FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT (ENSURING INTEGRITY) BILL 2019

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be moved on behalf of the Government

(Circulated by authority of the Attorney General and Minister for Industrial Relations, the Hon Christian Porter MP)
AMENDMENTS TO THE FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT (ENSURING INTEGRITY) BILL 2019

OUTLINE

The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (the Bill) amends the Fair Work (Registered Organisations) Act 2009 (the Act) to respond to community concern and the recommendations of the Final Report of the Royal Commission into Trade Union Governance and Corruption (the Royal Commission) to ensure the integrity of registered organisations and their officials, for the benefit of their members.

The Bill responds to Royal Commission recommendations 36, 37 and 38, and the Government’s commitment to fairness, integrity and transparency of registered organisations and their officials.

The Government proposes to move amendments to the Bill that would:

- limit standing to apply to the Federal Court (the Court) for an order seeking disqualification of an individual from holding office or cancellation of registration of or the making of an alternative order against an organisation to the Registered Organisations Commissioner (the Commissioner), and allow for a person, who reasonably believes a ground applies, to refer a matter to the Commissioner;

- provide that the sum of the maximum penalties for designated finding must be above a certain threshold within a certain timeframe, before certain grounds for disqualification can apply;

- clarify that it is the Commissioner who must satisfy the Court that disqualification, cancellation of registration or the making of alternative orders would not be unjust (including by reference to the gravity of the matters constituting the ground), before the Court can make an order;

- clarify that the Court may (but is not required) to make disqualification, cancellation or alternative orders when satisfied of the relevant statutory criteria;

- remove as a ground for cancellation of registration and alternative orders, where affairs of the organisation or part are being conducted in an oppressive, unfairly prejudicial or unfairly discriminatory manner against a member or class of members;

- remove an offence under a law of another country punishable on conviction by imprisonment for life or a period of 5 years or more as a prescribed offence for the purposes of the automatic disqualification regime;

- allow the Fair Work Commission (FWC) to decide as a threshold matter, whether a proposed amalgamation should be subject to the public interest test, based on the compliance history of the relevant organisations;

- provide that in carrying out his or her function of promoting efficient management of organisations and high standards of accountability of organisations, the Commissioner must prioritise matters that raise serious or systemic concerns; and
• make consequential amendments.

FINANCIAL IMPACT STATEMENT

Nil
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Amendments to the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

The amendments to the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (the Bill) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of amendments to the Bill

The Bill amends the Fair Work (Registered Organisations) Act 2009 (the Act) to respond to community concern and recommendations 36, 37 and 38 of the Final Report of the Royal Commission into Trade Union Governance and Corruption (the Royal Commission) to ensure the integrity of registered organisations and their officials, for the benefit of their members.

The amendments to the Bill on sheet RC114 would:

- limit standing to apply to the Federal Court (the Court) for an order seeking disqualification of an individual from holding office or cancellation of registration or the making of an alternative order against an organisation to the Registered Organisations Commissioner (the Commissioner), and allow for a person, who reasonably believes a ground applies, to refer a matter to the Commissioner;

- provide that the sum of the maximum penalties for designated findings must be above a certain threshold within a certain timeframe, before certain grounds for disqualification can apply;

- clarify that it is the Commissioner who must satisfy the Court that disqualification, cancellation of registration or the making of alternative orders would not be unjust (including by reference to the gravity of the matters constituting the ground), before the Court can make an order;

- clarify that the Court may (but is not required) to make disqualification, cancellation or alternative orders when satisfied of the relevant statutory criteria;

- remove as a ground for cancellation of registration and alternative orders, where affairs of the organisation or part are being conducted in an oppressive, unfairly prejudicial or unfairly discriminatory manner against a member or class of members;

- remove an offence under a law of another country punishable on conviction by imprisonment for life or a period of 5 years or more as a prescribed offence for the purposes of the automatic disqualification regime;

- allow the Fair Work Commission (FWC) to decide as a threshold matter, whether a proposed amalgamation should be subject to the public interest test, based on the compliance history of the relevant organisations;
Statement of Compatibility with Human Rights

- provide that in carrying out his or her function of promoting efficient management of organisations and high standards of accountability of organisations, the Commissioner must prioritise matters that raise serious or systemic concerns; and

- make related consequential amendments.

Human rights implications

The amendments positively engage with the human rights implications of the Bill as expressed in the Statement of Compatibility with Human Rights that accompanies the Explanatory Memorandum for this Bill.

The amendments are compatible with:

- Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 6 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) including:
  - the right to freedom of association;
  - the right to form and join trade unions; and
  - the right of trade unions to function freely.

The content of the rights to work and rights in work in the ICESCR can be informed by treaties of the International Labour Organisation (ILO), including the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) (ILO Convention 87), which provides employer and employee organisations with protection for their organisational autonomy.

- The right to the presumption of innocence and the minimum guarantees contained in Article 14 of the ICCPR.

1. Amendments to disqualification and cancellation standing provisions

The Commissioner is now the only person who has standing to apply to the Court for an order disqualifying someone from holding office under Schedule 1, or for an order cancelling an organisation’s registration or the making of an alternative order under Schedule 2.

While the amendments allow another person who reasonably believes that a relevant ground applies to refer matters in writing to the Commissioner, the Commissioner may, but is not required to, take action in relation to that referral.

Limiting standing to the Commissioner enhances compatibility with human rights obligations by providing that it is only the regulator of registered organisations alone, who has standing to apply for disqualification and cancellation/alternative orders.

2. Amendments to the grounds for disqualification and cancellation

The amendments to the grounds for disqualification in Schedule 1 and cancellation/the making of alternative orders in Schedule 2 of the Bill raise the threshold before a relevant ground can apply.
For a relevant ground for disqualification to be made out in relation to designated findings, there must now be a contravention of one or more civil penalty provisions with combined maximum penalties of 180 penalty units within the last 10 years. The ground for multiple failures to prevent contraventions etc. by an organisation has also been amended so that for civil contravention breaches alone, there must be at least two civil findings against the organisation with a combined total of the maximum penalties of at least 900 penalty units within the last 10 years. These amendments enhance compatibility with human rights obligations and address stakeholder concerns that minor or technical contraventions could be grounds for a disqualification application.

The grounds for cancellation orders and alternative orders have also been amended to remove the ground where the affairs of an organisation are being conducted in a way that is ‘oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or a class of members’. This amendment enhances compatibility with human rights and addresses stakeholder concerns that in registered organisations, particularly in the context of collective bargaining where groups of members can have competing interests, the ground could be made out where there is a perception that one group of members has been treated less favourably than another group.

3. Amendments to the automatic disqualification regime

A conviction of an offence under a law of ‘another country’ punishable by imprisonment for life or five years or more is no longer a prescribed offence that results in automatic disqualification. This amendment enhances compatibility with human rights obligations because the ground for automatic disqualification can under proposed section 212(aa) of the Bill can now only be engaged by contraventions of laws passed by parliaments of Australia.

4. Amendments to the application of the public interest test

The amendments to the amalgamation provisions in Schedule 4 of the Bill will require a Full Bench of the FWC to consider as a preliminary matter, whether a proposed amalgamation should be subject to the public interest test in the Bill. The FWC may only decide that the public interest test in the Bill is to apply to a proposed amalgamation if there is information before the FWC that at least 20 compliance record events have occurred for at least one of the existing organisations concerned in the amalgamation, within the 10 years prior to an application for approval for submission of an amalgamation ballot under section 44 of the Act. The FWC will be required to publish written reasons in relation to this preliminary threshold matter.

This amendment enhances compatibility with human rights obligations by ensuring that law-abiding organisations can amalgamate without additional oversight.

5. Burden of proof

The amendments to new sections 222, 28J and 28L of the Bill confirm and clarify that it is the applicant Commissioner who must satisfy the Court that the making of a disqualification order, cancellation order or alternative order would not be unjust.

This amendment enhances compatibility with human rights obligations, and in particular the right to presumption of innocence, by making it clear that it is the Commissioner at all times who bears the legal onus of proof in the Bill.
Conclusion

The amendments to the Bill are compatible with human rights.
NOTES ON AMENDMENTS

In these notes on amendments, the following abbreviations are used:

<table>
<thead>
<tr>
<th>Act</th>
<th>Fair Work (Registered Organisations) Act 2009</th>
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<tbody>
<tr>
<td>Bill</td>
<td>Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019</td>
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<tr>
<td>Corporations Act</td>
<td>Corporations Act 2001</td>
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<tr>
<td>Crimes Act</td>
<td>Crimes Act 1914</td>
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<tr>
<td>Court</td>
<td>Federal Court</td>
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<tr>
<td>FW Act</td>
<td>Fair Work Act 2009</td>
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<tr>
<td>FWC</td>
<td>Fair Work Commission</td>
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<tr>
<td>Commissioner</td>
<td>Registered Organisations Commissioner</td>
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Prescribed offences

Amendment 1 – Schedule 1, item 8, page 5 (line 23)

1. This amendment removes from new subsection 212(aa) an offence under a law of another country punishable on conviction by imprisonment for life or a period of 5 years or more. This means that only offences against a law of the Commonwealth, a State or Territory with the appropriate term of imprisonment will amount to a prescribed offence for the purposes of the existing automatic disqualification regime in the Act.

Standing

Amendment 2 – Schedule 1, item 11, page 6 (lines 10 and 11)

2. This amendment removes references to the Minister, or a person with a sufficient interest in the Simplified outline of the Division. This is a consequential amendment to Amendment 3.

Amendment 3 – Schedule 1, item 11, page 6 (lines 15 to 20)

3. This amendment amends the discretionary disqualification regime inserted by the Bill to provide that only the Commissioner has standing to apply to the Court for an order disqualifying a person from holding office in an organisation or a branch of an organisation if the Commissioner considers one or more of the grounds set out in section 223 applies.

4. The note directs the reader to new section 223A which provides that a person who reasonably believes that a ground set out in section 223 applies, may refer the matter to the Commissioner. The note also makes it clear that the Commissioner does not need a referral to make an application for a disqualification order under section 222.
**Amendment 8 – Schedule 1, item 11, page 7 (line 4)**

5. This amendment is consequential to the Commissioner now being the only person who can make an application for a disqualification order under section 222. It removes the requirement for the Court to provide the Commissioner with a copy of the disqualification order as the Commissioner will now always be the applicant in the proceedings.

**Amendment 14 – Schedule 1, item 11, page 9 (after line 5), at the end of Division 3**

6. This amendment inserts new section 223A into the Bill, providing for a person (the referrer) who reasonably believes that a ground for disqualification set out in section 223 exists in relation to another person, to refer the matter to the Commissioner.

7. The referral must be in writing, identify and provide contact details for the referrer, and set out the basis for the reasonable belief that a ground exists.

8. The amendment provides that the Commissioner may, but is not required to, take action in relation to the referral.

9. The note highlights that the Commissioner may apply for a disqualification order under section 222 in relation to referrals made under section 223A if he or she considers a ground set out in section 223 applies in relation to a person.

10. The referral mechanism provided for in this amendment does not limit the ability of a person to raise with the Commissioner any matter of concern for the Commissioner’s consideration.

**Amendment 15 – Schedule 1, item 14, page 11 (lines 11 and 12)**

11. This amendment removes references to the Minister, or a person with a sufficient interest from the note under subsection 308(1) of the Act. In the context of the existing disqualification power in section 307A of the Act, section 308 provides that the Court may make such orders as the Court considers appropriate in all the circumstances of the case where a person has contravened a civil penalty provision of the Act.

12. The note to subsection 308(1) draws the reader’s attention to the fact that the Commissioner may also apply under new section 222 for an order disqualifying a person from holding office in an organisation. This is a consequential amendment to Amendment 3.

**Amendment 19 – Schedule 2, item 4, page 15 (line 7)**

**Amendment 20 – Schedule 2, item 4, page 15 (line 8)**

13. These amendments remove references to the Minister, or a person with a sufficient interest in the Simplified outline of the Division. They are consequential amendments to the simplified outline of the part as a result of Amendment 22.

**Amendment 22 – Schedule 2, item 4, page 15 (line 23) to page 16 (line 14)**

14. This amendment omits sections 28, 28A and 28B of the Bill and inserts new sections 28, 28A and 28B to provide that it is now only the Commissioner who has standing to apply to the Court for a cancellation or alternative order (or both).
15. Legislative notes to new sections 28 and 28A direct the reader to new section 28HA which provides that a person who reasonably believes that a ground for cancellation of registration or an alternative order exists, may refer the matter to the Commissioner. However, the note also makes it clear that the Commissioner does not need a referral to make an application for a cancellation or alternative order (or both).

Amendment 25 – Schedule 2, item 4, page 19 (after line 28), at the end of Division 3

16. This amendment inserts new section 28HA into the Bill, providing for a person (the referrer) who reasonably believes that a ground for cancellation of registration set out in Division 3 exists in relation to an organisation, to refer the matter to the Commissioner.

17. The referral must be in writing, identify and provide contact details for the referrer, and set out the basis for the reasonable belief that a ground exists.

18. The amendment provides that the Commissioner may, but is not required to, take action in relation to the referral.

19. The note highlights that the Commissioner may apply for cancellation of registration or alternative orders in relation to referrals made under section 28HA if he or she considers a ground applies in relation to an organisation.

20. The referral mechanism provided for in this amendment does not limit the ability of a person to contact or otherwise raise with the Commissioner any matter of concern for the Commissioner’s consideration.

Amendment 32 – Schedule 2, item 4, page 22 (line 9)

21. This amendment is consequential to the Commissioner now being the only person who can make an application for a cancellation or alternative order. It removes the requirement for the Court to provide the Commissioner with a copy of the cancellation or alternative order as the Commissioner will now always be the applicant in the proceedings.

Amendment 33 – Schedule 2, item 9, page 24 (lines 24 to 26)

22. This is a consequential amendment that removes the delegation provisions contained in existing section 343 of the RO Act to reflect that the Minister will no longer have standing to apply to the Court for disqualification, cancellation or alternative orders.

Disqualification

Amendment 4 – Schedule 1, item 11, page 6 (line 23)

Amendment 5 – Schedule 1, item 11, page 6 (line 24)

23. These are consequential amendments to Amendments 6 and 7.
Amendment 6 – Schedule 1, item 11, page 6 (line 26)

Amendment 7 – Schedule 1, item 11, page 6 (after line 31), after subsection 222(2)

24. Amendment 6 clarifies and confirms that it is the Commissioner who has the legal burden of satisfying the Court that it would not be unjust to disqualify the person having regard to the matters set out in paragraph 222(2)(b) of the Bill.

25. Amendment 7 explicitly provides that the Court must not make a disqualification order unless it is satisfied, having regard to the gravity of the matters constituting the ground, that disqualification would not be unjust – subsection 222(2A).

Amendment 9 – Schedule 1, item 11, page 7 (lines 6 to 10)

26. This amendment amends the ground for disqualification in subsection 223(1) to provide that a ground for disqualification exists if:

- a criminal designated finding is made against the person within the meaning of new section 9C(1)(a) (criminal), (other than offence covered by subsection 223(4) which relates to breaches of officers’ and directors’ duties) – paragraph 223(1)(a); or

- one or more designated findings are made against the person under new section 9C(1)(b) (civil) within the last 10 years (other than a contravention covered by subsection 223(4) which relates to breaches of officers’ and directors’ duties) and the maximum penalty or the combined total of the maximum penalties for the contravention or contraventions amount to at least 180 penalty units, or the equivalent of 180 penalty units (see section 4AA of the Crimes Act for the value of a penalty unit) – paragraph 223(1)(b); or

- the person is found to be in contempt of court in relation to an order or injunction made under a designated law – paragraph 223(1)(c).

27. This amendment makes substantive changes to the ground now contained in paragraph 223(1)(b) related to civil contravention. For the ground to apply, the person must have, in the past 10 years, been ordered to pay a pecuniary penalty for the relevant contraventions of civil penalty provisions that amount to at least 180 penalty units for individuals. This can include one contravention of a civil penalty provision that has a maximum penalty set at 180 penalty units or more, or a number of civil penalty provision contraventions where the maximum penalties attached to those contraventions add up to 180 penalty units (for example, three contraventions where each of the maximum penalty amounts is 60 penalty units). Consistent with the existing Bill, only conduct that occurs after commencement can give rise to this ground. The timeframe and penalty unit threshold included in the amendment is intended to ensure that only those officers with an ongoing pattern of serious non-compliance can establish this ground for disqualification. The Court must also be satisfied that making the order would not be unjust, including having regard to the gravity of the matters constituting the ground.

Amendment 10 – Schedule 1, item 11, page 7 (lines 20 to 30)

28. This amendment amends subsection 223(3) of the Bill in relation to the ground of multiple failures to prevent contraventions etc. by an organisation. The amendment
substantively replicates the effect of that ground as introduced where there is more than one of a criminal designated finding within the meaning of paragraph 9C(1)(a) or a contempt of court in relation to an order or injunction made under a designated law against an organisation. The amendment modifies the ground as introduced to provide that where one of the above two exist and is coupled with a designated finding within the meaning of paragraph 9C(1)(b) (civil), then a ground for disqualification applies in relation to conduct that occurs after commencement, whilst the person was an officer of the relevant organisation, and the officer was in a position to take reasonable steps to prevent that conduct and the officer failed to take such steps.

29. The ground will not apply if there are only two (civil) designated findings as defined by subsection 9C(1)(b). This circumstance is covered by Amendment 11.

Amendment 11 – Schedule 1, item 11, page 7 (after line 30), after subsection 223(3)

30. This amendment includes a new ground for disqualification that applies if:

- two or more (civil) designated findings within the meaning of paragraph 9C(1)(b) have been made against any organisation within the past 10 years in relation to conduct engaged in while the person is an officer of the organisation; and

- the combined total of the maximum penalties for contraventions to which the designated findings relate is at least 900 penalty units; and

- the person failed to take reasonable steps to prevent the conduct.

31. This amendment provides that where designated findings solely relate to civil contraventions against the organisation, there must be a contravention of two or more civil penalty provisions and the maximum collective penalties must amount to at least 900 penalty units (see section 4AA of the Crimes Act for the value of a penalty unit) for the ground to exist. This can include two contraventions of civil penalty provisions where maximum penalties add up to at least 900 penalty units (for example, one contravention where the maximum penalty is 1,000 penalty units and a second contravention where the maximum penalty is 300 penalty units), or a greater number of civil penalty provision contraventions where the maximum penalties of those provisions add up to at least 900 penalty units (for example, three contraventions where each of the maximum penalties is 300 penalty units).

32. This ground for disqualification can only apply to findings made in relation to conduct that occurs after commencement, whilst the person was an officer of the relevant organisation, and the officer was in a position to take reasonable steps to prevent that conduct and the officer failed to take such steps.

33. The higher penalty unit value as compared to that provided for by Amendment 9 reflects that the civil penalties that can be imposed upon a body corporate are five times those that can be imposed upon an individual (see section 306 of the Act).

Amendment 12 – Schedule 1, item 11, page 8 (line 1)

34. This is an amendment to the heading of the ground under new subsection 223(4) ‘Breach of directors’ and officers’ duties’ that is consequential to Amendment 13.
Amendment 13 – Schedule 1, item 11, page 8 (before line 3), before paragraph 223(4)(a)

35. This amendment is consequential to the changes made to the designated finding ground in new paragraph 223(1)(a) (see Amendment 9). This amendment amends the existing ground for disqualification based on corporate impropriety in subsection 223(4) to include where a designated finding is made against a person and it relates to an offence against, or a contravention of, a provision of Division 2 of Part 2 of Chapter 9 (general duties in relation to the financial management of organisations). Such contraventions were previously captured by paragraph 223(1)(a) but now are situated in this ground with the comparable directors’ duties that apply under the Corporations Act. Co-locating contraventions of officer and director duties together reflects the fundamental importance of the respective duties in protecting the interests of organisations (and their members) and corporations (and their shareholders).

Amendment 16 – Schedule 1, item 17, page 12 (line 8)
Amendment 17 – Schedule 1, item 17, page 12 (line 14)
Amendment 18 – Schedule 1, item 17, page 12 (after line 17), after paragraph 17(2)(b)

36. These are consequential amendments to the changes made to the disqualification grounds and provide that a ground can only be established by conduct and events that occur after commencement.

Cancellation and alternative orders

Amendment 21 – Schedule 2, item 4, page 15 (lines 11 to 13)

37. This amendment to the simplified outline confirms and clarifies that the Commissioner bears the legal burden of satisfying the Court that cancellation of the registration of an organisation would not be unjust and is consequential to Amendments 26, 27 and 29.

Amendment 26 – Schedule 2, item 4, page 20 (line 5)
Amendment 27 – Schedule 2, item 4, page 20 (lines 9 and 10)
Amendment 29 – Schedule 2, item 4, page 20 (after line 22), after subsection 28J(1)

38. These amendments amend new section 28J of the Bill in relation to when the Court may make an order cancelling the registration of an organisation.

39. The amendments provide that the Court may cancel the registration of an organisation if:

- the Court is satisfied that a ground for cancellation of registration is established; and
- the Commissioner satisfies the Court that it would not be unjust to cancel the organisation’s registration (Amendments 26 and 27).

40. The existing matters in new paragraph 28J(1)(b) that the Court must have regard to in determining whether it would be unjust to cancel the organisation’s registration are unchanged, being:
• the nature of the matters constituting the 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.

41. Amendment 29 explicitly provides that the Court must not cancel an organisation’s registration unless it is satisfied, having regard to the gravity of the matters constituting the ground, that cancellation would not be unjust – new subsection 28J(1A).

42. The matters in paragraph 28J(1)(b) and new subsection 28J(1A) mean that for example, if the Court considered that the conduct giving rise to the ground related (wholly or partly) to pursuing a public health issue such as safety concerns in relation to asbestos exposure or patient care, the Court could decide not to cancel the organisation’s registration if it determined it would be unjust to do so.

Amendment 28 – Schedule 2, item 4, page 20 (lines 18 and 19)

43. This amendment amends Note 1 to new subsection 28J(1) and is consequential to Amendment 27 and makes clear that if the Commissioner fails to satisfy the Court that it would not be unjust to cancel the organisation’s registration, the Court may decide to make an alternative order.

Amendment 30 – Schedule 2, item 4, page 21 (lines 11 and 12)

Amendment 31 – Schedule 2, item 4, page 21 (after line 12)

44. Amendment 30 amends new paragraph 28L(1)(b) to provide that the Court may make an alternative order if the Commissioner fails to satisfy the Court that it would not be unjust to cancel the organisation’s registration.

45. Amendment 31 explicitly provides that the Court must not make an alternative order unless it is satisfied that, having regard to the gravity of the matters constituting the ground, the order would not be unjust – new subsection 28L(1A).

Amendment 23 – Schedule 2, item 4, page 16 (lines 24 to 28)

46. This amendment removes the current ground for cancellation of registration or alternative orders in new subparagraph 28C(1)(b)(i) where the affairs of the organisation of part of the organisation have been or are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or a class of members.

47. The amendment means that a ground under paragraph 28C(1)(b) will now only exist where the affairs of the organisation or part of the organisation have been or are being conducted in a manner that is contrary to the interests of the members of the organisation or part as a whole. This amendment recognises that in registered organisations, particularly in the context of collective bargaining, groups of members can have competing interests and there can be a perception that one group of members has been treated less favourably than
another group. The amendment is intended to ensure that the ground is not enlivened upon such issues arising within organisations.

**Grounds for cancellation**

**Amendment 24 – Schedule 2, item 4, page 17 (line 30)**

48. This amendment ensures that the penalty unit value ascribed to the ground of serious offence committed by an organisation in new section 28D is that set out in section 4AA of the Crimes Act.

**Public interest test for amalgamations**

**Amendment 34 – Schedule 4, item 2, page 34 (lines 19 to 22)**

**Amendment 35 – Schedule 4, item 6, page 35 (lines 13 to 15)**

49. Amendment 34 makes a consequential amendment to the Simplified outline of the Division to reflect the fact that before an amalgamation can take effect, the FWC must decide whether the amalgamation should be subject to a public interest test. The amalgamation does not take effect if the FWC decides that the public interest is to apply to the amalgamation and that the amalgamation fails that test.

50. Amendment 35 is also a consequential amendment that replaces new subsection 67(4) to provide that subsection 67(2) does not authorise the FWC to dispense with deciding whether the public test applies or, if it does apply, whether the amalgamation is in the public interest, when making orders in relation to a further ballot if an amalgamation is not approved in a ballot.

**Amendment 36 – Schedule 4, item 7, page 35 (lines 19 to 27)**

51. This amendment removes new section 72A from the Bill and includes new sections 72A and 72AA.

52. The amendment provides that before fixing an amalgamation day under section 73 of the Act for a proposed amalgamation, the FWC must:

- decide whether the public interest test in paragraph 72A(1)(b) is to apply to the amalgamation; and
- if the public interest test is to apply to the amalgamation – decide whether the amalgamation is in the public interest.

53. Note 1 to new subsection 72A(1) alerts the reader to the fact that in deciding whether the amalgamation passes the public interest test, the FWC must have regard to the matters in section 72D.

54. Note 2 to new subsection 72A(1) further alerts the reader to the fact that an amalgamation does not take effect if the FWC decides that the public interest test is to apply to the amalgamation and the amalgamation fails that test.
55. New subsection 72A(2) provides that the FWC must, and may only, decide under paragraph (1)(a) that the public interest test is to apply to the amalgamation if there is information before the FWC that at least 20 compliance record events have occurred for one or more of the existing organisations seeking to amalgamate within the 10 year period prior to the most recent application relating to the amalgamation under section 44 of the Act.

56. The note to new subsection 72A(2) alerts the reader to the fact that the FWC has ways of informing itself about whether compliance record events have occurred as outlined in section 590 of the FW Act. These include: conducting inquiries and requiring a person to provide copies of documents or records, or to provide any other information to the FWC. It will be a matter for the FWC to determine how to inform itself in each particular case.

57. The effect of these amendments will therefore be to require a Full Bench of the FWC to consider as a preliminary matter, whether a proposed amalgamation should be subject to the public interest test in the Bill. The amendments are intended to ensure that organisations that abide by workplace laws and therefore do not have a history of non-compliance with the law, will not be subject to a public interest test should they wish to amalgamate.

58. New section 72AA requires the FWC to publish written reasons for decisions made under new subsection 72A(1) as soon as practicable after making the decision. Any decision and reasoning must be expressed in plain English and be easy to understand in structure and content. This new provision does not limit the FWC’s power to put decisions in writing or publish decisions.

Amendment 37 – Schedule 4, item 7, page 35 (line 29)

Amendment 38 – Schedule 4, item 7, page 36 (lines 1 to 3)

59. These are consequential amendments to provide that if the FWC decides that the public interest test in new paragraph 72A(1)(b) is to apply to a proposed amalgamation, the FWC must fix a time and place for hearing submissions in relation to:

- the matters mentioned in subsection 72D(1) (record of compliance with law), and
- whether the amalgamation is otherwise in the public interest.

60. The effect of these amendments is that were the FWC to determine to apply the public interest to a proposed amalgamation, the hearing can deal with all of the matters in new subsection 72B(a).

Amendment 39 – Schedule 4, item 7, page 36 (lines 9 to 18)

Amendment 40 – Schedule 4, item 7, page 37 (lines 3 to 10)

61. These are amendments consequential to amendments 37 and 38.

Amendment 41 – Schedule 4, item 7, page 37 (line 13)

Amendment 43 – Schedule 4, item 7, page 37 (line 19)

Amendment 44 – Schedule 4, item 7, page 37 (line 23)
Amendment 45 – Schedule 4, item 7, page 38 (line 30)

Amendment 46 – Schedule 4, item 7, page 39 (line 2)

62. These are consequential technical amendments to reflect the fact that the public interest test is now contained in paragraph 72A(1)(b).

Amendment 42 – Schedule 4, item 7, page 37 (line 16)

63. This amendment amends the matters that the FWC must have regard to in determining whether an organisation has a record of not complying with the law, for the purpose of determining whether the proposed amalgamation is in the public interest.

64. In deciding whether the amalgamation is in the public interest, the FWC must have regard to any compliance record events within the meaning of new section 72E that have occurred for each of the existing organisations (subsection 72D(1)).

65. This amendment includes ‘gravity’ of compliance record events in new subsection 72D(2) so that the FWC must have regard to the incidence, age and gravity of compliance record events for each existing organisation, to determine whether the organisation has a record of not complying with the law.

Amendment 47 – Schedule 4, item 9, page 39 (lines 11 and 12)

66. This is a consequential amendment to subsection 73(2) to reflect the fact the two kinds of decisions can be made by the FWC under new section 72A.

Amendment 48 – Page 42 (after line 22) at the end of the Bill, add:

67. This amendment amends existing section 329AB of the RO Act (Functions of the Commissioner) to insert a new subsection 329AB(2). The amendment provides that in carrying out the function of promoting the efficient management of registered organisations and high standards of accountability of registered organisations and their office holders to their members, the Commissioner must give priority to matters that raise serious or systemic concerns. This will mean that in the exercise of this function, the Commissioner will have a comparatively lesser focus on trivial or otherwise minor matters.