Democrat Minority Report

The Senate Workplace Relations Small Business and Education Reference Committee: Inquiry into the *Building and Construction Industry Improvement Bill 2003*, the Cole Royal Commission recommendations and findings, and other relevant matters pertinent to the building and construction industry

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Preface

Conduct within the building and construction industry at large, including the residential sector, has long been a controversial media and political topic. Decades of criticism and debate have swirled around the personalities, unions, corporations and issues concerning this industry.

The Cole Royal Commission (Cole), both in origin and conduct increased the temperature and allegations surrounding the building and construction industry (BCI). The policy tensions between the Coalition Government and the Labor Party concerning building unions and their conduct have been high both before and since.

Although these political tensions have been clearly apparent in the Committee's work, looked at objectively the Committee has done a considerable service to the BCI, not just in putting some balance into the assessment of Cole but in addressing issues and perspectives insufficiently covered by Cole.

Away from the politics and ideology that colours parliamentary reaction to Cole and the BCI, are big policy issues that need to be addressed in Australia's national interest.

The Committee's report draws attention to these – issues such as serious deficiencies in occupational health and safety law, regulation and management; major shortcomings in skills training for the future; and serial and serious tax avoidance.

In these respects both Cole and the Committee's recommendations and findings, and the submissions, witnesses and reports to both, should provide invaluable material to assist in the development of better federal and state government policies for the BCI. That is, if the Coalition and Labor parties can adjudicate better than they have to date between the self-interest and vested interest that is so often influential in BCI matters.

The Committee was asked to examine:

- the Building and Construction Industry Improvement Bill 2003 and related bills;
- matters pertinent to equity, effectiveness, efficiency and productivity in the BCI;
- the proposed BCI legislation with respect to Australia's obligations under international labour law;
- the findings and recommendations of the Cole Royal Commission into the BCI, including the question of industry-specific legislation; occupational health and safety; corporations law shortcomings; workers entitlements; security of payments; tax and workers compensation evasion;
- regulatory needs in workplace relations in Australia;

- political donations and the BCI;
- lawlessness, criminality and whistle blowing; and
- employment related matters including skills and training needs.

I have written a Minority Report because the answers I find that arise from this Inquiry are different in concept, content and direction from those that the Majority Report contain. I have not attempted to cover all the Committee's terms of reference or conclusions comprehensively.

Executive Summary

1.1 The *Building and Construction Industry Improvement Bill 2003* implements 120 of the 212 recommendations of the Cole Royal Commission. The Bill introduces additional workplace relations and occupational health and safety regulation specific to the Australian building and construction industry.

1.2 My impression is of a diverse range of reactions to the proposed Bill. As generalisations:

- Peak employer groups strongly support the proposed legislation and Cole, present union officials in a devilish light, and are louder about stronger workplace relations law than they are about OH&S, entitlements rorts and tax avoidance;

- Key unions and the ACTU are strongly opposed to the Bill and Cole, present union officials in an angelic light, but share Cole's concerns on OH&S, entitlements rorts, and tax avoidance ;

- Some BCI companies are unconvinced that the Bill is in their interests, and most are silent onlookers. Many who have seen me privately would not appear before the Committee, but are adamant that the Workplace Relations Act (WRA) is not curbing unacceptable behaviour in the industry;

- Other observers, such as academics and law firms have strongly criticised the Bill. Much media commentary has focused on an anti-union bias in Cole and in the Bill.

1.3 There was much criticism about the Cole Royal Commission and therefore the legitimacy of the Bill in dealing with the problems of the BCI. However legitimate the criticism may be of the motivations for, direction taken, and selectivity of the Cole Royal Commission, the Cole Report properly drew attention to unacceptable industrial practices that challenge the rule of law, undermine the intent of the Workplace Relations Act, and adversely affect productivity, efficiency and competition.

1.4 Some key issues facing the industry include:

- The industry is recognised as dangerous with one building worker killed every week. Construction accounts for up to 15% of all workplace fatalities even though it employs only 5.9% of the total workforce.

- The industry suffers from a high level of tax avoidance. The ATO has submitted that the industry hides up to 40% of its income.

- Phoenix companies are widespread, denying workers their entitlements, forcing sub-contractors into liquidation and leaving debts unpaid to the ATO, which is presently investigating 550 cases.

- The majority of complaints made to the Office of the Employment Advocate (OEA) regarding freedom of association, coercion in certified agreement making, right of entry for union organisers, and strike pay, are in relation to the BCI.

- The level of disputes in the BCI is high compared with most other sectors in the Australian economy. Building and construction ranked among the four industry sectors with the highest levels of disputes. In the last five years the only industry with a higher level of disputes was mining. (It is interesting to note that industrial disputes in the BCI were at their lowest from 1992 –1995).

1.5 Our view is that given the environment of the Cole Royal Commission we are justified in being cautious in our approach to their findings. We cannot however avoid our duty to address genuine industry shortcomings. Neither can we just dismiss all of Cole's conclusions.

1.6 The Australian Democrats play an important role when it comes to workplace relations in the parliament, as we are often the deciding middle ground between two opposed political parties on IR (the Coalition and Labor), who broadly speaking see themselves as the political wings of business and the unions. We are neither beholden to employers and industry groups nor unions. Our response to Cole, to this Bill and to the needs of the Australian Building and Construction Industry must be assessed against this background.

1.7 The Democrats role in workplace relations has been considerable. You would not have the WRA at all without the Democrats, since we negotiated its amended passage through the Senate. Nor would you have had the Act's contribution to sustained productivity increases, sustained real wage increases, sustained GDP growth, historically low industrial disputes, increased employment, greater export competitiveness, and a flexible economy. You would still have two IR systems in Victoria too. All that does not mean the Act is perfect, but its strengths are too often downplayed. We just do not accept it needs further radical reform, least of all for the BCI.

1.8 The Building and Construction Industry Improvement Bill 2003 proposes:

- an Australian Building and Construction Commissioner ('ABC Commissioner') and a Federal Safety Commissioner.

- a mandatory 'Building Code'.

- a new framework for workplace relations negotiation in the construction industry focussed on 'genuine bargaining' at the enterprise level while restricting 'pattern bargaining' and providing for mandatory 'cooling off' periods during which protected industrial action is not permitted.

- further restrictions beyond those in the Workplace Relations Act on the range of allowable award matters in the construction industry.

- that all industrial action (within constitutional limits) in the construction sector should be unlawful, other than protected industrial action, with industry participants able to recover any losses they suffer due to unlawful action.

- additional freedom of association provisions so a wider range of behaviour identified by the Cole Royal Commission can be effectively dealt with.

- an amended right of entry system spelling out parties' rights and responsibilities.

- limiting the scope for State law to be used to circumvent Federal requirements.

- ensuring that registered organisations are accountable for the actions of their officials and employees, and

- a strengthened compliance regime through higher penalties and greater access to damages for unlawful conduct.

1.9 Many of the provisions in the Bill are provisions that the Government have proposed over the last few years as changes to the WRA, and that have failed to pass the Senate. That they should try to introduce them for just one part of one industry tells a story in itself.

1.10 The proposed provisions have been considered important or controversial enough that they have been before Senate Committees, including:

- Prohibiting pattern bargaining

- Cooling off periods

- Secret ballots for protected action

- Genuine bargaining

- Prohibition of compulsory union fees

- Right of entry

- Freedom of association

1.11 Generally speaking, some of these provisions or aspects of them have been opposed by the Democrats as they relate to the WRA because there was not substantial enough evidence that they were warranted and that they were fair for all.

1.12 One of the questions we considered is whether we think the BCI, (or just one part of it), is unique enough that these provisions previously rejected by us should apply to this industry alone. While we recognise that the industry has unique features it is, as Professor Stewart argued,

> ….'a long way short of being an essential service like police, firefighting, health and power … building workers were not the only employees with significant industrial muscle … If these amendments are worth introducing, why aren't they worth introducing more generally?

1.13 With the exception of targeted action needed in areas such as occupational health and safety and possibly in the area of agreement making with respect to project/site agreements, there was no evidence that convinced us that industry specific legislation was necessary. We did however identify some areas of the law that could be amended, but we saw no reasons why this should not and could not occur across and benefit all industries.

1.14 There are a number of provisions in this Bill that the Senate had not dealt with previously, particularly the creation of a regulatory body for the BCI.

1.15 The Democrats strongly support the need for greater compliance with the law and more effective law enforcement. The Royal Commission identified weaknesses in the current mechanisms of enforcing laws of general application, including criminal law, industrial relations law, civil law, tax law and state law. Therefore another question we considered during this inquiry was that if one of the key findings of the Commission was a weakness in current enforcement mechanisms, then how will creating new workplace relations laws solve a problem that has been identified as failure of the market regulators across these fields of law?

1.16 The Committee heard evidence from witness after witness, whether it was industry or union, that regulatory failure was a critical, if not the critical, issue facing the BCI.

1.17 While many submissions and witnesses supported the creation of the proposed Australian Building Construction Commission (ABCC), when asked whether they would support an industry wide regulator with a focus on the BCI the majority of witnesses responded yes. Those who did not support the creation of the ABCC often also recognised the need for better enforcement of the WRA, and supported the idea of an independent properly resourced third party to regulate the industry.

1.18 The Democrats support a system which means all Australians, employers and employees alike, would have the same industrial relations rights and obligations, regardless of where they lived. Supporting industry specific regulator would fly in the face of Democrats' beliefs. We are philosophically, practically and politically antagonistic to the idea of an industry specific regulator.

1.19 In addition we believe that it would be a waste of resources to establish an industry specific regulator such as the proposed ABCC, which the BCI may not need in a few years time if better regulation and enforcement of the law is successful. We can not see a situation ever arising when regulators with general application for all industries are not required. The ATO and the others will always be with us.

1.20 The Democrats support one central proposition behind the Bills – that greater regulation and enforcement of workplace relations law is necessary. We do not support the second central proposition behind the bills, that industry specific legislation and sweeping new WRA provisions are necessary to achieve this aim.

1.21 The Building and Construction Industry Improvement Bills will be opposed outright by the Australian Democrats. They cannot be salvaged or amended. The problems in the industry and in other industries would be far better addressed by enforcement of existing law and the creation of a well-resourced independent National Workplace Relations Regulator.

1.22 We are of the opinion that as for other sectors of the economy (such as ACCC, APRA, ASIC, ATO), greater regulation and enforcement of workplace relations law is desirable of itself, as a market and social service and mechanism, and that folding ineffective departmental inspectorates, the employment advocate and so on into a standard regulatory body would advance regulatory practice in industrial relations in Australia considerably.

1.23 We believe that workplace relations law is only as strong as its enforcement and that its enforcement is weak in the BCI. The lack of a well resourced active regulator with standard regulatory powers, plus inadequate penalties, is the prime cause of ineffective application and observance of existing law. The Senate inquiry reinforced the fact that better enforcement mechanisms and not new wide-ranging industrial laws are needed.

1.24 The Democrats believe that there has been enough evidence before the Senate to support the need for an independent National Workplace Relations Regulator.

1.25 There were also some areas that we think the Government has yet to address adequately. The BCI Bill implemented a little over half of the 212 Cole Royal Commission recommendations. In his ministerial statement introducing the Building and Construction Industry draft exposure Bill, previous Workplace Relations Minister Tony Abbott argued that there are current institutions in place to deal with issues such as tax evasion, workers compensation problems, detection of phoenix companies and that therefore no additional reform was necessary in these areas. We utilised the Senate Reference Committee to test this proposition and found that change and additional assistance is still needed in these areas, and make recommendations accordingly.

1.26 There are also areas that neither the Commission nor this Bill have addressed that we think are critical such as whistleblower provision and political donations. The Government's initiative of placing whistleblower provisions in corporations law means that some corporations' employees in the BCI will now have essential whistle blower protection. This will assist in improper corrupt or unlawful conduct being uncovered if people in a position to reveal it are genuinely protected and compensated. Our view is that these protections should be extended to other participants in the BCI – registered organisations and unincorporated associations.

1.27 We are convinced that the huge sums of political donations arising from the BCI with respect to candidates and political parties at the local government, state and territory, and federal level are likely to affect, or do affect political decision making. The dangers are obvious, particularly in an industry which has its fair share of criminal influences.

1.28 We are also concerned with accountability and governance of political parties. It is important that where non-party members of affiliated organizations elect delegates who have great influence in party matters, that both the election of those delegates and the representative function of those delegates properly reflects both the real numbers of the registered organisation concerned and their wishes as to how delegates conduct themselves. We believe that the WRA could be amended to insert provisions regulating the affiliation of registered employee and employer organisations to political parties, to reflect these concerns of ours.

1.29 Lawlessness may not be the best way to describe a problem of non compliance with the law. The laws do exist, but whether it is tax or workers compensation avoidance, or blatant disregard for the corporations law, the problem is weak enforcement. While it is quite wrong to characterise the BCI as an industry where the rule of law does not apply, criminality corruption and thuggery have to be addressed where they exist.

1.30 The Senate inquiry also highlighted the problems of having different industrial relations jurisdictions for the industry and the desire for a unitary system. The Democrats have consistently argued for years now that we need one industrial relations system not six. We have a small population, yet we have nine governments and a ridiculous overlap of laws and regulations. There are areas of policy and jurisdiction the States no longer have sensible involvement in. Like finance, corporations or trade practice law, labour law is one of those areas.

1.31 The Democrats believe that a unitary system does not have to be achieved with an all or nothing outcome. We strongly urge whichever party is in power in the next term to seriously consider the efficiencies and benefits that can be derived for a unitary industrial relations system. We do not have to immediately move from six systems to one. Transitional arrangements could allow for up to six systems to continue, after a national system was established. As was done with tax, trade practices, corporations and finance law the first step is to build the political will and consensus to try and reach a unitary goal.

1.32 Having highlighted the Democrats preference for addressing general mechanisms, the Democrats are not against targeting a problem in the short term. We supported the extension of the life of the Interim National Building and Industry Task Force and would not be opposed to increasing its information-gathering powers on a temporary basis, while the Government worked toward establishing a national workplace relations regulator. We would also support providing additional resources to bodies such as the ACCC, ATO and AIRC in order to focus on BCI 'hotspots'.

1.33 We support the Majority's recommendation 1, and its other recommendations either in full, or in the case of Recommendation 2, by assessing any legislation on its merits.

Key Recommendations

- Oppose the Building and Construction Industry Improvement Bill(s)
- Established an independent National Workplace Relations Regulator
- Include Merit based appointment provisions be included in any legislation created to establish a National Workplace Relations Regulator.
- Increase penalty provisions under the Workplace Relations Act for all industries
- Include whistleblower protection provisions into the Workplace Relations Act
- Increase powers and capacity of the AIRC to make good faith bargaining orders; resolve disputes on its own merits; and make more determinations
- Amend the *Workplace Relations Act* to enable genuine project agreements to be reached and certified for major projects.
- The Government consider legislating a definition of employee into the Workplace Relations Act 1996
- That the Building Industry Task Force play a more active role in pursuing under-payment of employee entitlements; and that section 178, - Imposition and recovery of penalties of the Workplace Relations Act 1996, relating to breaches of awards and agreement should be better enforced
- That the *Commonwealth Electoral Act 1918* and the *Workplace Relations Act* be amended to: ensure democratic control regarding donations remains with members of registered organisations and shareholders; cap donations; prohibit donations with strings attached; and provide better disclosure requirements
- That the *Commonwealth Electoral Act 1918* and the *Workplace Relations Act* be amended as appropriate to ensure democratic control remains vested in the members of political parties.
- Establish a national unitary industrial relations system

New Workplace Relations Law for the Building and Construction Industry

1.34 One of the things the Democrats were concerned about with the BCII Bills was the lack of balance. The Government are not doing themselves a service by producing Workplace Relations Bills that are unbalanced.

1.35 The Committee heard from a number of witnesses who argued that the Bills narrow focus could lead to employees and union bargaining outside the current statutory framework. For example, pre-eminent industrial relations academic, Professor McCallum said:

> My concern with the current bill is that its focus upon employee and trade union conduct is so all embracing that, if enacted into law in its present form, it may leave employees and trade unions no option other than to engage in collective bargaining outside the current statutory framework. [1]
>
> It is certainly possible for trade unions and employers to operate outside the system by entering into common law collective agreements on a sectoral basis or even on a project basis. In many ways this would be quite advantageous to both employers and trade unions because of the restrictions in the bill on enterprise bargaining.[2]

1.36 The CEPU said they had already started looking for ways to work outside the system if the Bill was put into place:

> We have been looking at ways that, if this legislation were put in place, we might move outside that process. We have looked at common law arrangements with contractors. We believe we can do it. We have had QC advice in relation to that. At the end of the day, if this cannot work as a vehicle for us then the industry will find some other vehicle.[3]

1.37 Many of the proposed provisions have also been considered important/controversial enough that they have been before Senate Committees, including:

- Prohibiting pattern bargaining
- Cooling off periods
- Secret ballots for protected action

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1 *Committee Hansard*, Sydney, 2 February 2004, p.1

2 ibid. p.4

3 *Committee Hansard*, Sydney, 3 February 2004, p.17

- Genuine bargaining
- Prohibition of compulsory union fees
- Right of entry
- Freedom of association

1.38 These provisions or aspects of them have been opposed by the Democrats as they relate to the WRA because there was not substantial enough evidence that they were warranted and that they were fair for all.

Awards

1.39 The provisions in the Bill are identical to the Workplace Relations Amendment (Award Simplification Bill) 2003. As noted in the Democrats minority report on the Workplace Relations Amendment (Award Simplification) Bill 2003, in 1996 the Australian Democrats negotiated the passage of the *Workplace Relations and other Legislation Amendment Act 1996* with the Government. That Bill rationalised an almost unlimited award field and restricted the number of allowable matters for inclusion in awards to twenty (s89A).

1.40 Section 89 A (2) was further amended in 2000 with Democrats' support, when tallies were removed from allowable matters and incentive-based payments added.

1.41 The 3,222 federal awards in 1996 have been reduced to 1,509 awards, which themselves have been rationalised and simplified. This has undoubtedly contributed to a more understandable streamlined efficient and productive award system.

The confusion, duplication and inefficiencies still occurs when numerous and complicated State awards conflict with the better federal system. It is here that there is a far greater need for reform.

1.42 The ACTU submission[4] to the Senate Committee on the *Workplace Relations Amendment (Award Simplification) Bill 2003*, noted that as of June 2003 the Commission reported that 95 per cent of the federal award simplification review process had been completed. 3050 federal awards have completed the review process as follows:

- 1164 awards have been simplified;
- 1461 awards have been set aside or superseded;
- 252 awards have been deemed to have ceased operation; and

4 Senate Inquiry *Workplace Relations Amendment (Award Simplification) Bill 2003,* ACTU, Submission No.1, p16-17

- 173 awards have been identified as not requiring review;
- 172 awards were at various stages of the simplification process.

1.43 There was lukewarm support for the *Workplace Relations Amendment (Award Simplification Bill) 2003*, and there was little evidence to this inquiry that the provisions were necessary in the Building and Construction Industry. The Democrats are not inclined to support the *Workplace Relations Amendment (Award Simplification Bill) 2003*, and would not be inclined to support the BCII Bill award provisions.

Right of Entry

1.44 In negotiating the passage of the Workplace Relations Act 1996, the Democrats totally reject the proposals of the Government that right of entry should be restricted to a written invitation. This could have resulted in union members being singled out for targeting by unscrupulous employers. The right of entry scheme which the Democrats negotiated in our view provides a sensible balance of union, employer and employee rights.

1.45 Professor McCallum raised concerns about watering down the system that the Democrats negotiated:

> What I would say about right of entry is that, under our system, it is for the arbitration inspectors and the registered trade unions to have the capacity to police awards and certified agreements. I do not think that that ought to be destroyed or watered down. Obviously improper use of right of entry is another thing.[5]

1.46 While we believe the current system is balanced we acknowledge that there is evidence of abuse of the right of entry system. The CFMEU argued that approximately two thirds of the 392 breeches identified by the Cole Royal Commission with industrial matters and that a significant number of these were related to right of entry:

> Of the two-thirds that are industrial matters, I can point you to the fact that a significant number involve the union failing to adhere precisely to the right of entry provisions. One of the common reasons for finding breaches—a whole litany of them against us—is that we failed to tell the employer that we had come on site or that we did not come on site during the prescribed lunchbreak.[6]

1.47 However we agree with the Committee majority report that the provisions in the BCII Bill place too much weight on the rights of employers and give too little protection to employees.

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5 *Committee Hansard*, Sydney, 2 February 2004. p.8

6 ibid. p.90

1.48 The Democrats believe there are a number of solutions that could be implemented that would not water down the rights of unions.

Recommendation 1 – Right of Entry

- Applicants for right of entry permits to be required to demonstrate a knowledge of the rights and obligations associated with the permit;
- The Registry be requested to develop, in consultation with union and employer bodies, a code of practice governing the right of entry;
- Implement a two tiered approach where on serious industrial issues or where there is dispute about the right of entry, an independent third party, such as an inspector, is called to arbitrate the matter.
- Increase penalties to right of entry provisions under the WR Act 1996, to act as a deterrent.

Freedom of Association

1.49 Chapter 7 amends the freedom of association legislative regime in the building and construction industry by:

1.50 providing a number of general prohibitions that apply to all building industry participants to deal with what the Royal Commission found to be the most common forms of inappropriate conduct;

- making improvements to various existing freedom of association provisions, particularly in relation to enhanced protection for independent contractors and their employees; and
- providing greater penalties for contravention of the freedom of association provisions.

1.51 The Democrats stated policy is to protect freedom of association and the right to join a particular union or employer organisation. There were some concerns raised to the Committee that the amendments would tip the balance of the current provisions. Professor McCallum stated that:

> Some of the provisions on freedom of association look extraordinarily detailed to me, when my view is that part 10A of the Workplace Relations Act works very well indeed.[7]

1.52 In negotiating changes to Freedom of association provisions to the Workplace Relations Act 1996 I said that:

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7 *Committee Hansard*, Sydney, 2 February 2004. p.11

> The Democrats support freedom of association and the removal of compulsory unionism, but an orderly conduct of trade union affairs remains an essential element of a workable industrial relations system in Australia. In the committee stage we will be seeking a fairer balance for the rights of trade unions.[8]

1.53 The Democrats would have difficulties supporting amendments that impacted negatively on the rights of trade unions. However we would consider supporting a small increase to penalties for breeches of freedom of association provisions.

Industrial Action and Secret Ballots

1.54 Chapter 6 of the BCII Bill makes certain forms of industrial action in the building and construction industry unlawful and provides 'improved access' to sanctions against unlawful industrial action in the form of injunctions, pecuniary penalties and compensation for loss. In addition, it sets down additional requirements for accessing 'protected' industrial action including a mandatory cooling-off period.

1.55 There have been several Bills before the senate dealing with many of these provisions including the More Jobs Better Pay Bill, *Workplace Relations Amendment (Genuine Bargaining) Act 2002*, and the *Workplace Relations Amendment (Better Bargaining Bill) 2004*. In particular the Secret ballot provisions proposed in the BCII Bill, have been before the Senate and rejected by the Democrats several times and one such Bill – Workplace Relations Amendment (Secret Ballots for protected Action) Bill 2002 - has been negatived by the Senate and is currently on the Double Dissolution list.

1.56 As I have said in numerous minorities and second reading g speeches before the senate, it is difficult for the Government to advocate a much greater tightening up of the area of industrial disputes, when Australia has the lowest level of industrial disputation in eighty years.

1.57 With respect to secret ballots, evidence was again received at this inquiry that Secret Ballot provisions such as those proposed in the BCII won't work, for example Professor McCallum said:

> Secret ballots have been in the act in one way or another since 1928…….the Fraser government extended certain secret ballots in elections in 1976. My research then, and there has been nothing much since to go against it—even the British studies—showed that secret ballots are equivocal. Sometimes the workers vote in favour of strike action when their leaders do not want them to; sometimes the workers vote against industrial action when the leaders want them to support it; sometimes, when the workers vote in favour of industrial action and the leaders of the trade union want a settlement, it is very hard to get a settlement because of the

8 Senator Murray, second reading speech to *Workplace Relations and other Legislation Amendment Bill 1996*.

> vote"[9]….. "There is an awful lot of literature on the notions of secret ballots and strikes that have been tried in Canada and have failed[10]…….We should be focusing upon allowing trade unions and other representatives to determine whether or not to take industrial action, and to ensure that these bodies are democratic and responsive to the law. [11]

1.58 The Democrats' policy recognises the legitimate role of unions in protecting the interests of workers who wish to be represented by them and in moving to improve the internal democracy and accountability of unions. We believe that the Industrial Relations Commission should have sufficient powers to end industrial action and to resolve underlying issues by arbitration. We have always supported the democratic protections afforded by secret balloting processes but there is no empirical or credible evidence that industry specific or industry-wide set of somewhat complex rules such as those that are being proposed is justified.

1.59 Instead we again recommend amendments we have moved in past that require trade unions to have within their rules secret ballot provisions which the members can activate when the members think it appropriate. Professor Ron McCallum in his evidence to the committee supported the proposed amendment.

> I think that is an interesting idea and I would have no problem with the Workplace Relations Act being amended to provide that union rules must contain that.[12]

1.60 CFMEU Secretary John Sutton was asked whether he objected to the principle of the Democrat proposal, his response was "no, I do not" [13]

1.61 With respect to cooling of periods, applications to terminate bargaining periods under section 170MW are comparatively infrequent, with 45 such applications in 2002-03, as against about 7 500 applications to certify collective agreements and over 15 000 applications to initiate bargaining periods.

1.62 The Government argue that the intention of the cooling-off period is to remove, for a period of time, the pressure of protected industrial action from the negotiations for a certified agreement.

1.63 While the Democrats fully support giving the Commission more discretion it is important to remember that this area was only recently amended via the Workplace Relations Amendment (Genuine Bargaining) Act 2002, which provided:

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9 *Committee Hansard*, Sydney, 2 February 2004. p.10

10 ibid. p.12

11 ibid. p.4.

12 ibid. p.15

13 ibid. p.81

- Guidance to the Commission on when parties are genuinely negotiating,
- Parties to apply for suspension or termination of bargaining periods without having to identify the specific bargaining periods being involved, and
- The Commission express powers to prevent, or attach conditions to, the initiation of new bargaining periods where a bargaining period has previously been withdrawn or suspended.

1.64 Surely we have to give these provisions a chance to settle in before we make further changes in this area.

1.65 Recent evidence would suggest that the current provisions to suspend or terminate bargaining are effective, with the AIRC just recently suspending for six weeks the unions' bargaining periods with three of the companies at the centre of Victoria's protracted electricity dispute.

1.66 I would probably be more appropriate at this stage for the Government to reconsider labors amendments 4 and 5 of the Workplace Relations Amendment (Genuine Bargaining) Bill 2002, which sort to define and articulate 'bargaining in good faith'.

1.67 The Committee heard evidence that the proposed agreement making framework adds so many complexities, that it would make union bargaining inefficient and unattractive. The CEPU stated that:

> It is our view that this will make the capacity for union agreements to be registered in the industry basically impossible. As I indicated earlier, we are talking about 90 per cent of the employers that we deal with having fewer than 20 employees. They do not have the capacity to go through these processes and sit down and negotiate where they would like to go. So that is it, in essence. I know this has been a very brief explanation, but I refer you to section 7 of our submission, and you can go through that at your leisure. You will see that there are distinct differences.[14]

1.68 The Democrats believe that these provisions are unnecessarily complex and would only serve to hinder the agreement making process and reduce the power of the unions to negotiate the best deal for their members.

1.69 One area where improvements could be made are in the area of dispute settlement procedures. The CFMEU argued that approximately two thirds of the 392 breeches identified by the Cole Royal Commission with industrial matters and that a significant number of these were related to non-compliance of dispute settling procedures.

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14 *Committee Hansard*, Sydney, 3 February 2004, p.5

> Non-compliance with the strict terms of the dispute settling procedure is another component. Often that was as petty as the union missing one stage in the dispute settling procedure or where the official got involved earlier than he should have or where the shop steward held a meeting when should not have. Non-compliance with dispute settling procedure was a heavy component of the industrial matters.[15]

1.70 The Queensland MBA called on more enforceable dispute mechanisms with the ability of an umpire to intervene:

> The fourth issue is to re-establish a complete commitment to the "Dispute Settling procedures of awards and agreements" which are designed to ensure that due process is strictly followed before industrial action commences. A strike first mentality must be challenged and eradicated from the union armory at least and until a due process is followed. The entire industrial relations system must provide fair access for unions to have matters raised and resolved without strike action and employers must be able to access the umpire who can intervene and have the jobs go back to work thus enabling the matters in dispute to be resolved on their merits.[16]

Recommendation 2 – Secret Ballots

- **require trade unions to have within their rules secret ballot provisions which the members can activate when the members think it appropriate**

Recommendation 3

- **Amend the WRA to require all agreements to provide effective dispute resolution mechanisms, which allow the AIRC to arbitrate disputes.**

Agreements/Bargaining

1.71 Provisions to ban pattern bargaining has been before the Senate and has been rejected by the Democrats. We do not believe that enterprise bargaining is necessarily at odds with industry-wide or sector-wide negotiations (I use the word sector here because industry wide negotiations that apply across Australia seldom occur). Sector-wide collective agreements and enterprise collective agreements are not mutually exclusive, and nor are multi-employer site or sector agreements necessarily at odds with efficient and effective industrial outcomes. In some cases, both employers and employees see benefits in having an industry or sectoral standard in mind as they approach bargaining at an enterprise level. Indeed, the federal government itself bargains in a whole-of-government manner in the context of their "Policy Parameters' that shape bargaining in the public sector and give it a comparable character across different government agencies. A Senate committee received evidence of multi-

15 *Committee Hansard*, Sydney, 2 February 2004. p.90

16 Queensland MBA, Submission No.90, p.1

employer agreements in retailing, media, education and electrical contracting which suited both unions and employers, particularly smaller employers.

1.72 At the senate inquiry into the BCII Bills, Professor Ron McCallum argued in his evidence that:

> the enterprise bargaining system works decidedly well when you are dealing with a factory producing widgets. You want that factory to be able to bargain with its work force to make sure that it can produce widgets more cheaply than its competitors can and that it will not have unnecessary labour costs. That factory is a stable workplace and it makes eminent sense. The building and construction industry is totally different. Projects vary in size and regions vary, and one is not so concerned with the labour costs of each individual subcontractor. One is more concerned about stability, and that is why most of the world has allowed there to be greater flexibility in bargaining in the building industry. [17]

1.73 Dr Buchanan argued that:

> This leads to our final question: is pattern bargaining part of the problem or part of the solution? As an IR researcher reading the report of the Cole royal commission, I would fail it. It shows the ascendancy of ideology over any grasp of the empirical reality in this area. You see traces of that elsewhere. In other parts of the recommendations there is recognition of the benefits of coordination. That comes through in parts of the training section and in the notions of codes of practice later on. But when they deal with IR issues this ideological obsession is apparent. They show a fetish about the enterprise.[18]

1.74 The Queensland Master Builders Association (MBA) argued that pattern bargaining actually provided benefits to the industry:

> One of the pivotal platforms of the proposed *Building and Construction Industry Improvement Bill 2003* is the removal of pattern bargaining within the BCI. While Master Builders acknowledges the arguments in favour of the proposal, the industrial realities paint a different picture from that provided by the Federal Government. Wage justice has long been defined as circumstances where as workers doing identical work in close proximity to one another receiving identical remuneration wherever practicable. A system that encourages individual employers to pay differing wages to workers performing similar tasks on the same site, is a recipe for industrial anarchy and cannot be supported. The industry has continued to negotiate pattern agreements within certain parameters as a deliberate strategy to minimise industrial disputation. The entire EBA framework is designed to

17 *Committee Hansard*, Sydney, 2 February 2004, p.5

18 ibid. p.36

> prevent workers receiving disparate industrial entitlements while working together on site.[19]

1.75 The Committee also heard from several subcontractors who argued that pattern bargaining provided benefits to the industry. For example, Engineering (Aust) Pty Ltd stated that:

> Pattern Agreements provide industry with a common set of standards of employment thereby ensuring that as an employer in a very competitive industry the means of setting one of the main components of our fixed costs is the same across the industry. This ensures that we are competitive with other companies operating in the same industry.

1.76 Project or site agreements were considered by many in the Industry as an alternative method to cater for the specific needs of the Building and Construction Industry.

1.77 The merits of project agreements were considered and analysed by Cole in Chapter 14 of Volume 5 of the Cole Royal Commission final report. Commissioner Cole found that while project agreements are attractive to major builders and unions, "they have a tendency to interfere with, contradict and pre-empt the process of bargaining at the enterprise level".

1.78 It was accepted by Commissioner Cole that head contractors need to maintain control over building sites in order to coordinate and plan work. However, in the Royal Commissioner's view such coordinating role "should not impinge upon or impugn the employment arrangements between a subcontractor and its employees".

1.79 However AIG argued that:

> The use of project agreements on major projects is a legitimate risk-management practice adopted by stakeholders in the building and construction industry and such practice can be clearly differentiated from damaging industry-wide pattern bargaining approaches and damaging industry agreements such as the *Victorian Building Industry Agreement*.
>
> Major projects can be viewed as enterprises that bring together parties with the relevant skills and expertise in pursuit of a common goal.

1.80 In their submissions to the Royal Commission, Ai Group argued strongly that the *Workplace Relations Act* should enable genuine project agreements to be certified for "major construction projects" given the size, nature, location and complexity of such projects and the complex chain of contractual relationships involved. They argue that in their experience, owners, head contractors and subcontractors all support the establishment of project agreements on major projects. And that subcontractors generally indicate that project agreements provide the best environment for them but

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19 Queensland MBA, Submission No.90, p.15

seek that project agreements be established in advance of tendering and only apply to the subcontractor's employees while they are engaged on the project.

1.81 AIG also argued that the *Workplace Relations Act* could be amended to enable genuine project agreements to be reached and certified for major projects by, either:

- Restore the mechanism which existed under the previous *Industrial Relations Act 1988* whereby employer associations were able to enter into project agreements which would then bind member companies while working on the relevant project; or

- Rely on the Corporations Power under the Australian Constitution to underpin a new legislative provision for project agreements to enable project agreements to be certified and become binding, as a common rule, on all Constitutional Corporations which work on the project.

1.82 Professor McCallum also saw merit in project certified project agreements and/or site awards:

> In my considered judgement, this industry is ill-suited to having single business enterprise bargaining as the only available form of bargaining throughout the industry. For example, clause 68 makes project agreements unenforceable, yet there are many instances where project agreements and sectoral agreements have the capacity to bring stability to the building and construction industry. This is also a sector of the economy where, in appropriate circumstances, arbitrated awards by the Australian Industrial Relations Commission could bring about stability as adjuncts to collective bargaining on a sectoral or project basis.[20]

1.83 The Labour Council of NSW told the committee that project agreements were such a success on the construction of the Olympic, that the unions supported to implement project agreements on other sites:

> …..we have tried to foster all those elements that established that environment in the Olympic Games on other major building projects right around New South Wales. You will see, in the submission that we have made, that we currently have under the auspices of the Labor Council some $5 billion worth of construction works that go under project agreements. We are very fearful that any moves to introduce the types of laws that are contemplated in the bill will undo all the good work and cooperation that we have been able to achieve in New South Wales.[21]

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20 *Committee Hansard*, Sydney, 2 February 2004. p.3

21 ibid. p.18

1.84 A number of witnesses argued that project agreements would reduce many of the problems experienced in the building and construction industry such as non-compliance and could improve efficiencies.

1.85 For example, Professor McCallum was asked whether he thought project agreements would improve efficiency, he said:

> Project agreements are the majority method of undertaking construction projects in most market economy countries. I am not an economist. I think they are an efficient way of operating. Certainly, no-one has been able to show me that a more efficient method would be single business enterprise bargaining with every subcontractor. I would see the economies of scale there as not being able to prove to me that that is more efficient. In most of the market economy countries, project agreements have been found to be the most efficient method.[22]

1.86 The Labor Council of NSW had the view that project agreements reduced non-compliance:

> ….in terms of the project awards that we have, where we do have overarching project awards that provide a whole set of additional procedures, that has limited the number of non-compliance issues that come up with respect to workers' entitlements, because the unions and employers have a system where they can regularly check that employers and subcontractors are paying into the superannuation fund and their redundancy schemes and that they are complying. [23]

> The way to run bargaining is to put in ground rules and to have discretionary powers exercised by agencies like the proposed Building and Construction Commission or by the Australian Industrial Relations Commission. Legislation that tells people how to bargain, and to only bargain in one way, is not conducive to industrial progress.[24]

1.87 The NSW Labour Council stated that:

> most of the problems correctly complained of in the Cole royal commission findings—such as forced donations which are contrived, telling people who turn up on sites that they have got to get under particular agreements or be a member of a particular organisation, or particular coercive practices— are outside of and extra to the project agreement? They are not a consequence of the project agreement; they are a consequence of what happens on the site.[25]

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22 *Committee Hansard*, Sydney, 2 February 2004, p.13

23 ibid. p.20

24 ibid. p.6

25 ibid. p.33

1.88 Concerns have been raised about the impact pattern bargaining in the Construction industry can have on subcontractors, especially those subcontractors that operate in both the construction sector and the cottage/housing sector. For example the Electrical and Communications Association (ECA) argued that:

> Of more significance is the trap that many small contractors find themselves falling into whereby they may only work on "major" sites three or four times a year, but due to pressure from the union and principle contractor have signed a pattern EBA.
>
> This then (often unbeknown to the contractor) locks in their wages and conditions for the next three years at the very high end of the market, rendering them uncompetitive for 80 or 90% of their traditional market. ECA has seen many companies go under in this situation because they do not have the resources and expertise to shift their market focus to only EBA work, and cannot win any work with their usual clients.[26]

1.89 In their submission ECA argued for a revamping of the award whereby the base rate remains constant while allowances move up and down depending on where the employee is working. ECA believe that this type of system would:

> provide contractors with the flexibility to move in and out of market sectors without the baggage of uncompetitive rates locked in for three years. It would provide employers with the ability to manage the business more effectively, and allow them greater ability to maintain employees during quiet times by being competitive enough to win work in non traditional markets, where using today's system they would be unable to win, and would need to reduce their staffing numbers.[27]

1.90 The system described by ECA is akin to project agreements. The Labour Council of NSW argued that project agreements would benefit subcontractors:

> …..the decision I referred to before, which was handed out, is a decision by the commission about how project awards actually operate for subcontractors—the very point that John has made. The clause that the commission was looking at was the clause that said that where the principal contractor enters into these arrangements, they make it a condition of tender that, when all the subcontractors are actually tendering for the job, they have to take into consideration the conditions under the project award. That actually does mean that, whether you are a subcontractor that has AWAs, whether you are a subcontractor that has a union EBA, or whether you are a subcontractor that has nothing, there is actually a set of minimum standards that apply on the project. It enables all subcontractors to get onto the project

26 ECA, Submission No.15, p.9

27 ibid. p.10

> as long as they apply the minimum standards. So it is not designed to force subcontractors to have a union agreement to get on the job.[28]

1.91 However, Dr Buchanan argued that there may be a need to protect subcontractors or to give them a voice on the establishment of project agreements:

> I do have a lot of sympathy for subbies here, and that is why I think the whole question of representation for subcontractors is so critical and that they need to be part of these arrangements. Simply leaving it to the head contractors and the unions to sort out does not necessarily take into account the subcontractors' interests…….. I am not an expert on project agreements, but you could potentially have a provision where maybe the MBA has a voice into some of the leading ones that come along.[29]

1.92 Commissioner Cole did not recommend that certified project agreements be outlawed completely but expressed support for some forms of project agreement. However, AIG argue that neither s.170LC or s.170LL provide a suitable mechanism for the certification of project agreements for major projects.

1.93 S.170LC agreements are of little use in the construction context because all of the organisations to be bound by the agreement need to be identified at the time when the agreement is certified. All such organisations need to sign the agreement and their employees need to vote in favour of the agreement. It is impossible to identify all employers that will work on a major project at the commencement of the project. The other mechanism - S.170LL – provides even less utility because such agreements can only apply to single businesses.

1.94 Based on evidence before the Senate inquiry, the Democrats believe that certified project agreements similar to that proposed by AIG, but with some adjustments to ensure subcontractors have a voice, would be appropriate to resolve some of the issues in the building and construction industry, including the pressure on subbies to sign EBAs, non-compliance and efficiencies.

Recommendation 4 – Agreement making

- **Reject provisions to ban pattern bargaining in the Building and construction industry and instead amend the *Workplace Relations Act* to enable genuine project agreements to be reached and certified for major projects.**

Occupational Health and Safety

1.95 We will not deal with Occupational health and Safety at length in our minority report, not because we don't think it is important, on the contrary, we believe

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28 *Committee Hansard*, Sydney, 2 February 2004. p. 27

29 ibid. p.46

occupation health and safety is a critical issue facing the industry, but because we believe that chapter 6 of the Committee majority covered the issues very well.

1.96 I would say that this is an area where I think a national uniform approach to occupational health and safety is important. There are several options:

- work through WR ministers council for reforms along the lines of those that led to ASIC toward national uniformity;
- or the Commonwealth could takeover OHS laws given its constitutional power to do so – or override bits of state laws it doesn't approve of.

Productivity and efficiency

1.97 Australia's Building and Construction Industry makes an important contribution to the Australian economy. It contributes 5.5% to GDP per annum. The value of total construction turnover increased by 8.8% in 2001/2002 and is set to further strengthen over the next couple of years. Productivity in Australian construction is higher or equal to that in the US, Japan and Western Europe, while labour costs are frequently lower.

1.98 The CFMEU argued the Building and Construction Industry in Australia was highly productive, citing a number of publications to support their claims:

> For some time now the Australian construction industry has been among the world's best. Every analysis, whether it be by Access Economics or the Productivity Commission, has found the industry to be highly productive by comparison with other OECD countries. Before the royal commission was announced, the federal government's Minister for Education, Training and Youth Affairs said that the industry was 'one of the most efficient and cost effective industries in Australia'. Even one of the royal commission's own discussion papers found that the industry is well placed by international comparisons. In 23 international studies, our industry ranked second or better 16 times. On productivity, we ranked second in five of the seven reports on the topic.[30]

1.99 The Econtech study, commissioned by the Department of Employment and Workplace Relations (DEWR), argued that the Australian economy could gain significantly if workplace practice in the construction sector could match the standards in the domestic housing building sector – the Consumer Price Index would be 1 per cent lower, there would be an annual gain in economic welfare of $2.3 billion and real GDP would be 1.1 per cent higher.

1.100 The Econtech further asserted that productivity gains could be made if restrictive work practices were reformed. The Government have utilised this report to argue that implementation of the BCII Bills would result in economic gain of

30 *Committee Hansard*, Sydney, 2 February 2004. p.53

$2.3 billion. When questioned at the Senate inquiry, the Director of Econtech agreed that he could not say that the BCII Bills would lead to productivity gains.

1.101 The reports methodology was seriously bought into question as outlined in the Majority report, further weakening the Governments ability to link restrictive work practices to the substantial productivity gains being touted.

1.102 What the committee did hear is that far from restrictive work practices being the main contributor to productive inefficiencies that other things that significantly impacted on productive such as tax avoidance, disguised contracting, lack of training and skill development, and OH&S.

1.103 When the Committee visited the Bechtel worksite in Darwin, the senior staff told the Committee that they believed that there comprehensive OH&S procedures contributed to higher productivity.

1.104 Dr Buchanan argued that productivity could be improved through a focus on training and tax avoidance. Specifically Senator Tierny asked Dr Buchanan "In terms of efficiency and in terms of getting industrial sites working properly, surely this is something that must be addressed." Dr Buchanan answered with the following:

> Absolutely. If you actually did something serious about skills, if the industry collectively said, 'We're going to offer people a future,' looking after training, and said, 'We're going to do something serious about safety,' and really followed through on that big-time, if they were going to do something about clearing up all the tax avoidance and actually deal with the real problems of corruption in the industry, you would have a very different climate prevailing. If you addressed the climate where skills are slowly rusting away, being burnt out, if you encouraged a climate where safety was elevated—safety in Australia is pretty good but it could be better—and if you did something about wiping out the corruption around tax, you would have a very different climate prevailing.[31]

1.105 Buchanan and Allan reported that the contracting system in the UK resulted in a deterioration in key features of the industry, including falls in productivity/building quality.[32]

1.106 The Democrats believe that there was no substantial evidence to support the Governments argument that implementing the BCII Bills would lead to significant productivity gains. And believe that that other areas such as improving OH&S, addressing disguised contractors, addressing phoenix companies, improving training and skill development, more effective enforcement of current law and

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31 *Committee Hansard*, Sydney, 2 February 2004. p.44-45

32 Buchanan J and Allan C 2000 'The growth of contractors in the construction industry: implications for tax revenue', *Economic and Labour Relations Review*, Volume 11:1, p.67

implementing a unitary Industrial relations system would instead lead to more significant productivity gains.

Is there a need for industry specific legislation?

1.107 Governments wherever possible, and legislators like us, have always preferred laws that are common to all. Philosophically, we are nervous of carving out an industry from the provisions of general law.

1.108 There have been (and still are) instances where industries have had specific legislation, which may, to some extent, govern industrial issues.

1.109 For example, the Coal mining industry until 1994 was regulated by the Coal Industry Tribunal (now absorbed into the AIRC) and Stevedoring/Waterfront and Seagoing industries either have, or have had specific legislation drawn up to apply to them.

1.110 Also, in the past, the forerunner *Conciliation and Arbitration Act* had separate provisions dealing with:

- Maritime Industries
- The Snowy Mountains Area
- Waterside Workers, and
- A separate part of the Act for the Flight Crew Officers Industrial Tribunal

1.111 So there is certainly precedent for legislation dealing with industries. However in recent years the trend has been towards providing general laws and general tribunals, a principle the Democrats have agreed with.

1.112 The Democrats support a system which means all Australians, employers and employees alike, would have the same industrial relations rights and obligations, regardless of where they lived. Supporting industry specific legislation would fly in the face of the Democrats Workplace Relations policy.

1.113 The construction industry is comprised of mostly small firms with fewer than 20 employees. They contribute most of the industry's output and account for 99% of the total number of enterprises. The BCI has some unique features, including:

- It is not exposed to global competition;
- Project based work headed by lead contractor, contracting many subcontractors;
- Short term, project based nature of working arrangements resulting in low levels of permanent employment and high job mobility;

- Changes in the organisation of labour and the growth in the number of dependent sub-contractors, self-employment, contract, part-time and casual labour;
- Wage disparity amongst workers performing similar work on the same site;
- Long working hours, including regular overtime; and
- Significant workplace health and safety risks and high rates of work-related injuries and deaths.

1.114 As noted in the Bills Digest[33] Professor Andrew Stewart from the School of Law at Flinders University argues that the Federal Government needed to demonstrate why the industry's problems were 'so unique' that Parliament should reverse the trend away from specialised institutions. He said the building and construction industry was:

> not the only industry in which employers and employees sometimes failed to comply with legal obligations … it was 'a long way short of being an essential service like police, firefighting, health and power … building workers were not the only employees with significant industrial muscle … If these amendments are worth introducing, why aren't they worth introducing more generally?

1.115 One of the questions that should be considered is 'is the problem Australia wide'? The figures outlined in the Cole Report suggest that the problems are greatest in a couple of states. The states with the largest BCI are New South Wales (35% of national total), Victoria (23 percent) and Queensland (22 percent). The Cole Report found 392 separate instances of unlawful conduct: 230 in WA, 58 in Victoria, 55 in Queensland, 25 in NSW, 13 in Tasmania. The NT seems largely free of problems.

1.116 The BCI is broken into three main sectors: cottage sector, large commercial sector; and civil construction sector. According to the OEA complaints are not frequently received from the cottage sector. Virtually all allegations of misbehaviour received come from the large commercial sector or (to a lesser extent) the civil construction sector.

1.117 It is also reported that complaints or evidence of unlawful conduct in relation to the industry are generally in urban (city centre) areas and not regional/rural areas.

1.118 The proposed BCIA focuses only on conduct regarding unions and employees, and will not address inappropriate conduct undertaken by employers, as identified in the Cole Report.

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33 *Bills Digest* No.129 2003-04, p.8

1.119 While the BCI is unique in its structure and characteristics from many other industries, there is not necessarily any more compelling evidence that as a result of its unique characteristics the provisions previously rejected by the Democrats for all industries should nevertheless all apply to this one industry.

1.120 One would also have to be cynical and question whether the implementation of the proposed (previously Senate-rejected) provisions would not be used by the Coalition government as precedents to argue for their implementation in 'other' industries and eventually all industries.

Recommendation 5 – BCII Bills

- **Oppose the Building and Construction Industry Improvement Bills**

Compliance, Enforcement and Regulation

Is the creation of new law the solution to what is essentially a problem of law enforcement?

1.121 Primarily, the Royal Commission identified weaknesses in the current mechanisms of enforcing laws of general application, including criminal law, industrial relations law and civil law. If this is the case, how will creating new laws solve a problem that has been identified as failure of the market regulators?

1.122 CFMEU Secretary John Sutton…

> I have a view that current laws should be better enforced, whether we are talking about tax law or corporate misdeeds or workers compensation breaches or superannuation breaches or OH&S breaches or the underpayment of workers and all of these things—the whole gamut of matters I have in mind. Lots of laws are already on the statute book. I probably lean to the view that better enforcement or more effective enforcement is the answer. Then that of course opens up another debate as to how you achieve more effective enforcement. It is a very big and difficult industry, it is a changing industry, and it is about how you achieve that better enforcement.[34]
>
> The debate obviously lies somewhere between better enforcement of existing laws and the possibility of some additional legislative sanctions to get better compliance.[35]

1.123 The logical first step would be to implement mechanisms to improve law enforcement, review and evaluate the effectiveness of these mechanisms, and if problems still exist, then look at implementing new law.

1.124 Various sources of evidence suggest that there is in fact considerable unlawfulness – by employees, unions and employers - in the BCI. The degree to which this unlawfulness is flagrant and widespread is still being debated.

1.125 In 2001, an OEA report found that despite the relatively small size of the BCI, the majority of complaints during 1996-2001 (56%) related to the BCI. The National Building Industry Task Force report that there is a lot of unlawful conduct and collusion between unions and employers occurring in the BCI. The Royal Commission found 392 cases of unlawful and inappropriate conduct.

1.126 The ATO reported that the industry hides up to (an amazing!) 40% of its income (reportedly $1 billion in unpaid tax, every year in NSW alone). Phoenix

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34 *Committee Hansard*, Sydney, 2 February 2004. p.75

35 ibid.

companies are widespread. The ATO is presently investigating 550 cases and has already collected more than $200 million in taxes and penalties.

1.127 One commentator argues that while Cole does not specifically accuse the institutions of failure his key recommendation leaves no other conclusion. The only institutions with a tick from Cole are the ATO and the Immigration department. Apparently both these authorities robustly enforce their responsibilities in the BCI. (Given the 40% hidden income figure, you would have to question the effectiveness of the ATO however!)

1.128 Ultimately the failure that Cole details is not that of market failure, but rather failure of the market regulators.

> There are so many areas of public policy where the authorities, federal and state, are reluctant or blind or will not enforce compliance with laws. I listened to some of the evidence this morning and I have to say that the vast majority of disputes that my union is involved in—and there are not that many, contrary to some of the propositions thrown about—are compliance disputes, where we have gone onto a site and found that the superannuation has not been paid for nine months and the workers' death and disability cover has lapsed because there is an insurance component with the super. So, yes, in a situation where workers entitlements have not been paid, generally they stop work until the moneys are paid.[36]

1.129 The problem is that the current mechanism are failing for example:

- *AIRC* –The WR Act 1996, has essentially limited the powers of the AIRC to prevent and settle disputes via conciliation and arbitration and to enforce the rights of parties to a dispute. An unintentional consequence is that the emphasis is now on the courts to resolve disputes, which is often not timely and is costly. Some commentators have argued that it is the reliance on courts that is fuelling the 'collusion' that occurs in the industry, because it is more commercially expedient to 'make a deal'.

- *OEA* – The Office of the Employment Advocate (OEA) has a philosophy of voluntary compliance, unfortunately from a law enforcement perspective there should be zero tolerance. The OEA have stated that much of the conduct reported to them is outside the jurisdiction of the OEA and therefore they are unable to assist complainants. In addition they find that it is often not possible to effectively refer the complainants to other appropriate law enforcement agencies, as their matters will simply not be actioned with any priority, or at all. Concerns have also been raised that the OEA has too many functions and limited resources, which limits its effectiveness.

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36 *Committee Hansard*, Sydney, 2 February 2004. p.76-77

- *Police* - The Police are reluctant to come down heavily on union representatives; especially given many police are also members of a union. The Police also lack knowledge and training in industrial relations law, which is often complicated because there is both a State and Federal system operating.

- *Taskforce* - While the ITF has made headway into addressing problems within the industry, it may only be scratching the surface. The biggest problem the ITF faces is that it does not have enough powers, such as access to information as a law enforcement body, which limits their ability to pursue complaints in a timely and effective manner. It has also experienced difficulty in establishing relationship with other agencies due to the ITF's lack of permanency.

1.130 The Government and the Building Industry Taskforce argue that one of the key factors impinging on current industrial relations mechanisms to regulate is that inspectors under the WR Act 1996 do not have the same powers as those under the Trades Practices Act (TPA), such as the ability to:

- access information as a law enforcement body;

- confirm residency particulars for service of notices;

- review call charge records to confirm alleged threatening phone calls;

- review taxation information of companies in pursuing employee entitlements;

- review financial records to investigate alleged inappropriate payments;

- investigate the range of matters dealt with during the hearings of the Royal Commission;

- compel persons to provide evidence or provide documents;

- search;

- appropriately protect parties; and

- intervene in AIRC or court matters

1.131 It is for these reasons that Cole and the Government recommend the creation and implementation of the ABCC with powers to monitor conduct in the industry and prosecute unlawful industrial action, similar to the ACCC.

1.132 There were many submissions that argued that a regulator could effectively address non-compliance issues. For example, the CFMEU felt that a regulator could be effective in dealing with non-compliance of employee entitlements:

> So often industrial disputes do have a linkage through to a lack of compliance. I am telling you that in this industry the bulk of disputes are non-compliance disputes. If you had a strong commission which could say: 'Hang on. Hold your horses. Get everyone back to work for a week or two. I'm sending people out there to fix all this up. Let's report back in a week's time to see if all these moneys are paid,' you would head off a lot of disputes. We do not want workers to have to walk out and lose money just trying to be paid their entitlement. If there were another decent enforcement mechanism then we would love it and our members would love it.[37]

1.133 The Democrats are generally in favour of improving law enforcement, however we do not believe that an industry specific regulatory body is the best use of resources. While many submissions and witnesses supported the creation of the proposed Australia Building Construction Commissioner, when asked if they would support an industry wide regulator with a focus on the building and construction industry, the majority were supportive.

National Workplace Relations Regulator

1.134 Complaint statistics from the OEA show that from 1997-2001, 44% of complaints regarding 'freedom of association', 'coercion in certified agreement making', 'right of entry for union organisers', and 'strike pay', were from industries other than the BCI.

1.135 The OEA have stated that much of the conduct reported to them is outside the jurisdiction of the OEA and therefore they are unable to assist complainants.

1.136 Evidence would suggest that improvements to current industrial relations mechanisms would benefit all industries. John Robertson from the Labor Council of NSW said that:

> Some of the instances of non-compliance that exist in this industry, in terms of employment related matters, would probably be in existence in a whole range of other industries as well. It begs the question: do you set up something specifically for this industry or more broadly?[38]

1.137 There are detractors to a workplace relations regulator who would argue that there are bodies that already exists that can deal with these issues, but as Dr Buchannan pointed out the other bodies are not verse in labour market function:

> I think the ACCC and ASIC are not equipped to understand how labour markets function, and they would be very blunt instruments for achieving

37 *Committee Hansard*, Sydney, 2 February 2004, p.81

38 ibid. p.23

> your ends. They might get a very healthy compliance with the commercial law but actually miss the main story….[39]

1.138 The Democrats believe that there has been enough evidence before the Senate and Indeed the Workplace Relations, Employment, Education and Training Committee, via Bills such as *Workplace Relations Amendment (Codifying Contempt offences) Bill 2003*, *Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003, Workplace Relations Amendment (Secret Ballots for Protect Action) Bill 2003,* to support the need for an independent National Workplace Relations Regulator.

1.139 In both the Workplace Relations Amendment (Codifying Contempt offences) Bill 2003, and Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003, I argued for the creation of a national Workplace Relations Regulator as a more effective means of dealing with non-compliance and issues on contempt as opposed to implementing new draconian laws.

1.140 As many witnesses pointed out a regulator would have to be independent and regulate both employers and employees. For example, Professor McCallum observed that the proposed ABCC was not symmetrical and appeared to focus just on enforcement of the unions:

> I was the principal executive officer of the Fraser government's industrial relations bureau, so I have some experience in these types of agencies. That body [proposed ABCC] seems to me to focus very much on employee and trade union conduct. I think if you wanted to improve that body and make it more symmetrical, you would give it the power to enforce wages and other employee entitlements against recalcitrant employers. I know that would mean transferring some staff from the Office of the Employment Advocate and the industrial inspectorate, but it would at least give that body a symmetrical approach. In industrial relations there needs to be a balance, and legislation which is not balanced either does not pass through the parliamentary process or does not operate very well at all.[40]

1.141 Also Dr Buchanan argued that the regulator would have to have a 'broad' agenda:

> I have no problems with regulations and regulators at all. The key questions are: what are they regulating and what are the principles guiding their interventions? For me, that is what has to be thought about more broadly because, as it is defined here, it is not a very broad agenda of issues.[41] ….

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39 *Committee Hansard*, Sydney, 2 February 2004. p.48

40 ibid. p.6

41 ibid. p.48

> "It should look at all aspects of the problem, not simply focus on the IR aspects narrowly defined.[42]

1.142 Labor Council Secretary John Robertson also notes that the regulator must be adequately funded:

> You can put all the laws you like into place, but if there is no commitment to properly fund the operations of these entities then frankly they are not going to succeed. It would be fair to say that they have been wound back to such an extent that they are all but ineffective.[43]

1.143 What the regulator would look like need careful consideration and consultation. Importantly the regulator would have to be independent, act as an even-handed enforcer on both the employer and union sides, and have the ability to investigate and work side by side with other bodies such as ASIC, ATO and the ACCC.

1.144 One model could see the regulator paired with the AIRC's tribunal, as happens with the ACCC's tribunal and regulator. The CFMEU argued that a regulator would need to be independent and seen to have credibility. The CFMEU argued that being a part of the AIRC would achieve this:

> We certainly support much stronger regulation than presently exists, whereby laws are enforced. I do not mean new prescriptions. There are enough prescriptions. I believe that the laws are there already and that what we need are better enforcement mechanisms. I am aware of the debate that is running in this area as to whether it ought to be a body that is specific to one industry or whether it ought to be a body that covers all industries and has a link with the AIRC. I very much support that approach. There ought to be a strong regulatory body linked to the AIRC.[44]

> There ought to be a strong regulatory body linked to the AIRC[45] …. A model that is attached to the AIRC where the people who have been appointed to that quasi-judicial body or whatever it is are independent of the government of the day, where they cannot be pulled this way or that by what the minister of the day might think, whether it be Liberal, Labor or another, and where they do their job without fear or favour because they are part of that independent structure.[46]

1.145 There are historical difficulties that have to be worked through. For example, until 1957 or thereabouts the Arbitration Commission was the

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42 *Committee Hansard*, Sydney 2 February 2004, p.47

43 ibid. p.21

44 ibid. p.80

45 ibid

46 ibid. p.81

Commonwealth Court of Conciliation and Arbitration. That was until the High Court in the *Boilermakers case* found its functions of 'law-maker' (awards) conflicted with its role enforcing those laws. The difference between the ACCC and the AIRC is that the AIRC has judicial authority and the ACCC does not.

1.146 However the industrial relations landscape has changed since this time. Such a model would also need to introduce safeguards and overcome concerns regarding civil liberties.

1.147 What is attractive is a 'one stop shop' on Industrial Relations matters, with powers to enforce current IR law (in all industries), provide advice on law, provide options, assist in arbitration, collaborate and refer matters to other agencies (ACCC, ATO, ASIC, and Police), and provide education on workplace relations law.

1.148 Mr Christodoulou from the Labour Council of NSW argued the need for a one-stop-shop for employment related matters:

> There is non-compliance with respect to WorkCover premiums, where employers underestimate the number of workers they need to insure. There is non-compliance with respect to payroll tax, and that is a big issue. There is sometimes also non-compliance with respect to Australian taxation generally. What we are coming to is that if there were to be a ramping up of compliance, it ought be not only with respect to things such as breaching an award or non-payment of superannuation but also the whole gamut of issues for which employers have obligations. If an employer is cheating on payroll tax, it does give him a competitive advantage over employers who do not. What we are after is a level playing field at the end of the day. We do not want to have one employer being able to win contracts on the basis of illegal activity, whether it is the non-payment of taxation, breaching awards or setting up sham subcontracting arrangements. I think compliance is not just limited to whether you breach awards or industrial agreements; it has to cover all employment related laws and, at the moment, we do not have a one-stop shop for that type of thing. [47]

1.149 The ideas are in embryonic stage and would need to be researched further.

Recommendation 6 - Regulator

- **Oppose the creation of the Australian Building Industry Commissioner**
- **Establish an independent National Workplace relations Regulator**

47 *Committee Hansard*, Sydney, 2 February 2004. p.22

Appointments on merit

1.150 The Democrats believe for a National Workplace Relations Regulator to be truly independent and to be seen to have creditability it is important that the appointment of the board and the chair should be based on merit.

1.151 The Democrats are long been concerned to ensure that wherever appointments are made to the governing organ of public authorities, whether they be institutions set up by legislation, 'independent' statutory authorities or quasi-government agencies, that the process by which these appointments are made is, and is seen to be, transparent, accountable, open and honest.

1.152 At present, there is a widespread public perception that Government appointments result in patronage to handsomely remunerated positions. This perception can damage the reputation of these bodies, as in the public eye they are then seen as being controlled by persons who lack the appropriate independence and who may not be as meritorious as they might be. Labor and the Coalition Government have rejected Democrats' amendments to ensure that appointments are made on merit 22 times so far!

1.153 One of the main failings of the present 'system', is that there is no empirical evidence to determine whether the public perception of jobs for the boys is correct, as these appointments are not open to sufficient public scrutiny and analysis; It is still the case that appointments to statutory authorities are left largely to the discretion of the Minister with the relevant portfolio responsibility. There is no umbrella legislation that sets out a standard procedure regulating the procedures for the making of appointments;

1.154 Perhaps most importantly, there is no external scrutiny of the procedure and merits of appointments by an independent body.

1.155 This issue was extensively investigated by a Committee appointed by the United Kingdom Parliament, which in 1995 set out the following principles to guide and inform the making of such appointments:

- A Minister should not be involved in an appointment where he or she has a financial or personal interest;
- Ministers must act within the law, including the safeguards against discrimination on grounds of gender or race;
- All public appointments should be governed by the overriding principle of appointment on merit;
- Except in limited circumstances political affiliation should not be a criterion for appointment;
- Selection on merit should take account of the need to appoint boards which include a balance of skills and backgrounds;

- The basis on which members are appointed and how they are expected to fulfil their roles should be explicit;

- The range of skills and backgrounds which are sought should be clearly specified.

1.156 The UK Government fully accepted the Committee's recommendations. The office of Commissioner for Public Appointments was subsequently created (with a similar level of independence from the Government as the Auditor General) to provide an effective avenue of external scrutiny. What needs to be done in Australia?
The Democrats' Charter of Political Honesty Bill should be enacted. The Bill is currently before a Senate Committee and proposes mechanisms to promote appointments on merit, along with a range of other accountability reforms.

1.157 Despite the efforts of the Democrats in the Senate, Labor and the Coalition have ensured that we in Australia lack not only the external scrutiny mechanism in the form of a Commissioner for Ethics, but more fundamentally we do not have even basic procedural safeguards. Such an independent body should be established as soon as is possible.

1.158 The first task of this body would be to develop a code of practice for public appointments that is intended not to act as a mere "guideline" to the Government in making appointments, but to regulate by law the way in which a Minister exercises the power of appointment.

1.159 Further, every piece of legislation relating to the constitution of public authorities should contain standard clauses setting out how appointments to the authority are to be made and affirming the jurisdiction of the external review body to examine those appointments. General principles for appointment would include merit, independent scrutiny of appointments, probity and openness and transparency.

1.160 When considering appointments, Ministers must also be obliged to give fair consideration to the impact of the particular appointee on the overall complexion of the Authority. This provision is aimed at ensuring "capture" of the Authority by any particular interest group cannot occur. It is essential that Boards are genuinely representative of the inevitably divergent views of those groups affected by their actions.

1.161 The public must have trust and confidence that the Government will not allow improper or irrelevant considerations or political interests to influence public appointments. The structures that we recommend be instituted to regulate these appointments would make it very difficult for any Government to make an appointment that was not based squarely on merit.

1.162 Appointment on merit provisions would be a must to include in any legislation to establish a National Workplace Relations Regulator, if the regulator is going to have any credibility and sense of independence.

Recommendation 7 – Appointments on Merit

- **Merit based appointment provisions be included in any legislation created to establish a National Workplace Relations Regulator.**

Penalties

1.163 The Cole Royal Commission recommended significant increases in penalty provisions for the Building and Construction Industry to act as deterrent and ensure greater compliance of Workplace Relations law.

1.164 As noted in the Bills Digest:

> Compared to the Workplace Relations Act, the Bill introduces significantly greater financial penalties for non-compliance (for employers and workers), provides for imprisonment for failure to provide information to the ABCC or for obstructing the ABCC or a Federal Safety Officer, and allows for de-registration for failure to comply with court orders. As well as introducing a wider range of civil and criminal offences in the building and construction industry, it also lowers the hurdles for establishing that such offences have been committed.

1.165 There is some support from the federal Court for increasing offence penalties. In imposing the maximum fine of $500 under section 301(e) of the Workplace Relations Act against a union organiser for improperly influencing and coercing a site manager, a magistrate criticised the inadequacy of the penalties provided, arguing that it did not reflect the severity for this type of offence.

1.166 The Democrats believe that increasing penalties under the Workplace Relations Acts would act as a deterrent to non-compliance. However we think that the Governments move under the BCII Bills to increase penalties ten fold is ridiculous and could as the Bills digest notes have the opposite effect and could instead lead to wides spread industrial disruption and public demonstrations. We have already rejected the government's attempts to include provisions to deregister union officials for failing to comply with court orders.

1.167 The opportunity for the Government to increase Part XI-offences penalties under the Workplace Relations Act, was available when the Democrats support 3 fold penalty increases proposed in schedule 2 of the Workplace Relations Amendment (Codifying Contempt offences) Bill 2003. However the Government in the end did not accept the Democrats amendments. The Democrats also moved additional amendments to increase penalties at section 178. As I said in my second reading speech to that Bill, we would prefer to see an increase in penalties at section 178 rather than support the government's proposal to criminalise contravening an order of the commission.

Recommendation 8

- **Increase penalty provisions 3 fold in the Workplace Relations Act to act as a deterrent to facilitate greater compliance.**

AIRC

1.168 As noted above, the WR Act 1996 has essentially limited the powers of the AIRC to prevent and settle disputes via conciliation and arbitration and to enforce the rights of parties to a dispute. An unintentional consequence is that the emphasis is now on the courts to resolve disputes, which is often not timely and is costly. Some commentators have argued that it is the reliance on courts that is fuelling the 'collusion' that occurs in the industry, because it is more commercially expedient to 'make a deal'.

1.169 The Labor Council of NSW argued that greater power needs to be given to the AIRC to intervene in agreement making:

> The only reform we think is absolutely necessary is to give the Australian Industrial Relations Commission the same powers that exist under the New South Wales act. Here in New South Wales the act provides for broad-ranging powers with respect to the making of awards. It allows the commission to intervene in disputes. We think that is one of the missing factors in the Australian Industrial Relations Commission. Beyond that, we think if those powers were in the federal act that would make for a better industrial relations system and one where there would be more certainty around disputes et cetera.[48]

1.170 Professor McCallum also advocated for greater involvement of AIRC in agreement making:

> A more flexible approach to bargaining, particularly with project agreements and sectoral agreements and, where appropriate, use of the Australian Industrial Relations Commission, is likely to give you better results.[49]

1.171 The Democrats have also expressed concerned in a number of Workplace Relations Bills before the Senate of later, about the ability of the AIRC to intervene in disputes.

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48 *Committee Hansard*, Sydney, 2 February 2004. p.20

49 ibid. p.8

1.172 While we support greater enforcement and compliance, we also believe that there needs to be appropriate and effective mechanisms for conciliation and arbitration as the preferred method to resolve disputes.

Recommendation 9

- **Provide the AIRC with powers to make 'good faith' bargaining orders;**
- **Increase the capacity for the AIRC to resolve disputes on its own motion and increased resources to ensure timely resolution of disputes;**
- **Remove limits on the subject matters on which the Australian Industrial Relations Commission can make determinations.**

Whistleblower

1.173 Lawlessness, corruption and thuggery identified by the Cole Royal Commission surely cannot be properly addressed without whistleblower protection mechanisms in place. Impropriety will only be uncovered if the people in a position to reveal it are genuinely protected, and compensated where appropriate.

1.174 Over the last decade the Australian Democrats have campaigned for strong whistleblower protection laws in both the private and public sectors.

1.175 There were a number of submissions and witnesses that identified a need for whistleblower protection. For example, the CFMEU stated that:

> We have a number of decisions at the Industrial Relations Commission which demonstrate that workers who have raised concerns over occupational health and safety or have taken a legitimate but active role within their trade union have faced dismissal. That has been borne out and demonstrated…….What I wanted to say was that, if that is indicative of what happens in areas where we have coverage of workers, we have little doubt although we do not have first-hand knowledge—that there are probably executives and management people in building companies who are aware of matters which may be in the public interest to expose. From the experience we have of the way that building workers are treated for raising concerns over safety or legitimate union issues—and we have had demonstrated cases where those people have been dismissed and discriminated against it is likely that in other areas of the building sector and, indeed, in private industry generally, that sort of thing goes on. The unions' view, I think, is that whistleblowers in that circumstance who are performing a legitimate public duty ought to be entitled to some protection under the law.[50]

50 *Committee Hansard*, Sydney, 2 February 2004. p.67

1.176 ECA in their submission also argued for whistleblower protection:

> ECA believes that effective whistleblowing provisions are essential for the proposed legislation to succeed. Presently the industry is caught in a systemic cycle of almost a "tit for tat" style of reprisal against anyone who rocks the boat and speaks to authorities with regard to any wrong doing in the industry. If a contractor does make a stand against a union, they are likely to find themselves "blacklisted" by the union when tendering for work. That is, the union will apply pressure to the principle contractor/developer to ensure that the contractor in question does not win work. Should they be lucky enough to win a project, then they will find that the project will be disrupted routinely with frivolous safety issues. In the eyes of most contractors in the building and construction industry industrial harmony is worth more than doing the right thing and standing up to coercion and intimidation. As ECA has mentioned earlier in this submission, the industry requires a shift in its culture and its thinking for the recommendations of the Cole Royal Commission to be successfully implemented. This can only occur if all stakeholders are comfortable with the levels of safety that are provided to them should they decide to come forward with information pertaining to lawlessness or criminality. These safeguards will be even more important if the legislation remains in tact to the point where supplying information to the Building and Construction Industry Commissioner is compulsory in certain circumstances.[51]

1.177 An effective whistleblower protection scheme serves the public interest by exposing and eliminating fraud, impropriety and waste. This is especially topical in the private sector, given the giant corporate collapses of WorldCom, Enron and HIH, and in the public sector with alleged government involvement in the sexing up of intelligence reports to encourage war in Iraq.

1.178 If you are fighting criminality or corruption in the workplace you need to encourage disclosure in the public interest. Public sector disclosure laws are quite effective in the States and Territories, but are effectively absent in the Federal arena. And private sector disclosure laws are effectively non-existent. Witness protection schemes are a poor substitute for disclosure laws.

1.179 There have been useful private sector initiatives aimed at self-regulation. The commercial world has come to realise that encouraging whistleblowing reduces impropriety and increases productivity.

1.180 In the last few years, major audit and accounting groups such as Deloitte Touche Tohmatsu, Ernst & Young, Pricewaterhouse Coopers and KPMG have established procedures that allow employees to blow the whistle anonymously to auditors on corporate fraud, corruption or theft.

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51 ECA, Submission No.15, p.7

1.181 The Australian Stock Exchange's Corporate Governance Council recommends that listed companies provide mechanisms for employees to alert management and the board to misconduct without fear of retribution.

1.182 Whistleblowers show great courage in exposing the corrupt and the improper. It is a sad fact that the law still offers them little real protection. Victimisation, exclusion, harassment and derision are all too common experiences for whistleblowers.

1.183 Law is needed to establish and enhance the legal rights of whistleblowers, and authorities receiving information must be discreet and wherever possible, maintain the whistleblower's anonymity.

1.184 Whistleblowers perform a valuable and essential public service. Without them, much corruption and impropriety would go undetected. Whether its unions, churches, corporations or governments, people need to feel able to come forward when they encounter wrongdoing.

1.185 We have introduced whistleblower protection legislation for debate in the Federal Parliament, for example I have introduced a private members Bill *Public Interest Disclosures (Protection of Whistleblower) Bill.* Despite strong and generally unanimous Senate pressure, certainly since 1994, successive federal governments have shown a reluctance to embrace this principle and to establish comprehensive protection for whistleblowers.

1.186 Persistence has resulted in a small break through with the Government including whistleblower provisions (and accepted amendments to the provision) in the CLERP (Audit Reform and Corporate Disclosure) Bill 2003. The amendment will only apply to corporate organisations. This will assist in improper corrupt or unlawful conduct being uncovered if people in a position to reveal it are genuinely protected and compensated.

1.187 Our view is that these protections should be extended to other participants in the BCI – registered organisations and unincorporated associations, if we are want to encourage people to come forward and reveal non-compliance with the law.

Recommendation 10

- **Insert Whistleblower provisions in the Workplace relations Act 1996**

Other Key issues Impacting on Building and Construction Industry

Training and skill development

1.188 As noted in Chapter 7 of the Majority report, the Committee heard a lot of evidence that training and skill development was a critical issue for the building and construction industry. And that adequate skill level was critical to the efficiency and productivity of the industry. The Democrats support the points raised in chapter 7 of the Committee majority report and believe that training and skill development in the industry should be a key priority of the Government as a way to improve productivity and efficiency and ensure that skills are not further eroded.

Work arrangements

1.189 According to Buchanan and Allan (2000), the construction industry has long been recognised as having distinctive employment relationships and that in the English speaking world the industry is often characterised by high levels of contractor and subcontractor employment[52]. Although in France for example the proportion of workers with less than standard employee status is approximately 10 per cent, compared to approximately 45 per cent in the UK and 35 percent in Australia[53].

1.190 Buchanan and Allan go on to argue that:

> The comparatively high level of sub-contracting and especially informal (ie black economy) activities in the Australian and UK industries have meant high levels of tax avoidance, if not complete evasion, have been a feature of this sector.[54]

1.191 Buchanan and Allan estimate that the in the mid 1990's the average construction worker payed around $6,000 a year less than equivalent PAYE workers. They estimated that losses in tax revenue could be up to $2.2 billion annually.

1.192 Buchanan and Allan reported that the contracting system resulted in a deterioration in key features of the industry, including falls in productivity/building quality; safety standards on sites; and commitment to skill formation.

1.193 Buchanan and Allan report that similar dynamics as to what we are seeing in Australia got so advanced that the Conservative UK Government was forced to take remedial action. Interestingly the campaign began by looking at a series of cases

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52 Buchanan J and Allan C 2000 'The growth of contractors in the construction industry: implications for tax revenue', *Economic and Labour Relations Review*, Volume.11:1, p50

53 ibid. pp.50-51

54 ibid. p.51

concerning dismissals, redundancy and safety rights for contractors. According to the authors:

> the UK government found that nearly all cases conducted established that the workers were in fact employees, despite the fact the Inland Revenue treated them differently.[55]

1.194 In 1996 the UK Government announced to the construction industry that all contractors would be obliged to review the employment status of their workforce, eventually setting deadline for the review the penalty for not making the deadline was liability of paying back taxes from that date on. Buchannan and Allan report that the Inland Revenue claims 200,000 workers subsequently went back to PAYE tax status.

1.195 In his submission to the Cole Royal Commission, Professor Stewart argued that they way to deal with the increase in disguised employment is by a redefinition of the term 'employment'. Professor Stewart argues that:

> There are many genuine contractors who quite clearly run business of their own and provide services to a range of different clients. They are not the concern. Rather, the concern lies with the "dependent contractors" who make up at least a quarter of all "self employed" contractors (and probably much higher in the building and construction industry) and who as a matter of practical reality are often distinguishable from employees….it is important to adhere to the principle that it should no be lawful to contract out of protective regulation. If a contract to pay an employee less than applicable award conditions or to deny them leave entitlements is illegal and unenforceable, why should it be lawful to do the same thing through the device of a delegation clause or an interposed entity – even if the worker freely consents?[56]

1.196 Professor Stewart argues that:

> The alienation of personal services income legislation has reduced the tax incentives for some workers to agree to be hired as an independent contractor rather than as an employee, or to operate through an interposed entity such as a personal company, partnership or family trust. However these provisions to not deems such a worker to be an employee, nor in any way affect the incentive for business to persuade workers to contract in this way.[57]

1.197 Professor Stewart also cites the advances that legislation is some jurisdictions (News South Wales, Queensland and lesser extent Commonwealth) that permit

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55 Buchanan J and Allan C 2000 'The growth of contractors in the construction industry: implications for tax revenue', *Economic and Labour Relations Review*, Volume.11:1, pp.66-67

56 Stewart, A (2002) Working Arrangements and the Definition of Employment, submission to Royal Commission into the Building and Construction Industry, pp.4-5

57 ibid. p.7

workers who are categorised by law as contractors to complain about the fairness their work arrangements. However, Stewart argues that they are piecemeal and that a more effective response is to tackle the problem at the source - the common law definition of employment itself. Stewart stated that:

> What is needed is to adopt a standard or model definition of employment that can be included in any legislation where it is considered necessary to apply obligations or extend entitlements to or in respect of those who work for someone else in a subordinate and dependent capacity, but not those who are genuinely in business in their own account.[58]

1.198 The Democrats adapted Stewarts proposed definition of employee

1.199 One would assume that the government would support such an amendment as the federal system has always supported access to genuine employees so it should have no objection to provisions that ensure genuine employees are captured by the unfair dismissal system. To further make my point, you cannot at one level deem an employee for tax purposes and then for workplace relations purposes exclude them.

1.200 However, it appears that despite the Government placing a lot of emphasis on productivity of the building and construction industry and the need to address what the econtech report referred to as 'restrictive work practices', yet have failed to look at the potential impact that non-genuine contracting may be having on the productivity of the industry.

Recommendation 11 – Definition of employee

- **The Government consider legislating a definition of employee into the Workplace Relations Act 1996.**

1.201 The CFMEU made several recommendations to deal with Labour hire, that are also worth consideration:

> In relation to subcontracting and labour hire, we suggest
>
> - that section 127A of the Workplace Relations Act be amended to ensure that bona fide contractors have recourse to effective remedy in situations where contracts are unfair; that the act be amended to include labour hire agencies within the definition of 'employer' in section 4;
>
> - that a comprehensive national licensing regime be introduced for the labour hire aspect of this industry; and

58 Stewart, A (2002) Working Arrangements and the Definition of Employment, submission to Royal Commission into the Building and Construction Industry, p.7

- that OH&S laws be amended to guarantee both the client/employer and labour hire company are responsible for OH&S of labour hire workers.[59]

Employee Entitlements

1.202 The Committee received evidence that underpayment or loss of employee entitlements was rife in the Building and Construction Industry as was indirectly and directly responsible union anxiety and 'action' against employers. According to the CFMEU:

> The building industry suffers from chronic under/non-payment of workers entitlements. A great deal of the union's time and resources is devoted to recovering these monies. The following are gross figures for the sum of entitlements recovered on behalf of workers by our corresponding State Branches in recent times.

State/Territory	Amount recovered	Time frame
Tasmania	170,000	years 1999, 2000 and 2001
Queensland	1,333,285	years 1999, 2000 and 2001
Australian Capital Territory	$5,312,395.46	years 1999, 2000 and 2001
New South Wales	$11,629,172.28	years 1999, 2000 and 2001
Victoria	$10,687,616.78	From 28/2/01 to 21/2/02
Western Australia	$950,000	years 1999, 2000 and 2001
South Australia	$750,000	years 1999, 2000 and 2001

> Whilst our union does its best to ensure that workers receive their entitlements, we are not always successful. Many workers are left out of pocket by companies which go bust or close down only to reappear under a different corporate structure. On other occasions workers choose to settle

59 *Committee Hansard*, Sydney, 2 February, pp.57-58

> their cases for less than what they are owed in order to avoid lengthy court proceedings.[60]

1.203 The Labour Council of NSW argued that project agreements can help reduce the incidence of non-compliance with respect to employee entitlements:

> I would say that in terms of the project awards that we have, where we do have overarching project awards that provide a whole set of additional procedures, that has limited the number of non-compliance issues that come up with respect to workers' entitlements, because the unions and employers have a system where they can regularly check that employers and subcontractors are paying into the superannuation fund and their redundancy schemes and that they are complying.[61]

1.204 Evidence presented in the following section suggested that more effectively dealing with phoenix companies will also go some way to reducing the incidence of non-payment of employee entitlements.

1.205 We note the Government on the 31 March launched a education and compliance campaign aimed to deal with rogue employers who do not meet their legal obligations to provide employee entitlements. According to the Government press release the Departmental inspectors will inspect the time and wage records of a sample of employers and follow up any breaches of federal awards and agreements and Employers who refuse to comply with their obligations may be prosecuted.

1.206 The Democrats support the Governments initiate, but recognises that this is a short-term initiative and that more will need to be done to ensure compliance. Again underpayment of employee entitlements is not quarantined to just the Building and Construction Industry and believes more needs to be done to address the problem. We would suggest that investigation of underpayment of employee entitlements would be something that a National Workplace Relations Regulator would pursue.

1.207 In the meantime we think the Building Industry task Force should play more of an active role in pursuing under-payment of employee entitlements. And increase in penalties for breech of awards and agreements.

Recommendation 12

- **That the Building Industry Task Force play a more active role in pursuing under-payment of employee entitlements;**
- **That section 178, - Imposition and recovery of penalties of the WR Act 1996, relating to breaches of awards and agreement should be better enforced; and**

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60 Senate Committee, CFMEU response to Question on Notice, 8 March 2004

61 *Committee Hansard*, Sydney, 2 February, p.20

- **That section 178 of the WR act 1996, should be increased three fold to act as a greater deterrent.**

Tax and Phoenix Companies

1.208 The Committee received a lot of anecdotal evidence that phoenix companies were rife in the Building and Construction Industry.

1.209 The CFMEU in their submission identify areas of the Building and Construction Industry where phoenix companies are most likely to occur:

> Phoenix companies are normally found in the labour intensive sectors of the building and construction industry where labour costs are a significant part of the running costs of a business. These sectors include formworking, scaffolding, concreting, bricklaying, plastering and gyprock fixing, and steel fixing.[62]

1.210 ASIC's submission to the Cole Royal Commission conveniently analyses the phenomenon in terms of 'Innocent phoenix operators', 'Occupational hazard' and 'Careerist offenders'.

1.211 Careerist offenders purposely structure their operations in order to engage in phoenix activity, avoid detection and exploit loopholes in insolvency laws. The timing of implementation of the arrangements is manipulated to ensure the maximum amount of debt is accumulated in the old company. Debts are usually owed to the ATO, State payroll and workers compensation premium authorities and employees entitlements such as superannuation and long service leave. The new phoenix company is established at the last possible moment. Assets are transferred to it at a value significantly below the market cost of the assets in question or for no consideration. The new company has the potential to repeat the pattern of failure.

1.212 The Cole Royal Commission found there had been significant incidents of fraudulent phoenix company activity in the building and construction industry.[63] Earlier research carried out by the ASC in 1996 indicated that:

- annual losses to the Australian economy due to phoenix type activities were estimated to be in the range of $670 million to $1.3 billion (for the 2003 financial year these figures translate to a range of $1.04 billion to $2.4 billion);
- 18% of SMEs had experienced phoenix activities;
- 45% of phoenix activities appeared to be in the building and construction industry;

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62 CFMEU, Submission No.37, p. 95

63 Volume 8, Reform – National Issues Part 2, Chapter 12 Phoenix Companies, p. 161

- 77% of phoenix companies will not have adequate books and records;
- 77% will transfer corporate assets to evade paying creditors; and
- the average phoenix company group generated creditor losses of about $557,000 which equated roughly to $90,000 per phoenix company group per annum over the average lifespan. The average number of creditors affected by a phoenix company group, again over its lifespan, appeared to be around 838 who lose on average $10,300 each.[64]

1.213 Phoenix company schemes have been a longstanding concern of regulatory agencies, parliamentary committees and other bodies of inquiry. The Parliamentary Joint Committee on Corporations and Securities (PJCCS), expressed concern about abuses of the corporate form (i.e. phoenix company activity) in its 1994 and 1995 *Reports on the Annual Reports of the Australian Securities Commission and Other Bodies*.[65] Australian Securities Commission (ASC) undertook investigations and initiatives to address phoenix companies in 1995 and again in 1996-97. And more recently, both the ATO and ASIC have instituted programs to identify and pursue companies and individuals that engage in phoenix company activity. If the anecdotal evidence received at this Senate inquiry is anything to go by the past initiates have not been entirely successful in addressing the problem.

1.214 The main legislative approach dealing with phoenix company activity has not been to define phoenix activity but rather to provide for disqualification of directors in certain circumstances and set penalties for contravening the disqualification

1.215 However there has been criticism about the effectiveness of the current provisions. At the Parliamentary Joint Committee on Corporations and Financial Services inquiry into Australia's Insolvency Laws, the Tax Office questioned whether the legislation governing voidable preferences, insolvent trading and fraud was sufficient to counter phoenix type activity.[66] Mr Robert Charles, ATO, argued that:

> We say that on the basis that we see instances of the same directors managing companies into the future without being disqualified, and we

64 ASC Research Paper, Phoenix Companies and Insolvent Trading, No.95/01, July 1996, pp.12, 74

65 Parliamentary Joint Committee on Corporations and Securities, *Report on the Annual Reports of the Australian Securities Commission, the Companies and Securities Advisory Committee, the Companies Auditors and Liquidators Disciplinary Board and the Australian Accounting Standards Board 1992-1993*, June 1994, p.6; and *Report on the Annual Reports of the Australian Securities Commission and Other Bodies: 1993-1994*, 23 October 1995, p.10

66 Parliamentary Joint Committee on Corporations and Financial Services inquiry into Australia's Insolvency Laws, Submission No.14, p.8

believe the system may be improved with increased clarity in terms of the consequences of being directors of insolvent companies.[67]

1.216 The CFMEU made a number of recommendations to deal with phoenix companies:

- tougher penalties should be enacted for those who repeatedly abuse corporate structures;
- laws should be introduced allowing the corporate veil to be lifted so that employees have access to the assets of directors/shareholders in appropriate circumstances such as fraud[68]
- Greater controls are needed for people wishing to establish a business and further legislation is needed to prevent asset stripping of companies.
- Consideration should also be given to the freezing and confiscation of assets held by family members, friends or trust arrangements, where they are related to the operation of phoenix companies.[69]

1.217 The Parliament is also currently looking at a number of measures to improve the disqualification provisions and more effectively prevent phoenix companies.

1.218 Schedule 4, Part 3 – Disqualification of Directors of the CLERP 9 Bill, proposes to increase the maximum period of court-ordered disqualification of directors for involvement in repeated company failures from 10 to 20 years; and to allow ASIC to apply for an additional period of disqualification (of up to a further 15 years) for persons who become automatically disqualified from managing a corporation. The Democrats are supporting these provisions.

1.219 The Parliamentary Joint Committee on Corporations and Financial Services is currently inquiring into Australia's Insolvency Laws and is looking at solutions to address the problems of phoenix companies – this committee is due to report soon. The Democrats played a leading role in establishing this committee. As a member of that committee I have read many of the submissions (and in fact referred a number of submissions to the Building and Construction Industry Senate inquiry to the inquiry into Australia's Solvency Laws), attended many of the hearings and support the proposed recommendations to come out of the committee. I believe that the recommendations will go someway to addressing the problems experienced in the Building and Construction Industry. I encourage the Government to consider implementing the recommendations.

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67 Parliamentary Joint Committee on Corporations and Financial Services inquiry into Australia's Insolvency Laws, *Committee Hansard*, 26 June 2003, p.53

68 *Committee Hansard*, Sydney, 2 February, p.57

69 CFMEU, Submission No. 37, p.98

Recommendation 13

- **Implement recommendations of the Parliamentary Joint Committee on Corporations and Financial Services into Australia's Insolvency Laws.**

1.220 With respect to tax evasion, the National Crime Authority (NCA) on page 29 of the "National Crime Authority Commentary wrote:

> Tax evasion is also a method used by the unscrupulous to increase profit by non-payment of tax and other government duties. Such action jeopardises legitimate business in a number of significant ways. One long-running Swordfish investigation that concluded in 2000 uncovered systematic fraud in the building industry. The businesses involved were reducing their operation costs by evading tax, avoiding superannuation payments, avoiding contributions to workers' compensation premiums and other typical operating expenses required by Commonwealth and State laws. In 1999 the Australian Senate's Select Committee on the New Tax System noted one estimate that serious tax avoidance occurring in the building industry was costing up to approximately $1 billion per annum and growing.[70]

1.221 In an early part of this document in the section on 'work arrangements' we noted evidence that disguised contracting not only impacts on the industries effectiveness, safety, skill formation but is estimated to result in a loss in tax revenue up to $2.2 billion annually. In this section we argued that a definition of employee in the Workplace relations Act was needed to address disguised contracting.

1.222 With respect to tax avoidance the CFMEU also made a number of recommendations, that:

- there should be a national licensing regime for this industry;
- a dedicated national ATO unit be established to investigate and prosecute sham subcontracting arrangements and the misuse of the ABN registration system; and
- the 80-20 concept arising from the Ralph review be promptly implemented in this industry.

Political donations and political governance

1.223 Ever since the first political donation changed hands, money has been used to influence electoral outcomes, the processes of government, and the futures of

70 CFMEU, Submission No.37

politicians and parties. However the Democrats believe that Politicians are in office to serve the public interest, not to bargain for policy outcomes with wealthy donors, whether donors are unions, companies or individuals.

1.224 The Australian Democrats have a long history of activism for greater accountability, transparency and disclosure in political finances.[71]

1.225 We also believe that democracy is best served by keeping the cost of political party management and campaigns at reasonable and affordable levels. Although in any democracy some political parties and candidates will always have more money than others, money and the exercise of influence should not be inevitably connected.

1.226 Honesty in politics requires more than just not telling lies. It requires politicians and political parties to be up front with the electorate, to give them the information they need to make informed judgements. So long as money has the capacity to corrupt or influence, we need comprehensive disc1osure laws to ensure proper accountability and transparency.

1.227 Supposedly, any donation over $1500 must be disclosed. However, there are plenty of options for donors who want to keep their identity a secret.

1.228 Some use clubs that collect donations from individuals, aggregate them, and then make a large donation to a political party. Some professional fundraisers and promoters play the same game. Trusts and foundations are another great way of hiding the true source of donations.

1.229 There are a number of changes to electoral law that are necessary. Borrowing from Tax law principles, firstly, we need to enact general anti-avoidance provisions in electoral law to ensure ***full*** disclosure.

1.230 We should require the publication of explicit details of the true sources of political donations, and the destination of their expenditure. Better disclosure laws will prevent, or at least discourage, corrupt, illegal or improper conduct in electing representatives, in the formulation or execution of public policy, and will help protect politicians from the undue influence of donors.

1.231 Another step forward is to set a limit on donations – to apply a cap, or ceiling. Ultimately, to minimise or limit the public perception of corruptibility associated with political donations, a good donations policy should forbid a political party from receiving inordinately large donations.

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71 A useful reference to our views is *the dangerous art of giving* Australian Quarterly June-July 2000 Senator Andrew Murray and Marilyn Rock.

We have also written about this matter in our supplementary remarks to the Joint Standing Committee on Electoral Matters, Report of the Inquiry into the conduct of the 2001 Federal Election and matters related thereto.

1.232 And finally an absolute ban on donations with strings attached. Most donors have broadly altruistic purposes. But there is a perception (and probably a reality) that some tie large donations to specific policy outcomes they want achieved. That constitutes corruption of the political process.

1.233 Undeniably, if a construction union threatens to withhold big donations to Labor, or a construction company makes big donations to the Party in Government, there is a certain public and private pressure at play on law, agreements, contracts and developments. Tables 1 and 2 demonstrate the large sums of money that are donated to both major parties by builders and constructors.

Table 1 – Total Donations by contributors, 1998/1999 to 2002/2003

Year	**Builders and Constructors**	**Property Developers**	**Total**
1998/99	907,222	1,367,964	**2,275,186**
1999/00	858,406	1,520,132	**2,378,538**
2000/01	1,573,656	1,808,885	**3,382,541**
2001/02	1,932,319	2,706,859	**4,639,178**
2002/2003	1,649,700	1,621,400	**3,271,100**
Total	**6,921,303**	**9,025,240**	**15,946,543**

Compiled from on-line AEC returns

Table 2 Top 10 Donations from Builders and Constructors 1998/1999 to 2002/2003

Companies	**Total Amount**
Multiplex Constructions Pty Ltd	1,710,350
Leighton Contractors/Holdings Pty Ltd (NSW)	1,277,817
Meriton Apartments Pty Ltd	1,018,067
Baulderstone Hornibrook P/L Vic	742,767
Paynter Dixon Constructions Pty Ltd	319,650
Becton Construction Group	302,945
Walter Construction Group	231,500
Grocon Pty Ltd	217,050

Stockland (Constructors) Pty Ltd	131,855
St Hilliers Pty Ltd	103,850

1.234 For this reason there is a strong incentive for the Democrats to tie electoral reform to consideration of the Building and Construction Industry legislation.

Recommendation 14 – Political Donations

- **No entity or individual may donate more than $100 000 per annum (in cash or kind) to political parties, independents or candidates, or to any person or entity on the understanding that it will be passed on to political parties, independents or candidates.**
- **Additional disclosure requirements to apply to Political Parties, Independents and Candidates:**
    - **any donation of over $10 000 to a political party should be disclosed within a short period (at least quarterly) to the Electoral Commission who should publish it on their website so that it can be made public straight away, rather than leaving it until an annual return;**
    - **professional fundraising must be subject to the same disclosure rules that apply in the Act to donations.**
    - **The *Commonwealth Electoral Act 1918* should specifically prohibit donations that have 'strings attached.'**
    - **The Corporations, Workplace and other laws be amended so that either:**
        - **Shareholders of companies and members of registered organisations (or any other organisational body such as mutuals) must approve a political donations policy at least once every three years; or in the alternative**
        - **Shareholders of companies and members of registered organisations (or any other organisational body such as mutuals) must approve political donations proposals at the annual general meeting.**
    - **Where the AEC conducts elections for registered and other organisations, the same provisions governing disclosure of donations for political organisations should apply.**

1.235 Political governance also needs to be focussed on as a reform priority. Political governance includes how a political party operates, how it is managed, its corporate and other structures, the provisions of its constitution, how it resolves

disputes and conflicts of interest, its ethical culture, and how transparent and accountable it is

1.236 As I noted in the Democrats supplementary remarks to the Report of the Inquiry into the conduct of the 2001 Federal Election and matters related thereto of the Joint Standing Committee on Electoral Matters (JSCEM):

> I and other Democrats have made a number of speeches in the Senate and elsewhere over the years concerning the accountability and governance of political parties. Democrat Issue Sheets have reflected these views, and Democrat traditions and perspectives support these views.
>
> Among other things the proposition has been put that political parties, in addition to their overriding duty to the Australian public, must be responsible to their financial members and not to outside bodies (hence, 'one vote one value'). In Australia this is particularly relevant with respect to the ALP.
>
> There are two legislative avenues that could be pursued in this regard - the Electoral and Workplace Relations (WRA) Acts. The JSCEM have taken the first step with its recommendation to introduce one vote one value in political parties, in its report on the integrity of the roll.
>
> The WRA could be amended to insert provisions regulating the affiliation of registered employee and employer organisations to political parties.
>
> These provisions would be contained in Chapter 7 of the Registration and Accountability of Organisations Schedule of the WRA (Schedule 1B), which relates to the democratic control of organisations by their members.
>
> Such an approach might wish to:
>
> - Prohibit the affiliation, or maintenance of affiliation, of a federally or state registered employee or employer organisation with a political party unless a secret ballot of members authorising the affiliation has been held in the previous three years;
>
> - Require a simple majority of members voting to approve affiliation to a political party, subject to a quorum requirement being met;
>
> This proposition is popular with some ALP reformers who aim to make the process of Trade Union affiliation to political parties more transparent and democratic.
>
> By way of background, the ALP is the only registered political party that allow unions to affiliate to it and to exercise a right to vote in internal party ballots, such as in the pre-selection of ALP candidates.
>
> Unions affiliate on the basis of how many of their members their committee of management chooses to affiliate for. The more members a union affiliates for, the greater the number of delegates that union is entitled to

send to an ALP state conference. Individual members of that union have no say as to whether they wish to be included in their unions affiliation numbers or not. Affiliation fees paid to the ALP by the union is derived from the union's consolidated revenue.

Some proposed amendments that could deal with the inherently undemocratic nature of the present system might be as follows:

- Any delegate sent to a governing body of a political party by an affiliated union has to be elected directly by those members of the union who have expressly requested their union to count them for the purpose of affiliation. As an added protection, the Australian Electoral Commission could conduct such an election and the count would be by the proportional representation method.

- Definitions would need to comprehensively cover any way a union may seek to affiliate to a political party e.g. by affiliating on the basis of the numbers of union members or how much money they may donate to a political party etc.

- Any union delegates that attend any of the governing bodies of a political party that the union is affiliated to, must be elected in accordance with the Act.

- Individual members of the union would need to give their permission in writing before the union can include them in their affiliation numbers to a political party. No person should be permitted to be both a voting party member in his or her own right, and also be part of the affiliation numbers of a union. Such people effectively exercise two votes, in contravention of the 'one vote one value' principle.[72]

Recommendation 15 – Political Governance

- **That the *Commonwealth Electoral Act 1918* and the *Workplace Relations Act* be amended as appropriate to ensure democratic control remains vested in the members of political parties. Specifically with respect to registered organisations to**

  - **Prohibit the affiliation, or maintenance of affiliation, of a federally or State registered employee or employer organisation with a political party unless a secret ballot of members authorising the affiliation has been held at least once in a federal electoral cycle;**

  - **Require a simple majority of members voting to approve affiliation to a political party, subject to a quorum requirement being met;**

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72 Joint Standing Committee on Electoral Matters, Report of the Inquiry into the conduct of the 2001 Federal Election and matters related theret, Democrat Supplementary Remarks, pp.9-11

Unitary IR system

1.237 Throughout the inquiry we heard evidence of inconsistencies between states on issues such as workcover, occupational health and safety, agreement making etc. There is a desperate

1.238 The BCII Bill proposed to use constitutional powers to override state jurisdictions to providing certainty across the industry. The benefits of which would be to prevent forum shopping and improve efficiencies. For example MBA Queensland stated that:

> While the need for strong third party intervention is acknowledged, industrial relations processes in Queensland are further complicated by the overlap created by a Federal and State Industrial Relations system, that enables unwilling industrial parties the opportunity to "jurisdiction shop" in order to avoid their industrial responsibilities. The CFMEU are registered under the Federal and State Industrial Relations Acts with the Builders Labourers' Federation registered exclusively under the State banner. Unfortunately, both unions can easily out maneuver the employer parties by claiming the incorrect jurisdiction whenever it suits. This tactic generally delays proceedings to the extent where the employer capitulates to the Union demands. The disputes surrounding the latest EBA was referred to both Industrial Commissions and the legalistic approach adopted by both Commissions enabled the unions to argue the inappropriateness of each jurisdiction to completely avoid any responsibility for that dispute. The proposed *Building and Construction Industry Improvement Bill 2003* seems to rely in part of the "Corporations Power" applicable to conduct by or against a constitutional corporation. Such an initiative is welcomed by Master Builders as it enables further certainty in the direction and resolution of inappropriate industrial conduct.[73]

1.239 However, as the bills Digest noted, it is unlikely that all workers and businesses in the building and construction industry will be covered. It is unclear, for example, whether employees of an unincorporated sub-contractor on a building site would be covered by the Bill, especially if any action they take is only in relation to their own employer.[74] ACCI noted that:

> The potential exists for legal disputes over the application of laws or inconsistency of laws. This could in turn lead to unnecessary costs, and frustrate the enforcement of the new laws or the application of the new laws by court.[75]

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73 Queensland MBA, Submission No. 90, p.14

74 Bills Digest no.129 2003-04, pp. 9-10

75 ACCI, Submission to Exposure Draft Bill, p.7

1.240 While we support the idea of using constitutional powers to override state laws to provide consistency of industrial laws across state jurisdictions, we do not support industry specific laws.

1.241 One of the fundamental reasons for the Democrats not supporting the BCII bills is that is proposes to have a sperate set of rules and laws governing a select group of employees and employers. You do not have international universal human right laws such as the rights of the child only covering select individuals such as good children. The laws are there to protect everybody on an equal basis.

1.242 As I have argued before, we need one industrial relations system not six. We have a small population, yet we have nine governments and a ridiculous overlap of laws and regulations. There are areas of the economy that genuinely require a single national approach. Like finance, corporations or trade practice law, labour law is one of those areas.

1.243 Globalisation and the information revolution have created competitive pressures that require us as a nation to be as nimble as possible in adapting to changing circumstances.

1.244 There are areas of policy and jurisdiction the States no longer have sensible involvement in. After seventy plus years we finally got a unitary system of trade practices law. After one hundred years states rights and vested interests finally gave way to one unitary financial system for Australia. Although the process was messy in execution we have a unitary system in corporations law.

1.245 It will be a difficult task but it is time we moved toward a national system of industrial regulation that will do away with unnecessary replications, conflicts and complexity.

1.246 Referenda aimed at extending the Commonwealth's industrial relations powers failed in 1911, 1913, 1926, 1944 and 1946. However, it seems unlikely that anyone would attempt a unitary system by referendum again.

1.247 The first step towards a unitary industrial relations system was a major one – the referral of the Victorian system to the Commonwealth from 1997. With that referral also came a category of several hundred thousand Victorian employees under inferior employment conditions under the State law of the time.

1.248 We supported the referral of Victoria's State industrial relations powers to the Commonwealth. If there is a lasting memorial of Jeff Kennet it is agreeing to refer industrial relations powers to the Commonwealth by the States. But how much better off has Victoria been with one system, not two.

1.249 Despite Victoria's success it is unlikely at this stage that other states will follow suit.

1.250 Opposition to a unitary system comes from two principal sources: vested interests (which include states rightists) and those who oppose whatever the content will be.

1.251 The only other route to a unitary system is for the commonwealth to use constitutional corporations power or the external affairs power to cover the field. Which the government recently tried to do with unfair dismissal laws via the *Workplace Relations Amendment (Termination of Employment) Bill 2003*.

1.252 However, relying on the constitutional corporations power alone will still leave large chunks of small business unregulated, as around 70% of small businesses are not incorporated, and do not fall under that power. While Federal awards do not currently cover many small businesses, State common rule awards cover some. Any unitary system must not only keep in the system those already in the federal or state systems, but it must also capture those presently not covered at all.

1.253 In the end the Democrats did not support the *Workplace Relations Amendment (Termination of Employment) Bill 2003* because it would have disadvantaged some employees in some states.

1.254 The Democrats believe that a unitary system does not have to be achieved with an all or nothing outcome. We strongly urge whichever party is in power in the next term to seriously consider the efficiencies and benefits that can be derived for a unitary industrial relations system. We do not have to immediately move from six systems to one. Transitional arrangements could allow for up to six systems to continue, after a national system was established. As was done with tax, trade practices, corporations and finance law the first step is to build the political will and consensus to try and reach a unitary goal.

Recommendation 16

- **Establish a national unitary industrial relations system**

Conclusion and Recommendations

We support the Majority's recommendation 1, and its other recommendations either in full, or in the case of Recommendation 2, by assessing any legislation on its merits, and we make the following additional recommendations:

Recommendation 1 – Right of Entry

- Applicants for right of entry permits to be required to demonstrate a knowledge of the rights and obligations associated with the permit;
- The Registry be requested to develop, in consultation with union and employer bodies, a code of practice governing the right of entry;
- Implement a two tiered approach where on serious industrial issues or where there is dispute about the right of entry, an independent third party, such as an inspector, is called to arbitrate the matter.
- Increase penalties to right of entry provisions under the WR Act 1996, to act as a deterrent.

Recommendation 2 – Secret Ballots

- require trade unions to have within their rules secret ballot provisions which the members can activate when the members think it appropriate

Recommendation 3 – Dispute mechanisms

- Amend the WRA to require all agreements to provide effective dispute resolution mechanisms, which allow the AIRC to arbitrate disputes.

Recommendation 4 – Agreement making

- Reject provisions to ban pattern bargaining in the Building and construction industry and instead amend the *Workplace Relations Act* to enable genuine project agreements to be reached and certified for major projects.

Recommendation 5 – BCII Bills

- Oppose the Building and Construction Industry Improvement Bills

Recommendation 6 - Regulator

- Oppose the creation of the Australian Building Industry Commissioner
- Establish an independent National Workplace relations Regulator

Recommendation 7 – Appointments on Merit

- Merit based appointment provisions be included in any legislation created to establish a National Workplace Relations Regulator.

Recommendation 8 - Penalties

- Increase penalty provisions 3 fold in the Workplace Relations Act to act as a deterrent to facilitate greater compliance.

Recommendation 9 - AIRC

- Provide the AIRC with powers to make 'good faith' bargaining orders;
- Increase the capacity for the AIRC to resolve disputes on its own motion and increased resources to ensure timely resolution of disputes;
- Remove limits on the subject matters on which the Australian Industrial Relations Commission can make determinations.

Recommendation 10 – Whistleblower

- Insert Whistleblower provisions in the Workplace relations Act 1996

Recommendation 11 – Definition of employee

- The Government consider legislating a definition of employee into the Workplace Relations Act 1996.

Recommendation 12 – Employee entitlements

- That the Building Industry Task Force play a more active role in pursuing under-payment of employee entitlements;
- That section 178, - Imposition and recovery of penalties of the WR Act 1996, relating to breaches of awards and agreement should be better enforced; and
- That section 178 of the WR act 1996, should be increased three fold to act as a greater deterrent.

Recommendation 13 – Phoenix Companies

- Implement recommendations of the Parliamentary Joint Committee on Corporations and Financial Services into Australia's Insolvency Laws.

Recommendation 14 – Political Donations

- No entity or individual may donate more than $100 000 per annum (in cash or kind) to political parties, independents or candidates, or to any person or entity on the understanding that it will be passed on to political parties, independents or candidates.
- Additional disclosure requirements to apply to Political Parties, Independents and Candidates:

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  - Require a simple majority of members voting to approve affiliation to a political party, subject to a quorum requirement being met;

Recommendation 16 – Unitary IR system

- Establish a national unitary industrial relations system

Senator Andrew Murray