

# **Linfox Australia Pty Ltd**

## **Submission to the Productivity Commission**

### ***Introduction***

This submission is made on behalf of Linfox Australia Pty Ltd (**Linfox**) in response to the following question posed in the issues paper released by the Productivity Commission in January 2015 in respect of the right of entry provisions under the *Fair Work Act 2009*:

*"Do the existing rights of entry laws sufficiently balance the interests of employees and employers and, if not, what are the appropriate reforms?"*

Linfox is the largest privately owned logistics company in Australia.

Linfox's logistics business operates more than 4.3 million square metres of warehousing and nearly 5,500 vehicles across 10 countries. Linfox provides supply chain solutions to leading companies, in a broad range of industries, in Australia, India, Indonesia, Malaysia, New Zealand, Singapore, Thailand, Vietnam, Laos and China / Hong Kong. Across the Asia Pacific, Linfox engages or employs approximately 21,000 people.

Linfox's logistics business is divided into industry sectors, each dedicated to specialist supply chain solutions including warehousing, distribution facilities management, transport and logistics for fast moving consumer goods, retail, resources and industrial and linehaul operations.

### ***Scope of Submission***

1. The right of entry provisions are set out at Part 3-4 of the *Fair Work Act 2009* (**FW Act**), provide for a permit holder to enter a premises for three purposes:
  - (a) to investigate a suspected contravention of the FW Act or a term of a Fair Work instrument;
  - (b) to hold discussions with one or more employees whose industrial interests the permit holder's organisation is entitled to represent; or
  - (c) to exercise rights conferred under State or Territory occupational health and safety laws.
2. This submission is concerned just with the exercise of entry rights for the purposes of holding discussions with employees under s. 484 of the FW Act.

### ***Entry to hold discussions***

3. Under s.484 of the FW Act, a permit holder may enter premises for the purposes of holding discussions with one or more employees (or TCF award workers), providing that:
  - (a) the permit holder is entitled to represent the industrial interests of those employees or workers; and
  - (b) those employees or workers wish to participate in those discussions (see s.484(c)).

4. Under s. 490 of the FW Act, the permit holder may only exercise an entry right during working hours and may hold discussions only during mealtimes or other breaks.
5. Under s. 492 of the FW Act, the permit holder must conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier. If the permit holder and occupier cannot agree on the room or area of the premises in which to hold discussions, then the permit holder may use the room in which the employees ordinarily take meal or other breaks and which is provided by the occupier for that purpose – i.e. a lunch room or canteen.

***Do the existing rights of entry under s.484 sufficiently balance the interests of employees and employers ?***

6. Linfox submits that the existing rights of entry under s.484 do not sufficiently balance the interests of employees and employers.
7. Rights of entry under s.484 necessarily infringe the employer's proprietary rights to control access to its premises. The section confers no direct benefit on employees. To the extent that an employee derives any benefit from s.484, it is the indirect benefit of having convenient access to union officials at the workplace for the purpose of raising issues with them. In the modern age, with the universal availability of electronic and telephonic communication, there is ready access for employees to their union. Face-to-face contact at the workplace is merely a matter of convenience for the employee, not one of necessity.
8. In reality, the real interest served by s.484 is the interest of the trade union itself. Section 484 enables a union to compel employers to allow its officials entry to premises which would otherwise be denied to them for the purpose of prosecuting the union's interests, and most significantly for recruitment purposes.
9. Linfox's experience has been that the rights of entry available to union officials under s.484 are able to be exercised so as to infringe the rights of employees and cause unwarranted disruption to the employer's business and interference with harmony in the workplace. This issue is adequately demonstrated by events in 2013/14 at the Coles Distribution Centre operated by Linfox at Truganina in Victoria.

***Events at Truganina***

10. In 2013 the Truganina site was operated by Linfox under contract to Coles as a storage and distribution facility for dry goods. The work at the site was subject to the *Linfox Road Transport and Distribution Centres National Enterprise Agreement 2011 (Agreement)*, an enterprise agreement made under the FW Act. The Agreement applied to approximately 146 sites, including around 13 of Linfox's distribution centres throughout Australia. The union party to the Agreement was the Transport Workers' Union of Australia (TWU) which had been the sole representative of the employees during the negotiation of the Agreement. The nominal expiry date for the Agreement was 31 December 2013 and negotiations for a replacement agreement were commenced with the TWU in September 2013.
11. In the period from August 2013 to October 2013, Linfox was provided with multiple entry notices under the FW Act from officials of the National Union of Workers (NUW) to enter the Truganina site under s.484 of the FW Act. Attached and marked Annexure A is a spreadsheet setting out the names of the permit holders and the dates upon which entry was effected during this period and since then.

12. While the stated purpose for effecting entry was to hold discussions with employees eligible to join the NUW who wished to participate in those discussions, the real purpose of the officials was to recruit employees to join the NUW and to agitate for a separate enterprise agreement to cover just the Truganina site separate to the national agreement between Linfox and the TWU.
13. NUW permit holders exercised rights under s.484 on an excessive number of occasions. They consistently insisted on entry to the lunchroom at the site, relying on the 'default arrangements' sanctioned by s.492 of the FW Act. Having gained access to the lunch room the NUW officials engaged in insistent and unwanted approaches to employees to try to get them to join the NUW (in preference to the TWU which had traditionally represented them at the site). They also approached employees in the car park at night as they left the site at the end of their shift.
14. Many employees felt intimidated and harassed by this conduct and Linfox management received numerous complaints – both written and verbal - directly from employees and through the TWU. Attached and marked Annexure B are extracts from the written complaints that were received by management at the Truganina Site. Many employees expressed to site management and their TWU delegates their resentment at the interference with the quiet enjoyment of the lunchroom during their lunch break caused by the constant presence of NUW officials and their intrusive behaviour in trying to recruit members, and the persistent approaches by NUW officials in the car park
15. Linfox filed an application in the FWC under s.505 of the FW Act, for the FWC to deal with a right of entry dispute. The dispute was listed for arbitration/conference, and the matter proceeded by way of conciliation conference. As a result of matters discussed in conference, the NUW moderated the conduct of its officials, but continued to seek entry under the FW Act on frequent occasions.
16. At around the same time, the NUW filed an application in the FWC under s.238 of the FW Act for a scope order for a proposed agreement which was to cover the warehouse workers engaged at the Truganina site. The application was dismissed by the FWC (*NUW v Linfox Australia Pty Ltd* [2013] FWC 9851).
17. The overall effect of the conduct of the NUW officials while on site under s.484 was to significantly disrupt the harmony which had existed in the workplace and to cause division and dissent.

### ***Failings of the current system***

18. The 'default arrangement' in s.492 whereby a permit holder can, in effect, insist on access to the lunchroom serves only the interests of the trade union. If a suitable venue is made available to a permit holder (other than a lunchroom) the purpose of entry under s.484, namely to enable employees who wish to speak with their union official to do so, is adequately served. The mandated use of the lunchroom necessitates the intrusion of the union official and the prosecution of union business into a venue used by all employees, some of whom have no desire to be involved in any discussions about the union. The general protection provisions of the FW Act (Part 3.1 of Chapter 3) make it clear that employees have as much right to **not** engage in industrial activity or take out union membership as they do to engage in it.
19. The current provisions allow for entry onto the premises by permit holders who are not bound by an enterprise agreement which applies to the site – meaning that officials from an organisation which is not bound by an enterprise agreement that applies at the site (i.e.

the NUW) can nonetheless enter the premises and disrupt the business of the occupier in circumstances where the occupier otherwise has a harmonious relationship with the employee organisation that is bound by the enterprise agreement on the site (i.e. the TWU).

20. The current provisions do not adequately support the interests of occupiers, effectively allowing them to be subject to significant disruption before an occupier can seek any relief.
21. The current provisions do not adequately address the issue of excessive frequency of access. The frequency of access demonstrated in the Truganina case was clearly not a genuine exercise in holding discussions with willing employees. Section 505A, which empowers the FWC to make orders regarding the frequency of entry to hold discussion is inadequate to address this issue. That the section requires an employer to show that it has be subjected to an "unreasonable diversion of its critical resources" before the FWC can intervene imposes an excessive imposition on an occupier's productivity. This is an unrealistic and irrelevant test. It ought not be about the application of the employer's resources, but the effect of the excessive entry that is the relevant consideration and there ought be some onus on the permit holder to justify why excessive entry is warranted.
22. There is no swift remedy available to occupiers where rights of entry have been misused – current options for relief (e.g. notifying a dispute to the FWC) are slow. If a permit holder misuses their rights of entry, the following relief is available:
  - 22.1 Employer or occupier can notify a dispute to the FWC:
    - (a) The FWC can deal with a dispute about the operation of relevant provisions under the FW Act (under s. 505) or about the frequency of entry to hold discussions (under s. 505A). However, the FWC may only make an order under s. 505A if it is satisfied that the frequency of entry by the permit holder would require an "unreasonable diversion of the occupier's critical resources".
    - (b) An application under s. 505 or 505A can be made by the employer or occupier of the premises and the FWC may deal with the dispute by arbitration, including by making any orders it deems appropriate, such as an order imposing conditions on an entry permit or an order suspending or revoking an entry permit.
  - 22.2 Employer may make an application to the Federal Court or Federal Circuit Court:
    - (a) The Courts can intervene only where the permit holder has intentionally hindered or obstructed another person, or otherwise acted in an improper manner in breach of s. 500 of the FW Act.
    - (b) Section 500 of the FW Act is a civil penalty provision. As such, the employer would need to prove the alleged misconduct on the basis of the higher *Briginshaw* standard of proof. The Court may make any orders it considers appropriate, including an order granting an injunction, awarding compensation or a pecuniary penalty order.
  - 22.3 Inspector (or the FWC on its own initiative) may make an application to the FWC:
    - (a) Under s. 508 of the FW Act, the FWC may restrict the rights of an organisation or official if the FWC is satisfied that the organisation or official has misused those rights.

- (b) Where an inspector has made an application, the FWC may take action against a permit holder under s. 507 of the FW Act by imposing conditions on any entry permits issued, suspending or revoking any entry permits.

### ***Recommendations***

23. An occupier should have the right to exclude permit holders where it believes on reasonable grounds that rights of entry have been misused:
  - (a) rights of entry interfere with an occupier's natural right to control its premises;
  - (b) if a permit holder is excluded by an occupier, they can challenge that decision or seek relief in the FWC or the Courts to demonstrate why they should be allowed to re-enter the premises (reverses the current position).
24. Occupiers should have the right to direct permit holders to any area or room on the premises, if it is reasonable, for the purposes of holding discussions. The default position of allowing permit holders in the lunch room should be removed.
25. The FW Act should be amended so that the right of entry to hold discussions with employees reflects the pre-*Fair Work Act* position. Namely:
 

A permit holder for an organisation may enter premises for the purposes of holding discussions with any **eligible employees** who wish to participate in those discussions. For this purpose, eligible employee means any employee who:

  - a) on the premises, carries out work that is covered by an award or enterprise agreement that is binding on the permit holder's organisation; and
  - b) is a member of the permit holder's organisation or is eligible to become a member of that organisation.
26. Section 505A should be amended so that the level of disruption required to be established by an occupier before the FWC makes orders regarding the frequency of entry to hold discussion is significantly lowered. The current requirement that the occupier must be subjected to an "unreasonable diversion of its critical resources" before the FWC can intervene imposes an excessive imposition on an occupier's productivity.
27. Where a permit holder from a particular organisation has misused entry rights, all permit holders from that organisation should be excluded from the premises until they demonstrate to the FWC or the Courts why they should be allowed to re-enter the premises (this stops different officials coming in the very next day and continuing to engage in disruptive behaviour).
28. The FW Act should be amended to allow occupiers to make urgent applications to the FWC in circumstances where the conduct of a permit holder:
  - (a) is causing, or is threatening to cause, harm to the personal safety or health, or the welfare, of persons on the premises; or
  - (b) is causing, or is threatening to cause, significant harm to the business of the occupier.

Similar to the provisions dealing with industrial action, those amendments should require that the FWC determine an application of that kind within 2 days after the application is made.

**13 March 2015**

**Linfox Australia Pty Ltd**

## Schedule A – Linfox submissions to the Productivity Commission

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Entry notices issued to Linfox pursuant to s.512 of the *Fair Work Act 2009* (Cth)

<b>Entry Notices - Coles RDC Truganina</b>			
<b>Who</b>	<b>Union</b>	<b>When Raised</b>	<b>Period Entry Requested</b>
Mathew Toner	NUW	26-Aug-13	27-Aug-13
Mathew Toner	NUW	26-Aug-13	28-Aug-13
Mathew Toner	NUW	26-Aug-13	29-Aug-13
Mathew Toner	NUW	26-Aug-13	30-Aug-13
Mathew Toner	NUW	26-Aug-13	02-Sep-13
Mathew Toner	NUW	26-Aug-13	03-Sep-13
Mathew Toner	NUW	26-Aug-13	04-Sep-13
Mathew Toner	NUW	26-Aug-13	05-Sep-13
Mathew Toner	NUW	26-Aug-13	06-Sep-13
Heath Lamaro	NUW	26-Aug-13	27-Aug-13
Heath Lamaro	NUW	26-Aug-13	28-Aug-13
Heath Lamaro	NUW	26-Aug-13	29-Aug-13
Heath Lamaro	NUW	26-Aug-13	30-Aug-13
Heath Lamaro	NUW	26-Aug-13	02-Sep-13
Heath Lamaro	NUW	26-Aug-13	03-Sep-13
Heath Lamaro	NUW	26-Aug-13	04-Sep-13
Heath Lamaro	NUW	26-Aug-13	05-Sep-13
Heath Lamaro	NUW	26-Aug-13	06-Sep-13
Tim Nelthorpe	NUW	26-Aug-13	27-Aug-13
Emma Kerin	NUW	26-Aug-13	27-Aug-13
Laura Bieniak	NUW	26-Aug-13	27-Aug-13
Chloe Holliday	NUW	26-Aug-13	27-Aug-13
Laura Bieniak	NUW	26-Aug-13	28-Aug-13
Cameron Stops	NUW	26-Aug-13	28-Aug-13
Tim Nelthorpe	NUW	26-Aug-13	28-Aug-13
John Glover	NUW	26-Aug-13	28-Aug-13
Cameron Stops	NUW	26-Aug-13	29-Aug-13
Laura Bieniak	NUW	26-Aug-13	29-Aug-13
Cameron Stops	NUW	26-Aug-13	30-Aug-13
John Glover	NUW	26-Aug-13	28-Aug-13
Emma Kerin	NUW	26-Aug-13	29-Aug-13
Chloe Holliday	NUW	26-Aug-13	29-Aug-13
Emma Kerin	NUW	26-Aug-13	30-Aug-13
Jenny Breen	NUW	26-Aug-13	30-Aug-13
Brendan Orders	NUW	02-Sep-13	03-Sep-13
Brendan Orders	NUW	03-Sep-13	04-Sep-13
Cameron Stops	NUW	03-Sep-13	04-Sep-13
Cameron Stops	NUW	05-Sep-13	06-Sep-13

Heath Lamaro	NUW	06-Sep-13	09-Sep-13
Mathew Toner	NUW	06-Sep-13	09-Sep-13
Heath Lamaro	NUW	06-Sep-13	10-Sep-13
Mathew Toner	NUW	06-Sep-13	10-Sep-13
Heath Lamaro	NUW	06-Sep-13	11-Sep-13
Mathew Toner	NUW	06-Sep-13	11-Sep-13
Heath Lamaro	NUW	06-Sep-13	12-Sep-13
Mathew Toner	NUW	06-Sep-13	12-Sep-13
Heath Lamaro	NUW	06-Sep-13	13-Sep-13
Mathew Toner	NUW	06-Sep-13	13-Sep-13
Heath Lamaro	NUW	06-Sep-13	16-Sep-13
Mathew Toner	NUW	06-Sep-13	16-Sep-13
Heath Lamaro	NUW	06-Sep-13	17-Sep-13
Mathew Toner	NUW	06-Sep-13	17-Sep-13
Heath Lamaro	NUW	06-Sep-13	18-Sep-13
Mathew Toner	NUW	06-Sep-13	18-Sep-13
Heath Lamaro	NUW	06-Sep-13	19-Sep-13
Mathew Toner	NUW	06-Sep-13	19-Sep-13
Heath Lamaro	NUW	06-Sep-13	20-Sep-13
Mathew Toner	NUW	06-Sep-13	20-Sep-13
Mathew Toner	NUW	18-Oct-13	21-Oct-13
Heath Lamaro	NUW	18-Oct-13	21-Oct-13
Mathew Toner	NUW	18-Oct-13	22-Oct-13
Heath Lamaro	NUW	18-Oct-13	22-Oct-13
Mathew Toner	NUW	18-Oct-13	23-Oct-13
Heath Lamaro	NUW	18-Oct-13	23-Oct-13
Mathew Toner	NUW	18-Oct-13	24-Oct-13
Heath Lamaro	NUW	18-Oct-13	24-Oct-13
Mathew Toner	NUW	18-Oct-13	25-Oct-13
Heath Lamaro	NUW	18-Oct-13	25-Oct-13
Mathew Toner	NUW	18-Oct-13	28-Oct-13
Heath Lamaro	NUW	18-Oct-13	28-Oct-13
Mathew Toner	NUW	18-Oct-13	29-Oct-13
Heath Lamaro	NUW	18-Oct-13	29-Oct-13
Mathew Toner	NUW	18-Oct-13	30-Oct-13
Heath Lamaro	NUW	18-Oct-13	30-Oct-13
Mathew Toner	NUW	18-Oct-13	31-Oct-13
Heath Lamaro	NUW	18-Oct-13	31-Oct-13
Mathew Toner	NUW	18-Oct-13	1-Nov-13
Heath Lamaro	NUW	18-Oct-13	1-Nov-13
Heath Lamaro	NUW	26-Nov-13	27-Nov-13
Mathew Toner	NUW	26-Nov-13	27-Nov-13
Mathew Toner	NUW	09-Dec-13	28-Nov-13
Mathew Toner	NUW	09-Dec-13	10-Dec-13
Mathew Toner	NUW	09-Dec-13	11-Dec-13
Mathew Toner	NUW	09-Dec-13	12-Dec-13
Mathew Toner	NUW	09-Dec-13	13-Dec-13



Mathew Toner	NUW	09-Dec-13	16-Dec-13
Mathew Toner	NUW	09-Dec-13	17-Dec-13
Mathew Toner	NUW	09-Dec-13	18-Dec-13
Mathew Toner	NUW	09-Dec-13	19-Dec-13
Mathew Toner	NUW	09-Dec-13	20-Dec-13
Mathew Toner	NUW	29-Jan-14	30-Jan-14
Mathew Toner	NUW	29-Jan-14	31-Jan-14
Alycia Economidis	NUW	29-Jan-14	30-Jan-14
Alycia Economidis	NUW	29-Jan-14	31-Jan-14
Heath Lamaro	NUW	29-Jan-14	30-Jan-14
Heath Lamaro	NUW	29-Jan-14	31-Jan-14
Mathew Toner	NUW	03-Feb-14	04-Feb-14
Mathew Toner	NUW	12-Feb-14	13-Feb-14
Alycia Economidis	NUW	12-Feb-14	13-Feb-14
Heath Lamaro	NUW	12-Feb-14	13-Feb-14
Tram Thu Nguyen	NUW	12-Feb-14	13-Feb-14
Mathew Toner	NUW	12-Feb-14	14-Feb-14
Alycia Economidis	NUW	12-Feb-14	14-Feb-14
Heath Lamaro	NUW	12-Feb-14	14-Feb-14
Tram Thu Nguyen	NUW	12-Feb-14	14-Feb-14
Mathew Toner	NUW	03-Mar-14	04-Mar-14
Mathew Toner	NUW	03-Mar-14	05-Mar-14
Mathew Toner	NUW	30-Apr-14	01-May-14
Mathew Toner	NUW	30-Apr-14	02-May-14
Mathew Toner	NUW	30-Apr-14	05-May-14
Mathew Toner	NUW	30-Apr-14	06-May-14
Mathew Toner	NUW	30-Apr-14	07-May-14
Mathew Toner	NUW	30-Apr-14	08-May-14
Mathew Toner	NUW	30-Apr-14	09-May-14
Mathew Toner	NUW	30-Apr-14	12-May-14
Mathew Toner	NUW	30-Apr-14	13-May-14
Mathew Toner	NUW	21-Jan-15	22-Jan-15
Mathew Toner	NUW	18-Feb-15	19-Feb-15
Rod Wigg	NUW	18-Feb-15	19-Feb-15
George Robertson	NUW	18-Feb-15	19-Feb-15
Vanessa Kalamistrakis	NUW	18-Feb-15	19-Feb-15

## Schedule B – Linfox submissions to the Productivity Commission

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Extracts of written complaints made to management regarding the conduct of NUW permit holders at the Truganina Site

Complaint 1: Sent by email 31 October 2013, 1.14am

"We feel intimidated and harassed by the actions of NUW the way they try to recruit members on the Afternoon shift, I [name redacted] TWU delegate witnesses on more then [sic] one occasion the NUW representatives following member [sic] to their cars at 11pm and 1am pushing pamphlets in their faces to get them to join their union, this has been going on for several months now...

I believe the NUW representatives are acting inappropriate [sic] and unprofessional manner if members want to join the [sic] will seek out the NUW delegates themselves. All we ask of the NUW is the respect that they keep talking about a right to have a bully free workplace so why is it they don't follow by example."

Complaint 2: Handwritten, undated

"The NUW has been harassing and intimidating afternoon shift employees to join their union. They are in the car park twice a week after we finish work at 11.00pm and even there when we work till 1.00am...

This is harassment and intimidation of Linfox (and TWU members) at our workplace and home. This must stop."

Complaint 3: Handwritten, 30 October 2013

"I [name redacted] work at Linfox Truganina, I'm am [sic] sick to death of them harassing me by following me to my car ring me at home. I have requested that they stop and leave me alone. This has been happening for several months now. I don't want this to continue at 1am in the morning."

Complaint 4: Handwritten, 30 October 2013

"I work at Linfox. I am an agency casual and in the past several months I have been asked a dozen times to join NUW by there [sic] deligates [sic] or representatives. They either ask during me breaks or after work when I am trying to go home at ridiculos [sic] hours."

Complaint 5: Typed, undated

"I [name redacted] wish not to be harassed after work by NUW on the car park. They seem to not understand that no means no and is becoming very annoying. I want nothing to do with them."

Complaint 6: Handwritten, 30 October 2013

"I [name redacted] am a TWU member who has been spoken to by the NUW on several times and am requesting that this stops. I am sick of being followed to my car at 1.00am."

Complaint 7: Handwritten, 30 October 2013

"We have been followed and harassed when we have finished our shift at either 11pm or 1pm and been bullyied [sic] into signing or listening to there [sic] requests. I don't want it to continue and I am sick of it."

Complaint 8: Handwritten, 30 October 2013

"I [name redacted] from Truganina RDC feel intimidated by the actions of the NUW in the way they try and recruit new members following you to your car and pushing pamphlets in your face is inappropriate and unprofessional. People have a right to decide who they choose who can represent them and not feel harassed [sic] in their decisions."

Complaint 9: Handwritten, 30 October 2013

"I [name redacted] a TWU member. I have been followed to my car by NUW to sing [sic] over to them. In the past several months we have been harassed [sic] by NUW by phone or at work. I have requested them to leave me allown [sic]."

Complaint 10: Sent by email, 30 October 2013, 9.13pm

"In response to the NUW's continual harassment, I would like to formalise a complaint. 3 or 4 nights a week there is at least 4 or 5 delegates or organisers waiting at the gates. They are becoming increasingly aggressive, to the point where they are thrusting paper work in my face and following others to their cars. On more than 1 occasion I have walked people to their cars because they are nervous and concerned with the increasingly aggressive tactics. Whilst I am pro union, I am anti-harassment."