Chapter 6

Occupational health and safety

> Fundamentally, the key killers of Australian workers in the 1900s were traumatic falls, crushes, amputations. That is still what is killing Australian workers now. We do not think that problem is unique to the construction industry. In terms of health and safety we think the debate about having a separate regulator, using health and safety as the trigger, is a furphy. We do not support a separate regulator for the building and construction industry in Australia. There are already adequate regulatory mechanisms present.[1]

6.1 Both the Cole royal commission, and the Government, have correctly identified the management of occupational health and safety as one of the critical issues facing the industry. This assessment is incontestable. The committee majority's criticisms begin at this point, for what Cole has recommended, and what the Government has legislated for, will introduce a confusing new element into what is already a problem area. Until recently it was fair to state that irrespective of the poor record of accidents in the industry up to now, an improvement trend is identifiable. And at least it could be said that there was a regime in place which was moving toward national codification of safety regulations in the industry. There was the promise of more stringent enforcement of compliance with current state laws. Statutory mechanisms for tripartite consultation and negotiation existed in regard to Commonwealth and state powers and responsibilities. Since a recent announcement that the National Occupational Health and Safety Commission (NOHSC) will be disbanded, the prospects for continued and concerted progress in reducing the industry accident rate may be in doubt.

6.2 The Government's proposal in the BCII Bill, and in its subsequent announcement about NOHSC, is a unilateral approach which is likely to result in an uneasy standoff between the state occupational safety agencies and the proposed Federal Safety Commissioner. Even if amicable consultations were to take place between the Commonwealth and the states to negotiate operational procedures, it is unlikely that the health and safety provisions of the BCII Bill could be implemented as intended, in view of all of the other elements in the bill which are a matter of dispute. As the states and territories combined submission states:

> It is ironic that, in the wider climate of a drive towards greater national uniformity in occupational health and safety (see for example the Productivity Commission's interim report on national workers' compensation and occupational health and safety frameworks, issued in

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1 Mr Bill Shorten, *Hansard*, Melbourne, 21 May 2004, p.54

> October 2003), the establishment of an additional agency covering health and safety and administering yet another, different framework should be proposed.[2]

6.3 The Government's announcement that it intends to disband the tripartite National Occupational Health and Safety Commission is a move consistent with its unilateral decision to appoint a Federal Safety Commissioner, directly answerable to the Minister. The committee majority considers it to be a retrograde step to disband NOHSC and inappropriate to replace it with a body which is unlikely to receive the full confidence of state agencies and of industry stakeholders. The committee majority points to the obvious fact that nothing can happen by way of reform in policy areas which involve concurrent powers unless there is negotiation and agreement. Grandstanding unilateralism is not an option in a federal system.

Occupational health and safety: the scale of the problem

6.4 The Cole royal commission, the Government, employer and employee representative all acknowledge the high rate of accidents and injuries that occur in this industry and agree that this is unsatisfactory. The committee received evidence of unacceptably high death and injury rates in the industry. Submissions from across the industry described circumstances where companies were forced by commercial pressures to cut costs and save time over short term project cycles,[3] and where ignorance of procedures and casual indifference to safety issues were unfortunate characteristics of industry culture.

6.5 NOHSC gave the committee a snapshot of the national data it had collected to provide some idea of the overall national performance. The committee was told:

> It is estimated that there are over 2,000 work related fatalities in Australia each year. Most are caused by work related disease, which for various reasons is difficult to measure. On the other hand, we have good information about compensated fatalities. In 2001-02, there were 297 fatalities compensated under workers compensation schemes in Australia. These were constituted by 198 traumatic fatalities and 99 from work related disease. Of those compensated fatalities, 39 or 13 per cent were in the building and construction industry. It is worth noting that the industry employs around seven per cent of the Australian work force or 700,000 workers. The incidence rate of compensation fatalities in the industry is more than double the Australian average. For 2001-02, that incidence rate was nine deaths per 100,000 employees for construction compared with four deaths per 100,000 employees for all industries. The frequency rate is also more than double the Australian average: five deaths per 100 million

2 Submission No.26, Australian States and Territories, p.50

3 Submission No.21, Australian Government Agencies, p.13

hours worked for construction compared with two deaths per 100 million hours worked for all industries.[4]

6.6 The following matters of fact and statistical data which have been provided to the committee give a bleak picture of safety in the industry. National and state figures quoted from DEWR Comparative Performance Monitoring reports, NOHSC statistics and Workcover statistics[5] showed that the industry has a higher rate of injury and fatalities in comparison with all-industry averages since 1991. Other data has revealed that:

- the average incident rate for the construction industry was almost double the average for all other industries, with workplace injuries accounting for an average of 70 per cent of employment injuries;[6]
- the number of weeks lost in the construction industry through workplace injury or illness has increased in the order of 78 per cent;[7]
- 10 percent of all workers compensation claims for injury and disease arise in the building and construction industry, with the number of workers staying off work more than twenty six weeks increasing;[8]
- construction had the second highest incidence of employment injury across all industries in the construction industry in NSW, with 32 fatalities (that gave rise to a compensation payment) in the construction industry in NSW, Labourers and related workers had the highest numbers, with 20 fatalities dying as a result of workplace injury;[9]
- between 1994 and 2000, around 50 fatalities have resulted from building site accidents, and currently the industry has the second highest rate of compensated injuries;[10]
- in Tasmania, construction workers had over 140 severe industrial accidents in the years 1998-2002, with an average cost per injury of over $84 000;[11]
- average workers compensation premium rates for the construction industry, at 4.9 per cent of payroll, are the second highest for all industry classifications and well

4 Mr Robin Stewart-Crompton, *Hansard*, Canberra, 11 December 2003, p.41

5 Submission 21, op. cit., p.37, paras.210-213; Submission No.55, CFMEU NSW, p.23, paras.85-86

6 1998 WorkCover report cited in Submission No.55, CFMEU NSW, p.23, paras.85-86

7 Submission No.37, CFMEU, p.71, section 4.7

8 1998 WorkCover report cited in Submission No.55, CFMEU NSW p.23, para.87

9 WorkCover Statistical Bulletin 1999/2000 cited in Submission No.55, CFMEU NSW p.24, para.89

10 Submission No.21, op. cit., p.15, paras.64-65

11 Submission No.26, Australian States and Territories: Tasmanian Government, p.95, paras.13-14

above the national average for all industries in 2001-2002 of 2.5 per cent;[12] and finally,

- , statistics for Queensland reveal that construction workers are 4.4 times more likely to be killed at work than the state industry average, and 2.3 times more likely to be seriously injured than the state industry average, with injured construction workers off work 2.2 times longer than the average Queensland industrial worker.[13]

6.7 To these sample figures on injuries may be added information from a recent case study on performance outcomes in the building and construction industry, commissioned by the Workplace Relations Ministers Council in February 2004.

> Even though open compensation claims are still maturing, as at the end of 2001 the direct cost of 1998/99 claims was $267 million. With national building and construction activity levels at around $50-$60b this represents approximately 0.5per cent of total industry revenue. The average direct cost of a compensation claim is $20-25,000. The annual industry incidence rate is around 28 claims per 1,000 workers. NSW and WA have higher rates, although they have been reducing over the review time frame. Victoria has low rates and is relatively stable while Queensland and Tasmania have deteriorating performance from a low base. The major mechanisms of injury are body stressing with muscular stress from lifting and handling the cause of 30 per cent of all injuries in the industry. The rate of fatalities in the building and construction industry is high (around 5 to 8 per annum per 100,000 employees) but has been decreasing over recent years.[14]

6.8 The committee recognises that while these figures are grim, they may not account for all of the deaths and injuries in the industry because the figures are based mainly on workers compensation figures and do not account for deaths and injuries of independent contractors, who make up a high proportion of the industry workforce. The committee was provided with evidence of a worker in Victoria who suffered from a severe fall but was not interviewed by WorkCover in relation to this injury.[15] Nor do the figures take into account deaths from occupational diseases.[16] The issue of unreported injuries will be dealt with in a later section of this chapter.

6.9 More work needs to be done in validating statistics for occupational health and safety. The Master Builders Association has looked at CPM and ABS data and has concluded that the construction industry is improving its safety record and that there

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12 Submission No.21, op. cit., p.13, para.54

13 Submission No.84, CFMEUQ, p.23, paras. 143-144

14 Bottomley, B. February 2004. Workplace Relations Ministers Council Comparative Performance Monitoring, Case study on performance outcomes in the building and construction industry: Executive Summary, p.3

15 Submission No.121a, Dieter Berber, para.13

16 Submission No.27, CEPU, paras. 10.1.1-10.1.2

have been steady reductions in compensation claims and fatalities.[17] A similar view is submitted by the CEPU, which points out that injury reductions have been achieved by the current system, however flawed it is perceived to be, and that Australia's performance in the sector, while not perfect, compares well with recent European Community figures. The MBA therefore regards claims of underperformance of current compliance agencies with scepticism.[18] Other data indicates a fluctuating record. There also appears to be a significant difference between what each jurisdiction reports, with New South Wales and Western Australia having the highest rates and Victoria and Queensland the lowest. NSW and WA are improving off relatively high rates and Queensland and Tasmania are deteriorating off relatively low rates.[19]

6.10 The committee believes that the ABS and NOHSC should be funded to collect more comprehensive data on deaths and dangerous industries, as well as days lost to production from any industrial action in support of comparison claims.

6.11 The committee notes that experienced workers bear the brunt of occupational health and safety incidents. This is a factor of age rather than proneness to accident. Workers over the age of 55 are almost three times more likely to suffer an injury resulting in a claim than workers under the age of 24.[20] The demanding physical requirements of the building and construction industry are particularly severe on workers with regard to health and their ability to work a fully productive day. Very few workers are able to continue in the industry until age 65.[21] Analysis of the industry by age has shown that Victoria claimants are on average older than those in other states, with Western Australia having the youngest claimant profile. Figures for each state show a clear relationship between age and claims, with the incidence rate higher for older age groups. Older workers also claim for longer periods of time off work.[22]

6.12 Statistics show that the industry is also losing younger workers who would normally be expected to replace middle aged and older workers. There is also evidence that apprentices experience higher rates of accidents and injuries and have less protection and support available to them by their employers than do older workers.

> Apprentices are particularly susceptible to bad occupational health and safety practices. Figures released by NSW Labor Council state that workers

17 Submission No. 12A, MBA, para.4.1

18 Submission No.27, op. cit., paras.10.1.3-10.1.9

19 Bottomley, B. Workplace Relations Ministers Council Comparative Performance Monitoring, Case Study on performance outcomes in the building and construction industry. February 2004, p.18

20 Submission No.9, CBUS, p.5

21 Submission No.34, BUSSQ, p.1

22 Bottomley, B. op. cit, p.5

> aged between 15 and 24 have a 75 per cent greater chance of being injured than an older worker. Coupled with that the chances of a young worker being injured are greatly increased during the first few weeks on the job. The union and the industry are not unfamiliar with the deaths and serious accidents involving apprentices and other young workers. …Only in October 2003, a 16 year old boy, Joel Exener was killed after only 3 days on the job after falling of a roof. He was not properly supervised and was not provided with adequate fall protection.[23]

6.13 The Government and the Cole royal commission both acknowledge that workers in the industry have a right to a safe working environment, and acknowledge the important role that unions play in maintaining safety for workers.[24] The committee was gratified to see that where the industry sought the active collaboration of government, employers and employees to improve safety, there were signs that injuries and deaths could be reduced:

> Since 1998, all major contractors, subcontractors and suppliers wishing to do business with Government have had their corporate OHS&R management systems accredited by government agencies. Overall the incidence rate for the New South Wales construction industry decreased from a ten year high of 58 per thousand workers in 1995-96, to 40 in 1999-2000, a reduction of 31 per cent. This rate of decline is greater than any other State or Territory in Australia over the past 5 years.[25]

6.14 This reported improvement arises from a relatively small change to Government procedure, yet it produces benefits out of proportion to the effort required to make the change. The committee submits that there is a strong lesson to be learned from this instance, and many others around the states.

6.15 While the committee is as dismayed as everyone at the ruination of lives that result from industrial accidents, and at the record of occupational health and safety failures listed at the beginning of this chapter, it does not doubt that a concerted effort by Commonwealth and state agencies can bring about a considerable improvement. This is more likely to be achieved through undramatic incremental change: closing loopholes and tightening compliance measures generally, and in some cases with amendments to current legislation, and through improvements to the administrative culture of government agencies which enforce compliance.

State initiatives and successes

6.16 The committee majority recognises that state governments and agencies are much closer to the ground in relation to work site involvement with occupational

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23 Submission No.55A, CFMEU NSW, p.7

24 Submission No.21, Australian Government Agencies, p.38, paras.225-228; Submission No.21, Ministers Second Reading Speech, p.77

25 Submission No.26, Australian States and Territories: NSW Government, p.90, paras.33-34

health and safety issues than are Commonwealth agencies. Codes and regulations are the enforcement responsibilities of state agencies. Even under the regime of the Federal Safety Commissioner, as proposed in the BCII Bill, there will be considerable reliance on state inspectors, and such matters as state WorkCover arrangements will remain as they are. This reflects a constitutional reality.

6.17 State and territory governments and their agencies have been subject to a great deal of criticism in evidence to the committee for their failures in regard to enforcing compliance with current laws. There has been flagrant abuse of state laws, and it is obvious, even in the absence of administrative machinery detail, that state agencies responsible for compliance have lacked either the will or the resources to carry out their tasks.

6.18 The committee acknowledges that this is a generalised impression, and it is highly likely that agencies in some states have been vigilant, particularly in those states which have maintained effective personnel levels. It is not possible for senators to probe very deeply into the administrative practices of state agencies, as they are accustomed to doing with Commonwealth agencies. Senators on the committee are happy to acknowledge that this is not their 'patch'. Instead, the committee relies on the quite detailed submission provided by the states and territories in order to make an assessment of their role and progress in improving their procedures, and to balance evidence received from other sources. Notwithstanding comments in a few sentences previously, there appears to be a strong impetus for change and improvement in the management of this problem by most states and territories. The benefits of incremental improvement are becoming obvious.

6.19 Part of this is due to the effects of union pressure. Partly it is due to questions about the capacity of WorkCover to handle its financial outlays, and other commercial considerations. This has resulted in state governments being much more willing to address the need to overhaul their procedures to deal with occupational health and safety enforcement, to the extent of cutting through bureaucratic entanglements. A submission from CFMEU Queensland states that:

> The need for change can be demonstrated by the fact that the Queensland Government set up a taskforce to review workplace health & safety in the building and construction industry a few years ago and its recommendations are currently being implemented with the first regulations being introduced later this year. Further, such was the concern of the State Government that a review has been carried out into the Department of Accident Prevention because of concern with its performance on policing workers health and safety in the past.[26]

6.20 Queensland has implemented a five year compliance strategy for the purpose of increasing compliance across all industry sectors, with a particular emphasis on the building and construction industry. There will be increased use of data matching and

26 Submission No.84, CFMEUQ, p.18, paras.99-114

increased capacity for field inspections. The Queensland Government claims that the effects are already being noticed in the industry, by way of reported wages growth declared for the purposes of premium calculation.[27] The Government has also establishment a workers' compensation policy capacity within its Department of Industrial Relations. A particularly noteworthy reform in Queensland is the proposal to amend the definition of worker in the relevant legislation to take into account a variety of contractual arrangements that employees are likely to be subjected to in the building industry.[28]

6.21 The Master Builders Association in Queensland submits that it has been party to and supported all of the recent reforms and initiatives introduced in the Queensland building industry over the last four years. It notes with approval that the state government taskforce report made over 60 recommendations, all supported by the building unions. The MBA also supported the recent amendments to the pre-qualification criteria for contractors wishing to tender for and work on Queensland Government projects. From July 2004 contractors wishing to tender on larger government projects will have to provide an independently accredited health and safety management system as well as become subject to independent site inspections to assess the safety management practices on the job. Severe penalties are provided for contractors deficient in their health and safety management practices.[29]

6.22 Not all state governments have specifically addressed occupational health and safety issues in their joint submission. New South Wales reports that the overall incidence rate for the state has fallen from a ten year high of 58 per thousand workers in 1995-96 to 40 per thousand in 1999-2000, a reduction of 31 per cent: more than any other state. Many of the occupational health and safety recommendations of the Cole royal commission have already been implemented in New South Wales, but some are potentially inconsistent with state laws, and imposition of new and inconsistent laws would create problems for the industry.[30]

6.23 Tasmania expressed concern that proposed right of entry provisions in the bill for Commonwealth safety inspectors may undermine the cooperative relationships which the Tasmanian Government has been encouraging between industry participants and the Workplace Standards Tasmania Inspectorate.[31]

6.24 In defining what is meant by 'national uniformity' in occupational health and safety codes and regulations, the committee majority recognises that this need not mean that regulations should be identical throughout the country. If the Commonwealth was to insist on this – and there has been no suggestion that they have

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27 Submission No.26, Australian States and Territories, p.60

28 ibid.

29 Submission No.90, QMBA, pp.8-9

30 Submission No.26, op. cit., p.89

31 ibid., p.95

– national uniformity would never be achieved. The committee majority supports the view presented in the joint submission from state and territory governments:

> It is the position of the Joint Governments that whether a health and safety regime is national or State-based will not affect the health and safety performance of the building and construction industry. National contractors may well have to manage different standards in each State, especially when operating close to State borders, but the regulatory models in each State are similar and the differences in standards only minimal in nature and effect. Subcontractors are usually small businesses and operate almost exclusively within their own State boundaries.[32]

6.25 The submission continues, in a reminder to Commonwealth law-makers, that it is not possible for the Commonwealth to legislate for a national scheme without the co-operation of the states. As a head of power, the corporations power has notable limitations and gaps in the areas it can cover.

> The States have different arrangements for workers' compensation and occupational health and safety, each having arisen from the particular needs of that State with its attendant industry mix, differing regional profile, demographics, market demands and historical precedents. There is nevertheless, significant evidence of the adoption of nationally consistent arrangements between jurisdictions that post-date the 1994-1995 Industry Commission Inquiries into occupational health and safety and worker's compensation. The lack of coverage resulting from a reliance on Federal corporations powers to legislate a national position, would be most significant in the building and construction industry in some States where there is a high proportion of small contractors. This would, by default, result in two schemes of arrangements for both workplace health and safety and workers' compensation in the industry.[33]

6.26 The committee is aware of the need to provide for long lead times if significant changes to workers compensation and occupational health and safety laws are to change. Small and medium businesses need to adjust to these changes.

6.27 The committee acknowledges that occupational health and safety must remain pre-eminently a matter for state and territories, if only for constitutional reasons. There is another reason. It is unnecessary for the Commonwealth to involve itself in the minutiae of administering regulations which are more appropriately administered locally. There is no reason on grounds of efficiency. The Commonwealth can bring no relevant experience to bear on the task, and can claim no practical expertise. In the absence of a body such as NOHSC, the Commonwealth is without even a credible national organisation in which it can vest a leadership and national coordination role.

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32 ibid., p.18

33 ibid., p.18, paras.46-47

The Federal Safety Commissioner

6.28 Chapter 4 of the Building and Construction Industry Improvement Bill 2003 establishes a new statutory office of the Federal Safety Commissioner. The role of the Commissioner is to promote occupational health and safety, monitor compliance with OH&S aspects of the Building Code and refer matters to relevant agencies.

6.29 As with the Building Task Force, the Federal Safety Commissioner, despite the eminence of the title, is a DEWR officer, as will be the staff which will support that Office. Clause 33 allows the Minister to issue directions to the Commissioner, except in relation to particular cases. The Federal Safety Commissioner will appoint safety inspectors with their powers to enter premises confined to finding out if the occupational health and safety aspects of the Building Code are being complied with. They do not have a general enforcement role in regard to OH&S and the powers that they are capable of exercising are similar to the current powers of inspectors under the Workplace Relations Act. The Commonwealth Safety Commissioner will ensure that successful tenderers for federally funded work are exemplars of occupational health and safety best practice.[34] Clause 33 allows the Minister to issue directions to the Commissioner, except in relation to particular cases.

6.30 One key role of the Federal Safety Commissioner will be to ensure new occupational health and safety benchmarks operate on Commonwealth projects. To ensure best practice OH&S performance, only companies that meet the requirements of the OH&S accreditation scheme will be contracted to work on Commonwealth projects. In addition, arrangements will be negotiated with state and territory authorities to provide for more intensive inspection regimes on Commonwealth projects. The DEWR submission notes that the administration of the OH&S accreditation scheme will be one of the key roles of the Federal Safety Commissioner. A builder seeking OH&S accreditation will have to demonstrate, on site, that adequate and certifiable OH&S management systems can support 'best practice'. Continuing accreditation will be subject to confirmation by periodic on-the-job audits.[35]

6.31 The committee notes that there is sparse information available about how the Federal Safety Commissioner is expected to operate within the current national OH&S framework. There are no guidelines on practical working relationships that are expected between state and territory agencies and the proposed Federal Safety Commissioner. It is noted that employees of a state or territory may be appointed as Federal Safety Officers under clause 233, but it is unclear what is intended they should do. The state and territory joint submission asks whether they intended to be state inspectors authorised under fee-for-service arrangements similar to those currently in place with Comcare.[36]

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34 Submission No.21, op. cit., p.8, para.27

35 ibid., paras.216-217

36 Submission No.26, op. cit: VIC Government, p.54, paras.21-22

6.32 The Federal Safety Commissioner, like his or her counterpart in the current Building and Construction Industry Taskforce, will have extensive powers to refer matters to relevant agencies in the states. The New South Wales authors of the joint submission from the states and territories express concern that the Federal Safety Commissioner's referral of matters to WorkCover will simply add another layer of bureaucracy to the system, increase WorkCover's workload and cause confusion about who is responsible for the administration of occupational health and safety in the construction industry. It is pointed out that Commonwealth inspectors will have broad powers under the Act to enforce the provisions of the proposed Building Code, which may cause further confusion about who is responsible for the administration of occupational health and safety in the construction industry. The committee notes evidence of the likelihood that the proposed occupational health and safety accreditation regime, which appears to be confined to Commonwealth funded construction projects, may be inconsistent with state government procurement policies and may increase red tape and compliance costs.[37]

6.33 Victoria has called for clarity in the legislation following legal advice that Victoria as a whole, and notwithstanding Victoria's referral of some of its industrial relations powers to the Commonwealth, is not a 'Commonwealth place' for the purpose of the chapters of the proposed bill which are relevant to occupational health and safety. The state is concerned that if another interpretation should prevail the result will be confusion among building and construction industry employers about their obligations under the Commonwealth and state legislation.[38] The committee majority is concerned about the possibility that builders and contractors may be faced with double jeopardy in cases where both Commonwealth and state legislation are in force.

6.34 While the Western Australian Government supports national consistency in occupational safety and health regulation, it submits that states must retain the ability to exercise a flexible control over regulation making. Western Australia continued to support the role of NOHSC in coordinating national standards, and objected to the duplication of its role through the establishment of the Federal Safety Commissioner.[39]

6.35 Trade unions had comments to make on the confusion that would result from having two separate jurisdictions making occupational health and safety regulations. The committee wonders how employers and building foremen, without profound knowledge of law, can be expected to exercise the informed judgement expected of them by the legislation. The CEPU provided some idea of the extent of the problem:

> The establishment of the Federal Safety Commissioner will overlay yet another system of responsibility and reporting on already burdened small

37 ibid., NSW Government, p.86

38 ibid., VIC Government, p.53

39 ibid., WA Government, p.71

> and medium building and construction employers subject employers to a dual system of responsibilities – how is an employer to resolve State/Federal conflicts and issues? And potentially have employers being prosecuted under different regimes for offences associated with the same OHS failure? Which is the appropriate agency to enforce standards on sites? How will the competition between State enforcement bodies and the Federal Commission work in practice? Subject employees to a confusion of regulatory arrangements – again who is the appropriate enforcement agency? While we believe that the industry is rife with occupational, health and safety rorts and compliance failures on the part of employers, we believe the resources to be ploughed into a separate new watchdog would be better directed to current regulators.[40]

6.36 The CEPU submission states that the proposal in the bill to create a new watchdog flies in the face of how successful OH&S initiatives are currently negotiated and carried through. It says that the main players in the industry addressing issues of workplace safety have always been employers, employee representatives and governments, and that all OH&S authorities have commissions or boards which are tripartite in nature, ensuring the interests of all parties involved are considered. These parties have no role in respect to the new Federal Safety Commissioner. His or her office is not answerable to anyone other than the Minister. Neither is there any requirement to consult anyone over OH&S breaches or standards.[41] The committee majority believes that the new office will be a strange creature, with insufficient legislative power at its disposal to have any real effect on occupational health and safety unless it develops a protocol for going cap in hand to the states to legislate on its behalf. If that is necessary, the folly of disbanding NOHSC will be obvious.

6.37 The committee majority accepts the view, put by a number of unions, notably by the CEPU, as well as by state governments and industry associations, that the main reason that NOHSC is being bypassed in favour of the Federal Safety Commission, is that it is a tripartite body. The Government finds it uncomfortable dealing with state governments, although it has no alternative but to do so. There is a degree of petulance in such policy making. For, while the new Federal Safety Commissioner will be a law unto himself, and answerable only to the Minister, he or she will need to liaise with state agencies and to engage in discussion with industries and unions. State powers cannot be overridden: they must be used in the most expedient manner, within a negotiated framework. This is a process which, in occupational health and safety regulation, stakeholders had been undertaking for nearly twenty years. Within sight of success, this process has ended, and few in the industry would be confident that the original objectives will be achieved under what is now proposed.

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40 Submission No.27a, CEPU, para.10.1

41 Submission No.27, CEPU, page 37, paras. 10.1.3-10.1.9

The demise of NOHSC

6.38 As announced in May 2004, the Government intends to disband the National Occupational Health and Safety Commission (NOHSC). It is obvious that the model of the Federal Safety Commissioner, being under the direct control of the Minister, is more amenable to government policy direction than is NOHSC, a tripartite and genuinely federal agency. None of the evidence received by the committee relevant to occupational health and safety, and which referred to the role and work of NOHSC, anticipated the demise of that body. However, the weight of evidence received by the committee is far more favourable to NOHSC than to the proposed Office of the Federal Safety Commissioner, which can now be regarded as its successor, so far as the construction industry is concerned. Stakeholders in the industry believe they have a stake or partnership in NOHSC. No one has any illusion about the potential of the Federal Safety Commissioner to accelerate changes that NOHSC had to painstakingly negotiate.

6.39 This decision, in common with other decisions of the Government in relation to the broad area of industrial relations, is not expected to be well received in the states and territories or among industry stakeholders who enjoyed participation in the making of regulations for their industry. The demise of NOHSC, should it actually eventuate, would be a messy affair, for it can only be done by legislation. Its executive staff would find work in DEWR, presumably serving the embryonic Office of the Federal Safety Commissioner, but the Commission itself is obliged to meet regularly. Its future deliberations will be interesting.

6.40 Committee members who are concurrently members of the EWRE Legislation Committee learnt at hearings for the 2004-05 budget estimates for NOHSC that the Government commissioned report on NOHSC, written by the Productivity Commission, was due to be released to Parliament by the Minister at some future time. The appropriation due to NOHSC would in all likelihood be retained within DEWR and used partly for the purposes of integrating NOHSC personnel into the department. The committee has no further information and urges the Government to release the Productivity Commission report into the organisation. The committee notes the paucity of information from the Government in regard to the disbanding of NOHSC.

6.41 The National Occupational Health and Safety Commission was established in 1983 and became a statutory body in 1985. In his second reading speech on the National Occupational Health and Safety Commission Bill 1985, Minister Ralph Willis MP, described the bill as a product of sustained dialogue with the states and territories, employers and unions. The Minister said that the (Hawke) Government welcomed the support of the opposition and 'trusts that it will continue'.[42] One of the important roles of NOHSC was to declare national standards and codes of practice. These would be advisory in character, made only after full consultation and be

42 Hon. Ralph Willis MP, *Hansard* (Reps), 23 April 1985, p.1658

advisory in character, with the application of these standards to be the responsibility of state and territory governments.

6.42 The committee may observe that this appeared to be a tentative start, for the bill recognised the political realities of the day. Thus it was a far more astute piece of legislation than is the BCII Bill currently before the committee. The NOHSC Act was landmark legislation for its time, and it is almost certainly the case that if funding had been maintained after 1996, progress on codes of practice would have been faster. As the CEPU pointed out:

> We agree that the lack of national uniform standards in the industry has been a problem for some time. However, it is the current Commonwealth Government that has done its best to inhibit standardisation of OH&S in all industry sectors. It has done this by halving the overall budget of the National Occupational Health and Safety Commission, the body responsible for the development of national standards.[43]

6.43 The CEPU makes the point that the Government's antipathy to NOHSC comes in evidence from the CEPU, which submitted that the Government disapproved of NOHSC's activities from the beginning of the Coalition's accession to government:

> In 1997 the Minister, through the Ministerial Council, basically stopped the development of further national standards. At the time NOHSC had almost completed standards on demolition and falls from heights in the industry (falls contribute to 30% of all deaths in the industry). Despite continued calls from the ACTU and construction unions to allow these draft standards to be finalised, the Minister and his Department fail to respond. The embargo on new standards for the industry was cynically lifted half way through the Cole Royal Commission.[44]

6.44 The NOHSC chief executive appeared before the committee to explain the scope and process of work on the five national priorities for occupational health and safety. Building and construction is one of the five priority areas. The codes of practice extend across industries, as for instance in codes for manual handling, plant and noise, and exposure to dangerous substances: activities common to all industries. Additional codes relevant to the building and construction industry were to be declared by the end of 2004. The next stage would be implementation by the states.[45]

6.45 The committee acknowledges that the federal and collaborative mode of operation for NOHSC inevitably meant that progress was slow. But it was also sure, and its participants, including all the states and territories, were contented with its processes and rate of progress. As noted elsewhere in this chapter, industry culture change comes slowly and cannot be forced. Incremental change, which follows negotiations which all stakeholders eventually accept, is more likely to result in long-

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43 Submission No.27, CEPU, para.10.4.1

44 ibid., para.10.4.2

45 Mr Robin Stewart-Crompton, *Hansard*, Canberra, 11 December 2003, p.45

term objectives being met. The committee majority is conscious of the irony of its having to point out these matters to those members of the committee and the Senate who regard themselves as conservatives.

6.46 The committee acknowledges that NOHSC had its critics, particularly those who saw its performance as slow and cumbersome, but that is the federal system in action. The comment on NOHSC from the national secretary of the Australian Workers Union (AWU) is candid and accurate:

> We think the National Occupational Health and Safety Commission is not automatically the last word in health and safety in Australia unfortunately. But one thing which is inherent in its structure which we think is worth hanging on to is the role of government, employers and unions together working through issues. We understand that even some of the employer representatives on the National Occupational Health and Safety Commission are deeply unhappy at the proposed changes which were mooted by the federal government. We see that the changes and the linking to insurance will only mean that insurance predominates over health and safety in terms of the debates of health and workplace safety.[46]

6.47 Consultation and negotiation are processes which all industry stakeholders now expect in relation to occupational health and safety. As the Master Builders Association submitted:

> The convening of a national OH&S conference under the banner of NOHSC may result in greater cooperation and understanding of how each jurisdiction is responding to the many challenges found in improving the health and safety performance of the industry. While it also seems quite reasonable to link the conference outcomes to NOHSC and the Cole Royal Commission's OH&S recommendations, it will be important to formulate a broader and more sustainable agenda that enables all of the industry's stakeholders to be given a role. Another continuing difficulty will be the relationship between health and safety practitioners (who are rarely responsible for management decisions) and managers. A 'talk fest' that fails to engage the decision makers of the industry will result in less than optimum outcomes. Evaluation of interventions introduced by different jurisdictions and evaluation of the conference outcomes themselves are fully supported.[47]

6.48 There is evidence of some suspicion about the relationship between NOHSC and the Federal Safety Commissioner. The Australian Chamber of Commerce and Industry (ACCI) points out that the bill makes no reference to the interaction of the role of the Federal Safety Commissioner with the current role of NOHSC, also a statutory body. ACCI is concerned that long-term safety strategies worked out by NOHSC should be safeguarded in the bill:

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46 Mr Bill Shorten*, Hansard*, Melbourne, 21 May 2004, p.61

47 Submission No.12a, MBA para.8.2

> The implementation by NOHSC of the ten year NOHSC National Strategy, adopted by all Australian governments and the two peak employer and employee associations (ACCI and the ACTU) in May 2002 identifies the construction sector as a priority industry. There are also other OHS agencies (in States, and federally – Seacare and Comcare). The Improvement Bill should include an additional function in para (i) as follows: 'working co-operatively with the National Occupational Health and Safety Commission or other statutory health and safety agencies whose function includes the promotion of health and safety in relation to building work". [48]

6.49 The states and territories have submitted that they are committed to nationally consistent occupational health and safety standards through NOHSC. Uniform standards had been a goal of Australian governments since the creation of NOHSC. Outcomes achieved so far included:

- the minimisation of duplication by government agencies in the regulation development process, leading to the more efficient use of resources by government;
- a reduction in administrative and compliance costs for employers who work in more than one jurisdiction;
- the facilitation of consistent OHS regulations being adopted by jurisdictions which contribute to an equitable operating environment for industry; and
- a reduction of barriers to a free national market in goods and services and labour mobility.[49]

6.50 The states and territories, presumably unaware of the Government's intentions in regard to NOHSC, pointed to the irony, in the wider climate of a drive towards national uniformity in occupational health and safety, the proposed establishment of an additional agency covering health and safety and of a proposal for a different framework.[50] It was a matter raised also in a submission from the CEPU, which expressed some bewilderment about the proposal:

> It seems to us that the powers to be invested in the new Safety Commission are already vested in NOHSC. NOHSC currently does not seek to enforce standards and codes as there is a clear demarcation between the Federal and State and Territory bodies. Day to day enforcement is the function of the State bodies. In fact NOHSC's power to declare standards and codes has until recently (in fact during the Cole Royal Commission) been stymied by this Government. Why give this power to another body when the mechanism is already in place to implement the Government's strategy?

48 Submission No.14, ACCI, p.27

49 Submission No.26, op. cit., p.18

50 ibid., p.54

> We believe the main reason that NOHSC is being overlooked in this process with another body being given those powers is that NOHSC is a tripartite body also comprising representatives of each of the State and Territory governments.[51]

6.51 As noted previously, ACCI has been a strong supporter of NOHSC for the reason that its structure allowed industry organisations to influence the policies and the details of occupational health and safety codes. ACCI is also committed to joint responsibility in achieving safe work outcomes. It submitted that while the main provisions in the BCII Bill should be supported, so should the continued contribution of NOHSC:

> Whilst the structures proposed to be established by this Bill are crucial, the work of NOHSC (and the good work that can be achieved through its tri-partite processes) should not be ignored. The co-operation between employers and unions at a peak level through NOHSC can set a positive example, despite the difficulties of that process. The value of NOHSC is also that State governments can also be directly involved in the development of nationally consistent regulation, codes, guidance material or 'on the ground' OHS initiatives. Given that OHS remains primarily a matter of State regulation, this involvement by NOHSC and the States is an aspect that helps broaden the reform framework relating to OHS matters.[52]

6.52 Finally, ACTU policy is that national occupational health and safety issues related to the construction industry should be pursued through the tripartite NOHSC. Its submission pointed out that the construction industry is a priority industry under the National OHS Strategy 2002-2012, which was endorsed in May 2002 by Commonwealth, state and territory governments, as well as the ACTU and ACCI.[53]

6.53 The committee majority is forced to the conclusion that the Government's disbanding of NOHSC has no support from building industry stakeholders, and that its decision is based on ideological grounds which it is unwilling to explain. The Government received no obvious encouragement from Commissioner Cole's recommendations to abolish NOHSC. To the contrary, Commissioner Cole recommended particular tasks be allotted to NOHSC, for instance, in relation to safe design performance.[54]

6.54 The Government commissioned a report into NOHSC by the Productivity Commission in March 2003 which has yet to be released. This was obviously intended as an artifice to provide an underpinning rationale for disbanding NOHSC. The committee speculates as to whether the delay in the release of the report is due to the

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51 Submission No.27, CEPU, paras.10.2.3 - 102.4

52 Submission No.14, ACCI, para.106

53 Submission No.17, ACTU, para.241

54 *Final Report of the Royal Commission into the Building and Construction Industry*, volume 1, p.46

Productivity Commission being inconveniently positive about the role and the work of NOHSC. The Government would have been on safer ground in following a recent precedent and setting up a royal commission into the organisation.

6.55 The committee is concerned that the demise of NOHSC will leave a policy vacuum in this vital area. The work it was undertaking in regard to the building industry was highly important. As the work toward national codes must continue, the committee majority believes that state-based tripartite organisational structures best fit the first-step requirement for establishing nationally agreed codes.

Recommendation 6

The committee majority recommends that in view of the impending abolition of the National Occupational Health and Safety Commission, state construction industry councils, whose establishment is recommended in this report, be asked to give priority to continuing the development of national safety codes for the construction industry.

Allegations of misuse of occupational safety issues for industrial purposes

6.56 The Cole royal commission found that misuse of what it termed 'non-existent occupational health and safety issues for industrial purposes' was rife in the building and construction industry.[55] As the Minister told the House of Representatives in his second reading speech on the bill, Commissioner Cole claimed that such action 'cheapened' legitimate occupational health and safety concerns within the industry.[56]

6.57 In response to this, the bill provides that industrial action to address concerns over occupational health and safety can only be undertaken by way of a complex dispute resolution process. If this process is adhered to, employees will be entitled to continued pay.[57]A feature of the process involves the reversal of the onus of proof, one which the Cole royal commission recommended as necessary if this abuse was to be tackled seriously. Commissioner Cole argued that individual workers will know when occupational health and safety issues are, or are not, justified.[58]

6.58 The committee heard evidence from employer organisations which elaborated on claims of abuse of safety claims. The Queensland branch of the Master Builders Association submission stated:

> Major CBD projects still suffer a range of restrictive work practices which have not been resolved in any meaningful way between the parties. Such restrictions include.. a burgeoning level of health and safety claims (eg stoppages due to objects 'falling' from construction sites, excessive and

55 *Final Report*, volume 1, Summary of findings and recommendations, February 2003, p.168

56 Hon. Kevin Andrews, MP, *Hansard* (Reps), 6 November 2003

57 Submission No.21, op. cit., para.98

58 *Final Report* of the Cole Royal Commission, volume 1

> continual audits, refusal to work in safe areas while others are cleaning up, 48 hour stoppages for minor WHS matters which can be easily rectified.. 'Death in Industry Response' - site personnel commonly leave work en mass, if any person dies on another construction site in Queensland (despite a declared Union policy that 'site audits' should occur whilst the workforce to remains on site to resume work. This behaviour will occur on building sites with even the most stringent of safety management processes in place, resulting in no apparent health and safety performance improvement.[59]

6.59 The committee majority notes that even on this issue, the drafting of the relevant clauses has been criticised by employer bodies. The Master Builders Association, for instance, claims that parts of clause 47 may provoke disputes with employees:

> We fully support the provisions of Clause 47 except that we believe the terms of Clause 47(7) will induce a great deal of disputation. The subclause stipulates that a relevant dispute resolution procedure is 'to be disregarded to the extent that the non-compliance was due to circumstances outside the employee's control.' Under occupational health and safety laws, most of the obligations of control of premises, machinery and the general conditions of work vest in the employer. We believe therefore that the provision goes too far and will enable employees to avoid the principal provision as, legally, most OH&S standards are not formally within their control. We recommend that subclause 47(7) be deleted.[60]

6.60 The Australian Chamber of Commerce and Industry (ACCI) had a similar view:

> Clause 47(7) is an exception to the principle that an employee is not entitled to payment once an OHS dispute is referred to the regulatory authority. It reflects an understandable qualification to that principle, but is too vaguely and too broadly drafted and could re-open loopholes for industrial disputes to find their way back into the industry under the guise of OHS disputes. It should be redrafted and narrowed.[61]

6.61 ACCI referred to its earlier submissions on these recommendations and emphasised how important it is for a sensible approach to be taken in the exercise of these powers, given that occupational health and safety issues are the shared responsibility of multiple parties on building sites, and capable of being misused.[62]

6.62 Unions were naturally more forceful in expressing views in opposition to proposed clauses in the bill, and in opposition to views expressed by employer

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59 Submission No.90, QMBA, para.22

60 Submission No.12c, MBA, para.9.2

61 Submission No.14, ACCI, para.97

62 ibid., p.29

organisations. In response to the QMBA's view, quoted above, the secretary of the Queensland branch of the CFMEU submitted:

> I reject the QMBA's allegation that the Union uses bogus safety disputes in order to pursue industrial aims. The QMBA has demonstrated its failure to provide a safe workplace on the basis that they lobbied state government to reduce the safety standards in the housing sector of the industry. Fall protection is only required in the housing sector above 3m, whereas in general industry (all industries) fall protection is required above 2.4m. Regrettably, poor health and safety standards are an all too common problem in the Queensland construction industry and quality safety plans are often sacrificed in cost cutting initiatives by contractors to win work. In a competitive market there is no doubt that to take a chance on a project and omit health and safety provisions can save substantial cost. For example, where a contractor takes a chance to dig a deep trench and omit the shoring, considerable savings can be made providing the trench does not collapse on an unfortunate worker. Further, the courts have been reluctant to hand out substantial fines in this area and certainly not sufficient inducement to modify contractor behaviour. The CFMEUQ submits that those who carry out the supervision of building sites should be held personally responsible, no different from a truck driver. [63]

6.63 The committee majority could quote much more from submissions on this subject, but has selected one issue which encapsulates the dilemma which union leaders may find themselves in dealing with unreasonable contractors and builders on dangerous work sites. The issues are sometimes matters of life and death, and at the nub of the problem is how far unions should go in protecting their members, if in doing so they may break the law, if the BCII Bill becomes the law.

The Melbourne City Link Project – a case study of an OH&S dispute

6.64 Commissioner Cole had been critical of unions in regard to occupational health and safety issues, a comment that aroused some antagonism in view of the commitment the unions have had to improving safety standards. The Cole royal commission focussed on the City Link Project in Melbourne as an instance of what it saw as the misuse of occupational health and safety for industrial purposes by unions and their OH&S representatives. Commissioner Cole specifically mentioned the CEPU OH&S representative as overstepping the mark in this regard. The committee majority considers that it is worthwhile to record the circumstances in which the union was accused of acting beyond its responsibilities. The CEPU submission, made by the national secretary, describes these circumstances as follows:

> Working in the City Link Project and in particular the tunnels, presented some unique and difficult occupational health and safety problems. In my view the City Link Project had the worst working conditions I have ever seen in Victoria. This was exacerbated by the reluctance on the part of the head contractor, Transfield Constructions Victoria, to promptly attend to

63 Submission No.84, CFMEUQ, paras.99-114

> and deal with OH&S problems. It is understandable in these circumstances that our OH&S representative may have been a bit edgy at times about the safety of the working conditions in the tunnels especially with respect to the tagging of temporary switchboards. It is my experience that members who are union activists taking on the role of shop steward or occupation health and safety representative, are often labelled troublemakers. In the building and construction industry, the result for such members can be difficulty in gaining future employment. They may even be discriminated against for ongoing employment opportunities. This is very difficult to prove. As a case in point, our ABB OH&S representative on the City Link Project was the only employee who did not go onto the next project with ABB.[64]

6.65 The CEPU submission states that occupational health and safety was a problem from the start. The evidence from the ABB (sub-contractors) project manager states that the site had not reached the stage where electrical work could be safely undertaken. Major excavation work was still in progress. Dust and poor drainage and poor lighting were problems, and for employees whose experience was on building sites rather than in mines, the working conditions were both dangerous and alarming. A comparison was made between work on the City Link and work done 20 years previously on the underground city railway loop. As the union reports:

> It is not the case that the appalling conditions under which they were working are typical of work in a tunnel. Some of the employees had worked on the underground rail loop built about 20 years before in Melbourne. According to Chris Meagher, a CEPU shop steward on the City Link Project who had also worked on the rail loop tunnel, the conditions of work in the rail loop were apparently quite good. The lighting was good. If there were water leaks they were rectified. Employees were not subject to fumes or dust. They were provided with above ground crib facilities to take breaks away from the environment of the tunnel. …Employees were treated with decency and provided with acceptable working conditions from the start. In contrast, on the City Link Project it took some two months of constant complaint to convince Transfield to provide above ground crib facilities, an evacuation system and a communication system.[65]

6.66 The point to be made by the committee majority regarding this evidence is that progress in establishing safe and civilised working conditions is not achieved at a uniform rate. Nor can progress be regarded as permanent. The City Link project was a serious regression in regard to conditions of work. The blame must lie with Transfield, the principal contractor, which, from the evidence, appear to have grossly mismanaged the labour force on the project. On two occasions, Transfield were prosecuted and fined for two separate OH&S breaches, resulting in one worker being killed and another seriously injured.

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64 Submission No.119, CEPU Electrical Division Victoria, pp.1-2, paras.5-6

65 ibid., p.3, para.14

6.67 Poor management practice usually has an adverse effect on occupational health and safety performance, although this is not always recognised by royal commissions. The City Link example shows how a large contractor will place safety considerations in last place when weighing the costs of undertaking building projects. The following submission from the CFMEU, although from the New South Wales branch, might well have had the Transfield experience in mind, when this extract was drafted: in drafting this extract:

> Poor programming practices are a contributing factor to unsafe working environments. Unrealistic scheduling and interfacing trades operate as a major barrier to improved safety practices. Financial incentives and bonuses which encourage projects to finish ahead of schedule results in compromise when it comes to safety. Pressure to finish projects also means workers are required to put in an excessive number of hours which further exacerbates the risk of accident and injury. Poor design is identified by the overseas research as a key contributing factor in a high percentage of construction industry incidents.[66]

6.68 The CEPU submission gives a detailed description of Transfield's neglect of occupational health and safety matters, all of which were verified by subcontractors as justified. Transfield were in some instance not able to rectify even obvious hazards within a week. The CEPU sums up the situation thus:

> With respect to the City Link Project, quite clearly Transfield's failure to act reasonable and promptly to OH&S problems forced the OH&S representative do to things that in other circumstances he would not have needed to do. Once such action is put into the perspective of an employer's failure to promptly attend to legitimate and serious OH&S problems and breaches, the picture is quite different. But Cole fails to link the repeated failure on the part of the employer to act to the actions of the OH&S representative. Even the subcontracting employers, ABB, agree that Transfield's failure to attend promptly to unique and legitimate OH&S problems was a huge problem. Yet somehow the union's OH&S representative comes out second best in this blatant negligence on the part of the employer.[67]

6.69 The committee majority refers to Commissioner Cole's attitude to unions in chapter 2, dealing with the conduct of the royal commission. In referring specifically to the City Link project, the committee wishes to make the point that criticism of unions for exceeding their responsibilities has to be set against the extreme provocation that prompts this action. In many cases these are matters of life and death. As has already been emphasised, intolerable working conditions are not matters for the history books. They can recur at any time, even in the middle of a city which has notoriety, in some quarters, for industrial militancy. The committee majority also makes the point that allegations of unions using occupational health and safety issues

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66 Submission No.55, CFMEU (NSW), p.26, paras.96(ii)-96(iii)

67 Submission No.119, CEPU Electrical Division Victoria, pp.12-13, paras.33-34

as an industrial relations tactic should be viewed in the context of project management and the environment of the workplace. It is inconceivable that unions would risk the health and safety of their members. Therefore, the committee majority argues that there may be circumstances in which no limits can be placed on the obligation of unions to enforce proper and safe working conditions.

Prohibition on 'unlawful industrial action'

6.70 In Part 2 of the BCII Bill (Clauses 46-48) there are provisions aimed at limiting the scope for employees to use occupational health and safety considerations for their failure to attend their place of employment or to take industrial action.

6.71 Clause 47 prohibits employees from accepting any payment for non-attendance at work on the pretext of an occupational health and safety issue. It also prohibits employers from paying them. These offences incur severe penalties of up to $22 000 for an individual, and $110 000 for a body corporate. This offence refers to any payment in relation to a pre-referral non-entitlement period; that is, before the matter has been referred to a Commonwealth or state authority when an employee has refused to work. An offence would not be committed where a prohibition notice had been issued under OH&S laws of a state or the Commonwealth, and where the employer had complied with relevant dispute resolution procedures.

6.72 The committee notes that the provisions of this bill in relation to OH&S are far more onerous than parallel provisions in the Workplace Relations Act. Section 24 of the WRA provides that the AIRC has the power to deal with a claim for the making of a payment if an employee undertakes action 'based on a reasonable concern about an imminent risk to his or her health and safety'. The CFMEU points out in its submission that states also have provisions for payment. For instance, subsection 26 (6) of the Victorian Occupational Health and Safety Act provides for payment if an inspector determines 'there was reasonable cause for employees to be concerned about their health and safety'. This is in addition to payments for 'any period pending the resolution of the issue' where a prohibition notice is issued.[68] The committee will be interested to see the outcome of litigation on this matter, should cases be brought to court.

6.73 The committee majority notes that employees would bear the burden of proving that their action was based on a reasonable concern for health and safety. This is in line with the recommendation of Commissioner Cole that in such cases it was appropriate to reverse the onus of proof. It also notes that there is a new definition of OH&S related industrial action that is known as 'building OH&S action', and that payments for periods of building OH&S action can only be claimed and made in extremely limited circumstances. It cannot be claimed, for instance, for action which occurs before a matter is referred to a relevant OH&S authority. Nor can it be claimed after the matter has been referred, except where the prohibition notice has been issued

68 Submission No.17, ACTU, p.11, paras.59-60

by the authority. That leaves a great deal of work time in which accidents, injuries and sickness may occur.

6.74 The committee majority accepts the ACTU's comment:

> Sections 46 and 47 of the Bill provide that an employee of a corporation or of the Commonwealth, or an employee at a Territory or Commonwealth place would not be entitled to be paid for non-attendance or non-performance of "any work at all" where "the failure or refusal is based on a reasonable concern by the employee about an imminent risk to his or her health and safety arising from conditions at the workplace" .... This provision is inconsistent with the common law and statute law. Employees have a common law right to refuse to comply with an instruction from an employer which exposes the employee to unreasonable danger of injury or disease.[69]

6.75 The committee majority also comments on the complexity of the legal procedures that are involved in attempting to deal with what the Government regards as a serious problem. This provision presumably exists in order to intimidate employees with the huge penalties involved, and provide some legal redress for employers who are able to demonstrate to the courts that they are victims of the misuse of OH&S claims. The committee majority believes that there is unlikely to be much recourse to this law, if only because it applies to corporations that come within the scope of Commonwealth law. Nor is it possible to anticipate the reaction of state OH&S authorities to claims by employees for prohibition notices. Nor does the bill define what 'relevant dispute resolution procedures' are, indicating that the Government is leaving a great deal to chance in the way in which these clauses may be interpreted by a court. The committee majority regards such law-making as speculative. It is as though the Government is saying, 'We will throw this into the bill to see what happens'.

OH&S whistleblowers

6.76 A related matter which has been drawn to the attention of the committee is the potential threat of intimidation faced by union occupational health and safety officers and union members of OH&S worksite committees. The CEPU has submitted that OH&S representatives perform an essential 'whistleblower' role in exposing deficiencies in safety on site and attempting to rectify those deficiencies before injury or death occurs:

> The OH&S representatives are often placed under substantial duress from his/her employer if the representative pursues the rectification of safety deficiencies by stopping work in that area or on that site to protect the safety of employees on that site. In an industry where substantial penalties can apply to employers for lateness in completing buildings or meeting contracts the pressure on OH&S representatives to overlook safety issues

69 ibid., p.11, paras.55-57

> can be immense. It is interesting to note that the bill does not appear to provide the same protection against discrimination to OH&S representatives as the bill provides union delegates. For example, the main protection against victimisation of union delegates or members is set out in Chapter 7 and in particular s154, s155 and s156 of the bill.[70]

6.77 The committee is very concerned about the possible 'blacklisting' of delegates and OH&S representatives. It is well-known that this practice would be unlawful, but it takes little imagination to reflect on the likelihood that effective OH&S delegates would become unpopular on sites managed by marginal contractors, or even by the very largest companies. The Transfield City Link project is an instance of this. As the CEPU points out, the practice may be unlawful, but:

> it is very effective in dissuading building workers from taking on the role of delegate or OHS delegate for fear of jeopardising their employment prospects. The union has been forced to respond to this situation and protect the 'whistleblowers' by 'placing' delegates and OHS representatives on sites where they can to ensure that the delegate/OHS representatives can continue to find work within the industry.

6.78 The submission draws attention to the comments of Commissioner Cole, who was critical of the unions for 'placing' OH&S delegates and interpreted the 'placements' as an attempt to further the interests of the union on that site and, no doubt, to orchestrate OH&S assisted industrial action. The CEPU response is that:

> The Royal Commission was incorrect in the conclusions it drew from the phenomenon. The delegates are 'placed' on site to protect them from not being able to find work in the industry. The Royal Commission should have focused more on how to eradicate the blacklisting of delegates/OHS representatives rather than misinterpret the causes or objective of the 'placings'. In a sense the whistleblowers on site (the delegates/OHS representatives) are the most vulnerable to victimisation as they are the ones who 'stick their hand up' and receive most attention from the employer.[71]

6.79 The committee majority regard these occupational health and safety measures to be a gross over-reaction to misinterpreted situations and to complaints of a very small proportion of employers who pay lip-service only to OH&S principles. The one grain of comfort for employees is that litigation will be problematic in view of gaps between Commonwealth and state legislation, and the cumbersome legal processes that will be involved.

Conclusion

6.80 Finally, the committee has heard a great deal during the course of this inquiry about industry costs. There is general agreement that the industry is driven by

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70 Submission No.27, CEPU, p.54, paras.13.1.4 - 13.1.5

71 ibid., paras.13.1.10-13.1.14

considerations of cost. What the committee has not heard much about is the extent to which industry costs are borne by the taxpayer in situations where the occupational health and safety systems and practices break down. Poor safety practices and underinsurance on workers compensation mean the potential and often the actuality of more accidents, and people not being appropriately covered by workers compensation. More accidents mean more of a demand on the health system and a higher cost to taxpayers who fund that system. Employees insufficiently covered by workers compensation are shunted onto the welfare system where the costs are covered by the taxpayer. Those contractors and builders who engage in nefarious activities, usually those on the wide fringes of the industry, shift the costs from themselves onto others. Deficiencies in public policy, which the proposed legislation fails to address, allow this state of affairs to continue.