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

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Law and Bills Digest Section

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Date introduced: 4 July 2019
House: House of Representatives
Portfolio: Industrial Relations
Commencement: The day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

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History of the Bill
The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (the Previous Bill) was introduced into the House of Representatives on 16 August 2017. The Bill was passed by that chamber and introduced to the Senate on 17 October 2017, but did not progress. The Previous Bill lapsed when the Parliament was prorogued on 11 April 2019.

The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (the Bill) which was introduced into the House of Representatives on 4 July 2019, is in ‘substantially similar terms’ to the Previous Bill—although there are some differences. A Bills Digest was prepared in respect of the Previous Bill. Whilst much of the material in this Bills Digest has been sourced from that earlier one, where there are differences between the Bill and the Previous Bill, these are noted and explored.

Purpose of the Bill
The purpose of the Bill, like the Previous Bill, is to respond to certain recommendations made by the Royal Commission into Trade Union Governance and Corruption (RCTUGC) and ‘community concern’ to ‘ensure the integrity of registered organisations and their officials, for the benefit of their members’ and subject proposed amalgamations of registered organisations to a public interest test by amending the Fair Work (Registered Organisations) Act 2009 (the FWRO Act) to:

• include serious criminal offences punishable by five or more years’ imprisonment as a new category of ‘prescribed offence’ for the purposes of the automatic disqualification regime which prohibits a person from acting as an official of a registered organisation
• allow the Federal Court to disqualify officials from holding office where they have:
  – contravened a range of industrial laws
  – are found in contempt of court in relation to industrial laws or certain other circumstances
  – repeatedly fail to stop their organisation from breaking the law or
  – are otherwise not a fit and proper person to hold office in a registered organisation
• make it an offence for a person to continue to act as an official or in a way that influences the affairs of an organisation once disqualified
• allow the Federal Court to deregister an organisation (or make alternative orders) where there is:
  – unlawful or otherwise improper conduct of the affairs of the organisation
  – serious criminal offences committed by the organisation
  – repeated breaches of a range of industrial laws by its members or
  – the taking of obstructive unprotected industrial action by a substantial number of members
• allow applications to be made to the Federal Court for alternative orders, including suspending the rights and privileges of an organisation, an individual or a branch or division of an organisation, instead of making an order deregistering an organisation.
• expand the grounds on which the Federal Court may order remedial action to deal with governance issues in an organisation and expressly provide that the Federal Court may appoint an administrator to an organisation or part of an organisation as part of a remedial scheme and

• introduce a public interest test for amalgamations of registered organisations, which will allow relevant matters to be taken into account, such as each organisation’s record of compliance with industrial laws. 4

Structure of the Bill
The Bill is divided into five Schedules:

• Schedule 1 deals with disqualifying people from holding office in a registered organisation
• Schedule 2 deals with the deregistration of registered organisations, alternative orders to deregistration and related matters
• Schedule 3 deals with the administration of dysfunctional registered organisations
• Schedule 4 proposes a public interest test for amalgamations of registered organisations and
• Schedule 5 contains minor and technical amendments.

Background
Organisations registered under the FWRO Act have certain rights under the Fair Work Act 2009 (FW Act) and other legislation, including in relation to bargaining for enterprise agreements. Registered organisations that represent the interests of employees include trade unions and professional associations, whilst registered organisations that represent the interests of employers or an industry are referred to as employer organisations.

Registered organisations (organisations) occupy a unique position within Australia’s workplace relations system. Whilst they represent the interests of their members, organisations also seek to advance their own interests, and can have a significant impact on the economy (or segments of it).

There are differing views about appropriate governance structures and standards for organisations. 5 One view is that organisations are more akin to incorporated associations then corporations, and therefore the regulation of organisations should be more like that imposed on incorporated associations. 6

Another view is that organisations are more like companies, and therefore should be regulated in a manner similar to how corporations are regulated. 7 This was the view accepted by the RCTUGC which concluded:

An approach that denies the equivalence of unions and companies and concludes therefore there should be no changes to statutory duties imposed on officers is an illogical and unthinking approach. 8

The Bill proceeds on the basis of the above and responds to the recommendations made by the RCTUGC in relation to the integrity of organisations and their officials, responsiveness to members’ interests and the deregistration of organisations in certain circumstances. 9 The Bill also

6. Ibid., pp. 3318–27.
8. Ibid., p. 3327.
seeks to give effect to the Government’s commitment to ‘effectively deal with registered organisations that are dysfunctional or not serving the interests of their members and to provide that registered organisations’ amalgamations are subject to a public interest test’.

**Royal Commission into Trade Union Governance and Corruption recommendations**

The RCTUGC made a number of recommendations that the Bill seeks to implement. Specifically those recommendations are 36, 37 and 38. These are briefly discussed below.

**Amending definition of ‘prescribed offence’ for the purposes of the disqualification regime**

Recommendation 36 of the RCTUGC was:

The definition of ‘prescribed offence’ in s 212 of the *Fair Work (Registered Organisations) Act 2009* (Cth) be amended to include an offence under a law of the Commonwealth, a State or Territory, or another country, which is punishable on conviction by a maximum penalty of imprisonment for life or 5 years or more.

Proposed paragraph 212(aa) of the *FWRO Act*, at item 8 of Schedule 1 to the Bill is consistent with this recommendation, and has not changed materially from the Previous Bill.

**New criminal offence for holding office whilst disqualified**

Recommendation 37 of the RCTUGC was:

The *Fair Work (Registered Organisations) Act 2009* (Cth) be amended to make it a criminal offence for a person who is disqualified from holding office in a registered organisation to continue to hold an office. The offence should be an offence of strict liability with a maximum penalty of 100 penalty units or imprisonment for two years, or both.

Whilst proposed section 226 of the *FWRO Act*, at item 11 of Schedule 1 to the Bill is consistent with this recommendation, the quantum of the penalty is inconsistent with principles guiding the creation of strict liability offences set out in the *Guide To Framing Commonwealth Offences, Infringement Notices And Enforcement Powers*, which provides:

- a strict liability offence will generally only be considered appropriate where it is punishable by a fine of up to 60 penalty units for an individual and
- is not punishable by imprisonment.

Proposed section 226 of the *FWRO Act* has not changed materially from the Previous Bill. In the context of that Bill, the Senate Standing Committee for the Scrutiny of Bills raised concerns about the imposition of strict liability in this provision (discussed below). In addition, a number of stakeholders previously noted the proposed penalty – whilst consistent with the RCTUGC recommendation – was double the penalty applicable to directors for the comparable offence under the *Corporations Act* at that time (the penalty being 50 penalty units or imprisonment for

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10. Ibid. p. ii.
13. Ibid., pp. 3388, 3397.
16. Section 206A of the *Corporations Act 2001*. For comment see, for example: Electrical Trades Union (ETU), *Submission* to the Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment (Ensuring Integrity)*.
one year, or both). However, since the passage of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* the penalty for the comparable offence in the *Corporations Act* is now five years imprisonment. This means that the situation has reversed since the Previous Bill was introduced: the penalty applicable to company directors for holding office whilst disqualified is currently more than double that proposed by the Bill for officials of registered organisations.

**New disqualification regime**

Recommendation 38 of the RCTUGC was:

> The *Fair Work (Registered Organisations) Act 2009* (Cth) be amended by inserting a new provision giving the Federal Court jurisdiction, **upon the application of the registered organisations regulator**, to disqualify a person from holding any office in a registered organisation for a period of time the court considers appropriate. The court should be permitted to make such an order if the conditions set out in paragraph 190 are satisfied. (Emphasis added)

The regime proposed by the Bill differs from the above recommendation in a number of ways, as discussed in detail below in the *Key Issues and provisions* parts of this Digest.

**Previous Committee Consideration**

The Previous Bill was considered by two Senate Committees, as noted below.

**Senate Education and Employment Legislation Committee**

The Previous Bill was examined by the Senate Education and Employment Legislation Committee. Details of the inquiry and report are on the [inquiry homepage](#).

The majority of the Committee recommended that the Previous Bill be passed. Labor and the Greens both issued dissenting reports, recommending that the Senate reject the Previous Bill. Labor considered the Previous Bill to be a ‘politically driven attack on the democratic functioning of unions’. The Greens described the Previous Bill as ‘politically motivated’ and ‘reflective of the Coalition’s continued efforts to reduce workers’ rights and undermine unions’. Both Labor and the Greens were concerned with the perceived lack of consultation on the Previous Bill.

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills raised a number of concerns about the Previous Bill including:

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2. **Senate Education and Employment Legislation Committee, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 [provisions]**, The Senate, Canberra, October 2017, p. 32.
3. Ibid., pp. 33–6.
4. Ibid., p. 33.
5. Ibid., p. 35.
10. Ibid., pp. 33–6.
• that the proposed disqualification powers were insufficiently defined
• the inclusion of strict liability offences and the quantum of the penalties associated with those offences
• the reversal of the evidential burden of proof in some circumstances and
• the proposed immunity from civil liability for administrators of organisations.25
Those concerns were reiterated in relation to the Bill.26 These concerns are explored in detail below in the Key Issues and provisions parts of this Digest.

Committee consideration

Senate Education and Employment Legislation Committee

The Bill has been referred to the Senate Education and Employment Legislation Committee for inquiry and report by 25 October 2019. Details of the inquiry are on the inquiry homepage. The Committee recommended that the Bill be passed.27 The Opposition and Greens issued dissenting reports and recommended that the Bill not be passed.28 The Centre Alliance recommended in their additional comments that the Bill not be passed without amendments.29

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills considered the Bill in its third report of 2019, stating:

The committee commented on a similar bill in the previous Parliament ... The committee does not have any additional comments regarding the matters it raised in relation to that bill.30

As noted above the Senate Standing Committee for the Scrutiny of Bills considered the Previous Bill. That consideration (taking into account any differences between the Bill and Previous Bill) and the Committee’s comments regarding the penalty for the proposed criminal offence of holding office whilst disqualified is examined below in the Key Issues and provisions parts of this Digest.

Policy position of non-government parties/independents

The Labor Party and Greens oppose the Bill.31 The Centre Alliance, whilst opposing the Bill in its current form has indicated support for the Bill with certain amendments relating to application threshold issues, persons with standing to commence disqualification proceedings, the range of factors to be considered by the courts and the removal of the proposed amalgamation regime.32

At the time of writing, the position of other non-government parties and independents on the Bill was not clear.

27. Senate Education and Employment Legislation Committee, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions], The Senate, Canberra, October 2019, p. 58.
28. Ibid., pp. 80 and 82.
29. Ibid., pp. 83 to 85.
31. Senate Education and Employment Legislation Committee, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions], op. cit., pp 80 and 82.
Position of major interest groups

The Australian Council of Trade Unions (ACTU) has indicated its opposition to the Bill on the basis that its provisions are incompatible with Australia’s commitments under two conventions of the International Labour Organisation (ILO), namely the:

- **ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise** (ILO Convention 87)\(^3^3\) and
- **ILO Convention (No. 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively** (ILO Convention 98).\(^3^4\)

The International Centre for Trade Union Rights (ICTUR) also opposes the Bill on the basis that it breaches Australia’s commitments under the two ILO conventions above and also because:

- it ‘conflicts criminal fraud and other serious crimes with minor infractions of industrial laws’ and by ‘distilling such a broad spectrum of unlawful activity into the same category of offence’ the Bill would ‘permit equal punishments for unlawful acts that are not of comparable gravity’ and this would ‘lead to unacceptably disproportionate outcomes’
- it ‘blurs the liabilities of trade union officials and the organisations they represent and work for’ and would permit ‘sanctions against the entirety of a union's membership for the acts of individual officers’ as well as against specific officers ‘for the acts of members or other officers not under their control’ and
- the proposed sanctions will have the practical effect of threatening ‘to destroy the careers of individuals or the very existence of workers' organisation’.\(^3^5\)

The Previous Bill was opposed by trade unions\(^3^6\) and some other stakeholders including Professor Bradon Ellem, the Australian Conservation Foundation, Australian Youth Climate Coalition, Friends of the Earth Australia, Getup!, Greenpeace Australia, Nature Conservation Council of Australia and Solar Citizens.\(^3^7\) The current Bill is opposed by trade unions,\(^3^8\) a range of other non-registered organisation entities,\(^3^9\) legal academics\(^4^0\) and religious associations.\(^4^1\)

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35. International Centre for Trade Union Rights (ICTUR), Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions], [Submission no. 1], July 2019, pp. 3–4.

36. See the submissions to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 [provisions] from: ACTU, p. 4; Professionals Australia (PA), p. 1; United Voice (UV), p. 3; Flight Attendants’ Association of Australia, International Division (FAAAID), p. 6; SA Unions (SAU), p. 2; Community and Public Sector Union (CPSU), pp. 1–2; The Australasian Meat Industry Employees’ Union (AMIEU), pp. 4–5; Unions Tasmania (UTAS), p. 1; ETU, p. 10; Construction, Forestry, Mining and Energy Union (CFMEU), pp. 2–3; Unions NSW (UNSW), p. 10; Queensland Council of Unions (QCU), p. 5; Maritime Union of Australia (MUA), pp. 3–4; Australian Nursing & Midwifery Federation (ANMF), pp. 3–4; The Australian Workers Union (AWU), p. 4; Textile, Clothing & Footwear Union of Australia (TFCU), p. 2.


38. See for example the Submissions to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions], from the Community and Public Sector...
The Australian Chamber of Commerce and Industry (ACCI) supports the Bill, arguing that it:

... is needed to deal with persistent, entrenched, and unacceptable conduct by some unions and their officials which continues to grab headlines. 42

The Bill is also supported by the Australian Mines and Metals Association (AMMA), Master Builders Australia (MBA), Australian Industry Group (AIG), Housing Industry Australia (HIA) and Australian Chamber of Commerce and Industry (ACCI). 43

Financial implications

The Explanatory Memorandum states that the Bill will have no financial impact on the Commonwealth. 44

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. Whilst the Government considers that the Bill is compatible,45 the Parliamentary Joint Committee on Human Rights (PJCHR) raised concerns about the Previous Bill’s compatibility with a number of human rights, as discussed below.

Parliamentary Joint Committee on Human Rights

In its third report of 2019 the PJCHR noted that the Bill has ‘been reintroduced in relevant substantially similar terms to those previously commented on’ and further:

Union (SPSF Group) (CPSU SPSF), National Tertiary Education Union, James Cook University Branch (NTEUJC), and the Australian Council of Trade Unions (ACTU).

See for example the Submissions to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions], from the Human Rights Law Centre, Australian Conservation Foundation, Public Interest Advocacy Centre and Community Legal Centres NSW (Joint HRLC submission) and Maurice Blackburn Lawyers.

See for example the Submissions to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions], from Professor Anthony Forsyth and Professor David Peetz.

See for example the Submissions to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions], from Catholic Religious Australia and the Uniting Church in Australia, Synod of Victoria and Tasmania.

Australian Chamber of Commerce and Industry (ACCI), Australian Chamber welcomes the reintroduction of the Ensuring Integrity Bill, media release, 4 July 2019; ACCI, Union claims exaggerated on union accountability laws, media release, 18 July 2019.

Australian Mines and Metals Association (AMMA), Time for Parliament to act on integrity of all registered organisations, media release, 4 July 2019; Master Builders Association (MBA), Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions], 29 August 2019, p. 2; Australian Industry Group (AIG), Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions], 27 August 2019, p. 3; Housing Industry Australia (HIA), Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions], 29 August 2019, p. 1; Australian Chamber of Commerce and Industry (ACCI), Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions], August 2019, pp. 1, 4.

Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, p. iii.

The Statement of Compatibility with Human Rights can be found at pages v to xvi of the Explanatory Memorandum to the Bill.
...the committee notes that while there have been a number of changes to the bill including relating to matters the committee previously commented on, these do not fully address the committee's initial concerns.46 (emphasis added)

The Previous Bill was considered in the PJCHR’s ninth and 12th reports of 2017.47 At that time the PJCHR noted the measures proposed by the Bill would impact on a number of recognised human rights, including the right to freedom of association and the right to just and favourable conditions of work. The PJCHR noted that those rights are informed by various International Labour Organization (ILO) treaties to which Australia is a signatory. Further, those ILO treaties also provide additional rights including:

- the right of workers to autonomy of union processes (including electing their own representatives in full freedom)
- organising their administration and activities without interference and
- formulating their own programs without interference.48

Various ILO treaties also protect unions from being dissolved, suspended or de-registered and protect the rights of workers to form organisations of their own choosing.49 The PJCHR noted that various measures contained in the Bill would limit the ability of unions to govern their internal processes and therefore engage and limit those rights. The specific issues raised by various provisions contained in the Bill in relation to human rights concerns and compatibility with ILO conventions, are discussed below.

After considering the Minister’s response to its concerns on the Previous Bill, the PJCHR concluded:

- the proposed disqualification regime and ‘public interest test’ for amalgamation of registered organisations is ‘likely to be incompatible with the right to freedom of association’50 and
- the proposed deregistration regime and proposed administration regime for ‘dysfunctional’ registered organisations ‘may be incompatible with the right to freedom of association’.51

Key issues and provisions: disqualification of officials

As noted above, the RCTUGC formed the view that the governance requirements of organisations should be more like those imposed on corporations than incorporated associations. To give context to the proposed amendments a brief outline of the:

- disqualification regime applicable to company directors in the Corporations Act 2001 and
- Australia’s relevant human rights obligations and international standards and how they relate to the disqualification of officers of registered organisations

is provided below.

49. Ibid., pp. 13–14.
50. PJCHR, Report, 12, 2017, p. 121 and 136 respectively.
51. Ibid., pp. 127 and 131 respectively.
Disqualifying directors of companies

The Corporations Act contains a number of provisions which provide for the disqualification of directors. This includes:

- automatic disqualification
- disqualification by court processes and
- disqualification by the regulator (the Australian Securities and Investments Commission (ASIC)) in limited circumstances.

Importantly however, none of the processes as described below allow the Minister, shareholders or other stakeholders in the corporation or other corporations to seek to have directors disqualified. Only ASIC has this power.

In contrast, the regime proposed by Schedule 1 of the Bill will enable the Registered Organisations Commissioner (ROC), the Minister or ‘a person with sufficient interest’ (which could potentially include an employer or employer association) to seek a court order disqualifying a person from being an official of a registered organisation.52

Automatic disqualification

Section 206B of the Corporations Act automatically disqualifies a person from being a director of a corporation, if they are convicted of serious criminal offences or are an undischarged bankrupt.53

Section 206B provides that a person is automatically disqualified from being a director of a company if:

- they are convicted (by either an Australian or foreign court) of an offence that concerns the making, or participation in the making, of decisions that affect the whole or a substantial part of the business of the company, or concerns an act that has the capacity to significantly affect the corporation's financial standing
- they are convicted for a contravention of the Corporations Act punishable by imprisonment for a period of greater than 12 months
- they are convicted of either an Australian or foreign offence that involves dishonesty and is punishable by imprisonment for a period of at least three months
- they are convicted by a foreign court of an offence punishable by imprisonment for a period of greater than 12 months.

Disqualification by court order

Part 2D.6 of the Corporations Act provides the court with power to disqualify directors in a range of circumstances, including:

- where a director has contravened certain civil penalty provisions in the Corporations Act (section 206C)
- where a director is involved in repeated corporate insolvencies and non-payment of debts (section 206D)
- where a director has repeatedly been involved in contraventions of the Corporations Act, and failed to take reasonable steps to prevent the contraventions (section 206E)

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52. Proposed subsection 222(1) of the FWRO Act, at item 11 of Schedule 1 to the Bill.
• to give effect to a disqualification order made under the *Competition and Consumer Act 2010* (CCA) or the *Australian Securities and Investments Commission Act 2001* (ASIC Act) (sections 206EA and 206EB)

• where a person has been disqualified from being a director of, or being concerned in the management of, a foreign company under a law of a foreign jurisdiction (section 206EAA) and

• where a person, as an officer or director of two or more corporations, has a track record of involvement in contraventions of the *Corporations Act* and insolvencies where:
  – the Fair Entitlements Guarantee scheme has inappropriately funded the payment of outstanding employee entitlements and
  – there has been a minimal return to the Commonwealth (section 206EAB).  

The grounds of disqualification most relevant to the regime proposed by the Bill are briefly examined below.

**Contraventions of civil penalty provisions contained within the Corporations Act**

Section 206C gives the court the power to disqualify a director for any period it considers appropriate where the director breached various civil penalty provisions contained within the *Corporations Act* and the court is satisfied that the disqualification is justified. Such proceedings can only be commenced by ASIC – not by other stakeholders (such as shareholders or creditors) or the Minister. Nor can other corporations seek such orders.

**Repeated involvement in corporate insolvencies is insolvent and non-payment of debts**

Section 206D gives the court the power to disqualify a director for up to 20 years if:

• within the last seven years, the director was an officer of two or more failed companies and

• the court is satisfied that the manner in which the corporation was managed was wholly or partly responsible for the corporation failing and

• the disqualification is justified.

Importantly however, applications for a disqualification order under section 206D can only be made by ASIC, not by other stakeholders (such as creditors or shareholders) or the Minister. Nor can other corporations seek such orders.

**Repeated contraventions of the Corporations Act**

Section 206E provides the court with power to disqualify a director for any period it considers appropriate where:

• the director has at least twice been an officer of a company that contravened the *Corporations Act* and the director failed to take reasonable steps to prevent a contravention or

• the director contravened the *Corporations Act* at least twice while they were director of the company or

• the director was an officer of a body corporate and did something that would have contravened subsection 180(1) or section 181 (which require directors of corporations to exercise their powers and discharge their duties with care, diligence, good faith and for a proper purpose) if the body corporate had been a corporation and

• the court is satisfied that the disqualification is justified.

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Again however, applications for disqualification under section 206E can only be made by ASIC, and not by the Minister, shareholders, creditors, other stakeholders or other corporations.

Disqualification under a law of a foreign jurisdiction

Section 206EAA provides the court the power to disqualify a director for any period it considers appropriate where the person is disqualified under the law of a foreign jurisdiction from:

- being a director of, or being concerned in the management of, a foreign company (or carrying on substantially similar activities) and
- the Court is satisfied that the disqualification is justified.

Again however, applications seeking disqualification under section 206EAA can only be made by ASIC, and not by the Minister, shareholders, creditors, other stakeholders or other corporations.

Disqualification by ASIC

Section 206F gives ASIC the power to disqualify a director for up to five years. ASIC may give notice to a director under section 206F if:

- within the last seven years they were an officer of two or more companies
- when the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and
- the liquidators lodged reports under section 533(1) about the inability of the company to pay its debts.  

The notice gives the person an opportunity to demonstrate why they should not be disqualified as a director, and to be heard on the question.

Once ASIC has considered the director’s response to its notice, it can disqualify the director for up to five years. Importantly, ASIC can disqualify a director under section 206F without the need to show breaches of commercial morality or gross incompetence. It is sufficient that the director was the subject of two or more reports that were lodged by liquidator under section 533 of the Corporations Act.

Human rights issues related to disqualifying officials of registered organisations

Both the right to freedom of association and the right to just and favourable conditions of work include the right to form and join trade unions. These rights are protected by Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which Australia is a signatory.

Those rights are informed by International Labour Organization (ILO) treaties, including ILO Convention 87 and ILO Convention 98.

56. Ibid., paragraph 206F(1)(b).
Contents of ILO Convention 87

*ILO Convention 87* provides that workers have the right to autonomy of union processes, which includes:

- selecting their own representatives ‘in full freedom’ (that is, without interference)
- freedom to organise their administration and activities without interference and
- formulating their own programs without interference.\(^\text{60}\)

The disqualification of officers of registered organisations therefore raises human rights concerns as it can amount to an interference with the autonomy of unions, by (for example) depriving them of the right to elect their own representatives ‘in full freedom’. The PJCHR referred to comments from international supervisory mechanisms of the ILO in relation to the human rights engaged by the disqualification regime:

> The right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves.\(^\text{61}\)

**When can freedom of association be limited?**

The PJCHR noted that the right to freedom of association may be subject to permissible limitations, provided certain conditions are met. Generally a justifiable limitation on the right in question (in this case, to freedom of association) must:

- address a legitimate objective
- be rationally connected to that legitimate objective and
- be a proportionate way to achieve the legitimate objective.\(^\text{62}\)

The PJCHR specifically noted that Article 22(3) of the *ICCPR* and Article 8 of the *ICESCR* expressly provide that ‘no limitations are permissible’ on the right to freedom of association if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in *ILO Convention 87*, to which Australia is a signatory.\(^\text{63}\)

As such, a key issue is whether or not the disqualification regime is inconsistent with the guarantees of freedom of association and the right to collectively organise contained in *ILO Convention 87*. In relation to disqualification of officials and its impacts on the autonomy of union processes the ILO Committee of Experts on the Application of Conventions (CEAC) has noted:

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\(^{\text{63}}\) Ibid.; *ILO Convention 87*, op. cit.
• legislation which establishes excessively broad ineligibility criteria such as by means of a long list, including ‘acts which have no real connection with the qualities of integrity required for the exercise of trade union office’ is incompatible with the Convention64

• not every contravention of industrial relations legislation, nor every violation of a judicial order to stop a strike nor every conviction for a criminal offence will necessarily constitute acts of such a nature as to be prejudicial to the performance of trade union duties65 and

• conviction on account of offences that do not call into question the integrity of the person and are not prejudicial to the exercise of trade union functions should not constitute grounds for disqualification.66

Is there a legitimate objective?
The PJCHR noted that the objective of the measures identified in the Statement of Compatibility with Human Rights contained in the Explanatory Memorandum is ‘improving the governance of registered organisations and protecting the interests of members’, including by ensuring the leadership of unions act lawfully.67

On the basis of this explanation, the PJCHR concluded that the measure is likely to constitute a legitimate objective for the purposes of international human rights law.68 In contrast however, the ICTUR viewed the Bill as going well beyond the pursuit of a legitimate objective and argued:

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.69

Is the disqualification regime rationally connected to the legitimate objective?
The PJCHR noted that it was unclear from information provided in the statement of compatibility contained in the Explanatory Memorandum, how the breadth and impact of the disqualification regime is rationally connected to the stated objectives of improving the governance of organisations and protecting the interests of members.70

Further, the PJCHR questioned whether the measure was the least rights restrictive way of achieving the objectives, as required in order to be a proportionate limitation on the rights in question (discussed below).71

Is the disqualification regime a proportionate way to achieve the legitimate objective?
An aspect of the right to freedom of association includes the right to strike – a right specifically acknowledged and protected under international law. Further, the PJCHR noted that the existing restrictions on taking industrial action under Australian law (that is the framework in relation to

65. Ibid.
66. Ibid., pp. 139, 142, 172.
68. Ibid.
69. ICTUR, *submission*, op. cit., p. 5.
70. PJCHR, *Report*, 12, op. cit., p. 117.
71. Ibid., p. 117.
‘protected’ and ‘unprotected’ industrial action) have been criticised by various international oversight organisations.\(^72\)

The PJCHR noted that because the proposed disqualification regime as provided for in the Bill could lead to union officials being disqualified for conduct that may be protected under international law, it further limits the right to strike and therefore the right to freedom of association. Further, the PJCHR noted the breadth of conduct (including non-serious matters) that could potentially lead to a union official being disqualified raises questions about the rational connection of the disqualification regime to the stated objective of protecting the interests of members of unions, where those members may be of the view that taking particular forms of industrial action (such as unprotected industrial action) are in their best interests.\(^73\)

The PJCHR noted that whilst:

... it is a relevant safeguard that disqualification orders are to be made by the Federal Court, this alone is insufficient to ensure that the measure constitutes a proportionate limitation. The court’s discretion in determining that a ground for disqualification exists and that it would not be unjust to make such an order does not address the breadth of the grounds for disqualification in the proposed legislation that the court will apply... The expanded basis for criminal offences to constitute a ground for either mandatory or discretionary disqualification also raises a concern that some of these offences may be unrelated to a person’s capacity or suitability to perform functions in union office.\(^74\)

The ICTUR argued:

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... 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). Imposing these standards for trade union officials is thus totally disproportionate to the existing standards for holding public office.\(^75\)

**Summary of human rights concerns regarding the disqualification regime**

After considering the Minister’s response to the issues it had raised, the PJCHR stated:

... it appears that the scope and extent of the limitation on holding union office goes beyond what is permissible as a matter of international human rights law.\(^76\)

The PJCHR therefore concluded that the proposed disqualification regime ‘is likely to be incompatible with the right to freedom of association’.\(^77\)

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72. Ibid., pp. 116–117.
73. Ibid., p. 117.
74. Ibid., p. 120.
75. ICTUR, Submission, op. cit., pp. 8–9.
76. PJCHR, Report, 12, op. cit., pp. 120–121.
77. PJCHR, Report, 12, op. cit., p. 121.
Sector Union (SPSF Group) (CPSU) argue that the proposed disqualification regime directly breaches the right to freedom of association.78

**Disqualifying officials of registered organisations**

The Bill contains two mechanisms by which officials of registered organisations can be disqualified:

1. proposed Division 3 of Part 4 of Chapter 7 of the FWRO Act (at item 11 of Schedule 1 to the Bill) and related amendments: this deals with disqualification orders generally (and includes the ‘fit and proper person’ test as a potential ground for disqualification) and
2. the making of a disqualification order as an alternative to deregistration of a registered organisation.79

Importantly the two mechanisms are separate to each other. For the purposes of this Digest the ‘disqualification regime’ will refer to proposed Division 3 of Part 4 of Chapter 7 and its related amendments and the ‘alternative disqualification mechanism’ will refer to disqualification as an alternative order to the deregistration of a registered organisation.

**Key concepts and definitions underpinning the disqualification regime**

The disqualification regime proposed by the Bill is underpinned by two key concepts: designated findings and designated laws.80 As noted below, the concept of wider criminal findings used in the Previous Bill is absent from the Bill. Importantly however, the above concepts are also relevant to other aspects of the Bill such as the proposed deregistration, administration and amalgamation regimes. To aid readers, the concepts are briefly outlined below.

### Designated findings and designated laws

**Proposed subsection 9C(1) of the FWRO Act, at item 2 of Schedule 1 to the Bill, defines a designated finding as a finding in criminal proceedings that a person has committed an offence under a designated law; or in any civil proceedings, that the person has contravened, or been involved in a contravention of:**

- a civil penalty provision of the FWRO Act
- a civil remedy provision of the FW Act
- a civil remedy provision of the Building and Construction Industry (Improving Productivity) Act 2016 (BCI Act)
- a Work Health and Safety (WHS) civil penalty provision of the Work Health and Safety Act 2011 (WHS Act) or a related state or territory Occupational Health and Safety (OHS) law within the meaning of the FW Act.

**Proposed subsection 9C(2) defines designated laws as the following:**

- the FWRO Act and FW Act
- the BCI Act and

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78. ICTUR, Submission, op. cit., pp. 3, 6, 11-13; Community and Public Sector Union (SPSF Group) (CPSU), Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions], The Senate, Canberra, n.d., p. 4.
79. Proposed sections 28L and 28M of the FWRO Act (at Item 4 of Schedule 2 to the Bill).
80. Proposed section 9C of the FWRO Act at Item 2 of Schedule 1 to the Bill.
• the WHS Act and each related state or territory OHS law within the meaning of the FW Act.

As discussed below, the PJCHR and some stakeholders expressed concerns about the breadth (and appropriateness) of the types of conduct captured by the definition of designated finding and regulated by the designated laws that could then serve as a basis for disqualifying registered organisation officials – and in particular concerns about minor or administrative offences and those linked to legitimate trade union activity being captured.

Changes from previous Bill

Differences between the Bill and Previous Bill regarding disqualification of officials

The Bill uses different definitions of designated findings and designated laws compared to those used in the Previous Bill. It also entirely removes the concept of wider criminal findings used in the Previous Bill.

This has the effect of limiting (compared to the Previous Bill) the range and types of offences and contraventions that are grounds for disqualification of officials to ‘core workplace laws’ such as the FW Act, Work Health and Safety legislation and Building Industry legislation. This has been achieved because proposed section 9C of the Bill no longer contains the references used in the Previous Bill to:

- the Fair Work (Building Industry) Act 2012 as in force at any time before its repeal (it now only refers to the Building and Construction Industry (Improving Productivity) Act 2016)
- a provision of Part IV of the Competition and Consumer Act 2010, or a provision of the Competition Code of a State or Territory and
- Part 7.8 of the Criminal Code (causing harm to, impersonation and obstruction of, Commonwealth public officials) and any other provision of the Code so far as it applies in relation to that Part.

As these definitions underpin the operative provisions relating to disqualification of officials, their impact is significant as discussed below.

Effect of removal of ‘wider criminal findings’

As noted in the Digest to the Previous Bill, a wider criminal finding was defined in the Previous Bill as a finding (other than a designated finding) in any other criminal proceeding against the person that the person committed an offence against any law of the Commonwealth, a state or territory. That is, it applied to criminal findings beyond industrial laws. In turn the Previous Bill provided that a ground for disqualification was:

- that a wider criminal finding is made against a person and
- the person engaged in the conduct to which the wider criminal finding relates in the course of (or purportedly in the course of) performing functions in relation to any organisation.

For example, committing assault whilst performing functions as an official would have constituted a ‘wider criminal finding’ for the purposes of disqualifying an official under the Previous Bill. This had the practical effect of ensuring that a person with a wider criminal finding made in relation to their conduct whilst performing functions as an official for organisation ‘A’ and who subsequently left that organisation, could nonetheless be disqualified from being an official for organisation ‘B’.

The effect of removing ‘wider criminal findings’ as an explicit ground for disqualification from the Bill is that grounds for disqualification will, subject to the discussion below, have to be connected to ‘core’ workplace laws. Nonetheless the PJCHR and some stakeholders raised concerns about the breadth (and appropriateness) of the types of conduct captured by the Bill that could lead to the disqualification of registered organisation officials – and in particular concerns about minor and
administrative offences and offences linked to legitimate trade union activity being captured. These concerns are discussed below.

**Disqualification orders**

The Bill proposes to introduce a significantly revised disqualification order regime. Currently the *FWRO Act* does not provide a comprehensive mechanism by which the regulator (or any other persons) can apply to have an official disqualified. In contrast the *Corporations Act* allows the regulator (ASIC) to apply for an order to disqualify a director. The regime proposed by the Bill will enable the ROC, the Minister, or any other person with ‘sufficient interest’ to apply to the court for an order to disqualify an official of a registered organisation.⁸¹

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’.⁸² This would appear to allow members of registered organisations, and potentially parties affected by the actions of those organisations (for example employers, employer associations or other registered organisations) to apply for orders to disqualify an official. In this regard, the regime proposed by the Bill differs substantially from the current regulatory regime imposed on corporations. Further, the Bill differs from recommendation 38 of the RCTUGC, which recommended that the *FWRO Act*:

> … be amended by inserting a new provision giving the Federal Court jurisdiction, **upon the application of the registered organisations regulator**, to disqualify a person from holding any office in a registered organisation for a period of time the court considers appropriate. **The court should be permitted to make such an order if the conditions set out in paragraph 190 are satisfied.**⁸³ (Emphasis added)

That is, the RCTUGC specifically recommended that only the ROC have standing to seek disqualification orders. This would mirror the situation with respect to ASIC and company directors under the *Corporations Act*. To illustrate the differences between the model recommended by the RCTUGC and that proposed by the Bill, Table 2 in the Appendix to this Digest sets out in detail the conditions proposed by the RCTUGC and those proposed by the Bill, and their differences.

**Concerns about persons with standing to seek disqualification orders**

As noted above the Bill will enable the ROC, the Minister, or any other person with ‘sufficient interest’ to apply to the court for an order to disqualify an official of a registered organisation⁸⁴—whereas the RCTUGC specifically recommended that only the ROC have standing to seek disqualification orders.

A number of stakeholder raised concerns about the breadth of persons granted standing to seek disqualification orders, arguing that the relevant provisions would breach Australia’s obligations with respect to freedom of association and the autonomy of trade union processes. The ICTUR stated:

> The range of actors who can initiate any of these processes is problematic, including the Minister, Commissioner or any person with a ‘sufficient interest’... And we reiterate our concern that the

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⁸¹. *Proposed subsection 222(1)* of the *FWRO Act*, at item 11 of Schedule 1 to the Bill.


⁸⁴. *Proposed subsection 222(1)* of the *FWRO Act*, at item 11 of Schedule 1 to the Bill.
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.  

The CPSU SPSF Group likewise stated that in relation to disqualification orders the Bill would mean:

Any employer in an industry in which a union operates could have a “sufficient interest” even though they may not have been directly affected by the conduct of an organisation. Also, customers of enterprises effected by actions of a union could have a “sufficient interest.” The great expansion in the class of persons who can bring proceedings under the Bill reinforce an argument that it breaches our international obligations relating to free association … [and] that a union be “protected” from interference in their functioning by employers, employer associations or their proxies.

**When can a disqualification order be made?**

In relation to disqualification orders, the RCTUGC noted:

Subject to specific situations where the registered organisations regulator should be entitled to disqualify an officer because of certain easily verifiable objective matters, it is preferable that the power to ban be conferred on a court. First, any decision by the regulator would be subject to judicial review and the reviewing court would be able to review the jurisdictional facts supporting the regulator’s decision. In practice, this would often lead to increased delays, cost and expense. Secondly, the judicial process provides a greater safeguard against the possibility of the power being misused. Thirdly, ASIC only has the power to issue a banning notice in limited circumstances.

The RCTUGC noted that ‘having regard to the problems identified by the Commission, the Federal Court should be permitted to make an order disqualifying a person from holding an office within a registered organisation or branch’ where:

- a ground for disqualification is made out (discussed below) and
- the Court is satisfied that the disqualification is justified.

Table 2 in the Appendix to this Digest sets out in detail the grounds justifying disqualification proposed by the RCTUGC and those proposed by the Bill, and their differences. However, in contrast to the RCTUGC’s recommendation, proposed subsection 222(2) of the FWRO Act, at item 11 of Schedule 1 to the Bill provides that the Court may make a disqualification order where a ground is made out and the court does not consider that it would be unjust to disqualify the person after ‘having regard to’:

- the nature of the matters constituting the ground (noting that these will have had to occur after the commencement of the amendments in the schedule)
- the circumstances and the nature of the person’s involvement in the matters constituting the ground and
- ‘any other matter that the court considers relevant’.

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85. ICTUR, Submission, op. cit., p. 8.
86. CPSU SPSF, submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions], The Senate, Canberra, n.d., p. 6.
88. Ibid., p. 3396.
The grounds for disqualification proposed by the Bill (discussed below) are more expansive than that proposed by the RCTUGC. Professionals Australia argued that the difference in the drafting between the Bill and that recommended by the RCTUGC ‘has the practical effect of effectively shifting the onus onto the defendant to satisfy the Court why the order is unjust if a ground is made out’ rather than the applicant satisfying the court that because a ground is made out, disqualification is justified.  

Further, a number of stakeholders argue that a number of potential grounds for disqualification breach Australia’s obligations with respect to freedom of association and the autonomy of trade union processes (also discussed below).

Differences between the Corporations Act and the Bill’s disqualification regime

The differences between the disqualification regime proposed by the Bill and that contained in the Corporations Act can be briefly summarised. First, the disqualification regime proposed by the Bill is more expansive in its application than that contained in the Corporations Act because:

• it proposes that not being a ‘fit and proper person’ (the proposed test that takes into account certain civil and criminal findings and ‘any other event the Court considers relevant’) be a ground for disqualification – the Corporations Act applies no equivalent test
• the range of persons who can seek to apply to have an official disqualified includes the Commissioner, the Minister and any person with a ‘sufficient interest’ – the Corporations Act only provides standing to ASIC, not the Minister, directors, shareholders or creditors (all persons roughly analogous to a person with a ‘sufficient interest’ in a registered organisation) and
• the Bill does not contain any provisions that prevent frivolous or vexatious applications to disqualify officials – the Corporations Act does contain provisions that operate to prevent certain frivolous or vexatious applications (but not in relation to disqualification of directors, as standing is reserved for ASIC alone).

Summary of grounds for disqualification

Proposed section 223 of the FWRO Act, at item 11 of Schedule 1 to the Bill sets out the grounds for disqualification. They are:

• a designated finding is made against the person or the person is found to be in contempt of court in relation to an order or injunction made under a designated law
• the person is found in contempt of court in relation to conduct whilst performing (or purportedly performing) functions in relation to any organisation

90. Professionals Australia, Submission to the Senate Education and Employment Legislation Committee, inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 [provisions], n.d., p. 3.
91. Proposed paragraph 223(6)(f) of the FWRO Act, at item 11 of Schedule 1.
92. Section 236 of the Corporations Act 2001 permits a member (shareholder) or director of a company to bring proceedings on behalf of the company, or intervene in any proceedings to which the company is a party, for the purpose of taking responsibility on behalf of the company for those proceedings. The criteria for the operation of this section are provided in section 237: it must be probable that the company will not itself bring proceedings; the applicant must be acting in good faith; it must be in the best interests of the company that the applicant be granted leave; there must be a serious question to be tried and written notice must be provided to the company of the intent to apply. In essence, sections 236 and 237 allow the shareholders and directors who are in a minority position on the Board to usurp the authority that the corporate entity has vested in the board of directors as a whole by allowing them to ‘act as some form of corporate watchdog, to pursue an action against a wrongdoer, when the board refuses to act’: L Griggs, ‘A statutory derivative action: lessons that may be learnt from its past’, University of Western Sydney Law Review, 6(1), 2002 at 1.1.
• the person was involved in multiple failures to prevent contraventions by the organisation and failed to take ‘reasonable steps’ to prevent the conduct
• the person committed an offence or contravened a provision related to directors duties or was disqualified from managing a corporation under Part 2D.6 of the Corporations Act or
• the person is not a fit and proper person to hold office in an organisation.

These are briefly discussed below. Table 2 in the Appendix to this Digest sets out in detail the differences between these grounds for disqualification and those originally proposed by the RCTUGC. As noted above, the grounds for disqualification proposed by the Bill are more expansive than that proposed by the RCTUGC and have been argued to breach Australia’s obligations with respect to freedom of association and the autonomy of trade union processes.

**A designated finding is made against the person and certain contempt findings**

Two grounds for disqualification are that:

• a designated finding is made against the person or
• the person is found to be in contempt of court in relation to an order or injunction made under a designated law.  

The breadth of conduct captured by these grounds was of substantial concern to the PJCHR and a number of stakeholders and is discussed under the heading ‘Breadth of conduct captured by definitions of designated findings and laws’ below.

**The person is found in contempt of court in certain circumstances**

Proposed subsection 223(2) provides that a ground for disqualification is where a person is found in contempt of court in relation to an order or injunction made under any law of the Commonwealth, a state or territory and the person engaged in the conduct to which the contempt of court finding relates in the course of (or purportedly in the course of) performing functions in relation to any organisation.

**Multiple failures to prevent contraventions by the organisation**

A ground for disqualification is where at least two of the following findings are made against any organisation in relation to conduct engaged in whilst the person is an officer of the organisation:

• a designated finding or
• a finding that the organisation is in contempt of court in relation to an order or injunction made under a designated law.

In the Previous Bill, this ground included a ‘wider criminal finding’ and a finding that the organisation is in contempt of court in relation to an order or injunction made under ‘any law of the Commonwealth, a state or territory’. As such the Bill somewhat (noting concerns about the breadth of conduct captured by designated findings) restricts the range of conduct to those related to industrial laws, rather than broader criminal conduct unrelated to the operation of a registered organisation.

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93. Proposed subsection 223(1) of the FWRO Act, at item 11 of Schedule 1 to the Bill.
94. Proposed paragraph 223(3)(a) of the FWRO Act, at item 11 of Schedule 1 to the Bill.
95. Proposed subsection 223(3) of the FWRO Act, at item 9 of Schedule 1 of the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (Previous Bill).
Importantly however this ground of disqualification only applies where the official failed to take reasonable steps to prevent the conduct covered by the findings. In relation to the Previous Bill, the Scrutiny Committee noted the Minister’s response that the reasonable steps defence to a failure to prevent contraventions by an organisation:

- entails an objective test, involving the consideration of whether the steps taken accord with those a prudent and reasonable person would take in the particular circumstances
- that what constitutes taking reasonable steps will vary depending on the circumstances of each case, it is neither appropriate nor possible to provide specific guidance in legislation as to the types of conduct that might avoid disqualification and
- even where grounds for disqualification exist, it will be for the Federal Court to determine whether disqualification is justified in the circumstances

and requested that the key information provided by the Minister be included in the Explanatory Memorandum to the Bill.

The PJCHR noted that because of the breadth of the concept of a ‘designated finding’ this ground of the disqualification regime means it is possible that where a union has engaged in two or more relevant contraventions (which may be minor in nature) the entire elected leadership of a union could be subject to disqualification. The PJCHR specifically noted that this could occur regardless of whether or not the union members in question had agreed to participate in the conduct which led to the ‘designated findings’ and whether they considered the relevant conduct to be in their best interests.

**Breaches of directors duties and the Corporations Act**

A ground for disqualification is where a person is found in any criminal or civil proceedings, to have committed an offence against, or contravened a provision of, Division 1 of Part 2D.1 of the Corporations Act (this relates to directors duties) or the person is disqualified from managing a corporation under the Corporations Act.

This will ensure that where a person commits certain criminal offences or breaches of directors duties that are similar in nature to those imposed on officials of organisations, they can be disqualified. The Explanatory Memorandum argues:

A finding that a person has previously contravened their duties as an officer in relation to a corporation may be indicative that the person is not a suitable person to hold office in an organisation or branch of an organisation.

Likewise, where a person is disqualified as a director proposed subsection 223(4) will allow the person to be disqualified from acting as an official. The Explanatory Memorandum notes that ‘the types of conduct that form the grounds for disqualification under Part 2D.6 of the Corporations Act’ mean where a person is disqualified as a director, the ‘suitability of the person to hold office

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96. Proposed paragraph 223(3)(b) of the FWRO Act, at item 11 of Schedule 1 to the Bill.
98. PJCHR, Report, 12, 2017, op. cit., p. 120.
99. Ibid.
100. Proposed subsection 223(4) of the FWRO Act, at item 11 of Schedule 1 to the Bill.
101. Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, pp. 7-8
in an organisation’ comes into question, and hence ‘such disqualification should properly be a ground for disqualification of an official’.102

**The person is not a fit and proper person to hold office in an organisation**

The final ground for the disqualification of an official is where, after having regard to certain events, that person is not a fit and proper person to be an official in a registered organisation.103

**Proposed subsection 223(6)** sets out the events that are indicative of not being a fit and proper person to be an official in a registered organisation. The events are:

- the person is refused an entry permit, or an entry permit held by the person is revoked or suspended under the *FW Act*
- a person is refused a WHS entry permit, or a WHS entry permit held by the person is revoked or suspended under the *WHS Act* (or under a state or territory OHS law)
- in any criminal or civil proceedings against the person, or any action against the person by an agency of the Commonwealth, state, or territory, the person is found to have engaged in conduct involving fraud, dishonesty, misrepresentation, concealment of material facts, or a breach of duty
- in any criminal proceedings against the person, the person is found to have:
  - engaged in conduct 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 or
  - committed an offence against any law of the Commonwealth or a state or territory that is punishable by imprisonment for two years or more.

The Explanatory Memorandum notes that various rights of entry provisions in the *FW Act* and WHS legislation that grant significant rights and privileges to permit holders to access premises are subject to the permit holder being a fit and proper person.104 The Government argues that these rights should only be exercisable by persons who demonstrate appropriate regard for the law.105 The Government argues that the types of conduct covered by the events above include behaviours that may indicate that a person is neither fit nor proper to hold office in a registered organisation.106

The Government notes the *FWRO Act* places duties on officials of registered organisations including to act with appropriate care and diligence, to act in good faith and not to misuse their position or information gained as a result of holding office. As such, it argues that an official who has been found in any relevant proceedings to have engaged in conduct involving fraud, dishonesty, misrepresentation, concealing material facts or a breach of those duties may be a person who cannot uphold the duties imposed on an official, and is therefore not a suitable person to hold office in a registered organisation.107

In this regard, there appears to be a degree of overlap with existing sections 212 and 215 of the *FWRO Act*. This was noted by the ICTUR:

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102. Ibid., p. 8.
103. *Proposed subsection 223(5)* of the *FWRO Act*, at *item 11* of *Schedule 1* to the Bill.
105. Ibid.
106. Ibid.
107. Ibid.
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.\footnote{ICTUR, \textit{Submission}, op. cit., p. 8.}

This is because under these provisions a person is automatically disqualified from being an official if they are convicted of an offence involving fraud or dishonesty punishable by imprisonment for a period of three months or more – that is, conduct involving fraud, dishonesty, misrepresentation, concealing material facts and so forth. However, whilst there is a degree of overlap, nonetheless the proposed amendment would allow persons with the requisite standing to seek the disqualification of an official in circumstances where (for whatever reason) \textbf{automatic disqualification} had not occurred (or been enforced) under the existing automatic disqualification provisions of the \textit{FWRO Act}.

Finally, the Government notes that where a person has been convicted of an offence involving the intentional use of violence towards another person, the intentional causing of death or injury of another person or the intentional damaging or destruction of property, such findings may indicate that the person is not suitable to be an official in a registered organisation. This is ‘due to significant and important functions and powers that exercisable by officers’.\footnote{Explanatory Memorandum, \textit{Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019}, p. 9.}

\textit{Criticisms of the ‘not a fit and proper person test’}

A number of stakeholders were critical of the inclusion of the proposed ‘not a fit and proper’ person test as a ground for disqualification.\footnote{See \textit{Submissions} to the Senate Education and Employment Legislation Committee, \textit{Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 [provisions]}, from: ACTU, p. 16; TCFUA, p. 6; PA, p. 6; CFMEU, p. 8.}

\begin{quote}
\textit{No equivalent test is imposed on company directors} or officers of incorporated associations under state legislative regimes. The expansive range of grounds is a significant overreach and invites undue political, corporate and regulatory interference in the democratic and autonomous functioning and control of registered organisations.\footnote{ACTU, \textit{Submission} to the Senate Education and Employment Legislation Committee, \textit{Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 [provisions]}, 8 September 2017, p. 16.} (Emphasis added)
\end{quote}

The Victorian Government was also critical of the fit and proper person test, noting:

\begin{quote}
There is also no general ‘fit and proper person test’ for company directors under the \textit{Corporations Act 2001} (Cth). The proposed disqualification provisions create an unjustifiable inequality of standards for registered officials compared to company directors.\footnote{Victorian Government, \textit{submission} to the Senate Education and Employment Legislation Committee, \textit{Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions]}, The Senate, Canberra, 28 August 2018, p. 7.}
\end{quote}

The effect of \textit{proposed paragraph 223(6)(e)} is that a person can be found to not be a fit and proper person where they are found to have engaged in certain conduct, or to have committed a criminal offence punishable by two or more years imprisonment, but are not convicted of the offence. In this regard the Queensland Law Society (QLS) noted:

\begin{quote}
We are concerned that the current drafting of these provisions leaves it open to the possibility that a person could be acquitted, or have a hung jury yet still fall within the language of “found to have engaged in”. For instance, a judge might make a finding of fact that an accused person committed an act of violence, but acquits them because they have raised a defence or because the proceeding ends for
\end{quote}
another reason. It would seem more appropriate that there should be a conviction before the disqualification provisions can be invoked.\textsuperscript{113}

In addition, another effect of proposed subparagraph 223(6)(e)(ii) is that a person can be found to not be a fit and proper person where they have been found to have committed a criminal offence punishable by two or more years imprisonment – including offences not necessarily related to the ‘core’ roles and responsibilities of officials of organisations (whether convicted or not of the offence).\textsuperscript{114} In this regard the QLS noted:

\begin{quote}
The scope of behaviour captured by the proposed grounds for disqualification under the bill are wider than that recommended by the Royal Commission report. They may also overlap with existing disqualification provisions under the \textit{Fair Work Act} and create uncertainty about the interaction between the relevant laws.\textsuperscript{115}
\end{quote}

As such, for the reasons discussed below appears that the breadth of conduct captured by the proposed disqualification regime, whilst somewhat narrower than the Previous Bill, nonetheless creates the potential for official to be disqualified in circumstances that are prohibited by Australia’s international legal obligations in relation to freedom of association and autonomy of union processes.

Other matters that may be considered

As noted previously proposed subsection 222(2) the court \textit{may} make a disqualification order where a ground is made out and the court does not consider that it would be unjust to disqualify the person after ‘having regard to’, amongst other things, ‘any other matters the court considers relevant’.\textsuperscript{116} The Explanatory Memorandum notes:

\begin{quote}
Other matters may include consideration of the best interests of the organisation’s members and whether other action has been taken to address the conduct.\textsuperscript{117}
\end{quote}

Differences to the Previous Bill

There are two main differences between the Previous Bill’s disqualification regime and that proposed by the Bill.

First, as noted earlier the Bill removes the concept of ‘wider criminal findings’, including as an explicit ground for disqualification. This means, subject to the previous discussion above regarding the breadth of conduct captured, grounds for disqualification will have to be connected to breaches of ‘core’ workplace laws.

Second, the Bill alters the range of grounds that could serve as a basis for finding that a person is not a ‘fit and proper’ person to hold office in an organisation. In the Previous Bill, proposed section 223 provided that the Court could determine that a person was not a fit and proper person hold office in an organisation, having regard to:

\begin{itemize}
\item [113] Queensland Law Society (QLS), \textit{submission} to the Senate Education and Employment Legislation Committee, \textit{Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions]}, The Senate, Canberra, 29 August 2019, p. 2.
\item [114] Human Rights Law Centre (HRLC), \textit{submission} to the Senate Education and Employment Legislation Committee, \textit{Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions]}, The Senate, Canberra, 28 August 2018, p. 9.
\item [115] QLS, \textit{submission}, op. cit., p. 3.
\item [116] \textit{Proposed paragraph 222(2)(b)(iii)}.
\item [117] \textit{Explanatory Memorandum}, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, p. 6.
\end{itemize}
• whether, in any criminal proceedings against the person, they were found to have engaged in conduct 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 or

• any other event the Court considers relevant. (emphasis added)

Given the breadth of ‘any other event’, the Previous Bill would have allowed a court to consider a wide range of conduct in relation to determining if a person was not a fit and proper person to hold office in an organisation. It could be argued that ‘any other event’ would have been read in the context of the section as a whole and therefore linked to criminal conduct or proceedings. However, it may also have been that the section could have been interpreted as allowing the court to consider events more broadly, including those unrelated to criminal conduct or proceedings, when determining if a person was not fit and proper to hold office in an organisation.

In contrast, the Bill adopts a slightly narrower test. First, the first limb of this element from the Previous Bill is adopted without change. However, the second limb (‘any other event …’) is amended to instead refer to circumstances where:

… in any criminal proceedings against the person, the person is found to have … committed an offence against a law of the Commonwealth or a State or Territory that is punishable by imprisonment for 2 years or more. (emphasis added).\(^\text{118}\)

Whilst – as noted above – this allows criminal conduct not related to an official’s duties to serve as a basis for disqualification, it nonetheless represents a narrowing of the fit and proper person test by imposing a requirement that the relevant offences in both limbs were actually proved (rather than a person merely being charged, which the Previous Bill may have captured). Whilst the Bill still requires the Court to have regard to ‘any other matters’, this applies not in regards to establishing where a ground for disqualification exists, but rather in determining whether disqualifying an official would be unjust.

The combined effect of those changes is to reduce the scope of conduct that could serve as grounds for disqualification to more serious (and proved) conduct, albeit including conduct that may be ‘completely unrelated to a person’s role working as a union official’.\(^\text{119}\)

**Breadth of conduct captured by definitions of designated findings and laws**

The PJCHR noted that the effect of the broad definitions of designated finding and designated law is that the range of conduct that could result in the disqualification of an official is extremely broad. This is because a ‘designated finding’ includes a contravention of various industrial laws, and therefore includes contraventions that are potentially of a less serious nature (including the taking of unprotected industrial action).\(^\text{120}\)

The PJCHR noted that the right to strike is an aspect of the right to freedom of association – and that the right to strike is specifically protected and permitted under international law.\(^\text{121}\) Further, the PJCHR noted that the existing restrictions on taking industrial action under Australian law (that

\(^{118}\) Proposed paragraph 223(6)(e)(ii).

\(^{119}\) Ibid.

\(^{120}\) Ibid.

\(^{121}\) Ibid.
is the framework in relation to ‘protected’ and 'unprotected' industrial action) have been ‘consistently criticised by international supervising mechanisms as going beyond what is permissible’.\footnote{122}

The PJCHR concluded that because of the broad application of the concept of a ‘designated finding’, union officials could be disqualified for conduct that may be protected under international law.\footnote{123} As such, it noted that the disqualification regime appears to limit the right to strike and raises questions about the rational connection of this aspect of the disqualification regime to the stated objective of protecting the interests of members of unions, where those members may be of the view that taking particular forms of industrial action (such as unprotected industrial action) is in their interests.\footnote{124}

The ICTUR also expressed concerns about the range of conduct captured by the definition of ‘designated finding’ arguing that it conflates failure to comply with the duties ordinarily placed on the officers of corporations, infractions of industrial law (including ‘potentially even minor technical aspects’) and ‘the potentially arbitrary concept of an individual’s ‘fitness’ for office’ with ‘serious crime’\footnote{125} and that:

\begin{quote}
The conflation of these very different grounds is deeply problematic ... 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 lodging 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.\footnote{126}
\end{quote}

The CPSU expressed similar concerns, arguing that:

\begin{quote}
A number of these bureaucratic or procedural civil penalty provisions can be cobbled together to form a pattern of “unlawfulness” to support a case for an order for disqualification, deregistration, administration or to deny an amalgamation. The combination of a low threshold for standing to bring applications, together with the relatively low-level matters as grounds invites speculative and strategic applications by employers, and employer associations. The prospect of strategic lawfare against unions or their officials by employers, brought for reasons other than to enforce compliance, is a compelling reason to recommend this Bill be withdrawn.\footnote{127}
\end{quote}

\textbf{Automatic disqualification of officials}

Currently Chapter 7, Part 4, Division 2 of the \textit{FWRO Act} deals with the automatic disqualification of officials. In simple terms, under sections 213 and 215 if an official has been convicted of a \textbf{prescribed offence}, they are automatically disqualified from holding office in a registered organisation for a certain period of time. A \textbf{prescribed offence} is currently defined as:

\begin{quote}
\footnotesize
\textit{\textbf{Automatic disqualification of officials}}

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\end{quote}

\begin{footnotes}
\footnote{122. Ibid.}
\footnote{123. Ibid.}
\footnote{124. Ibid.}
\footnote{125. ICTUR, \textit{Submission}, op. cit., p. 6.}
\footnote{126. Ibid.}
\footnote{127. CPSU SPSF, \textit{Submission}, op. cit., p. 8.}
\end{footnotes}
• an offence under a law of the Commonwealth, a state or territory, or another country, involving fraud or dishonesty and punishable on conviction by imprisonment for a period of three months or more

• an offence under the FWRO Act related to registered organisation elections, criminal breaches of an official’s duties of good faith, use of position and information, and criminal offences related to reprisals against whistleblowers

• any other offence in relation to the formation, registration or management of an association or organisation 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. 128

As noted by the ICTUR the FWRO Act currently provides ‘powers for disqualification in relation to serious criminal offences’ and that such provisions are – from an international law perspective – ‘relatively uncontroversial’. 129 However, the ICTUR noted:

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). 130

Expansion of offences justifying automatic disqualification

Proposed paragraph 212(aa), at item 8 of Schedule 1 to the Bill, will expand the definition of prescribed offence in section 212 to include an offence under a law of the Commonwealth, state or territory, or another country, punishable upon conviction by imprisonment for life or a period of five years or more. This is consistent with recommendation 36 of the RCTUGC. 131

Item 17(1) of Schedule 1 provides that automatic disqualification will not apply to a conviction for an offence of the type listed in proposed paragraph 212(aa) if the conviction is in relation to conduct engaged in before the commencement of Schedule 1. This means proposed paragraph 212(aa) will not operate retrospectively in that respect. Further a person convicted after commencement in relation to conduct engaged in before the commencement of Schedule 1 will also not be subject to automatic disqualification under proposed paragraph 212(aa).

Comparison to disqualification of company directors

It is worth noting that directors of companies are automatically disqualified for up to five years where they are convicted of an offence against the law of a foreign country or an offence under the Corporations Act punishable by imprisonment for a period of greater than 12 months. 132 In contrast, the Bill proposes that an official will only be automatically disqualified where they are convicted of an offence against the law of a foreign country (other than the specific types of offences discussed above) punishable by imprisonment for a period of greater than five years. 133

128. Fair Work (Registered Organisations) Act 2009, section 212.
129. ICTUR, Submission, op. cit., pp. 7–8.
130. Ibid., p. 10.
133. Proposed paragraph 212(aa) of the FWRO Act, at item 8 of Schedule 1 to the Bill; Fair Work (Registered Organisations) Act 2009, paragraphs 212(a) and (b).
In that regard the Bill arguably imposes a more lenient threshold for automatic disqualification of officials of registered organisations on the basis of breaching laws of a foreign country that do not relate to fraud or dishonesty than the Corporations Act imposes in relation to directors of companies. In contrast the Bill imposes a stricter threshold for automatic disqualification of officials of registered organisations on the basis of breaching laws of a foreign country that relate to the use of violence or damaging property. This is because the Bill provides that any conviction will lead to automatic disqualification, regardless of the punishable period of imprisonment. In contrast the Corporations Act only captures such offences where punishable by imprisonment for a period greater than 12 months.134

Under the Bill and the Corporations Act, both directors of companies and officials of registered organisations are automatically disqualified where they are convicted of an offence that involves dishonesty that is punishable by imprisonment for at least three months.135 Further, the automatic disqualification regimes in the Corporations Act and FWRO Act apply where a director or official is convicted of any offence that involves the management of the entity concerned.136

Concerns about range of conduct justifying automatic disqualification

The PJCHR and some stakeholders expressed concern about the expansion of the definition of prescribed offence in section 212 by proposed paragraph 212(aa).

The PJCHR noted that ‘the bill would expand the categories of offence where a person may be subject to automatic disqualification’ and after discussing the impact of the expanded grounds for both automatic disqualification and disqualification under the proposed disqualification regime, concluded that due to the breadth of conduct captured, the measure is ‘likely to be incompatible with the right to freedom of association’.137

In discussing the various pathways for disqualification (including automatic disqualification) the ICTUR noted:

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.138

In this regard it is again worth noting the CEAC has stated that convictions for offences ‘that do not call into question the integrity of the person and are not prejudicial to the exercise of trade union functions’ should not constitute grounds for disqualification.139

In this regard it is worth noting that proposed paragraph 212(aa) would allow officials to be disqualified for offences that may not call into question the integrity of the person or are not prejudicial to the exercise of trade union functions, and hence may pose a risk of placing Australia

137. PJCHR, Report, 12, 2017, op. cit., p. 121.
in breach of its international legal obligations in relation to freedom of association and autonomy of union processes.

**Offences related to disqualified officials**

**Proposed Division 4** of Part 4 of Chapter 7 of the *FWRO Act* contains amendments that provide that a person disqualified from being an official in an organisation may commit an offence if they are a candidate for office, hold office, or act as if they hold office, in an organisation.\(^{140}\)

**Definition of disqualified official**

**Proposed section 225** defines a person **disqualified from holding office in an organisation** as:

- a person who is not eligible to be a candidate for election to, or to hold an office in, an organisation under **subsection 215(1)** as amended by **item 9 of Schedule 1** (that is, a person who has been convicted of a **prescribed offence** as defined in section 212, discussed above under the heading ‘**Automatic disqualification**’)

- a person disqualified from holding office in an organisation under an order made under **proposed section 28M**, at **item 4 of Schedule 2** to the Bill, or proposed section 222. (**Proposed section 28M** allows the Federal Court to disqualify a person from holding office in an organisation when an application has been made under **proposed sections 28** or **28A** seeking the cancellation of a registered organisation’s registration or alternative orders and the Court determines that a ground set out in the application is established wholly or mainly because of the conduct of officers, including the specified person.)\(^{141}\)

The note to **proposed section 225** states that a person disqualified from holding office in an organisation is also disqualified from holding office in a branch of an organisation.

**Offences related to disqualified officials**

**Proposed section 226** contains three offences, all of which are punishable by a fine of up to 100 penalty units ($21,000), imprisonment for up to two years, or both.\(^{142}\)

The first offence is where a person is a candidate for election to an office in an organisation and the person is disqualified from holding office in an organisation. The second offence is where the person holds office while disqualified. If the person is disqualified because they committed a prescribed offence and were in office at the time of the conviction, they will commit the second offence if they continue to hold office in an organisation or a branch of the organisation either 28 days after their conviction or when the Federal Court refuses their application for leave to hold office despite the prescribed offence (see subsections 215(2) and (3), 216(3) and 217(3) of the *FWRO Act* for details).

The third offence is where a person is disqualified from holding office in an organisation and the person acts as if they hold office. **Proposed subsection 226(3)** has a number of elements that are required to be met to prove that a disqualified person is acting as an official. The first element is that the person is disqualified from holding office in a registered organisation. In addition the person must also:

- exercise the capacity to significantly affect the financial standing or other affairs of an organisation or part of an organisation (for example a branch) or

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\(^{140}\) **Proposed section 224** of the *FWRO Act*, at **item 11 of Schedule 1** to the Bill.

\(^{141}\) **Explanatory Memorandum**, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, p. 10.

\(^{142}\) Section 4AA of the *Crimes Act 1914* (Cth) provides that a penalty unit is equal to $210.
• give directions (not including advice given by the person in the proper performance of functions that relate to the person’s professional capacity) to the management committee of an organisation or part of an organisation.\(^{143}\)

In the case of a person giving directions to the management committee of an organisation or part of an organisation, proposed paragraph 226(3)(c) provides that the person must know that the committee of management is accustomed to act in accordance with the person’s directions or intend that it will do so.

Proposed subsection 226(4) provides that strict liability applies to the physical element of the offences; that is, that the person is disqualified from holding office in a registered organisation, if the person is disqualified under an order made by the Federal Court under proposed sections 28M or 222 of the FWRO Act (discussed above). The Explanatory Memorandum notes that section 206A of the Corporations Act provides a comparable offence in relation to disqualified directors that also applies strict liability to the circumstance of whether or not a person is disqualified from being a director.\(^{144}\)

The Government argues that, as with the Corporations Act offence, strict liability is appropriate in the circumstances as the Federal Court will have made an order disqualifying a person from holding office under proposed sections 28M or 222. The Government argues that applying a fault element, whether intention, knowledge, recklessness or negligence, would unnecessarily weaken the deterrent effect of proposed sections 28M and 222 because a person who has been disqualified by Federal Court order will be aware that they have been disqualified.\(^{145}\)

Importantly however, the imposition of strict liability does not apply to disqualification under section 215 of the FWRO Act (automatic disqualification). The Government notes that this is appropriate as there may be questions as to whether a person was aware of the automatic disqualification, in the absence of court order.\(^{146}\)

The Scrutiny Committee noted the penalties proposed for the offences in proposed section 226—100 penalty units or imprisonment for two years, or both. This has not altered from the Previous Bill. Whilst previously the proposed penalty was double that applying to the comparable offence in existing 206A of the Corporations Act, the situation has changed.\(^{147}\) This is because, as noted earlier in this digest, the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 increased the penalty for the comparable offence in the Corporations Act to five years imprisonment. This means that the penalty applicable to company directors for holding office whilst disqualified is currently more than double that proposed by the Bill for officials of registered organisations.\(^{148}\)

The Scrutiny Committee also reiterated its long-standing view that ‘it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed’.\(^{149}\)

\(^{143}\) Proposed subsection 226(3) of the FWRO Act, at item 11 of Schedule 1 to the Bill.

\(^{144}\) Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, p. 11.

\(^{145}\) Ibid.

\(^{146}\) Ibid.

\(^{147}\) Senate Standing Committee for the Scrutiny of Bills, Scrutiny digest, 3, 2019, The Senate, 24 July 2019, p. 22.


\(^{149}\) Ibid.
**Application of amendments**

**Item 17** of Schedule 1 to the Bill deals with how the proposed amendments to the disqualification regime will apply. Generally, the amendments will apply upon commencement of the provisions in the schedule. However, **subitem 17(1)** has the effect of providing that the automatic disqualification regime will only apply to offences of the type listed in **proposed paragraph 212(aa)** where the conviction relates to conduct engaged in after the commencement of the amendments contained in Schedule 1. The only exception to this will be where the offence covered by proposed paragraph 212(aa) was already covered by existing section 212.

This will ensure that the changes to the automatic disqualification regime will not apply retrospectively.

**Item 17(2)** relates to the disqualification regime contained in **proposed section 222**. It provides which conduct or events the court may consider when determining whether any of the grounds for disqualification under **proposed section 223** apply to an official. Generally, the effect of **item 17(2)** is that grounds for disqualification can only be established by conduct or events that occurred after the commencement of the amendments (in other words the amendments will not operate retrospectively).

However there is an important qualification to the operation of **item 17(2)**. **Item 17(3)** provides the court **may** have regard to matters that occurred before the commencement of the amendments for the purposes of **proposed paragraph 222(2)(b)**; that is, in determining whether it would be unjust to disqualify the person, having regard to:

- the nature of the matters constituting the ground
- the circumstances and the nature of the person’s involvement in the matters constituting the ground and
- any other matter that the court considers relevant.

As such **item 17(3)** will allow the court to consider ‘matters that occurred prior to the commencement of this Schedule for the purposes of determining whether it would be unjust to disqualify the person from holding office’.

**Alternative disqualification mechanism**

The amendments contained in Schedule 2 will provide that the Court can, instead of cancelling the registration of an organisation, make various alternative orders where the grounds for cancellation have been made out because of the conduct of the officials or members of a particular part of an organisation. Importantly, this includes disqualification of officials via a court order issued as an alternative order to deregistration of a registered organisation – the ‘alternative disqualification mechanism’.

As the de-registration regime is examined in detail later in this Digest, only a brief summary of the differences between the grounds for disqualifying an official under the alternative disqualification mechanism and the Bill’s proposed disqualification regime and changes to automatic disqualification are examined.

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151. Ibid., p. 15.
Grounds for disqualifying an official under the alternative disqualification mechanism

Broadly speaking the grounds that can serve as the basis for disqualifying an official under the alternative disqualification mechanism relate to what would be colloquially understood as unlawful or otherwise improper conduct by the organisation, its officials, or members.\(^{152}\)

Whilst those grounds are examined in detail later in this Digest, concerns about the compatibility of specific grounds with Australia’s human rights obligations were raised.\(^{153}\)

Interference with the autonomy of union processes

**Proposed subsection 28C(1)** provides that a ground for making an order to disqualify an official includes where the affairs of the organisation or part of the organisation have been or are being conducted in a manner resulting in the organisation or part, or officers or members of the organisation or part, having a record of not complying with designated laws.

**Proposed section 28G** provides that a ground for making an order to disqualify an official includes where obstructive industrial action (defined to exclude protected industrial action) is organised or engaged in by the organisation (or part of it), or a substantial number of members (or a class of members) of the organisation.

The PJCHR noted that as many of the grounds for cancellation (and therefore disqualification as an alternative order):

> ... could relate to less serious contraventions of industrial law or to taking unprotected industrial action such that it is unclear how the cancellation of union registration would necessarily be in the interests of members or would guarantee the democratic functioning of the organisation. For example, union members may have democratically decided to take unprotected industrial action and hold the view it is in their best interests to do so... restrictions on taking industrial action in Australian domestic law have been subject to serious criticisms by international treaty monitoring bodies as going beyond permissible limitations on the right to strike as an aspect of the right to freedom of association.\(^{154}\) (emphasis added).

The ICTUR was also critical of allowing the disqualification of officials ‘on matters of internal union democracy’\(^{155}\) (which members voting to take unprotected industrial action is an example of).

Disqualifying officials for conduct they had no involvement in

**Proposed sections 28D and 28E** provide that a ground for making an order to disqualify an official includes where the organisation has committed serious offences, or where

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\(^{152}\) *Explanatory Memorandum*, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, p. i; **Proposed section 27A** of the *FWRO Act*, at **item 4** of **Schedule 2** to the Bill.

\(^{153}\) See for example the *Submissions* to the Senate Education and Employment Legislation Committee, *Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions]*, from the CPSU SPSF (pp. 5-6): ‘One class of persons who can bring the various proceedings in the Bill is someone with a “sufficient interest”... The great expansion in the class of persons who can bring proceedings under the Bill reinforce an argument that it breaches our international obligations relating to free association. Particularly the prescription in Article 2 of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) that a union be “protected” from interference in their functioning by employers, employer associations or their proxies.’; ICTUR, pp. 8, 11-13; ACTU, p. 50: ‘Schedule 2 also enables the Court to make a range of so-called ‘alternative’ orders, which in fact can be made either as alternatives to cancellation of registration or as orders applied for in their own right, without a concurrent application for cancellation... In combination with the broad range of grounds on which these orders can be made, they contravene Australia’s international obligations regarding organisational autonomy and are proposed despite ongoing criticism of Australia for failing to comply with its international obligations in respect of non-interference in industrial organisations and particularly in respect of the right to strike.’


\(^{155}\) ICTUR, *Submission*, p. 8.
multiple designated findings against a substantial number of the members of the organisation, a part of it or a class of members. The ICTUR argues that this:

... makes disqualification of an official possible on grounds of conduct attributable not to that person but to the organisation.156

Limitations on alternative disqualification mechanism

Proposed section 28L provides that before the court makes a disqualification order under proposed section 28M the Court must be satisfied that the relevant ground justifying deregistration of the organisation or making alternative orders was established wholly or mainly because of the conduct of:

• officers of a particular part of the organisation or
• members of a particular class of members or of a particular part of the organisation.157

However, proposed paragraph 28L(2)(b) and subsection 28L(3) provide that before making an order to disqualify an officer, exclude certain members or suspend rights, privileges or capacity the court must be satisfied that it would not be unjust to make the order having regard to:

• the circumstances and nature of the officers’ or members’ involvement in the matters constituting the ground and
• any other matters the Court considers relevant.

Whilst it is possible that a ground for disqualification could exist because of the conduct of members of the organisation with which an official had no involvement, it would appear that proposed subparagraph 28L(2)(b)(i) may make such outcomes unlikely. Whilst lacking a ‘reasonable steps to prevent the conduct’ defence such as that found in proposed paragraph 223(3)(b), nonetheless the Court must specifically consider the ‘circumstances and nature’ of the officials ‘involvement in matters constituting the ground’.

As such, in circumstances where an official was not involved in the relevant matter, or (for example) was either unaware of the matter or took steps to prevent it, it would appear unlikely that the Court would disqualify them. However, the inclusion of a ‘reasonable steps’ defence may clarify the issue.

Views of members not considered

Proposed subsection 28L(4) specifically provides that the organisation (rather than its members) must be given an opportunity to be heard by the court before it makes an alternative order. Professionals Australia criticised this aspect of the Bill on the basis that a court should not determine what is in the best interests of an organisation’s members ‘with no requirement to hear from or take into consideration’ their views.158 Likewise United Voice argued:

156. Ibid.
157. Proposed paragraph 28M(2)(a) of the FWRO Act, at item 4 of Schedule 2 to the Bill.
158. Professionals Australia, Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 [provisions], n.d., p. 4.
Workers decide what is in their collective interest - there is no place for an external determination of this interest. It is both paternalistic and an undue interference in the internal affairs of workers’ organisations.  

In that regard it is worth noting that the view of the organisation (taken to mean the officials controlling it) may be different from those of the members who either opposed the conduct supporting a ground for disqualification or who caused it.

**Key issues and provisions: deregistration of organisations**

Currently Chapter 2, Part 3 of the *FWRO Act* deals with the cancellation of registration of organisations (‘deregistration’). Schedule 2 of the Bill contains a number of amendments to the existing regime in the *FWRO Act* that are intended to expand the grounds for, and streamline the processes related to, deregistration of organisations by the Federal Court.

In addition, the amendments contained in Schedule 2 will provide that the Court can, instead of deregistering an organisation, make various alternative orders where the grounds for cancellation have been made out because of the conduct of the officials or members of a particular part of an organisation. In other words, the Court will have a range of options available to it from the disqualification of officials (discussed earlier under the heading ‘Alternative disqualification mechanism’) through to cancellation of registration of a registered organisation.

**Grounds for cancelling the registration of an organisation**

The effect of the amendments proposed by Schedule 2 is that the Federal Court can cancel the registration of an organisation when certain grounds are established. Broadly speaking, those grounds relate to what would be colloquially understood as unlawful or otherwise improper conduct by the organisation, its officials, or members. Those same grounds may also form the basis for alternative orders – such as disqualifying particular officials, altering eligibility rules to exclude certain members, and suspension of rights and privileges of the organisation and its members.

**Effect of deregistration**

To give context to the analysis of deregistration provisions, a brief summary of the impacts of deregistration is provided below.

First, what deregistration does is remove the rights and privileges accorded to the organisation by the *Fair Work Act* and other legislation. This includes:

- automatic standing to appear in FWC proceedings to represent the interests of members or potential members, without having to seek formal permission.

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161. *Proposed section 27A* of the *FWRO Act*, at item 4 of Schedule 2 to the Bill.

162. *Fair Work Act 2009*, subsection 596(4) which provides that union officials are excluded from the requirement to obtain permission from the Fair Work Commission to represent individuals in matters before the Commission: *Fair Work Commission (FWC), ‘Anti-bullying benchbook: Representation by lawyers and paid agents’, FWC website*, 2 October 2019: ‘The following representatives are not required to seek permission to appear... a lawyer or paid agent who is an employee (or officer) of any of the following, which is representing the person: an organisation (including a union or employer association), or an association of employers that is not registered under the *Fair Work (Registered Organisations) Act 2009* (Cth), or a peak council, or a bargaining representative, or a lawyer or paid agent who is a bargaining representative. In these circumstances a
• the capacity to object to the registration of any competing association on the basis that members of that association ‘could more conveniently belong’ to it and that it would ‘more effectively represent those members’; 163

• automatically being recognised as ‘bargaining representatives’ 164 in relation to proposed enterprise agreements and – as protected industrial action is only available in relation to certain types of proposed enterprise agreements – the ability to take protected industrial action 165

• being eligible to apply for right of entry permits under Part 3-4 of the Fair Work Act and exercise the powers provided by those permits (including entering workplaces to investigate possible breaches of the law or to hold discussions with members) and

• enjoying any rights and benefits provided by a modern award, order of the FWC or enterprise agreement that binds the organisation or its members. 166

As noted by the ICTUR, deregistration:

... 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. 167

Second, deregistration whilst removing the rights and privileges noted above, does not (usually) end the existence of the organisation. Unlike companies formed under the Corporations Act, the separate legal personality of registered organisations is not always solely dependent upon registration under the FWRO Act. This is because many registered organisations are formed as separate legal entities under other legislation (for example, incorporated associations) prior to registration under the FWRO Act.

As such, the cancellation of registration of an organisation does not always end the existence of the organisation as a separate legal entity in the same way that liquidation under the Corporations Act does in relation to companies formed under that Act. 168 Further, paragraph 32(a) of the FWRO Act specifically provides that deregistration does not cause an organisation to ‘cease to be an association’ – only an association lacking the rights and privileges noted above, and hence significantly constraining its ability to perform the purposes for which it was established.

Applications to cancel the registration of an organisation

As with the proposed disqualification regime, proposed sections 28 and 28A of the FWRO Act, at item 4 of Schedule 2 to the Bill, provide that any of the following persons may apply to the court for an order cancelling the registration of an organisation or alternative orders:

• the Commissioner

person is not considered to be represented by a lawyer or paid agent’. See also FWC, ‘Unfair dismissals benchbook: Representation by lawyers and paid agents’, 21 October 2019; FWC, ‘General protections benchbook: Representation by lawyers and paid agents’, 15 June 2018. See also: Fair Work (Registered Organisations) Act 2009, sections 353A, 151 and subsections 38(5) and (9).

163. Fair Work (Registered Organisations) Act 2009, subsections 19(1) and (2), 158(4), 367(6).

164. Fair Work Act 2009, sections 176 and 177.

165. Fair Work Act 2009, see for example sections 408 to 413.

166. Fair Work (Registered Organisations) Act 2009, paragraph 32(c).


168. Corporations Act 2001, sections 601AA, 601AB, 601AC and 601AD (see for example subsection 601AD(1): ‘A company ceases to exist on deregistration’).
• the Minister or
• a person with a ‘sufficient interest’.

**Wider standing granted than in relation to liquidation of companies**

The proposed amendments provide standing to a wider range of person who might seek to have the registration of the organisation cancelled than those with standing to wind up a company.

The *Corporations Act* provides standing to a range of persons (shareholders, liquidators, creditors and ASIC) seeking to have a company liquidated, who must have a degree of interest in the affairs of the entity. The Bill allows a range of persons to apply to have an organisation deregistered. It is expected that some of these are analogous to the range of persons with standing to apply to have a company wound up, for example:

• the Commissioner (equivalent to ASIC)
• an official (equivalent to a director)
• member (equivalent to a shareholder) or
• an administrator of the organisation (analogous to a liquidator in some circumstances)

as they are likely to be persons with a ‘sufficient interest’. Other persons that may have standing to apply to have the organisation deregistered arguably have no analogy under the *Corporations Act*, including:

• another registered organisation such as another union or an employer organisation (analogous to a non-related or competing company)
• an employer that is a party to an enterprise agreement negotiated with the organisation (analogous to an employer of a company, or a subcontractor of the company) or
• the Minister (no equivalent).

In noting these differences, Professionals Australia expressed the view:

> ... the regime for the cancellation of registration of an organisation contained in the Bill is far more expansive than the regime for the winding up of companies in the Corporations Act. Further, the amendments regarding cancellation of registration were not recommended by the Heydon Report. There is no policy explanation for why they are appropriate or evidence of any extant policy issue that they address.

The ICTUR expressed concern at the breadth of standing granted in relation to seeking deregistration orders and noted that deregistration proceedings 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

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171. Ibid., p. 6.
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. ¹⁷²

**Grounds for cancelling registration or making alternative orders**

The grounds for cancelling the registration of a registered organisation, or making alternative orders, are:

- unlawful or otherwise improper conduct of the affairs of the organisation
- a serious offence committed by an organisation
- multiple findings against members
- non-compliance with orders or injunctions and
- obstructive industrial action. ¹⁷³

These are discussed below.

**Changes from previous Bill**

<table>
<thead>
<tr>
<th>Differences between the Bill and Previous Bill regarding deregistration of organisations</th>
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<tr>
<td>As noted previously, the Bill uses different definitions of <em>designated findings</em> and <em>designated laws</em> compared to those used in the Previous Bill. It also entirely removes:</td>
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<tr>
<td>• the concept of <em>wider criminal findings</em> used in the Previous Bill and</td>
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<td>• multiple findings against an organisation from the proposed deregistration regime. In addition, the Bill removes the references in the Previous Bill to ‘corrupt or unlawful conduct’ and ‘a substantial number’ of officers of the organisation or part of an organisation from certain grounds for deregistration. The effect of these changes is examined below.</td>
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**Effect of removal of ‘wider criminal findings’**

The Bill removes ‘multiple findings against organisation’ as a ground for deregistration of an organisation. This included two or more ‘wider criminal findings’. This means that the grounds for deregistration will – subject to the discussion below – have to be connected to ‘core’ workplace laws. Nonetheless the PJCHR and some stakeholders raised concerns about the breadth (and appropriateness) of the types of conduct captured by the Bill that could lead to trade unions being deregistered for minor or administrative offences, or offences linked to trade union activity considered legitimate at international law. These concerns are discussed below.

**Unlawful or otherwise improper conduct of the affairs of the organisation**

Proposed section 28C provides that a ground to deregister an organisation or to make alternative orders is the unlawful or otherwise improper conduct of the affairs of the organisation. More specifically, the three forms of unlawful or otherwise improper conduct include:

- where officers of the organisation or part of it have acted in their own interests rather than the interests of members of the organisation or part as a whole (‘acting in self-interest’)
- where the affairs of the organisation or a part of it are conducted in a manner that is:

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¹⁷³. Proposed sections 28C to 28G of the FWRO Act, at item 4 of Schedule 2 to the Bill.
– oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or a class of members or
– contrary to the interests of the members of the organisation or part as a whole (‘oppressive or improper conduct’) or

• where the affairs of the organisation or part of the organisation have been or are being conducted in a manner that results in the organisation or part, or officers or members of the organisation or part, having a record of not complying with designated laws (‘history of non-compliance’).

**Acting in self-interest**

**Proposed paragraph 28C(1)(a)** provides that a ground for deregistration exist when officers of the organisation or a part of it have:

... acted in affairs of the organisation or part in their own interests rather than in the interests of the members of the organisation or part as a whole.

This replicates **proposed paragraph 28C(1)(d)** of the Previous Bill – with one notable change, the removal of the ‘substantial number of officers’ requirement (discussed below).

This ground appears to reflect the fiduciary duties of officials of registered organisations to avoid a conflict of interest between their personal interests and any duties they have to the organisation or its members discussed below under the heading ‘Relevance of fiduciary duties of union officials’.

Whilst not stated in the Explanatory Memorandum, it would appear likely that determining whether officials had acting in their self-interest would involve considering the conduct of the officials in light of their statutory and fiduciary duties to both the organisation and its members. This is because, as noted by the RCTUGC, one aspect of the fiduciary duties of organisation officials is to avoid a conflict between their personal interests and any duties they have to the organisation or its members, not to make any secret profit from their position, to exercise their powers bona fides and for a proper purpose, and to exercise their powers for purposes honestly and reasonably believed to be in the best interests of the members of an organisation as a whole.

This would appear to suggest that where officers of an organisation had breached their fiduciary duties, related statutory duties or were otherwise acting in their self-interest instead of in the interests of the members, this finding is likely to be established.

**Oppressive or improper conduct**

**Proposed paragraph 28C(1)(b)** provides that a ground to deregister an organisation or to make alternative orders is where the affairs of the organisation or a part of the organisation have been conducted in a manner that is:

• oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or a class of members (**proposed subparagraph 28C(1)(b)(i)**) or
• contrary to the interests of the members of the organisation or part as a whole (**proposed subparagraph 28C(1)(b)(ii)**).

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174. This includes not making any secret profit from their position, exercising their powers bona fides and for a proper purpose, and exercising their powers for purposes honestly and reasonably believed to be in the best interests of the members of an organisation as a whole: RCTUGC, *Final report*, vol. 5, op. cit., pp. 3320–1, 3379.

This ground is broadly consistent with section 461 of the *Corporations Act*, and the Explanatory Memorandum notes it is adapted from paragraphs 461(1)(e) and (f). That section allows the winding up of a company on various grounds including that the directors have acted in affairs of the company in their own interests rather than in the interests of the members as a whole. However, unlike proposed section 28C, section 461 of the *Corporations Act* does not provide a stand-alone basis for disqualifying directors. Those differences aside the grounds in the *Corporations Act* for winding up a company on the basis of oppressive or improper conduct must be considered in the context of the duties placed on company directors. The questions to be answered are:

- what duties are owed by company directors and
- to whom are they owed?

The duties may be broadly described as fiduciary duties, common law duties and statutory duties.

**About fiduciary duties**

Directors of corporations have duties in equity called *fiduciary duties* and statutory duties specified in the *Corporations Act*. Similarly the officials of a registered organisation have fiduciary as well as statutory duties.

*Fiduciary duties* are obligations of trust and confidence which equity will attach to one party in certain relationships whereby the party owing the duty, the fiduciary, is bound to place the interest of his principal ahead of his own.  

Essentially, equity will not allow the fiduciary to enter into any engagement in which he or she has, or could have, a personal interest conflicting with that of his principal. Nor will it allow him to retain any benefit or gain obtained or received by reason of his fiduciary position or through some opportunity or knowledge resulting from it. The fiduciary duties require directors to act in good faith in the company's best interests and to exercise their powers for a proper purpose.  

The courts have considered that the *fiduciary duty* of company directors is owed, broadly speaking, to the company itself rather than to individual shareholders or groups of shareholders. As noted in one case:

> Sectional interest may have to be taken into account and balanced. In this respect I adopt the comment in Heydon JD, 'Directors' Duties and the Company's Interests' in Finn P, 'Equity and Commercial Relationships' (1987), 134 - 135:
> 
> The duty which is owed to the company is not to be limited to, or to be regarded as operating alongside, a duty to advance the interests of shareholders. There is no superadded duty to shareholders ... And the directors' duty to the company is not to be limited to the duty to consider shareholders ... To consider only the short-term interests of the present shareholders

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176. Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, p. 17.  
178. *Hospital Products Ltd v United States Surgical Corp*, [1984] HCA 64.  
180. See *Westpac Banking Corporation v The Bell Group Ltd (in liq) [No 3]* [2012] WASCA 157, (2012) 44 WAR 1; (2012) 270 FLR 1; (2012) 89 ACSR 1 where the majority of the Court of Appeal of Western Australia held that the duties owed by company directors to act in good faith in the company’s best interests and to exercise their powers for a proper purpose were also fiduciary in character (per Lee AIA at [918]–[933], per Drummond AIA at [1956]–[1978]).
would mean that every dollar available for dividend should be paid out; that no attempt to re-invest funds or expand the company’s market by price cutting could be allowed ...

This is where the relevant distinction arises. It is, in my view, incorrect to read the phrases ‘acting in the best interests of the company’ and ‘acting in the best interests of the shareholders’ as if they meant exactly the same thing. To do so is to misconceive the true nature of the fiduciary relationship between a director and the company ... it does not follow that in determining the content of the duty to act in the interests of the company, the concerns of shareholders are the only ones to which attention need be directed or that the legitimate interests of other groups can safely be ignored. 181  (emphasis added)

Essentially, the courts have determined that the fiduciary duties owed by the director of a company are to the company itself and are not limited to advancing the interests of shareholders.

This is consistent with the comments by the RCTUGC that generally officials of registered organisations owe their fiduciary duties to the entity itself rather than the members as a whole. However, there are circumstances where officials owe fiduciary duties to the members as a whole in addition to, or instead of, the organisation as a separate entity. 182

**Interpretations of common law and statutory duties of directors**

The starting point for the common law duties of company directors is the consideration of the interests of shareholders:

> It may be readily accepted that directors and other officers of a company must act in the interests of the company as a whole and that this will usually require those persons to have close regard to how their actions will affect shareholders. It may also be readily accepted that shareholders, as a group, can be said to own the company. 185  (emphasis added)

However, there will be exceptions to this general rule. Under the common law in some circumstances directors may act in what they consider to be the best interests of the company as a separate entity from its members (shareholders) even though this may not be in the best interests of shareholders at that time. 184 However, in most situations the interests of the company as a separate entity from its owners (the shareholders) will coincide with that of shareholders:

> In my view the interests of shareholders and the interests of the company may be seen as correlative not because the shareholders are the company but, rather, because the interests of the company and the interests of the shareholders intersect. 185

These common law duties are overlaid by statutory duties. The *Corporations Act* sets out the duties of directors in terms of ‘the best interests of the corporation’ and provides for criminal or civil penalties for a breach of those duties. 186

Importantly the ‘business judgment rule’ in subsection 180(2) of the *Corporations Act* provides that a director is taken to have exercised their powers with the necessary degree of care and

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185. *The Bell Group Ltd (In liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 as per Owen J at [4393].
diligence if they made a ‘business judgment’. This requires the director to act in good faith and for a proper purpose, to not have a material personal interest in the subject matter at hand, be informed about the subject matter to the degree determined reasonably appropriate, and hold a rational belief that the judgment is in the best interests of the entity. In other words, the business judgment rule ensures that directors are not liable for decisions made in good faith, with due care and in the best interests of the entity.

In this way the business judgement rules largely reflects the discharge of the fiduciary duties owed by directors discussed above. The business judgment rule therefore essentially allows the discharge of those fiduciary duties by a director to effectively act as defence against alleged breaches of the statutory duties imposed by the Corporations Act, which can, for example, serve as a basis for disqualifying a company director.

**What the Bill does**

Whilst it is clear that the officials of registered organisations, as is the case with company directors, owe fiduciary, common law and statutory duties, proposed paragraph 28C(1)(b) changes who they are owed to. It does that by imposing statutory duties on registered organisation officials which place the interests of the members of the organisation (or members of part of the organisation) as a whole over the interests of the organisation as a separate entity. This would allow for the deregistration of the organisation or disqualification of officials in circumstances where the interests of members differ from those of the organisation as a separate entity and where officials choose to act in the best interest of the organisation as a separate entity at that time.

Importantly, the amendment overrides those circumstances where there are fiduciary duties owed by officials to the members as a whole in addition to, or instead of, the organisation as a separate entity. This means that in relation to the measures proposed by the Bill, it is at least theoretically possible that an official could:

- be acting in the best interests of the registered organisation as a separate entity from the members as whole for an honest, bona fide purpose at a particular time, but
- those actions may not necessarily be in the (short term) interests of the membership as a whole, or part of the membership.

**What the Bill does not do**

Whilst it has been argued that registered organisations should be regulated in the same way as corporations a fundamental element is missing—the Bill does not include an overarching safe harbour for officials of registered organisations such as the ‘business judgment rule’ found in the Corporations Act. The CFMEU noted that the idea that it is necessarily:

... improper for a union or official to elevate the interests of one group of members over another is a nonsense. Trade union affairs involve balancing what are often complex and competing needs and interests of a diverse membership group. Officials are called on to make decisions about pursuing certain claims on behalf of members, including unmeritorious ones, about prioritising scarce union resources and about general policy positions. Not all decisions will satisfy every member or group of members. That does not make those decisions ‘corrupt’ or even ‘oppressive’ or ‘unfairly prejudicial’. By
joining a union, most members accept that the merit of union decision making is best judged at the ballot box, not through complex and costly court processes. 187

Unions NSW argued that ‘the nature of unions requires them to balance the needs and interests of individuals against those of the broader collective’ and that therefore ‘it is impossible to simultaneously meet the interests or members collectively and individually’. 188 The ACTU made a similar point:

For most widely representative unions, it is almost a daily duty to conduct affairs in a manner that may arguably discriminate unfairly between classes of members or part of the organisation. For example, a decision whether to press for and accept a flat rate pay increase instead of a percentage pay increase involves discrimination in favour of the lower-paid members. Almost every contested negotiation – be it about a pay structure, about a redundancy selection process, about conditions or employment or trade-offs – involves the sometimes difficult elevation of the interests of one group of members over those of another. 189

In such circumstances the Bill may allow either the organisation to be deregistered, or the officials in question to be disqualified despite the fact that they may have made a genuine judgement as to how to fairly balance the types of conflicting interests noted by the CFMEU and ACTU at that point in time and had, as part of determining how to balance those conflicting interests, decided it was preferable to act:

• in the interests of the organisation as separate entity or
• in the interests of one class of members over another (which could be viewed as oppressive or discriminatory to certain other members).

This is because as drafted the Bill does not provide that acting fairly between different classes of members or parts of the organisation in such circumstances is permitted—as courts have held can, in some circumstances, be the case for directors of companies. 190

Likewise, unlike the position under the Corporations Act the Bill does not contain a ‘business judgment rule’ linked to a rational belief that the relevant conduct or decision was in the best interests of the company. 191 This means that under the Bill where the interests of members differ from those of the organisation as a separate entity, officials who act in the best interest of the organisation (and therefore in accordance with their fiduciary duty to the organisation) will have no defence with respect to deregistration or alternative orders proceedings (such as disqualification of officials) under the FWRO Act.

In contrast the Corporations Act provides that in some circumstances, acting in the rationally perceived best interests of the company as a separate legal entity (rather than in the interests of shareholders) and therefore in accordance with their fiduciary duty to the company itself may

188. UNSW, Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 [provisions], 12 September 2017, p. 7.
189. ACTU, Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 [provisions], 8 September 2017, p. 23.
191. See Corporations Act 2001 subsection 180(2). See also subsection 181(1). The interaction between these provisions is examined in R Austin and I Ramsay, Ford, Austin and Ramsay’s Principles of Corporations Law, 17th ed., LexisNexis Butterworths, Australia, 2018, pp. 553-556.
provide a defence for alleged breaches of statutory directors’ duties and in turn, disqualification orders being made under that Act.

**Removal of ‘substantial number of officers’ requirement**

**Proposed section 28C** has been significantly altered from the version that appeared in the previous Bill. One notable change is that Bill not only removes references to corrupt conduct, perverting the course of justice and abusing their position as officers, but also the qualifying words ‘a substantial number of the officers’ included in the Previous Bill.

Under the Previous Bill, a ground for disqualification existed where ‘a substantial number of the officers of the organisation or a part of the organisation’ or two or more ‘senior officers of the organisation or a part of the organisation’ engaged in corrupt conduct, as defined in in proposed paragraphs 28C(a) to (e) of the Previous Bill. This included, for example, where a substantial number of officers or two or more senior officers had acted in their self-interest rather than in the interests of members. ¹⁹²

As the Bill removes the qualifying words ‘a substantial number of the officers’ entirely from proposed section 28C, this means an organisation can potentially be deregistered where only a few officers have:

- acted in their own self-interest or
- engaged in oppressive or improper conduct.

As such, this would represents a widening of the grounds for deregistration on the basis of unlawful or otherwise improper conduct of the affairs of the organisation, at least as it relates to those two limbs. This is because proposed paragraph 28C(1)(a) and (b) now examine the conduct of the organisation or part and/or the conduct of its officers, rather than whether the conduct relates to a ‘substantial number’ of officers of the organisation or part.

This means that it is the existence of unlawful or otherwise improper conduct, rather than how widespread such misconduct is that serves as a ground for deregistration. This means a small group of officials who operate or conduct the affairs of the organisation improperly, in their own interests or in a manner that results in designated laws not being complied with by themselves, the organisation or a part of it could potentially serve as grounds for de-registration.

**History of non-compliance**

The Previous Bill provided that a ground for deregistration existed where two or more designated findings or wider criminal findings had been made against the organisation. ¹⁹³ That provision has been removed.

**Proposed paragraph 28C(1)(c)** of the Bill instead provides that a ground to deregister an organisation or to make alternative orders exists where the affairs of the organisation or part of the organisation have been or are conducted in a manner resulting in:

- the organisation or part of it or
- officers or members of the organisation or part

having a record of not complying with designated laws.

¹⁹². Previous Bill, proposed paragraph 228C(1)(d).
¹⁹³. Previous Bill, proposed section 28D.
Proposed subsection 28C(2) then provides that a court must have regard to the incidences and age of occurrences of non-compliance with designated laws to assess whether there is a record of non-compliance.

Whilst subitem 11(1)(a) of Schedule 2 provides that instances of non-compliance are limited to those related to conduct that occurred after commencement of the Schedule, subitem 11(2) provides that once a ground has been established, a court may have regard to matters occurring before or after commencement in determining whether it is unjust to make a cancellation and/or alternative order.

The removal of the wider criminal findings from this ground for deregistration means that the Bill somewhat narrows the range of conduct that can justify deregistration, by confining it largely to ‘core’ workplace laws. However, as noted previously, concerns remain about the breadth (and appropriateness) of the types of conduct captured by the Bill that could lead to trade unions being deregistered for minor or administrative offences, or offences linked to trade union activity considered legitimate at international law.

Human rights concerns related to deregistration for a history of non-compliance

In the Previous Bill, the ground for deregistration based on multiple findings having been made against the organisation was set out in proposed section 28D, which does not appear in the current Bill. The PJCHR expressed concern about that provision, which may be applicable to the ground in paragraph 28(1)(c) in the current Bill. The PJCHR, noting that where deregistration related to designated findings of a less serious nature, or to taking unprotected industrial action, stated:

... it is unclear how the cancellation of union registration would necessarily be in the interests of members or would guarantee the democratic functioning of the organisation. For example, union members may have democratically decided to take unprotected industrial action and hold the view it is in their best interests.\(^{194}\)

The PJCHR also noted that the existing restrictions on taking industrial action in Australian domestic law have been subject to ‘serious criticisms’ by international treaty monitoring bodies that concluded that they go beyond the permissible limitations on the right to strike as an aspect of the right to freedom of association.\(^{195}\)

The PJCHR concluded that cancelling the registration of a registered organisation for undertaking conduct captured by designated findings (especially in relation to less serious contraventions of industrial law or taking unprotected industrial action) would further limit the right to freedom of association. The PJCHR also noted that as a potential alternative order to deregistration is excluding particular members from membership of the organisation, such orders would ‘appear to undermine’ the rights of those individuals ‘to be part of a union of their choosing’.\(^{196}\) The PJCHR further noted that the breadth of the proposed power to deregister an organisation ‘raises specific questions about whether it is sufficiently circumscribed with respect to [the] stated objectives’.\(^{197}\)

\(^{195}\) Ibid, p. 124.
\(^{196}\) Ibid.
\(^{197}\) Ibid.
The PJCHR noted that the statement of compatibility with human rights contained in the Explanatory Memorandum ‘provides some arguments about the proportionality of the measure’ and the ‘availability of certain safeguards’ including that:

1. deregistration orders may be limited to a part of an organisation that is undertaking the relevant conduct justifying deregistration and
2. workers will still be entitled to be represented by a union.\footnote{198}

However, the PJCHR concluded that ‘the role of the court may not be sufficient to ensure that the limitation is the least rights restrictive way to achieving its stated objectives, in view of the breadth of the grounds for cancellation of union registration’.\footnote{199}

The concerns expressed by the PJCHR were echoed by some stakeholders. The ACTU argued that ‘there are no equivalent provisions’ in the \textit{Corporations Act} that ‘allow for companies to be wound up due to a history of non-compliance with law by the company, its directors or the members (that is, shareholders)’ and as a result ‘a company can repeatedly rip off consumers, put workers lives at risk, illegally dump toxic chemicals or produce dangerous products and not be wound up’ but the amendments would allow a union to ‘have its registration cancelled if a small group of members take unprotected industrial action’.\footnote{200} The ACTU also argued:

\begin{quote}
These amendments allow the actions of what may be a very small part of an organisation or its membership to be sheeted home to the whole of the organisation with orders for deregistration or the suspension of rights and privileges etc. It is difficult to conceptualise any way in which such an outcome could be fair to, or properly serve the interests of, members who may find themselves denied certain or all of the benefits of representation by a registered organisation because of conduct in which they had no involvement.\footnote{201}
\end{quote}

It appears that the above concerns are equally applicable to \textit{proposed paragraph 28C(1)(c)}.

\textbf{Evidence that can be used to establish unlawful or improper conduct}

\textit{Proposed subsection 28C(5)} provides that a finding of fact in proceedings before any court (this would not include Fair Work Commission decisions, as it is a tribunal, not a court) relating to the grounds for cancelling registration or alternative orders set out in \textit{proposed section 28C} (such as disqualification of officers), are admissible as \textit{prima facie} evidence of that fact.

This means \textit{proposed subsection 28C(5)} operates to allow an applicant to use a finding of fact in another proceeding as evidence of the fact that a ground for deregistration occurred. However, it will not prevent the respondent from establishing the contrary by leading their own evidence. The Explanatory Memorandum notes the purpose of \textit{proposed section 28C(5)} is ‘to expedite’ applications made under \textit{proposed sections 28} and 28A where ‘relevant factual findings have been made in other proceedings’.\footnote{202}

\begin{footnotes}
198. Ibid.
201. Ibid.
\end{footnotes}
**Serious offence committed by an organisation**

**Proposed section 28D** provides a ground to cancel the registration of a registered organisation or to make alternative orders exists where the organisation is found, in criminal proceedings against it, to:

- have committed an offence against a law of the Commonwealth or a state or territory and
- the offence is punishable upon conviction by a penalty for a body corporate of (or equivalent to) at least 1,500 penalty units ($315,000).

The Explanatory Memorandum notes that the threshold quantum of penalty units (1,500) establishes ‘the gravity of the offence for a body corporate’ as it is ‘equivalent to 5 years imprisonment for a natural person’. Further, the Explanatory Memorandum notes the use of the words ‘or equivalent to’ in **proposed paragraph 28D(b)*** are necessary as:

... not all States and Territories utilise the concept of penalty units and some instead express penalties as fixed amounts. In such a case where the fixed amount is equivalent to the monetary value of at least 1,500 penalty units, it will be sufficient to provide a ground for cancellation.

**Multiple findings against members**

**Proposed section 28E** provides a ground to cancel the registration of a registered organisation or to make alternative orders exists where designated findings have been made against a ‘substantial number’ of members of:

- the organisation
- a part of the organisation or
- a class of members of the organisation.

The phrase ‘substantial number’ is not defined in the Bill, nor does the Explanatory Memorandum provide any guidance as it its meaning. Despite this, it would appear reasonable, based on its ordinary meaning and case law in other areas of law, to conclude that a ‘substantial number’ of members of the organisation will be a number that is ‘considerable’ and more than ‘significant’. As such, what constitutes a ‘substantial number’ of members against which designated findings have been made will turn on a case-by-case basis, and will be based on various facts such as the total number of members in the organisation, part of the organisation or class of members of the organisation compared to the number of members against which relevant designated findings have been made. As designated findings may be made against a substantial number of:

- members of a small part of the organisation overall or
- a class of members that are a very small proportion of the overall membership of the organisation

the ACTU expressed concern that the effect of **proposed section 28E** would be that ‘the actions of what may be a very small part of an organisation or its membership’ may be used as a basis for orders for deregistration or the suspension of rights and privileges. The ICTUR also argued:

203. Ibid., p. 18.
204. Ibid.
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.\textsuperscript{207}

The Victorian Government raised a similar concern about the use of the phrase ‘a substantial number’ in this ground for deregistration:

The Victorian Government is concerned about the lack of clarity around what will amount to a ‘substantial number’ of members and the possibility of an organisation, and a majority of members of that organisation, being penalised for the actions of a smaller group of members who may be acting in their own interests, without the support of the organisation more broadly. This may lead to registered organisations being penalised for the industrial action of members, even in circumstances where the action may not have been supported by the organisation.\textsuperscript{208}

\textbf{Non-compliance with orders or injunctions}

\textbf{Proposed section 28F} provides a ground to cancel the registration of a registered organisation or to make alternative orders exists where the organisation has failed to comply with an order or injunction made under a \textit{designated law}; or a substantial number of members of:

- the organisation
- a part of the organisation or
- a class of members of the organisation

have failed to comply with an order or injunction made under a \textit{designated law}.

The represents a narrowing of the version of his ground contained in the Previous Bill for two reasons. First, the Previous Bill included where an organisation had failed to comply with an order or injunction under ‘any law of the Commonwealth or a state or territory’. Further, the definition of \textit{designated law} has been narrowed from the Previous Bill to capture only core industrial laws.

This means that in effect \textbf{proposed section 28F} provides two narrower limbs for cancelling the registration of a registered organisation, or making alternative orders under this ground than the Previous Bill.

The first is where the organisation itself has failed to comply with any order or injunction made under a \textit{designated law}. The second ground is where a substantial number of members of the organisation, a part of the organisation, or a class of members of the organisation, have failed to comply with an order or injunction made under a \textit{designated law}.

That said, in relation to the second limb, this would only apply breaches of \textit{designated law} by a ‘substantial number’ of members of the organisation, a part of it or a class of members (noting the criticisms of the PJCHR, ACTU and ICTUR that this could still potentially mean that actions of a very small part of an organisation or its membership may result in deregistration of the entire union, with the resulting negative repercussions for the broader membership not involved in the relevant breaches).\textsuperscript{209}

As discussed above, what constitutes a 'substantial number 'of members will turn on a case-by-case basis.

\begin{itemize}
  \item \textsuperscript{207} ICTUR, \textit{Submission}, op. cit., p. 14.
  \item \textsuperscript{208} Victorian Government, \textit{Submission}, op. cit., pp. 6–7.
\end{itemize}
Proposed subsection 28F(2) provides that a finding of fact in proceedings before any court (this would not include FWC decisions, as it is a tribunal, not a court) relating to the grounds for cancelling registration or alternative orders set out in proposed section 28F is admissible as prima facie evidence of the fact. This means proposed subsection 28F(2) operates to allow an applicant to use a finding of fact in another proceeding as evidence of the fact that a ground for disqualification has occurred. However, it will not prevent the respondent from establishing the contrary by leading their own evidence.

Evidence that can be used to establish non-compliance with orders or injunctions

Whilst subitem 11(1)(d) of Schedule 2 provides that instances of non-compliance are limited to failures to comply with orders or injunctions made after commencement of the Schedule, subitem 11(2) provides that once a ground has been established, a court may have regard to matters occurring before or after commencement in determining whether it is unjust to make a cancellation and/or alternative order.

Obstructive industrial action

Proposed section 28G provides a ground to cancel the registration of a registered organisation or to make alternative orders exists where the organisation or a ‘substantial number’ of members of:

• the organisation
• a part of the organisation or
• a class of members of the organisation

engaged in certain types of industrial action. Proposed subsection 28G(2) effectively provides that obstructive industrial action is any industrial action (other than protected industrial action)\(^\text{210}\) that:

• prevented, hindered or interfered with:
  – the activities of a federal system employer
  – the provision of any public service by the Commonwealth or a state or territory or an authority of the Commonwealth or a state or territory or
• that had, or is having or is likely to have, a substantial adverse effect on the safety, health or welfare of the community or a part of the community.

Proposed subsection 28G(3) provides that a finding of fact in proceedings before any court (this would not include FWC decisions, as it is a tribunal, not a court) relating to the grounds for cancelling registration or alternative orders set out in proposed section 28G is admissible as prima facie evidence of that fact that the relevant ground occurred.

This means proposed subsection 28G(3) operates to allow an applicant to use a finding of fact in another proceeding as evidence of the fact a ground for disqualification has occurred. However, it will not prevent the respondent from establishing the contrary by leading their own evidence. Likewise it will not prevent an applicant from leading evidence that the organisation, a part of it, or its members engaged in obstructive industrial action, even if there has been no judicial finding to that effect. This means that evidence from FWC proceedings or other evidence could be used to

\(^\text{210}\) Section 408 of the Fair Work Act 2009 defines ‘protected industrial action’ in such a way as to limit it to industrial action taken in relation to a proposed enterprise agreement (see also section 413 of the Fair Work Act 2009). It is called ‘protected’ industrial action because a limited immunity applies, meaning that remedies that might otherwise be sought by (usually) the employer in relation to the industrial activity are generally not available (see section 415 of the Fair Work Act 2009).
establish this ground, albeit such evidence would not be *prima facie* evidence of the fact that obstructive industrial action had occurred. The PJCHR noted:

... restrictions on taking industrial action in Australian domestic law have been subject to serious criticisms by international treaty monitoring bodies as going beyond permissible limitations on the right to strike as an aspect of the right to freedom of association.\(^{211}\)

Therefore the PJCHR concluded that cancelling the registration of registered organisations for obstructive industrial action ‘further limits the right to freedom of association’.\(^{212}\) The ACTU was also critical of *proposed section 28G* on the basis that ‘a union could have its registration cancelled if a small group of members take unprotected industrial action’.\(^{213}\) The Victorian Government expressed a similar concern.\(^{214}\)

**Justifying non-deregistration of the organisation**

Under *proposed section 28J*, if the court finds that one of the above grounds is established it **must** deregister the organisation **unless** the organisation can satisfy the court that it would be unjust to cancel its registration having regard to:

- the nature of the matters constituting that ground
- the action (if any) that has been taken by or against the organisation or its members or officers in relation to those matters
- the best interests of the members of the organisation as a whole and
- any other matters the court considers relevant.

The Queensland Law Society (QLS) noted that under current paragraph 28(3)(b) of the *FWRO Act*, in considering an application for cancellation of registration, the Court must have regard to:

... the degree of gravity of the matters constituting the ground and the action (if any) that has been taken by or against the organisation in relation to the matters.

The QLS went on to argue that as ‘there are significant implications for an organisation in cancelling registration ... the court’s discretion in these matters should remain as provided for in the Act’ but further noted that ‘we do query whether the proposed change is in line with the subject recommendations of the Royal Commission report.’\(^{215}\)

**Human rights concerns regarding justifying non-deregistration of an organisation**

*Proposed subsection 28J(2)* specifically provides that the organisation must be given an opportunity to be heard by the court. In its submission to the Senate Education and Employment Legislation Committee in relation to the Previous Bill, Professionals Australia noted that *proposed section 28J* (as it now is) does not impose a ‘requirement to hear from or take into consideration the views of the membership’ as a whole and argued that as such the deregistration regime proposed by the Bill ‘potentially contravene[s] Article 3 of *ILO Convention 87*’ as it:

\(^{212}\) Ibid.
\(^{215}\) QLS, *submission* to the Senate Education and Employment Legislation Committee, *Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions]*, The Senate, Canberra, 29 August 2019, p. 3.
... impact[s] significantly on the right of organisations and their members to self-determination and to manage their own affairs without political or industry interference.\(^{216}\)

In effect, **proposed paragraph 28J(1)(b)** and **subsection 28J(2)** allow the organisation to point out to the court the nature of the matter related to the ground for deregistration: a small group of members acting in their own interests. The organisation could then point to any action it had taken in relation to the matter constituting a ground for deregistration (for example, disciplinary action against members who engaged in obstructive industrial action) with a view to persuading the court that deregistration, in those circumstances, would be unjust.

However, from a practical perspective it would appear that despite the operation of **proposed paragraph 28J(1)(b)** and **subsection 28J(2)** deregistration of a union for the actions of a small group of members acting in their own interests is a possible outcome. Unions NSW criticised this potential practical outcome of **proposed section 28J** (as it now is) and noted:

> In this instance, if grounds have been established against a union, it must stand before the Court and justify its very existence. In considering if the deregistration is unjust, the Court must have regard to the best interests of the members as a whole. The idea that a court would decide what is in the best interests of union members, when considering whether or not to effectively abolish a union, is offensive and misplaced. Unions are democratic organisations whose membership hold the leadership accountable through elections and internal union structures.\(^{217}\) (emphasis added).

In that regard it is worth noting that the ILO’s Committee on Freedom of Association (CFA) has, in relation to deregistration of trade unions, noted:

> To deprive many workers of their trade union organizations because of a judgement that illegal activities have been carried out by some leaders or members constitutes a clear violation of the principles of freedom of association.\(^{218}\)

**Other powers related to deregistration**

The Bill provides a range of additional orders that can be made alongside an order to cancel the registration of a registered organisation under **proposed section 28K**.

**Proposed paragraph 28K(a)** allows the court to direct that an application by the de-registered organisation for registration as an organisation is not to be dealt with before the end of a specified period. The purpose of this section is to ensure that de-registration of an organisation is effective, and cannot be undermined by the re-registration of the organisation within a short period of time after deregistration is ordered.\(^{219}\)

**Proposed paragraph 28K(b)** allows the court to direct that an application for the registration of an organisation whose officers are the same, or substantially the same, as officers of the deregistered organisation is not to be dealt with before the end of a specified period. The purpose of this section is to ensure that deregistration of an organisation is effective and cannot be undermined

\(^{216}\) Professionals Australia, Submission, op. cit., p. 4.

\(^{217}\) UNSW, Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (provisions), 12 September 2017, p. 9.


\(^{219}\) Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, p. 21.
by the re-registration of an organisation that has the same, or substantially the same officers as those in the organisation that was deregistered.\textsuperscript{220}

**Alternatives to deregistration**

The Bill proposes that:

- where a ground for deregistration has been established \textbf{and}
- the court is satisfied that it would be unjust to cancel the registration of the organisation it \textbf{may}, as an alternative to ordering deregistration, make various other orders (such as disqualifying officials).\textsuperscript{221}

**When can alternative orders be made?**

\textbf{Proposed subsection 28L(2)} provides that before the court makes an order under:

- proposed section 28M (the alternative disqualification mechanism)
- proposed section 28N (exclusion of certain members), or
- exercises power under \textbf{proposed paragraph 28P(1)(a)} (suspension of rights, privileges or capacity) in relation to only part of an organisation or only some members

the Court must be satisfied that the relevant ground justifying deregistration of the organisation or making alternative orders was established ‘wholly or mainly because of the conduct of’:

- officers of a particular part of the organisation or
- members of a particular class of members or of a particular part of the organisation.\textsuperscript{222}

However, \textbf{proposed paragraph 28L(2)(b)} provides that before making an order to disqualify an officer, exclude certain members or suspend rights, privileges or capacity the court must:

- after having regard to the circumstances and nature of the officers’ or members’ involvement in the matters constituting the ground and any other matters the Court considers relevant
- be satisfied that it would not be unjust to make the order or exercise the power.

\textbf{Proposed subsection 28L(3)} provides that before exercising the power under \textbf{proposed paragraph 28P(1)(a)} (suspension of rights, privileges or capacity) in relation to the whole of an organisation or all of its members the Court must be satisfied that it wold ‘not be unjust to exercise the power in that way’ having regard to:

- the nature of the matters constituting the ground and
- any other matters the Court considers relevant.

\textbf{Proposed subsection 28L(4)} specifically provides that the organisation must be given an opportunity to be heard by the court. Professionals Australia criticised this aspect of the Bill on the basis that a court should not determine what is in the best interests of an organisation’s members ‘with no requirement to hear from or take into consideration’ their views.\textsuperscript{223} Likewise United Voice argued:

\begin{quote}

\end{quote}

\begin{flushright}
\textsuperscript{220.} Ibid.
\textsuperscript{221.} Proposed subsection 28L(1).
\textsuperscript{222.} Proposed paragraph 28L(2)(b) of the FWRO Act, at item 4 of Schedule 2 to the Bill.
\textsuperscript{223.} Professionals Australia, \textit{Submission}, op. cit., p. 4.
\end{flushright}
Workers decide what is in their collective interest - there is no place for an external determination of this interest. It is both paternalistic and an undue interference in the internal affairs of workers’ organisations. 224

Criticism of interaction between alternative orders and deregistration regime

The ICTUR was critical of the interaction between the deregistration regime and the availability of alternative orders, noting that deregistration as a form of sanction for union misconduct was ‘deeply alarming’ and:

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. 225

The PJCHR expressed similar concerns, noting:

... there is no express requirement in the legislation that the court only cancel registration as a last resort. Rather once a ground for cancellation is established the court must cancel registration unless it would be unjust to do so. While the court is required to consider the interests of members in considering whether it would be unjust to cancel registration, this is only one factor it must take into account. 226

The PJCHR noted that it remained concerned that the role of the court may not be ‘sufficient to ensure that the limitation is the least restrictive way to achieving its stated objectives’ due to the breadth of the grounds for cancellation of union registration. 227 It further noted that as possible grounds for cancellation ‘could include two or more relevantly minor breaches of industrial laws’ much would depend on ‘the approach taken by the courts to their discretion not to cancel registration’. 228 As such, it concluded:

... the cancellation powers may operate in a manner that is not a proportionate limitation on the right to freedom of association, given in particular that cancellation of registration is not stated in the proposed legislation to be a measure of last resort. 229

Alternative disqualification mechanism

Proposed section 28M provides the alternative disqualification mechanism discussed earlier in the digest. In short it provides that the court, as an alternative to deregistration of the organisation, can disqualify officers of a part of the organisation that the Court is satisfied is wholly or mainly responsible for the conduct justifying deregistration, for a period the Court considers appropriate.

227. Ibid.
228. Ibid.
 Proposed subsection 28M(2) provides that if the Court does make an order disqualifying an officer, the officer is also disqualified from holding office in a branch of an organisation.

Altering membership rules and excluding certain members

Currently subsection 28(4) of the FWRO Act allows the Court to alter the eligibility rules of the organisation to exclude certain members, despite the effect of any membership agreement made under section 151 of the FWRO Act. Section 151 of the FWRO Act allows the rules of an organisation to authorise the organisation to enter into agreements with unions registered under state legislation to allow certain members of the state union who are ineligible to be members of that union, to become members of the registered organisation.

Proposed section 28N provides that where the Court is satisfied of the relevant matters in proposed section 28L it may make an order altering the eligibility rules of an organisation so as to exclude from eligibility for membership of the organisation persons belonging to the part of the organisation, or the class of members, mentioned in proposed subparagraph 28L(2)(a)(ii) (that is, members of a certain part of the organisation wholly or mainly responsible for the conduct establishing the ground for deregistration). The Court can make an order excluding people belonging to such a part or class of the membership despite any membership agreement made under existing section 151 of the FWRO Act.

Where an order is made to alter the rules of eligibility, those changes take place on the date of the order or a date specified in the order. 230

Proposed subsection 28N(3) provides that where the Court makes an order to alter the eligibility rules to exclude certain members it may make an additional order prohibiting an organisation, for a specified period of time, from seeking consent under section 158 of the FWRO Act to alter the organisation’s eligibility rules in such a manner as to have the effect of restoring eligibility to the persons who were excluded by the order.

Suspension of rights and privileges

Section 29 of the FWRO Act deals with making alternative orders where deregistration of an organisation is deferred. Currently subsection 29(2) of the FWRO Act allows the Court to make orders suspending the rights, privileges or capacities of the organisation or a part of the organisation, or of all or any of its members under various legislation (or order made under such legislation), an enterprise agreement or modern award. Further, the Court may also:

• give directions as to the exercise of any rights, privileges or capacities that have been suspended and

• make orders that restrict the use of the funds or property of the organisation or a part of the organisation, and orders for the control of the funds or property for the purpose of ensuring observance of the restrictions.

Proposed subsection 28P(1) is consistent with the above.

As with current subsection 29(4), proposed subsection 28P(2) provides that an order under proposed section 28P will have effect despite anything in the rules of the organisation, or part of the organisation, concerned. Likewise as provided for in current subsection 29(5), proposed subsection 28P(3) provides that any orders made under proposed section 28P:

230. Proposed subsection 28N(2) of the FWRO Act, at item 4 of Schedule 2 to the Bill.
• may be revoked by an order of the Court upon the application of a party to the proceedings or
• expire on the date specified in the order.

Currently subsection 29(3) of the FWRO Act provides that the court must reconsider the question of whether to deregister an organisation once the relevant alternative orders (such as disqualifying officials or excluding members) cease to operate, or upon application of a party to the proceedings (whichever is earlier).

**Proposed subsection 28P(4)** is largely consistent with existing subsection 29(3), as it provides that the Court must reconsider an application to deregister an organisation once either:

• any orders made under **proposed section 28P** cease to be in force or
• one of the existing parties makes an application requesting that the Court consider whether it is just to determine the substantive issues in the application having regard to the evidence given in relation to compliance with any orders made under **proposed section 28P** or any other relevant circumstances.

However, unlike existing subsection 29(3), **proposed subsection 28P(4)** also applies to applications for alternative orders to deregistration made under **proposed section 28A**.

**Human rights concerns raised by the alternative orders regime**

The PJCHR and other stakeholders expressed a number of concerns about aspects of the alternative orders regime proposed by the Bill.

First, the PJCHR noted that empowering the court to exclude particular members from union membership (as an alternative to deregistration) ‘appeared to undermine the capacity to be part of the union of their choosing’.  

Second, the PJCHR noted that whilst deregistration orders may be limited to the part of an organisation that had been undertaking the conduct justifying the deregistration, employees ‘will still be entitled to be represented by union’ as a matter of international law and therefore it appears that the alternative orders regime is not be the least rights restrictive way to achieve the Bill’s stated objectives (this is because of the breadth of the grounds justifying the deregistration of an organisation).

The ICTUR concluded that as standing to commence deregistration proceedings is granted to ‘all and sundry’, a ground for deregistration ‘may arise from the actions of certain members or union leaders’ and ‘deregistration is a first – not a last – resort’ then given that deregistration ‘would deprive the entire membership of the industrial relations functions of their union’ it could be concluded:

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232. Ibid.
Key issues and provisions: administration of dysfunctional organisations

Currently section 323 of the *FWRO Act* provides for applications to be made to the Court for a declaration in relation to an organisation or any part of it. If a declaration is made, the Court may approve a scheme for the taking of action to resolve the matters to which the declaration relates, which could include appointing an administrator for a period of time.

**Item 4** of **Schedule 3** to the Bill repeals existing section 323 of the *FWRO Act* and replaces it with **proposed Part 2A**, which deals with the administration of dysfunctional organisations.

<table>
<thead>
<tr>
<th>Key concepts and definitions</th>
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<tbody>
<tr>
<td><strong>Administrator</strong> The definition of ‘administrator’ includes a person appointed as an administrator or interim administrator under <strong>proposed section 323A</strong>.</td>
</tr>
<tr>
<td><strong>Books</strong> The definition of <strong>books</strong> is expansive and includes a register, any other record of information, financial reports or financial records, however compiled, recorded or stored and documents.</td>
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<tr>
<td><strong>Financial misconduct</strong> The definition of <strong>financial misconduct</strong> is defined as including (and is therefore not limited to):</td>
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<tr>
<td>• a contravention of a provision of Division 2 of Part 2 of Chapter 9 of the <em>FWRO Act</em> (dealing with duties of officers in relation to the financial management of organisations)</td>
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<tr>
<td>• misuse of funds or false accounting and</td>
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<tr>
<td>• failure to fulfil duties in relation to financial reports.</td>
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<td>The Explanatory Memorandum notes that whether other conduct not specified in the list above constitutes financial misconduct will turn on the facts of each case. What constitutes a ‘misuse of funds’ is not defined, but would appear to capture a range of conduct including using funds in circumstances where the approval of the expenditure or the expenditure itself results in an officer breaching their fiduciary or statutory duties.</td>
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<tr>
<td><strong>Part of an organisation</strong> The definition of a part of an organisation is consistent with current paragraph 323(1)(a) of the <em>FWRO Act</em> and hence includes:</td>
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<tr>
<td>• a branch or part of a branch of the organisation and</td>
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<tr>
<td>• a collective body of the organisation or a branch of the organisation.</td>
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**Who can apply to have an administrator appointed?**

**Proposed subsection 323(1)** enables the Commissioner, Minister, organisation, a member of the organisation and ‘any other person having a sufficient interest’ to seek a court order under **proposed subsection 323(3)** (discussed below). **Proposed subsection 323(1)** provides standing

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234. Ibid., p. 21.  
236. *Proposed subsection 323(1)* of the *FWRO Act*, at **item 4** of **Schedule 3** to the Bill.
to a wider range of persons seeking to have an organisation or part placed under administration in a wider range of circumstances compared to the Corporations Act.

**Circumstances that can lead to an administrator being appointed**

Proposed subsection 323(3) provides that the circumstances that can lead to an administrator being appointed include where the court is satisfied:

- that an organisation or part of an organisation has ceased to function effectively
- one or more officers of an organisation or part of an organisation have engaged in financial misconduct
- a substantial number of the officers of an organisation or part have acted in their own interests rather than in the interests of members of the organisation or a part as a whole
- that affairs of an organisation or part are being conducted in a manner that is:
  - oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or class of members or
  - in a manner that is contrary to the interests of the members of the organisation or part as a whole or
- that an office or position in an organisation or part of an organisation is vacant and there is no effective means under the organisation or part’s rules to fill it.

These are briefly examined below.

**The organisation or a part of it has ceased to function effectively**

Proposed paragraph 323(3)(a) provides that circumstances that can lead an administrator being appointed include where the court is satisfied that an organisation or part of it has ceased to function effectively and there are no effective means under the rules of the organisation or part by which the organisation or part can be reconstituted or enabled to function effectively.

The Explanatory Memorandum notes that proposed paragraph 323(3)(a) is ‘modelled on existing paragraph 323(1)(a)’ of the FWRO Act. Proposed subsection 323(4) provides that an organisation or a part is taken to have ceased to function effectively where the court is satisfied officers of the organisation or part have:

- on multiple occasions, contravened designated laws
- misappropriated funds of the organisation or part or
- otherwise repeatedly failed to fulfil their duties as officers of the organisation or part of the organisation.

However, this list is indicative only—it does not limit the circumstances in which an organisation or part ceases to function effectively. Due to the breadth of the definition of designated laws an administrator could be appointed where officers have engaged in conduct leading to minor contraventions of designated laws, a point raised by the PJCHR.

**One or more officers of an organisation or part have engaged in financial misconduct**

Proposed paragraph 323(3)(b) provides that circumstances that can lead to an administrator being appointed include where the court is satisfied that one or more officers of an organisation
or part have engaged in financial misconduct in relation to carrying out their functions or in relation to the organisation or part (that is breaching various financial management duties under the FWRO Act, false accounting or misusing funds).

A substantial number of the officers have acted in their own interests

Proposed paragraph 323(3)(c) provides that circumstances that can lead to an administrator being appointed include where the court is satisfied that a ‘substantial number’ of the officers of an organisation or part have, in affairs of the organisation or part, acted in their own interests rather than in the interests of members of the organisation or part as a whole.

The Explanatory Memorandum notes that proposed paragraph 323(3)(c) is ‘adapted from paragraph 461(1)(e) of the Corporations Act’. However that paragraph deals with applications to have a company wound up (that is, liquidated) rather than appointing an administrator.

That said, section 232 and paragraph 233(1)(c) of the Corporations Act provide that where the conduct of the company’s affairs are contrary to the interests of the members as a whole or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity, members or former members of a company (or persons ASIC thinks appropriate) to apply to the court for an order regulating the conduct of affairs of the company in the future, which can include replacing the existing board of a listed company with a board chosen by the court (although this is very rare).

Oppressive conduct contrary to the interests of the members of the organisation

Proposed paragraph 323(3)(d) provides that circumstances that can lead to an administrator being appointed include where the court is satisfied that the affairs of an organisation or part are being conducted in a manner that is:

- oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or
- contrary to the interests of the members of the organisation or part as a whole.

The Explanatory Memorandum states that proposed paragraph 323(3)(d) is ‘adapted from paragraph 461(1)(f) of the Corporations Act’. However that paragraph deals with applications to have a company wound up (that is, liquidated) rather than appointing an administrator.

That said, section 232 and paragraph 233(1)(c) of the Corporations Act, as described earlier, allow a court to appoint a new board where the conduct of the company’s affairs are contrary to the interests of the members as a whole or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or types of members.

Vacant office or position and no effective means of filling it

Proposed paragraph 323(3)(e) provides that circumstances that can lead to an administrator being appointed include where the court is satisfied that:

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239. Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, p. 28.
241. See, for example, Re Spargos Mining NL (1990) 8 ACLC 1,218 where Justice Murray of the Supreme Court of Western Australia ordered the appointment of a new board, the amendment of the company’s constitution and for the new board to report to the court every three months.
243. See footnote 241.
• an office or position in an organisation or part is vacant and
• there is no effective means under the organisation or part’s rules to fill the office or position.

Proposed paragraph 323(3)(e) reflects existing paragraph 323(1)(b) of the FWRO Act.

Differences between appointing administrators under the Corporations Act and Bill

As noted above, the RCTUGC formed the view that the governance requirements of registered organisations were more like corporations than incorporated associations. However the RCTUGC did not make any recommendations nor provide any detailed commentary on the appointment of administrators to oversee dysfunctional organisations. The Explanatory Memorandum states that the amendments in relation to placing organisations under administration are:

... modelled and adapted from broadly equivalent provisions of the Corporations Act, [to] ensure that governance issues within an organisation, or individual branches or divisions, can be addressed promptly and transparently to ensure that the interests of members are protected. 244

To give context to the proposed amendments a brief outline of the regime applicable to the appointment of administrators of companies under the Corporations Act is provided below.

Appointing administrators of companies

Voluntary administration involves the appointment of an independent, registered insolvency practitioner (an ‘administrator’) to take control of a company that the Board thinks is insolvent or is likely to become insolvent, for a relatively short period of time. 245 As not all corporate insolvencies are caused by dysfunctional administration this means that voluntary administration only deals with insolvency or potential insolvency, rather than dysfunctional corporate governance generally.

Directors may appoint an administrator where the directors believe that the company is insolvent or is likely to become insolvent at a future time. 246 In most cases the decision to place a company into voluntary administration is made by the directors, and does not require approval of the shareholders, creditors, ASIC or the court. However, the Corporations Act also provides that a company may be placed under voluntary administration by a liquidator or a creditor who has a charge over the whole or substantially the whole of the company's property. 247

The aim of voluntary administration is to maximise the chances of the company and its business remaining in existence and, failing that, to achieve a better return to creditors than the immediate winding up of the company would achieve. 248 Directors of financially troubled or insolvent companies are able to initiate voluntary administration (and certain other forms of external administration). 249 There are a number of reasons why they may do so, such as:

• to achieve a better outcome for shareholders and creditors than maintaining the status quo or
• because they are ‘encouraged’ to take such action by ‘a number of legislative incentives’. 250

245. Corporations Act, Part 5.3A.
250. Ibid., p. 626.
As noted above, once appointed an administrator takes complete control of the company. Further, the directors lose their power to manage the affairs of the company, even though they retain their office. The Corporations Act imposes a number of requirements in relation to administrators including:

- they must be registered liquidators and
- they must also be independent of the company, its officers, its creditors and the company’s auditor.

One of the key duties of an administrator is to investigate the financial position and circumstances of the company. The administrator must form an opinion as to whether it would be in the creditors’ interests for the company:

- to enter into a deed of company arrangement
- end the administration or
- wind up the company.

Court orders to deal with dysfunctional companies

The Corporations Act contains mechanisms outside the appointment of a voluntary administrator by which certain persons can seek court orders to deal with dysfunctional management of a company (noting this does not automatically correlate to actual or likely insolvency – a dysfunctional company can be solvent, and not every insolvent or potentially insolvent company is managed in a dysfunctional manner).

As discussed above, sections 232, 234 and paragraph 233(1)(c) of the Corporations Act effectively provide that where the conduct of the company’s affairs is contrary to the interests of the members as a whole, or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or class of members, or former members of a company (or persons ASIC thinks appropriate) may apply to the court for an order regulating the conduct of the affairs of the company in the future. This can include replacing the existing board of a company with a board chosen by the court.

In essence, this means that in certain situations the administration of a company can be directed or supervised by the court, or the court can (in effect) appoint such persons as it sees fit to manage the corporation. Technically however, this is not voluntary administration per se.

Summary of differences between administration under the Bill and Corporations Act

From the above it can be seen that the range of persons with the power to place a company into voluntary administration is limited to directors and in some (limited) situations, a liquidator or a creditor. Further, voluntary administration deals with insolvency or potential insolvency, rather than dysfunctional management per se.

Importantly, under the Corporations Act neither ASIC, the Minister nor shareholders have standing to initiate proceedings to place a company into voluntary administration. In contrast, the regime proposed by Schedule 3 of the Bill will enable:

• the Commissioner, Minister and the organisation
• a member of the organisation and
• ‘any other person having a sufficient interest’
to seek a court order to place the organisation or a part of it under administration.255 Whilst the Corporations Act does provide an alternative mechanism that could be used to deal with dysfunctional corporate management, it is rarely used, is not voluntary administration per se and standing to bring such applications is effectively limited to members and former members of the company or persons ASIC thinks appropriate.256

As such, whilst the Explanatory Memorandum notes that the administration regime is modelled off that contained in the Corporations Act, the provisions referred to in the Explanatory Memorandum relate to voluntary administration (which deals with insolvency) rather than court orders to deal with dysfunctional management in and of itself (which is distinct and separate from insolvency). Hence the analogy between the processes proposed by the Bill and those referred to in the Explanatory Memorandum appears somewhat inapt. This is because the Bill provides:

• standing to apply to the court for a declaration that may result in an administrator being appointed to an organisation or part of an organisation to a wider range of persons than the Corporations Act provides standing to, to appoint either a voluntary administrator or to seek court orders to deal with dysfunctional corporate management
• a wider range of circumstances that may lead to appointing an administrator than the appointment of a voluntary administrator under the Corporations Act or court orders dealing with dysfunctional management and
• a wider range of purposes and objectives for the appointment of an administrator than that provided for the appointment of a voluntary administrator under the Corporations Act.

Process to appoint an administrator

The process for appointing an administrator is as follows:

• a person with the requisite standing applies to the court for a declaration that the circumstances discussed above exist in relation to the organisation or a part of it257
• the court then determines whether to make the declaration.258 If it does make a declaration then the court must not make an order unless it is satisfied that the order(s) would ‘not do substantial injustice to the organisation or any member of the organisation’259
• if the court determines it is appropriate to make an order, it may make any such orders as it sees fit including:
  – the appointment of an administrator for the organisation or part of it
  – types of reports to be given to the Court under the scheme
  – when the scheme begins and ends and
  – when elections (if any) are to be held under the scheme.260

255. Proposed subsection 323(1) of the FWRO Act, at item 4 of Schedule 3 to the Bill.
257. Proposed section 323 of the FWRO Act, at item 4 of Schedule 3 to the Bill.
258. Proposed subsection 323(2) of the FWRO Act, at item 4 of Schedule 3 to the Bill.
259. Proposed subsection 323A(3) of the FWRO Act, at item 4 of Schedule 3 to the Bill.
260. Proposed subsection 323A(2) of the FWRO Act, at item 4 of Schedule 3 to the Bill.
Proposed section 323B provides that such orders made by the Court (and any action taken by an administrator or other person in accordance with them) overrides anything in the *FWRO Act* or the rules of the organisation or part to which it relates, as well as any previous direction or exemption made under the *FWRO Act*. However, there are limitations to the operation of orders made under proposed section 323A including:

- if a scheme provides for its own end, the Court may only approve it where it provides that it does not end unless the Court is satisfied that the circumstances it aims to deal with have been resolved or no longer exist and
- if a scheme provides for an election for an office, the Court may only approve it if it provides for the election to be conducted by the Australian Electoral Commission (AEC) in accordance with Chapter 7 of the *FWRO Act*.

Proposed section 323D provides that administrators must advise the court in writing of any interest that could conflict with the proper performance of their duties as an administrator within 21 days of acquiring or becoming aware of the interest.

Proposed section 323E provides that the court may terminate the appointment of the administrator at any time, including where the administrator has notified the court of a conflict of interest under proposed section 323D.

**Functions and powers of administrators**

Once appointed by the Court proposed section 323F provides the administrator has the power to:

- control the property and affairs of the organisation or part and manage that property and those affairs
- dispose of any of that property and
- 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.

In addition, proposed subsection 323G(2) provides the administrator with the power to require a person to attend on the administrator at such times and to give them any information about the business, property, affairs and financial circumstances of the organisation or part as reasonably required. In addition, proposed subsection 323H(3) provides the administrator with the power to require a person by written notice to deliver any books specified in the notice that the person possesses.

Finally, proposed section 323K provides that an administrator or person acting under the direction of the administrator, is not liable in any action or proceedings in relation to:

- an act done, or omitted to be done
- in good faith
- in the performance or exercise, or purported performance exercise
- of any function or power of the administrator as an administrator under proposed part 2A.

**Offences related to administrators**

As noted above, administrators have the power to require certain persons (for example, officers or employees of the organisation or part, or a person who has possession of books related to an

261. Proposed subsection 323A(4) and (5) of the *FWRO Act*, at item 4 of Schedule 3 to the Bill.
organisation or part) to provide information, books or attend on the administrator as reasonably required.\textsuperscript{262} Where a person does not comply with those requirements to assist an administrator, the person commits an offence punishable by penalty of up to 120 penalty units.\textsuperscript{263} Further, those offences are strict liability offences.\textsuperscript{264}

In a criminal law offence the proof of fault (for example, intent) is usually a basic requirement. However, offences of strict liability remove the fault (mental) element that would otherwise apply.\textsuperscript{265}

In relation to the offence of failing to help an administrator, it is a defence if the person has a reasonable excuse, proposed subsection 323G(5) provides that it is a reasonable excuse for a person to refuse or fail to give information on the ground that to do so might tend to incriminate the person or expose them to a penalty. As such, the Bill preserves the privilege against self-incrimination. Further, proposed subsection 323G(6) also preserves legal professional privilege. However, in relation to the offence of failing to provide the books of the organisation or part (or allowing the administrator to inspect and make copies of such books) no such exceptions are provided. (Although the defence of mistake of fact is available for both offences under sections 6.1 and 9.2 of the \textit{Criminal Code}.)

\textbf{Changes from Previous Bill}

Whilst the offences discussed above are unchanged the penalties associated with them have been adjusted. The Previous Bill provided that the offences of failing to help an administrator or provide an organisation’s books to an administrator attracted a penalty of up to 12 months imprisonment and/or a fine of up to 50 penalty units.

The Bill removes the possible jail term of up to 12 months for failing to help an administrator or provide an organisation’s books on request, in favour of increasing the maximum fine to 120 penalty units.

\textbf{Criticisms of penalties imposed in relation to provision of books to an administrator}

The above changes would appear to be a partial response to criticism from the Scrutiny Committee which, in relation to the Previous Bill, raised concerns about the strict liability offences including:

\begin{itemize}
  \item it is not evident that the strict liability elements are 'clear and straightforward' (as claimed in the Explanatory Memorandum to the Previous Bill) because the requirements are framed by reference to what the 'administrator reasonably requires' (the Explanatory Memorandum to the Bill is expressed in the same terms)
  \item the \textit{Guide To Framing Commonwealth Offences, Infringement Notices And Enforcement Powers} states that strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual, whereas the strict liability offences in question were subject to up to 12 months imprisonment.\textsuperscript{266}
\end{itemize}

\begin{footnotes}
\item[262] Proposed subsections 323G(1), (2) and 323H(3) of the FWRO Act, at item 4 of Schedule 3 to the Bill.
\item[263] Proposed subsections 323G(3) and 323H(5) of the FWRO Act, at item 4 of Schedule 3 to the Bill.
\item[264] Ibid.
\end{footnotes}
As a result the Scrutiny Committee reiterated ‘its long-standing scrutiny view’ that it ‘is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed’. 267 Whilst the changes remove imprisonment as a potential penalty, they also increase the maximum penalty amount from 50 to 120 penalty units. In regards to this change the Scrutiny Committee noted:

The Guide to Framing Commonwealth Offences states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual... In this instance, the bill proposes applying strict liability to offences that are subject to... 120 penalty units... The explanatory memorandum provides no justification for including penalties above what is recommended in the Guide to Framing Commonwealth Offences. 268

**Human rights issues raised by the proposed administration regime**

In addition to the concerns regarding the proposed strict liability offences raised by the Scrutiny Committee, the PJCHR noted that by allowing for unions to be placed into administration, the proposed administration regime engages and limits the right to freedom of association and in particular the ‘right of unions to organise their internal administration and activities and to formulate their own programs without interference’. 269 The PJCHR stated that international supervisory mechanisms have noted:

‘[t]he placing of trade union organisations under control involves a serious danger of restricting the rights of workers’ organizations to elect their representatives in full freedom and to organise their administration and activities’. 270

The PJCHR noted that the statement of compatibility in the Explanatory Memorandum states that the measure has:

... the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintains public order. 271

The PJCHR noted that this objective is the same as that used to justify the measures pertaining to the deregistration of unions 272 and further that as the statement of compatibility ‘appears to identify multiple objectives’ it is unclear ‘whether each of these objectives addresses a substantial and pressing concern as required under international human rights law’. 273

The PJCHR noted that matters identified in the statement of compatibility do not address the proportionality of the measure ‘but rather address the aims or goals’ of the proposed administration regime. 274 The PJCHR noted that the test of proportionality is:

... concerned with whether a measure is sufficiently circumscribed in relation to its stated objective, including the existence of effective safeguards. 275

267. Ibid.
270. Ibid.
271. Ibid.
272. Ibid., pp. 128–129.
273. Ibid.
274. Ibid., p. 129.
In this respect, the PJCHR expressed concerns regarding the scope of conduct that may lead a union to be placed into administration. This was because ‘the potential breadth of the definition of ‘designated laws’ meant that the proposed administration regime makes it possible for unions to be placed into administration (or other orders made) because of less serious breaches of industrial law or for taking unprotected industrial action’ and that this may have ‘significant consequences in terms of the representational rights of employees and any current campaigns or disputes’.

After considering the Minister’s response to its concerns, the PJCHR concluded:

... given the scope of the grounds for a declaration there are questions that remain about whether the measure is the least rights restrictive approach in all circumstances. Accordingly, at least in relation to some proposed grounds for placing a union into administration, the measure would not appear to be a proportionate limitation on the right to freedom of association ... the measure may be incompatible with the right to freedom of association. In order to improve the human rights compatibility of the measure, the committee recommends that the measure be amended so that prior to placing a registered organisation into administration the court must be satisfied that it is in the best interests of the members.

However, the Bill has not amended the position under the Previous Bill. As such, there remains no requirement that prior to placing a registered organisation into administration the Court must be satisfied that it is in the best interests of the members.

Key issues and provisions: public interest test for amalgamations

In the second reading speech for the Bill the Minister stated:

This bill also introduces a new public interest test that must be satisfied before registered organisations can merge. The Fair Work Commission will consider the likely impact of the merger and an organisation’s record of compliance with the law as well as other matters of public interest. Parties with sufficient interest will have the opportunity to voice their opinions about the proposed merger. Before corporations are able to merge, they must satisfy the regulator that the merger would not substantially lessen competition or is otherwise in the public interest, so it is appropriate that registered organisations must simply do the same.

With regards to how company mergers are dealt with, in relation to the Previous Bill the then Minister stated:

When companies seek to merge, they must first satisfy a regulator—the Australian Competition and Consumer Commission—such a merger won’t substantially lessen competition. This competition test is like a public interest test for companies seeking to merge. By comparison, unions and employer associations face no similar test. Currently, the Fair Work Commission has very limited ability to do anything other than effectively rubber stamp a merger approved by just a bare majority of members. There are no general public interest considerations and there is very limited scope for affected parties to raise any concerns about a proposed merger of registered organisations... So this Bill...
introduces a new public interest test... which will take account of the broader impact of a proposed merger and also the record of the organisations in complying with the law. 280 (emphasis added)

As the Government appears to infer that the proposed public interest test is modelled (at least in part) off the competition test regulating company ‘mergers’, to give context to the proposed reforms a brief background to the current laws pertaining to registered organisation and company ‘mergers’ as well as the current interpretation of the ‘public interest’ within the industrial relations context is provided below.

Currently, Chapter 3 of the FWRO Act deals with the amalgamation of registered organisations. Whilst the term ‘amalgamation’ has no definite legal meaning, it implies the combination of separate things into a homogenous whole. 281 However, this is somewhat of a misnomer as the process of amalgamation under the FWRO Act involves at least one registered organisation being de-registered and ceasing to exist. Whilst it is true that its assets, liabilities and (often) members will ‘merge’ with another registered organisation, in reality one entity remains (often re-named) and the others cease to exist.

Likewise, whilst in Australia, the terms ‘takeover’ and ‘merger’ are used somewhat interchangeably to refer to the acquisition of control of one company by another, the use of the word ‘merger’ is also somewhat of a misnomer—one company acquires the other company itself (and hence control of it) and therefore acquires its assets, liabilities and business. Whilst sometimes the ‘target’ company may cease to exist after a takeover or ‘merger’, unlike the case with union amalgamations, this is not a requirement for the takeover or merger to succeed. The text box below provides a brief summary of the comparative regulation of company and registered organisation ‘mergers’.

Summary of comparison of company and registered organisation ‘mergers’

<table>
<thead>
<tr>
<th>Currently companies and registered organisations that seek to ‘merge’ are not automatically subject to a ‘public interest’ test or ‘history of lawlessness test’.</th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Instead, where a company or registered organisation meets the criteria set out in the relevant legislation the ‘merger’ will ordinarily be approved provided the directors/officers and shareholders/members agree to the ‘merger’. However, in the case of companies if the ‘merger’:</td>
<td></td>
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<tr>
<td>• raises competition issues: the test to be applied is whether or not the ‘merger’ would have the effect, or likely effect, of a substantial lessening of competition in a market in Australia (the ‘competition test’) 282</td>
<td></td>
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<tr>
<td>• is disputed by one of the merger parties, ASIC or a person whose interests may be affected: the Takeovers Panel can choose to make (or decline to make) a declaration of ‘unacceptable circumstances’ (which can lead to the ‘merger’ being blocked) where it ‘is not against the public interest’ to do so 283 or</td>
<td></td>
</tr>
<tr>
<td>• involves a foreign investor: the Treasurer, on advice from the Foreign Investment Review Board (FIRB) can block the ‘merger’ where it is contrary to Australia’s ‘national interest’ (this</td>
<td></td>
</tr>
</tbody>
</table>

Summary of previous law in relation to amalgamations of registered organisations

The Explanatory Memorandum refers to subsections 90(2) (later 103(2)) of the Workplace Relations Act 1996 (WR Act) and states:

Applying a public interest test to the mergers of registered organisations is not a new concept. Under predecessor legislation, the Australian Industrial Relations Commission was required to have regard to the public interest in performing its functions under the registered organisations provisions. The public interest test in this Bill is more limited and will only apply when the FWC considers applications for the amalgamation of registered organisations.  

The suggestion that previous Commonwealth industrial relations legislation imposed a public interest test on the amalgamation of registered organisations (that is, that an amalgamation deemed to be contrary to the public interest could be prevented) appears to be incorrect. Subsection 103(2) of the WR Act provided:

103 Commission to take into account the public interest

... (2) To the extent that the Commission is performing its functions in relation to matters arising under the Registration and Accountability of Organisations Schedule, the Commission must take into account the public interest, and for that purpose must have regard to:

(a) Parliament’s intention in enacting that Schedule; and

(b) the state of the national economy and the likely effects on the national economy of any order that the Commission is considering, or is proposing to make, with special reference to likely effects on the level of employment and on inflation. (emphasis added)

For the reasons discussed below, it appears that the AIRC didn’t have any discretion to refuse to make an amalgamation order if the statutory steps outlined in the WR Act had been complied with. Put simply, the requirement to ‘take into account the public interest’ imposed by section 103 did not appear to apply in such a way as to enable an amalgamation to be refused by the AIRC on ‘public interest’ grounds for a number of reasons.

First, the provisions dealing with amalgamation approval ballots provided that approval must be given if certain conditions were satisfied. Importantly, those conditions did not include a specific requirement that the amalgamation was ‘contrary to the public interest’ as a ground for refusal to approve an amalgamation ballot, or that an amalgamation had to be ‘in the public interest’ for an amalgamation ballot to be approved.

Secondly, the WR Act specifically provided:

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286. ibid., Schedule 1, sections 55 and 57.
If the members of each of the existing organisations concerned in a proposed amalgamation approve the proposed principal amalgamation, the proposed principal amalgamation is approved for the purposes of this Part. 287 (emphasis added).

This appears to be a self-executing provision, and as such contained no basis for the AIRC to refuse the amalgamation as it specifically provided that if the proposed amalgamation was approved by the members of the merging organisations, it was approved for the purposes of the legislation. No discretion was conferred on the AIRC and no other pre-conditions were imposed at that point.

As such, the WR Act effectively provided that an amalgamation had to be if it met the relevant conditions – none of which imposed a specific requirement that the proposed amalgamation be in, or not contrary to, the public interest. Therefore, the section 103 requirement in the WR Act that the AIRC ‘must take into account the public interest’ and ‘have regard to’ certain matters when exercising its powers under the Registration and Accountability of Organisations Schedule (Schedule 1 of the WRA Act, which included proposed amalgamations) does not appear to have provided grounds for the AIRC to refuse to give effect to an otherwise approved amalgamation.

Put simply, provided the approval process and conditions in the relevant Part of the WR Act were met, section 103 did not appear to have provided a mechanism for the AIRC to refuse an amalgamation. As such, section 103 of the WR Act was – in operation – not a ‘public interest test’, and certainly substantially different to what is proposed by the Bill. Finally, in the apparent absence of any court decisions that have considered the issues discussed above it is worth noting that a requirement for a regulator to ‘take into account’ the public interest when performing its functions does not appear to be the same as imposing a ‘public interest test’ as a pre-condition to approving an amalgamation, as is proposed by the Bill.

Summary of current law in relation to amalgamations of registered organisations

The amalgamation process involves:

- internal actions and decisions by the management committees of the organisations concerned (thereby enlivening the fiduciary duties of the officers concerned)
- an application to the FWC and
- a vote of the affected members. 288

Relevance of fiduciary duties of union officials

Putting aside specific statutory duties imposed by the FWRO Act, 289 at equity officers of a registered organisation (such as a trade union) have, as noted by the RCTUGC, been recognised by the courts to be fiduciaries and therefore have fiduciary duties. 290

Fiduciary duties are obligations of trust and confidence which equity will attach to one party in certain relationships whereby the party owing the duty (the fiduciary) is bound to place the interest of his or her principal ahead of his own. 291 The gist of the fiduciary relationship is that

287. Ibid, Schedule 1, subsection 70(1).
288. FWRO Act, Chapter 3, Part 2, Division 5 generally and sections 42 and 44.
289. FWRO Act, sections 285 and 286 impose statutory duties on officers of an organisation in relation to the financial management of the organisation.
equity will not allow the fiduciary to enter into any engagement in which he or she has, or could have, a personal interest conflicting with that of his or her principal.\textsuperscript{292} Nor will it allow the fiduciary to retain any benefit or gain obtained or received by reason of his or her fiduciary position or through some opportunity or knowledge resulting from it.\textsuperscript{293} Importantly (and as noted previously) as with company directors, union officials owe their fiduciary duties to the registered organisation as a separate legal entity directly.\textsuperscript{294}

Because union officials are fiduciaries, an officer of an organisation owes a number of important duties to the organisation. Most importantly the common law also imposes a duty to act in \textit{good faith and for a proper purpose}. However, in addition to those common law duties the \textit{FWRO Act} imposes the following duties on union officials, \textit{but only in relation to the financial management of the organisation}:

\begin{itemize}
  \item to discharge their duties and exercise their powers:
    \begin{itemize}
      \item with care and diligence\textsuperscript{295}
      \item in good faith and ‘in what he or she believes to be’ the best interest of the organisation\textsuperscript{296} and
      \item for a proper purpose\textsuperscript{297}
    \end{itemize}
  \item not improperly use his or her position or information obtained because they are or were an officer or employee of the union (or a branch) to:
    \begin{itemize}
      \item gain an advantage for himself, herself or someone else or
      \item cause detriment to the organisation or to another person.\textsuperscript{298}
    \end{itemize}
\end{itemize}

Further, officials are also bound by the rules of the organisation of which they are a member.

Essentially this means that whether under the common law, equity or the \textit{FWRO Act}, officials must exercise their powers bona fide for the benefit of the organisation (or what they believe to be the best interests of the organisation) rather than for personal gain.

In relation to amalgamation, because there will be a transfer of assets from one organisation to another (including for example, membership fee income streams) union officials must be satisfied that it is in the best interests of the organisation to proceed with the amalgamation. Further, they must not proceed with the amalgamation for reasons primarily related to person gain – the amalgamation \textbf{must} be in the best interests of the organisation as a separate legal entity. No requirement that the amalgamation must also be in the broader ‘public interest’ is currently imposed under equity, the common law or the \textit{FWRO Act}.

\textbf{Application for amalgamation and role of FWC}

Once the organisations have resolved to amalgamate, an application must be lodged with the FWC. The application must contain:

\begin{itemize}
  \item a joint application in writing\textsuperscript{299}
\end{itemize}
• resolutions of each Committee of Management in favour of the proposed amalgamation

• a scheme for amalgamation and

• an outline of the scheme which contains sufficient information to allow members of the organisations in question to make an informed decision.

The organisations may also lodge:

• an application for exemption from a ballot which, if successful, would mean that only the members of the smaller organisation would participate in the vote

• an application for a ‘Community of Interest Declaration’ (CID) which, if successful, lowers the number of votes which have to be cast in favour of amalgamation before the amalgamation is approved and

• Yes and No statements in relation to the amalgamation.

If the FWC approves the application, a ballot of affected members will be conducted by the Australian Electoral Commission. This will typically be a secret postal ballot and the ballot paper will be accompanied by the outline of the scheme of amalgamation and any Yes or No statements.

**Importance of a Community of Interest Declaration**

The organisations seeking to amalgamate may apply to the FWC for a CID under section 43 of the *FWRO Act*.

When determining whether to make the CID, the FWC must be satisfied that ‘there is a community of interest between the existing organisations of employees in relation to their industrial interests’ which in turn occurs where the FWC is satisfied that ‘a substantial number of members of one of the organisations’ are:

• eligible to become members of the other organisation or each of the other organisations

• engaged in the same work or in aspects of the same or similar work as members of the other organisation(s)

• covered by the same modern awards as members of the other organisation(s)

• employed in the same or similar work by employers engaged in the same industry as members of the other organisation(s)

• engaged in work, or in industries, in relation to which there is a community of interest with members of the other organisation(s) or

• there are other circumstances that satisfy the FWC ‘that there is a community of interest between organisations in relation to their industrial interests’.

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300. *FWRO Act*, section 42.
301. *FWRO Act*, section 40.
302. *FWRO Act*, subsection 44(3).
304. *FWRO Act*, section 43.
305. *FWRO Act*, subsection 44(3), sections 48, 60.
307. Ibid.
308. *FWRO Act*, subsection 43(1).
309. *FWRO Act*, subsection 43(5).
310. *FWRO Act*, subsection 43(5).
The effect of the FWC making a CID is that it lowers the number of votes which have to be cast in favour of amalgamation before an amalgamation can be approved to ‘more than 50%’ (that is, 50 per cent plus one vote) of formal votes cast in the ballot, rather than the usual two-step test:

• 25% of eligible voters vote and
• 50% of those votes are in favour of the amalgamation.312

This means that having the amalgamation approved becomes an easier task where a CID is in force.

**Standing of other persons**

Submissions under the CID process may be made by a person other than the applicants only with the leave of the FWC and only in relation to any proposed alteration to the name or eligibility rules of an organisation involved in the proposed amalgamation (subsection 54(3) of the *FWRO Act* and Regulation 44 of the *Fair Work (Registered Organisations) Regulations 2009*).

**Standing of the Minister and related powers**

Section 351A of the *FWRO Act* allows the Minister to intervene in ‘proceedings before a court’ in relation to matters arising the *FWRO Act* (including union amalgamations) if ‘the Minister believes it is in the public interest to do so’. It should be noted however, that this is only standing to intervene and make submissions. Although these may be framed in terms of the broader effect of the amalgamation on the community, the Minister’s standing does not of itself impose a ‘public interest’ test on the proposed amalgamation.

However, the Minister has other powers that may allow them to intervene in amalgamation cases. For example, section 604 of the *Fair Work Act 2009* (*FW Act*) allows a ‘person aggrieved by a decision’ made by the FWC (other than a Full Bench or Expert Panel decision) or the General Manager under the *FWRO Act* to appeal that decision, with permission from the FWC.

Importantly, the phrase ‘a person aggrieved’ has been broadly defined to extend to people beyond those who have a legal interest at stake in the matter.313 This means that the Minister may be able to appeal any decision to approve an amalgamation between two registered organisations, on the basis that they are a ‘person aggrieved by a decision’, provided the FWC grants permission.

Section 605 of the *FW Act* also allows the Minister to apply to the FWC for a review to be conducted by the FWC of a decision, other than that of a Full Bench or Expert Panel, if the Minister believes the decision is ‘contrary to the public interest’. Subsection 605(3) allows the Minister to make submissions to such a review. Again however, this is only standing to request a review and then make submissions. Importantly, this does not, of itself, impose a ‘public interest’ test on the proposed amalgamation.

Despite this however, the grounds for arguing against an amalgamation are currently limited, and the range of matters and issues that can be raised in submissions from persons given leave (including the Minister) are substantially narrower than those proposed by the Bill.

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Members approval of the amalgamation

Assuming the members approve the amalgamation, after consultation with the organisations, the FWC will fix ‘an amalgamation day’. On that day:

• all but one of the amalgamating organisations are de-registered
• the eligibility rules of the amalgamating organisations are merged and any rule changes set out in the scheme of amalgamation take effect
• any change of name of the amalgamated organisation takes effect
• members of a de-registered organisation become members of the amalgamated organisation
• all assets and liabilities of a de-registered organisation become assets and liabilities of the amalgamated organisation and
• all pending proceedings involving a de-registered organisation are deemed to instead involve the amalgamated organisation.  

It is the responsibility of the amalgamated organisation to take such steps as are necessary to ensure that the amalgamation is fully effective. The Federal Court can resolve any difficulties which arise.

Summary of current law in relation to company ‘mergers’ and takeovers

In Australia, the term ‘takeover’ is often used to refer generically to the acquisition of control of a publicly listed company. However, the takeover rules apply to acquisitions of ASX-listed Australian companies, ASX-listed Australian managed investment schemes (being investment trusts), and also unlisted Australian companies with more than 50 shareholders.

Usually control of a company is obtained upon ownership of more than half of a company’s voting shares. However, in some cases, control can be obtained at a lower shareholding interest if, as a practical matter, a person can determine the composition of a company’s board of directors.

Sometimes, the term ‘merger’ is used in lieu of ‘takeover’. In Australia the term ‘merger’ is a commercial concept used to describe an agreed acquisition of one company by another where the two companies are of similar size. Unlike other jurisdictions (such as the United States), there is no stand-alone process in Australia to effect a true merger which results in the target company (as a separate legal entity) being subsumed into the bidder company and the target company ceasing to exist. Instead, following the transfer of assets and so forth to the bidder company, the target company is wound up – but that process is separate to the takeover process itself (which is about purchasing the target company, or enough of it, to gain control over it).

In other words, the use of the word ‘merger’ is somewhat a misnomer – one company takes over the other, and acquires its assets, liabilities and business.

Regulatory framework regarding corporate takeovers

Takeovers in Australia are regulated by a combination of legislation (Part 5.1 and Chapter 6 of the Corporations Act 2001) governmental policy (developed by the ASIC and the Takeovers Panel, a specialist tribunal which resolves takeover disputes), and to a lesser extent, the listing rules of the ASX. In addition, Australia has anti-trust rules set out in the Competition and Consumer Act 2010

314. FWRO Act, sections 73, 74, 81 and Chapter 3, Part 2, Division 6 generally.
315. FWRO Act, sections 81, 87.
(CCA) which are administered by the ACCC, foreign investment rules set out in the *Foreign Acquisitions and Takeovers Act 1975* (FATA) and accompanying Regulations, where proposed acquisitions requiring approval are examined by the FIRB, and other rules specific to an industry (such as banking, broadcasting, aviation and gaming) which may regulate or otherwise control ‘merger’ transactions.

The focus of this digest, however, is on the rules in the *Corporations Act*, CCA and FATA as they pertain to company ‘mergers’. Importantly however, currently company mergers are not automatically subject to review unless the proposed merger:

- is disputed by one of the parties or certain other persons
- raises competition issues or
- involves a foreign investor acquiring an Australian company.

As such, the majority of company takeovers in Australia are not subject to any external review. In contrast Schedule 4 of the Bill proposes for automatic review of all proposed amalgamations of organisations.

**Policy underpinning takeover rules in the Corporations Act**

The takeover rules in respect of corporate entities reflect policies that:

- the acquisition of control of companies takes place in an efficient, competitive and informed market
- target shareholders have a reasonable time to consider a proposed acquisition and are given enough information to enable them to assess the merits of the proposal and
- target shareholders have an equal opportunity to participate in the benefits of a change of control of a company (referred to as a control transaction).  

There is no policy of automatically reviewing company takeovers/mergers or applying a public interest test to company takeovers in the *Corporations Act*.

**Takeover structures**

The most commonly used takeover structures are an off-market takeover bid (for either a friendly or hostile deal), or a scheme of arrangement (for a friendly deal only). The majority of friendly deals are affected via a scheme of arrangement (largely because of their ‘all-or-nothing’ outcome).

**Takeover bids**

In simple terms, a typical takeover bid involves the making of individual offers to purchase target securities (for example shares) at a specified bid price. There are two types of takeover bid: an off-market bid and a market bid. Virtually all takeover bids are off-market bids, because of the ability to include conditions. Takeover bids are subject to various rules.

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318. Other, less commonly used takeover structures include: a selective capital reduction or a security holder-approved transaction.
319. Those rules include: all offers must be the same; the bid price cannot be lower than the price which the bidder paid for a target security within the previous four months; the offer period to be no less than one month and no more than 12 months; there are no special deals for individual target security holders; there are no self-triggering bid conditions (for off-market
When those rules are compared to the amalgamation process for registered organisations, there are some similarities. For example, both require a scheme/bid to be developed and information about the proposed ‘merger’ to be provided to members/shareholders.

Importantly however, unlike the amalgamation of organisations, where the takeover bid is not disputed by the parties, does not raise any competition issues and does not involve foreign investment and the process has complied with the relevant laws, the default position is that takeover is approved without applying a public interest test. Further, the ability of interested persons to prevent the merger from proceeding are limited (discussed below).

Schemes of arrangement

A scheme of arrangement can be used only for a friendly acquisition of a company, and is frequently used to effect 100% acquisitions. A scheme of arrangement is a shareholder and court-approved statutory arrangement between a company and its shareholders that becomes binding on all shareholders by operation of law.

Schemes are subject to fewer prescriptive rules than takeover bids and therefore can be more flexible, but are supervised by ASIC and the courts. A standard scheme involves various steps, and overall has some features in common with amalgamations of organisations: various matters are agreed between the two entities, information is provided to the regulator for review and also provided to shareholders/members, meetings are held and the ‘merger’ then proceeds.

As with takeovers, the ability of interested persons to prevent the scheme of arrangement proceeding and the resulting merger from eventuating are limited to seeking declarations or orders from the Takeovers Panel (discussed below).

No public interest test applied under the Corporations Act 2001

From the above it can be seen that at no stage of a company takeover/merger—be it by a takeover bid or a scheme of arrangement—is any form of ‘public interest’ test automatically applied. Rather the only automatic test that is applied is derived from the duties of the directors: the takeover is in the best interests of the company as a separate legal entity.
However, certain types of ‘mergers’ may have other tests applied by takeover regulators themselves, or by the regulators as a result of applications by certain persons, as discussed below.

**Company takeover regulators**

The key takeover regulators are ASIC, the Takeovers Panel, the ACCC and the FIRB.

**ASIC**

ASIC has general supervision of the *Corporations Act* including the takeover rules, and has the power to modify and grant relief from the *Corporations Act* takeover rules (but not retrospectively). ASIC’s regulatory role in the administration and conduct of company takeovers primarily involves:

- reviewing and monitoring of documentation, disclosures and conduct in relation to bids to ensure compliance with the takeover provisions and the purposes underlying Chapter 6 of the *Corporations Act*
- providing regulatory guidance and relief that improves commercial certainty and balances the protections of Chapter 6 of the *Corporations Act* with the objective of facilitating company takeover transactions and
- in certain cases, taking enforcement action to protect the interests of investors and promote their confident and informed participation in the takeover process and financial markets generally.

ASIC also has standing to apply to the Takeovers Panel for a declaration of unacceptable circumstances or an order under section 657D or 657E of the *Corporations Act* (that is, to have the ‘merger’ blocked).

**Takeovers panel**

The Takeovers Panel is established by Part 10 of the *Australian Securities and Investments Commission Act 2001* (*ASIC Act*) with the powers conferred on it by the *Corporations Act*. The Takeovers Panel is the primary forum for resolving disputes regarding company takeovers or ‘mergers’. It has the power to declare circumstances unacceptable (even if they do not involve a breach of law) and to make remedial orders. In effect, the takeovers panel can block a ‘merger’.

Subsection 657C(2) of the *Corporations Act* provides that the bidder, target, ASIC or ‘any other person whose interests are affected by the relevant circumstances’ may apply to the Panel for a declaration of unacceptable circumstances under section 657A or an order under section 657D or 657E (that is, seek to have the ‘merger’ blocked). In turn, section 657A of the *Corporations Act* provides that the Takeovers Panel can choose to make, or decline to make, a declaration of unacceptable circumstances where it ‘is not against the public interest after taking into account any policy considerations that the Panel considers relevant’.

There is no definition of the term unacceptable circumstances in the *Corporations Act*. Instead, the Takeovers Panel is directed to use section 602, Chapter 6 of the *Corporations Act* and the public interest as reference points to determine when circumstances are unacceptable. Parliament considered that black letter law would be insufficient to deal with all the possible circumstances.

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323. ASIC, ‘Apply for relief’, Information sheet, 82, INFO 82, ASIC website.
that might defeat the policy of section 602. Accordingly, it empowered the Takeovers Panel, as an expert body, to address the issues by considering whether circumstances are unacceptable in terms of those reference points.\(^{326}\)

The Takeovers Panel is required to take the public interest into account when considering whether or not to make a declaration of unacceptable circumstances. Whilst ‘public interest’ is a difficult term to define, the Panel takes its significance to mean that the Panel should not merely consider the commercial interests and convenience of the parties and their shareholders directly involved in a dispute before the Panel. Rather, the Panel should consider wider issues such as: what signals its decision to make, or not make, a declaration of unacceptable circumstances in an individual case, will send to:

- the market and
- the wider investing community.

If such signals may improve the standards in the market and the future efficiency of the market for control of companies in Australia, consideration of the public interest in sending such signals may add weight to the choice of making, or not making, a declaration of unacceptable circumstances. Indeed, in some cases, it may sway an otherwise on-balance decision definitely one way or another.\(^{327}\)

Importantly however, declaration of unacceptable circumstances blocking a merger will only be made by the Takeovers Panel when it is not against the public interest. This means that a disputed merger does not have to be in the public interest to be approved, only that it can be blocked where it is against the public interest.

**Australian Competition and Consumer Commission**

Section 50 of the CCA prohibits any direct or indirect acquisition of shares or assets that would have the effect, or likely effect, of ‘substantially lessening competition’ in a market in Australia (the ‘competition test’).

There are no mandatory pre-merger notification requirements in the CCA. However, in practice, parties are encouraged to—and do—notify the ACCC about proposed company mergers which may raise competition concerns. In practice, the ACCC can conduct both informal and formal merger review processes.\(^{328}\) It has been suggested:

> The ability of the ACCC to investigate any transaction and the risks of court action to prevent a transaction from closing (or post-closing court action for divestiture, declaration that a transaction is void or penalties) have resulted in the practice in Australia of seeking 'informal clearance' from the ACCC where a proposed merger may raise competition concerns in Australia.\(^ {329}\)

However, in regards to the informal clearance process it does not provide assurances against subsequent third party litigation. Regardless of the process used however, the parties to a merger or persons the Australian Competition Tribunal (ACT) are satisfied have a ‘sufficient interest’ in the

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proposed merger are able (in some circumstances) to have decisions relating to merger authorisations made by the ACCC reviewed by the ACT. However, this digest does not consider the role of the ACT in detail.

**Competition test**

The factors to be taken into account in making a decision about whether a proposed merger has, or is likely to have, the effect of substantially lessening competition make the process an extremely complex one. Readers are referred to the ACCC’s Merger Guidelines and to the Bills Digest for the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 for further information about the competition test.

Whilst competition in the market is often cited as a factor considered when determining the public interest, this does not mean that the test applied by the ACCC to a particular ‘merger’ is a ‘public interest’ test per se – it is not. Rather it is whether the ‘merger’ would have the effect, or likely effect, of a substantial lessening of competition in a market in Australia. This is a narrower test than the public interest, as competition is only one aspect of the public interest.

**Conduct of merger parties**

The ACCC does not appear to apply a ‘history of lawlessness’ test per se when evaluating proposed mergers. However the ACCC’s merger guidelines note that when applying the competition test it does consider the conduct of the merger parties, especially in relation to prior coordinated conduct between ‘merging’ businesses (that is, anti-competitive conduct and/or breaches of the CCA) and:

> Given the potential complexity of the assessment required, evidence of prior coordinated conduct between firms in the relevant market may be highly relevant, particularly if the merger is likely to reduce the number of participants without undermining the conditions that facilitate coordinated conduct. (Emphasis added).

This would appear to suggest that where one or both of the ‘merger’ parties has a prior history of breaching the CCA or there is evidence of prior coordinated conduct between the merger parties that was anti-competitive (but not tested in court) that factor is given substantial weight within the competition test.

**Summary of ACCC merger clearance**

Whilst competition can be viewed as a part of the public interest, the competition test itself is not equivalent to a broader public interest test. However, the ACCC does appear to apply a ‘history of potential or actual anti-competitive coordinated conduct’ test when assessing company ‘merger’ proposals, as part of the competition test.

In summary, the competition test applied by the ACCC, whilst not automatically applied to every company merger and narrower than a public interest test per se, nonetheless shares some similarities with proposed subsections 72D(1) (record of compliance with the law) and 72D(3) (impact of the merger on employers and employees in the industry or industries concerned) of the

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331. ACCC, Merger guidelines, op. cit.
333. ACCC, Merger guidelines, op. cit., p. 34.
**FWRO Act**, at **item 7 of Schedule 4** to the Bill, in terms of considering the issues of legal compliance and the economic impact of the proposed merger on the industry, sector or economy.

**Foreign Investment Review Board**

Australia’s foreign investment review framework consists of the FATA, the [Register of Foreign Ownership of Water or Agricultural Land Act 2015](#) and their associated Regulations, and Australia’s Foreign Investment Policy (the Policy).

**Triggers for the exercise of the Treasurer’s powers under the FATA**

The FATA provides a legislative framework that requires certain acquisitions proposed by foreign investors (such as purchasing an Australian company) to be reviewed by the Treasurer (who receives advice from the FIRB). The FATA also provides the Treasurer with a range of powers, including the ability to order divestment of assets, to block proposals, or to apply conditions to proposals, to ensure that they are not contrary to Australia’s ‘national interest’.

The national interest, and hence what might be contrary to it, is not defined in the FATA. The FATA confers upon the Treasurer the power to decide in each case whether a particular proposal would be contrary to the national interest. The Government’s foreign investment policy statements set out guidelines on national interest matters in relation to foreign acquisitions (such as the purchase of a controlling stake in an Australian company).

Ordinarily a proposal that does not meet the requirements set out in the policy would be regarded as being, prima facie, contrary to the national interest and hence subject to rejection.

Whilst there are some similarities between the factors considered in the ‘national interest’ test applied by the FIRB such as the ‘character of the investor’, competition and impact on the economy and the community, and those factors are generally considered when determining the ‘public interest’, the two tests are not entirely the same and vary according to the context in which they are used. This is because the public interest can be viewed as domestically focused, whilst the national interest has international aspects.

**Character of the investor**

The FIRB policy document notes:

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335. Foreign Acquisitions and Takeovers Act 1975, section 3 and Part 3 generally. Specifically the FATA empowers the Treasurer to examine proposals by foreign persons that are a significant action or a notifiable action (noting that notifiable actions are, in effect, a sub-set of significant actions). See also: FIRB, Significant actions and notifiable actions, Guidance note, 35, 1 July 2017: ‘Some significant actions, called notifiable actions, must also be notified to the Treasurer before the actions can be taken ... If the significant action is also a notifiable action, the Treasurer must be notified before the action can be taken.’


337. The overlap between ‘national interest’ and ‘public interest’ and the differences between them have been noted in a variety of different contexts. See: J Kinslor and J English, ‘Decision-making in the national interest?’, ALAI Forum, 79, January 2015, pp. 35–51; V Bath, ‘Foreign investment, the national interest and national security — foreign direct investment in Australia and China’, Sydney Law Review, 34(1), March 2012, pp. 5–34; M Penny, ‘Defining and refining the concept of practising in “the public interest”’, Alternative Law Journal, 28(1), February 2003, pp. 3–12, which argued that the term ‘public interest’ is indeterminate, but also noted that ‘public interest’ can be viewed domestically whilst ‘national interest’ has international aspects.
The Government considers **whether the investor complies with Australia’s laws**, including following both the spirit and the letter of Australian law, and acting in good faith in complying with any conditions imposed by the Government.\(^{338}\)

This includes, to use the Bill’s terminology, a ‘record of compliance with the law’ aspect: a foreign investor with a history of breaching Australian laws is likely to have their investment either rejected or subject to stringent conditions. For example, the FIRB’s guidance on tax notes that ‘it is considered contrary to the national interest if foreign investors operating in Australia do not meet their obligations imposed under the tax laws’ and ‘compliance with Australia’s tax laws would be determined by applying the usual legal principles and processes, including reliance on objection or appeal rights by affected entities’.\(^{339}\)

This means that being involved in disputes with the ATO would not, of itself, lead to the national interest test being failed and the investment being blocked – but failure to comply with the laws and failure to comply with court orders once disputes are resolved would.

As such, it would appear that whilst the term ‘a history of lawlessness’ is not specifically used, compliance with Australian laws is a significant factor applied by the FIRB when determining if an acquisition is in the ‘national interest’ (which as noted above, despite some differences, overlaps at least in part with the ‘public interest’).

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339. FIRB, Tax conditions, Guidance note, 47, 13 August 2018, Attachment D, ‘Additional information on the tax conditions’. 
Summary table

The table below summarises the similarities and differences between the current regime regulating the amalgamations of registered organisations and those regulating company ‘mergers’.

Table 1: summary of registered organisation and company merger processes and issues

<table>
<thead>
<tr>
<th>Stage</th>
<th>Registered organisation</th>
<th>Company</th>
<th>Dispute: takeover panel involved</th>
<th>FIRB clearance required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Directors/Officers developing a ‘merger’ proposal</td>
<td>Directors and officials must act in best interests of the company/organisation and therefore any actions to facilitate the merger must be in the best interests of the company/organisation.</td>
<td>N/A if foreign company is developing proposal.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Directors/Officers considering a ‘merger’ proposal</td>
<td>Directors and officials must act in best interests of the company/organisation and therefore any actions related to the consideration of a merger proposal must be in the best interests of the company/organisation.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Regulator consideration or approval</td>
<td>Are the various matters set out in the FWRO Act met? Do the members approve the merger? No public interest test applied.</td>
<td>Are the various matters set out in the Corporations Act met? Do the shareholders approve the takeover/scheme/sell the required number of securities?</td>
<td>Only applies where the merger raises competition issues. Would the merger have the effect, or likely effect, of substantially lessening competition in a market in Australia?</td>
<td>Only applies where there is a dispute between the takeover parties. Are there unacceptable circumstances? This requires the panel to take the public interest into account.</td>
</tr>
</tbody>
</table>

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340. That is, there are no competition issues, foreign investment issues or disputes between relevant parties to the proposed merger.
### Table: Corporate Takeovers and Dispute Resolution

<table>
<thead>
<tr>
<th>Stage</th>
<th>Registered organisation</th>
<th>Company</th>
<th>Competition issues</th>
<th>Dispute: takeover panel involved</th>
<th>FIRB clearance required</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Straight takeover</td>
<td>No public interest test applied.</td>
<td>This involves considering any ‘history of potential or actual anti-competitive coordinated conduct’. No broader public interest test applied.</td>
<td>investor complies with Australia’s laws</td>
</tr>
<tr>
<td>Appeal of decisions / persons with standing to contest decisions or approvals</td>
<td>Limited – but can extend to a ‘person aggrieved’ by the decision’.</td>
<td>Limited, but a ‘person whose interests are affected’ by the relevant circumstances of the takeover can seek to have the merger blocked by the Takeovers Panel.</td>
<td>Generally limited to parties involved in the proposed merger or a person ‘the Tribunal is satisfied’ has ‘a sufficient interest’, without approval by the Australian Competition Tribunal.</td>
<td>The Takeovers Panel is the main forum to resolve disputes about company takeovers until the bid period has ended.</td>
<td>No appeals or reviews are possible.</td>
</tr>
</tbody>
</table>

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341. Section 604 of the *Fair Work Act 2009* allows a ‘person aggrieved by a decision’ made by the FWC (other than a Full Bench or Expert Panel decision) or the General Manager under the *FWRO Act* to appeal that decision, with permission from the FWC. In addition, section 56 of the *FWRO Act* provides limited grounds for a person to object to an amalgamation involving the extension of eligibility rules.

342. Subsection 657C(2) of the *Corporations Act* provides that the bidder, target, ASIC or ‘any other person whose interests are affected by the relevant circumstances’ may apply to the Panel for a declaration of unacceptable circumstances under section 657A or an order under section 657D or 657E (that is, seek to have the ‘merger’ blocked).

343. *Competition and Consumer Act 2010*, subsections 102(1AA), (1A). However subsection 109(2) allows the Tribunal to ‘upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal’.
<table>
<thead>
<tr>
<th>Stage</th>
<th>Registered organisation</th>
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<th>Competition issues</th>
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</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Straight takeover(^{340})</td>
<td></td>
<td>persons whose ‘interests are affected by’ the relevant circumstances. (^{345})</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>ASIC, the Minister and certain other public office holders and entities may commence court proceedings before the end of the bid period. (^{346})</td>
<td></td>
</tr>
</tbody>
</table>

\(^{340}\) Corporations Act 2001, section 659AA.

\(^{345}\) Section 657EA of the Corporations Act 2001 provides that standing to have a Takeover Panel decision reviewed is confined to ASIC and ‘party to the proceedings in which the decision was made’ (inferring a person who applied under section 657E may also have standing).

\(^{346}\) Corporations Act 2001, section 659B.
Key issue: new amalgamation regime for registered organisations

Overview of proposed changes

The RCTUGC made no recommendations regarding amending the FWRO Act in relation to the amalgamation of organisations. However, the imposition of a public interest test on ‘mergers of registered organisations’ that would ‘allow relevant matters to be taken into account, such as the organisations’ history of compliance with workplace laws’ was a Liberal Party election commitment in both 2016 and re-stated as a Government commitment in 2018.347

Item 2 of Schedule 4 to the Bill and proposed section 72A of the FWRO Act, at item 7 of Schedule 4, require that the Full Bench of the FWC determine whether a proposed amalgamation of two or more registered organisations is in the public interest, before approving the amalgamation. Importantly, the application of the public interest test is – unlike the case for most company mergers – automatic and mandatory for all proposed amalgamations between organisations.

To give context to the proposed public interest test, a brief overview of the interpretation of other public interest tests in industrial relations legislation is provided below.

The public interest test in other industrial relations contexts

Various parts of the FW Act require the FWC to apply a public interest test. For example, subsection 189(2) of the FW Act allows the FWC to approve an enterprise agreement that does not pass the better off overall test if there are exceptional circumstances and doing so would not be ‘contrary to the public interest’. It has been noted that whilst ‘is not contrary to the public interest’ is a lower test than ‘in the public interest’348 the approach to determining both is the same.349 Further, when determining whether to terminate an enterprise agreement, section 226 of the FW Act provides that the FWC must be satisfied that the proposed termination ‘is not contrary to the public interest’. In these (and other) regards it has been held that in terms of the application of the FW Act:

- the expression ‘in the public interest’, when used in legislation, should be treated as a term of art350 and is to be determined by making a discretionary value judgement on the relevant facts that involves a balancing of interests including competing public interests in a manner constrained only by the subject matter and the scope and purpose of the legislation351
- the public interest is broader than and distinct from the interests or views of parties or persons directly affected (although there may be overlap between the public interest and the interests of the parties) and refers to matters that might affect the public as a whole352

347. Liberal Part of Australia, The Coalition’s commitment to fairness and transparency in workplaces, media release, 17 June 2016; Craig Laundy (Minster for Small and Family Business, The Workplace and Deregulation, Speech at the AI Group, National Policy Influence Reform (PIR) Conference, media release, 30 April 2018, p. 7: ‘The Government remains 100 per cent committed to getting the Ensuring Integrity Bill through the Senate. Now that the merger between the MUA and CFMEU is a grim reality, this Bill becomes more important than ever’.
349. Ibid., at [44].
352. Top End Consulting Pty Ltd re Top End Consulting Enterprise Agreement 2010 [2010] FWA 6442 as per DP Bartel at [45]; Application by Agri Labour Australia Pty Ltd [2015] FWC 5332 as per DP Bartel at [24]; Re Kellogg Brown and Root, Bass Strait
whilst there is some overlap, the public interest does not embrace considerations which are essentially derivative from the individual interests of the employer, or employees. That is not to deny an individual interest may have an overlapping public interest dimension, such as individual interests in freedom of association or in freedom from certain kinds of discrimination.\(^{353}\)

in the context of enterprise agreements, the public interest may include ‘consideration in maintaining a level playing field among employees in a particular industry or sector’\(^{354}\) and in other contexts includes that the interests of employees are safeguarded, ensuring that the businesses are able to efficiently operate without unnecessary complications in their employment arrangements and facilitating arrangements that permit and encourage the maintenance of employment in company merger situations.\(^{355}\)

the public interest refers to matters that might affect the public more broadly as a whole, such as the attainment of the objects of the relevant Act,\(^{356}\) the pursuit of desirable economic outcomes, or the maintenance of appropriate industrial standards.\(^{357}\)

consideration of the public interest might involve balancing countervailing public interests\(^{358}\) that can include factors such as inflation, employment levels and maintenance of proper industrial standards.\(^{359}\)

all of the relevant circumstances should be taken into account in considering what is in the public interest, but the FWC should be guided by the likely foreseeable consequences, rather than being guided by speculation about possible consequences.\(^{360}\)

Perhaps one of the best summaries of the notion of the ‘public interest’ within an industrial relations context (under the FW Act) is provided in *GlaxoSmithKline Australia Pty Ltd v Colin Makin*:

> The expression ‘in the public interest’, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only by the objects of the legislation in question.”\(^{361}\)

As such it can be seen that the public interest test applied in other contexts under the FW Act’s, confers wide discretion on decision makers and involves considering various (sometimes competing) factors. This is consistent with a definition of ‘public interest’ provided in a legal dictionary:

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354. *Agnew Legal Pty Ltd re CLB No. 1 Pty Ltd - Enterprise Agreement 2012* [2012] FWA 10861 as per C Asbury at [12].


357. The *Australian Workers’ Union* [2015] FWCA 3956 as per C Gregory at [12].

358. Ibid., at [13].


360. The *Australian Workers’ Union* [2015] FWCA 3956 as per C Gregory at [14].

A concern common to the public at large, or a significant portion of the public, which may or may not involve the personal or proprietary rights of individual people.362

Importantly however, the public interest is generally broader than the issues of parties to a matter under the *FW Act*, although there can be a degree of overlap. Hence in relation to the Bill it could be argued that the impact of a proposed amalgamation on employees or employers in a particular industry (for example) is both an example of a public interest consideration but is also a consideration that may go to the individual interests of affected persons (for example, the unions seeking to merge, employers that may be impacted by the merger and the employees of companies in the industry as a whole).

**Standings of persons to make submissions**

**Proposed section 72B** of the *FWRO Act*, at item 7 of **Schedule 4**, provides that the FWC must hold a hearing into the proposed amalgamation and:

• it must receive submissions in relation to the record of compliance with the law of the organisations seeking to amalgamate and
• where an amalgamation is not automatically blocked due to the history of non-compliance with the law of the organisations seeking to amalgamate, the FWC must receive submissions in relation to whether the amalgamation is in the public interest.

**Proposed subsection 72C(1)** provides the following persons and entities with standing at the hearings in relation to the record of compliance with the law of the organisations seeking to amalgamate:

• the existing organisations
• 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
• a body other than an organisation that represents the interests of employers or employees in the industry or industries concerned
• the Commissioner
• the Minister and a Minister of a referring state (within the meaning of the *FW Act*), or of a territory, who has responsibility for workplace relations matters in the state or territory and
• any other person with a sufficient interest in the amalgamation.

Where an amalgamation is not automatically blocked due to the history of non-compliance with the law of the organisations seeking to amalgamate, standing is granted to the above persons and entities in relation to whether the amalgamation is in the public interest.

**Bill provides standing to a wider range of persons than other regimes**

Compared to the application of the competition test by the ACCC in relation to company mergers that pose potential competition issues and the range of persons with standing to commence proceedings with the Takeovers Panel, the Bill explicitly confers standing on a wider range of persons.

The *Corporations Act* allows persons whose ‘interests are affected by’ the relevant circumstances of the takeover to seek a declaration of unacceptable circumstances and/or orders that would

prevent the company takeover in question from proceeding. Persons whose ‘interests are affected by’ the relevant circumstances of the takeover could encompass the parties to the proposed company merger, other companies, registered organisations (both employee and employer) associated with the industry or industries impacted by the proposed company merger, and potentially the Minister. As a result, they are comparable to the range of persons and entities granted standing in proposed subsection 72C(1).

This means that the standing provisions in relation to matters before the Takeovers Panel and that proposed by the Bill are roughly analogous. However, the merger regime overseen by the ACCC (which the second reading speech to the Previous Bill referred to as noted above, confers standing on a narrower range of persons – essentially only the merger parties and a person the ACT is satisfied has a ‘sufficient interest’ in the proposed merger. Importantly, unlike the Bill, the merger clearance regime under the CCA does not confer automatic standing on the Minister. Further, the merger clearance processes imposed by the CCA are not, unlike the regime proposed by the Bill, automatic and mandatory processes that are applied to every proposed company merger – they only apply where the takeover in question raises competition issues. The same is true for the FIRB clearance process – it only applies where a company acquisition involves a foreign investor and then only involves the Minister and relevant parties – no standing to make submissions is granted to any other persons.

**Human rights concerns raised by the proposed public interest test**

The PJCHR noted that the proposed public interest test engages and limits the right to freedom of association, and ‘particularly the right to form associations of one’s own choosing’. Further the PJCHR stated:

> International supervisory mechanisms have noted concerns with measures that limit the ability of unions to amalgamate stating that “[t]rade union unity voluntarily achieved should not be prohibited and should be respected by the public authorities.”

After considering the justification for the inclusion of a public interest test, and the Minister’s Response, the PJCHR concluded that ‘the measure is likely to be incompatible with the right to freedom of association’.

In addition, some stakeholders raised concerns about the imposition of a public interest test on amalgamations of registered organisations. For example, in its submission to the Committee Inquiry into the Previous Bill, the ACTU argued:

> The current amalgamation regime is consistent with the emphasis in international law on the self-determination of industrial organisations and the intention of the FWRO Act to provide for their democratic functioning and control. The amendments in Schedule 4 are an egregious interference in the internal affairs of industrial organisations.

Further, the ACTU argued that the proposed public interest test ‘is far broader than the competition test’ imposed by the CCA and that under the regimes applicable to company mergers:

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365. Ibid.
366. Ibid., p. 136.

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Corporations can have an extensive record of not complying with the law, including tax avoidance and wage theft, and not be prevented from merging.\textsuperscript{368}

Whilst that is true to a certain extent, as noted above the history of a company complying with various laws is a factor considered by the ACCC when applying the competition test, and by the FIRB when applying the national interest test. Further, it is conceivable that – given the breadth of factors that the Takeovers Panel can consider – that the history of a company complying with various laws may be a factor considered by the Takeovers Panel when determining whether to make a declaration of unacceptable circumstances or to make various orders, which may have the effect of blocking a merger.

\textbf{When is the public interest test applied?}

\textit{Proposed subsection 72A(2)} allows the FWC to determine whether a proposed amalgamation is in the public interest ‘any time after an application’ for amalgamation is lodged with the FWC. Further, the effect of item 13 of Schedule 4 to the Bill is that the amendments will apply to proposed amalgamations already being dealt with by the FWC prior to the amendments commencing. The ACTU argued:

\begin{quote}
\ldots the public interest test can be applied at any time after the application is made, including before, during or after the ballot of the organisations’ respective memberships. This drafting is nonsensical, because the public resources expended by the AEC and the resources expended by the organisations in the preparation and conduct of the ballot are wasted if the amalgamation then fails the public interest test.\textsuperscript{369}
\end{quote}

\textbf{Elements of the public interest test}

\textit{Proposed section 72D} sets out the public interest test. The public interest test contains two elements:

\begin{itemize}
\item the record of compliance with the law of the organisations seeking to amalgamate
\item other matters of public interest.
\end{itemize}

These are outlined below.

\textbf{Record of compliance with the law}

\textit{Proposed subsection 72D(1)} provides that the FWC must have regard to any compliance record events that have occurred in each of the existing organisations that seek to amalgamate.

\textit{Proposed subsection 72D(2)} provides that if:

\begin{itemize}
\item having regard to the incidence and age of compliance record events in relation to each of the amalgamating organisations the FWC considers that the organisation has a record of not complying with the law then
\item the FWC must determine that the amalgamation is not in the public interest (therefore preventing the amalgamation from proceeding).
\end{itemize}

\textit{Proposed subsection 72D(2)} provides that the FWC is to have regard to ‘the incidence and age’ of compliance record events when determining whether the organisation has a record of not

\textsuperscript{368} Ibid., p. 31.
\textsuperscript{369} Ibid., p. 36.
complying with the law. Whilst the Explanatory Memorandum is silent on the matter, the ACTU argues that the FWC is:

... not permitted to consider the nature or seriousness of the 'compliance record events' (only the 'incidence and age'), let alone the relevance of the events (if any) to the merits of the proposed amalgamation.370

An alternative interpretation could be that the phrase 'having regard to' does not restrict the FWC from considering other factors such as those mentioned by the ACTU. It could be argued that the phrase simply requires that the FWC considers the number and age of compliance record events as part of the overall process of determining whether the organisations seeking to amalgamate have a record of compliance with the law.

Compliance record events

Proposed section 72E defines what constitutes a compliance record event. A compliance record event occurs where:

• a designated finding is made against the organisation
• a finding of contempt of court is made against the organisation relating to an order or injunction made under a designated law or
• the organisation, part of the organisation or a class of members of the organisation organised or engaged in obstructive industrial action as defined in proposed subsection 28G(2).371

A compliance record event also includes where:

• a designated finding is made against a person who was an officer of the organisation at the time of the conduct to which the finding relates
• a finding of contempt of court is made against a person in relation to an order or injunction under any law of the Commonwealth, or a state or territory if the person:
  – was an officer of the organisation at the time of the conduct to which the finding relates and
  – the conduct was in the course of, or purportedly in the course of, performing functions in relation to the organisation
• a person is disqualified from holding office in an organisation while an officer in the organisation.372

The definitions of 'officer' and 'office' in sections 6 and 9 of the FWRO Act respectively mean that references to officers of an organisation includes officers of branches of organisations. As noted by the Explanatory Memorandum this means:

... a finding that an officer of a particular branch of an organisation organised or engaged in obstructive industrial action is a compliance record event relevant to the FWC's overall decision about an organisation’s compliance record.373

The effect of linking the definition of a compliance record event to designated findings is to capture a wide array of conduct related to core industrial laws, or conduct related to the performance of an official’s duties. As noted previously, due to the definition of designated

370. ACTU, Submission, op. cit., p. 33.
371. Proposed subsection 72E(1) of the FWRO Act, at item 7 of Schedule 4 to the Bill.
372. Proposed subsection 72E(2) of the FWRO Act, at item 7 of Schedule 4 to the Bill.
373. Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, p. 38.
finding this mean compliance record events capture conduct that has not necessarily attracted a court imposed penalty, or a criminal conviction. Further a compliance record event can occur when a substantial number of members engage in the relevant conduct and also where only a small part of the organisation or a small class of members organises or engages in 'obstructive industrial action'.

Other matters of public interest

Proposed subsection 72D(3) provides that where an amalgamation is not blocked on the basis of the record of non-compliance with the law of one or more of the amalgamating organisations, the FWC must have regard to whether the amalgamation is otherwise in the public interest. In making this determination, the FWC is to have regard to the impact the amalgamation is likely to have on:

• employees in the industry or industries concerned and
• employers in the industry or industries concerned.

Proposed subsection 72D(4) then provides that the FWC may have regard to 'any other matters it considers relevant'. The ACTU argues that as drafted the public interest test is 'focused on economic considerations and the commercial interests of industry and employers'. However, proposed subsection 72D(3) also imposes a requirement on the FWC to consider the economic and commercial interests of employees in the industry or industries concerned, not just employers. Further, whilst the Explanatory Memorandum suggests that under proposed subsection 72D(4) other relevant matters 'could include the likely impact upon the industry or industries concerned or the economy or an important part of it', it confers on the FWC wide discretion to consider a range of matters, which, as discussed above, is a common feature of a public interest test.

Changes from Previous Bill

The Previous Bill defined compliance record events as including where wider criminal findings were made against the organisation or an officer engaged in conduct purportedly in the course of performing functions in relation to the organisation. It also captured where findings of contempt of court were made against the organisation relating to an order or injunction issued under any law of the Commonwealth, a state or territory, rather than in relation to a designated law.

The effect of the removal of wider criminal findings and restricting contempt findings against organisations to designated laws is to capture a narrower array of conduct than the Previous Bill. Nonetheless, for the reasons noted elsewhere in this Digest, due to the breadth of conduct captured by the definition of designated laws, amalgamation could be refused where minor or technical breaches of industrial laws have occurred.

What happens when the public interest test is failed?

Proposed section 72F provides that where the FWC decides that an amalgamation is not in the public interest:

• the FWC must not fix an amalgamation day for the amalgamation and
• the amalgamation does not take effect.

374. ACTU, Submission, op. cit., p. 33.
375. Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, p. 37.
Further, proposed subsection 72F(2) provides that where the FWC decides that an amalgamation is not in the public interest the FWC must not approve the submission of the proposed amalgamation to a ballot of the members of the organisations in question.

**Changes apply to amalgamations commenced before amendments commence**

The effect of item 13 is that the amendments contained in Schedule 4 of the Bill will apply to a proposed amalgamation already being dealt with by the FWC prior to the amendments commencing. Further, item 13 also provides that a reference to a compliance event includes events that occurred before the commencement of the Bill.

Whilst this means that when applying the public interest test, the FWC will be required to consider compliance events that occurred before the amendments took effect, it would appear that the effect of the requirement imposed by proposed subsection 72D(2) to consider the age of the compliance record events would allow the FWC some discretion when considering the weight to give compliance events that occurred before the amendments commenced.

**Exercise of amalgamation powers only by Full Bench of FWC**

Item 4 of Schedule 4 repeals and replaces section 37 of the FWRO Act. Proposed subsection 37(1) provides that the powers of the FWC in relation to the amalgamation of organisations are exercisable only by a Presidential Member of the FWC (that is, the President, a Vice President or Deputy President). However, proposed subsection 37(2) provides that the public interest test for amalgamations function of the FWC is exercisable only by a Full Bench of the FWC.

The Explanatory Memorandum notes that the effect of requiring that the public interest test be applied only by a Full Bench of the FWC is that a decision of a Full Bench on the question of the public interest of a proposed amalgamation is not subject to merits review.³⁷⁶ The Government states:

The intent is not to restrict the right of organisations affected by a decision to fair decision-making about whether an amalgamation is in the public interest. Rather, the requirement for a Full Bench protects the integrity of the decision-making process by ensuring that a decision on the question of an amalgamation is made by a number of senior members of the FWC. This would not be a new exclusion from merits review, rather, decisions on the public interest test for amalgamations would simply fall into the existing exclusion from merits review that applies to all decisions of the Full Bench of the FWC under the Act and the FW Act.³⁷⁷

Further, the Explanatory Memorandum notes that the changes contained in proposed section 37 do not exclude a right of judicial review to the Federal Court or High Court, and hence decisions by a Full Bench of the FWC will remain reviewable by the High Court under section 75(v) of the Constitution or the Federal Court under section 39B of the Judiciary Act 1903.³⁷⁸

The ACTU was critical of the changes proposed by item 4, arguing that other provisions in the FWRO Act ‘ensure that the powers are exercised by a senior member of the FWC’ whilst still allowing parties access to merits review ‘by way of an appeal to the Full Bench’ and:

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³⁷⁶. Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, p. 34.
³⁷⁷. Ibid.
³⁷⁸. Ibid.
It would be preferable and in the interests of access to justice if s 37 did not distinguish powers in relation to applying the public interest test and all FWC powers under Chapter 3, Part 2 of the [FW]RO Act were exercisable only by a presidential member.379

This was because, the ACTU argued, judicial review is ‘expensive, time consuming and only available on limited grounds’. 380

Changes to when amalgamation can take effect

Currently section 73 of the FWRO Act provides that where the FWC is satisfied that the members have approved the proposed amalgamation and satisfied about certain matters, it must fix an amalgamation day (in effect, the day the amalgamation occurs). Paragraph 73(2)(c) provides that one of the current matters that the FWC must be satisfied about before fixing an amalgamation day is that:

\[c) \text{ there are no proceedings (other than civil proceedings) pending against any of the existing organisations concerned in the amalgamation in relation to:}\]
\[(i) \text{ contraventions of this Act, the Fair Work Act or other Commonwealth laws; or}\]
\[(ii) \text{ breaches of modern awards or enterprise agreements; or}\]
\[(iii) \text{ breaches of orders made under this Act, the Fair Work Act or other Commonwealth laws}\]

The drafting of the current paragraph 73(2)(c) is somewhat internally inconsistent.381 It requires that there are not any proceedings ‘other than civil proceedings’ pending against the organisations under various laws. In other words, there are no criminal proceedings pending against the organisations seeking to amalgamate. Importantly however, breaches of modern awards or enterprise agreements do not currently attract criminal penalties – they only attract civil penalties (in earlier laws breaches of what are now termed modern awards or enterprise agreements did attract criminal penalties).382 As such the internal inconsistency is between an apparent purpose of only considering criminal proceedings, whilst specifically including certain proceedings that are civil proceedings only in paragraph 73(2)(c)(ii).

Proposed paragraph 73(2)(c), at item 10 of Schedule 4, provides that one of the matters that the FWC must be satisfied about before fixing an amalgamation day is that ‘there are no proceedings of the kind’ contained in proposed subsection 73(2A) against the organisations seeking to amalgamate. Proposed subsection 73(2A), at item 12 of Schedule 4, then provides that the relevant types of proceedings are:

• criminal proceedings in relation to contraventions of the FWRO Act, the Fair Work Act or any other law of the Commonwealth
• breaches of orders related to criminal proceedings for contraventions of the FWRO Act, the Fair Work Act or any other law of the Commonwealth and
• civil proceedings for a contravention of a provision mentioned in a subparagraph of paragraph (b) of the definition of a designated finding in proposed subsection 9C(1) (at item 2 of

379. ACTU, Submission, op. cit., p. 32.
380. Ibid.
381. Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, p. 39.
382. Ibid.
Schedule 1). The relevant provisions are: a civil penalty provision of the **FWRO Act**, **FW Act**, **Building and Construction Industry (Improving Productivity) Act 2016**, a WHS civil penalty provision of the **Work Health and Safety Act 2011** or a related a state or territory Occupational Health and Safety (OHS) law within the meaning of the **FW Act**.

The Government argues that amendments made by **item 12** to section 73 of the **FWRO Act** are:

... required to clarify the scope of pending proceedings against organisations which the FWC is satisfied of in determining whether to fix an amalgamation day.

However, after setting out the legislative history of section 73 of the **FWRO Act** the ACTU argued:

... the provision’s original intention, and the evident intention of the existing provision, was to include only criminal proceedings and to exclude civil proceedings.

The ACTU argued that the amendment proposed by **item 12** ‘fundamentally alters the provision by extending its scope to civil proceedings’ in a way that ‘is not even limited to breaches of awards or enterprise agreements’ and therefore ‘significantly expands the scope of s 73(2)(c)’.

**Human rights issues relating to the public interest test for amalgamations**

As noted elsewhere in this Digest, various ILO conventions also protect unions from being dissolved, suspended or de-registered and – relevantly to the proposed public interest test for amalgamations – protects the rights of workers to form organisations of their own choosing.

The PJCHR referred to comments from international supervisory mechanisms of the ILO in relation to the human rights engaged by the disqualification regime:

International supervisory mechanisms have noted concerns with measures that limit the ability of unions to amalgamate stating that ‘[t]rade union unity voluntarily achieved should not be prohibited and should be respected by the public authorities’.

The PJCHR noted that the right to freedom of association may be subject to permissible limitations, provided certain conditions are met. Generally a justifiable limitation on the right in question (in this case, to freedom of association) must:

- address a legitimate objective
- be rationally connected to that legitimate objective and
- be a proportionate way to achieve the legitimate objective.

In relation to the proposed public interest test for proposed amalgamations, the PJCHR, after considering the Minister’s response concluded:

While it is a relevant safeguard that the decision as to whether an amalgamation is in the ‘public interest’ is to be made by the FWC, this alone appears to be insufficient to ensure that the measure constitutes a proportionate limitation. As outlined above, the measure appears to be overly broad such

383. Ibid.
384. ACTU, Submission, op. cit., p. 35.
385. Ibid.
386. PJCHR, Report, 12, 2017, op. cit., p. 132 (see also p. 114).
387. Ibid., p. 132.
388. Ibid., pp. 132–133.
that it does not appear to be the least rights restrictive approach ... the measure is likely to be incompatible with the right to freedom of association."  

389. Ibid., p. 137.
**Appendix: Differences between the disqualification regimes proposed by RCTUGC and the Bill**

**Table 2: differences between the disqualification regimes proposed by the RCTUGC and the Bill**

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<tr>
<th>RCTUGC model</th>
<th>The Bill’s model</th>
<th>Notes</th>
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| Paragraph 190(a)(i):  
- the person has or has been found to have contravened a civil remedy provision of the *FW Act*, or a civil penalty provision of the *FW(RO) Act* or the *Work Health and Safety Act 2011* (Cth), and  
- the Court is satisfied that the disqualification is justified. | Proposed paragraph 223(1)(a) and 222(2)(b):  
- a designated finding is made against the person, and  
- the Court does not consider that it would be unjust to disqualify the person. | Definition of **designated finding** – specifically the inclusion of the *BCI Act* – means the Bill’s model applies to a slightly broader range of conduct than that proposed by the RCTUGC, but narrower than that put forward in the Previous Bill. Bill provides that the court must be satisfied that it would not be **unjust** to disqualify the person, arguably a lower threshold than disqualification being ‘justified’. |
| Paragraph 190(a)(ii):  
- the person has been found liable for contempt, and  
- the Court is satisfied that the disqualification is justified. | Proposed paragraphs 223(1)(b), 223(2)(a), (b) and 222(2)(b):  
- the person is found to be in contempt of court in relation to an order or injunction made under a designated law (proposed paragraph 223(1)(b)), or  
- the person is:  
  - found to be in contempt of court in relation to an order or injunction made under any law of the Commonwealth or a state or territory (other than a designated law); and  
  - the person engaged in the conduct to which the finding relates in the course of (or purportedly in the course of) performing functions in relation to any organisation, and  
- the Court does not consider that it would be unjust to disqualify the person. | Broadly comparable, however the Bill provides that the court must be satisfied that it would not be **unjust** to disqualify the person, arguably a lower threshold than disqualification being ‘justified’. |
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<th>RCTUGC model</th>
<th>The Bill’s model</th>
<th>Notes</th>
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| Paragraph 190(a)(iii):  
• the person has been at least twice an officer of a registered organisation that has, or has been found to have, contravened a provision of the *FW Act* or the *FW(RO) Act* or 
• has been found liable for contempt while the person was an officer and 
• each time the person failed to take reasonable steps to prevent the contravention or the contempt, and  
• the Court is satisfied that the disqualification is justified. | Proposed subsection 223(3) and 222(2)(b):  
• more than one of the following findings is made against any organisation in relation to conduct engaged in while the person is an officer of the organisation:  
  – a designated finding  
  – a finding that the organisation is in contempt of court in relation to an order or injunction made under a designated law, and  
• the person failed to take reasonable steps to prevent the conduct, and  
• the Court does not consider that it would be unjust to disqualify the person. | Definitions of **designated finding** means the Bill’s model applies to a broader range of conduct than that proposed by the RCTUGC. However, the removal of **wider criminal findings** means it applies to a narrower range of conduct than the Previous Bill. Bill provides that the court must be satisfied that it would not be **unjust** to disqualify the person, arguably a lower threshold than disqualification being ‘justified’. |
| Paragraph 190(a)(iv):  
• the person has, or has been found to have, at least twice contravened a provision of the *FW Act* or the *FW(RO) Act*, and  
• the Court is satisfied that the disqualification is justified. | Proposed paragraph 223(1)(a) and 222(2)(b):  
• a designated finding is made against the person or  
• the person is found in contempt of court in relation to an order or injunction made under any law of the Commonwealth, a state or territory and the conduct engaged in relates to the persons performance or duties for any organisation, and  
• the Court does not consider that it would be unjust to disqualify the person. | Definition of **designated finding** and the requirement that only one designated finding is required to trigger this ground (compared to two contraventions required in the model proposed by the RCTUGC) means the Bill’s model applies to a broader range of circumstances than that proposed by the RCTUGC. The contempt provisions potentially capture a broad range of conduct outside of core industrial laws, and hence are broader than what was recommended by the RCTUGC. Bill provides that the court must be satisfied that it would not be **unjust** to disqualify the person, arguably a lower threshold than disqualification being justified. |
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<th>RCTUGC model</th>
<th>The Bill’s model</th>
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| Paragraph 190(a)(v):  
- the person is otherwise not a fit and proper person to hold office within a registered organisation or branch, and  
- the Court is satisfied that the disqualification is justified. | **Proposed subsections 223(5) and (6), paragraph 222(2)(b):**  
- having regard to any events mentioned in subsection (6), the person is not a fit and proper person to hold office in an organisation, and  
- the Court does not consider that it would be unjust to disqualify the person. | Whilst somewhat more directive than the model proposed by the RCTUGC, the models are broadly comparable other than the fact that the Bill provides that the court must be satisfied that it would not be unjust to disqualify the person, arguably a lower threshold than disqualification being justified. |

Source: RCTUGC, *Final report*, vol. 5, RCTUGC, Canberra, 28 December 2015, Recommendation 38; para 190; relevant provisions of the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 and the Library’s own analysis.

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390. *Proposed subsection 223(6) of the FWRO Act*, at item 11 of Schedule 1 to the Bill provides that those events are: (a) the person is refused an entry permit, or an entry permit held by the person is revoked or suspended, under Part 3-4 of the *Fair Work Act*; (b) the person is refused a WHS entry permit, or a WHS entry permit held by the person is revoked or suspended, under Part 7 of the *Work Health and Safety Act 2011*; (c) the person is refused an entry permit (however described), or any such permit held by the person is revoked or suspended, under a State or Territory OHS law (within the meaning of the *Fair Work Act*); (d) in any criminal or civil proceedings against the person, or in any action against the person by an agency of the Commonwealth or a State or Territory, the person is found to have engaged in conduct involving fraud, dishonesty, misrepresentation, concealment of material facts or a breach of duty; (e) in any criminal proceedings against the person, the person is found (i) to have engaged in conduct 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 or (ii) committed an offence against a law of the Commonwealth or a State or Territory that is punishable by imprisonment for 2 years or more.
Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.