



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

**Inquiry by the Senate Standing Committee on Education and
Employment**

29 AUGUST 2019

We believe in good business

180 Hay Street,
East Perth WA 6004
PO Box 6209,
East Perth WA 6892
Phone: 1300 4 CCIWA (1300 4 22492)

ABN 96 929 977 985
© 2019 Chamber of Commerce and Industry of Western Australia

This work is copyright. No part of this publication may be reproduced or used in any way without acknowledgement to the Chamber of Commerce and Industry of Western Australia.

Disclaimers & Acknowledgements

The Chamber of Commerce and Industry of Western Australia (CCIWA) has taken reasonable care in publishing the information contained in this publication but does not guarantee that the information is complete, accurate or current. In particular, CCIWA is not responsible for the accuracy of information that has been provided by other parties. The information in this publication is not intended to be used as the basis for making any investment decision and must not be relied upon as investment advice. To the maximum extent permitted by law, the CCIWA disclaims all liability (including liability in negligence) to any person arising out of use or reliance on the information contained in this publication including for loss or damage which you or anyone else might suffer as a result of that use or reliance.

Contents

Introduction and Recommendation	4
With rights come responsibilities	4
Evidence supports the need for action.....	5
Promoting harmonious industrial relations	7
Democracy within registered organisations	7
Freedom of association	10

Introduction and Recommendation

1. The Chamber of Commerce and Industry of Western Australia (**CCIWA**) is the leading business association in Western Australia (**WA**) and has been the voice of business for more than 125 years. CCIWA represents employer members from across all regions and industries in Western Australia, including local chambers of commerce, industry associations and employers, particularly small and medium enterprises, both in the private and government sectors. CCIWA is also a foundation member of the Australian Chamber of Commerce and Industry (**Australian Chamber**).
2. The Senate Standing Committee on Education and Employment (**the Committee**) has invited interested parties to make submissions to an inquiry into the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* (**Ensuring Integrity Bill**). CCIWA welcomes the opportunity to make a submission to the Committee.
3. CCIWA supports the Ensuring Integrity Bill as an essential tool in tackling those registered organisations and officials who fail to comply with the rule of law. We endorse the submission made by the Australian Chamber and encourage the Committee to take into consideration the views expressed within it.
4. Registered organisations enjoy a number of rights and privileges under the *Fair Work Act 2009 (Cth)* (**FW Act**). However, these rights have been subject to systematic abuse by some unions to the detriment of workers, employers and the broader community.
5. These abuses are well known and it is important to ensure that we have a system of regulation in place that supports the notion that if you enjoy a position of privilege under the FW Act and engage in unlawful activity, then you run the risk of losing that privilege.
6. In this submission, CCIWA seeks to address some of the key emotive arguments against the Ensuring Integrity Bill, in particular that it:
 - a) has no tangible benefit to the promotion of harmonious industrial relations;
 - b) infringes on freedom of association; and
 - c) undermines the democratic operation of registered organisations.

With rights come responsibilities

7. Under the FW Act, registered organisations are provided with a range of legislative rights.
8. The nature of these rights differ between registered employer association and unions, with unions having a greater range of resources available to them under the FW Act with which they may represent their members. These rights include:
 - a) Right of entry;
 - b) Default bargaining representative status in enterprise bargaining, which in turn facilitates the union in:
 - i. Initiating protected industrial action;
 - ii. Seeking majority support determinations; and
 - iii. Applying for scope orders.

- c) Ability to be a party to an Enterprise Agreement, which allows the union to negotiate provisions regarding the relationship between the employer and the union, such as trade union training leave and delegate rights provisions;
 - d) Capacity to commence proceedings seeking a civil remedy;
 - e) Ability to appear before the Fair Work Commission on behalf of members;
 - f) Initiating an application to make or vary a modern award.
9. The rights conferred on registered organisations under the Fair Work Act also impose obligations regarding their use, particularly with respect to right of entry, enterprise bargaining and industrial action. This recognises that these provisions provide registered unions with significant coercive powers and that these must be exercised in a responsible manner.
10. Where these rights are abused it is necessary for the relevant legislation to impose meaningful sanctions to address unlawful behaviour. In the case of some registered organisations and their officials, the existing system does not achieve this.

Evidence supports the need for action

11. Critics have argued that the sole justification for the Ensuring Integrity Bill arises out of the activities of the Construction Forestry Maritime Mining and Energy Union (**CFMMEU**). The brazen and deliberate actions of parts of the CFMMEU with respect to non-compliance with their legal obligations mean that it is the union most frequently in the spotlight with respect to such behaviour. However, the CFMMEU is not alone in having a track record of non-compliance.
12. The Royal Commission into Trade Union Governance and Corruption (**Heydon Royal Commission**) identified examples of widespread misconduct against multiple unions with *“almost all of the underlying facts have been established by admissions to the Commission, incontrovertible documents, decisions of courts and tribunals or well-corroborated testimony”*.¹ The case studies examined by the Royal Commission identified examples of misconduct by officials within the:
- a) Australian Workers Union (AWU);
 - b) then Construction, Forestry, Mining and Energy Union (CFMEU);
 - c) Communications, Electrical, Electronic, Energy, Information, Postal Plumbing and Allied Services Union of Australia (CEPU);
 - d) Health Services Union (HSU);
 - e) Transport Workers Union of Australia (TWU); and
 - f) National Union of Workers (NUW).

¹ [Heydon, J \(2015\) *Royal Commission into Trade Union Governance and Corruption - Final Report, Volume One*, pp8-9](#)

13. The Heydon Royal Commission further identified that:

These aberrations cannot be regarded as isolated. They are not the work of a few rogue unions, or a few rogue officials. The misconduct exhibits great variety. It is widespread. It is deep-seated.

Nor can the list be regarded as complete. It would be utterly naïve to think that what has been uncovered is anything other than the small tip of an enormous iceberg. It is inherently very hard to identify most types of misconduct by union officials. So far as it is typified by hard core corruption, there is no 'victim' to complain, and the parties to the corruption have a strong incentive to keep it secret. Whistleblowers are unlikely to be found for various reasons including a well-founded fear of reprisals. The same is true of misconduct on building sites and other aspects of the misbehaviour that has been revealed. The very existence of a Royal Commission tends to cause a temporary reduction in misconduct. But it is clear that in many parts of the world constituted by Australian trade union officials, there is room for louts, thugs, bullies, thieves, perjurers, those who threaten violence, errant fiduciaries and organisers of boycotts.² (Emphasis added)

14. Given the findings of the Heydon Royal Commission, it is clear that the existing penalty regime for non-compliance is not a sufficient enough deterrent for those unions and/or officials who consider monetary penalties to be the price of doing business.
15. This was reinforced in a recent decision of the Federal Court in relation to the multiple breaches of right of entry requirements by two CFMMEU officials. Justice Bromberg concluded that the officials actions were "a deliberate and orchestrated campaign, which had the express or tacit approval of more senior officials of the CFMMEU" and that the union "has an appallingly long history of prior contraventions of industrial laws" and that there is no evidence "of any compliance regime ever put in place by the CFMMEU to address its long history of prior contraventions"³. This pattern of behaviours continues to occur notwithstanding that \$4.2 million in penalties had been imposed upon the union in 2018/19 financial year⁴, reinforcing that the perceived benefits to the union derived from its unlawful behaviours outweighs the penalties imposed by the relevant Courts.
16. The actions of those unions and/or officials that act unlawfully or corruptly, brings into disrepute the reputation of all unions, including those that act responsibly in representing the interests of their members.
17. It is noteworthy that despite the reputational harm that these behaviours have on the trade union movement as a whole, unions have collectively failed to meaningfully address the problem. In opposing the Ensuring Integrity Bill without proving any alternative solution to address this issue, the ACTU appears to be condoning the unlawful behaviour of some unions and asking that the Australian Parliament do the same.

² Ibid at pp12-13

³ [Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union \(The Laverton North and Cheltenham Premises Case\) \(No 2\) \[2019\] FCA 973 at 63,76 and 77.](#)

⁴ [Australian Building and Construction Commission \(4 July 2019\) Media Release - CFMMEU and Luke Collier penalized \\$13,500 for safety breaches on Barangaroo site.](#)

Promoting harmonious industrial relations

18. It is the experience of CCIWA and its members that harmonious industrial relations are promoted when the rules governing the operation of the industrial relations system are complied with by all parties.
19. The FW Act establishes rules regarding:
 - a) rights of employees to participate, or not participate, in lawful industrial activities;
 - b) rights of employees to join, or not join, a union;
 - c) right of entry for union officials;
 - d) the making of enterprise agreements;
 - e) representational rights; and
 - f) the taking of industrial action.
20. In the case of unions and employer associations, these rights are well understood and guide the manner in which responsible organisations advise and represent their respective members.
21. The exercise of right of entry provisions provide a clear example of where compliance with the rule of law encourages a more harmonious relationship.
22. From CCIWA's interaction in providing assistance to members in managing right of entry, as well as overseeing right of entry on construction projects, it is our experience that compliance with right of entry provisions creates a more harmonious relationship between unions, employers and employees. This is because non-compliance creates disputation between the employer and union as to the manner in which the visit was conducted, thus minimising the potential for discussion on any genuine issues identified as a result of the visit.
23. Disenchantment with the operation of these provisions in no excuse for non-compliance. This is particularly so where an organisation seeks the protection of those provisions which confer a beneficial right, whilst deliberately flouting those provisions which impose responsibilities.
24. This has frequently proven to be the case with the CFMMEU, which is a frequent litigant in seeking penalties against employers who it alleges have refused or restricted their right of entry, whilst at the same time deliberately flouting the same laws where it imposes an obligation on the union. The hypocrisy of such action is clear.

Democracy within registered organisations

25. One of the arguments concerning the Ensuring Integrity Bill is that it may negatively impact upon the right of union members to democratically choose who represents them. Critical to this argument is the view that members will collectively hold the officials of registered organisations accountable for their actions.
26. We note that the Ensuring Integrity Bill does not impinge on the elections conducted by registered organisations.
27. However, the argument raises questions as to how democratic union elections are.
28. An example of potential misuse of power by existing union officials to retain their positions is demonstrated by the 2008 challenge to the leadership of the WA branch of the then Construction Forestry Mining and Energy Union (**CFMEU**).

29. At the time, the incumbent Secretary's and Assistant Secretary's positions were being challenged under the campaign banner of "Reform the CFMEU". The challenge was led by a then former employee of the union who was terminated shortly after announcing that he would be running for the position of secretary. The challenger promised to move away from the practices of the then existing leadership, instead promising a professional and disciplined leadership that would not: live in a "luxury apartment"; "be driving a \$140,000 Range Rover"; "be flying Business Class"; or "doing deals with bosses to buy pubs".⁵
30. As part of its response to the leadership challenge, the CFMEU sought an injunction preventing the challenger from using the organisation's membership list to send election material in the lead up to the formal campaign. In considering the matter, Justice Heenan identified that there was a strong arguable case that on learning of the challenge the Secretary sought to restrict the challenger's ability to communicate with members whilst at the same time had been utilising the union's resources to criticise the challenger's "campaign claims and to advance their own personal interests for re-election..."⁶
31. In refusing the application, Justice Heenan stated that:
- I do not consider that one can properly exclude from this evaluation of discretionary factors affecting the availability of interlocutory relief, the possibility, indeed the probability on the basis of the provisional findings which I have described, that [the Secretary] and the other existing officers of the executive may be using the advantages of incumbency arising from their existing control of the unions' affairs, to stifle the first defendant's electoral ambitions and to advance their own personal interests for re-election.*
- The interests of individual office bearers or, for that matter, the collective interests of an existing executive of an organisation before an imminent election may well diverge from the interests of the organisation itself. Their interests may be personal in the sense of desiring retention of office and the preservation of power and influence, whereas the interests of an organisation, in the course of an electoral campaign, may be no more than to allow the status quo and the administration of the organisation to continue, while a free and fair election is conducted in accordance with the rules of the organisation and any prescribed laws and regulations is conducted. An analogy can be found in the convention of the 'caretaker period' of a government once an election has been called but before the results of the ballot have been declared.⁷ (emphasis added)*
32. In short, Justice Heenan refused the application on the grounds that the existing leadership appeared to be seeking to use the court to further disadvantage the election prospects of a challenger whilst at the same time using union resources to further their own personal interests.
33. These elections were further compounded by irregularities in the union's electoral role which resulted in a number of members being ineligible to vote due to the manner in which their membership dues were paid. This matter came to light when some of these members sought nomination to challenge the then existing leadership for their positions as part of the previously mentioned "Reform the CFMEU" team. In order to nominate for a position and vote a member must be financial. A decade earlier, the union set up direct debit options but did not change the organisation's rule to facilitate this method of payment, leaving a number of members technically classified as 'unfinancial' despite having been advised that they enjoyed full membership rights. In considering the matter, the Acting President Ritter identified that:
- [The Secretary] and the executive of the [CFMEU] encouraged and purported to authorise the receipt of membership contributions made by way of direct debit or payroll deduction, when the rules did not. Furthermore, these members were regarded as financial and received all of the benefits of financial membership, apart from being included on the electoral roll. As I have said the fact that this has occurred is quite regrettable.⁸*

⁵ [Renew the CFMEU. \(2008\) Election Pamphlet.](#)

⁶ [Construction, Forestry, Mining and Energy Union v Kavanagh \[2008\] WASC 146 at 36-38](#)

⁷ *Ibid* at 62-63.

⁸ [Ben Richard Thompson and Others v Kevin Noel Reynolds – the Secretary, CFMEUW and Others \[2009\] WAIRC 00024 \(23 January 2009\) at 208](#)

34. In ordering that the electoral role be reviewed, the Hon Ritter also identified that:

It is also relevant to comment at this stage that the [CFMEU] is not an under-resourced organisation in which a small executive has battled against the odds to exist and function. As set out in the affidavit of [the Secretary], the [CFMEU] have approximately 27 staff members in Western Australia including elected organisers and also legal officers. It also has significant financial resources and has the capacity to and/or has engaged accountants, solicitors and counsel to provide assistance, advice and representation when required.⁹

35. The decision identified that there was no reason for the rules of the union not to have been amended to facilitate for these means of payment to ensure its members enjoy their full rights and that the fault lay with the executive. In response to the union's claim that the election should be delayed to allow it to make the necessary changes Ritter stated that:

To not allow an election would be tantamount to saying that because of the failure by the executive of the [CFMEU] to manage the organisation in accordance with its rules, the members should be denied the right to consider whether they should be re-elected. This could not be properly permitted by the Commission in my opinion.¹⁰

36. The above example highlights the potential for the incumbent leadership within a union to misuse their position within the union (either deliberately or otherwise) to limit members exercising their right to choose who runs their union.

37. It is therefore not correct to suggest that union members have the power or opportunity to hold union officials accountable for their actions. Rather, it is frequently claimed that incumbent officials will use the resources of the union to further their re-election campaigns at the expense of any challenges and in doing so discourage potential contenders from contesting.

38. Even to the extent that members elect a new leadership, it is not guaranteed that change will be allowed to occur. The Heydon Royal Commission provides an example regarding the NSW branch of the Health Services Union (HSU) where during the 1995 elections the General Secretary was returned, but two new Assistant Secretaries were elected who ran in opposition to the General Secretary. It is alleged that the General Secretary then took steps to sideline the two new assistant secretaries by ensuring that they were not provided with an office or a vehicle, given no work to do, and denied access to key meetings. At the same time the two previous incumbents were re-employed as consultants to undertake their old duties with appropriate resources.¹¹ A similar experience was also identified over a decade later when the president of a NSW sub branch of the HSU also claims to have been marginalised when she sought to establish greater transparency and accountability within the union.¹²

39. Consequently, even where members elect new officials under the banner of reform, there is no guarantee that such individuals will be provided with the opportunity to act on that agenda.

40. Finally, we note that even to the extent that unions are truly democratic, the findings of the Heydon Royal Commission demonstrate that their membership have either not been able to, or prepared to, assert influence over the behaviour of officials who act improperly.

⁹ Ibid at 173

¹⁰ Ibid at 218

¹¹ [Royal Commission into Trade Union Governance and Corruption \(2015\) Final Report – Volume Five, pp 135 - 139](#)

¹² Ibid, at p 139

Freedom of association

41. Part 3-1 of the FW Act establishes a range of general protections which confirm rights for employees, and others, with respect to freedom of association.
42. These rights protect the choice of workers to join a union and engage in lawful industrial activity. Likewise, it also seeks to protect the rights of workers to choose not to join a union or participate in industrial activities. It is a right that protects an individual's choice in whichever direction is exercised.
43. Unfortunately, not all unions respect the right of employees with regards to this matter.
44. Central to the trade union movement is the concept of collective action, which is frequently reflected in the sentiment "one out - all out". This principle can often result in inappropriate pressure being placed on employees to participate in industrial action under fear of reprisal or being ostracised should they not participate.
45. This was most acutely demonstrated in the example of the then Maritime Union of Australia (**MUA**) who in 2014 was found by the Federal Court to have taken adverse action against a group of five employees, some of whom were union members.¹³ Four of the employees had exercised their right not to engage in planned strike action at Fremantle Harbour whilst the fifth employed had stayed back briefly after the finish of his shift to do a handover.
46. The MUA subsequently distributed posters at various locations, publicly naming the five port workers as 'scabs', condemning their behaviour as treacherous and describing them as lowlives. The poster (the contents of which are provided below) also included the poem "Ode to a Scab" which incites bodily harm to be taken against those classified as a scab.

¹³ Two of the employees were members of the MUA, one had applied for MUA membership, and one was a member of the Australian Maritime Offices Union.

47. Understandably, the employees in question feared that the poster would encourage co-workers to incite violence upon them, their family or property.¹⁵
48. In the subsequent prosecution by the Fair Work Ombudsman, Justice Siopis found that the union's then WA branch Assistant Secretary *"was personally aggrieved and affronted by the fact that the strike had failed, and that the strategy which he had carefully planned had been thwarted by a small number of persons. In my view, [the Assistant Secretary's] anger would have been further inflamed by his passionate loathing of persons whom he regarded as scabs"*.¹⁶
49. As a result of this incident, the MUA were ordered to pay \$120,000 in compensation to the affected workers, plus a penalty of \$80,000. The Assistant Secretary was also issued with a personal penalty of \$15,000. Despite the action costing the union over \$215,000, the Assistant Secretary has progressed to a more senior position within the MUA, which continues to target employees who exercise their freedom of association rights. This most recently occurred in February 2019 when it issued stickers in its member magazine that shows a cartoon character wearing an MUA hat pointing a shotgun with the words "scab hunter" across the barrels.¹⁷
50. This is another clear example of monetary penalties not providing sufficient incentive for some unions, or union officials, to respect the rights of employees.
51. Likewise, some unions fail to respect the right of employees to choose not to be a member of a union.
52. The trade union movement largely agree that one of the causes for the decline in trade union members is the demise of compulsory unionism¹⁸. Notably under the *Industrial Arbitration Act 1912 (WA)* workers in Western Australia were generally required to be union members¹⁹ and that in the Act's final year of operation the Federated Clerks' Union of Australia initiated three prosecutions, two of which were against employees for failure to join the union with only one against an employer for underpayment of wages.²⁰ Clearly in this situation, there was a disproportionate concern against employees not being a union member over representing the interests of employees.
53. Despite legislative protections that protect employees' rights to either join or not join a union, some unions continue to promote closed shop arrangements.

¹⁴ [Fair Work Ombudsman v Maritime Union of Australia \[2014\] FCA 440 at 27.](#)

¹⁵ Ibid at 253

¹⁶ Ibid at 149

¹⁷ [Butterly, N \(27 February 2019\) Labor deputy leader Tanya Plibersek takes aim at union scab scare. The West Australian.](#)

¹⁸ [Australian Council of Trade Unions \(1999\) The Future of Australia Unionism in the Global Economy, p7](#)

¹⁹ Employees were able to seek an exemption subject to making payment equivalent to the union dues.

²⁰ [Scott, P \(2018\) The Changing Workplace: the rise of the individual. p 4](#)

54. This is demonstrated in a recent decision of the Federal Court in which an official of the then CFMEU was found to have prevented the employees of a subcontractor from performing work at a shopping centre expansion project with the intent to coerce them to pay union membership subscriptions. As part of an agreed statement of facts, the organiser admitted to telling two employees *“You can’t get on site ... if you’re not financial, you’re not getting on the site”* and *“if you’re not part of the union, you’re not allowed on this site”*. When one of the employees responded that he was not prepared to join the union, the official stated *“What, so fuck the union? all right. That’s good to know. Well, you’re not getting on site. You can sit in the car”*.²¹
55. In his decision, Justice Tracey found that the official’s *“conduct was deliberate and wilful. He arrogated to himself the right to determine who would and would not be permitted to work on the site”* and that in doing so he *“was acting to enforce a union policy that only financial members of the union be permitted to work on the site”*.²²
56. Justice Tracey also identified the CFMEU was a large, asset rich, and well-resourced industrial organisation and as a result of previous litigation was well aware of the constraints imposed by the relevant legislation. He also highlighted that at the time of the decision the CFMEU and its officials had been found guilty of breaching freedom of association provisions in 15 cases since 2000 in seeking to maintain “no ticket no start” regimes on building sites and that the present case falls into this pattern of repeated disregard for the law.²³
57. In a clear acknowledgement of the existing lack of meaningful penalty for such action, Justice Tracey stated that *“it may be doubted that any penalty falling within the available range for contraventions of the kind presently under consideration would be sufficiently high to deter repetition. Any penalty will be paid and treated as a necessary cost of enforcing the CFMEU’s demand that all workers be union members”*.²⁴
58. It is the view of CCIWA that the Ensuring Integrity Bill does not infringe upon employees’ freedom of association. Rather it has the potential to reinforce the enforceability of freedom of association provisions by allowing for meaningful action to be taken against unions that fail to recognise the rights of individual employees.

²¹ [Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union \(Werribee Shopping Centre Case\) \[2017\] FCA 1235 at 11](#)

²² Ibid at 23

²³ Ibid at 25 - 28

²⁴ Ibid at 32