e.g. misappropriation of funds) to potentially minor or trivial contraventions of designated laws.[196] As noted by ICTUR, 'By conflating all of these very distinct situations and channelling the response towards a single process … these provisions pose a very high risk of abuse'.[197]

107. The administration regime proposed by the Bill finds no comparator internationally. In other industrialised liberal democracies, measures to address fraud, corruption and misappropriation of funds are directed to holding those individuals to account and providing redress to victims—but these are dealt with as matters of general application and not in laws regulating industrial organisations.[198] Deficiencies in union democracy and situations concerning an organisation that has ceased to exist are a private law matter, normally dealt with following procedures found in the organisation's own rules.[199]

108. The Joint Committee has expressed concern about the breadth of conduct that may lead a union to be placed into administration, the consequences of which may be significant in terms of the representational rights of employees and any current campaigns or disputes.[200] Of particular concern is the capacity for a union to be placed into administration because officers of the union, or a part of the union, have contravened 'designated laws'.[201] Given the scope of that concept, a declaration could be made in relation to less serious breaches of industrial law, or in relation to the taking of unprotected industrial action. The Joint Committee also expressed

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193 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [450].
194 Schedule 3, Item 1, proposed s 323(a) or (e).
195 Schedule 3, Item 1, proposed s 323(c) or (d).
196 Schedule 3, Item 1, proposed s 323(a) or (b).
197 Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, July 2019, 25.
198 Ibid, 26-27. Such as those contemplated by Schedule 3, Item 1, proposed ss 323(a) (when read in conjunction with 323(4)) and 323(b).
199 Ibid, 27. Such as those contemplated by Schedule 3, Item 1, proposed s 323(a) and (c)-(e).
200 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 129. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.
201 Schedule 3, Item 4, proposed ss 323(3)(a) and (4)(a).

concern that the proposed grounds for a declaration may capture conduct that does not run contrary to the interests of members.[202] Minor, less serious or technical breaches are not necessarily always contrary to the interests of members. It may also be that members have decided on a democratic basis to engage in conduct such as the taking of unprotected industrial action because they consider it is in their interests to do so. The Joint Committee found that Schedule 3 may be incompatible with the right to freedom of association.

109. The very broad range of circumstances in which a union can be placed under administration has no equivalent in corporations law. There are no means by which unlawful conduct of a company director can lead to the company being placed under administration.[203] Currently, company directors can engage in a wide range of law breaking and misconduct and the company continues 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 potentially expose the union to being placed under administration or a range of other intrusive orders.[204]

110. The Government says that the amendments in Schedule 3 are 'modelled and adapted from broadly equivalent provisions of the Corporations Act'.[205] The provisions are not in fact true to the Corporations Act. More importantly, organisations and corporations are not equivalent organisations in any event, including because the democratic functioning and control of industrial organisations without interference is recognised in international law.[206]

111. The grounds on which a declaration can be made under Schedule 3 are broader than the grounds for the appointment of an administrator under the Corporations Act. Under the Corporations Act, the grounds for a court-ordered appointment of an administrator are generally limited to insolvency and enforceable security interests and do not go to the conduct of the company or its directors.[207] The notion that a corporation might have an administrator appointed because it failed to fulfil its financial reporting obligations is inimical to the

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202 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 130. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

203 In rare circumstances relating to the conduct of the company's affairs, an administrative-type scheme can be imposed by order of the court: see, e.g., Corporations Act, ss 232-233.

204 For e.g., Registered Organisations Act, s 268 (see Schedule 3, Item 4, proposed ss 323(3)(a) and (4)(a) or 323(b) and Item 1, s 6 (definition of financial misconduct).

205 Explanatory Memorandum, paragraph [158].

206 See, especially: *International Covenant on Civil and Political Rights*, Article 22(1) and (2); *International Covenant on Economic, Social and Cultural Rights*, Article 8(1)(a); *Freedom of Association and Protection of the Right to Organise Convention 1948*, No. 87, Article 3 and 98, Article 2 (ratified by Australia in 1973); and, also, the *ILO Declaration on Fundamental Principles and Rights at Work*, Article 2(a).

207 Sections 436A to 436C. In rare circumstances relating to the conduct of the company's affairs, an administrative-type scheme can be imposed by order of the Court: see, e.g., Corporations Act, ss 232-233.

regulatory scheme that applies to companies. Yet under Schedule 3, an industrial organisation—which already endures far more onerous financial reporting requirements than most companies—could face this consequence.[208]

112. The Government claims that two of the grounds, being the 'officers acted in own interests' and 'affairs conducted in an oppressive etc manner' grounds,[209] are adapted from ss 461(e) and (f) of the Corporations Act.[210] However, those Corporations Act provisions ground the winding up of a company, not the appointment of an administrator.[211] Under the Bill, these grounds can support the cancellation of registration of an organisation and alternative orders discussed above under Schedule 2, and the imposition of an administrative scheme including the appointment of an administrator under Schedule 3. The difficulties in transposing the oppressive conduct ground into the regulation of registered organisations, particularly in the way that has been done in the Bill (which is not faithful to the equivalent provisions in the Corporations Act), are discussed above in paragraphs [77] to [80].

Orders

113. The Joint Committee found that Schedule 3 may be incompatible with the right to freedom of association. To improve the compatibility of Schedule 3 with human rights, the Joint Committee recommended that the Court must be satisfied that it is in the best interests of members prior to placing a registered organisation into administration.[212]

Commencement

114. As noted earlier in this submission, retrospective operation of laws is antithetical to the rule of law.[213] It is therefore worrying that, unlike Schedules 1 and 2, Schedule 3 is subject to *no limitation* on retrospectivity. No policy rationale or justification for this omission is provided.

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208 For e.g., Registered Organisations Act, s 268 (see Schedule 3, Item 4, proposed ss 323(3)(a) and (4)(a) or 323(b) and Item 1, s 6 (definition of financial misconduct)

209 Schedule 4, Item 4, proposed ss 323(3)(c) and (d).

210 Explanatory Memorandum, paragraph [167].

211 Corporations Act, ss 461(1)(e) and (f). In rare circumstances, the Court can appoint a receiver, rather than an administrator (or make other orders), to address similar grounds: Corporations Act, ss 232 and 233(1), especially (1)(h).

212 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 131. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

213 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Interim Report*, ALRC Report 127 (Interim) July 2015, 250.

This lack of any safeguard against retrospectivity underscores the Government's attempt to transform the administration regime into a punitive one.

Offences in relation to assisting an administrator

115. The ACTU supports the submission of the Queensland Law Society to this inquiry in relation to the proposed ss 323G and 323H offences and the application of strict liability.[214] In particular, we echo the Society's concern that the scope of proposed s 323G(3) is much wider than the equivalent offence in the Corporations Act,[215] which only applies to directors and not to all officers and employees.

214 Schedule 3, Item 4, proposed ss 323G–323H.
215 Corporations Act, s 438B.

SCHEDULE 4: PUBLIC INTEREST TEST FOR AMALGAMATIONS

116. The Registered Organisations Act already contains comprehensive provisions regulating the amalgamation of registered organisations.[216] Those provisions, and their equivalents in predecessor legislation, have governed the amalgamation process for many years. The current amalgamation regime is consistent with the emphasis in international law on the self-determination of industrial organisations[217] and the intention of the Registered Organisations Act to provide for their democratic functioning and control.[218] Internationally, requirements for unions to notify the authorities, and various other bureaucratic formalities associated with a merger process, are common. The proposed 'public interest test' on amalgamations is entirely novel, and a shocking interference in the internal affairs of industrial organisations.[219]

117. Particularly troubling about this Schedule is that it was originally drafted to support the Government's then immediate political objective of preventing the amalgamation of the (then) CFMEU, the Maritime Union of Australia (**MUA**) and the Textile, Clothing and Footwear Union of Australia (**TCFUA**). That is not a sound reason for legislative change.

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216 Registered Organisations Act, ch 3.

217 See, especially: *International Covenant on Civil and Political Rights*, Article 22(1) and (2); *International Covenant on Economic, Social and Cultural Rights*, Article 8(1)(a); *Freedom of Association and Protection of the Right to Organise Convention 1948*, No. 87, Article 3 and 98, Article 2 (ratified by Australia in 1973); and, also, the *ILO Declaration on Fundamental Principles and Rights at Work*, Article 2(a).

218 Section 5(3)(d).

219 Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, July 2019, 30.

Public interest test

118. Schedule 4 of the Bill introduces a 'public interest test' to be applied by the Full Bench of the FWC when registered organisations seek to merge. This amendment was not based on any findings or recommendations of the Royal Commission. It is unsupported by any policy justification or policy development process. Its inclusion in the Bill as originally introduced in 2017 was self-evidently targeted at preventing the CFMEU, MUA and TCFUA amalgamation.

119. The Government says, 'Before corporations are able to merge, they must satisfy the regulator that the merger would not substantially lessen competition or is otherwise in the public interest, so it is appropriate that registered organisations must simply do the same.' [220] This claim is problematic for several reasons.

120. **First**, the free and democratic functioning and control of industrial organisations is recognised in international law.[221] As noted, the ILO Committee on Freedom of Association has said that restrictions on the organisational autonomy of organisations 'should have the *sole* objective of protecting the interests of members and guaranteeing the democratic functioning of organizations'.[222] Even the Government does not pretend that these amendments are directed to that purpose, but instead cites economic justifications.[223] That the Registered Organisations Act currently provides for a simple process for amalgamations to give effect to the wishes of the respective organisations' members, as expressed in a ballot conducted by the AEC, is entirely appropriate and in accordance with Australia's international obligations. To require the FWC to take into account the impact on, and views of, employers[224] is clearly contrary to these obligations, as employer interests will necessarily sometimes be in conflict with the interest of employees. The Joint Committee found that the Schedule is likely to be incompatible with the right to freedom of association.[225]

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220 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 289–91 (Christian Porter).

221 See, especially: *International Covenant on Civil and Political Rights*, Article 22(1) and (2); *International Covenant on Economic, Social and Cultural Rights*, Article 8(1)(a); *Freedom of Association and Protection of the Right to Organise Convention 1948*, No. 87, Article 3 and 98, Article 2 (ratified by Australia in 1973); and, also, the *ILO Declaration on Fundamental Principles and Rights at Work*, Article 2(a).

222 ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, Fifth (revised) Edition, 2006, paragraph [369], as quoted in the Explanatory Memorandum to the Bill, p *vii-viii* (emphasis added).

223 Explanatory Memorandum, p *xiv* and paragraph [208].

224 Schedule 4, proposed ss 72C(1)(b)-(c) and 72D(3)(b).

225 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017), 136. The Committee has reiterated its views in respect of the 2019 version of the Bill: *Report 3 of 2019* (30 July 2019), 15.

121. **Second**, the competition test imposed on company mergers only takes into account whether the merger would have the effect of 'substantially lessening competition in any market'.[226] 'Lessening competition' is irrelevant to the amalgamation of registered organisations. Registered organisations do not compete for members because eligibility for membership is defined by the organisation's eligibility rules. The public interest test that Schedule 4 imposes on organisations takes into account the organisations' 'record of complying with the law',[227] as well as the broader public interest including the impact on employers and employees in the industry or industries concerned.[228] The latter is far broader than the competition test. The former has no equivalent. Corporations can have an extensive record of not complying with the law, including tax avoidance and wage theft, and not be prevented from merging. Under the Bill, an individual union officer's disqualification, for a minor violation of industrial or work health and safety laws, or for an offence entirely unrelated to their union role, could result in the State intervening to block the democratic mandate of thousands of union members.[229]

122. **Third**, the 'public interest test' requires registered organisations wishing to amalgamate to undergo a burdensome two-stage hearing process in which notice of the hearings must be published widely and the FWC must have regard to submissions from a wide range of parties given a statutory right to be heard.[230] Matters of questionable relevance could be raised in order to prevent or delay amalgamations deemed politically undesirable. If the FWC finds that the amalgamation is not in the public interest, the organisations have no access to a merit review but are restricted to judicial review, which is expensive, time consuming and only available on limited grounds.[231] Under the *Competition and Consumer Act 2010* (Cth), merger parties can choose from three avenues to have a merger considered and assessed: the Australian Competition and Consumer Commission (**ACCC**) can assess the merger on an informal basis; the ACCC can assess an application for formal clearance of a merger; or the Australian Competition Tribunal can assess an application for authorisation of a merger. If the merger proposal is likely to contravene the competition test, the merger parties may decide

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226 Competition and Consumer Act, s 50.
227 Schedule 4, Item 7, proposed ss 72D(1).
228 Schedule 4, Item 7, proposed s 72D(3).
229 Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019', International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, July 2019, 29.
230 Schedule 4, Item 7, proposed ss 72A-72C.
231 This is because the powers of the FWC under proposed Subdivision A of Division 6 are exercisable only by a Full Bench: Schedule 4, Item 4, proposed s 37(2).

either not to proceed with the merger, to provide a court enforceable undertaking to address the concerns, or to proceed and defend court action.

123. The reason why the applicant organisations (or, indeed, any opposing parties) have no access to a merit review is because the powers of the FWC in applying the public interest test are exercisable only by a Full Bench.[232] The equivalent powers in the current Registered Organisations Act,[233] and the balance of the FWC's powers in respect of amalgamations under Schedule 4,[234] are exercisable only by a presidential member. These provisions ensure that the powers are exercised by a senior member of the FWC, while still allowing parties access to merits review by way of an appeal to the Full Bench. It is in the interests of access to justice that all FWC powers under Chapter 3, Part 2 of the Registered Organisations Act are exercisable only by a presidential member.

124. The so-called 'public interest' test proposed for registered organisations is not a true public interest test. A public interest test would ordinarily confer a broad discretion on a decision maker and require the decision maker to balance a range of competing considerations. The proposed provisions afford the FWC virtually no discretion in determining whether an organisation has 'a record of not complying with the law', which is an automatic 'fail' on the test.[235] The FWC is not permitted to consider the nature or seriousness of the 'compliance record events' (only the 'incidence and age'), let alone the relevance of the events (if any) to the merits of the proposed amalgamation.

125. The definition of 'compliance record events' is extraordinarily wide. It is not limited to contraventions that have attracted a court-imposed penalty. 'Designated findings' against officers and organisations constitute a compliance record event, even if no conviction was recorded. A compliance record event occurs if a substantial number of members of *even only a small part* of the organisation or class of members organises (*not even engages in*) 'obstructive industrial action' *on one occasion*.[236] The definition of obstructive industrial action can be met even where there has been no judicial finding of such, or where there was a finding of fact 'in any court proceeding' without regard to whether the proceeding was between the same or related parties or any one of them.

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232 Schedule 4, Item 4, proposed s 37(2).
233 Registered Organisations Act, s 37.
234 Schedule 4, Item 4, proposed s 37(1).
235 Schedule 4, Item 7, proposed ss 72D(1).
236 As defined in proposed s 28G.

126. If the amalgamation is not prevented under this first stage of the public interest test, the FWC must then determine whether the amalgamation is otherwise in the public interest, having regard to the impact it is likely to have on employees or employers in the industry or industries concerned and any other matters it considers relevant.[237] The test thus imposes an external 'merit' requirement focussed on economic considerations and the commercial interests of industry and employers. This requirement is inserted into what is currently, in accordance with international law and Parliament's stated intentions in enacting the Registered Organisations Act,[238] a simple process to give effect to the wishes of the respective organisations' members as expressed in a democratic ballot conducted by the AEC.

Standing

127. Critically, Schedule 4 confers a statutory right to be heard in respect of the public interest test on a range of parties who may not otherwise meet the 'sufficient interest' test ordinarily applied in a tribunal (and in the balance of the Bill), including the Commissioner, various Ministers and organisations who are not within the relevant industry but 'that might otherwise be affected'.[239] For example, this could potentially include an organisation that represents the industrial interests of employers in another part of the supply chain. This amendment again opens up substantial opportunity for third parties to seek to prevent or delay an amalgamation undesirable to their own interests. It allows significant political, corporate and regulatory interference in the internal affairs of an industrial organisation and seriously undermines the principle of organisational autonomy.[240] The extension of standing to such a broad range of parties is unparalleled elsewhere in the Registered Organisations Act or the Fair Work Act. In contrast, unions do not have a right to be heard in relation to an application for approval of an

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237 Schedule 4, Item 7, proposed ss 72D(3) and (4).

238 See Registered Organisations Act, s 5(3) and, especially: *International Covenant on Civil and Political Rights*, Article 22(1) and (2); *International Covenant on Economic, Social and Cultural Rights*, Article 8(1)(a); *Freedom of Association and Protection of the Right to Organise Convention 1948*, No. 87, Article 3 and 98, Article 2 (ratified by Australia in 1973); and, also, the *ILO Declaration on Fundamental Principles and Rights at Work*, Article 2(a).

239 Schedule 4, Item 4, proposed s 72C.

240 See, especially: *International Covenant on Civil and Political Rights*, Article 22(1) and (2); *International Covenant on Economic, Social and Cultural Rights*, Article 8(1)(a); *Freedom of Association and Protection of the Right to Organise Convention 1948*, No. 87, Article 3 and 98, Article 2 (ratified by Australia in 1973); and, also, the *ILO Declaration on Fundamental Principles and Rights at Work*, Article 2(a).

enterprise agreement that may have significant effects on the pay and conditions of its members, let alone to be heard in relation to a company merger.[241]

Amendment to s 73(2)(c)

128. Schedule 4 proposes a further amendment that broadens the criteria that the FWC must be satisfied of before it can fix the day on which an amalgamation is to take effect.[242] This amendment did not appear in any stated policy position prior to the original introduction of the Bill in 2017, but arose in the course of argument by the Australian Mines and Metals Association in opposition to the CFMMEU amalgamation some 12 days before the 2017 bill was read into Parliament.[243]

129. The Government claims that these amendments 'are required to *clarify* the scope of pending proceedings against organisations which the FWC is satisfied of in determining whether to fix an amalgamation day'.[244] The Government says that 'existing paragraph 73(2)(c) is not internally consistent because it incorrectly suggests that proceedings for breaches of modern awards or enterprise agreements can be the subject of criminal proceedings. This reflects earlier law under which a breach of an award could amount to a criminal offence. That is no longer the case, but the contravention of an FWC order may be an offence.'[245]

130. The Explanatory Memorandum to the *Industrial Relations Legislation Amendment Bill 1990* (Cth) clearly stated that the original intention of the predecessor provision in the *Industrial Relations Act 1988* (Cth) was to require the Presidential Member dealing with an amalgamation application, before fixing the amalgamation day, to be satisfied that 'there are no unresolved *criminal* proceedings against any organisation concerned in the amalgamation'.[246] However, the Full Federal Court dismissed this argument when made by the Australian Mines and Metals Association in their application to quash the FWC decision

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241 *Construction, Forestry, Mining and Energy Union v Collinsville Coal Operations Pty Limited* [2014] FWCFB 7940.

242 Schedule 4, Item 12.

243 Transcript (D2017/5), 4 August 2017, PN118-134: https://www.fwc.gov.au/documents/sites/cfmeu-mua-tcfua-proposed-amalgamation/20170804_d20175.pdf. See, also, 'Employers say litigation against CFMEU stymies merger', *Workplace Express*, 4 August 2017.

244 Explanatory Memorandum, paragraph [249] (emphasis added).

245 Explanatory Memorandum, paragraph [250].

246 Explanatory Memorandum to the *Industrial Relations Legislation Amendment Bill 1990* (Cth), p 28 (second dot point) (emphasis added).

approving the CFMMEU amalgamation. To the contrary, the Full Court found that the policy since 1990 has been to encourage and make easier the process amalgamations, including by the removal of outstanding civil penalty proceedings as a bar to that process.[247]

131. The provision's original intention, and the evident intention of the existing provision, was to include only criminal proceedings and to exclude civil proceedings. To 'clarify' the scope of the provision in accordance with that intention would require only the deletion of s 73(2)(c)(ii), which deals with breaches of modern awards or enterprise agreements. Instead, the amendment fundamentally alters the provision by extending its scope to civil proceedings. This extension is not even limited to breaches of awards or enterprise agreements. The amendment therefore significantly expands the scope of the existing provision, and the Government has been less than honest about that. No policy justification has been provided for why the scope should be expanded.

Commencement

132. There is no limit on Schedule 4 being applied retrospectively. The Schedule applies to amalgamation applications already made[248] *and* allows the FWC to take into account conduct and findings which pre-date its commencement.[249] Further, the public interest test can be applied at any time after the application is made, including before, during or after the ballot of the organisations' respective memberships.[250] This drafting is nonsensical, because the public resources expended by the AEC and the resources expended by the organisations in the preparation and conduct of the ballot are wasted if the amalgamation then fails the public interest test. Presumably the section was drafted in this way because the CFMMEU amalgamation application was already advanced when the 2017 bill was introduced. Even if that amalgamation has been approved by the organisations' respective memberships when the Schedule commences, the public interest test can still be applied. This retrospectivity is not only bad law making; it underscores the political motivation for the amendments.

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247 *Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCAFC 223, [5].
248 Schedule 4, Item 13(1) and (2).
249 Schedule 4, Item 13(3).
250 Schedule 4, Item 7, proposed s 72A(2).

CONCLUSION

133. The Bill does not do what the Government claims that it does. It is a blunt instrument that will divert union resources away from the critical work of advancing and defending worker interests and into litigation. The only winners from this Bill are employers, law firms and the top end of town. The Bill is so badly misconstrued, so dangerously extreme, and so patently politically motivated that it must be rejected in its entirety.

address

ACTU

Level 4 / 365 Queen Street

Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au

australianunions.org.au

ACTU D No.

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