Submissions of the CPSU (SPSF) to the Senate Education and Employment Committee inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions]

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I. INTRODUCTION

"Those who would destroy or further limit the rights of organised labour – those who cripple collective bargaining or prevent organisation of the unorganised – do a disservice to democracy" John F. Kennedy[1]

1. Trade Unions are democratic organisations that play a key role in creating and maintaining democracy. The free association of workers serves as a vehicle for the exercise of many other civil, cultural, economic, political and social rights. The *sine qua non* for the democratic function of trade unions is the free association of workers.

2. Barbara Fick has described the democratic role of trade unions as follows:
   "[They] provide a basis for citizens to compete with, and challenge the power of, both the political elite (as institutionalised in the governing structure of the State) and the economic elite (as institutionalised through the market structures of the State). They provide a voice for citizens, act as a watchdog to make elites accountable, model democratic behaviours, act as a mediator between the elites and the citizenry in finding solutions to social, economic and political problems, and assist reconciling conflicting interests between elites and citizens" 2

3. Australian trade unions, as stable, well-organized institutions with reasonable resources at their disposal, play a significant role in our democracy. The 1.5 million members of trade unions form one of the most significant civil society institutions. For democracy to flourish, civil society institutions, including unions, must have an ability to function without unnecessary interventions from the State or other actors.

4. The importance of the rights of workers to freely associate in Australia has been recognised by the ratification of international human rights and labour conventions that protect that freedom:
   - Article 2 of the *International Covenant on Civil and Political Rights (ICCPR)*: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."
   - Article 8(1)(a) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR):
     "The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others"
   - Article 2, 3 and 4 of the *Freedom of Association and Protection of the Right to Organise Convention, 1948* (No. 87) respectively state:

[1] Quoted by Peter Kihss, *Labor Called the Key to Nations Race with Communism,* New York Times September 5, 1960 a t A 1
[2] Barbara Fick, *Not Just Collective Bargaining: The Role of Trade Unions in Creating and Maintaining A Democratic Society*, The Journal of Labor and Society Vol 12 at pp249 to 264 at p 250.

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

"Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes."

"The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."

- Article 2 of the *Right to Organise and Collective Bargaining Convention, 1949* (No. 98)
  "Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration."

5. The 2019 iteration of the Bill directly breaches the association rights guaranteed in these conventions. The Bill greatly increases the capacity of the Minister, the Registered Organisations Commission, employers (and their proxies) to make interventions into the internal affairs of union of the most severe kind. It expands the capacity to disqualify trade union leaders from office, greatly expands the capacity to cancel registration of unions, increases the power of the State to appoint an administrator and allows State agencies and employers to subvert the will of members to amalgamate unions.

6. It is noteworthy that legislation of this character is unknown in any other OECD Country. The lack of statutory equivalents in similar Countries should alarm the Committee.

7. It is the contention of the CPSU (SPSF) that the form of this Bill crosses a line of intervention in the democratic rights of trade unionists that should not be crossed.

II. GENERAL PROBLEMS WITH THE BILL

A. Standing to bring proceedings under the Bill: "sufficient interest" is a low threshold

9. Before a person can commence any of the proceedings created by this Bill it is necessary that they have standing to sue. This simply means a person must be considered by the Federal Court (or the Fair Work Commission) to be an appropriate party to instigate, or intervene in, the proceedings in question.

10. One class of persons who can bring the various proceedings in the Bill is someone with a "sufficient interest":
    10..1. For seeking a disqualification order for union official under the proposed s222;
    10..2. For seeking cancellation of registration or other of the "alternative orders" under proposed s28;
    10..3. To seek a declaration that an organisation is "dysfunctional" under proposed s323 a person must have "sufficient interests in the organisation" (such a person need not be a member of the organisation);
    10..4. To make submissions about the public interest of an amalgamation the person must have a "sufficient interest in the amalgamation" under s72C(1)(g).

11. In *Brown v Health Services Union*[3]*, the* phrase "sufficient interest" was considered in the context of standing to bring an application to reconstitute a branch, or part of an organisation, under s323 of the *Fair Work (Registered Organisations) Act 2009*. Flick J expressed the view that there was at least an argument the Minister had a sufficient interest to commence the proceeding[4]. In the end, Flick J did not have to decide the issue because the application by the Minister was withdrawn.

12. An analysis of the sufficiency of an interest to bring a proceeding has been considered by the High Court, particularly in matters of public law.
    12..1. Mason J gave some consideration of the nature of the interest in *Robinson v. Western Australia* [5] where he remarked:

> "...the plaintiff must be able to show that he will derive some benefit or advantage over and above that to be derived by the ordinary citizen if the litigation ends in his favour. The cases are definitely various and so much depends in a given case on the nature of the relief sought, for what is a sufficient interest in one case may be less than a sufficient interest in another."

[3] [2012] FCA 644
[4] See id. Paragraphs [50] and [51]
[5] (1977) 138 CLR 283 at 295

12..2. Gibbs J elaborated on this in *ACF v. Commonwealth*[6]

> "..an interest does not mean a mere intellectual or emotional concern, A person is not interested within a meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle, or winning a contest, if his action succeeds or to suffer some disadvantage other than a sense of grievance or a debt of costs if his action fails. A belief however strongly felt, that the law generally…should be observed or that conduct of a particular kind should be prevented, does not suffice…"

13. The word "sufficient" is opaque and has no clear meaning. It would require an interest that is more than an "emotional concern" and amounting to a "advantage or disadvantage beyond the ordinary citizen". Any employer in an industry in which a union operates could have a "sufficient interest" even though they may not have been directly affected by the conduct of an organisation. Also, customers of enterprises effected by actions of a union could have a "sufficient interest."

14. The great expansion in the class of persons who can bring proceedings under the Bill reinforce an argument that it breaches our international obligations relating to free association. Particularly the prescription in *Article 2 of the Right to Organise and Collective Bargaining Convention, 1949* (No. 98) that a union be "protected" from interference in their functioning by employers, employer associations or their proxies.

[6] [1980] 146CLR 493 at 530 to 531

B. "Designated Finding" - some of the grounds for liability are low level

15. Some of the activity which qualifies unions or their officials for liability under the Bill relates to a "designated finding" in each Schedule.

16. "Designated finding" is defined in s9C (1) as:
    16..1. "in any criminal proceeding a person has committed an offence under a designated law';
    16..2. in any civil proceedings a person has contravened or have been involved in a contravention of:
        16..2.1. A civil penalty provision of the *Fair Work (Registered Organisations) Act 2009*[7];
        16..2.2. A civil remedy provision of the *Fair Work Act 2009*;
        16..2.3. A civil remedy provision of the *Building and Construction Industry (Improving Productivity) Act 2016*[8] :
        16..2.4. A WHS civil penalty under the *Workplace Health and Safety Act 2011*[9];
        16..2.5. A provision in a State or Territory occupational health and safety law.

17. A "designated law" is defined in s9C (2) as:
    17..1. The RO Act;
    17..2. The Fair Work Act;
    17..3. The BCCI Act;
    17..4. The WHS Act;
    17..5. Each State and Federal OHS law.

18. A designated finding is relevant to liability under the various provisions of the Bill as follows:
    18..1. It is a ground for a finding for disqualification from office under s223(1)(a);
    18..2. if more than one designated finding is made against any organisation while the person is an officer of the organisation, it is a separate ground for disqualification under s223(3)(a)(i);
    18..3. It is a ground for cancellation of registration order if designated findings have been made against a substantial number of members (s28E);
    18..4. One of the matters the Commission must have regard in a determination of public interest in an amalgamation proceeding is

[7] From here on "The RO Act"
[8] From here on "the "BCCI Act"
[9] From here on the "WHS Act"

"compliance record event" which is a designated finding against a union (s72E(1)(a) or the officers of the union (s72E(2)(a);

19. Given the serious consequences it is deeply troubling that some of the matters which are "designated findings" relate to civil penalty provisions for what can be described as "low level" conduct:
    - A failure to provide the AEC with a declaration that the membership register is maintained in accordance with the Fair Work Act;
    - A failure to provide a statement of membership on request of a member in 28 days;
    - Failure to respond to a post-election report within 30 days;
    - Late filing of financial or other records;
    - Officer changing office and is unable to complete the required financial training within six months;
    - The contravention of an award or agreement;
    - Contravention of a bargaining order;
    - Contravention of an order to cease taking industrial action under s418 of the RO Act;
    - Failure to return a right of entry permit on expiry;
    - Failure to give 24 hours' notice of exercise of a State or Territory WHS right of entry.

20. A number of these bureaucratic or procedural civil penalty provisions can be cobbled together to form a pattern of "unlawfulness" to support a case for an order for disqualification, deregistration, administration or to deny an amalgamation.

21. The combination of a low threshold for standing to bring applications, together with the relatively low-level matters as grounds invites speculative and strategic applications by employers, and employer associations.

22. The prospect of strategic lawfare against unions or their officials by employers, brought for reasons other than to enforce compliance, is a compelling reason to recommend this Bill be withdrawn.

III. THE CONTENT OF THE SCHEDULES

A. SCHEDULE 1 – DISQUALIFICATION FROM OFFICE

(a) THE EXISTING DISQUALIFICATION POWERS

23. The current law provides for disqualification in Chapter 7, Part 4 of *Fair Work (Registered Organisations) Act 2009*[10]. The operative provision is s215 and s307A.
24. It provides that a person who has been found guilty of a "prescribed offence" is ineligible to hold or continue to hold office in an organisation. Only the Registered Organisations Commissioner, an organisation or a member can make the application.

(b) THE PROPOSED NEW DISQUALIFICATION REGIME

25. The disqualification power within the RO Act would be greatly expanded if this Bill becomes law.
26. The persons who can bring proceedings to seek a disqualification have been expanded beyond the Registered Organisations Commission, to include the Minister and "any person with a sufficient interest" [s222(1)]
27. The automatic disqualification process is expanded to include an offence under a law of the Commonwealth, a State or Territory, or another Country, punishable by imprisonment for life or a period of five years or more (new s212(a))
28. The Bill also inserts a new test to be applied by the Court [s222(2)] that it is "satisfied that **one** of the grounds for disqualification is made out" and "does not consider that it would unjust to disqualify a person having regard to the nature of matters constituting the grounds, circumstances of the officer's involvement and any other matters that Court considers relevant"

Grounds of disqualification

29. The grounds which can form the basis of a disqualification are as follows:
    - 29..1. person has had a "designated finding" that a person has committed an offence against a designated law or contravened or been involved in a contravention of a civil penalty provision of a designated law [s223(1)]
    - 29..2. A person has been found guilty of contempt of court performing functions in relation to any organisation [s223) (2)]
    - 29..3. Where the organisation of which the person is an officer engages in conduct in contempt of court under a designated law and has failed to take reasonable steps to prevent that conduct[s223(3)]
    - 29..4. Breach of the director's duties provisions of the *Corporations Law 2001* [s223(4)]
    - 29..5. An officer is not a "fit and proper person" "having regard to" [s223(5)]:

[10] from here on the "**RO Act**"

29..5.1. Refusal, revocation, or suspension of rights of entry or WHS entry permit;

29..5.2. Findings in a criminal or civil proceeding whether or not a conviction is recorded;

29..5.3. A finding in criminal and civil proceedings under a Commonwealth that is punishable by imprisonment for two or more years.

(c) CRITIQUE OF THE DISQUALIFICATION POWER

(ii) Conceptual dissonance – law enforcement in the hands of private parties

30. The sheer breadth of the matters which can be considered as grounds for disqualification is itself problematic. They range from the serious to the trivial[11]. The class of persons who can make these applications is too broad[12].
31. Under this Bill conduct that has led to an order for a civil penalty can also be grounds for disqualification. This is a perverse double penalty, particularly in circumstances where the misconduct is relatively trivial.
32. There is a conceptional dissonance in the idea that employers, employer organisations or other "interested" parties can bring proceedings to remove an officer to prevent further breaches of the designated law. A power to penalise an officer by removing them from office is usually left in the hands of the regulators.
33. For example, the capacity to bring proceedings to disqualify a company director under s206E of the *Corporations Law 2001* is solely limited to ASIC.
34. In this context, it is appropriate that persons internal to the organisation (namely the union itself or a member of the union) also have a right to commence disqualification proceedings. A punitive power to disqualify an officer should not be extended to employers, employer organisations or customers.

(iii) The proposed expansion of disqualification power offends ILO conventions

35. Australia ratified ILO Convention concerning *Freedom of Association and Protection of the Right to Organise* (C87) in 1973. The expanded disqualification provisions of the Bill would offend the C87. The jurisprudence of the Freedom of Association Committee of the ILO [13]makes this clear.

[11] See the discussion on "Designated Finding" at paragraphs 15 to 22
[12] See the discussion about "sufficient interest" above in paragraphs 9 to 14.
[13] from here on referred to as the "FOAC"

36. The FOAC has determined that: "freedom of association implies the right of workers and employers to elect their representatives in full freedom"[14]; and "The right of worker's organisations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention that might impair the exercise of that right…"[15]

37. The FOAC has considered the effect that a disqualification regime might have on the free association of workers:
    37..1. " Conviction on account of offences the nature of which is not such as to call into question the integrity of the persons concerned and is not prejudicial to the exercise of trade union functions shall not constitute grounds for disqualification from holding trade union office"[16]
    37..2. "Ineligibility for trade union office based on any crime involving "fraud, dishonesty or extortion" could run counter to the right to elect representatives in full freedom since "dishonesty" could cover a wide range of conduct not necessarily making it inappropriate for persons convicted of this crime to hold a position of trust such as trade union office"[17]

38. A review of the FOAC jurisprudence makes it clear that the lengthy list of grounds that support an application for disqualification are not consistent with the principles of free association and unduly restrict the right of trade unionists to elect their representatives in full freedom in manner inconsistent with the ILO conventions.

39. The extension of the capacity of employers and employer organisations to bring disqualification proceedings exacerbates the conflict of this Bill with the ILO Conventions. It opens the possibility of tactical or strategic applications and breaches our obligations under the Right *to Organise and Collective Bargaining Convention, 1949 (No. 98)* that a union be "protected" from interference in their functioning by the State, employers, employer associations or their proxies.

[14] *Digest of the decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edition) (2006, International Labour Organisation, Geneva) at p83 paragraph 388
[15] *Digest* at paragraph 391
[16] *Ibid* at p 89 at p422
[17] *Ibid* at p89 at p414

B. SCHEDULE 2 – CANCELLATION OF REGISTRATION AND ALTERNATIVE ORDERS

(a) THE EXISTING DEREGISTRATION POWERS

40. The power to cancel the registration of unions currently exists under 'Chapter 2, Part 3 – Cancellation of Registration' of the *RO Act*. The operative provision is section 28.

41. Under the current s28 "an organisation, a person interested, or the Minister" may apply to the Federal Court for an order cancelling the registration of an organisation on the grounds that the organisation or a substantial number of members:
    - 41..1. continuously breached a Fair Work Commission (FWC) order; or
    - 41..2. engaged in obstructive or unsafe industrial action (other than protected action) that interferes with the activities of a federal system employer or any public service or authority of a Commonwealth State or Territory.
    - 41..3. failed to comply with an injunction, general protections order, interim order or an order in relation to conduct during an amalgamation process.

42. Under the current s28A, the Registered Organisations Commissioner may also apply for a similar order but only on the ground that accounting and auditing provisions of the *RO Act* have been breached. In each case, if the Federal Court finds it appropriate to do so, it may instead make an order that forcibly alters the union's eligibility rules to exclude particular members or a whole class of members.

(b) NEW DEREGISTRATION POWERS

43. The Bill essentially redrafts the existing provisions in s28 of the *RO Act*. The persons with standing to initiate an application would be Registered Organisations Commissioner, the Minister, or a person with "sufficient interest". Those persons may apply to the Federal court for an order cancelling the registration of a union or to seek what are referred to as "alternative orders"

44. A person can make an application for cancellation of registration, alternative orders or both at the same time. The 'alternative' orders can be applied for directly as well as, or instead of, an application for cancellation of registration.

S28J cancellation of registrations

45. The operative provisions are s28J and s28L.

45..1. 28J provides that, if the application is made for cancellation of an organisation's registration under new s 28, the Court **must** cancel the registration if:

45..1.1. the Court finds **a** ground in the application is established; and the organisation concerned does not satisfy the Court that cancelling its registration would be unjust, having regard to:

45..1.2. the nature of the matters constituting the ground (s 28J(1)(b)(i));

45..1.3. any action taken by or against the organisation, members or officers in relation to those matters (s 28J(1)(b)(ii));

45..1.4. the best interests of the members of the organisation as a whole (s 28J(1)(b)(iii)); and

45..1.5. any other matters the Court considers relevant (s 28J(1)(b)(iv)).

Section 28L Alternative orders

46. s 28L in Schedule 2 provides that the Court may make alternative orders (other than cancellation of registration) if:

46..1. the Court finds a ground in application, but the organisation satisfies the Court that it would be unjust to cancel registration and before:

46..1.1. making an order to disqualify certain officers;

46..1.2. making an order for exclusion of certain members;

46..1.3. or exercising the power to make alternative orders in relation to only part of an organisation or some of its members;

46..2. the Court is satisfied the ground set out in the application is established wholly or mainly because of the conduct of officers, or members of a particular part of the organisation, or a particular class of members of the organisation and it would not be unjust to make the order or exercise the power in that way, having regard to:

46..2.1. the circumstances and nature of the officers' or members' involvement in the matters constituting the ground;

46..2.2. any other matters the Court considers relevant.

46..3. before exercising the power to suspend the rights and privileges of members in relation to the whole of an organisation or all members, the Court is satisfied that it would not be unjust to do so having regard to:

46..3.1. the nature of the matters constituting the ground (s 28L(3)(a)); and

46..3.2. any other matters the Court considers relevant (s 28L(3)(b)).

(i) Disqualification of a group of officers [s28M]

47. If a ground is established wholly or mainly because of the conduct of officers of the organisation, or a particular part of the organisation, the Court may make an order disqualifying the officers from holding office in an organisation (or branch) for a period the Court considers appropriate.

(ii) Exclusion of certain members by excising an eligibility rule [s28N]

48. If a ground is established wholly or mainly because of the conduct of members (or a particular part, or class, of members of the organisation,) the Court may make an order determining alterations of the eligibility rules of the organisation so as to exclude from eligibility for membership persons belonging to that part of the organisation or class of members.

(iii) Suspension of rights and privileges under an Agreement etc [s28P]

49. The Court also has power to suspend, to the extent specified in the order, any of 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 RO Act, the Fair Work Act or any other Act, under modern awards, or orders made under the RO Act, the FW Act or any other Act or under enterprise agreements. This power includes a right to give directions as to the exercise of any rights, privileges or capacities that have been suspended.

(iv) Restriction on the use of funds [s28P]

50. The Court also has power to make provision restricting the use of the funds or property of the organisation or a part of the organisation, and for the control of the funds or property for the purpose of ensuring observance of the restrictions.

Grounds for cancellation or alternative remedies

51. The following grounds apply to both applications for cancellation of registration and for alternative orders.

(i) Grounds relating to the "affairs or the organisation"

51..1. The 'affairs of the organisation', or a part of the organisation, is defined non-exhaustively;

51..1.1. the internal management, governance and proceedings of the organisation or part;

51..1.2. its business model, including the way it is structured and how it operates to achieve its aims; and

51..1.3. its transactions and dealings with other persons

51..2. having regard to both acts and omissions (s 28C (3)-(4)

51..3. officers of the organisation, or a 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 (s 28C(1)(a)); or

51..4. the affairs of the organisation, or a part of the organisation, have been or are being conducted in a manner that is:

51..4.1. oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or a class of members (s 28C(1)(b)(i)); or

51..4.2. contrary to the interests of the members of the organisation or part as a whole (s 28C(1)(b)(ii));

51..5. the affairs of the organisation, or a 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 (s 28C(1)(c)) – having regard to the incidence and age of occurrences of non-compliance (s 28C(2)).

(ii) Serious offence committed by organisation [s28D]

52. News 28D provides a ground 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 on conviction by a penalty for a body corporate of (or equivalent to) at least 1,500 penalty units ($315,000).

(iii)Multiple findings against members[s28E]

53. 'Designated findings' have been made against a substantial number of the members of the organisation, a part of the organisation, or a class of members.

(iv)Non-compliance with orders or injunctions [s28F]

54. The organisation has failed to comply with an order or injunction made under a 'designated law'; or a substantial number of the members of the organisation, a part of the organisation, or a class of members have failed to comply with an order or injunction made under a 'designated law'.

(v) Obstructive industrial action [s28G]

55. The organisation, or a substantial number of the members of the organisation, or part of the organisation, or a class of members have organised or engaged in industrial action (other than protected action) that: prevented, hindered or interfered with:

55..1. the activities of a federal system employer; or the provision of any public service by the Commonwealth or a State or Territory or an authority of the Commonwealth or a State or Territory; or had, or is having or is likely to have, a substantial adverse effect on the safety, health or welfare of the community or a part of the community.

(c)CRITIQUE OF THE PROPOSED DEREGISTRATION PROVISIONS

(i) General critique

56. The deregistration of a trade union is the "nuclear option". It is imperative the bases for a deregistration order are precisely laid out in the proposed law. The fact that the Court can consider 'any other matters the Court considers relevant' is too ambiguous given the consequences of the order.

57. The Bill would mean that any breach of an industrial or criminal law by a member or its officers could form the basis of an application. The deregistration provisions allow an employer to seek relief for a series of breaches that in themselves may be

trivial. Further, under the terms of the "obstructive industrial action" ground, **one act** of unprotected industrial action is, of itself, a ground for deregistration.

58. Furthermore, the conduct of a few officers can lead to deregistration of the union. This is illogical. To save the union from corrupt officials by deregistering the union seems perverse.

59. The proposed s28P provides the Court with the ability to make an alternative order to suspend the rights and privileges of union members under modern awards or enterprise agreements. It is hard to contemplate a set of circumstances where a Court would choose to suspend the rights of union members to their terms and conditions in this way.

(ii) Conceptual dissonance and standing to bring these proceedings

60. The ability of the Minister ,the regulator, or a person with "sufficient interest" to bring a proceeding on a series of unrelated breaches encourages a "burger with the lot" approach where an employer can set out a number of grounds and seek a series of alternative remedies in the hope that one will be upheld by the Federal Court.
61. The bewildering amount of "alternative remedies" (which can be sought in their own right) will encourage applicants to seek a series of remedies in the hope that one or more will be successful. This will not lead to the efficient administration of justice.
62. These provisions suffer from the same conceptual dissonance suffered by the disqualification grounds in that private individuals can commence proceedings which are really penalty proceedings designed to enforce the law.
63. True it is the applicants with standing to bring cancellation proceedings under the current law includes "a person interested". However, given the greatly expanded grounds, and the broader range of alternative orders, it is not appropriate than an employer has the capacity to make an application.
64. There is no equivalent standing for a person with a "sufficient interest" in the Corporations Law. The parties who can bring a winding up application under s459P are a creditor with a valid debt, the Company itself, a director, a liquidator, ASIC or APRA. This is a much narrower class of applicants who have a direct interest in the proceeding.

(iii) The expansion of the grounds for deregistration offends ILO Convention 87 and 98

65. The proposed expansion of the grounds for deregistration offend Australia's international obligations and more particularly the terms of C87. The FOAC have found the following with respect to international analogues to these provisions:
    65..1. Deregistration should be a last resort process: "In view of the serious consequences which dissolution of a union involves for the occupational representation of workers, the Committee has considered that it would be preferable…that such action were taken only as a last resort, and after

exhausting all other possibilities with less serious effects for the organisation as a whole."[18]

65..2. The members of a trade union should not be held responsible for the illegal activities of some leaders or members: "to deprive thousands of workers of their trade union organisation because of a judgement that illegal activities have been carried out by some leaders and members constitutes a clear violation of the principles of freedom of association"[19]

65..3. It is preferable that corrupt or criminal behaviour of officials is prosecuted against individuals rather than to use deregistration as a remedy: "If it was found that certain members of a trade union had committed excesses going beyond the limits of normal trade union activity, they could have been prosecuted under specific legal provisions and in accordance with normal judicial procedure without involving the suspension and subsequent dissolution of an entire trade union"[20]"

66. A deregistration process which can be brought by a broad class of persons for a series of grounds which may include trivial matters is offensive to our obligations under C87 and C98 because it allows employers and the State to grossly interfere with the activities of trade unions and prevents the free association of workers in a union of their choosing

C. SCHEDULE 3 – ADMINISTRATION OF DYSFUNCTIONAL ORGANISATIONS

(a) THE EXISTING ADMINISTRATION REGIME

67. Under s323 of the *RO Act* the Federal Court may order the reconstitution of a branch (amongst other things) on the application of an organisation, a member of an organisation or any person having "a sufficient interest" in relation to an organisation.

68.. Those persons can apply to the Federal Court for the following orders to approve a scheme if an office or position within an organisation is vacant and there are no effective means under the rules to fill the vacancy. The Court can make an order to approve a scheme:

68..1. for the reconstitution of the branch; or

68..2. to enable the branch to function effectively; or

68..3. for the filling of the office or position.

[18] *Digest* at p137 paragraph 678
[19] ibid at p140 paragraph 692
[20] id at paragraph 693

(b) PROPOSED ADMINISTRATION REGIME

69. Schedule 3 of the Bill would repeal section 323 and replace it with a new section 323. The proposed changes keep most of the original text but expand the persons with standing to initiate the application to:
    - the Commissioner;
    - the Minister;
    - the organisation;
    - a member of the organisation;
    - any other person having a sufficient interest in the organisation.

70. The categories of declarations in subsection 323(1) of the Act are expanded. The Federal Court's power to approve a scheme consequent to the making of a declaration are amended to expressly permit the appointment of an administrator under a scheme and set out the functions etc of an administrator.

71. The proposed s 323(2) provides the Federal Court may make a declaration if it is satisfied that specified circumstances exist in relation to the organisation. The proposed s323A sets out orders that the Federal Court may make if a declaration is made under s 323 in relation to an organisation or part of an organisation.

Available Orders

72. Proposed 323A (1) provides that, if the Court makes a declaration under s 323, the Court may, by order, approve a scheme for the taking of action by the organisation or an officer or officers of the organisation or part of the organisation to resolve the circumstances in the declaration.

73. The Court must not make such an order unless satisfied that the order would not do substantial injustice to the organisation or any member.

74. The scheme may include: the appointment of an administrator for the organisation or part of it; for 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 (s 323A (2)). Elections for office held under the scheme must be conducted by the AEC (s 323A (5) and 323C).

Grounds for the orders

(i) Section 323(3)(a): ceased to exist of function effectively

75. The Court may make a declaration that an organisation, or a part of an organisation, has ceased to exist or function effectively and there are no effective means under the rules of the organisation, or a part of the organisation, by which the organisation or part can be reconstituted or enabled to function effectively.

76. Section 323(4) provides a new non-exhaustive list of circumstances in which 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 part have:
    - on multiple occasions, contravened designated laws;
    - misappropriated funds of the organisation or part; or
    - otherwise repeatedly failed to fulfil their duties as officers of the organisation or part of the organisation.

(ii) Section 323(3)(b): Officers engaged in financial misconduct

77. The Court may make a declaration that one or more officers of an organisation or a part of an organisation have engaged in financial misconduct in relation to carrying out their functions or in relation to the organisation or a part of the organisation.

78. Section 6 provides a new, non-exhaustive definition of financial misconduct as:
    78..1. a contravention of a provision of Division 2 of Part 2 of Chapter 9 (general duties in relation to the financial management of organisations);
    78..2. misuse of funds;
    78..3. false accounting; and
    78..4. failure to fulfil duties in relation to financial reporting.

(iii) Section 323(3) (c): Officers acted in own interests

79. The Court may make a declaration that a substantial number of the officers of an organisation, or a part of an organisation have, in affairs of the organisation or part, acted in their own interests rather than in the interests of the members of the organisation or part as a whole.

(iv)Section 323(3)(d): Affairs conducted oppressive, prejudicial or discriminatory manner

80. The Court may make a declaration that the affairs of an organisation or a part of an organisation are being conducted in a manner that is:
    80..1. oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or a class of members;
    80..2. contrary to the interests of the members of the organisation or part as a whole.

(v) Section 323(3)(e): Office or position is vacant

81. The Court may make a declaration that an office or position in an organisation or a part of an organisation is vacant and there is no effective means under the rules of the organisation or part to fill the office or position.

(c) CRITIQUE OF THE PROPOSED ADMINISTRATION OF DYSFUNCTIONAL ORGANISATION PROVISIONS

(i) General critique: standing to bring applications and the nature of administration

82. Section 323 in the *RO Act* is a machinery provision.

83. It is designed to address situations where a union's rules are unable to resolve a problem such as vacant sub-branches, or vacant officer positions that no longer function or are inactive. The proposed amendments conflate governance issues and mismanagement under the heading 'Dysfunctional Organisations etc'.

84. Previously only the union, a member, or person with a sufficient interest could apply for an order under this section. Under the proposed changes the Commissioner and the Minister can apply to the Court for an order. This potentially undermines the democratic control of unions. If, for example, one or more officers where engaged in financial misconduct it could lead to the Minister making an application for an Administrator to take control of the union. The misconduct of some officers can lead orders the take the control of the union out of the hands of its members.

85. One of the grounds for placing a union in administration is "the contravention of designated laws[21]." This shows conceptual confusion. The appointment of an administrator in industrial or company law is not a punitive act. The role of an administrator in company law is to work out whether the entity can continue doing business or not. The provisions of this Bill dealing with administration do not fit that model.

(ii) The administration provisions breach ILO conventions

86. It is a general principle of Freedom of Association as elaborated in C87 that "Freedom of Association implies the right of workers to elect their representatives in full freedom and organise their administration and activities without interference from public authorities."[22]

87. Schedule 3 expands the persons who may apply to appoint an administrator and greatly expands the circumstances in which an administrator may be appointed. It transforms a practical provision to deal with a gap in a union's rules in the *RO Act* into punitive provisions designed to punish officials for bad behaviour. It inhibits the capacity of unions to organise their activities without interference from public authorities in a manner offensive to C87.

[21] S323(4)
[22] *Digest* at p95 paragraph 454

D. SCHEDULE 4 – PUBLIC INTEREST TEST FOR AMALGAMATIONS

(a) THE EXISTING LAW

88. Chapter 3 of the *RO Act* contains a regime for amalgamations that is mostly concerned with administrative procedures overseen by the Fair Work Commission. There is currently no public interest test that applies to amalgamations under the provisions of that Chapter.

89. The current amalgamation provisions are designed to ensure any amalgamation represents the will of the members and that procedural fairness is accorded to members of the unions who propose to amalgamate.

90. The only persons with an "as of right" power to make submissions in amalgamation hearings are "the applicants for amalgamation" and "any other person with leave of the FWC in person and only in relation to a prescribed matter"[23] It follows the capacity for "outsiders" to interfere with the pre-amalgamation processes is strictly limited.

91. The provisions of the current Chapter 3 make clear that amalgamations are a matter for the organisations wishing to amalgamate and their members. This is not the case under the new Schedule 4 which would introduce a new public interest test for amalgamations through a new Subdivision A.

92. Part 2 of Chapter 3 of the Act provides the procedure for the amalgamation of two or more organisations. Currently, the FWC need only be satisfied of matters contained in subsection 73(2) of the Act before fixing the day on which the amalgamation is to take effect (amalgamation day).

(b) THE PROPOSED AMALGAMATION PROCESS

93. The new s37(1) provides that powers under this Part are exercisable only by a Presidential Member of the FWC. s 37(2) provides that the public interest test for amalgamations function of the FWC is exercisable only by a Full Bench.

Public interest test

94. The Full Bench must decide whether an amalgamation is in the public interest before fixing the amalgamation day (s 72A (1)). It can make this decision at any time after an application for amalgamation is lodged (s 72A (2)).

95. An amalgamation does not take effect if the FWC decides that it is not in **the public interest** (s 72F).

[23] see s54 of the RO Act

96. New s 72B requires the FWC to take steps in relation to hearings about whether an amalgamation is in the public interest. The process for deciding whether an amalgamation is in the public interest has two stages.

97. New s72D 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.

First stage – 'Record of complying with the law'

98. The FWC must first:
    - 98..1. fix a time and place for hearing submissions in relation to the matters in s 72D (1), which relates to organisations' record of compliance with the law (s 72B(1)(a));
    - 98..2. promptly notify the existing organisations concerned in the amalgamation of the time and place of the hearing (s 72B(1)(b)); and
    - 98..3. promptly publish a notice on the FWC website, or in any other way the FWC considers appropriate, of the hearing details (s 72B(1)(c)) (for the benefit of persons who are not expressly notified (e.g. employer organisations).

99. 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 s 72E that have occurred for each of the existing organisations (s 72D (1)).

100. New s 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 s 72A that an amalgamation is not in the public interest.

'Compliance record events'

101. New s 72E provides for when a compliance record event occurs for an organisation.

(i) compliance record events involving organisation or members

102. In relation to compliance record events involving an organisation or members, these are defined by new s 72E (1) to be:
    - 102..1. 'Designated findings' or 'wider criminal findings' against the organisation (s 72E(1)(a));
    - 102..2. Findings of contempt of court against the organisation relating to an order or injunction (s 72E(1)(b)); or
    - 102..3. 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 s 28H (2) even if there has been no judicial finding of such (s 72E(1)(c)).

(ii) compliance record events involving officers

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

103..1. 'designated findings' against a person who was an officer of the organisation at the time of the conduct to which the finding relates (s 72E(2)(a));

103..2. wider criminal findings against a person 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 (s 72E(2)(b));

103..3. 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 (s 72E(2)(c));

103..4. a person's disqualification from holding office in an organisation while the person was an officer in the organisation (s 72E(2)(d)).

103..5. 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.

Second stage – Otherwise in the public interest

104. If the matter is not concluded under s 72D (2),

104..1. the FWC must fix a time and place for hearing submissions in relation to whether the amalgamation is otherwise in the public interest (s 72B(2)(a));

104..2. promptly notify the existing organisations concerned in the amalgamation of the time and place of the hearing (s 72B(2)(b)); and

104..3. promptly publish a notice on the FWC website, or in any other way the FWC considers appropriate, of the hearing details (s 72B(2)(c)) (for the benefit of persons who are not expressly notified, e.g. employer organisations).

Impact of the amalgamation on the employers/employees in the industry

105. 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:

105..1. employees in the industry or industries concerned (s 72D(3)(c)); and

105..2. employers in the industry or industries concerned (s 72D(3)(d)).

Standing to make submissions on public interest

106. 72C provides for persons who can make submissions in relation to 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 (s 72C (2)).

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

107..1. the existing organisations (s 72C(1)(a));

107..2. 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 (s 72C(1)(b));

107..3. bodies, other than organisations, that represent the industrial interests of employers or employees in the industry or industries concerned (s 72C(1)(c)) (i.e. unregistered organisations such as AMMA);

107..4. the RO Commissioner (s 72C(1)(d));

107..5. the Minister (s 72C(1)(e));

107..6. a Minister of a referring State or Territory with responsibility for workplace relations (s 72C(1)(f)); and

107..7. any other person with a 'sufficient interest' in the amalgamation (s 72C(1)(g)).

Commencement

108. 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 before the commencement day of Schedule 4. A 'compliance record event' includes an event that occurred **before** Schedule 4 commences.

Amalgamation cannot proceed if certain proceedings pending

109. Existing s 73(2) provides that the FWC must fix the amalgamation day if it is satisfied of certain matters, including that there are no proceedings (other than civil proceedings) pending against any of the existing organisations concerned in the amalgamation in relation to contraventions and breaches of certain instruments.

110. New s73(2A) defines the kinds of proceedings relevant to new paragraph 73(2)(c). These are:

110..1. criminal proceedings in relation to a contravention of the RO Act, the FW Act or any other law of the Commonwealth (s 73(2A) (a)(i));

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

110..3. civil proceedings for a contravention of a provision mentioned in a subparagraph of paragraph (b) of the definition of 'designated finding' in new s 9C (1).

(c)CRITIQUE OF THE PROPOSED INTRODUCTION OF PUBLIC INTEREST TEST FOR AMALGAMATIONS

111. It is an essential element of free association that members can choose with whom they associate. What is free association of workers if employers and other parties can intervene to prevent a freely chosen decision by the membership to amalgamate legitimately under their rules? Association in those circumstances is no longer free.

112. These provisions allow the State, employers and other outside parties to impede or prevent the democratic will of members. This is an egregious breach of the obligations under C87. The FOAC has previously stated that:

112..1. "The free exercise of the right to establish and join unions implies the free determination of the structure and composition of unions"[24]

112..2. "restrictions on the organisational autonomy of organisations should have the sole objective of protecting the interests of the members and guaranteeing the democratic functioning on organisations". [25]

113. The public interest test which is introduced by Schedule 4 imports matters that are irrelevant to the interests of members of the amalgamating unions including: a union's compliance record or the impact of the amalgamation on employers.

114. The FOAC has said the following about applying the public interest test to the internal affairs of a union:

> "Legislation which accords to the Minister the discretionary right to investigate the internal affairs of a trade union merely if he or she considers it necessary in the public interest is not in conformity with the principle that organisations should have the right to organise their administration and activities without interference by public authorities which would restrict the right or impede the lawful exercise thereof"[26]

115. The provisions of the Bill are directly analogous to the matters complained of in the paragraph quoted above. This Bill allows employers, employer organisations, the Minister and the Registered Organisations Commission to make submissions against a decision by members of two or more unions to amalgamate on the basis of the public interest. A direct interference with the internal affairs of a union in breach of our international obligations

116. There is also a practical consequence of the imposition of a "public interest" test for amalgamations. Smaller unions are struggling to cope with the steep compliance burden under the RO Act. This may lead to a decision to amalgamate with a larger union. The very compliance failure may prevent smaller unions from using amalgamation to access the governance and compliance capacity of a larger union.

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[24] *Digest* ibid at p70 at paragraph 333
[25] *Digest* ibid at p 79 at paragraph 369
[26] *Digest* ibid at p96 at paragraph 96

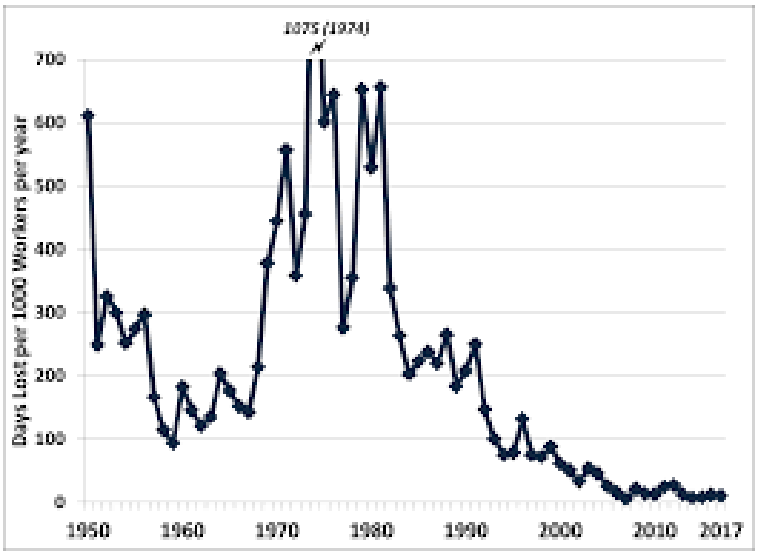
IV. POLITICAL AND SOCIAL CONTEXT IN WHICH THIS BILL APPEARS

A. Current regulation and activities of trade unions

117. The *Royal Commission into Trade Union Corruption and Governance* cost $46 million dollars. The references by the Commissioner to prosecutorial agencies has led to a handful of criminal prosecutions and orders for civil penalties in a limited number of unions.

118. Under the *Fair Work Act 2009*, Australian unions have a limited capacity to exercise collective rights and their rights to take industrial action are some of the most restrictive in the Western World. Further legislated compliance provisions are not necessary.

119. The number of days lost through strike action is at historic lows. The 2017/18 financial year was one of the quietest on the ABS's books for industrial disputes, with 110,000 working days lost — down 20 per cent on the previous year. *The Centre for Future Work* has produced the following chart that starkly illustrates the rapid and increasing decline in days lost as a result industrial action, [27]



120. The reporting and compliance regime for registered organisations since the creation of the Registered Organisations Commission in May 2017 places a high compliance burden on trade unions and has introduced stiff penalties for breaches.

121. The Australian Building and Construction Commission has a strict regime specifically for building unions which closely police the conduct of building workers including:

[27] Briefing Note: *Historical Data on the Decline in Australian Industrial Disputes* by Jim Stanford, Economist and Director January 30, 2018

- The taking down of CFMMEU Flags[28]; and
- The wearing of union badges on hard hats[29]

122. The assertion that trade unions are currently beset by wide spread lawlessness is a myth. Many thousands of unionists and their officials go about their business without corruption or law breaking. There are 46 unions affiliated with the ACTU which have hundreds of officials and thousands of staff.

123. Why then do the current circumstances justify an increased capacity to disqualify officials, to appoint administrators to run unions, to deregister unions, and an increased capacity to intervene in an amalgamation process? The answer is they do not.

B. We need to ensure integrity elsewhere

124. The Bill hits the wrong target if the aim is to contain lawlessness in Australia:

124..1. The findings of the Banking Royal Commission showed widespread, conscious and systematic criminal and other illegality.[30] No Bill has yet been introduced to Parliament to allow banking customers or regulators to deregister banks or disqualify bankers.

124..2. Wage theft continues to be a problem in franchises and in the hospitality industry[31]

124..3. Migrant farm workers are being subjected to illegal debt bondage and made to live and work in slave like conditions [32]

124..4. Issues of conflicts of interest by current and recently retired politicians has increasingly become an issue[33] Transparency International has noted the increasing perception of corruption in Australia.[34]

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[28] https://www.afr.com/leadership/workplace/commission-pursues-workers-for-striking-over-cfmeu-flags-20190719-p528sp

[29] https://www.smh.com.au/business/workplace/flags-and-hard-hat-slogans-banned-under-new-building-code-20180205-p4yzfl.html

[30] https://www.abc.net.au/news/2019-03-19/royal-commission-criminal-charges-unlikely-to-hit-court/10913066

[31] https://www.smh.com.au/national/underpayment-as-business-model-what-is-wage-theft-20190509-p51lko.html

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[32] https://www.abc.net.au/news/rural/2017-10-19/debt-bondage-in-horticulture-sector-akin-to-slavery-in-australia/9057108

[33] https://newpolitics.com.au/2018/03/29/conflicts-of-interest-and-the-corruption-of-politics/

[34] https://tradingeconomics.com/australia/corruption-index

125. The Committee might be better served encouraging the withdrawal of this Bill and suggesting the parliamentary draftsperson to draft laws to ensure integrity in these four areas?

C. Civil Liberties in Australia

126. Serious concerns have been expressed that the raft of legislation passed in the name of national security, might have had unintended consequences for important civil liberties in Australia. For example, the Australian Federal Police raids on the ABC offices, and the home of News Corp journalist Annika Smethurst, has led to widespread anxiety that freedom of the press may not be adequately protected.[35]

127. The October 2017 AFP raid on the offices of the Australian Workers Union (that was tipped off to the press prior to the raid) could be characterised as misuse of the power of the State for political advantage. The use of State power for partisan political advantage is not something you would expect in an advanced democracy characterised by the rule of law.

128. The recent High Court decision in *Comcare v. Banjeri* [36] , establishes the *APS Code of Conduct* effectively extinguishes a public sector worker's implied right of political communication. This decision demonstrates that Australian law offers little protection for what many would regard as the fundamental human rights of workers.

129. In these circumstances, where Australians are concerned about the safety of their civil liberties, the Committee **should not** recommend a law that would seriously limit the fundamental human right of workers to freely associate.

[35] https://theconversation.com/why-the-raids-on-australian-media-present-a-clear-threat-to-democracy-118334

[36] *Comcare v Banerji* [2019] HCA 23

V. CONCLUSION

130. The *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* marks a paradigm shift in the regulation of trade unions in Australia.

131. This Bill expands the capability of the State, employers, and employer associations to reach in and fundamentally change an organisation by removing officers, by appointing administrators, by deregistering organisations, or by intervening to deny members wishes to amalgamate with another organisation.

132. It would allow State and employer interventions in unions that have no counterpart in any other democratic Country. The Bill should be regarded as radical rather than conservative.

133. The low bar for standing to bring these applications, and the inclusion of grounds for the various remedies which include civil penalties for procedural and bureaucratic errors, will encourage employers and other actors to bring proceedings for strategic advantage rather than for the enforcement of lawful conduct.

134. The Committee should consider this Bill through the lens of the fundamental rights of workers to freely elect union officials and to associate in a manner that they choose. If this Bill became law, it would seriously damage those rights. It flagrantly and egregiously breaches the UN covenants and ILO conventions that protect free association.

135. Irrespective of what Committee members may think of trade unions and their leaders it is important that organs of civil society are not strangled by unnecessary intervention. The passage of this Bill would retard rather than advance the cause of democracy in Australia and should be rejected by the Committee and the Parliament.

136. We urge you to recommend the Bill not proceed further through Parliament.

END