Chapter 2

The Cole Royal Commission

It is submitted that even by the standards of State and Federal Royal Commissions in general, the Cole Royal Commission was a vast, hugely expensive exercise in partial (in both senses) examination of the building and construction industry. Its Terms of Reference, set by the Government, ensured that some matters, in particular industrial relations and alleged union conduct, received far more attention than other matters that many would, and have, argue should receive greater scrutiny.

2.1 On 26 July 2001 the Government announced the establishment of a royal commission into the building and construction industry, to be headed by retired New South Wales Supreme Court judge Terence Cole. The timing of the inquiry, a few months before the calling of an election, was widely commented on. *The Australian* called the royal commission 'a political stunt' and the *Australian Financial Review* editorialised that the inquiry was as much about propaganda and the political cycle as about policy. This was because the inquiry was not prompted by any particular issue or dispute in the industry. There had been no recent crisis: only that the industry had been targeted by the Government several years before as 'ripe for reform'. The industry was to be 'fixed' in the way that the stevedoring industry had been 'fixed' some years before.

Why royal commissions are useful to governments

2.2 The device of the royal commission has a long and chequered history in Australian politics. There have been instances of royal commissions breaking new ground in advancement of public policy. There have been a number of instances where royal commission recommendations have ushered in changes to government procedures and have precipitated much-needed legal and administrative changes. They have often succeeded in recommending sound policy solutions for complex technical issues. It is also the case that royal commissions have been appointed to alleviate political pressures that threaten to overwhelm governments; and they have been used to promote policy changes that governments, lacking sufficient fortitude and public trust, have not been able to initiate without first preparing the ground through what the general public sees as a respectable quasi-judicial process. Royal commissions have also been appointed by opportunistic governments to act as plausible and disinterested hatchetmen; and sometimes to restore lost credibility in the way executive functions have been exercised.

2.3 The committee received, from a number of legally trained experts, advice as to the nature of the findings of royal commissions and how their findings and

recommendations are to be regarded. A representative submission from one law firm stated:

> Simply because Royal Commissions are not and do not have to behave like courts does not, of itself, impugn their potential role or value in examining contentious public issues or, for that matter, in arriving at conclusions and framing recommendations for the Executive to consider. It merely means that those in the legislature or the executive considering the "findings" or "recommendations" of a Royal Commission should not assume, or misleadingly represent to the public at large:
>
> that the findings of fact can be accorded the same level of confidence as findings by a court after judicial process;
>
> that the work of a Royal Commission has been conducted in a manner calculated to arrive in a detached manner at conclusions about all relevant matters within the scope of its inquiry; or
>
> that the recommendations of a Royal Commission follow logically, inexorably or at all from the deliberations and findings of fact of the Commission.[1]

2.4 In defence of its legislation the Government is able to point to the authoritative conclusions and recommendations of the royal commission. It has been evident during the inquiry that an attitude prevails among some supporters of the Government's position on the BCII Bill that the validity of the royal commission findings may be assumed simply on the basis that they are the findings of a royal commission.

2.5 In the view of the committee majority, and of every witness who expressed a view on the matter, the decision of this Government to establish a royal commission on the building and construction industry, select a commissioner, and set the terms of reference was an inherently political act. Royal commissions are an extension of the exercise of executive power through quasi-judicial processes. A royal commissioner is constrained by a government's terms of reference. However, in the exercise of that commission, wider procedural discretion is available to a royal commissioner than would be allowed to a judge in a court of law, because the inquisitorial role demands it. In addition, royal commissions have coercive powers which make them an extremely powerful mode of inquiry readily available to governments. Not only do governments select the royal commissioners and write their terms of reference, they can thereafter distance themselves, should they wish, from both the operations and outcomes of the inquiry. They can choose whether or not to accept all or some of the recommendations. One commentator has stated that these political advantages have ensured that royal commissions continue to be appointed regularly across all jurisdictions to perform a variety of functions.[2]

---

1 Submission No.64, Taylor and Scott, Lawyers, p.1

2 George Gilligan, 'Royal Commissions of Inquiry', *The Australian and New Zealand Journal of Criminology*, vol.35, no.3 2002, p.292

2.6 Legal practitioners and others told the committee that, being part of an executive process, royal commissions could never enjoy the same measure of independence as a court.

> It is a natural but unreasonable and unrealistic tendency to assume that the operations of and the eventual "findings" by a Royal Commission will conform to the principles governing courts and bodies exercising judicial power or the conclusions of fact and law made by courts after "legal process". Royal Commissions involve the exercise of executive, not judicial, power and it is unlikely that they could ever be truly "independent" of the political process. Their findings have no legal consequences but in law are merely expressions of the opinions of those who conduct them.[3]

2.7 It is remarkable, after such evidence, that the validity of Commissioner Cole's findings should warrant particular regard, or should be accorded particular respect because they bear the mark of a royal commissioner. The Government appointed a royal commissioner to give weight, respectability and a semblance of judicial impartiality to what was a political process.

Outsourcing the parliament

2.8 It is significant to this inquiry that the policy debate on the building and construction industry has largely taken place outside of the Parliament. The Government's general response to queries about the appropriateness of particular provisions in the bill is to refer to the royal commission. Stakeholders in the industry were marched before the commission to present their views, or to be questioned to the extent that suited the political objectives of the commission. Thus the Government was able to stand aside and have its work done for it by the royal commission.

2.9 Subsequently, little has been heard from the Government in the detailed defence of its legislation. The debate in the House of Representatives was the predictable set-piece ritual which saw the expounding of broad principles and their ideological justifications. It was not Commissioner Cole's role to provide or suggest the detail of how his recommendations should be translated into legislation, or to explain their rationale or likely consequences, or ways in which probable difficulties in implementation would be resolved. This was the task of the Government, had they been able to accomplish it. But there was scarcely any information forthcoming from the Government on this process. Thus the Senate has received the bill from the House without enlightenment from a proper debate in the House in which technicalities of implementation should have been explained. A great many questions relating to practical details therefore remain unanswered. It was for this reason that the committee invited Minister Andrews to appear before it to deal with matters that should have been the business of the House. The committee acknowledges the relative inexperience of Minister Andrews in this portfolio, but there was no suggestion that

3 Submission No.64, op. cit., p.4

this was his reason for declining to appear. This failure of ministerial responsibility is alone sufficient grounds for the Senate's rejection of the BCII Bill.

Appointment of the Cole royal commission

2.10 The Cole royal commission appears to have had inauspicious beginnings. Comment in the press at the time, as noted in the first paragraph to this chapter, suggests that there was a cynical and widely-held view that political opportunism was more than usually evident as a motive in the appointment of the commission.

2.11 The pretext for setting up the royal commission was the 11 page report dated 11 May 2001 which then Minister Abbott commissioned from the Employment Advocate. The report made allegations of union corruption, fraud and other illegality in the building industry. According to lawyers who closely observed the commission, none of the allegations contained in the Employment Advocate's report were borne out by evidence, and few of them were even aired in commission hearings.[4] The submission from Slater and Gordon also stated that matters referred to prosecution authorities in the secret volume of the royal commission report are apparently not of the sensational character alleged in the Employment Advocate's report. An *Australian Financial Review* article (29 September 2003) said to be based on a leaked copy of the secret volume states the royal commission chose to refer matters it merely concluded 'might' have constituted breaches of the law, which, according to Slater and Gordon, is a very low threshold.[5]

2.12 The committee notes the initially ambivalent attitude of the principal construction union, the CFMEU, to the establishment of the Cole royal commission. While it recognised the political motive for the royal commission, the union's national secretary is reported as saying that if the commission was 'a genuine attempt to tackle crooks in the industry, then we will have a constructive attitude'.[6] The CFMEU decided against boycotting the inquiry, and instead to develop a legal strategy to focus the inquiry on areas of the industry which the union considered to be unsatisfactory. The CFMEU withheld comment on the appointment of former Mr Justice Cole as royal commissioner, but noted without comment that the inquiry secretary had worked for the Business Council of Australia and as adviser to the Borbidge and Court governments in Queensland and Western Australia respectively.[7]

2.13 The Government did not respond well to this approach. Minister Abbott made it clear that the main purpose of the inquiry was to investigate claims of industrial intimidation, coercion and collusion: matters which were not monitored by any existing agency. Therefore, almost the entire focus of the evidence brought before the

---

4 Submission No.69, Slater and Gordon, Lawyers, p.1

5 ibid.

6 'Union inquiry counters tax attack', *Australian Financial Review*, 27 July 2001

7 'Unions to demand tax dodge inquiry', *Australian Financial Review*, 1 August 2001

commission was the unions industrial action, protests, demonstrations, 'pattern bargaining' and efforts to maintain the power and authority of the union through militancy backed by high levels of union membership. An indication of the priorities of the commission may be seen in an analysis of witness time over the course of the hearings. The CFMEU found that 90 per cent of hearing time had been devoted to anti-union topics; 663 employers or their representatives gave evidence, but only 36 workers. Only 3.3 per cent of hearing time was spent dealing with allegations about the wrong doing of employers.

2.14 This was to be the most expensive royal commission ever, costing around $67 million. The commissioner was paid at an unprecedented rate, and there was huge expense in paying for 13 counsel assisting: 4 senior counsel and 9 other counsel. Not one of counsel assisting had a background in representing unions, although a number of them had been regularly briefed by employers or the Employment Advocate in industrial matters. Administrative staff supporting the commission were current or former DEWR officials or ministerial staffers associated with 'reform' strategy or had been associated with stevedoring industry policy during the Patrick Stevedoring disputes a few years previously.[8]

Conduct of the royal commission

2.15 The committee heard much adverse comment on the conduct of the Cole royal commission. To a considerable degree, much of the dissatisfaction with the way in which the commission directed the inquiry can be attributed to the loaded terms of reference, but the conduct of the royal commissioner and council assisting should also be commented on in view of the manner in which the ground rules (known as 'practice notes') were set down by the commission and the ways in which the commission exercised its discretion.

Rules of evidence

2.16 Royal commissions are not bound by rules of evidence, and therefore evidence that would normally be inadmissible in a court, such as hearsay evidence, may be received by a royal commission. This can be an open invitation for counsel assisting to arrange for all manner of scuttlebutt to go onto the public record. Nor do traditional legal notions of proof and onus of proof apply. Commissioner Cole remarked, in relation to what is acceptable to a royal commission, that the law did not mandate 'any particular level of satisfaction that must be achieved before a finding of fact, which carried no legal consequences'.[9]

2.17 The CFMEU, which could fairly be regarded as the main target of the royal commission, was not given general leave to appear in the royal commission proceedings. The union argued, to no avail, that the royal commission's interests

8 Submission No.69, Slater and Gordon, Lawyers, p.2

9 *Cole Royal Commission: Final Report*, volume 2, chapter 2, para.31

would be served from having the CFMEU at the bar table ready to test the views of witnesses making adverse comment about the union. Only in a few instances was the CFMEU put on notice that it was subject to adverse evidence or a potentially adverse finding.

2.18 The main complaint of the CFMEU was the restriction placed by Commissioner Cole on the union's right to cross-examine witnesses. Cross-examination was limited to witnesses whose evidence was at odds with that given by other witnesses. As most of the evidence was unfavourable to the CFMEU and other unions, there were few contradictions which provided such a window of opportunity for union counsel. This was also due to the practice of counsel assisting the commission controlling the flow and content of the evidence. Restrictions placed on the cross-examination of witnesses by counsel for the unions was claimed in part to be an economy measure, and to allow Commissioner Cole to report on time.

2.19 The cross-examination of witnesses was very tightly controlled during proceedings, and it was only in situations such as direct conflict in factual evidence that the practice was allowed. The range of cross-examination was also very narrow. The procedures laid down by the commission regarding the sequence in which witnesses were called, could in practice, result in allegations and adverse comment made against union officials remaining unquestioned by counsel representing them. As one submission explained:

> Witnesses giving evidence adverse to union officers or members were generally called first, asked to attest to the truth of their statement, perhaps mildly examined, if examined at all by Counsel Assisting, and then excused. Contrary evidence from union witnesses was then generally called only if the union witness had made a statement giving contrary evidence for the purpose of cross-examination and the witness giving that contrary evidence was then sworn and vigorously cross-examined by Counsel Assisting. The original witness was then recalled if there was a statement with contrary evidence and only after a ruling had been made allowing cross-examination.[10]

2.20 As the CFMEU submission points out, this procedure led to the evidence of the original witness being unchallenged by anyone if counsel assisting chose not to call the union witness and no statement was made contrary to that of the original witness. Unlike an ordinary trial, the evidence of the first commission witness was heard in two parts so that any second cross-examination was done after the contrary evidence was heard. Therefore, such witnesses knew what they could be expected to be cross-examined on, and to prepare their answers accordingly, or to bring on further evidence. The CFMEU submitted that:

> In Tasmania a union witness gave evidence that there was dangerous asbestos on the site of an employer who had previously testified. The very

10 Submission No.37, CFMEU, Annexure 12, p.10; See Cole royal commission *Final Report*, Volume 2, Chapter 4, para.64

> next morning the employer went back in the witness box for the final time and presented further evidence to counter the evidence of the union witness. Such a process inevitably favours the version of events given by the first witness.[11]

2.21 More often than not, counsel assisting the royal commission would announce that no union witnesses would be called in relation to matters raised by employers, and other witnesses who had made serious allegations against the CFMEU and its officials. The opportunity to put statements on the official record was therefore lost. The royal commission was content to hear, as the last word, all the allegations made against unionists. Unions had to respond to each allegation as reported in the press. These obstacles placed in the way of unions attempting to fairly represent themselves and their members before the royal commission are well summarised in the submission from Slater Gordon:

> At the commission hearings all around the country, allegations were sprung on unions at the last moment which made it practically impossible for them to look at the material and obtain proper legal advice. Union lawyers complained about it regularly but nothing changed. The royal commission also imposed extraordinary, restrictive limitations on cross-examination of witnesses. When cross-examination was allowed, it was often days or even weeks after the damage in the media was done, and even then the Royal Commission severely restricted what could be the subject of cross-examination. It is believed that the only other royal commission to impose similar restrictions on cross-examination was the Victorian Royal Commission into Communism which took place at the height of anti-communist hysteria more than 50 years ago.[12]

2.22 The committee notes that the CFMEU made an application to the Federal Court claiming that Commissioner Cole had shown actual bias toward the union, or that his conduct of the inquiry had given rise to 'reasonable apprehension' that the Commissioner was biased, and asserting that the union had been denied procedural fairness by reason of the process of the inquiry.

2.23 The Federal Court rejected both contentions on the grounds that the report of the royal commission related to practices and conduct of specific kinds which did not particularise as to individual incidents or as to individual participants. Mr Justice Branson concluded that Commissioner Cole was under no duty to afford the applicants an opportunity to adduce additional material that might have deterred the Commissioner from making the findings and recommendations set out in his First Report.[13]

---

11 ibid, p.11

12 Submission No.69, Slater and Gordon, Lawyers, p.2

13 *Ferguson vs Cole*, op. cit, paras.56, 62

2.24 In commenting on the Branson J decision, a submission to the inquiry stated:

> Although its manner of operation was held by the Federal Court to conform to the principles of natural justice, as narrowly defined in this context, for those regularly involved in the process that manner appeared calculated to support a predilection to find fault in one major area only (that of union activity) and to marginalise or suppress scrutiny of other key problems facing the industry (occupational health and safety, avoidance of award/agreement obligations on employers, loss of workers' entitlements and such like). All in all, it would be considered a gigantic missed opportunity to objectively consider the real strengths and problems facing the industry.[14]

2.25 The committee majority notes that the substance of the Federal Court's ruling confirms the judicial view that royal commissions have a great deal of procedural latitude to further the political objectives of the government which appointed them. In this respect the CFMEU's grievance is understandable. Some of this grievance is against the bias of the counsel assisting the royal commission. Counsel controlled the flow of evidence and Commissioner Cole could only report on those matters that had been investigated.

> The normal thing in royal commissions is that they operate in a similar way to a court, in that a witness is called and those who have leave to appear as a general rule get an opportunity to cross-examine the witness, particularly if the witness is giving evidence adverse to the interests of the client concerned. It is true that royal commissioners are anxious to control the proceeding so that it does not get out of hand.
>
> Here, of course, that was not the case: you could only cross-examine the witness if your client had submitted a statement, and only in relation to facts, not in relation to the credit of the witness. We had, obviously, expert counsel involved and we did research ourselves. The only example we could find in Australian history—and there have been a lot of royal commissions—was the Lowe royal commission into communism in Victoria in 1949. There seemed to be a similar rule then, according to an article in the *Australian Law Journal* about how that royal commission operated—which of course was at the height of anticommunist hysteria in this country.[15]

Selection of witnesses

2.26 This committee has, in the course of this inquiry, been accused of selecting witnesses on the basis of the evidence the committee majority wanted to hear. This is said regardless of the strenuous attempts the committee has made to ensure balance to the inquiry through direct, if largely unsuccessful, soliciting of those thought likely to support the passage of the legislation. It appears that the royal commission was less

14 Submission No.64, op. cit., p.2

15 Mr Marcus Clayton, *Hansard*, Melbourne 19 May 2004, p.104

than diligent in this respect. It refused the CFMEU general leave to appear, even though it is generally believed that the union's activity was the provocation for the royal commission's appointment, and for the legislation which followed its recommendations.

2.27 As noted previously, the Cole royal commission gave the overwhelming proportion of its hearing time to employers, their representatives and those wishing to attack trade unions. Yet most of these witnesses had to be summonsed to appear. The committee notes with interest the claim made by counsel assisting the commission that the summonses were necessary because of the climate of intimidation in the industry. This committee heard similar views expressed by its members in regard to this inquiry. This committee majority believes that it is impossible to establish any basis of truth in such allegations, whether before the royal commission or this inquiry.

Untested allegations allowed to stand

2.28 The committee majority notes that these allegations of criminal activity which precipitated the inquiry remain to be substantiated. It is concerned that these allegations, and adverse mentions, and even inferences made about individuals, remain posted on the royal commission website. It is over 12 months since they were made. No charges have been brought. From the point of view of civil liberties, this reflects very poorly on the royal commission. The committee put its concerns to the Victorian Council for Civil Liberties. The response was:

> We have a very strong concern about that kind of situation, where a conclusion has been reached by a royal commissioner—who is not a court of criminal law—and in relation to people who did not have the rights before that process, which they would have if charged in a criminal court, to have those allegations made in the first place in language which sounds as if it is conclusive. But secondly, as you point out, to have those allegations remaining unchallenged, unquestioned, untested indefinitely seems to us to be entirely wrong in principle and there should be, one would have thought, a removal from the public record. … we would share your concern that the person in respect of whom such a finding has been made, remains under that cloud with no opportunity to clear his or her name. That seems to be highly undesirable.[16]

2.29 The Victorian Council for Civil Liberties concluded that the Government had 'no idea whatever about basic civil liberties' and that 'it regards questions of civil liberties as entirely dispensable and of no consequence in their own right'. This was regarded as an outrageous position for a government to take. Human rights, according to the council, should be the starting point rather than a proviso.[17] The committee majority deplores the tactic used by the royal commission, on behalf of the

16 Mr Christopher Maxwell, *Hansard*, Melbourne, 21 May 2004, p.18

17 ibid., p.22

Government, to abuse its powers and processes for the purpose of discrediting people against whom no evidence of wrong doing could be proven.

2.30 A particular example of this was the use by the royal commission of a tactic deliberately aimed at reinforcing in the public mind an impression of the CFMEU's involvement with criminal activity. This occurred in relation to the involvement in the building industry of organised crime identity, Mr Tom Domican. A well-known underworld figure, Domican was involved for a time in a conspiracy, together with dissident and corrupt former CFMEU officials, including Mr Craig Bates, to head an employer takeover of the CFMEU. The activities of this group had previously provoked CFMEU NSW state secretary John Sutton to call for a National Crime Authority investigation into criminal activities in the industry.

2.31 It is reported that counsel assisting the royal commission, Mr Nicholas Green, called Bates to verify the statutory declaration he had made to the royal commission detailing illegalities and corruption in the union. Bates was then dismissed from the services of the commission.[18] The revelations were timed to be made available to the evening television news. There was no chance of Bates being recalled by the commission again because his credibility would have been vulnerable under cross-examination by counsel for the CFMEU. Nonetheless, he has served a useful purpose for the royal commission, having left an impression of the CFMEU tainted by Domican's association with some of the union's opponents of Sutton's leadership. It was not to be expected that the union's internal disputes would be know to television viewers, or to be of interest to them.

2.32 The committee has not seen itself as being sufficiently qualified to involve itself in legal arguments as to the obligations on royal commissions to ensure that procedures follow the laws of natural justice or fairness to individuals and organisations. However, the committee considers it an unsatisfactory state of affairs for royal commissions, as instruments of executive power, albeit having special powers and quasi-judicial trappings, not to be bound by some procedures which serve to protect the reputations of innocent individuals caught up in their proceedings.

2.33 The committee majority believes that there is a lesson in this unscrupulous use of royal commission powers for political purposes. A legal practitioner appearing before the committee was asked for his views on whether the Royal Commission Act should be amended to prevent future abuses of power. Mr Marcus Clayton of Slater and Gordon replied:

> Yes, the Royal Commissions Act could be amended to provide that, unless there are exceptional circumstances, cross-examination should be allowed, within limits determined by the royal commissioner, and that procedural fairness should be accorded to those who are the subject of adverse evidence and inferences. You only had to sit through it, to go to the royal

18 Jim Maher, *First the Verdict: the real story of the building industry royal commission*, Pluto Press, Sydney 2003, pp.69-74

> commission hearings, to see that when union witnesses were in the witness box the atmosphere, the approach of counsel assisting and, for that matter, the royal commission, was palpably hostile.[19]

2.34 The committee majority notes that Commissioner Cole was dissatisfied with the limited extent of his powers. His first recommendation to the Government is that they should be considerably increased. Among other things he recommended that measures to enforce the production of information, documents and oral evidence be strengthened, and increased fines and jail terms be available to punish those not answering summonses. Also recommended were prohibitions on witnesses divulging that they had been summoned.[20] Such recommendations are only to be expected in the light of everything that is known about the conduct of the Cole royal commission. The committee believes that royal commissions have sufficient power to fulfil their purposes.

Recommendation 2

The committee majority recommends that the increased powers for royal commissions, recommended in the final report of the Cole royal commission, be resisted in the Senate should amending legislation be introduced.

Royal commission conclusions and recommendations

2.35 Cole reported to the Governor-General on his findings on 23 February 2003. The report comprises 23 volumes, the final volume of which Commissioner Cole recommended be confidential because it included information arising from the inquiry which might be used in the prosecution of people implicated in criminal activities.

2.36 The committee notes that Justice Cole, in opening his summary of findings and recommendations, put them in the context of the value of the industry, its economic significance, and the need to improve its levels of productivity. As a generalisation, this assumption may have some validity, although some of the information on which this premise is based may be questionable. Even more questionable assumptions follow when Commissioner Cole attempted then to make a connection between achievement of higher productivity and the need for structural change. Commissioner Cole claimed that structural change was needed in four areas: prohibition of pattern bargaining; clarity about what constitutes unlawful industrial action and the surety of punitive action against perpetrators of unlawful action; settlement of industrial action as a result of the application of the law rather than industrial might; and, the institution of an independent body to ensure that industry specific laws are enforced.[21]

---

19 Mr Marcus Clayton, *Hansard*, Melbourne, 19 May 2004, p.100

20 *Final Report*, volume 1, pp.23-24

21 *Final Report*, volume 1, p.4

2.37 Structural change and cultural change are interdependent, according to Commissioner Cole, requiring a recognition by all participants in the industry that they need to abide by industrial, civil and criminal laws. Commissioner Cole also believes that cultural change requires a recognition of the principle of freedom of association and the rights of individuals to equal treatment in the industry, and an attitudinal change of participants regarding the management of building projects, in which, according to Commissioner Cole, unions have taken a disproportionately prominent role.[22]

2.38 The royal commission's terms of reference focused on issues of lawlessness and illegal or inappropriate conduct. Commissioner Cole made 25 adverse findings in regard to conduct and practices in the industry ranging from departure from proper standards in occupational health and safety standards, through inappropriate payments and unlawful strikes and stoppages to disregard of WR Act entry provisions and AIRC court orders. Commissioner Cole stated that lawlessness is at the heart of his findings: that state acts are regularly breached with impunity and that unions, particularly the CFMEU, took the view that agreements entered into by them are only binding insofar as they confer a benefit and may be disregarded whenever they impose an obligation.

2.39 In addition, Commissioner Cole listed 88 types of inappropriate conduct which he believes exist throughout the industry. These involve unions in almost every instance, and are variations on a theme of union stoppages and pressures over employment of non-EBA contractors and other instances of alleged intimidation. Commissioner Cole saw this as evidence of an attempt by the CFMEU to exert control over the industry, with builders so concerned with maintaining market share and profitability that they become complicit in the CFMEU strategy. Financiers and clients will not risk construction delays and much prefer to 'buy off' unions in order to ensure industrial peace. The culture of disregard for the law, according to Commissioner Cole, is fostered because of the short term focus on profitability of all those in the industry except the unions.

2.40 Past attempts to change the industry have failed, according to Commissioner Cole, because governments have shown insufficient determination to establish structures to allow the industry to operate within the law. Industry leadership has also been lacking, particularly in its willingness to understand the long term advantage of structural and cultural change. Builders and developers have instead been driven by pragmatism and self interest.[23]

2.41 The committee finds this charge against developers, builders and contractors interesting insofar as it has seen much evidence that Commissioner Cole's assessment is almost certainly correct. The committee, however, takes a much less censorious attitude to this behaviour, believing that pragmatism and self interest are commercially rational considerations for anyone in business. It would be rational even if

22 ibid.

23 ibid., p.13

Commissioner Cole's description of the parlous state of the industry happened to be true. As there appears to be much less substance in the weight of Commissioner Coles evidence than he makes out in his report, the attitude of industry leaders and investors appears all the more rational. The committee majority makes the point that is most frequently made in business circles: that neither pragmatism nor self-interest are necessarily at odds with service to the public interest. The self-interest of trade unions – which concerns the welfare of members – in most cases finds a ready accommodation with the interest of business shareholders. The committee has not been overwhelmed by submissions from developers and builders complaining about the nature or extent of this accommodation.

Allegations of a 'biased' royal commission

2.42 Reference has been made in an earlier section of this chapter to a decision of the Federal Court in relation to allegations of bias by the Cole royal commission. Regardless of the decision, this is a matter which will take a long time to recede in the memories of those caught up in the process. The CFMEU has undertaken an exhaustive analysis of the proceedings of the royal commission. The details of its record present a devastating indictment of the conduct of the royal commission,[24] which will become notorious over time, and not only on account of the CFMEU study.

2.43 On the basis of the account of proceedings in the CFMEU report, the allegations of bias are well founded. It is only necessary to look at one aspect of the proceedings: the treatment of union submissions and evidence. Some of this has been referred to in a previous section. Union submissions were rarely referred to in the report, but there were many adverse findings against unions which were not the subject of submissions at all. In general, the submissions of counsel assisting were crucial to the way evidence was interpreted, and the key elements or general tenor of those submissions have found their way into the final reports. It is stated in the CFMEU report that, in general, counsel assisting set out the version of events given by the employer, or the anti-union witness. Such witnesses were rarely if ever called to be questioned, much less cross-examined. A serious charge in the CFMEU report is that the continued acceptance of the evidence of anti-union witnesses over that provided by union witnesses is hidden in the report. Contrary evidence is confined to a footnote.[25] As the report instanced:

> Another example is in NSW Volume 14 – Labour Hire, where the Report sets out Hill's version of a conference (paragraphs30 to 32) which is contradicted in certain respects by that of Ferguson. While Ferguson's evidence is corroborated by Tobler, their evidence is confined to the footnotes (fn 91-103) while the evidence of Barrios and Parker who were only peripherally involved in the conference and have no real recollection,

24 Tom Roberts, *An Analysis of the Cole Royal Commission into the Building and Construction Industry*, CFMEU, Sydney 2003. This is Annexure 12 to Submission No.37, CFMEU.

25 Tom Roberts, ibid., p.23

> is actually mentioned in the Report (paragraphs 33 and 34). There is no justification for mentioning their evidence in the Report and not that of Ferguson and Tobler. In any event, it is impossible for the reader to discern what the contrary evidence was from either the report or the footnotes.[26]

2.44 The committee regards the record of distortion, suppression and manipulation of evidence recorded here and in other sections of the Roberts-CFMEU report as seriously as it does the unsubstantiated allegations against a number of people who remain stigmatised by the unprovable charges. At all levels the Cole royal commission conducted its affairs badly.

2.45 Another, quite different aspect of bias is evident in the account of allegations against union officials caught up in a case of gross mismanagement of a construction project; the case having to do with occupational health and safety. Once more the unions could do no right.

2.46 In chapter 5 of this report, which deals with occupational health and safety, extended reference has been made to the construction of the City Link motorway project in Melbourne. The issue was the unsatisfactory management of the project which resulted in serious breaches of occupational health and safety regulations. What was described was the dilemma faced by unions in fulfilling their obligations to their members, on the one hand, and on the other, the requirement that they comply with the law: a point given scarce recognition by the royal commission.

2.47 This issue was investigated by the royal commission. Many statements were made critical of lead contractor Transfield's handling of the OH&S and industrial relations problems. Commissioner Cole nonetheless accused CEPU shop stewards of taking matters into their own hands and ordering work to stop. Commissioner Cole also accused the CEPU of rarely adhering to the dispute resolution procedures under the relevant EBAs and for OH&S under the Act. Yet, according to the evidence of the ABB Project Manager, 99 per cent of the OH&S issues identified by the CEPU/ETU OH&S representative were genuine, particularly those made in relation to the temporary electrical supply boards which did not comply with the Code of Practice.[27]

2.48 While Commissioner Cole, after considering the City Link project evidence, conceded that occupational health and safety is frequently given 'insufficient attention by employers and employees', it also exemplified misuse of the issue for industrial purposes. No specific detail of this misuse by employees was given. Neither was the employer specifically cited for a failure of care. The CEPU submission continued:

> In all the detailing of "Unjustifiable OH&S issues" there is no evidence of employees giving OH&S insufficient attention. Indeed the evidence with respect to the CEPU/ETU OH&S representative is quite the opposite. At times he is said to have been over zealous in his attention to the OH&S site

---

26 ibid.

27 Submission No.119, CEPU Electrical Division Victoria, paras..24-27

> issues. To accuse employees in this manner without supporting facts, smacks of the same bias Cole has exhibited towards unions and their members throughout the Commission proceedings. However, time and time again there is evidence of Transfield's failure to attend to legitimate and serious OH&S problems but the same cannot be said for employees. Further, there is no evidence of even infrequent misuse of OH&S for industrial purposes by employees on this Project. There was "conduct by an OH&S representative which was an abuse of his position." However, no specific instances of this abuse is detailed.[28]

2.49 Instances like this cause the committee majority to reflect on the extent to which Commissioner Cole considered both sides of the argument. It would be expected that Commissioner Cole would uphold the vital importance of occupational health and safety, and his upholding of the principles of mutual obligation would be those of any member of the judiciary. What appears from the judgements and commentary is an impression of someone who knows what side he is on, and who is personally predisposed to give more credence to some witnesses than to others. Taking the point further, it is difficult to disregard the impression that there is an element of class consciousness in the report. It is as though Commissioner Cole and his counsel assisting, perhaps unconsciously, view large elements of the building industry workforce as 'riff raff'. In cases where unions allege rough treatment from cost-cutting lead contractors, their credibility is regarded as suspect from the start.

2.50 It is well documented that a number of trade unionists have declared the royal commission report to be biased. The committee majority is uncomfortable with the possibility that the peculiar attitudes of Commissioner Cole and counsel assisting may arise from political bias, or from usually well-concealed feelings of disdain for a class of employee and a working culture which is represented by their unions. Nonetheless, if what the committee majority sees is an emerging new version of 'class warfare' then this possibility should be recognised.

2.51 The bias shown by the royal commission has been shown in several ways, as outlined in this chapter. The rules governing the conduct of royal commissions appear to give a royal commissioner wider powers than those of a judge. The committee, while understanding the logic of allowing such rules to stand in normal circumstances, sees dangers in their application to what are essentially political trials. The reputations of people named in proceedings of royal commissions need protection in an age when internet access to royal commission records are so readily accessible.

Recommendation 3

The committee majority recommends, in view of its concerns regarding natural justice, that the Senate refer to its Legal and Constitutional Affairs Committee the question of whether amendments should be made to the *Royal Commissions Act 1902*, to ensure that procedures of royal commissions accord with principles

28 ibid.

of natural justice and give due protection of the reputations of people whose prosecution is recommended but against whom no charges are laid.

Conclusion

2.52 The committee majority regards the Cole royal commission as being the second step (following the Employment Advocate's report to Minister Abbott) in the political strategy aimed at specific regulation of the building and construction industry, weaken unions representing employees in the industry. For this reason neither its procedures nor its conclusions and recommendations should have come as any surprise.

2.53 The Government's strategy can be seen in the terms of reference given to the royal commission, which focused on matters of unlawful practice and conduct, fraud, corruption and anti-competitive conduct, and called for recommended measures to deal with these matters. It was necessary only for the royal commission to unearth allegations: in a sense to 'start the hares running'. The committee notes that the confidential material in volume 23 of the report, intended to be used as the basis for prosecutions against unions and individuals, has been of little practical use. So far only one prosecution has been successful out of the 92 that have been recommended. It may not have mattered to the royal commission that the evidentiary standards required by courts is much higher than that required by a royal commission. Securing successful prosecutions arising from its investigations was probably far less important to the royal commission than setting up a suitable pretext for legislative action by the Government. Thus, it could be argued that this political exercise has seen the very unusual use of a royal commission to corrupt the public mind.

2.54 Fixated by this policy strategy, the Government appears not to realise that this exercise has been an expensive waste of time. In the committee's view, the narrowness of the strategy has been self-defeating and has ensured that no public benefit can be salvaged from the exercise. A number of submissions have pointed to the misdirected priorities of the Government in its so-called 'reform' agenda. The Government does not agree because it sees other problem issues as being the responsibility of state governments or Commonwealth agencies already sufficiently empowered. The evidence before the committee does not support the Government's contention. In relation to this issue, and to the findings of the royal commission, the committee majority takes the view expressed in the Taylor and Scott submission, which states:

> Suffice to say, it is suggested that the Committee can have no confidence that the “findings” of the Cole Royal Commission are necessarily fair or accurate, or were based on the evidence adduced or which could have been adduced by the Commission and counsel assisting.[29]

It is on such shaky foundations that the Government intends to erect the equally shaky edifice of its 'reform' legislation.

---

29 Submission No.64, op. cit, p.2