Royal Commission into the Building and Construction Industry

Submission by the Australian Industry Group

28 March 2002

Introduction

In order to make a significant improvement in workplace relations in the building and construction industry, this submission sets out some key reform proposals, including:

- The establishment of a Construction Industry Task-force with the power to investigate breaches of federal and state industrial, criminal and other laws;
- The establishment of a Major Construction Projects Tribunal within the Australian Industrial Relations Commission;
- Various legislative amendments to deal with the unique agreement-making requirements of the industry and to outlaw protected action in pursuit of pattern bargaining;
- Various legislative amendments aimed at stamping out unacceptable coercive conduct and to reinforce the philosophy that those who wish to have rights under Australia's industrial relations system also have responsibilities under such system.

The improved workplace relations environment likely to flow from the proposed amendments would benefit both employers and employees in the industry.

This submission should be read in conjunction with the detailed statement which Ai Group submitted to the Royal Commission into the Building and Construction Industry in November 2001.

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Contents

1. Preamble

The Australian Industry Group's (Ai Group) Statement to the Royal Commission of November 2001 sets out in some detail various problems which exist in the building and construction industry and various proposals for improving workplace relations.

Following further consideration of the issues and with the benefit of the Royal Commission's deliberations thus far, Ai Group proposes that the reforms set out in this submission be implemented which are aimed at achieving a significant improvement in workplace relations in the industry.

Ai Group represents approximately 10,000 employers, large and small, in every State and Territory. Members provide more than $100 billion in output, employ more than 1 million people and produce exports worth some $25 billion.

Ai Group has long standing relationships with all stakeholders in the construction industry including the owners of projects, head contractors and subcontractors. Many of these stakeholders are members of Ai Group in their own right, as well as clients who retain the services of Ai Group for specific projects.

Our members have significant involvement in engineering construction as well as building construction.

Services provided by Ai Group to construction projects include:

- Strategic planning, design, development, negotiation and implementation of employee relations structures;
- Advice and representation to clients, contractors and subcontractors;
- Occupational health and safety and environment services;
- Training and skills development services;
- Risk identification and management strategies.

2. National Task-force

The task-forces which operated in the building and construction industry in New South Wales and Western Australia (the task-force which existed prior to the changes implemented by the current Government) were successful in improving compliance with the law and improving workplace relations in the industry. Such task-forces addressed the significant problem of employers being reluctant to enforce their legal rights due to retaliation and victimisation by construction industry unions.

Drawing on the successful New South Wales and Western Australian models, a National Building and Construction Industry Task-force should be established. It is proposed that the Task-force have the following powers, responsibilities and characteristics:

- Power to investigate breaches of both state and federal laws;
- Power to deal with projects regulated under both state and federal industrial relations systems;
- Power to deal with breaches of industrial, criminal and other relevant laws;
- Works in close contact with police regarding any criminal matters identified;
- Works in close contact with the Australian Industrial Relations Commission (AIRC) and State Industrial Commissions regarding industrial relations matters;
- Well-resourced;
- Respected by all stakeholders in the industry and supported by federal, state and territory governments;
- Apolitical and perceived to be;
- Overseen by an independent Ombudsman or other appropriate independent body;
- Its charter is reviewed every three years.

The establishment of such a task-force raises a series of complex Constitutional and other legal issues. Ai Group proposes that the Royal Commission dedicate appropriate resources to considering these issues. The complex matters to be addressed include:

- Whether or not the Federal Parliament has the power to create legislation to establish and regulate the proposed task-force;
- Whether or not some referral of state powers would be required;
- Whether or not uniform legislation should be created in each state to establish and regulate the task-force/s.

3. Legislative framework

The *Workplace Relations Act 1996* ("the Act") should continue to regulate workplace relations in the construction industry. However, the Act should be amended to insert a new part of the Act to deal with a limited number of issues relating to the regulation of "major construction projects" (to be defined) in the construction industry.

This Part of the Act should deal with:

- The Major Construction Projects Tribunal referred to in section 4;
- Mechanisms for the negotiation and certification of project agreements for major projects. (See sections 5 and 6 below);

It will be important for the Act to define a *"major construction project".* In developing such a definition, existing industry definitions should be considered. For example, the NSW Government's *Industrial Relations Management Guidelines* (December 1999) contain a definition of a "Category 1 project" which is defined as:

> *"those with a value of $20 million or more, and those with a value under $20 million but which have some or all of the following features as determined by the government construction agency:*
>
> - *An extended construction period;*
> - *Identifiable contract packages within an overall program of works;*
> - *Sensitivity in terms of industrial relations".*

The approach of defining a "major construction project" with reference to a monetary value and other characteristics but allowing some flexibility for projects with a lower monetary value to be included in the definition in appropriate circumstances has merit. A possible definition would be:

"A 'major construction project' is defined as a project which:

- *Is constructed in specified geographical location/s; and*
- *Is constructed over a specified estimated construction period; and*
- *Has a value of $20 million or more; or has a value of under $20 million but which the Australian Industrial Relations Commission has declared a 'major construction project' for the purposes of the Workplace Relations Act 1996."*

4. Dispute avoidance and settlement / The establishment of a Major Construction Projects Tribunal

An unacceptably high number of industrial disputes occur in the construction industry which cost the industry many millions of dollars every year. Such disputation deters investment and results in contractors building a significant margin into their tender bids as a contingency for industrial action[1].

Australia's building and construction industry makes an important contribution to the Australian economy. Annual production in the industry exceeds $33 billion (ABS Cat. Nos. 8752.0 and 8755.0). This contribution justifies that some special measures be implemented to assist the AIRC to fulfil its role in preventing and settling industrial disputes in this important industry.

Currently, disputes in the industry are handled by a panel of Commission Members responsible for industries as diverse as building and construction, journalism and pet food manufacturing.

[1] For example, see *Work Arrangements on Large Capital City Building Projects*, Productivity Commission, August 1999, p.34.

Industrial parties in the building and construction industry should continue to have access to the AIRC for conciliation and arbitration (within the limits set out in the Act).

However, with regard to industrial relations matters relating to major construction projects (to be defined), such matters should be dealt with by a Major Construction Projects Tribunal to be established within the AIRC.

The establishment of a Major Construction Projects Tribunal within the AIRC would enable members of such tribunal to gain a much better understanding of current major construction projects and the industrial relations issues surrounding such projects than the current arrangements allow. This would assist tribunal members to deal with industrial disputes relating to major projects in a more timely and effective manner. It is likely that from time to time such tribunal members would need to visit major projects as part of their dispute avoidance and settlement role and this first-hand experience and involvement would provide benefits to all parties.

It is proposed that the Major Construction Projects Tribunal be presided over by a nominated Presidential Member of the AIRC and contain an appropriate number of other Commission Members. At least one member of the Tribunal should be based in each capital city.

The proposed Major Construction Projects Tribunal should deal with:

- Disputes which arise in respect of major construction projects (to be defined);
- The certification of project agreements for major construction projects;
- Conciliation during the negotiation of project agreements for major construction projects, where one or more negotiating parties seeks such assistance;
- Applications to stop or prevent industrial action under s.127, applications under s.166A, and other relevant applications under the Act relating to major construction projects.

Where the Tribunal has indications that breaches of the law may have or are likely to occur, the Tribunal should have the power to refer such incidents to the National Building and Construction Industry Task-force. The Tribunal and the Task-force should maintain a close working relationship.

5. Project agreements

The Act should enable genuine project agreements to be certified for major construction projects (to be defined).

The difficulty of establishing such mechanisms under the current Act has created concern for all stakeholders, and uncertainty about how risks can best be managed on major construction projects.

The size, nature, location and complexity of major construction projects results in a complex chain of contractual relationships.

Management of a construction project is delegated to a head contractor. Specialist work is then let to subcontractors. However, due to issues such as scale and complexity, a significant number of major construction projects have additional layers of contractual relationships. Typically the head contractor divides a construction project into packages of work. These packages are let to major subcontractors, who then in turn subcontract specialist work within each of the packages.

Project owners

From the project owner's perspective, major construction projects generally have a large number of risk factors. In Ai Group's experience, project owners display the following common views:

- A requirement for certainty of project cost;
- A recognition that labour costs significantly impact upon overall project costs, and constitute a high risk in cost management;

- A desire to maximise return on investment and net present value of a project, by completion of the project on time and within budget;
- Where a project is constructed on an existing operational site, a desire to quarantine operations from construction and to prevent the construction impacting upon their operational workforce and employee relations structures.

In Ai Group's experience, project owners are anxious to ensure that a project agreement can be put into place prior to approval being given to commence a project. Such an agreement from the project owner's perspective would ideally include:

- Similar conditions of employment for all contractors and subcontractors employing labour on the project, to minimise risk associated with disputation and claims during the life of the project;
- A clear definition of construction work;
- A no extra claims commitment which locks in terms and conditions of employment for the life of the project;
- A clause which ties the agreement to the specific project and specifies that the agreement has no operation beyond the project.

The Head Contractor

Standard contractual arrangements on major construction projects provide for head contractors to accept responsibility for managing risks associated with labour costs and delays to completion. Head contractors face liquidated damages in the event of delays to project completion. Head contractors are also responsible for other high risk employee relations matters such as workplace health and safety across a project.

Head contractors are not usually the direct employers of the vast majority of labour on a construction project. Head contractors are responsible for the project overall and they typically have a direct contractual relationship with major subcontractors undertaking packages of work. The subcontractors, in turn, have a contractual relationship with sub-subcontractors who perform the bulk of the work on a project. This means that the head contractor, who assumes the majority of the risk, has no

direct contractual relationship with the sub-subcontractors whose behaviour can significantly impact on that risk. In such circumstances, it is essential that mechanisms be available to enable head contractors to control the significant risks associated with multiple employers coming together on a single project.

In the experience of Ai Group, project managers perceive that differences in wage rates, conditions of employment and human resource management practices between employers on the same project, constitute the single largest industrial relations risk on major construction projects. Project agreements provide a basis to ensure stability and consistency across the multiple employers who will work on a project.

By establishing project agreements, head contractors are assuming responsibility for the following critical areas of risk:

- Ensuring that wages and conditions of employment are sufficient to attract and retain necessary skilled labour to construct a project, in the face of significant skills shortages which are currently impacting on the industry;
- Minimising the prospect of industrial disputation arising;
- Ensuring that sufficient flexibility is provided under the terms of the project agreement to enable subcontractors to complete their scope of work in a timely and efficient manner.

Subcontractors

In the experience of Ai Group, subcontractors (including sub-subcontractors) do not object to the practice of head contractors establishing project agreements prior to the commencement of major construction projects. When industrial action occurs on a project, all of the stakeholders suffer loss and damage, including subcontractors.

Subcontractors tendering for work on major projects want to be provided with information about the wage rates and conditions of employment upon which they should base their bid. Where project agreements are not in place to set wages and conditions of employment, subcontractors face substantial risks including:

- An inability to compete due to overestimating wages and conditions, in the absence of common guidelines provided by project agreements;
- Underestimating the level of wages and conditions of employment necessary to attract and retain appropriately skilled labour and being unable to recover the necessary increases in those wages and conditions from project managers, when faced with claims part of the way through a project.

These factors create great difficulty for the vast majority of small to medium sized businesses which lack the resources to manage their way through the myriad of contractual issues which would arise on a major construction project in the absence of a project agreement.

A further complication for many subcontractors arises because they need to employ personnel on a project by project basis and do not carry a large core workforce.

Subcontractors generally indicate to Ai Group that project agreements provide the best environment for them. Typically, subcontractors seek that project agreements:

- Are established in advance of tendering;
- Are applicable to all construction employees other than owners, partners, directors or supervisory personnel;
- Are only applicable to the subcontractor's employees while they are engaged on the project;
- Contain a commitment from unions not to use the project agreement as a basis for claims against employers in respect of activities other than the project concerned;
- Prevent claims being made during the term of the agreement.

A subcontractor who complies with the terms of a project agreement cannot be held responsible contractually for any delays in the completion of work which may occur if that agreement is not competitive or does not provide for sufficient flexibility. Further, any cost incurred by a subcontractor as a result of applying the terms of an agreement correctly, is able to be recovered by that subcontractor from the principal.

Many subcontractors are ill equipped to handle employee relations risks arising from a major construction project and will have no desire to do so.

Proposed Legislative Amendments to enable the certification of genuine project agreements

The existing provisions of the Act make the achievement of common wages and conditions on a major project very difficult and complex. Multiple business agreements are provided for but this form of agreement is 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. It is impossible to identify all of employers which will work on a major project at the commencement of the project.

The Act appears to have been framed to prevent, or at least significantly inhibit, the achievement of common terms and conditions on construction sites. The legislation places artificial constraints on subcontractors and forces them to act in a manner which does not constitute best practice and is contrary to the factors which make them successful in the industry – that is, the ability to integrate their expertise and personnel into a project.

The mechanism currently being used on many major construction projects to manage the significant risks associated with industrial relations is the use of common enterprise agreements. Establishing common enterprise agreements for all employers across a project is complex and far less efficient than a mechanism which would enable genuine project agreements to be reached and certified for major projects (to be defined).

Under the previous *Industrial Relations Act 1988* (as it existed immediately prior to the operation of the *Workplace Relations Act 1996*) employer associations such as Ai Group, could enter into project agreements which would then bind member companies while working on the relevant project. Such agreements applied to the

exclusion of any other agreement the subcontractor had entered into, but only while the subcontractor was performing work on the particular project. Project managers did not need to identify subcontractors in advance of the project agreement being certified. This approach delivered many best practice outcomes for major construction projects.

An alternative approach would be to rely on the Corporations Power under the Australian Constitution to underpin a new legislative provision for project agreements. It appears that such a mechanism could be introduced into the legislation which would enable project agreements to be certified and become binding, as a common rule, on all corporations which work on a major project. The overwhelming majority of employers which perform work on major projects are corporations. Once again, if such a mechanism was adopted it would be important to ensure that the project agreement applied to the exclusion of other agreements while the relevant company was performing work on the project but did not apply beyond the project.

In proposing these mechanisms, it should be noted that Ai Group would be strongly opposed to protected action being made available during the negotiation of project agreements. It is a fundamental tenet of the Act that protected action applies exclusively for enterprise bargaining – not bargaining across an industry, a sector, a geographic area or more than one employer.

It is proposed that a single member of the Commission have the power to certify project agreements entered into in accordance with the above mechanisms, rather than a Full Bench as currently required for multiple business agreements.

In summary, Ai Group believes that there is strong support from project owners, head contractors and subcontractors for the Act to be amended to incorporate mechanisms which would enable genuine project agreements to be certified for major projects (to be defined). Such mechanisms would provide the means for a very flexible and desirable workplace relations environment to be created for the construction of major projects.

It is important that the damaging union pattern bargaining strategies described in detail in Ai Group's November 2001 Statement to the Royal Commission and mentioned briefly in section 8 below are differentiated from legitimate practices adopted by stakeholders in the building and construction industry to manage the significant risks associated with the construction of major projects. Such practices include the use of project agreements and common enterprise agreements on a project.

The amendments proposed by Ai Group would require some consequential changes to be made to relevant codes of practice which operate in the construction industry.

6. Existing forms of agreement

All of the existing bargaining options should continue to be available in the construction industry, eg. certified agreements with unions, certified agreements directly with employees, greenfields agreements and AWAs.

7. Duration of agreements

A significant risk, from a project owner's perspective is that major projects often have relatively long construction periods. For major projects, a four or five year construction period is not uncommon. It is difficult to maintain a stable workplace relations environment on a project comprising multiple employers, over these lengthy periods. This difficulty is exacerbated by the fact that certified agreements under the Act can operate for a maximum of three years. This can expose companies to claims for higher wages and conditions, backed up by protected industrial action, at a critical time during the construction of a project.

The current three year limit on certified agreements is inappropriate for agreements applying to major construction projects. It hinders efficiency and productivity and should, therefore be removed from the Act. Negotiating parties should be able to enter into agreements which continue for the life of a major project, which in many cases will be longer than three years.

8. Outlawing protected action in pursuit of industry, area or pattern bargaining

Ai Group's statement to the Royal Commission of November 2001 outlined in some detail the problems caused by pattern bargaining in the building and construction industry. The Victorian building industry dispute of 1999/00 was used to highlight the devastating effects of such union tactics.

Protected industrial action should be available for genuine enterprise bargaining only. The Act affords primacy to enterprise bargaining and provides a right to take protected action only during the negotiation of an enterprise agreement.

The Act should make it abundantly clear that protected action is not available for any form of multiple-employer bargaining such as:

- The pursuit of "enterprise" agreements via pattern bargaining;
- The negotiation of industry or pattern agreements;
- The negotiation of area agreements such as the Victorian Building Industry Agreement;
- The negotiation of multiple-business agreements under s.170LC of the Act;
- The negotiation of project agreements (as proposed in section 5).

9. Objectionable enterprise agreement provisions

Under the Act (s.298Z), any provision in a certified agreement which breaches the freedom of association laws is defined as an "objectionable provision" and certain parties (eg. the Employment Advocate) can apply to the AIRC to have the provision removed from the agreement.

A highly objectionable provision which is being pursued by unions in the building and construction industry is a provision which requires that non-union members pay a bargaining fee to the relevant union. Such a provision was recently held by Justice Merkel of the Federal Court to not be a matter pertaining to the employment relationship and therefore not a matter capable of being included in a certified

agreement[2]. Merkel J's decision is being appealed by various unions and such appeal is listed for hearing by the Full Federal Court in late May 2002.

In the event that Justice Merkel's decision is overturned on appeal, the definition of an "objectionable provision" under the Act should be expanded to include provisions which require non-union members to pay a bargaining fee to a union.

10. Outlawing protected action during the life of a certified agreement

Protected industrial action should not be available in any circumstances where the relevant group of employees are bound by a certified agreement which has not reached its nominal expiry date. That is, the approach adopted by the Federal Court in the *Emwest*[3] case should not apply. (Note: Ai Group has sought leave to appeal Kenny J's *Emwest* decision and Ai Group's application is listed for hearing before the Full Federal Court on 30 May 2002).

Employees working on a major project and covered by a certified project agreement (as proposed in section 5) should not be entitled to take protected industrial action during the re-negotiation of any enterprise agreement that applies to those employees (or would apply to those employees were it not for the operation of the project agreement).

11. Extension of grounds for suspension or termination of a bargaining period

To provide the AIRC with more effective mechanisms for dealing with industrial action which is having a devastating impact on a company or companies and their employees, Ai Group proposes that additional grounds be available to the Commission to suspend or terminate a bargaining period. The proposed new grounds are, where protected action is:

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2 *Electrolux Home Products v AWU* [2001] FCA 1600 (14 November 2001). See *www.austlii.edu.au/au/cases/cth/federal_ct/2001/1600.html*

3 *Emwest Products Pty Ltd v AMWU* [2002] FCA 61 (6 February 2002). See *www.austlii.edu.au/au/cases/cth/federal_ct/2002/61.html*

- Causing significant damage to an enterprise; or is
- Significantly endangering the welfare of employees in an enterprise; or is
- Causing significant damage to an industry or an important part of an industry; or is
- Significantly endangering the welfare of employees in an industry or an important part of it.

In Ai Group's view, demonstrating that protected action is causing significant damage to *"the Australian economy or an important part of it"*, places the hurdle too high. On many occasions, individual companies and industry sectors have suffered significant and lasting damage due to protected action but have not been regarded by the Commission as constituting *"an important part"* of the Australian economy.

Where a bargaining period is terminated for any of the above reasons the AIRC should have the power to arbitrate and make an award under s.170MX of the Act.

The grounds for suspending or terminating a bargaining period should also be extended to include circumstances where industrial action is taken in pursuit of pattern, industry or area bargaining or any form of multiple employer bargaining. Where a bargaining period is terminated for this reason the AIRC should not have the power to arbitrate.

It is noted that in February 2002 the Federal Government introduced the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* into Parliament which enables a bargaining period to be suspended or terminated if a negotiating party is pursuing an agreement which is not a genuine enterprise agreement.

12. Cooling-off periods

In the building and construction industry, even relatively short periods of industrial action can have devastating effects leading to losses of millions of dollars.

Where protected industrial action is being taken during enterprise agreement negotiations, the Act should enable the Commission to suspend a bargaining period and establish a cooling-off period after hearing from the parties, if the Commission decides that a cooling-off period would be beneficial. The *Workplace Relations Amendment (Genuine Bargaining) Bill 2002,* if passed, would provide the Commission with this power.

13. Measures to prevent the AIRC's intentions in suspending or terminating bargaining periods being frustrated

The provisions under the Act which enable the Commission to intervene and suspend or terminate bargaining periods are far too slow and cumbersome for the building and construction industry. As set out in Ai Group's November 2001 Statement to the Royal Commission, during the Victorian Building Industry dispute in 1999/00 the process of identifying all of the case numbers relating to the thousands of specific bargaining notices served by the unions was so exhaustive that by the time the bargaining periods were identified the dispute was virtually over. Employers under massive commercial pressure had been forced to accede to the unions' excessive demands.

To address this issue, Ai Group proposes that the Act be amended to enable applicants seeking suspension or termination of bargaining periods to simply identify the enterprises involved and the negotiating parties – not the specific bargaining notices served. It is proposed that the Commission have the power to suspend or terminate all bargaining periods relating to negotiations over certified agreements applicable to particular single businesses or parts (without the need to identify the specific bargaining case numbers relating to each relevant bargaining period).

Ai Group also proposes that the Commission have the power to make an order that prevents negotiating parties initiating further bargaining periods in pursuit of such certified agreements for the period specified in the order. This approach would

prevent unions simply serving other bargaining notices to establish new bargaining periods to replace suspended or terminated bargaining periods.

14. Federal awards

Federal awards should continue to operate as a safety net with the prime emphasis on enterprise bargaining. The content of awards should continue to be limited to the existing 20 allowable matters for all industries, including building and construction.

The large number of awards which operate in the building and construction industry create administrative difficulties for employers and such awards should be rationalised to significantly reduce the number of awards.

At the conclusion of the *Building Industry Inquiry* in 1989, a five member Full Bench of the AIRC said:

> *"Having regard to all the submissions and evidence in this case, we have decided that the objective of a single award in the building and construction industry has merit and, over time, could be pursued"*[4].

Thirteen years later, virtually no progress has been made in rationalising the many awards which exist in the industry.

15. Union nominated labour

Unions frequently coerce head contractors and subcontractors responsible for major packages of work on major projects to employ specific persons who they nominate and assign key roles (eg. occupational health and safety representative or union delegate) to such persons. Often the individuals would not be the best qualified applicants if the jobs were advertised. The coercion typically takes the form of the union refusing to sign an industrial agreement with the head contractor or

[4] Print H7460

subcontractor until agreement has been reached on employing the union nominated labour.

This practice is having a significant negative impact on workplace relations in the industry because many of the individuals nominated are highly militant and have a history of contributing to poor workplace relations on previous construction projects. For example, bogus safety disputes initiated by union nominated occupational health and safety representatives are causing significant losses in the industry.

Further, it appears that on occasions employers are being coerced by unions to pay union dues for their employees including, in some instances, where the employees are already a member of another union. Such a practice is clearly inappropriate.

Ai Group proposes that these problems be addressed by expanding the offences set out in the Act relating to unlawful attempts to influence or coerce. There are currently several offences recognised under the Act in this area. Such offences include:

- Coercing a person to enter into a certified agreement, through threatening, organising or taking unprotected industrial action (s.170NC);
- Coercing a company to breach the freedom of association laws (eg. by requiring an employee to join a union), through threatening, organising or taking industrial action (s.298P(2)); and
- Advising, encouraging or inciting an employer to take action in breach of the freedom of association laws (s.298P(3)).

The offences should be expanded to include:

- *Employment of Particular Persons*

    - Coercing an employer to employ or not to employ particular persons, through threatening, organising or taking industrial action;

- Advising, encouraging or inciting an employer to employ or not to employ particular persons.

- *Allocation of Particular Duties to Persons*

  - Coercing an employer to allocate or not to allocate particular duties to a person, through threatening, organising or taking industrial action;
  - Advising, encouraging or inciting an employer to allocate or not to allocate particular duties to a person.

  "Particular duties" should include but not be limited to duties as an occupational health and safety representative or union delegate.

- *Payment of Union Dues by an Employer*

  - Coercing an employer to pay the union dues of a person through threatening, organising or taking industrial action;
  - Advising, encouraging or inciting an employer to pay the union dues of a person.

16. Section 127 orders

Given the enormous losses which can result from unprotected industrial action in the building and construction sector, employers need access to quick and effective mechanisms to bring unlawful industrial action to an end.

The issuing of orders by the Commission under s.127 of the Act to stop or prevent industrial action is discretionary and instances have occurred of delays in having applications heard, delays in decisions being issued and a failure on the part of unions to comply with s.127 orders which are issued.

The AIRC should be required to hear and determine s.127 applications within 24 hours of their lodgement and, if it is not able to determine an application within 24

hours, to issue an interim order, unless it is satisfied that it would not be in the public interest to do so.

The AIRC should be required to insert a provision in s.127 orders (where such a provision is sought by the applicant) which provides that a separate breach of the order occurs for each day that the order is not complied with, unless the Commission is satisfied that it would not be in the public interest to do so.

17. Measures to improve compliance with AIRC awards and orders

Given the current high level of non-compliance with s.127 orders and avoidance of disputes procedures in awards and certified agreements by unions, the Act should be amended to enable the AIRC to suspend the registration of a union (perhaps for a relatively short period for an initial offence) on the ground that it has continually failed to comply, or failed to ensure that its members comply, with AIRC orders or avoidance of disputes clauses in awards or certified agreements.

It is proposed that the Federal Court retain the right to cancel the registration of a union on the ground that it has continually failed to comply, or failed to ensure that its members comply, with AIRC orders or avoidance of disputes clauses in awards or certified agreements.

The above approach is consistent with the philosophy that if unions wish to have rights under the industrial relations system then they have responsibilities to obey the laws applicable to such a system.

18. Abuse of right of entry privileges

It is essential that a mechanism be established to ensure that union officials who abuse their right of entry privileges lose their right to enter building and construction sites under all federal and state industrial and occupational health and safety laws through a

single unitary investigation and determination process. If the AIRC cannot be given the power to make an order with such effect[5] because of Constitutional limitations then some form of coordination of state and federal processes to cancel right of entry is essential. Alternatively, some referral of state powers to the Commonwealth may be needed. Ai Group proposes that the Royal Commission dedicate appropriate resources to considering this issue.

The current legislative provisions are not working effectively as highlighted by the *CSR Humes* case. In this matter, Mr Andrew Ferguson, the NSW Branch Secretary of the Construction and General Division of the CFMEU and two other union officials were found by Deputy Industrial Registrar Ellis to have intentionally hindered and obstructed the business of CSR Humes. The officials were found to have walked around the company's site encouraging employees to take part in a 30 to 40 minute stop work meeting.

In response to the decision of Registrar Ellis of 29 May 2001 (PR904755) to revoke his entry permit under the *Workplace Relations Act*, Mr Ferguson was quoted in the media as making the following comments:

> *"Ferguson said the ban would have no impact on his work as a union official. He said he went to building sites every day of the week and would continue to do so because he had a NSW entry permit and also had rights under powerful NSW OHS laws to enter premises. Any employer who tried to stop him entering a site would find workers going offsite to hold meetings, he said. But he doubted employers would try to restrict his access". ("IRC revokes CFMEU leader's entry permit"* Workplace Express, 29 May 2001).

In a decision of 24 October 2001 (PR910502), a Full Bench of the AIRC overturned the decision of Registrar Ellis to revoke the entry permit of Mr Ferguson and another union official on the basis that the Registrar was wrong in finding that the officials

[5] Under s.285G of the *Workplace Relations Act*, the AIRC has the power to revoke an entry permit and issue an order about the issue of any further permit under the *Workplace Relations Act* to the relevant

were exercising powers under the *Workplace Relations Act*. It was held that the officials were exercising powers under NSW state legislation at the time – not the federal legislation.

19. Occupational Health and Safety

Ai Group is committed to the maintenance of high standards of occupational health and safety (OHS) in the construction industry. In recent years, the industry has made significant improvements in OHS.

Unfortunately, construction unions frequently adopt a tactic of using OHS as a industrial weapon against employers. Bogus safety disputes cost the industry dearly and are constantly cited by construction industry employers as one of the most significant industrial relations problems in the industry.

In analysing the problems and potential solutions, issues such as the following need to be considered:

- Should union officials continue to have special powers of entry and inspection under occupational health and safety laws?
- Should the number of State occupational health and safety inspectors be increased to ensure that there are sufficient Government resources devoted to OHS auditing, investigation and inspection thereby removing the need to rely on union officials to carry out such tasks?
- What remedies should be available to an employer when an occupational health and safety dispute which is ultimately found to have no substance, causes losses and damage to the employer?

Ai Group is considering the above issues and intends to forward a further submission to the Commission at a later stage regarding these matters.

20. Conclusion

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The construction industry has some unique features which need to be taken into account. Ai Group submits that the workplace relations environment in the construction industry in Australia would be significantly improved if the legislative amendments proposed in this submission are adopted. Such improved environment would benefit both employers and employees in the industry.