# Chapter 4

## Lawlessness

> At the moment, despite the propaganda, our industry is actually free from major disruption. Of course we have day-to-day disputes around the place at the site level about conditions and about employers honouring their agreements in relation to safety and so on. They are all dealt with at the site level. They are dealt with by shop stewards, employers, union officials, company senior representatives, dispute boards, arbitration commissions and through consultative procedures. Plenty of devices are available to be used and they are used on a regular basis.[1]

4.1 Allegations of endemic lawlessness in the building and construction industry are at the bottom of the Government's determination to 'reform' the industry. Lawlessness, it is claimed, is the root cause of low productivity and of the poor performance of the industry, by international standards. Wild claims have been made in the Cole royal commission report which is replete with detail of alleged lawlessness in all its industry manifestations. In addition to what is in this report is information, though much less detailed, in the Building Industry Taskforce report *Upholding the Law - One Year On.*

4.2 This chapter commences with some general comments on the industry which are not emphasised in the royal commission reports, followed by the findings and recommendations of the Cole royal commission in regard to lawlessness, particularly allegations against unions and their officials; and, evidence of disregard of statutory obligations by employers. These matters put this issue of lawlessness in context and separate the perception from the reality.

### Relevant characteristics of the industry

4.3 The Government argues that the unique characteristics of the building and construction industry, including its culture of lawlessness, require it to have a separate industrial relations regime, centrally administered, under its proposed agency of regulation, the Australian Building and Construction Commission. The committee majority rejects this narrow 'policeman's vision' partly for the reason that it is inequitable to place employees in a particular industry in a position where they have fewer rights than are enjoyed by other workers. More broadly, it opposes the scheme because it will inevitably cause a great deal of industrial strife.

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1 Mr Martin Kingham, *Hansard*, 20 May 2004, p.24

4.4 But the committee agrees that there are some distinctive characteristics of construction work that are important to recognise, and which have a bearing on this inquiry. Allegations of lawlessness by workers, mostly through industrial action or the threat of industrial action, should be viewed in the light of these factors. So should the documented accounts of illegal behaviour and negligence on the part of employers. The construction industry, in most essential details, is similar the world over. The characteristics which bear on the theme of this chapter are as follows:

- construction is cost-driven and employers are usually under pressure to reduce cost, with frequent recourse to measures which deny employees their full entitlements;
- employees and unions know that if they do not pursue entitlements either before the project starts, or while it is still going, they will not be recovered;
- construction work is dangerous in all places, the level of danger depending on the competence of management and the quality of occupational health and safety regulations and the thoroughness of compliance with them;
- it is served overwhelmingly by a male workforce and the work culture is often characterised by the use of coarse language and rough behaviour; and
- trade union membership is higher, and 'militancy' is more evident than in other industries, for reasons which arise from most of the above.[2]

> Recognition of these characteristics is important in so far as they have been largely overlooked by the Government. The industry is organised like no other. The nature of employment in the construction industry is based on the project rather than the enterprise. The work is therefore short-term, with employees moving from one project on one site, to another, within the space of months, depending on the size of the project. There they will encounter different conditions of work and different management arrangements and style on different worksites. Projects draw together a range of workers at certain points in the process, with specialist tradesmen and women moving in and out of the site at intervals.[3]

4.5 The financial pressures are evident in the descending spiral of contractual arrangements that apply to each project. Evidence in other chapters explains how the cost squeeze bears on cost cutting; the casualties being the employees working in unsafe conditions, being paid less than their full entitlements, with their workers compensation and superannuation entitlements not being paid, or underpaid. The Australian Taxation Office is frequently omitted from the list of an employer's creditors, on a 'long-term temporary' basis. In these circumstances there is often considerable animosity generated between employers and employees. The unions are appealed to, and the result is often industrial strife, mainly through the imposition of bans. In these circumstances, employers may often complain to their representative

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2 Submission No.17, ACTU, p.40

3 Submission No.26, Australian States and Territories, p.16

organisation, the Master Builders Association or ACCI, who, regardless of the facts of the matter, and even in the course of giving sound advice, may gain an impression that union action is causing hardship to one of their members. The charge of lawlessness by an employer may indicate a reluctance to acknowledge a management failure.

4.6 The committee has received a great deal of evidence of the failure of employers to ensure the proper maintenance of occupational health and safety standards. Occupational health and safety issues are the most common cause of industrial disputes in the construction industry, which is not surprising in a relatively dangerous industry.

4.7 It is reasonable to be shocked by the thought of violent action and intimidation, for which there can be no excuse, but in the context of underpayments, dangerous working conditions and given the way labour is deployed in the industry, it is to be expected that the temper of employees on some occasions runs several degrees hotter than for those in more sedentary and less dangerous occupations. The relatively high rate of industrial disputes in the industry may be attributed to these factors. The operation of the workplace and the effects that an occupational culture may have on workers needs to be accepted even if it cannot be understood by those outside the industry.

## The nature of lawlessness in the industry

4.8 The use of terms such as lawlessness are intended to make a political point that there is a continuing culture of violence in the industry. The committee notes that the term lawlessness appears to recur more frequently in Government statements than in statements coming from industry, perhaps for the reason that participants and stakeholders are closer to operational realities than are the Minister and his personal and departmental advisors. Witnesses appearing before the committee have stated firmly that they have no knowledge or evidence of such violence or intimidation as it would be understood in criminal law, in the industry and in the general community.

4.9 The committee noted that there was a range of evidence presented on the nature of lawlessness, how it may be defined, and what forms of lawlessness were to be regarded most seriously. In the previous section the committee looked at lawlessness in relative terms, and suggested that there were underlying causes linked to the way the industry operated. The royal commission saw lawlessness as disregard for the rules set down in statutes or the decisions of courts and regulatory agencies. This is lawlessness defined by 'black letter' law. The committee believes it is likely that a body such as the AIRC is less interested in 'black letter' law than in the resolution of disputes, an attitude which Commissioner Cole and successive workplace relations ministers are known to be critical of.

4.10 The Master Builders Association quotes Singleton from the Cato Institute to support the view that law has the function of preventing disputes between individuals,

businesses and investors and to minimise risk and costs for investment.[4] For groups such as the MBA and the Ai Group as employer representatives, lawlessness is any activity which risks investment in the industry, and the main purpose of maintaining a 'stable' industrial relations climate is to encourage investment.[5] Therefore, for an organisation like the MBA the most readily identifiable problem for the industry is criminal and unlawful behaviour that undermines the 'moral fibre' of the industry and, at a practical level, is behaviour which will act against investment and productivity.[6]

4.11 The committee majority would not entirely reject this view because it recognises that without investment there would be no economic activity. Nonetheless, it is a wholly unbalanced view, rather as if the committee was to attempt to argue that the product of labour is immaterial, and that the purpose, and priority, of industry should be maintaining full employment. What the committee does argue is that the law exists to protect individuals from exploitation by those in power. The committee majority would argue that behaviour which might affect investment is not criminal activity, and has not been recognised as such under either national or international law. The withholding of labour is intended to bring economic pressure to bear on employers in the expectation that a bargain can be reached at some point. That such bargaining is now carried out through means which often involves confrontation is a direct result of the industrial relations framework that this Government has established. As a representative of the International Council for Trade Union Rights (ICTUR) pointed out to the committee:

> Economic coercion—again, that is a term that has its own colour—economic pressure is part and parcel of collective bargaining; that is the nature of collective bargaining. We used to have a system of conciliation and arbitration where, instead of the application of economic pressure, there was an independent arbitrator who determined a balanced result. Given that we have moved to a collective bargaining system, economic pressure is part and parcel of the fabric of that system. So it is wrong, in my view, to take economic pressure and wrongly characterise it in the language of the criminal law. There is no doubt that it is economic pressure, but it is a legitimate part of the system.[7]

4.12 The committee believes that what the Government takes to be lawlessness relates to the process of negotiation between employee and employer representatives: that the real issue is not criminality as it would relate to civil law such as trespass or violence against individuals, but the process of negotiation, review and compliance with enterprise agreements:

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4 Submission No.12, MBA, p.4, para.3.2

5 Submission No.12, MBA, page 4, para.3.4; Submission 1, Attachment A, Australian Industry Group, p.3; Submission 90, MBAQ, p.2, para.7

6 Submission No.12, MBA, p.5, para.4.2

7 Mr Mordy Bromberg, *Hansard*, Melbourne, 19 May 2004, p.59

> 'Illegal' tends to be reserved by lawyers for conduct which impugns the criminal law. It is a narrower concept, as normally understood, than the word 'unlawful', which can involve interference with contractual relations or tort matters. There is a debate among lawyers as to whether breach of contract can also constitute unlawful conduct—in other words, civil matters.[8]

4.13 The committee believes that the totally opposite philosophical positions held by the Government and the trade unions on what may be defined as lawlessness is reflected in the use of their language and the meaning given to words. The Government tends to apply such terms as 'criminality' and coercion in regard to any activity in pursuit of collective bargaining. The implication is that such activity is improper. The ILO would not accept as reasonable the Government's use of such terminology in this context. As the national secretary of the CFMEU responded to a Government party senator when questioned on this matter:

> Under your government there is some attempt to add the taint of criminality to simple bargaining. If you were referring me to the use of violence, threats of violence or some kind of genuine criminal matter then we might share common purpose but, based on what you have said to me, I think what is in your hand are industrial matters.[9]

4.14 Such activities have resulted in the working conditions that all Australian workers enjoy today.[10]

**Use of commercial and criminal law**

4.15 Some industry representatives are arguing for this bill in the mistaken belief that when the industrial relations system doesn't work in their favour, they are able to move such matters into commercial and criminal law to try and redefine the power relationships in their favour. They are encouraged in that line of thinking by the Government favouring a similar approach, at least in principle.

4.16 The committee is concerned that the use of commercial concepts such as 'trespass' and 'coercion' are based on the notion that labour is a 'commodity' with commercial value and whose regulation and use can be addressed through civil courts in a similar way to other property rights. This issue was addressed by ICTUR:

> One of the things that bedevils this debate is that terms in common usage in criminal law now frequently appear in arguments over industrial matters. For example, 'right of entry' is characterised as 'trespass', and 'bargaining' can be characterised as 'intimidation' or in some circumstances as 'extortion'. These words, which are dramatic language in popular currency, are used in industrial relations. It seems to me that there is a blurring of

8 Mr Lachlan Riches, *Hansard*, Sydney, 3 February 2004, p.71

9 Mr John Sutton, *Hansard,* Sydney, 2 February 2004, p.71

10 ibid., p.72

> what are appropriate terms for the criminal jurisdiction, appropriate terms for the civil jurisdiction and appropriate terms for the industrial relations system. .... it is inappropriate. It really is a reversion to the culture that permeated through the common law a hundred years ago. One would hope that we have moved well beyond that, but it seems that we have reverted to it to some degree.[11]

4.17 In establishing such legislation, the government has used commercial concepts for the regulation of industrial relations that will create ambiguity and uncertainty in the regulation of relations between employers and employees in the industry.[12] Such legislation will wind back conventions and precedents that have been established over a century of industrial law practice which has evolved to balance the rights of both employers and employees.[13] The committee is concerned that by taking this legislative approach, Australia is ultimately flouting international law and laying the basis for lawlessness not only in this industry, but for industrial relations across all industries.[14] The ACTU told the committee that recourse to a regime of pains and penalties exacerbates industrial conflict:

> … and it is why during the major part of our federal history we have successfully had an emphasis, as a community I think, on processes of conciliation and arbitration and dealing with industrial relations issues within that context. You cannot apply commercial law and concepts of criminal law to what are fundamentally basic rights for people to associate and to collectively bargain to improve their living standards and protect their occupational health and safety. If you attempt to proscribe those basic rights and apply very severe penalties for breaches, it is a recipe for industrial chaos—that is all that it can be described as. A fundamental breach of basic rights is proposed in this bill for workers in this industry, and it cannot, in any sense, lead to greater efficiency, productivity or cost outcomes. It will be a destructive thing if this bill passes in this form.[15]

4.18 As evidence noted in the previous chapter indicates, conciliation and arbitration has many champions in the industry and is likely to gain many more should the industry experience what the proposed legislation promises.

## The findings of the Cole royal commission

4.19 Chapter 2 deals with the Cole royal commission, in particular with its role in promoting the Government's industrial relations policy, and in the procedures it adopted for this purpose. The pretext for appointing the royal commission was lawlessness in the industry reported to the Minister in a paper by the Employment

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11 Mr Mordy Bromberg, *Hansard*, Melbourne, 19 May 2004, p.59

12 Professor John Buchanan, *Hansard*, Sydney, 2 February 2004, pp.47-50

13 Mr John Sutton, *Hansard*, Sydney, 2 February 2004, pp.72-73

14 Mr Mordy Bromberg, op .cit., pp.43-45

15 Mr Greg Combat, *Hansard*, Canberra, 11 December 2003, p.97

Advocate in which he describes the hostile response to the building site visits conducted by his officers. They were there for the purpose of promoting AWAs, so the response may have been anticipated. Visits to workplaces by officials carrying out policies intended to undermine the role of unions and to weaken their bargaining power might be expected to arouse animosity and even lead to what is loosely termed 'unacceptable behaviour'.

**The CFMEU conspiracy**

4.20 The conclusions of Commissioner Cole as to the causes of unlawfulness are provocative. He notes that:

> There is a clash between the short term project profitability of the providers of capital, clients, head contractors and subcontractors on the one hand, and the long term aspirations of the union movement, especially the CFMEU, to dominate, control and regulate the industry for its benefit, and to what it perceives to be the benefit of its members, on the other hand.[16]

4.21 Commissioner Cole's argument is that short sighted employers, eager for short term benefits, have agreed up to now to pay off unions through giving way to their demands. Yet while employers are merely complicit, trade unions are the real criminals. This is so, it is argued, because the unions have more bargaining power than the employer groups. This is evidenced by their ability to organise and engage in industrial disputes, whereas, presumably, the employers for whom solidarity is an alien concept (and illegal in many operational circumstances) are left vulnerable. The royal commission report points out that this state of affairs will continue, unless broken by the action it recommends, because aspiring lead contractors who are tomorrow's industry leaders are learning bad habits. The report makes the point that:

> The prospect of industrial disruption is a disqualifying feature for the obtaining of future work, and thus being a long time participant in the industry. This is well understood by the contractors, and by the unions. It places enormous power in the hands of unions. It encourages unions to use that power to obtain otherwise unattainable outcomes. The threat of the use of power is as effective as its exercise. Each of the unions and the contractors know this and factors this circumstance into their relationships.[17]

4.22 The committee majority finds this observation remarkable, but notes that it comes from one whose experience in industrial law is in representing building firms in their tussles with trade unions. That does not necessarily carry with it a close knowledge of unions. It is alleged that the CFMEU is engaged in a national conspiracy to control the construction industry. It must be presumed to be 'national', even though it is widely known that there are differences in the attitudes and opinions

16 *Final Report of the Royal Commission into the Building and Construction Industry*, Volume 1, p.11

17 ibid.

of the CFMEU branches across states. There are historical reasons for this. It may even be observed by the authors of this majority report, all former trade union officials, that Commissioner Cole's assertion is far too flattering in its attribution of such an ambition to the CFMEU, or to any union. Union officials are often bemused by assumption that they are in possession of vast reserves of power which they can unleash at a strategic moment. In truth, unions operate in a chaotic world along with everyone else and meet the circumstances which arise as best they can, with the material interests of their members as their first consideration.

4.23 It has to be conceded that the CFMEU has ambitions to increase its membership to the extent that it can, and works assiduously to achieve this, as all trade unions do. But there is not a piece of credible evidence to suggest that the CFMEU has even the remotest ambition to dominate, regulate and control the industry. The committee does not believe that investors and leading construction firms have this ambition either, although as holders of capital and management expertise they would be in a better position to do so than the CFMEU, which is only one of several unions involved in the construction industry.

4.24 The committee concludes that it is beyond the bounds of possibility for the CFMEU to run a conspiracy along the lines suggested in the royal commission report. The nature of the union's activity, and the large number of organisers involved at hundreds of project sites across the country means that a great deal of local activity, even industrial action, may be unknown to national and state officials. The CFMEU is cast as the bogy man in this drama, as its treatment at the hands of the royal commission shows. Leaving aside the fears of the CFMEU, it is unlikely that industry players have been deceived by this malign campaign.

**The evidence to the royal commission**

4.25 In addressing the issue of lawlessness, the submission from DEWR states that the royal commission found an entrenched culture of lawlessness in the industry, coupled with widespread inappropriate practices that act against choice, productivity and safety. The submission also said that the royal commission found that the industry was found to have a deep-seated culture of disregard for the law and clear patterns of unlawful conduct.[18]

4.26 Commissioner Cole found lawlessness and inappropriate conduct exhibited in many ways, including breaches of the criminal law, breaches of the Workplace Relations Act, breaches of various state acts in regard to occupational health and safety, and disregard of revenue statutes of the Commonwealth and the states. Commissioner Cole specifically found that the CFMEU regarded such orders as were issued by courts and tribunals as not applying to it; and the underlying assumption was that no one would be held accountable for the considerable array of offences that

18 Submission No.21, Australian Government Agencies, p.57

had been committed.[19] The committee majority notes with interest that the CFMEU has, in fact, been charged with very few breaches of WR Act section 127 orders. According to figures provided by the Australian Industrial Registrar, only 15 section 127 orders under the WR Act were issued against the CFMEU for activities in the building and construction industry in the last five years.[20]

4.27 Over a five year period, the committee notes that the number of orders that have been issued over the period is extremely low, indicating that employers have not made use of existing legislation, even when it can be accessed within 24 hours.

4.28 Over 100 types of unlawful and inappropriate practices in the industry were listed in the summary report, and Commissioner Cole made findings about 392 separate instances of unlawful conduct by individuals, trade unions and employees.

4.29 Under his terms of reference, Commissioner Cole was obliged to investigate and report not only on illegal, but 'inappropriate 'conduct. Consideration of the latter required a more subjective assessment, hinging on whether such conduct could be considered 'undesirable' or otherwise rather than strictly lawful or unlawful. The difficulty facing the commission was pointed out by a CFMEU legal official who noted that 'on any view, a non-judicial body, proceeding without the rules of evidence and making determinations about "inappropriateness", would involve an inordinate amount of subjectivity and value judgement'.[21] These difficulties were overcome. The royal commission lists 88 instances of inappropriate conduct in its summary of findings.[22] All but three of these were engaged in by a trade union or a union official.

4.30 It is unnecessary for all the alleged offences to be listed in this report. As will be noted later in more detail, few of the 392 cases of alleged illegalities have been prosecuted, for the reason that there was insufficient evidence to proceed. The royal commission is not a court and has lower evidentiary standards than does a court. But as has been calculated by the CEPU, based on ATO and royal commission figures, the workforce in the industry is remarkably law abiding. About 99.94 per cent of those employed in the industry are law-abiding, with the royal commission accusing only 31 people out of more than 700,000 employees in the industry. The committee expects that such figures represent far less incidence of crime than would be represented in the community overall, and would compare more than favourably with the Victoria Police.[23]

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19 *Final Report*, Volume 1, p.6

20 Answers to Questions on Notice No. 1822, House of Representatives, *House Hansard*, 11 August 2003, p.18098

21 Tom Roberts, *An Analysis of the Cole Royal Commission into the Building and Construction Industry*, CFMEU, 2003, p.7

22 *Final Report*, Volume. 1, p.6

23 Submission No 36, CEPU Plumbers Division, p.6

4.31 In reality, the royal commission provided no evidence of significant criminality in the industry. As the ACTU observed, the alleged culture of industrial lawlessness, when examined closely, amounts to not much more than the exercise of right of entry or the taking of industrial action outside the restrictive framework of current legislation. In 20 per cent of cases cited in the report, the laws that are breached are the common law torts of interference with contractual relations or trespass, rather than any statutory prohibition. [24]

## Cole allegations: the prosecution record

4.32 In his confidential volume of the royal commission report, Commissioner Cole cited 92 incidents of unlawful conduct in which 98 people were involved. The Attorney General referred 31 of these incidents to states and territories for prosecution. Nine of these referrals are still under investigation, and no action will be take in regard to the others, as of 25 March 2004. One referral was finalised by Queensland on the basis that the action could not be undertaken, but it had been referred to the ACCC for possible breaches of the Trade Practices Act.

4.33 Seven incidents were referred to the Minister for Justice and Customs. One incident was finalised by the Australian Federal Police involving a person convicted for offences under the Royal Commissions Act, another three incidents are unlikely to be successfully prosecuted. Another three incidents are still under active investigation by the AFP.

4.34 Five incidents were referred to the ACCC, three of them now discontinued, and the other two incidents are still under active investigation by the ACCC. In regard to other agencies, two incidents are still with ASIC and one incident is with the federal registrar who is considering what action to take.

4.35 The first report of the Cole royal commission recommended the establishment of an interim body to monitor conduct in the construction industry, to investigate cases and to proceed with prosecutions to ensure that current laws were being upheld. As a consequence, the Interim Building Industry Taskforce was established, commencing operations on 1 October 2002.

4.36 The Attorney General referred 52 incidents to the Building Industry Taskforce, which has discontinued action in regard to 47 incidents. One incident was finalised in the Federal Court, which found that Baulderstone Hornibrook had contravened the Workplace Relations Act by knowingly paying strike pay. Four incidents are still under active investigation. The Taskforce has a continuing role in the handing of complaints and, in addition to the referrals from the royal commission it has received 1,673 calls since it was established. The committee was given the breakdown of these figures as follows:

- 1,446 at the outside were reports or complaints;

24 Submission No.17, ACTU, pp.55-56; Submission No.36, p.6

- 293 investigations were under way;
- 10 matters were before the court that are yet to be dealt with;
- 59 were active investigations;
- 184 investigations were on hold or with a watching brief;
- 21 briefs of evidence were referred to state police and other external agencies;
- 5 briefs of evidence were with the internal legal section;
- 4 briefs of evidence were with external lawyers to adjudicate whether action is warranted or whether it is in the public interest to take action; and
- 6 have already been dealt with, details of which appear in *Upholding the Law—One Year On: Findings of the Interim Building Industry Taskforce* which was tabled by the Minister on 25 March 2004.[25]

4.37 The committee observes that this is a very low prosecution rate. It indicates that the Taskforce had a problem in identifying cases that could be successfully prosecuted. The Taskforce has reported that the interim nature of the Taskforce has constrained the development of relationships with outside agencies, and to date, there has been a general reluctance by these bodies to follow-up on the matters referred to them by the Taskforce.'[26]

4.38 The committee has noted in chapter 2, dealing with the proceedings of the royal commission, that allegations of wrongdoing, arising out of the royal commission and referred on to law enforcement bodies, continue to remain on the record without any advice given to people named by Commissioner Cole as to the progress of investigations. In some cases it is obvious that the purpose was simply to put individuals on notice of investigation, an intimidatory tactic common to totalitarian regimes but ludicrously out of place in Australia. One person so named was asked about this at the committee's Melbourne hearings:

> Senator COOK—...Have you had adverse findings made against you?
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> Mr Kingham—Yes.
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> Senator COOK—Have any of them been brought to fruition?
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> Mr Kingham—Not one. I have been interviewed by no-one in relation to them—a task force investigator, a royal commission investigator, or a federal or state police officer. I have been investigated by no-one. I have no knowledge about what is going on in relation to them... As I said earlier, there has been a great disservice and great disrespect not just to the two blokes that you see sitting here; but to our entire industry. It does not include just us. Rank and file members, shop stewards, union workers and,

25 Ms Barbara Bennett, *Hansard*, Canberra, 25 May 2004, pp.41, 43-44; and Mr Nigel Hadgkiss, op. cit. pp. 47, 51, 78-79

26 Hadgkiss, H., *Upholding the Law: One Year On*, Interim Building Industry Taskforce, 25 March 2004, p.15

> in some cases, employer representatives have also been smeared without any right to defend themselves. We were denied the right to cross-examine witnesses who provided information to the royal commission that led it to making its interim findings against us and against other officials and rank and file members of the union, which is an absolute travesty of justice. As Tommy {another witness at the table}pointed out, in this electronic age all of that is on the Internet. All of that is open to anyone in any country. We have no recourse. We cannot protest. There is nothing we can do about it to change it. We cannot even go anywhere to get an indication of whether or not an investigation is happening. It is clouded in secrecy, and for no good reason.[27]

4.39 The committee is surprised that those responsible for processing investigations against named individuals would allow these matters to remain in a state of limbo. It does not reflect well on the integrity of law enforcement institutions.

4.40 The committee majority notes in conclusion that the royal commission has put in considerable labour, and a corresponding degree of publicity, to bring forth a result which will be criticised in time for its absence of any sense of proportion. That it will secure only a handful of convictions is not a serious criticism. The criticism has always been that the royal commission has been a frolic though the peripheries of the industry's problems.

**The Building Industry Taskforce**

4.41 The Building Industry Taskforce has now been left to pick up the pieces after the royal commission reports and to act as the repository for all allegations that will be made in future about the industry. In the executive summary of its 24 March 2004 report to the Minister, the Taskforce described the extent of the task before it in view of the prevalence of lawlessness. It states:

> Such an overwhelming indictment of the industry's behaviour means the challenge before the Taskforce is not to simply restore the rule of law to the industry, it is to introduce the rule of law for the first time. Approaches for reform which may be appropriate for other industries would simply fail in the building and construction industry because of the poor state of workplace relations and the pervading culture of lawlessness.[28]

4.42 This is written very much in the spirit of 'fighting the good fight'. It maintains the assumption that the construction industry is a special case, which it is, but not simply because of allegations of lawlessness. It fails to acknowledge that what is termed lawlessness is a response to the inadequacies of the Workplace Relations Act. The Taskforce believes that if it is equipped with additional powers, it hopes to fulfil its Charter. The committee believes this to be an unrealistic expectation.

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27 Senator Peter Cook and Mr Martin Kingham, *Hansard*, Melbourne 20 May 2004, p.39

28 Nigel Hadgkiss, *Taskforce Report*, op. cit., p.v

4.43 The Building Taskforce has complained about the lack of informative response from agencies about the outcome of investigations. The Australian Taxation Office provided evidence to the committee that, while they are not able to provide details of the actions they have referred to the Taskforce, they continue to provide advice on the strategies that the ATO is undertaking to address tax evasion and the use of phoenix companies in the industry.[29] As the ATO told the committee:

> overall we have actioned 85 per cent of the evidence provided to the royal commission and we are continuing to risk assess those that are outstanding...It is important to say that evidence to the royal commission in our hands are allegations which must be tested to see whether they can be backed up and used to found an assessment. We go through what we call risk assessment. A lot of effort goes into risk assessment because we have to make sure that when we commence an investigation there is a reasonable prospect that it will amount to something.[30]

4.44 It is clear to the committee that the Taskforce has interpreted the reluctance of law enforcement agencies to prosecute as an indicator that they have different priorities, and that this will impede the operations of the Taskforce.[31] The Taskforce's solution to this problem is to seek increased powers so as to undertake prosecutions in its own right. The Taskforce director told the committee he had in mind 'coercive powers' akin to those possessed by other Commonwealth bodies: the Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investment Commission (ASIC) and the Australian Taxation Office (ATO).[32]

4.45 The committee majority opposes the continued operation of the Building Industry Taskforce. There can be no real comparison between the investigative and prosecution roles of such agencies as the ATO, the ACCC and ASIC on the one hand, and the Building Industry Taskforce on the other. The essential difference is than in the case of the three aforementioned agencies, their functions are essential to the efficient operations of important national financial institutions. As such they have the authority to set their own enforcement priorities. These agencies are established under statutes which assure their independence, which they exercise. In all respects they are accountable public institutions and report to Parliament.

4.46 The Building Industry Taskforce, on the other hand, is not a statutory body, but is an entity within a government department. Even under the proposed legislation, in which the Taskforce would presumably come within the Australian Building and Construction Commission (ABCC), its operations could be subject to direct ministerial control. There would be no question of a Taskforce acting independently of a minister. In some circumstances there would be every prospect of a Taskforce

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29 Mr Ian Read, *Hansard,* Melbourne, 19 May 2004, p.62

30 Mr Ian Read & Mr Mark Konza*, Hansard*, Melbourne, 19 May 2004, p.68

31 Hadgkiss, N. op. cit. pp.15-16

32 Mr Nigel Hadgkiss, *Hansard*, Canberra, 25 May 2004, p.48

armed with 'coercive' powers using them for political purposes. It would have been naïve of departmental officials to have disregarded the likelihood of such concerns being raised in the senate when advising the Minister about this part of the bill.

## The evidence to the committee

4.47 The committee has questioned a high proportion of witnesses about their personal knowledge of criminal activity in the industry. Perhaps not surprisingly, none have admitted any knowledge. These included many employer association leaders and heads of large contracting firms. None of the submissions to the committee provided any evidence in relation to criminal activity in the industry, although those from ACCI, the MBA and Ai Group, among others, did so in a general way.

4.48 As to allegations that employers were intimidated into buying industrial peace, there is no evidence in any of the investigations that the ATO has undertaken. What is clear to the committee majority is that there is no evidence provided of systemic criminal activity in the industry. The Taskforce report raises the possibility of organised crime infiltrating the industry, but this development arises from a comment from the national secretary of the CFMEU.[33] Even on that authority, the Taskforce has not seen fit to make investigations.

4.49 What the committee majority has found most revealing about the evidence it has received is the way it contrasts with the picture of corruption, bitterness and intimidation which is presented in the reports of the royal commission. A perusal through several volumes of the commission's final report would almost lead one to wonder how the industry was still able to function. Witnesses who appeared before the committee were free with their comments on systemic weaknesses in regard to industry costs, various inflexible arrangements, cumbersome legal and administrative processes and the lack of effective regulations and enforcement of them. There was much criticism with the difficulty of complying with current laws, including the Workplace Relations Act, which puts industry participants and the AIRC into legal straightjackets. Many of the problems complained about related to the slow response or indifference to matters shown by state governments and their agencies.

4.50 Yet despite all this, there was a general mood of optimism. There was evident goodwill shown between trade union and industry association leaders at several hearings. The committee does not believe that this was contrived for the committee's benefit. It should be admitted that such cordiality was less evident in Western Australia and Victoria. Witnesses from other states were aware of tensions in the aforementioned states and it was implicit in the evidence given by the CFMEU, and other unions, that national policy should not be determined on the basis of what was happening in those two states. The committee restates its view, made clear in the previous chapter, that there is a much stronger likelihood of success in pursuing 'culture change', and genuine reform at state level rather than attempting something

33 Hadgkiss, N., op. cit., p.8

similar at the Commonwealth level. There, the real problems of the industry become remote from the workplace, take no account of local or state modes of operation, and are constitutionally impeded.

## Lawless employers

4.51 The royal commission unearthed a great deal of information about the unlawful and 'inappropriate' behaviour of employers. Commissioner Cole put these into a different category to his main target, the trade unions. This is one of many actions which give rise to comment that both the royal commission, and the Government in the implementation of its recommendations, have shown a lack of balance in addressing the main concerns of the industry. The royal commission identified illegal behaviour by employers and acknowledged other problems following from the failure of state and Commonwealth agencies to ensure compliance with the law. But the royal commission argued that there were institutions currently responsible for addressing these problems. That has not deterred critics from accusations that Commissioner Cole ignored his responsibilities. The committee notes that the royal commission's terms of reference may have had some bearing on the way he carried out his brief. The CEPU has made an observation on this matter:

> We agree with the submission of the ACTU that only a small number of findings were made against employers despite the incidence of the use of phoenix companies, tax avoidance and non payment of entitlements. Tax evasion of itself is estimated to account for some $1 billion per annum yet the bulk of the Cole Royal Commission findings and recommendations and indeed the provisions of the Bill are aimed at union behaviour and practices. We believe if the same effort and attention were given to: improving compliance with State and federal tax regimes including addressing the massive tax avoidance which characterises the industry; improving security of payment of employee entitlements; dealing with the incidence of sham employment arrangements and phoenix companies...In all these areas there is an entrenched culture of lawlessness on the part of business which is not in anyway dealt with effectively by the Cole Royal Commission.[34]

4.52 There are a number of serious issues which can be dealt with briefly about which employees had much to tell the committee. The committee attaches more importance to these matters than does the royal commission because grievance by workers can poison the industrial relations of work sites. Issues like workers compensation premiums may become contentious to the point where the issue spills over to other workplace matters. Employers who ignore their obligations to workers will have poor industrial relations records.

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34 Submission No.27, CEPU, p.6, paras 2.1.3-2.1.4

## Unpaid entitlements

4.53 The committee was provided with a great deal of evidence that most industrial relations disputes in the industry were related to employers not complying with lawful agreements, or employees raising concerns over occupational health and safety and superannuation payments. These are not matters of thuggery or criminal behaviour, but employees exercising a lawful action to ensure that the contracts that they have entered into are honoured. The committee believes that governmensshould increase funding for the effective regulation of corporate, taxation and criminal law across the building and construction industry. The committee notes instances of employer grievances from the inquiry record:

> The operation of the industry could be improved greatly by federal legislation which addressed real problems. These include massive non compliance by shonky contractors with workers compensation laws, pyramid subcontracting and the inappropriate use of the ABN system. Another problem which arguably needs a federal legislative solution is abuse of illegal immigrants in the industry, which also renders companies such as ours uncompetitive.[35]

4.54 The committee majority has been led to the view that the operations of large contracting firms are probably more likely to lead to better employment outcomes than for small contractors who are more vulnerable to cost pressures. As one contracting firm, QR Concrete, saw it, the lower end of the commercial construction trade shared many characteristics of the housing industry, engaged in building suburban bungalows and two storey townhouses, where employee entitlements were not assured:

> … when it comes to the small end of the commercial market, things are a lot different because there is nothing in place in many of these projects and it is very difficult to compete because compliance issues are a major problem in the fact that there are no agreements in place, contractors don't pay workers compensation or superannuation and other rightful entitlements to their employees.....even in the big commercial projects there are still problems with non-compliance because some of the competitors in this industry tend to cheat not just their workers but also revenue to State and Federal Government by no paying payroll taxes, workers compensation levies and other statutory obligations.[36]

The CFMEU told the committee that in Queensland, a state with generally harmonious industrial relations, the building and construction industry has a long history of underpaying workers entitlements and evading income tax, payroll tax, WorkCover premiums, superannuation and redundancy entitlements. The underpayments were estimated to be $1.3 billion per annum.[37]

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35 Submission No.53, Action Construction, p.3

36 Submission No.73, QR Concrete, p.2, paras.9-10

37 Submission No.84, CFMEU Queensland, p.2, para.8

4.55 Another view is presented by the Australian Workers Union:

> … in terms of the industry, the major problems we see are either unsafe management practices or incompetent management practices. In terms of criminality, that has not been the experience of the Australian Workers Union. What frustrates me is the situation with some workers who work on road maintenance down in Gippsland. The company became insolvent and there was about $4 million of workers' entitlements which we had to recover for the workers. The directors are gone; they do not feel any obligation. We have had to negotiate with their client VicRoads to make sure that money which VicRoads had to pay the insolvent company was put aside to pay the workers....What frustrates me is, whilst there is a lot of discussion perhaps in headline issues about criminality in some quarters by conservatives, we have 50 people who spend their time maintaining roads, clearing road kill off the roads, very basic maintenance of country roads. In the summertime they are the trained bulldozer operators who then are used to put out bushfires and all the other key work which is important in fighting summer fires. I have never seen any Liberal politician raise what happens to these workers.[38]

4.56 The CFMEU told the committee that employees are well aware of their lack of protection of rights such as superannuation, workers compensation and occupational health and safety standards and, with the union, have worked hard to monitor their legal entitlements. Given the tight margins and timeframes that companies operate under, employees and unions are under pressure to recover legal entitlements while contracts last and there is funding available to meet these obligations.[39] The committee was also told that Queensland building industry employers have an abysmal history of poor compliance with industrial awards, and that approximately 35 per cent of employers in the industry attempted to comply with their award or EBA.[40]

4.57 Finally, the national office of the CFMEU has assembled a depressing list of details about the extent of unfunded entitlements over which it has had to pursue employers. This amounts to theft on a grand scale. Although reported to the royal commission there was no investigation recommended. Over $30 million in unpaid entitlements has been recovered by the CFMEU in recent times, which is considerably les than would have been owed, and does not include the proceeds from unreported local site organisers' efforts on behalf of individuals.[41] The CFMEU submission also refers to an estimate that workers in all industries are short changed by an average $240 per year in employer superannuation contributions. This is a particular problem in the construction industry. Even the royal commission papers note that just under 20

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38 Mr Bill Shorten, *Hansard*, Melbourne, 21 May 2004, p.65

39 Submission No.17, ACTU, pp.39-40

40 Submission No.84, op. cit., p.5

41 Submission No.37, CFMEU, p.101

per cent of workers in the industry have no superannuation, and a further 17 per cent have payments in the funds but make no regular contribution.[42]

## Tax evasion

4.58 As stated in the introductory chapter, tax evasion is the most serious of all offences in the industry because it is the key indicator of business honesty. Tax compliance, rather than the conduct of industrial relations, is the key indicator of the extent of integrity in an industry. Tax evasion is linked to industrial relations because of the high use of contractors and cash payments in the industry. A number of submissions point out that the current taxation system provides significant incentives for both employers and employees to engage workers as independent contractors rather than employees, even through they have a management relationship that is clearly one of employer to employee. Employers are estimated to save on wages a minimum of 25 per cent on standard hours and 40 per cent on overtime hours. In addition they avoid payroll tax, workers compensation premiums, superannuation contributions and redundancy entitlements. The committee notes the concerns that such practices encourage a culture of avoidance not only of taxation but also avoidance or underpayment of workers entitlements, including superannuation. It also places enormous difficulties on honest contractors trying to compete in the market place and puts a further burden on taxpayers who are effectively subsidising employers in the construction industry.

4.59 The ATO is also aware and concerned about the use of contractors in the sector and notes the complexity of defining responsibilities for work between an individual contractor or employee, and how such responsibilities can be defined through the taxation system.[43] The committee notes with concern the evidence from the ATO that tax evasion and non-compliance in the construction industry continues to be a severe problem for the industry.[44]

> On those sites that are probably between that $2 million to $10 million turnover. The employer group is sometimes obviously lower as well, but a lot of the time we find that the weekly wage is paid and tax deducted. That which relates to overtime or weekend work is paid in cash. Then there will be other sites where the majority of the pay is in cash without having withholding. A lot of those types of activities usually are involved in phoenix activities as well....We have a mix of cases. On occasions when you front the taxpayer, it is that the employer had said that they were going to be paid in cash. On the employer's side, the employer says the employee will not work unless they are paid cash. The status of the worker issue,

42 ibid., p.102

43 Mr Ian Read, *Hansard*, Melbourne, 19 May 2004, p.71

44 Mr Mark Konza, *Hansard*, Melbourne, 19 May 2004, pp.63, 73

> while it is involved in those types of cases, is usually a separate issue as well.[45]

4.60 Given the high levels of concern by the tax office of non-compliance it is clear to the committee that the economic benefits of the legislation cited by the Government are illusory, with no data available on the real wage costs of both the housing and construction sectors if all taxation was paid by employers and employees. The committee believes the problem warrants a review by the ATO on measures to support increased compliance with taxation laws by employers in the construction industry.

4.61 The extent of the problem is very considerable. For instance, the committee was told in the Northern Territory that the proportion of workers who are described as contractors is as high as 98 per cent but that in the vast majority of cases these workers are clearly employees:

> Payment is usually by way of an "all-in" hourly rate i.e. a flat hourly amount paid for hours worked. In these cases the employer exercises direction and control over the performance of work and is responsible for rectification of defects. Most workers are not incorporated as companies, although some are instructed to register as Pty Ltd companies to receive work. No written contract is in place. The employer simply informs the worker of the hourly rate on which they will be working and no negotiation is entered into. The average rate is around $23 per hour for a tradesperson. I believe the use of these false sub-contract arrangements is for the purpose of relieving employers from the responsibilities of paying workers under correct award conditions.[46]…The relevant worker's compensation legislation requires that workers be defined as employees in order to be covered. This means that the majority of NT construction workers have no workers compensation coverage. Unless they self-insure, they have no income protection at all.[47]

4.62 The committee heard evidence from South Australia of the intimidation faced by employees whose company demanded that they become contractors:

> A recent example of this type of practice has emerged with a national company which manufactures and installs insulated sandwich panels for cold stores, and roof/wall cladding panels for warehouses, public buildings and factories. The union has an EBA with the company (which has passed its nominal expiry date) for the six on site workers who have worked for the company for between 5 - 11 years. The company now wants these workers to become contractors rather than employees. Although the workers do not want to change they are fearful for their jobs.[48]

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45 Mr Ian Read, op. cit., pp.66-67

46 Submission No.88, CFMEU, Construction and General Division, NT, pp.1-2

47 ibid., p.4

48 Submission No.101, CFMEU South Australia, p.8

4.63 Again, the saving to the company in this instance is in not having to pay payroll tax, long service leave, superannuation and workers compensation premiums. The majority of these costs are then passed on to the individual worker who also can become liable for rectification work. If the worker is found at the end of the day to be more like an employee (under the 80/20 rule), then it will be the individual worker who may be penalised by a higher tax bill. As for the employer, there appears to be little disincentive for using this practice.[49]

4.64 The committee notes that amendments contained in the *New Business Taxation System (Alienation of Personal Services Income) Act 2000* implemented some recommendations of the Ralph Report on the reform of business tax. The Senate Standing Committee on Finance and Public Administration, in its 1999 inquiry into business tax reform, noted that strong opposition to Ralph's recommendation came from the Master Builders Association (MBA) and the Housing Industry Association. This committee regrets that the Government did not accept the Senate's recommendations in 1999 for tighter legislation, but notes that it also rejected, at the same time, advice from the Treasurer. The MBA refuted charges made then by the CFMEU that it wanted to preserve a tax avoidance scheme. One beneficial consequence of this for employee-contractors is that employers have to pay the superannuation entitlements for contractors who are deemed to be employees.

4.65 However, these laws do not extend to employers' obligations to pay WorkCover premiums or fulfil any other requirements under state laws. The committee believes that there remains much more work to be done in tightening measures for compliance with state legislation. While it accepts in principle the primacy of state powers in relation to the regulation of worksites and employee welfare, these powers must be used, and compliance with the regulations must be vigorously enforced. If not, it becomes difficult to oppose pressure for Commonwealth intervention.

## Phoenix companies

4.66 The issue of phoenix companies is of interest to the committee because they represent a pestilence in the construction industry and they have so far defied measures to get rid of them. They represent an entrenched illegality of significant proportions. Phoenix companies adversely affect employees who lose their legal entitlements when a company collapses. Directors are, in effect, stealing the wages of their staff to restart a new company under a different name. The cost of this behaviour is borne by the Australian public, who have to support workers who have lost their jobs and their means of support. The Australian public loses out twice because such companies usually avoid paying their taxes which are used to support workers who have lost their jobs.

49 ibid.

4.67 The Cole royal commission reported that there has been a significant incidence of fraudulent phoenix company activity in the building and construction industry. It reported that since 1998 the ATO has raised at least $110 million in taxes and penalties from the detection of these companies. The committee received evidence from the ATO about its strong compliance focus, but acknowledges that a great deal of inter-agency and inter-governmental agreement will need to take place before a high success rate in suppressing this illegality can be achieved.

4.68 This would involve, as well as the ATO, ASIC and state and territory revenue agencies. The committee notes that apart from secrecy provisions in tax law, one of the main obstacles to tracking down the persons behind various entities is that there is no state system of registration of partnerships and trusts. Therefore, people engaged in running phoenix companies would not be traced if they used the partnership or trust as a vehicle to engage in business with the assets and management of a previously failed company. The registration of partnerships and trusts will require the cooperation of the states and territories, following the precedent of company registration by ASIC. The trust lobby will oppose this, as they have previously opposed other measures to eliminate tax evasion.

4.69 The committee notes with interest the experiences of the Queensland Government in reducing the incidence of phoenix companies by banning individuals who have become insolvent, whether or not they are directors of the company, from holding a building licence for a period of five years, and placing life bans on individuals who enter into a second insolvency.[50] The committee has heard no other comment on this.

4.70 The committee heard telling evidence from the CFMEU of the efforts that are required to track down lost workers entitlements from 'sham' companies:

> What usually happens is the company will have one company in which they have a certified agreement with the union. The employee will think they work for this company and as such send a wage claim to the union when they don't get paid in accordance with the certified agreement. The union will make a claim on the company and sometimes even take a wages application to the QIRC. After a lot of time and effort has gone into attempting to recover the money, the company will reveal that they actually have another company which they employ the workers under. This other company will not have a certified agreement attached to it and therefore the employee is not entitled to the conditions of the certified agreement. This is an extremely deceitful practice as the union believes it has secured a certified agreement with the company and the employee believes it works for the company with the certified agreement. As the employer has records to show that the employee is in fact employed under the company without

50 Submission No.26, Queensland Government, pp.57-58; Submission No.90 MBAQ, p.9

> the certified agreement there is nothing the union can do to recover any money for the member.[51]

4.71 The committee majority acknowledge that the legislative path to reducing the costs caused by phoenix companies will be considerable. It is another case where the maintenance of strong working relationships with state governments is highly important. There is a role for Commonwealth leadership is taking on the task of negotiating uniform laws in this area.

**Recommendation 5**

**The committee majority recommends that corporations law be amended to enable more effective prosecution of perpetrators of phoenix companies; and that in association with this, the Government work with state governments to negotiate their legislating for stringent registration laws applying to partnerships and trusts.**

## Effects of underpaying workers compensation

4.72 Evidence presented to the Royal Commission showed there was substantial non-compliance with workers compensation obligations in the building and construction industry. This relates particularly to underestimation of workers' remuneration and nomination of incorrect tariffs.[52] The committee acknowledges that this is a matter for state and territory authorities, which should be introducing measures to reduce non-compliance with workers compensation obligations.[53]

4.73 Non-payment of workers compensation premiums imposes excessive costs on all players in the industry and the general community. There is a cost to uninsured employees, and their families, who find themselves without injury compensation. There is the cost to the compliant employers who are forced to pay higher premiums, in some cases making them uncompetitive with non-paying companies when tendering for work. There is the cost to the client who must compensate the contractors for the higher premiums that they pay. The wider community bears the cost not only through the higher price of buildings, but also through the burden imposed on the social security and health systems in caring for uninsured workers. A consequence of the non-payment of premiums is that many accidents and injuries are not reported. In such cases workers are told by their supervisors or employers to claim the injury as non-work related. The reliability of statistics on workplace injuries, being based on workers' compensation statistics, is therefore in doubt. The role of the National Occupational Health and Safety Commission (NOHSC) has been to lead and

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51 Submission No.85, Ms Melissa Austin, CFMEU Queensland, p.5

52 *Final Report*, Volume 9, p.272

53 Submission No.26, Joint Governments, p.22

co-ordinate national efforts to prevent workplace death, injury and disease. This is assisted by the collection and analysis of safety data.

4.74 The committee understands that the practice of non-payment of workers compensation premiums or non-compliance is very widespread. The New South Wales branch of the CFMEU estimates 30 per cent of contractors fail to pay workers' compensation premiums. WorkCover aims at securing an extra $30 million in billable premiums. The issue of non-compliance however, is not limited to the building and construction industry, although it is probably more widespread in the building industry. The CFMEU claims that the much higher recoveries is in very large measure due to the constant campaigning of the CFMEU to draw attention to this issue. Yet the committee is sure that these achievements are still only minor compared to the scale of the problem. The CFMEU points out that company liquidations also cause mounting pressure on the workers compensation system. In 1995-6 the NSW WorkCover Authority conducted an audit on the workers compensation policies of 97 companies in the building industry. This audit disclosed a serious problem with companies underestimating their annual wages bill in order to pay a lower premium. The audit raised $2 339 847 in extra premiums of which $2 007 712 was unable to be collected by the insurer because the companies concerned had gone into liquidation and there were insufficient funds to cover this unsecured debt.[54]

4.75 The committee notes with concern advice from state governments on evidence that contractors, who make up a high proportion of the workforce in the industry, do not contribute sufficient funds into superannuation schemes to enable them to support themselves in the future. The consequences can be predicted.[55]

> An employee might not find out for months that superannuation contributions have not been made on his or her behalf or in the case of younger employees not even be aware until many years later there is a problem. At that point it may be too late to recover them. While Commonwealth provides a legal mechanism to recover superannuation contributions, the funds themselves often have no enforcement mechanisms available other than pursuing breaches of deeds of adherence which require a contract law remedy. Where unions seek to recover superannuation or redundancy contributions, in the absence of Government support we have had to resort to industrial pressure to recover our members money and we have been criticised for doing so.[56]

4.76 Indeed, as ACCI has stated, it is ultimately the broader community which is carrying the burden of higher costs resulting from unlawful or inappropriate industrial conduct:[57]

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54 Submission No.37, CFMEU, pp.118-119

55 Submission No.26, op. cit., p.22

56 Submission No.27, CEPU, paras.11.4.5-11.4.6

57 Submission No.14, ACCI, p.7

> In the absence of an effective government mechanism to ensure that workers in the industry are able to access long service leave, redundancy (or severance) payments and income protection, the unions (including the CEPU) have devoted a lot of resources to establish appropriate funds to ensure that employees are able to enjoy such entitlements.[58]

4.77 There appears to be general agreement for the need of a simpler and more streamlined process in which worker entitlements can either be protected up front through the industry WorkCover levy, or recovered through a tribunal or special body. The Master Builders Association of Queensland concedes the point that unions sometimes have to resort to unlawful industrial behaviour to achieve these ends. The MBAQ states that industry reviews have pointed to the need for the Queensland Government, as regulator, to improve its enforcement record to ensure far greater compliance with the laws it makes.[59] This is also the committee's view about state legislation across the country. The committee will be looking for a stronger commitment by states and territories to compliance enforcement, as evidenced by their increased appropriations for regulatory agencies.

## Conclusion

4.78 The committee majority acknowledges the usefulness of inquiries that unearth masses of information about the way organisations conduct themselves. It is the interpretation of such information that becomes crucial. The Cole royal commission knew what it was looking for, and by stretching public credulity was able to claim that it had found it. Among a possible 700 000 stories it was likely to find at least 100 which had unhappy endings. As the record shows, however, most of these could be dismissed as insignificant.

4.79 The committee gives very little credence to the intelligence collected by the royal commission into alleged wrong-doing by employees. It does not deny that across a diverse industry employing over 700 000 people there will be irregular and sometimes illegal activities going on. In this respect the construction industry is no different to other industries or to the general community. More significant, in the view of the committee majority, is the widespread lack of compliance with current state and Commonwealth laws relating to WorkCover contributions, occupational health and safety, taxation avoidance, and the operations of phoenix companies. The committee notes that the evidence suggests that state government regulatory compliance measures leave something to be desired. These matters are being subject to energetic attention in some states. There is merit in states collaborating to draft model legislation based on successful application of laws in some states. The committee cannot come to terms with the current reality that builders and contractors are able to flout state regulations and obligations and not be deprived of their operating licenses.

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58 Submission No.27, CEPU, para.11.5.2

59 Submission No.90, MBAQ, pp.1-2

4.80 In regard to Commonwealth laws relating to taxation and corporations, the committee majority recommends that amendments to some laws be considered to close loopholes exploited by unscrupulous builders, should be considered.

4.81 In the view of the committee majority, the evidence unearthed by the Cole royal commission points to the urgent need for concerted action by the states to improve compliance with their regulations. There needs also to be a review of current laws and a study of model legislation around the country. For instance, the committee heard evidence in Melbourne of the highly effective New South Wales legislation to ensure security of payments. There was a lament that Victoria had not introduced similar legislation. Similar legislation nationwide would bring considerable relief to many contractors. The committee laments the loss of NOHSC but believes that it is not beyond the ability of states to continue a national federalist approach to developing enforceable codes. A federal approach to reform of national legislation does not necessarily require Commonwealth oversight, but it would be very encouraging to some states.