## CHAPTER 1

### INTRODUCTION

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A – INTRODUCTION

1. This Volume of the Report is devoted to recommendations in relation to law reform.

2. The Interim Report made a number of recommendations for referral of material to relevant regulatory and prosecutorial bodies.\(^1\) Volume 1 of this Report lists a number of further referrals. The Interim Report, however, did not reach any final conclusions or make recommendations as to law reform. That was because the Commission’s hearings and investigations were not complete at the time of the delivery of the Interim Report.\(^2\)

3. Prior to the publication of the Interim Report, the Commission released a series of Issues Papers seeking submissions as to law reform on a number of specific topics: (1) the protection available to whistleblowers; (2) the duties of union officials; (3) the funding of union elections; and (4) relevant entities. The Commission received a total of 37 submissions in relation to these Issues Papers from a range of interested persons and general law reform submissions from governments, unions and employers.

4. At that time, the Commission’s factual inquiries were at a preliminary stage. It was not possible to canvass all of those areas where law reform might be desirable.

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5. On 19 May 2015, the Commission issued a more comprehensive discussion paper titled ‘Options for Law Reform’ (Discussion Paper).\(^3\) The Discussion Paper tried to elicit informed opinions from interested parties on a range of potential law reform options and their desirability. It also tried to elicit the views of interested persons in respect of whether there were other areas of law reform that the Commission had not explored, but which should be considered. The Commission received a total of 20 submissions (including confidential submissions) from various government agencies, employer and union related parties. All of them were taken into account in formulating the recommendations for law reform set out below.

6. It is of some significance that the Commission did not receive submissions from the Australian Council of Trade Unions (ACTU) after it made a decision to boycott the Commission in 2014.\(^4\) The ACTU’s decision not to engage in policy debate was unfortunate because it meant that the Commission was not provided directly with the views of Australia’s peak union body on matters affecting its members. However, the Commission has had detailed regard to various submissions made by the ACTU to a range of Parliamentary and other inquiries.

\(^3\) Royal Commission into Trade Union Governance and Corruption, Discussion Paper – Options for Law Reform, 19/5/15.

\(^4\) Letter from the Australian Council of Trade Unions to the Royal Commission into Trade Union Governance and Corruption dated 23 June 2014.
7. Consistently with the theme of the Discussion Paper, this Volume of the Report endeavours to consider possible law reform options in the following way. First it identifies a potential problem with the existing legal and regulatory framework exposed by the Commission’s inquiries. Then it analyses:

(a) whether its cause is a lack of, or insufficient, regulation, and whether it requires the introduction of new laws or amendments to existing provisions;

(b) whether existing laws are not sufficiently clear to address the problem or require amendment to better reflect their original intent; and

(c) whether existing laws, while appropriately targeted towards the problem, are being ignored or insufficiently enforced.

8. The Discussion Paper also made two key points, which should be repeated here.

(a) While broad, the terms of reference assume that employee associations (that is trade unions) will continue to remain an important part of the industrial landscape, and their basic functions and responsibilities under the *Fair Work Act 2009* (Cth) and the general law will remain.

(b) Unions have historically achieved much for their members, and for society more broadly. Some of those achievements are discussed below. The matters for law reform identified
below do not arise out of the conduct of members. Nor do they arise out of the existence of unions per se. Rather, they arise out of the conduct of some union officials and the employers that deal with them.

B – STRUCTURE OF VOLUME

9. This Volume of the Report is divided into the following ten Chapters:

Chapter 1 Introduction

Chapter 2 Regulation of Unions

Chapter 3 Regulation of Union Officials

Chapter 4 Corrupting Benefits

Chapter 5 Regulation of Relevant Entities

Chapter 6 Enterprise Bargaining

Chapter 7 Competition Issues

Chapter 8 Building and Construction

Chapter 9 Rights of Entry

Chapter 10 Reform of the *Royal Commissions Act* 1902 (Cth)
10. In addition, there are two Appendices. Appendix 1 contains certain model legislative provisions for consideration. The purposes of drafting these was merely to assist in understanding the reasons underlying the proposals for reform. No claim whatsoever is made that they represent satisfactory legislative drafting. Model provisions have not been provided in relation to every recommendation made, only those where a level of detail is necessary to understand the recommendation. Appendix 2 sets out a list of the various submissions received by the Commission in relation to policy and reform issues.

11. Each Chapter deals with a number of issues, or problems, with the existing law on the same broad theme. Following identification of the issue or problem there is consideration of possible solutions having regard to submissions received:

(a) in response to the Discussion Paper;

(b) in response to the Issues Papers;

(c) from affected parties in relation to particular case studies; and

(d) from other parties in relation to policy issues raised by the Commission more generally.

12. Regard has also been had to the public submissions made to, issues papers released by, and the draft and final reports of a number of other inquiries which have been, or are being, conducted into issues that overlap with or complement matters arising out of the Commission’s inquiries. These inquiries include:
(a) the Competition Policy Review;\textsuperscript{5}

(b) the Financial System Inquiry;\textsuperscript{6}

(c) the Productivity Commission Inquiry into the Workplace Relations Framework;\textsuperscript{7} and

(d) a number of Senate committee and other parliamentary committee inquiries into proposed legislation in the industrial relations area.

13. Following analysis of the various arguments, there is a recommendation for reform. A summary of each recommendation is contained in a box at the end of the relevant section. Some recommendations are more technical than others, and it may be necessary in some cases to refer to the discussion concerning that recommendation. A complete list of recommendations can be found in Volume 1 of this Report.

14. The balance of this Chapter sets out some important matters of background that inform questions of trade union governance.


\textsuperscript{6} Financial System Inquiry, \textit{Final Report} (December 2014).

\textsuperscript{7} The Australian Government Productivity Commission Inquiry into the Workplace Relations Framework Inquiry Report was handed to the Australian Government on 30 November 2015. At the time of writing this report, that Inquiry Report had not been released by the Government. Regard has been had, in this Report, to the draft report released in August 2015.
C – HISTORY OF TRADE UNION REGULATION IN AUSTRALIA

15. A basic appreciation of the history of trade union regulation in Australia is relevant to understanding the role of unions in Australia’s industrial and political framework. That role necessarily underpins law reform concerning union governance. Set out below is a summary, not intended to be comprehensive, of key developments in terms of legal regulation.8

British settlement to Federation

16. In CFMEU v North Goonyella Coal Mine Pty Ltd,9 Logan J referred to the Tolpuddle Martyrs’ Case10 and the public outrage which followed that case involving the prosecution of farm workers who swore an oath to organise themselves to prevent the reduction of their wages. He said that these factors provided:11


the inception of a movement which gradually throughout the 19th century led to the recognition by the British parliament and then by colonial parliaments here of trade unions as lawful organisations.

17. Whether or not that is so, the history of trade unions in Australia starts in English law at the time of British settlement in Australia. In Britain

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9 [2013] FCA 1444.

10 R v Lovelass (1834) 6 Car & P 595; 172 ER 1380.

11 [2013] FCA 1444 at [30]-[31].
at the turn of the 19th century, the *Combination Acts* of 1799\(^\text{12}\) and 1800\(^\text{13}\) attached criminal liability to combinations of workmen for any purpose relating to their employment.\(^\text{14}\) The consequence of those laws was effectively to outlaw any form of trade union. The 1800 Act was repealed in 1824 but the repeal coincided with considerable industrial violence and unrest.\(^\text{15}\) As a result, the following year the *Combination of Workmen Act 1825* (\textbf{1825 Act}) was passed which had the effect of reinstating some, but not all, of the restrictions on combination. The legislation expressly legalised agreements between workmen as to the wages and working hours they would accept. However, it expressly criminalised acts of interference with an employer or employee by way of ‘threats’, ‘intimidation’ or ‘by molesting or in any way obstructing another’.

18. The upshot of the 1825 Act was that trade unions were not illegal associations by statute.\(^\text{16}\) The 1825 Act applied to the Australian colonies by virtue of the *Australian Courts Act* 1828 (Imp). Later

\(^\text{12}\) An Act to Prevent Unlawful Combinations of Workmen 1799 (39 Geo 111 c 81).

\(^\text{13}\) An Act to Prevent Unlawful Combinations of Workmen 1800 (39 and 40 Geo 111 c 106).


\(^\text{15}\) B Creighton and A Stewart, *Labour Law* (5th ed, Federation Press, 2010), [2.10].

\(^\text{16}\) See *Williams v Hursey* (1959) 103 CLR 30 at 61-62 per Fullagar J. It appears that there was little enforcement in Australia of the restrictions in the 1825 Act, which were progressively repealed in the Australian colonies from 1878 onwards: see J H Portus, *The Development of Australian Trade Union Law* (Melbourne University Press, 1958), p 89.
cases also made it clear that, despite some statements to the contrary,\(^\text{17}\) they were not illegal associations at common law.\(^\text{18}\)

19. However, at common law union members could be liable for criminal conspiracy if they induced members to strike in breach of their contracts of employment.\(^\text{19}\) Further, as in Britain, each of the Australian colonies and thus after Federation the States had master and servant laws which imposed criminal sanctions on employees who breached their contracts of employment.\(^\text{20}\) In addition, the objects of a trade union were commonly, although not invariably, held to be in restraint of trade, with the result that the rules of the trade union and any trusts set up for the holding of property were unenforceable in court.\(^\text{21}\) A consequence was that in general no civil action would lie against a member of trade union who misappropriated trade union property.\(^\text{22}\) Further, in the majority of cases, there was no criminal offence committed either.\(^\text{23}\)

20. Clearly, this placed trade unions and their members in a precarious position. The position of trade unions in Britain was substantially

\(^\text{17}\) See, eg, *Hilton v Eckersley* (1855) 6 El & Bl 47 at 53; 119 ER 781 at 784.


\(^\text{19}\) *R v Bunn* (1872) 12 Cox 316.


\(^\text{21}\) See *Williams v Hursey* (1959) 103 CLR 30 at 61-62 per Fullagar J referring to *Hilton v Eckersley* (1855) 6 El & Bl 47; 119 ER 781 and *Hornby v Close* (1867) LR 2 QB 53.

\(^\text{22}\) See D W Smith and D W Rawson, *Trade Union Law in Australia* (2nd ed, Butterworths, 1985), p 15.

improved in 1871 with the enactment of the *Trade Union Act 1871* (UK). That legislation provided that the purposes of any trade union should not, merely by reason of being in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. However, the obvious consequence of this provision would have been to render the rules of a trade union enforceable between the members on the basis of contract and could have resulted in courts being required to enforce agreements to strike or boycott. As a result, s 4 of the *Trade Union Act 1871* (UK) provided that nothing in the Act would enable a court to entertain any legal proceeding with the object of enforcing certain agreements.

21. In addition to these reforms, the legislation introduced a system of registration. Under it the property of a registered trade union was vested in trustees and the trustees were entitled to bring or defend any action concerning the property, rights or claims to property of the trade union. The legislation regulated the affairs of registered trade unions in a number of important respects:

(a) The trustees of a registered trade union were not liable to make good any deficiency in the funds of the union, but were liable only for the money actually received on account of the union.

24 *Trade Union Act 1871* (UK), s 3.

25 *Trade Union Act 1871* (UK), s 10.
(b) The treasurer and other officers of a registered trade union were liable to account to the trustees or members, which account was required to be audited.\textsuperscript{26}

(c) Officers and members were made criminally liable for the fraudulent misapplication of the funds of the union for any purpose other than those specified in the rules of the trade union.\textsuperscript{27}

(d) A trade union could not be registered unless it had certain rules including rules as to the purposes of the trade union, the investment of funds and the annual or periodical audit of accounts.

22. The \textit{Trade Union Act 1871} (UK), as amended by the \textit{Trade Union Act 1876} (UK), was fairly quickly adopted in each of the Australian colonies that became States.\textsuperscript{28} However, except in New South Wales, few trade unions appear to have obtained registration under these Acts.\textsuperscript{29}

23. In 1875, the United Kingdom Parliament enacted the \textit{Conspiracy and Protection of Property Act 1875} (UK), which among other things removed criminal liability for conspiracy to do acts in contemplation or

\textsuperscript{26} \textit{Trade Union Act} 1871 (UK), s 11.

\textsuperscript{27} \textit{Trade Union Act} 1871 (UK), s 12.

\textsuperscript{28} \textit{Trade Union Act} 1876 (SA); \textit{Trade Union Act} 1881 (NSW); \textit{The Trade Unions Act} 1884 (Vic); \textit{Trade Unions Act} 1886 (Qld); \textit{Trades Unions Act} 1889 (Tas); \textit{Trade Unions Act} 1902 (WA).

\textsuperscript{29} See D W Smith and D W Rawson, \textit{Trade Union Law in Australia} (2nd ed, Butterworths, 1985), p 48.
furtherance of a trade dispute and for breaches of contract by an employee. Similar legislation was later enacted in all of the Australian colonies except New South Wales.

24. The overall result was that at the time of Federation (or shortly thereafter in the case of Western Australia), trade unions in Australia were similar to their British cousins. Trade unions were legal in all Australian States. They were capable of being registered. Registration conferred some benefits on a union. However, the precise legal consequences of registration under the State Acts were somewhat obscure. Was the registered trade union a body corporate? Was it a ‘quasi-corporation’? Or was it simply an unincorporated association with some characteristics of a body corporate? The internal affairs of registered trade unions were subject to a limited degree of regulation, but unregistered trade unions were entirely unregulated.

Development of industrial arbitration

25. Operating in parallel with these British developments was the development in Australia from the 1890s onwards of two forms of

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30 See K D Ewing, Trade Unions, the Labour Party and the Law (Edinburgh University Press, 1982), p 11.

31 Conspiracy and Protection of Property Act 1878 (SA); Conspiracy and Protection of Property Act 1889 (Tas); Employers and Employes Act 1891 (Vic); Conspiracy and Protection of Property Act 1900 (WA); Trade Union Act 1915 (Qld).

legislative regulation of industrial conditions – wages boards and compulsory industrial arbitration.33

26. Wages boards, which operated principally in Victoria and Tasmania, fixed wages in certain industries. Trade unions had no direct part in such a system.34 However, they played a critical role in the compulsory industrial conciliation and arbitration systems which were successively established in Western Australia, New South Wales, the Commonwealth, Queensland and South Australia. In these jurisdictions, registered trade unions could submit industrial disputes for compulsory conciliation and arbitration to the relevant industrial court. That court could settle industrial disputes within the court’s jurisdiction by overseeing agreed settlements, making non-binding recommendations and making awards that would become binding on the parties but also, depending on the scope of a dispute and on the jurisdiction, on other employers and employees in the same industry.35 A valid award created rights and obligations in the employees bound by the award which derived their force from statute. However, the award did not form part of the employees’ contracts of employment.36 It was not possible for employers and employees to contract validly on terms that were less favourable than the award. Under these systems, registered trade unions could also enter into collective or industrial


34 See B Creighton and A Stewart, *Labour Law* (5th ed, Federation Press, 2010), [2.31].


36 See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.
agreements with employers or associations of employers, although this was not the main focus of the systems.\textsuperscript{37}

\section*{27.}

In 1904, the \textit{Commonwealth Conciliation and Arbitration Act 1904} (Cth) was enacted. Among other things it established a Commonwealth Court of Conciliation and Arbitration with the power to resolve interstate industrial disputes. Part V of that Act provided for the registration of organisations being associations of employers or associations of employees with more than 100 employees. Registered organisations received the benefits of separate legal personality. They became entitled to certain privileges in relation to industrial disputes. One of these privileges was the capacity to submit industrial disputes in which an organisation was interested to the Commonwealth Court of Conciliation and Arbitration. Another was the capacity to be represented before the Court in the hearing and determination of any industrial dispute in which the organisation was interested.

\section*{28.}

With the growth and development of the Federal and various State compulsory arbitration systems, trade unions inevitably came under greater regulation:\textsuperscript{38}

The arbitration system recognizes the institution of trade unionism and gives it important rights. To the extent that it does so it must take away rights of the individual employee. In such circumstances the only protection which can be given the employee is the imposition of various restrictions on trade unions to protect the interests of individual members from unfair union action. The motives behind the restrictions are twofold – the protection of the interests of the individual member and the

\begin{footnotesize}
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\item[\textsuperscript{38}] J H Portus, \textit{The Development of Australian Trade Union Law} (Melbourne University Press, 1958), p 182.
\end{itemize}
\end{footnotesize}
protection of the public interest to ensure that an association which has been given power by the state does not act in a way contrary to the interests of the state.

29. Over time, both at the State and Commonwealth level legislation was introduced regulating the activities of trade unions registered under relevant industrial legislation.\(^{39}\) In short, increased regulation was the price to be paid for the rights and privileges conferred on registered trade unions under the industrial relations legislation. There was no requirement on a trade union to be registered but there was an obvious incentive to do so.

30. The *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) survived for over 80 years, finally being replaced by the *Industrial Relations Act* 1988 (Cth).

**Move away from industrial arbitration: 1990s onwards**

31. Initially, the *Industrial Relations Act* 1988 (Cth) was little more than a consolidation of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth).\(^{40}\) However, during the 1990s there was a shift by the Federal Labor Government away from compulsory industrial arbitration toward enterprise bargaining – that is, towards agreements between unions and individual employers on an enterprise basis.\(^{41}\) The shift towards enterprise bargaining was formalised by the *Industrial


\(^{40}\) See B Creighton and A Stewart, *Labour Law* (5th ed, Federation Press, 2010), [2.44].

\(^{41}\) See B Creighton and A Stewart, *Labour Law* (5th ed, Federation Press, 2010), [2.49]-[2.56].
Relations Reform Act 1993 (Cth). The trend was continued by the Coalition Government from 1996. First, there were further amendments to the Industrial Relations Act 1988 (Cth) in 1996 (renamed the Workplace Relations Act 1996 (Cth)). Ultimately the WorkChoices legislation was enacted in 2006. 42

32. The WorkChoices legislation decoupled the Federal industrial relations system from the ‘conciliation and arbitration’ power in the Commonwealth Constitution. More significantly, it expanded considerably the scope of the Commonwealth industrial relations system by applying Commonwealth law to all employees employed by trading or financial corporations. 43 The consequence was to diminish very significantly the importance and application of the traditional State-based industrial relations systems.

33. Subsequently, the Federal Labor government introduced the Fair Work Act 2009 (Cth). Although that Act differs in many respects from the WorkChoices legislation, it still seeks to regulate industrial relations on a national basis. In addition, in 2009 each of the States other than Western Australia referred certain powers to the Commonwealth concerning industrial relations. 44 The result is that in those States, subject to certain exceptions largely confined to various public sector

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42 Workplace Relations Amendment (Work Choices) Act 2005 (Cth).

43 From 1996, Victorian employees were also subject to Commonwealth law after Victoria referred legislative power in relation to industrial relations to the Commonwealth: Commonwealth Powers (Industrial Relations) Act 1996 (Vic).

44 Industrial Relations (Commonwealth Powers) Act 2009 (NSW); Fair Work (Commonwealth Powers) Act 2009 (Vic); Fair Work (Commonwealth Powers) and Other Provisions Act 2009 (Qld); Fair Work (Commonwealth Powers) Act 2009 (SA); Industrial Relations (Commonwealth Powers) Act 2009 (Tas).
employees, all employees are subject to federal industrial relations regulation under the *Fair Work Act 2009* (Cth).

**Changes to unions and union regulation from late 1980s onwards**

34. In combination with changes to the industrial relations landscape, during and following the late 1980s there were considerable changes to the number and structure of unions as a result of legislative changes and direction from the ACTU:

(a) At 30 June 1986, the Australian Bureau of Statistics (ABS) reported a total of 326 trade unions in Australia. 200 of those unions (61.3%) had less than 2,000 members. Eight unions had more than 80,000 reported members each, together accounting for 30.7% of trade union members. There were 146 unions registered under Commonwealth law reflecting 81% of total reported trade union membership.

(b) By 30 June 1996, the ABS reported a total of 132 trade unions in Australia. 76 of those unions (57.5%) had less than 2,000 members. 12 unions had over 100,000 members each.

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48 Australian Bureau of Statistics, 30 June 1986, *Trade Union Statistics, Australia* (ABS Catalogue No 6323.0), pp 1, 2, 5. The membership figures are total members as opposed to financial members.
together accounting for 71.2% of union members.\textsuperscript{49} There were 46 unions registered under Commonwealth law reflecting 86% of total reported trade union membership.\textsuperscript{50}

35. The reduction of the number of unions and the creation of ‘super unions’ through amalgamation led, among other things, to the increased concentration of power in the hands of union officials. At the same time there was an increase in the complexity of the day-to-day operations of those amalgamated unions.

36. At the same time, as a result of a range of complex factors including substantial changes in the structure of the economy, union membership began to decline significantly:

(a) In August 1986, the ABS reported that 46% of Australia’s employees were trade union members.\textsuperscript{51}

(b) By August 1996, that figure reported by the ABS had dropped to 31%, with 24% union membership in private sector employment and 55% union membership in the public sector.\textsuperscript{52}

\textsuperscript{49} Australian Bureau of Statistics, 30 June 1996, \textit{Trade Union Statistics Australia} (ABS Catalogue No 6323.0), pp 5, 7, 9-10. The membership figures are total members as opposed to financial members.


\textsuperscript{52} Australian Bureau of Statistics, August 1996, \textit{Trade Union Members Australia} (ABS Catalogue No. 6325.0), pp 5-6.
(c) In August 2006, 20% of employees were trade union members. A higher proportion of public sector employees were trade union members (43%) than private sector employees (15%).

(d) As at August 2014, only 15% of employees were trade union members. 11.1% of private sector employees (996,700) were trade union members, compared with 39.5% (573,400) of public sector employees.

37. There were also significant changes from the 1990s onwards to the way registered unions were regulated. Registered unions at both State and Commonwealth level had long been subjected to various forms of regulation concerning their rules, elections for office with the union and accounting. However, during the 1990s various State legislatures introduced provisions imposing statutory duties on union officials similar to those imposed on company directors: New South Wales introduced such duties in 1991, Western Australia in 1995 and Queensland in 1997.

38. At the Commonwealth level, equivalent duties were first introduced in 2002 when the Workplace Relations Amendment (Registration and

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54 Australian Bureau of Statistics, August 2014, Characteristics of Employment, Australia (ABS Catalogue No. 6333.0), data cube 16 (table 16.1), released 27/10/15.
55 Industrial Relations Act 1991 (NSW).
56 Industrial Relations Legislation Amendment and Repeal Act 1995 (WA).
57 Industrial Organisations Act 1997 (Qld).
Accountability of Organisations) Act 2002 (Cth) introduced Schedule 1B to the Workplace Relations Act 1996 (Cth).

39. Despite the demise of the traditional industrial arbitration systems from the 1990s onwards, and the changes to unions, trade unions still possess a number of significant rights and privileges under both Commonwealth and State laws. The current statutory framework regulating trade unions in the various jurisdictions is outlined below.

D – PRESENT COMMONWEALTH STATUTORY FRAMEWORK

40. At the Commonwealth level, there are two relevant pieces of legislation: the Fair Work (Registered Organisations) Act 2009 (Cth) (FW(RO) Act) and the Fair Work Act 2009 (Cth) (FW Act). In essence, the FW Act provides for the registration of employee associations (that is, trade unions) and employer associations as ‘organisations’. It also contains provisions regulating such organisations. Among other things, the FW Act confers certain rights and powers on employee organisations and their officials.

Fair Work (Registered Organisations) Act 2009 (Cth)

41. The FW(RO) Act is largely based on Schedule 1B of the Workplace Relations Act 1996 (Cth).
42. Under the FW(RO) Act, a ‘federally registrable’ association of employees or employers or an enterprise association is eligible to apply for registration as an ‘organisation’.\(^58\)

43. An association of employees is ‘federally registrable’ if it is a constitutional corporation (i.e. a trading, financial or foreign corporation) or some or all of its members are ‘federal system employees’.\(^59\) A ‘federal system employee’ is defined as a ‘national system employee’ within the meaning of that term in the FW Act or an independent contractor who, had he or she been an employee, would be a ‘national system employee’.\(^60\) In turn, a ‘national system employee’ includes an employee employed or usually employed by (a) a constitutional corporation, (b) the Commonwealth or a Commonwealth authority, (c) a person who employs or usually employs flight crew officers, maritime workers or waterside workers in connection with interstate trade or commerce, or (d) an employer who carries on activity in a Territory.\(^61\)

44. By these techniques the legislation bases itself at least on the Commonwealth legislative powers conferred by ss 51(i), (xx), (xxxix) and 122 of the Constitution. The constitutional validity of the predecessor to the FW(RO) Act, which in this respect was substantially

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\(^{58}\) *Fair Work (Registered Organisations) Act* 2009 (Cth), s 18.

\(^{59}\) *Fair Work (Registered Organisations) Act* 2009 (Cth), s 18B.

\(^{60}\) *Fair Work (Registered Organisations) Act* 2009 (Cth), s 6.

\(^{61}\) *Fair Work Act* 2009 (Cth), ss 13, 14.
identical to the FW(RO) Act, was upheld by the High Court in *The WorkChoices Case*.

45. Further, as a result of the referral of powers mentioned in paragraph 33 above, the definition of ‘national system employee’ also includes employees employed by other entities in those referring States (eg sole traders, partnerships), except (to varying degrees in each State) certain public sector and local government employees.

46. The consequence is that most employees in Australia are ‘federal system employees’ for the purposes of the FW(RO) Act.

47. An organisation registered under the FW(RO) Act is a body corporate. That is, it is a legal entity with separate legal personality. It has certain rights, powers and liabilities e.g. the ability to own property, to sue and be sued. Most, if not all, trade unions in Australia operating federally are organisations registered under the FW(RO) Act (or one of its predecessors), and are therefore subject to the provisions of the FW(RO) Act.

48. The FW(RO) Act regulates organisations in a number of ways. In very broad terms:

(a) chapter 2 concerns the registration and cancellation of registration of organisations;

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63 *Fair Work Act* 2009 (Cth), ss 30C, 30D, 30H, 30M, 30N, 30S.
64 *Fair Work (Registered Organisations) Act* 2009 (Cth), s 27.
(b) chapter 3 deals with the amalgamation and withdrawal from amalgamation of organisations;

(c) chapter 4 sets out provisions dealing with the ability of organisations to represent particular persons;

(d) chapter 5 prescribes and regulates the rules of organisations;

(e) chapter 6 concerns membership of organisations;

(f) chapter 7 provides for democratic control of organisations through elections;

(g) chapter 8 imposes a range of reporting and accounting requirements on organisations; and

(h) chapter 9 regulates the conduct of officers and employees of organisations and branches of organisations.

49. Under the FW(RO) Act, the regulation of organisations is overseen principally by the General Manager of the Fair Work Commission. The General Manager of the Fair Work Commission is a separate statutory office. The holder is appointed by the Governor-General on the nomination of the President of the Fair Work Commission for a period not exceeding five years.\textsuperscript{65} The Fair Work Commission itself is a body consisting of a President, two Vice Presidents, an unspecified number of Deputy Presidents and Commissioners and six expert panel

\textsuperscript{65} \textit{Fair Work Act} 2009 (Cth), ss 656, 660.
members. Fair Work Commission members are appointed by the Governor-General, and hold office until aged 65.

Rights of employee organisations under the *Fair Work Act 2009* (Cth)

50. Apart from the benefit of separate legal personality conferred by the FW(RO) Act, the FW Act confers a number of significant rights and privileges on registered employee organisations.

*Participation in enterprise bargaining*

51. *First*, employee organisations are critical participants in the enterprise bargaining system established by the FW Act.

52. In essence, the enterprise bargaining system requires employees (through their bargaining representatives) and their employers to bargain in good faith for terms and conditions of an enterprise agreement. Any agreement that is ultimately made must result in the employees to whom it is to apply being ‘better off overall’ than the relevant modern award that covers them (and which would apply to them but for the existence of the enterprise agreement). Together

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66 *Fair Work Act 2009* (Cth), s 575(2).

67 *Fair Work Act 2009* (Cth), s 629. Expert panel members hold office for a period specified in their instrument of appointment, and the period must not exceed five years: s 629(4).

68 *Fair Work Act 2009* (Cth), s 186(2)(d). The Fair Work Commission may, in exceptional circumstances, approve an enterprise agreement where it does not pass the ‘better off overall test’ if the approval would not be contrary to the public interest: *Fair Work Act 2009* (Cth), s 189.

69 See *Fair Work Act 2009* (Cth), ss 47, 48, 52, 53 in relation to when a modern award and enterprise agreement cover and apply to an employer, their employees and a registered organisation.
with the National Employment Standards contained in the FW Act, modern awards set the minimum safety net for employees’ terms and conditions within the Commonwealth industrial relations system.

53. The decision to commence bargaining is usually consensual. But in certain circumstances, such as where a majority of employees would like to bargain with a reluctant employer and as a consequence the Fair Work Commission makes a ‘majority support determination’, an employer can be required to engage in bargaining and in so doing to comply with good faith bargaining requirements, even where the employer’s preference is that its employees’ terms and conditions be covered by a modern award. However, the good faith bargaining requirements do not require the making of concessions or the reaching of agreement on the terms that are to be included in an enterprise agreement.

70 Fair Work Act 2009 (Cth), s 237.

71 Fair Work Act 2009 (Cth), s 228(2). For the tortured results that arise from being compelled genuinely to negotiate but not being required to make concessions, see Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia (2012) 206 FCR 576 and APESMA v Peabody Energy Australia Coal Pty Ltd [2015] FWCFB 1451.

54. As will be apparent from the above summary, ‘good faith bargaining’ is critical to the content of enterprise agreements. Contrary to the position under the previous ‘WorkChoices’ legislation, trade unions have a distinct role in that process.

55. Pursuant to s 176 of the FW Act, an employee organisation is the default bargaining representative for a proposed enterprise agreement (that is not a ‘greenfields agreement’) if an employee to be covered by
the proposed agreement is a member of the employee organisation and the employee organisation is entitled to represent the employee’s industrial interests in respect of the work to be covered by the agreement.

56. An employee who is a union member may appoint someone other than the union to be his or her representative, but so long as there is one union member who has not appointed someone else, the union will be a bargaining representative and will therefore play a role in determining the content of an enterprise agreement. The union will also be entitled to give written notice to the Fair Work Commission that it wishes to be covered by the agreement. That coverage must be noted by the Fair Work Commission in its decision to approve the agreement.

57. In addition, employers who wish to engage employees in a genuinely new enterprise may bargain with an employee organisation for a ‘greenfields agreement’. Such an agreement may be made at any time after bargaining commences between an employer and any employee organisation that they agree to bargain with, and which is entitled to represent the industrial interests of the employees who will be covered by the agreement.

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72 Fair Work Act 2009 (Cth), s 176.
73 Fair Work Act 2009 (Cth), ss 183, 201.
74 Fair Work Act 2009 (Cth), ss 172(4), 182(3).
**Right of entry powers**

58. *Secondly*, union officials also have extremely broad ‘right of entry’ powers under the FW Act, the *Work Health and Safety Act 2011* (Cth) and State and Territory work health and safety laws.

59. Section 512 of the FW Act allows the Fair Work Commission, on the application of an organisation, to issue an entry permit for an official of the organisation if the Commission is satisfied that the official is a ‘fit and proper person to hold the entry permit’. Although this provision is not limited to the officials of employee organisations, so that in theory the officials of employer organisations could be granted a right of entry permit, the rights conferred on a permit holder in effect limit the holders of permits to trade union officials.

60. Subject to certain conditions and limitations, an entry permit holder is permitted to enter premises to investigate suspected contraventions of the FW Act,\(^{75}\) to hold discussions with workers whose industrial interests the permit holder’s organisation is entitled to represent\(^{76}\) and to exercise powers conferred by State or Territory work health and safety laws.\(^{77}\) Whilst on the premises, the permit holder may inspect anything relevant to a suspected contravention of a modern award, enterprise agreement, workplace determination or Fair Work Commission order, and inspect and make copies of any record or

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\(^{75}\) *Fair Work Act 2009* (Cth), s 481.

\(^{76}\) *Fair Work Act 2009* (Cth), s 484.

\(^{77}\) *Fair Work Act 2009* (Cth), s 494.
document (other than a ‘non-member record’) on the premises that is directly relevant to the suspected contravention.\textsuperscript{78}

61. The \textit{Work Health and Safety Act} 2011 (Cth) contains provisions which are similar to the FW Act. It allows a union official who has completed relevant safety training and who holds an entry permit under the FW Act to apply for a Work Health and Safety Permit. In general terms, that permit allows the holder to enter premises to inquire into suspected contraventions of the \textit{Work Health and Safety Act} 2011 (Cth) and also to consult and advise workers on health and safety matters. Similar rights of entry are provided under State and Territory work health and safety laws.\textsuperscript{79}

62. In effect, union officials who hold an entry permit are authorised to act in a manner in some ways akin to police officers in relation to industrial and work health and safety laws. However, in fact their powers exceed those of the police in at least one respect: unlike police officers they do not need a search warrant obtained from a court prior to entering premises and examining documents stored there. In addition, permit holders are not required to provide advance notice of entry where it relates to inquiries into suspected contraventions of work health and safety laws.

\textsuperscript{78} \textit{Fair Work Act} 2009 (Cth), s 482.

Rights in relation to awards

63.  *Thirdly*, employee organisations have broad standing rights to apply to the Fair Work Commission to vary, revoke or make a modern award, to commence proceedings in the Federal Court or Federal Circuit Court seeking a civil remedy or to appear before the Fair Work Commission on behalf of a member.\(^{80}\)

General observations concerning possible reform of the *Fair Work (Registered Organisations) Act 2009* (Cth)

64.  It is apparent from the above summary that in considering possible reforms to the FW(RO) Act two matters should be kept in mind.

65.  *First*, for the most part the FW(RO) Act draws no distinction between employer and employee organisations. Accordingly, any changes to the FW(RO) Act must take this into account.

66.  *Secondly*, not all organisations, whether employee organisations or employer organisations, are the same size. Not all have the same level of resources. Thus, whilst a change in the law may not impose much of a regulatory burden on a large trade union such as the CFMEU or the AWU, it may impose a much greater burden on a smaller employee or employer association.

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\(^{80}\) *Fair Work Act* 2009 (Cth), s 158.

\(^{81}\) *Fair Work Act* 2009 (Cth), ss 539-540.

\(^{82}\) *Fair Work Act* 2009 (Cth), s 596.
67. As at 3 December 2015, there are 109 registered organisations, of which 47 are unions. The remaining 62 are employer organisations or enterprise associations.\textsuperscript{83} However, registered trade unions are considerably larger than registered employer organisations. Based on the 2013 annual public returns provided to the Fair Work Commission, there were just over 2 million members of registered trade unions, compared with just under 100,000 members of registered employer organisations. Further, almost half of the 47 registered trade unions were larger in terms of members than the largest employer organisation, the Master Builders Association of Victoria.

\textbf{E – PRESENT STATE STATUTORY FRAMEWORK}

68. Each State has legislation that regulates trade unions to varying degrees. Although the legislation varies between States there are three general patterns of regulation.

\textbf{New South Wales, Queensland, South Australia and Western Australia}

69. In these States, the equivalents of the \textit{Trade Union Act} 1871 (UK) have been repealed and there is no legislation that regulates trade unions as such.\textsuperscript{84} Instead, as under the FW(RO) Act, provision is made for the registration of industrial organisations or associations of employees.


\textsuperscript{84} In New South Wales and South Australia, the provisions of the \textit{Trade Union Act} 1871 (UK) that excluded trade unions from the restraint of trade doctrine have been re-enacted: \textit{Industrial Relations Act} 1996 (NSW), ss 303-305; \textit{Fair Work Act} 1994 (SA), s 137.
and employers. Registration confers separate legal personality on the State-registered organisation. In terms of numbers:

(a) As at August 2014, there were 45 registered employee organisations (unions) and 43 registered employer associations in New South Wales.  

(b) As at 30 June 2015, there were 27 employee organisations (unions) and 19 employer organisations registered in Queensland.  

(c) As at 30 June 2015, there were 28 employee associations (unions) and 11 registered employee associations registered under South Australian legislation.  

(d) As at 30 June 2015, there were 43 employee industrial organisations (unions) and 18 registered employer industrial organisations registered in Western Australia.  

70. Certain privileges under State industrial relations legislation are conferred on State-registered organisations of employees, for example,  

85 *Industrial Relations Act* 1996 (NSW), Part 3 of Chapter 5; *Industrial Relations Act* 1999 (Qld), Chapter 12; *Fair Work Act* 1994 (SA), Chapter 4; *Industrial Relations Act* 1979 (WA), Division 4 of Part II.  


right of entry powers, and rights to negotiate and enter collective or enterprise agreements with respect to employees who are otherwise not covered by the federal system.

71. State-registered organisations are also subject to regulation. The precise regulation varies between States. In South Australia, regulation is limited largely to certain matters concerning rules of an organisation and the preparation of accounts. In New South Wales, Queensland and Western Australia there is, to varying degrees, regulation similar to that which exists under the FW(RO) Act and in general involves regulation of the rules of organisations, the election and duties of officers of those organisations and reporting and accounting requirements.

Tasmania

72. Tasmania has a hybrid model. The Trades Unions Act 1889 (Tas), which is based on the Trade Union Act 1871 (UK), remains in force. But it is largely obsolete. In 2015, only four trade unions are registered under the Trades Unions Act 1889 (Tas). Trade unions that are registered have at least some attributes of separate legal personality and are subject to the regulation (albeit fairly limited) imposed by the

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90 Fair Work Act 1994 (SA), ss 124-125, 128.
92 Letter from the Solicitor-General of Tasmania to the Solicitor Assisting the Commission dated 14 May 2015. The Act has never been highly utilised. Smith and Rawson report that at the end of 1981, there were 18 unions registered under the Trades Unions Act 1889, most of which were very small: D W Smith and D W Rawson, Trade Union Law in Australia (2nd ed, Butterworths, 1985), p 48.
Trades Unions Act 1889 (Tas). Trade unions which are not registered remain as unincorporated associations (unless they are incorporated under some other legislation) and are not subject to any specific regulation.

73. However, in addition, Part V of the Industrial Relations Act 1984 (Tas) provides for the registration of employee or employer associations as ‘organisations’. Unlike the legislation in New South Wales, Queensland, South Australia and Western Australia, registration does not confer separate legal personality on a registered organisation. However, it does confer a number of benefits on the organisation under the Tasmanian industrial relations system. These benefits include the right to appear before the Tasmanian Industrial Relations Commission, the right to enter into industrial and enterprise agreements and the right of its officers to enter premises. Registered organisations must comply with certain minor requirements in relation to rule changes and amalgamations but regulation does not otherwise affect them.

Victoria

74. Prior to 1996, Victoria also adopted the hybrid model currently adopted in Tasmania. The Trade Unions Act 1958 (Vic), based on the Trade Union Act 1871 (UK), regulated trade unions directly, and Part 12 of the Employee Relations Act 1992 (Vic) provided for the

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93 As at 3 December 2015, there were 29 employee associations (i.e. unions) and 25 employer associations formally registered under the Industrial Relations Act 1984 (Tas): a list of registered organisations is available on the Tasmanian Industrial Relations Commission website, [http://www.tic.tas.gov.au/registered_organisations/employee_orgs](http://www.tic.tas.gov.au/registered_organisations/employee_orgs), and [http://www.tic.tas.gov.au/registered_organisations/employer_organisations](http://www.tic.tas.gov.au/registered_organisations/employer_organisations), accessed 3/12/15.
recognition of employee and employer associations with consequent benefits for the purposes of the then Victorian industrial relations system. However, in 1996 Victoria referred most of its powers concerning industrial relations to the Commonwealth and Part 12 of the *Employee Relations Act 1992* (Vic) was repealed.\(^94\) Consequently, the only current Victorian legislation regulating trade unions is the *Trade Unions Act 1958* (Vic). As is the case in Tasmania, few trade unions are registered under that Act.\(^95\)

**F – ROLES OF TRADE UNIONS IN AUSTRALIA**

75. As noted in paragraph 15 above, any consideration of law reform in relation to union governance must have regard to the roles and significance of unions in contemporary Australia.

**Role in assisting members and improving society**

76. There can be little doubt that during the course of the 20\(^{th}\) century, trade unions in Australia helped improve the working conditions not only of their members, but of workers more generally. The ACTU, formed in 1927 as a ‘peak body’ for Australian trade unions, was involved along with individual unions and their members in numerous successful campaigns for better conditions including equal pay for

\(^{94}\) *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic).

\(^{95}\) As at November 1995, there were 25 organisations registered under the Act: see Victorian Government Printer, Scrutiny of Acts and Regulations Committee Redundant and Unclear Legislation, *Review of Trade Unions Act 1958*, November 1995, pp 5-6. The Committee reviewing the Act recommended that it be repealed, but the recommendation was not implemented. Nevertheless, the Act is still little utilised. Information provided to the Commission by the Victorian Government indicated that as at May 2015 there were only 26 organisations registered under the Act.
women, increases in the minimum wage, long service leave and occupational health and safety laws.

77. These improvements in broader social conditions were largely achieved at a time of high trade union membership. As noted in paragraph 36 above, the proportion of trade union membership in Australia has consistently fallen over the last three decades from 46% in 1986 to only 15% in 2014.\textsuperscript{96} Notwithstanding declining membership, modern trade unions continue to provide a number of valuable benefits to their members. They seek better, safer and fairer working conditions for their members. They help to recover wages and other entitlements when employers have failed to pay them. They can investigate and help remedy safety issues in the workplace. They can assist members in litigation, and fund it. They can provide pastoral care and more general assistance to members.

78. The officials in charge of unions thus play an important role in the lives of their members. They occupy a position of considerable trust. They are in charge of substantial sums of money which is not their own.

Commercial role

79. Despite the humble beginnings of the trade union movement, it is clear that many modern trade unions are large and complicated commercial

\textsuperscript{96} Australian Bureau of Statistics, August 2014, \textit{Characteristics of Employment, Australia} (ABS Catalogue No. 6333.0), data cube 16 (table 16.1), released 27/10/15.
Evidence given before the Commission has shown that large unions, such as those named in the Commission’s Terms of Reference, receive significant revenue from commercial agreements concerning insurance schemes, redundancy funds and training funds. They operate complex commercial structures. They have large numbers of staff. They operate across multiple jurisdictions. The funds which certain unions have established, and which they and their officials administer, are even more complex in structure: incorporated associations, unincorporated associations, trusts and various corporate entities.

80. Even if a trade union carries on commercial activities, it is exempt from income tax, provided the trade union incurs its expenditure and pursues its objectives principally in Australia, complies with all of the substantive requirements of its governing rules and applies its income and assets solely for the purposes for which the trade union was established. Under ordinary principles of taxation law, funds contributed by members of a not-for-profit association to the association for the common benefit of the members (for example, membership and subscription fees, donations by members) do not

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98 Income Tax Assessment Act 1997 (Cth), s 50-15. Similar exemptions apply in respect of employee and employer associations registered under the Fair Work (Registered Organisations) Act 2009 (Cth). The other main classes of entity which have tax exempt status are registered charities, education and health institutions, and sporting and cultural associations.
constitute income of the association. 99 However, unless the association has tax exempt status, income received from external sources (for example, grants, sponsorships, third party commissions) is treated as assessable income and subject to tax.

81. The tax exempt status which is afforded to trade unions has the consequence that the substantial revenues which modern trade unions generate from sources other than their members are not subject to tax. The privilege of tax exempt status afforded to trade unions is one justification for the interest of the Commonwealth in proper union governance and financial accountability.

Statutory role in industrial relations system

82. The statutory role of trade unions in the State and Commonwealth industrial relations systems has already been discussed: see paras 50-63, 70 and 73 above. In short, registered trade unions and their officials occupy a privileged position in Australia’s industrial relations systems. As has already been noted, the right of entry powers conferred on trade union officials are extremely broad, exceeding those of the police in some respects. The granting of the various statutory privileges justifies proper legislative measures to safeguard the interests of those affected by those privileges and the general public interest.

99 This is so-called ‘mutuality principle’. In essence it is based on the idea that an organisation cannot derive income from itself.
Political role

83. The final contextual aspect that must be borne in mind is the political power and influence exercised by the officials of trade unions. The deep historical ties between the trade union movement and the Australian Labor Party (ALP) are well-known, the latter emanating from the former at the turn of the twentieth century. Those institutional ties remain strong today. Union affiliation fees and union donations are a core part of ALP funds. Union loans can be another source of help. A person who is eligible to join a union must be a financial member of a union if he or she wishes to become a member of the ALP.

84. Apart from these general institutional ties, union officials play an important role in the selection of ALP representatives for State and Federal Parliament. Through the various rules of the ALP, the Secretaries of large affiliated trade unions exercise substantial voting power at ALP State Conferences, and have a very significant role in determining the composition of the Australian Senate and State and Federal Parliaments more generally.

85. Why is this relevant to union governance? It is relevant because, given the substantial political power that is capable of being exercised by trade union officials, there is a heightened public interest in maintaining safeguards against any form of corruption by trade union officials and those employers with whom they deal.