Human Rights Law Centre

AUSTRALIAN CONSERVATION FOUNDATION

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Community Legal Centres NSW

Democracy and the union movement

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

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Human Rights Law Centre

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1. Executive summary

1. At a time when wage theft is making headlines, wages growth is at record lows and work is becoming increasingly insecure, the advocacy work that trade unions do on behalf of workers has never been more important. Trade unions play an integral role in a healthy democracy and serve as an important mechanism to help workers exercise their right to safe and fair work conditions.

2. The *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* (Cth) (**the proposed law**) proposes amendments to the *Fair Work (Registered Organisations) Act 2009* (Cth). While it is framed by the Federal Government as reform aimed at addressing serious crime and misconduct in the trade union movement, the proposed law will weaken and undermine the democratic operation of the trade union movement internally and drastically limits its ability to perform its function in a democratic society.

3. The proposed law does this in two main ways:

   (a) it gives more people (including the Minister and anyone else who might have a "sufficient interest") broader powers to interfere in union leadership and remove officials from their position in a union in an extraordinarily wide range of circumstances; and

   (b) it also gives more people (including the Minister and anyone else who might have a "sufficient interest") broader powers to interfere in the functioning - and existence of - unions, by giving them a greater say in the decision to cancel a union's registration, place a union into administration and for unions to amalgamate with one another.

4. International human rights law recognises that everyone has the right to freedom of association with others, including the right to form and join trade unions. Freedom of association is something that people who live in a democracy enjoy in all walks of life. People should have the right to join or leave groups as they please, like political parties, religious organisations, sports clubs, community groups or any other type of club or association.

5. Freedom of association is not an absolute right, but should only be limited where it is necessary, and limitations should be reasonable and proportionate.

6. Freedom of association is particularly important for trade unions because of the important role they play in regulating the power imbalance between workers and employers. It is the bedrock for the protection of workers' rights. The system of collective bargaining, which ensures that the majority of Australian workers are employed subject to fair conditions and pay, relies on the freedom of trade unions to form, meet and support their members without the threat of interference by the Government or other "sufficiently interested" people.

7. The proposed law would be unique to Australia. As canvassed in the submission made by the International Centre for Trade Union Rights (**ICTUR**) on behalf of the Australian Council of Trade Unions (**ACTU**), they found "no precedent for the degree of state interference in the functioning and establishment of trade unions in comparable industrialised liberal democracies"[1]. Notably, none of the industrialised democracies surveyed in that submission have laws that resemble the punitive regime for deregistration of trade unions set out in the proposed laws[2]. Nor do any of the other countries surveyed have an obvious comparator when it comes to the broad powers to place unions into administration.[3]

8. The Human Rights Law Centre opposes the introduction of the proposed law. The explanatory materials accompanying the proposed law do not articulate compelling reasons why the existing laws are inadequate and why new, broad provisions are necessary and proportionate. If serious crime exists in the trade union movement, the appropriate response is for those people to be dealt with through the existing criminal and industrial laws which already provide adequate protection.

9. The proposed law would seriously limit workers' rights to freedom of association, and on the basis of the Government's evidence, it is not necessary or proportionate way to achieving the purported aim of improving the governance of unions and protecting the interests of members.

   (a) Schedule 1 of the proposed law significantly expands the circumstances in which a person may be **disqualified from holding office in a union**. There is a threshold question whether the provisions are necessary, given that the current legislative regime is more than sufficient and provides for disqualification for receipt of a range of criminal and civil penalties. The provisions are also disproportionate because the types of conduct that could result in a trade union official being disqualified could include taking unprotected strike action or the mere late lodgement of financial report. Further, the provisions go too far in granting the Minister and employers standing to bring disqualification proceedings.

   (b) Schedule 2 of the proposed law expands the grounds for the **cancellation of the registration of union**s. These provisions should not be passed and are susceptible to abuse. They allow for applications to be made to cancel the registration of a union in overly-broad circumstances, by a Minister or an employer, when union registration is an essential part of the right to freedom of association. The cancellation provisions are also not the least rights restrictive way to achieve the stated objective. They make the most punitive outcome – deregistration of the union – the default response, rather than a last resort following the exhaustion of alternative options.

[1] The International Centre for Trade Union Rights on behalf of The Australian Council of Trade Unions, Submission on the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (July 2019).
[2] Ibid.
[3] Ibid.

(c) Schedule 3 of the proposed law expands the grounds on which the Federal Court can make various declarations, indicating that a **union has become "dysfunctional", and place a union into administration**. Their combined force allows for something as minor as a short delay in filing a financial report to be used by Registered Organisations Commissioner or the Minister as evidence of "dysfunction" and grounds to impose an unelected administrator on a union. These matters are clearly not necessarily indicative of a union ceasing to exist or function effectively. The provisions are also not the least rights restrictive approach to take, especially in light of the fact that placing a union under administration will have significant consequences in terms of the representational rights of workers and any current campaigns or disputes.

(d) Schedule 4 of the proposed law introduces a new, **two-stage "public interest" test for amalgamations between unions**. The first stage of this test allows the Fair Work Commission to block the democratic mandate of union members on potentially quite minor or technical grounds. The second stage allows for the Fair Work Commission to consider any objections from employer organisations and anyone with a "'sufficient interest in the amalgamation". This leaves broad scope for abuse and could allow for matters of questionable relevance to be raised in order to prevent or delay amalgamations.

10. The Parliamentary Joint Committee on Human Rights shares a number of these concerns and has said that the proposed law raises questions as to whether the measure is compatible with the right to freedom of association, the right to just and favourable conditions at work and, in particular, the right of unions to elect their own leadership freely and the right to strike.

11. The disproportionality of the proposed law is highlighted by the lack of corporate equivalency for many of the provisions. For example, the proposed law expands the grounds for disqualification of people working as officials in trade unions to be much broader than for company directors. As well as conduct pertaining to their duties as a union officer, a court can disqualify a union officer for conduct entirely unrelated to their union role. This introduces a markedly different standard for union officers when compared to company directors. A union officer could twice be caught driving while their licence is disqualified and be exposed to disqualification, while this would not have the same consequences for a company director. Such differential treatment is unreasonable and unjustified.

12. Overall, the law establishes an overly adversarial and litigious framework for interactions between the Government and employers on the one hand and the union movement on the other. Overly broad laws cannot be justified by an expectation that the courts will enforce them appropriately, particularly when laws like these restrict the ambit of the court's consideration. Litigation is stressful, expensive and resource intensive. If there is no evidence of the need for the disqualification regime's expansion, we should not be wasting precious resources, including court resources, adjudicating it.

13. This submission will focus on the human rights implications of the proposed law and explain why workers' rights are human rights, the importance of upholding the right to freedom of association and then step through some of the most egregious elements of the proposed law. For the latter, this submission will follow the structure of the proposed law and highlight the most concerning parts set out in its four main Schedules (as set out above).

Recommendation: The Federation Government should not pass the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* (Cth).

2. Workers' rights are human rights

14. Article 22 of the International Covenant of on Civil and Political Rights (**ICCPR**) states 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 [their] interests". It goes on to say that:

> No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others…

15. Article 8 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) states that State Parties must ensure:

(a) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests;

(b) that no restrictions are placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; and

(c) the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.

16. The interpretation of the rights in the ICCPR and the ICESCR are informed by International Labour Organisation (**ILO**) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise (**ILO Convention No. 87**) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (**ILO Convention No. 98**).

17. Nothing in Article 22 of the ICCPR or Article 8 of the ICESCR authorises State Parties to the ILO Convention No. 87 to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in those Conventions.

18. Australia is a State Party to the ICCPR, the ICESCR, the ILO Convention No. 87 and the ILO Convention No. 98.

19. Article 2 of the ILO Convention No. 87 provides that:

> Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

20. Importantly, the ILO Convention No. 87 sets out that workers' organisations – i.e. trade unions – have the right to:

    (a) draw up their constitutions and rules;

    (b) elect their representatives in full freedom;

    (c) organise their administration and activities; and

    (d) to formulate their programs.[4]

21. Public authorities must refrain from any interference which would restrict the aforementioned rights or impede the lawful exercise of those rights.[5]

22. The Convention also states that workers' organisations must not be liable to be dissolved or suspended by administrative authority.[6]

23. The United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association has also explained the importance of the right to freedom of association as empowering people to:

> express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable.[7]

24. The right to freedom of association, like most other human rights, may be subject to permissible limitations providing certain conditions are met. Generally, to be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective. For the reasons set out below, the provisions of the proposed law do not meet these conditions.

3. Disqualification provisions

25. Schedule 1 of the proposed law significantly expands the circumstances in which a person may be disqualified from holding office in a union and allows the Minister or an employer to bring an application for disqualification. It also makes it a criminal offence for a person who is disqualified to continue to hold office or act in a manner that would significantly influence the union.

[4] ILO Convention No. 87, Article 3.1.
[5] Ibid, Article 3.2.
[6] Ibid, Article 4.
[7] UN Human Rights Council, The Rights to Freedom of Peaceful Assembly and of Association, 15th Sess, UN Doc A/HRC/RES/15/21 (6 October 2010).

3.1 Court-ordered disqualification

26. The current laws allow for a person to be disqualified from holding office in a union if they have been convicted of a prescribed offence[8] or if they have contravened a civil penalty provision and the Court is satisfied that the disqualification is justified.[9] This framework is more than sufficient and ensures that the Federal Court has adequate power to disqualify people involved in criminal activities from holding positions as union officials.

27. The proposed regime allows the Federal Court to disqualify a person if satisfied that a ground for disqualification applies and it would not be unjust to disqualify the person having regard to the nature of the ground, the circumstances and any other matters the court considers relevant. The proposed section 223 broadens the grounds for disqualification to include:

    (a) a "designated finding" or contempt in relation to "designated law";[10]

    (b) contempt in relation to a law other than designated law;

    (c) the failure to take reasonable steps to prevent two or more "designated findings" findings or a finding that the organisation is in contempt of court in relation to an order or injunction made under a designated law;[11]

    (d) corporate impropriety; or

    (e) a person is not a "fit and proper" person.[12]

28. Under proposed section 9C, a "designated finding" includes a finding that a person has contravened a civil penalty provision of industrial laws. This includes potentially very minor or technical breaches, such as late lodgement of a union's financial reports with the regulator (a requirement under section 268 of the *Fair Work (Registered Organisations) Act 2009*).

29. Powers for disqualification in relation to serious criminal offences already exist, under section 212 of the *Fair Work (Registered Organisations) Act 2009*). This allows for a trade union official to be disqualified in a range of circumstances, including being convicted of an offence

[8] Current s 215 and disqualification if convicted of a "prescribed offence", as defined in s 212.
[9] Current s 307A.
[10] A designated finding is a finding: (a) in any criminal proceedings against a person—that the person has committed an offence against a designated law; or (b) in any civil proceedings against a person—that the person has contravened, or been involved in a contravention of: (i) a civil penalty provision of the *Fair Work (Registered Organisations) Act 2009;* or (ii) a civil remedy provision of the *Fair Work Act 2009*; or (iii) a civil remedy provision of the *Building and Construction Industry (Improving Productivity) Act 2016*; or (iv) a WHS civil penalty provision of the *Work Health and Safety Act 2011*; or (v) a provision of a State or Territory OHS law (within the meaning of the *Fair Work Act*), other than an offence. The following are designated laws: (a) this Act; (b) the *Fair Work Act*; (c) the *Building and Construction Industry (Improving Productivity) Act 2016*; (d) the *Work Health and Safety Act 2011*; (e) each State or Territory OHS law (within the meaning of the *Fair Work Act*).
[11] In terms of what "reasonable steps" means, the Explanatory Memorandum at [40] states: It is not desirable to be prescriptive about the actions expected from an individual officer in taking reasonable steps. The reasonable steps assessment entails an objective test that will be informed by the particular circumstances of the case and the person's position and responsibilities within the organisation. The test involves considering if the steps taken would be in accordance with those of a 'prudent and reasonable' person and would have regard to an individual's sphere of knowledge, influence and accountability within the organisation.
[12] See proposed s 223, grounds for disqualification, item 9.

involving fraud or dishonesty that is punishable on conviction by imprisonment for a period of 3 months or any other offence under a law of the Commonwealth, a State or Territory, or another country, involving the intentional use of violence towards another person, the intentional causing of death or injury to another person or the intentional damaging or destruction of property.

30. The new "fit and proper person" test can see a person disqualified for technical breaches of industrial laws, like not giving the right notice when inspecting a dangerous worksite or investigating the underpayment of workers.

31. In determining whether a person is "fit and proper", the Court can now only have regard to specific events. Those specific events include:

(a) Refusal, revocation or suspension of a right of entry or WHS entry permit;

(b) Certain findings in criminal or civil proceedings or in any action by a government agency against the person, whether or not a conviction was recorded;[13] and

(c) A finding that the person has committed an offence against a law of the Commonwealth, State or Territory that is publishable by imprisonment of two years or more.

32. One of those specific events is a conviction of **any** offence that is punishable by imprisonment for two years or more. This means the conduct completely unrelated to a person's role working as a union official – for example, driving offences punishable for two years imprisonment – can result in disqualification from their role.

3.2 Who is a "person with a sufficient interest"?

33. Currently, disqualification applications for people working as trade union officials can only be brought by the Registered Organisations Commissioner, the General Manager of the Fair Work Commission, or a person authorised in writing by either.[14]

34. Under the proposed law, an application for an order disqualifying a person working in a trade union can be brought by:

(a) the Registered Organisations Commissioner;

(b) the Minister; or

(c) a "person with sufficient interest."

[13] Fraud, dishonesty, misrepresentation, concealment of material facts, breach of duty, intentional violence, death or injury or intentional damaging or destruction of property.
[14] s 310(1).

35. The proposed law expands the Government's ability to interfere in who works in leadership roles within trade unions by granting the Minister the power to apply for a person to be disqualified from their position when previously the Minister did not have this power.

36. The Explanatory Memorandum notes that "sufficient interest" has been interpreted as an interest beyond that of an ordinary person and includes those whose rights, interests or legitimate expectations would be affected by the decision.[15]

37. There is broad scope for a "person with sufficient interest" to be interpreted to include an employer, lobby group, a rival in a leadership ballot, or any person who can claim they have a "sufficient interest". This could allow organisations with an anti-union agenda to initiate either of these processes at any time and to massively disrupt unions.

38. Union members vote for who they want to lead their union and they exercise democratic control over their representatives under their own constitutions. In operation, the proposed law has the potential to impair the right to freedom of association by providing employer organisations or lobby groups with an avenue to interfere in this process.

39. This is likely an infringement of Article 3 of ILO Convention No. 87, which protects the rights of workers to elect their representatives in full freedom and emphasises that public authorities should refrain from interfering with this.

3.3 Limitation on the right to freedom of association

40. The Parliamentary Joint Committee on Human Rights has stated that the proposed law raises questions as to whether the measure is compatible with the right to freedom of association, the right to just and favourable conditions at work and, in particular, the right of unions to elect their own leadership freely and the right to strike.[16]

41. While the Statement of Compatibility identifies the objective of the disqualification regime as "improving the governance of registered organisations and protecting the interests of members"[17] and this is likely a legitimate objective, the provisions in the proposed law are likely not rationally connected or a proportionate way to achieve that objective.[18] The proposed law allows for people to be disqualified from their role in a trade union organisation in overly broad circumstances that could include taking strike action, which is a legitimate trade union activity.

[15] See Explanatory Memorandum, [29].
[16] Parliamentary Joint Committee on Human Rights, Human rights scrutiny report (Report 9 of 2017) 17. This committee commented on a similar bill, being the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017*.
[17] Statement of Compatibility, viii.
[18] Ibid, 15-17.

42. Further, Article 22(3) of the ICCPR and Article 8 of the ICESCR expressly state that no limitations are permissible on the right to freedom of association if they are inconsistent with the guarantees and the right to collectively organise contained in the ILO Convention No. 87.

43. A key component of the right to freedom of association is the right to strike. Under the proposed law, the types of conduct that could result in disqualification are extremely broad and include a "designated finding". This is a finding of a contravention of an industrial relations law, which includes taking unprotected industrial action, like taking strike action.[19]

44. Although holders of trade union office do not, by virtue of their position, have the right to disobey the law, the law 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.[20] Taking strike action – whether protected or unprotected – is a legitimate trade union activity.

45. It is also important to note that this is in the context of existing laws that have already been critiqued by international supervisory mechanisms as going beyond what is permissible to limit the right to take strike action.[21] The proposed law therefore compounds the problem by further restricting the right to freedom of association.

46. The proposed disqualification regime also provides that a person may be disqualified from holding office in a union on the basis of their failure to prevent two or more contraventions by their union that amount to a "designated finding". Where a union has engaged in two or more such contraventions, the entire elected union leadership could be subject to disqualification. This is regardless of whether or not union members agreed to participate in, for example, conduct which lead to "designated findings" – like the taking of unprotected industrial action – and whether they considered that this was in their best interests. The disqualification regime may therefore have an extensive impact on freedom of association more broadly,[22] and is therefore not a reasonable nor proportionate restriction on rights.

[19] Statement of Compatibility, vi.
[20] ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [40].
[21] See, UN Committee on Economic Social and Cultural Rights (UNCESCR), *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (23 June 2017) [29]-30]: "The Committee is also concerned that the right to strike remains constrained in the State party (art. 8). The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action." See, also, ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 103rd ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 101st ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 99th ILC session, 2009; ILO CEACR, *Individual Observation Concerning the Right to Organise and Collective Bargain Convention*, 1949, (No. 98), Australia, 99th session, 2009. See also, UNCESCR, *Concluding Observations on Australia*, E/C.12/AUS/CO/4 (12 June 2009) 5.
[22] Parliamentary Joint Committee on Human Rights, Human rights scrutiny report (Report 9 of 2017) 17.

47. The Statement of Compatibility provides that the disqualification regime is a proportionate limitation of rights because the Federal Court has the power to supervise the disqualification process.[23] This is an insufficient safeguard on its own. The Federal Court may disqualify a person if satisfied that a ground for disqualification applies and it would not be **unjust** to disqualify the person having regard to a number of factors. The term "unjust" is not defined in the proposed law and leaves broad scope for interpretation by the Federal Court.

48. Conduct that could result in disqualification also includes conduct as minor as the late filing of financial or other records. For example, it is a requirement of the *Fair Work (Registered Organisations) Act 2009* (Cth) for unions to notify the regulator within 30 days if an office holder changes or vacates a position in the union. The proposed law will mean that if this notification is one day late, an application could be made to disqualify the elected Secretary of the union in question. Drastic consequences for minor infractions only highlights that the provisions are disproportionate to any legitimate goal.

49. Overall, the proposed disqualification regime is not rationally connected to improving governance or protecting the interests of members. There is also no evidence that the proposed regime is the least rights restrictive way of achieving either of those aims.

4. Cancellation of registration of unions

50. Schedule 2 of the proposed law seeks to expand the grounds for the cancellation of the registration of unions under the *Fair Work (Registered Organisations) Act 2009* (Cth).

51. This will allow the Federal Court to make an order cancelling the registration of a union on the following grounds:

    (a) a substantial number of officers or two or more senior officers have engaged in a range of serious conduct;[24]

    (b) a serious offence is committed by the union (punishable by at least 1,500 penalty units);[25]

    (c) multiple designated findings have been made against a substantial number of the members;[26]

    (d) the union or a substantial number of the members have failed to comply with an order or injunction made under a designated law;[27]

[23] Statement of Compatibility, viii.
[24] See proposed s 28C.
[25] See proposed s 28D.
[26] See proposed s 28E.
[27] See proposed s 28F.

(e) that the union or a substantial number of members have organised or engaged in "obstructive industrial action".[28]

52. The proposed law provides that the Federal Court **must** cancel the union's registration if the Court finds that one of the grounds in the application is established and the union does not satisfy the Court that cancelling its registration would be unjust (having regard to the nature of the matters constituting the ground,[29] any action taken by or against the union, members or officers in relation to those matters,[30] the best interests of the members of the union as a whole[31] and other matters the Court considers relevant).[32]

53. Currently, applications to cancel the registration of trade unions can be brought by the Minister, a registered organisation or a person interested. Under the proposed law, an application for can be made by:

(a) the Registered Organisations Commissioner;

(b) the Minister; or

(c) a "person with sufficient interest".

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

55. Under the proposed law, the Federal Court will also be empowered to make a range of alternative orders, including the disqualification of certain officers, the exclusion of certain members or the suspension of the rights of the organisation.[34]

4.1 Limitation on the right to freedom of association

56. The Parliamentary Joint Committee on Human Rights has stated that, by expanding the grounds upon which unions can be deregistered, the proposed law raises questions as to whether the measure is compatible with the right to freedom of association and the right to just and favourable conditions at work.[35] This is because union 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."[36]

[28] See proposed s 28G.
[29] Proposed s 28J(1)(b)(i).
[30] Proposed s 28J(1)(b)(ii).
[31] Proposed s 28J(1)(b)(iii).
[32] Proposed s 28J(1)(b)(iv).
[33] Explanatory Memorandum, [90].
[34] Proposed ss 28N-28Q.
[35] Parliamentary Joint Committee on Human Rights, Human rights scrutiny report (Report 9 of 2017) 20.
[36] ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [295].

57. It is not clear from the Statement of Compatibility what the main objective of these cancellation provisions is.[37] Even assuming that it is a legitimate objective, there are serious questions about whether the measures set out in the proposed law are rationally connected to it. The breadth of the powers to cancel union registration compound the issues articulated above in relation to the disqualification regime and further limits the right to freedom of association.

58. For example, union members may have democratically decided to take unprotected industrial action. Under the proposed law, if multiple "designated findings" are made against the union or members, an application could be made to cancel the registration of the union. This could include multiple findings of a contravention of an industrial relations law, which includes taking unprotected industrial action, like taking strike action. The current law already regulates that activity.

59. While the measures will make the deregistration of unions easier, many of the grounds for cancellation could relate to less serious contraventions of industrial law or to taking unprotected industrial action. This leaves the provisions susceptible to abuse.

60. The cancellation provisions are also not the least rights restrictive way to achieve any stated objective. They make the most punitive outcome – deregistration of the union – the default response, rather than a last resort following the exhaustion of alternative responses.

61. This is in circumstances where the effect of deregistration is significant. The loss of status as an organisation and a body corporate means that the union is relegated to the status of an association. The practical implications of this are that neither it nor its members are entitled to the benefits of any modern award, order of the Fair Work Commission or enterprise agreement that bound the organisation or its members.

5. Power to place unions into administration

62. Schedule 3 of the proposed law gives significant powers to the Registered Organisations Commissioner and the Minister to seek declarations from the Federal Court, indicating that a union has become "dysfunctional", and place unions into administration.

63. The current law provides that an application can be made to the Federal Court for a declaration in relation to an organisation. If a declaration is made, the Federal Court may approve a scheme for the taking of action to resolve the matters to which the declaration relates. The ability to seek such a declaration was limited to the union, a member of a union or

[37] Statement of Compatibility, xi: sole objective of protecting the interests of members and promoting public order by ensuring an organisation is administered lawfully.

any other person having a "sufficient interest" in relation to an organisation.[38] The proposed law represents a significant expansion in the Government's powers.

64. Under the proposed law, the Registered Organisations Commissioner and the Minister can seek a declaration. This is in addition to the union, a member of the union and any other person having a sufficient interest in the organisation who already had standing under the existing law.

65. The new section 323(4) allows for the Federal Court to make a declaration that that an organisation has ceased to exist or function effectively if the union has:

(a) on multiple occasions contravened designated laws; or

(b) misappropriated funds of the organisation or part; or

(c) otherwise repeatedly failed to fulfil their duties as officers of the organisation.

66. If a court makes a declaration under section 323 then, under section 323A, the Federal Court has the power to impose a "scheme". This 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".[39] This allows unelected administrators to gain control of a union, overriding the union's own democratic processes and denying the members their right to elect their own representatives.

67. The "scheme" may also require that an election be organised,[40] making this process attractive to anyone who – for whatever motive – might like to overturn the elected leadership of a union.

68. The combined force of these provisions allows for something as minor as a short delay in filing a financial report to be pointed to by Registered Organisations Commissioner and the Minister as evidence of "dysfunction" and grounds to impose an unelected administrator on a union.

5.1 Limitation on the right to freedom of association

69. The Parliamentary Joint Committee on Human Rights has stated that, by allowing for unions to be placed into administration, the proposed law raises questions as to whether the measure is compatible with the right to freedom of association and the right to just and favourable conditions at work.[41] It also raises concerns about that right of unions to organise their internal administration and activities and to formulate their own programs without interference.[42]

[38] Current s 323.
[39] Current s 323F(1)(d).
[40] Current s 323A(2)(d).
[41] Parliamentary Joint Committee on Human Rights, Human rights scrutiny report (Report 9 of 2017) 21.
[42] Ibid.

70. Again, it is unclear what the main objective of these administration provisions is.[43] Even assuming that it is a legitimate objective, given the broad definition of "designated laws", there are serious questions about whether the measures set out in the proposed law are rationally connected to it. The administration powers makes it possible for a declaration to be made in relation to less serious breaches of industrial law or for taking unprotected industrial action. These matters are not necessarily indicative of a union ceasing to exist or function effectively.

71. The provisions are also not the least rights restrictive approach to take, especially in light of the fact that placing a union under administration will have significant consequences in terms of the representational rights of workers and any current campaigns or disputes.

6. New test for union amalgamations

72. The proposed law introduces a new, two-fold test for union amalgamations. This means that a decision about whether or not two unions should merge is now subject to strict scrutiny by the Fair Work Commission.

6.1 First stage

73. The first stage of the process involves the Fair Work Commission having regard to any "compliance record events". These events are set out in a new section 72E. For organisations or members, those events include "designated findings" against the organisation,[44] findings of contempt of court against the organisation relating to an order or injunction[45] or where the organisation or a group of members organise or engage in "obstructive industrial action" even if there has been no judicial finding of such.[46]

74. In relation to officials, those events include "designated findings" against a person who was an officer of the union at the time of the conduct,[47] findings of contempt of court against a person in relation to an order or injunction[48] and being disqualified from holding office.[49]

75. If the Fair Work Commission considers, having regard to the "compliance record events" for each existing organisation, that the organisation has "a record of not complying with the law", they **must** decide under a new section 72A that an amalgamation is not in the public interest.

[43] Statement of Compatibility, xiii: sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintains public order.
[44] Proposed s 72E(1)(a).
[45] Proposed s 72E(1)(b).
[46] Proposed s 72E(1)(c).
[47] Proposed s 72E(2)(a).
[48] Proposed s 72E(2)(b).
[49] Proposed s 72E(2)(c).

6.2 Second stage

76. If the amalgamation passes the first stage of the test, the Fair Work Commission moves onto the second stage of the process. At this point, the Fair Work Commission must consider whether the amalgamation is in the "public interest". The Fair Work Commission can have regard to the impact that the amalgamation could have on:

    (a) employees in the industry or industries concerned;[50] and

    (b) employers in the industry or industries concerned.[51]

77. The Fair Work Commission can also have regard to other matters it considers relevant, which could include the likely impact on the industry or industries concerned or the economy.[52]

6.3 Limitation on the right to freedom of association

78. The Parliamentary Joint Committee on Human Rights has stated that, by inserting a public interest test, the proposed law raises questions as to whether it is compatible with the right to freedom of association and the right to just and favourable conditions at work.[53]

79. The Statement of Compatibility identifies an objective of the proposed law as enhancing "relations within workplaces and to reduce the adverse effects of industrial disputation".[54] It cannot, however, be assumed that industrial disputes necessarily have adverse effects given that the right to take industrial action is protected as a matter of international law.[55]

80. Section 72C provides broad powers for a number of interested parties to make submissions on a union's record of compliance with the law and whether the amalgamation is otherwise in the public interest. These include:

    (a) the existing organisation;

    (b) any other organisation that represents the industrial interests of employers or employees in the industry or industries concerned or that may otherwise be affected by the amalgamation;

    (c) a body other than an organisation that represents the interests of employers or employees in the industry or industries concerned;

    (d) the Commissioner;

[50] Proposed s 72D(3)(c).
[51] Proposed s 72D(3)(d).
[52] Explanatory Memorandum, [237].
[53] Parliamentary Joint Committee on Human Rights, Human rights scrutiny report (Report 9 of 2017) 23.
[54] Statement of Compatibility, xiii.
[55] Parliamentary Joint Committee on Human Rights, Human rights scrutiny report (Report 9 of 2017) 23. See also ILO, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [521].

(e) the Minister;

(f) a Minister of a referring State or Territory, who has responsibility for workplace relations matters in the State or Territory; or

(g) any other person with a "sufficient interest" in the amalgamation.

81. The first stage of this test allows the Fair Work Commission to refuse an amalgamation if one of the unions involved or its officers has breached the law, even in circumstances where that breach might be very minor. This means that the Fair Work Commission can block the democratic mandate of union members on potentially quite minor or technical grounds.

82. The second stage of the test allows for the Fair Work Commission to consider any objections from employer organisations[56] and anyone with a "'sufficient interest in the amalgamation".[57] This leaves wide scope for abuse and could allow for matters of questionable relevance to be raised in order to prevent or delay amalgamations.

83. There are no equivalent provisions or requirements for corporations seeking to merge. Corporate mergers are merely subject to voluntary notification under the *Australian Competition and Consumer Act 2010* (Cth) and their authorisation is based on detailed guidelines concerning competition. None of these considerations concern the record of compliance with the law of either the merging corporations or their management.

84. In practice, this will significantly increase the burden on union branches seeking to merge, will mean that union members have less input into the decision-making process and allow third parties (who are not members) an opportunity to intervene in the process.

85. The public interest test has been introduced in response to the recent merger of the Construction, Forestry, Mining and Energy Union (CFMEU), the Maritime Union of Australia (MUA) and the Textile, Clothing and Footwear Union of Australia (TCFUA). While this merger was approved by the Fair Work Commission in 2018, the move was opposed by business groups, including Master Builders Australia, and the Federal Government at the time.[58] If the proposed public interest test existed at the time of this merger, it might not have been approved given the new test allows for "sufficiently interested" organisations – like business groups and the Federal Government – to object in Fair Work Commission and seek to interfere in union amalgamations. This has the potential to significantly undermine the right to freedom of association, by allowing corporations and the Government to interfere in decisions democratically reached by union members to amalgamate their unions.

[56] Proposed s 72C(1)(b).
[57] Proposed s 72C(1)(g).
[58] ABC News, CFMEU, Maritime Union of Australia merger approved by Fair Work Commission (6 March 2018) <www.abc.net.au/news/2018-03-06/cfmeu-maritime-union-to-merge-fair-work-decision/9517618>.