The Senate

Employment, Workplace Relations and Education References Committee

Beyond Cole

The future of the construction industry: confrontation or co-operation?

June 2004

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Membership of Committee

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Terms of Reference

1 That the Senate notes the Government's release of the draft Building and Construction Industry Improvement Bill 2003, the recommendations and findings from the Cole Royal Commission into the building and construction industry in Australia, and other relevant and related matters pertinent to equity, effectiveness, efficiency and productivity in the building and construction industry.

2 That the following matters be referred to the Employment, Workplace Relations and Education References Committee for inquiry and report by the second sitting week of 2004:

(a) the provisions of the draft Building and Construction Industry Improvement Bill 2003 or any version thereof that the Government might subsequently introduce into Parliament;

(b) whether the draft bill or any subsequent bill is consistent with Australia's obligations under international labour law;

(c) the findings and recommendations of the Cole Royal Commission into the Building and Construction Commission, including an assessment of:

(i) whether the building and construction industry is so unique that it requires industry-specific legislation, processes and procedures,

(ii) the Government's response to the Cole Royal Commission, particularly with respect to occupational health and safety and the National Industry Building Code of Practice, and

(iii) other relevant and related matters, including measures that would address:

(A) the use of sham corporate structures to avoid legal obligations,

(B) underpayment or non-payment of workers' entitlements, including superannuation,

(C) security of payments issues, particularly for subcontractors,

(D) evasion or underpayment of workers' compensation premiums, and

(E) the evasion or underpayment of taxation;

(d) regulatory needs in workplace relations in Australia, including:

(i) whether there is regulatory failure and is therefore a need for a new regulatory body, either industry-specific such as the proposed Australian Building and Construction Commissioner, or covering all industries,

(ii) whether the function of any regulator could be added as a division to the Australian Industrial Relations Commission (AIRC), or should be a separate independent regulator along the lines of the Australian Competition and Consumer Commission or Australian Securities and Investments Commission, and

(iii) whether workplace relations regulatory needs should be supported by additional AIRC conciliation and arbitration powers;

(e) the potential consequences and influence of political donations from registered organisations, corporations and individuals within the building and construction industry;

(f) mechanisms to address any organised or individual lawlessness or criminality in the building and construction industry, including any need for public disclosure (whistleblowing) provisions and enhanced criminal conspiracy provisions; and

(g) employment-related matters in the building and construction industry, including:

(i) skill shortages and the adequacy of support for the apprenticeship system,

(ii) the relevance, if any, of differences between wages and conditions of awards, individual agreements and enterprise bargaining agreements and their impact on labour practices, bargaining and labour relations in the industry, and

(iii) the nature of independent contractors and labour hire in the industry and whether the definition of employee in workplace relations legislation is adequate to address reported illegal labour practices.

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The committee majority **recommends,** in view of its concerns regarding natural justice, that the Senate refer to its Legal and Constitutional Affairs Committee the question of whether amendments should be made to the *Royal Commissions Act 1902*, to ensure that procedures of royal commissions accord with principles of natural justice and give due protection of the reputations of people whose prosecution is recommended but against whom no charges are laid.

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The committee majority **recommends** that the Government promote cultural change throughout the industry by encouraging states to institute tripartite industry councils at state level. The Victorian model could be used as an exemplar. Associated with this, the committee majority also **recommends** the establishment of an overarching tripartite national body, working to a ministerial council, to implement a broad program of agreed reform in the building and construction industry.

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

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

Preface

This report is the first undertaken on the building and construction industry by a parliamentary committee. It has been an instructive exercise in every way. The size and diversity of the industry, and its unique operational characteristics and culture have justified the committee's decision to give itself broad terms of reference. This inquiry has focused, for the first time, on the industrial relations of a particular industry. The committee is well experienced to undertake this task. The Government's industrial relations policy, as expressed in a large number of (attempted) amendments to the *Workplace Relations Act 1996,* have been the subject of numerous inquiries by the legislation committee over the past three parliaments. In the Building and Construction Industry Improvement Bill 2003 (the BCII Bill) we see, in a new legislative context, a reincarnation of provisions and clauses recycled from previously rejected legislation. All this is concentrated on the centrepiece of core policy: the creation of a separate and quarantined industrial relations regime for an industry allegedly much troubled by disputes instigated by unions tainted by criminality. The whole industry, employers and employees alike, being around 7 per cent of the workforce, will be fenced off from the rest of the working population and other industry, as in a gulag, working under a much more exacting regulatory regime.

The committee's terms of reference direct it to look specifically at the provisions of the Building and Construction Industry Improvement Bill 2003, but this is not just a report on a bill, or even on the industrial relations record of the industry. It attempts to cover the spectrum of industry related matters which will be affected by the bill if it is passed. In fact, industrial relations is one, relatively minor, issue affecting the industry, but only because the more important issues of industry cost structures and resulting occupational health and safety problems accentuate what little industrial unrest affects the industry. The Government has not been interested in adopting a holistic approach to the building and construction industry. To do so would be to raise awkward questions that could not be addressed by the 'reforms' it wishes to impose.

The inquiry into the building and construction industry elicited 125 submissions. Those appearing as witnesses before the 14 public hearings across the country numbered 141. Submissions and witnesses are listed in appendices to the report. As will be referred to again later in this preface, most submissions came from individuals and organisations broadly opposed to the Government's industrial relations policy, and to the BCII Bill in particular. The committee majority regrets the imputation by one Government party senator that the organisation of the hearings and the selection of witnesses was carried out so as to disadvantage supporters or advocates for the BCII Bill.

Such a subterfuge was as unnecessary as it would have been improper. Despite the committee having issued specific invitations to individual developers and to large building firms and contractors, the response was negligible. It has been suggested that this was the result of intimidation from unions, but that is unlikely. It has also been claimed that constructors were reluctant to reveal their concerns because of their fear

of losing Commonwealth contracts. That is a more plausible explanation, but the reasons will remain a matter for conjecture. It is more likely that businesses currently enjoying 'boom' conditions, and having good relations with unions and employees did not wish to involve themselves unnecessarily in a potential controversy, especially given the likelihood that the Government's legislation would fail to pass the Senate. In short, there is no credible evidence that builders or contractor were 'stood over' either to prevent their appearance, or to force them to appear. Had there been such evidence the committee and the Senate would have taken appropriate action.

Among the witnesses who appeared before the committee were industrial lawyers and academics specialising in industrial law, employment and the construction industry. Their evidence was valuable for the perspective it offered, for its exposition of complex relationships in the industry, and for its caution against taking simplistic views on causes and effects. Equally useful was the contribution from many workers and contractors in the industry who explained the way the industry worked and the nature of the relationships which held the industry together. The hearings allowed the committee to test some assumptions underlying the Government's policy, although there are gaps in the information which has been sought and used by the committee.

This inquiry by the references committee, while covering a great deal of familiar ground, has allowed scope for more reflection on the assumptions underlying Government policy, and the failure of the Government to win the confidence either of most industry stakeholders or the Senate in the pursuit of this policy. This report explains why the committee majority recommends the rejection of the Building and Construction Industry Improvement Bill 2003.

The committee majority has examined the evidence and finds overwhelming support for the bill's rejection. It has sought in vain for direct evidence from builders and developers in support of the proposed legislation. It acknowledges that there is support from industry associations and from the Property Council of Australia, but it is difficult to assess the extent to which this reflects the attitudes of the membership of these bodies. Such constituents appear to have absented themselves from the debate. For instance, the submission received from the largest construction company, Multiplex, avoided endorsing the bill and proposed its own solution to industrial dispute resolution in the industry.

Inevitably, in any inquiry, there will be more evidence from those who are resistant to change than those who desire it. Advocates of change need to convince sceptics that improvements leading to material benefits will result from changes proposed, and that those benefits will be widely distributed among the stakeholders. The Government's proposals have fallen down badly when measured against this criterion. It looks extremely doubtful that even those who are the intended beneficiaries of the Government's 'reforms' will gain from this legislation. They realise that the targets of the legislation, the trade unions, cannot be removed from the industrial scene at the stroke of a pen. The future of the building and construction industry will continue to depend on a co-operative arrangement between capital and labour. Increased industrial action is a likely outcome of the passage of the BCII Bill, but pressures on builders

and contractors will not follow from industrial action alone. Worse than having employees who have to be well-treated is the threat of having no workers at any price. The industry is already under pressure from a looming skill shortage, as this and other inquiries of this committee have revealed. Punitive anti-union action will have the effect of disrupting, if not destroying, what remains of the training compact between unions and industry employers.

There appears to be no enthusiasm from industry for the kind of legislation which is proposed here. A great deal of departmental time and a $67 million royal commission have been taken up with driving an agenda which has no appreciable industry or community support.

As a consequence of the Minister declining the committee's invitation to appear before it, the committee was unable to question him as to why particular provisions had not been discarded from the draft bill as a result of strong representations from employer groups, whose members might make some claim to be the beneficiaries of the legislation. The committee majority expresses some disappointment with the paucity of evidence it received in relation to the origins of Government policy and the motivation behind it. In this report the committee has sometimes been forced to rely on speculation because it was not able to question the Minister about the anticipated effects of the bill.

For instance, why were some clauses retained when they appeared to benefit no one in the industry? What industrial response was the Government expecting if the bill was to pass? What options did the Government have if its measures provoked sustained industrial unrest? Departmental officers who appeared for the Government could not be expected to answer questions that go to the heart of policy - explaining the reasons behind ministerial policy - let alone speculate on the likely effects of the bill's passage on the state of the industry. In essence, the Government has escaped effective scrutiny by both Houses in the consideration of this legislation.

The Government claims that the findings of the Cole royal commission point to a culture of lawlessness in the building and construction industry which is so entrenched as to require that industrial relations in the industry be separately regulated under the supervision of a Building Industry Taskforce. To see this in perspective, such industrial lawlessness operates at a level which saw (in 2000-01) an average building worker engaged in industrial action for less than half a day per year. What is proposed by the Government is likely to provoke a major industrial confrontation, with the potential to cause very considerable damage to the industry and to the economy. It is not much wonder that developers and builders have been conspicuously unenthusiastic about the Government's legislation.

There is no precedent for industrial legislation being applied to one industry to the extent which is proposed in the Building and Construction Industry Bill 2003. The government may point to past legislation covering the coal industry and airline pilots, but arrangements made in these cases were within the ambit of the then Conciliation

and Arbitration Act, with decisions made by commissioners of the Conciliation and Arbitration Commission.

The committee believes that caution and reflection have been lacking in the Government's approach to the undoubted problems that beset the building and construction industry. This has led the Government to overlook the possibility of more energetic national leadership in bringing about effective uniform legislation dealing with occupational health and safety and other regulatory concerns which are within the province of the states. This would have been a far more effective means of eliminating sources of industrial discord in the industry than haphazard use of the corporations power. It would also have led to widely acceptable and enduring change, in contrast to what is promised with the BCII Bill.

The Cole royal commission wasted its time in chasing demons rather than in looking at the commercial characteristics of the industry which determine the nature of its labour needs. The Government has similarly ignored this challenge by failing to legislate effectively against tax evasion and the operation of phoenix companies. Costs also have a bearing on the affordability of effective occupational health and safety practices, and this in turn has consequences for industrial relations.

The committee majority also notes the Government's heed of Commissioner Cole's specific warnings against practices such as pattern bargaining and project agreements which have assured a large measure of industrial harmony. Instead, we are promised rule by 'black-letter law', leading to a substantial increase in industrial regulation in the industry. The Government has relied on the royal commission to underpin its outmoded industrial relations policy stance and to frame its legislative response. The result has been a failure in political processes and a textbook example of how not to make public policy.

Senator George Campbell
Chair

Chapter 1

Introduction and overview

> If we are interested in achieving a fair and efficient construction industry, we have got to address the key problems that come up empirically. As an applied labour market researcher who has been observing the sector pretty actively for the last 15 years, the things that come screaming out from my point of view are safety, skills, hours of work and tax evasion. Each of these ultimately boils down to a chronic problem of trust within the sector. If we are interested in achieving efficiency, we have got to do something about those four issues.[1]

1.1 Reform of the building and construction industry has been on the national IR agenda for decades. The task has preoccupied governments of all political persuasions at both state and federal levels, and has twice been the subject of royal commissions. This is not an industry which any government would find easy to take by the scruff of its neck for the purposes imposing a new culture. Its size and diversity, the nature of its workforce and the way the industry players transact their business, are factors which discourage the application of radical measures to industry practices which have evolved over many years.

1.2 A large proportion of this report will be taken up with the issue of industrial relations. That is the arena of policy which the Government has marked out for attention in its terms of reference to the Cole royal commission, and in the thrust of the legislation which is before the Senate. It should be made clear at the outset, however, that there appears no justification for taking such a narrow view of the problems that beset the industry. A number of submissions have pointed to the waste of money and effort that has been taken up by a misdirected royal commission and a subsequent bill flawed by impractical and irrelevant provisions. The only point of agreement between the Government's position and the findings of this Senate inquiry is that there is room for further reform in the building and construction industry. The committee has looked at the same industry as Commissioner Cole, but sees it in a vastly different light, as do so many authorities and specialists involved in some way with the industry. The committee notes a thoughtful opinion from an academic authority it heard from in Sydney on the subject of reform of the building and construction industry:

> Australian reform … has been characterised by lots of good ideas but very little action. We know what the causes of conflict are in the industry, what the causes of poor performance and low efficiency are, and they are

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1 Dr John Buchanan, *Hansard*, 2 February 2004, p.36

> numerous. They include confrontational, unfair and divisive contracts; procurement systems; employment practices; a culture of risk transfer which drives the construction industry from the very top to the very bottom and pushes performance down to the lowest common denominator; protective and fragmented professional and industry bodies; long and unwieldy supply chains that separate potential innovators from the rewards they can gain from those innovations; an anti-intellectual, insensitive, uncaring and incestuous culture; a lack of investment in training; a very traditional mono disciplinary educational system; and, of course, confrontational union and employer relationships.[2]

1.3 The industrial relations element comes last in this list and, in the committee's view, is probably a consequence of failures listed before it. The comment concludes:

> Our worry is that the current agenda is once again focusing very negatively and confrontationally on industrial relations reform and is ironically galvanising attitudes against reform when what is actually needed in this country is a positive reform strategy which recognises the full complexity of issues impeding progress in the construction industry, and which engenders a sense of collective responsibility and trust towards reform.[3]

1.4 The committee notes that the activity level of the building and construction industry, and the prosperity of the sector, is often taken as a key indicator of economic growth and of business activity levels generally. The industry is highly sensitive to movements in employment and investment activity and, in its turn, makes its own mark on the state of the economy. This report is highly critical of Government policy, and implementing legislation, which has as its purpose the 'reform', or rather, the elimination of important stakeholder interests in the building and construction industry. His takes no account of the flow-on effects to the industry as a whole, to its profitability, its continuing climate of industrial harmony, and the well-being of employees and the chain of small business contractors who make up the vast majority of its workforce.

1.5 The players in the building and construction industry, for all their supposed ruthlessness and alleged disregard for rules and regulations, are a pragmatic lot. They are united in their efforts to secure fair profits and fair wages and conditions. Inevitably some who operate within the industry see the opportunity for marginal gain, either at the expense of the company, the contractor, the employee or the taxman. But while all agree that particular practices, as outlined later in this report, are undesirable, and ought to be prevented by regulations properly enforced, the committee found little enthusiasm for the Government's proposed legislation. As expected, it found implacable opposition from trade union stakeholders against whom the legislation is principally directed. Neither is there much enthusiasm to be found

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2 Professor Martin Loosemore, *Hansard*, Sydney, 7 April 2004, p.4

3 ibid.

among those stakeholders considered most likely to be the principal beneficiaries of what is proposed.

1.6 What is most obvious to the committee majority is the flawed assumption underlying the BCII Bill, that by attempting to address only the issue of industrial relations, it has failed to use the opportunity to implement 'root and branch' reforms which would deal with problems that the industry believes are more worthy of the Government's attention. The Government's failure to do so deprives this proposed legislation of credibility and reduces the likelihood of its passage and implementation.

1.7 The committee majority finds no particular satisfaction in making this judgement. Policies fail when they are based on narrow premises and disregard the need to accommodate disparate interest groups sharing broadly common goals. The Government is at fault not because it is attempts to establish a more stable industrial relations climate. Its mistake is to impose a highly prescriptive regime which disadvantages one set of industry participants, unions and employees, and therefore indirectly everyone in the industry. The committee majority sees no evidence that business leaders in the industry, or contractors of any size, will look on with enthusiasm while the Government puts the legislative boot into their employees and their representatives. Construction firms, large and small may have ambivalent views on unions or particular union officials, but they also have reason to be sceptical of misguided rescue attempts through a bill initiated by zealots rather than by agreements negotiated by pragmatic industry insiders.

1.8 Governments which choose to wield power without responsibility may relish the prospect of a class war. No one else does. The dangers inherent in what Professor Ron McCallum has described as 'asymmetric' legislation are as much obvious to corporate sector builders concerned with maintaining the profitability of their company, as they are to trade unions which are more directly targeted.

Characteristics of the building industry

1.9 There is no argument about the importance of the industry to the generation of national wealth and employment. In 2001-02 the industry contributed 5.5 per cent of the national gross domestic product and accounted for 7.5 per cent of employment. In that year the value of building and construction activity was close to $52 billion. The latest ABS figures indicate that the value of activity is currently $72 billion annually.

1.10 One of the matters addressed in the report of the Cole royal commission was the international competitiveness of the building and construction industry. It was difficult for the commission to overlook facts which indicated a high level of competitiveness relative to other OECD economies although it attempted to do so in its report, describing productivity growth as 'less than average' for the market sector over the past five years. The facts as set out in the Commission's research papers showed, among other data, that Australia ranked second or better in 16 of the 23 comparative international studies of the industry consulted by the researchers; that on productivity specifically, Australia ranked second in 5 of the 7 reports; that on project

completion times Australia ranked second in all studies; and finally, on cost per square metre, Australia was consistently rated as second lowest in all studies.[4] In addition to this, a Productivity Commission report published in 2002 and covering the period 1994-98 showed that productivity in the building and construction industry exceeded the OECD average based on a range of advanced economies in Europe and North America.[5] The committee majority would argue on this basis that one of the characteristics of the building and construction industry is its high degree of international competitiveness. This is scarcely a credible basis for proposing radical changes likely to jeopardise the success that has been achieved under current arrangements.

1.11 The 1997-98 ABS survey of the industry shows that very small firms, employing up to 5 people make up about 94 per cent of building firms. Only 1 per cent of building firms employ more than 20 people. It is small business which drives the industry: three quarters of construction industry pre-tax profits come from firms employing fewer than 5 people. Yet, large contractors, though relatively small in numbers (less than 1 per cent of firms) employ 14 percent of all employees and earn 32 per cent of the total wages paid in the sector. Large firms generate 14 per cent of sector profits and produce a quarter of the total construction output.[6]

1.12 These figures for percentages relate to approximately 210 000 businesses involved directly in construction and around 440 000 specialist trade businesses operating within the sector. Total employment is currently around 773 000.

Cost pressures in the industry

1.13 The Government was taken to task by the Australian Industry Group (Ai Group) for its failure to include in its terms of reference to the Cole royal commission the extent to which commercial imperatives drive the building and construction industry and how much they drive industry relationships.[7] The committee majority believes that this issue is be crucial in any genuine investigation of the industry, and perhaps for this reason was not included in an inquiry intended to demonstrate that 'curing' industrial relations alone would solve the problems of the industry.

1.14 There are three key segments in the industry: housing construction, which is the largest and whose output is valued at around $32.5 billion annually; civil and engineering construction which has a turnover of over $24 billion annually; and commercial and industrial construction, with a turnover of around $15.5 billion

4 Submission No.37, CFMEU, p.14

5 ibid., p.13

6 Royal Commission into the Building and Construction Industry, Discussion Paper 1, May 2002, p.21

7 Mr James Barrett, *Hansard*, Canberra, 11 December 2003, p.31

annually.[8] The housing sector is outside the scope of this legislation, and the likely collateral effects upon it have not been commented on by the Government.

1.15 It has been pointed out to the committee that the building and construction industries of most market economy countries have histories of industrial turbulence. The reasons include: the history and nature of trade unionism in the industry; the cyclical nature of the building industry; and the enormous financial pressures which this industry places upon developers, builders, contractors, subcontractors and labourers.[9] All of the evidence seems to point to the cost pressures as being indirectly responsible for the fragility of industrial harmony, and this has probably been so throughout the history of the industry. Rarely do construction companies enjoy stable contractual arrangements, for the obvious reason that the demand for buildings fluctuates. The industry is highly competitive, and companies often operate at the margins of profitability. So do the contractors and subcontractors further down the profit and cost chain. This leads to cut-throat tendering which is often practiced at the expense of compliance with workplace entitlements and occupational health and safety regulations. It is also associated with the most corrupt of all business practices, evasion of taxation. Commercial malpractice is often manifested through the deliberate evasion of responsibility to pay for materials and services provided. Such practices, which bear a heavy human cost, are rightly seen as heinous, but tax evasion is, for reasons explained in a later chapter, the fundamental and most insidious threat to the integrity and prosperity of the industry and its workforce. This has the capacity to corrupt the industry and render it resistant to reform.

1.16 The issue of cost begins with the investor and developer. These, along with public sector authorities, are the clients of the industry. The relationship between clients and the construction industry has been changing over recent times, according to the Property Council of Australia. The committee was told that in the past, the clients used to be part of the manufacturing process that was the construction industry. The larger corporate firms had planning and engineering departments, and governments had public works departments which they no longer retain. Today, the property sector has been integrated into the capital market sector. It thinks like the capital market sector and looks at reasons why money should be invested in buildings and what risks are attached to it.[10] This distance between client developers and financiers on the one hand and builders on the other leads to tensions over commercial pressures. As the Ai Group has explained to the committee:

> For example, on a major project, if the Commonwealth as a client said, 'We'll accept the industrial risk. We won't transfer it to the contractor. We'll accept the industrial risk and we expect the contractor to ensure that the rule of law applies at every stage and that everything is done to ensure that. If it costs us five times as much to deliver the project, so be it. There

8 Submission No.12, Master Builders Australia, Attachment C, p.2

9 Professor Ron McCallum, *Hansard*, Sydney, 2 February 2004, p.2

10 Mr Peter Verwer, *Hansard*, Sydney, 7 April 2004, p.92

> won't be any liquidated damages applied,' then the whole environment changes, and you allow the rule of law then to flourish. One of the fundamental weaknesses we have at the moment, which we revisited several times, is this key driver of the client—whether it be the Commonwealth or a private sector client—saying to the contractor, 'You're responsible for the industrial risk. You price it and deliver the project at the price that we've negotiated and, if it goes pear-shaped, it's your responsibility.' In my view, that drives an environment where the project just has to be delivered within a schedule and a time frame. The price we pay then is some of those other issues to do with the law and people exercising what might be their rights under the law, and I think they are the victim of that sort of system.[11]

1.17 The committee heard evidence that the majority of clients are unsophisticated investors who procure buildings relatively infrequently and are more interested in price than in value.[12] The committee notes that the Property Council has strongly rejected such criticisms from academics, insisting that the quality of construction standards is increasing to the point where it is outstandingly good and offers very good value for money. The capital market is highly sophisticated, and it is no longer possible for builders to get away with shoddy construction work.[13]

1.18 Yet the Housing Industry Association has made comments, similar to those of Professor Loosemore, and counter to those of the Property Council. The committee majority believes that the views expressed below by the Housing Industry Association more truly represent the reality of the industry than do those of the Property Council, which is an insulated distance away from the noisy nuts and bolts of the industry:

> The commercial construction industry is unique [because it is].... working mainly for one-off clients (who normally have no interest in the industry's long-term health)...in a physically demanding and inherently risky work environment...the whole being driven by a boom and bust economic cycle. Industry cost structures, together with generally unsympathetic clients who impose tight schedules and high daily delay damages, create commercial pressures, which drive practices that would normally be unacceptable in the broader community.[14]

1.19 Contractors face two difficulties over costs: competing for tenders in a market where only the 'bottom line' counts; and then having, in many cases, the problem of securing payments. The CFMEU submission explains that in the building industry the problem of payments is exacerbated by the hierarchical sub-contract system which characterises the sector:

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11 Mr James Barrett, *Hansard*, Canberra, 11 December 2003, p.38

12 Professor Martin Loosemore*, Hansard*, op. cit., p.21

13 Mr Peter Verwer, op. cit, p.103

14 Submission No.13, HIA, page 9

> The bargaining position of successive contractors and sub-contractors diminishes with each step down the contractual chain. This, coupled with the fact that levels of direct employment are concentrated at the lower end of the chain, make the implications for wage-earners clear when payment problems occur at any level.[15]

1.20 Even at the higher level of contracting, with firms employing up to 100 specialist tradesmen, the same difficulties faced by small operators and individuals apply. Cost is paramount, and quality and reputation are not generally worth the consideration given to the lowest tender price. As the committee heard, the lead contractors are in the same cost squeeze as everyone else, and pass it down the line:

> They are under the same pressures we are under—that is, profit and bottom line and those sorts of things. Our contracts are usually let by what you could term middle management. They are under pressure of making budget savings to the bottom line, so they are probably not responsible for choosing the wrong subcontractor, which may turn out to be the wrong subcontractor two years down the track. That is my personal view of it. I would like to see a much more stringent approach by the builders, but that is a risk they are willing to take. It is a dollar risk for them. If I am $200,000 dearer than the next guy they will say, 'Well, we'll go with him and have 200,000 in the kitty if something goes wrong.' That happens all the time. It would be great if we won all our work on reputation regardless of price but that is not the case.[16]

1.21 Australian Chamber of Commerce and Industry (ACCI) has similar points to make:

> The commercial arrangements in the industry do not in any sense help those lower down in the industry to exercise some authority over industrial matters. The types of commercial arrangements include, for example, liquidated damages; if buildings are not constructed on time, then damages flow. Obviously there is an attempt to cover one's risk all the way down and, as one attempts to cover one's risk all the way down, people right down the bottom have increasingly less say in the way in which they can operate. So the industrial authority of unions and the way in which the industry is commercially constructed combine to create a situation where there is a lot of difference between the way in which this industry operates industrially and the way in which industry generally operates industrially.[17]

1.22 ACCI complains that commercial pressures from the top, and union muscle from below, are squeezing the subcontractors in the middle. ACCI's rationale appears to be that it is possible to strip the unions of their muscle by regulation, but impossible to regulate capital. As the industry cannot exist without capital, so other stakeholders must be subordinated to a regime which finds its reason for being in the peculiar

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15 ibid.

16 Mr Frank D'Agostino, *Hansard*, Melbourne, 21 May 2004, p.16

17 Mr Peter Anderson, *Hansard,* Canberra, 11 December 2003, p.15

nature of the building and construction industry. As ACCI has stated, this industry operates differently to all others. While the committee majority acknowledges these differences, it points to the absurdity of having employees in a particular industry regulated in a way which is different to other workers. In more practical terms, it believes that it is up to stakeholders, with assistance from governments, to reconcile the demands of capital investors and those without whom the product and the value cannot be delivered.

1.23 The perspective of ACCI, which taken together with those from the CFMEU and Mr D'Agostino, director of a large electrical contracting firm, suggests to the committee that cost pressures are indirectly responsible for a high proportion of tensions which spill over into the industrial relations arena. The rest would result from occupational health and safety issues which are also the indirect result of cost pressures. Cost pressures can only be managed. They cannot be legislated for.

1.24 In conclusion, the committee majority notes a core of shared experience and commonality in the evidence presented from four major groups of participants in the industry, which are summarised here in ascending order. Trade union submissions have put forward voluminous evidence concerning the short-cuts and illegal practices which are characteristic of a high proportion of marginally profitable building companies forced to operate on very slim margins. Small business contractors and skilled trades operators complain about the squeeze enforced by agreements to which they are not a negotiating party. Builders and lead contractors have referred to the cost penalties likely to be incurred as a result of bearing the risks of industrial action. Finally, many investors and developers have no particular knowledge of, or expertise, in the area of industrial relations, leaving such matters to industry groups. They do, however, require a minimum level of certainty and return on their investment. The level of investment in the industry is declining as a consequence of increased competition on the capital markets, just as the pool of skilled labour is diminishing. The Government's energies should be directed to dealing with these more fundamental challenges facing the industry.

Security of payments

1.25 This report will make only a brief reference to security of payments, not because it is an unimportant matter, but because it is primarily dealt with under state legislation. Evidence on this issue arose more often in public hearings than in submissions, probably because, while it is outside the committee's terms of reference, it is relevant to the issue of cost.

Volatility in industry participation

1.26 Another characteristic of the industry is the volatility of entry and termination rates by entrepreneurs. There are few if any entry requirements based either on levels of technical or trade skill, commercial acumen or business training. The high turnover of people entering and leaving the industry, and the high rate of business failure, injects a state of uncertainty into industrial relations. Academic observers have noted

that the absence of 'trust' within the industry, and the perception of an industry to which fly-by-night contractors are drawn, contributes to this lack of trust. The submission from the CFMEU has this to say:

> The volatile nature of the industry makes construction workers particularly vulnerable to the effects of corporate collapses. When the level of economic activity is high, the industry is flooded with under-capitalised operators each with an eye to a quick profit. Many have little or no experience in contractual matters, statutory obligations or business management. The majority of enterprises in the industry are small businesses, employing less than ten people, and include many partnerships and sole traders. Most are capital poor and thus unable to absorb the effects of non-payment, late payment or withholding of progress payments, variations, retention and other forms of contractual payments. Many also lack the legal, technical and administrative skills necessary to resolve contractual issues as they arise.[18]

1.27 The CFMEU submission quoted evidence that in December 1997 alone, in the midst of a sustained building and construction 'boom', 40 building companies entered into some form of external administration, indicating that collapses due to management deficiencies did not disappear even in the most buoyant of markets. The inevitable peaks and troughs faced by the industry often bring devastating consequences for workers. Whilst many workers become resigned to the boom and bust cycle, they never accept the loss of accrued entitlements. The committee majority points out that the insecurity suffered by building workers, which is on a much wider scale than in other industries less susceptible to market fluctuations, creates a climate of distrust which flows over to workplace attitudes. As the CFMEU points out, it does not take an industry downturn or even a corporate insolvency, real or contrived, to generate payment or job security problems for employees.[19] A simple contractual dispute will do. This goes a long way to explaining the background to 'unaccountable' and apparently 'wildcat' stoppages at some building sites.

1.28 The CFMEU submission finds support in comments in the Industry Commission's 1991 report on construction costs. The Commission identified characteristics of the industry which hampered industrial relations and the development of a productive relationship between employers and employees. Thirteen years on, these are still relevant to the problems looked at by this committee. First among the characteristics identified in the Commission's 1991 report was the fluctuation in construction activity and the temporary nature of construction sites. This led most major developers to rely on subcontractors in preference to directly employing their workforces. The result has been that employment relationships are now far more fluid, and as evidence from contracting firms indicates, is determined more by tendering price than any other consideration.

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18 Submission No.37, CFMEU, p.109

19 ibid.

1.29 The Industry Commission also observed that success in managing industrial relations varied significantly between sites, and it is highly likely that this remains as true today. Amicable working relations between site management and union representatives are the key to industrial harmony. It was observed that a successful site relies heavily on the personal attitudes, skills and relationships between key individuals.

1.30 The committee received much more evidence from unions about the detailed operations of building sites, and of project relationships than it did from the proprietors, developers and major contractors. Nor did the Cole royal commission devote much attention to structural characteristics of the industry which explain much about the prevailing culture that exists in it. The CFMEU submission explains that in the construction industry the problem of payments is exacerbated by the hierarchical subcontract system which is a feature of the sector:

> The bargaining position of successive contractors and sub-contractors diminishes with each step down the contractual chain. This, coupled with the fact that levels of direct employment are concentrated at the lower end of the chain, make the implications for wage-earners clear when payment problems occur at any level.[20]

1.31 The CFMEU submission further explains:

> There is also ample evidence that many instances of lost employee entitlements come about not as a result of commercial miscalculation or ineptitude on the part of the employer. A number of employers have made an art form of using the corporate veil to profit at the expense of their workforce, creditors and the public purse.
>
> Principal contractors frequently fail to make payments due under contracts at the time that they are due. Sometimes there are legitimate disputes as to the proper performance of contracts by the sub-contractor; in other cases the principal simply withholds payment for spurious reasons, knowing that the subcontractor does not have the means to pursue legal remedies or that the time and cost of litigation is not justified by the amount owed. The situation is further complicated by the use of verbal agreements, particularly in relation to variations. This is one of the major reasons for the high level of insolvencies in the building and construction industry.[21]

1.32 Problems such as these are more intractable than any of those which either the Cole royal commission or the Government has chosen to recognise. The truth is that there are no dragons for the Government to slay and no CFMEU ogres to vanquish. The causes of distress to building employees, contactors and corporate builders alike spring from fluctuating markets; folly and miscalculation by some developers, builders and investors; from relatively petty fraud; and, it must be conceded, varying levels of retaliatory response to legitimate grievances from those at the bottom of the

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20 ibid.

21 ibid., p.110

remuneration chain. It is a difficult prospect to consider how these problems can be overcome except through more thorough checks on industry participants at all levels. The committee majority cannot see how poor management and malpractice at this level can be effectively addressed through the measures proposed by the Government.

1.33 As the committee heard at its first Sydney hearings, the problems of the industry are far more complex than the government's interpretation of the Cole royal commission report would suggest, and its legislation provides no solution to them. To the contrary, the legislative cure would worsen the disease. As one industrial lawyer told the committee:

> I have said that some of the matters that I have drawn attention to are incapable of resolution, that there are as many problems for the employers in the building and construction industry as there are for the unions and their workers and that in my view there will be significant difficulties in the administration of the provisions of the bill and they will be a source of endless litigation. That is not in the public interest.[22]

1.34 Solicitors from industrial law firms commented on the rich field of litigation the proposed bill presented. One of them told the committee:

> If I were coming to this committee representing just the interests of Taylor and Scott, I would say to go ahead and pass this legislation as quickly as possible, because it will be clover. I have said at one stage in the submission that some of the jurisdictional, definitional and other problems that might be encountered are a happy hunting ground for lawyers, and the CFMEU and the AMWU will be in need of my services more than ever if this legislation goes through.[23]

1.35 The committee notes the reluctance of larger building firms to provide evidence. The submission from the ACCI made no reference to any onerous processes to be endured by businesses as a consequence of the bill passing, although the submission from the Ai Group was less complacent. On the evidence of legal practitioners and contractors, however, it is clear to the committee that implementation problems would inevitably arise if the bill was to be passed. The committee doubts that the Government has been properly advised about the adverse effects of the legislation on business operations.

Occupational health and safety

1.36 The committee notes that the number of weeks lost in the construction industry through workplace injury or illness rose from 94 939 in 1997-98 to 168 655 in 2000-01. This is an increase of 78 per cent. The corresponding cost increases were from $82.8 million to over $190 million. These costs far exceed the losses to the industry caused by industrial disputes, although this fact is disguised by a large tax-payer

22 Mr Lachlan Riches, *Hansard,* Sydney, 3 February 2004, p.77

23 ibid., p.69

subsidy to pay for injured workers. Some submissions to the inquiry identified occupational health and safety as the single most important problem facing the construction industry. The committee notes evidence that OH&S is a factor in a high proportion of industrial disputes, and notes also that employer claims as to the misuse of OH&S as an industrial lever were accepted uncritically by the Cole royal commission.

1.37 Safety issues in the industry loomed large in this inquiry for the reason that recommendations of the Cole royal commission did not give occupational health and safety the degree of emphasis that deserves. Cole called for attitudinal changes to occupational health and safety, and volume 6 of the royal commission's report included 17 recommendations for possible Commonwealth action. The proposed implementation of these recommendations is in Chapter 4 of the BCII Bill.

1.38 Unions regard OH&S issues as being perhaps the most important facing the industry. The issue is a source of workplace tension and dispute, and the committee heard some hair-raising stories of workplace carelessness. Cole focussed on the allegation that unions were inclined to make use of the issue as an industrial tool to blackmail employers.[24] In a legislative response to the recommendations of the Cole royal commission, the Federal Safety Commissioner, to be appointed under the bill, is supposed to ensure that this practice is curbed. Significantly, the powers of the Federal Safety Commissioner are restricted to provisions which do not directly improve workplace safety, and which will continue to be exercised by state officials who may be referred matters by the Federal Safety Commissioner. The committee acknowledges that the appointment of a Federal Safety Commissioner has some superficial appeal. It would, however, require a considerable transfer of powers from the states to work. The committee considers this to be an overly ambitious outcome.

1.39 The submission from the state and territory governments to this inquiry is unanimously opposed to the intrusion into their jurisdiction of Commonwealth powers in regard to occupational health and safety. The Victorian Government has received advice that Victoria is not a 'Commonwealth place' for the purposes of sections of the proposed legislation, even though particular construction sites may be Commonwealth building projects.[25] State ministers have pointed out the obvious potential for confusion among building and construction employers about their obligations under separate legislation.

1.40 The states and territories claim that differences between them in relation to OH&S regulation is minor, and has no adverse affects on the industry. These differences reflect the differing regional, demographic and market demands. They argue that the Commonwealth would achieve its desired objectives more expeditiously by working with the states to achieve more uniformity where it was considered

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24 Final Report of the Royal Commission into the Building and Construction Industry, vol.1, February 2003, p.57

25 Submission No.26, Hon Rod Hulls MP, Victorian Minister for Industrial Relations, p.53

necessary.[26] The committee agrees with this approach. In an early draft of this report it was anticipated that the committee would regard with favour an enhanced role for the National Occupational Health and Safety Commission (NOHSC). The committee now notes, with considerable regret, the announcement from the Government about the demise of NOHSC and its replacement by the Australian Safety and Compensation Council. NOHSC had been impeded in its role over a number of years by Government obstruction and lack of funding. It appears that the Government has chosen to dispense with NOHSC because it is uncomfortable with that organisation's federalist, tripartite and participative modes of operation. Little detail is available as this report is tabled, about the proposed new body. It is as yet unclear as to the extent to which the Government's decision was influenced by a report it commissioned from the Productivity Commission into NOHSC, because the report has not been released.

1.41 The committee majority notes that the CFMEU believes that OH&S should be left with he states because it is easier to address these issues 'closer to the coalface'.[27] The committee acknowledges that proximity to the 'coalface' does not guarantee that state regulations are going to be properly enforced for the simple reason of proximity. Evidence to the committee suggests that the performance of the states and territories in the administration of their OH&S regulations is remarkably uneven. There are recent signs, however, of much more energetic compliance enforcement in most states.

1.42 It was pointed out to the committee that while ever building firms compete on price, and in the absence of strict supervision of safety regulations, there will always be compromises in the area of occupational health and safety.[28] So while the safety enforcement structures may be created by legislation, it would be too little effect.

1.43 The committee received evidence that, according to an analysis data in New South Wales, workers compensation claims for the self-employed were running at twice the rate of employees. The massive increase in the number of one-person businesses and partnerships, and the intensification of subcontracting in the building industry has led to adverse OH&S outcomes, the cost of which is largely borne by the Commonwealth through the health and social welfare outlays.

Taxation issues

1.44 Cost pressures and the absence of properly enforced regulations have seen the image of the building and construction industry tarnished by unethical business practices, exploitation of labour, tax evasion and evasion of other statutory obligations placed on employers. Mention has already been made to the corrupting influence of tax evasion on the culture of the industry. While witnesses from all sides of the industry have told the committee that they have no knowledge of criminality in the

26 ibid., p.18

27 Mr Andrew Ferguson, *Hansard*, Sydney, 7 April 2004, p.61

28 Associate Professor Braham Dabscheck, *Hansard*, Sydney, 7 April 2004, pp.34-35

form of thuggery and blackmail, there has been much evidence received about illegalities relating to unethical and illegal business practices.

1.45 The first of these deals with sham corporate structures, or 'phoenix' companies which operate at a loss for period of one to two years, and are then liquidated, owing the Australian Tax Office, suppliers and employees large amounts of taxes, payments and wages. Another company, often with a very similar name, will emerge from the ruins of the liquidated company, run by the same principals and 'entrepreneurs' and will continue in business, taking over its predecessors operations.

1.46 No dedicated intergovernmental body has been established to deal with phoenix companies. The ATO has established taskforces and conducted investigations, but the committee believes that a more determined and co-ordinated effort needs to be made to prevent the establishment of phoenix companies. Changes are needed to corporations law to stop the registering of $2 companies. Asset stripping should be prevented, and the confiscation of assets made an easier option for the courts. The committee is disappointed that the Government has rejected a recommendation of the royal commission that members of a phoenix company group be held jointly and severally liable for the tax debts of the group.

1.47 Underpayment of superannuation is a serious problem in the industry. The ATO have estimated that around 29 per cent of employers either fail to make superannuation payments, or pay less than the entitlement. This phenomenon is due partly to the high levels of bogus contacting in the industry.

1.48 The CFMEU has identified in its submission to the inquiry the serious problem of underpayment and non-payment of entitlements. The extent of the problem can be seen in the amounts recovered by the CFMEU. In the three years 1999-2001 the CFMEU recovered, through all its state branches, in excess of $30 million in unpaid wages, unpaid redundancies and unpaid superannuation. This figure does not include settlements negotiated by the union at the worksite, or claims that have not been pursued.

Training and apprenticeships

1.49 The skills shortage within the industry was addressed in all of the major submissions to this inquiry. It is not difficult to argue that the long-term prosperity of the building and construction industry is heavily dependent on its capacity to attract employees with the incentive to upgrade their levels of skill.

1.50 The committee notes evidence from this and previous inquiries that the systemic disincentives for skilled training have not been seriously addressed either by governments or industry. At the core of the problem is cost. The 'race to the bottom' which is being run by competitors for scarce skilled labour resources, continues a self-destructive course toward a deskilled workforce. The committee heard evidence of the direct relationship between skill shortages and the trend toward subcontracting:

> I think that this intensification of the subcontracting system has dramatically increased the level of competition within the industry and has reduced the average firm size. It is well known that, for a whole range of reasons, there is a very strong relationship between the increase in firm size and the propensity to train. Basically, if you have an industry where the average firm size is declining, it reduces the capacity of the industry to train. One index of that is the apprenticeship training ratio—that is, the ratio of apprentices to employed tradespeople. That has declined over the last decade by around 15 per cent, and it is directly contributing to skill shortages.[29]

1.51 Evidence to the committee's skill shortages inquiry in 2003 strongly suggested that as skilled workers in strategically critical areas, such as may be found in the construction industry, become scarcer, labour will be attracted to the highest bidder.[30] A poaching problem will emerge, if it has not already done so in this industry. As employer voluntarism is sharply declining because of poaching, the challenge will be to encourage a higher level of employee investment in training directly across the industry, with no tolerance extended to 'freeloaders'. The committee majority takes the view that those who can afford to employ can afford to train.

1.52 Evidence from this inquiry also echoes views expressed to this committee's skills inquiry in 2003 that a current training policy limitation is the failure to recognise that training needs to be seen in the context of industry, social and taxation policy. It cannot be allowed to depend on the demands of individual enterprises.

Attempts at industry reform

1.53 The building and construction industry has been intensively studied over the past 15 years. Inquiries into the industry have been prompted partly by the property and construction boom which has continued since the mid 1980s. Nearly all of the inquiries have focussed on the efficiency of the industry, although the perspectives and intent have varied according to the different political agendas of initiating state and Commonwealth governments.

1.54 Research undertaken by Unisearch for the Cole royal commission explains the connection between the influx of investment into the industry, the effects of fixed-price contracts, and the consequential pressures on industrial relations. Major constructors, who employed few people, made decisions through their industry associations which ignored the interests of subcontractors who did most of the employing. Subcontractors were badly organised as a group. There was increasing mistrust between participants in the industry, which was then intensified by credit problems in the 1970s and 1980s. A number of building firms collapsed. As one study of the industry explained conditions at the end of the 1980s:

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29 Dr Phillip Toner, *Hansard*, Sydney, 7 April 2004, p.83

30 Senate EWRE Committee, *Bridging the Skills Divide*, Canberra 2003, pp.200-203

> By 1988 the building boom in commercial offices in most Australian cities had stretched the capacity of the construction industry to meet demand. Some of the projects were those of relatively inexperienced speculative developers, supported by relatively easy credit. Regardless of the experience of the developers or the source of funds for development, all players suffered through skill shortages, particularly on-site management. While credit was easy, interest rates rose to historically high levels, increasing the demand for speedy construction, and heralding the widespread use of innovative procurement strategies. These were often not well understood or tested. Legal problems grew as a result. Trust declined.[31]

1.55 The first wave of Japanese investors had entered the construction industry bringing with them new procurement methods, the purpose of which was to bring about more predictability in costs and completion times. Fixed-price contracts soon became the norm in the industry, which saw a shift in higher levels of risk toward contractors, who were therefore more vulnerable to the threat of industrial action. The end of the equities boom came in 1987. This boom had helped fuel commercial and hotel development speculation. The glut in office space then led to a collapse in the business rental market. Consequently, forward orders for office buildings declined, margins fell below prime costs in some cases, and employment in the building and construction industry fell by 16 per cent.[32] There were a number of government responses to this state of affairs.

1.56 First, in 1989 the Industry Commission (to which reference has been made) commenced an inquiry into the cause of excessive costs of major constructions, with a view to identifying avenues for improved efficiency. The Industry Commission reported that the evidence of high construction costs on a comparative basis was conflicting. But it also noted many impediments to efficiency, including costs associated with remote locations, poor industrial relations and ponderous government approval processes. A noteworthy finding, also identified in later inquiries, was that the complex and intermittent nature of major projects limited the opportunities for acquiring project management skills.

CIDA

1.57 The Industry Commission's report was presented in 1991, coinciding with the unrelated implementation of the Commonwealth's Construction Industry Reform Strategy through the Construction Industry Development Agency (CIDA). This was a tripartite agreement between the Commonwealth, developers and employers in the industry, and trade unions. CIDA established working groups whose task it was to develop a uniform set of criteria and standards for the appointment of action plan advisers (industry volunteers and CIDA staff) to tackle five key industry goals: best

31 Peter Barda, *In Principle: Construction Industry Reform, 1991 to 1995*, AGPS Canberra, p.11

32 ibid, p.14-16

practice; project delivery; industry development; skills formation; and, workplace reform.

1.58 Between 1992 and 1995 CIDA developed a business plan to involve itself in a culture of learning and continuing improvement. The ultimate objective of this was to bring about 'a self sustaining and dynamic process of continuous reform in the industry' to ensure its international competitiveness.[33] One outcome of this was the development of pre-qualification criteria, which set out specific criteria for contractors and sub-contractors and consultants for the purpose of informing developers and other building clients how to select the most suitable firms. This was the first systematic attempt to assess the financial and technical capabilities of builders and contractors. CIDA took the view that through these measures the overall capability of the industry would be lifted.[34]

1.59 CIDA's vision of a more dynamic industry depended on improvements to the skills and creativity of employees. It also depended on improved human resource management in the industry and improved training. Implicit in this report of the committee majority is an acknowledgement of the importance of continuing along the lines that were pioneered by CIDA. Evidence to the committee indicates that the Government has failed to recognise the importance of harnessing the strengths and the common purpose in the industry to break through the culture barriers that so many builders lament, but can do little to circumvent in the absence of constructive leadership at the Commonwealth level. CIDA was disbanded in mid 1995 and its work was continued by the Australian Construction Industry Council, with more limited objectives. This body was in turn disbanded in 1997 and its activities assumed by the National Building and Construction Committee.

1.60 To date, CIDA has been the only Commonwealth initiative taken to improve productivity in the building industry and to secure its future through management improvements. A number of comments have been made in submission and in oral evidence to the effect that a lack of leadership and co-ordinated technical advancement is hampering the industry. Evidence of this is to be found in the Commonwealth neglect of training in the skilled trades on which the industry depends. This is remarkable for the reason that the construction and housing industries are key indicators of economic activity. It is also remarkable that industry has not been able to convince the current government that increased spending on skills development is essential for the future of this and other industries. When academics like Dr John Buchanan refer to the absence of leadership in the industry, such matters as this provide the evidence.

1.61 It is clearly against current Government policy to collaborate with, much less initiate, any long-term planning to make genuine reforms to the construction industry.

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33 Royal Commission into the Building and Construction Industry, Discussion Paper 15, November 2002, p.38

34 ibid., p.39

The hope for this may lie with initiatives the committee heard about from the states. Evidence the committee heard in Melbourne about the Building Industry Consultative Committee of Victoria is described in chapter 3. It outlines proposals to amend the Workplace Relations Act to simplify industrial relations procedures and to minimise disputes. The committee notes that state initiatives for reforms fill a gap left by Commonwealth abandonment of this progressive policy area since 1996.

Gyles royal commission

1.62 Second, while this activity was going on at the national level, significant inquiries were conducted at state level. The Gyles royal commission into productivity in the building and construction industry in New South Wales was established in 1991. While the terms of reference directed the inquiry to examine illegal activities and industry practices affecting efficiency and productivity, the main recommendations of the inquiry centred on the role of government, as the biggest client of the industry, in driving the process toward increased efficiency and productivity.

1.63 The hearings of the Gyles royal commission revealed an industry riven by mistrust and stretched beyond its capacity because of skill shortages.[35] A tangible outcome of the Gyles royal commission was the establishment of Construction Policy Steering Committee (CPSC) in New South Wales, whose prime responsibility was to establish a code of conduct for the industry. The CPSC was aiming at cultural change in the industry, to be promoted by a whole-of-government codification of tendering expectations. The codes established standards of contractor behaviour and formalised the expectations of public sector clients. They stipulated co-operative approaches in all business dealings, due regard for all legislated regulatory requirements, notably in regard to occupational health and safety and environmental matters. Collusive tendering practices were banned. Victoria and Western Australia and South Australia followed New South Wales precedent in the establishment of codes of practice. The committee is interested in how these codes have worked in practice, and whether they have fulfilled their objectives.

1.64 The Gyles commission could in some respects be seen as a precursor to the Cole commission, although it should be noted that the higher incidence of industrial disruption in the industry in the early 1990s gave a degree of plausibility to the NSW Government's action, in contrast to the absence of any similar rationale for the establishment of the Cole commission. Gyles also found that the problems of the industry extended beyond industrial disputes. As the Master Builders Association of Queensland told the committee:

> I can recall when master builders New South Wales rang to inform me that the Giles royal commission had just been established in New South Wales and they were rather excited. I can assure you that two years later, when a number of their contractors—and master builders New South Wales

35 ibid., p.16

> themselves—found themselves in the same difficulty, they were less excited.[36]

1.65 A common feature of the recommendations flowing from both Gyles and Cole was the formation of task forces to pursue allegations of misconduct arising from evidence produced by each commission. Issues common to both royal commissions included allegations of abuse by unions and employees of occupational health and safety issues as an industrial dispute tactic. While both royal commissions were established to bring pressure to bear on the building unions, there are important differences in relation to the conduct of each inquiry. The procedural fairness of the Gyles commission was not a point at issue, and Gyles' adverse findings did not spare employers. In contrast, the Cole commission was widely criticised for its high-handed disregard for principles of natural justice, and its lack of objectivity in assessing the relative importance of evidence presented to it.

Developments since CIDA

1.66 By the mid 1990s a number of states had developed building industry codes of practice, mainly as it applied to government contract work. The publication of Green Papers in New South Wales in 1996 confirmed all that had been said before about the state of the industry. Commonwealth involvement in the industry has continued since 1997 through the National Building and Construction Committee (NatBACC). This body embraced a broad agenda for modernisation of the industry but maintained a low profile until it was disbanded in 2000. The Australian Construction Industry Forum (ACIF) was then set up to implement action agendas established by the NatBACC.

1.67 The Productivity Commission reported in 1999 on *Work Arrangements on Large Capital City Building Projects*. The Commission found some improvements, unevenly applied, since the 1980s. The report's recommendations found some echo in the Cole royal commission report, particularly in regard to pattern agreements and union power.

1.68 The primary aim of reform during the 1990s was to change the confrontational and adversarial culture in the industry. There was an attempt to concentrate on process management issues as a result of increasing concern about the slow adoption of information technology and unacceptably high accident rates. It is claimed that the process of improvement is hampered by the need for the Commonwealth to accept state initiatives in this area where states have the constitutional powers to act.

The BCII Bill in the context of the Government's WR reform agenda

1.69 The Building and Construction Improvement Bill 2003 needs to be seen in the context of all other industrial relations legislation introduced by the Government since 1996.

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36 Mr Graham Cuthbert, *Hansard*, Brisbane, 25 February 2004, p.22

1.70 The Opposition Senators' Report on the Workplace Relations Amendment (Protecting the Low Paid) Bill 2003 noted:

> In a little over five years this committee has dealt with nineteen amending bills to the *Workplace Relations Act 1996* (WR Act). These bills have represented, *in toto*, attempts by the Government to weaken the entitlements of employees across the whole spectrum of their relationship with employers, all of this in the name of 'balance'. These matters include the conditions of the termination of employment, the rights of association and representation, the rights to collective bargaining, and now the rights to have award wages matters fairly dealt with by the Australian Industrial Relations Commission (the Commission).[37]

Government policy assumptions

1.71 In all likelihood, the government would argue that in all its industrial relations legislation blocked in the Senate it has consistently aimed at achieving 'balance' in the relationship between unions and employers. From the Government's perspective the ground is tilted in favour of the unions, and they would claim that this state of affairs is embedded in the industrial culture of the nation. It has long been claimed by the Government that there is too much prominence and recognition accorded to the role that unions play in determining the outcome of negotiations of wages and conditions. The thrust of government policy has been to marginalise unions by encouraging the erosion of their membership base through establishing alternative processes for negotiations of wages and conditions.

1.72 The implied policy of 'putting unions in their place' is based on a number of related false assumptions. The basic assumption is that unions are increasingly irrelevant in the twenty-first century because structural changes to the economy have created new skills demands and employment arrangements. The consequent assumption is that most wealth is now generated by new industries, so the argument goes, and these new industries have no tradition of unionism. It follows that the most productive workers have little interest in collective agreements anyway, which is why the Government is promoting the use of AWAs. The final assumption is that employees will increasingly demand flexible working and contracting arrangements that will exclude the need for union participation in the bargaining for these arrangements. Hence the increasing use of the buzzword 'flexibility', which is used to put a favourable connotation on the trend toward part-time and contract working arrangements. That such working arrangements are unsatisfactory for the great majority of the workforce is generally overlooked by 'reformers'. By a massive leap of extrapolation it becomes clear that what promotes job satisfaction for a very small number of highly paid workers with specialised skills must be regarded as the way to the future for the bulk of the workforce. In these circumstances it is not difficult to understand why union membership is now steadily increasing.

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37 Senate EWRE Legislation Committee, *Report on the Workplace Relations Amendment (Protecting the Low Paid) Bill 2003*, June 2003, p.13

1.73 This viewpoint also illustrates the consequence of failing to see industrial relations in other than economic terms. As Professor McCallum explained to the committee:

> Industrial relations is about people—Australian workers and Australian employers—and their relevant organisations such as employer associations and groupings and trade unions. For legislation to work, it must have the confidence of all those parties. My concern with this legislation is that it really deals much more with trade union conduct and employee conduct in an asymmetrical manner than it deals with employer conduct. The fact that the building commission does not have any powers, as I read them, over wages and employee entitlements is an instance of this. The fact that all industrial action is deemed unlawful is another instance of this. I am simply saying that good legislation has to be balanced, has to be workable and has to have discretions reposed in bodies so that they can act in an independent manner. This legislation is not good legislation according to my criteria, and I doubt that it will pass the Senate in its current form.[38]

1.74 The Government's policy of weakening the influence of unions in the setting of benchmarks for wages and conditions is consistent with its strict and uncompromising view that enterprise level bargaining over wages and conditions must prevail in all circumstances. Enterprise bargaining was an innovation of the Keating Government, which recognised certain commercial realities related to the capacity of individual enterprises to pay increased remuneration and other benefits. The 1991 amendments to the Industrial Relations Act implemented policy changes which have since been transformed from pragmatic expediency into an ideological crusade. The Government's view appears to be that workplace agreements are the only acceptable avenue to wage negotiation, regardless of the kind of enterprise for which an agreement must be sought. The complexities of the building and construction industry, and the characteristics of its employment needs, make sole reliance on enterprise agreements impractical in many cases. As Professor Ron McCallum told the committee:

> To put it neatly, 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. The problem with this bill is that it pushes onto the construction industry

38 Professor Ron McCallum, op. cit., p.11

> the paradigmatic model of enterprise bargaining that is the centrepiece of the Workplace Relations Act.[39]

Pattern bargaining and project agreements

1.75 Chapter 5 of the BCII Bill contains a major provision which has been previously rejected in a proposed amendment to the Workplace Relations Act: a prohibition on pattern bargaining in the industry. This provision is highly contentious, and causes as much unease among those who otherwise support the bill, as among those who oppose it. Pattern bargaining is the subject of a later chapter. The committee majority makes the point in this introductory chapter that the Government's campaign against this practice flies in the face of common sense in reaching agreements on wages and conditions. The committee found that many small contractors support it because of the degree of certainty it brings to cost projections through the 'levelling of the playing field'. With labour costs agreed to over a three year period, firms can then compete on levels of service and competence and on materials costs. Even when large building corporations make a ritual complaint about pattern bargaining they support the continuation of other aspects of pattern bargaining that would be in breach of the proposed legislation.

1.76 In particular, the committee majority notes the carefully expressed views of Ai Group which in its position statement on the exposure draft of the BCII Bill, stated its opposition to industrial action being used as a tactic to force employers into accepting pattern bargaining. It noted, however, that prohibiting pattern bargaining which is freely entered into by parties would be a very 'significant' step because the vast majority of current enterprise agreements in the industry are pattern agreements.[40] The paper also made the point that a prohibition on pattern bargaining could only work if the legislation contained a mechanism to enable the certification of genuine project agreements. Major projects, according to Ai Group, should be viewed as enterprises bringing together parties with relevant skills and expertise in pursuit of a common goal. As such, project agreements are a legitimate risk-management practice.[41]

1.77 Evidence from the Queensland Master Builders Association (QMBA) appears to the committee majority to be highly credible in relation to pattern bargaining. Its submission notes that wage justice has long been defined as circumstances where workers doing identical work in close proximity receive identical remuneration. It describes a system that encourages individual employers to pay differing wages to workers doing similar tasks on the same worksite as 'a recipe for industrial anarchy' which cannot be supported. Pattern bargaining within certain limits has been deliberately pursued by builders as a strategy to minimise industrial disputes. An

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39 ibid., p.5

40 Submission No.1, Ai Group, Attachment A, p.92

41 ibid.

additional reason to support pattern bargaining is to remove the threat of leapfrogging claims which would be the inevitable consequence of an unregulated labour market.[42]

1.78 The QMBA also favoured the idea of registered project agreements which are commonly used on large civil and engineering projects. The strongest argument for their use is cost transparency for contractors. Both unions and employers can contractually ensure that wages and conditions agreements are honoured. Project agreements ensure industrial harmony because compliance can be legally enforced.[43] The committee majority notes that clause 67 of the BCII Bill is a specific provision that makes project agreements unenforceable. This indicates the extraordinary lengths to which the government will go to ensure the purity of its doctrine, regardless of the practical consequences. Even the bill's least critical supporter, ACCI, has raised in its submission the possibility of a 'genuine project agreement', taking the form of 170LJ, 170LK or 170LL agreements, and has sought assurances that such agreements would be enforceable.[44]

1.79 The committee notes that builders who face the challenge of managing industrial relations in the practical circumstances of the workplace have a far more pragmatic view of what the legislation should contain than those Canberra-based legislators and industry representatives whose direct experience of the industry is remote or non-existent. The question arises as a result of hearing witnesses across the country: whose interests does this legislation serve? The committee majority notes from the evidence that few stakeholders are happy with the legislation before the Senate. There is a commonly-held view across the industry that whatever merit lies in the intentions of the legislation (and obviously some parties see no merit at all), is overshadowed by such flaws as would render it unworkable.

1.80 The committee received strong evidence of the success of project agreements associated with the construction of the Sydney Olympic Games facilities. A memorandum of understanding between the Olympic Coordination Authority and trade unions set out a framework of negotiations on each of the projects. The project agreements based on the framework were not identical, and included provision for allowances to be conditional on meeting production goals. In one instance payments were reduced for employees when progress goals were not met on a project.[45] Dispute resolution mechanisms were established to allow properly trained rank and file union delegates to resolve local workplace issues quickly. The committee makes the point that such agreements would not be permitted under the provisions of the bill which is before the Senate. That is, had this bill been enacted before the Olympic Games, it is highly likely that we would have seen the kind of difficulties now facing the Athens games organisers, in addition to a massive cost blow out.

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42 Submission No.90, Queensland Master Builders Association, p.15

43 ibid., p.17

44 Submission No.3, Australian Chamber of Commerce and Industry (ACCI), para 71, p.28

45 Mr John Robertson, *Hansard*, Sydney, 2 February 2004, p.31

Reliance on commercial legal principles

1.81 Another element of the Government's general policy on workplace relations is to relegate industrial law to a lesser status, and to promote commercial law as the basis for legislative provisions. The Government's implicit belief is that for over 100 years industrial law has enjoyed a growing privileged existence: that decisions affecting the prosperity of the country were being made in tribunals dominated by those with an industrial relations mindset. The committee heard evidence that legislation based on commercial law was beginning to prevail over labour law: that commercial law, derived from common law, has traditionally regarded unions as conspiracies in restraint of trade.[46] This attitude is the foundation of the Government's consistent opposition to pattern bargaining.

1.82 The committee heard that Commissioner Cole was unable to see any reason for giving industrial law particular consideration in workplace relations matters.[47] It also heard that in many areas of the industry, builders wished to be regulated by commercial law rather than by industrial law because they operated as businesses, and because industrial law was associated in their mind with a culture of unlawfulness: meaning that unlawful acts can be routinely settled as part of a final agreement.[48]

Industry productivity

1.83 The Government is attaching a great deal of weight to evidence that the building and construction industry is inefficient, and for this reason alone requires the kind of extreme regulatory intervention that is proposed in the BCII Bill. They rely on a number of recent studies have identified the need for improving the performance of the industry.

1.84 There are four elements of performance: productivity, cost, time and quality. There is more comparative information available on productivity and cost than on the other two elements. In considering issues of productivity, the committee bears in mind advice it has received that there is no one single universal measure of productivity, and that it is overly simplistic and inaccurate to say that productivity is declining across the board in the construction industry or that it can be put down to any one factor in particular.[49]

1.85 Research undertaken for the Cole royal commission indicates that in terms of cost performance, Australian industry rates highly in comparison with other advanced countries that were part of the comparative study undertaken by Unisearch. The other countries were Britain, Canada, France, Germany, Japan, the United States and Singapore. The most common ranking for Australia was second place against 14 listed

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46 Dr John Buchanan, *Hansard,* Sydney, 2 February 2004, p.45

47 ibid.

48 Mr Glenn Simpson*, Hansard*, Brisbane, 24 February 2004, p.10

49 Professor Martin Loosemore, op. cit., p.2

comparisons, and Australia fell within the group of countries with a clear competitive advantage.

1.86 In the productivity comparison, research indicates that Australia ranks on a par with Germany and Japan, performs slightly better than Britain and France, but lags behind Singapore and the United States. In value added per employee, Australia is on a par with Japan, is ahead of the three European countries and lags behind Canada, the United States and Singapore. The Australian construction sector's contribution to GDP relative to its workforce was approximately equal to that in the United States, and ranked sixth in the cross-sector comparison.[50]

1.87 The committee also heard that on the most reliable of all productivity indicators, global market share and attractiveness to foreign investment, Australian industry was doing well. A higher share of the funding of construction projects in Australia is coming from abroad, consistent with a view that the returns on investment are at a satisfactory level. Foreign investment is also seen in the takeover of ownership in large Australian companies. Leightons, John Holland and Baulderstone are now owned by foreign interests and are competing internationally.[51]

1.88 Industry productivity is difficult to assess on a comparative basis, and it is likely that the ranking given to particular countries is likely to change. To the extent that studies have been informative, they do not show cause for alarm about the relative productivity levels in the industry. Some of the evidence about industry productivity which has been relied on by the Government has been very contentious.

The credibility of research into productivity comparisons

1.89 The committee was faced with conflicting evidence in relation to industry productivity. Research was commissioned by the Government to prove its case that productivity is low in the construction industry. Two weeks before the release of the Cole royal commission final report, the Government released a report from Econtech which the Minister claimed to reveal that productivity is higher in the housing sector than in the commercial construction sector; that productivity is lower in Victoria than in New South Wales; and that productivity is significantly lower in Australia than in the United States.

1.90 This research by Econtech appears to have been commissioned to counter research contracted to a University of New South Wales (UNSW) organisation named Unisearch, by the Cole royal commission. It may be presumed that the Unisearch report was considered to have given an unduly optimistic and favourable view of the performance of the local industry, as compared to the industry in the United States,

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50 Unisearch Ltd, UNSW, *Workplace Regulation, Reform and Productivity in the International Building and Construction Industry, Discussion Paper 15,* Royal Commission into the Building and Construction Industry, November 2002, p.2

51 Dr Phillip Toner, *Hansard,* Sydney, 7 April 2004, p.80

and an equally inconvenient comparison outcome between the domestic housing industry performance and the domestic construction industry. As the Unisearch researchers told the committee, no matter which way they pushed and pulled the figures, Australia ended up in the top quartile. It was also put to the committee that the use (or misuse) by other researchers of the Unisearch data gave an unduly pessimistic comparison between United States and Australian construction industries, to Australia's disadvantage. As was explained to the committee, these figures were too 'rubbery' to use as a basis for extrapolations about productivity.[52]

1.91 Research undertaken by Dr Phillip Toner refutes the conclusions drawn by Econtech. Toner claims that the method used by Econtech to determine productivity was not supported by authoritative data produced by the ABS Census of Private Construction Activity 1996-97. It is fair to point out that Econtech has insisted on the validity of its research method when giving evidence to the committee.[53] ABS data supports the view that labour productivity in the housing sector is lower than in the construction sector. Toner claims that Victoria's increased share of nation investment in commercial construction is inconsistent with Econotech's findings of Victorian cost disadvantage as compared to other states.

1.92 Likewise, in relation to the difficult task of making valid international comparisons of productivity, Toner argues that Econtech was very selective and limited in its choice of data in making comparisons between Australia and the United States. It is claimed that the Econtech report failed to mention that in three out of four studies of labour productivity, Australia is on a par with the United States and generally performing better than Japan, Singapore, Germany and France.

1.93 Toner concludes that productivity improvement strategies which focus on work practices and industrial disputes leave out far more important considerations. These have to do with improved levels of consultation between management and labour; regular upgrading of skills; improving the technical skills of project management and exploiting new technologies.[54] The committee majority notes the consistency between Toner's comments in relation to international comparisons and those of Unisearch. Dr Toner explained his position when he appeared before the committee, pointing out that while Econtech claimed that its report was concerned with work practices and labour productivity it used Rawlinson cost data to underpin its arguments. In referring to his article submitted to the committee,[55]Dr Toner told the committee:

> I think the point I was making there was that the Econtech data was being highly selective. Discussion Paper 15 uses a very broad range of summarised international studies using three different measures: labour

52 Loosemore and McGeorge, op. cit., pp.17-26

53 Mr Christopher Murphy, *Hansard*, Canberra, 25 May 2004, pp.2-5

54 Phillip Toner, *An Evaluation of Economic Analysis of the Building and Construction Sector,* Employment Studies Centre, University of Newcastle, p.1

55 ibid., p.11

> productivity, cost per square metre and time to completion. The overall conclusion is that Australia's are quite favourable, as indicated by those quotes. In the Econtech report they wanted to discount all of those other measures—time to completion and cost per square metre—and just focus on one of the measures, labour productivity, and within that on only one measure, the one that was provided by the authors. I am just emphasising the highly selective nature of the data that they drew from Discussion Paper 15. In saying that they did not want to use comparisons other than labour productivity, they were saying that they did not want to use the cost comparisons based on cost per square metre, in which Australia fares quite favourably. Arguing that they do not want to use that data for their international comparisons actually contradicts Econtech's own use of the Rawlinson data for their labour productivity comparisons, which is wholly and solely based on cost comparisons.[56]

1.94 The committee has been struck by the limited scope of Econtech research which led it to its conclusion that the housing industry is more productive than the commercial sector. Econtech's report states that the same building tasks, such as laying a concrete slab, building a brick wall, or painting and carpentry work, cost on average 10 per cent more for commercial buildings than for domestic residential housing. In defending its analysis, Econtech made a number of counter arguments to those made by Dr Toner at the Sydney hearing in April.[57] UNSW researchers also claimed to be startled by the same data presented by Econtech to a conference held after the release of the Cole report. The committee believes that in trying to establish reasons for this difference between the two sectors of the industry, Econtech's speculations are uninformed by specialist construction knowledge. This is, unfortunately, a commonplace instance of Government-commissioned research aimed at trying to fit the facts to the argument.

1.95 A number of builders and their associations were asked by the committee to comment on Econtech's assertions about cost differentials between the housing and commercial construction sectors. Informed and specialised advice was given to the committee at its Brisbane hearings by an experienced union official as to the differences between a high rise concrete pour and a house slab pour:

> First of all, you will generally find that the slab will be supported by formwork in the commercial sector. Secondly, the structural nature of the slab differs. A typical housing sector slab will have nothing more than F62 mesh in it on ground whereas a slab in the building industry will have substantial reinforcement placed in it and is required to be inspected by an engineer before pouring takes place—which causes delays. The concrete generally will have to be, because it is off the street, placed either using a pump or a crane with cables. This will incur additional cost. There are usually traffic management systems required at street level in commercial building construction for that. Because you are working at an elevated

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56 Dr Phillip Toner, *Hansard,* op. cit, p.79

57 Econtech, *Economic Analysis of the Building and Construction Sector*, 20 February 2003, p.i

> height, you would also require additional safety measures such as edge protection et cetera.
>
> The concrete in commercial construction is of a much higher standard; it is usually MPA40—versus MPA25 in the building industry—in terms of the strength of the concrete. That requires concrete vibrating. The penetrations et cetera have to be much more carefully measured for services. Obviously in a cottage situation if the sewerage pipes are an inch or two wrong then it is not as serious as what the structural implications can be for placing a penetration through a suspended slab, where it is more critical. So there is a vast difference in the requirements for a commercial inner city building. If you try to compare it with a cottage, there is no comparison whatsoever.[58]

1.96 Econtech's director made a robust defence of his firm's modelling which assumed that the costs of high rise building construction should be no more than the cost of domestic bungalow construction. Nor did Mr Murphy concede that concrete work in bungalows and concrete form-work on high rise buildings should markedly differ on cost.[59] On that score, the committee majority is inclined to believe the unanimous view of builders. Econtech's research was also criticised from the other side of the table. The AiG witness in Canberra told the committee:

> I actually do not necessarily support the view that comparing the residential housing market with the commercial market or the high-rise market or the industrial engineering market are actually safe comparisons. I say that for a number of reasons. The more complex, bigger, dangerous and expensive the project is, the more it relies on the contractor and the people working on it to have appropriate health and safety systems and quality systems for the training and skilling of staff. The reality is that in residential or cottage construction there are a lot of flexibilities in the market, and I question whether they necessarily flow into the commercial construction sector.[60]

1.97 The committee rejects simplistic arguments supported by highly selective research. It recognises a tendency by the Government to purchase tailored research which is skewed in favour of the contention which the Government wishes to put forward. Thus, the committee majority is not attempting to impugn the research work done by Econtech under Government contract, but rather the inferences which the Government draws from that research. The committee did not believe that the Econtech data, or conclusions, could support the Government's contention that productivity rises would follow the implementations of the 'reforms' promised in the BCII Bill. That is because a number of non-economic factors intrude in such a projection. As Senator Murray's questions revealed, economic modellers cannot factor into their calculations the effects of state legislation, or, as Senator Murray put it, 'human or attitudinal consequences'. For instance, the bill provides for secret ballots. The use of this provision, in a bill intended to increase industry productivity, is more

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58 Mr Wallace Trohear, *Hansard,* Brisbane, 24 February 2004, p.73

59 Mr Christopher Murphy, *Hansard*, Canberra, 25 May 2004, p.10ff

60 Mr James Barrett, op. cit., p.24

than likely to extend periods of lost time.[61] The conclusion to be drawn is that legislation is not likely to lead to productivity growth. This is more likely to result from improved technology and its application, from improved knowledge and skills in management and the general workforce, and from more efficient movement and investment of capital.

The justification for industry-specific legislation

1.98 The building and construction industry has been in the Government's sights since 1996, and has been marked for 'reform'. The Government justifies the implementation of industry-specific legislation for the reason that building and construction has been subject to prolonged periods of union direction and interference. It argues that companies are hostage to unions and uncompetitive work practices which have been forced on the industry, and that where companies appear to have prospered, this has resulted from 'sweetheart' deals with unions, notably the CFMEU. It is claimed that such deals have been arranged at the expense of other companies which operate at near-insolvency levels as a result.

1.99 By treating the building and construction industry as a special case, the Government hopes to 'reform' it, even though the measures proposed would condemn the industry to a prolonged existence apart from the mainstream of employer-employee relations which would lead eventually to its assuming a 'pariah' status within the wider economy. The Ai Group has supported the extension of this arrangement for a limited period only. There is no indication in the legislation, or in Government commentary, that this is a temporary, if misguided, expediency.

1.100 The key characteristics of the industry have been discussed above, but few of these important elements appear to have a bearing on the Government's rational for the legislation. The Government claims that solving the industry's problems is reduced to the simple formula of 'fixing' the conduct of its industrial relations by legislation. On the other hand, the committee majority sees the issues in the industry as being more closely linked to its cost structures, its profit margins and its sensitivity to economic cycles. In these respects it more closely resembles agriculture and primary industries than it does the manufacturing or service sectors. The attitudes of the workforce are determined by these characteristics and the accumulation of experience that continues to the present day. The committee majority believes that the industrial relations problems that arise in the industry flow, fundamentally, from the need felt by unions to negotiate agreements which protect the long-term interests of employees in an industry subject to work-level fluctuations and the complexities of labour management of building projects. To attempt to regulate a narrow industrial relations scheme in isolation from more fundamental forces driving the industry is to invite wholesale disruption.

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61 Note exchange of views between Mr Murphy and Senator Murray, *Hansard*, Canberra 25 May 2004, pp.30-35

1.101 The committee received a considerable amount of evidence which argued against specific legislation for the industry. Advice from a Sydney law firm specialising in industrial law was that there would need to be very strong and cogent evidence of the need for separate legislation, and this was not presented either to the Cole royal commission, or by Commissioner Cole in his recommendation for such legislation.[62] The practical result of the separate legislation is that it will provide reduced and inferior rights and entitlements to building workers, compared to all other workers. It will mean that two or more differing standards will apply to employees performing the same work for different employers or working in different parts of the country. The submission argues that an attempt to 'quarantine' any discrete and defined section of the workforce from industrial laws having general application cannot succeed. The submission gives some instances to illustrate:

> Given constitutional and other limitations, it will never be possible in practice to legislate away State award coverage in the proposed sector of the building and construction industry, meaning that there will be under the proposals two or three "tiers" of standards: State award/agreement workers, Federal award, Federal agreement or Federal AWA workers (first class) and Federal BCII workers (second class).
>
> Given the structure of the industry and the inherent mobility of building workers, the industrial law standards applying to a worker will vary from month to month (perhaps day to day) or from job to job. For example building and construction workers move readily into and out of the "single dwelling" housing sector and the "commercial" sector of the industry, move from one state or region to another and from one employer to another.
>
> Notwithstanding (or perhaps because of) the attempts at definitions to confine or quarantine the coverage of the BCII Bill to a specific area of the industry, it is difficult to envisage that there will not be clear anomalies even in the "heartland" of what is attempted to be defined. That is, it appears that a number of workers of a single employer could be subject to the provisions of the proposed legislation while others would not be so subject.[63]

1.102 Another complication, briefly alluded to by academics from the UNSW School of the Built Environment, is the highly fragmented nature of the industry, and its connections with the rest of the economy through the supply chain network. Major building contractors do not have a high financial investment stake in the industry. Those that do are more likely to be suppliers of lift equipment and IT systems and other capital goods and infrastructure suppliers, which makes it difficult to isolate 'construction' as a discrete entity in isolation from the wider economy. If the labour supply to the industry is affected by the proposed legislation, there will be flow-on effects throughout the economy.[64]

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62 Submission No.64, Taylor and Scott, Lawyers, p.7

63 ibid.

64 Professor Denny McGeorge, *Hansard*, Sydney, 7 April 2004, p.8

1.103 Leaving aside the principled objection to single-industry regulatory legislation, there remains the constitutional limitations on the Commonwealth's power to regulate industry in the way this Government would like. The proposed Australian Building and Construction Authority has to rely on the existence of state powers and state legislation, and most importantly, the willingness of the states to agree to their proposals. There is no indication the Government is making any serious attempt to involve the states in collaborative measures to further the national interest in regard to the regulation of the industry. When critics of the bill point to its lack of 'symmetry' it is partly to this which they are referring.

1.104 It follows that if the building and construction industry requires separate regulatory legislation because it is a 'unique' case, the most obvious course of action for it is to legislate on issues that are clearly matters for the Commonwealth, such as closer supervision of industry compliance with regard to taxation, superannuation and other worker entitlements.

1.105 The committee majority regards legislation which is intended to regulate the employment conditions of workers and contractors in one industry sector alone is wrong in principle when it deprives employers of the rights which continue to be enjoyed by employees in other occupations. There can be very few exceptions to this rule. In principle, it may be defensible to waive this in specific areas of government employment related to national security, especially when compensating provisions to work entitlements are in place. The committee believes that as compensation for reducing the statutory rights of employees (compared to employees in all other industries) to take industrial action, there should be mechanisms to ensure that the need to take such action is eliminated. The committee majority cannot imagine what provisions in legislation could allow for this in the case of the building and construction industry.

1.106 Finally, the committee majority notes that an asymmetrical legislative response to what the Government mistakenly believes to be the main problems in the industry, may be the result of the limited Commonwealth power to regulate the industry. As the evidence from Taylor Scott revealed, the Commonwealth cannot overthrow state laws. It may only work through and around them. Therefore, its ability to legislate for all stakeholders in all of the industry is severely circumscribed. As the evidence of Professor Loosemore indicates, the culture change so necessary to improve the performance of the industry cannot be legislated for; it requires instead leadership from the top and consultative processes. The committee agrees with a view put to it that the Cole recommendations, and the subsequent legislation, are essentially based on a unitarist view of industrial relations: that management views are paramount and everyone else in the industry has to fit in with them.[65] It is for this reason that Opposition senators, who constitute the majority of the committee, argue that any attempt at genuine and broad reform of the industry can only succeed through collaboration with states and through consultations with all stakeholders.

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65 Associate Professor Braham Dabscheck, *Hansard*, Sydney, 7 April 2004, p.32

Likely consequences of enactment

1.107 It is not expected that the bill will pass in its current form. Were it to do so, the problems for the industry – and the Government - would have just begun. Getting the bill past the Senate, however unlikely, would shift the focus of opposition to this legislation to the courts where litigation, initially on procedural issues, would ensure that the implementation of the bill would prove difficult for the Government.

1.108 The committee majority noted that during the course of the inquiry information and speculation emerged that neither Government policy nor its proposed legislative implementation were being taken very seriously in industry circles. A report of the Director of the then Interim Building Taskforce, highlighting further alleged wrongdoings by building unions, was doubtless intended to 'maintain the rage' which marked the tone of the Cole royal commission report. The Interim Task Force reported on its powerlessness to act, but according to press accounts has found little sympathy among builders for its failure to secure convictions against alleged wrongdoers. As was reported:

> There is … industry concern about the wisdom and practicality of some of the Cole recommendations, which were, paradoxically, meant to achieve a more regulated building sector, while at the same time deregulating industrial relations in the sector. …'Cole came to his views of what needs to be done in the industry and the law does not have the unanimous support of anyone', a major building company chief executive says.
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> Another describes the commission report as an expensive statement of the obvious.
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> Another remarks:'The industry at large is very disappointed and the other half is "so what", we have to return to our normal working relationship with the union.'[66]

1.109 The committee has been considerably hampered in its consideration of the likely effects of the legislation as a result of the refusal of large construction companies to put in submissions or appear before the committee. It must therefore rely to some extent on press reports that it has no reason to believe to be unreliable. These reports indicate that building firms are not co-operating with the Building Industry Taskforce; that to do so would jeopardise their relations with the unions, and therefore the profitability of their businesses. The committee notes the strong likelihood of building industry leaders having almost as much disdain for the Taskforce as do the unions for the simple fact of their being interfering outsiders. As one company manager told the *Australian Financial Review*:

> Until they (the Task Force) have a fundamental understanding of the industry and what motivates unions, they will never get anywhere. There is no use getting investigators (former police officers) who have retired and

66 Marcus Priest, 'Building taskforce targets Multplex', *Australian Financial Review*, 31 March 2004, p.1

> get them to deal with quite complex problems in the industry: it's a different culture.[67]

1.110 The Building Industry Taskforce has made a strong plea for the coercive powers that are provided in the bill. These include the powers to compel a person to attend and answer questions in relation to an investigation; to provide answers to questions; and to produce documents and other relevant information.[68] These powers are provided to other Commonwealth agencies like the Australian Taxation Office and the ACCC.

1.111 The committee majority makes the point that in its attempts to maintain the rule of law in the industry, the use of such powers will be counterproductive if they result in serious confrontation and resultant disruption to the industry. The introduction of an agency into the industry armed with mainly punitive powers, and having no role to play which is analogous to that once exercised by the AIRC, would be highly provocative. It is more than likely to provoke the scale of lawlessness that the Taskforce now claims exists but which it cannot prove, and which has been denied by all industry witnesses before this committee.

1.112 The committee majority concludes that the consequences of implementation of the legislation, were the bill to pass the Senate, would bring strife rather than stability and peace to the industry. It would see a decline in industrial productivity, and a decline in investment and employment. It would contribute significantly to the demise of whatever trust remains between unions and employers, and severely test the management skills of companies dealing with what would turn out to be a permanent crisis. This would occur at a time when the industry is otherwise performing well, although under some stress as a result of skill shortages.

Recommendation 1

The committee majority recommends that the Building and Construction Industry Improvement Bill 2003 be opposed by the Senate.

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67 ibid.

68 Nigel Hadgkiss, *Upholding the Law - One year On: Findings of the Interim Building Industry Taskforce,* Canberra, March 2004, p.18

Chapter 2

The Cole Royal Commission

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

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

Why royal commissions are useful to governments

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

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

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

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

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

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

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

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

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

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

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

Outsourcing the parliament

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

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

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

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

Appointment of the Cole royal commission

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

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

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

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

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

5 ibid.

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

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

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

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

Conduct of the royal commission

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

Rules of evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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11 ibid, p.11

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

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

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

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

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

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

Selection of witnesses

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

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

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

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

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

Untested allegations allowed to stand

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

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

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

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

17 ibid., p.22

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

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

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

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

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

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

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

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

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

Recommendation 2

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

Royal commission conclusions and recommendations

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

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

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

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

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

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

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

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

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

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

22 ibid.

23 ibid., p.13

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

Allegations of a 'biased' royal commission

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

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

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

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

25 Tom Roberts, ibid., p.23

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

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

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

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

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

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

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

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26 ibid.

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

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

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

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

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

Recommendation 3

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

28 ibid.

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

Conclusion

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

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

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

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

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

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

Chapter 3

The plan to quarantine a workforce

> 'Apartheid' is an emotional term but does bear out the wrong done when a discrete group within a community is treated differently to the rest. Whether that different treatment is based on race, or religion, or income, or location, it is unjust. The fact that it is based on industry, as is the case in the present instance [see clause 3 of the Bill], does not remove the vice in treating one section of a class less or more favourably than the rest. As discussed earlier the rule of law principle showers us all. Those proposing this legislation understand that, unless there is valid justification, it is wrong to identify a particular industry for special treatment.[1]

3.1 The central issue to be addressed in this chapter is the Government's rationale for creating legislation which isolates an important segment of industry through stringent regulation of the conditions of employment imposed upon its workforce. It is as though 7 per cent of the national workforce is being sent into quarantine, or at least to undergo some form of collective punishment for failing to meet unspecified productivity goals. The Government has argued for nearly eight years that the building and construction industry has been in need of some form of special treatment, now it appears that the BCII Bill is to be this cure. The discriminatory features of the Building and Construction Industry Improvement Bill 2003 are plain to see. What is not so clear is how the Government expects to apply such a regime to this relatively small sector of the economy and workforce, in isolation from the wider industrial economy.

3.2 This chapter looks at the institutions to be created by this legislation, how they might carry through Government policy, and the serious consequences that are likely to flow from this. It will also respond to a number of matters raised in submissions relating to excessive restrictions on the rights of employees which have not been dealt with elsewhere in the report.

Issues of principle and practice

3.3 The fact that employer organisations have so readily accepted the principles underlying this legislation says a great deal about their indifference to notions of equal treatment under the law and the practical problems likely to result from jurisdictional disputes and other complex litigation in the courts. The committee notes an exception in the comments of the Australian Industry Group (Ai Group). The Ai Group states

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1 Submission No.36, CEPU Plumbers Division, p.21

that as a general principle, it would prefer to have consistent workplace relations legislation that is applicable to all employers and employees, rather than sector-specific legislation. While on balance the Ai Group supports the BCII Bill, with qualifications, it proposes that there be a review of the legislation after 5 years to ascertain whether there is a need to retain it.[2] The committee notes that the Ai Group has a great many reservations about the BCII Bill, many of them relating to definitional problems which are dealt with further on in this chapter.

3.4 The committee accepts advice that there would have to be very strong and cogent evidence of the need for industry specific legislation in area of industrial legislation, especially in the case where it could be demonstrated, as it can be here, that workers in that industry will enjoy less favourable terms and conditions of employment. The Cole royal commission has not provided this evidence.[3]

3.5 The committee is aware of some specific provisions under the former Conciliation and Arbitration Act and now the Workplace Relations Act that deal with particular groups of workers in particular industries, where there are constitutional limitations under the conciliation and arbitration power on the Commonwealth's ability to regulate these employees. In the past, such bodies as the Joint Coal Board and the Flight Crew Officers Industrial Tribunal had wage fixing and arbitration functions, but these arrangements, which arose from particular circumstances, were accepted without controversy because there needed to be a mechanism to include those workers in provisions which applied generally. These industry-specific approaches to industrial relations were considered worthwhile at the time.[4] Had those provisions not existed they would be excluded from the benefits of the rest of the workforce. The committee was told that the purpose of the BCII Bill was to achieve the very opposite result:

> It is an attempt to quarantine a segment of the Australian community's economic life away. One of the things I also say in the submission is that even if that were justified—and in my view it clearly is not—this bill can never do that. It can attempt to do that but it cannot succeed.[5]

3.6 Apart from issues of principle, it is clear from the evidence given to the committee that there are some serious practical problems which the Government and industry stakeholders are likely to encounter as a result of attempts to differentiate some building and construction workers from other workers. The problems will be compounded by new definitions contained in the bill, an issue discussed in a later section of this chapter. This is explained in the submission from Taylor and Scott:

> In simple terms, it will mean two or more differing standards applying to workers working for the same employer, or performing the same work for

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2 Submission No.1, Australian Industry Group (Ai Group), Attachment A, pp.21-22

3 Submission No.64, Taylor Scott, Lawyers, p.6

4 Submission No.1, op. cit., p.21

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

> different employers or working in different parts of the country. That is, to the extent that the Bill is an attempt to "quarantine" a discrete and defined section of the workforce from those industrial laws of general application, it does not and cannot ever succeed. To take some obvious examples:
>
> > Given constitutional and other limitations, it will never be possible in practice to legislate away State award coverage in the proposed sector of the building and construction industry, meaning that there will be under the proposals two or three "tiers" of standards: State award/agreement workers, Federal award, Federal agreement or Federal AWA workers (first class) and Federal BCII workers (second class).
> >
> > Given the structure of the industry and the inherent mobility of building workers, the industrial law standards applying to a worker will vary from month to month (perhaps day to day) or from job to job. For example building and construction workers move readily into and out of the "single dwelling" housing sector and the "commercial" sector of the industry, move from one state or region to another and from one employer to another.
> >
> > Notwithstanding (or perhaps because of) the attempts at definitions to confine or quarantine the coverage of the BCII Bill to a specific area of the industry, it is difficult to envisage that there will not be clear anomalies even in the "heartland" of what is attempted to be defined. That is, it appears that a number of workers of a single employer could be subject to the provisions of the proposed legislation while others would not be so subject.[6]

3.7 The committee accepts the view expressed above and in a number of other submissions that the proposed bill will not simplify or codify industrial or workplace rights for the areas defined as coming within the scope of the bill. It will most likely introduce a multiplicity of operative regimes and create even more complexity and confusion. Only when this occurs, and as the courts become choked with litigants, is the Government likely to recognise that the bill cannot achieve its stated objectives. It may even be forced to reconsider whether the objectives were properly founded on necessity.

A matter of definition

3.8 A number of submissions pointed out the difficulties that will face the industry, and eventually the courts, as a consequence of disputes over definitions in the BCII Bill. The central question is where the proposed regulatory regime begins and ends? As the CFMEU submission reminds the committee, sound law-making requires that people know with some certainty what laws apply to them and in what circumstances.[7] This is particularly so where the imposition of heavy civil penalties apply.

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6 Submission No.64, Taylor and Scott, pp.7-8

7 Submission No.37, CFMEU, p.26

3.9 Several submissions itemise the difficulties with reference to particular terms. For instance, the CFMEU refers to the term 'maintenance', which was removed from the bill at the urging of the Ai Group which claimed it was not the same as 'construction'. As the CFMEU points out:

> …the definition still includes references to "restoration" and "repair" work which can be regarded as synonymous with "maintenance". The distinction between "construction" on the one hand and "maintenance" or "repair" on the other is regarded by many in the industry as difficult to draw. Often it can be difficult to determine where repair or maintenance ends and construction starts and vice versa. The history of lengthy litigation over industry definitions in for example union eligibility rules and long service legislation indicate the problems that can be associated with attempts of this kind.[8]

3.10 Even among employer groups expressing complete or qualified support for the BCII Bill, there are varying degrees of dissatisfaction with the definitions in the bill.

3.11 The Ai Group submitted that its support for industry–specific legislation was contingent upon an appropriate definition of the building and construction industry being incorporated into the legislation, especially for the purposes of defining the coverage of the legislation. Ai Group does not support the approach taken in the bill, which defines the building and construction industry in a very broad way. Ai Group fears that the bill's definitions would lead to the significant risk of a drift of construction industry terms and conditions across into non-construction sectors. The Ai Group is critical of the Government's definition of terms and expressions in the bill such as 'building award' and 'building agreement' and 'building work', the definition of the latter term being taken from security of payment legislation in New South Wales. The Ai Group claims that it is appropriate for its original purpose, but not for the BCII Bill. The Ai Group further argues that clear definitions are extremely important for industries which are not involved in the construction industry, and who have no wish to have construction industry terms and conditions used in their own agreements.[9]

3.12 The submission from ACCI only noted the failure of the Government to define the 'building and construction industry' in the bill. It supported the broad definition of the industry, for reasons that the submission does not entirely make clear, claiming that narrow definitions provided scope for 'the unlawful, coercive or unacceptable practices as found by the Royal Commission to still occur in the excluded area, and for it to be without an adequate legal or enforcement regime to deal with such practices.'[10]

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8 ibid., p.24

9 Submission No.1, Ai Group, Attachment A, p.26

10 Submission No.14, ACCI, p.19

The Australian Building and Construction Commission

3.13 Commissioner Cole concluded from all the evidence that he heard about lawlessness in the industry that a thoroughgoing cultural change was necessary in the industry. He concluded that a well-resourced and dedicated regulator was necessary if the industry was to be kept in order. The explanatory memorandum to the bill describes the Australian Building and Construction Commission (ABCC) as an 'independent' body broadly covering investigation, enforcement and prosecution in the building and construction industry. The agency will operate as a 'one-stop shop', either dealing with matters itself under the powers granted to it under a BCII Act or the WR Act, or referring a matter on to state agencies with the requisite powers.

3.14 In the exercise of 'wide ranging powers' the ABCC Commissioner will operate across the country, accessing over 400 Commonwealth construction sites including nearly 200 CBD sites. To ensure that ABCC inspectors are quickly deployed, employers are to be obliged to notify the ABCC Commissioner within 72 hours of any industrial action. The Government has stated its expectation that the effect of the new regime on the industry will be 'significant', dealing as it will with the lawlessness which was discovered by Commissioner Cole to be 'endemic'. Even so, the ABCC Commissioner will be 'even-handed' in protecting the public interest, and although this may involve legal action, there will also be an educative role for the commission to undertake. What form this role might take is one of very many questions which the committee was not able to ask in the time available.

3.15 Under the proposed legislation the ABCC will have 'wide ranging powers' to monitor, investigate and enforce Commonwealth workplace relations law and the Building Code, and refer other matters to the appropriate Commonwealth, state or territory agencies. The DEWR submission explains that:

> It is appropriate for an industry specific body to be established for the building and construction industry as the industry has been found to require a level of regulation over and above that generally applicable to ensure compliance with the law. The BCII Bill will impose a higher level of regulation, and the establishment of the ABCC will involve considerable resources. However, without such an approach, the industry will continue to operate as it does presently, with the economic benefits that should flow to the Australian economy from an improved building and construction industry never being fully realised.[11]

3.16 The committee majority finds the descriptive prose of so much Government commentary on this bill as being worthy of parody. The tone of this extract suggests that the Government is only doing this for our own good, and that if we want to grow up to be rich then we have to take this medicine, which by the way is rather expensive. This is government as a wrong-headed nanny.

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11 Submission No.21, Australian Government Agencies, p.50

Ministerial and bureaucratic control

3.17 The committee majority does not believe that statutory positions created under the BCII Bill will have any areas under their control which are not subject to almost routine supervision of the minister and senior level officers of the department. That will be so in the case of the ABCC Commissioner and the Federal Safety Commissioner, as it is currently with the Director of the Building and Construction Industry Taskforce. This is not a Government which maintains a light hand on the tiller of state. The extraordinary detail of legislation, anticipating every possible contingency and loophole, is indicative of this tendency. As one witness told the committee:

> In recent years I have observed a tendency amongst the drafters of federal legislation to be ever more prescriptive in all fields. It is thought, wrongly in my view, that it is preferable to enact prescriptive rules for all foreseeable circumstances than to grant discretionary powers to institutions, agencies and bodies that have superintendence of the activities covered by the legislation in question. For example, the following clauses are, in my view, unnecessarily prescriptive: clause 54—Extraneous matters; clause 55—Non-standard period or retrospective payments; clause 62—Indicators of genuinely trying to reach agreement; and clause 68—Project agreements not enforceable.[12]

3.18 The same point is made in the joint submission from the states and territories:

> The Joint Governments … submit that the Bill itself does not accord with its objects. The Bill is overly prescriptive, unnecessarily legalistic and will only serve to drive a wedge between employers and their workforce. The Bill will ultimately increase conflict.
>
> Some irony is to be found in the approach of the Federal Government, on the one hand railing against the intervention of third parties in workplace relations, and then promoting legislation that tries to micro-manage the day-to-day employment relationship. Turning again to the WR Act, the centrepiece of the Federal Government's industrial legislation, the principle objects of that Act are replete with references to the sanctity of the employer-employee relationship, free from outside interference. …The current federal Government has a long history of intervening in workplace relations, against the wishes of both the employer and employees. This latest Bill continues that history.[13]

3.19 Obsessive ministerial control and departmental and agency supervision are the hallmarks of this Government. It is for this reason that promises of a benign and protective independent agency to which construction industry stakeholders can refer their industrial woes is a piece of fiction. The disadvantage of maintaining a close rein on agencies is that they then loose public confidence. If they are subject to the whims

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12 Professor Ron McCallum, *Hansard,* Sydney, 2 February 2004, p.3

13 Submission No.26, Australian States and Territories, p.31

of ministerial discretion they will never become effective instruments of public policy. There is a high expectation that agencies run by EWR ministers will be subject to an unusually high level of political direction. As the ACTU submission pointed out in relation to the absence of restrictions over the powers of the ABCC:

> Not only does the Bill lack any provision for judicial oversight, it is not clear that the Cole Royal Commission's recommendation that the ABCC be subject to the jurisdiction of the Commonwealth Ombudsman has been accepted and will apply. The ACTU believes that there should be a clearly independent process involved in initiating applications for civil penalties of up to $110,000. The Bill indicates that the ABCC is likely to act in a partisan and political way, as has been the case with the Office of the Employment Advocate.[14]

3.20 The ACTU also points out the problems that will result from expensive bureaucratic impositions on employers. It argues for what would normally be regarded as a common-sense view that there is no need to establish an expensive bureaucracy to enforce laws when current structure are able to do so:

> A particularly absurd element of the scheme is the level of mandatory reporting by employers - all 80,000 of them - to the ABCC of events including the taking of unprotected industrial action or a request for payment for a period during which employees are on strike. Union officials holding a right of entry permit are required to provide to the ABCC a copy of each notice of entry given to an employer. Building industry unions would expect an organiser to make a number of site visits each day. The Commission must notify the ABCC of each hearing to certify an agreement - thousands of such agreements are certified.[15]

3.21 This has been described by the ACTU as bureaucracy gone mad. It also points to the slavish and unquestioning attitude of the Government to the tenor of the royal commission report, and its determination to follow Commissioner Cole's thinking without reference to the experience of its supporters and constituents. It may be laudable in some cases for Governments to ignore wide ranging advice from interests groups, but it is impossible to justify in this case. It is unlikely that ACCI members would support the ABCC's requirements on mandatory reporting requirements on employers in relation to industrial action. In doing so they will be required to participate in legal proceedings in which they have no interest.[16] They may take some comfort from this extract from the Explanatory Memorandum:

> Despite the administrative burden associated with notification of matters to the ABC Commissioner, those affected by unlawful industrial action will benefit through improved access to damages to which they are entitled.[17]

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14 Submission No.17, ACTU, p.7, paras.30-31

15 ibid., p.5

16 ibid., p.20

17 Explanatory Memorandum, p.11, para.40

The uncertain role of the ABCC inspectorate

3.22 The teeth of the ABCC are to be its inspectorate. They will have power to gather information by requiring the production of documents and by demanding answers to questions. ABCC inspectors will be able to exercise powers of entry and investigation to determine whether relevant legislation and the Building Code are being complied with. ABCC inspectors will be empowered to enter premises without warrant, and they may inspect work, material and machinery, take samples of goods or substances, interview anyone, inspect or copy documents or require their production. ABCC inspectors can also be directed by the ABCC to make an assessment of damages resulting from industrial action. The committee emphasises that the powers of inspectors under the provisions of the BCII Bill exceed those of inspectors having similar responsibilities under the Workplace Relations Act, as is explained below:

> The powers of the WR Inspectors and the OEA do not include coercive powers of the type proposed for the ABC Commissioner in section 230. In particular, the ACTU is concerned about the proposed power of the Commissioner to require persons to attend and answer questions in relation to an investigation. This power would enable the Commissioner to require individual building workers to attend its premises and answer questions under oath about issues such as why they took or did not take industrial action, or why they did or did not vote for a certified agreement. Such treatment would be terrifying for most workers and union officials, as it would be for most Australians, and is quite disproportionate to the scale of any identified problem.[18]

3.23 This is evidence of the limitations on the rights of employees in the construction industry as compared to those in the housing industry or in any other employment. These are additional restrictions that don't apply to other workers.

3.24 Such powers as these invite speculation as to the reaction of builders and their employees should inspectors find themselves on a building site. The bill makes it clear what they will intend to do, but it is not clear as to how they will manage their task. The committee majority is of the view that the exercise of coercive powers should be sanctioned by regulation only when there is clear evidence of likely criminality, or when the operation will not result in even more strife than it is investigating. There is a danger that all sense of proportion will be lost as a result of these powers being made available to the inspectorate. The Government will no doubt respond with the assurance that the ABCC will exercise careful discretion, but there can be no assurance that this will always be exercised.

3.25 Nor is it clear that the Government has thought through the likelihood and consequences of physical resistance to ABCC inspectors on building sites. These inspectors have no police powers, and if a show of force is required, support will have to come from state police or the Australian Federal Police. Yet the committee heard

18 Submission No.17, ACTU, p.6

quite emphatic evidence from a number of supporters of the BCII Bill that coercive measures were required because of the reluctance of state police to enter building sites to enforce the law.

3.26 The committee has heard no evidence that police would be any more willing to back up the ABCC inspectorate in the exercise of its powers, than they would be to act in their own capacity. Some idea of the attitude of police to this issue is indicated in the submission from the Police Association of Victoria, which expressed its abhorrence at the requirement that police be required to enforce laws which eroded the political neutrality of the police.[19] As is mentioned later in this chapter, the New South Wales Government opposes the secondment of its police to the ABCC, presumably for the same reason.

3.27 Commissioner Cole recognised the tendency for the police to regard all conduct on constructions sites as an industrial issue, even if the conduct is potentially in breach of criminal laws. He noted the continuation of signs posted on building sites denouncing investigators as 'rats' and inciting workers not to cooperate. The Government submission refers to the lack of success experienced by the Office of the Employment Advocate in signing up construction workers to AWAs. It states that this is partly due to limitations on the power of inspectors to investigate suspected contraventions of the law and the modest penalties for coercive conduct.[20] However, as Commissioner Cole has reported, the main reason for the OEAs lack of success has been the harassment of OEA officers on worksites. Their very presence is a provocation. It is reported that OEA officers have been abused, had objects thrown at them and had their property vandalised:

> The arrival of OEA inspectors frequently leads to work stoppages, with resulting increased project costs, and sometimes site invasions. For obvious reasons, under these circumstances, neither offenders nor their victims are eager to co-operate in law enforcement.[21]

3.28 The committee majority is struck by the misguided trust that is being placed in the powers of the ABCC and its inspectorate. While it is intended that it be armed with powers that the Building Industry Taskforce claims it needs now, principally the powers to enforce demands for evidence, there is no assurance that this alone can deal with the problems the royal commission has identified. This is particularly so in relation to criminal matters. As one witness told the committee:

> It is important that the committee be aware of what I mentioned about the state criminal matters. The royal commissioner said, 'There's some uncertainty about whether a commission could investigate matters under state criminal law.' It is our view there is no uncertainty about that; it is perfectly clear, as a matter of constitutional law, that the commissioner

19 Submission No.6, Police Association of Victoria, para.1-2

20 Submission No.21, Australian Government Agencies, p.48

21 ibid.

> could not investigate breaches of state criminal law. Nor could the Commonwealth parliament authorise the commissioner to do that. That means that there is much less actual role for that commissioner to play as the 'cop on the beat' than the government might have been suggesting or the commissioner might have hoped. It will actually be limited to matters under Commonwealth law, in particular the Workplace Relations Act.[22]

3.29 It is not clear to the committee majority how matters will be improved if the BCII Bill is passed by the Senate. The Government has yet to recognise that by creating certain offences and having inspectors enforce them leads to resistance which can be very effectively organised and managed on a building site. Unions are 'militant' in that they are organised and can show solidarity under pressure. The nature of construction work builds a culture of solidarity and acceptance of organisation and leadership which is alarming to many people without collectivist action experience either in the workplace or in any other activity in their lives.

3.30 The committee would be most alarmed if the Government deliberately sought to provoke confrontations on worksites. It cannot imagine that leading contractors would call in the ABCC inspectors and risk industrial action and set-backs to project completions. What the committee majority fears most is a conjunction of events or circumstances involving a clash over several separate concurrent issues which would strain beyond breaking point the normally successful mechanisms for on-site dispute resolution. This may arise from no fault on the part of either unions or lead contractors and project managers. The source of such disputes is likely to be the difficulty which both sides have in complying with the BCII Act.

The Building Code of Practice

3.31 The Building Codes have a significance far beyond their purpose of ensuring that occupational health and safety measures on Commonwealth-funded building sites reach the highest minimum standards. For that reason the Building Code is dealt with in this chapter, rather than in the chapter dealing with occupational health and safety.

3.32 The BCII Bill provides, in Chapter 3, for a new Building Code of Practice, to be issued by the Minister in a series of documents. Clause 26 sets out that these relate to occupational health and safety matters, and will take into account the recommendations of the Federal Safety Commissioner. These apply to building contractors recognised as coming under the corporations power of the Constitution or who are carrying out construction on building projects in a Commonwealth or territory place.

3.33 The Government intends to use its purchasing power to impose its Building Code on the industry. Naturally enough, the Master Builders Association (MBA) has some complaints about this for the threat it poses to builders who may be disadvantaged as a result of having to comply with the Code. The MBA has argued

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22 Mr Chris Maxwell, *Proof Hansard*, Melbourne 21 May 2004, p.25

that clause 26 needs further consideration, and that statutory recognition of the Code requires more direct reference to the checks and balances relating to its development and implementation, including industry consultation. Like the ACTU, the MBA draws attention to the administrative burden on builders.[23] The MBA also expresses concerns about the possibility of the Building Code being used to erect prescriptive measures that could damage the flexibility and simplicity attached to labour hire.[24] The committee majority notes that the concerns of the MBA and its members are that they may have to take more notice of occupational health and safety issues. Prepared as they are to support a severe restriction on the rights of employees, they are suspicious of any attempt to impose more rigorous occupational health and safety regulations.

3.34 Nonetheless, the committee majority accepts, if for rather different reasons, the point made by the MBA that more reliance should be given to state and territory occupational health regulations, and that these should be valid for Commonwealth projects. This is consistent with evidence provided that the state level agencies are the most appropriate administrators and enforcers of OH&S laws. There is no doubt about the force of some of the MBA's arguments in relation to this matter:

> MBA believes that this is but one example of a difference between the State and Commonwealth regimes that may induce a builder to be forced to choose between undertaking work for either the Queensland Government or the Commonwealth. Such a situation is untenable. … In particular, we note that Recommendation 41 would require any person who contracts to work on a building site owned, operated or funded, even in part, by the Commonwealth, to comply with the national Code and Guidelines in all their other work including private sector work. In the face of inconsistent Commonwealth and State laws, Recommendation 41 would seem to an undue constraint on individual enterprises.[25]

3.35 Another serious objection to the Building Code relates to the manner of its coming into force. As in other aspects of the bill, the hand of the Minister is never far from the lever of policy micro-management. For all the claims of 'independence' for the ABCC Commissioner and the Federal Safety Commissioner, there is no indication that such independence can be exercised in practice. If the Government acts according to accustomed practice, as is likely, the Building Code will be a matter for routine exercise of ministerial discretion, with only a tabling requirement laid down. This would be an exercise in ministerial heavy-handedness seldom seen even from this Government. As the ACTU submitted:

> The use of Commonwealth contribution to building projects as a means of forcing all other parties into industrial relations arrangements which are repressive, unnecessary and unwanted is a misuse of that funding role based on a view that the Government's preferred industrial relations model trumps

23 Submission No.12a, MBA, para.12.11

24 ibid., para.10.4

25 ibid., para.9.4.11

> any other element of public interest. … The proposed Code has also been strongly criticised by the governments of Victoria and Western Australia, the former submitting that it will "simply impose another layer of complexity on the industry" while the latter stated that: "Commonwealth funding of State projects is often only a small proportion of the total cost and the Commonwealth's policy represents an unjustified intrusion into an area of state responsibility."[26]

3.36 The committee takes the ACTU point about the reaction of the states. The complexity of the BCII Bill, and the limited parliamentary time available to debate it, means that this point has been lost on many people. The Building Code is regarded by states as a wedge, driven into current bilateral arrangements to administer occupational health and safety, to ensure the hegemony of the Commonwealth over an area where they have neither experience nor expertise.

3.37 The Ai Group has expressed strong opposition to the proposal to regulate the industry through a non-legislative instrument. The Ai Group points out that the bill extends the role of the Code far beyond that of providing a client guidance document. The Code represents a minister's exercise of the corporations power, making it binding on contactors coming under that power. The Ai Group believes that the Building Code should be a statutory instrument, subject to tabling and disallowance.[27]

3.38 The opposition of AiG to the Building Code runs deep. It is dissatisfied at the way in which the Government has implemented recommendations of the Cole royal commission, as its submission states:

> In its submissions to the Royal Commission, Ai Group argued for increased client activism in order to achieve higher standards of OHS in the building and construction industry. This proposal was adopted by Commissioner Cole who recommended that there be increased activism by the Commonwealth, as a client of the industry and as an agent to drive OHS improvement. However, AiGroup is concerned that the manner in which the Commissioner's recommendations have been translated into the *Building and Construction Industry Improvement Bill* may exacerbate the confusion and complexity described above. One area of concern relates to the provisions of the Bill which pertain to the proposed *"Building Code"*.[28]

3.39 The following extract from the AiG submission indicates that it rejects entirely the Government's strategy in relation to take more control of the building and construction industry through the device of the Building Code.

> The incorporation of health and safety requirements within the *Building Code* (s.26(2)) and the application of the *Building Code* to all incorporated building contractors, has the potential to establish competing occupational

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26 Submission No.17, ACTU, paras.38-42

27 Mr James Barrett, *Hansard,* Canberra, 11 December 2004, p.23

28 Submission No.1, Attachment A, Ai Group, p.59

> health and safety standards and, accordingly, to compromise the OHS of employees because of confusion regarding which of the competing obligations need to be complied with by employers.[29]

3.40 And later:

> It is not appropriate that the Federal Safety Commissioner have a role in monitoring and promoting "compliance"18 with the *Building Code,* nor is it appropriate that the *Building Code* contain detailed provisions relating to OHS. At the present time, OHS is almost entirely regulated through State and Territory laws. Comprehensive monitoring and compliance mechanisms are already in place under such legislation.[30]

3.41 The committee finds it noteworthy and encouraging that one employer organisation is able to look critically at the detail and the ramifications of the legislation. It comes as close as any submission from such an organisation could in recognising the Building Code as a 'trojan horse' whose significance to the legislation has little to do with the Government's promotion of occupational health and safety. Its purpose is to provide the constitutional lever, through the corporations power, to allow the Government to be the ultimate regulator for the majority of building and construction firms in the country. If it did not have this purpose there would be little reason for its existence. As nearly all submissions addressing occupational health and safety argue, there is little wrong with the current system that more rigorous compliance regimes and more determined collaborative attempts to achieve minimum levels of uniformity across states will not fix.

3.42 Whether or not the committee majority agrees that the Building Code ought to be subject to the provisions of the Acts Interpretation Act, and that the Codes be subject to tabling and disallowance like any other regulation, is an academic point. It fully understands why the Government will never consent to this.

Protected action

3.43 Proposals in Part 3 of the BCII Bill provide for exceptions to the rules currently in force under the Workplace Relations Act. The result has been that, for all intents and purposes, employees in the industry will be deprived of their right to take industrial action.

3.44 Clause 78 makes it clear that where industrial action is taken for the purpose of supporting or advancing claims, the action will not be protected if it does not pertain to the relationships between the parties to the agreement. The issue of whether or not a claim is pertinent is complex, and often cannot be easily determined. Parties engaging in protected action need to be able to make confident and rational decisions. The ACTU believes it is inappropriate to make immunity from legal liability dependent on

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29 ibid., p.60

30 ibid., p.61

conclusions concerning a technical matter of law, and notes that the courts have accepted union claims on this matter.[31]

3.45 The committee has heard evidence that the requirements for industrial action to be protected would, in practice, be impossible for building unions to meet, for the following reasons:

- the requirements are all at individual employer level, there being 4 000 EBAs in the industry in Victoria alone;
- the requirements apply to every single ban or limitation, not just strikes;
- before even a bargaining notice is served on a particular employer, the employees of that employer must have voted in favour of serving the notice in the last 21 days, and the vote must be by secret ballot if there are more than 10 employees;
- the union must be 'genuinely trying to reach agreement' with the particular individual employer;
- then before serving a notice of industrial action, the union must apply to the AIRC for an order for a secret ballot of the employees of the particular employer, and 30 pages of the bill are devoted to requirements about how the AIRC must deal with the application and how the ballot must be conducted;
- if the AIRC grants the ballot order, then the secret postal ballot is held;
- only if more than 40 per cent of the employees vote in the ballot and more than 50 per cent of them vote in favour, can the industrial action notice be served;
- industrial action can only continue for 14 days, after which it becomes unlawful for the next 21 days;
- After the 21 day 'cooling off period', the union can apply to the AIRC for approval of further industrial action;
- if the AIRC is satisfied that strict criteria are met, it may grant a certificate allowing further action for a maximum period of 14 days, after which action again becomes unlawful.
- after the 21 day 'cooling-off' period, the union can apply to the AIRC for approval of further industrial action; and
- if the AIRC is satisfied that strict criteria are met, it may grant a certificate allowing further action for a maximum period of 14 days, after which action again become unlawful.[32]

3.46 It is almost inevitable that a union or an employee attempting to negotiate their way through this minefield would fail to pass in safety. Just one of the traps, for instance, that unions must be 'genuinely trying to reach agreement', has a set of

31 Submission No.17, ACTU, p.20

32 Submission No.69, Slater Gordon, Lawyers, p.3

indicators in clause 62 which would, on the evidence of one industrial law firm, be 'practically impossible to comply with'.[33]

3.47 The ACTU describes the cooling off processes as tortuous and litigious, as well as counter productive. It points out that while long periods of industrial action are rare in the construction industry, the effect of this provision would be to encourage unions and their members to take more sustained action, rather than ceasing work for a day and recommencing negotiations. The committee majority fears that we may then see the kinds of industrial action that occur in North America, resulting in longer bargaining disputes, with greater economic damage to employers and employees alike.[34]

3.48 Slater Gordon Lawyers were quizzed on this list of protected action conditions and confirmed that while industrial action had not been outlawed explicitly, the practical effect of the legislation did so:

> …. I think that, if one analyses in the concrete conditions of the building industry how this regime would work, one sees that in effect you would never get to protected industrial action, and the bill provides that if it is not protected then it is unlawful. The problem is the hoops that would need to be jumped through. I think reference was made to this before. Take the situation in Victoria. I think there are about 3,000 or 4,000 individual enterprise agreements in Victoria. If this regime were imposed, I think it would be practically impossible for the union and the workers of each of those employers to go through the process here in order to reach protected action. If they took industrial action, it would not be protected and therefore would be unlawful. That is the aim of the bill, it seems to me, when you read it.[35]

3.49 That opinion echoes advice received in Sydney from another industrial lawyer, who stated that the right to take protected action is so circumscribed as to be something of a theoretical right only. This is because of the tortuous processes of the law which can tie up both parties to disputes:

> Lawyers can make the process through which unions and employers have to go, in working their way through this labyrinth in the bill, worse. There are opportunities for lawyers or indeed the ABC Commissioner to intervene actively at all stages in this process. They can go to the Federal Court to seek injunctive relief and are not liable to give the usual undertakings as to damages if they happen to turn out to be wrong. Sometimes they may have genuine issues, but sometimes they may want to use the law and lawyers—my brothers and sisters in the law—as delaying devices as a means to obfuscate.[36]

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33 ibid.

34 Submission No.17, ACTU, pp.22-23

35 Mr Marcus Clayton, *Hansard,* Melbourne, 19 May2004, p.96

36 Mr Lachlan Riches, *Hansard*, Sydney, 3 February 2004, p.70

3.50 The committee heard evidence of serious legal problems, flaws and deficiencies in the bill in regard to protected action. On legal grounds alone, and without regard to the various objections on policy grounds, the committee was told of a number of serious concerns about the differentiating and novel concepts in this bill, compared with the Workplace Relations Act. The Taylor and Scott submission set these out thus:

> Among the matters which it is respectfully suggested will pose particular legal problems are:
>
> > the level of intrusion generally and coercive powers of the ABC Commissioner;
> >
> > the concept of and the particular manner in which the Bill seeks to proscribe "pattern bargaining";
> >
> > the extent of retrospective effect of the Bill (given that paragraph 2.9 of the Explanatory Memorandum stated that the related Transitional Bill, "will ensure that, after the commencement of these provisions, the AIRC holds a hearing for the certification of every building agreement");
> >
> > the enormously technical, legalistic and convoluted procedure sought to be prescribed for the taking of protected industrial action (quite apart from matters of "policy" in all this, the provisions provide a certain type of lawyer's "happy hunting ground" for the imposition of technicality, delay and obfuscation); and
> >
> > the failure to provide full legislative prescription or detail on the Building Industry Code, which is however to be established on a statutory basis, but the content to be at the discretion of the Minister under Clause 26 of the Bill.[37]

3.51 The committee majority agrees with the ACTU that there is no justification for such drastic restriction on protected industrial action based on any evidence that industrial action, or unprotected industrial action, is a significant problem in the industry. It scarcely warrants the labyrinthine obstacles the Government has erected with this legislation. The ACTU submission described the extent of the problem the Government was dealing with:

> The number of incidents of unprotected action in the building and construction industry found by the Royal Commission is small, when considered in the context of the industry as a whole. Findings were made in relation to the taking of unprotected industrial action in only 24 disputes around the country since 1999: four in NSW, seven in Victoria, three in Queensland, two in South Australia, seven in Western Australia and one in Tasmania. Many of these incidents of unprotected action were very short, involving a stoppage of no more than a few hours, and frequently involved issues to do with site working conditions.[38]

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37 Submission No.64, Taylor and Scott, p.11

38 Submission No.17, ACTU, pp.18-19, paras.114-115

3.52 A related issue arising from the bill needs mentioning: protected action during the term of a certified agreement. The Government is legislating to overcome a loophole in section 170MN of the Workplace Relations Act which could allow protected action, during the term of a certified agreement, as part of negotiation over a claim that parties had agreed to set aside for later resolution. The Federal Court has found such action to be legal. The Government is taking this opportunity to ensure that the loophole will not appear in the BCII Bill. The committee majority takes the view that if this succeeds, the Government will have unnecessarily fettered the parties' freedom to bargain and to negotiate site-specific arrangements for particular types of projects.

Union right of entry

3.53 Right of entry provisions for trade union officials wishing to confer with their members or to recruit new members are more severely restricted under the BCII Bill than under the Workplace Relations Act. This is in response to a recommendation of the royal commission which it regarded as critical to the success of 'reform'. The royal commission received evidence that industrial disputes often followed the visit to work sites of trade union officials, particularly when they intervened in some matter. The royal commission believed that such visits had an unsettling effect on workers, and that for many of them the visit was unwelcome.

3.54 Subject to constitutional limitations, therefore, the right of entry provisions applying to premises and worksites under the coverage of the bill will be limited. That is, they will become more restrictive than the opportunities afforded to union officials and members of their unions than is the case for all other employers and workplaces. The ABCC will enforce the proposed rules and the Industrial Registrar will certify whether individual union officials are 'fit' persons to be issued with a right of entry permit.

3.55 The ACTU asserts that the right of entry provisions are intended to make it difficult for union officials to carry out their responsibilities. Union recruitment is likely to be made difficult because potential members may be intimidated by fear of their employers being aware that they have taken the opportunity to talk to a visiting official. Entry for recruitment purposes is only allowed every six months. The submission continued:

> The degree of investigation of an applicant for a permit under proposed section 182 is unnecessary, and is likely to result in long delays in the issuing of permits. This is made even more difficult by the automatic expiry of permits after three years provided for in section 183. The scheme is established to encourage third party intervention by the ABCC in applying for revocation of a permit, whether or not the employer involved is concerned about the way in which the permit holder has exercised his or her rights. This is linked to the requirement that the ABCC receives a copy of each and every notice of entry, presumably to allow for investigation during or after the entry. The restriction of union officials to an area of the workplace determined by the employer, even to the extent of the route taken

> to get there, makes the task of effective representation virtually impossible, given that employees may find themselves in the position of being observed by the employer as they go to meet the union official in the designated place.[39]

3.56 The provisions of the BCII Bill dealt with so far demonstrate the inequitable treatment to be given to workers in the construction industry. The committee asked former Australian Industrial Relations Commission (AIRC) commissioner Robert Merriman his view on the likely effect of imposing a lesser set of rights and entitlements on this industry sector than what prevails throughout the rest of the workforce, to which the reply was:

> Firstly, I would say it is unfair. I do not think it is necessary. If we can get the current act to the situation of having proper dispute-settling procedures—and I mean proper dispute-settling procedures that are enforceable by the commission—and if we can give the commission back the power that it had, that is all we need to do to resolve the problem of some of the figures that were quoted to me earlier. Going the next step and imposing on the industry an absolutely different—and harsher, to go to the example—set of criteria will only create greater disputation. Every time it has been applied over the years, whether in the post office or wherever else, we have seen nothing but greater anarchy and ultimately the need to back down from that legislation in the interests of the operation of the business.[40]

3.57 This point has been made many times to the committee. It has never been responded to by proponents of the legislation.

Commonwealth–state issues

3.58 The reaction of the states to the Building and Construction Industry Improvement Bill 2003 has been muted, as far as the committee can see. The joint states and territories submission has made some strong points in disagreement to the bill, but the committee has relied on other submissions, mainly from trade unions, to identify areas where state rights and functions are threatened by the proposed legislation. As a starting point, the states and territories have submitted that:

> The Joint Governments are of the view that the Bill constitutes an unwarranted and disruptive incursion by the Federal Government into State jurisdictions. The legislation appears to be based on the notion that the modern workplace relations regulatory approach (ie. a framework that allows employers and employees to build fair, productive relationships via agreements at the enterprise level) has failed to deliver positive outcomes in the building and construction industry. It is submitted that any apparent failure is a reflection of the legislative approach taken by the Federal Government through the WR Act. The adoption of an interventionist, highly regulated, restrictive and punitive model under the Bill is unlikely to

39 ibid., p.28

40 Mr Robert Merriman, *Hansard*, Melbourne 19 May 2004, p.91

> increase productivity and efficiency in the industry. Nor is it likely to increase levels of trust and cooperation in the industry. Instead, it will drive the parties into further levels of confrontation and litigation.[41]

3.59 The committee majority accepts this view, but it has not been clearly set out in the submission how the Commonwealth incursion will be disruptive, or how the states are able to deal better with matters coming within the scope of the bill. The committee majority believes that this is the case, and would have welcomed a more forensic examination from state officials of the proposed ABCC arrangements for supervising the industry. It would have welcomed commentary on how the proposed Commonwealth administration (to the extent that is known) would have been deficient, and fallen short of current practices which are so fulsomely described, in the case of some states, in the joint submission.

3.60 The committee notes a number of issues affecting the states which have arisen in different contexts. The first, already discussed in this chapter, is in reference to the right of entry provisions, which, at clause 195 of the BCII Bill, exclude union officials from all rights to enter workplaces under other industrial laws, such as the Workplace Relations Act or state industrial acts. This is a generally recognised instance of the use of the corporations power to override state legislation. It will surely be subject to a legal test should the bill pass. The committee notes that the states oppose this provision in principle, but the seriousness with which this matter should be regarded is most strongly put by the ACTU:

> The attempt to override state jurisdiction, resulting in state parliaments and tribunals being unable to determine the conditions under which right of entry operates in respect of its own laws and awards, is another attempt to reduce industrial law to the lowest common denominator.[42]

3.61 Based on some evidence that the committee heard of the different problems, and the different industrial cultures around the states, it accepts that there are important functions which states must retain in regulating the industry and bringing about changes where necessary. It was put to the committee that the Victorian Government's initiative to establish a Building Industry Consultative Committee was likely to do much more for the industry in that state than any national body.[43] The point that was being made was that while a national body similar to CIDA, which operated for a time in the 1990s, was useful, it was perhaps more important to maintain active state bodies.

3.62 The Government assumes that the passage of its legislation would require the states to fall into line and pass complimentary legislation to give effect to the Commonwealth's need for the transfer of certain state powers. The New South Wales

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41 Submission No.26, op. cit., p.12

42 Submission No.17, ACTU, p.28

43 Mr Robert Merriman, *Hansard,* 19 May 2004, p.89

Government has said that it will not do this.[44] It opposes the imposition of Commonwealth laws which override state laws in regard to freedom of association and right of entry. It points out that the secondment of New South Wales police to the proposed ABCC is contrary to current state policy which is based on a co-operative an consultative model.

3.63 The most serious consequences of Commonwealth intrusion into the affairs and responsibilities of states is in relation to occupational health and safety. The New South Wales Government has advised the committee that proposed changes to safety standards in the building industry are inconsistent with current state safety frameworks, and are likely to result in confusion. The state's compliance with the National Code would require the reorganisation of current project management practice. Nor does New South Wales require replacement or substitute Commonwealth legislation dealing with security of payments in place of its own very successful legislation. Submissions from all states explained, in varying levels of detail, the differences between state laws and the proposals under the BCII Bill which would mostly give rise to confusion.

Lost faith in the Australian Industrial Relations Commission (AIRC)

3.64 The committee has received much evidence from submissions and from witnesses in lamentation of the Government's contempt for long-standing and respected national institutions, the most crucial of which have had their powers gravely weakened over the past seven years. In broad terms, this means institutions which are accessible to industry stakeholders on the basis of equity before the law, and where collaboration and negotiation between parties and among interest groups is the accepted operating norm.

3.65 Chief among all of these institutions is the AIRC. This institution is the successor to the Australian Conciliation and Arbitration Commission, established by an act of the Parliament in 1903. The committee heard evidence from legal practitioners and a former AIRC commissioner about ways in which the AIRC should be strengthened so as to overcome the problems the government claims to want to address. Such evidence is of no interest to the Government which attempts in small ways, to further reduce the scope of AIRC activity under the BCII Bill. But it does reassure the committee majority that its more conservative approach to industrial relations reform is practicable and likely to be a far more attractive solution that an ABCC.

3.66 The AIRC was probably lucky to survive the 'reform' attempts of the coalition government in 1996 with the passage of the Workplace Relations Act. The restriction of the power and influence of the AIRC was the main purpose of the 1996 Act. As the committee was informed, it was the Government's wish to reduce the influence of third parties, that is, the AIRC, over the regulation of working conditions. There was

44 Submission No.26, op. cit., p.84

to be no more umpire. The scope of awards was severely limited, as they are to be further limited under the provisions of the BCII Bill. At the same time, the ability of the AIRC to intervene in disputes and settle them was reduced, with its arbitral powers to be exercised only as a last resort. It lost its powers to enforce bargaining in good faith between parties to a dispute. The AIRC has been out of favour for some time. Commissioner Cole, it is submitted, disagreed with the AIRC resolving matters by conciliation and mediation.[45]

3.67 But the AIRC has strong supporters at all levels, who recognise that its functions are sorely missed in an industrial relations climate where there is insufficient attention given to the difficulties faced by industry participants in the bargaining process. The purist line followed by the Government leaves many employees marginalised in the process. Ironically, this is given belated recognition in the sudden attention given to the plight of sub-contractors caught in the cost squeeze.

3.68 This matter, among others, has been the subject of attention by former AIRC Commissioner Mr Robert Merriman, who is chairman of the Building Industry Consultative Committee of Victoria. This is a body set up to overview the industry and to recommend regulatory changes that come within the ambit of state legislative power, including industrial relations. Mr Merriman told the committee that there was agreement on his committee that:

- there was a need for the Workplace Relations Act to be improved to provide the Australian Industrial Relations Commission with powers to make good faith bargaining orders, to increase the capacity of the Industrial Relations Commission to resolve disputes on its own motion, to strengthen section 127;
- to increase resources to the commission and to ensure timely resolution of disputes—something that is not occurring in this industry because of the resources available to the commission at the moment;
- to amend the Workplace Relations Act to remove the limits on the subject matters on which the Australian Industrial Relations Commission can make determinations—in other words, the restrictions placed by section 89A of the act;
- to amend the Workplace Relations Act to require all agreements to provide effective dispute resolution mechanisms which allow the Australian Industrial Relations Commission to arbitrate outcomes within those dispute resolutions, not just to conciliate;
- to amend the Workplace Relations Act to provide a legal framework for site agreements, where the parties seek it; to amend the Workplace Relations Act to provide for industry-wide bargaining—again, where the parties seek it; and

45 Submission No.82, Mr John O'Connor, pp.4-5

- to amend the Workplace Relations Act to ensure that subcontractors receive a fair minimum wage and conditions; and to provide for the effective enforcement of awards and agreements made under the act.[46]

3.69 Mr Merriman told the committee that the Building Industry Consultative Committee, of which the Master Builders Association of Victoria is a member, has approached Vice-President Ross, head of the building panel of the AIRC to have this plan accepted for consideration by him when cases come before the AIRC.

> The goal of the BICCV is to have a joint position on the exact form of dispute resolution that should be applied in the industry. There are good prosects of success.[47]

3.70 In his submission Mr Merriman stated that the Government should start taking the AIRC seriously, and appoint people to it who were experienced and knowledgeable about industrial relations. Orders and certificates and the bureaucratic processes now laid down cannot resolve the underlying issues of the dispute. Most cases that come before the AIRC should be resolved through conciliation processes.[48] The committee notes the Government's suspicion of this. Evidence to this inquiry indicates that many stakeholders retain considerable faith in the potential for a re-empowered AIRC to deal effectively with problems that arise in the industry. The committee majority believes that there is a cost-effective solution available to the Government if only they could recognise it.

3.71 Without specifically endorsing the proposals that the BICCV has agreed to, the committee majority commends them to the Government as an excellent staring point for multi-lateral discussions. They are an example of what can be done within the current legislative framework, dispensing with the need for the kind of legislation which would give us the Australian Building and Construction Commission. The committee majority's consistent view has been that long-established institutions of regulatory control and policy formulation retain their ability to deliver appropriate judgements and solutions to changing needs. It is for this reason that the committee majority recommend a return to the principles of federalism and tripartite decision making.

Recommendation 4

The committee majority recommends that the Government promote cultural change throughout the industry by encouraging states to institute tripartite industry councils at state level, based on the Victorian model. Associated with this, the committee majority also recommends the establishment of an

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46 Mr Robert Merriman, *Hansard*, Melbourne, 19 May 2004, pp.78-79

47 ibid., pp.87-88

48 Submission No.8, Mr Robert Merriman, p.1

overarching national body, working to a ministerial council, to implement a broad program of agreed reform in the building and construction industry.

Concluding comments on 'reform'

3.72 The committee is suspicious of any claim that 'reform' can be achieved through legislation, or that legislation can produce culture change. There is no doubt that governments can play a part in such a process, but the change process needs to be supported at key levels of the industry and enlist the participation and goodwill of the main participants. The leadership role for government is to promote stakeholder consensus and promote industry leadership from among them. In none of these respects has the Government even attempted to play its proper role, much less succeed in doing so. Instead it has taken refuge behind a flawed royal commission inquiry and report and produced a piece of bludgeoning legislation which will bring benefit only to industrial lawyers.

3.73 The 'reform' of the building and construction industry was intended to follow up the 'reform' of the stevedoring industry. Minister Reith had certain advantages not now possessed by Minister Andrews. He did not attempt to prepare the ground with a royal commission. He worked closely and publicly with a waterfront industry leader, and he dealt with a relatively small, discrete and specialised industry. Furthermore, as events have shown, the waterfront changes were driven not so much by government initiative as by the irresistible force of macro-economic demand. The changes fitted the changing nature of the industry at the time and managed also to accommodate the changing attitudes of the workforce. In the case of construction industry 'reform' we see few of those characteristics.

3.74 Perhaps the most telling evidence of the difference between the Government's record on waterfront changes compared to construction industry changes, is that in the case of the waterfront, the leadership was in the hands of Patrick Stevedoring, with the assistance of the Government. In the case of the construction industry there is a deafening silence from the large building contactors whose levels of efficiency and profitability compare well with international standards. The only submission received by the committee from the peaks of the industry was from Multiplex, proposing changes to the industrial relations of the industry which were the antithesis of the provisions in the BCII Bill. When asked by Senator Tierney whether, in supporting the Government, the MBA had 'got it wrong', Ford Australia's labour relations manager for 27 years, and later AIRC commissioner, Mr Robert Merriman said:

> There is no doubt in my mind that they are wrong. I would rely on the evidence from Multiplex, from Grollo, from Baulderstone and from other major builders as to the culture and the activities in this industry.[49]

3.75 The ABCC is the Government's answer to its loss of faith in institutional thinking that has served the country well since federation. As a bureaucratic entity

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49 Mr Robert Merriman, *Hansard,* Melbourne, 19 May 2004, p.78

subject to the whims of ministerial direction it is not an inspiring replacement. To begin with, there is no thought given as to whether the ABCC is likely to endure. Just as the Government is in the process of repealing the National Occupational Health and Safety Commission Act it is probably a reasonable assumption to expect that the Government does not believe its legislative work will endure either. The committee majority does not believe this attitude is worthy of a government, which should be building enduring institutions and strengthening those which have enjoyed national support for generations. Such institutions cannot, in any event, be built on the basis of inequity in the treatment of their workforces, with restrictions placed on the legal rights of both employers and employees, and operating in an industrial relations gulag.

3.76 The committee majority heard much evidence which supports this attitude. There is a general belief that what the Government is presenting in this legislation in the form of the ABCC is a body that is both threatening and impotent, and both dangerous and toothless. It is threatening and dangerous because it has the potential to cause strife through intervention in processes that need to be negotiated between parties. It is impotent and toothless because when the arguments which it has caused come to a head it will be powerless to do any thing about them of its own accord. It will call in the AIRC and the Federal Court to solve the disputes which it has fermented. This is because the ABCC has been designed to fly in a constitutional vacuum: to extend Commonwealth powers where they need not belong. It invests far too much legislative effort in a search for solutions to a problem which it has chosen to magnify out of all proportion to its real significance.

Chapter 4

Lawlessness

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

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

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

Relevant characteristics of the industry

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

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

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

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

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

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

2 Submission No.17, ACTU, p.40

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

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

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

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

The nature of lawlessness in the industry

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Use of commercial and criminal law

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

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

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

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

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

10 ibid., p.72

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

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

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

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

The findings of the Cole royal commission

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

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

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

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

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

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

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

The CFMEU conspiracy

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

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

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

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

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

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

17 ibid.

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

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

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

The evidence to the royal commission

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cole allegations: the prosecution record

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Building Industry Taskforce

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The evidence to the committee

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

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

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

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

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

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

Lawless employers

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

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

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

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

Unpaid entitlements

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

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

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

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

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

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

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

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

4.55 Another view is presented by the Australian Workers Union:

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

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

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

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

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

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

41 Submission No.37, CFMEU, p.101

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

Tax evasion

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

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

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

42 ibid., p.102

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

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

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

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

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

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

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

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

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

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

47 ibid., p.4

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

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

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

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

Phoenix companies

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

49 ibid.

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

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

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

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

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

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

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

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

Recommendation 5

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

Effects of underpaying workers compensation

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

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

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

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

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

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

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

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

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

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

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

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

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

57 Submission No.14, ACCI, p.7

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

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

Conclusion

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

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

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58 Submission No.27, CEPU, para.11.5.2

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

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

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

Chapter 5

Pattern bargaining and enterprise agreements

> 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.[1]

5.1 This chapter deals with a core issue that arose from the committee's examination of the provisions of the Building and Construction Industry Improvement (BCII) Bill: pattern bargaining and enterprise agreements. The prohibition on pattern bargaining and on project agreements are key clauses in the bill. This raises interesting questions as to what notice the Government has taken of industry leaders and the extent of its understanding of the way in which construction businesses must operate in the marketplace. The evidence before the committee calls into question any 'reformist' claims the Government makes about this legislation.

What is at stake?

5.2 Opposition to pattern bargaining has been a defining characteristic of the Government's industrial relations policy since the coalition took office in 1996. The importance of workplace and enterprise circumstances in wage agreements was first recognised in amendments to the Industrial Relations Act made by the Keating Government. It has since been made the defining characteristic of policy implemented through the Workplace Relations Act. The insistence on the use of the term 'workplace' in all employer-employee relations contexts illustrates and reinforces the ideological focus of this policy.

5.3 The Senate has filtered the worst excesses of this policy by way of rejecting most amendments made to the WR Act. The most recent attempt was in the Workplace Relations (Genuine Bargaining) Bill 2002. Chapter 5 of the BCII Bill contains a major provision similar to previously rejected amendments to the Workplace Relations Act: a prohibition on pattern bargaining in the building and construction industry. The continuing use of pattern bargaining in defiance of the

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1 Dr John Buchanan, *Hansard,* Sydney, 2 February 2004, p.36

Government's policy of limiting wage bargaining to enterprise level negotiations has been a continued source of vexation to successive ministers for Workplace Relations.

5.4 The uncompromising thrust of the legislation before the Senate includes a ban on project agreements. This is controversial, as project agreements were used with considerable success in construction work for the Sydney Olympic Games. They are generally supported by large construction firms acting as principal contractors. The achievement of negotiating a project agreement is a managerial challenge and an indicator of high level success when the process comes to fruition, because the financial rewards to participants in the agreement are considerable. The Government's opposition to this aspect of managerial excellence is explicable only if one accepts that it violates the canon that agreements must be with individual or small groups of workplace employees on the one site. Any deviation which involves a staggered sequence of builders and contractors (as the nature of the project requires) is unacceptable, regardless of the managerial inefficiencies that result.

5.5 The point was made in chapter 1 that the Government's campaign against pattern bargaining flies in the face of common sense in reaching agreements on wages and conditions. Evidence to the committee suggests that developers, builders and contractors support pattern bargaining because of the degree of certainty it brings to cost projections. If the wages issue is settled, and wage rates are similar or identical across the industry, then a level playing field is created upon which competitive bids can be made. These can be made on the basis of savings and cost reductions in non-wage areas, not least of all through efficiencies in materials procurement and project management. Industry peak bodies claim that building corporations may find some aspects objectionable, but there is no evidence that they do not support pattern bargaining. They certainly support the continuation of other aspects of pattern bargaining that would be in breach of the proposed legislation.

5.6 Evidence to the committee supported legislation that provides options for determining wages and conditions, including the use of pattern agreements and, project agreements. While there appears to be some use of AWAs in the industry, common law agreements are also used. Bechtel, for instance, the large American constructor involved in the Darwin LNG project, prefers to use common law agreements. The diverse nature of the industry will require mechanisms for negotiating agreements on wages and conditions. There was miniscule evidence in support of the highly restrictive provisions contained in the bill. Restriction of the use of pattern bargaining was seen as increasing costs, adding to complexity and resulting in inefficiencies in doing business. The committee majority is concerned that in its desire to prevent standard agreements being established across the industry, the legislation will impose unwieldy and time consuming processes that will adversely affect the capacity of employers and employees to establish a suitable bargaining process either in the form of a pattern or a project agreement.

5.7 Unions support the use of pattern agreements because they include provisions ensuring common industry standards in relation to occupational health and safety and superannuation requirements that apply under state and Commonwealth laws, and

because they provide stable conditions and reduced transactional costs. It was also argued that it was important to establish fair tendering based on standard wages and conditions both across the industry and within a project site. Any arrangement which sees wage discrimination on a worksite is an almost certain guarantee of disruption. Stable wages and conditions are also likely to reduce the risk to businesses of an unstable workforce, with key skilled staff being vulnerable to poaching on the basis of variable wages and conditions. This increases the risks to projects being completed due to the availability of staff.

The Government's case

5.8 The explanatory memorandum describes how the bill will encourage genuine bargaining at the enterprise level and restrict pattern bargaining and provide for mandatory 'cooling off' periods during which protected industrial action is not permitted. The bill defines pattern bargaining as a course of conduct or bargaining, or the making of claims, by a person that involves seeking common wages or other common conditions of employment (other than in an award or state award); and extends beyond a single business.[2]

5.9 Having set up the Cole royal commission to unearth evidence in support of its policy of eliminating pattern bargaining, the Government, thus armed with the findings it anticipated, echoes in its submission to the committee the recommendations it received, although without some of the rhetorical flourishes. Cole had claimed that enterprise agreements were being undermined, and that one form of centralised wage-fixation was now replaced by another, the result being that initiative was stifled and creativity denied. How this manifested itself was not made clear, but the result was claimed to be detrimental to the industry and those who worked in it.[3] It is to the credit of DEWR that they have not attempted to elaborate on this argument. The DEWR submission claimed that pattern bargaining is a major cause of excessive costs and unlawful activity in the construction industry. It argues that in spurning workplace agreements, construction workers are denying themselves the flexibility that that they might otherwise have in reaching satisfactory agreements through enterprise bargaining. The submission continues:

> One-size fits all pattern agreements are routinely forced upon employers and employees by unions with no real opportunity to negotiate. Such agreements can result in increased costs and limit productivity growth.
>
> Freedom of choice is a core principle underpinning the WR Act. …the Royal Commission found that this choice is often denied to construction industry participants. Pressure is applied to contractors and subcontractors to incorporate informal industry-wide or project agreements into their workplace agreements, without any regard for their specific business needs. Employers, employees and independent contractors are subject to coercion

2 Explanatory Memorandum, p.24

3 *Final Report of the Royal Commission into the Building and Construction Industry*, Volume.1, p.28

> and discrimination because of their choices about union membership and the types of workplace agreements.[4]

5.10 The Government provides figures showing that the majority of agreements made in the construction industry are pattern agreements. These figures come from the DEWR Workplace Agreements Database, which showed that at 30 June 2003:

- there were 3593 federal construction industry agreements in operation and of these agreements, non-wage (conditions only) agreements accounted for only 3 per cent (118 agreements);
- for federal agreements that were certified between 1 January 2002 and 30 June 2003 inclusive, the construction industry had the lowest number of employees per agreement with an estimated mean of 14 employees;
- 69 per cent of federal agreements in construction were certified agreements with unions under s 170LJ of the WR Act;
- 625 of the 3593 federal agreements (17.4 per cent) were made under section 170LL of the WR Act as 'greenfields' agreements (i.e. covering the terms and conditions of employment for potential employees of a new business that the employer proposed to establish);
- 82.6 per cent of construction industry agreements were made under ss 170LJ, 170LK and 170LO and 170LP of the WR Act for which protected industrial action may be taken; and
- of the federal wage and non-wage agreements certified between 1 January 2002 and 30 June 2003, 3865 (or 80 per cent) were identified as pattern agreements covering approximately 34 400 (or 66 per cent) of employees.[5]

5.11 The committee majority sees nothing alarming in these figures. They indicate what would be expected in an industry concentrated in large metropolitan centres and subject to strong competitive pressures. This works in favour of similarities in costs and wages, with some variations around the states. It is clear that the Government does not like what it reports and in this legislation is intervening in the normal dynamics of employer-employee relations. There is a degree of irony in the proactive attempts of governments, which claim to be business oriented, to erect elaborate legislative edifices to prevent the normal processes of wage negotiation between the consenting parties.

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4 Submission No.21, Australian Government Agencies, p. 34

5 ibid, pp. 62-63

The pattern bargaining debate

5.12 This section of the chapter surveys the views of witnesses and submissions on the issue of whether pattern bargaining is necessary or whether it is a practice which poisons the industrial relations culture, as the government claims. Not surprisingly, the committee received no submissions speculating on how agreements would proceed under arrangements which would be necessitated by the passage of the bill.

5.13 In general, industry groups do not appear to be opposed to the concept of establishing common wages and conditions for employees who are undertaking similar work in a common working environment. One industry group also provided evidence that, as long as the employment conditions suited the needs of their members, a common set of terms and agreements across the industry was an acceptable way to deal with industrial relations in the industry. Evidence from the Electrical and Communications Association in Queensland began with the assertion that pattern bargaining 'had reached its used-by date', for a number of reasons to do with the particular circumstances of electrical workers in the building industry. However, the committee established that this was not so much opposition to the principle of pattern bargaining as to its inflexible application to electricians.[6] The committee majority understands the problem, and suggests such issues can only be resolved through negotiation between the parties. The fact that there are impediments to negotiation confirms the view that the culture of the industry is such as to discourage lateral thinking on agreements. Legislation intended to enforce solutions will be counter productive and result in a higher level of animosity and lack of trust.

5.14 The committee majority notes the submissions which recognise the importance of maintaining pattern bargaining as the most practical way of dealing with pay and conditions, while at the same time addressing the difficulties which are evident. The committee would not condone agreement practices which disadvantage sub-contractors. It believes that the energies of DEWR would be far better employed in facilitating collaborative attempts to overcome these problems, in co-operation with state industrial agencies, unions and employer associations. The rights of subcontractors in enterprise bargaining agreements will be addressed in the section which follows on project agreements:

> Section 56 excludes pattern bargaining. All of the agreements struck in the resource expansion industry in WA are the results of pattern bargaining at the initiative of the developers and contractors. To have employees on the same site, such as the Northwest Shelf Expansion Project, performing the same work for different rates of pay, is a recipe for disaster. It would result in industrial action unable to be controlled by any trade union and would see conflict between contractors due to poaching of employees in a skilled workforce that is increasingly harder to attract. The AIG submission also

6 Mr Paul Daly, *Hansard*, Brisbane, 24 February 2004, p.130 and pp.148-50

> points to the necessity to allow some form of common agreement for major projects.[7]

5.15 Evidence from the Queensland Master Builders Association appears to the committee majority to be highly credible in relation to pattern bargaining. Its submission notes that wage justice has long been defined as circumstances where workers doing identical work in close proximity receive identical remuneration. It describes a system that encourages individual employers to pay differing wages to workers doing similar tasks on the same worksite as 'a recipe for industrial anarchy' which cannot be supported. Pattern bargaining within certain limits has been deliberately pursued by builders as a strategy to minimise industrial disputes. An additional reason to support pattern bargaining is to remove the threat of leapfrogging claims which would be the inevitable consequence of an unregulated labour market.[8]

5.16 Overall, the committee found that both employer and employee representatives believed that pattern bargaining could benefit all participants in the building and construction industry.[9] These benefits included stable employment conditions and costs,[10] improved occupational health and safety standards, and reduced transactional costs for small, medium and large businesses. The committee believes that certain provisions must be available to protect all employees in the industry and that will need to be included in all agreements. Under the proposed bill such provisions may be invalid because they arise from what may be considered a pattern agreement, even though only part of the agreement results from this process.

5.17 The CEPU believes that there are some provisions such as those related to skill based career paths and occupational health and safety that by definition must apply across an industry. It is impractical for workers sit down with each individual employer to renegotiate industry standards designed to protect employees in the industry.[11] The CEPU submission continues:

> Pattern agreements have been singularly responsible for ensuring employees have access to redundancy and income protection entitlements via the use of industry funds. Industry funds pay entitlements to employees even where employers go out of business. In the absence of the pattern agreement provision it is likely the employee would have lost all his or her entitlements. Enterprise agreements containing some pattern clauses should

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7 Submission No. 82, Mr John O'Connor, p.9

8 Submission No.90, QMBA, p.15

9 Submission No.17, ACTU, Para 102; Mr Frank D'Agostino, *Hansard*, Melbourne, 21 May 2004, p.3; Mr Charles Dixon, *Hansard*, Melbourne, 20 May 2004, p.41; Mr Mark Birkett, *Hansard,* Melbourne, 20 May 2004, pp.42-43

10 Submission No.27, CEPU, paras.7.612-7.6.18

11 ibid., paras.7.6.2-7.6.4

> not invalidated or refused certification. Pattern agreements should be certifiable as they facilitate a level playing field.[12]

5.18 The committee received evidence that pattern bargaining was fast and efficient because it is well understood by both employers and employees. The committee majority is concerned that the bill will disadvantage some small businesses which may lack the skills and resources in industrial relations to negotiate a unique EBA for every site or project. Businesses would be forced to find the resources or to develop expertise to negotiate a series of separate agreements with the same employees for different wages and conditions as they move between different sites and projects. The result would be inexpert industrial relations practices rife in industry, creating uncertainty about wages and conditions, curtailing core building activities and increasing costs, resulting in reduced productivity across the industry.[13]

5.19 Oral evidence from the CEPU set out the dilemmas facing contractors in the electrical industry. It was noted that companies with flat management structures will have problems negotiating the hurdles of implementation. Employers say they want consistency and uniformity but they do not want pattern bargaining. Many electrical contractors are quite comfortable with the provisions as they work now, because they are simple. They can sit down and negotiate flexibilities in relation to hours of work and work arrangements which are built into core EBAs. But under the new arrangement they will not know how to treat their employees who are off site.

> When there is a loss of time in relation to a health and safety issue in a residential area, are they required to report that to the federal safety commissioner? If there is an issue in relation to a stoppage, or there is a claim made by the union in relation to the maintenance service area, are they required to report that to the ABCC? These are the provisions that they are going to have to deal with. For a very small business with a very flat management, our view is that it will create the chaos which I referred to in my initial submission.[14]

5.20 The committee notes this warning about the difficulties to be faced, mostly by small business contractors, with the introduction of requirements that they make individual agreements. It is aware from other inquiries about the trauma of legislative changes to small business as a result of GST compliance. Compliance with industrial relations changes are far more onerous because it involves more than learning about a procedure. It involves higher level personnel management and negotiating skills, which many small business people do not possess. If the lack of skill forces people out of an industry already short of trade skills the result will not be a happy one for the industry.

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12 ibid., paras.7.6.29-7.6.31

13 Submission No.17, ACTU, paras.102 & 105*;* Submission No.27, CEPU, paras.7.6.9, 7.6.13, 7.6.15 & 7.6.27; Submission No.62, Queensland Council of Unions, paras 13-15

14 Mr Peter Tighe*, Hansard,* Sydney, 3 February 2004, pp.11-12

Who controls this industry?

5.21 The problems which seem to occur with pattern bargaining, and therefore the reason for prohibiting them, relate to perceptions of relative power in the negotiation process, and particularly the use of industrial action by unions to support their negotiating position.[15]

> Coercion in agreement making is at the heart of the standover tactics in the industry that gives rise to unlawful industrial action, anti competitive practices, agreements that barely reflect a mutuality of interests and militant and unlawful union power over contractors or labour supply.[16]

5.22 A belief in the unfairness of the relative balance of power in establishing agreements between employers and employees in the construction industry underpins both the Cole royal commission and the Governments' response to the commission's findings. The Government wishes to negate the relative power imbalances that it sees in the industry by providing additional power to contractors and subcontractors in the making of agreements. The Government perceived that unions have power to apply pressure to contractors and subcontractors to establish agreements that do not suit their businesses. This power is based on the risk of substantial liquidated damages for breach of contract facing employers, whereas only minor financial penalties face employees if industrial action takes place to establish an agreement.[17]

> What is proposed is a new system that empowers employers and employees to accommodate proper bargaining....It establishes clear boundaries around lawful industrial action and other processes for revising outmoded work rules....The way that pattern bargaining in the building and construction industry currently operates is one-sided, inflexible and anti-democratic.[18]

5.23 While some groups within the industry and government are concerned that the practice of pattern bargaining gives excessive negotiating power to employees, overall the practice is seen as providing benefits to all stakeholders in the industry. The committee majority is concerned that, in seeking to address the relative balance of power between the different stakeholders in the industry, the bill does not fairly balance the legitimate role of both unions and employers to reach a genuine agreement.[19]

5.24 For instance, the matters set out in section 62 do not provide the power to compel both parties to negotiate fairly, with the proposed sanctions removing the negotiating power of only one of the parties. Employees cannot use the termination of a bargaining period to promote genuine bargaining because while this supports this

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15 ibid., para.32

16 Submission No.14, ACCI, para.124

17 Submission No.21, Australian Government Agencies, paras.188-191

18 Submission No.12, MBA, p.7

19 Submission No.37, CFMEU, pp.34-35

bargaining position of the employer it negates the bargaining power of the employees.[20]

5.25 Employer organisations support the prohibition on pattern bargaining in the belief that contractors are targeted on the basis of their commercial vulnerability to unspecified threats. It is claimed that resulting peer pressure will compel other contractors to fall in line with standard agreements:

> There is a lot of authority in the hands of union officials if they know full well that there are massive commercial implications for a particular developer or contractor if projects are not constructed on time. And that conveys an enormous amount of power, as well as responsibility, to union leaders. If the findings of the royal commission that there is a failure to adhere to or respect the authority of law and the proper processes of dispute resolution and the like are then superimposed on that construct then that power is capable of being misused and is misused and damages the industry.[21]

5.26 Union leaders privately dismiss any idea that they wield power in the way that is claimed by their critics. They see themselves and their unions as just as vulnerable as proprietors. The committee believes that power is diffuse on both sides of the industrial divide, a reflection of the diversity in business and industrial activity. Industrial relations are local: they are not (except in unusual circumstances) centrally ordered. Union leadership at a state level may not be aware of many industrial disputes. As evidence to the Brisbane hearings clearly indicated, industrial harmony depends very much on the degree of trust which is developed, and the appreciation of shared interests between managers and proprietors on the one hand and local and state branch level union leaders on the other. Personal relationships play an important role in sorting out industrial relations in this industry, as in any other.

5.27 Building firms allegedly targeted by unions are indeed more likely to be the most vulnerable, as some submissions have suggested, but the nature of this vulnerability needs closer examination. It more often than not relates to their level of solvency, to the degree to which they comply with regulations, and to the general managerial competence which their proprietors demonstrate. Marginal operators in the industry are mostly responsible for underpayment of employees, tax evasion and failure to pay superannuation entitlements. They are most likely to go into liquidation, leaving their employees and sub-contractors with unpaid entitlements. The committee majority does not believe that the industry should be re-regulated by the BCII Bill for the purposes of protecting this class of business.

5.28 The committee notes also that employers are advocating that their attempts to enforce the rule against pattern bargaining be supported by the taxpayer. Presumably they would argue for this on the grounds of public benefit. It is argued that:

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20 ibid., p.34

21 Mr Peter Anderson, *Hansard,* Canberra, 11 December 2003, p.16

> The principal means of enforcing the prohibition against this illegitimate use of pattern bargaining is by way of injunction. This mechanism would be unduly expensive for a small business to instigate, both financially and in terms of the coercive force that may, as a consequence, be directed towards the particular small business. MBA believes it is essential that the ABCC stand in the shoes of the affected party. We believe that the Recommendation should be strengthened by permitting a relevant small business to make a complaint to the ABCC, which it must investigate, where an allegation of pattern bargaining arises and by providing that ABCC is able to initiate the injunctive proceedings.[22]

5.29 The committee notes that no union has put forward a similar claim to finance injunctions on the basis that disciplining the small business sector is a matter for the public good. The committee majority makes only the obvious point that parties are equal before the law in countries which are governed by the rule of law. The MBA's assumption is that ABCC will always be standing in the shoes of small business. This proposition is probably unconstitutional. Courts either determine what is in the public good, according to law, or where they cannot do so they draw this to the attention of legislators. But it is beyond the role of Parliament to make legislation on the basis that a free association of citizens will be presumed to operate on the margins of the law or beyond.

The right to negotiate

5.30 Several witnesses provided evidence that pattern bargaining is legitimate within national and international industrial relations practices in both union and non-union bargaining contexts.[23]

> The purpose of pattern bargaining may be to try and improve industrial conditions across an industry or industry sector. There is nothing fundamentally objectionable with that approach to collective bargaining. That approach is entirely in keeping with international labour standards and with what is a guaranteed international human right.[24]

5.31 The capacity of both employers and employee organisations to establish common wages and conditions for workers who are carrying out similar activities and providing reduced transactional costs for members is both legitimate and necessary for the industry. The industry has established democratic and representative processes within both employer and employee representative groups who are able to reflect the policy views of their members. Both groups are therefore able to legitimately

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22 Submission No.12a, MBA, para.7.1.1

23 Submission No.23, TWU, paras.30-32; Submission No.26, Australian States and Territories, paras.129-132

24 Submission No.77, ICTUR, p.29

represent these interests in the process of establishing industrial agreements on behalf of their members.[25]

> Unions are representative of classes of employees, and may have an interest in ensuring that employees (whether or not members of the union) in an industry or part of it provide certain minimum conditions. By seeking a certain uniformity of conditions unions are exercising a proper and long-recognised role.[26]

5.32 Government provides advice to employers by providing common or template AWAs that are developed by the Office of the Employee Advocate. A number of submissions have pointed out that this practice could be prohibited under clause 8(1) of the BCII Bill as a result of the ban on pattern bargaining. The Ai Group has recommended to the Government that the relevant clauses be amended to restrict the prohibition on pattern bargaining to conduct which might occur during the negotiation of certified agreements. [27] The committee majority speculates that this provision is an oversight, and agrees with one submission that noted that the Government is not opposed to pattern bargaining when it works to the benefit of employers, including active promotion by the Office of Employment Advocate of template style AWAs for different industries. The Government only has a problem with pattern bargaining when it is used as an effective vehicle to provide good wages and conditions to workers.[28]

5.33 This point was made strongly by the Western Australian Government:

> … the WA Government submits that, whilst the Bill seeks to outlaw pattern bargaining in the context of collective agreements, no provision is made with respect to pattern Australian Workplace Agreements (AWAs). It is common practice for AWAs to not only be made a condition of employment, but to also be made in identical terms across workplaces. It is submitted that such practices constitute the worst elements of pattern bargaining and represent an inherent contradiction in the Commonwealth's legislative approach. The failure of the Commonwealth to address such issues is further evidence of the imbalance associated with the Bill.[29]

5.34 The committee noted authoritative evidence from Dr John Buchanan of ACIRRT who observed that the proposed restrictions on pattern bargaining were not in accordance with the practice of common law or industrial relations practice and would therefore not contribute to an effective labour market for the building and construction industry:

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25 Submission No.37, CFMEU, p.32

26 Submission No.45, Society of Labor Lawyers Victoria, paras.19-20

27 Submission No.1, Ai Group, p.96

28 Submission No.16, Maritime Union of Australia, p.8

29 Submission No.26, Australian States and Territories: WA Government, paras.35-37

> … what strikes me is that, if one reflects on how labour markets function, they operate pretty much like the common law. The core of the common law is that you treat like cases alike; you follow precedent. It seems to me that, when you are dealing with the concept of wages and employment conditions... people are saying: let's treat like cases alike. There are actually deep jurisprudential grounds for pattern bargaining. It is not simply some ideological concept dreamed up by the CFMEU to stifle initiative and fairness: it has deep roots in labour market practice and in jurisprudence.[30]

Negotiating on a level playing field

5.35 A critical element to the achievement of efficiencies in the construction industry is the establishment of common employment conditions that provide predictability and stability in labour relations. This is important in reducing the risks of industrial strife and giving confidence to investors. Stakeholders in the industry are happy for this to be achieved either through pattern agreements, project agreements or an award system. The Queensland Council of Unions claims that project agreements are necessary for the industry as they provide stable employment conditions for new projects. This is supported by employer groups as well as unions.[31] The CEPU claims that pattern bargaining is not an evil to be stamped out by legislation because many employers actually prefer pattern bargaining as it creates a level playing field, and a disincentive to employers undercutting each other.[32] Confirmation of these views comes from the Queensland MBA:

> One of the strongest arguments in support of an industrial regime that supports the formation of genuine project agreements is the cost transparency for contractors who know what is required and the ability of head contractors to contractually ensure wages and conditions are honoured on the project. This form of inferred and stable contracting would go along way in securing first class industrial conditions within an environment of trust and cooperation. Building unions would be able to secure compliance through the Project agreement which would become legally enforceable and contractually obligated.[33]

5.36 Experience on large projects, such as the Sydney Olympic Games site, shows that project agreements characterised by standard pay-rates across classifications and provisions to ensure appropriate wages for sub-contactors can be highly successful business arrangements. As the committee was told:

> The simple fact is that if you have different rates of pay at a workplace for people with the same skill, it will lead to questions, unrest and, I believe, industrial anarchy. The beauty of the Olympic experience was that every electrical contractor who walked onto that site knew the rate of pay that

30 Dr John Buchanan, *Hansard*, Sydney, 2 February 2004, p.36

31 Submission No.62, Queensland Council of Unions, para.10

32 Submission No.27, CEPU, para.7.6.12

33 Submission No.90, QMBA, paras.54-61

> would apply to that class of individual. That led to industrial harmony on the site, and that is why it was so good. It was such an easy experience for the trade union movement because we did not have to be there every other day, worrying about those core industrial issues that we find on most building sites.[34]

5.37 One of the factors leading to relative stability for the industry has been the establishment of similar wages and conditions between workers who are doing similar tasks on construction sites. The committee majority is concerned that the BCII Bill will affect the availability of standardised agreements which will inevitably lead to more disputes over differences in wages and conditions. Current practice also ensures that skilled staff are not poached by competing companies, when competition for skilled labour is becoming more intense. Poaching has provided the competitive edge for contractors and subcontractors within and between project sites.[35]

5.38 An interesting perspective was given by former AIRC member Mr J J O'Connor in his submission which described the idea of having employees on the same site performing the same work for different rates of pay, as 'a recipe for disaster'. It would interest the Government to know that the reason for the former commissioner's view is that the inevitable industrial strife that would follow would result from unions being unable to be control the conflict. Another result would be conflict between contractors due to poaching of employees in a skilled workforce that is increasingly harder to attract.[36] The committee majority sees the likelihood of much more 'wildcat' action if differential rates of pay and different conditions apply across a building site, or even a number of building sites in a city. Local union organisers could not prevent this, and participants in the actions are likely to include non-unionists as well, who would be beyond the reach of any regulatory agency.

5.39 Opposition to what is proposed in the BCII Bill extends to non-union contractors and employers, as evidence from one proprietor confirms:

> 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... If pattern bargaining is removed as an employer I will have to deal with employees bartering their services around the industry as they will be able to obtain a higher wage from another employer for their services. This will create instability and force the cost of employment up. I cannot see any benefit to our company in the removal of Pattern Bargaining.[37]

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34 Mr Riordan, *Hansard,* Sydney, 3 February 2004, p.15

35 Submission No.23, TWU, paras.30-32

36 Submission No.82, Mr John O'Connor, p.9

37 Submission No.4, Concept Engineering (Aust) Pty Ltd, p.1

5.40 Thus, the committee majority notes that while umbrella organisations like the MBA and ACCI may support the Government's campaign against pattern bargaining, and therefore the relevant provisions in this bill, there appears to be little rank and file support for this policy among MBA members. The Cole royal commission found that subcontractors provided between 90 per cent and 95 per cent of labour for construction work. Subcontractors have provided evidence that they are happy with pattern bargaining arrangements; that they provide a 'level playing field' to fair tendering for work on the basis of agreed costs for employees across the industry. These small business owners find pattern bargaining convenient, providing certainty in one of their cost components.[38]

5.41 The evidence provided to the committee indicates that restrictions on pattern bargaining would not achieve stable industrial relations, with each individual employer facing protected industrial action as individual agreements are established, risking disruptions throughout the life of the project.[39]

5.42 The committee is also concerned that the bill will result in increased pressure to reduce employment conditions, with employers forced to compete on the basis of lower cost structures including reductions in workers compensation and superannuation, transferring the risks and costs for support of employees to the public purse.[40]

> The other critical factor is for the employing parties to have some certainty regarding the labour cost structure prior to tendering for work. This issue is problematic as the major contractors want to engage subcontractors who are covered by the pattern bargain but are unable to insist on their subcontractors being a party to the industry pattern agreement. Less scrupulous contractors may also want to deliberately choose a subcontractor who is not covered by the pattern agreement in the hope of getting a cheaper price. With the EBA rates currently in excess of $200 per week above the award, the incentive to accept the lowest price must be high.[41]

5.43 Evidence was provided to the committee that less reputable companies were bargaining with employees for reduced awards and conditions in order bid for tenders at lower rates, in many cases successfully winning contracts unfairly in competition with companies who did pay industry standard rates and fulfil all regulatory requirements. Disreputable companies often avoided providing employees with information about the actual awards and conditions that would be paid for the work. The committee heard of a particular dispute at Nambour in Queensland referred to at the Cole royal commission. In that instance, employers defended the legitimacy of an

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38 Submission No.53, Action Construction Services, p.1

39 Submission No.30, Australian Mines and Metals Association, paras.31-36; Submission No.84, CFMEUQ, para.129; Submission No.90, QMBA, para.54

40 See, for example, Submission No.17 ACTU, paras.106-7

41 Submission No.90, QMBA, para.55

agreement which bound all of the current and future employees to non-union awards and conditions: an agreement that was signed by two senior managers and two apprentices. The unions provided evidence that this agreement was invalid, because the two managers were not employees within the incidence provisions of the EBA, and the State Contracting Award does not cover their work. The committee was advised:

> Our members, who were electricians engaged to perform the electrical work at Nambour, were unhappy because they were under the impression that [the subcontractor] had tendered on the basis of the site allowance and redundancy. Our members only discovered they were not to be paid these entitlements when they got their first pay packets. The members did not know about the changed tender arrangements whereby a non union EBA was used as the basis of the tender….The purpose of this non union certified agreement entered into by the company was to avoid paying EBA rates. Getting apprentices and managers to sign the agreement rather than real workers to be covered by the EBA is further evidence of the intention behind the agreement. It was a sham. [42]

5.44 This industrial dispute was cited during the Cole royal commission as an instance of unwarranted exercise of union power. The committee majority finds it hard to understand how this interpretation of events could be arrived at by any impartial investigator. It represents a typical example of a union protecting its members from a companies acting to take unfair advantage of them during contract negotiations.[43]

Moving between sectors

5.45 There is a perception that pattern bargaining results in increased costs for employers, with both employers and employee organisations acknowledging that union members receive higher pay and conditions then employees covered by non-union agreements. For instance, the difference in costs to employers between employing under the award and employing under the current EBA was quoted as 62.5 per cent in the electrical industry in Queensland.[44]

5.46 The Queensland Electrical Contractors Association argued that this difference in costs restricted the capacity of subcontractors to move between the housing and construction sectors because of the very large pay differences. It is claimed that having signed a pattern EBA on a major construction site, which may only happen three times each year, contractors are locked out of general electrical work because they are uncompetitive in their traditional market.[45] It was also claimed that these cost

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42 Submission No.80, CEPU Queensland, paras.4-23

43 ibid., paras.4-23

44 Submission No.15, ECA Queensland, p.9

45 ibid., pp.9-10

differentials encouraged illegal behaviour in the industry, with subcontractors avoiding rates set in legally registered EBAs to move back to the housing sector.[46]

5.47 The committee majority accepts that the costs for employees can be higher in the construction sector in comparison to the housing sector. This, however, does not mean that there are problems associated with union participation in the establishment of standard industry agreements. Instead, the committee accepts that the higher wages and conditions reflect the current process for establishing enterprise agreements. As the CEPU submission explains in response to the claim of Commissioner Cole that pattern agreements have resulted in considerable cost increases:

> Cole states: "There was evidence before me that the wage structure of a typical construction worker was about 22 per cent greater than the award." This is hardly surprising. As we argue elsewhere the industry awards have become increasingly irrelevant as EBAs are replaced and renewed. This is the aim of the bargaining system. Awards contain only outdated minimum rates as a safety net. The only way to increase those rates is via AIRC safety net increases. The amount and frequency of those increases is such that over time the difference between the safety net and the market rate is widening.[47]

5.48 The committee majority accepts this explanation. It makes the point that current arrangements have provided wage stability and high profits with very little industrial disruption in the commercial sector, in contrast with other sectors which have shown increases in labour costs. As the CFMEU Queensland submission stated:

> This can be demonstrated by contractor support for pattern bargaining in the commercial sector which has delivered to contractors their greatest boom on record and wage stability with total wage costs constrained to approximately 6 per cent per annum, whereas in the informal sector of the market (ie. housing) labour costs have increased by 87 per cent over the last 18 months, thereby compressing profits. In effect, for many builders in the housing sector, it is a green drought.[48]

Genuine bargaining

5.49 The cumbersome and prescriptive nature of industrial relations legislation introduced by the Government over past years has been much remarked on in industrial legal circles. It has the purpose of fettering the discretion, as far as possible, of the Australian Industrial Relations Commission and the Federal Court. Clause 62 of the bill sets out indicators of what is to be regarded as genuine attempts to reach agreement. Neither the AIRC nor the Federal Court can be relied on to make this judgement without assistance. The DEWR submission describes how the relevant clauses will operate:

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46 Submission No.90, QMBA, para.56

47 Submission No.27, CEPU, para.7.6.27

48 Submission No.84, CFMEUQ, paras.124-126

> The ABCC, or any person affected by pattern bargaining, will be able to seek an injunction to stop or prevent pattern bargaining conduct occurring. Injunctions will be available whether the conduct occurs under the federal or a State system or relates to bargaining for an informal agreement. The BCII Bill also makes it clear that pattern bargaining is not 'genuine bargaining' and that the AIRC can suspend or terminate a bargaining period where a party engages in pattern bargaining. The Bill contains a list of indicators of 'genuine bargaining'.[49]

5.50 The committee majority agrees with the submission from Slater and Gordon that provisions set out in clause 62 are unrealistic given the thousands of individual employers who would need to participate in the bargaining process.[50] Currently, as provided by section 67 of the WR Act, the AIRC has recognised that as long as unions have made a genuine effort to have each employer concede the benefit sought from the agreement, a legitimate agreement can be established.[51]

> The breadth of s 67 is likely to render the making common claims, of itself, a sufficient basis for attracting injunctive relief on the basis that it either constitutes or is at least indicative of a person "proposing to engage in pattern bargaining". For all practical purposes the actual manner in which such common claims might in fact be pursued by a negotiating union would be thus rendered otiose.[52]

5.51 The committee is concerned that union participation in negotiating employment conditions at an enterprise level is not seen as a legitimate indicator of a genuine attempt to reach an agreement. It notes the CFMEU view in this regard:

> The view embodied in the Bill that the individual enterprise is the only legitimate (and lawful) level at which bargaining occur, demonstrates a failure to understand or accept the representative nature of registered organisations under the Workplace Relations Act. Unions consist of members who combine to pursue their common interests. They democratically elect their leadership to pursue those interests as they determine appropriate. They should not be constrained by law to negotiations at the workplace level….[53]

5.52 The CFMEU submission surmised that seeking common wages or conditions beyond a single business is not to be regarded as 'pattern bargaining' unless the person seeking the wages and conditions is 'genuinely trying to reach agreement' on the matters in question. Genuineness is equated with bargaining at the level of the enterprise. Thus it appears that it is not so much common claims that are proscribed, but the means by which, or the level at which, such claims are advanced and pursued.

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49 Submission No.21, Australian Government Agencies, para.106

50 Submission No.69, Slater and Gordon, section 5

51 Submission No.77, ICTUR, p.30

52 ibid., p.31

53 Submission No.37, CFMEU, p.32

The CFMEU argues that there is nothing inherently more 'genuine' about claims advanced at an enterprise level.[54] The committee majority anticipates that this issue will be one for litigation in the unlikely event of the passage of the bill.

Flexibility

5.53 It can be argued that while pattern bargaining does provide for common wages and conditions, resulting in clearly defined costs for industry, flexibility can still be achieved within the agreements by defining flexibility in hours of work and other conditions to be established by individual employers and employees aiming at significant improvements in productivity. This could include skill development, client focus and innovative human resource management practices.[55]

5.54 While the Cole royal commission found pattern bargaining impeded productivity, research presented by ACIRRT contradicts this. ACIRRT has identified 23 different types of pattern bargains, and the Department of Employment and Workplace Relations has identified 45. Professor Braham Dabschek, an industrial relations specialist from UNSW, told the committee that the existence of so many pattern indicates how flexible and adaptable they are. It also demonstrates that they are not necessarily indicative of control from some centralised position of union power. Nor does the 'one size fits all' notion sit easily with the royal commission's finding that many agreements included complex sets of allowances and special rates.[56]

5.55 The issue of flexibility has been subject to some academic analysis by those who question the OECD-IMF orthodoxy, the inspiration for Government rhetoric. One research piece states:

> The international data for the end of the 1990s, as well as the data for Britain in the 1980s and 1990s, consistently demonstrate that marginal workers in the "flexible" United States and United Kingdom fare no better, and frequently far worse, than their counterparts in most of the rest of the OECD. ... At a minimum, the data suggest that "flexibility" is neither a necessary nor a sufficient condition for improving the labor-market opportunities for marginal workers, and that different economic systems as practiced in other countries seem perfectly capable of producing the same, if not better labor market outcomes.[57]

5.56 The committee majority, noting the tone of Government rhetoric over the past several years concerning industrial relations 'reform', has identified the word

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54 ibid. pp.31-32

55 Submission No.27, CEPU, paras.7.6.17 and 7.6.19

56 Submission No.110, Assoc. Professor Braham Dabschek

56 John Schmitt & Jonathan Wadsworth, 'Is the OECD Jobs Strategy Behind US and British Employment and Unemployment Success in the 1990s?' pp.170-171, in David Howell, ed. *Fighting Unemployment: The Limits of Free Market Orthodoxy,* OUP

'flexibility' as the most overused buzz-word in the Government's WR lexicon. Flexibility has come to mean the extent to which employees are either given, or take up, the 'opportunities' to meet the terms and conditions of labour which are determined by employers. A flexible employment policy is one in which employees can be persuaded to accept workshifts and routines which suit the operational needs of firms at the price employers are willing to pay. The committee majority does not believe that this attitude to the building and construction workforce is widely shared by developers and builders, which is just as well for the industry.

Project agreements

5.57 The committee heard persuasive evidence of the desirability of making project agreements standard practice across the industry. While the evidence appears to be overwhelming, it flies in the face of the Government's determination to avoid any practise which is likely to be 'contaminated' by association with pattern bargaining. Project agreements are banned to the extent that they are unenforceable under clause 68 of the bill. As the Government has stated, project agreements usually provide standard employment conditions for workers employed in a number of different businesses on a particular building site and provide a means of securing 'pattern' outcomes. This is contrary to the focus of the WR Act on enterprise or workplace bargaining.[58]

5.58 But as some influential submissions pointed out, the difficulties which commonly arise with pattern bargaining are largely eliminated by the implementation of project agreements. The committee is much more attracted to pragmatic solutions to problems than the Government appears to be, and it believes it is at one with most industry stakeholders in taking this position. Risk management strategies are regarded by investors as vitally important. The implication, as the committee sees it, is that the Government's opposition to project agreements is an impediment to investment, and therefore to growth in the industry.

5.59 The position of the Ai Group is a case in point, as was made clear in its response to the draft bill. While supporting a prohibition on industrial action taken in support of pattern bargaining – and the committee notes this careful wording of this position – the Ai Group states its belief that the prohibition would be reasonable so long as the provisions were carefully drafted, which they are not. There needs to be a mechanism to enable the certification of genuine project agreements for major projects, thereby obviating the need for the use of common enterprise agreements (which could be regarded as pattern agreements) so that the significant risks associated with major projects could be properly managed.[59] The point was re-enforced by the Ai Group in evidence to the committee at its first Canberra hearings:

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58 Explanatory Memorandum, p.49

59 Australian Industry Group, Position on the Exposure Draft of the Building and Construction Industry Improvement Bill 2003, 17 October 2003, pp.91-93

> Can I say first and foremost that we strongly believe that major projects need a project agreement to allow them to be delivered. We have argued this right from day one, because you have to get your mind around the concept that a major project is itself an enterprise—it is an enterprise that brings together a lot of different employers in different trades and sub-trade groups. Those activities are organised to produce a result.
>
> We find it a difficult concept that you can find all those activities coming together on a site with myriad different industrial arrangements and without any sort of responsibility for how that outcome would be delivered if you do not have some sort of agreement to deliver those results. Fundamentally, we think that the legislation ought to have some workable provision for project agreements. The royal commissioner, I might add, did not dismiss project agreements. I do not think his proposals were workable, but he did not dismiss them. In the national code of practice there is a recognition of the role of project agreements.
>
> The issue we try to wrestle with in pattern bargaining is that an organisation—which might be an electrical contractor, say—which already has an EBA ought to be able to enter a major project as an electrical contractor, work under the umbrella of the agreement that might be in place for that project and be able to exit that project back to his enterprise and not have the baggage of what may be involved in a project agreement following him around. One of the issues that consistently came up through the hearings was small contractors tendering for work on a major project and finding that they were not able to work on it unless they signed up to a pattern agreement. The pattern agreement might then last for three years. If you move into another market or another area of work of whatever then that pattern agreement follows you around.[60]

5.60 Reference has been made to the committee receiving evidence of the success of project agreements associated with the construction of the Sydney Olympic Games facilities. The committee heard details of the memorandum of understanding between the Olympic Coordination Authority and trade unions:

> It started off as a negotiation, with a memorandum of understanding between the Olympic Coordination Authority and the trade union movement. That set out a framework for negotiations on each of the projects. It was not binding in what would or would not be in project awards for each of the projects constructed during the Olympics construction program. Those negotiations were undertaken with each of the successful builders. … specifically dealing with things like superannuation, occupational health and safety, safety inductions, dispute settlement procedures that dealt with whole-of-project matters and dispute settlement procedures that dealt with specific subcontractor matters. So there were negotiations on two separate dispute settlement procedures.
>
> The project agreements or awards in place were not identical, and there were variations to suit the specific needs of a particular project. Many of

60 Mr James Barrett, *Hansard*, Canberra, 11 December 2003, pp.28-29

> them included a requirement to meet key milestone dates as part of the project allowances paid. So the allowances were paid in good faith on the assumption that there would be compliance and that the dates would be met. They contained procedures under which, if the dates were not met, the issue went before a committee put in place to deal with the reasons why. …
>
> I can tell you that, in one instance, milestones were not met and payments were reduced to those workers on the project. …If you look at the Olympics experience it shows that, where there is a good industrial relations environment in place and there is trust and cooperation, you can initiate some fairly innovative processes on a construction site that will deliver better outcomes for everybody. The history is that, without doubt, it was a huge success from a construction point of view. Frankly, the model has continued to be applied in New South Wales and continues to deliver.[61]

5.61 When asked how prescriptive were the dispute settlement procedures, the Trades and Labor Council explained that no industrial action could be brought while the agreement was in force. They were not so prescriptive as to undermine people's rights. They established a framework for the speedy resolution of disputes, if necessary with the assistance of external mediators.[62]

5.62 The Government concedes that there is employer pressure to institute project agreements. It argues that it would only occur in very limited circumstances where efficiencies would be gained through multi-employer or project agreements. The committee has been unable to find out the basis for the Government's reasoning in this regard and assumes this to be a rhetorical statement. The DEWR submission also points out that while multiple employer agreements are not inconsistent with the WR Act, problems occur if this constrains choice and competition.[63] There is an implication that this would more than likely be the result.

5.63 While the BCII Bill may allow project agreements to be made as part of the multiple business agreement provisions in the WR Act, the committee finds that the distinction between pattern bargaining and bargaining to establish a project agreement is not clear in the proposed legislation. Were the bill to be subject to wide-ranging amendments in a different legislative climate, the definition of 'pattern bargaining' in clause 8 and the relationship with clause 68 would be amended to enable genuine project agreements to be established in accordance with the current multiparty and 'pre-start' provisions of the WR Act.

5.64 A proposal to regularise pattern bargaining so as to meet the concerns of sub-contractors was put forward by Gadens, a Perth law firm, in its submission to the inquiry. The submission proposed that pattern bargaining provisions need to ensure that multiple-business agreements under Section 170LC of WRA (and in certain

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61 Mr John Robertson, *Hansard*, Sydney, 2 February 2004, p.32

62 ibid, p.33

63 Submission No.21, Australian Government Agencies, paras.350-351

circumstances greenfields agreements under Section 170LC of WRA) are exempt from what is proposed in the bill. The submission continues:

> The provisions for multiple-business agreements (and in certain circumstances greenfields agreements) need to be enhanced to accommodate project agreements.
>
> Subcontractors on any particular project should be able to become a party to the multiple-business project agreement.
>
> If any subcontractor chooses not to become a party to the multiple-business project agreement the subcontractor should be free to enter into a certified agreement as long as the terms and conditions of that certified agreement do not go above the terms and conditions contained in the multiple-business project agreement.
>
> In circumstances where the head builder chooses to have a section 170LK agreement or Australian Workplace Agreements with its employees as opposed to a multiple-business project agreement then the subcontractors will be free to negotiate a separate certified agreement and/or Australian Workplace Agreement with the relevant unions and/or their employees as the case may be without limitation.
>
> I believe there would then be a great incentive for head builders to look to entering into multiple-business project agreements.
>
> Such enhanced multiple-business project agreements should be capable of being registered by single Commissioners of the AIRC in the interests of speed and efficiency.[64]

5.65 The committee assumes that this advice would be unpalatable to the Government, for whom the solution to a problem through the accommodation of competing interests by way of compromise would be heresy. The value of the outcome appears to depend on the means to achieving it, and the challenge the Government has set itself is to make the practice fit the theory.

5.66 The resource sector is also concerned about negative flow-on effects of the bill for major resource projects, which rely heavily on s170LL 'pre-start' agreements.[65] Evidence from a former member of the AIRC, Mr J J O 'Connor, points out that the unenforceability of project agreements under clause 68 will have severe consequences for the future of mining projects in Western Australia. All of them employ common project agreements. The point is made that these have been very successful in minimising industrial disputes.[66]

5.67 The industry is concerned that the bill places too much emphasis on registering a project agreement as a multi-business agreement (WRA s170LC) which would

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64 Submission No.109, Gadens Lawyers, p.6

65 Submission No.30, Australian Mines and Metals Association, para.17

66 Submission No.82, Mr John O'Connor, p.10

result in delays in registering and concluding agreements before the commencement of a project. The establishment of pre-start agreements provides for certainty in industrial relations, and contains and helps to resolve industrial disputes for the life of the project.[67] This is in line with practice in the United States, which institutes project labour agreements (PLAs) for major public infrastructure works.

> A PLA is an agreement that defines wages and work rules for a project, and is approved by labor and the awarding public body before the project begins. It eliminates the need to negotiate a separate labor agreement with each contractor and each building trade, and sets up a process of conflict resolution to deal with the occasional job dispute.[68]

5.68 The committee noted on its visit to the LNG project site in Darwin the familiarity with and preference of a large American construction firm, Bechtel, for enterprise agreements based on the project model.

5.69 The QMBA also favoured the idea of registered project agreements which are commonly used on large civil and engineering projects. The strongest argument for their use is cost transparency for contractors. Both unions and employers can contractually ensure that wages and conditions agreements are honoured. Project agreements ensure industrial harmony because compliance can be legally enforced.[69] The committee majority notes that clause 67 of the BCII Bill is a specific provision that makes project agreements unenforceable. This indicates the extraordinary lengths to which the government will go to ensure the purity of its doctrine, regardless of the practical consequences. Even the bill's least critical supporter, ACCI, has raised in its submission the possibility of a 'genuine project agreement', taking the form of 170LJ, 170LK or 170 LL agreements, and has sought assurances that such agreements would be enforceable.[70]

5.70 The committee majority sees no connection between a ban on pattern bargaining and project agreements and the Government's objective of encouraging culture change in the construction industry. What is proposed will not serve that objective because it makes no business sense. It will impose considerable strain on labour-employer relations and drain reservoirs of goodwill. As stated previously it will raise questions about whose interests this legislation is intended to serve. It looks ominously as though the Government is putting its ideological concerns before the practical needs of industry. If that is the case, the legislation will fail.

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67 Submission No.30, op. cit., paras.31-36

68 Submission No.37, CFMEU, p.37

69 ibid., p.17

70 Submission No.3, Australian Chamber of Commerce and Industry (ACCI), para.71

Chapter 6

Occupational health and safety

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

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

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

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

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

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

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

Occupational health and safety: the scale of the problem

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 Submission No.9, CBUS, p.5

21 Submission No.34, BUSSQ, p.1

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

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

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

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

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

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

State initiatives and successes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 ibid.

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

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

31 ibid., p.95

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

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

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

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

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

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

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32 ibid., p.18

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

The Federal Safety Commissioner

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

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

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

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

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

35 ibid., paras.216-217

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

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

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

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

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

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

37 ibid., NSW Government, p.86

38 ibid., VIC Government, p.53

39 ibid., WA Government, p.71

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

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

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

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

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

The demise of NOHSC

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

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

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

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

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

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

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

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

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

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

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

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

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43 Submission No.27, CEPU, para.10.4.1

44 ibid., para.10.4.2

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

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

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

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

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

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

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

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

47 Submission No.12a, MBA para.8.2

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

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

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

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

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

48 Submission No.14, ACCI, p.27

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

50 ibid., p.54

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

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

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

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

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

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

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

52 Submission No.14, ACCI, para.106

53 Submission No.17, ACTU, para.241

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

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

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

Recommendation 6

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

Allegations of misuse of occupational safety issues for industrial purposes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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59 Submission No.90, QMBA, para.22

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

61 Submission No.14, ACCI, para.97

62 ibid., p.29

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

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

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

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

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

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

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

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

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

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

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

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

65 ibid., p.3, para.14

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

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

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

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

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

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

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

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

Prohibition on 'unlawful industrial action'

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

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

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

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

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

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

6.74 The committee majority accepts the ACTU's comment:

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

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

OH&S whistleblowers

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

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

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

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

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

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

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

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

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

Conclusion

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

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

71 ibid., paras.13.1.10-13.1.14

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

Chapter 7

Maintaining industry skills

> Another problem in our industry … is the huge shortage of skilled people in the industry. Many of the people in the industry are just glorified handymen who have never been taught properly and do not have the wide range of skills of a qualified tradesperson. I don't have any problem with people being given the opportunity to skill-up but unfortunately no-one even undertakes to assist in training those people working their way through the industry.[1]

7.1 This chapter is written in recognition of the key importance of maintaining a skilled workforce for the building and construction industry. If training fails to deliver the skilled workforce required then other issues become irrelevant. The Cole royal commission recognised some current training deficiencies, and within the limits imposed by ideological blinkers, made some useful recommendations. However, the Government's single-minded preoccupation with instilling order and discipline into the industrial relations of the industry has caused it to lose sight of one of the more fundamentally important trends affecting the industry: the growing shortage of skilled labour. If the Government is concerned that wage breakouts are even now affecting productivity in the industry, there is worse to come. It will not come as a result of pattern bargaining or alleged industrial blackmail by unions, but as a clear response to labour market trends. That is, the cost to industry of skilled labour will rise because it is in short supply.

7.2 Historically, the construction industry has had a low level of investment in training, due partly to the large number of small firms which make up the industry, and because of its project based nature which sees employees constantly moving from site to site. Those working in the industry have learnt on-the-job. Furthermore, the culture of the industry and the nature of the workforce, as noted in chapter 1, does not encourage a high regard for training. While this attitude is changing, the industry finds itself in the position of having to catch up to others in the development of a training culture.

7.3 This chapter will deal with the reluctance of employers to fund training and the disputes which arise in relation to what kinds of training to provide, and how to deliver it. These disputes have their roots in the fragmented nature of the industry, complicated processes for the allocation of training funds and unresolved questions of how training quality can be maintained through different methods of delivery.

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1 Submission No.86, CFMEUQ, para.16

The declining skills base

7.4 The latest data compiled and analysed by Construction Training Australia (CTA) shows that training activity levels, measured by the number of people under training contracts, is lagging behind building and construction activity and resulting employment levels. CTA states that if this trend continues, the skills base of the industry will gradually erode. It is generally agreed that apprenticeship enrolments follow a cyclical pattern, although the peaks and troughs are now lower that they were in the last decade. This is despite the moderate increase in the number of commencing apprentices and trainees in the VET sector. The looming critical skills shortage needs to be seen in the context of expected high levels of construction over the period to 2007 and the effects of retirements from the industry which, according to demographic trends, are likely to increase over the same period of time.[2]

7.5 A study by NCVER and DEWR in 2001 noted that the particular difficulties experienced in the building and construction industry in relation to recruitment and retention of skilled labour are partly attributable to the cyclical nature of the industry. This was a disincentive for builders to take on apprentices despite the relatively high retention rates. The DEWR Skilled Vacancies Index showed that in the five years to 2001, vacancies in the building trades increased by 61 per cent, against the general industry trend.[3]

7.6 The ACTU identified a range of causes for skills shortages, including fewer people entering the industry, higher attrition rates amongst apprentices and higher separation rates from trades, lack of training opportunities to upgrade the existing workforce and increasingly narrower skills base through greater job specialisation rather than broad trade skills. [4]

7.7 The Construction Industry Training Board argues that changes to the industry have shaken the foundations upon which the apprenticeship system is based. In particular, full time employment has declined and casual employment has increased; the number of small businesses that make up the industry struggle under extreme price and competition pressures and are less able to accommodate the cost of an unskilled worker. Furthermore, for the 65 per cent of the businesses in the industry that are 'non-employing', the notion of succession planning (of skills) is non-existent. The CITB further points to the fact that career paths are not well defined or are limited in the case of most small businesses in the industry. Finally, for many businesses, much of the work has become structured around very narrow tasks that do not require broad-based skills.[5]

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2 Construction Training Australia*, Building and Construction Workforce 2007: Strategic Plan for the Building and Construction Industry,* March 2003, p.48

3 NCVER, *Skill trends in the building and construction trades*, 2001, p.6

4 Submission No.17, ACTU, para.349

5 Submission No.47, Construction Industry Training Board, p.6

7.8 The electrical trades have made strong representations to the committee about skill shortages. It was told that normally in this sort of economic cycle we would have about 26,000 electrical and electronic tradesmen being trained as apprentices. That number is now running at about 21,000 or 22,000, not even keeping up with the levels of five years ago. This comes at a time when the level of electro-technology in industry has comprehensively increased. Chronic skill shortages in this specialisation are predicted.

Types of training

7.9 The committee is concerned over advice from the ACTU that there are currently low levels of qualifications in the industry, with only 45 per cent of the workforce receiving formal qualifications.[6] Training, when offered or undergone, comes in various forms. The industry preference is for training leading to an Australian Qualifications Framework (AQF) certificate, preferably at level 3 or 4. These qualifications may be obtained either through apprenticeships or in some cases through TAFE colleges or private registered training organisations (RTOs). There is very wide choice available in course delivery, and the aim is flexibility in training delivery. As is noted later, there has been a proliferation of private RTOs serving the expanding training market, although few of them engage in the kinds of trade training courses which remain the specialities of the TAFE system.

7.10 School leavers may embark upon apprenticeships if they are available, and current workers can upgrade their skills through part-time training. Training is competency-based, with recognition of skills gained at the time of attainment rather than at the end of a set period. As will be noted, this is an area of controversy. A related complication is that trades like electrical and plumbing require licensing by an agency operating independently outside the AQF.

7.11 There is a continuing debate about whether trade skills training is sufficiently enterprise focused and sufficiently specialised. Many, if not most, builders believe it is not. There is also resentment among some builders and contractors that TAFE components of apprenticeships are too demanding of the time of apprentices, and that too much importance is attached to theory at the expense of practice. The views of the committee majority are clear on this point: that the long-term interests of the industry are best served by broadly-based training, and that it is the role of the state to maintain high standards in the national interest, rather than to pay undue attention to the needs of individual enterprises in an industry where mobility of labour is such an integral feature of its operation.

Apprenticeships

7.12 Apprenticeships that are said to be in decline are the traditional contracts of training which had a three or four year duration, with practical employment

6 Submission No.17, op. cit., p.59, para.365

experience interspersed with set hours of TAFE training. There is general agreement that such arrangements produce the optimum training results. There is broad based skills acquisition and the provision of a good theoretical underpinning of practical knowledge and skill. With such a training background, tradesmen and women are likely to be more flexible and versatile in the work they can do, and more receptive to regular reskilling to take into account technological changes.

7.13 The committee has long been concerned about the decline in trade apprenticeships. This has been most strongly evident in the increasing reluctance of small business trades to take on apprentices for the reason that they are unaffordable in the first two, and sometimes three, years of their training. Only in the latter years of their apprenticeship can tradesmen and women pay their way in the firm. Related to this is the reduction of the average size of firms serving the building and construction industries. There has also been a large increase in the employment share of specialist sub-contractors who usually work alone, or with only a small number of partners. The growth in the scale of outsourcing, and increased labour hire employment, have also brought changes to the structure of employment in the industry which has been unfavourable to the expansion of traditional apprenticeships.

7.14 The apprenticeship statistics show a steady trend rather than a dramatic decline. Apprenticeship commencements have declined since 1999 and have fallen by 9 per cent by 2001.

New Apprenticeships

7.15 New Apprenticeships are the drivers of the Government's policy to increase the number of people undergoing training. The dramatic increase in the numbers over the term of this Government has resulted from the creation of a training regime which has seen a proliferation of new training courses corresponding to expanding areas of employment, particularly in the services industries. It has also seen the encouragement of private training institutions to fill the expanded training market, especially in courses not offered in TAFE institutes. This committee's report on skill shortages, tabled in 2003, was strongly critical of the focus of New Apprenticeships, which are concentrated mainly on providing basic skills to employees for the services sector of the economy. Such activity allows the Government to boast of considerable increases in the number of young people in training, while allowing it to ignore criticism that it is neglecting the requirements of industry in need of employees with higher level technical skills.

7.16 The relevance of the New Apprenticeship training issue to the building and construction industry turns on issues such as quality of training, in so far as it is of shorter duration, and whether expenditure on training of low-level skills is justified in the absence of effective financial incentives for training at the high-end level of skills essential to industry and construction. High level skills are needed for high value-added products which return more revenue. The committee has heard sufficient evidence over this and two previous inquiries to be convinced that the current training

policy framework favours low-skill acquisition at the expense of middle to higher skills training.

7.17 The Government's answer to this appear to be that in concentrating training at the lower end of the skills spectrum it is serving the needs of the service industry where most of the employment growth is taking place. The Government also defends the quality of training offered under New Apprenticeship arrangements: a claim that is strongly contested by industry. NCVER data indicates that only 41 per cent of New Apprenticeships at AQF 3 have expected durations of more than 2 years and only 8 per cent have expected durations of three or more years.[7] The Government's response to this is that short duration courses are favoured by many contractors in the construction industry. This is so, but Governments must follow the strongest and best informed argument rather than the popular argument.

7.18 The Government's vocational education policies and operations have been thoroughly examined by this committee in its 2000 report. It suffices to say here that one concern raised by the committee in that report, and which remains relevant to training for the building and construction industry, concerns the customisation or tailoring of training to meet enterprise specific needs.[8] Employer groups in the industry have been calling for the application of this practice, the result of which would see the emergence of narrow specialisations. For instance, building employers have been arguing the case for tilers not having to undergo the training that is required for bricklayers, the base trade in which tiling is a subset speciality skill. The Housing Industry Association (HIA) explains the problem in more detail:

> It is also difficult to separate out aspects of brick paving and bricklaying and even break down wall and ceiling fixing into distinct training regimes and employment opportunities. This produces many inflexibilities and absurdities. For example, in far North Queensland, masonry construction is almost invariably using cement blocks rather than bricks. Yet it is impossible to train young people as block layers – they must be trained through the full traditional bricklaying apprenticeship, with skills never used and materials not available in their part of Australia. This sort of inflexibility severely reduces employment opportunities for young people and working flexibility for industry.[9]

7.19 In similar vein, some industry groups have expressed concern about the costs associated with current training and argue that apprenticeships should be reduced to core skills to address skill shortages. The Electrical and Communication Association in Queensland submitted that, for the purposes of serving the needs of domestic or household electrical contactors, apprenticeships should be reduced to the core skills applicable to this line of business, including training in safety, handskills, electrical

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7 ibid., p.66

8 Senate EWRE Committee, *Aspiring to Excellence: Report into the quality of vocational education in Australia,* November 2000, p.185

9 Submission No.13, HIA, p.25

theory and testing. More advanced options, the ECA argues, could be offered to those wanting to follow a commercial path. As current standards apply, sole traders and family businesses cannot afford an apprentice.[10]

7.20 Both of these cases would appear to urge changes that would fit within the Government's New Apprenticeship philosophy, except that such changes would need to run the gauntlet of industry training boards which consider the short term practical needs of employers in the context of overall training policy. The case made by the Electrical and Communications Association needs to be seen beside evidence to the committee from the CEPU in Darwin. A CEPU official described what the committee believes to be the likely result of any reduction in the course of training for electricians:

> In America they break down the trade so that you do not have a licensed electrician who can come in and do power points, do lighting, fit off switchboards et cetera. They have broken the trade down so much over there that only one person comes in and is allowed to do the lighting, another person comes in and learns how to fit off power points and another one will come in and fit off the switchboard. That breaks down the trade tremendously. They have a lot more accidents over there than we do here. Thank God being an electrician is still a licensed trade; otherwise we would be in the same basket.[11]

7.21 The committee is concerned that the short-term focus of the industry, with its boom and bust cycles is responsible for the calls for reductions in the length and complexity in training. Businesses that are focused on small margins and short term projects are not able to see the value in contributing to the development of a highly skilled workforce, particularly through a traditional apprenticeship program. The Construction Industry Training Board has said that there is a growing divide between the training and skills provided by the full apprenticeship qualification and the skills actually required in many of the contracting firms, particularly in the volume home building market. According to the CITB, this raised questions about the relevance of the training provided by the apprenticeship system.[12]

7.22 The committee majority particularly notes comment from the CITB which suggests that competitive pressures are at work to reduce the quality, and therefore the cost, of training. For small contractors, survival in the market is more important than training. One small contractor in Darwin told the committee that most contractors in the Territory could not see five years of work in front of them, so precarious were business prospects. So apprentices were not taken on.[13] The bill before the Senate purports to benefit small contractors against the force of unionism, but their real

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10 Submission No.15, ECAQ, p.8

11 Mr Alan Paton, *Hansard*, Darwin, 6 April 2004, p.30

12 Submission No.47, Construction Industry Training Board, p.5

13 Mr Vernon Cridland, *Hansard*, Darwin, 6 April 2004, p.50

problem is surviving the cost squeeze imposed by the builders who are the principal contractors.

> It is in the interests of the building and construction firms to have large numbers of these smaller contractors to ensure vigorous competition exists for the projects on offer. Whilst this keeps the construction costs down, it also means that these small contracting firms are deprived of the certainty of work and operate on low margins. It is this uncertainty of work that limits the capacity for the contractors to engage an apprentice. Unfortunately, this is the price that has been paid by the industry and the community for having a highly adaptive workforce.[14]

Flexibility or versatility?

7.23 It is now fashionable to regard licensing boards and custodians of 'quality control' as analogous to medieval craft guilds. It is argued that they are conspiracies in restraint of trade and are out of touch with the requirements of the market economy. That these practices are supported by trade unions only proves the point of the criticism.

7.24 There is some dispute in the industry and among trainers as to the relative importance of minimum training periods as distinct from time spent on the attainment of competencies, but in his inquiry the committee heard strongly held views that effective training involved a strong theoretical skills base and a maturity factor. For instance the committee was told during its visit to the VicTech Skills Training Centre in Carlton that it was undesirable to curtail the length of a four year electrical training apprenticeship. This followed advice it received in Darwin that electrical training needed to be comprehensive, and to cover all licensing requirements because a number of allegedly qualified people were being rejected by the licensing authority.[15]

7.25 The electricians and plumbers appear to be in league on this issue. The committee heard that a good reason for maintaining a broad skills base for plumbers was that versatility was a hedge against loss of employment during industry downturns. This argument appears to be reasonable.

> Within the plumbing qualifications there are four subcomponents of that particular trades equivalent. There might be a roof plumber, a hydraulics component, installation and maintenance. The view of a number of people—not just the CEPU—about that is that a gradual erosion of those four key competencies within that overall qualification will make it difficult for those workers with that small skill set to find an alternative occupation, in a building industry decline, outside the building industry in terms of their career possibilities and their employability.[16]

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14 Submission No.47, op. cit., p.5

15 Mr Alan Paton, *Hansard,* Darwin, 6 April 2004, p.32

16 Mr Graham Warren, *Hansard*, Adelaide, 18 March 2004, p.100

7.26 Interestingly, builders and contractors who are critical of TAFE training and traditional apprenticeships often quote the counter benefits of 'flexibility' while discounting the value of versatility and multi-skilling. The committee majority believes that innovation and efficient project development require complex skills that can reach across the industry. Skill sets that are narrowly confined to selected components of an industry do not encourage innovation within vocations and between the multiple vocations on a building site.

7.27 NCVER statistics show that the proportion of traditional apprenticeships have declined as a proportion of the total number of trainees; from 54 per cent in 1998 to 31 per cent in 2003. This indicates to the committee a substantial real drop in the number of commencing traditional apprentices. This is not to suggest that New Apprenticeships in the service industries have been taken up at the expense of those wishing to enter the traditional trades. The New Apprenticeship incentive program is demand driven, and employment prospects in the service industries have expanded at an increased rate relative to employment prospects in manufacturing and construction industries. However the relevant consideration is whether the rate of training in the traditional trades is sufficient to meet the need. The committee, in common with participants in the construction industry, believes they are not.

Apprenticeship wages

7.28 The obvious weakness in the apprenticeship system that currently applies to traditional trades in the construction industry is the exceptionally low 'wage' which is paid. The committee heard that the pay of a first year apprentice electrician in the Northern Territory is $5.40 an hour, which is not a living wage, even at full-time employment. This explains the huge skill shortage in the Northern Territory.[17]

7.29 The industry is experiencing difficulty in attracting and retaining a younger workforce, with witnesses providing evidence of apprentice drop out rates that are linked to poor wages, cultural behaviours and lower levels of investment in training by the industry.[18]

> The fact that apprentices wages are so low makes apprentices vulnerable to being used as cheap labour. Awards and training agreements prohibit apprentices working outside of trades duties – that is that they prohibit apprentices being used as labourers. However the CFMEU has come across many instances of apprentices exclusively performing labouring work. The union is currently involved in handling a dispute with the Brick Industry Group Training Company, a Sydney based group training company and registered training organisation, over allegations of the widespread use of their apprentices as labourers. [19]

17 Mr Alan Paton, *Hansard,* Darwin, 6 April 2004, p.29

18 Submission No.17, ACTU, pp.58-59

19 Submission No.55A, CFMEU NSW, p.2

7.30 The committee majority agrees that apprenticeship wages are a disincentive to trades training. Low as wages are, they are also a disincentive for employers for the totally opposite reason that they are unaffordable. But we also need to have wages high enough to attract apprenticeship. The committee majority takes the view that the Commonwealth and the states will need to take an imaginative look at how funding support can assist apprentices in the trades.

Group training

7.31 Group training arrangements are proving to be generally successful in compensating for the increasing inability of contractors to offer traditional apprenticeships. Group trainers rotate apprentices among a number of host employers in order to provide continuity of work experience and development in a broad range of skills. CTA reports that group training companies account for about 30 per cent of all trainees in the building and construction industry, which is the highest proportion in any industry. High as this proportion is, however, group training arrangements have not led to any increase in industry apprentices or trainees overall.[20] Nonetheless, CTA is strongly in favour of group training, although it is aware of the association of this arrangement with labour hire companies, and warns that the industry need to ensure that group training companies maintain a training focus.

7.32 Industry groups such as HIA and ACCI support the implementation of group training schemes and streamlining to core skills training, with an emphasis on flexibility that can allow training or education structures to be set by employers.[21]

7.33 Group training receives support from some academics, and not because it is a scheme that makes the best of a deficiency. Dr John Buchanan believes there are some positive and dynamic trends at work affecting the whole industry.

> If you look at other countries, they do not have anything like the apprenticeship system we have in construction. This is something to be celebrated and nurtured and worked with. If one is obsessed with the enterprise, one breaks up those structures of accountability and identity. Australia has been very innovative—it is something that is often overlooked and the construction industry was at the forefront of this—in developing group training arrangements. I am not sure if you know the statistics, but around one apprentice in four in construction now goes through a group scheme; in some local labour markets, it is as many as two in four. That is coordination of a very dynamic nature, because it means the apprentice is not indentured to any one employer but indentured to a central scheme, and the risks of employment are spread across a group of employers. This is a classic case of how coordination and flexibility can be combined to enhance both efficiency and fairness.[22]

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20 Construction Training Australia, *Building and Construction Workforce 2007*, March 2003, p.60

21 Submission No.13, HIA, paras.24–25; Submission No.14, ACCI, paras.193-195

22 Dr John Buchanan, *Hansard*, Sydney 2 February 2004, p.37

7.34 However, the committee also received evidence that group training is regarded in some quarters as a barely adequate substitute for traditional apprenticeships. The Queensland branch of the CFMEU claims that the failure of Queensland employers to take in apprentices has resulted in a high take-up of group apprenticeships in that state. The committee is less inclined to take employers to task over this, partly for the reason that the training record for Queensland compares very favourably with other states. While the committee accepts that in many cases group training schemes do not produce as good an outcome for the employer or the trainee as a direct relationship with an employer would, such schemes are the only practical way of ensuring training for many apprentices, and at their best they deliver very good training.

7.35 Furthermore, in its skills inquiry in 2003, the committee heard evidence from 'traditional' apprentices in Queensland that suggested their experiences were not always satisfactory. There were complaints in some cases of a lack of breadth in work experience, and a lack of opportunity to refine skills or acquire new skills. Traditional electrical apprentices serving their full term were not always able to meet licensing requirements because of insufficient experience.

7.36 Other submissions have noted that group apprentices are often used as labourers because of inadequate training and poor management by companies.

> The Group Apprenticeship schemes carry out a useful function and bridges the training gap but they do not produce as good an outcome for the employer or the trainee as a direct relationship would. In downtimes host employers return the apprentices to the group scheme which inevitably leads to the standing down of the apprentices.[23]

7.37 The ACTU has made useful comments in regard to group training, stating that the schemes carry out useful functions and bridge the training gap, but they do not produce as good an outcome for the employer or the trainee as a direct relationship would. In downtimes host employers return the apprentices to the group scheme which inevitably leads to the standing down of the apprentices. However, group training companies can readily use industry downtimes to engage in training and to organise cross-training of apprentices which is essential to broadening their range of skills.[24] The committee notes that this is one positive advantage that group training has over traditional apprenticeships. The all important proviso is that much depends on the energy and enterprise of the company, and its ability to organise its programs effectively.

Employer attitudes to skills shortages and training

7.38 A number of submissions noted that skill shortages were affecting the industry and were likely to worsen as the current workforce retires. Part of the

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23 Submission No.84, CFMEUQ, p.3, para.15

24 Submission No.17, op. cit., paras.352-353

explanation for relatively low levels of training conducted by the industry is the predominance of small firms which are less able to afford to train their employees. CTA figures show that only 29 per cent of employers in the industry provide structured training.[25]

7.39 One result of skill shortages has been to encourage mobility of skilled labour, which also has the occasional effect of discouraging the training of local workforces. As the committee heard in Darwin, this trend particularly affects the Northern Territory which has not yet outgrown its reputation as a frontier town where itinerant skilled labour is the norm rather than the exception. Such labour provides short term solutions to problems which should be addressed by training agencies of government and local industry.

7.40 The committee was particularly interested to visit the Northern Territory because it had been identified by Commissioner Cole as one jurisdiction where the Workplace Relations Act was generally adhered to and which did not see the unsavoury industrial practices at work which his report was later to condemn in the southern states and in Western Australia. Comment on what the committee found in the Northern Territory in regard to some of these matters which will be dealt with elsewhere. In regard to apprenticeships, the record of the Northern Territory is probably worse than elsewhere. The committee was told that apprenticeships and training are at extremely low levels in the Northern Territory. This meant that skilled labour is often imported from interstate, and young Territorians were denied the right to gain skills which would enable them to find work in the industry.[26]

7.41 The Government has recognised that there are two critical training strategies that have to be implemented in the industry: training new entrants and increasing the skills base of the current workforce.[27] However there are structural barriers to address both of these training strategies, with industry unable to resource the re-skilling of employees required to provide the industry with qualified tradespeople.

7.42 Witnesses have attributed this in part to high levels of self employment and low levels of permanent employment in the industry resulting in a high turn over of staff, including apprentices, who move from job to job and employer to employer. This has resulted in perceptions of low return on investment in training by employers, with skilled staff 'poached' in a competitive industry.[28] This environment also

25 Construction Training Australia, op.cit., p.38

26 Submission No.88, CFMEU (NT), paras.8-9

27 *Building Brighter Futures: Present and Future Skills Needs in the Building and Construction Industry*, August 2001, Executive Summary, pp.2-3

28 Submission No.26, Australian States and Territories: QLD Government, paras.37-39; Submission No.17, op. cit., paras.363-64

contributed to the low uptake of apprentices, requiring support for training by state governments.[29]

The award system

7.43 Clause 51 of the proposed bill contains provisions to further simplify building awards and to ensure that exceptional matters orders in relation to industry disputes are made only by the Full Bench of the AIRC.[30] Putting this another way, the bill proposes a further costly round of litigation aimed at further award stripping, resulting in a significant loss of earnings for more vulnerable employees. The ACTU submission concedes that many employees will succeed in retaining threatened provisions in certified agreements. The relevance of this issue to training is that paragraph 4(b) of the clause excludes training or education from the list of allowable matters except in the case of leave and allowances for apprentices. The practical effect, according to the ACTU, is as follows:

> Skill-based career paths, for example, have played an important role in encouraging training and providing clear and accessible career paths to employees who might not previously have aspired to this. The specific exclusion of "training or education (except in relation to leave and allowances for trainees or apprentices)" is presumably aimed at union training in dispute resolution and the like, but would also cover any other leave or reimbursement of expenses for training undergone by employees.
>
> It is simply extraordinary that the Bill seeks to discourage training by preventing the Commission from dealing with this issue in any way.[31]

7.44 The ACTU further comments that the removal of training from the award, particularly for apprentices, will reduce any capacity for the industry to ensure that a skilled workforce is available in the future to contribute to a highly productive sector of the Australian economy. It argues that the effect of proposed paragraph 51(4)(h), prohibiting award provisions dealing with the number or proportion of employees that an employer may employ on a particular type of employment or in a particular classification, will have the effect of removing existing provisions setting out ratios of apprentices to tradespeople.[32] This will allow employers to evade current obligations to maintain the pool of skilled tradesmen and women. It is a provision that is at odds with recommendations of the Cole royal commission.

7.45 The committee notes that the award system is often used by industries such as the electrical trades to establish career paths and to align training packages against national bench marks. This ensures that the construction industry can keep up to date with the latest innovations in sectors that are likely to provide the highest innovations

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29 Submission No.26: Australian States and Territories: Tasmanian Government, paras.22–31

30 *Explanatory Memorandum*, p.39

31 Submission No.17, op. cit., p.13

32 ibid., p.60

and productivity gains. The committee accepts that the removal of training and education from allowable matters in the award is likely to adversely affect the overall skills base that is available to the industry into the future.[33] As CEPU evidence stated:

> CEPU Electrical Division members rely on the Electrical Contracting Industry Award training provisions to identify and provide for their career path. Throughout their working career electrical and electronic workers undertake regular update and additional training to both keep their skills current and to upgrade their skills. They work in areas where technological innovation is rapid and on-going training is essential. Being compensated for that training is an incentive to undertake the training.[34]

7.46 Industry groups such as ACCI and Ai Group do not support the elimination of training from awards. While ACCI sees award simplification as a positive outcome of the bill, it urges a more flexible approach in establishing awards to ensure that descriptions of training programs in awards can be allowable as part of the fixing of wages and conditions.[35] Ai Group states that it is far from satisfied with aspects of the skill-based classification structures in construction awards, but, unlike ACCI, does not agree that this matter would be more appropriately dealt with at the enterprise level. Ai Group argues that skill-based classifications in awards, when appropriately structured, are able to encourage higher levels of skill and address skill shortages in the industry through linkages with national competencies and industry training packages.[36]

7.47 As noted in chapter 1, the industry is dominated by subcontractors, who, in general, have no complete understanding the multiple training needs of the industry. The CEPU has submitted that by providing a clear set of training provisions through an award, employers can establish with employees appropriate training schedules to improve employee retention rates. It also removes potential industrial disputes, with both employers and employees using agreed standards for training and ensure that skills can be identified for the purposes of negotiating agreements. Thus, the industry drives improvements in skills across the different sectors, with identified career paths. This practice also minimises the incidence of *ad hoc* training programs that do not support the broader skills sets that can drive efficiencies and innovations by the industry.[37]

7.48 The committee is also concerned that the removal of training from awards is a further restriction on employees' rights to collectively bargain, including the right to establish a career path which suits the long term skills requirement of the industry. The International Centre for Trade Union Rights submitted that the further attenuation

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33 Submission No.27, CEPU, paras.6.1.11-6.1.12

34 ibid., para.6.1.23

35 Submission No.14, op. cit., para.115

36 Submission No.1, Ai Group, Attachment A, p.77

37 Submission No.27, CEPU, paras.6.1.25 - 6.1.26

of the scope of awards as proposed in the bill is inconsistent with Australia's obligation to promote and encourage collective bargaining. The effect of this limitation on awards would be to diminish the viability and attractiveness of awards as an instrument reflecting the terms of collective agreements.[38]

7.49 Finally, the committee received strong representation from the CEPU on the matter of training and the award. The secretary of the union explained to the committee that, from his own experience as chair of one of the ANTA skills councils and as a member of the ACTU Vocational Education and Training Committee, if that award provision is taken out of enterprise agreements, it is possible that provisions in relation to skill formation and ratios of apprentices will become subject to the provisions of pattern agreements. The national secretary, Mr Peter Tighe, in commenting specifically on the effect of the proposed award change, summed up a number of issues which have been canvassed in this chapter:

> You will see a marked decrease in the number of people trained in the industry. My own organisation and responsible employers in the industry have put in a lot of work in relation to the skill shortages that are in place in our sector today—we are around 23 per cent below the level of apprentices that should be in training, some 5,000 to 6,000 electrical apprentices. We have seen the development of the group training companies which are now in place. These are the largest trainers of electrical apprentices in Australia—our two in New South Wales and Victoria train upwards of 500 electrical apprentices each year. With the increase in labour hire and supplementary labour to core labour, which does not add to the increased effort in relation to training, we will see a further decline of electrical trades people within this country, which will be disastrous for the totality of a number of industries.... If we cannot put in place provisions in relation to education and training in that area, my view is that in five years we will be having twice the level of difficulty with skilled workers that we have today.[39]

7.50 Awards are seen by the Government as a vestige of a discredited industrial relations past, and it has long sought the reduction of allowable matters in awards as a step toward the 'purification' of enterprise agreements. Again, the committee majority observes that an ideological stance is at odds with the need to address very practical problems facing the industry. In this case in point, employers are offered a clear disincentive to engage their workers in further training. Many enterprises which rely on high order skills will doubtless ignore this provision and EBAs will reflect this. It will more severely affect workers who wish to upgrade their skills but whose employers are indifferent to the need for them to do so.

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38 Submission No.77, ICTUR, p.35

39 Mr Peter Tighe*, Hansard*, Sydney, 3 February 2004, p.7

Paying the cost of training

7.51 Funding for training is a highly contentious element of the skills debate, with employers arguing that they cannot afford to invest in a mobile workforce that may provide labour for relatively short periods of time in the operations of a company. Nevertheless, it could be argued that the construction industry as a whole also takes training more seriously than most other industries, and has addressed funding through a variety of methods ranging from full investment in training schemes by individual companies, through obtaining government incentives for apprenticeships schemes, and extending to industry sponsored training schemes.

7.52 Significantly, the industry is alone in accepting the need to have a training levy. These operate in four states (New South Wales and Victoria being the exceptions) and in both territories. These building and construction levy bodies have a statutory basis, operating under government appointed industry representatives. Currently, the five funds together spend around $30 million annually in training support for approximately 300 000 current workers and about 5000 apprentices. This is money well spent, for, as Construction Training Queensland told the committee:

> … apprentices and trainees funded from the industry training fund have an attrition rate of less than 10 per cent. This is five times less than the all-industry (including building and construction) high of 50 per cent. The reason? Industry training funds value-add – they don't just provide the funds, but also the 'after sales service' which keeps more apprentices and trainees in their training. So the value of industry training funds is two-fold. Not only are they an alternate source of funding, but they are strategically placed to better target this funding for maximum impact and to provide the "after sales service" that government cannot.[40]

7.53 CTA also notes that by supplementing the training funded by the Commonwealth and the Queensland Government, the Building Industry Training Fund in Queensland has increased the total number of apprentices and trainees by 1611 in 2000-03. The Tasmanian record is also good, with over 23 000 being put through workplace safety courses since 1991.

7.54 There is a range of industry opinion about the effectiveness of funding levies. The ACTU has pointed out that the current state training levy arrangements highlight the absence of a nationally co-ordinated and consistent scheme. It notes also that the initiative of state governments, at the behest of the state construction industry training boards, is under threat from the current policy of rationalising ITABs. This process will see Construction Training Australia being forced to amalgamate with the property services sector. The ACTU sees this policy as motivated by the desire to reduce union influence in the various industry training boards.[41] The committee has seen no comment on this issue from industry bodies.

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40 Submission No.50, Construction Training Queensland, p.3

41 Submission No.17, op. cit., p.58

7.55 The Housing Industry Association (HIA), as a registered training organisation, is concerned about accountability of industry training funds and ACCI notes that the construction levy could be used by employers rather than applied collectively.[42] Other industry groups such as NECA have advocated dismantling industry training funds because of concerns that employers have little say over whether the training meets the needs of their business. Instead, NECA would appear to advocate the removal of a tripartite approach to training in the industry, preferring to recommend either unions or employers undertake direct responsibility for training their members on behalf of the industry as a whole.[43]

> In terms of post-trade training, we generally try to fund that through a levy scheme operating in the industry through our EBAs, and that seems to be working pretty well. It is delivering a huge amount of training to tradespeople and the like. We do have a difficulty with the current federal government's policy when it comes to the funding of ITABs—industry training advisory boards. The Queensland Utilities and Services Industry Training Advisory Board was the victim of financing arrangements by this current federal government and, again, the burden has now fallen to both the union and the industry employers association to largely fund that ITAB. That is a significant impost on our limited resources. It would become even more difficult to fund into the future if this sort of legislation became law and we were prevented from operating in a significant area of our membership and potential growth.[44]

7.56 The committee notes that NECA continues its relationship with industry and the Electrical Trades Union (Southern Branch) in supporting VICTEC, the private RTO and group training company operating out of Carlton. This is a successful operation, born in the early 1990s out of a belief that the TAFE system was insufficiently flexible in its training arrangements. The committee commends this model of collaboration, which would see even more success were private RTOs engaged in higher order skill specialisation granted some measure of recurrent Commonwealth funding. This is warranted by its community service programs alone, in providing electrical training for young people from disadvantaged areas of Melbourne.

7.57 Some witnesses have stated that the Government's current apprenticeship scheme is not flexible enough to adapt to different industry requirements, with the skill sets for trades in the construction significantly more complex and dangerous than trades in other industries, requiring longer training timeframes and more financial incentives and support for employers to ensure that employees be trained for the period of time that is required to reach full competency in the range of skills that are required for the construction industry.

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42 Submission No.13, HIA, pp.24-25; Submission No.14, ACCI, pp.51-52

43 Submission No.39, NECA p.4

44 Mr Richard Williams, *Hansard,* Brisbane, 24 February 2004, p.128

> The Committee should examine the feasibility of basing employer incentives on the relative cost to employers for different occupations so that incentives better reflect the time that apprentices in different occupations take to become competent in the full scope of skills in the qualification.[45]

7.58 The committee majority has no formed view on the intricacies of funding training for the building and construction industry even though it notes the anomalies and problems that currently exist. In the concluding section of the chapter it sets out some ideas for an approach to dealing with these problems.

Union initiated training

7.59 The proactive training role of unions, while acknowledged and widely supported throughout the industry, has incurred the suspicion of the current Government. The committee believes that this suspicion arises from a conservative view of the role of unions, and an instinctive dislike of any attempt to involve unions in mainstream industry concerns and activities. There is concern that such an activity may elevate the status and importance of unions as key stakeholders in the industry. This is directly at odds with the instincts and the policy of the Government, which is to marginalise unions to the extent that they will wither away.

7.60 The Cole royal commission's interest in union training activity appeared to be restricted to union training activity which attracted Commonwealth funding likely to be misused for industrial relations purposes. One union-run training centre which attracted the particular interest of Commissioner Cole was the Construction Skills Training Centre (CSTC) in Perth, a registered training organisation established by the CFMEU with funding from ANTA through the state training authority. The CSTC describes its role and its record in the following terms:

> The CSTC is providing young Western Australians with the skills to get a job to better themselves. The CSTC is open to all workers, both union members and non-union members, those who are employed and those who are unemployed. The CSTC benefits industries as a whole, including employers, by providing highly trained, skilled workers. The skills centre trained 6,000 workers in the 2003 calendar year. The CSTC has provided training to the Department of Defence and to big companies like Woolworths. WorkSafe estimate that 71 per cent of crane drivers, riggers and scaffolders in WA are trained by the CSTC.[46]

7.61 The Centre carries out around 70 per cent of training done in Western Australia, with a significant transfer of skills interstate. Royal commission investigators found no irregularities in the Centre's use of funds.

7.62 The CFMEU Queensland branch manages an apprenticeship initiative which sees 60 additional apprentices in the industry funded through the Queensland

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45 Submission No.47, Construction Industry Training Board, p.8

46 Mr Kevin Reynolds, *Hansard,* Perth, 16 March 2004, p.2

Construction Training Fund. This organisation manages the apprenticeship training and subsidises employers up to $1000 per annum. This initiative is claimed to be one of the most cost effective training initiatives in the industry. Essentially, the scheme is managed by 1.3 people in total and the QCTF funds the scheme on the basis of fee for service.

7.63 The CFMEU claims that its Skills Management Project 2000 was the first to accurately assess the skills deficiencies of over 650 building construction workers and provide tangible assistance to them to extend their qualifications to full trade status. Hundreds of these workers are now fully qualified tradesmen working and training apprentices in the industry. The project was successful in defining four or five training programs that can be used to upgrade building tradesmens' skills.[47]

7.64 The CEPU Queensland Plumbing Division spokesman told the committee:

> Up until probably four or five years ago there was virtually no post-trade training happening in the plumbing industry. We got some grants through the Queensland Construction Training Fund and later through the Building Industry Training Fund to run training courses. The union have organised trade training courses both regionally and in Brisbane over the last four or five years and have trained up to 900 union members and non-union members during that period of time as a commitment to the industry. That has sparked an interest in training to the extent that employer associations, such as the Master Plumbers Association, have started to run training courses as well. The whole training agenda has shifted to the extent that people now accept the concept of lifelong learning as opposed to doing a trade and finishing your time. That would not have happened if it had not been kick-started. Being a licensed trade the retention rates for apprentices are appalling and the completion rates are appalling, but the uptake for the plumbing trade compared to the other building trades is reasonably high. I do not think we meet the one to eight ratio but we would probably be among the building trades that would be the closest to it.[48]

7.65 The record of union participation in carrying the training load for the industry is well recognised. The committee saw no evidence of any political or industrial influence in the training that was offered. Allegations of such occurrences at the CFMEU skills centre in Perth have no foundation, which is probably why a host of bodies unconnected with the building trade, such as the Department of Defence, continue to assign personnel to the centre for training.

Future directions

7.66 The committee majority concludes with the view that the Government's expenditure on extravagant inquiries and institutions for the purposes of bringing trade

47 Submission 84, CFMEUQ, p.3, para.19

48 Mr Jorgan Gullestrup, *Hansard*, Brisbane, 24 February 2004, p.127

unions into line is worthy of a more productive objective: that is, programs to underpin the national training needs of the building and construction industry.

7.67 It should be acknowledged that Commissioner Cole made a worthwhile recommendation in regard to training, notably, in Recommendation 142, that the requirement for tenders to Commonwealth building projects should include provision for the employment of apprentices. This rule applies in most state jurisdictions in regard to public works tenders. The committee majority strongly supports this idea.

7.68 Another worthwhile idea which has already received strong support in construction circles is the introduction of a construction skills certification system. This has become known as the Skills Card. Data on the card would be certified by a registered training organisation and would include the competencies and qualifications gained by the card holder. Thus it would be a job passport. Construction Training Australia has completed a pilot project for the card in Queensland, the evaluation of which is still awaited.[49] Interestingly, national representatives of the housing construction industry have indicated a lack of interest in the scheme, which may or may not indicate the valuation which this sector places on skills. The committee majority believes it has many advantages to offer the commercial construction industry and those who work in it.

7.69 The evidence strongly suggests that core skills in the industry are beginning to erode, at least to the extent that a much smaller proportion of people entering the industry will be equipped with the full range of skills that will allow them to further develop their capacities in the industry. There are pressures on training providers to allow training that will fragment skills rather than consolidate them. Narrow specialisation will eventually lead to a less flexible skills market, to the disadvantage both of industry and individual tradesmen and women. For the same reason the industry will, in the future, be short of competent building foremen and supervisors. Furthermore, the increased use of labour hire companies will see a systemic neglect of training and likely diminution of building quality. If low-wages for apprentices continue, without some form of compensating remuneration scheme, the skill shortage will become more acute in the short term.

7.70 The committee believes that it is necessary for the Commonwealth to develop or to initiate, either through ANTA or an ANTA-style body drawn from the building and construction industry, a bi-partite industry training and development plan. An organisation should be established to implement this plan, representing industry stakeholders, with due regard to the necessity of closely involving state and territory interests. One of the tasks of such a body may be to consider the extension of a building levy to all states and the possibility of subsidising the employment of apprentices in the first years of their training. The committee majority believes that the industry is in far more need of exclusive institutional support on the issue of training than it is in need of an industry policing regime.

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49 Construction Training Australia, op. cit., p.67

Chapter 8

ILO Conventions and the BCII Bill

> Australia is a signatory to the International Labour Organisation's conventions, which provide for freedom—not just freedom of association—to collectively bargain. What you are alluding to is the attempt to criminalise normal bargaining activities, to effectively outlaw things that are associated with fundamental international legal rights—the law, in other words... This law, if it is not rejected, will actually criminalise working people's rights by any definition of international law, and that is just unheard of in a democracy.[1]

8.1 The committee's consideration of the Building and Construction Industry Improvement Bill in the light of International Labour Organisation (ILO) Conventions would normally be seen to be an academic exercise. However, provisions of the *Workplace Relations Act 1996* and several amendment bills introduced subsequently, have been found to contravene fundamental ILO Conventions in regard to freedom of association and the right to collective bargaining. Provisions of the bill now before the Senate are flawed in the same way. The BCII Bill goes even further in singling out a particular category of employees who will enjoy fewer rights than those employed in other industries, particularly in regard to their rights to bargain collectively for improvements to wages and conditions. This is the basic right proclaimed in the industrial laws of all OECD counties and western democracies.

8.2 The right to collective bargaining is a benchmark right which is recognised by ILO Conventions. There is some irony in the Government's claims to be restoring respect for the law through the implementation of the BCII Bill in view of the disregard it has for ILO Conventions, which form the basis of our national industrial laws. While the conventions are not binding on signatories to the ILO, it should not be expected that a country with Australia's tradition of support for the ILO should suddenly disregard them.

Background to the ILO

8.3 The ILO was established in 1919 by the League of Nations. In the aftermath of the First World War, there was a widely held view that the war had been caused by commercial rivalry between the leading powers. There appeared to be a clear correlation between the preservation of peace and improvements in employment conditions and social progress.

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1 Ms Sharan Burrows, *Hansard*, Canberra, 11 December, p.96

8.4 Principles established at this time sought to define rights of association, standards of living, wages and conditions along with the abolition of child labour in all countries. These principles were reconfirmed in 1944 with the Declaration of Philadelphia, which became an annex to the final constitution of the ILO.

Tripartite participation

8.5 As indicated by evidence referred to in other chapters of this report, the Government's long-standing aversion to tripartite arrangements is hardening. It is turning towards a unilateral approach, of which the BCII Bill is an example. Much of the evidence provided to the committee in relation to the BCII Bill (and in regard to several WR Amendment Bills dealt with recently by the Legislation Committee) raised concerns about the diminution of the tripartite process. This leads to shifts in bargaining power in favour of one principal stakeholder in the employment relationship which will lead to poor policy outcomes.[2] The ACTU reported its attempt to persuade the Government that most aspects of its bill were not relevant to the future of the industry:

> None of it deals with the real issues of concern for the industry. We proposed an alternative process to Mr Abbott's some time ago... It basically emphasised a tripartite approach involving the employers, governments at state and national levels and the unions looking at some of the issues in the industry to come up with a coherent and intelligent way of tackling them.[3]

8.6 The Government is unlikely to be influenced by consideration of ILO principles, or by the fact that from its inception, the ILO has recognised that the tripartite involvement of government, employers and employees in labour relations is critical for economic and social progress, both internationally and nationally. This principle was enunciated in response to suppression of workers and organised labour, either by totalitarian governments or by laws of the kind that existed in the United States before the New Deal. There was a crucial recognition of the unique roles that each of these participants played in achieving global economic growth and improved standards of living. This was recognised in the Philadelphia Declaration which states, as a core principle:

> the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status

2 Submission No.17, ACTU, Recommendation 1, para.218, 241, 244; Submission No.26, Australian States and Territories: QLD Government, p.56, paras.1-3; Submission No.26, Australian States and Territories: WA Government, paras.26-29 & paras.106-107, Submission No.27, CEPU, paras.10.1.9, 10.2.4, 10.5.1, 10.7.1; Submission No.37, CFMEU, Conclusion; Submission No.38, CPSU, para.15, Submission No.57, Victorian Trades Hall Council, Recommendation 1

3 Ms Sharan Burrows, *Hansard*, Canberra, 11 December 2003, p.83

> with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.[4]

8.7 Accordingly, when the ILO charter was revised in 1944 it was given a constitution for the General Conference and Governing Body that balanced representation between government, employer and employees, as set out in Article 3 and 7,[5] and which is reaffirmed through the national consultation processes established in convention 144, Articles 2 and 3.[6] This principle is further elaborated on through Recommendation 113:

> Measures appropriate to national conditions should be taken to promote effective consultation and co-operation at the industrial and national levels between public authorities and employers' and workers' organisations, as well as between these organisations... .Such consultation and co-operation should have the general objective of promoting mutual understanding and good relations between public authorities and employers' and workers' organisations ... with a view to developing the economy as a whole or individual branches thereof, improving conditions of work and raising standards of living.[7]

8.8 The objective of developing mutual understanding and good relationships is fundamental for the establishment of an efficient and productive construction industry. Evidence was provided to the committee on the benefit of industrial relations models that supported partnership between tripartite industry participants to achieve high performance in the industry.[8] As the joint submission from the states and territories stated:

> a cooperative and collaborative approach to the industry provides an appropriate basis for reforming the industry. The approach in the Bill does not address the needs of the building and construction industry nor does it address the need for culture change in the industry. Instead the confrontationist model adopted will only serve to entrench negative practices.[9]

8.9 The committee majority echoes the views overwhelmingly expressed by industrial relations practitioners that the bill lacks a balance in its approach to industrial relations. Neither has nearly every Workplace Relations Amendment Bill introduced following the passage of the 1996 Act. The Government is unlikely to be

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4 Philadelphia Declaration Principle I (d)

5 Articles 3 & 7. *The ... General Conference ... shall be composed of four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members. The Governing Body shall consist of 28 representing governments, 14 representing the employers, and 14 representing the workers.*

6 ILO Convention 144

7 ILO Recommendation 113

8 Submission No.26, op. cit., pp.13-14, paras.22-25

9 Submission No.26, op. cit., p.14, para.25

moved by calls for a tripartite approach to industrial relations, all the more so if this is ILO policy. For the record, the Government will concede that unions have a legitimate role in establishing appropriate working conditions for the industry, particularly in relation to occupational health and safety, and workers' entitlements.[10] Off the record, the Government is unlikely to be turned from its goal of removing union influence from workplace agreement negotiation processes. The committee majority urges the Government to re-establish consultative processes with all participants in the industry to ensure their acceptance and involvement in any changes to laws. It does so in the knowledge that this process is the only way of achieving lasting productivity improvements. As the International Centre for Trade Union Rights (ICTUR) submitted in oral evidence to the committee:

> At the end of the day these conventions seek to balance competing interests and competing rights. In my view they generally achieve that. They achieve it through a very longwinded process involving all the relevant interest groups coming to a compromise on the issue. That is why we emphasise that these are standards that are not partisan in any particular direction. They have been the subject of rigorous scrutiny from all interested parties.[11]

Enforcing the conventions

8.10 Article 19 of the ILO Constitution sets out the obligations of members to enact domestic law in line with the conventions that have been adopted. Commonwealth and state parliaments have traditionally considered industrial relations legislation in the light of ILO conventions. The main process by which the ILO monitors compliance with its conventions is through the review of annual reports by governments to the International Labour Office in conformity with Article 22 of the Constitution.[12] Such reports are initially reviewed by a Committee of Experts, and, if they find that the conventions are not being fully complied with, the Committee addresses a comment, known as an 'observation', to the government and requests that amendments be made to the legislation. Observations are generally used in more serious or long-standing cases of failure to fulfil obligations.[13]

8.11 The ILO review process does not extend to draft legislation or to bills, and it has not been the usual practice of the Government to invite comment from the ILO on draft legislation.[14] DEWR provided internal advice that the legislation complies with

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10 Mr Chris Maxwell, *Hansard*, Melbourne, 21 May 2004, pp.23-24; Submission No.13, HIA, p.15

11 Mr Mordy Bromberg, *Hansard*, Melbourne, 19 May 2004, p.54

12 ILO Constitution Article 22 *'Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.*

13 ILO website *Handbook of procedures relating to international labour Conventions and Recommendations - . Foot note 56<http://www.ilo.org/public/english/standards/norm/sources/handbook/hb7.htm>*

14 Submission No.21, Australian Government Agencies, p.28

Australia's obligations under ILO conventions. The committee notes that such internal advice as the Government believes it needs is easily obtained and will always approve the policy purposes of the Government. This applies almost equally to external advice as well, as Governments 'shop around' to find justification from 'independent' consultancies.

8.12 The Government has provided evidence that there is a 'continuing dialogue' with the ILO in relation to WRA legislation. However, the committee has been advised that dialogue is an inaccurate description of the communication that the Government has with the ILO: that in fact the ILO has used the strongest mechanisms it has, in the form of observations, to admonish the Government over its failure to draft legislation supporting the implementation of ILO conventions. The most recent report from the Australian Government resulted in the following observations in relation to the Workplace Relations Act which are likely to be applied to the provisions of the BCII bill:

> 'Workers' organizations should be able to take industrial action in support of multi-employer agreements; providing in legislation that workers cannot take action in support of a claim for strike pay is not compatible with the Convention;
>
> Prohibiting industrial action that is threatening to cause significant damage to the economy goes beyond the definition of essential services in the strict sense of the term.… The Committee requests once again the Government to amend the provisions of the Act, to bring it into conformity with the Convention.
>
> The Committee recalls once again that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is lawful.[15]

8.13 It would be surprising if similar comments are not made about the BCII Bill if it becomes law. The committee notes that the ILO, unlike the WTO, does not have powers to compel countries to comply with its rulings.[16] The Government makes only an acknowledgement of receipt of observations. The communications do not attract public attention. There are no sanctions to be feared by the Government in Australian courts, or in international courts and tribunals. As the committee was told:

> The history of challenging domestic law on the basis of international instruments is not altogether a happy one. Clearly much of the bill would infringe the international instruments to which Australia is a party.[17]

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15 CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Australia (ratification: 1973) Published: 2003

16 Ms Stephanie Mayman, *Hansard*, Perth, 16 March 2004, p.75

17 Mr Marcus Clayton, *Hansard*, Melbourne, 19 May 2004, p.105

ILO views on pattern bargaining

8.14 The provisions in the BCII Bill prohibiting pattern bargaining are contrary to ILO conventions. The ILO has recognised the right of workers and employers to enter into collective bargaining arrangements through Philadelphia Declaration III (e), which provides for:

> The effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures.

8.15 This principle has been further developed through Convention 98 which supports the right of collective bargaining:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.[18]

8.16 Freedom of association and the right of collective bargaining are 'core' labour standards that form a subset of human rights defined in the International Bill of Human Rights.[19] Freedom of association and the right to collectively organise are one of eight fundamental conventions that:

> are a precondition for all the others in that they provide for the necessary implements to strive freely for the improvement of individual and collective conditions of work.[20]

8.17 The BCII Bill would restrict the rights of employers and employees in the construction industry to establish appropriate agreements by democratically elected officials which meet the needs of all industry participants.[21] The committee received advice from a range of submissions and witnesses about the likely observations that the ILO would issue in relation to breaches of Conventions which support the right of employees to collectively bargain.[22]

> However, what I would say is that those ILO conventions assert, as part of international law, that employees and their representatives have the right to

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18 Convention 98, Article 4

19 Submission No.77, ICTUR, Section 1.2 (b)

20 International Labour Standards <http://www.ilo.org/public/english/standards/norm/whatare/fundam/index.htm>

21 Submission No.36, CEPU Plumbers Division, p.12, section 14

22 Submission No.26, Australian States and Territories: NSW Government, para.24, Submission No.57, Victorian Trades Hall Council, paras.45-52; Submission No. 77, ICTUR, Exec Summary para.1; Mr Doug Cameron, *Hansard*, Sydney, 3 February 2004, p.118; Ms Stephanie Mayman, *Hansard*, Perth, 16 March 2004, pp.65, 75; Mr John Sutton, *Hansard*, Sydney, 2 February 2004, p.60; Mr David Chin, *Hansard*, Melbourne, 19 May 2004, p.45

> engage in collective bargaining. This bill, which I think stultifies collective bargaining, certainly has the capacity to go against the spirit of these conventions.[23]

8.18 The committee sees a serious weakness in the proposed legislation for the construction industry in that it should provide a framework for the equal participation in industrial relations by all participants in the industry in line with international best practice. Instead, it provides for heavy penalties for misconduct for employees, while exempting employers from the rigours of the law. This is one of many instances of such discrimination in the bill.[24] It makes for very bad legislation and, with these provisions included, is unworthy of Parliament's consideration:

> My concern with this legislation is that it really deals much more with trade union conduct and employee conduct in an asymmetrical manner than it deals with employer conduct. The fact that the building commission does not have any powers, as I read them, over wages and employee entitlements is an instance of this. The fact that all industrial action is deemed unlawful is another instance of this. I am simply saying that good legislation has to be balanced, has to be workable and has to have discretions reposed in bodies so that they can act in an independent manner.[25]

8.19 The committee majority notes that the Government and those who support its legislation take a narrow interpretation of the requirements of the ILO Conventions, claiming that measures to restrict collective bargaining to individual workplaces do not contravene the Convention:

> HIA further submits that the requirements of Convention 98 with respect to collective bargaining have in no way been contravened. Collective bargaining is still possible but it will be rightly based on the premise of individual business units. Article 4 of this Convention states that "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements." How can widespread enforcement of pattern bargaining by the CFMEU be seen as in any sense 'voluntary'? HIA submits that the coercion into signing a pattern bargained arrangement in itself contravenes this Article.[26]

8.20 What this fails to acknowledge is that ILO Conventions are not written as black letter law is written: as clauses to be interpreted by courts or circumvented through legal argument. They cannot be 'written down' or subject to narrow interpretation. They can, however, be violated through disregard of the principles they embody, and

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23 Professor Ronald McCallum, *Hansard*, Sydney, 2 February 2004, p.2

24 Mr John Sutton, *Hansard*, Sydney, 2 February 2004, p.73; Professor Ronald McCallum, *Hansard*, Sydney, 2 February 2004, pp.5-6; Submission No.37, CFMEU, p.21, para. 4.1

25 Professor Ronald McCallum, *Hansard*, Sydney, 2 February 2004, p.11

26 Submission No.13, HIA, p.13

this is what the Government has done in this legislation. Nor can the argument about the alleged CFMEU enforcement of pattern bargaining be taken as justification for disregarding ILO conventions, even if this charge was valid.

8.21 The ILO does not force either employers or employees to establish a particular type of agreement. It establishes the principal that such agreements should be determined by the parties affected, who should be free to establish how they will meet their bargaining objectives.[27]

> It is one of the reasons why the conventions are deliberately not prescriptive, because the conventions take the view that, as far as possible, matters should be left to the bargaining parties as to what is contained in whatever agreement eventuates from that process.[28]

8.22 The committee majority believes that the Government should revise the legislation to restore to the AIRC the powers which it has lost in recent years, to allow arbitration and conciliation between employers and employees. The committee is concerned that the introduction of a third party to the bargaining process to enforce a bargaining process that does not suit the needs of employers and employees will force inefficient and costly processes on the industry.[29]

Freedom of Association

8.23 The committee notes the arguments of the Government and industry employer groups that the WRA and the proposed building and construction bill contain legal protection for freedom of association in line with the intent of the ILO clauses, but notes also that this is a curious inversion of the normal meaning of the term. The committee has criticised elsewhere, in its legislation scrutiny role, the semantic ploys and rhetorical devices used by the Government to put misleading 'spin' on legislative intentions, as in the short titles given to bills. These signal such objectives as to provide more jobs and better pay, and to 'protect' Victorian workers. Such outcomes cannot be assured, and are sometimes intended to disguise the real objectives of the bill. In the same spirit, the Government provides in this legislation for protection of workers who wish not to be represented by unions in their pursuit of better pay and working conditions. It would be more accurate to describe this as 'freedom of disassociation', which is covered by current workplace relations legislation, and does not need to be reissued through the BCII Bill:

> I think the debate internationally is inconclusive as to whether there is a freedom to not associate. The Workplace Relations Act already deals, through section 298, with the kinds of impediments you speak of. Coercing someone to join a union is already a breach of section 298.[30]

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27 Submission No.77, ICTUR, Section 2.2

28 Mr Tony Lawrence, *Hansard*, Melbourne, 19 May 2004, p.55

29 Professor Ronald McCallum, *Hansard*, Sydney, 2 February 2004, pp.6-8

30 Mr Mordy Bromberg, *Hansard*, Melbourne 19 May 2004, p.52

8.24 The committee majority has no criticism to make of section 298. However, not everyone is assisted by. The committee heard from witnesses representing the trades sub-contractors who are members of the Christian Brethren Fellowship. The beliefs of this religious group allow them no association with organisations beyond those who live by their creed. While the freedom not to associate may appear to be tailor made to suit this sect, or others like them, a difficulty may arise in their relations with other contractors because of their opposition to EBAs. In these circumstances lead project contractors may come to the conclusion that their participation in a project may require more delicate negotiation than they have time to make. The result would be that some minority groups may be excluded from sections of the industry by their own rules, and in the case of builders may be advised to stay with the bungalow and town house market.

8.25 Such cases would be rare. The committee majority takes the view that it is the right to collective bargaining which is most under threat in this legislation. The committee sees particular dangers in this provision for the reason that it may be used by unscrupulous employers to strenuously discourage union membership on the proposed grounds, even though this may be against the law.

8.26 The committee believes that, far from affirming freedom of association, it is more likely that it may be compromised by enactment of this legislation. This is particularly in relation to Article two of convention 87 which states that workers have the right to organise and adopt rules for their organisation. This states:

> Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.
>
> Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.[31]

8.27 The committee is critical of the BCII provisions that will prevent employees from taking lawful industrial action because of the highly complicated processes that must be established for bargaining and undertaking secret ballots. The bill places many restrictions on the processes that workers can use to organise themselves. Secret ballot provisions are unduly complex and are likely to prevent ordinary workers, union officials or indeed employers from using such provisions, and increase the administrative burdens for employers, unions and individual employees. It is expected that the bill will result in both employers and employees requiring the support of specialists such as industrial lawyers, adding considerably to their costs and time in pursuing the usual bargaining process. The effect of such complicated provisions, rather then encouraging the active participation of individual employers and

31 C87 Freedom of Association and Protection of the Right to Organise Convention, 1948, Part 1, Article 2 and Article 3.

employees in the bargaining process, will require the active participation of lawyers in all future industrial relations activities. [32]

> The problem is the hoops that would need to be jumped through... Take the situation in Victoria. I think there are about 3,000 or 4,000 individual enterprise agreements in Victoria. If this regime were imposed, I think it would be practically impossible for the union and the workers of each of those employers to go through the process here in order to reach protected action. If they took industrial action, it would not be protected and therefore would be unlawful.[33]

8.28 The committee is also concerned that employers have sought to select which employee representatives they will negotiate with.[34] It recommends that the legislation is revised to enforce the rights of employees to select their representatives for the purposes of negotiating agreements with employer representatives. The Government should take into account the 1998 ILO CEACR Observation which states:

> The Committee requests clarification regarding section 170LL of the Act which appears to permit an employer of a new business to choose which organisation to negotiate with prior to employing any persons. The Committee recalls that the choice of bargaining agent should be made by the workers themselves; section 170LL appears to allow the employer to preselect the bargaining partner on behalf of the potential employees, regardless of whether or not that union will ultimately be truly representative of the workers finally employed.[35]

8.29 The purpose of current provisions is to exclude or discourage union participation from negotiations for enterprise bargaining agreements (EBAs). The committee majority is of the view that the Government regards union involvement in EBA negotiations, even when conducted on the worksite and with no apparent connection with other similar enterprises, as a variation of pattern bargaining. The Government would take the view that union workplace organisers have an incorrigible tendency to 'exchange notes' across worksites. Its preferred position, which it would find impossible to legislate for, would probably be to exclude union organisers or representatives from negotiating parties.

8.30 The issue of freedom of association has also arisen in relation to negotiations with the United States of America over the proposed free trade agreement. There has been some frank criticism of the attitude and performance of the Australian Government by the United States Labor Advisory Committee (LAC) in its report to

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32 Submission No.77, ICTUR, Sections 3.4 & 3.5; Mr Chris Maxwell, *Hansard*, Melbourne, 21 May 2004, p.25; Mr Lachlan Riches, *Hansard,* Sydney, 3 February 2004, pp.72-73

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

34 Submission No.107, CFMEUWA, pp.15-18

35 CEACR: Individual Observation concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia (ratification: 1973) Published: 1998, para.9

the trade representative of the President, who is responsible for negotiating the free trade agreement on behalf of the United States Government.

8.31 The Labor Advisory Committee has reported that Australia's laws contain a number of onerous restrictions on workers' right to freedom of association and their right to organise and bargain collectively. It states that many of these restrictions were created by the *Workplace Relations Act 1996*, which constituted a major restructuring of Australia's labor laws and has been criticised repeatedly by the ILO, the US State Department, and the International Confederation of Free Trade Unions (ICFTU). The report continues:

> The fairly recent enactment of the WRA shows that problems with workers' rights in Australia are not the result of insufficient enforcement resources or the inheritance of outdated labor legislation from another era – they are the result of a conscious and recent decision in the Australian government to restrict the fundamental rights of workers.[36]

8.32 The Labor Advisory Committee reported with disapproval that the Workplace Relations Act allows employers to choose a union to bargain with before it has even employed any workers, through 'greenfield agreements'; that these agreements can last for up to three years, and effectively deny workers the right to choose their own bargaining representative for that length of time. The ILO had twice criticised this provision and requested that the Australian government review and amend the Act to eliminate this problem. According to the ICFTU, the WRA also makes it much harder for unions to get into workplaces to organise workers, further depriving workers of their ability to freely join the union of their choosing.[37] These are observations of industrial relations experts from the United States, a country regarded as being at the leading edge of the free market in labour. Australia, which for many years – indeed for most of the post-war era – has a strong record of support for the ILO and the rights of trade unions, is now criticised for being backward by a country with a chequered labour relations history. The irony of this is not lost on the committee.

Right of Entry

8.33 The Government has stated that the right of entry provisions are in line with ILO conventions, particularly Convention 135,[38] and that employers have the right to conduct their business without undue interference or harassment.[39] Freedom of Association principles of the ILO include the right for employees to communicate amongst themselves and to engage them in the process of industrial relations both at a local and national level.[40]

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36 Mr George Becker, *Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC)*, March 12, 2004, p.6

37 ibid.

38 Submission No.21, Australian Government Agencies, p.30, para.173

39 BCII Explanatory Memorandum, p.15, para.68

40 Submission No.77, ICTUR Section 2.5

8.34 The committee accepts that directives about how and when employee representatives can meet members or to recruit members will restrict the rights of union officials. Restrictions on their rights to communicate with members, and to investigate issues on their behalf, is contrary to Article 3 of ILO Convention No. 98, and is likely to result in further observations by the ILO.[41] The committee supports the legitimate rights of unions to maintain these relationships.[42] The new restrictions on right of entry place too much weight on the rights of employers and give too little protection to employees' representatives to exercise their proper functions. These are to monitor the implementation of agreements that they are party to, including the payment of employee entitlements.[43] This is especially true for the more vulnerable members of the workforce including apprentices who, while they are not often union members, often request the assistance of unions when issues of OH&S or employee entitlements arise.[44]

> There are clear similarities between the right of entry provisions. These effectively prevent a union official from going about their lawful duty, which is to go onto work sites without causing undue disruption to the work and to recruit—which means to encourage workers to join unions. That is the rightful, recognised, international principle...We as international participants in the ILO recognise that principle, but we seem to consider in our laws or in the proposed bill that that will be removed.[45]

8.35 The proposed use of trespass provisions as a deterrent to union representation on worksites is an iniquitous abuse of the legislative process. The committee notes the MBA's frustration at a magistrate refusing to treat right of entry dispute as a criminal matter.[46] It is clearly not a criminal matter, and this assumption underlines the danger of injecting into industrial law the notions underlying both commercial and criminal law. The failure of the Cole royal commission, and the drafters of the BCII Bill, to recognise that industrial law involves the recognition of an industrial contest and the need to negotiate agreements, is at the bottom of impatient claims for the application of black-letter law. The committee notes advice it received from a legal practitioner at its Perth hearings:

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41 ibid., Executive Summary para.5

42 Submission No.17, ACTU, p.18, para.111; Submission No.29,Labor Council of NSW, p.2, para.6; Submission No.37, CFMEU, p.84; Submission No.40, CFMEU Mining and Energy Division, p.7; Submission No.57, Victorian Trades Hall Council, p.18, para.81; Submission No.62, Queensland Council of Unions p.4, paras.27-29

43 Submission No 26, Australian States and Territories: WA Government, p.75, para.65; Submission No.37, CFMEU, pp.80-81; Submission No.53, Action Construction, p.1; Submission No.55, Attachment; Submission No.72, CEPU Plumbing Division Queensland, p.11, paras.50-53; Submission No.85, CFMEUQ, p.6

44 Submission No.55A, CFMEU; Submission No.99, CEPU Engineering and Electrical Division WA, pp.3-4

45 Ms Stephanie Mayman, *Hansard*, Perth, 16 March 2004, p.76

46 Submission 12a, MBA, p.22, para.9.5.2

> .... under the federal and state laws there are rights of entry. If those rules are followed then the right of entry is a lawful right of entry; if they are not it is an unlawful right of entry. Technically, I suppose that in some cases it is a trespass, but in most cases it is simply a breach of the right of entry provisions...I thought that the right of entry provisions in the federal act and also the right of entry provisions in the Western Australian act had been designed to get away from the use of police act and Crimes Act provisions. They have been designed to return issues of right of entry to the industrial arena, as opposed to the criminal arena. That has always been my understanding.[47]

8.36 Of serious concern to the committee majority is the proposals by industry employer groups to ban right of entry to union officials who are seeking to investigate occupational health and safety concerns.[48] The committee accepts that there are few resources available to the industry to police occupational health and safety in the industry and such proposals are likely to increase the numbers of injuries and deaths on construction sites which are already one of the most dangerous work places in Australia. Further discussion on occupational health and safety is to be found in chapter 6.[49]

8.37 The complexity of current right of entry provisions in the Workplace Relations Act and right of entry laws enacted under state legislation are sufficient to keep legal minds occupied. The right of entry provisions under the BCII Bill will increase uncertainty and the likelihood of increased industrial disruption to the industry.[50] The committee majority believes that a uniform approach to right of entry for all workers, as currently provided for in the Workplace Relations Act, is more likely to be acceptable than a law which places intolerable restrictions on the employees in a particular industry. Construction workers should have access to the same rights and protections that are available to workers in all other sectors of the economy.[51]

8.38 The committee notes that there are powers available to the AIRC to cancel right of entry permits when an abuse of the system has occurred.[52] The committee majority believes there should be a review into how the AIRC enforces the provisions

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47 Mr Alan Drake-Brockman, *Hansard*, Perth 16 March, p.91

48 Submission No.13, HIA, p.12; Submission No.14, ACCI, p.3, para.10, p.42, para.163, Submission No.33b, WACCI, pp7-8

49 Submission No. 27, CEPU, p.36, para.7.8.3; Submission No.72, CEPU Plumbing Division Queensland, p.11, para.54, p.14, para.68; Submission No.99, CEPU Engineering and Electrical Division, WA, p.5, para.18, p.6, paras.20-31

50 Submission No.21, Australian Government Agencies, p.24, para.130; Submission No.14, ACCI, p.17, para.51; Submission No.26, Australian States and Territories, p.18, para.44; Australian States and Territories: WA Government p.67, para.19

51 Submission No.21, Australian Government Agencies, p.24, paras.130 & 132, Submission No.67, Victorian Council for Civil Liberties, p.6, para.21(d); Submission No.69, Slater and Gordon, p.6, para.7

52 Submission No.26, Australian States and Territories, p.41, para.152; Submission No.37, CFMEU, p.83; Submission No.82, Mr John O'Connor, pp.13-14

of current industrial laws to address concerns raised by the Master Builders Association and to ensure a balanced right of entry process that encourages the resolution of disputes.[53] This manner of collaborative management of a problem is preferable to introducing specific restrictions on some unions in contravention of ILO principles and conventions.

The right to strike

8.39 The committee has been provided with evidence on rights to strike established through the International Covenant for Economic, Social and Cultural Rights and in ILO conventions.[54] The committee accepts advice from the ICTUR that:

> the right to strike ought to be respected. The right to strike is not an unlimited right. The right to strike is limited to action taken in furtherance of industrial claims: for instance, it is limited to action, by the Workplace Relations Act, which does not involve damage to property or defamation. There are a number of other such limitations that I think you will find in section 170MT of the Workplace Relations Act.[55]

8.40 As discussed above, the unduly complex requirements for prestrike ballots will either prevent industrial action, or they will prolong those which occur. It is unclear from the legislation how employees would return to work after agreeing to a strike in accordance with the secret ballot provisions. In particular, it is unclear from the proposed legislation what processes could be used to finalise a dispute once a prestrike ballot has occurred, because the normal relationships and negotiation processes between employer and employee representatives would no longer be available for fast resolution of a dispute.[56]

> ...I would not support all of the components of the legislation. One thing that sticks out to me, and I have been doing this job for 30 years, is that having a secret ballot is absolutely insane. What happens if they actually vote to go on strike? How the hell do you get them back?[57]

8.41 The ILO view is that it is up to employees to arrange how they will organise themselves, which has been discussed above. The committee notes that employees who have any concerns over democratic processes within unions in relation to strike action have access to section 136 under the Workplace Relations Act. The use of strike action can be seen as the exercise of economic power by both unions and employers through a bargaining process.

> Generally our view is that if you are talking about economic coercion by the exercise of a right to strike then that is legitimate. It is accepted as

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53 Submission No.26, Australian States and Territories: WA Government, p.79, para.85; Submission No.90, QMBA, p.14, para.48; Submission No.106, MBAWA, p.8

54 Mr Mark Gibian, *Hansard*, Melbourne, 19 May 2004, p.45

55 Mr Mordy Bromberg, *Hansard*, Melbourne, 19 May 2004, p.50

56 Ms Stephanie Mayman, *Hansard,* Perth, 16 March 2004, p.76

57 Mr Glen Simpson, *Hansard*, Brisbane, 24 February 2004, p.27

> legitimate under international law. That is collective bargaining. That is what it is about. An employer has the right to impose economic coercion through lockouts and the employees collectively can strike as a means of imposing economic coercion on employers, as long as that is done as part of a bargaining process for reaching collective agreements.[58]

8.42 The committee majority accepts this view. However, it understands the Government's tendency to be captive to obsolete rhetoric. Strike ballots were supposed to be the answer to the once prevailing view that real workers would happily stay at work if it was not for the militant union 'bosses'. Such a provision as this was intended as a curb on union 'bosses'. In fact, as union leaders admit, much of their time is spent dampening the enthusiasm of their members for industrial action. This provision should be resisted by all parties interested in maintaining industrial harmony. It presents serious potential problems for both employers and unions.

Rights against self incrimination

8.43 A fundamental tenet of common law is the right of an individual not to incriminate themselves. While the government has provided plausible reasons for overriding this principal of law in the case of anti-terrorism legislation, the committee has not been provided with evidence that workers in the building and construction industry represent a threat comparable to that of terrorist organisations. The removal of their basic legal right not to incriminate themselves is another characteristic of a law intended to discriminate against a particular segment of the workforce. The committee heard evidence from legal practitioners in its Melbourne hearings on this issue, the first from an industrial lawyer, and the second from a representative of the Victorian Council for Civil Liberties:

> It is...repressive to set up an industrial relations industry-specific body with coercive powers to compel the production of documents and compel answers to questions on oath without the privilege against self-incrimination. Those powers are normally reserved for terrorists and organised crime and suchlike.[59]

> In relation to the privilege against self-incrimination ...we would say that is an indefensible departure from basic human rights. We have had in our criminal justice system that privilege—that is, I can refuse to answer a question if it will expose me to prosecution or punishment...is a fundamental tenet of our system..... there are limited areas where you might justify abrogating that privilege, but this is not one of them. There is nothing very special or exceptional about the alleged criminal activity in these areas.[60]

8.44 The committee's strong views on the request for the Building Industry Taskforce to be given powers similar to statutory bodies like the ACCC, ASIC and the

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58 Mr Mordy Bromberg, op. cit., p.51

59 Mr Marcus Clayton, *Hansard*, Melbourne, 19 May 2004, p.101

60 Mr Chris Maxwell, *Hansard*, Melbourne, 21 May 2004, pp.23-24

ATO is expressed in chapter 3. Suffice to say here that it is appropriate that regulatory bodies such as the police, ATO and DIMIA continue to investigate and prosecute any infringement of Australia's taxation and criminal laws as they affect participants in the construction industry. There are sufficient powers available to these regulators, including the right to gather evidence, and it is not appropriate to provide such powers to compel individuals to provide self-incriminating information.[61]

8.45 The powers sought for the ABC Commissioner in relation to information gathering should be more clearly defined to ensure that the rights of the individual are clearly established. Only in this way can the Senate ensure that workers in the industry do not have lesser legal rights in comparison with the rest of the workplace.[62]

61 Submission No.36, CEPU, pp.16-17; Mr Chris Maxwell, ibid., p.32

62 Mr Chris Maxwell, ibid.

Government Senators' Report

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

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

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

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

Challenging Labor conservatism

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

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

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

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

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

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

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

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

The Cole Royal Commission

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

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

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

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

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

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

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

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

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

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

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

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

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

Lawlessness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The importance of the Building and Construction Industry Improvement Bill 2003

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

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

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

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

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

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

The Queensland Master Builders association made very similar comments.

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

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

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

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

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

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

Opposition to the bill from trade unions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conduct of the inquiry

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

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

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

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

12 ibid., p.17

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

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

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

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

Investment and productivity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The BCII Bill and ILO Conventions

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

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

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

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

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

Recommendation

Government senators urge the Senate to pass the BCII Bill.

Senator David Johnston

17 Submission No.13, HIA, page 13

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]

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.

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

21 ibid. p.18

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]

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:

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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

> 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 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:

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26 ECA, Submission No.15, p.9

27 ibid. p.10

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

> 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 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:

29 ibid. p.46

- 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 $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.

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

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

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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

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:

- 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.

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;

Recommendation 16 – Unitary IR system

- Establish a national unitary industrial relations system

Senator Andrew Murray

Appendix 1

List of Submissions

No:	Submission from:
1	Australian Industry Group
2	Enviro/Electrics, Vic (hard copy only)
3	Victorian Building Industry Group of Unions, VIC
4	Concept Engineering (Aust) Pty Ltd, VIC
5	Dr Phil Toner (hard copy only)
6	The Police Association Victoria (hard copy only)
7	Maxim Electrical Services, VIC
8	Mr Robert Merriman (hard copy only)
9	Construction & Building Industry Superannuation Fund, VIC (appendices 1 & 2 hard copy only)
10	Queensland Nurses' Union (hard copy only)
11	Communication Workers' Union (hard copy only)
12	Master Builders Australia
12A	Master Builders Australia
13	Housing Industry Association Limited
14	Australian Chamber of Commerce and Industry
15	Electrical and Communications Association, QLD
16	Maritime Union of Australia
17	ACTU
18	Australian Nursing Federation, ACT
19	CEPU, Electrical Division, QLD branch
20	United Firefighters Union of Victoria

21	Australian Government Agencies (DEWR)
22	Department of Housing and Works (hard copy only)
23	Transport Workers Union of Australia
24	Australian Liquor, Hospitality and Miscellaneous Workers Union (hard copy only)
25	The Development and Environmental Professionals' Association (hard copy only)
26	The Hon Rob Hulls MP – on behalf of all Australian States and Territories
27	CEPU
28	The United Trades & Labor Council of South Australia (hard copy only)
29	Labor Council of New South Wales
30	Australian Mines and Metals Association
31	Independent Education Union of Australia
32	Australian Rail, Tram and Bus Industry Union (hard copy only)
33	Chamber of Commerce and Industry of WA
34	Building Union Superannuation Scheme, QLD
35	Air Conditioning and Mechanical Contractors' Association of Victoria Pty Ltd
36	CEPU (Plumbing Division) (attachments hard copy only)
37	Construction, Forestry, Mining and Energy Union
38	The Community and Public Service Sector Union, PSU Group
39	National Electrical and Communication Association
40	Construction, Forestry, Mining and Energy Union, Mining and Energy Division
41	Australian Manufacturing Workers' Union (hard copy only)
42	Multiplex Limited (hard copy only)

43	Police Federation of Australia
44	The Rail Tram & Bus Union – Victorian branch
45	Society of Labor Lawyers, VIC
46	Ryan Carlisle Thomas Lawyers (hard copy only)
47	Construction Industry Training Board
48	Australian Liquor Hospitality and Miscellaneous Workers Union – Queensland branch (hard copy only)
49	Higgins Coatings Pty Ltd
50	Construction Training Queensland
51	Master Plumbers & Mechanical Services Association of Australia
52	Queensland Teachers' Union
53	Action Construction Services Pty Ltd
54	CFMEU Construction & General Division, Clay & Ceramics Industry Divisional branch
55	CFMEU Construction & General Division, NSW divisional branch
55A	CFMEU Construction & General Division, NSW divisional branch]
56	Linddales Personnel (hard copy only)
57	Victorian Trades Hall Council
58	Mr Richard Whitehead, NSW
59	Walsos Pty Ltd
60	Professor Ron McCallum, NSW
61	Australian Services Union – Victorian private sector branch
62	Queensland Council of Unions
63	Dr John Buchanan, NSW
64	Taylor and Scott Lawyers
65	North West Commercial Industries Pty Ltd, NSW
66	National Tertiary Education Industry Union

67	Liberty Victoria
68	Shamrock Civil Engineering Pty Ltd
69	Slater & Gordon Lawyers
70	Superior Walls and Ceilings (hard copy only)
71	Confidential
72	CEPU Plumbing division, Qld branch
73	QR Concrete, QLD
74	Sunland Constructions, QLD
75	Ms Robyn McGoldrick, NSW (hard copy only)
76	Mr Anthony Kele, QLD
77	International Centre for Trade Union Rights, NSW
78	Confidential
79	Walter Construction Group Ltd
80	CEPU Electrical Division & Electrical Trades Union – Qld branch
81	Mr Anthony Hampson, NSW (hard copy only)
82	Mr J.J O'Connor, WA
83	Construction Income Protection Queensland
84	Mr William Trohear, CFMEU – Qld branch
85	Ms Melissa Austin, CFMEU – Qld branch
86	Mr Mark Parsons, CFMEU – Qld branch
87	Mr Rudiger Kramer, CFMEU – Qld branch
88	CFMEU, Construction and General Division , NT branch (attachments hard copy only)
89	Gibbus Pty Ltd t/a Swift Form Formwork, Qld
90	Queensland Master Builders Association
91	The Independent Education Union of Australia, Qld

92	Southern Eastern Consolidated Fire Protection Pty Ltd (hard copy only)
93	Contrax Plumbing Pty Ltd, VIC
94	Barden Steeldeck Industries Pty Ltd, VIC
95	CEPU – Plumbers Division, WA
96	Collingwood Building Services Pty Ltd ,Vic (hard copy only)
97	Australian Institute of Building
98	Mr John Kobelke MLA – On behalf of the Western Australian Government (hard copy only)
99	CEPU, Engineering and Electrical division, WA
100	Friends of Pyrmont Point (hard copy only)
100A	Ms Jan Oakes, NSW
101	CFMEU, Construction and General division, SA branch
102	National Precast Concrete Association Australia
103	Employee Ombudsman
104	Building Industry Specialist Contractors Organisation of South Australia
105	Master Builders Association of South Australia
106	Master Builders Association of Western Australia
107	CFMEU, WA
108	Trades and Labour Council of Western Australia
109	Gadens Lawyers
110	Mr Braham Dabscheck
111	Structural Concrete Industries Pty Ltd
112	CEPU, Northern Territory
113	Masonry and Concrete
114	Professor Denny McGeorge & Professor Martin Loosemore

115	Property Council of Australia
116	APAC Precast Pty Ltd (hard copy only)
117	Civil Contractors Federation
117A	Civil Contractors Federation
118	Georgiou Group (hard copy only)
119	CEPU, Electrical Division, Southern States Branch
120	Australian Taxation Office (hard copy only)
121	CFMEU, Victorian branch (appendices hard copy only)
121A	Mr Dieter Berber, VIC
122	Master Builders Association of Victoria
123	CFMEU, Construction and General division FEDFA divisional branch
124	The Australian Workers' Union
125	CEPU, Southern States branch, electrical division

Appendix 2

Hearings and Witnesses

Canberra, Thursday, 11 December 2003

Australian Chamber of Commerce and Industry (ACCI)
Mr Peter Anderson, Director of Industrial Relations

Australian Industry Group (AIG)
Mr Jim Barrett, National General Manager, Construction
Mr Peter Nolan, Director Industrial Relations

National Occupational Health and Safety Commission
Mr Robin Stewart-Crompton, CEO

Master Builders Association of Australia
Mr Wilhelm Harnisch, Chief Executive Officer
Mr Richard Calver, National Director, Industrial Relations and Legal Counsel
Mr Brian Seidler, Executive Director, MBA NSW

Australian Council of Trade Unions
Ms Sharan Burrow, President
Mr Greg Combet, Secretary
Ms Linda Rubinstein, Research Officer

Department of Employment and Workplace Relations
Mr John Lloyd, Deputy Secretary (Workplace Relations)
Ms Barbara Bennett, Group Manager, Workplace Relations Implementation
Mr David Bohn, Assistant Secretary, Building Industry Legislation Team
Mr Rex Hoy, Group Manager, Workplace Relations Policy
Mr Steve Kibble, Assistant Secretary, Royal Commission Implementation Team
Ms Flora Carapellucci, Assistant Secretary, Industries Branch
Mr Derren Gillespie, Assistant Secretary, Royal Commission Implementation Team

Sydney, Monday, 2 February 2004

Professor Ronald McCallum

Labor Council of New South Wales
Mr John Robertson, Secretary
Mr Chris Christodoulou, Deputy Assistant Secretary

Dr John Buchanan

Construction, Forestry, Mining and Energy Union
Mr John Sutton, National Secretary
Mr David Noonan, National Assistant Secretary
Mr Trevor Melksham, Divisional Branch Secretary
Mr Tom Roberts, Senior Legal Officer

Sydney, Tuesday, 3 February 2004

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
Mr Peter Tighe, National Secretary
Mr Bernard Riordan, Secretary

Linddales Personnel
Mr Anthony Bleasdale, Director

Mr Richard Whitehead

Taylor and Scott, Lawyers
Mr Lachlan Riches, Senior Associate

Walsos Pty Ltd
Mr Terry Hough, Managing Director
Mr Chris White, President, Australian Sub-contractors Association
Mr Ian Fulford, Consultant

Australian Manufacturing Workers Union
Mr Doug Cameron, National Secretary
Mr Alister Kentish, National Research Officer

Brisbane, Tuesday, 24 February 2004

Housing Industry Association
Mr Glenn Simpson, Executive Director, Industrial Relations and Legal Services
Mr Ferdie Kroon, Assistant Director, Compliance
Mr John Futer, Executive Director, Occupational Health and Safety (National)

Building Union Superannuation Scheme QLD
Mr Paul Byrne, CEO

Construction Income Protection Queensland
Mr Bill Wallace**,** Company Secretary (former Director Membership Services, QMBA)

Building Employees Redundancy Trust (BERT Fund)
Mr William Perrett**,** Coordinator

CFMEU (Queensland Branch)

Mr Wallace Trohear, General Secretary
Ms Melissa Austin, Industrial Relations Research Officer
Mr Anthony Kele, Crane Driver
Mr Mark Parsons**,** Carpenter
Mr Rudiger Kramer, Carpenter, Plasterer

Queensland Council of Unions
Ms Grace Grace, General Secretary
Mr Mark Brady, Industrial Officer

CEPU, Queensland
Mr Dick Williams, General Secretary, Electrical Division
Mr Peter Ong, Organiser
Mr Jorgen Gullestrup, State Secretary, Plumbing Division

ECA (Electrical and Communications) QLD
Mr Paul Daly, Executive Manager, Compliance

Brisbane, Wednesday, 25 February 2004

Queensland Master Builders Association
Mr Graham Cuthbert, Executive Officer
Mr John Crittall, Director of Construction and Excavation

Walter Construction Group
Mr Greg Packer, Construction Manager

Hutchinson Builders
Mr Greg Quinn, Managing Director

Sunland Constructions
Mr John Tatler, Construction Manager

Construction Training Queensland CTQ
Mr Greg Shannon, General Manager

Australian Building and Construction Employees Association and Builders Labourers Federation QLD
Mr Greg Simcoe, State Secretary

North West Commercial Industries
Mr Peter Cavanagh, Director

Shamrock Civil Engineering
Mr Brendan Kealy, Director

Higgins Coatings Pty Ltd
Mr Chris Dennis, Queensland State Manager

QR Concrete
Mr Chris Jones, Managing Director

Superior Walls and Ceilings
Mr Paul Lathouras, Director

Perth, Tuesday, 16 March 2004

Gadens Lawyers
Mr Allan Drake-Brockman, Partner

Construction, Forestry, Mining and Energy Union ,WA branch
Mr Kevin Reynolds, Secretary
Mr Timothy Kucera, Industrial Officer
Ms Karen Scoble, Industrial Officer

Unions WA
Ms Stephanie Mayman, Secretary

CEPU
Mr Les Mclaughlan, Organiser

Mr John O'Connor

Perth, Wednesday, 17 March 2004

Master Builders Association of Western Australia
Mr Michael McLean, Executive Director
Mr Kimberley Richardson, Industrial Relations Manager

Chamber of Commerce and Industry of Western Australia
Mr Bruce Williams, Divisional Director, Employee Relations

Adelaide, 18 March 2004

Building Industry Specialist Contractors Organisation of South Australia
Mr Keith Bleechmore, Director

Construction Industry Training Board
Mr Stephen Larkins, Chief Executive Officer
Mr John O'Connor, Finance and Administration Manager
Ms Catherine Carn, Entry Level Training Manager

Office of the Employee Ombudsman
Mr Gary Collis, Employee Ombudsman

Australian Institute of Building
Mr Graham Fricker, International President and Past National President
Mr John Thomas, Chairman, National Building Professionals Register Committee and Past National President
Mr Leslie Thompson, Honorary Secretary, South Australian Chapter
Mr Donald Dalby, Director, D. and R. Dalby Pty Ltd

Construction, Forestry, Mining and Energy Union
Mr Martin O'Malley, Secretary
Mr Harold Ennis, Director, Construction Industry Training Centre

United Trades and Labor Council of South Australia
Ms Janet Giles, Secretary
Mr Graham Warren, VET Project Officer

Master Builders Association of South Australia Inc
Mr Robert Stewart, Chief Executive Officer
Mr Maurice Howard, Industrial Relations Manager

Northern Territory, Tuesday, 6 April 2004

Construction, Forestry, Mining and Energy Union
Mr David Noonan, Assistant National Secretary
Mr Joseph Gallagher, Organiser,

Communications, Electrical and Plumbing Union
Mr Alan Paton, Organiser, Electrical Division

Masonry and Concrete
Mr Vernon Cridland, Owner

Sydney, Wednesday, 7 April 2004

Professor Denny McGeorge

Professor Martin Loosemore

Associate Professor Braham Dabscheck

Construction, Forestry, Mining and Energy Union
Mr Andrew Ferguson, Secretary, New South Wales Branch
Mr David Glass, State Official, New South Wales Branch
Ms Keryn McWhinney, Senior Claims Officer, New South Wales Branch

Australian Expert Group in Industry Studies
Dr Phillip Toner, Senior Research Fellow, University of Western Sydney

Property Council of Australia
Mr Peter Verwer, Chief Executive

Melbourne, Wednesday, 19 May 2004

Victorian Trades Hall Council
Mr Brian Boyd, Senior Industrial Officer

Master Builders Association of Victoria
Mr Brian Welch, Executive Director
Ms Kim Attwood, Manager, Industrial Relations and Occupational Health and Safety

Australian National Committee of the International Centre for Trade Union Rights
Mr Mordy Bromberg, International Vice-President
Mr David Chin, Vice-President
Mr Anthony Lawrence, Secretary-Treasurer
Mr Mark Gibian, Member, Executive Committee

Central Equity Ltd
Mr Vincent Cerritelli, General Manager, Building and Construction

Australian Taxation Office
Mr Mark Konza, Deputy Commissioner, Small Business
Mr Ian Read, Assistant Deputy Commissioner, Small Business

Private capacity
Mr Robert Merriman

Slater and Gordon
Mr Marcus Clayton, Partner in charge of Industrial, Employment and Public Interest Unit

Melbourne, Thursday, 20 May 2004

Plumbing Division, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
Mr Earl Setches, State/Federal Secretary
Mr Nazzareno Ottobre, President, Plumbing Division
Mr Justin Cooney, Industrial Officer, Plumbing Division
Mr Barney Cooney, Senate amicus

Construction, Forestry, Mining and Energy Union
Mr Tommy Watson, State Secretary
Mr Martin Kingham, State Secretary, FEDFA branch

Enviro Electrics Pty Ltd
Mr Charles Dixon, Managing Director

Maxim Electrical Services (Vic) Pty Ltd
Mr Mark Birkett, Contracts Manager

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)
Mr Dean Mighell, Secretary, Southern States Branch
Mr David Mier, Organiser, Southern States Branch

Private capacity
Mr Alan Allpress, Manager, Western Ceilings
Mr John Allpress
Mr Warwick John
Mr Gordon Stevens

Melbourne, Friday, 21 May 2004

Contrax Plumbing
Mr Greg Fowler, Chief Executive Officer

Collingwood Plumbing
Mr Frank D'agostino, Managing Director

Liberty Victoria
Mr Christopher Maxwell, Immediate Past President

National Electrical Contractors Association
Mr Peter Glynn, Secretary and Chief Executive Officer
Mr Philip Green, Chief Executive Officer, Victorian Chapter

Master Plumbers and Mechanical Services Association of Australia
Mr Ray Herbert, Executive/Secretary

Australian Workers Union
Mr Bill Shorten, National and Victorian Branch Secretary

PricewaterhouseCoopers Legal
Mr Ross Levin, Partner

Civil Contractors Federation
Mr Geoff Stevenson, National Industrial Relations Adviser
Mr Douglas Williams, National Chief Executive

Canberra, Tuesday, 25 May 2004

Econtech
Mr Christopher Murphy, Director

Department of Employment and Workplace Relations
Ms Barbara Bennett, Group Manager, Workplace Relations Implementation Group
Mr Nigel Hadgkiss, Director, Building Industry Taskforce
Mr John Lloyd, Deputy Secretary, Workplace Relations
Mr James Smythe, Chief Counsel, Workplace Relations Legal Group

Appendix 3

Tabled Documents and answers to questions on notice

Hearing: **Canberra, 11 December 2003**

Australian Chamber of Commerce and Industry: Corrections to submission 14 [EWRE 2]

Petition received 16 February 2004
Senator Aden Ridgeway: Petition 54 signatures; 'Appeal from Retired Building Workers'.

Hearing: **Brisbane, 24 February 2004**

CFMEU, Qld branch: Comparisons of rates of pay [EWRE 56-57]
Document titled *'How the building industry performed on construction in Queensland 1993-2003'* [EWRE 57]

Hearing: **Brisbane, 25 February 2004**

Construction Training Queensland: Photographs [EWRE 65]

Hearing: **Adelaide, 18 March 2004**

Australian Institute of Building; Correspondence from the Australian Construction Industry forum [EWRE 82]

United Trades and Labor Council SA: Labour force statistics for South Australia [EWRE 93-94]

Hearing: **Darwin, 6 April 2004**

CFMEU, NT branch: Documentation in relation to an Australian Workplace Agreement [EWRE 14]
Correspondence received on 4 May 2004 in regard to the above tabled document.

Hearing: **Sydney, 7 April 2004**

Professor Martin Loosemore: Article titled *'Impediments to reform in the Australian Building and Construction Industry'* written by Mr Martin Loosemore [EWRE 30]

Associate Professor Braham Dabscheck: Sir Richard Kirby Industrial Relations Lecture, booklet titled *'Two and Two Make Five'* [EWRE 29]

Document, Pheonix figures on tax evasions [EWRE 74]
CFMEU NSW branch: Petition 10,428 signatures; 'Fair Go for Building Workers' [EWRE 51]

Hearing: **Melbourne, 21 May 2004**

Mr Peter Glynn: Document; Submissions of Counsel assisting concerning an income protection insurance policy entered into by Elecnet (Aust) Pty Ltd, dated 30 October 2002 [EWRE 83]

Senator Gavin Marshall: Article titled *'Pioneering new benefits for members and their families*' dated December 2000 [EWRE 84]

Answers to questions on notice

Canberra, Thursday, 11 December 2003

Australian Industry Group received: 20 January 2004	Answers to questions asked by Senator Cook
National Occupational Health and Safety Commission received: 2 February 2004	Answers to questions re: Occupational Health and Safety

Sydney, Monday, 2 February 2004

Dr John Buchanan received: 16 February 2004	Answer to question from Senator Cook re: Reserve Bank productivity numbers (attachments provided)

Sydney, Tuesday, 3 February 2004

Taylor and Scott Lawyers received: 16 March 2004	Answers to questions from Senators Johnston and Tierney.
Linddales Personnel received: 16 March 2004	Answers to questions from Campbell and Johnston re: Union fees

Brisbane, Tuesday, 24 February 2004

Housing Industry Australia received: 19 March 2004	Answers to questions re: indemnity insurance

Perth, Tuesday, 16 March 2004

CFMEU received: 6 May 2004	Answers to questions from Senator Johnston

Perth, Wednesday, 17 March 2004

Master Builders Association of Western Australia received: 22 March 2004	Answer to question from Senator Murray re: break up or percentage of member employers

Canberra, Tuesday, 25 May 2004

Department of Employment and Workplace Relations received: 18 June 2004	Answers to questions from Senator Johnston

Appendix 4

Additional Information

Additional information received from public hearings

Hearing: **Canberra, Thursday, 11 December 2003**

Master Builders Association: The Bulletin news article, titled *'Goon Show'*, written by Bob Bottom, dated December 2003.

Hearing: **Sydney, Tuesday, 3 February 2004**

CEPU: Document titled *'10 hurdles to frustrate the bargaining process under the BCII Bill'.*

Hearing: **Perth, Wednesday, 17 March 2004**

Chamber of Commerce and Industry: Information relating to grant funding for CCI's Kwinana Skills Centre

Hearing: **Sydney, Wednesday, 7 April 2004**

CFMEU: Documentation relating to the CFMEU Wage Claims trust account.