Submissions of the CPSU (SPSF) to the Senate Education and Employment Committee inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 [provisions]

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I. INTRODUCTION

1. The *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017*[1] marks a paradigm shift in the regulation of trade unions in Australia. It greatly increases the capacity of the State (and other actors) to make drastic interventions into the conduct of trade unions.

2. In the clamour to demonise trade unions and so called "union bosses" it is often forgotten that unions are fundamentally democratic organisations that constitute a vital part of civil society in Australia.

3. The well-being of society cannot be entrusted solely to governments, corporations, and private citizens. The concept of civil society suggests there is a set of institutions that operate in the space between family, the business world, and the state. These institutions are vital to the health of any democratic society.

4. Trade unions, as stable, well-organized institutions with reasonable resources at their disposal, can play a significant role in civil society. The 1.6 million members of trade unions are one of the most significant civil society institutions. For civil society to flourish, its institutions must have an ability to function without unnecessary interventions from the State.

5. This Bill greatly increases the capacity of the State (and other actors) 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 the contention of the CPSU (SPSF) that the form of this Bill crosses a line in the balance between civil society and the State to a disturbing degree. We therefore urge the Committee to recommend the Bill be withdrawn.

[1] The Bill

II. THE CONTENT OF THE BILL

A. SCHEDULE 1 – DISQUALIFICATION FROM OFFICE

The existing disqualification powers and the proposed new powers

7. The current law provides for disqualification in Chapter 7, Part 4 of *Fair Work (Registered Organisations) Act 2009*[2]. The operative provision is s215. 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.

8. Schedule 1 of the Bill expands the prescribed offences which can form the basis for an application for disqualification to include any State or Commonwealth offence punishable on conviction by imprisonment for a period of 5 years or more. The Bill also introduces a new 'Division 3 – Disqualification orders' and 'Division 4 – Offences in relation to standing for or holding office while disqualified.'

9. Under the proposed new Division 3 the Commissioner, the Minister, or a person with a sufficient interest may apply to the Federal Court for an order disqualifying a person from holding office if the Court is satisfied on one of the following grounds:
    - a designated finding is made against the person (designated finding includes criminal law and selected industrial relations legislation);
    - a wider criminal finding is made against the person;
    - the person is found to be in contempt of court;
    - the person failed to take reasonable steps to prevent the union engaging in the above conduct;
    - the person committed an offence against the *Corporations Act 2001* (Cth) (relating to general duties of officers);
    - the person has been refused an entry permit;
    - the person committed an offence involving fraud, dishonesty or misrepresentation under Commonwealth or State law;
    - the person has committed an offence involving intentional violence towards a person or intentional destruction of property under any Commonwealth or State law.

10. The Proposed Division 4 creates criminal offences for those who are disqualified from office but seeks to be a candidate, or influence the affairs of the union, or hold office, each punishable by $21,000 fine or 2 years imprisonment.

[2] from hereon the "**RO Act**"

Key changes proposed for disqualification powers

11. The disqualification power within the **RO Act** would be greatly expanded if this Bill becomes law.

12. The current law only permits applications for disqualification for officials found to have engaged in fraud/dishonesty related conduct and the reasons for disqualification are logical and in line with community expectations.

13. The proposed changes expand the disqualification criteria to include denial of entry permits, and failure to take reasonable steps to prevent certain behaviour. Under the proposed changes the Minister would have power to directly apply for a disqualification order and interfere with the internal affairs of the union. Previously only the union, members or the General Manager of the Fair Work Commission could apply for such an order.

CRITIQUE OF THE DISQUALIFICATION POWER

The expansion of the disqualification powers is not necessary

14. The Bill proposes an extension to the range of persons who can commence disqualification proceedings and in the grounds on which a disqualification order can be sought. The Committee should not recommend a change to the law that empowers agencies of the State to commence proceedings to disqualify democratically elected union officials.

15. Despite the broad brush conclusions of the Commissioner, a close reading of the adverse findings of fact in the *Royal Commission on Trade Union Governance and Corruption* only involved five unions. The most seriously corrupt conduct was limited to a hand full of individuals.

16. There are 46 unions affiliated with the ACTU which have hundreds of officials and thousands of staff. The assertion of widespread lawlessness within trade unions is a myth. In those circumstances it is not necessary to expand the disqualification regime.

The proposed expansion of disqualification power offends ILO conventions

17. 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 [3]makes this clear.

18. The FOAC has determined that:"freedom of association implies the right of workers and employers to elect their representatives in full freedom"[4]; and "The right of worker's organisations to elect their own representatives freely is an indispensible 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..."[5]

[3] from hereon referred to as the "FOAC"
[4] *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
[5] Ibid at paragraph 391

19. The extension of the capacity to disqualify on the basis of a "wider criminal finding" has been squarely found to offend C87 by the FOAC: "Conviction on account of offences the nature of which is not such as to call into question the integrity of the person concerned and is not such as to be prejudicial to the exercise of trade union functions should not constitute grounds for disqualification from holding trade union office, and any legislation providing for disqualification on the basis of any offence is incompatible with the principles of freedom of association."[6]

[6] Ibid at p. 89 paragraph 422

B. SCHEDULE 2 – CANCELLATION OF REGISTRATION AND ALTERNATIVE ORDERS

The existing deregistration powers in Chapter 2 of the RO Act

20. 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.

21. Schedule 4 would redraft section 28 and introduce new sections 28A – 28Q. These new sections expand the grounds for which an order can be made to deregister a union.

22. Under the current law 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/substantial number of members:
    - continuously breached a Fair Work Commission (FWC) order; OR
    - engaged in obstructive or unsafe industrial action (other than protected action); OR
    - breaches a particular FWC order.

23. 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.

24. The Bill essentially redrafts the existing provisions in s28 of the **RO Act** with some changes. For example, the persons with standing to initiate an application have been varied so that the Registered Organisations 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 one or more of the following grounds:
    - corrupt conduct of officers;
    - serious criminal offence committed by the organisation;
    - multiple breaches of any criminal law or selected industrial laws by the organisation or its members;
    - non-compliance with any court orders or injunctions;
    - obstructive or unsafe industrial action.

CRITIQUE OF THE PROPOSED DEREGISTRATION PROVISIONS

The existing deregistration provisions and the proposed new provisions

25. The power to deregister unions in the Bill is essentially a redraft of the current s28. The proposed Sections 28A-28Q reproduces much of the text of the current section 28.

26. The most significant [and disturbing] change is the wide expansion of the grounds on which deregistration can take place. Under the current law only breaches of Fair Work related orders (as well as 'illegal' industrial action) constitute grounds for deregistering a union. The Bill dramatically expands the grounds for deregistration to now include:
    - any criminal law;
    - any civil remedy or civil penalty provision of the Fair Work Act;

- any civil remedy provision of the *Building and Construction Industry (Improving Productivity) Act 2016*;
- any civil penalty provision of the *Fair Work (Building Industry) Act 2012*;
- any provision of Part IV of the *Competition and Consumer Act 2010* or a provision of the Competition Code of a State or Territory;
- a WHS civil penalty provision of the *Work Health and Safety Act 2011*;
  any State or Territory OHS law; and
- a finding of fact from any court could be used as evidence for the Federal Court to determine whether a union should be deregistered.

27. Perversely the proposed s28Q 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.

28. The Bill also provides for "additional orders" in the proposed s28L. Such an order empowers the Court to place a restriction on any application for re-registration within a specified period of time.

29. Under these proposed new laws 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 counter-productive, self-destructive and against the interests of members.

30. 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 take into account 'any other matters the Court considers relevant' is too ambiguous given the consequences of the order. 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.

31. The grounds that could found a deregistration order are too broad and could mean an accumulation of relatively insignificant breaches of the Fair Work Act (for example) could found an order.

The expansion of the grounds for deregistration offends ILO Convention 87

32. 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:
    32.1. 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."[7]
    32.2. 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

[7] ibid at p137 paragraph 678

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"[8]

32.3. 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"[9]"

[8] ibid at p140 paragraph 692
[9] id at paragraph 693

C. SCHEDULE 3 – ADMINISTRATION OF DYSFUNCTIONAL ORGANISATIONS

The existing powers of administration appointment and the proposed new law

33. 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. 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:
    - for the reconstitution of the branch; or
    - to enable the branch to function effectively; or
    - for the filling of the office or position.

34. 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.

35. Schedule 3 would also expand the circumstances in which orders can be sought to the following:
    - a branch or part of a branch has ceased to operate and there are no effective means under the rules to enable it to function; or
    - an office or position of the organisation is vacant and there are no effective means under the rules to fill the vacancy; or
    - one or more officers have engaged in financial misconduct;
    - a substantial number of the officers of an organisation acted in their own interests rather than in the interests of the members as a whole;
    - the affairs of the organisation are being conducted in a manner that is oppressive or discriminatory against a member or class of members.

36. If the Court makes a declaration then the Court may make an order to approve a scheme to resolve the circumstances set out in the declaration, including the appointment of an administrator.

CRITIQUE OF THE PROPOSED ADMINISTRATION OF DYSFUNCTIONAL ORGANISATION PROVISIONS

37. Section 323 in the **RO Act** is a machinery provision. It is designed to address situations where a union's rules were unable to resolve a problem such as vacant sub-branches and vacant officer positions that no longer function or are active. The proposed amendments conflate governance issues and mismanagement under the heading 'Dysfunctional Organisations etc'.

38. Previously only the union, a member, or person with 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.

39. If, for example, one or more officers of a union are engaged in financial misconduct it could lead to an application for an Administrator to be appointed. The misconduct of some officers in those circumstances would mean the control of the union is taken out of the hands of its members.

40. 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."[10]

41. Schedule 3 expands the persons who may apply to appoint an administrator and greatly expands the circumstances in which an administrator may be appointed.

42. 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.

[10] ibid at p95 paragraph 454

D. SCHEDULE 4 – PUBLIC INTEREST TEST FOR AMALGAMATIONS

The existing law to facilitate amalgamations and the proposed new law

43. 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.

44. 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.

45. 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"[11] It follows the capacity for "outsiders" to interfere with the pre-amalgamation processes is strictly limited.

46. 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.

47. Under the proposed changes the Fair Work Commission must be satisfied the amalgamation is in the public interest before approving amalgamation. The proposed new s72C confers a statutory right to be heard on the issue of "public interest" to the following persons:
    - the amalgamating unions;
    - other unions that share coverage with the amalgamating unions;
    - employer interest groups;
    - the Registered Organisations Commissioner;
    - the Minister;
    - Any other person with a sufficient interest.

48. In deciding whether or not the amalgamation is in the public interest the Fair Work Commission must have regard to:
    - the unions' record of compliance;
    - the impact on employees and employers in the industry concerned;
    - any other matter the Commission finds relevant.

49. The public interest test is to be applied to amalgamations made before the commencement of the amending Act and requires the Fair Work Commission to take into account the compliance record events that occurred before commencement.

[11] see s54 of the RO Act

CRITIQUE OF THE PROPOSED INTRODUCTION OF PUBLIC INTEREST TEST FOR AMALGAMATIONS

50. These provisions are the only retrospective provisions sought in this Bill. The Committee should be alert to the real purpose of these laws – to stop the application for amalgamation of the CFMEU, the TCFUA and the MUA which has already commenced.

51. The Committee should not support a change in the law. Schedule 4 is designed to:
    51.1. prevent a lawful application that is currently before the Fair Work Commission; and to
    51.2. subvert the internal processes and will of the respective members of the CFMEU, the MUA and the TCFUA to combine.

52. The High Court has cautioned against retrospective legislation that may interfere with vested rights. The presumption against retrospective statutory construction is based on 'the presumption the Legislature does not intend what is unjust'. [12]

53. The High Court has held that, although there is no absolute prohibition on the Parliament enacting laws that have retrospective effect, such a power should only be used in the most unusual circumstances. In *R v Kidman* (1915) 20 CLR 42, Higgins J stated:

> "There are plenty of passages that can be cited showing the inexpediency, and the injustice, in most cases, of legislating for the past, of interfering with vested rights, and of making acts unlawful which were lawful when done; but these passages do not raise any doubt as to the power of the Legislature to pass retroactive legislation, if it sees fit.[13]"

54. Retrospective measures generally offend rule of law principles that the law must be readily known, available, and certain and clear. For example, in *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117, French CJ, Crennan and Kiefel JJ stated:

> "In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the principle of legality, which also applies the constructional assumption that Parliament will use clear language if it intends to overthrow fundamental principles, infringe rights, or depart from the general system of law."[14]

55. These provisions would retrospectively allow standing to interfere in a proceeding that has already started. This is patently unjust and offensive to the rule of law. It follows the Committee should not support it.

56. Further, these provisions allow employers and other outside parties to impede or prevent the democratic will of members to amalgamate. This is obviously offensive to the obligations under C87. The FOAC has previous stated that: "restrictions on the organisational autonomy of organisations should have the sole objective of protecting the interests of member and guaranteeing the democratic functioning on organisations". [15]

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[12] *Polyukovich v. Commonwealth* (1991) 172 CLR 501 at 611-12,642,687-9,718 per Dean, Dawson, Toohey, McHugh JJ respectively
[13] *R v Kidman (*1915) 20 CLR 425 at 451.
[14] *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 at [30] (French CJ, Crennan and Kiefel JJ).
[15] *Digest* ibid at p 79 at paragraph 369

57. The public interest test which is introduced by Schedule 4 imports matters that are irrelevant to the interests of members such as: a union's compliance record or the impact of the amalgamation on employers. This is not consistent with our international obligations with respect to free association.

58. 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 to amalgamate made by the members, and by the executive bodies of unions, legitimately under their rules? Association in those circumstances is no longer free.

III. CONCLUSIONS

59. 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. The *Registered Organisations Act* places a high compliance burden on registered organisations in this Country.

60. 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. Strikes (protected or otherwise) are at generationally low levels.

61. 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.

62. Each Schedule of this Bill squarely offends Australia's international obligations to provide for free association under C87 as elaborated through the decisions of the Freedom of Association Committee of the ILO.

63. The *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* marks a paradigm shift in the regulation of trade unions in Australia. It greatly increases the capacity of the State to make drastic interventions into the conduct of trade unions by increasing the actors and circumstances in which duly elected officers can be disqualified, trade unions can be deregistered, administrators appointed and for interference in the amalgamation processes of trade unions.

64. 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.

65. The imposition of the State into civil society organisations has a "boiling frog" character. State intervention into the operation and internal affairs of organs of civil society should be limited.

66. All the institutions that comprise civil society are subject to the rule of law, however, this Bill expands the capability of the State and other actors to reach in and fundamentally change an organisation by removing officers, by appointing an administrator or by

deregistering it. The Committee should consider this Bill a bridge too far, an impermissible incursion into civil society and the right of unionists to associate.

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

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