Chapter 1

Introduction and overview

> If we are interested in achieving a fair and efficient construction industry, we have got to address the key problems that come up empirically. As an applied labour market researcher who has been observing the sector pretty actively for the last 15 years, the things that come screaming out from my point of view are safety, skills, hours of work and tax evasion. Each of these ultimately boils down to a chronic problem of trust within the sector. If we are interested in achieving efficiency, we have got to do something about those four issues.[1]

1.1 Reform of the building and construction industry has been on the national IR agenda for decades. The task has preoccupied governments of all political persuasions at both state and federal levels, and has twice been the subject of royal commissions. This is not an industry which any government would find easy to take by the scruff of its neck for the purposes imposing a new culture. Its size and diversity, the nature of its workforce and the way the industry players transact their business, are factors which discourage the application of radical measures to industry practices which have evolved over many years.

1.2 A large proportion of this report will be taken up with the issue of industrial relations. That is the arena of policy which the Government has marked out for attention in its terms of reference to the Cole royal commission, and in the thrust of the legislation which is before the Senate. It should be made clear at the outset, however, that there appears no justification for taking such a narrow view of the problems that beset the industry. A number of submissions have pointed to the waste of money and effort that has been taken up by a misdirected royal commission and a subsequent bill flawed by impractical and irrelevant provisions. The only point of agreement between the Government's position and the findings of this Senate inquiry is that there is room for further reform in the building and construction industry. The committee has looked at the same industry as Commissioner Cole, but sees it in a vastly different light, as do so many authorities and specialists involved in some way with the industry. The committee notes a thoughtful opinion from an academic authority it heard from in Sydney on the subject of reform of the building and construction industry:

> Australian reform … has been characterised by lots of good ideas but very little action. We know what the causes of conflict are in the industry, what the causes of poor performance and low efficiency are, and they are

1 Dr John Buchanan, *Hansard*, 2 February 2004, p.36

> numerous. They include confrontational, unfair and divisive contracts; procurement systems; employment practices; a culture of risk transfer which drives the construction industry from the very top to the very bottom and pushes performance down to the lowest common denominator; protective and fragmented professional and industry bodies; long and unwieldy supply chains that separate potential innovators from the rewards they can gain from those innovations; an anti-intellectual, insensitive, uncaring and incestuous culture; a lack of investment in training; a very traditional mono disciplinary educational system; and, of course, confrontational union and employer relationships.[2]

1.3 The industrial relations element comes last in this list and, in the committee's view, is probably a consequence of failures listed before it. The comment concludes:

> Our worry is that the current agenda is once again focusing very negatively and confrontationally on industrial relations reform and is ironically galvanising attitudes against reform when what is actually needed in this country is a positive reform strategy which recognises the full complexity of issues impeding progress in the construction industry, and which engenders a sense of collective responsibility and trust towards reform.[3]

1.4 The committee notes that the activity level of the building and construction industry, and the prosperity of the sector, is often taken as a key indicator of economic growth and of business activity levels generally. The industry is highly sensitive to movements in employment and investment activity and, in its turn, makes its own mark on the state of the economy. This report is highly critical of Government policy, and implementing legislation, which has as its purpose the 'reform', or rather, the elimination of important stakeholder interests in the building and construction industry. His takes no account of the flow-on effects to the industry as a whole, to its profitability, its continuing climate of industrial harmony, and the well-being of employees and the chain of small business contractors who make up the vast majority of its workforce.

1.5 The players in the building and construction industry, for all their supposed ruthlessness and alleged disregard for rules and regulations, are a pragmatic lot. They are united in their efforts to secure fair profits and fair wages and conditions. Inevitably some who operate within the industry see the opportunity for marginal gain, either at the expense of the company, the contractor, the employee or the taxman. But while all agree that particular practices, as outlined later in this report, are undesirable, and ought to be prevented by regulations properly enforced, the committee found little enthusiasm for the Government's proposed legislation. As expected, it found implacable opposition from trade union stakeholders against whom the legislation is principally directed. Neither is there much enthusiasm to be found

2 Professor Martin Loosemore, *Hansard*, Sydney, 7 April 2004, p.4

3 ibid.

among those stakeholders considered most likely to be the principal beneficiaries of what is proposed.

1.6 What is most obvious to the committee majority is the flawed assumption underlying the BCII Bill, that by attempting to address only the issue of industrial relations, it has failed to use the opportunity to implement 'root and branch' reforms which would deal with problems that the industry believes are more worthy of the Government's attention. The Government's failure to do so deprives this proposed legislation of credibility and reduces the likelihood of its passage and implementation.

1.7 The committee majority finds no particular satisfaction in making this judgement. Policies fail when they are based on narrow premises and disregard the need to accommodate disparate interest groups sharing broadly common goals. The Government is at fault not because it is attempts to establish a more stable industrial relations climate. Its mistake is to impose a highly prescriptive regime which disadvantages one set of industry participants, unions and employees, and therefore indirectly everyone in the industry. The committee majority sees no evidence that business leaders in the industry, or contractors of any size, will look on with enthusiasm while the Government puts the legislative boot into their employees and their representatives. Construction firms, large and small may have ambivalent views on unions or particular union officials, but they also have reason to be sceptical of misguided rescue attempts through a bill initiated by zealots rather than by agreements negotiated by pragmatic industry insiders.

1.8 Governments which choose to wield power without responsibility may relish the prospect of a class war. No one else does. The dangers inherent in what Professor Ron McCallum has described as 'asymmetric' legislation are as much obvious to corporate sector builders concerned with maintaining the profitability of their company, as they are to trade unions which are more directly targeted.

Characteristics of the building industry

1.9 There is no argument about the importance of the industry to the generation of national wealth and employment. In 2001-02 the industry contributed 5.5 per cent of the national gross domestic product and accounted for 7.5 per cent of employment. In that year the value of building and construction activity was close to $52 billion. The latest ABS figures indicate that the value of activity is currently $72 billion annually.

1.10 One of the matters addressed in the report of the Cole royal commission was the international competitiveness of the building and construction industry. It was difficult for the commission to overlook facts which indicated a high level of competitiveness relative to other OECD economies although it attempted to do so in its report, describing productivity growth as 'less than average' for the market sector over the past five years. The facts as set out in the Commission's research papers showed, among other data, that Australia ranked second or better in 16 of the 23 comparative international studies of the industry consulted by the researchers; that on productivity specifically, Australia ranked second in 5 of the 7 reports; that on project

completion times Australia ranked second in all studies; and finally, on cost per square metre, Australia was consistently rated as second lowest in all studies.[4] In addition to this, a Productivity Commission report published in 2002 and covering the period 1994-98 showed that productivity in the building and construction industry exceeded the OECD average based on a range of advanced economies in Europe and North America.[5] The committee majority would argue on this basis that one of the characteristics of the building and construction industry is its high degree of international competitiveness. This is scarcely a credible basis for proposing radical changes likely to jeopardise the success that has been achieved under current arrangements.

1.11 The 1997-98 ABS survey of the industry shows that very small firms, employing up to 5 people make up about 94 per cent of building firms. Only 1 per cent of building firms employ more than 20 people. It is small business which drives the industry: three quarters of construction industry pre-tax profits come from firms employing fewer than 5 people. Yet, large contractors, though relatively small in numbers (less than 1 per cent of firms) employ 14 percent of all employees and earn 32 per cent of the total wages paid in the sector. Large firms generate 14 per cent of sector profits and produce a quarter of the total construction output.[6]

1.12 These figures for percentages relate to approximately 210 000 businesses involved directly in construction and around 440 000 specialist trade businesses operating within the sector. Total employment is currently around 773 000.

Cost pressures in the industry

1.13 The Government was taken to task by the Australian Industry Group (Ai Group) for its failure to include in its terms of reference to the Cole royal commission the extent to which commercial imperatives drive the building and construction industry and how much they drive industry relationships.[7] The committee majority believes that this issue is be crucial in any genuine investigation of the industry, and perhaps for this reason was not included in an inquiry intended to demonstrate that 'curing' industrial relations alone would solve the problems of the industry.

1.14 There are three key segments in the industry: housing construction, which is the largest and whose output is valued at around $32.5 billion annually; civil and engineering construction which has a turnover of over $24 billion annually; and commercial and industrial construction, with a turnover of around $15.5 billion

4 Submission No.37, CFMEU, p.14

5 ibid., p.13

6 Royal Commission into the Building and Construction Industry, Discussion Paper 1, May 2002, p.21

7 Mr James Barrett, *Hansard*, Canberra, 11 December 2003, p.31

annually.[8] The housing sector is outside the scope of this legislation, and the likely collateral effects upon it have not been commented on by the Government.

1.15 It has been pointed out to the committee that the building and construction industries of most market economy countries have histories of industrial turbulence. The reasons include: the history and nature of trade unionism in the industry; the cyclical nature of the building industry; and the enormous financial pressures which this industry places upon developers, builders, contractors, subcontractors and labourers.[9] All of the evidence seems to point to the cost pressures as being indirectly responsible for the fragility of industrial harmony, and this has probably been so throughout the history of the industry. Rarely do construction companies enjoy stable contractual arrangements, for the obvious reason that the demand for buildings fluctuates. The industry is highly competitive, and companies often operate at the margins of profitability. So do the contractors and subcontractors further down the profit and cost chain. This leads to cut-throat tendering which is often practiced at the expense of compliance with workplace entitlements and occupational health and safety regulations. It is also associated with the most corrupt of all business practices, evasion of taxation. Commercial malpractice is often manifested through the deliberate evasion of responsibility to pay for materials and services provided. Such practices, which bear a heavy human cost, are rightly seen as heinous, but tax evasion is, for reasons explained in a later chapter, the fundamental and most insidious threat to the integrity and prosperity of the industry and its workforce. This has the capacity to corrupt the industry and render it resistant to reform.

1.16 The issue of cost begins with the investor and developer. These, along with public sector authorities, are the clients of the industry. The relationship between clients and the construction industry has been changing over recent times, according to the Property Council of Australia. The committee was told that in the past, the clients used to be part of the manufacturing process that was the construction industry. The larger corporate firms had planning and engineering departments, and governments had public works departments which they no longer retain. Today, the property sector has been integrated into the capital market sector. It thinks like the capital market sector and looks at reasons why money should be invested in buildings and what risks are attached to it.[10] This distance between client developers and financiers on the one hand and builders on the other leads to tensions over commercial pressures. As the Ai Group has explained to the committee:

> For example, on a major project, if the Commonwealth as a client said, 'We'll accept the industrial risk. We won't transfer it to the contractor. We'll accept the industrial risk and we expect the contractor to ensure that the rule of law applies at every stage and that everything is done to ensure that. If it costs us five times as much to deliver the project, so be it. There

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8 Submission No.12, Master Builders Australia, Attachment C, p.2

9 Professor Ron McCallum, *Hansard*, Sydney, 2 February 2004, p.2

10 Mr Peter Verwer, *Hansard*, Sydney, 7 April 2004, p.92

> won't be any liquidated damages applied,' then the whole environment changes, and you allow the rule of law then to flourish. One of the fundamental weaknesses we have at the moment, which we revisited several times, is this key driver of the client—whether it be the Commonwealth or a private sector client—saying to the contractor, 'You're responsible for the industrial risk. You price it and deliver the project at the price that we've negotiated and, if it goes pear-shaped, it's your responsibility.' In my view, that drives an environment where the project just has to be delivered within a schedule and a time frame. The price we pay then is some of those other issues to do with the law and people exercising what might be their rights under the law, and I think they are the victim of that sort of system.[11]

1.17 The committee heard evidence that the majority of clients are unsophisticated investors who procure buildings relatively infrequently and are more interested in price than in value.[12] The committee notes that the Property Council has strongly rejected such criticisms from academics, insisting that the quality of construction standards is increasing to the point where it is outstandingly good and offers very good value for money. The capital market is highly sophisticated, and it is no longer possible for builders to get away with shoddy construction work.[13]

1.18 Yet the Housing Industry Association has made comments, similar to those of Professor Loosemore, and counter to those of the Property Council. The committee majority believes that the views expressed below by the Housing Industry Association more truly represent the reality of the industry than do those of the Property Council, which is an insulated distance away from the noisy nuts and bolts of the industry:

> The commercial construction industry is unique [because it is].... working mainly for one-off clients (who normally have no interest in the industry's long-term health)...in a physically demanding and inherently risky work environment...the whole being driven by a boom and bust economic cycle. Industry cost structures, together with generally unsympathetic clients who impose tight schedules and high daily delay damages, create commercial pressures, which drive practices that would normally be unacceptable in the broader community.[14]

1.19 Contractors face two difficulties over costs: competing for tenders in a market where only the 'bottom line' counts; and then having, in many cases, the problem of securing payments. The CFMEU submission explains that in the building industry the problem of payments is exacerbated by the hierarchical sub-contract system which characterises the sector:

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11 Mr James Barrett, *Hansard*, Canberra, 11 December 2003, p.38

12 Professor Martin Loosemore, *Hansard*, op. cit., p.21

13 Mr Peter Verwer, op. cit, p.103

14 Submission No.13, HIA, page 9

> The bargaining position of successive contractors and sub-contractors diminishes with each step down the contractual chain. This, coupled with the fact that levels of direct employment are concentrated at the lower end of the chain, make the implications for wage-earners clear when payment problems occur at any level.[15]

1.20 Even at the higher level of contracting, with firms employing up to 100 specialist tradesmen, the same difficulties faced by small operators and individuals apply. Cost is paramount, and quality and reputation are not generally worth the consideration given to the lowest tender price. As the committee heard, the lead contractors are in the same cost squeeze as everyone else, and pass it down the line:

> They are under the same pressures we are under—that is, profit and bottom line and those sorts of things. Our contracts are usually let by what you could term middle management. They are under pressure of making budget savings to the bottom line, so they are probably not responsible for choosing the wrong subcontractor, which may turn out to be the wrong subcontractor two years down the track. That is my personal view of it. I would like to see a much more stringent approach by the builders, but that is a risk they are willing to take. It is a dollar risk for them. If I am $200,000 dearer than the next guy they will say, 'Well, we'll go with him and have 200,000 in the kitty if something goes wrong.' That happens all the time. It would be great if we won all our work on reputation regardless of price but that is not the case.[16]

1.21 Australian Chamber of Commerce and Industry (ACCI) has similar points to make:

> The commercial arrangements in the industry do not in any sense help those lower down in the industry to exercise some authority over industrial matters. The types of commercial arrangements include, for example, liquidated damages; if buildings are not constructed on time, then damages flow. Obviously there is an attempt to cover one's risk all the way down and, as one attempts to cover one's risk all the way down, people right down the bottom have increasingly less say in the way in which they can operate. So the industrial authority of unions and the way in which the industry is commercially constructed combine to create a situation where there is a lot of difference between the way in which this industry operates industrially and the way in which industry generally operates industrially.[17]

1.22 ACCI complains that commercial pressures from the top, and union muscle from below, are squeezing the subcontractors in the middle. ACCI's rationale appears to be that it is possible to strip the unions of their muscle by regulation, but impossible to regulate capital. As the industry cannot exist without capital, so other stakeholders must be subordinated to a regime which finds its reason for being in the peculiar

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15 ibid.

16 Mr Frank D'Agostino, *Hansard*, Melbourne, 21 May 2004, p.16

17 Mr Peter Anderson, *Hansard,* Canberra, 11 December 2003, p.15

nature of the building and construction industry. As ACCI has stated, this industry operates differently to all others. While the committee majority acknowledges these differences, it points to the absurdity of having employees in a particular industry regulated in a way which is different to other workers. In more practical terms, it believes that it is up to stakeholders, with assistance from governments, to reconcile the demands of capital investors and those without whom the product and the value cannot be delivered.

1.23 The perspective of ACCI, which taken together with those from the CFMEU and Mr D'Agostino, director of a large electrical contracting firm, suggests to the committee that cost pressures are indirectly responsible for a high proportion of tensions which spill over into the industrial relations arena. The rest would result from occupational health and safety issues which are also the indirect result of cost pressures. Cost pressures can only be managed. They cannot be legislated for.

1.24 In conclusion, the committee majority notes a core of shared experience and commonality in the evidence presented from four major groups of participants in the industry, which are summarised here in ascending order. Trade union submissions have put forward voluminous evidence concerning the short-cuts and illegal practices which are characteristic of a high proportion of marginally profitable building companies forced to operate on very slim margins. Small business contractors and skilled trades operators complain about the squeeze enforced by agreements to which they are not a negotiating party. Builders and lead contractors have referred to the cost penalties likely to be incurred as a result of bearing the risks of industrial action. Finally, many investors and developers have no particular knowledge of, or expertise, in the area of industrial relations, leaving such matters to industry groups. They do, however, require a minimum level of certainty and return on their investment. The level of investment in the industry is declining as a consequence of increased competition on the capital markets, just as the pool of skilled labour is diminishing. The Government's energies should be directed to dealing with these more fundamental challenges facing the industry.

Security of payments

1.25 This report will make only a brief reference to security of payments, not because it is an unimportant matter, but because it is primarily dealt with under state legislation. Evidence on this issue arose more often in public hearings than in submissions, probably because, while it is outside the committee's terms of reference, it is relevant to the issue of cost.

Volatility in industry participation

1.26 Another characteristic of the industry is the volatility of entry and termination rates by entrepreneurs. There are few if any entry requirements based either on levels of technical or trade skill, commercial acumen or business training. The high turnover of people entering and leaving the industry, and the high rate of business failure, injects a state of uncertainty into industrial relations. Academic observers have noted

that the absence of 'trust' within the industry, and the perception of an industry to which fly-by-night contractors are drawn, contributes to this lack of trust. The submission from the CFMEU has this to say:

> The volatile nature of the industry makes construction workers particularly vulnerable to the effects of corporate collapses. When the level of economic activity is high, the industry is flooded with under-capitalised operators each with an eye to a quick profit. Many have little or no experience in contractual matters, statutory obligations or business management. The majority of enterprises in the industry are small businesses, employing less than ten people, and include many partnerships and sole traders. Most are capital poor and thus unable to absorb the effects of non-payment, late payment or withholding of progress payments, variations, retention and other forms of contractual payments. Many also lack the legal, technical and administrative skills necessary to resolve contractual issues as they arise.[18]

1.27 The CFMEU submission quoted evidence that in December 1997 alone, in the midst of a sustained building and construction 'boom', 40 building companies entered into some form of external administration, indicating that collapses due to management deficiencies did not disappear even in the most buoyant of markets. The inevitable peaks and troughs faced by the industry often bring devastating consequences for workers. Whilst many workers become resigned to the boom and bust cycle, they never accept the loss of accrued entitlements. The committee majority points out that the insecurity suffered by building workers, which is on a much wider scale than in other industries less susceptible to market fluctuations, creates a climate of distrust which flows over to workplace attitudes. As the CFMEU points out, it does not take an industry downturn or even a corporate insolvency, real or contrived, to generate payment or job security problems for employees.[19] A simple contractual dispute will do. This goes a long way to explaining the background to 'unaccountable' and apparently 'wildcat' stoppages at some building sites.

1.28 The CFMEU submission finds support in comments in the Industry Commission's 1991 report on construction costs. The Commission identified characteristics of the industry which hampered industrial relations and the development of a productive relationship between employers and employees. Thirteen years on, these are still relevant to the problems looked at by this committee. First among the characteristics identified in the Commission's 1991 report was the fluctuation in construction activity and the temporary nature of construction sites. This led most major developers to rely on subcontractors in preference to directly employing their workforces. The result has been that employment relationships are now far more fluid, and as evidence from contracting firms indicates, is determined more by tendering price than any other consideration.

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18 Submission No.37, CFMEU, p.109

19 ibid.

1.29 The Industry Commission also observed that success in managing industrial relations varied significantly between sites, and it is highly likely that this remains as true today. Amicable working relations between site management and union representatives are the key to industrial harmony. It was observed that a successful site relies heavily on the personal attitudes, skills and relationships between key individuals.

1.30 The committee received much more evidence from unions about the detailed operations of building sites, and of project relationships than it did from the proprietors, developers and major contractors. Nor did the Cole royal commission devote much attention to structural characteristics of the industry which explain much about the prevailing culture that exists in it. The CFMEU submission explains that in the construction industry the problem of payments is exacerbated by the hierarchical subcontract system which is a feature of the sector:

> The bargaining position of successive contractors and sub-contractors diminishes with each step down the contractual chain. This, coupled with the fact that levels of direct employment are concentrated at the lower end of the chain, make the implications for wage-earners clear when payment problems occur at any level.[20]

1.31 The CFMEU submission further explains:

> There is also ample evidence that many instances of lost employee entitlements come about not as a result of commercial miscalculation or ineptitude on the part of the employer. A number of employers have made an art form of using the corporate veil to profit at the expense of their workforce, creditors and the public purse.
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> Principal contractors frequently fail to make payments due under contracts at the time that they are due. Sometimes there are legitimate disputes as to the proper performance of contracts by the sub-contractor; in other cases the principal simply withholds payment for spurious reasons, knowing that the subcontractor does not have the means to pursue legal remedies or that the time and cost of litigation is not justified by the amount owed. The situation is further complicated by the use of verbal agreements, particularly in relation to variations. This is one of the major reasons for the high level of insolvencies in the building and construction industry.[21]

1.32 Problems such as these are more intractable than any of those which either the Cole royal commission or the Government has chosen to recognise. The truth is that there are no dragons for the Government to slay and no CFMEU ogres to vanquish. The causes of distress to building employees, contactors and corporate builders alike spring from fluctuating markets; folly and miscalculation by some developers, builders and investors; from relatively petty fraud; and, it must be conceded, varying levels of retaliatory response to legitimate grievances from those at the bottom of the

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20 ibid.

21 ibid., p.110

remuneration chain. It is a difficult prospect to consider how these problems can be overcome except through more thorough checks on industry participants at all levels. The committee majority cannot see how poor management and malpractice at this level can be effectively addressed through the measures proposed by the Government.

1.33 As the committee heard at its first Sydney hearings, the problems of the industry are far more complex than the government's interpretation of the Cole royal commission report would suggest, and its legislation provides no solution to them. To the contrary, the legislative cure would worsen the disease. As one industrial lawyer told the committee:

> I have said that some of the matters that I have drawn attention to are incapable of resolution, that there are as many problems for the employers in the building and construction industry as there are for the unions and their workers and that in my view there will be significant difficulties in the administration of the provisions of the bill and they will be a source of endless litigation. That is not in the public interest.[22]

1.34 Solicitors from industrial law firms commented on the rich field of litigation the proposed bill presented. One of them told the committee:

> If I were coming to this committee representing just the interests of Taylor and Scott, I would say to go ahead and pass this legislation as quickly as possible, because it will be clover. I have said at one stage in the submission that some of the jurisdictional, definitional and other problems that might be encountered are a happy hunting ground for lawyers, and the CFMEU and the AMWU will be in need of my services more than ever if this legislation goes through.[23]

1.35 The committee notes the reluctance of larger building firms to provide evidence. The submission from the ACCI made no reference to any onerous processes to be endured by businesses as a consequence of the bill passing, although the submission from the Ai Group was less complacent. On the evidence of legal practitioners and contractors, however, it is clear to the committee that implementation problems would inevitably arise if the bill was to be passed. The committee doubts that the Government has been properly advised about the adverse effects of the legislation on business operations.

Occupational health and safety

1.36 The committee notes that the number of weeks lost in the construction industry through workplace injury or illness rose from 94 939 in 1997-98 to 168 655 in 2000-01. This is an increase of 78 per cent. The corresponding cost increases were from $82.8 million to over $190 million. These costs far exceed the losses to the industry caused by industrial disputes, although this fact is disguised by a large tax-payer

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22 Mr Lachlan Riches, *Hansard,* Sydney, 3 February 2004, p.77

23 ibid., p.69

subsidy to pay for injured workers. Some submissions to the inquiry identified occupational health and safety as the single most important problem facing the construction industry. The committee notes evidence that OH&S is a factor in a high proportion of industrial disputes, and notes also that employer claims as to the misuse of OH&S as an industrial lever were accepted uncritically by the Cole royal commission.

1.37 Safety issues in the industry loomed large in this inquiry for the reason that recommendations of the Cole royal commission did not give occupational health and safety the degree of emphasis that deserves. Cole called for attitudinal changes to occupational health and safety, and volume 6 of the royal commission's report included 17 recommendations for possible Commonwealth action. The proposed implementation of these recommendations is in Chapter 4 of the BCII Bill.

1.38 Unions regard OH&S issues as being perhaps the most important facing the industry. The issue is a source of workplace tension and dispute, and the committee heard some hair-raising stories of workplace carelessness. Cole focussed on the allegation that unions were inclined to make use of the issue as an industrial tool to blackmail employers.[24] In a legislative response to the recommendations of the Cole royal commission, the Federal Safety Commissioner, to be appointed under the bill, is supposed to ensure that this practice is curbed. Significantly, the powers of the Federal Safety Commissioner are restricted to provisions which do not directly improve workplace safety, and which will continue to be exercised by state officials who may be referred matters by the Federal Safety Commissioner. The committee acknowledges that the appointment of a Federal Safety Commissioner has some superficial appeal. It would, however, require a considerable transfer of powers from the states to work. The committee considers this to be an overly ambitious outcome.

1.39 The submission from the state and territory governments to this inquiry is unanimously opposed to the intrusion into their jurisdiction of Commonwealth powers in regard to occupational health and safety. The Victorian Government has received advice that Victoria is not a 'Commonwealth place' for the purposes of sections of the proposed legislation, even though particular construction sites may be Commonwealth building projects.[25] State ministers have pointed out the obvious potential for confusion among building and construction employers about their obligations under separate legislation.

1.40 The states and territories claim that differences between them in relation to OH&S regulation is minor, and has no adverse affects on the industry. These differences reflect the differing regional, demographic and market demands. They argue that the Commonwealth would achieve its desired objectives more expeditiously by working with the states to achieve more uniformity where it was considered

24 Final Report of the Royal Commission into the Building and Construction Industry, vol.1, February 2003, p.57

25 Submission No.26, Hon Rod Hulls MP, Victorian Minister for Industrial Relations, p.53

necessary.[26] The committee agrees with this approach. In an early draft of this report it was anticipated that the committee would regard with favour an enhanced role for the National Occupational Health and Safety Commission (NOHSC). The committee now notes, with considerable regret, the announcement from the Government about the demise of NOHSC and its replacement by the Australian Safety and Compensation Council. NOHSC had been impeded in its role over a number of years by Government obstruction and lack of funding. It appears that the Government has chosen to dispense with NOHSC because it is uncomfortable with that organisation's federalist, tripartite and participative modes of operation. Little detail is available as this report is tabled, about the proposed new body. It is as yet unclear as to the extent to which the Government's decision was influenced by a report it commissioned from the Productivity Commission into NOHSC, because the report has not been released.

1.41 The committee majority notes that the CFMEU believes that OH&S should be left with he states because it is easier to address these issues 'closer to the coalface'.[27] The committee acknowledges that proximity to the 'coalface' does not guarantee that state regulations are going to be properly enforced for the simple reason of proximity. Evidence to the committee suggests that the performance of the states and territories in the administration of their OH&S regulations is remarkably uneven. There are recent signs, however, of much more energetic compliance enforcement in most states.

1.42 It was pointed out to the committee that while ever building firms compete on price, and in the absence of strict supervision of safety regulations, there will always be compromises in the area of occupational health and safety.[28] So while the safety enforcement structures may be created by legislation, it would be too little effect.

1.43 The committee received evidence that, according to an analysis data in New South Wales, workers compensation claims for the self-employed were running at twice the rate of employees. The massive increase in the number of one-person businesses and partnerships, and the intensification of subcontracting in the building industry has led to adverse OH&S outcomes, the cost of which is largely borne by the Commonwealth through the health and social welfare outlays.

Taxation issues

1.44 Cost pressures and the absence of properly enforced regulations have seen the image of the building and construction industry tarnished by unethical business practices, exploitation of labour, tax evasion and evasion of other statutory obligations placed on employers. Mention has already been made to the corrupting influence of tax evasion on the culture of the industry. While witnesses from all sides of the industry have told the committee that they have no knowledge of criminality in the

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26 ibid., p.18

27 Mr Andrew Ferguson, *Hansard*, Sydney, 7 April 2004, p.61

28 Associate Professor Braham Dabscheck, *Hansard*, Sydney, 7 April 2004, pp.34-35

form of thuggery and blackmail, there has been much evidence received about illegalities relating to unethical and illegal business practices.

1.45 The first of these deals with sham corporate structures, or 'phoenix' companies which operate at a loss for period of one to two years, and are then liquidated, owing the Australian Tax Office, suppliers and employees large amounts of taxes, payments and wages. Another company, often with a very similar name, will emerge from the ruins of the liquidated company, run by the same principals and 'entrepreneurs' and will continue in business, taking over its predecessors operations.

1.46 No dedicated intergovernmental body has been established to deal with phoenix companies. The ATO has established taskforces and conducted investigations, but the committee believes that a more determined and co-ordinated effort needs to be made to prevent the establishment of phoenix companies. Changes are needed to corporations law to stop the registering of $2 companies. Asset stripping should be prevented, and the confiscation of assets made an easier option for the courts. The committee is disappointed that the Government has rejected a recommendation of the royal commission that members of a phoenix company group be held jointly and severally liable for the tax debts of the group.

1.47 Underpayment of superannuation is a serious problem in the industry. The ATO have estimated that around 29 per cent of employers either fail to make superannuation payments, or pay less than the entitlement. This phenomenon is due partly to the high levels of bogus contacting in the industry.

1.48 The CFMEU has identified in its submission to the inquiry the serious problem of underpayment and non-payment of entitlements. The extent of the problem can be seen in the amounts recovered by the CFMEU. In the three years 1999-2001 the CFMEU recovered, through all its state branches, in excess of $30 million in unpaid wages, unpaid redundancies and unpaid superannuation. This figure does not include settlements negotiated by the union at the worksite, or claims that have not been pursued.

Training and apprenticeships

1.49 The skills shortage within the industry was addressed in all of the major submissions to this inquiry. It is not difficult to argue that the long-term prosperity of the building and construction industry is heavily dependent on its capacity to attract employees with the incentive to upgrade their levels of skill.

1.50 The committee notes evidence from this and previous inquiries that the systemic disincentives for skilled training have not been seriously addressed either by governments or industry. At the core of the problem is cost. The 'race to the bottom' which is being run by competitors for scarce skilled labour resources, continues a self-destructive course toward a deskilled workforce. The committee heard evidence of the direct relationship between skill shortages and the trend toward subcontracting:

> I think that this intensification of the subcontracting system has dramatically increased the level of competition within the industry and has reduced the average firm size. It is well known that, for a whole range of reasons, there is a very strong relationship between the increase in firm size and the propensity to train. Basically, if you have an industry where the average firm size is declining, it reduces the capacity of the industry to train. One index of that is the apprenticeship training ratio—that is, the ratio of apprentices to employed tradespeople. That has declined over the last decade by around 15 per cent, and it is directly contributing to skill shortages.[29]

1.51 Evidence to the committee's skill shortages inquiry in 2003 strongly suggested that as skilled workers in strategically critical areas, such as may be found in the construction industry, become scarcer, labour will be attracted to the highest bidder.[30] A poaching problem will emerge, if it has not already done so in this industry. As employer voluntarism is sharply declining because of poaching, the challenge will be to encourage a higher level of employee investment in training directly across the industry, with no tolerance extended to 'freeloaders'. The committee majority takes the view that those who can afford to employ can afford to train.

1.52 Evidence from this inquiry also echoes views expressed to this committee's skills inquiry in 2003 that a current training policy limitation is the failure to recognise that training needs to be seen in the context of industry, social and taxation policy. It cannot be allowed to depend on the demands of individual enterprises.

Attempts at industry reform

1.53 The building and construction industry has been intensively studied over the past 15 years. Inquiries into the industry have been prompted partly by the property and construction boom which has continued since the mid 1980s. Nearly all of the inquiries have focussed on the efficiency of the industry, although the perspectives and intent have varied according to the different political agendas of initiating state and Commonwealth governments.

1.54 Research undertaken by Unisearch for the Cole royal commission explains the connection between the influx of investment into the industry, the effects of fixed-price contracts, and the consequential pressures on industrial relations. Major constructors, who employed few people, made decisions through their industry associations which ignored the interests of subcontractors who did most of the employing. Subcontractors were badly organised as a group. There was increasing mistrust between participants in the industry, which was then intensified by credit problems in the 1970s and 1980s. A number of building firms collapsed. As one study of the industry explained conditions at the end of the 1980s:

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29 Dr Phillip Toner, *Hansard*, Sydney, 7 April 2004, p.83

30 Senate EWRE Committee, *Bridging the Skills Divide*, Canberra 2003, pp.200-203

> By 1988 the building boom in commercial offices in most Australian cities had stretched the capacity of the construction industry to meet demand. Some of the projects were those of relatively inexperienced speculative developers, supported by relatively easy credit. Regardless of the experience of the developers or the source of funds for development, all players suffered through skill shortages, particularly on-site management. While credit was easy, interest rates rose to historically high levels, increasing the demand for speedy construction, and heralding the widespread use of innovative procurement strategies. These were often not well understood or tested. Legal problems grew as a result. Trust declined.[31]

1.55 The first wave of Japanese investors had entered the construction industry bringing with them new procurement methods, the purpose of which was to bring about more predictability in costs and completion times. Fixed-price contracts soon became the norm in the industry, which saw a shift in higher levels of risk toward contractors, who were therefore more vulnerable to the threat of industrial action. The end of the equities boom came in 1987. This boom had helped fuel commercial and hotel development speculation. The glut in office space then led to a collapse in the business rental market. Consequently, forward orders for office buildings declined, margins fell below prime costs in some cases, and employment in the building and construction industry fell by 16 per cent.[32] There were a number of government responses to this state of affairs.

1.56 First, in 1989 the Industry Commission (to which reference has been made) commenced an inquiry into the cause of excessive costs of major constructions, with a view to identifying avenues for improved efficiency. The Industry Commission reported that the evidence of high construction costs on a comparative basis was conflicting. But it also noted many impediments to efficiency, including costs associated with remote locations, poor industrial relations and ponderous government approval processes. A noteworthy finding, also identified in later inquiries, was that the complex and intermittent nature of major projects limited the opportunities for acquiring project management skills.

CIDA

1.57 The Industry Commission's report was presented in 1991, coinciding with the unrelated implementation of the Commonwealth's Construction Industry Reform Strategy through the Construction Industry Development Agency (CIDA). This was a tripartite agreement between the Commonwealth, developers and employers in the industry, and trade unions. CIDA established working groups whose task it was to develop a uniform set of criteria and standards for the appointment of action plan advisers (industry volunteers and CIDA staff) to tackle five key industry goals: best

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31 Peter Barda, *In Principle: Construction Industry Reform, 1991 to 1995*, AGPS Canberra, p.11

32 ibid, p.14-16

practice; project delivery; industry development; skills formation; and, workplace reform.

1.58 Between 1992 and 1995 CIDA developed a business plan to involve itself in a culture of learning and continuing improvement. The ultimate objective of this was to bring about 'a self sustaining and dynamic process of continuous reform in the industry' to ensure its international competitiveness.[33] One outcome of this was the development of pre-qualification criteria, which set out specific criteria for contractors and sub-contractors and consultants for the purpose of informing developers and other building clients how to select the most suitable firms. This was the first systematic attempt to assess the financial and technical capabilities of builders and contractors. CIDA took the view that through these measures the overall capability of the industry would be lifted.[34]

1.59 CIDA's vision of a more dynamic industry depended on improvements to the skills and creativity of employees. It also depended on improved human resource management in the industry and improved training. Implicit in this report of the committee majority is an acknowledgement of the importance of continuing along the lines that were pioneered by CIDA. Evidence to the committee indicates that the Government has failed to recognise the importance of harnessing the strengths and the common purpose in the industry to break through the culture barriers that so many builders lament, but can do little to circumvent in the absence of constructive leadership at the Commonwealth level. CIDA was disbanded in mid 1995 and its work was continued by the Australian Construction Industry Council, with more limited objectives. This body was in turn disbanded in 1997 and its activities assumed by the National Building and Construction Committee.

1.60 To date, CIDA has been the only Commonwealth initiative taken to improve productivity in the building industry and to secure its future through management improvements. A number of comments have been made in submission and in oral evidence to the effect that a lack of leadership and co-ordinated technical advancement is hampering the industry. Evidence of this is to be found in the Commonwealth neglect of training in the skilled trades on which the industry depends. This is remarkable for the reason that the construction and housing industries are key indicators of economic activity. It is also remarkable that industry has not been able to convince the current government that increased spending on skills development is essential for the future of this and other industries. When academics like Dr John Buchanan refer to the absence of leadership in the industry, such matters as this provide the evidence.

1.61 It is clearly against current Government policy to collaborate with, much less initiate, any long-term planning to make genuine reforms to the construction industry.

33 Royal Commission into the Building and Construction Industry, Discussion Paper 15, November 2002, p.38

34 ibid., p.39

The hope for this may lie with initiatives the committee heard about from the states. Evidence the committee heard in Melbourne about the Building Industry Consultative Committee of Victoria is described in chapter 3. It outlines proposals to amend the Workplace Relations Act to simplify industrial relations procedures and to minimise disputes. The committee notes that state initiatives for reforms fill a gap left by Commonwealth abandonment of this progressive policy area since 1996.

Gyles royal commission

1.62 Second, while this activity was going on at the national level, significant inquiries were conducted at state level. The Gyles royal commission into productivity in the building and construction industry in New South Wales was established in 1991. While the terms of reference directed the inquiry to examine illegal activities and industry practices affecting efficiency and productivity, the main recommendations of the inquiry centred on the role of government, as the biggest client of the industry, in driving the process toward increased efficiency and productivity.

1.63 The hearings of the Gyles royal commission revealed an industry riven by mistrust and stretched beyond its capacity because of skill shortages.[35] A tangible outcome of the Gyles royal commission was the establishment of Construction Policy Steering Committee (CPSC) in New South Wales, whose prime responsibility was to establish a code of conduct for the industry. The CPSC was aiming at cultural change in the industry, to be promoted by a whole-of-government codification of tendering expectations. The codes established standards of contractor behaviour and formalised the expectations of public sector clients. They stipulated co-operative approaches in all business dealings, due regard for all legislated regulatory requirements, notably in regard to occupational health and safety and environmental matters. Collusive tendering practices were banned. Victoria and Western Australia and South Australia followed New South Wales precedent in the establishment of codes of practice. The committee is interested in how these codes have worked in practice, and whether they have fulfilled their objectives.

1.64 The Gyles commission could in some respects be seen as a precursor to the Cole commission, although it should be noted that the higher incidence of industrial disruption in the industry in the early 1990s gave a degree of plausibility to the NSW Government's action, in contrast to the absence of any similar rationale for the establishment of the Cole commission. Gyles also found that the problems of the industry extended beyond industrial disputes. As the Master Builders Association of Queensland told the committee:

> I can recall when master builders New South Wales rang to inform me that the Giles royal commission had just been established in New South Wales and they were rather excited. I can assure you that two years later, when a number of their contractors—and master builders New South Wales

35 ibid., p.16

> themselves—found themselves in the same difficulty, they were less excited.[36]

1.65 A common feature of the recommendations flowing from both Gyles and Cole was the formation of task forces to pursue allegations of misconduct arising from evidence produced by each commission. Issues common to both royal commissions included allegations of abuse by unions and employees of occupational health and safety issues as an industrial dispute tactic. While both royal commissions were established to bring pressure to bear on the building unions, there are important differences in relation to the conduct of each inquiry. The procedural fairness of the Gyles commission was not a point at issue, and Gyles' adverse findings did not spare employers. In contrast, the Cole commission was widely criticised for its high-handed disregard for principles of natural justice, and its lack of objectivity in assessing the relative importance of evidence presented to it.

Developments since CIDA

1.66 By the mid 1990s a number of states had developed building industry codes of practice, mainly as it applied to government contract work. The publication of Green Papers in New South Wales in 1996 confirmed all that had been said before about the state of the industry. Commonwealth involvement in the industry has continued since 1997 through the National Building and Construction Committee (NatBACC). This body embraced a broad agenda for modernisation of the industry but maintained a low profile until it was disbanded in 2000. The Australian Construction Industry Forum (ACIF) was then set up to implement action agendas established by the NatBACC.

1.67 The Productivity Commission reported in 1999 on *Work Arrangements on Large Capital City Building Projects*. The Commission found some improvements, unevenly applied, since the 1980s. The report's recommendations found some echo in the Cole royal commission report, particularly in regard to pattern agreements and union power.

1.68 The primary aim of reform during the 1990s was to change the confrontational and adversarial culture in the industry. There was an attempt to concentrate on process management issues as a result of increasing concern about the slow adoption of information technology and unacceptably high accident rates. It is claimed that the process of improvement is hampered by the need for the Commonwealth to accept state initiatives in this area where states have the constitutional powers to act.

The BCII Bill in the context of the Government's WR reform agenda

1.69 The Building and Construction Improvement Bill 2003 needs to be seen in the context of all other industrial relations legislation introduced by the Government since 1996.

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36 Mr Graham Cuthbert, *Hansard*, Brisbane, 25 February 2004, p.22

1.70 The Opposition Senators' Report on the Workplace Relations Amendment (Protecting the Low Paid) Bill 2003 noted:

> In a little over five years this committee has dealt with nineteen amending bills to the *Workplace Relations Act 1996* (WR Act). These bills have represented, *in toto*, attempts by the Government to weaken the entitlements of employees across the whole spectrum of their relationship with employers, all of this in the name of ‘balance’. These matters include the conditions of the termination of employment, the rights of association and representation, the rights to collective bargaining, and now the rights to have award wages matters fairly dealt with by the Australian Industrial Relations Commission (the Commission).[37]

Government policy assumptions

1.71 In all likelihood, the government would argue that in all its industrial relations legislation blocked in the Senate it has consistently aimed at achieving 'balance' in the relationship between unions and employers. From the Government's perspective the ground is tilted in favour of the unions, and they would claim that this state of affairs is embedded in the industrial culture of the nation. It has long been claimed by the Government that there is too much prominence and recognition accorded to the role that unions play in determining the outcome of negotiations of wages and conditions. The thrust of government policy has been to marginalise unions by encouraging the erosion of their membership base through establishing alternative processes for negotiations of wages and conditions.

1.72 The implied policy of 'putting unions in their place' is based on a number of related false assumptions. The basic assumption is that unions are increasingly irrelevant in the twenty-first century because structural changes to the economy have created new skills demands and employment arrangements. The consequent assumption is that most wealth is now generated by new industries, so the argument goes, and these new industries have no tradition of unionism. It follows that the most productive workers have little interest in collective agreements anyway, which is why the Government is promoting the use of AWAs. The final assumption is that employees will increasingly demand flexible working and contracting arrangements that will exclude the need for union participation in the bargaining for these arrangements. Hence the increasing use of the buzzword 'flexibility', which is used to put a favourable connotation on the trend toward part-time and contract working arrangements. That such working arrangements are unsatisfactory for the great majority of the workforce is generally overlooked by 'reformers'. By a massive leap of extrapolation it becomes clear that what promotes job satisfaction for a very small number of highly paid workers with specialised skills must be regarded as the way to the future for the bulk of the workforce. In these circumstances it is not difficult to understand why union membership is now steadily increasing.

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37 Senate EWRE Legislation Committee, *Report on the Workplace Relations Amendment (Protecting the Low Paid) Bill 2003*, June 2003, p.13

1.73 This viewpoint also illustrates the consequence of failing to see industrial relations in other than economic terms. As Professor McCallum explained to the committee:

> Industrial relations is about people—Australian workers and Australian employers—and their relevant organisations such as employer associations and groupings and trade unions. For legislation to work, it must have the confidence of all those parties. My concern with this legislation is that it really deals much more with trade union conduct and employee conduct in an asymmetrical manner than it deals with employer conduct. The fact that the building commission does not have any powers, as I read them, over wages and employee entitlements is an instance of this. The fact that all industrial action is deemed unlawful is another instance of this. I am simply saying that good legislation has to be balanced, has to be workable and has to have discretions reposed in bodies so that they can act in an independent manner. This legislation is not good legislation according to my criteria, and I doubt that it will pass the Senate in its current form.[38]

1.74 The Government's policy of weakening the influence of unions in the setting of benchmarks for wages and conditions is consistent with its strict and uncompromising view that enterprise level bargaining over wages and conditions must prevail in all circumstances. Enterprise bargaining was an innovation of the Keating Government, which recognised certain commercial realities related to the capacity of individual enterprises to pay increased remuneration and other benefits. The 1991 amendments to the Industrial Relations Act implemented policy changes which have since been transformed from pragmatic expediency into an ideological crusade. The Government's view appears to be that workplace agreements are the only acceptable avenue to wage negotiation, regardless of the kind of enterprise for which an agreement must be sought. The complexities of the building and construction industry, and the characteristics of its employment needs, make sole reliance on enterprise agreements impractical in many cases. As Professor Ron McCallum told the committee:

> To put it neatly, the enterprise bargaining system works decidedly well when you are dealing with a factory producing widgets. You want that factory to be able to bargain with its work force to make sure that it can produce widgets more cheaply than its competitors can and that it will not have unnecessary labour costs. That factory is a stable workplace and it makes eminent sense. The building and construction industry is totally different. Projects vary in size and regions vary, and one is not so concerned with the labour costs of each individual subcontractor. One is more concerned about stability, and that is why most of the world has allowed there to be greater flexibility in bargaining in the building industry. The problem with this bill is that it pushes onto the construction industry

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38 Professor Ron McCallum, op. cit., p.11

> the paradigmatic model of enterprise bargaining that is the centrepiece of the Workplace Relations Act.[39]

Pattern bargaining and project agreements

1.75 Chapter 5 of the BCII Bill contains a major provision which has been previously rejected in a proposed amendment to the Workplace Relations Act: a prohibition on pattern bargaining in the industry. This provision is highly contentious, and causes as much unease among those who otherwise support the bill, as among those who oppose it. Pattern bargaining is the subject of a later chapter. The committee majority makes the point in this introductory chapter that the Government's campaign against this practice flies in the face of common sense in reaching agreements on wages and conditions. The committee found that many small contractors support it because of the degree of certainty it brings to cost projections through the 'levelling of the playing field'. With labour costs agreed to over a three year period, firms can then compete on levels of service and competence and on materials costs. Even when large building corporations make a ritual complaint about pattern bargaining they support the continuation of other aspects of pattern bargaining that would be in breach of the proposed legislation.

1.76 In particular, the committee majority notes the carefully expressed views of Ai Group which in its position statement on the exposure draft of the BCII Bill, stated its opposition to industrial action being used as a tactic to force employers into accepting pattern bargaining. It noted, however, that prohibiting pattern bargaining which is freely entered into by parties would be a very 'significant' step because the vast majority of current enterprise agreements in the industry are pattern agreements.[40] The paper also made the point that a prohibition on pattern bargaining could only work if the legislation contained a mechanism to enable the certification of genuine project agreements. Major projects, according to Ai Group, should be viewed as enterprises bringing together parties with relevant skills and expertise in pursuit of a common goal. As such, project agreements are a legitimate risk-management practice.[41]

1.77 Evidence from the Queensland Master Builders Association (QMBA) appears to the committee majority to be highly credible in relation to pattern bargaining. Its submission notes that wage justice has long been defined as circumstances where workers doing identical work in close proximity receive identical remuneration. It describes a system that encourages individual employers to pay differing wages to workers doing similar tasks on the same worksite as 'a recipe for industrial anarchy' which cannot be supported. Pattern bargaining within certain limits has been deliberately pursued by builders as a strategy to minimise industrial disputes. An

39 ibid., p.5

40 Submission No.1, Ai Group, Attachment A, p.92

41 ibid.

additional reason to support pattern bargaining is to remove the threat of leapfrogging claims which would be the inevitable consequence of an unregulated labour market.[42]

1.78 The QMBA also favoured the idea of registered project agreements which are commonly used on large civil and engineering projects. The strongest argument for their use is cost transparency for contractors. Both unions and employers can contractually ensure that wages and conditions agreements are honoured. Project agreements ensure industrial harmony because compliance can be legally enforced.[43] The committee majority notes that clause 67 of the BCII Bill is a specific provision that makes project agreements unenforceable. This indicates the extraordinary lengths to which the government will go to ensure the purity of its doctrine, regardless of the practical consequences. Even the bill's least critical supporter, ACCI, has raised in its submission the possibility of a 'genuine project agreement', taking the form of 170LJ, 170LK or 170LL agreements, and has sought assurances that such agreements would be enforceable.[44]

1.79 The committee notes that builders who face the challenge of managing industrial relations in the practical circumstances of the workplace have a far more pragmatic view of what the legislation should contain than those Canberra-based legislators and industry representatives whose direct experience of the industry is remote or non-existent. The question arises as a result of hearing witnesses across the country: whose interests does this legislation serve? The committee majority notes from the evidence that few stakeholders are happy with the legislation before the Senate. There is a commonly-held view across the industry that whatever merit lies in the intentions of the legislation (and obviously some parties see no merit at all), is overshadowed by such flaws as would render it unworkable.

1.80 The committee received strong evidence of the success of project agreements associated with the construction of the Sydney Olympic Games facilities. A memorandum of understanding between the Olympic Coordination Authority and trade unions set out a framework of negotiations on each of the projects. The project agreements based on the framework were not identical, and included provision for allowances to be conditional on meeting production goals. In one instance payments were reduced for employees when progress goals were not met on a project.[45] Dispute resolution mechanisms were established to allow properly trained rank and file union delegates to resolve local workplace issues quickly. The committee makes the point that such agreements would not be permitted under the provisions of the bill which is before the Senate. That is, had this bill been enacted before the Olympic Games, it is highly likely that we would have seen the kind of difficulties now facing the Athens games organisers, in addition to a massive cost blow out.

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42 Submission No.90, Queensland Master Builders Association, p.15

43 ibid., p.17

44 Submission No.3, Australian Chamber of Commerce and Industry (ACCI), para 71, p.28

45 Mr John Robertson, *Hansard*, Sydney, 2 February 2004, p.31

Reliance on commercial legal principles

1.81 Another element of the Government's general policy on workplace relations is to relegate industrial law to a lesser status, and to promote commercial law as the basis for legislative provisions. The Government's implicit belief is that for over 100 years industrial law has enjoyed a growing privileged existence: that decisions affecting the prosperity of the country were being made in tribunals dominated by those with an industrial relations mindset. The committee heard evidence that legislation based on commercial law was beginning to prevail over labour law: that commercial law, derived from common law, has traditionally regarded unions as conspiracies in restraint of trade.[46] This attitude is the foundation of the Government's consistent opposition to pattern bargaining.

1.82 The committee heard that Commissioner Cole was unable to see any reason for giving industrial law particular consideration in workplace relations matters.[47] It also heard that in many areas of the industry, builders wished to be regulated by commercial law rather than by industrial law because they operated as businesses, and because industrial law was associated in their mind with a culture of unlawfulness: meaning that unlawful acts can be routinely settled as part of a final agreement.[48]

Industry productivity

1.83 The Government is attaching a great deal of weight to evidence that the building and construction industry is inefficient, and for this reason alone requires the kind of extreme regulatory intervention that is proposed in the BCII Bill. They rely on a number of recent studies have identified the need for improving the performance of the industry.

1.84 There are four elements of performance: productivity, cost, time and quality. There is more comparative information available on productivity and cost than on the other two elements. In considering issues of productivity, the committee bears in mind advice it has received that there is no one single universal measure of productivity, and that it is overly simplistic and inaccurate to say that productivity is declining across the board in the construction industry or that it can be put down to any one factor in particular.[49]

1.85 Research undertaken for the Cole royal commission indicates that in terms of cost performance, Australian industry rates highly in comparison with other advanced countries that were part of the comparative study undertaken by Unisearch. The other countries were Britain, Canada, France, Germany, Japan, the United States and Singapore. The most common ranking for Australia was second place against 14 listed

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46 Dr John Buchanan, *Hansard,* Sydney, 2 February 2004, p.45

47 ibid.

48 Mr Glenn Simpson, *Hansard*, Brisbane, 24 February 2004, p.10

49 Professor Martin Loosemore, op. cit., p.2

comparisons, and Australia fell within the group of countries with a clear competitive advantage.

1.86 In the productivity comparison, research indicates that Australia ranks on a par with Germany and Japan, performs slightly better than Britain and France, but lags behind Singapore and the United States. In value added per employee, Australia is on a par with Japan, is ahead of the three European countries and lags behind Canada, the United States and Singapore. The Australian construction sector's contribution to GDP relative to its workforce was approximately equal to that in the United States, and ranked sixth in the cross-sector comparison.[50]

1.87 The committee also heard that on the most reliable of all productivity indicators, global market share and attractiveness to foreign investment, Australian industry was doing well. A higher share of the funding of construction projects in Australia is coming from abroad, consistent with a view that the returns on investment are at a satisfactory level. Foreign investment is also seen in the takeover of ownership in large Australian companies. Leightons, John Holland and Baulderstone are now owned by foreign interests and are competing internationally.[51]

1.88 Industry productivity is difficult to assess on a comparative basis, and it is likely that the ranking given to particular countries is likely to change. To the extent that studies have been informative, they do not show cause for alarm about the relative productivity levels in the industry. Some of the evidence about industry productivity which has been relied on by the Government has been very contentious.

The credibility of research into productivity comparisons

1.89 The committee was faced with conflicting evidence in relation to industry productivity. Research was commissioned by the Government to prove its case that productivity is low in the construction industry. Two weeks before the release of the Cole royal commission final report, the Government released a report from Econtech which the Minister claimed to reveal that productivity is higher in the housing sector than in the commercial construction sector; that productivity is lower in Victoria than in New South Wales; and that productivity is significantly lower in Australia than in the United States.

1.90 This research by Econtech appears to have been commissioned to counter research contracted to a University of New South Wales (UNSW) organisation named Unisearch, by the Cole royal commission. It may be presumed that the Unisearch report was considered to have given an unduly optimistic and favourable view of the performance of the local industry, as compared to the industry in the United States,

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50 Unisearch Ltd, UNSW, *Workplace Regulation, Reform and Productivity in the International Building and Construction Industry, Discussion Paper 15,* Royal Commission into the Building and Construction Industry, November 2002, p.2

51 Dr Phillip Toner, *Hansard,* Sydney, 7 April 2004, p.80

and an equally inconvenient comparison outcome between the domestic housing industry performance and the domestic construction industry. As the Unisearch researchers told the committee, no matter which way they pushed and pulled the figures, Australia ended up in the top quartile. It was also put to the committee that the use (or misuse) by other researchers of the Unisearch data gave an unduly pessimistic comparison between United States and Australian construction industries, to Australia's disadvantage. As was explained to the committee, these figures were too 'rubbery' to use as a basis for extrapolations about productivity.[52]

1.91 Research undertaken by Dr Phillip Toner refutes the conclusions drawn by Econtech. Toner claims that the method used by Econtech to determine productivity was not supported by authoritative data produced by the ABS Census of Private Construction Activity 1996-97. It is fair to point out that Econtech has insisted on the validity of its research method when giving evidence to the committee.[53] ABS data supports the view that labour productivity in the housing sector is lower than in the construction sector. Toner claims that Victoria's increased share of nation investment in commercial construction is inconsistent with Econotech's findings of Victorian cost disadvantage as compared to other states.

1.92 Likewise, in relation to the difficult task of making valid international comparisons of productivity, Toner argues that Econtech was very selective and limited in its choice of data in making comparisons between Australia and the United States. It is claimed that the Econtech report failed to mention that in three out of four studies of labour productivity, Australia is on a par with the United States and generally performing better than Japan, Singapore, Germany and France.

1.93 Toner concludes that productivity improvement strategies which focus on work practices and industrial disputes leave out far more important considerations. These have to do with improved levels of consultation between management and labour; regular upgrading of skills; improving the technical skills of project management and exploiting new technologies.[54] The committee majority notes the consistency between Toner's comments in relation to international comparisons and those of Unisearch. Dr Toner explained his position when he appeared before the committee, pointing out that while Econtech claimed that its report was concerned with work practices and labour productivity it used Rawlinson cost data to underpin its arguments. In referring to his article submitted to the committee,[55]Dr Toner told the committee:

> I think the point I was making there was that the Econtech data was being highly selective. Discussion Paper 15 uses a very broad range of summarised international studies using three different measures: labour

52 Loosemore and McGeorge, op. cit., pp.17-26

53 Mr Christopher Murphy, *Hansard*, Canberra, 25 May 2004, pp.2-5

54 Phillip Toner, *An Evaluation of Economic Analysis of the Building and Construction Sector,* Employment Studies Centre, University of Newcastle, p.1

55 ibid., p.11

> productivity, cost per square metre and time to completion. The overall conclusion is that Australia's are quite favourable, as indicated by those quotes. In the Econtech report they wanted to discount all of those other measures—time to completion and cost per square metre—and just focus on one of the measures, labour productivity, and within that on only one measure, the one that was provided by the authors. I am just emphasising the highly selective nature of the data that they drew from Discussion Paper 15. In saying that they did not want to use comparisons other than labour productivity, they were saying that they did not want to use the cost comparisons based on cost per square metre, in which Australia fares quite favourably. Arguing that they do not want to use that data for their international comparisons actually contradicts Econtech's own use of the Rawlinson data for their labour productivity comparisons, which is wholly and solely based on cost comparisons.[56]

1.94 The committee has been struck by the limited scope of Econtech research which led it to its conclusion that the housing industry is more productive than the commercial sector. Econtech's report states that the same building tasks, such as laying a concrete slab, building a brick wall, or painting and carpentry work, cost on average 10 per cent more for commercial buildings than for domestic residential housing. In defending its analysis, Econtech made a number of counter arguments to those made by Dr Toner at the Sydney hearing in April.[57] UNSW researchers also claimed to be startled by the same data presented by Econtech to a conference held after the release of the Cole report. The committee believes that in trying to establish reasons for this difference between the two sectors of the industry, Econtech's speculations are uninformed by specialist construction knowledge. This is, unfortunately, a commonplace instance of Government-commissioned research aimed at trying to fit the facts to the argument.

1.95 A number of builders and their associations were asked by the committee to comment on Econtech's assertions about cost differentials between the housing and commercial construction sectors. Informed and specialised advice was given to the committee at its Brisbane hearings by an experienced union official as to the differences between a high rise concrete pour and a house slab pour:

> First of all, you will generally find that the slab will be supported by formwork in the commercial sector. Secondly, the structural nature of the slab differs. A typical housing sector slab will have nothing more than F62 mesh in it on ground whereas a slab in the building industry will have substantial reinforcement placed in it and is required to be inspected by an engineer before pouring takes place—which causes delays. The concrete generally will have to be, because it is off the street, placed either using a pump or a crane with cables. This will incur additional cost. There are usually traffic management systems required at street level in commercial building construction for that. Because you are working at an elevated

56 Dr Phillip Toner, *Hansard,* op. cit, p.79

57 Econtech, *Economic Analysis of the Building and Construction Sector*, 20 February 2003, p.i

> height, you would also require additional safety measures such as edge protection et cetera.
>
> The concrete in commercial construction is of a much higher standard; it is usually MPA40—versus MPA25 in the building industry—in terms of the strength of the concrete. That requires concrete vibrating. The penetrations et cetera have to be much more carefully measured for services. Obviously in a cottage situation if the sewerage pipes are an inch or two wrong then it is not as serious as what the structural implications can be for placing a penetration through a suspended slab, where it is more critical. So there is a vast difference in the requirements for a commercial inner city building. If you try to compare it with a cottage, there is no comparison whatsoever.[58]

1.96 Econtech's director made a robust defence of his firm's modelling which assumed that the costs of high rise building construction should be no more than the cost of domestic bungalow construction. Nor did Mr Murphy concede that concrete work in bungalows and concrete form-work on high rise buildings should markedly differ on cost.[59] On that score, the committee majority is inclined to believe the unanimous view of builders. Econtech's research was also criticised from the other side of the table. The AiG witness in Canberra told the committee:

> I actually do not necessarily support the view that comparing the residential housing market with the commercial market or the high-rise market or the industrial engineering market are actually safe comparisons. I say that for a number of reasons. The more complex, bigger, dangerous and expensive the project is, the more it relies on the contractor and the people working on it to have appropriate health and safety systems and quality systems for the training and skilling of staff. The reality is that in residential or cottage construction there are a lot of flexibilities in the market, and I question whether they necessarily flow into the commercial construction sector.[60]

1.97 The committee rejects simplistic arguments supported by highly selective research. It recognises a tendency by the Government to purchase tailored research which is skewed in favour of the contention which the Government wishes to put forward. Thus, the committee majority is not attempting to impugn the research work done by Econtech under Government contract, but rather the inferences which the Government draws from that research. The committee did not believe that the Econtech data, or conclusions, could support the Government's contention that productivity rises would follow the implementations of the 'reforms' promised in the BCII Bill. That is because a number of non-economic factors intrude in such a projection. As Senator Murray's questions revealed, economic modellers cannot factor into their calculations the effects of state legislation, or, as Senator Murray put it, 'human or attitudinal consequences'. For instance, the bill provides for secret ballots. The use of this provision, in a bill intended to increase industry productivity, is more

58 Mr Wallace Trohear, *Hansard,* Brisbane, 24 February 2004, p.73

59 Mr Christopher Murphy, *Hansard*, Canberra, 25 May 2004, p.10ff

60 Mr James Barrett, op. cit., p.24

than likely to extend periods of lost time.[61] The conclusion to be drawn is that legislation is not likely to lead to productivity growth. This is more likely to result from improved technology and its application, from improved knowledge and skills in management and the general workforce, and from more efficient movement and investment of capital.

The justification for industry-specific legislation

1.98 The building and construction industry has been in the Government's sights since 1996, and has been marked for 'reform'. The Government justifies the implementation of industry-specific legislation for the reason that building and construction has been subject to prolonged periods of union direction and interference. It argues that companies are hostage to unions and uncompetitive work practices which have been forced on the industry, and that where companies appear to have prospered, this has resulted from 'sweetheart' deals with unions, notably the CFMEU. It is claimed that such deals have been arranged at the expense of other companies which operate at near-insolvency levels as a result.

1.99 By treating the building and construction industry as a special case, the Government hopes to 'reform' it, even though the measures proposed would condemn the industry to a prolonged existence apart from the mainstream of employer-employee relations which would lead eventually to its assuming a 'pariah' status within the wider economy. The Ai Group has supported the extension of this arrangement for a limited period only. There is no indication in the legislation, or in Government commentary, that this is a temporary, if misguided, expediency.

1.100 The key characteristics of the industry have been discussed above, but few of these important elements appear to have a bearing on the Government's rational for the legislation. The Government claims that solving the industry's problems is reduced to the simple formula of 'fixing' the conduct of its industrial relations by legislation. On the other hand, the committee majority sees the issues in the industry as being more closely linked to its cost structures, its profit margins and its sensitivity to economic cycles. In these respects it more closely resembles agriculture and primary industries than it does the manufacturing or service sectors. The attitudes of the workforce are determined by these characteristics and the accumulation of experience that continues to the present day. The committee majority believes that the industrial relations problems that arise in the industry flow, fundamentally, from the need felt by unions to negotiate agreements which protect the long-term interests of employees in an industry subject to work-level fluctuations and the complexities of labour management of building projects. To attempt to regulate a narrow industrial relations scheme in isolation from more fundamental forces driving the industry is to invite wholesale disruption.

61 Note exchange of views between Mr Murphy and Senator Murray, *Hansard*, Canberra 25 May 2004, pp.30-35

1.101 The committee received a considerable amount of evidence which argued against specific legislation for the industry. Advice from a Sydney law firm specialising in industrial law was that there would need to be very strong and cogent evidence of the need for separate legislation, and this was not presented either to the Cole royal commission, or by Commissioner Cole in his recommendation for such legislation.[62] The practical result of the separate legislation is that it will provide reduced and inferior rights and entitlements to building workers, compared to all other workers. It will mean that two or more differing standards will apply to employees performing the same work for different employers or working in different parts of the country. The submission argues that an attempt to 'quarantine' any discrete and defined section of the workforce from industrial laws having general application cannot succeed. The submission gives some instances to illustrate:

> Given constitutional and other limitations, it will never be possible in practice to legislate away State award coverage in the proposed sector of the building and construction industry, meaning that there will be under the proposals two or three "tiers" of standards: State award/agreement workers, Federal award, Federal agreement or Federal AWA workers (first class) and Federal BCII workers (second class).
>
> Given the structure of the industry and the inherent mobility of building workers, the industrial law standards applying to a worker will vary from month to month (perhaps day to day) or from job to job. For example building and construction workers move readily into and out of the "single dwelling" housing sector and the "commercial" sector of the industry, move from one state or region to another and from one employer to another.
>
> Notwithstanding (or perhaps because of) the attempts at definitions to confine or quarantine the coverage of the BCII Bill to a specific area of the industry, it is difficult to envisage that there will not be clear anomalies even in the "heartland" of what is attempted to be defined. That is, it appears that a number of workers of a single employer could be subject to the provisions of the proposed legislation while others would not be so subject.[63]

1.102 Another complication, briefly alluded to by academics from the UNSW School of the Built Environment, is the highly fragmented nature of the industry, and its connections with the rest of the economy through the supply chain network. Major building contractors do not have a high financial investment stake in the industry. Those that do are more likely to be suppliers of lift equipment and IT systems and other capital goods and infrastructure suppliers, which makes it difficult to isolate 'construction' as a discrete entity in isolation from the wider economy. If the labour supply to the industry is affected by the proposed legislation, there will be flow-on effects throughout the economy.[64]

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62 Submission No.64, Taylor and Scott, Lawyers, p.7

63 ibid.

64 Professor Denny McGeorge, *Hansard*, Sydney, 7 April 2004, p.8

1.103 Leaving aside the principled objection to single-industry regulatory legislation, there remains the constitutional limitations on the Commonwealth's power to regulate industry in the way this Government would like. The proposed Australian Building and Construction Authority has to rely on the existence of state powers and state legislation, and most importantly, the willingness of the states to agree to their proposals. There is no indication the Government is making any serious attempt to involve the states in collaborative measures to further the national interest in regard to the regulation of the industry. When critics of the bill point to its lack of 'symmetry' it is partly to this which they are referring.

1.104 It follows that if the building and construction industry requires separate regulatory legislation because it is a 'unique' case, the most obvious course of action for it is to legislate on issues that are clearly matters for the Commonwealth, such as closer supervision of industry compliance with regard to taxation, superannuation and other worker entitlements.

1.105 The committee majority regards legislation which is intended to regulate the employment conditions of workers and contractors in one industry sector alone is wrong in principle when it deprives employers of the rights which continue to be enjoyed by employees in other occupations. There can be very few exceptions to this rule. In principle, it may be defensible to waive this in specific areas of government employment related to national security, especially when compensating provisions to work entitlements are in place. The committee believes that as compensation for reducing the statutory rights of employees (compared to employees in all other industries) to take industrial action, there should be mechanisms to ensure that the need to take such action is eliminated. The committee majority cannot imagine what provisions in legislation could allow for this in the case of the building and construction industry.

1.106 Finally, the committee majority notes that an asymmetrical legislative response to what the Government mistakenly believes to be the main problems in the industry, may be the result of the limited Commonwealth power to regulate the industry. As the evidence from Taylor Scott revealed, the Commonwealth cannot overthrow state laws. It may only work through and around them. Therefore, its ability to legislate for all stakeholders in all of the industry is severely circumscribed. As the evidence of Professor Loosemore indicates, the culture change so necessary to improve the performance of the industry cannot be legislated for; it requires instead leadership from the top and consultative processes. The committee agrees with a view put to it that the Cole recommendations, and the subsequent legislation, are essentially based on a unitarist view of industrial relations: that management views are paramount and everyone else in the industry has to fit in with them.[65] It is for this reason that Opposition senators, who constitute the majority of the committee, argue that any attempt at genuine and broad reform of the industry can only succeed through collaboration with states and through consultations with all stakeholders.

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65 Associate Professor Braham Dabscheck, *Hansard*, Sydney, 7 April 2004, p.32

Likely consequences of enactment

1.107 It is not expected that the bill will pass in its current form. Were it to do so, the problems for the industry – and the Government - would have just begun. Getting the bill past the Senate, however unlikely, would shift the focus of opposition to this legislation to the courts where litigation, initially on procedural issues, would ensure that the implementation of the bill would prove difficult for the Government.

1.108 The committee majority noted that during the course of the inquiry information and speculation emerged that neither Government policy nor its proposed legislative implementation were being taken very seriously in industry circles. A report of the Director of the then Interim Building Taskforce, highlighting further alleged wrongdoings by building unions, was doubtless intended to 'maintain the rage' which marked the tone of the Cole royal commission report. The Interim Task Force reported on its powerlessness to act, but according to press accounts has found little sympathy among builders for its failure to secure convictions against alleged wrongdoers. As was reported:

> There is … industry concern about the wisdom and practicality of some of the Cole recommendations, which were, paradoxically, meant to achieve a more regulated building sector, while at the same time deregulating industrial relations in the sector. …'Cole came to his views of what needs to be done in the industry and the law does not have the unanimous support of anyone', a major building company chief executive says.
>
> Another describes the commission report as an expensive statement of the obvious.
>
> Another remarks:'The industry at large is very disappointed and the other half is "so what", we have to return to our normal working relationship with the union.'[66]

1.109 The committee has been considerably hampered in its consideration of the likely effects of the legislation as a result of the refusal of large construction companies to put in submissions or appear before the committee. It must therefore rely to some extent on press reports that it has no reason to believe to be unreliable. These reports indicate that building firms are not co-operating with the Building Industry Taskforce; that to do so would jeopardise their relations with the unions, and therefore the profitability of their businesses. The committee notes the strong likelihood of building industry leaders having almost as much disdain for the Taskforce as do the unions for the simple fact of their being interfering outsiders. As one company manager told the *Australian Financial Review*:

> Until they (the Task Force) have a fundamental understanding of the industry and what motivates unions, they will never get anywhere. There is no use getting investigators (former police officers) who have retired and

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66 Marcus Priest, 'Building taskforce targets Multplex', *Australian Financial Review*, 31 March 2004, p.1

> get them to deal with quite complex problems in the industry: it's a different culture.[67]

1.110 The Building Industry Taskforce has made a strong plea for the coercive powers that are provided in the bill. These include the powers to compel a person to attend and answer questions in relation to an investigation; to provide answers to questions; and to produce documents and other relevant information.[68] These powers are provided to other Commonwealth agencies like the Australian Taxation Office and the ACCC.

1.111 The committee majority makes the point that in its attempts to maintain the rule of law in the industry, the use of such powers will be counterproductive if they result in serious confrontation and resultant disruption to the industry. The introduction of an agency into the industry armed with mainly punitive powers, and having no role to play which is analogous to that once exercised by the AIRC, would be highly provocative. It is more than likely to provoke the scale of lawlessness that the Taskforce now claims exists but which it cannot prove, and which has been denied by all industry witnesses before this committee.

1.112 The committee majority concludes that the consequences of implementation of the legislation, were the bill to pass the Senate, would bring strife rather than stability and peace to the industry. It would see a decline in industrial productivity, and a decline in investment and employment. It would contribute significantly to the demise of whatever trust remains between unions and employers, and severely test the management skills of companies dealing with what would turn out to be a permanent crisis. This would occur at a time when the industry is otherwise performing well, although under some stress as a result of skill shortages.

Recommendation 1

The committee majority recommends that the Building and Construction Industry Improvement Bill 2003 be opposed by the Senate.

67 ibid.

68 Nigel Hadgkiss, *Upholding the Law - One year On: Findings of the Interim Building Industry Taskforce,* Canberra, March 2004, p.18