

Master Builders Australia

Submission to the Royal Commission into Trade
Union Governance and Corruption

On

Duties of Union Officials

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CONTENTS

1	Introduction	1
2	Purpose of submission.....	1
3	Background – Fit and Proper Person Test	1
4	History of Contravention of the Law by the CFMEU	2
5	Questions.....	8
6	Conclusion	12

1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 124 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of submission

- 2.1 On 13 June 2014 the Royal Commission into Trade Union Governance and Corruption published three Issues Papers. This submission seeks to address Issues Paper 2: Duties of Union Officials (Issues Paper).
- 2.2 Before addressing the questions raised in the Issues Paper, we raise the issue of Master Builders' principal solution to the poor behaviour of union officials: the introduction of a new fit and proper person test. In addition, we outline in detail some of the material that supports Master Builders' contention that a culture of lawlessness exists within the CFMEU. We note the very tight timeframe for lodgement of submissions in response to the Issues Paper. Given greater time many of the responses would be more fully researched.

3 Background – Fit and Proper Person Test

- 3.1 Under cover of a letter dated 23 May 2014, Master Builders provided the Royal Commission with a copy of a submission which outlines in detail our proposal that the Government introduce a new fit and proper person test in the requirements of the workplace relations legislation.

- 3.2 Master Builders' position in this context is outlined under paragraph 5.2.1 of this submission which is the response to the first question appearing in the Issues Paper.

4 History of Contravention of the Law by the CFMEU

- 4.1 The CFMEU has a long history of prior contraventions of the workplace standards established by various industrial relations statutes. Most of the contraventions have occurred within the Construction and General Division of the CFMEU. An historical pattern of unlawful behaviour is demonstrated by the 107 court judgments against building unions charted by Master Builders in the table shown at Attachment A to this submission.
- 4.2 The CFMEU's record of behaviour suggests there is a culture of non-compliance with industrial laws within the organisation, particularly in its dealings within the construction industry. The courts have made observations to this effect on many occasions as now illustrated:

- 4.2.1 On 11 April 2008, Justice Gyles made the following observation:

A number of findings involving unlawful behaviour by officials related to the CFMEU have been made in recent years...[His Honour then cited 12 cases] ... These various cases illustrate that the federal body has not been effective in ensuring that officials act in accordance with the law. I note that there is no evidence of offending officials... suffering any serious disciplinary penalties.

In my opinion, notwithstanding the purely vicarious nature of the liability of the CFMEU, the penalty in this case, when compared with the maximum penalty, should adequately reflect the systematic nature of the failure of the CFMEU to deter or prevent actions of the kind involved in this case and act as a spur towards effective action by the CFMEU and the State entities connected with it. A penalty of \$5,500 will be imposed.¹

- 4.2.2 On 19 September 2008, Justice Tracey said:

...Similar previous conduct demonstrates that the respondent has a history of engaging in the particular conduct in question, that the penalties previously imposed were insufficient to deter the respondent from re-engaging in

¹ *A & L Silvestri Pty Limited v Construction, Forestry, Mining and Energy Union* [2008] FCA 466 at [13]-[14]. The maximum penalty applicable was \$10,000.

*that conduct and that the respondent has failed to take adequate steps to prevent further contraventions...*²

4.2.3 On 29 May 2009, Justice Jessup said:

*...the history tends to suggest that the Union has, with respect to anti-coercion and similar provisions of industrial laws, what the High Court in Veen described as 'a continuing attitude of disobedience of the law'. ..*³

4.2.4 On 10 September 2009 Justices Goldberg, Jacobson and Tracey of the Full Court of the Federal Court referred to:

*the litany of contraventions ... [and] the many prior contraventions of relevant statutory proscriptions by the Union ... indicating a propensity, on the part of the Union, to engage in proscribed conduct.*⁴

4.2.5 On 7 April 2010, Federal Magistrate Reithmuller (as he was then) said:

*Deterrence is clearly an important factor in this case as the applicant submits because the union is a repeat offender and, indeed, it seems it has quite an unenviable history of breaches as set out in the various cases.*⁵

4.2.6 On 7 February 2012, Federal Magistrate Burnett (as he was then) said:

*... I have had referred to me, particularly in Schedule A to the submissions prepared by the applicant, material which identifies at least 38 occasions where the fourth respondent [CFMEU] has been adversely noted as a party to proceedings seeking imposition of penalties. It is fair to infer from that Schedule that, as was submitted, the fourth respondent does have a history of engaging in conduct that brings it adversely to the attention of the courts and, notwithstanding the imposition of significant or at least not insignificant penalties, it does not appear that the penalties imposed have, to date at least, been sufficient to deter it from re-engaging in that conduct. As I have noted in the course of debate with counsel, perhaps the union needs to review its enterprise risk management processes in order to do more to bring attention to this form of behaviour to those who manage the union.*⁶

² *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426 at [44]

³ *Williams v Construction, Forestry, Mining and Energy Union and Mates (No 2)* [2009] FCA 548 at [29]. This penalty decision was overturned on appeal but not on this observation.

⁴ *Draffin v CFMEU & Ors* [2009] FCAFC 120 at [70], [79], [92].

⁵ *Cozadinos v CFMEU & Ors* [2011] FMCA 284 at [18]

⁶ *Hogan v Jarvis* [2012] FMCA 189 at [20].

4.2.7 On 20 August 2013, Justice Collier said:

On the material before the Court the CFMEU appears a worse offender than the CEPU, in that the CFMEU has been penalised approximately \$1.2 million of members' money (in addition to penalties personally imposed on individual union officials) in respect of more than 40 contraventions of laws relating specifically to coercive conduct.⁷

... the facts demonstrate the need to impose penalties which meet the objective of specific deterrence, particularly in relation to the CFMEU whose organisers appear to have shown a somewhat cavalier disregard both of the need to comply with the law and of penalties which have been previously imposed on the union for similar conduct.⁸

4.2.8 On 7 October 2013, Justice Gordon said:

The CFMEU has engaged in a significant number of prior contraventions of similar legislation. These contraventions are relevant to an assessment of penalty... They justify a heavier sentence although they cannot lead to the imposition of a penalty disproportionate to the gravity of the offence.⁹

4.2.9 On 21 November 2013, Justice Tracey said:

There is also a need for any penalty to have a specific deterrent effect on the CFMEU. It has, as I have already outlined, a deplorable record of contraventions of the BCII Act and similar legislation. The union has not displayed any contrition or remorse for its conduct. The contravention is serious... Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct. As a result this consideration must weigh heavily when determining an appropriate penalty.¹⁰

4.2.10 On 20 December 2013, Justice Barker remarked:

It was mentioned above that there are a number of prior incidents involving unlawful industrial action that have resulted in the imposition of penalties against the respondents. It is generally accepted by the parties that the penalties imposed for the conduct described in the cases listed in Sch B of the respondents' outline of submissions on

⁷ *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 846 at [34].

⁸ *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 846 at [35].

⁹ *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 1014 at [46].

¹⁰ *Cozadinos v Construction, Forestry, Mining and Energy Union* [2013] FCA 1243 at [43].

penalty are relevant in this case, and I take them into account generally when setting penalty. Among other things, they confirm that the respondents are not “cleanskins” when it comes to compliance with industrial laws such as the BCII Act and know that repeated, calculated contraventions will be met with monetary penalties of some significance.¹¹

4.2.11 On 5 March 2014, Justice White said:

... even if regard is had only to the CFMEU’s contraventions of s 43 of the former BCII Act, its antecedent history must be regarded as significant.¹²

The CFMEU’s history and the nature of its present contravention indicate that deterrence, both general and specific, should be a significant consideration in the fixation of an appropriate penalty. The CFMEU is not, of course, to be punished again for its previous contraventions but its history does mean that it is not entitled to any leniency by reason of a previous good record, or by reason of a history of attempting to comply with provisions such as s 355. The penalty is to be fixed in the context of the CFMEU’s previous record.¹³

4.2.12 Most recently, on 31 March 2014, Justice Cavanough said:

... the pattern of repeated defiance of court orders by the CFMEU revealed by those four cases is very troubling. Specific deterrence must loom large in this case. I accept that a respondent is not to be punished a second time for prior conduct. And, as the CFMEU submitted, the concept of deterrence cannot be permitted to hijack the process. I accept also that the objective seriousness of the contempt remains the necessary central focus. However, as indicated above, I regard these contempts as exceptionally serious. So much so that they warrant explicit classification as criminal contempts, perhaps for the first time in the Australian industrial context. I have already explained why I consider these contempts to be so serious. In short, they were highly contumacious. They were also highly visible and highly memorable. The Court must visit the defiance of the CFMEU with a penalty which will not only adequately respond to the scale of the defiance but also act as a general and specific deterrent. No fines of the level previously imposed could do that.¹⁴

¹¹ *Director of the Fair Work Building Industry Inspectorate v McDonald* [2013] FCA 1431 at [73].

¹² *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 160 at [46].

¹³ *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 160 at [56].

¹⁴ *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2)* [2014] VSC 134 at [201].

- 4.3 Given the nature of these comments made in such strong terms by well experienced and credentialed judges the questions that should be asked are:
- 4.3.1 Has the CFMEU taken steps to reduce the incidence of non-compliance by its employees or to address the concerns raised by the courts about the apparent culture of non-compliance? For example, have its officers or employees been required to pay their fines imposed upon them personally or has the union paid the fines for the individuals, or perhaps allegedly paid by third parties? Should CFMEU members be made explicitly aware of how their membership fees are spend on court fines?
- 4.3.2 Has the union done anything to sanction, discipline or rehabilitate any of its officers or employees who have contravened industrial laws? If so, what evidence is there to show that this has led to a change of behaviour?
- 4.3.3 What does the CFMEU propose to do in the future to ensure that its officers and employees comply with workplace laws in a sustained manner? Relatedly, can the CFMEU officials explain the significant number of contraventions as being consonant with the duty of care and diligence required by s285 *Fair Work (Registered Organisations) Act 2009*, (Cth) (Registered Orgs Act)?
- 4.4 These should not remain rhetorical questions. Stakeholders should be empowered to ensure that union officials comply with the standards of civil behaviour expected of all citizens. It is Master Builders' contention that requiring persons who wish to act as officials of registered organisations to comply with a threshold fit and proper person test is one manner in which standards of behaviour will be rapidly remediated. Those who break the law would be excluded from acting as officials. The evidence presented earlier in this submission shows that the application of civil penalties and, indeed, a penalty for criminal contempt is not sufficient to deter the CFMEU.
- 4.5 In addition, stakeholders need to be made aware of how their money is spent in a more transparent way, especially in the context of when civil penalties for breach of the law have been applied by the courts. If currently reported, of which we are unaware, this appears to be quite opaque and usually with no explanation to members as to how the civil penalties accrued.

- 4.6 As government agencies take a more focussed role in litigating unlawfulness (especially FWBC and perhaps the soon-to-be-re-formed ABCC) it seems reasonable that members of registered organisations should be made aware in a prominent and timely report to members the scale of penalties imposed, particularising the offending officials and containing identified commitments to stop unlawfulness in the future such as enforceable undertakings about on-going compliance with the law. This reporting requirement should be made palpable as a requirement of the workplace relations law.
- 4.7 The question arises as to whether or not the changes proposed by *Fair Work (Registered Organisations) Amendment Bill 2014* (Amendment Bill) to change the Registered Orgs Act as discussed below would lead to the outcomes implied in the questions just posed. Certainly, we would argue that a report along the lines outlined should be added as a specific supplement to the terms of that Bill.
- 4.8 The Amendment Bill proposes to insert new section 290A concerning a duty of good faith in the use of position and the use of information by officers and employees of registered organisations which would impose a criminal penalty up to \$1.7 million for a body corporate or \$340,000 or imprisonment for 5 years or both for an individual. Proposed section 290A is (as indicated in the Explanatory Memorandum to the Amendment Bill at paragraph 161) broadly modelled on section 184 of the *Corporations Act*. The new law would create offences where officers and employees of organisations and branches fail to exercise powers or discharge duties in good faith and for a proper purpose. Offences would also be created where those same persons use their positions to gain an advantage for themselves or someone else and where they use information obtained while employed to gain an advantage for themselves or someone else. Whether paying fines on behalf of employees or officials is a 'proper' purpose would need to be litigated but would not appear to be caught if *Williams v Hursey*¹⁵ is construed in this context as vindicating a 'political' outcome. In other words, paying fines on behalf of officials or employees may or may not be argued to be a matter pursued in a political context.

¹⁵ (1959) 103CLR 30

- 4.9 Accordingly Master Builders' recommendation is that paying fines on behalf of employees and officials of registered organisations should be specifically labelled as improper in the legislation and a change to the Amendment Bill made in that regard.
- 4.10 Master Builders notes that in the current legal environment a branch of the CFMEU which was found to have been in criminal contempt of court and be run by an executive where members of that executive were directly involved in that criminal contempt: see the case mentioned at 4.2.12 of this submission. In addition, the same members of that executive do not hold federal right of entry permits, presumably because they are unable to meet the current fit and proper person test under the FW Act. Master Builders points out that these officers, under the current law, are able to continue in their roles. The application of Master Builders' fit and proper person test would provide an appropriate mechanism to remediate the law.

5 Questions

- 5.1 Are the duties trade union officials have to their members under the common law and the Registered Orgs Act adequate and effective to protect members?
- 5.1.1 This subject is not well researched especially in relation to the common law. The article by Christie entitled *Legal Duties and Liabilities of Federal Union Officials*¹⁶ remains one of the most well researched pieces of writing on this subject, particularly as it outlines fiduciary duties of trade union officials, but is now somewhat out of date.
- 5.1.2 Master Builders would support provisions for those fiduciary duties to be specifically recognised in legislation governing registered organisations. This encapsulation of the common law in the governing statute will assist to make compliance easier and clarify the nature and extent of those duties.
- 5.2 Could improvements be made to the regulatory model as they relate to the duties of trade union officials? If so, what are they?

¹⁶M Christie "Legal Duties and Liabilities of Federal Union Officials", *Melbourne University Law Review* Vol. 15, December 1986, 591

- 5.2.1 A fit and proper person test should be introduced, as outlined in Attachment B. The model proposed by Master Builders requires the scrutiny of a declaration concerning a number of issues which impinge on the relevant person's good fame and character. In essence, Master Builders proposes that persons who intend to hold an office in a registered organisation or persons who intend to have management or control of a registered organisation must provide a declaration which outlines a number of matters. These relate to the fact that they would not have been the subject of any criminal or civil proceedings involving fraud, dishonesty, misrepresentation, concealment of material facts or a breach of a duty. In addition they should not have been refused membership of or have their membership cancelled or suspended by a registered organisation because they have engaged in fraud, dishonesty, misrepresentation, concealment of material facts or a breach of duty. They should have received training about their rights and responsibilities as an official or person with management or control and finally, but importantly, the public would have confidence in the person's suitability to be involved in the registered organisation. These elements would elevate the current tests in the Registered Orgs Act and ensure consistency with some of the elements in other laws, particularly those involving persons who may be concerned with the governance of Registered Training Organisations.
- 5.3 Are the enforcement and investigative powers of regulators of workplace relations adequate and effective as they relate to duties of trade union officials?
- 5.3.1 Master Builders supports the establishment of a more proactive and well-resourced regulator along the lines of the Registered Organisations Commissioner and Commission per proposed Part 3A of Chapter 11 of the Registered Orgs Act that would be inserted by the Amendment Bill.
- 5.4 Are existing laws adequate and effective in relation to the accountability of officers to their members in relation to use of funds or other assets in relation to relevant entities?

- 5.4.1 The change to the law proposed in paragraph 4.9 of this submission would mean that members were better informed of unacceptable expenditure in the wake of breaches of the law. Union officials and employees should be required to pay their own fines and these matters should be disclosed by way of a separate report to the members.
- 5.4.2 The elevation of a breach of fiduciary duty from an implied breach of a registered organisation's rules¹⁷ to an actual breach of the governing statute would assist with compliance with those duties.
- 5.5 What changes, if any, could be made to improve governance mechanisms or laws that relate to trade union officials' conduct and accountability?
- 5.5.1 Again, Master Builders responds by referring to the fit and proper person test proposal set out in detail in Attachment B.
- 5.5.2 Master Builders' position is that any monies paid to a political party should be specifically authorised by the members of a registered organisation through a dedicated vote. This ensures that members democratically exercise their right to support or not to support a political party; see the approach adopted in Queensland under s553D *Industrial Relations Act 1999*. That provision clearly sets the boundaries of what is or is not a political purpose as follows:
- (1) An organisation spends money for a political purpose if it spends money for, or by the way of, any of the following—*
- (a) giving a gift to a political party;*
 - (b) giving a gift to, or paying the costs or expenses of, a candidate for election, whether before, during or after the candidate's candidature or election;*
 - (c) publication or distribution in any way, including through advertising, of material about a political matter;*
 - (d) conducting opinion polling, or otherwise ascertaining opinions, about a political matter;*
 - (e) another activity related to a political matter prescribed under a regulation;*
 - (f) giving an amount to a person on the understanding that the person or someone else will apply, either directly*

¹⁷ Christie footnote 16 above at p.601

or indirectly, the whole or a part of the amount for an activity mentioned in paragraph (a) to (e).

(2) However, an organisation does not spend money for a political purpose if—

(a) the organisation spends money for an activity mentioned in subsection (1)(c), (d), (e) or (f); and

(b) the activity engages or involves only members of the organisation.

Examples—

an organisation distributes brochures containing material about a political matter only to its members

an organisation conducts opinion polling about a political matter only of its members

(3) In this section—

publication, of material, does not include designing, printing or otherwise preparing the material.

- 5.6 Could changes be made to improve the effectiveness of regulatory frameworks dealing with bribery, secret commissions or other unlawful payments or benefits involving trade unions and/or their officers?
- 5.6.1 The law in relation to secret commissions differs from State to State. Master Builders proposes that the Royal Commission recommends to Government that the Council of Australian Governments investigates introducing Australia wide consistency in this area of the law.
- 5.6.2 Master Builders recommends that greater levels of enforcement of these laws relating to secret commissions should be implemented by governments in cooperation. State and Territory police forces should be required to report on successful prosecutions in these areas against pre-agreed government targets.
- 5.6.3 The proposal to place the fiduciary duties owed by officials of registered organisation in the governing statute, referred to above at paragraph 5.4.2 of this submission, would also assist.
- 5.7 Is there evidence that differences in how trade unions are regulated at the federal and state level have an impact on reporting/ accountability?

- 5.7.1 Master Builders has had experience with the CFMEU, particularly in Western Australia, operating in a manner noted by Creighton and Stewart¹⁸ as a problem thus:

Serious complications may obviously arise if two different bodies, governed by different laws, are operated as if they were a single entity. The administration of the federal body may not comply with the rules registered under the FW (RO) Act, or the administration of the State body may not comply with its rules, or both. Sometimes, it will be found on close analysis that members have been improperly admitted or denied admission to one or other body, or that officials have been improperly elected, or that assets have been improperly dealt with – indeed, there may be a chain of irregularities which renders ineffective or unlawful virtually all the union's actions in one or other (or both) of its guises, often over an extended period. These legal problems may build up over a number of years until they suddenly come to the surface. This most often occurs in the context of a factional struggle within the union that finds its way into the courts, with one or other set of protagonists seeking to exploit past irregularities in order to gain some tactical advantage.¹⁹

- 5.7.2 We refer the Royal Commission to the decision in *Robert McJannett v Kevin Reynolds, CFMEUW & Ors*²⁰ attached as Attachment C.

6 Conclusion

- 6.1 Master Builders strongly recommends that the Royal Commission consider the Master Builders' submission regarding the introduction of a new fit and proper person test in the Royal Commission's recommendations to Government.
- 6.2 Master Builders would be happy to further discuss the fit and proper person test with Royal Commission personnel as well as expand on the additional matters outlined in this submission.

¹⁸ B Creighton and A Stewart, *Labour Law, Fifth Edition, The Federation Press 2010*

¹⁹ *Ibid* at para 20.37 (footnotes omitted) original emphasis

²⁰ [2009] WAIRC 01282