THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney General and Minister for Industrial Relations, the Hon Christian Porter MP)
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.

Registered employee and employer organisations have a privileged position in Australia’s workplace relations system and their members place a great deal of trust in them.

The Royal Commission, however, uncovered numerous examples of some organisations and officials repeatedly flouting the law, misappropriating union funds, putting their own interests before members, and generally failing to meet the basic standards of accountability and governance that members and the community more broadly, should be able to expect from them.

In response, the Royal Commission made a number of observations and recommendations. These included highlighting the insufficiency of the current regulatory framework in relation to the disqualification of registered organisations’ officers from office, the regime for cancellation of registration of registered organisations, and the potential to use the amalgamation procedure to avoid cancellation of registration.

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 by amending the 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;

- include a discretionary regime that allows the Federal Court to disqualify officials from holding office in certain circumstances, including for contraventions of a range of industrial laws, repeatedly failing to take reasonable steps to stop their organisation from breaking the law, or where they 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 they have been disqualified;

- allow the Federal Court to cancel the registration of an organisation and/or make alternative orders on a range of grounds including in relation to 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, and the taking of obstructive unprotected industrial action by a substantial number of members;
• 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;

• 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.

The discretionary disqualification regime for officers of registered organisations in the Bill will ensure more acceptable minimum standards of behaviour and accountability for officers and promote democratic governance in the interests of members of registered organisations.

The measures in the Bill also implement 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.

In addressing these issues, the amendments will combat the culture of lawlessness of some organisations and officials identified by the Royal Commission and therefore improve the governance of registered organisations.

The Bill also makes a number of minor and technical amendments to the Act subsequent to the passage of the *Fair Work (Registered Organisations) Amendment Act 2016*. 

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*House of Representatives*
FINANCIAL IMPACT STATEMENT

Nil
REGULATION IMPACT STATEMENT

The Interim and Final reports of the Royal Commission into Trade Union Governance and Corruption have been certified by the then Department of Employment as being informed by a process and analysis equivalent to a Regulation Impact Statement as set out in the Australian Government Guide to Regulation. The Office of Best Practice Regulation ID for this proposal is 19873. The Office of Best Practice Regulation does not assess independent reviews.

These Royal Commission reports can be accessed at:

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

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

The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (the Bill) is 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 the Bill

The object of the Fair Work (Registered Organisations) Act 2009 (the Act) is to enhance relations within workplaces and to reduce the adverse effects of industrial disputation. By requiring registered organisations to meet the standards set out in the Act in order to obtain a range of rights and privileges, those relations will be enhanced and the adverse effects will be reduced.

The Bill amends 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 members. The Royal Commission uncovered numerous examples of some organisations and officials repeatedly flouting industrial and other laws, putting their own interests before members, and generally failing to meet the basic standards of accountability and governance that members, and the community more broadly, should be able to expect from them.

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 by amending the 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;

- include a discretionary regime that allows the Federal Court to disqualify officials from holding office in certain circumstances, including for contraventions of a range of industrial laws, repeatedly failing to take reasonable steps to stop their organisation from breaking the law, or where they 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 they have been disqualified;

- allow the Federal Court to cancel the registration of an organisation and/or make alternative orders on a range of grounds including in relation to 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, and the taking of obstructive unprotected industrial action by a substantial number of members;
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;

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.

The new discretionary disqualification regime for officers of registered organisations will ensure appropriate minimum standards of behaviour and accountability for officers and promote democratic governance in the interests of members of registered organisations.

The measures in the Bill also implement 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 amalgamations of registered organisations are subject to a public interest test.

In addressing these issues, the amendments will address the culture of lawlessness of some organisations and their officials identified by the Royal Commission and improve the governance of registered organisations.

**Human rights implications**

The definition of ‘human rights’ in the *Human Rights (Parliamentary Scrutiny) Act 2011* relates to the seven core United Nations human rights treaties. The Bill engages with the following rights:

- rights in work in 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), such as 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 take part in public affairs and elections in Article 25 of the ICCPR;

- the right to the presumption of innocence and the minimum guarantees in Article 14 of the ICCPR; and

- the right to privacy and not to be subject to unlawful attacks on a person’s reputation in Article 17 of the ICCPR.
The Right to Freedom of Association and the Right to take part in Public Affairs and Elections

Article 6(1) of the ICESCR provides for the right to work. The exercise of work requires the existence of just and favourable conditions of work, including the right to form trade unions.¹

Article 22(1) of the ICCPR protects the right to freedom of association, including the right to form and join trade unions. Article 8(1)(a) of the ICESCR also provides for:

> The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of these rights other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.

Article 8(1) of ILO Convention 87 provides that:

> 1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectives, shall respect the law of the land.

The following amendments in the Bill engage the right to freedom of association and, insofar as they engage that right, also engage the right to take part in public affairs and elections:

- amending the regime for disqualification of officers (recommendations 36–38 of the Royal Commission);
- amending the regime for cancellation of registration of organisations;
- broadening the grounds for a remedial scheme to be approved by the Federal Court, including the appointment of an administrator, when officers of an organisation or branch are no longer serving member’s interests; and
- introducing a public interest test for amalgamations of registered organisations.

The right appropriately recognises that organisations and officials, like other persons or organised collectives, shall respect the law of the land. Where the provisions of the Bill engage the right to freedom of association, any limitations on the right are permissible as they pursue a legitimate objective, are prescribed by law, and are reasonable, necessary and proportionate. They have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations.

¹ Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work (E/C.12/GC/18), p 5.
1. Amendments to the regime for the disqualification of officers (recommendations 36–38 of the Royal Commission)

The Bill will:

- expand the categories of offences for which a person can be automatically disqualified from holding office to include conviction of a serious offence, being an offence against any law in Australia or another country carrying a penalty of five years’ imprisonment or more (recommendation 36);

- provide a criminal offence of running for, holding or continuing to hold office, or acting as a ‘shadow officer’ whilst disqualified from holding office in a registered organisation (recommendation 37); and

- on application, give the Federal Court a discretionary power to disqualify a person from holding office in a registered organisation for the period of time the Court considers appropriate, in circumstances where a ground for disqualification exists and the Court does not consider it would be unjust to disqualify the person (recommendation 38).

These new provisions are made in response to the recommendations of the Royal Commission and pursue the legitimate objectives of improving the governance of registered organisations and protecting the interests of members. The Royal Commission identified that the current disqualification scheme provides no consequence for acting while disqualified or for committing serious criminal offences.

For example, the Royal Commission noted that a person against whom a civil penalty has been imposed for a contravention of the statutory officers’ duties cannot be disqualified from holding office under the current disqualification provisions. This is the case even if the conduct that led to the imposition of a civil penalty clearly demonstrated the person was unable or unwilling to uphold the standards reasonably expected of a person holding office in an organisation.

Providing for the possibility of disqualification from office and restricting who can be elected to office, in circumstances where a ground for disqualification has been made out and the Federal Court considers disqualification just, is a rational means of ensuring greater compliance with the standards of conduct reasonably expected of officers, and a rational method for improving governance of organisations more generally.

Any limitations on the capacity of registered organisations to regulate their affairs as they see fit are a necessary and proportionate means of ensuring greater compliance with the standards of conduct reasonably expected of officers and improving the governance of registered organisations.

The procedure for disqualification from office will continue to be administered and supervised by the Federal Court, an impartial and independent judicial body from which appeals to a Full Federal Court and to the High Court are available.

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2 Set out in Division 2 of Part 2 of Chapter 9 of the Act.
3 Final Report of the Royal Commission into Trade Union Governance and Corruption, Volume 5, Chapter 3, para 188.
These are reasonable and proportionate methods of ensuring that officials who deliberately disobey the law are restricted in their ability to be in charge of registered organisations.\(^4\) It is also necessary and proportionate that the sanction of disqualification for a substantial number of members’ failure to comply with core industrial laws is placed on officials as it is incumbent on those in leadership positions to promote a culture of compliance. This will serve to protect the interests of members and support public order by ensuring the leadership of registered organisations act lawfully.

2. Amendments to the regime for cancellation of registration of organisations

The Bill expands the grounds for the cancellation of a registered organisation’s registration by the Federal Court. The new grounds include:

- certain conduct of the affairs of the organisation, or a part of the organisation;
- serious breaches of criminal laws by the organisation; and
- multiple findings against a substantial number of members.

The Bill also streamlines and simplifies some of the existing grounds for cancellation, including:

- failure to comply with a court order or injunction by the organisation or a substantial number of its members; and
- the organisation or a substantial number of members taking or organising obstructive, unprotected industrial action.

Broadly, the new grounds for cancellation are enlivened where an organisation or its officials or members have a record of not complying with the law. The amendments do not limit the ability of members to form and join trade unions.

The Bill provides that the Court must cancel an organisation’s registration where a ground for cancellation exists and the Court considers that it would not be unjust to do so. In deciding whether it would be unjust to cancel an organisation’s registration, the Court must consider the best interests of the organisation’s members, the nature of the conduct that constitutes a cancellation ground, if other action has been taken to address the conduct, and any other relevant matters.

The Court may also make alternative orders that target a particular part of an organisation, where a ground for cancellation is established because of the behaviour of officers or members in a particular part of an organisation, for example, a branch or division. Applications for alternative orders may be made to the Court directly without the need for there to be a concurrent application for the cancellation of an organisation’s registration.

The alternative orders the Federal Court can make include:

- the disqualification of certain officers from holding office for a period of time;

\(^4\) *Final Report of the Royal Commission into Trade Union Governance and Corruption, Volume 5, Chapter 3, para 188.*


- changes to an organisation’s eligibility rules to exclude certain members from the organisation; and

- the suspension of rights, privileges or capacities of a part of the organisation, such as rights to apply for entry permits under the FW Act or restriction on the use of funds or property by a part of the organisation.\(^5\)

The provisions of the Bill allowing for an application for cancellation of registration to be made on the basis that an organisation, part of the organisation, or a class of members, have engaged in obstructive industrial action effectively replicate the existing provisions of the Act.\(^6\)

Extensive evidence was presented to the Royal Commission of some organisations, branches, or parts of organisations where a culture of little or no regard for the law regulating registered organisations, and even criminal law, persists. The existence of such a culture demonstrates the need for new mechanisms intended to ensure compliance with the standards reasonably expected of organisations and their officers. It has become clear that, in addition to the changes to industrial relations legislation recommended by the Royal Commission, there is a pressing need to ensure greater compliance with the existing legislative regimes and relevant criminal laws.

These measures will improve the effectiveness of the provisions in the Act concerning cancellation of registration as they:

- address the costly and lengthy process under the Act that the Royal Commission found to be one of the impediments to deregistration;\(^7\) and

- facilitate the continued existence and functioning of an organisation or some of its component parts in circumstances in which one part of the organisation is affected by maladministration or dysfunction associated with a culture of lawlessness.

These amendments address the legitimate objective by providing a clearer and more streamlined scheme for the cancellation of registration of an organisation and expanding the grounds on which an application for cancellation can be made. The new cancellation provisions make it obvious to organisations, their officers, and their membership that the types of conduct forming grounds for an application may result in the cancellation of registration, and that misconduct and unlawful behaviour cannot ever be considered an ‘acceptable’ method of achieving a desired outcome.

Article 8(1) of ILO Convention 87 specifically provides that, in exercising the rights provided for in the Convention, workers, employers and their respective organisations shall respect the law of the land. Choosing to register under the Act is a privilege governed by the existing Act. Organisations registered under the Act do not currently have freedom to conduct their affairs in any way they see fit, but are bound by the Act. For example, the rules of every organisation must be approved by the FWC and cannot be set by the organisation without limit.

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\(^5\) Item 4, Schedule 2, new Division 5.

\(^6\) Paragraphs 28(1)(b) and (c) of the Act.

\(^7\) Final Report of the Royal Commission into Trade Union Governance and Corruption, Volume 5, Chapter 8, para 35.
When organisations or their officers deliberately breach the Act then there must be an effective sanction if the system of registration is to remain meaningful. In the case of a registered organisation, the sanction could include losing the right to expand through amalgamation, being placed into administration, or losing registration.

Consistent with the existing structure for the registration of industrial associations, the Bill makes clear that there is a framework within which registered organisations must operate. The Bill makes clear that failing to comply with the Act has consequences consistent with the purpose of that Act.

The measures maintain a meaningful system of registration and protect the rights of members in that the amendments have the sole objective of protecting the interests of members and promoting public order by ensuring an organisation is administered lawfully. The sanction of cancelling registration is reasonable and proportionate when an organisation or a part thereof operates without regard to the law, officers do not act in their members’ interests, or a substantial number of members fail to comply with core industrial laws.

The measures do not impact on the rights of workers to continue to be represented by a registered organisation. An organisation that obeys the law and complies with its rules is not at risk of having its registration cancelled.

Where a ground for cancellation exists, the Federal Court still has a discretion not to cancel the registration of an organisation in circumstances where that cancellation would be unjust. This ensures that cancellation remains a measure of last resort. The Court is required to take into account the best interests of the members of the organisation as a whole in determining whether the cancellation of registration would be unjust.

In addition, the availability of alternative orders provides the Federal Court with appropriate means of limiting the effect on members who have not been involved in activity that would otherwise be grounds for an order for cancellation.

3. Amendments to the regime for the remediation of dysfunction and lawlessness

The Bill expands the categories of declaration for a remedial scheme in relation to an organisation to be approved by the Federal Court to include:

- that one or more officers of an organisation or part of an organisation have engaged in financial misconduct in relation to the carrying out of their functions or in relation to the organisation or part. An inclusive definition of financial misconduct is included in the Bill;

- that a substantial number of the officers of the organisation or part of an organisation have, in the 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; and

- that affairs of an organisation or part of an organisation are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfair discriminatory against, a member or members in a manner that is contrary to the interests of the members of the organisation or part as a whole.
The Bill also amends the Federal Court’s power to approve a scheme consequent to the making of a declaration to expressly permit the appointment of an administrator, and clearly sets out the functions of the administrator. The administrator will control, and may manage, the property and affairs of the organisation, and may perform any functions or powers that the organisation or its officers would typically perform. Officers and employees must assist administrators and there are criminal penalties for failing to do so.

These measures have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials who respect the law and thus maintain public order.

The Royal Commission identified numerous examples of organisations no longer serving the interests of their members because of the pervasive breaches of duties by officers and widespread and repeated law-breaking by union officials. The measures will improve the effectiveness of the administration provisions by allowing the Federal Court to take appropriate remedial and facilitative action to secure the future effective functioning of an organisation or its component parts.

The proposed changes pursue the legitimate objective of ensuring that organisations are functioning effectively to be able to serve the interests of their members. Consistent with current administration provisions, the Court must be satisfied that an order would not do substantial injustice to the organisation or any member of the organisation. The amendments are rationally connected to this objective because the new grounds for a declaration are all instances of an organisation not acting in the interests of their members and therefore not functioning effectively.

These measures are proportionate as they are made with the sole objective of benefiting members. The measures are reasonable and proportionate for the following reasons:

- the measures protect the interests of members and promote public order by ensuring an organisation is administered lawfully;
- the new grounds under which the Federal Court may make a declaration are clearly set out and, if present, indicate that an organisation is not serving the interests of its members and is not functioning effectively;
- the measures protect union members who have not been involved in maladministration or unlawful activity by providing for orders to be limited to the part of the organisation that has conducted these activities;
- the measures provide only for the appointment of an administrator or interim administrator under a scheme in new Part 2A of Chapter 11 if the Court is satisfied that it is in the best interests of members of the organisation;
- relief is discretionary and the Federal Court may find that no action is necessary or justified;

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8 Proposed subsection 323A(1) in the Bill.
• consistent with the current administration provisions in the Act, the Court must be satisfied that an order (should it choose to make one) would not do substantial injustice to the organisation or any member of the organisation; and

• the measures do not impact on the rights of workers to continue to be represented by a registered organisation.

4. Introduction of a public interest test for amalgamations of registered organisations

The Bill introduces a public interest test to be applied by the Full Bench of the FWC when registered organisations seek to merge.

In determining the public interest, the FWC will take into account:

• the impact on employees and employers in the industries concerned;

• any history the organisations may have in breaking the law, taking into account the age and incidence of such contraventions; and

• other relevant matters.

The existing organisations concerned will be able to make submissions about the public interest, as will organisations and bodies that represent industries potentially affected by the merger, and those who represent employees and employers in those industries.

The Registered Organisations Commissioner, the Minister, and a Minister who has responsibility for workplace relations in a referring state will also be able to make submissions. Submissions can also be made by any person with sufficient interest in the proposed amalgamation, that is, those whose rights, interests, or legitimate expectations would be affected.

An object of the Act is to enhance relations within workplaces and to reduce the adverse effects of industrial disputation. By requiring registered organisations to meet the standards set out in the Act in order to gain a range of rights and privileges, it is considered that those relations will be enhanced and the adverse effects will be reduced.

The public interest test for amalgamations will improve organisational governance, protect the interests of members, ensure that organisations meet the minimum standards set out in the Act, and address community concerns by creating a disincentive for a culture of ‘contempt for the rule of law’ that has been identified in some registered organisations. It is a pressing and substantial concern, such as is required to constitute a legitimate objective for the purposes of international human rights law, that this culture may present in some registered organisations seeking to amalgamate.

The introduction of a public interest test will be effective in meeting this objective as it will reduce the risk of an adverse effect of an amalgamation of existing organisations. This is

\[9\] Proposed subsection 323A(3) in the Bill.

because a culture of lawlessness in one or more amalgamating organisations will be prevented from pervading into other organisations involved in an amalgamation.

When organisations or their officers deliberately breach relevant laws then there must be an effective sanction if the system of registration is to remain meaningful. In the case of a registered organisation, the sanction could include losing the right to act as an officer, losing the right to expand through amalgamation, being placed into administration, or losing registration.

If an organisation obeys the law and complies with its rules then its activities will not be limited by the provisions in the Bill. For example, two organisations that comply with the law would be highly likely to satisfy the public interest test for amalgamations.

The amendments are necessary in a democratic society as they will empower the FWC to make a more effective assessment and oversight of applications for amalgamation under the Act. The measures will reduce the risk of an adverse effect of an amalgamation on existing organisations on the Australian economy.

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.11 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.

This measure is reasonable and proportionate. It is sufficiently circumscribed in that it does not impact on the rights of workers to continue to be represented by a registered organisation and takes the likely benefit to members of the existing organisations proposing to enter into an amalgamation into account. In addition, the measure does not limit the right to take protected industrial action.

These amendments further protect the interests of members by helping to ensure the democratic functioning of organisations under the stewardship of officials who respect the law and thus maintain public order.

The measures in the Bill are also a reasonable and proportionate means to limit the spread of a culture of lawlessness in some organisations. The measure is properly supervised by a Full Bench of the FWC to ensure rigorous and robust consideration of merger applications.

Right to the presumption of innocence and other guarantees

The right to the presumption of innocence and the minimum guarantees contained in Article 14 of the ICCPR is relevant to some of the new criminal offences in the Bill. The provisions are not inconsistent with the right to the presumption of innocence as they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

When strict liability applies to an offence, the prosecution is only required to prove the relevant physical elements and not the fault elements of the offence.

11 The latest iteration of this provision was contained in subsection 103(2) of the Workplace Relations Act 1996 and prior to 2005 it was contained in section 90 of that Act.
The Bill contains the following new strict liability offences:

- the offences in relation to a person who is disqualified from holding office by the Federal Court, standing for or continuing to hold either an actual or de facto office (in section 226);

- the offence in relation to helping administrators (section 323G); and

- the offence in relation to administrators’ access to an organisation’s books (section 323H).

1. The offences in relation to a person who is disqualified from holding office by the Federal Court, standing for office or continuing to hold office (in section 226)

The Royal Commission recommended that the offence of continuing in office while disqualified should be an offence of strict liability to address the gap in the Act that currently provides no consequences for a person who stands for or continues to hold either an actual or a de facto office whilst disqualified.12 This limitation is reasonable, necessary and proportionate in cases where a person has been disqualified from holding office by the Federal Court because:

- the lack of a strong sanction in these circumstances, including strict liability elements of the relevant offence, may encourage further non-compliance with the Act, the FW Act and other relevant laws;

- the Corporations Act provides that it is an offence for a person disqualified from managing a corporation to do so and similarly applies strict liability to the circumstance of whether or not a person is disqualified from managing corporations. Under section 206A of the Corporations Act, strict liability applies to the element of the offence concerning whether or not the relevant person is disqualified from managing a corporation under the Corporations Act;

- the strict liability elements of the offences are clear and straightforward; the Federal Court either has or has not disqualified a person from holding office under the Act. Requiring proof of fault for this element of the offences would undermine the integrity and effectiveness of the regulatory and enforcement regime for disqualification of officials. Strict liability applies only if the person is disqualified under an order made under new sections 28M or 222 and does not apply where an officer has been automatically disqualified under section 215 of the Act; and

- the defence of honest and reasonable mistake of fact is also available for these offences where the defendant has turned his or her mind to the existence of these facts (see section 9.2 of the Criminal Code Act 1995 (Criminal Code)).

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2. The offence in relation to assisting administrators (section 323G) and the offence in relation to administrators’ access to an organisation’s books (section 323H)

The amendments requiring officers and employees of registered organisations to assist administrators and entitling an administrator to access an organisation’s books are intended to assist an administrator appointed by the Federal Court under new Part 2 of Chapter 11 to effectively carry out their functions. These are important provisions that ensure an administrator can carry out their role in remediating an organisation that has become dysfunctional or is no longer serving its members’ interests.

These strict liability offence provisions are reasonable, necessary and proportionate because:

- strict liability offences are a common feature of regulatory frameworks underpinning corporate regulation in the Corporations Act and are the appropriate comparator for the administration provisions in the Bill. In particular, the proposed strict liability offences replicate identical strict liability offences in the Corporations Act (see proposed sections 323G and 323H of the Bill and sections 438B and 438C of the Corporations Act) and are necessary and appropriate to enforce obligations arising from an administrator’s functions and powers;

- the strict liability elements of the offences are clear and straightforward, and are necessary to ensure the integrity and effectiveness of the regulatory regime to optimise the opportunity for remedial administration of dysfunctional organisations;

- the offences are not punishable by a term of imprisonment;

- the defence of honest and reasonable mistake of fact is also available for these offences where the defendant has turned his or her mind to the existence of these facts (see section 9.2 of the Criminal Code); and

- the strict liability offence in relation to assisting administrators (section 323G) also contains a defence of reasonable excuse, consistent with the comparable offence in section 438B of the Corporations Act. Explicit provisions are also included so that the offence is not intended to override the privilege against self-incrimination or legal professional privilege (subsections 323G(4) and (5)).

Conclusion

The Bill is compatible with human rights because any restriction is for a purpose that falls within one of the permitted grounds for restriction under the relevant article, and because the measures will be effective in achieving better governance of registered organisations. To the extent that the Bill may limit human rights, those limitations are reasonable, necessary and proportionate.
NOTES ON CLAUSES

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

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<thead>
<tr>
<th>Act</th>
<th>Fair Work (Registered Organisations) Act 2009</th>
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<tr>
<td>Amendment Act</td>
<td>Fair Work (Registered Organisations) Amendment Act 2016</td>
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<td>Bill</td>
<td>Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019</td>
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<tr>
<td>Corporations Act</td>
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<td>Final Report</td>
<td>Hon John Dyson Heydon AC QC’s Final Report of the Royal Commission into Trade Union Governance and Corruption</td>
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<td>FW Act</td>
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<td>FWC</td>
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<td>Royal Commission</td>
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Clause 1 – Short title

1. This is a formal provision specifying the short title.

Clause 2 – Commencement

2. The table in this clause sets out when the provisions of the Bill commence.

Clause 3 – Schedules

3. Clause 3 of the Bill provides that legislation that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule operates according to its terms.
SCHEDULE 1 – AMENDMENTS RELATING TO DISQUALIFICATION FROM OFFICE

4. Schedule 1 will amend the Act in relation to disqualification from office. The amendments will expand the circumstances in which a person may be automatically disqualified from office and make it a criminal offence for a person who is disqualified from holding office in a registered organisation to continue to hold office or act in a manner that would significantly influence the organisation. The schedule also provides a discretionary disqualification regime that allows the Federal Court to disqualify an official from holding office in certain circumstances.

Fair Work (Registered Organisations) Act 2009

Item 1 – Section 6

5. This item amends section 6 of the Act by inserting two new definitions related to the new provisions contained in the Bill. Key concepts that underpin the various schedules in Bill are:

- designated finding (new subsection 9C(1)); and
- designated law (new subsection 9C(2)).

6. These new definitions are relevant for the purposes of disqualification, cancellation of registration, administration, and amalgamation of organisations regimes in the Bill.

7. Finally, this item also inserts a new definition of ‘disqualified from holding office in an organisation’ and provides that the term has the meaning given by new section 225. New section 225 defines a person disqualified from holding office in an organisation or branch as:

- a person not eligible to be a candidate for election to, or to hold, an office in an organisation or branch of an organisation under subsection 215(1); or
- a person disqualified from holding office in an organisation or branch of an organisation under sections 28M or 222.

Item 2 – After Section 9B

8. This item inserts new sections 9C and 9D providing the definitions of ‘designated finding’ and ‘designated laws’ and when findings will apply to an organisation.

Section 9C – Designated findings and designated laws

9. New subsection 9C(1) provides that a ‘designated finding’ is:

- a finding in criminal proceedings that a person has committed an offence against a ‘designated law’; or
- in any civil proceedings, that the person has contravened, or been involved in a contravention of:
Schedule 1 – Amendments relating to disqualification from office

10. New subsection 9C(2) provides that ‘designated laws’ are:

- the Act;
- the FW Act;
- the Building and Construction Industry (Improving Productivity) Act 2016;
- the Work Health and Safety Act 2011; or
- each State or Territory OHS law within the meaning of the FW Act.

11. Compliance with the legislation listed in the new definitions of ‘designated finding’ and ‘designated law’ goes to the heart of the effective operation of the workplace relations system and by extension, the effective and lawful management of registered organisations by their officials. The legislation listed in each definition has been adapted from the list of circumstances in which Commissioner Heydon recommended that the Federal Court be given capacity to disqualify a person from holding office in an organisation. Organisations and officials that do not comply with these core workplace laws cannot be considered to be lawfully and effectively representing the interests of organisation members as a whole.

Section 9D – Findings against part of an organisation

12. New section 9D provides that a finding made against a part of an organisation will, for the purposes of the Act, be taken to have been made against the organisation.

Items 3 and 4 – Section 181

These items amend the simplified outline of Part 1 of Chapter 7 in section 181 to account for the amendments made to Chapter 7 regarding orders disqualifying a person from holding office in organisations.

Item 5 – Division 1 of Part 4 of Chapter 7 (heading)

13. This item repeals and replaces the current heading of Division 1. The new heading for Division 1 is ‘Preliminary’.

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Item 6 – At the end of section 210

14. This item amends the simplified outline of Part 4 of Chapter 7 set out in section 210 to cover new Divisions 3 and 4.

Item 7 – At the end of Division 1 of Part 4 of Chapter 7

Section 210A – Application of this Part to branches

15. New section 210A provides that a reference in Part 4 of Chapter 7 to ‘an office in, or holding office in an organisation’ includes a reference to an office in a branch of an organisation or holding office in a branch of an organisation. The new section also provides that a reference to ‘an officer in an organisation’ in Part 4 of Chapter 7 will include a reference to an officer in a branch of an organisation.

16. This new section aligns the existing disqualification provisions in Division 2, Part 4 of Chapter 7 with the new disqualification provisions that will be inserted in new Division 3, Part 4 of Chapter 7. The new disqualification provisions apply to holding office in a branch of an organisation and not just an organisation.

17. New subsection 210A(2) specifically notes that this section does not limit the operation of subsection 9(2) of the Act which provides that a reference to an office in an association or organisation includes a reference to an office in a branch of the association or organisation.

Item 8 – After paragraph 212(a)

18. This item inserts new paragraph 212(aa) into existing section 212 to expand the definition of ‘prescribed offence’. Section 212 defines prescribed offence for the purposes of Division 2, Part 4 of Chapter 7, which provides when a person will be automatically disqualified from holding office because they have been convicted of a prescribed offence.

19. Recommendation 36 of the Final Report was that the definition of prescribed offence in section 212 be expanded to include a category of ‘serious offences’. The Final Report defined serious offences as offences under a law of the Commonwealth, State or Territory punishable on conviction by a maximum penalty of imprisonment for life or a period of five years or more.

20. The insertion of the new paragraph 212(aa) expands the definition of prescribed offence to include an offence under a law of the Commonwealth, a State or Territory, or another country, punishable upon conviction by imprisonment for life or a period of five years or more. Section 215 provides that a person convicted, per section 213, of one of the prescribed offences set out in section 212 is disqualified from holding office (subject to the person making an application for leave to hold office or a reduced period of exclusion under sections 216 or 217).

21. The effect of item 17(1) is that automatic disqualification will not apply to a conviction for an offence of the type listed in new paragraph 212(aa) if the conviction is in relation to conduct engaged in before commencement of this Schedule.
Item 9 – Subsection 215(1)

22. This item amends subsection 215(1) to streamline the terms used in the section to take into account the offences created in new section 226 and align the terms used in section 215 with those used in the disqualification provisions in new Division 3, Part 4 of Chapter 7 and offence provisions in new Division 4, Part 4 of Chapter 7.

23. Subsection 215(1) currently provides that a person convicted of one of the prescribed offences set out in section 212 is disqualified from being a candidate in an election for office and from being elected or appointed to office. This amendment to subsection 215(1) is consequential to the new offences to provide that a person convicted of a prescribed offence is disqualified from being elected to, or holding, office.

Item 10 – At the end of subsection 215(1)

24. This item adds a new note to amended subsection 215(1) to explain that the effect of new section 226 will be that a person who is disqualified from holding office is also not eligible to be a candidate for election to, or to hold, office in a branch of an organisation.

Item 11 – At the end of Part 4 of Chapter 7

25. This item inserts new Divisions 3 and 4 of Part 4, Chapter 7. 

26. New Division 3 includes new sections 221–223 which respond to recommendation 38 of the Royal Commission. Recommendation 38 was that the Federal Court be provided with the jurisdiction to disqualify a person from holding office in a registered organisation for a period of time the Court considers appropriate.

Section 221 – Simplified outline of this Division

27. New section 221 provides a simplified outline of Division 3 of Part 4 of Chapter 7.

Section 222 – Disqualification orders

28. New subsection 222(1) provides that the Commissioner, the Minister or a person with sufficient interest can apply to the Federal Court for an order disqualifying a person from holding office in an organisation or a branch of an organisation if the applicant considers one or more of the grounds set out in section 223 applies.

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

30. New subsection 222(2) provides that the Federal Court can make an order disqualifying the person from holding office for any period the Court considers appropriate if the Court is satisfied that a ground for disqualification set out in the application applies to the person and the Court does not consider it would be unjust to disqualify the person. In determining whether disqualifying a person from office would be unjust, the Court is to have regard to:

- the nature of the matters that constituted the ground for disqualification (new subparagraph 222(2)(b)(i));
Schedule 1 – Amendments relating to disqualification from office

- the circumstances and nature of the person’s involvement in the matters constituting the ground for disqualification (new subparagraph 222(2)(b)(ii)); and
- any other matter the Court considers relevant (new subparagraph 222(2)(b)(iii)).

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.

31. New subsection 222(3) clarifies that if the Federal Court makes an order under new subsection 222(2), the person is also disqualified from holding office in a branch of an organisation for the period.

32. Finally, subsection 222(4) provides that if the Federal Court makes an order under subsection 222(2), a copy of that order must be given to the Commissioner.

Section 223 – Grounds for disqualification

33. New section 223 sets out the prima facie grounds that enliven the power of the Federal Court to consider making an order under new section 222.

34. The effect of item 17(2) is that a ground for disqualification can only be established by conduct that occurs after commencement of this Schedule.

Designated finding or contempt in relation to designated law

35. New subsection 223(1) provides that a ground for disqualification exists if a person has had a ‘designated finding’ made against them or has been found to be in contempt of court in relation to an order or injunction made under a designated law.

36. Section 6, as amended, provides that a ‘designated finding’ has the meaning given to it by new section 9C. New section 9C defines a ‘designated finding’ as a finding:

- in criminal proceedings that a person has committed an offence against a ‘designated law’; or
- that a person has contravened, or been involved in a contravention, of a civil remedy or civil penalty provision of a ‘designated law’.

Contempt in relation to law other than designated law

37. New subsection 223(2) provides that a ground for disqualification exists if the person has been found to be in contempt of court in relation to an order or injunction made under any law of the Commonwealth, a State or Territory (other than a designated law).

38. Significantly, this ground will only be established if 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 an organisation. In this way, findings which are committed in a private capacity will not be relevant.

39. Ensuring absence of contempt by officials is important for ensuring the effective and lawful management of registered organisations by law-abiding officials.
Multiple failures to prevent contraventions etc. by organisations

40. New subsection 223(3) provides that a ground for disqualification applies in relation to a person if more than one of either of the following findings are made against an organisation whilst that person was an officer of that organisation:

- a designated finding (new subparagraph 223(3)(a)(i)); or

- the organisation was found to be in contempt of court in relation to an order or injunction under a designated law (new subparagraph 223(3)(a)(ii));

and the person failed to take reasonable steps to prevent that conduct (new paragraph 223(3)(b)).

41. The requisite threshold of more than one finding can be made up of any combination of findings in paragraph 223(3)(a). For example, the ground could be established by a designated finding and a finding that the organisation is in contempt of a court order or injunction as described in 223(3)(a)(ii).

42. The Final Report recommended that this ground for disqualification from office be incorporated to reflect a similar ground for disqualifying a person from managing a corporation provided for in subsection 206E(1) of the Corporations Act. Like the comparable Corporations Act provision, the new ground for disqualification only applies where a person has failed to take reasonable steps to prevent the branch or organisation, of which they are an officer, from engaging in the relevant conduct.

43. It is not desirable to be prescriptive about the actions expected from an individual officer in taking reasonable steps. The reasonable steps assessment entails an objective test that will be informed by the particular circumstances of the case and the person’s position and responsibilities within the organisation. The test involves considering if the steps taken would be in accordance with those of a ‘prudent and reasonable’ person and would have regard to an individual’s sphere of knowledge, influence and accountability within the organisation.

Corporate impropriety

44. New subsection 223(4) provides that a ground for disqualification applies to a person if:

- the person is found to have committed an offence under, or contravened a provision of, Division 1 of Part 2D.1 of the Corporations Act (this Division concerns the general duties of officers of corporations); or

- the person becomes disqualified from managing corporations under Part 2D.6 of the Corporations Act.

45. The general duties of officers in a corporation, set out in Division 1, Part 2D.1 of the Corporations Act, mirror those in Division 2, Part 2 of Chapter 9 of the Act. Each of these Acts imposes duties on officers relating to an appropriate level of care and diligence, acting in good faith and not misusing their position of officer or information gained as a result of holding office. 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.

46. If a person has been disqualified from managing a corporation under Part 2D.6 of the Corporations Act, such disqualification should properly be a ground for disqualification of an official under this Part. This is because if a person has engaged in the types of conduct that form the grounds for disqualification under Part 2D.6 of the Corporations Act, suitability of the person to hold office in an organisation is also relevant.

Not fit and proper

47. New subsection 223(5) provides that a ground for disqualification applies to a person if having regard to the events set out under subsection 223(6) a person is not a fit and proper person to hold office in an organisation.

48. New subsection 223(6) sets out the events relevant for the ground in new subsection 223(5). These are:

- the person was refused an entry permit, or had an entry permit revoked or suspended, under Part 3-4 of the FW Act (new paragraph 223(6)(a));

- the person was refused a WHS entry permit, or had a WHS entry permit revoked or suspended, under Part 7 of the Work Health and Safety Act 2011 (new paragraph 223(6)(b));

- the person was refused an entry permit (however described), or had such a permit revoked or suspended, under a State or Territory OHS law within the meaning of the FW Act (new paragraph 223(6)(c));

- in any criminal or civil proceedings against the person, or in enforcement action by an agency of the Commonwealth or a State or Territory against the person, the person was found to have engaged in conduct involving fraud, dishonesty, misrepresentation, concealment of material facts or a breach of duty (new paragraph 223(6)(d));

- in any criminal proceedings against the person, the person was found to have engaged in conduct involving the intentional use of violence toward another person, the intentional causing of death or injury to another person, or the intentional damaging or destruction of property (new paragraph 223(6)(e)(i)); or

- in any criminal proceedings against the person, the person was found to have committed an offence against any law of the Commonwealth or a State or Territory that is punishable by imprisonment for 2 years or more (new paragraph 223(6)(e)(ii)) and is adapted from the definition of ‘serious offence’ in the Crimes Act 1914.

49. Currently, there is no capacity in the Act for a person to be disqualified from holding office in an organisation on the basis that they are not a fit and proper person to hold such a position. The Final Report specifically recommended that a person’s fitness and propriety be included as a ground for disqualification from office in light of the various case studies provided throughout the Final Report of continuing and unabated mismanagement by officers. The events set out in new subsection 223(6) give content to the term ‘fit and proper’ by
highlighting the types of conduct and behaviour that may indicate that a person is not fit or proper to hold office in an organisation.

50. The Final Report questioned whether a person who has been a denied an entry permit, or had such a permit suspended or revoked under the FW Act, the Work Health and Safety Act 2011 or a State or Territory occupational health and safety law, is an appropriate person to hold office in an organisation or branch of an organisation. The issuing of an entry permit under section 512 the FW Act is conditional upon a person being a fit and proper person and a person cannot hold an entry permit under the Work Health and Safety Act 2011 unless they have a permit issued under the FW Act. The denial, suspension or revocation of an entry permit, as described in new subsections 223(6)(a), (b) and (c), may be indicative that the person is not a suitable person to hold office in an organisation or branch of an organisation. This is because the right of entry provisions in the FW Act grant significant rights and privileges to permit holders to access premises, including in the absence of consent, and should only be exercisable by those who demonstrate appropriate regard for the law.

51. Division 2, Part 2 of Chapter 9 of the Act places duties on officers, including a duty to act with an appropriate level care and diligence, a duty to act in good faith and duties to not misuse the position of officer or misuse information gained as a result of holding office. A person who has been found in any relevant proceedings to have engaged in conduct involving fraud, dishonesty, misrepresentation, concealment of material facts or a breach of duty in the circumstances described in paragraph 223(6)(d) may be a person who cannot uphold the duties of an officer and is thus not suitable to hold office in an organisation.

52. A person who has been convicted of an offence involving the intentional use of violence toward another person, the intentional causing of death or injury to another person or the intentional damaging or destruction of property is automatically ineligible to be elected to, or hold, office under section 215. New paragraph 223(6)(e) will require the Federal Court to consider whether a person has ever been found in any criminal proceedings to have either engaged in such violent, damaging or destructive behaviour, or otherwise committed a serious criminal offence, being an offence punishable by 2 years imprisonment or more, in order to determine if a person is a fit and proper person to hold office in an organisation. A finding in criminal proceedings that a person has engaged in such behaviour may be indicative that the person is not a suitable person to hold office in an organisation due to the significant and important functions, privileges and powers that are exercisable by officers.

53. In ‘having regard to’ the events set out in new subsection 223(6), in appropriate cases, the Court would need to form its own view about the conduct that gave rise to the actions or findings taken against the individual. For example, the Court would not take an entry permit refusal as set out in new paragraph 223(6)(a) and disqualify a person from office without looking behind the refusal to assess for itself the gravity and relevance of the underlying conduct. The language of ‘having regard to’ demonstrates that the Court would need to form its own view about the conduct that gave rise to the refusal and determine for itself whether that conduct, and the refusal that followed, made the person unfit to hold office in a registered organisation.

Division 4 – Offences in relation to standing for or holding office etc. while disqualified

54. Item 11 also inserts new Division 4, Part 4 of Chapter 7 responding to recommendation 37 of the Final Report. Recommendation 37 was that the Act be amended to
make it a criminal offence for a person disqualified from holding office to continue to hold office. It was recommended that the offence be one of strict liability.

Section 224 — Simplified outline of this Division

55. New section 224 provides a simplified outline of Division 4, Part 4 of Chapter 7.

Section 225 — Definition of ‘disqualified from holding office in an organisation’

56. New section 225 provides that a person is ‘disqualified from holding office in an organisation’ if a person is:

- not eligible to be a candidate for election to, or to hold, an office in an organisation or a branch of an organisation under subsection 215(1) (new paragraph 225(a)); or
- disqualified from holding office in an organisation or branch of an organisation under section 28M or section 222 (new paragraph 225(b)).

57. A person is not eligible to be a candidate for election to, or to hold, an office in an organisation or a branch of an organisation under subsection 215(1) if the person has been convicted, within the meaning of section 213, of one of the prescribed offences listed in section 212.

58. New section 28M provides the Federal Court with the power to disqualify a person from holding office in an organisation where an application has been made to the Federal Court under new sections 28 or 28A seeking the cancellation of an organisation’s registration or alternative orders. The Federal Court can make an order under new section 28M where the Court determines that one of the grounds set out in the application is established, subject to the conditions set out in new section 28L, and the Court is satisfied that the ground was established wholly or mainly because of the conduct of officers.

59. The Federal Court can disqualify a person from holding office in an organisation or branch of an organisation under new section 222 where the Court is satisfied that one of the grounds for disqualification set out in new section 223 exists and the Court does not consider it would be unjust to disqualify the person.

Section 226 - Offences

60. New section 226 provides that a person commits an offence if the person is disqualified from holding office in an organisation or branch and the person:

- is a candidate for office in an organisation or branch of an organisation (new subsection 226(1));
- continues to hold a position as an officer in an organisation or branch of an organisation (new subsection 226(2));
- exercises the capacity to significantly affect the financial standing or other affairs of an organisation or branch (subparagraph 226(3)(b)(i)); or
- gives directions to the committee of management of an organisation or branch, excluding advice given in a professional capacity, knowing the committee of
management is accustomed to acting in accordance with the person’s wishes or intends that the committee of management will do so (subparagraph 226(3)(b)(ii)).

61. The maximum penalty for each of these offences is 100 penalty units ($21,000), two years imprisonment, or both. This ratio represents a departure from that set out in subsection 4B(2) of the Crimes Act 1914 (Cth) but reflects the Final Report recommendation as to the appropriate penalty. Subsection 226(4) provides that for each of the offences in new section 226, where a person is disqualified as a result of an order made by the Court under either new section 28M or new section 222, strict liability will apply to that circumstance concerning whether or not the person was disqualified from holding office (the physical element).

62. The comparable offence in section 206A of the Corporations Act similarly applies strict liability to the circumstance of whether or not a person is disqualified from holding office. Strict liability is appropriate in circumstances where the Federal Court has made an order disqualifying a person from holding office under new sections 28M or 222 in terms of providing a sufficient deterrent effect.

63. Applying a fault element, whether intention, knowledge, recklessness or negligence, would unnecessarily weaken the deterrent effect of new sections 28M or 222. It is a matter of fact as to whether a person has been disqualified by order of the Federal Court and by virtue of such order, a person will be aware that they have been disqualified under those provisions. The defence of honest and reasonable mistake of fact is also available where the defendant has turned his or her mind to the existence of these facts (see section 9.2 of the Criminal Code).

64. Strict liability does not apply to automatic disqualification under subsection 215(1), since there may be a question as to whether a person was aware of their automatic disqualification, in the absence of a Court order.

65. Subsection 226(5) provides that new section 226 does not limit the Federal Court’s power to punish a person for contempt of Court.

Item 12 – Subsection 255E(2)

66. Existing section 255E provides when the Commissioner can refuse to grant an application for registration as an auditor under section 255A of the Act. This item repeals and replaces existing subsection 255E(2) with a new subsection that reflects the amendment made to subsection 215(1) and the creation of a new power of disqualification by the Federal Court in new section 222.

67. Existing subsection 255E(2) provides that the Commissioner must refuse a person’s application for registration as an auditor if the person:

- is not eligible to be a candidate for election, or to be elected or appointed, to an office in an organisation under existing subsection 215(1); or

- is disqualified from holding office under existing section 307A.

68. Item 12 replaces subsection 255E(2) with a new subsection that simply provides that the Commissioner must refuse to register a person as an auditor under the Act if the person is disqualified from holding office in an organisation. This replacement subsection relies on the
definition of ‘disqualified from holding office in an organisation or branch’ provided in new section 225.

**Item 13 – Section 307A**

69. This item repeals existing section 307A which is no longer needed due to the new discretionary disqualification regime in section 222. The grounds for disqualifying a person from holding office under new section 222 provided in new subsection 223(3) include the ground in existing 307A of contravening a civil penalty provision of the Act.

**Item 14 – At the end of subsection 308(1)**

70. Existing section 308 provides that the Federal 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.

71. This item inserts a new note to subsection 308(1) providing that the Commissioner, the Minister, or a person with sufficient interest, may apply under new section 222 for an order disqualifying a person from holding office in an organisation. New subsection 223(3) provides a ground for disqualification under new section 222 where a person has contravened a civil penalty provision of the Act.

**Item 15 – Paragraph 324(2)(g)**

72. Existing section 324 provides when the Minister may authorise financial assistance to certain persons under the Act. Paragraph 324(2)(g) allows a person who has made an application for a declaration under subsection 215(5) to apply to the Minister for financial assistance relating to that application.

73. This item is consequential to the changes the Bill makes to section 215.

**Item 16 – Subsection 325(2)**

74. Subsection 325(2) provides for when the Federal Court may certify that an application made under subsection 215(5), for a declaration that a person was not eligible to be a candidate for office, not eligible to be elected or appointed to office or had ceased to hold office, was made reasonably.

75. This item is consequential to the changes the Bill makes to section 215.

**Item 17 – Application of amendments**

**Definition of prescribed offence**

76. This item explains how the amendments to the disqualification regimes made by the Bill will apply upon commencement of the provisions of this Schedule.

77. Subitem 17(1) provides that despite existing paragraph 213(a), Part 4 of Chapter 7 dealing with automatic disqualification will not apply to a conviction for an offence of the type listed in new paragraph 212(aa) if:
• the offence is not a prescribed offence within the meaning of another paragraph of section 212); and

• the conviction is in relation to conduct engaged in before commencement of this Schedule.

Section 222 disqualification

78. Subitem 17(2) provides for which conduct or events the Federal Court may consider when determining whether any of the grounds for disqualification under new section 223 are applicable to a person. The general effect of this subitem is that a ground for disqualification can only be established by conduct or events that occur after commencement of this Schedule.

• For the purposes of the grounds set out in new subsections 223(1) and 223(2), concerning designated findings and contempt, the Federal Court may only consider conduct the person engaged in after the commencement of this Schedule and contempt relating to an order or injunction made after the commencement of this Schedule.

• For the purposes of the ground set out in new subsections 223(3), concerning multiple findings made against an organisation, the Federal Court may only consider conduct the organisation engaged in after the commencement of this Schedule and contempt by the organisation relating to an order or injunction made after the commencement of this Schedule. Further, when considering whether the person failed to take steps to prevent the organisation’s conduct, the Court may only have regard to a failure to take reasonable steps after the commencement of this Schedule.

• For the purposes of the ground set out in new subsections 223(4), concerning corporate impropriety, the Federal Court may only consider findings, or a disqualification, made in relation to conduct or an event occurring after the commencement of this Schedule.

• For the purposes of the ground set out in new subsections 223(5), concerning whether the person is a fit and proper person to hold office, the Federal Court may only consider events that occurred after the commencement of this Schedule or findings made in relation to conduct that was engaged in after the commencement of this Schedule.

79. The effect of subitem 17(3) is that once a ground for disqualification is established by reference to conduct or events that occurred after commencement of this Schedule, the Federal Court may have regard to 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 (per new section 222(2)).

Section 307A disqualification

80. Subitem 17(4) provides that current section 307A will continue to have effect, allowing the Federal Court to disqualify a person from office in certain circumstances, after the commencement of this Schedule and in spite of the section’s repeal, in relation to relevant conduct that was engaged in prior to the commencement of this Schedule.
Schedule 1 – Amendments relating to disqualification from office

81. Subitem 17(5) is a consequential amendment to subitem 17(4).

Commencement

82. Subitem 17(6) clarifies that references to ‘commencement’ within item 17 are references to the day on which this Schedule commences.
SCHEDULE 2 – AMENDMENTS RELATING TO CANCELLATION OF REGISTRATION AND ALTERNATIVE ORDERS

83. Schedule 2 amends the Act to expand the grounds for, and streamline the regime in relation to, the cancellation of registration of organisations by the Federal Court. Provision is also made for the availability of alternative orders where a ground for cancellation has been made out because of the conduct of the officers or members of a particular part of an organisation.

Fair Work (Registered Organisations) Act 2009

Item 1 – At the end of section 17

84. This item amends the simplified outline of Chapter 2 of the Act in existing section 17 to provide that, under new Division 5, the Federal Court can make certain orders instead of cancelling the registration of an organisation. Alternative orders that can be made under new Division 5 include orders disqualifying certain officers from holding office, orders altering eligibility rules to exclude certain members from organisations, and orders suspending the rights and privileges of the organisation and members.

Item 2 – Subsections 19(4) and 20(2)

85. This item is a consequential amendment to include references to ‘officers’ of an organisation. This amendment takes into account the provisions of the Bill that repeal and replace section 28 to provide that the actions of officers may provide a ground for an application to have an organisation’s registration cancelled.

Item 3 – Part 3 of Chapter 2 (heading)

86. This item repeals and replaces the heading to Part 3 of Chapter 2. The heading will now read ‘Part 3 – Cancellation of registration and alternative orders’ to reflect the fact that the Part allows an applicant to seek orders other than the cancellation of an organisation’s registration.

Item 4 – Sections 28 and 29

87. This item repeals current sections 28 and 29 and inserts new Divisions 1–7 of Part 3 of Chapter 2.

Division 1 – Simplified Outline of this Part

Section 27A – Simplified outline of this Part

88. New section 27A provides a simplified outline of Part 3 of Chapter 2.
Division 2 – Applications to the Federal Court for orders under this Part

Section 28 – Application for cancellation of registration

89. New section 28 provides that the Commissioner, the Minister, or a person with sufficient interest may apply to the Federal Court for an order cancelling the registration of an organisation on any of the grounds set out in new Division 3. The Commissioner will now have automatic standing to apply for the cancellation of an organisation’s registration. The current standing of the Minister is retained. An organisation (or other person) will also have standing if they are a person with a sufficient interest.

90. ‘Sufficient interest’ has been judicially 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.

Section 28A – Application for alternative orders

91. New section 28A provides that the Commissioner, the Minister or a person with sufficient interest, may also apply to the Federal Court for one or more of the alternative orders set out in new Division 5 on any of the grounds contained in new Division 3.

92. An application under new section 28A provides an alternative avenue for redress where a ground for cancellation in Division 3 is established because of the behaviour of officers or members in a particular part of an organisation, for example, a branch or division.

Section 28B – Multiple applications

93. New section 28B makes it clear that a person can make an application for the cancellation of an organisation’s registration under new section 28 and an application for alternative orders under new section 28A at the same time. The Federal Court will be required to deal with those applications together.

Division 3 – Grounds for Federal Court orders

94. The Division sets out the grounds for cancellation of an organisation’s registration. When a ground or grounds applies, it is still necessary for the Federal Court to determine whether cancellation of registration and/or the imposition of alternative orders is just in the circumstances.

95. Attention of the reader is drawn to item 11 (Application of amendments). The effect of item 11 is that a ground for deregistration can only be established by conduct that occurs after commencement of this Schedule.

Section 28C – Ground—conduct of affairs of organisations or part of organisation

96. New section 28C provides a ground for cancelling an organisation’s registration under new section 28, or making an alternative order under new section 28A where:

- officers of the organisation or part of the organisation 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 (new paragraph 28C(1)(a));
Schedule 2 – Amendments relating to cancellation of registration and alternative orders

- affairs of the organisation or 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 section 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 (new paragraph 28C(1)(b)); or

- 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 (new paragraph 28C(1)(c)).

97. The new paragraphs are adapted from the formulation of paragraphs 461(1)(e) and 461(1)(f) of the Corporations Act which provide grounds on which a company may be wound up by the Court that relate to the affairs of the company.

98. ‘Affairs’ of the organisation’ is non-exhaustively defined to include:

- the internal management, governance, and proceedings of the organisation or part; and

- its business model, including the way it is structured and how it operates to achieve its aims; and

- its transactions and dealings with other persons.

99. It is intended that a consideration of an organisation’s transactions and dealings with other persons would include (but not be limited to) its interactions with employers and employers’ employees, other organisations or parts of organisations, regulators (whether industry-specific or otherwise), worker entitlement funds, training and welfare funds, superannuation funds, and other funds established for an industrial purpose.

100. Subsection 28C(3) makes it clear that the Court may have regard to both acts and omissions in considering the manner in which the affairs of the organisation are being conducted.

101. The ground in paragraph 28C(1)(c) is intended to address instances of systemic organisational culture, administration or governance that result in the organisation (or part) or officers or members of the organisation (or part) having a record of not complying with designated laws.

102. Subsection 28C(2) provides that the Court is to have regard to the incidences and age of occurrences of non-compliance with designated laws to assess whether there is a record of not complying with designated laws. Subitem 11(1)(a) makes it clear that regard to such instances of non-compliance are limited to those that relate to conduct that occurs after commencement of the Schedule. However, subitem 11(2) makes it clear that once a ground has been established, the 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.

103. Subsection 28C(4) provides that a finding of fact in proceedings before any court, relating to the grounds for cancelling registration or alternative orders set out in new section
Schedule 2 – Amendments relating to cancellation of registration and alternative orders

28C, is admissible as prima facie evidence of that fact. This new subsection is an evidentiary provision to allow an applicant to use a finding of fact in another proceeding as evidence of that fact, unless the contrary is established. It is intended to expedite the application under new sections 28 or 28A where relevant factual findings have been made in other proceedings.

Section 28D – Ground—serious offence committed by organisation

104. New section 28D provides a ground for cancelling an organisation’s registration under new section 28, or making an alternative order under new section 28A, 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 threshold quantum of penalty units required establishes the gravity of the offence for a body corporate, which is equivalent to 5 years imprisonment for a natural person.

105. The words ‘or equivalent to’ 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.

Section 28E – Ground—multiple findings against members

106. New section 28E is adapted from current paragraph 28(1)(a)(ii) of the Act.

107. New section 28E provides a ground for cancelling an organisation’s registration under new section 28, or making an alternative order under new section 28A, where designated findings have been made against a substantial number of the members of the organisation or the members of a part or class of the organisation. The term ‘designated finding’ is defined under amended section 6 and new section 9C (items 1 and 2 of Schedule 1).

Section 28F – Ground—non-compliance with orders or injunctions

108. New section 28F is adapted from current paragraph 28(1)(d) of the Act.

109. New section 28F provides a ground for cancelling an organisation’s registration under new section 28, or making an alternative order under new section 28A, where the organisation has failed to comply with an order or injunction made under a designated law (paragraph 28F(1)(a)).

110. New section 28F also provides a ground for cancelling an organisation’s registration under new section 28, or making an alternative order under new section 28A, where a substantial number of the members of the organisation, or a part or class of the organisation have failed to comply with an order or injunction made under a designated law. The term ‘designated law’ is defined under amended section 6 and new section 9C (items 1 and 2 of Schedule 1).

111. New subsection 28F(2) provides that where an application under new sections 28 or 28A is made on the ground in new section 28F, a finding in proceedings before any court that there has been a relevant failure to comply with court orders or injunctions is admissible as prima facie evidence. This new subsection is an evidentiary provision to allow an applicant to use a finding of fact in another proceeding as evidence of that fact, unless the contrary is
established. It is intended to expedite the application under new sections 28 or 28A where relevant factual findings have been made in other proceedings.

Section 28G – Ground—obstructive industrial action

112. New section 28G substantively replicates current paragraphs 28(1)(b) and (c) of the Act.

113. New subsections 28G(1) and (2) provide a ground for cancelling an organisation’s registration under new section 28, or making an alternative order under new section 28A, where the organisation, or a substantial number of the members of the organisation or of a part or class of the organisation, have organised or engaged in industrial action (other than protected industrial action) that:

- prevented, hindered or interfered with the activities of a federal system employer or the provision of any public service by the Commonwealth, a State or Territory, or an authority of the Commonwealth, a State or Territory (new subparagraphs 28G(2)(a)(i) and (ii)); or

- has had, 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 (new paragraph 28G(2)(b)).

114. The definition of ‘protected industrial action’ is set out in section 408 of the FW Act.

115. New subsection 28G(3) provides that where an application under new sections 28 or 28A is made on the ground in new section 28G, a finding of fact in any court is admissible as prima facie evidence in the application under new sections 28 or 28A. This new subsection is an evidentiary provision to allow an applicant to use a finding of fact in another proceeding as evidence of that fact, unless the contrary is established. It is intended to expedite the application under new sections 28 or 28A where relevant factual findings have been made in other proceedings.

Section 28H – Application of grounds in relation to amalgamated organisations

116. New subsection 28H(1) provides that when considering whether a ground in new Division 3 exists in relation to an amalgamated organisation:

- a reference to an ‘organisation’ includes any deregistered organisation in relation to the amalgamation (new paragraph 28H(1)(a));

- a reference to an ‘officer’ of the organisation includes a person who was an officer of any such deregistered organisation (new paragraph 28H(1)(b)); and

- a reference to the conduct of an officer in relation to an organisation includes any conduct of the officer as an officer in relation to any such de-registered organisation (new paragraph 28H(1)(c)).

117. In relation to an amalgamated organisation, this provision ensures that where relevant conduct occurs after commencement of this Schedule so that a ground for cancellation is established, the Federal Court can consider the prior conduct of any deregistered organisation.
or its officers, for the purposes of determining whether it is unjust to make an order under Division 4 or Division 5 of Part 3 of Chapter 2 of the Act.

118. New subsection 28H(2) explains that the definitions created for the purposes of Part 2 of Chapter 3, which deal with amalgamations, apply to any such terms used in new section 28H.

Division 4 – Cancellation of registration of an organisation by the Federal Court

Section 28J – Order cancelling registration of an organisation

119. New section 28J provides that, if an application is made for the cancellation of an organisation’s registration under new section 28, the Federal Court must cancel the registration of the organisation if:

- the Court finds that one of the grounds set out in the application is established; and
- the organisation concerned does not satisfy the Court that cancelling the organisation’s registration would be unjust having regard to:
  - the nature of the matters constituting the ground (new subparagraph 28J(1)(b)(i));
  - any action taken by or against the organisation, members or officers in relation to those matters (new subparagraph 28J(1)(b)(ii));
  - the best interests of the members of the organisation as a whole (new subparagraph 28J(1)(b)(iii)); and
  - any other matters the Court considers relevant (new subparagraph 28J(1)(b)(iv)).

120. New subsection 28J(2) clarifies that the relevant organisation must be given the opportunity to be heard by the Federal Court when the Court is determining whether or not to cancel the organisation’s registration.

121. Note 1 to new subsection 28J(1) draws the reader’s attention to the alternative orders the Court may make under new Division 5 in circumstances where a ground for cancellation is established but the organisation satisfies the Court that it would be unjust to cancel its registration.

122. Note 2 to new subsection 28J(1) draws the reader’s attention to the effect of cancellation of registration as provided for under new Division 7.

Section 28K – Orders additional to cancelling registration under section 28J

123. New section 28K is adapted from existing subsection 28(5) and provides that, where an order cancelling the registration of an organisation has been made under new section 28J, the Court may also direct, by order, either or both of the following:

- that any future application for registration under the Act by the former organisation not be dealt with before the end of a specified period (new paragraph 28K(a));
Schedule 2 – Amendments relating to cancellation of registration and alternative orders

- that any future application for the registration of an organisation with the same, or substantially the same, officers as those in the organisation that has had its registration cancelled, not be dealt with before the end of a specified period (new paragraph 28K(b)).

124. Each of the grounds for cancelling an organisation’s registration set out in new Division 3 relates to an organisation that has ceased to function in the best interests of members as a whole. New section 28K is intended to ensure that the cancellation of an organisation’s registration is effective and is not undermined by the re-registration of the organisation or the registration of an organisation that has the same, or substantially the same, officers as those in the organisation that had its registration cancelled.

Division 5 – Alternative Federal Court orders

Section 28L – When the Federal Court may make alternative orders

125. New section 28L provides that the Federal Court may make alternative orders (other than the cancellation of the registration of the organisation) under Division 5 if:

- the Court finds that one of the grounds set out in Division 3 has been established in an application made under new sections 28 or 28A (new paragraph 28L(1)(a)); and
- if the Court is considering an application made under new section 28, or an application made under new section 28A in conjunction with an order made under section 28, the relevant organisation has satisfied the Court that cancelling the organisation’s registration would be unjust (new paragraph 28L(1)(b)).

126. The alternative orders that the Federal Court can make are:

- disqualification of certain officers (new section 28M);
- exclusion of certain members (new section 28N); and
- suspension of rights, privilege and capacity (new section 28P).

127. New subsection 28L(2) provides that, before making an order under new sections 28M (disqualification of officers) or 28N (exclusion of certain members), or exercising power under new paragraph 28P(1)(a) (suspension of rights, privileges or capacity) in relation to only part of an organisation or only some of its members, the Federal Court must be satisfied that the relevant ground was established wholly or mainly because of the conduct of:

- officers of a particular part of the organisation (new subparagraph 28L(2)(a)(i)); or
- members or class of members of a particular part of the organisation (new subparagraph 28L(2)(a)(ii)).

128. In addition, the Court must be satisfied that it would not be unjust to make the order or exercise the power, 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 (new paragraph 28L(2)(b)).
129. Subsection 28L(3) provides that, before exercising the power provided to the Federal Court under new 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 exercising that power in that way would not be unjust having regard to the nature of the matters constituting the ground and any other matters the Court considers relevant.

130. New subsection 28L(4) provides that the relevant organisation must be given the opportunity to be heard by the Federal Court when it is determining whether or not to make alternative orders.

Section 28M – Order—disqualification of certain officers

131. New section 28M provides that the Federal Court may make an order disqualifying the officers mentioned in new subparagraph 28L(2)(a)(i) from holding office in an organisation for a period the Court considers appropriate. An order under new section 28M is only available to the Court if it is satisfied of the relevant matters in new section 28L.

132. New subsection 28M(2) provides that if the Court does so, the officer is also disqualified from holding office in a branch of an organisation.

133. New subsection 28M(3) provides that the Court must provide the Commissioner with a copy of any order disqualifying a person from office under new section 28M.

Section 28N – Order—exclusion of certain members

134. New section 28N is adapted from existing subsection 28(4) of the Act.

135. If the Federal Court is satisfied of the relevant matters in new section 28L, under new subsections 28N(1) and (2) 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 new subparagraph 28L(2)(a)(ii). The Federal Court can make an order excluding people belonging to such part of class of the membership despite any membership agreement made under existing section 151 of the Act.

136. New subsection 28N(2) provides that if an order is made under new section 28N, the alteration of the rules of eligibility takes place on the date of the order or a date specified in the order.

137. New subsection 28N(3) provides that where the Court makes an order under new section 28 it may make an additional order prohibiting an organisation, for a specified period of time, from seeking consent under section 158 of the 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 the subject of the order under section 28N.

Section 28P – Order—suspension of rights and privileges etc. and later reconsideration of question of cancellation or alternative orders

138. New section 28P is adapted from existing subsection 29(2) of the Act.

139. If the Federal Court is satisfied of the relevant matters in new section 28L, it may under new section 28P do any of the following:
make an order suspending the rights, privileges or capacities of the organisation or a part of the organisation, or of all or any of its members, as such members, under the Act, the FW Act or any other Act, under modern awards or orders made under this Act, the FW Act or any other Act, or under enterprise agreements (new paragraph 28P(1)(a)); or

make orders providing directions as to the exercise of any rights, privileges or capacities that have been suspended (new paragraph 28P(1)(b));

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 (new paragraph 28P(1)(c)).

140. New subsection 28P(2) provides that an order made under new section 28P relating to the exercise of power will have effect despite anything in the rules of the organisation, or part of the organisation, concerned.

141. Under new subsection 28P(3), any orders made under new section 28P relating to the exercise of power may either be:

- revoked by an order from the Court upon the application of a party to the proceedings (new paragraph 28P(3)(a)); or
- will expire on the date specified in the order (new paragraph 28P(3)(b)).

142. New subsection 28P(4) provides that the Federal Court must reconsider an application made under either or both of sections 28 (cancellation of registration) or 28A (alternative orders) once either:

- any orders made under new section 28P cease to be in force (new paragraph 28P(4)(a)); 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 new section 28P or any other relevant circumstances (new paragraph 28P(4)(b)).

**Division 6 – Cancellation of registration of an organisation by the FWC**

143. This item inserts a new heading to Division 6 and is consequential to the other amendments being made by this Schedule. The cancellation of registration of an organisation by the FWC is not affected by the amendments in this Schedule and continues unamended.

**Item 5 – At the end of section 30**

144. This item adds a note to section 30 to draw the reader’s attention to the fact that new Division 7 provides for the effect of cancelling the registration of an organisation.
Item 6 – Before section 31

Division 7 – Effect of cancellation of registration

145. This item inserts new Division 7. The creation of this new Division is consequential to the other amendments being made by this Schedule and separates the effects of cancelling the registration of an organisation in new Divisions 1–5 concerning cancellation of registration by the Federal Court from Division 6 concerning cancellation by the FWC.

Item 7– Before paragraph 158(10)(a)

146. This item amends section 158, concerning changing the name or eligibility rules of an organisation, to ensure that it does not apply to an order made under new section 28N determining an alteration to the name or eligibility rules of an organisation.

Item 8 – Section 343

147. This item amends section 343 so that the section now contains subsections. This amendment is necessary for the purposes of item 9, which adds a new subsection to the end of existing section 343.

Item 9 – At the end of section 343

148. This item inserts a new subsection 343(2) into section 343 to provide that the Minister is not able to delegate his or her power to make an application for:

- the cancellation of the registration of an organisation or alternative orders under new sections 28 or 28A (new paragraphs 343(2)(a) and (b));
- the disqualification of a person from office under new section 222 (inserted by Schedule 1) (new paragraph 343(2)(c)); or
- a declaration made under new subsection 323(1) (inserted by Schedule 3) (new paragraph 343(2)(d)).

Item 10 – Paragraph 343B(2)(a)

149. This item repeals paragraph 343B(2)(a) and substitutes new paragraph 343(2)(a) to reflect the fact that existing section 28 has been repealed and replaced by new sections 28 and 28A. Paragraph 343B(2)(a) provides that the Commissioner cannot delegate his or her power to make an application for the cancellation of the registration of an organisation or alternative orders under new sections 28 or 28A.

Item 11 – Application of amendments

150. This item explains how the amendments to the Act made by Schedule 2 will apply upon commencement of this Schedule.

151. In finding whether a ground for cancellation of registration of an organisation set out in an application under new section 28 or 28A is established, the Federal Court may only have regard to conduct engaged in after commencement (subitem (1)).
152. However, once a ground has been established, the Court may have regard to matters occurring before or after commencement for the purposes of new subparagraphs 28J(1)(b)(iv) and 28L(2)(b)(ii), and new paragraph 28L(3)(b). These provisions give the Court the power to have regard to other matters it considers relevant in determining whether it is unjust to exercise its power under those sections (subitem (2)).

153. Subitem (3) provides that, in relation to the application of sections 28 and 29 of the Act as in force immediately before commencement, these provisions continue in effect after commencement and, despite the amendments in Schedule 2, in relation to:

- conduct engaged in before commencement (subitem (3)(a));
- conduct engaged in before or after commencement in relation to an order or injunction made before commencement (subitem (3)(b)).

154. Subitem (4) clarifies that for the purposes of the operation of sections 28 and 29 of the Act as continued in effect by sub-item (3), the amendments made by Schedule 2 are taken not to have been made.

155. Subitem (5) defines the term ‘commencement’ for the purposes of item 11 to mean the start of the day item 11 commences.
SCHEDULE 3 – AMENDMENTS RELATING TO ADMINISTRATION OF DYSFUNCTIONAL ORGANISATIONS ETC.

156. Section 323 of the Act provides for applications to be made to the Federal Court for a declaration in relation to an organisation or any part of it. If a declaration is made, the Federal Court may approve a scheme for the taking of action to resolve the matters to which the declaration relates.

157. Schedule 3 repeals section 323 and substitutes it with new Part 2A of Chapter 11. New part 2A expands current section 323 through three key amendments:

- the standing for seeking a declaration and order for a scheme will be expanded to include the Commissioner and the Minister;
- the categories of declarations in subsection 323(1) of the Act will be expanded; and
- the Federal Court’s power to approve a scheme consequent to the making of a declaration will be amended to expressly permit the appointment of an administrator under a scheme and clearly set out the functions of an administrator.

158. These amendments are remedial in nature, modelled and adapted from broadly equivalent provisions of the Corporations Act, and 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.

Fair Work (Registered Organisations) Act 2009

Item 1 – Section 6

159. This item amends section 6 to insert new definitions of ‘administrator’, ‘books’, ‘financial misconduct’ and ‘part’. The definition of ‘administrator’ includes any interim administrator appointed for the time being by the Federal Court under new subsection 323A(1). The definition of ‘financial misconduct’ is inclusively defined and includes misuse of funds and false accounting. Whether other conduct constitutes financial misconduct will turn on the facts of each case. The definition of a part of an organisation follows current subsection 323(1)(a).

Item 2 – Subsection 280(6)

160. This item repeals existing subsection 280(6), which contains a definition of ‘books’. This definition is currently limited to section 280 and will no longer be required because of the insertion of an identical definition in section 6 by item 1.

Item 3 – Section 317

161. This item amends the simplified outline of Chapter 11 to include an outline of new Part 2A.
Item 4 – Section 323

162. This item repeals existing section 323 and substitutes it with new Part 2A.

Section 323 – Declaration of dysfunction, misconduct etc. or vacancy in offices

163. New subsection 323(1) gives standing to the following persons to seek a declaration or declarations from the Federal Court of the type set out in new subsection 323(3), if the applicant considers that circumstances mentioned in a paragraph of that subsection exist in relation to an organisation:

- the Commissioner;
- the Minister;
- the organisation in relation to which the declaration is sought;
- a member of the organisation in relation to which the declaration is sought; and
- any other person having a sufficient interest in the organisation in relation to which the declaration is sought.

164. New subsection 323(1) has expanded the standing in existing subsection 323(1) to include the Commissioner and the Minister. The issue of the Minister’s standing in terms of having a sufficient interest, was considered but not resolved in Brown v Health Services Union [2012] FCA 644 per Flick J at [51]. New paragraph 323(1)(b) addresses this uncertainty.

165. ‘Sufficient interest’ has been interpreted as an interest beyond that of an ordinary person and includes those whose rights, interests and legitimate expectations would be affected by the decision.

166. New subsection 323(2) enables the Federal Court to make the declaration if the Court is satisfied that the circumstances exist in relation to the organisation.

167. New subsection 323(3) sets out the declarations the Federal Court may make:

- that an organisation or part of an organisation has ceased to function effectively and there are no effective means under the organisation or part’s rules by which the organisation or part can be reconstituted or enabled to function effectively (new paragraph 323(3)(a)) and is modelled on existing paragraph 323(1)(a) of the Act. New subsection 323(4) provides for a new inclusive definition of when an organisation or part of it has ceased to function effectively;

- that one or more officers of an organisation or part of an organisation have engaged in financial misconduct in relation to carrying out of their functions or in relation to the organisation or part (new paragraph 323(3)(b)). An inclusive definition of financial misconduct is inserted into section 6 by item 1 of this Schedule;

- that a substantial number of the officers of an organisation or part of an organisation 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 (new paragraph...
Schedule 3 – Amendments relating to administration of dysfunctional organisations etc.

323(3)(c)). New paragraph 323(3)(c) is adapted from paragraph 461(1)(e) of the Corporations Act;

- that affairs of an organisation or part of an organisation are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members of the organisation or part as a whole (new paragraph 323(3)(d)). New paragraph 323(3)(d) is adapted from paragraph 461(1)(f) of the Corporations Act; and

- 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 the office or position (new paragraph 323(3)(e)). New paragraph 323(3)(e) reflects existing section 323(1)(b).

168. New subsection 323(4) provides that for the purposes of new section 323, without limiting the circumstances in which an organisation or a part of an organisation ceases to function effectively, an organisation or a part of an organisation is taken to have ceased to function effectively if the Court is satisfied that officers of the organisation or a part of an organisation have:

- on multiple occasions, contravened designated laws (new paragraph 323(4)(a)); or

- misappropriated funds of the organisation or part (new paragraph 323(4)(b)); or

- otherwise repeatedly failed to fulfil their duties as officers of the organisation or part of the organisation (new paragraph 323(4)(c)).

169. The term ‘designated law’ is defined under amended section 6 and new section 9C (items 1 and 2 of Schedule 1).

Section 323A – Federal Court may make certain orders if declaration made under section 323

170. New section 323A sets out orders that the Federal Court may make if a declaration is made under new section 323.

171. The Federal Court may, by order, approve a scheme for the taking of action by the organisation or part of an organisation, or by an officer or officers of the organisation, or part of the organisation, to resolve the circumstances set out in the declaration (new subsection 323A(1)). The power under new subsection 323(1) provides a broad remedial discretion.

172. New subsection 323A(2) provides that, without limiting subsection 323A(1), a scheme ordered under new subsection 323A(1) may include the appointment of an administrator for the organisation or part of it, reports to be given to the Court under the scheme, information about when the scheme begins, and ends and when elections (if any) are to be held under the scheme.

173. New subsection 323A(3) provides that the Court must not make an order under new section 323A unless it is satisfied that the order would not do substantial injustice to the organisation or any member of the organisation. This subsection reflects existing subsection 323(4).
174. New subsection 323A(4) provides that if a scheme approved under new section 323A provides for its own end, the Court may only approve the scheme if the scheme provides that it does not end unless the Court is satisfied that the circumstances set out in the declaration have been resolved or no longer exist.

175. New subsection 323A(5) provides that if a scheme approved under new section 323A involves provision for an election for an office, the Court must not approve the scheme unless the scheme provides for the election to be conducted by the Australian Electoral Commission and in accordance with Chapter 7.

176. New subsection 323A(6) provides that if the Court makes an order approving a scheme, the Court may give any ancillary or consequential directions it considers appropriate, including but not limited to directions about the matters referred to in new subsection 323A(2). This subsection reflects existing subsection 323(3).

Section 323B – Federal Court order has effect despite other provisions

177. New section 323B provides that an order or direction under new section 323A, and any action taken by an administrator or other person in accordance with the order or direction, has effect despite anything in the organisation or part’s rules to which the order or direction relates and any previous order, direction or exemption made under the Act.

Section 323C – Elections while under administration

178. New section 323C provides that any election for an office held while the organisation or any part of it is under administration must be conducted by the Australian Electoral Commission.

Section 323D – Administrators—conflict of interest

179. New section 323D provides that within 21 days after an administrator acquires any interest, pecuniary or otherwise, that could conflict with the proper performance of his or her duties, or becomes aware that any interest, pecuniary or otherwise, that he or she has or is likely to acquire, could conflict with the proper performance of his or her duties, the administrator must notify the Federal Court in writing of that interest.

180. New section 323D is broadly modelled on section 436DA of the Corporations Act, which requires a voluntary administrator to report to creditors and the Australian Securities and Investments Commission on their independence by declaring relevant relationships and indemnities.

Section 323E – Administrators—termination of appointment

181. New section 323E provides that the Federal Court may terminate the appointment of an administrator at any time. This includes, but is not limited to, if the administrator has a conflict of interest and has notified the Court of that conflict under new section 323D.

Section 323F – Functions of administrator

182. New section 323F sets out the functions of an administrator appointed under a scheme in new section 323A. New section 323F is modelled on section 437A of the Corporations Act.
Section 323G – Officers etc. to help administrator

183. New section 323G imposes obligations on certain persons to assist an administrator. New subsections 323G(1) to (4) are modelled on similar obligations in section 438B of the Corporations Act.

184. New subsections 323G(1) and (2) provide that officers and employees of an organisation or part of an organisation under administration, or a person who ceased to be an officer of an organisation or part because of or following the appointment of an administrator, must attend on the administrator at such times and give the administrator such information about the organisation or part’s business, property, affairs and financial circumstances as the administrator reasonably requires.

185. New subsection 323G(3) creates an offence of strict liability if the person does not comply with an administrator’s reasonable request under new subsection 323G(2). As this offence is strict liability it will not be necessary to establish the person’s state of mind, but the defence of honest and reasonable mistake will apply (see section 9.2 of the Criminal Code). The penalty is 120 penalty units.

186. New subsection 323G(4) provides that the offence in new subsection 323G(3) does not apply if a person has a reasonable excuse.

187. New subsection 323G(5) makes it clear that the privilege against self-incrimination is a reasonable excuse under new subsection 323G(4). New subsection 323G(6) also provides that new section 323G does not affect the law relating to legal professional privilege.

188. The offence in new section 323G and the level of penalty is modelled on the similar obligation in section 438B of the Corporations Act. The similarities between the regulation of the corporate governance of companies and registered organisations justifies the imposition of strict liability. The strict liability elements of the offence in new section 323G are clear and straightforward and will ensure the integrity and effectiveness of the regulatory regime to optimise the opportunity for remedial administration of dysfunctional organisations.

189. The inclusion of the reasonable excuse defence ensures consistency with the Corporations Act.

Section 323H – Right to organisation’s books

190. New section 323H gives an administrator a right to an organisation’s books. This section is modelled on section 438C of the Corporations Act.

191. New subsection 323H(1) prevents a person from retaining possession of the books of an organisation or part of an organisation, or claiming or enforcing a lien on the books of an organisation or part of an organisation, however, such a lien is not otherwise prejudiced.

192. New subsection 323H(2) preserves a secured creditor’s right of possession over books (other than because of a lien) but provides that an administrator is entitled to inspect and make copies of such books at any reasonable time.

193. New subsection 323H(3) permits an administrator to give written notice to a person requiring the person to deliver to the administrator books that are in the person’s possession.
The written notice must specify the books that are in the person’s possession to be delivered to the administrator.

194. The compliance period for a notice given under new subsection 323H(3) must be at least 3 business days and this must be specified in the notice (new subsection 323H(4)).

195. New subsection 323H(5) creates an offence of strict liability if a person does not comply with a notice under new subsection 323H(3). As this offence is strict liability it will not be necessary to establish the person’s state of mind (see section 6.1 of the Criminal Code), but the defence of honest and reasonable mistake will apply (see section 9.2 of the Criminal Code). The penalty is 120 penalty units.

196. New subsection 323H(6) provides that new subsection 323H(5) does not apply to the extent that the person is entitled to retain possession of the books. Subsection (6) also contains a note identifying the relevant provision in the Criminal Code that deals with the evidential burden that a defendant bears in relation to the matter in subsection (6). The imposition of an evidential burden does not impose a legal burden of proof and is consistent with the common law and the Criminal Code. When a defendant wishes to take advantage of a defence, the defendant always has the burden of adducing or pointing to evidence that suggests the reasonable possibility that the matter exists or does not exist. When the defendant discharges this evidential burden, the prosecution then has the legal burden to disprove the matter beyond a reasonable doubt.

197. The definition of books is similar to the Corporations Act definition and section 280(6) of the Act, which defines books broadly to include any record of information or a document. Whether a person is entitled to retain possession of relevant books is a matter peculiarly within the person’s knowledge. A person relying on the defence in subsection 323H(6) must adduce evidence to discharge the burden of proof by pointing to the fact that information belongs to the person or contains personal information belonging to the person.

198. The offence in new section 323H and the level of penalty is modelled on the similar obligation in section 438C of the Corporations Act. The similarities between the regulation of the corporate governance of companies and registered organisations justifies the imposition of strict liability. The strict liability elements of the offence in new section 323H are clear and straightforward and will ensure the integrity and effectiveness of the regulatory regime to optimise the opportunity for remedial administration of dysfunctional organisations.

199. The inclusion of the reasonable excuse defence ensures consistency with the Corporations Act.

Section 323J – Remuneration determinations

200. New section 323J gives the Federal Court discretion to make any orders it considers appropriate to provide for an administrator’s remuneration.

201. If the Court makes an order providing for remuneration of an administrator, new section 323J sets out the process for determining an administrator’s remuneration. This section is modelled on the process for Court approval of an administrator’s remuneration under Division 60 of Schedule 2 of the Corporations Act.
Section 323K – Administrator not to be sued

202. New section 323K excludes an administrator appointed under new section 323A, or a person acting under the direction of an administrator, from liability for acts or omissions done in good faith in the performance or exercise, or purported performance or exercise, of any function or power of the administrator.

203. Section 323K is modelled on s 290D of the Industrial Relations Act 1996 (NSW). The provision is directed at immunity from civil proceedings only. For the immunity to apply, it would need to be proven that the administrator was acting in good faith in the performance or exercise of their functions or powers. The reference to ‘purported’ performance or exercise of any function or power reflects the indemnity provisions of the Corporations Act (s 443D(aa)). Acts and omissions an administrator mistakenly thought were in the scope of their functions will be covered by the proposed immunity, provided that the administrator was acting in good faith.

Item 5 – Paragraph 324(2)(p)

204. This item amends paragraph 324(2)(p) to preserve the right of persons to apply to the Minister for financial assistance where they are a party to a proceeding under new Part 2A.

Item 6 – After paragraph 343B(2)(h)

205. This item amends subsection 343B(2) to insert new paragraph 343B(2)(ha), which provides that the Commissioner’s standing to seek a declaration under new subsection 323(1) is not delegable.
SCHEDULE 4 – AMENDMENTS RELATING TO A PUBLIC INTEREST TEST FOR AMALGAMATIONS

206. Part 2 of Chapter 3 of the Act provides the procedure for the amalgamation of two or more organisations. The existing regulatory framework does not require the FWC to decide whether an amalgamation is in the public interest when considering the amalgamation of two or more organisations.

207. Currently, the FWC need only be satisfied of matters contained in subsection 73(2) of the Act before fixing an amalgamation day. That is, the FWC must ensure that valid ballot proceedings on the question of amalgamation have been conducted, there are no proceedings (other than civil proceedings) pending against an existing organisation that is seeking to amalgamate, and that the newly amalgamated organisation will assume all legal responsibilities and liabilities that arise from an existing organisation.

208. Schedule 4 will amend the Act to empower the FWC with more effective oversight over the amalgamation process in order to reduce the risk of an adverse effect of an amalgamation of existing organisations on the Australian economy, including relevant industrial sectors, the organisations’ members and other relevant persons.

209. The new provisions will require the FWC to consider whether a proposed amalgamation is in the public interest, before fixing an amalgamation day.

210. The new provisions supplement and do not override the existing amalgamation provisions contained in Part 2 of Chapter 3 of the Act.

211. Schedule 4 will amend the Act to:

- empower the FWC to decide whether an amalgamation is in the public interest with reference to the record of the organisations’ and their officials in complying with the law, as well as other relevant matters including the likely impact of the amalgamation on the industry or industries concerned and the Australian economy and any important part of it;
- include a broad list of relevant persons who are allowed to make submissions to the FWC on whether an amalgamation is in the public interest;
- require the FWC to fix an appropriate time and place to give consideration to whether an amalgamation is in the public interest, and to give sufficient notice to the existing organisations and relevant persons; and
- provide that an amalgamation does not take effect if the FWC decides that it is not in the public interest.

Fair Work (Registered Organisations) Act 2009

Item 1 – Section 6

212. Item 1 amends section 6 to add a cross-reference to the definition of the term ‘compliance record event’ in new section 72E.
Item 2 – Section 34

Item 3 – Section 34

213. Items 2 and 3 amend the simplified outline of Chapter 3 in section 34 to take account of the amendments made by this Schedule.

Item 4 – Section 37

Section 37 – Exercise of the FWC’s powers under this Part

214. Item 4 repeals and substitutes existing section 37. New subsection 37(1) provides that the powers of the FWC under Part 2 of Chapter 3, except in relation to the public interest test for amalgamations, are exercisable only by a Presidential Member of the FWC. New subsection 37(2) provides that the public interest test for the amalgamations function of the FWC is exercisable only by a Full Bench of the FWC.

215. One effect of this requirement is that a decision of a Full Bench on the question of the public interest is not subject to merits review. 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.

216. 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.

217. Item 4 does not exclude a right of judicial review to the Federal Court or High Court. Decisions by the Full Bench of the FWC are reviewable by the High Court under section 75(v) of the Constitution or the Federal Court under section 39B of the Judiciary Act 1903.

Item 5 – Subsection 56(1)

218. Item 5 is a consequential amendment to the amendments in this Schedule providing for a public interest test for amalgamations. It amends subsection 56(1) to note the exception to the section 56 objections provision for objections provided for by the public interest test amendments.

Item 6 – At the end of section 67

219. Item 6 is a consequential amendment to the amendments in this Schedule providing for a public interest test for amalgamations. It adds new subsection 67(4) to provide that subsection 67(2) does not authorise the FWC to dispense with the public interest test for amalgamations when making orders in relation to a further ballot if an amalgamation is not approved in a ballot.
Item 7 – Before section 73


Subdivision A - Public interest test for amalgamations

Section 72A – Decision whether amalgamation is in public interest

221. New subsection 72A(1) requires the FWC to decide whether an amalgamation is in the public interest before fixing a day for amalgamation under section 73.

222. New subsection 72A(1) requires the FWC to consider the matters mentioned in new section 72D to decide if an amalgamation is in the public interest.

223. The FWC must decide that an amalgamation is in the public interest for the amalgamation to take effect, as made clear in new section 72F. In practice, this means that a decision of the FWC under new section 72A will determine whether an amalgamation can proceed under section 73.

224. New subsection 72A(2) provides that the FWC can decide whether an amalgamation is in the public interest at any time after an application for amalgamation is lodged with the FWC under sections 43 or 44.

Section 72B – Hearings about public interest

225. New section 72B requires the FWC to take certain steps in relation to hearings about whether an amalgamation is in the public interest.

226. The FWC must first:

- fix a time and place for hearing submissions in relation to the matters mentioned in subsection 72D(1), which relates to organisations’ record of compliance with the law (new paragraph 72B(1)(a));

- promptly notify the existing organisations concerned in the amalgamation of the time and place of the hearing (new paragraph 72B(1)(b)); and

- promptly publish a notice on the FWC website, or in any other way the FWC considers appropriate, of the hearing details (new paragraph 72B(1)(c)).

227. This last requirement is for the benefit of persons who are not expressly notified.

228. If the matter is not concluded under subsection 72D(2), the FWC must:

- fix a time and place for hearing submissions in relation to whether the amalgamation is otherwise in the public interest (new paragraph 72B(2)(a));

- promptly notify the existing organisations concerned in the amalgamation of the time and place of the hearing (new paragraph 72B(2)(b)); and
promptly publish a notice on the FWC website, or in any other way the FWC considers appropriate, of the hearing details (new paragraph 72B(2)(c)).

229. This last requirement is for the benefit of persons who are not expressly notified.

Section 72C – Persons who may make submissions about public interest

230. New section 72C provides for persons who can make submissions in relation to the matters mentioned in subsection 72D(1) concerning the organisations’ record of compliance with the law and whether the amalgamation is otherwise in the public interest. The FWC is required to have regard to those submissions (new subsection 72C(2)).

231. Submissions about the matters relevant to whether an amalgamation is in the public interest can be made by:

- the existing organisations (new paragraph 72C(1)(a));
- other organisations that represent the industrial interests of employers or employees in the industry or industries concerned or that may otherwise be affected by the proposed amalgamation (new paragraph 72C(1)(b));
- bodies, other than organisations, that represent the industrial interests of employers or employees in the industry or industries concerned (new paragraph 72C(1)(c));
- the Commissioner (new paragraph 72C(1)(d));
- the Minister (new paragraph 72C(1)(e));
- a Minister of a referring State or Territory with responsibility for workplace relations (new paragraph 72C(1)(f)); and
- any other person with a ‘sufficient interest’ in the amalgamation (new paragraph 72C(1)(g)).

232. ‘Sufficient interest’ has been judicially 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.

Section 72D – Matters to which the FWC must have regard

233. New section 72D lists the matters the FWC must have regard to in deciding whether an amalgamation is in the public interest. The FWC may also have regard to other matters it considers relevant.

Record of compliance with the law

234. 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)).

235. New subsection 72D(2) provides that if the FWC considers, having regard to the incidence and age of compliance record events for each existing organisation, that the
organisation has a record of not complying with the law, the FWC must decide under new section 72A that an amalgamation is not in the public interest.

**Other matters of public interest**

236. New subsection 72D(3) requires that if the public interest consideration is not concluded under new subsection 72D(2), the FWC must, in deciding whether the amalgamation is otherwise in the public interest, have regard to the impact the amalgamation is likely to have on:

- employees in the industry or industries concerned (new paragraph 72D(3)(a)); and
- employers in the industry or industries concerned (new paragraph 72D(3)(b)).

237. Subsection 72D(4) makes it clear that the FWC may have regard to other matters it considers relevant when determining whether the amalgamation is in the public interest. Other relevant matters could include the likely impact upon the industry or industries concerned or the economy or an important part of it.

**Section 72E – Compliance record events**

238. New section 72E provides for when a compliance record event occurs for an organisation.

239. In relation to compliance record events involving an organisation or members, these are defined by new subsection 72E(1) to be:

- designated findings against the organisation (new paragraph 72E(1)(a)). ‘Designated finding’ is defined by new subsection 9C(1) inserted by item 2 of Schedule 1 to this Bill;
- findings of contempt of court against the organisation relating to an order or injunction made under a designated law (new paragraph 72E(1)(b));
- where the organisation, part of the organisation or a class of members of the organisation organised or engaged in ‘obstructive industrial action’ as defined by new subsection 28G(2) inserted by item 4 of Schedule 2 to this Bill (new paragraph 72E(1)(c)).

240. In relation to compliance record events involving officers, these are defined by new subsection 72E(2) to be:

- designated findings, as defined by new subsection 9C(1) inserted by item 2 of Schedule 1 to the Bill, against a person who was an officer of the organisation at the time of the conduct to which the finding relates (new paragraph 72E(2)(a));
- findings of contempt of court against a person in relation to an order or injunction 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 (new paragraph 72E(2)(b));
• a person’s disqualification from holding office in an organisation while the person was an officer in the organisation (new paragraph 72E(2)(c)).

241. As a consequence of the definition of ‘office’ in section 9 and the definition of ‘officer’ in section 6, references to officers of an organisation include officers of branches of organisations. This means, for example, that 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.

Section 72F – Amalgamation not in public interest does not take effect

242. New subsection 72F(1) provides that the FWC is prohibited from fixing an amalgamation day and the amalgamation does not take effect if the FWC decides it is not in the public interest.

243. New subsection 72F(2) clarifies that if the FWC decides under new section 72A that an amalgamation is not in the public interest at any time before the FWC approves the submission of the amalgamation to ballot, the FWC must not approve a ballot to be held on the question of amalgamation despite any other provision of Part 2 of Chapter 3.

Subdivision B – Amalgamation taking effect

244. Item 7 also inserts the new title ‘Subdivision B – Amalgamation taking effect’ before section 73.

Item 8 – Subsection 73(1)

Item 9 – Subsection 73(2)

245. Items 8 and 9 are consequential amendments to the amendments in this Schedule providing for a public interest test for amalgamations. They amend subsections 73(1) and (2) to reinforce that an amalgamation is contingent on the FWC deciding that it is in the public interest.

Item 10 – Paragraph 73(2)(c)

246. Item 10 repeals and substitutes paragraph 73(2)(c) to provide that the FWC is to be satisfied that there are no proceedings of the kind mentioned in new subsection 73(2A), inserted by item 12, pending against any of the existing organisations concerned in the amalgamation, before fixing an amalgamation day.

Item 11 – At the end of subsection 73(2)

247. Item 11 inserts a new note at the end of subsection 73(2) to clarify that, notwithstanding subsection 73(1), an amalgamation does not take effect if the FWC decides that it is not in the public interest.

Item 12 – After subsection 73(2)

248. Item 12 inserts new subsection 73(2A) to define the kinds of proceedings relevant to new paragraph 73(2)(c). These are:
• criminal proceedings in relation to a contravention of the Act, the FW Act or any other law of the Commonwealth (new subparagraph 73(2A)(a)(i));

• criminal proceedings in relation to a breach of an order made under the Act, the FW Act or any other law of the Commonwealth (new subparagraph 73(2A)(a)(ii)); and

• civil proceedings for a contravention of a provision mentioned in a subparagraph of paragraph (b) of the definition of ‘designated finding’ in new subsection 9C(1) inserted by item 2 of Schedule 1 to this Bill.

249. The amendments made by item 12 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.

250. Existing paragraph 73(2)(c) is not internally consistent because it incorrectly suggests that proceedings for breaches of modern awards or enterprise agreements can be the subject of criminal proceedings. This reflects earlier law under which a breach of an award could amount to a criminal offence, but is no longer the case. However, the contravention of an FWC order may be an offence (s 675 of the FW Act).

251. New subsection 73(2A) will correct this and make clear which pending proceedings are relevant to the FWC’s consideration of whether to fix an amalgamation day. These are:

• criminal proceedings for contravention of the Act, the FW Act or any other Commonwealth law or a breach of an order made under the Act, the FW Act or any other Commonwealth law (new paragraph 73(2A(a)); and

• civil proceedings for contravention of a provision mentioned in subparagraph (b) of the definition of ‘designated finding’ in new subsection 9C(1) inserted by item 2 of Schedule 1 to this Bill.

Item 13 – Application of amendments

252. Item 13 clarifies that the FWC must consider whether an amalgamation is in the public interest for all proposed amalgamations, if, on the commencement day of this item, an amalgamation day has not been fixed under section 73, regardless of whether the application was made under subsections 43 or 44 of the Act before the commencement day of this item.

253. Item 13 also provides that a reference in the Act to a compliance record event includes an event that occurred before this item commences.
SCHEDULE 5 – MINOR AND TECHNICAL AMENDMENTS

254. Schedule 5 makes minor and technical amendments to the Act.

Fair Work (Registered Organisations) Act 2009

Item 1 – Section 6 (the definition of Australian Accounting Standards)

255. This item updates the definition of ‘Australian Accounting Standards’ on the basis that the accounting bodies no longer have responsibility for setting accounting standards.

256. The ability for the Regulations to modify the standards is not new and is adapted from the previous provision and is consistent with section 253.

Item 2 – Section 6 (the definition of Australian Auditing Standards)

257. This item updates the definition of ‘Australian Auditing Standards’ on the basis that the accounting bodies no longer have responsibility for setting auditing standards.

258. The ability for the Regulations to modify the standards is not new and is adapted from the previous provision and consistent with section 253.

Item 3 – Section 6 (paragraph (d) of the definition of authorised official)

259. This item updates paragraph (d) of the definition of ‘authorised official’ to refer to the Australian Building and Construction Commissioner. This amendment reflects the passage of the Building and Construction Industry (Improving Productivity) Act 2016.

Item 4 – Subdivision BB of Division 4 of Part 2 of Chapter 5 (heading)

260. This item repeals the redundant heading ‘Subdivision BB of Division 4 of Part 2 of Chapter 5’.

Item 5 – Subsection 329FA(1) (note)

261. This item replaces the note to subsection 329FA(1) to update the reference to the Legislative Instruments Act 2003 to the Legislation Act 2003 following the passage of the Acts and Instruments (Framework Reform) Act 2015.

Item 6 – Subparagraph 337A(1)(b)(iii)


Item 7 – Subparagraph 337A(1)(b)(iiia)

263. This item omits the reference to ‘subsection 15(2) of the Building and Construction Industry (Improving Productivity) Act 2016’, in relation to a Deputy Australian Building and Construction Commissioner, following the passage of the Building and Construction Industry (Improving Productivity) Act 2016'.
Item 8 – Paragraph 337BB(4)(d)

264. This item updates paragraph 337BB(4)(d) in relation to persons who may apply for a civil remedy for protected disclosure reprisal action to refer to the Australian Building and Construction Commissioner. This amendment reflects the passage of the Building and Construction Industry (Improving Productivity) Act 2016.

Item 9 – Subsection 337C(1)

265. This item corrects the reference to subsection 337A(4) in subsection 337C(1) with a reference to subsection 337A(3), being the provision by which disclosures to lawyers qualify for protection under the protected disclosure provisions.

Item 10 – Paragraph 343A(2)(b)

Item 11 – Paragraph 343A(3)(aa)

266. These amendments remove the references to section 154C, relating to approval of financial training, in the lists of the General Manager’s delegable functions, following the repeal of section 154C by the Amendment Act.

Item 12 – Subsection 343B(2A)

267. This amendment adds the Commissioner’s functions or powers in relation to financial training to those functions or powers delegable to a senior executive employee or acting senior executive employee who is a member of the staff assisting the Commissioner.