Government Senators' Report

This minority report is a brief rejoinder to the report of majority Opposition senators who have, at inordinate length, rejected the findings and recommendations of the Cole royal commission because they do not accept the veracity of the evidence presented. The Senate is left with the message that only a return to the past will address the problems of the industry, and Government senators believe that the limited proposals made in the majority report are either irrelevant to the problems facing the industry or would set it back ten years.

The Government's determination to confront the issue of union lawlessness in the construction industry has provoked mild fury in the labor movement. This is a tender nerve because of strains and pressures it exerts on affiliation ties. Labor senators have devoted much energy to affirming and reinforcing ties with the CFMEU, CEPU and other unions affected by this legislation. The tactics of intimidation in this industry which are impossible to paper over are not stories that the Labor Party likes to hear about. Inevitably they would rather not know or be seen not to know about these things, and the there is no alternative to assuming an attitude of denial.

In using the argument that Commissioner Cole ignored the pressing needs of the industry in order to chase demons like the CFMEU, the Opposition report attempts to minimise the serious problem of union intimidation in many areas of the construction industry and the destructive affects of this lawlessness. Likewise, to regard the Cole royal commission as a 'lost opportunity' shows a particularly blinkered attitude. Even if the issue of industrial relations was a less significant problem in the industry than occupational health and safety, or issues of compliance with current laws, the culture of industrial thuggery would deserve a royal commission of its own. Nor was the Government or the royal commission obsessed with need to weaken unions. The terms of reference were wide enough to enable Commissioner Cole to make recommendations for reform across the spectrum of industry concerns. The royal commission report is a blueprint for wider reform that will extend beyond the scope of the bill which is currently before the Senate.

Government party senators have comments to make in relation to nearly all of the issues dealt with in the majority report. It is first necessary to comment on some broad policy matters which go to the heart of differences between the Opposition and the Government in regard to workplace relations matters.

Challenging Labor conservatism

Workplace relations divides the radicals from the conservatives. The Building and Construction Industry Improvement Bill 2003 is, as the majority report described, consistent with the policy approach taken by the Government since the landmark *Workplace Relations Act 1996* which few could deny has been a positive redirection of industrial relations and productivity in this country. Its radicalism stems from its ambitious policy of undermining a culture of industrial relations dependent on

centralised wage fixation and elaborate legal apparatus to maintain and balance wages, productivity and workplace harmony. Unions and employers were once both supporters of this system, the demise of which was heralded by globalisation and the changing structure of the Australian economy. Since 1996 the Government has been working toward a shift to a deregulated labour market based on enterprise bargaining at the workplace. In an Australian context this is a radical step, and explains why progress has been slow. Despite its origins in Keating government legislation, the move away from centralised wage fixing has been strenuously resisted by trade unions because it threatens industry-wide pattern bargaining. Indeed in 1990, the then Minister, Senator Peter Cook said of the need for building industry reform: "Friends, this industry is going to bite the bullet at last. If this country wants to be efficient and productive, everybody has to undergo the reform process – and most certainly an industry which has such pressing and demonstrable need for it."

This battle has been won, but rearguard actions in isolated ideological pockets are still fought out in the Senate. This inquiry into the BCII Bill and associated issues is only the latest skirmish. The provisions in the BCII Bill are indeed, as pointed out in the majority report, similar to those in previous legislation rejected by the Senate. Even if this bill fails to pass the Senate it will not be the last time a ban on pattern bargaining is presented for the Senate's approval.

A careful reading of the majority report reveals what a conservative document it is. Opposition senators are more comfortable living with the certainties of the past then embracing changes to secure the future needs of the construction industry. Thus, there is no solution offered in the Opposition report for the chronic problems faced by builders and contractors in dealing with trade union extortion and intimidation. It would be extremely difficult for the Opposition to agree on how this could be done. Therefore it is better to say that the problem does not exist. Nor are there solutions offered in relation to convincing unions to bring their unruly shop stewards and organisers into line. This is an internal union matter, is no doubt unresolvable, but which in any case the affiliated party would not be would be given no leave to pursue. In this respect the party is captive to a conservative labor tradition unchallenged in over a century and this was evident in the method and approach of the Committee in its pursuit of the terms of reference and the calling of witnesses. It is by tradition, by temperament and by its own constitution incapable of making policies or undertaking actions to secure peace and security on the construction sites of the nation. In short, each individual affiliated opposition senator disclosed a soft predisposition to be hostage to the militant ideologies and approach of the very powerful building and construction unions.

The single relevant recommendation that is made in the Opposition report relates to a proposal to establish construction industry advisory boards in all states and at the Commonwealth level. This is an exercise in nostalgia. What is proposed is the reconstruction of tripartite edifices which enable ministerial appointees to travel across the country at public expense for meetings and discussions about policies which would be very slow to evolve, take even longer to be implemented, and would

be of limited usefulness when they were. The committee heard authoritative evidence from the housing Industry Association on this point:

> I have been working in the construction industry for 10 years and I have been through a large number of iterations of the modern tripartite consultative structures. They have changed nothing. You have to ask yourself why they would. What possible incentive would anybody have for giving up an existing position of power in the industry for the sake of abstract ideals such as a more efficient building industry for the sake of Australia as a whole? To our way of thinking the problems in the industry are not going to be solved by negotiations—and why should they be?[1]

Government senators see the prosperity of the construction industry, and its improved productivity, resting on the initiative of individual developers, builders and contractors, in partnership with skilled, productive and well-paid tradespeople throughout the industry. All that is asked of government is the maintenance of the rule of law in matters of workplace relations, occupational health and safety, and in ensuring effective compliance with state and Commonwealth laws. Apart from this the industry can run its own affairs and institute its own practices and innovations in line with client demand and technological change. There are research and innovation organisations currently established to provide industry with the ideas it needs, all of them supported by the construction industry. There is no call for more advisory committees at any level of government. Government party senators do not anticipate that the Government will react positively to this recommendation for these reasons.

The Cole Royal Commission

Throughout the Opposition senator's report runs a continuing line of criticism of the Cole Royal Commission. There is an inference that Commissioner Cole was unsuited to the task he was given, and that his attitude was biased. It is not hard to understand why Commissioner Cole's conduct of proceedings would have incensed the trade union movement. For the first time the nefarious activities of some unions and unionists were subject to close scrutiny and public exposure.

Government senators do not wish to engage in commentary on the procedural details of the royal commission and whether or not the practice notes were fairly made by Counsel Assisting. They rely on the judgement of Branson J in the Federal Court that Commissioner Cole did not contravene any provisions of the Royal Commissions Act. What is most interesting is the irony of the CFMEU protesting about violations of the human rights of its members and the fact that they had been 'defamed' by the royal commission: their names besmirched through being listed on the internet as one of a number of people whose behaviour was under question. This will be small recompense for hardship visited on victims of union intimidation. Whether Commissioner Cole could be said to have delivered some rough justice to some unionists is one question. There is no question that for some it would have been the

1 Mr Glen Simpson, *Hansard*, Brisbane, 24 February 2004, p.2

first justice ever meted out to them and that as such they are entirely unaccustomed to such events.

This report balances the evidence that the committee received on the Cole royal commission. It received considerable support from industry organisations from the time it was appointed. There is a danger that the Cole royal commission will be regarded as unfavourabe simply on the basis of the notoriety which has been foisted upon it by some journalists and trade unionists. Its conclusions may have broken new ground in the detail of the evidence it received about lawlessness in the industry, but as those with long memories noted, Commissioner Cole's conclusions were not new:

> This royal commission is not the first inquiry or commission into the building and construction industry. There have been numerous inquiries prior to this and at least one royal commission that I am aware of—namely, the Gyles royal commission. There have been a series of other inquiries, either through the Productivity Commission or through other agencies of federal and state governments, which have found very much the same issues that were identified in the Cole royal commission. From our point of view, our support for the need for serious reform—including in this case an industry specific bill—is not based purely on the Cole royal commission; it is based on a history of this sort of behaviour that has been documented independently by other royal commissions and other inquiries...This is just another inquiry or finding that has shown that the problems within the industry are entrenched, run deep. There is no indication shown that those behaviours are being modified to reflect the modern economy and the modern society that we live in. The other thing is that, with the establishment of the interim task force, those findings are still there in terms of the sort of behaviour that the Cole royal commission has identified.[2]

This view is supported by the Australian Chamber of Commerce and Industry which has a close knowledge of industry problems shared between its members. The Master Builders Association and ACCI have an overlapping membership and jointly represent a high proportion of middle order construction firms and contractors who are most vulnerable to overbearing demands of shop stewards and local CFMEU organisers. ACCI made the point that the evidence spoke for itself :

> We are saying that the general findings of the royal commission are obviously based on the conclusions that it reached, and they accord with the general views that have been expressed by industry about some of the difficulties and problems in the industry. We also say in our submission that it is important not to have this reflect on the entire industry. The problems that are identified by the royal commission do not mean that every participant in the industry is to be characterised in that way. But the royal commission has said that these problems are serious and, as a result, the industry needs both structural and cultural change, and we will support that[3]

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2 Mr Wilhelm Harnisch, *Hansard*, Canberra 11 December, pp.60-61

3 Mr Peter Anderson, *Hansard*, Canberra 11 December, pp.5-6

The submission from the Australian Industry Group (Ai Group) may be regarded as particularly authoritative. It takes a constructively critical view of Government policy in all the submissions it makes to this committee but has been no less supportive than other industry bodies of the thrust of current Government policy in regard to strengthening the Workplace Relations Act. The Ai Group is in no doubt of the need for the reform of the construction sector, and speaks in the main for the 'big end' of the construction industry. As its Melbourne based industrial relations manager told the committee:

> We had a report on the royal commission hearings every day, and I think there were something like 400 witnesses. You could not fail to get the message that people, particularly small contractors and suppliers working on major construction projects, felt intimidated and coerced. That was a theme that came through day after day of the royal commission hearings. At its very worst, there may well have been issues of violence and intimidation. I think the more important theme is that people cannot go about their business on a day-to-day basis without intimidation. The fact is that they do not actually feel there are any remedies for them to carry on their business, other than to fit in with the prevailing power structure. That, to me, was a theme that recurred through all the various evidence that was given by the parties who appeared before the commission. I do not want to overstate the issue of violence and intimidation, but there is certainly an issue about power and people's capacity to—or ability to feel that they can—actually run their business without complying with a particular regime that might apply to a particular project.[4]

The Ai Group has reported its support for the key elements of the recommendations of the royal commission, including the establishment of an Australian Building and Construction Commission under industry specific legislation, and the 'new paradigm' for occupational health and safety.[5] The attention paid by the royal commission to matters of lawlessness referred to above require more specific attention.

Lawlessness

The treatment by the Opposition of the issue of lawlessness divides this problem into two distinct parts. The first element of lawlessness, that investigated by the royal commission and generally understood to refer to thuggery and intimidation by union officials, is dismissed as a furphy by the Opposition. They will go as far as to admit that that the industry has its fair share of 'robust' characters noted for coarse language. The second element of lawlessness: the evasion of tax; the disregard of state building regulations, including occupational health and safety rules; and avoidance of payment of workers entitlements, is regarded by the Opposition as representing the true extent of lawlessness, and of having far more serious implications for the industry.

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4 Mr James Barrett, *Hansard*, Canberra 11 December 2003, p.28

5 Australian Industry Group, *Ai Group's position on the final report of the Royal Commission into the Building and Construction Industry,* July 2003, pp.8-9

Government party senators make the point here that the first element of lawlessness has never been investigated, particularly by affiliated Labor State Governments, and that notwithstanding compliance problems in other areas of the law, this element is the most noxious and the most intractable. It ensures that the industry workplaces maintain pariah status in the public imagination, where sensible people will not choose to work. The Opposition senators lament the decline of apprenticeships, for instance, yet are unwilling to link this with the 'robust' culture of construction sites. Another lament, also from both sides, about the low representation of women in the construction industry, should also give pause to reflect on the truth of Commissioner Cole's observation about the need to change the culture of the industry. This cannot occur without addressing the central problem of respect for the rule of law for which one CFMEU state secretary has considerable difficulty in acknowledging his support.

Opposition senators have made much of the fact that few prosecutions have been launched against union officials implicated in harassment and intimidation incidents. It is well known that this occurs because the victims of this behaviour will not testify for fear of the consequences. Those consequences are likely to be deprivation of the right to work on building sites. By any standard this is a most serious offence against the rights of individuals: the same rights which Opposition senators champion in several chapters of their report. The committee heard many witnesses identify such concerns.

Opposition senators have made much of the fact that when they have asked witnesses if they are aware of any kind of criminality in the industry the answer has always been no. This is a safe answer because most people seldom encounter illegal acts in the workplace. But the crimes which are referred to are not those of the kind that are reported in the press. They are committed without the knowledge of anyone but the victim being aware of them. There is no trail of either blood or paper. There are usually no witnesses. Accusations, if they are made, can be based on hearsay evidence which is always denied. There is no recourse for victims of a few quiet menacing words from the shop steward or organiser who often appears to have more authority that the site manager.

The royal commission has not failed in bringing to public attention the extent of a culture of lawlessness in the industry. It has lifted the lid on iniquitous practices which have been going on for many years, but about which stakeholders in the construction industry have been in denial about. The industry leaders in the large firms have been remote from the problem, and for that reason would deny responsibility to manage it. Site managers further down the ladder have not become interested because it does not affect operations or the supply of subcontractors. The trade unions have been allowed to control the entry gates to the industry at the basement level, and this appears to have suited everyone's convenience. The royal commission was as much an inquiry into the violation of civil liberties and individual rights as anything else, and it has thoroughly addressed that implicit term of reference. .

The Government senators note from the Cole reports, accounts of contractors who evade their responsibility as employers, and who for purposes of cost saving wilfully

ignore regulations. This has most serious implications for occupational health and safety. Government senators see no reason to doubt claims that lax standards of occupational health and safety measures on some building sites are responsible for a high proportion of industrial disputes.

They begin with a reaffirmation that there is thuggery and intimidation in the industry. It simply cannot be denied, even though there may be argument to the extent to which it goes on and how serious it is. At its worst, it is very serious and affects the profitability of building firms. This has repercussions for a large number of manufacturing industries linked to construction. Unlike the opposition report, this report takes the findings of the Building Industry Taskforce seriously. Its report released in May 2004 gives case studies of intimidation and threats of intimidations, which amounts to the same thing. These cases are worth noting.

> **Case Studies: anyone for t-shirts**
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> In the latter part of 2003, a subcontractor was required by a union official to purchase t-shirts, bearing a union logo, at a cost of thousands of dollars per item. The subcontractor provided payment in return for access to the site where he could continue his work. This type of activity is common on sites throughout Australia. in one city, the clothing company awarding these clothing contracts is owned by the wife of a union organiser.
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> In a matter investigated by the Taskforce in February 2004, a subcontractor was charged $1,000 by a union official for each of the seven days he worked on site. The official demanded this payment because the subcontractor did not have a union-endorsed EBA. The subcontractor was issued with receipts that indicated the payment was for t-shirts.
>
> It is hard to fathom what any small subcontractor will now do with $7,000 worth of t-shirts bearing the CFMEU logo of a striking cobra and the words "if provoked, we will strike".

Another case illustrates what amounts to corruption and expropriation of assets.

> **Case study: not bad for a week's work**
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> An examination of a head contractor's fortnightly time and wage records clearly illustrates that the building and construction industry is like no other:
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> A shop steward was paid $2,821 for the first week and $3,156 for the second, purportedly having worked 76 and 83 hours, respectively. Other records show this employee has an arrangement with his employer whereby $,000 per week is salary sacrificed;
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> An OH&S officer was paid $2,911 for the first week and $3,156 for the second, purportedly having worked the same hours as the shop stewards; and
>
> Another OH&S officer was paid $1,867 for the first week and $2,352 for the second, also purportedly having worked the same hours as the shop steward. interestingly, records for this particular worker show that he

> worked 20 hours at double time each week. However, unlike the other two employees, this man received no payment for those 20 hour claimed. The Taskforce has not been able to trace where this money went to due to its lack of powers to follow the money trail. The ATO briefed as a consequence. As previously noted, because the Taskforce is not a statutory law enforcement agency recognised under the Income Tax Assessment Act and the Taxation Administration Act, no feedback can be provided.[6]

The point about these case studies is that they represent a tiny fraction of the irregularities that occur in the industry. So common are such practices that they cease to register in the consciousness of employees (or, incredibly, some employers) as illegal acts. When this state of affairs is reached, a large proportion of the workforce is in danger of being corrupted, and this leads to more serious crime. Government senators believe that only a fundamental root and branch assault on illegality at all levels of the industry will change its culture.

It is also important to note that in this atmosphere of petty corruption, the more serious kinds of illegality identified by Government senators also flourishes. If union officials take a cut then why cannot contractors do so, at the expense of the Australian Taxation Office, or by failing to pay WorkCover premiums? It is impossible to draw a distinction between different kinds of illegality and argue that some acts are more tolerable than others.

Finally, as the Minister pointed out soon after the establishment of the royal commission, and in answer to trade union criticism of the terms of reference, that there are already agencies whose task it is to enforce compliance with Commonwealth laws in their application to the building and construction industry. The committee was also assured in the submission from the states and territories that compliance with state laws and regulations were being more strictly enforced. But as the Minister remarked, there was no procedure for dealing with the kinds of lawlessness that was characteristic of the building industry, and almost entirely confined to that industry. That was why the royal commission was established.

The importance of the Building and Construction Industry Improvement Bill 2003

The thrust of policy reform comes with the strengthening of Commonwealth powers in the regulation of the construction industry. The Australian Building and Construction Industry commission is to be the co-ordinating body to oversee the reform process. It will rely on the co-operation of contractors tendering for Commonwealth building projects. These have substantial value and construction firms will need to comply with Commonwealth regulations known as the Building Code. Government senators are aware that this will not cover the field in the construction industry but it has the capacity to extend the ABCC influence throughout

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6 Interim Building Taskforce, *Upholding the Law: Findings of the Interim Building Taskforce,* March 2004, p.9, 11

the sub-contracting market. In this way a reformist industry culture will filter into pockets of the industry not directly affected. This is the practical meaning of the culture change which Commissioner Cole frequently referred to in his report.

The single biggest impediment to proper law enforcement in the construction industry at present is the necessity for parties injured by union misbehaviour to initiate law enforcement proceedings themselves. In most cases they are either fearful of the repercussions or lack the resources or time to pursue the matter to a point where they may get any substantial redress.

The only way to remedy this fundamental weakness of the industry is to implement a regulatory body which has the power to independently initiate law enforcement proceedings. This was a recommendation of Commissioner Cole and has been commended in a number of submissions. The protection of a large number of participants in the construction industry depends on the existence of an institution which is able to 'stand in the shoes' of contractors and others who are victimised by trade union officials on the building site. Government senators note the extent to which industry peak bodies have expressed confidence in the Government's legislative proposals.

> The model that the royal commissioner has proposed is very much the model we would like to see. We know that the model works because it is essentially the same as the model proposed by the Gyles royal commission and implemented in New South Wales and Western Australia. That model is of an independent task force which is there to enforce the rule of law in the industry, which cannot be intimidated, which cannot be bought off and whose activities cannot be overawed by industrial action, as has typically been the case in the industry in the past, where employers have been unable to exercise their legal rights for fear of the industrial consequences.[7]

The Queensland Master Builders association made very similar comments.

> The industry is in desperate need of an umpire that can re-establish the rule of law and protect the interests of all parties within the industrial relations system. This umpire will require an investigative arm to make sure there are consequences for any party that breaches the law. The umpire must have special powers to intervene and ensure that the rule of law is respected and followed. The umpire must be able to apply strong sanctions for unlawful behaviour. They need to be able to determine for themselves and moderate the unlawful conduct that permeates key sectors of our industry. I will give one brief example of why we need a new system. In October 2002 a CFMEU official allegedly threatened and intimidated two employees prior to their appearance before the Industrial Relations Commission. In November 2003 he was found guilty and fined $500. Thirteen months later

7 Mr Glen Simpson, op. cit., p. 2

> found guilty: the fine was the equivalent of $38 a month. What protection did the current system give to the contractors or the employees involved?[8]

It is clear that employers across the country believe, with good reason, that the AIRC lacks the authority to back them in cases of intimidation. The AIRC has become part of the problem because its arbitration role sits uneasily with an imperative to strike hard at wilful contempt of agreements. Trade unions have become adept at using the AIRC to delay matters and to use the commission's procedures to its own advantage. The AIRC cannot, even with increased powers, do what the Australian Building and Construction Commission has to do. The future effectiveness of the AIRC will depend very much on the success of the ABCC in restoring to the industry an acceptable level of respect for the law and its processes. As the chief executive of the Property Council of Australia expressed:

> Our very firm conclusion in terms of workplace relations issues is that there is a breakdown in the quality of the civic community mores that operate in that sector, and that harms the industry. It is not working as efficiently as it could. For that reason, given that in our mind the existing institutions which govern workplace relations have broken down, we agree that there needs to be a solution. That solution is a more permanent body which is going to ensure that the rules which apply to the rest of the community apply to the construction sector as well.[9]

Government senators expect that there will be groundswell of support from the industry as a whole once these reforms have been implemented. Threats of trade union retaliation or other forms of resistance need to be faced and overcome.

Opposition to the bill from trade unions

Trade union opposition to the BCII Bill was inevitable. It is consistent with their opposition to all amendments to the Workplace Relations Act, which in the course of refining principles of workplace bargaining and simplification of awards, have in the process attempted to reduce the dependency of employees on union-managed negotiation arrangements. This process continues. In the case of the BCII Bill, the policy is pushed further. This is to ensure that genuine agreements take place, and that they take place with minimal scope for industrial action, and when once struck, the agreements will hold without unions making further demands as an 'afterthought'.

The system of conciliation and arbitration is predicated on the notion that parties to industrial disputes will enforce the law against each other and agree to having their disputes solved by a third party. This assumption may be valid in an environment in which the rule of law is generally accepted by all parties, but in an environment where construction unions have a 'whatever it takes' attitude to getting their way, and builders being extremely vulnerable through the contractual exigencies of time and

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8 Mr Graham Cuthbert, *Hansard,* Brisbane, 25 February 2004, p.2

9 Mr Peter Verwer, *Hansard*, Sydney 7 April 2004, pp.97-98

performance, such processes become meaningless. Most of the unlawful conduct which occurs on building sites never gets reported the AIRC, let alone conciliated or arbitrated, because employers and employees are too fearful of challenging unions.

It is for this reason that Government party senators are not impressed by claims made in the Opposition report and by trade unions that dispute levels have fallen in the industry. This is not a uniform trend, and in the construction industry many stoppages are not recorded. As one former AIRC commissioner told the committee:

> One could argue that, under the enterprise bargaining arrangements we have had, probably since the commission's structural efficiency decision of 1989, industrial disputation has diminished. In my view, strikes have diminished but bans and limitations have not diminished. The measurement of bans and limitations is not in the same category as the question of strikes.[10]

The Opposition senators report makes an attempt to portray trade unions as organisations with exercise restraint in their dealings with employers and maintain an image of urbane respectability. Government senators believe that in many cases this is an accurate reflection of modern unionism. But the CFMEU presents many faces, and the committee saw a very different one in Western Australia than it saw in other states. It is clear that at the level of project site management there are unionists who have a vindictive, and even anarchic attitude to their employers. They operate without any accountability for their actions because in many cases they exercise a control over a local workforce (though perhaps only for the life of a project) which is in many ways similar to their disdain for employer rights and responsibilities. Such people are beyond the control of responsible union hierarchies, to whom they are an embarrassment and a source of trouble.

When Commissioner Cole wrote of the ambitions of the CFMEU to control the building industry, Government senators interpreted this to mean that across many building sites are local union operatives determined that projects will run the way they dictate. Such behaviour is rare on a Multiplex or Baulderstone Hornibrook site. It is more likely to occur on the construction sites on third or fourth tier builders. As far as the general public is concerned, there is little obvious industrial trouble in most places, but it exists on many smaller projects across the country.

Trade union rallies were organised in Victoria and New South Wales in opposition to the BCII Bill at the time of its introduction to the House of Representatives. This industrial action was an example of the problem targeted by the bill.[11] The CFMEU 'declaration of war' against Minister Abbott saw the organisation of rallies across the country. In Perth, the WA branch of the MBA sought unsuccessfully for a section 127 injunction to ban the rally. AIR Commissioner Harrison refused the injunction because the MBA did not choose to identify any person who would be directly

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10 Mr Robert Merriman, *Hansard*, Melbourne, 19 May 2004, p.77

11 Submission No.12, Master Builders Association, pp.9-10

affected by the action complained of. The threat of retribution could not be risked. As the MBA submission continued:

> We use this as an indicative example of where the Bill will assist the building industry. It is unlikely, because of the threat of retribution, that individual employers will come forward to give evidence. If Commissioner Harrison is correct and the evidence he required is a threshold issue, then the vulnerability of employers in this industry, highlighted in paragraph 5.3, is, once again, palpable. If employers do in fact have the fortitude to give evidence about the impact of industrial action upon their particular business, the Commission, under s.127 may well then limit the orders to those who are prepared to give evidence. In addition, we note the Commissioner's direction to the unions and those participating in the rallies to return to work after the rallies were over. This did not occur – we are informed by our Victorian affiliate that the Victorian branch of the CFMEU wanted to "send a message" that it would not comply and had deliberately therefore passed a resolution in defiance of the AIRC. This is, in our experience, typical of the contempt held by the CFMEU for current institutions.[12]

Conduct of the inquiry

The preface to the majority report refers to the unbalanced nature of the evidence received by the committee. Government senators agree with comments made there, but would add further comment on this.

A remarkable aspect of the inquiry was the role played by the CFMEU in encouraging the writing of submissions and in organising for witnesses to appear. Many contractors who appeared would have been on the CFMEU 'approved list' and those who appeared of their own volition, or took their own initiative to do so will undoubtedly find that they will never run out of contracts. CFMEU and CEPU officials appeared at almost every hearing and became familiar faces, sitting among observers at the hearings. A senior CFMEU official once or twice accompanied a less experienced state or territory secretary giving evidence at the table. If nothing else, it showed the dedication of the unions guarding their privileged patch and was a reminder of their formidable organising powers.

The evidence presented by the CFMEU differed only marginally from state to state. It was the familiar mantra: claims of royal commission bias and defamation; a chorus against the iniquities of employers, especially in relation to their failures to pay taxes and workers entitlements; neglect of occupational health and safety measures; and condemnation of the Government for attempting to marginalise unions in the industrial relations process.

There was a remarkable similarity in all of the trade union submissions. Only the trades changed in the case study issues and were brought forward as evidence. There

12 ibid., p.17

was a depressing conformity in all of the evidence presented, even though we are led to believe that terms and conditions of employment vary across the country and that the construction industry shows considerable variation across states. Government senators know that the relationships between unions and employers differ across the states, but evidence of this was hard to come by. It can only be identified by inference, or from remarks made off the record

Also noteworthy was the evidence given by industrial lawyers appearing before the committee. Most had at least some criticism to make of the legislation: the most credible of them confining their comments to technicalities of the law and the difficulties presented by particular provisions of the BCII Bill. Government senators simply note that lawyers representing and obviously making substantial livings from unions made strong representations for their cause, while lawyers who normally represent employers were, like their clients, conspicuous by their absence.

Governments proposing ambitious legislation can be assailed by criticism of the uncertain nature of provisions in a bill. In the case of the BCII Bill the Government has taken all reasonable steps to ensure that the bill has been drafted with its administrative practicabilities and its legal foundations well established. Government senators note that there was little serious questioning by opposition senators in legal technical matters, as distinct from questioning intended to discredit processes. The criticism made of Minister Andrews for declining an invitation to attend a hearing is therefore tendentious. Departmental officials were not extended beyond their competence in answering the questions of opposition senators.

Government senators are disappointed that large contractors did not respond to the committee's invitation to make submissions to the inquiry. This resulted in an unbalanced presentation of evidence. The void was naturally filled by all state branches of the CFMEU, with generous amounts of time given by the CEPU. The evidence presented was notable for what was not submitted. The use of intimidation and the occasional threat of violence are matters of fact which unions have trouble dealing with. The strategy is to minimise the significance of localised activity of this kind and to concentrate on the work done by organisers in collecting unpaid entitlements. Thus the committee was presented with an impression of unions as benevolent societies, or champions of oppressed workers. The difficulty all members of the committee found was how to distinguish between what is fair and accurate about this impression and what it compensates for. Government senators have no recommendation to make about how unions purge themselves of undesirable elements. As free organisations they are responsible for their own future, but their continued effectiveness in exercising those benevolent responsibilities to their members would be enhanced if they purged their membership of self-seeking despots eager to make profit from their office.

Investment and productivity

The Opposition report was on stronger and more credible ground when noting that the construction industry was driven by cost, with contractual agreements on costs

spiralling from investors at the top to contractors at the bottom influenced bargaining arrangements. Several major submissions deal with this. The point that Government senators make is that such matters are beyond the scope of regulation. These matters are determined by investors, their profit expectations, and the price they are prepared to pay to obtain it.

This is an important aspect of the industry about which union submissions are naturally silent. The industry is investment driven and investors are usually risk averse and have an interest in diversifying their investment. In recent years investment in construction and properties has declined, and the fear of Government senators is that the state of lawlessness in the industry may be one factor that deters investment. There is no wish to place too much emphasis on this point, but the market is often influenced by factors which even experienced analysts may consider insignificant. The chief executive of the Property Council of Australia was reassuring to the committee when he spoke about investment intentions.

> And we want to keep investing in this sector. It is not my troops who are saying, 'Right, we're out of here.' Strikes of capital and that sort of stuff would never work, but the clients are not just the people who occupy the physical asset; the clients are the entire superannuation fund industry of Australia—$600 billion worth of decision makers. They currently allocate 11 per cent to property. It used to be 18 per cent. There is only two per cent of direct allocation. It used to be that 18 per cent of the total funds under management went into direct property ownership; that is now down to two per cent—in fact, it is 1.8 per cent. The total allocation for investment in property is 11 per cent. What is the rest? It is securitised property—that is, property you can get in and out of very quickly because it is listed. So there has been a massive flight away from this industry. We would like to get the current 11 per cent back up to 15 per cent but it is pretty tricky when international equities are returning far more than this sector. Of all the funds raised last year from our members 43 per cent went overseas into overseas property.[13]

The committee, unfortunately, received little information on investment issues, probably because the focus of the inquiry was on workplace relations. Yet Government senators repeat the message that workplace relations are important to investors. If cost distortions arise because of disputes or the need to accommodate wage demands over what is agreed to, investors will go elsewhere and Governments will pay beyond what is reasonable for the construction of infrastructure in the nature of hospitals and schools.

Another influence on investment is the level of productivity in the industry. There are two ways of looking at this. The first is that the investment in building is determined more by sales and rental prices than by the initial costs of buildings, which in any case depends on a range of factors beyond the control of investors. The second element is the containment of costs through efficient use of labour and materials and the

13 Mr Peter Verwer, *Hansard*, Sydney 7 April 2004, pp113-114

application of new technologies. The committee spent some time, much of it wasted, on consideration of claims as to the relative efficiencies of the domestic suburban bungalow construction sector and the high rise commercial sector.

Econtech, which did the research for the Government produced evidence that suggested the domestic housing was more efficient. In the face of criticism from other economic research groups, and many in the construction industry, Econtech held to its position that the housing sector was about 13 per cent more efficient than the commercial construction sector, and that the difference included a 6 per cent advantage in labour costs.[14] Econtech also noted that its critics did not factor in a productivity net figure to their calculations. The Econtech Report still stands as the most authoritative and accurate evaluation of the substantial productivity benefits flowing to the national economy through the reform of this industry.

Government senators accept that the issue might be rather academic. As Senator Andrew Murray pointed out, there are a number of factors which no economic modelling can take account of when considering possible effects of legislation on productivity.[15] This would apply to the construction industry more than anywhere else, with the possible exception of the farm sector. Government senators note with approval the common sense statements from the Ai Group on the issue of productivity.

> There is quite a bit of documented information, both in the discussion papers issued by the royal commission and through the government's own studies by Econtech, that the productivity of the industry internationally is actually very good. That should not be the focus of the issue. The focus should be on how much better we could be, and I think all the findings of the royal commission leave you with the view: if we are doing this well with what we have at the moment, potentially how much better could we be? One of the most difficult things in the construction industry, of course, is that it is not internationally competitive in the sense that our marketplace is our marketplace. So whether the prices that our clients pay for the products that are delivered are in fact the best prices that could be delivered is always a moot point—it is almost impossible to establish. The issue is not whether we are technically capable in terms of our engineering ability and the skills of our people; it is a question of how much better it could be. Quite clearly in the reports of the royal commission the issue is that there is great room for improvement. This industry operates with constraints that a lot of other industries do not have.[16]

Government senators fail to see how a culture change in the construction industry, ensured by observance of the rule of law, could do anything but improve productivity levels in the construct industry.

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14 Mr Chris Murphy*, Hansard*, Canberra, 25 May 2004, pp. 2-3

15 Senator Andrew Murray, op. cit., pp.30-35

16 Mr Barrett, *Hansard*, Canberra 11 December 2003, p.25

The BCII Bill and ILO Conventions

Opposition senators, in following a well-worn path of Labor Party veneration for international labour institutions and covenants, regards itself as the custodian of ILO influence in legislation. They assume a higher degree of sensitivity and competence in these matters. Government senators will therefore use far less space to comment on them.

Government senators, however, do take the view that self-regulation of the kind that currently exists is clearly inadequate to ensure that employers and unions within the industry comply with Australia's international obligations under ILO conventions. For instance, ILO Convention 81, Labour Inspection 1947, requiring a system of labour inspection in industrial workplaces; and ILO Convention 155, Occupational Safety and Health, 1981, requiring 'an adequate and appropriate system of inspection' and the provision of guidance in relation to OHS matters. The proposed ABCC and Federal Safety Officers will provide such inspection systems and will comply more closely with out ILO obligations than current arrangements.

Government senators also note that the Housing Industry Association has cited ILO Conventions in support of its claim that right of entry provisions in the BCII Bill are proper and appropriate.

> Union officials seeking to exercise statutory power to enter private premises must objectively be 'fit and proper' persons, a reasonable requirement which can be reviewed by a court. Article 4 of Convention 135 enables a National Government to determine "…type or types of workers' representatives which shall be entitled to the protection and facilities provided for in this Convention." Article 6 of the same Convention indicates that "Effect may be given to this Convention through national laws or regulations or collective agreements, or in any other manner consistent with national practice."[17]

It is simply not the case that ILO Conventions have been flouted by the Government in its drafting of the BCII Bill. The Government will continue to observe them and take them as benchmarks for any future legislation.

Recommendation

Government senators urge the Senate to pass the BCII Bill.

Senator David Johnston

17 Submission No.13, HIA, page 13