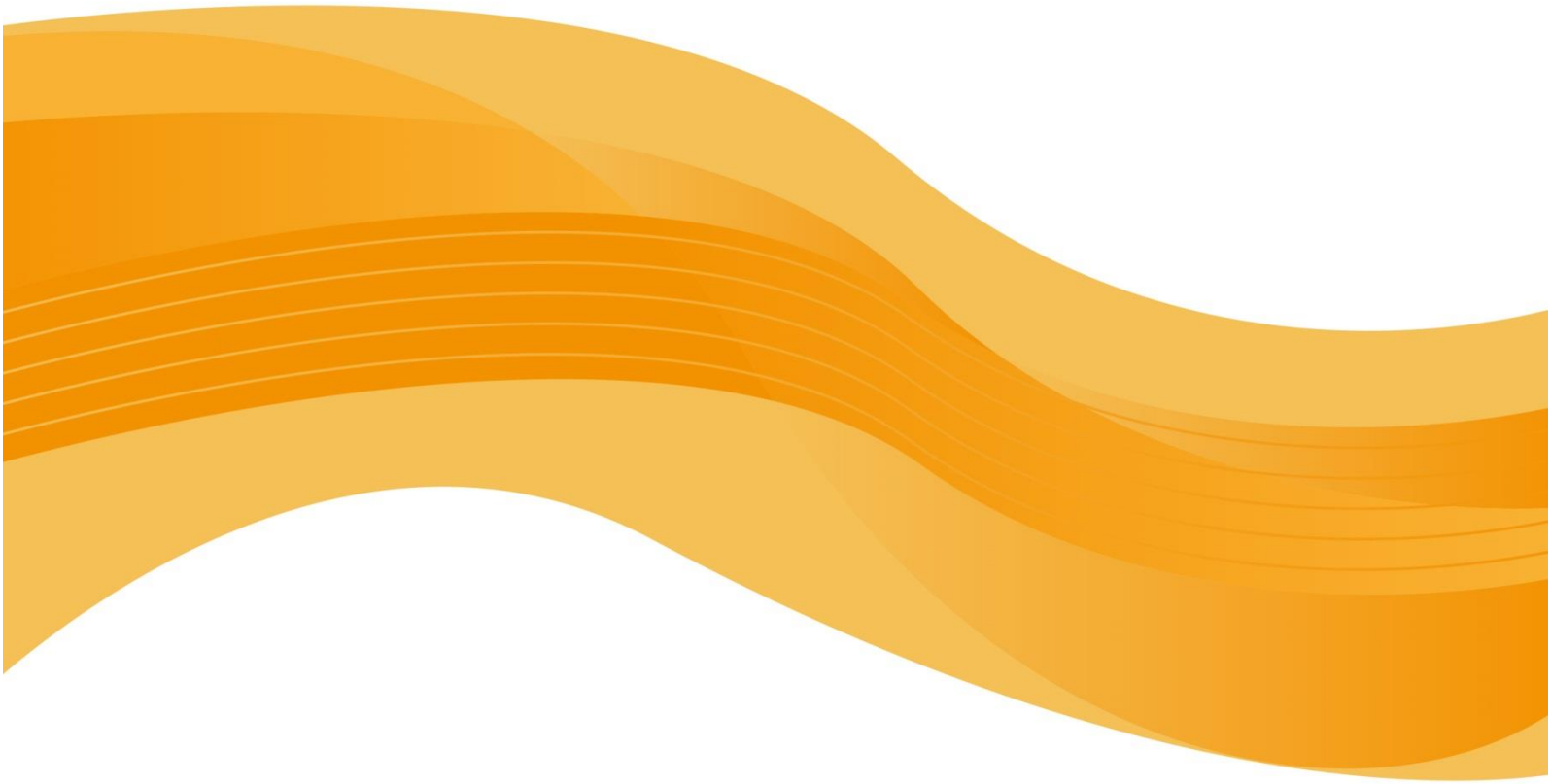
Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

ACTU Submission to the Senate Education and Employment Legislation Committee

8 September 2017



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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 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector. All but seven of the ACTU affiliates are organisations registered as employee organisations under the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**).[1] When account is taken of federated structures adopted by unions, all but six small unions of the 45 organisations registered as employee organisations under that Act are ACTU affiliates.

[1] All statutory references in this submission are to the RO Act, unless otherwise stated.

EXECUTIVE SUMMARY

3. With the exception of Schedule 5, which deals with minor and technical amendments, the ACTU is strongly of the view that the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* (Cth) (**Bill**) should not be passed.

4. The foundations of the Bill are unsound:

    a. The Bill is politically motivated and unsupported by policy. There has been a total lack of proper policy development such as stakeholder consultation and independent research or inquiry in support of the proposed amendments.

    b. To the limited extent that the Bill implements recommendations of the Royal Commission into Trade Union Governance and Corruption (**Royal Commission**), the Royal Commission fundamentally misunderstood the nature and purpose of industrial organisations. The Bill goes well beyond the recommendations in any event.

    c. The Bill rests upon assumptions that are unsupported by evidence and that replicates the misconstruction of industrial organisations that characterised the approach of the Royal Commission.

    d. This misconstruction is particularly evident to the extent that the Bill purports to transplant aspects of the regulatory regime of corporations into that of industrial organisations. The Bill imposes more onerous standards and processes on industrial organisations in any event.

    e. The Bill is inconsistent with international law and Parliament's stated intention in enacting the RO Act, particularly in respect of organisational autonomy. The amendments proposed by Bill allow excessive political, corporate and regulatory interference in the democratic functioning and

control of industrial organisations, particularly through the extension of standing provisions and expansion of grounds for various intrusive court orders.

5. Schedule 1 of the Bill significantly expands the regime for the disqualification of persons from holding office in registered organisations. The amendments proposed by Schedule 1 interfere with the principle of free elections within industrial organisations. The amendments are unsupported by policy and go beyond the recommendations of the Royal Commission or equivalent provisions in respect of corporations or incorporated associations.

6. Schedule 2 of the Bill significantly expands the regime for the cancellation of registration of an organisation and a range of far-reaching 'alternative' orders. The amendments proposed by Schedule 2 interfere with principle of organisational autonomy of industrial organisations. The amendments 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 the companies and industrial organisations.

7. Schedule 3 of the Bill significantly expands the existing regime for administration of 'dysfunctional' organisations. The amendments proposed by Schedule 3 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 an organisation or its officers or members. The amendments are unsupported by policy and are not based on any recommendations of the Royal Commission. Again, recourse is made to the regulation of corporations to justify the amendments, but again, the provisions are not equivalent and, more importantly, nor are the nature and purpose of the entities that the respective regimes seek to regulate.

8. Schedule 4 of the Bill significantly expands the matters of which the FWC must be satisfied before an amalgamation of registered organisations can take effect. The current amalgamation regime, consistent with the principle of organisational autonomy and democracy, provides for a simple procedural process for amalgamations to give effect to the wishes of the respective organisations' members, as expressed in a ballot conducted by the AEC. The amendments proposed by Schedule 4 impose a range of additional requirements, including the consideration of political and corporate interests, that are irrelevant to the merits of the proposed amalgamation from the perspective of the organisations' memberships and their interests. The amendments are unsupported by policy and are not based on any recommendations of the Royal Commission.

INTRODUCTION: The foundations of the Bill are unsound

9. The *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* (Cth) (**Bill**) amends the RO Act. The Bill is divided into five schedules. Following this introduction, this submission deals with each of the first four schedules separately and in turn. It does not deal with the fifth schedule. For the reasons discussed below, we are of the view that, with the exception of the fifth schedule, the Bill should not be passed.

10. The Explanatory Memorandum to the Bill describes the Bill's purpose as being to implement the Government's election commitments in respect of registered organisations and 'to respond to community concern and the recommendations of the Final Report of the Royal Commission into Trade Union Governance and Corruption … to ensure the integrity of registered organisations and their officials, for the benefit of members'.[2] Specifically, the Explanatory Memorandum claims that the Bill will 'combat a culture of lawlessness identified by the Final Report of the Royal Commission into Trade Union Governance and Corruption (**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'.[3] The Second Reading speech for the Bill, following on from the approach adopted by the Royal Commission, describes the Bill as applying consistent standards to registered organisations as are applied to companies. However, on proper analysis of the Bill, several problems with these claims are immediately apparent.

11. First, the Bill is politically motivated and 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. For every amendment, there is either no evidence of an extant problem that the amendment is addressing, or the claimed evidence is unsound. This

[2] Explanatory Memorandum, p *ii*.
[3] Explanatory Memorandum, pp *ii* and *vi*.

deficiency is particularly significant where the Bill implements the Government's election commitments. These election commitments were not based on the recommendations of the Royal Commission or any policy development process. Aspects of the amendments to amalgamations of registered organisations in particular go beyond the Royal Commission *and* the Government's election commitments and highlight the political motivation for the Bill. They serve to support the Government's immediate political objective of preventing the amalgamation of the Construction, Forestry, Mining and Energy Union (**CFMEU**), the Maritime Union of Australia (**MUA**) and the Textiles, Clothing and Footwear Union of Australia (**TCFUA**). That is not a sound reason for legislative change.

12. Second, to the limited extent that the Bill implements the recommendations of the Royal Commission, it is not faithful to the recommendations and, importantly, the Royal Commission does not provide a sound basis for those recommendations in any event. The Royal Commission failed to properly conceptualise 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[4] and in Parliament's intention in enacting the RO Act,[5] was missed.

[4] 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).
[5] RO Act, s 5(3).

13. Third, the claim that the Bill is justified because of a 'culture of lawlessness' identified by the Royal Commission is unsupported by evidence. The Explanatory Memorandum to the Bill says that the Royal Commission 'uncovered numerous examples of organisations and officials repeatedly flouting industrial and other laws, putting their own interests before members and generally failing to meet the basic standards of accountability'.[6] Yet of the 93 referrals that the Royal Commission made for further investigation into possible breaches of criminal and civil laws, only a handful of convictions or even prosecutions have resulted. There is no evidence of endemic 'lawlessness' or other failings by officials of registered organisations.

14. Fourth, the claim that the Bill simply applies consistent standards to registered organisations as are applied to companies is especially problematic, for three reasons. Firstly, the standards applied to registered organisations by the Bill are not consistent with equivalent standards applied to companies but impose more onerous standards and procedures on registered organisations. Secondly, and importantly, 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 Royal Commission was 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.[7] Thirdly, 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 in respect of officers in registered organisations who are, for example, members who hold office on an honourary basis or who are on the committee of management on a voluntary basis, or elected paid organisers

[6] Explanatory Memorandum, p *i*.
[7] 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).

who do not generally perform a management role but may fall within the definition of 'office' in s 9 of the RO Act.[8] The imposition of a regulatory regime on industrial organisations that entails standards and burdens of observance that exceed those of either incorporated associations or commercial corporations gives no recognition to the practicalities of the organisational structure of industrial organisations as non-profit, member-based institutions.[9]

15. Fifth, the Bill is inconsistent with international law. The ACTU supports a legislative regime that promotes the autonomous operation of accountable, democratic and effective trade 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.[10] The ILO Committee on Freedom of Association has warned that, '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.'[11] 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.

16. Finally, the amendments are inconsistent with Parliament's stated intention in enacting the RO Act, as set out in s 5 of the Act. Section 5(3) in particular says that the standards set out in the RO Act are intended to 'encourage members to

[8] For eg, within the meaning of s 9(1)(b) or (d).
[9] See by contrast, for eg, *Associations Incorporation Act 2009* (NSW) (**AI Act**), Part 4 – Management of Associations and Part 8 – Enforcement Provisions, Division 2 – Offences.
[10] 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).
[11] 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*.

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. Corrupt practices within unions, to the extent they exist, are more effectively addressed by internal democracy than by state regulation. In turn, research suggests that member participation and internal democracy are key determinants of union growth at the workplace,[12] 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.

SECTION 9C: KEY CONCEPTS

17. Item 2 of Schedule 1 inserts a new s 9C which introduces three key concepts that underpin the various Schedules in the Bill: 'designated finding', 'designated law' and 'wider criminal finding'. A designated finding or wider criminal 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, or the imposition of an administrative scheme including the appointment of an administrator. Given these significant consequences, it is concerning how broadly these concepts are defined. In particular: that a finding against particular officers, a small class of members or part of an organisation can in various ways be counted against the whole of the organisation; that the finding can relate to a minor breach (for example, an organisation failing to lodge its records and accounts on time);[13] and that there is a lack of effort to link the findings to the merits or performance of the officer, members, organisation or amalgamation under scrutiny.

[12] 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.
[13] For eg, RO Act, ss 233, 237, 268, 293J.

SCHEDULE 1: DISQUALIFICATION FROM OFFICE

18. The interests of members are best protected by ensuring member-centred and democratic functioning of organisations.[14] In this context we note the comments of the ILO Committee on Freedom of Association on the importance of free elections within industrial organisations:

> 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.[15]

19. In accordance with this principle, provision for the removal of officers other than by the organisation's members in accordance with the organisation's rules should be limited, not expanded. The RO Act already requires organisations to have rules for the removal of persons from office.[16] These provisions largely retain member control for the removal of officers in accordance with the organisation's own rules. Schedule 1 significantly expands the regime for disqualification of persons from holding office in a registered organisation regardless of the views of the members as expressed through the organisation's democratic processes, contrary to the principle of free elections within industrial organisations.

New criminal offence for disqualified persons

20. Schedule 1, Item 9 of the Bill inserts a new Division 4 in Part 4 of Chapter 7, which creates offences in relation to standing for or holding office etc while disqualified. This amendment implements Recommendation 37 of the Royal Commission. In accordance with the recommendation, the maximum penalty for the offences is 100 penalty units or two years imprisonment, or both – double the

[14] 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.
[15] 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).
[16] RO Act, s 141(b)(iii) and (c).

penalty attached to the equivalent provision of the Corporations Act.[17] However the Royal Commission did not cite any evidence of persons continuing to hold office or influence a registered organisation after disqualification.[18] There is no evidence of an extant problem that the amendment or, importantly, the increased penalty seeks to address.

Expanded definition of 'prescribed offence'

21. Schedule 1, Item 6 amends s 212 to expand the definition of 'prescribed offence', for the purposes of the automatic disqualification regime in s 215, 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). Notably, no equivalent provision applies to company directors (or indeed to incorporated associations), despite the Government's rhetoric about applying consistent standards.

22. This amendment implements Recommendation 36 of the Royal Commission. The Royal Commission described the list of prescribed offences as too narrow, 'with the result that officers of registered organisations who have committed significant criminal offences can still continue to hold office'.[19] Recommendation 36 is based on a view that 'it is anomalous that the definition of prescribed offence does not include a general category of serious offence'.[20] However the Royal Commission did not cite any evidence of an extant problem that the recommendation seeks to address. There is no analysis of whether such a conviction bears any relationship to the person's effectiveness in their role as an officer that would justify automatic disqualification, particularly given that disqualification limits members' right to freely choose who holds office within the

[17] Corporations Act, s 206A(1).
[18] Final Report of the Royal Commission into Trade Union Governance and Corruption (**Royal Commission Report**), paragraph [171].
[19] Royal Commission Report, paragraph [173].
[20] Royal Commission Report, paragraph [174].

organisations to which they belong. The ILO Committee on Freedom of Association has said that a law which *generally* prohibits access to trade union office because of any conviction is incompatible with the principles of freedom of association.[21]

23. 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 standards and expectations of the Australian community as reflected in our legal system. Where the current definition of prescribed offence includes offences under a law of another country, it is limited to particular types of offences.[22] 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.

Expanded regime for disqualification orders

24. Schedule 1, Item 9 inserts a new Division 3 in Part 4 of Chapter 7, which expands the existing regime for disqualification orders (and replaces the existing regime in s 307A which is repealed by Item 11). Before turning to the detail of these amendments, we make three general comments which are further developed below.

25. First, these amendments purport to implement, but in many significant respects are not faithful to, Recommendation 38 of the Royal Commission.

[21] 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].
[22] Involving fraud or dishonesty (existing 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 (existing s 212(d)).

26. Second, the Second Reading speech describes the expanded disqualification regime as 'consistent with community standards', saying, 'If a company director breaks the law they can be disqualified by a court from running a corporation', but the laws are not equivalent.

27. Third, the Explanatory Memorandum to the Bill claims that the 'limitations on the capacity of registered organisations to regulate their affairs as they see fit' contained in these amendments are 'necessary and proportionate' because they have the objective of 'protecting the interests of members and guaranteeing public order by ensuring the leadership of registered organisations act lawfully'.[23] However 'guaranteeing public order' is not a legitimate objective of legislative provisions which regulate in detail the internal functioning of workers' and employers' organisations.[24] 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 demand the disruption of the 'public order' to advance the interests of working people (for example, through protest or strike action).

Orders

28. Proposed new s 222(2) provides that the Federal Court (**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' having regard to various matters. This formulation is different from the current regime,[25] the Corporations Act regime[26] and the regime recommended by the Royal

[23] Explanatory Memorandum, p *viii*.
[24] 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*.
[25] RO Act, s 307A.
[26] Corporations Act, ss 206C-206EEA.

Commission,[27] 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 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.

Grounds

29. The grounds on which the Court can make a disqualification order in proposed new s 223 are far more expansive than those proposed by the Royal Commission,[28] with no policy justification provided or evidence of an extant problem that these expanded grounds address. The 'fit and proper person' test in particular allows the Court to take into account the refusal, revocation or suspension of an entry permit (being a decision made by a non-judicial officer), civil or criminal findings against the person (in some respects, whether or not a conviction was recorded) and *any* other event the Court considers relevant.[29] No equivalent test is imposed on company directors or officers of incorporated associations under state legislative regimes. 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 registered organisations.

30. These amendments implement the Government's election commitment to 'legislate to allow the courts to ban officials of registered organisations from holding office where they repeatedly break the law'.[30] As discussed earlier in this submission, this commitment is based on the number of referrals from the Royal Commission for investigation into possible breaches of criminal and civil laws and

[27] Royal Commission Report, paragraph [190].
[28] Royal Commission Report, paragraph [190].
[29] Schedule 1, Item 9, proposed s 223(5).
[30] https://www.liberal.org.au/latest-news/2016/06/17/coalitions-commitment-fairness-and-transparency-workplaces.

does not take into account that in the overwhelming majority of cases, subsequent investigations have not resulted in convictions, let alone prosecutions. In any event, the grounds on which a person can be disqualified in proposed s 223 are broader than 'repeatedly break[ing] the law'.

Standing

31. Proposed new s 222(1) provides that an application for a disqualifying order can be brought by the Commissioner, the Minister or a 'person with sufficient interest'.[31] The latter could conceivably include an employer, 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.[32] There are no conditions on standing or the bringing of an application that could operate as safeguards against frivolous or vexatious claims.[33] Persons holding office could therefore be subject to significant burdensome litigation, which is a disincentive for members to participate in an organisation's democratic processes and stand for office. Anyone familiar with the history of registered organisations should be aware of the relatively high incidence of litigation; 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 this bill. Employer registered organisations are subject to such litigation less often.

32. The disqualification regime recommended by the Royal Commission only gave standing to bring an application for a disqualifying order to the registered organisations regulator, which is the case in respect of the equivalent provisions

[31] Currently disqualification applications can only be brought by the Commissioner, the General Manager, or a person authorised in writing by either: RO Act, s 310(1).
[32] 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'.
[33] See, for eg, 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.

of the Corporations Act.[34] 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 or why standing should be cast so broadly.

Commencement

33. The general effect of Item 15 of Schedule 1 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 made out. However 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 in certain cases. This effect is contrary to the legislative intention that the Bill does not apply retrospectively in regard to when a ground is met.

[34] Corporations Act, ss 206C-206EEA.

SCHEDULE 2: CANCELLATION OF REGISTRATION AND ALTERNATIVE ORDERS

34. Schedule 2 implements the Government's election commitment to enable courts to deregister registered organisations or individual divisions of branches 'if they become dysfunctional or are no longer serving the interests of their members'.[35] Schedule 2 also gives the Court powers to make 'alternative orders' that were not foreshadowed in the election commitment. The election commitment was not based on any findings or recommendations of the Royal Commission. There is no policy justification for the amendments in Schedule 2, or evidence of any extant problem that they address.

35. The Second Reading speech for the Bill says that the new cancellation regime 'applies a consistent standard. The new grounds for cancellation are modelled on similar powers relating to the winding up of companies'. However the regime for the cancellation of registration of an organisation contained in the Bill is 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 RO Act, it has been done without proper consideration of the fundamental differences between companies and industrial organisations. These issues are further discussed below.

36. The Explanatory Memorandum to the Bill claims that the amendments in Schedule 2 'have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintains public order'. In fact, the amendments are anti-democratic and undermine the right of organisations and their members to manage their internal affairs without political, corporate or regulatory interference.

[35] https://www.liberal.org.au/latest-news/2016/06/17/coalitions-commitment-fairness-and-transparency-workplaces.

Orders

37. Schedule 2, Item 4 repeals existing ss 28 and 29. Proposed new s28K provides that the Court must cancel registration if a ground is established and the organisation does not satisfy the Court that deregistration is unjust, having regard to various matters including the 'best interests' of the members. It is contrary to the free and democratic functioning of industrial organisations that a Court determines what is in the best interests of the organisation's membership and not the membership itself, in accordance with the organisation's rules and processes. The reverse onus of proof and mandatory exercise of the Court's power in s 28K are not present in the equivalent provisions in s 461 (or s 232) of the Corporations Act; or in comparable incorporated association regimes.[36]

38. Proposed new Chapter 2, Part 3, Division 5 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. These orders can have far-reaching intrusion into the democratic and autonomous functioning and control of organisations. Proposed new s 28N 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 new s 28Q 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. These amendments 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.[37] Although a similar power already exists in s 29(2) of the RO Act,

[36] See, for eg, AI Act, s 63.
[37] See, for eg: Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010), ch 10; Andrew Stewart et al, Submission to Productivity Commission, *Inquiry into the Workplace Relations Framework*, March 2015, 23;

Schedule 2 significantly expands the grounds on which such an order can be made (and grants the Commissioner automatic standing).

Grounds

Ground 28C – Corrupt conduct of officers

39. The grounds in proposed new ss 28C(1)(a) to (c) impose on officers of registered organisations, which may include workers undertaking the role on a voluntary basis in a small union or branch, standards of conduct that are imposed on staff members of law enforcement agencies such as the Australian Federal Police[38] and that are *not* imposed on directors of corporations or members of management committees of incorporated associations. Again, no policy justification has been provided for why this measure is necessary or appropriate, taking into account the obvious differences between industrial organisations and law enforcement agencies.

40. The formulation of the grounds in proposed new ss 28C(1)(d) and (e) are effectively much wider and looser than in the provisions of the Corporations Act upon which they are ostensibly modelled. That breadth is calculated to be extremely intrusive and disruptive in the affairs of industrial organisations because of the different character of the status and interests of members (ie shareholders) of corporations on one hand and members (ie working people and volunteers) of unions on the other. There is nothing in the Second Reading

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Stephen Long, *Have Australia's right to strike laws gone too far?* (21 March 2017) ABC News < http://www.abc.net.au/news/2017-03-21/have-the-right-to-strike-laws-gone-too-far/8370980>; Observation (CEACR) - adopted 2016, published 106th ILC session (2017), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Australia; Direct Request (CEACR) - adopted 2016, published 106th ILC session (2017) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Australia; Observation (CEACR) - adopted 2016, published 106th ILC session (2017) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia; Direct Request (CEACR) - adopted 2016, published 106th ILC session (2017) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.

[38] Sections 28C(1)(a) to (c) are adapted from the definition of 'engages in corrupt conduct' in s 6(1) of the *Law Enforcement Integrity Commissioner Act 2006* (Cth): Explanatory Memorandum, paragraph [98].

Speech or the Explanatory Memorandum to the Bill to suggest those differences are understood or addressed.

41. In that respect it is necessary to look in some detail at the provisions of proposed new ss 28C(1)(d) and (e) and contrast them with ss 461(1)(e) and (f) of the Corporations Act upon which, according to the Explanatory Memorandum, the provisions are based.[39] Although not alluded to, ss 232(d) and (e) of the Corporations Act are also relevant. Unlike the direct winding up provisions in s 461, which prohibit individual persons from applying for a winding up order, s 234 allows a member to apply. Under both ss 233(1)(a) and s 461(1), the court has discretion to make a winding up order (or other orders under s 233). However, as noted, unlike in the Bill there is no reverse onus of proof and the exercise of the power is not mandatory.

42. Further, none of the grounds drawn from the Corporations Act extend to actions that are 'not in the interests of the members of the organisation *or part* as a whole'.[40] The inclusion of the words 'or part' in the provisions of the Bill is an important addition to the precedent provisions in the Corporations Act. The terminology marshalled in the Bill introduces a false conflation of 'oppressive conduct' under the Corporations Act with 'corrupt conduct of officers' under the Bill. Perhaps it is considered that there is a political dividend for that choice, but the reality is that in the context of union administration, conduct that might be thought 'oppressive' is not necessarily 'corrupt'. To equate arguably oppressive conduct with corruption is a false conflation that ignores the multiplicity of reasons why, in a competitive industrially vulnerable environment, union leadership may adopt courses that on some points of view fall short of being in the best interests of 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

[39] Explanatory Memorandum, paragraph [98].
[40] Emphasis added.

rather than through the organisation's internal democratic processes, in accordance with the organisation's rules.

43. The inclusion of 'or part' does not recognise the distinctive circumstances and functional representative and democratic control precepts of industrial organisations. Moreover, the extension to 'part' of the members of an organisation turns on its head the classical and time honoured test in corporations law of whether conduct of the affairs of a corporation is or is not 'in the interests of the members of the entity as a whole'. A potentially massive disruptive effect upon the democratic functioning and control of unions will flow from the effects of this less than honestly introduced change. For most widely representative unions, it is almost a daily duty to conduct affairs in a manner that may arguably discriminate unfairly between 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 or employment or trade-offs – involves the sometimes difficult elevation of the interests of one group of members over those of another.

44. These provisions, designed ostensibly to address corrupt conduct by union officers, 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 employer organisations) to use court processes to canvass dissents, disrupt a union's functioning and control or 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.

Grounds 28D-28H – Findings against organisation etc

45. The grounds in proposed ss 28D to 28H of the Bill pertain to certain findings being made against, or offences being committed by, the organisation or members. They include a 'wider criminal finding' against the organisation, even where no conviction was recorded, and 'obstructive industrial action' being organised by a substantial number of members of a part or class, even where there has been no judicial finding of such, or where the action was organised but not taken, or where the part or class was only a small fraction of the whole. 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 the members (ie shareholders).[41] 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, whereas a union could have its registration cancelled if a small group of members take unprotected industrial action.

46. These amendments allow the actions of what may be a very small part of an organisation or its membership to be sheeted home to the whole of the organisation with orders for deregistration or the suspension of rights and privileges etc.[42] 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

[41] 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 the ASIC Act 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. Equivalent provisions in incorporated associations legislation regimes operate along similar lines.
[42] Noting the provisions in proposed ss 28K(1)(b), 28M(2) and 28M(3).

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.

47. In respect of the grounds that pertain or potentially pertain to 'unprotected' industrial action[43] (or even to a failure to comply with an order or injunction made under a 'designated law', insofar as it pertains to a peaceful picket or other form of protest), the ACTU again notes the ongoing criticism of Australia for failing to comply with its international obligations in respect of the right to strike.[44].

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

48. Proposed new ss 28C(2), 28G(2) and 28H(3) effectively compound the reverse onus of proof in s 28K(1)(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.

Standing

[43] The definition of 'obstructive' industrial action largely replicates existing s 28(1)(b), but the available orders are significantly expanded and the Commissioner now has automatic standing.
[44] See, for eg: Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010), ch 10; Andrew Stewart et al, Submission to Productivity Commission, *Inquiry into the Workplace Relations Framework*, March 2015, 23; Stephen Long, *Have Australia's right to strike laws gone too far?* (21 March 2017) ABC News < http://www.abc.net.au/news/2017-03-21/have-the-right-to-strike-laws-gone-too-far/8370980>; Observation (CEACR) - adopted 2016, published 106th ILC session (2017), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Australia; Direct Request (CEACR) - adopted 2016, published 106th ILC session (2017) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Australia; Observation (CEACR) - adopted 2016, published 106th ILC session (2017) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia; Direct Request (CEACR) - adopted 2016, published 106th ILC session (2017) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.

49. 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.[45] In contrast, proposed new s 28 gives 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 or an employer organisation.[46] The combination of this broad standing regime and the wide range of grounds for orders under Schedule 2 of the Bill creates significant opportunity for political, corporate and regulatory interference in the democratic functioning and control of organisations and for the diversion of union members' money into burdensome and potentially vexatious litigation.

SCHEDULE 3: ADMINISTRATION OF 'DYSFUNCTIONAL' ORGANISATIONS ETC

50. Schedule 3 of the Bill significantly expands the existing regime for administration of 'dysfunctional' organisations. The RO Act already provides for the Court to make a declaration that an organisation has ceased to function effectively or that a vacant position cannot be filled and to order a remedial scheme to address that.[47] Schedule 3 expands the existing regime in three ways.[48] 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 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.

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[45] See, eg, Corporations Act, ss 234, 459P, 462 and 464.
[46] The Minister has standing under the existing regime. The Commissioner now has automatic standing and an organisation (or other person) will also have standing if they are a person with a sufficient interest – applying the usual test: Explanatory Memorandum, paragraph [91].
[47] RO Act, ss 323(1) and (2).
[48] Explanatory Memorandum, paragraph [154].

51. Schedule 3 implements the Coalition's election commitment to allow courts to place registered organisations or divisions or branches into administration or deregister them if they become dysfunctional or are no longer serving the interests of their members.[49] The amendments are not based on any findings or recommendations of the Royal Commission. The lack of proper policy development, such as stakeholder consultation or independent research, is particularly disturbing when one considers the dramatic and fundamental change to the nature of the provisions that these amendments introduce to the existing regime. The existing provisions provide for a remedial scheme to be imposed by the Court for the benefit of members in very limited circumstances, where there are no effective means under the organisation's own rules to address the circumstance.[50] Schedule 3 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.

Declarations

52. According to the Explanatory Memorandum to the Bill, the amendments in Schedule 3 are 'modelled and adapted from broadly equivalent provisions of the Corporations Act'.[51] 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.[52] The amendments empower a Court to impose an administrative scheme on an industrial organisation on application which can be

[49] https://www.liberal.org.au/latest-news/2016/06/17/coalitions-commitment-fairness-and-transparency-workplaces.
[50] RO Act, ss 323(1) and (2).
[51] Paragraph [155].
[52] 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).

brought by not only the organisation or a member but also the regulator or Minister.

53. 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.[53] The notion that a corporation might have an administrator appointed or some other administrative scheme imposed because it failed to fulfil its duties in relation to financial reporting is inimical to the 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.[54]

54. The Explanatory Memorandum to the Bill claims that two of the grounds, being the 'officers acted in own interests' and 'affairs conducted in an oppressive etc manner' grounds,[55] are adapted from ss 461(e) and (f) of the Corporations Act.[56] However those Corporations Act provisions ground the winding up of a company, not the appointment of an administrator.[57] In rare circumstances, the Court can appoint a receiver, rather than an administrator (or make other orders), to address similar grounds.[58] Under the Bill, these grounds can support the cancellation of registration of an organisation, the alternative orders discussed above and the imposition of an administrative scheme including the appointment of an administrator. The difficulties in transposing the oppressive conduct ground into the regulation of registered organisations, particularly in the way that has

[53] Sections 436A to 436C.
[54] Schedule 4, Item 4, proposed s 323(3)(b) and Item 1, definition of 'financial misconduct' to be inserted into s 6 (at (d)).
[55] Schedule 4, Item 4, proposed ss 323(3)(c) and (d)
[56] Paragraph [164].
[57] Corporations Act, ss 461(1)(e) and (f).
[58] Corporations Act, ss 232 and 233(1).

been done in the Bill (which is not faithful to the equivalent provisions in the Corporations Act), are discussed above in paragraphs [34] to [38].

Standing

55. Under the Corporations Act, an administrator can only be appointed by a liquidator, a secured party or the company itself[59] or, in rare circumstances, an administrative-type scheme can be imposed by order of the Court.[60] Under the Bill, the Court can order an administrative scheme be imposed on a registered organisation following an application for a relevant declaration by the organisation, a member, the Commissioner, the Minister or a person with sufficient interest.[61] The Bill allows 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.[62]

SCHEDULE 4: PUBLIC INTEREST TEST FOR AMALGAMATIONS

56. The RO Act already contains comprehensive provisions regulating the amalgamation of registered organisations.[63] 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[64] and the intention of the RO Act to provide for their democratic

[59] Corporations Act, ss 436A to 436C.
[60] See, eg, Corporations Act, s 233.
[61] Schedule 4, Item 4, proposed s 323(1).
[62] 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).
[63] RO Act, ch 3.
[64] 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*

functioning and control.[65] The amendments in Schedule 4 are an egregious interference in the internal affairs of industrial organisations.

Public interest test

57. Schedule 4 of the Bill implements the Coalition's election commitment to 'introduce a new public interest test for mergers of registered organisations, which will allow relevant matters to be taken into account, such as the organisations' history of compliance with workplace laws'.[66] This commitment was not based on any findings or recommendations of the Royal Commission. It is unsupported by any policy justification or policy development process and is self-evidently targeted at preventing the CFMEU, MUA and TCFUA amalgamation.

58. The Second Reading speech for the Bill claims that the competition test applied to companies seeking to merge is like a public interest test, similar to the public interest test that the Bill imposes on registered organisations seeking to amalgamate. The Second Reading speech complains that, 'Currently, the Fair Work Commission has very limited ability to do anything other than effectively rubber stamp a merger approved by just a bare majority of members'. These claims are problematic for several reasons.

59. First, the free and democratic functioning and control of industrial organisations is recognised in international law.[67] 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

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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).

[65] Section 5(3)(d).

[66] https://www.liberal.org.au/latest-news/2016/06/17/coalitions-commitment-fairness-and-transparency-workplaces.

[67] 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).

members and guaranteeing the democratic functioning of organizations'.[68] Even the Explanatory Memorandum to the Bill does not pretend that these amendments are directed to that purpose, but instead cites economic justifications.[69] That the RO Act currently provides for a simple procedural process for amalgamations to give effect to the wishes of the respective organisations' members, as expressed in a ballot conducted by the Australian Electoral Commission, is entirely appropriate and in accordance with Australia's international obligations.

60. 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'.[70] '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',[71] as well as the broader public interest including 'the impact on' employers and employees in the industry or industries concerned.[72] 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.

61. 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.[73] If the FWC finds that the amalgamation is not in the public interest, the

[68] 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).
[69] Explanatory Memorandum, p *x* and paragraph [232].
[70] *Competition and Consumer Act 2010* (Cth), s 50.
[71] Schedule 4, Item 7, proposed ss 72D(1) and (2).
[72] Schedule 4, Item 7, proposed s 72D(3).
[73] Schedule 4, Item 7, proposed ss 72A-72C.

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

62. 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.[75] The equivalent powers in the current RO Act,[76] and the balance of the FWC's powers in respect of amalgamations under Schedule 4,[77] 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 would be preferable and in the interests of access to justice if s 37 did not distinguish powers in relation to applying the public interest test and all FWC powers under Chapter 3, Part 2 of the RO Act were exercisable only by a presidential member.

63. 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. Proposed new ss 72D(1) and (2) afford the FWC

[74] 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).
[75] Schedule 4, Item 4, proposed s 37(2).
[76] RO Act, s 37.
[77] Schedule 4, Item 4, proposed s 37(1).

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. 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.

64. The definition of 'compliance record events' is extraordinarily wide. It is not limited to contraventions that have attracted a court imposed penalty. 'Wider criminal 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' as defined in s 28H. 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.

65. 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.[78] Schedule 4 therefore 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 RO Act,[79] a simple procedural process to give effect to the wishes of the respective organisations' members as expressed in a democratic ballot conducted by the Australian Electoral Commission (**AEC**).

[78] Schedule 4, Item 7, proposed ss 72D(3) and (4).
[79] See RO 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).

Standing

66. 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'.[80] For example, this could potentially include an organisation that represents the industrial interests of employers in another part of the supply chain. This amendment allows significant political, corporate and regulatory interference in the internal affairs of an industrial organisation and seriously undermines the principle of organisational autonomy.[81] The extension of standing to such a broad range of parties is unparalleled elsewhere in the RO Act or the *Fair Work Act 2009* (Cth) (**Fair Work Act**). In contrast, unions do not have a right to be heard in relation to an application for approval of an enterprise agreement that may have significant effects on the pay and conditions of its members, and persons eligible to be members, in that enterprise, the occupation or industry and potentially beyond.[82]

Amendment to s 73(2)(c)

67. Item 12 of 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. This amendment did not appear in any stated policy position prior to the Bill but arose in the course of argument by the

[80] Schedule 4, Item 4, proposed s 72C.
[81] 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).
[82] *Construction, Forestry, Mining and Energy Union v Collinsville Coal Operations Pty Limited* [2014] FWCFB 7940.

Australian Mines and Metals Association in opposition to the amalgamation some 12 days before the Bill was read into Parliament.[83]

68. The Explanatory Memorandum to the Bill claims that the amendments made by Item 12 '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'.[84] The Explanatory Memorandum 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, but is no longer the case.'[85]

69. 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'.[86]

70. 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 in Item 12 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 s 73(2)(c), and the Explanatory Memorandum is less than honest about

[83] 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.
[84] Paragraph [244] (emphasis added).
[85] Paragraph [245].
[86] Explanatory Memorandum to the *Industrial Relations Legislation Amendment Bill 1990* (Cth), p 28 (second dot point) (emphasis added).

that. No policy justification has been provided for why the scope should be expanded.

Commencement

71. Schedule 4 is the only schedule of the Bill where there is no limit on it being applied retrospectively. The Schedule applies to amalgamation applications already made[87] *and* allows the FWC to take into account conduct and findings which pre-date its commencement.[88] 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.[89] 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 has been drafted in this way because the CFMEU, MUA and TCFUA amalgamation application is already advanced, so that even if it 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, but underscores the immediate political motivation for the amendments to prevent the CFMEU, MUA and TCFUA amalgamation.

[87] Schedule 4, Item 13(1) and (2).
[88] Schedule 4, Item 13(3).
[89] Schedule 4, Item 7, proposed s 72A(2).

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