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

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I. Introduction

1.1 The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019[1] creates a number of sweeping powers for interference in trade union organisations, which are not only in violation of the principles of freedom of association, but are also highly likely to produce arbitrary and disproportionately punitive outcomes damaging to Australia's industrial relations system. Harmful to workers, undermining to trade union democracy, and of no tangible benefit to the promotion of harmonious industrial relations, these measures are - in our assessment - incompatible with Australia's commitments under the ILO's Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

1.2 The following analysis sets out our main concerns with four key aspects of the proposed legislation and seeks to provide a comparative overview of trade union regulation in countries with commensurate levels of economic and industrial development, as well as an outline of the authoritative interpretations given to the relevant ILO Conventions by the ILO's supervisory bodies. In these examples, we find no precedent for the degree of state interference in the functioning and establishment of trade unions in comparable industrialised liberal democracies. The ills that the Ensuring Integrity Bill is ostensibly designed to remedy are rather addressed in other jurisdictions through more moderate regulatory mechanisms, which (by and large) aim at promoting trade unions' internal democracy, independence and lawful conduct. We note however that draconian measures of this variety are characteristic of some authoritarian regimes in which independent trade unions are suppressed or entirely prohibited.

1.3 Authoritative interpretations of the relevant ILO Conventions clearly indicate that legislative measures of this severity constitute unjustifiable restrictions on workers' exercise of their fundamental rights, and raise significant risks of impairing freedom of association through state interference, abuse and judicial delay. From an international labour law perspective, the Ensuring Integrity Bill would enable unlawful restrictions on freedom of association for a wide class of workers who are neither participants in (nor even suspected of) any wrongdoing. From an industrial relations policy perspective, the legislation is a recipe for legal uncertainty, litigation and industrial strife.

[1] Hereinafter the 'Ensuring Integrity Bill'

1.4 ICTUR has particular concerns – explained in further detail in the analysis below – with three overarching failings manifest in the proposed legislation:

1.5 Firstly, the legislation conflates criminal fraud and other serious crimes with minor infractions of industrial laws. By distilling such a broad spectrum of unlawful activity into the same category of offence, the legislation would permit equal punishments for unlawful acts that are not of comparable gravity, and lead to unacceptably disproportionate outcomes. This applies to measures concerning disqualification of individuals from union office as much as to the cancellation of a union's registration. Such an approach can hardly be regarded as an improvement to the efficacy of the criminal law - which requires at a minimum the differentiation between categories of offence of a greater or lesser magnitude of grievousness.

1.6 Secondly, and in a similar vein, the legislation blurs the liabilities of trade union officials and the organisations they represent and work for, and permits sanctions against the entirety of a union's membership for the acts of individual officers, as well as sanctions against individual officers for the acts of members or other officers not under their control.

1.7 Thirdly, we are deeply alarmed at the sanctions against unions proposed in the legislation. The practical effects of these measures threaten to destroy the careers of individuals or the very existence of workers' organisations. These consequences are not mitigated by thorough investigation or appropriate allocation of responsibility for unlawful acts, nor by the availability of alternative, less severe, means to promote compliance with the law. They represent a sledge-hammer approach, which is all the more concerning due to the fact that these judicial sanctions may be initiated by an undefined class of ‘sufficiently’ interested persons - an invitation to union-busters and anti-union forces.

1.8 In light of these three aspects, the Ensuring Integrity Bill appears cynically designed to encourage deeply damaging interference in trade unions' activities by using (even minor) instances of unlawful behaviour as an entry point and justification. Taken as a whole, the legislation spells a serious threat to trade union democracy.

1.9 The other jurisdictions we review below, by and large, accord the internal democratic functioning of trade unions primacy in their trade union laws, reflecting the broad international consensus which is articulated in the ILO Conventions and related jurisprudence: the constitution, establishment, operation and elections of trade unions are matters for the trade union members themselves. Any conditions or formalities in state regulations should aim at supporting this principle, not overriding it. The expansion of the

state's regulatory power: to interfere in union democracy; to determine its right to function; to dictate whom its members may elect; and even to administer the union's functions, manifestly conflicts with this principle.

1.10 Concerning serious crime, financial misconduct and fraud, ICTUR does not contest the significance of adapting new legal tools to tackle such complaints. However, tightening regulations on unions' registrations and elections is not the appropriate response. Issues of criminality should be dealt with in criminal law, the primary purpose of which is to reduce crime. The Ensuring Integrity Bill will do nothing to improve the functioning or efficacy of those laws. Nor will it help remedy harms committed against individual employers as a result of unlawful conduct of union officers or members. Unsurprisingly therefore, legislation permitting interference of this magnitude in trade unions is not found in other jurisdictions; the proposed approach would be entirely unique to Australia. The reason for such a disparity is clearly that such levels of interference are simply not justified and this legislation is not designed to effectively combat unlawful conduct. Rather, the legislation is aimed at attacking and destroying particular organisations of workers.

1.11 Wider, unintended outcomes of the Ensuring Integrity Bill should not be underestimated. While its effects on unions can be expected to be deeply harmful, it is important to acknowledge that it is also without any tangible benefit to employers, to the broader community, or to the maintenance of peaceful industrial relations. The proposed legislation invites a greater bureaucratic and juridical burden on industrial relations, without usefully addressing the root causes of the problems it is ostensibly meant to resolve. It risks shifting labour disputes into new areas of law, and trade union administration becoming an uncertain proxy for both industrial policy and criminal law. Indeed, as we note in the following analysis, precedents in authoritarian states that curtail freedom of association by way of like-restrictions often do little to reduce instances of trade unions operating outside the law. Repairing trust in the formal mechanisms of industrial relations after (even temporary) experiences of unjustifiable interference in trade unions' democracy or the denial of trade union rights is likely to be a lengthy process. The long-lasting impact of such legislation could therefore be damaging to the operation of harmonious industrial relations in Australia for generations to come.

II. Disqualification of individuals from holding office in a union

2.1 Schedule 1 of the Ensuring Integrity Bill establishes a range of grounds that may be the basis for the disqualification of union officials from their posts. It is a sweeping power authorising an unprecedented level of state interference and supervision over the democratic process. The proposed reforms in essence deprive union electorates of their free choice of representatives and allow the state to dictate whether individuals may retain their liberty to hold leadership positions within their organisations. The proposed disqualification regime covers broad ground, across several Divisions of the Bill, and in doing so conflates a extraordinary range of issues: from serious crime (ss. 212(aa) and 223(6)(e)(i)); through failure to comply with the duties ordinarily placed on the officers of corporations (s. 223(4)); through the infraction of (potentially even minor technical aspects of) industrial law (ss. 223(1) to 223(3) - as per the definition under s. 9C(1)); to the potentially arbitrary concept of an individual's 'fitness' for office (s. 223(5)), itself to be weighed against an extraordinarily broad concept of 'events' (s. 223(6)). There is also a pathway (under s. 28A) to disqualification of officers (s. 28M) – and even permitting the exclusion of certain members (s. 28N) – on grounds that relate to issues of internal union democracy (s. 28C).

2.2 The conflation of these very different grounds is deeply problematic. In the first instance, the matters addressed are simply not comparable and bear no meaningful relationship to one another. Of particular concern in relation to several of the potential grounds for disqualification is the definition (s. 9C) of 'designated finding' (which draws even trivial infractions of industrial law within the ambit of s. 223(1) and s. 223(3)). As per the definition set out in s. 9C, a 'designated finding' could include minor or technical failures such as late lodgement of a union's financial reports with the regulator (a requirement under the Fair Work (RO) Act 2009, s. 268) and other routine aspects of industrial law, which are an entirely different class of legal infraction to incidents of theft or violence – and such minor cases of non-compliance are unjustifiable as grounds for disqualification.

2.3 Within these provisions, rests an attempt to find a regulatory solution to a problem that undoubtedly warrants the attention of the State: that of serious crime. Serious crime has no place in the trade union movement. Where instances of organised criminal fraud or serious violence occur our organisation recognises the role of the State to investigate and prosecute those responsible: trade unionists have no special protection against the ordinary application of the criminal law. Appropriate measures to deal with serious criminal conduct

within the labour movement or elsewhere do not therefore unduly concern our organisation. We note, however, that the disqualification measures constitute a supplementary punitive sanction, in addition to normal criminal law processes. These measures by their nature sanction not only the individual, but also interfere with the ordinary democratic functioning of membership organisations. Where such disqualifications do concern genuinely serious criminal matters they may be permissible, and we note parallels in the legal practice of several countries (see discussion below). We note, however, that equivalent provisions already exist under Australian law (Fair Work (Registered Organisations) Act 2009, s.215, and Part IV, generally[2]). Additional powers under the Ensuring Integrity Bill are unnecessary to bolster the existing laws, and the inclusion of serious criminal matters within this Bill does little to legitimise the more far-reaching powers contained within it, which have *nothing whatsoever to do with serious crime*.

2.4 The disqualification process includes a variety of potential grounds for disqualification that arise in situations that are *completely unrelated to serious crime.* One example is that disqualification may be triggered under s. 223(1) in relation to a 'designated finding' against a person (we note that the definition of 'designated finding' under s. 9C draws even minor or technical infractions of industrial law within the ambit of s. 223(1)). The potential for an individual to be disqualified from a leadership position – with personal, financial, and career implications – following a minor violation of non-criminal law, is excessive and grossly disproportionate. We are further concerned that disqualification from office of an individual on such meagre grounds further subverts the democratic process and wholly disrespects the principles of freedom of association, which require that the State ought normally to refrain from intervention in the free choice of leadership by union members.

2.5 Of further concern are the extraordinary powers in s. 223(3), under which an individual may be disqualified from office on grounds for which they personally may bear little meaningful responsibility or accountability. The section is engaged by potentially quite trivial violations of industrial law ('designated findings') against an organisation, but the sanction lies against an individual officer: 'a ground for disqualification *applies in relation to a person* if: (a) 2 of any of the following *findings are made against any organisation*' (s.223(3) – emphasis added). While the potentially sweeping impact of this section is tempered by s.223(3)(b), which indicates that an officer may have a defence if they can prove that they took reasonable steps to prevent the conduct, it is not clear that a union official will always be in a position to exercise this level of control with respect to the kinds of trivial

[2] Hereinafter the 'Fair Work (RO) Act 2009'

infractions of industrial law that appear to be caught by s. 223(3)(a)(i) ('designated finding'). The section establishes no requirement to prove that an officer sanctioned the conduct, failed appropriately to supervise the conduct, or was even aware of the conduct.

2.6 There are numerous areas of overlap in the Bill, with yet further disqualification powers arising also under the 'alternative orders' of s. 28, and under the 'fit and proper person' test outlined in ss. 223(5) and (6). These sections create alternative pathways to pursue the disqualification of a union official on grounds relating to compliance with industrial law (s. 28C(2) and 223(6)(a – c)). Section 28 also establishes a pathway to pursue the disqualification of an official based on matters of internal union democracy (s. 28C(1). As with s. 223(3), the s. 28C(1) process also makes disqualification of an official possible on grounds of conduct attributable not to that person but to the organisation (s.28D and E). The range of actors who can initiate any of these processes is problematic, including the Minister, Commissioner or any person with a 'sufficient interest' (ss. 28 and 222(1)). And the failure to distinguish between what are clearly incomparable categories of offence, present throughout this Bill, is again present under s. 223(6), which has damage to property (which could be of some seriousness, but is equally potentially quite a trivial matter), blithely listed alongside 'intentional causing of death' (s. 223(6)(e)(i)). We recall that, in any case, powers for disqualification in relation to serious criminal offences already exist, under the Fair Work (RO) Act 2009, s. 212.

2.7 We do not plead for any special dispensation from the criminal law for trade unionists, but this additional sanction, over and above the processes of the ordinary criminal law, is deeply problematic: firstly, because disqualification from office may be triggered even by a potentially minor offence (which is disproportionate); and secondly, because the subversion of trade union democracy which is inherent in the disqualification of a union leader constitutes a major interference with freedom of association and ought to be contemplated only in the most serious cases (if at all). Disqualification from union office should certainly not arise on grounds related to a minor or trivial offence, or as an externally imposed punishment following perceived failings in internal democracy. And we reiterate our concern that the legislation establishes a pathway for 'interested' parties (s. 222(1)) to initiate disqualification proceedings against trade unionists in relation to any breaches of the criminal law, however trivial.

2.8 Crucially, there is no requirement that legal infractions be of a nature that impugns upon the moral character of the officers concerned. While trade unionists can claim no exemption from the ordinary application of the law it is unclear why even relatively minor

legal infractions – particularly those by an organisation rather than the individual themselves – might bar them from office. Not even the conditions for nomination to the Senate and the House of Representatives contain such standards (these only bar from nomination candidates serving a prison sentence of 12 months or more)[3]. Imposing these standards for trade union officials is thus totally disproportionate to the existing standards for holding public office.

How is this issue dealt with in the rest of the world?

2.9 Throughout Europe, the US and Canada, the election of union officials is largely free from state interference on almost any grounds. Many states have no formal provisions restricting who may stand for union election, deferring such matters internal to trade union democracy exclusively to the decision-making of the relevant union's membership. Our colleagues in New Zealand reported no power of the State to disqualify a person from election to a trade union position, citing that this would be purely a matter of internal trade union democracy.

2.10 Some exceptions were reported to this position. US law has one of the most far-reaching disqualification regimes, but this is concerned only with serious crime and financial crime. The US disqualifies from union office persons convicted of 'robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of title II or III of this Act [financial reporting and trustee obligations], any felony involving abuse or misuse of such person's position or employment in a labor organization or employee benefit plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element' (Labor Management Reporting and Disclosure Act, 1959 (29 USC, Chapter 11, s. 504(a)).

2.11 French law is similarly concerned only with serious criminal offences: an individual is disqualified from running for union office in the event that they have been convicted of certain serious crimes in relation to which a judge has imposed an additional sanction of the restriction of their civil (voting) rights, which restriction is temporary, for a duration specified by the judge according to the seriousness of the crime (Labour Code (unofficial English

[3] https://www.aec.gov.au/Elections/candidates/overview htm

translation), Art. L2143-1). In the UK, there are provisions disqualifying persons guilty of dishonest falsification and destruction of documents, which may last for 5 or 10 years, from the position of president, general secretary, and principal executive committee (Trade Union and Labour Relations (Consolidation) Act 1992, s. 45).

2.12 Provisions such as those identified above seem relatively uncontroversial, and already have a parallel in existing Australian law (Fair Work (RO) Act 2009, s.215, and Part IV, generally). It is notable that this existing Australian framework *already* draws within its ambit a wider range of offences, and less serious offences, than most of the disqualification frameworks we have looked at for comparative purposes for this report, but this is tempered by a right to apply for leave to hold office (ss. 216 – 218). The present move to promote a greater role for the state to interfere in this aspect of union democracy would take Australia away from the approach it currently broadly shares with these other jurisdictions. Restrictions on electoral eligibility for union officials arising from much less serious infractions of technical industrial law would be significantly out of step with practice in North America and Europe.

2.13 More far-reaching systems for the disqualification of union officials find their parallels in States with weaker democratic traditions. Turkey, for example, disqualifies from *founding* a union persons 'who have been found guilty of a felony such as embezzlement, corruption, bribery, theft, fraud, forgery, obtaining by false pretences, fraudulent bankruptcy, bid rigging, fraud in fulfilment of obligations, laundering assets derived from criminal offences or smuggling' (Law on Trade Unions and Collective Labour Agreements, Law No. 6356, Date of Enactment: 18/10/2012 (Article 6)), and was one of very few States where we found explicit powers for the State to remove a union official from their post, for 'activities contrary to the characteristics of the Republic enshrined in the Constitution and the democratic principles' (Law on Trade Unions and Collective Labour Agreements, Law No. 6356, Date of Enactment: 18/10/2012 (Article 31)).

2.14 While the specific harm addressed by Article 31 of the Turkish law is poorly defined (and therefore carries a risk of abuse), we do find it worthwhile to note that Turkey makes a clear distinction between cases in which the organisation is found to be at fault, and those 'where the acts of violation are *committed individually by union officials'* (emphasis added). In the former case, the sanction is against the organisation, in the latter the sanction is addressed to the individuals, not the organisation, and 'the court shall decide to remove only those union officials from office' (Article 31). The proposed Ensuring Integrity Bill takes the

opposite approach and repeatedly blurs the distinction between fault and accountability of the organisation and the individual.

2.15 Another jurisdiction in which we found examples of more far-reaching disqualification of individuals from holding union office is Brazil, but it is notable that the provisions in question date back to 1943, and are a legacy of the Vargas dictatorship. Brazilian law bars from union positions: 'those who do not have their accounts permanently approved to act in management positions'; 'those who have damaged the heritage of any labour union'; 'those who have not performed in the effective exercise of the activity or profession within the territorial base of the union, or the performance of economic or professional representation for at least two (2) years'; 'those who have been convicted of a felony while the effects persist'; 'those not in the enjoyment of their political rights; ; and 'those guilty of duly attested misconduct' (Consolidated Labour Laws, Decree-Law No. 5452, of 1 of May 1943 (Decreto-ley núm. 5452, de 1° de mayo de 1943, por el que se aprueba la Codificación de las Leyes del Trabajo [en su tenor modificado]) (unofficial English translation) (Art. 530)). This broad framework groups together serious crime with other minor and vaguely defined transgressions, and is probably the closest of all those we considered to that proposed by the Ensuring Integrity Bill. For Australia to propose an industrial law reform that would bring it closer to the example provided by Brazil's historical dictatorship than to those found in modern Western Europe illustrates just how alarming these developments are. The proposal is not merely 'out of step' with the industrial relations systems of comparable countries; it has no rightful place in a modern liberal democracy.

Position in international law

2.16 Article 3 of ILO Convention No. 87 states clearly that: 'workers' and employers' organisations shall have the right to […] to elect their representatives in full freedom…' and emphasises specifically that 'the public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof'. The basic position, consistently advocated by the Committee on Freedom of Association (CFA) is that there should be essentially no interference by the authorities: 'the determination of conditions of eligibility for membership or office is a matter that should be left to the discretion of union/employer organization by-laws and the public authorities should refrain from any intervention which might impair the exercise of this right' (*Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, ILO. 6th Edition,

2018[4], para. 606). Commensurate with this position, 'the removal by the Government of trade union leaders from office is a serious infringement of the free exercise of trade union rights' (*Freedom of Association*, para. 654).

2.17 The CFA does recognise that trade union leaders have no specific immunity to violate the law, but it emphasises that the law must not sanction legitimate trade union activities. We recall that the 'designated findings' clauses within the Bill may be called into play for precisely the kind of breaches of industrial law that might occur within the context of legitimate trade union activities: 'although holders of trade union office do not, by virtue of their position, have the right to transgress legal provisions in force, these provisions should not infringe the basic guarantees of freedom of association, nor should they sanction activities which, in accordance with the principles of freedom of association, should be considered as legitimate trade union activities' (*Freedom of Association*, para. 79).

2.18 Looking further into the question of the grounds upon which the CFA might accept the disqualification clauses of the Ensuring Integrity Bill, we note the CFA's emphatic rejection of a general disqualification for any conviction: 'A law which generally prohibits access to trade union office because of any conviction is incompatible with the principles of freedom of association, when the activity condemned is not prejudicial to the aptitude and integrity required to exercise trade union office' (*Freedom of Association*, para. 625). The failure to distinguish minor or trivial offences under ss. 223(6)(d)–(e) of the Ensuring Integrity Bill would seem wholly incompatible with the ILO's clear position.

2.19 This is a position that the CFA has emphasised further: 'as regards legislation which provides that a sentence by any court whatsoever, except for political offences, to a term of imprisonment of one month or more, constitutes grounds that are incompatible with, or which disqualify from the holding of executive or administrative posts in a trade union, the Committee has taken the view that such a general provision could be interpreted in such a way as to exclude from responsible trade union posts any individuals convicted for activities involving the exercise of trade union rights, such as a violation of the laws governing the press, thereby restricting unduly the right of trade unionists to elect their representatives in full freedom' (*Freedom of Association*, para. 628).

2.20 Of importance in the jurisprudence of the CFA is the idea that too broad a regime of disqualification for any offence is unacceptable, and that the only kinds of conviction that

[4] Hereinafter '*Freedom of Association'*

might potentially constitute legitimate grounds for the disqualification of a trade union leader are those that specifically call into account the integrity of the person: 'conviction on account of offences the nature of which is not such as to call into question the integrity of the person concerned and is not such as to be prejudicial to the exercise of trade union functions should not constitute grounds for disqualification from holding trade union office, and any legislation providing for disqualification on the basis of any offence is incompatible with the principles of freedom of association' (*Freedom of Association*, para. 626). The CFA has rejected outright the principle of disqualification for criminal transgressions committed in the course of trade union activities, stating that only offences that are 'unconnected with trade union activities' could potentially be grounds for such a sanction: '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' (*Freedom of Association*, para. 627).

2.21 The CFA cautions too against sweeping generalisations founded on oblique notions of "dishonesty", noting that 'ineligibility for trade union office based on "any crime involving fraud, dishonesty or extortion" could run counter to the right to elect representatives in full freedom since "dishonesty" could cover a wide range of conduct not necessarily making it inappropriate for persons convicted of this crime to hold positions of trust such as trade union office' (*Freedom of Association*, para. 629). Proposed s. 223(6)(d) fails to anticipate the kinds of distinction which the CFA here plainly requires. The section would thus be incompatible with ILO principles of freedom of association.

III. Cancellation of registration of registered organisations

3.1 Uniquely, among the broadly comparable industrialised democracies we surveyed, Australia already has excessive laws in place for the punitive deregistration of trade unions, (s. 28, Fair Work (RO) Act 2009). These laws as they currently exist are already non-compliant with the principles of freedom of association enshrined in ILO Convention 87 (see below). The Ensuring Integrity Bill will introduce even more far-reaching measures for the state to deregister trade unions and take Australia still further from normal international practice in this area; it risks normalising and extending what is a profoundly intrusive system of state intervention in the democratic affairs of trade unions.

3.2 Like other provisions of the Bill, this section conflates a spectrum of distinct grounds. For the same reasons discussed above with regard to disqualification orders, it is problematic that s. 28D anticipates serious forms of criminal offence, yet could equally be triggered by minor or even trivial offences). The provisions also cover breaches of industrial law (s. 28E and s. 28C (i)(c)) ('compliance with 'designated laws'). As noted above, in the case of serious criminal matters and corruption , we recognise that there may well be a rationale for states to take action against those responsible under appropriate criminal laws. For less serious offences, or in the case of technical non-compliance with industrial law (s. 28E and s. 28C (i)(c)), the rationale for serious punitive action against a union and its entire membership, through deregistration, is highly questionable.

3.3 The effect of deregistration is the loss of status as an organisation and a body corporate (s. 32, Fair Work (RO) Act 2009). The union is thus relegated to the status of an association; neither it nor its members are 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 (Fair Work (RO) Act 2009, s. 32(c)). Deregistration thus deprives the targeted union of the capacities to perform its basic functions, and effectively deprives its members of the freedom to organise to defend their interests.

3.4 This form of sanction is deeply alarming. Not only is it practically unheard of in industrialised liberal democracies, but the section makes the 'nuclear option' of deregistration the default response, rather than a last resort following the exhaustion of alternative responses: if a finding is made under section 28 'the Federal Court *must* cancel the registration' (s. 28J, emphasis added). For the default penalty to be tempered the accused

organisation must demonstrate that deregistration would be 'unjust', in which case the Court may consider imposing a less severe sanction (s. 28L). This posits deregistration as the primary response to alleged violations and makes lesser alternative sanctions subject to the targeted union's ability to appeal for clemency; such a legal structure is highly questionable from both a policy and an international law perspective.

3.5 Having raised concern that deregistration is foregrounded under the s. 28 powers, we note that an alternative pathway exists, under which the complainant (on which point, see below) may choose to commence the process by application for an 'alternative order', which may include disqualification of union officials (discussed in the previous section), the exclusion of certain members (s. 28N), or the suspension 'of the rights, privileges or capacities of the organisation or a part of the organisation, or of all or any of its members' (s. 28P).

3.6 Of equal concern is the fact that the s. 28 deregistration process can be initiated not only by the State but also by the Minister, or indeed by any 'person with sufficient interest', which seems openly to invite employers and lobby groups with an anti-union agenda to seek to initiate this process at any opportunity. As drafted, this section is not a recipe for industrial peace, and seems recklessly to seek to create an opportunity for employers and other parties 'with a sufficient interest' to attempt to push trade unions out of the formal industrial relations framework. In operation it turns the current system of registration into one under which the basic purpose of freedom of association – which should be guaranteed without restriction or impairment – may be severely curtailed on minor grounds, at the initiation of employers or other parties hostile to organised labour.

3.7 This creates instability and unpredictability in industrial relations and such an outcome is unlikely to benefit even those who are advocating it. Deregistered unions are unlikely to roll over and die – a fact to which Australia's own historical experiences with deregistration can testify. On the contrary, such measures are likely to exacerbate conflicts over industrial and employment policies. Our organisation regularly reports on disputes in countries where such approaches have been tested; we list some examples in the following section. Authoritarian regimes, which seek to ban unions or subvert the industrial relations framework to exclude the organisations that workers have democratically chosen to establish and join, antagonise the very complaints that prompted workers to organise in the first place. In most cases, this leads to more industrial strife. Unions will pursue their members' interests as best they can however ad-hoc and repressive the environment becomes into which they are driven.

How is this issue dealt with in the rest of the world?

3.8 None of the industrialised democracies we surveyed entertain anything approximating such a punitive regime for deregistration of trade unions. In most of these countries, the establishment of trade unions is constitutionally protected; in many cases, there is no provision for registration and no equivalent status for trade unions. For example, the laws in Belgium, Denmark, France, Germany, Italy, Norway, Sweden and the US do not require trade union registration; since there is no equivalent to the registration system, unions cannot be deregistered. In France and Spain only very minimal requirements exist for the deposit of statutes with the authorities, and there is no formal deregistration process for unions. In Portugal, unions are constituted by means of their own statutes and constituting assembly and register with the Ministry of Labour only as a formality in order to acquire legal personality. In Germany, unions may register as associations but predominantly opt not to and are thus treated as 'Associations without legal personality' under the German Civil Code ('Bürgerliches Gesetzbuch' s. 54); this option does not curtail their ability to function as unions.

3.9 Where systems of registration exist, some states make basic provisions for deregistration of a union in the event that it ceases to comply with the requirements for registration, which are typically minimal. For example, in the UK a union's certificate of independence can be withdrawn only on very limited grounds – essentially that it is either no longer a trade union, or is no longer independent (i.e. is under employer domination) (Trade Union and Labour Relations (Consolidation) Act 1992 (Chapter 52) (as amended) (ss. 4-5)). In New Zealand, registration can also be withdrawn only if the union is employer-dominated or has rules that are undemocratic, discriminatory, contrary to law, or fail to provide for mandatory balloting rules (Employment Relations Act 2000 (Ss. 7 and 14). In the Republic of Ireland a union's negotiating licence is granted as a matter of course **'**where … the applicant is shown to the satisfaction of the Minister to be an authorised trade union', the Minister shall grant such licence (Trade Union Act, 1941, s. 10), and it can be revoked only on very limited grounds - that the union 'has ceased to be an authorised trade union' (s. 17). Provisions for voiding registration are limited to cases in which the union no longer exists or has an unlawful purpose (Trade Union Act, 1871, s. 6). These cases reflect the kind of categories that already exist in the Fair Work (RO) Act 2009, s.30.

3.10 States which provide for formal union registration or certification usually deploy these regimes as gateways for unions being accorded bargaining rights, and thus the conditions which need to be met (such as independence) are often little different from how

bargaining rights are achieved in states without formal union registration. In the US for example, a certification system gives unions bargaining rights vis-à-vis the employer. De-certification of a union is however a democratic matter for the employees represented in any given bargaining unit (National Labor Relations Act 1935 (29 USC, Chapter 7, s. 159(e))). The only provision permitting the withdrawal of bargaining rights applies to public sector unions that commit unlawful acts. This is thus on a par with how bargaining rights are accorded in states without systems of formal registration or certification: in Germany for instance, a collective agreement signed by a union may be deemed invalid if a union has no relevant members or is deemed not to be independent of the employer.

3.11 One outlier in our survey is Poland, where the registry court is permitted to remove a union from the register, triggering its dissolution. This is possible however only in cases of a union's unlawful activity, and only as a last resort. Prior to this, the court must exhaust alternative options, including imposing a 14-day order on the trade union authority to rectify unlawful activity, fining the individual members that do not comply, and setting a date for elections to the trade union authority under threat of its suspending activities. If these prove ineffective, the registry court will deregister the union, subject to appeal. (Act of 23 May 1991 on the Settlement of Collective Labour Disputes (unofficial English translation), Text No. 236 (Ustawa z dnia 23 maja 1991 r. o rozwiazywaniu sporów zbiorowych) (Art. 36)). The procedure can crucially be initiated only by the competent public prosecutor and has been sparingly used in practice[5].

3.12 In contrast to Polish law, the Ensuring Integrity Bill provides that 'the Court *may consider making alternative orders* instead of cancellation *only* if the organisation satisfies the Court that cancellation would be unjust' (s. 27A, emphasis added), meaning that *the last resort* option entails providing a union with *the opportunity to rectify the situation* which gives grounds for its deregistration, subject to convincing the court that deregistration would be unfair. Cancellation of registration is however of the first order. Combined with the fact that such applications for a union's deregistration under the regulations may be initiated by any person with a sufficient interest and include grounds of any trivial infraction of technical industrial relations legislation (incorporated through reference to 'designated findings'), this means that the proposed legislation is of a wholly different order to the Polish trade union laws.

[5] Jakub Gołaś, 'Defining the Pillars of Trade Union Freedoms: the Polish Example' Adam Mickiewicz University Law Review (2018), pp.265-280: DOI 10.14746/ppuam.2018.8.18

3.13 Analogous powers are also found in Turkey, where the courts may dissolve 'organisations carrying out activities contrary to the characteristics of the Republic enshrined in the Constitution and the democratic principles shall be dissolved by a Court decision, upon the request of the Chief Public Prosecutor of the Republic' (Law on Trade Unions and Collective Labour Agreements, Law No. 6356, Date of Enactment: 18/10/2012 (Article 31)). While this goes some way further than the proposed deregistration, two points are important to note: firstly, that such comparison places Australia on a par with a state notorious for its repressive and authoritarian legal-political culture and a serious record of trade union and human rights violations; secondly, that even under the Turkish law, a clear distinction is preserved between acts committed by the organisation (arising from which the sanction is against the organisation) and acts committed by individual officials (arising from which the sanction is only against the officials concerned).

3.14 Other comparisons worth contemplating in respect of the proposed legislation hail from states that either ban trade unions in particular sectors, or prohibit independent unions outright. Examples include Bangladesh's export textiles sector, China, Iran, Saudi Arabia, and Vietnam. Of these, Saudi Arabia and Iran's totalitarian regimes have largely (but not entirely) stifled trade unionism in those countries – not only through restrictive industrial relations laws, but also through a penal system that excessively punishes those participating in criminalised trade union activities through detention, torture and capital punishment. Unionisation in these and similar states is dangerous, fraught and understandably rare.

3.15 The other examples however illustrate that restrictive industrial relations laws that deny workers the right to organise and establish unions of their choosing, or deny those unions the associated participatory rights necessary to defend their members' interests, do not effectively silence workers. On the contrary, these countries are afflicted by some of the largest-scale industrial unrest anywhere in the world. Bangladesh's export zones see frequent outbursts of wildcat strike activity, mass protests often descending into confrontation with the authorities and the deployment of state violence. Vietnam and China, which both prohibit worker organising outside a monopolistic State-controlled system, have witnessed ad-hoc and unpredictable strikes break out on a vast scale completely outside of the formal industrial relations system. Legal strategies to deny particular unions having a voice can hardly be regarded as a recipe for peace, or for a reduction in trade unionism of a militant character. Rather, they often embolden the labour movement to adopt more radical action, justified by unions' exclusion from official channels through which to express their grievances.

Position in international law

3.16 It is worth noting at the outset that in 2016, the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) commented on deregistration powers contained in the Industrial Relations Act 1996 (New South Wales) (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). This restriction from the Industrial Relations Act 1996 is almost identical to one of the existing provisions permitting deregistration in the Fair Work (RO) Act 2009 (s. 28(1b). The objections of the CEACR to the 1996 Act would therefore seem to also apply to the 2009 Act as it currently exists, namely that deregistration 'is an extreme measure involving a serious risk of interference by the authorities with the very existence of organizations'.

3.17 The ILO's supervisory bodies have consistently articulated three concerns relevant to the proposals on deregistration: (1) that formal registration procedures which in effect subject workers' rights to organise to the prior authorisation of public authorities are in contravention of Convention 87; (2) that attributing liability for acts of individual officials or certain members to the union organisation as a whole violates the principles of freedom of association; and (3) that due to the impact on workers' capacity to exercise their fundamental rights, procedures for deregistration of a union should be imposed only as a last resort – after all reasonable alternatives have first been exhausted.

3.18 With regard to the first, the CFA has clearly established that 'the right to official recognition through legal registration is an essential facet of the right to organise since that is the first step that workers' or employers' organisations must take in order to be able to function efficiently, and represent their members adequately' (*Freedom of Association*, para. 449). Permitting administrative refusal of union registration on the grounds that 'the organisation could exceed normal union activities or that it might not be able to exercise its functions', to prevent ostensible future unlawful acts, or because the authorities consider registration 'politically undesirable', would – according to the CFA – be tantamount to subjecting unions to previous authorisation of the administrative authorities and can give rise to abuse (*Freedom of Association*, paras. 451-2, 461). For these reasons, only where 'the registration of trade unions consists solely of a formality where the conditions are not such as to impair the guarantees laid down by the Convention' does the CFA consider such conditions in compliance with Convention 87 (*Freedom of Association*, para. 448). Deregistration by administrative authorities is thus also regarded as 'tantamount to the dissolution of that

organisation by administrative authority' and 'constitutes a clear violation of Article 4 of Convention No. 87' (*Freedom of Association*, para. 987-8).

3.19 Although the proposed legislation permits deregistration only following judicial (not merely *administrative*) proceedings, it is notable that the current process (Fair Work (RO) Act 2009, s. 30) allows the Commission to deregister a union, and the Ensuring Integrity Bill maintains that. In any case, the above texts from the CFA highlight the clear primacy accorded by the ILO Conventions to the principles of freedom of association, with the result that restrictions on these principles through registration proceedings are to be minimalised in order to avoid interference with workers' fundamental rights. The use of registration procedures as a way to curb the activities of trade unions is clearly regarded as an unjustifiable impairment of these rights.

3.20 Secondly, the CFA has pronounced on many occasions that depriving workers of their trade union organisations on the grounds either that some of its leaders or some of its members have engaged in illegal activities constitutes a clear violation of the principles of freedom of association (*Freedom of Association*, para. 995). Any proceedings against those individuals should not constitute an obstacle to the granting of legal personality to the organisation concerned, nor to its continued enjoyment of legal personality (*Freedom of Association*, para. 426). Where such activity is alleged or confirmed, the individual leaders or members concerned should be prosecuted under the specific legal provisions and in accordance with ordinary judicial procedure, without invoking procedures for deregistration, suspension or dissolution of the union organisation (*Freedom of Association*, para. 996) Financial irregularities should be similarly dealt with, and any legal action directed against the persons responsible, rather against the union itself, as such would punish all members and deprive them of their rights to take action to defend their interests (*Freedom of Association*, para. 997). The authorities should not extend judgment or prejudice the existence of a union organisation simply on the basis of convictions upheld against individual trade unionists within its membership or leadership (*Freedom of Association*, para. 159).

3.21 Thirdly, the CFA is unequivocal that deregistration by administrative authority is tantamount to dissolution, and in view of the serious consequences which such sanctions would involve for the occupational representation of workers, it is in the interest of labour relations that such action is taken 'only as the last resort, and after exhausting other possibilities with less serious effects for the organisation as a whole' (Report in which the committee requests to be kept informed of development - Report No 323, November 2000, Case No 2075 (Ukraine), para. 518). As noted, these provisions do only permit *judicial*

deregistration; however, in this judicial procedure, deregistration is a *first* – not a last – resort. In combination with the fact that such sanction may arise from the actions of *certain* members or union leaders, but would deprive the *entire* membership of the industrial relations functions of their union, and that the judicial process may be initiated by all and sundry, one can conclude that the CFA would also adjudge these entirely novel and lamentable provisions on deregistration in the Ensuring Integrity Bill as tantamount to dissolution, and therefore a violation of Convention No. 87.

IV. Placing unions into administration

4.1 Section 323 of the Ensuring Integrity Bill proposes that, on the application of any one of various parties entitled to raise the matter, the Federal Court may make various declarations indicating that a union has become in some sense 'dysfunctional'. The accompanying s. 323A then empowers a court to impose a 'scheme', which could include the appointment of an administrator who has broad powers to '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' (s. 323F(1)(d)). Officers and employees of the union are placed under a strict liability obligation to cooperate and provide assistance to the administrator (s. 323G). These measures place unelected administrators in full control of all functions of the union, denying the membership their fundamental rights to act collectively and independently in defence of their interests. The 'scheme' may also require that an election be organised (s. 323A(2)(d)), thus making the process attractive to anyone who – for whatever motive – wishes to attempt to overturn the elected leadership of an organisation.

4.2 The declaration that an organisation is 'dysfunctional' is extraordinary – as are the sweeping powers of the administrator, not only to ensure protection of union assets, but to '*exercise any power*' that the union would otherwise have (s. 323F(1)(d), emphasis added), wholly usurping the powers of the entire body of democratically elected representatives.

4.3 The extraordinary power that this section seeks to create has no reasonable justification. It is provided a certain legitimising cover by the inclusion within its ambit of serious matters of criminal fraud and financial misconduct (ss. 323(4)(b) and 323(3)(b)). These are issues that rightly draw condemnation, and there are concerns within the labour movement for the need to protect union assets on behalf of members against corruption and mismanagement. The existence of at least some form of state regulatory framework to cover these issues is not unusual (equivalent provisions under UK and US law are discussed below). Here however, the proposed non-exhaustive definition of financial misconduct includes a 'failure to fulfil duties in relation to financial reporting' (s. 6), whereby minor or technical contraventions of extensive reporting duties (such as short delays in filing a financial report) could be invoked as grounds to impose sweeping administrative powers over a union.

4.4 Furthermore, like other sections of the Ensuring Integrity Bill, s. 323 bundles together a number of divergent situations, ranging from the apparently mundane – addressing a union

that has 'ceased to exist' (s. 323(3)(a)) – to various aspects of union democracy (ss. 323(3)(c) and 323(3)(d)) and the conduct of individual officers (s. 323(3)(b) and 323(4)). In the existing s. 323 of the Fair Work (RO) Act 2009, the Court's power is clearly limited to approving a scheme for a collective body of (or officers of) *the organisation itself* to take action to reconstitute a branch or part of the organisation, *absent effective means provided for in the organisation's own rules*. Such power would appear justified to support – rather than undermine – the effective and democratic functioning of unions: it does not entertain superseding any power from the union itself. The current Bill proposes extensive reform of these provisions, far beyond their original rationale.

4.5 Moreover, by conflating a range of grounds within the ambit of powers for an administrative takeover of unions, the provisions create avenues for the law to be abused in order to disrupt legitimate trade union activities. For example, in a situation where 'an office or position in an organisation or part of an organisation is vacant' and 'there is no effective means under the rules of the organisation or part to fill the office or position' (s. 323(3)(e)), there is no logical policy basis for appointing an administrator with sweeping powers over the union's functions – over and above its membership – to resolve the situation. The only reason that these are now connected in the Bill seems to be that these extraordinary powers have been tacked on to provisions in the existing legislation – creating possibilities for interference where there is no genuine need and greatly increasing the risk of their misuse.

4.6 Nor do the situations that have been appended to this section serve to justify such a degree of interference. Concerning trade union democracy, Section 323 powers may be invoked in a range of situations, in which officers have acted in their own interests rather than in the interests of the members' (s. 323(3)(c)); or that the union's affairs are being conducted in a way that is 'oppressive or unfairly prejudicial, or unfairly discriminatory against, a member or a class of members' (s. 323(3)(d)(i)); or that officers have conducted the affairs of the organisation 'contrary to the interests of the members of the organisation or part as a whole' (s. 323(3)(d)(ii)). There is no doubt that office holders' exercise of their mandates against the interests of the members who elected them is of the greatest significance for a union's membership. But *who* is to determine whether the affairs of a union are being conducted 'contrary to the interests of the members of the organisation' (s. 323(3)(d)(ii)), if not the *members themselves*?

4.7 Union members exercise democratic control over their representatives under their organisation's constitutions, through the democratic processes that they have agreed upon. If an official is acting contrary to their interests, members must be empowered to express their

displeasure (and to remove the individual) through the union's democratic process. We do not agree that the State has the right to step in and take such decisions for them, presuming a paternalistic duty to define the members' collective 'interests' – the promotion of which is the very objective of workers' rights to organise independently in the first place. Such a presumption has contemporaneous manifestations in precisely those States which seek to place the entire spectrum of labour organisation under monopolistic state control.

4.8 A union is furthermore automatically 'taken to have ceased to function effectively' where individual officers have repeatedly violated provisions of 'designated' (industrial) laws (s. 323(4)(a)), misappropriated funds of the organisation (s. 323(4)(b)) or 'repeatedly failed to fulfil their duties as officers' (s. 323(4)(c). Of themselves, none of these examples of individuals' conduct are adequate as indicators for the effective functioning of the organisations in which they may have occurred. In the first instance, the frequency of violations of laws says nothing of the gravity of the infractions themselves: certain individual officers' repeated infringements of minor, technical requirements of industrial relations law are not justifiable grounds for placing *the entire organisation under administration* and such measures serve no meaningful policy objective. The same applies to the fulfilment of officers' duties.

4.9 Nor is the instance of theft from an organisation by its officers indicative of whether the organisation itself is 'functioning effectively'. In this case, the focus of lawmakers should be precisely on holding those individuals to account and providing redress to victims, by supporting the organisation concerned in addressing the conduct or taking action against those individuals. While Section 323(4) clearly alludes to what are potentially serious situations, concerning unlawful and dishonest conduct of individual officers, it is *non sequitur* to draw from such conduct sweeping conclusions about the organisations for which these individuals work, and unjustifiable to use these premises to thus usurp all powers of those organisations, denying their members the right to act collectively and in accordance with their own rules.

4.10 Finally, we note with concern that these measures can be initiated not only by the membership, but also by a Government Minister, an employer or lobby group, or indeed any person claiming to have a 'sufficient interest' (s. 323(1)). By conflating all of these very distinct situations and channelling the response towards a single process – the establishment of a 'scheme' under s. 323A, which permits the appointment of an administrator, with the sweeping powers referred to above – these provisions pose a very high risk of abuse. The potential for abuse of these procedures by 'interested' parties opening malicious prosecutions is clear. These administrative measures restrict and ultimately jeopardise the exercise of

freedom of association, by placing unelected administrators in full control of all functions of the union, denying the membership their fundamental rights to act collectively and independently in defence of their interests. Even in cases of serious fraud, these clearly involve the actions of individuals and do not impugn the organisations in which they hold office, so there is simply no logical justification for permitting this level of state interference: civil and criminal laws should suffice to combat, punish and remedy fraudulent acts of individuals and where they do not, reform should be sought in these areas of law, not in the realm of trade union regulation.

How is this issue dealt with in the rest of the world?

4.11 The breadth of the power under this section of the Ensuring Integrity Bill is without an obvious comparator in the countries we surveyed. The power to take administrative control of a union is a uniquely severe legislative measure, for which one finds little precedent in modern industrial relations law in liberal democracies. As discussed elsewhere in this report, and in conformity with the fundamental ILO Conventions and interpretations of the ILO's supervisory bodies, state regulations that concern the establishment or functioning of trade unions are meant to promote trade union democracy, not impair or restrict it. The imposition of an unelected administrator with sweeping powers is irreconcilable with this purpose, and therefore one does not find an equivalent form of regulation in other states.

4.12 With regard to fraud and financial misconduct within unions, some jurisdictions do have relevant laws – though they bear little comparison to these proposals. The closest analogies are from other Anglophone nations, with shared juridical antecedents, and they provide a useful comparison of how these specific problems can be more appropriately targeted.

4.13 Insofar as similar powers exist in the US, these are not exercised as an aspect of State power over the union. Rather, unions themselves are allowed to impose trusteeships on subdivisions - and US law has extensive requirements for such imposition - but nothing in the law allows the government or a court to declare a union 'dysfunctional' and take it over. A court may impose receivers to protect union funds and for recovery of the proceeds of crime if a case is made out under the Racketeer Influenced and Corrupt Organizations ('RICO') Act (18 USC. ss. 1961–1968), but this requires a 'pattern of activity' involving serious criminal activities, defined as: 'any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion or dealing in narcotic or other dangerous drugs', or cases of

counterfeiting, or fraud. The statute was introduced to tackle the spread of serious organised crime (particularly the infamous Cosa Nostra crime syndicate) throughout US social and economic life, and particularly in the business world (which is why the statute refers to activity within an 'enterprise', though this has been interpreted liberally, to cover many forms of organisation). The notorious case in which a national union was prosecuted under these provisions, some decades ago, did not lead to the imposition of administrators, and ended with a consent agreement between the union and the Justice Department creating an independent monitor who reported back to the Justice Department on the union's progress. After a number of years, the union made enough progress that the oversight regime ended and it regained fully independent control of its affairs.

4.14 In the UK, the Certification Officer has the power to require unions to produce financial documents and records in respect of fraud, management of funds by a person convicted of fraud, or of the union not complying with statutory duties or its own rules in relation to funds. Failure to comply may be an offence (s. 45(1)), punishable by fine or imprisonment (s. 45A). An alternative power permits court intervention if trustees have caused or permitted unlawful use of the union's property (s. 16, Trade Union and Labour Relations (Consolidation) Act 1992). The courts may require the trustees to take steps to protect or recover the property, appoint a receiver to protect the property, or remove trustees. But there is no concept for declaring a union 'dysfunctional', the removal of trustees does not usurp the executive powers of elected officials, and the powers exist solely to protect union funds against unlawful use – there is no punitive element. Further, and significantly distinguishing the s. 16 power from that proposed under the Ensuring Integrity Bill, is that the process is triggered by a complaint presented by a member, with no power for outside 'interested parties' to trigger the process.

4.15 Colleagues in New Zealand similarly advised us that nothing in New Zealand's law would allow for a union to be declared 'dysfunctional' leading to the imposition of administrators, but New Zealand also has rules for addressing financial misconduct by those responsible for administering trade union finances. These however, could in no way be regarded as part of a punitive regime, and rather – as would be expected – seek to empower the trade union as an organisation against individuals who may commit crime or fraud against it. The provisions emphasise the obligations of the treasurer to the union, establishing financial reporting requirements, and creating a cause of action for the trade union's trustees to sue the treasurer in the event of a failure to properly account for and release funds to the union (Trade Union Act 1908, s. 16). A person wilfully withholding or misapplying trade

union funds is obliged to repay such funds to the trade union, or face criminal punishment under proceedings that may be commenced by the Registrar or by the trade union (s. 15).

4.16 In general, laws concerning financial misconduct are not subject to any particular regime specifically targeting trade unions in most countries. Instances of fraud, corruption and misappropriation of funds are legally no different in cases when they are alleged or confirmed against union officials than in cases involving other organisations, and the trade union laws are usually absent such provisions. Our survey of labour laws was also unable to find legislation comparable to the provisions under this section placing a union under administration on grounds of various deficiencies in union democracy. Situations concerning an organisation that has ceased to exist are similarly a private law matter, normally dealt with following procedures found in the organisation's own constitution.

Position in international law

4.17 Article 3 of ILO Convention No. 87 states: 'workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes'. The CFA has clearly articulated that this principle requires public authorities to refrain from any intervention in the free and democratic exercise of Convention rights by trade unionists: 'freedom of association implies the right of workers and employers to elect their representatives in full freedom and to organise their administration and activities without any interference by the public authorities' (*Freedom of Association*, para. 666).

4.18 In so far as any scheme of administrative oversight of trade union affairs is concerned, the CFA has consistently warned that it regards such actions as dangerously threatening fundamental liberties: 'the placing of trade union organisations under control involves a serious danger of restricting the rights of workers' organisations to elect their representatives in full freedom and to organise their administration and activities' (*Freedom of Association*, para. 662). Grounds that unions have suffered from 'corruption' have not been deemed sufficient to legitimise such practices: 'the appointment by the government of persons to administer the central national trade union on the ground that such a measure was rendered necessary by the corrupt administration of the unions would seem to be incompatible with freedom of association in a normal period' (*Freedom of Association*, para. 656).

4.19 While the Ensuring Integrity Bill's concept of 'dysfunctional' trade unions is quite novel, parallels are clear in cases where it has been claimed that unions have been 'incapable' or have lacked 'discipline'. Where union leaders have been removed from office on such grounds, the CFA has stated bluntly that this 'obviously' violated freedom of association: '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 organisations have the right to elect their representatives in full freedom and to organise their administration and activities' (*Freedom of Association*, para. 659).

4.20 Indeed, the legitimacy of a process by which an administrator might be installed to oversee union affairs has consistently been called into question by the CFA in defence of the fundamental principles of independence that Convention 87 seeks to protect: 'the fundamental idea of Article 3 of Convention No. 87 is that workers and employers may decide for themselves the rules which should govern the administration of their organisations and the elections which are held therein' (*Freedom of Association*, para. 667). In a case analogous to the proposed Ensuring Integrity Bill powers authorising a 'scheme' to interfere in the management of a trade union, to remove officers, and to set a date for elections, the CFA has said: 'legislation which confers on the public authorities the power to remove the management committee of a union whenever, in their discretion, they consider that they have "serious and justified reasons", and which empowers the government to appoint executive committees to replace the elected committees of trade unions, is not compatible with the principle of freedom of association' (*Freedom of Association*, para. 658).

V. Public interest test for amalgamations of unions

5.1 Schedule 4 of the Ensuring Integrity Bill proposes to impose a 'public interest test' for amalgamations of unions. Unions' applications to the FWC for approval to hold a ballot on amalgamation will be refused if the FWC decides the amalgamation is not in the public interest (ss. 34 and 72F(2)), having regard to the incidence and age of 'compliance record events' and their bearing on the unions' historical record of complying with the law (ss. 72D(1) and 72D(2)). 'Compliance record events' are defined as any 'designated findings' made against either organisations *or* their officers, raising the same concerns as addressed in the provisions discussed above – and potentially making an individual union officer's minor violations of criminal or civil law grounds to block a union amalgamation (s. 72E). Incidents of disqualification of an organisation's officers are also included as 'compliance record events'. We observe that such an action may result in the State intervening to block the democratic mandate of potentially tens of thousands of members, on potentially quite trivial grounds.

5.2 If consideration of an organisation's 'compliance record events' does not prove conclusive for the public interest test, the FWC must further consider the impact of the proposed amalgamation on employers and employees in the industries concerned (s. 72D(3)) and 'any other matters it considers relevant' (s. 72D(4)), leaving a very wide margin of discretion for determining which 'public interest' concerns could be raised to bar an amalgamation. Conceivably, matters of questionable relevance could be raised in order to prevent or delay amalgamations deemed politically undesirable, leaving wide scope for abuse. Submissions to the FWC on the issue of the amalgamation's 'public interest' aspects may be made by numerous parties, including employers' organisations (s. 72C(1)(b)) or any person with a 'sufficient interest in the amalgamation' (s. 72C(1)(g)). Amalgamation cannot proceed where there is any pending proceeding against any of the amalgamating organisations concerning a wide range of civil or criminal matters (ss. 73(2) and 73(2A)).

5.3 These provisions risk exposing the democratic choices of union members to freely amalgamate their organisations for the purposes of protecting and promoting the rights and interests of workers, to a wide variety of arbitrary obstacles created by parties which claim an interest in the unions' administration over and above the interests of members. Not only is such interference of questionable justification, it also risks diverting the resources of the FWC and of social partners into potentially costly and unfruitful disputes over the putative public

interest aspects of mergers, even when these are overwhelmingly supported by the unions' members.

5.4 Notably, the Ensuring Integrity Bill will mean that such a test is automatically triggered as part of the merger process of unions, since unions are already required to first apply for FWC approval in order to ballot members on any proposed amalgamation. In stark contrast, corporate mergers are merely subject to voluntary notification under the Australian Competition and Consumer Act 2010 and their authorisation is based on detailed guidelines concerning competition. Notably, none of these considerations concern the record of compliance with the law of either the merging firms or their management. Imposing on unions the prerequisite that their records of compliance with the law serve as a measure of their fitness to merge is not only unfair and unwarranted, but also wholly disconnected from the dominant concerns of contemporary industrial and economic policy. It serves no obvious policy goal other than weakening workers' collective voice by hindering trade unions efforts to consolidate their bargaining power and promote trade union unity.

How is this issue dealt with in the rest of the world?

5.5 As in many other areas of union administration, it is extraordinary for a developed economy to impose such a public interest test for union amalgamations, or to expose union mergers to the potential disruption of employers, industry groups, and vaguely defined interested persons. While one finds examples of laws requiring trade unions to notify the authorities, and various other bureaucratic formalities associated with the merger process, the proposed 'public interest test' on amalgamations seems to be entirely novel: we found no comparable power in the jurisdictions we surveyed. Colleagues in the US advised us that under US law 'there is no such test and the government has no power to prevent union mergers', adding further that 'such a law or test would likely be unconstitutional'. Our New Zealand colleague advised that no such legal basis for restricting a merger exists in New Zealand law, and that the State would therefore 'not be permitted' to prevent a union merger.

5.6 Where regulations concerning union mergers exist, these usually aim merely to ensure that unions themselves make sufficient provision within their own statutes for merger procedures or that ballots on union amalgamation fulfil certain voting requirements. For instance, in the UK, a ballot on amalgamation must be approved by a simple majority of those voting, unless otherwise provided for in the union's own rules. UK legislation on this issue concerns only ensuring that all members are able to vote and that the ballot is scrutinised by an independent person (Trade Union and Labour Relations (Consolidation) Act 1992

(Chapter 52)). In Spain, trade union statutes must include requirements and procedures for mergers, as well as dissolution (Organic Law on Freedom of Association, No. 11 of August 1985 (unofficial translation) 1985 (Art. 4). In South Korea, unions are deemed dissolved upon merging, triggering an obligation on the part of the representative of the union to notify the administrative authorities within fifteen days of the date of the dissolution. Trade Union and Labor Relations Adjustment Act (Law No. 5310). (Art. 28(1)).

5.7 Even at their most onerous, such regulations on amalgamations in other states bolster the democratic basis of trade unions and attempt to foster legal certainty. The Ensuring Integrity Bill does precisely the opposite, inviting both unpredictability with regard to the exercise of workers' fundamental rights to freedom of association and undermining those rights by inviting interference from anti-union forces.

Position in international law

5.8 Article 2 of Convention 87 establishes workers' right 'to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation'. The rights of workers to independently determine their own organisations, structures and administration without interference from the public authorities are central to the principle of trade union pluralism (*Freedom of Association*, para. 483). The CFA has specifically declared that this 'implies the free determination of the structure and composition of unions' and that 'trade union unity voluntarily achieved should not be prohibited and should be respected by the public authorities (*Freedom of Association*, paras. 502 and 498).

5.9 Complaints examined by the CFA in this respect have more commonly addressed the issue of states' requiring the compulsory unification of workers' organisations. With regard to the relative benefits or disadvantages of a unified trade union movement or trade union pluralism however, the CFA has made clear that the provisions of Convention 87 do not prescribe any favoured organisational arrangement, but rather expressly protect the rights of workers to choose freely and voluntarily, without interference by the authorities, how to best promote their interests (*Freedom of Association*, para. 488). A legislative regime – such as is here proposed – which *bars* trade union *unity* is no better than a legislative regime which *prohibits* trade union *independence* and imposes a compulsory structure under a state-controlled monopoly union: either case ultimately serves to impede workers' collective rights to independently and democratically promote their interests.

5.10 To this end, the CFA has stated that legislative provisions – if deemed necessary by the public authorities – may *at most* 'simply establish an overall framework in which the greatest possible autonomy is left to the organisations in their functioning and administration' and 'have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations' (*Freedom of Association*, para. 563) Furthermore, 'any legislative provisions that go beyond formal requirements may hinder the establishment and development of organisations and constitute interference contrary to Article 3, paragraph 2, of [Convention 87]' (*Freedom of Association*, para. 566).

5.11 Obstructing the voluntary amalgamation of two or more trade unions clearly constitutes such interference. Where a trade union merger is prevented or delayed following objections raised by employers, even when the union's representatives are invited to respond to these objections, such an impairment of the workers' right to freely establish their own organisations is unjustified. In such a case, the CFA has recommended that the amalgamated union be recognised and immediately registered by the authorities (Report No 365, November 2012 Case No 2840 (Guatemala), para. 1058-9; see also Report No 377, March 2016 Case No 2949 (Eswatini) - Complaint date: 23-MAY-12, para. 440).

5.12 Ultimately therefore the provisions of Convention 87 treat such instances no differently from the fundamental right of workers to establish or join a trade union of their choosing – for which the imposition of a 'public interest test' would similarly constitute a severe and unjustifiable restriction. There can be no more justification for imposing such a test on mergers than there would be for making workers' exercise of their right to freedom of association generally subject to a public interest test. Far from 'guaranteeing the democratic functioning of organisations' or promoting their 'greatest possible autonomy', such a test would permit arbitrary interference in the organisational arrangements adopted by unions pursuant to their own rules, and thus sabotage their democratic functioning. The provisions of Convention 87 expressly prohibit such acts of interference, legislative or otherwise.

VI. Conclusions

6.1 The Ensuring Integrity Bill contains a variety of sweeping powers to interfere in and curtail the exercise of trade union rights. These provisions are contrary to the principles of freedom of association enshrined in the ILO's Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Article 2 of Convention 87 establishes workers' right 'to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation'. Article 3 of the Convention states that 'workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes'.

6.2 ICTUR urges Australia first and foremost to ensure that its industrial relations and trade union laws are compatible with Australia's commitments under the ILO Conventions.

6.3 The framing of these reforms – as ostensibly aimed to address serious issues of crime and misconduct – obscures a much broader agenda, likely to prove deeply harmful to the maintenance of a functioning industrial relations system that promotes lawfulness and social dialogue.

6.4 The ills to which the Ensuring Integrity Bill purportedly attends have little or no connection to the measures proposed to address them. The legislation's principle failures are its conflation of serious crimes and minor legal infractions, a blurring of joint and individual liabilities, and the establishment of punitive sanctions that are both disproportionate and arbitrarily directed. While a differentiated approach to these issues would improve the proposals, the justification for a special regime targeting the internal functioning of workers' organisations is unconvincing. Rather these measures entail a significant, unjustified and anti-democratic attack on trade union members' rights to collectively determine the establishment and functioning of their own organisations. These proposals will ultimately exacerbate rather than ameliorate any concern about democratic deficiency in particular trade union organisations.

6.5 It is for these reasons that one finds almost no comparable legislation in other industrialised democracies. Even at their most onerous, regulations in these other states aim to

bolster the democratic basis of trade unions and attempt to foster legal certainty. The Ensuring Integrity Bill does precisely the opposite, and as such invites comparisons with the regulations deployed by repressive regimes, which are aimed at wholly undermining workers' rights to organise freely and independently of the state.

6.6 In light of the foregoing, we wish to highlight the following objections to the proposed legislation:

- **Trade union officials and representatives should be elected freely by union members themselves.** These individuals should be held to account by the union's membership in accordance with the union's own rules. At a maximum, state regulations for the disqualification of individuals from holding union office must be limited to very extreme cases of conduct that calls into question the integrity of the individual concerned and be aimed at fostering - rather than overriding - trade union democracy. Conduct connected with trade union activities should not provide grounds for such disqualification, nor should generalised disqualification on grounds of a criminal conviction be permitted.

- **Instances of fraud and serious criminal offences must be addressed by the operation of the criminal law.** A supplementary punitive regime for trade unionists has no justification. Trade union regulations must serve to empower trade unions and their membership against individuals who may commit crime or fraud against them. The threats of deregistration or forced state administration of a union, with the membership's corresponding loss of rights and control over the union's functions, advances no benefit to the enjoyment of these rights. Legislation permitting the collective punishment of trade union members – by curtailing the exercise of their fundamental rights – is unwarrantable under any circumstances.

- **The registration of trade unions should consist solely of a formality, and no conditions to registration should be imposed such as would impair workers' freedom of association.** This applies equally to union amalgamations. The right to freedom of association must not be made subject to a public interest test, either generally or in respect of instances concerning trade union unity or pluralism. Imposing a requirement for prior authorisation on workers' organisations is deeply undermining of trade union rights.

- **Trade union regulations should aim at enhancing the principles of freedom of association.** Permitting judicial proceedings leading to administrative restrictions on a trade union's functions, which may be initiated by employers' organisations or anti-union actors, is an invitation for abuse of workers' fundamental rights. Court delays and legal battles over complex trade union legislation are an unnecessary substitute for addressing criminal conduct through normal legal channels provided for in criminal law. For lesser infractions of the law, the proposed sanctions represent a wholly disproportionate response – whether directed at particular individuals or organisations.

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(July 2019)

For:
The International Centre for Trade Union Rights (ICTUR)

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ICTUR is a non-governmental organisation ('NGO') that has accredited status with the UN ECOSOC and the ILO Special List of INGOs. The Centre coordinates a global network of expertise on international law, trade union rights, human rights, and industrial relations. It aims:

• To defend and extend the rights of trade unions and trade unionists worldwide;

• To collect information and increase awareness of trade union rights and their violations;

• To carry out its activities in the spirit of the United Nations Charter, the Universal Declaration of Human Rights, the International Labour Organisation Conventions and appropriate international treaties.

ICTUR's membership includes trade unions, human rights organisations, research institutes and lawyers' associations around the world. ICTUR's coordinating office is currently based in London, UK. Worldwide, more than 50 national level organisations are affiliated to ICTUR.

This submission is based upon a research paper prepared by ICTUR at the request of our Australian affiliate, the Australian Council of Trade Unions.

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