Senate Education and Employment Legislation Committee

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

Submission of the Australian Institute of Employment Rights

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About the Australian Institute of Employment Rights

Adopting the principles of the International Labour Organisation (**ILO**) and its commitment to tripartite processes, the Australian Institute of Employment Rights (**AIER**) works to promote the recognition and implementation of workplace rights in a cooperative industrial relations framework.

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Introduction

The AIER welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee's (**Committee**) inquiry into the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* (**EI Bill**).

The EI Bill is intended to amend the *Fair Work (Registered Organisations) Act 2009* (**RO Act**) 'to ensure the integrity of registered organisations and their officials, for the benefit of their members'.[1] The AIER's position is that the provisions of the EI Bill fail to protect or benefit members and instead propose a regime of targeted sanctions, in addition to existing criminal and civil regimes, that will ultimately disadvantage and harm the membership of registered organisations.

The amendments proposed by the EI Bill are in direct violation of Australia's labour and human rights obligations under international law. The right to freedom of association is essential to any democratic society; enabling a working population to build power and voice to promote and protect their economic and social interests. This fundamental right is recognised internationally under human rights law and contained in both the United Nations (**UN**) *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**) and the *International Covenant on Civil and Political Rights* (**ICCPR**), the substance of which is informed by reference to the ILO *Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87)* (**Convention 87**).

Whilst these international Covenants do not automatically form part of domestic law in Australia, they are standards which Australia has freely signed onto. Having ratified Convention 87, in particular, Australia is obliged to ensure that national law and practice conform with it.[2] Further Australia's obligation to observe these instruments is acknowledged through the framework provided for assessing proposed laws under the *Human Rights (Parliamentary Scrutiny) Act 2011*. It has also been reaffirmed internationally in labour clauses included in international trade agreements and most recently through the ILO Centenary Declaration.

[1] Explanatory Memorandum ("EM"), Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 ("EI Bill**"**) i.
[2] Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 91.

If legislated, the provisions of the EI Bill would directly interfere with the right to free association and the independent functioning of trade unions.[3] The grounds proposed for disqualification of union officials and deregistration of unions are broad and include minor or technical breaches of industrial legislation. Sanctions under the EI Bill may be sought by persons of 'sufficient interest' — an invitation to employers, employer associations and industry lobby groups to hinder and attack trade unions. Such measures pose a direct threat to cooperative and harmonious industrial relations in Australia.

Protection of the principle of freedom of association and Australia's international reputation as a guardian of human rights, along with adherence to the rule of law, demand the unequivocal rejection of the EI Bill.

Freedom of association

The International Labour Organisation

Freedom of association is an internationally recognised human right. The ILO acknowledges that freedom of association sits 'at the heart of democracy' and enables participatory action to realise other human rights.[4] Freedom of association is the primary means by which workers may advance their economic and social interests.

The 1998 Declaration on Fundamental Principles and Rights at Work committed ILO member states, through the fact of membership to 'promote and realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights',[5] including 'freedom of association and the effective recognition of the right to collectively bargain'.[6] Freedom of association was again highlighted in the 2008 Declaration on Social Justice for a Fair Globalisation[7] and most recently the ILO Centenary Declaration for the Future of Work declared the need for:

> promoting workers' rights as a key element for the attainment of inclusive and sustainable growth, with a focus on freedom of association and the effective recognition of the right to collective bargaining as enabling rights[8]

As a member State of the ILO, Australia is obliged to ensure that the principles of freedom of association and other freely ratified conventions are respected in national legislation.[9]

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[3] Although the EI Bill amendments would apply to all registered organisations, their clear focus is registered employee organisations. This submission deals only with the impact of the EI Bill upon those organisations.
[4] International Labour Office, *Giving Globalization a Human Face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008,* Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 101st Session 2012, Report III (Part 4B), Geneva ("General Survey 2012") [49].
[5] International Labour Organisation, *Declaration on Fundamental Principles and Rights at Work 1998,* 86th Session, Geneva, ("*Fundamental Principles and Rights at Work"*) art 2.
[6] Ibid art 2(a).
[7] International Labour Organisation, *Declaration on Social Justice for a Fair Globalization 2008,* 97th Session, Geneva, I A(iv).
[8] International Labour Organisation, *Centenary Declaration for the Future of Work 2019,* 108th Session, Geneva, II A(vi).
[9] International Labour Organization, *Compilation of decisions of the Committee on Freedom of Association,* (ILO, 6th ed, 2018) ("CFA Compilation") [45] – [46].

The principal components of freedom of association are understood primarily in terms of Convention 87 and the *Right to Organise and Collective Bargaining Convention 1949 (No. 98)* (**Convention 98**). Creighton observes that Conventions 87 and 98 are uniquely authoritative, having acquired a high degree of international acceptance.[10] The authority afforded Conventions 87 and 98 is derived in part by the high level of ratification these Conventions enjoy. Of the 187 ILO member states, Conventions 87 and 98 have received 155 and 167 ratifications respectively. The authority of Conventions 87 and 98 may be further ascribed to the special supervisory mechanisms they are afforded. In addition to the reporting requirements set out by the ILO Constitution and the Declaration on the Fundamental Principles and Rights at Work,[11] freedom of association is subject also to a unique complaints mechanism comprised of the tripartite Committee on Freedom of Association (**CFA**), and the Fact-Finding and Conciliation Commission (**FFCC**), comprised of independent persons.[12] It is important to acknowledge that the tripartite structure of the CFA means that its decisions interpreting the principles of freedom of association are developed with input from employer representatives.

The United Nations

Freedom of Association is further recognised by the UN *International Bill of Human Rights*.[13] The *International Covenant on Civil and Political Rights* (**ICCPR**) provides that 'everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests'.[14] The *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**) reiterates the right to join trade unions[15] and additionally provides the right to establish national federations, confederations and for the latter to form or join international trade-union organisations,[16] the right to the free function of trade unions,[17] and the right to strike.[18] The rights prescribed by the ICCPR and the ICESCR are expressed to be subject to the law of the land,[19] however this limitation is qualified in both instruments such that:

> Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention. [20]

The preservation of the standards set out by ILO Convention 87, by this clause in both the ICCPR and ICESCR, indicates that the international principles of freedom of association set out in Convention 87

[10] Breen Creighton, 'Freedom of Association' in Roger Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (Wolters Kluwer, 11th ed, 2014) 315 [3].
[11] *Fundamental Principles and Rights at Work* (n 5).
[12] Lee Swepston, 'International Labour Law' in Roger Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (Wolters Kluwer, 11th ed, 2014) 155, 177 -181.
[13] *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, 3rd sess, 183rd mtg, UN Doc A/810 (10 December 1948).
[14] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ("ICCPR") art 22.
[15] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ("ICESCR") art 8 1(a).
[16] Ibid art 8 1(b).
[17] Ibid art 8 1(c).
[18] Ibid art 8 1(d).
[19] Ibid art 8 1(c), 1(d).
[20] ICCPR (n 14) art 22 (3); ICESCR (n15) art 8 (3).

and the related commentary of the ILO supervisory bodies provide a 'touchstone' for the interpretation and application of the ICCPR and the ICESCR.[21]

Australian Human Rights Law

Australian human rights law is unique in that it relies almost exclusively on the will of the parliament implemented through legislation or administrative action.[22] Australia does not have a constitutionally enshrined bill of rights. The Australian Constitution may be said to provide express protection for a limited number of fundamental rights,[23] however these do not extend to freedom of association, nor does the Constitution contain an implied right to freedom of association.[24]

Australia has ratified both ILO Conventions 87 and 98, and is further bound to respect, promote and realise the principles of freedom of association by virtue of ILO membership. In addition, Australia is a signatory to both the ICCPR and ICESCR and has thus undertaken to guarantee the rights provided by these instruments.

Australia's international obligations concerning freedom of association have been formally reaffirmed and recommitted by the Federal Government through both the *Australia-United States Free Trade Agreement*[25] and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnerships*.[26] Both agreements affirm Australia's obligations as a member of the ILO, including those stated in the ILO Declaration on Fundamental Principles and Rights at Work, and commit to the principles of freedom of association and collective bargaining.

Australia's obligations to observe international human rights instruments are also acknowledged domestically, through the *Human Rights (Parliamentary Scrutiny) Act 2011*, which establishes the Parliamentary Joint Committee on Human Rights. The role of the Committee is to scrutinise legislative instruments and report on their compatibility with Australia's human rights obligations. Among the instruments that form the Committee's terms of reference are the ICCPR and the ICESCR. As a result, the Committee is required to report on potential violations of the right of freedom of association as protected by the ICCPR and ICESCR and informed by ILO Conventions 87 and 98. The 2011 legislation also requires all proposed legislation introduced into the Australian Parliament to be accompanied by a statement of compatibility with human rights.

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[21] Colin Fenwick, 'Minimum Obligations with Respect to Article 8 of the International Covenant on Economic, Social and Cultural Rights' in Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, 2002) 53, 61-2.
[22] Colin Fenwick, 'Workers' Human Rights in Australia' (Working Paper No. 39, Centre for Employment and Labour Relations Law, The University of Melbourne, August 2006) 2.
[23] Colin Fenwick, 'Workers' Human Rights in Australia' in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work* (Hart Publishing, 2010) 41, 49.
[24] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 234 [148] (Gummow and Hayne JJ: 'There is no such 'free-standing' right [as freedom of association] to be implied from the Constitution').
[25] *Australia – United States Free Trade Agreement,* signed 18 May 2004 [2005] ATS 1 (entered into force 1 January 2005) (AUSFTA) ch 18.
[26] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* signed 8 March 2018, [2018] ATNIF 1 (entered into force 30 December 2018) (CPTPP) s 51(h).

In light of Australia's international obligations to uphold the principles of freedom of association as set out in ILO Conventions 87 and 98, it is necessary that Australian law conforms with freedom of association principles (understood in terms of the ILO Conventions and jurisprudence).

This submission will next examine the provisions of the EI Bill in the context of Australia's commitments under international human rights law, highlighting areas of non-compliance and other concerns held by the AIER.

Schedule 1 – Disqualification from office

The primary object of ILO Convention 87 is to protect the autonomy and independence of worker and employer organisations from public authorities with regard to their establishment, activity and dissolution.[27] This is achieved through a framework of principles, with Member States undertaking to give effect to prescribed principles[28] and 'to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.' [29] In accordance with ILO principles, workers' organisations have the right to freely determine their constitution and rules, to freely elect their representatives, to 'organise their administration and activities and to formulate their programmes.'[30] The lawful exercise of this right must not be restricted or impeded by interference from public authorities.[31]

Schedule 1 of the EI Bill seeks to expand both the circumstances in which a person may be disqualified from office in a registered organisation, and the actors who may initiate disqualification. Further, Schedule 1 introduces a criminal offence for disqualified persons who continue to hold office or act to influence the organisation. These provisions unjustifiably interfere with freedom of association and the right of workers and employers to elect their membership in full freedom, as articulated by the ILO CFA:

> 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.[32]

Under the current RO Act, persons convicted of a prescribed offence are automatically disqualified from holding elected office in a registered organisation.[33] Prescribed offences include offences of fraud and dishonesty punishable by a period of 3 months' or more imprisonment, mismanagement and offences under certain sections of the RO Act, and other offences involving intentional violence, injury or the destruction of property.[34] This definition is expanded under the EI Bill to include, also:

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[27] General Survey 2012 (n 4) [55].
[28] ILO *Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87)* ("Convention 87") art 1.
[29] Convention 87 art 11.
[30] Convention 87 art 3(1).
[31] Convention 87 art 3(2).
[32] CFA Compilation (n 9) [589].
[33] *Fair Work (Registered Organisations) Act 2009* ("RO Act") s 215.
[34] RO Act s 212.

'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'.[35]

Further, the EI Bill expands the grounds for disqualification of registered organisation officials to include 'designated findings' under proposed new s 9C of the RO Act, which include findings that an official has:

- committed a criminal offence under a 'designated law' (e.g. the RO Act, *Fair Work Act 2009* (**FW Act**), *Building and Construction Industry (Improving Productivity) Act 2016*, federal and state work health and safety laws);
- contravened a civil penalty/civil remedy provision of any of the above laws.

This proposed definition of 'designated findings' conflates criminal and civil violations, potentially roping in a range of minor or technical contraventions, such as right of entry breaches in response to serious safety concerns or the late lodgement of a union's financial records which do not justify disqualification from office. This provision is in clear violation of the ILO's conception of freedom of association, whereby:

> The loss of fundamental rights, such as the ban on standing for election to any trade union office and any political or public office, could be justified only with reference to criminal charges unconnected with trade union activities, and are serious enough to impugn the personal integrity of the individual concerned.[36]

This principle is further offended under the proposed amendments whereby the disqualification of union officials may be ordered on grounds not directly related to the conduct of the individual but rather that of the organisation. Proposed s 223(3) sets out grounds for disqualifying an individual for 'multiple failures to prevent contraventions etc. by the organisation'. This applies where the organisation has engaged in conduct resulting in more than one 'designated finding' (see above) or findings of contempt in relation to an order or injunction under the RO Act, FW Act, etc. An official of such an organisation may be disqualified in those circumstances (even though they may not have been involved in or had knowledge of the offending conduct), unless they could show they took 'reasonable steps to prevent the conduct'[37].

The inclusion of civil contraventions of industrial relations law as a ground for disqualification has the effect of introducing additional sanctions for union officials engaging in conduct, such as unprotected industrial action, that is otherwise allowable under international law. The right to strike is an 'intrinsic corollary to the right to organise [which is] protected by Convention No. 87'.[38] This right is explicitly protected under the ICESCR[39], and it should be noted that Australia has been consistently criticised by the ILO supervisory bodies for the inconsistency of our domestic law with

[35] Proposed s 212(aa), RO Act. According to the EM para [19], this reflects Recommendation 36 of the *Royal Commission into Trade Union Governance and Corruption* (Final Report, December 2015) (**"**Heydon Royal Commission").
[36] CFA Compilation (n 9) [627].
[37] Proposed s 223(3)(b), RO Act.
[38] CFA Compilation (n 9) [754].
[39] ICESCR (n 15) art 8 1(d).

this right.[40] Such criticism was echoed in 2017 by the UN Committee on Economic, Social and Cultural Rights, which stated:

> 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 Organisation (ILO) Conventions (nos. 87 and 98).[41]

The Parliamentary Joint Committee on Human Rights observed that the scope of the proposed provisions for disqualification in an earlier version of the EI Bill 'raises questions about [their] rational connection to the stated objective of protecting the interests of members, where members may be of the view that taking particular forms of industrial action are in their interests'. Further the Committee noted that where a union has engaged in multiple contraventions, the effect of the proposed legislation 'could be that the entire elected union leadership could be subject to disqualification' regardless of whether members agreed to participate in such action or believed it to be in their best interests.[42] This circumstance constitutes a 'grave violation of the principles of freedom of association' through the imposition of 'sanctions on unions for leading a legitimate strike'.[43]

The EI Bill proposes to introduce a new Division 3 in Part 4 of Chapter 7, RO Act, relating to disqualification orders. These new provisions would enable the Federal Court to make orders for disqualification of an office-holder for a specified period of time based on a wide range of grounds,[44] including designated findings being made against that individual (see above); multiple failures to prevent contraventions by the official's organisation (see above); or that the official is not a 'fit and proper person'. Under this new fit and proper person test,[45] a union official could be disqualified from continuing to hold office based on any of the following:

- their entry permit under Part 3-4 of the FW Act or under federal/state/territory work health and safety legislation has been refused, revoked or suspended;
- they have been found to have engaged in fraud, dishonesty, misrepresentation, concealment of material facts or breach of duty, in any civil or criminal proceedings;
- in any criminal proceedings, they have been found to have engaged in the intentional use of violence, intentional causing of death or injury, or intentional damage/destruction or property;

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[40] ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 106th ILC session, 2016; 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, 99th ILC session, 2009; ILO CEACR, *Individual Observation Concerning the Right to Organise and Collective Bargain Convention*, 1949, (No. 98), Australia, 99th session, 2009.

[41] UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on the fifth periodic report of Australia,* E/C.12/AUS/CO/5 (23 June 2017) [29] – [30]. See also, UNCESCR, *Concluding Observations on Australia*, E/C.12/AUS/CO/4 (12 June 2009) [19].

[42] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Report 12 of 2017* (2017) Report [2.68] – [2.69].

[43] CFA Compilation (n 9) [951].

[44] Proposed new s 223, RO Act.

[45] Proposed new s 223(5)-(6).

- they have committed an offence under federal, state or territory law punishable by two or more years' imprisonment.

These proposed provisions constitute a sweeping new regime for the disqualification of union office-holders, which imposes unwarranted forms of double punishment in certain circumstances. For example, an official whose right of entry permit has been suspended or revoked on relevant grounds under Part 3-4 of the FW Act already has legal consequences imposed upon them (withdrawal of the statutory right to enter employers' premises for the period of the suspension/revocation). There is no legitimate basis for imposing the further sanction of disqualification from office, and therefore withdrawal of the right to exercise the other functions of that office which are entirely unrelated to entry upon premises.

In addition to the substantive unfairness of the proposed disqualification order provisions, they are procedurally unfair in that they give standing to a wide range of parties to apply to the Federal Court for an order.[46] These parties include the Registered Organisations Commissioner; the Minister; or 'a person with a sufficient interest'. According to the EM (para 29):

> 'Sufficient interest' has been judicially interpreted to mean an interest beyond that of an ordinary person and includes those whose rights, interests or legitimate expectations would be affected by the decision.

However the scope of relevant actors here goes well beyond Recommendation 38[47] of the *Royal Commission into Trade Union Governance and Corruption* (**Heydon Royal Commission**), which proposed that only 'the registered organisations regulator' could apply to the Federal Court for a disqualification order. The proposed 'sufficient interest' category invites weaponised applications by employers, employer associations or industry lobby groups against trade union officials, seeking to have them disqualified from office (for example) as an additional tactic to be pursued in the course of an industrial dispute. Such interference in the democratic working of trade unions by any so-called 'interested parties' cannot be justified when considered alongside Australia's international obligations to uphold the principles of freedom of association, including the autonomy of workers' organisations.

The EI Bill also proposes a new Division 4 in Part 4 of Chapter 7, RO Act, establishing several offences for disqualified persons including to stand as a candidate, hold office or act to influence a registered organisation. Proposed s 226 sets out maximum penalties (for each of these offences) of 100 penalty units ($21,000), two years' imprisonment or both, reflecting Recommendation 37 of the Heydon Royal Commission. This recommendation was made to bolster the existing RO Act provisions for disqualification of union officials as a result of serious criminal offences. The proposed expansion of the grounds on which disqualification from office may be ordered (see above) renders the addition of the offences proposed in Recommendation 37 unnecessary and inappropriate. In circumstances where persons become disqualified from union office as the direct result of union activity that is otherwise legitimate under internationally accepted principles, subjecting them to further punishment, indeed imprisonment 'for reasons connected with their activities in defence of the

[46] Proposed s 222(1), RO Act.
[47] Heydon Royal Commission (n 35).

interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular'.[48]

Schedule 2 – Cancellation of registration and alternative orders

Schedule 2 of the EI Bill proposes to expand the grounds and 'streamline' the process by which the Federal Court may order the cancellation of an organisation's registration[49] (also known as 'deregistration'). At the outset, it is important to note that existing s 28 of the RO Act providing for deregistration applications to be made to the Federal Court has been described as allowing the 'excessive … punitive deregistration of trade unions' unparalleled in comparable industrialised democracies.[50] The current laws are already in direct contravention of the internationally recognised principles of freedom of association: relevant provisions of the *Industrial Relations Act 1996* (NSW), now closely reflected in s 28(1)(b) of the RO Act, were criticised by the ILO's Committee of Experts on the Application of Conventions and Recommendations (**CEACR**) as 'an extreme measure involving a serious risk of interference by the authorities with the very existence of organisations'.[51]

Under existing s 28, the available grounds of deregistration are 'essentially related to "delinquent" conduct by an organisation which is inconsistent with participation in the Fair Work system',[52] including hindering the objects of the FW Act or RO Act (e.g. through continued breaches of an award or enterprise agreement); engaging in unprotected industrial action having certain specified effects; or failing to comply with certain types of orders and injunctions.

The expanded grounds of deregistration proposed in the EI Bill[53] include the following:

- the officers of the organisation have acted in their own interests rather than those of the organisation as a whole; the affairs of the organisation are being conducted oppressively or unfairly prejudicially to the members; or are being conducted such that the organisation/its officials or members are not complying with 'designated laws' (see above);[54]
- the organisation is found to have committed a federal/state/territory criminal offence punishable by a penalty of at least 1,500 penalty units ($315,000);[55]
- 'designated findings' (see above) have been made against a substantial number of members of the organisation, part of the organisation or a class of members of the organisation;[56]
- the organisation, or a substantial number of its members, has failed to comply with an order or injunction made under a designated law;[57]

[48] CFA Compilation (n 9) [123].
[49] EM (n 1) [83].
[50] Daniel Blackburn and Ciaran Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019' (Research Paper, International Centre for Trade Union Rights, July 2019) [3.1].
[51] ILO CEACR, *Direct Request Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 106th ILC session, 2016.
[52] *Creighton and Stewart's Labour Law* (n 2) 832 (footnote omitted).
[53] In addition to an application for deregistration on any of these grounds under proposed new s 28, these grounds could support the making of an application for 'alternative orders' under proposed s 28A (see also proposed ss 28L-28P).
[54] Proposed s 28C, RO Act.
[55] Proposed s 28D.
[56] Proposed s 28E.
[57] Proposed s 28F.

- the organisation, or a substantial number of its members, has organised or engaged in 'obstructive industrial action', i.e. unprotected industrial action that prevents, hinders or interferes with the activities of a federal system employer or the provision of a public service by federal/state/territory authorities – or that has a substantial adverse effect on the safety, health or welfare of the community.[58]

This dramatic broadening of the statutory grounds of deregistration is unjustified, unnecessary and should be rejected for at least the following five reasons. First, there is no support for this significant change to existing law in the recommendations of the Heydon Royal Commission. Commissioner Heydon only considered deregistration in the context of the union then known as the Construction, Forestry, Mining and Energy Union (now the Construction, Forestry, Maritime, Mining and Energy Union or **CFMMEU**), given the Commissioner's findings of that union's history of disregard for industrial laws.[59] Commissioner Heydon recommended against deregistration of the union, either under special legislation or under the process available under s 28 of the RO Act, concluding instead that 'any targeted action to combat the culture of the CFMEU should focus on the officials of the union'.[60]

Secondly, and related to the first point, it is clear from many public statements that the Government's major target for the proposed new deregistration provisions is the CFMMEU.[61] Yet, contrary to the Minister's assertion,[62] the Government could apply under existing s 28(1)(b) of the RO Act for deregistration of the CFMMEU. There is absolutely no legitimate basis for adding multiple new grounds of deregistration that could apply not only to the CFMMEU, but to *all* registered employee organisations.

Thirdly, deregistration of a union is a very serious step with drastic consequences for the members of the deregistered organisation. Proposed s 28J sets out that where one of the grounds for cancellation of registration has been made out, the Federal Court *must* (emphasis added) cancel the registration unless the organisation can convince the Court that to do so would be unjust. This raises the prospect of deregistration being ordered following a minor or one-off breach of a relevant law by one part of the organisation. For example, the actions of nurses engaging in unlawful industrial action in support of improved nurse-patient ratios or that of teachers supporting appropriate class sizing or school resourcing could result in the deregistration of the union to which they belong. As a consequence of deregistration, according to s 32(c) of the RO Act, the union and its members are not entitled to the benefits of any modern award, order of the Fair Work Commission (**FWC**) or enterprise agreement that bound the organisation or its members.[63] It is not entirely clear how this

[58] Proposed s 28G.
[59] Heydon Royal Commission (n 35) vol 5, 395-408.
[60] Ibid, 406.
[61] See for example the extensive references to the CFMMEU in the Minister's Second Reading Speech for the EI Bill.
[62] See ABC Radio National, *Breakfast with Fran Kelly*, 24 July 2019, where the Minister stated that: 'there has never been … an organisation in the union movement more unlawful than the CFM[M]EU … and *a rational government under the present laws is hamstrung in having even an application brought to deregister it'* (emphasis added; transcript available at: https://www.attorneygeneral.gov.au/Media/Pages/breakfast-on-radio-national-with-fran-kelly-24-july-2019.aspx).
[63] See also proposed s 28P, which would enable the Federal Court to make an alternative order (where deregistration is not ordered) suspending the rights, privileges or capacities of a union or its members under the RO Act, *Fair Work Act*, modern awards, enterprise agreements or orders of the FWC.

provision interacts with relevant provisions of the *Fair Work Act*, under which modern awards and enterprise agreements 'cover' or 'apply' to employees (rather than 'binding' them). It is clear, though, deregistered organisations would lose standing to bring actions on behalf of affected members to enforce modern award or enterprise agreement terms. Deregistration, especially when made subject to much easier statutory tests as proposed in the EI Bill, is a blunt instrument. Commissioner Heydon himself observed that: 'Cancellation of the registration of [a] whole union may have a disproportionate effect on union members who have not been involved in illegal activity.'[64]

Fourthly, as with other parts of the EI Bill, the provisions of Schedule 2 are so broad as to constitute a 'scatter-gun' approach. An application for the cancellation of registration may be made by persons with a 'sufficient interest', raising the same arguments as were ventilated above in respect of applications for disqualification of union officials. Deregistration may be also be sought in response to acts undertaken by an individual official of a registered organisation, in direct violation of freedom of association principles, whereby 'to deprive many workers of their trade union organizations because of a judgement that illegal activities have been carried out by some leaders or members constitutes a clear violation of the principles of freedom of association'.[65]

Finally, it is worth recalling that the current deregistration provisions in the RO Act form part of a compact — established at the commencement of the conciliation and arbitration system in 1904 — under which trade unions accepted the advantages of registration under federal law in exchange for a high level of external regulation of their internal affairs and activities.[66] Over time, the fine balance reflected in that compact has been upset, with unions subject to ever-increasing levels of regulation as the benefits of registration have decreased.[67] The proposed deregistration provisions in the EI Bill further erode that balance and may lead some unions to question the value of continuing to remain federally registered organisations which are subject to the disciplines of the FW Act and RO Act frameworks.

Schedule 3 – Administration of dysfunctional organisations etc.

Schedule 3 of the EI Bill proposes to amend existing s 323 of the RO Act, without any foundation in recommendations of the Heydon Royal Commission. Section 323 allows a registered organisation, a member of an organisation or anyone with a sufficient interest to apply for a Federal Court declaration that a part of the organisation (e.g. a branch) has ceased to function effectively; and approval of a scheme for the reconstitution of the relevant part of the organisation or other means to enable it to function effectively.

The amendments proposed in the EI Bill enable the Federal Court to make a declaration under s 323 based on an expanded range of grounds, including that: an organisation or part of an organisation has ceased to exist of function effectively;[68] one or more officers have engaged in financial

[64] Heydon Royal Commission, (n 35) 405.
[65] CFA Compilation (n 9) [995].
[66] *Creighton and Stewart's Labour Law*, (n 2), 814-815.
[67] Ibid, pages 833-834.
[68] Proposed s 323(3)(a), RO Act.

misconduct;[69] a substantial number of officers have acted in their own interests rather than in the interests of the members as a whole;[70] the affairs of the organisation are being conducted in an oppressive, unfairly prejudicial or discriminatory manner or contrary to the interests of the members;[71] or there exists a vacant office or position and there is no effective means in the organisation's rules for filling the vacancy.[72]

For the above purposes, an organisation (or part) will be taken to have ceased to function effectively if the Court is satisfied that its officers have on multiple occasions breached designated laws (see above); misappropriated funds of the organisation (or part); or otherwise repeatedly failed to fulfil their obligations as officers.[73]

Should a declaration be made under proposed s 323, the Federal Court may order the imposition of a 'scheme', that may include elections to be held or the appointment of an administrator with powers over the property and affairs of the organisation and who 'may perform *any* function, and exercise *any* power, that the organisation or part, or any officers could perform or exercise if it were not under administration' (emphasis added).[74]

Given the expanded grounds under proposed s 323, and that declarations may be sought by various additional actors including the Registered Organisations Commissioner and the Minister,[75] the potential arises for a union to be placed into administration or subject to court-ordered elections in a manner that breaches accepted principles of freedom of association. The provisions of Schedule 3 of the EI Bill amount to a direct violation of the right of unions to organise their internal administration and activities and to formulate their own programs without interference. The CFA has stated that:

> The placing of trade union organizations 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.[76]

The issue of maladministration by way of criminal fraud or financial misconduct is a legitimate concern and one that requires an avenue of redress. These issues, which arose mostly in the context of the Health Services Union of Australia, were considered by Commissioner Heydon and have already been the subject of legislative responses from both the former Labor and current Coalition Governments.

The AIER's concern is that the measures proposed in the new s 323 go far beyond protecting members from maladministration and represent an unjustifiable interference with trade union democracy. It is our position that the conflation of available grounds in this provision, as seen elsewhere in the EI Bill, and the variety of actors with standing to apply to the Federal Court invite

[69] Proposed s 323(3)(b).
[70] Proposed s 323(3)(c).
[71] Proposed s 323(3)(d).
[72] Proposed s 323(3)(e).
[73] Proposed s 323(4).
[74] Proposed s 323F(1) (emphasis added); see also proposed ss 323A-323K.
[75] Proposed s 323(1).
[76] CFA Compilation (n 9) [662].

potential for misuse of a mechanism designed to address the dysfunctional operation of an organisation. Instead, the provision offers yet another avenue for interference with the internal functioning of unions on the ground of non-compliance with other applicable laws (e.g. taking unlawful industrial action).

Further, on the removal of trade union leaders, the CFA has stated:

> Where trade union leaders were removed from office, not by decision of the members of the trade unions concerned but by the administrative authority, and not because of infringement of specific provisions of the trade union constitution or of the law, but because the administrative authorities considered these trade union leaders incapable of maintaining "discipline" in their unions, the Committee was of the view that such measures were obviously incompatible with the principle that trade union organizations have the right to elect their representatives in full freedom and to organize their administration and activities.[77]

Schedule 4 – Public interest test for amalgamations

Schedule 4 of the EI Bill again extends well beyond the recommendations of the Heydon Royal Commission and seeks to introduce a new 'public interest' test for union amalgamations. This matter is currently sufficiently regulated by Chapter 3, Part 2 of the RO Act, which essentially provides for a democratic process involving the members of the unions seeking to merge, overseen by the FWC. In deciding whether an amalgamation should take effect, the Commission can have regard to certain criteria including that there are no proceedings (other than civil proceedings) pending against any of the merging organisations relating to contraventions of the RO Act, FW Act or other federal laws; breaches of awards or enterprise agreements; or breaches of applicable orders.[78]

Under the new public interest test proposed in the EI Bill, in determining whether a proposed amalgamation is in the public interest the FWC must consider any 'compliance record events' (see below) in respect of the relevant unions.[79] Where the FWC determines that one of the organisations has a record of non-compliance with the law, the amalgamation must be declared not to be in the public interest.[80] Even where the compliance record of an organisation is found to pose no impediment to the proposed amalgamation, the FWC must then consider the likely impact the amalgamation will have on the employees and employers in the industries concerned.[81] The FWC may also have regard to any other matters it considers relevant to whether the merger is in the public interest.[82]

Proposed s 72E defines 'compliance record events' to include (on the part of an organisation) designated findings or contempt of court in relation to an order/injunction made under a designated law; or (on the part of an organisation or a substantial number of its members) organising or engaging in obstructive industrial action within the meaning of proposed s 28G(2)[83] (see above). In

[77] Ibid [659].
[78] RO Act, s 73(2).
[79] Proposed s 72D(1), RO Act.
[80] Proposed s 72D(2).
[81] Proposed s 72D(3).
[82] Proposed s 72D(4).
[83] Proposed s 72E(1).

addition, designated findings, contempt of court or disqualification of individuals from office are to be considered where such findings were made whilst the individual was an officer of the organisation.[84] As discussed above the scope of the designated findings provisions is so broad as to capture both serious criminal activity and minor industrial relations breaches, without sufficient distinction. Further the inclusion of findings against individuals who may or may not still hold office with the relevant organisation has the potential effect of allowing decisions to be made to the detriment of an entire organisation's membership, based on acts carried out by an individual outside of their control.

Submissions concerned with whether an amalgamation is in the public interest may be made by an extraordinarily broad range of parties, including the relevant organisations; other unions in the relevant industries; other bodies; the Registered Organisations Commissioner; federal, state or territory Ministers; and 'any person with a sufficient interest in the amalgamation'.[85] The potential for such persons to utilise standing under the EI Bill to engage in various kinds of direct attacks on trade unions has been discussed previously in this submission. The proposed new public interest test would enable a wide range of persons and organisations to intervene in matters in which they may have only a remote — or no — real interest.

In accordance with the principles of freedom of association 'trade union unity voluntarily achieved should not be prohibited and should be respected by the public authorities'.[86] The provisions proposed in Schedule 4 of the EI Bill are a clear violation of the right of workers to determine their constitutions and rules in full freedom. The CFA has stated 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. Where such provisions are deemed necessary by the public authorities, they should simply establish an overall framework in which the greatest possible autonomy is left to the organizations in their functioning and administration. Restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations. Furthermore, there should be a procedure for appeal to an impartial and independent judicial body so as to avoid any risk of excessive or arbitrary interference in the free functioning of organizations.[87]

In contrast, corporate mergers under Australian law are subject to voluntary notification, and do not require consideration of the compliance records of either merging firms or their managers. The *Competition and Consumer Act 2010* (**CC Act**) prohibits acquisitions that would result in a 'substantial lessening of competition'.[88] Persons may apply to the Australian Competition and Consumer Commission (**ACCC**) for a domestic *Merger Authorisation*. The granting of such authorisations is governed by Section 90 of the CC Act and serves to protect applying persons from legal action under Section 50 of the CC Act. Applications are approved in accordance with detailed guidelines concerned with matters of competition alone.[89]

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[84] Proposed s 72E(2).
[85] Proposed s 72C.
[86] CFA Compilation (n 9) [498].
[87] Ibid [563].
[88] *Competition and Consumer Act 2010* ("CC Act") s 50.
[89] Australian Competition and Consumer Commission, *Merger Authorisation Guidelines* (October 2018).

In summary, there is no public policy justification for this major proposed change to Australian regulation of trade unions. It is well known that the Government was strongly opposed to the amalgamation in 2018 which created the CFMMEU, and that an earlier version of the EI Bill included provisions intended to thwart that merger. The irresistible conclusion is that the proposed public interest test is not intended to address any genuine concern or deficiency in current regulation, but rather is simply about combating union power.

Conclusion

The proposed amendments in the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* are in direct violation of Australia's labour and human rights obligations under international law. The right to freedom of association, as protected under the ICCPR and ICESCR and defined by ILO Conventions 87 and 98 is essential to the free and democratic function of workers' organisations. The free and democratic administration of those organisations is critical to the ability of workers to protect their rights at work and further the social and economic interests of the population and must be protected from interference by the State, employers and their organisations.

As proposed the EI Bill represents a targeted regime of substantively and procedurally unfair sanctions that:

- may be initiated by an unreasonably broad range of actors;
- are available on the basis of a wide variety of grounds, conflating serious crime and civil or technical breaches; and
- fail to adequately distinguish between individual and organisational liability.

The provisions proposed by the EI Bill represent a significant over-reach to the recommendations of the Heydon Royal Commission and risk upsetting the balance between the benefits of registration under federal law and external regulation of an organisation's internal affairs and activities.

Recommendations of the Heydon Royal Commission to increase the regulation of registered organisations in order to raise standards of transparency and accountability have already been implemented through three other statutes and a legislative instrument.[90]

We urge the Committee to recognise the greater cost of denying internationally accepted human rights for democratic civil organisations and their members, and recommend the unequivocal rejection of the EI Bill.

[90] *Fair Work (Registered Organisations) Amendment Act 2016; Building and Construction Industry (Improving Productivity) Act 2016; Code for the Tendering and Performance of Building Work 2016; Fair Work Amendment (Corrupting Benefits) Act 2017*.