CEPU

Senate Employment, Workplace Relations and Education References Committee

Review of

Building & Construction Industry Improvement Bill 2003

&

Recommendations & Findings of the Cole Royal Commission into the Building and Construction Industry

& other relevant & related matters

CEPU SUBMISSION

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to the

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1. Introduction

1.1. Submission made on behalf of Plumbing & Electrical Divisions

1.1.1. This submission is made by the Communications, Electrical, Electronic, Energy, Postal, Plumbing and Allied Workers Union of Australia (the CEPU). Although this submission is made on behalf of the entire Union, this Senate Review primarily impacts on our members in the Electrical and Plumbing Divisions involved in building and construction both on and off site.

1.2. Support for this Senate inquiry

1.2.1. We support the Senate Inquiry in the hope that some commonsense will prevail with respect to many of the proposals contained in the Building and Construction Improvement Bill 2003 and that a more reasoned approach will be taken regarding practices in the industry.

1.2.2. We appreciate that the scope of this Senate Inquiry goes beyond the proposals contained in the Government's Building and Construction Industry Improvement Bill 2003 and the recommendations and findings from the Cole Royal Commission into the building and construction industry in Australia. We welcome the opportunity to provide submissions and evidence to the Senate in relation to all of the issues in the industry rather than being confined to the narrow and politically motivated terms of reference for the Royal Commission and the Government's response to the findings of the Royal Commission.

1.3. Support ACTU Submission

1.3.1. We support the submission of the ACTU. As such, in view of the broad range of matters subject to this Inquiry our submissions will concentrate on matters on specific relevance to our members.

1.3.2. Our submission expands upon the submission we put to the Government regarding the draft Building and Construction Industry Improvement Bill 2003 in October and relies upon the ACTU submission for areas of concern we have in common with the rest of the workforce in building and construction.

1.4. Separate submissions

1.4.1. The Queensland Branch of the Electrical Division of the CEPU (the ETU Qld Branch) has made a separate submission to the Inquiry to supplement this submission. When the Inquiry sits in Brisbane the union seeks leave of the Inquiry to have Mr Peter Ong appear for the union to provide supplementary evidence. A Statement outlining the issues Mr Ong wishes to address before the Inquiry will be provided in sufficient time before the Inquiry sits in Brisbane.

1.4.2. The Plumbing Division of the CEPU is making a separate submission which is complementary to this submission.

1.5. About the CEPU

1.5.1. This submission is made on behalf of the three Divisions of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (the CEPU), ie. The Communications, Plumbing and Electrical Divisions.

1.5.2. The CEPU Electrical Division (formerly the Electrical Trades Union or 'ETU') represents the interests of skilled electrical workers in a wide range of industries including electrical contracting, manufacturing and power generation and distribution. Electrical tradespeople form the largest membership group.

1.5.3. The Plumbing Division (formerly the Plumbers and Gasfitters Union) represents the interests of skilled workers in the plumbing industry including general plumbing, roofing, mechanical services, and fire protection. Plumbing tradespeople form the largest group within the membership.

1.5.4. The Communications Division (formerly the Communications Workers Union) represents the interests of skilled workers in the communications industry and persons employed by Australia Post.

2. Findings & Recommendations of Cole Royal Commission

2.1. Overview

2.1.1. It would seem from the emphasis given to unions and their so-called lawlessness and the focus on reforming workplace and industrial relations that this was the sole focus of the Cole Royal Commission. However, the Cole Commission also identified problems with security of employee entitlements, a widespread use of sham employment arrangements and phoenix companies, an industry characterised by massive tax avoidance and lack of compliance with

Federal and State tax regimes. The Cole Commission had a prime opportunity to do something constructive about these practices which cost the community both economically and socially far in excess of any of the employment practices the Commission seems so concerned about.

2.1.2. In general the findings of the Cole Royal Commission reflect its anti-union bias and underline the true intention in establishing the Commission. The Royal Commission was too narrowly focussed, unfair and unjust in that it was predisposed against workers and unions. It was a political exercise, ideologically motivated to reduce union influence in the industry. This is evidenced by the undue emphasis on the so-called "entrenched culture of lawlessness" whereby unions engage in criminal and unlawful conduct in the knowledge that they will not be held to account. The majority of the 392 findings of unlawful conduct concerned breaches of the Workplace Relations Act by unions and their officials. Of those findings the majority are hardly cause for separating out this industry for special treatment. Some 22% of findings concerned breach of dispute resolution provisions.

2.1.3. 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

2.1.4. 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. In fact it could almost be said it is business as usual with respect to those issues. The recommendations dealing with these areas are much weaker and less specific than those dealing with the unions and do not take such a punitive approach. Which is remarkable in view of the cost to the Australian Government and community of tax avoidance in particular.

2.1.5. Specifically with respect to the CEPU the findings were limited and we intend to lead verbal evidence during public hearings concerning the findings of the Cole Royal Commission regarding our alleged inappropriate conduct.

2.1.6. We are strongly opposed to the biased approach the Cole Royal Commission has taken with respect to the building and construction industry which is reflected in the provisions of the Building and Construction Improvement Bill 2003 (the Bill). The Bill is technically complex and overlays another system of

industrial and occupational, health and safety regulation on the industry. It creates a whole new and unnecessary bureaucracy that will so fetter the bargaining process that genuine bargaining is pretty well neutered.

2.1.7. We welcome this Senate Review as an opportunity for a balanced, fair and objective examination of the industry. We urge this Senate Committee to reject the Bill in its entirety.

3. The Electrical Contracting Industry

3.1. Industry is separate from but intersects with building and construction

3.1.1. The nature of the electrical contracting industry needs to be understood before the impact of the Bill on the industry can be described. The electrical contracting industry is separate from but intersects with the building and construction industry. It is not possible to neatly carve out a part of the electrical contracting industry and put it in the "building and construction industry" because the participants are not always solely engaged in such work.

3.1.2. The electrical contracting industry provides electrical services to every industry including:

- the installation of electrical/electronic/communications wiring, appliances and systems in single dwellings, commercial construction and engineering construction (including telecommunications) and
- the upgrading/ renovating/ refit of electrical/ electronic/ communications wiring, appliances and systems;
- the maintenance and repair of a wide range of appliances and plant and equipment including maintenance contracts in manufacturing, mining and processing, electrical power distribution, telecommunications facilities, rail and air transport, business equipment, and buildings.

3.1.3. The electrical contracting industry is regulated by the National Electrical, Electronic and Communications and Contracting Industry Award 1998[1], equivalent State awards and relevant enterprise agreements. The Electrical Contracting Industry Award is a multi industry award as electrical contracting companies often operate in multiple industries. Industry participants are not always solely engaged in work in the building and construction industry. The breadth of the electrical contracting industry and its separateness from the building industry was acknowledged in the 1988 Inquiry into the Building Industry by the Australian Industrial Relations Commission which found that: *"...the electrical contracting industry is involved in a wide range of industries and not just the building industry."*

3.1.4. Since that time this involvement in a wide range of industries has increased with the exponential growth of the communications industry and the incursion of electrical and electronic contracting companies into these emerging technology areas. Maintenance contracts have also increased dramatically as manufacturers 'contract out' their electrical/process control maintenance functions.

[1] This is an award of the Australian Industrial Relations Commission (AIRC) and is referred to hereafter as 'the electrical contracting industry award'.

3.1.5. The current pattern of industrial award and agreement coverage of electrical contracting employees covers the work irrespective of whether it is carried out in the context of a construction site or outside of that sector. Putting aside the argument about the sensibility of creating separate regulation etc for the "building industry", it makes no sense to separately regulate the activities of employers and employees when they are engaged in construction and regulate them differently when they are not.

3.1.6. This was the reason why in 1988, the AIRC accepted the submissions from both the union and the main employer representative, the Electrical Contractors Association (now NECA), and chose not to disturb the existing award structures and industrial relationships in the industry.

3.2. 20% of electrical contracting work is maintenance work

3.2.1. According to research commissioned by the National Electrical Contractors Association ("NECA")[2] approximately 20% of work undertaken by electrical contractors is maintenance work totally outside of the building and construction industry as defined by the Bill.[3]

3.3. The Electrical Contracting Industry dominated by small businesses

3.3.1. Employers in the industry include thousands of small electrical contractors employing less than five employees on the one hand, and a handful of large national companies employing more than 100 employees on the other end of the scale. The 1994 electrical contracting research results[4] found that the percentage breakdown was as follows:

Table 1: Breakdown of Electrical Contractors by Company Size

Number of Employees	% of Electrical Contractors
Employing less than 5 employees	60.7%
Employing between 5 – 9 employees	15.5%
Employing between 10 – 19 employees	13.5%
Employing between 20 – 49 employees	6.1%
Employing between 50 – 99 employees	3.0%
Employing more than 100 employees	1.2%

[2] The only employer organization party to the award
[3] See further NECA Industry Study January 2003
[4] Commissioned by the National Electrical Contractors Association

3.3.2. The average is 4.9 employees per business with qualified electricians constituting the largest category of staff employed.

3.3.3. It can be seen from the above figures, if "small business" is defined to be up to 20 employees, then *89.7% of electrical contractors are small businesses.*

3.4. Electrical contractors work across industries

3.4.1. Electrical contracting employees work in different industries according to the contracts being completed. Even small contractors work on residential (single dwelling) one day and may be working on small to medium commercial (eg a shop fitout etc) the next day.

3.4.2. Another NECA Industry Study (2003)[5] found that "*Small electrical contractors tend to be in residential/project home/small to medium commercial*" with 'project homes/residential customers' accounting for 19% of industry turnover.[6]

3.4.3. NECA published a list of electrical contracting members in 2000 which sets out the sectors in which each of its members are engaged. According to the NECA membership information most contractors work in several sectors of the contracting industry. The industry sectors used by NECA are:

- commercial;
- data and communication;
- residential;
- electricity supply sector;
- fire detection;
- hazardous location;
- high voltage; industrial;
- manufacturing;
- refrigeration and airconditioning;
- security;
- other.[7]

3.4.4. The activities of NECA members clearly show that the contractors who are engaged in single dwelling residential are invariably also engaged in work in other sectors, especially the commercial sector.

3.5. The Bill proposes broad changes to industrial law

3.5.1. The Bill, if passed in its current form, will have a dramatic effect on the employers and employees in the electrical contracting industry.

3.5.2. The additional reporting obligations imposed on employers will be particularly onerous for small employers. These additional obligations are set out in the following table.

[5] NECA Study (2003) p.12
[6] Ibid Figure 2, p.12
[7] An extract from the NECA membership publication is attached (XXX).

Table 2: Additional obligations imposed on employers by the Bill

Section	*Requirement*	*Penalty*
47 (3)	Employer must not make payment to employee in relation to pre-referral or non-entitlement period	Grade A Civil
47 (5)	Employer must not make payment to employee when employee engages in 'building OHS action' after OHS matter referred to relevant body.	Grade A Civil
48	Employer must notify ABC Commissioner when employee threatens or engages in building OHS action (within 72 hours)	Grade B Civil
49	Employer must notify ABC Commissioner if they have made payment to employee in building OHS action (within 72 hours)	Grade B Civil
76 (1)	Employer must notify ABC Commissioner when unlawful industrial action ceases	Grade B Civil
76 (3), (4)	Employer to provide requested information to ABC Commissioner	Grade B Civil
118, 119	Employer (if applicant for ballot) is liable for cost of protected action ballot.	Material Cost
135	Employer must notify ABC Commissioner when employee threatens or engages in building industrial action (within 72 hours)	Grade B Civil
137	Employer must notify ABC Commissioner when employee applies for strike pay (within 72 hours)	Grade A Civil
237 (14)	Cannot refuse or delay ABC Inspector access to premises	Grade A Civil
240 (14)	Cannot refuse or delay Federal Safety Officer access to premises	Grade A Civil
241 (14)	Cannot refuse or delay Federal Safety Officer exercising powers	Grade A Civil

3.5.3. Small electrical contractors will no longer be able to choose the type of agreement which best suits their business. Pattern agreements, which retain widespread support from small contractors, are proscribed by the Bill and certified agreements must have a 3 year term irrespective of the needs of the enterprise.

3.5.4. The process of enterprise bargaining will become much more complicated than it is at the moment. The current Workplace Relations Act allows employers to negotiate an agreement and have it certified expeditiously with a single vote by affected employees (the valid majority). The system proposed by the Bill no longer allows such streamlined agreement making. At the very least a union must hold a ballot of employees before a bargaining period can be instituted, that is before any proposed agreement can be put to the employees.

3.5.5. For electrical contracting employees, the provisions of the Bill means that they will also be restricted in the type of agreement they want and its duration. The enterprise bargaining process will also become unduly complicated with the current right to take protected industrial action being severely restricted.

3.5.6. Employees of electrical contractors are part of a permanent and stable workforce, working for single employers across industry sectors. This was recognised in the 1988 AIRC inquiry[8] and accepted as a reason to leave the regulation of this work the way it was. Despite this finding, the Bill seeks to create regulatory chaos in the industry by decreasing the choice of industrial instrument available and by making the bargaining process much more complicated and bureaucratic.

4. Scope of the BCI Improvement Bill 2003

4.1. The Bill covers work outside the Terms of Reference

4.1.1. The scope of Building and Construction Industry Improvement Bill 2003 is much wider than the Terms of Reference of the Royal Commission. Even though it was outside the brief of the Royal Commission to look at non-construction work, the resulting Bill in fact covers non-building work. There is no legal or defensible basis for the legislation to apply in areas outside construction.

[8] AIRC 1988 Report, ibid at p.32

4.2. The Bill covers more than building and construction

The definition of building industry

4.2.1. We base our view that the coverage of the Bill goes beyond on site construction work, on the scope of *building work* set out in the definitions in sections 4 and 5 of the Bill.

4.2.2. According to the Explanatory Memorandum[9] the definition of building and construction proposed by the Bill; *"is integral to the understanding and application of the Bill. It determines the scope of the Bill by forming the basis of terms such as building employee and building agreement ... The coverage of all provisions of the Bill is ultimately determined by reference to the definition of building work."*

4.2.3. We agree that the definition is integral and have serious concerns about the operation of the provisions of the Bill in practice where it so blatantly covers non-building work.

4.2.4. Section 5 of the proposed Bill defines *building work* as follows:

> *"(1) building work means any of the following activities:*
>
> *(a) the construction, alteration, extension, restoration, repair, demolition or dismantling of buildings, structures or works that form, or are to form, part of land, whether or not the buildings, structures or works are permanent;*
>
> *(b) the construction, alteration, extension, restoration, repair, demolition or dismantling of railways (not including rolling stock) or docks.....*
>
> *(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;*
>
> *(d) any operation that is part of, or is preparatory to, or is for rendering complete, work covered by paragraphs (a), (b) or (c), for example*
> ...
>
> *(iv) **the prefabrication of made to order components** to form part of any building, structure or works, whether carried out on-site **or off-site;** [emphasis added]*

[9] P.22

4.2.5. Clearly, the definition of the industry is deliberately wider than what is normally considered to be the industry. The increased scope of the definition is important as it creates difficulties in a number of areas, including the practical difficulties which will be created if a specialist building and construction regulatory body is established.

4.2.6. There are a number of problems with the scope of this definition. Already amended in response to industry claims that it encompassed non building and construction industry activities and employers, the definition still fails in this respect. It still overlaps with other industry areas. In addition, the definitions of, *building award, building agreement, building association, building certified agreement, building industry participant* and *Commonwealth building employee* as set out in section 4, all include reference to work outside the building industry. Not only is this deliberate (see the quote from the Explanatory Memorandum below) but it creates a number of serious and practical operational problems.

4.2.7. *Building agreement, building award and building certified agreement* are defined in s.4 respectively to mean any agreement, award or certified agreement that applies to building work **regardless of whether that agreement, award or certified agreement also applies to any other kind of work**[10]. That this casts the net of the Bill significantly wider than the building industry is acknowledged in the Explanatory Memorandum; *"For example, an agreement whose provisions apply to both commercial construction and other work will be a building agreement."*[11]

4.2.8. The electrical contracting industry award is clearly a *'building award'* as defined by the Bill. It will be considered a building award because ***part of the work*** performed under the award is building work, despite the fact that a substantial percentage of contracting employees do not work on construction and indeed never step near a construction site. Where this leaves that part of the contracting industry not working in the building industry is a serious issue.

4.2.9. The definition of building employee also gives the CEPU cause for concern as it clearly covers employees engaged in non-building work. *"Building employee is defined to mean both a person whose employment consists of, or includes, building work .... An employee that performs some building work* ***and also performs other work will be a building employee*** *for the purposes of the Bill."*[12]

4.2.10. Further, building industrial dispute *"means an industrial dispute that relates to building employees, whether or not the dispute also relates to other employees."* [emphasis added]

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[10] House of Representatives, Building and Construction Improvement Bill 2003 *Explanatory Memorandum* p20

[11] Ibid

[12] *Explanatory memorandum*, p.20 emphasis added

4.2.11. An industrial dispute in the electrical contracting industry would normally involve both non-building employees and building employees because they are employed by the same employer. The non-building employees would be caught by this provisions of the Bill.

4.2.12. Commonwealth building employee organisation *"means an organisation of employees ... whose eligibility rules allow membership by building employees (whether or not those rules also allow other person to be members)."* Clearly this catches the eligibility rule of the CEPU.

4.2.13. Specifically with respect to "building work", the definition is too broad in scope. The Bill clearly covers work carried out in the manufacturing industry and any other area where made to order components are prefabricated off site. For example, a manufacturer of electrical switchboards manufactures 'made to order' switchboards (components) in a small factory employing 5 people. Most switchboards are made to order as they are built to specifications peculiar to each installation. By including the off site prefabrication of made to order components the definition brings non-building employers and non-building activities within the scope of the Bill. None of the employees ever work on a construction site, but still have the harsh provisions of the Bill imposed on them.

4.2.14. Other examples of the types of activities and employers that are comprehended by the Bill but are not strictly speaking involved in the building and construction industry per se, are manufacturers of lifts and elevators, airconditioning, smart building systems, security/fire alarms, communications equipment, and service companies.

4.2.15. Businesses such as these operate within their own industry sectors. For instance, the lift industry or electrical contracting industry, and have their own awards, enterprise agreements, industry regulation, industry committees and so on. They operate in distinctly different areas to building and construction employers.

4.2.16. Of particular concern to the CEPU is the impact that the Bill will have on the electrical contracting industries, covering substantially all the work of electrical contractors, despite the fact that contracting employees work both on and off site.

4.2.17. It is unnacceptable that the legal nightmare being created by the Bill will be imposed on electrical contracting employers and employees *who work largely outside of the industry* simply because it's too hard to define the industry.

4.3. The exclusion of residential work

4.3.1. Domestic or residential work on less than 5 houses is specifically excluded from the definition of 'building work' and hence the operation of the Act. This would appear to exclude electrical contractors engaged in the residential sector. However, as soon as employees of the same contractor perform installation

work in the 'commercial' sector, the Bill does apply, as it is defined to be 'building work' under the Bill (s5(1)(c)).

4.3.2. The problem created by the various definitions is that if some of the work some of the time satisfies the definition, then all of the work all of the time is covered by the Bill.

4.3.3. All electrical contracting work is caught. What appears to be an exclusion is not an exclusion if the contracting work goes beyond the terms of the exclusion and is caught by the definition of *building work*.

4.4. Ramifications of non-building employees & employers being caught by the Bill

4.4.1. The Bill covers employers who have not had an opportunity to address either the Cole Royal Commission or this Senate Committee because they did not understand that although they do not work in the construction industry all of the time, their activities are still covered by the Bill. This amounts to a denial of natural justice akin to making such an employer party to an award or agreement without their knowledge.

4.4.2. As work outside the construction industry was not part of the Cole Royal Commission's brief, those parties involved in non-construction work did not have an opportunity to address the Commission.

4.4.3. Non building employees who are caught up by the Bill are seriously disadvantaged by having the restrictions on bargaining, right of entry and their awards imposed upon them.

5. Is the industry unique requiring industry specific legislation, processes and procedures?

5.1.1. One of the findings and recommendations of the Cole Royal Commission was that the building and construction industry is so unique that it requires industry-specific legislation, processes and procedures.

5.1.2. The CEPU rejects this finding totally. Every industry has distinct and unique features but this is not of itself sufficient to warrant a different approach to regulation in each industry. There is no justification to warrant specific legislation and processes and procedures with respect to the building and construction industry.

5.1.3. In addition, there are substantial problems with defining the industry which the Bill proposes to separate for specific regulation. The definition is broader than building and construction work and overlaps with areas outside the industry. This could create a situation where depending on where a particular group of workers is working, their employment will be regulated by the proposed Bill

and the Workplace Relations Act, or simply by the Workplace Relations Act. This could vary on a daily basis. Clearly, this is not a satisfactory approach to regulation of the industry. It militates against certainty and creates costly duplication of services.

5.1.4. We do not agree with the need for specific legislation for a single industry. Nor do we support an industry specific regulatory watchdog. The current Workplace Relations Act is specifically and uniquely designed to cater to the industrial relations needs of employers and employees across the board. There is no good reason to specifically separate the building and construction industry from the operation of that Act.

5.1.5. The Workplace Relations Act already provides sufficient remedies for employees, including those employed in the building and construction industry. The AIRC already has the experience, expertise and track record to deal with the building and construction industry. Any concerns the Government has with the conduct of the building and construction industry should be addressed within the context of the existing regulating institutions and infrastructure.

5.1.6. This will avoid problems which will be created by trying to separate the building and construction industry from the rest of industry. It is not possible to neatly draw a circle around the industry and its workers and say they should be regulated by alternative regulator. This will give rise to competing jurisdictional problems in a system which is already characterised by undue technicalities and bureaucratic hurdles. Good industrial relations in the building and construction industry requires that the system be simple to understand and readily accessible by the parties. Specifically legislating to provide a separate regulator for this industry will only create jurisdictional confusion for electrical contracting companies as they work across industries not within the building and construction industry.

5.1.7. We also fear that this is a precedent designed to isolate perceived 'troublesome' industries such as construction from other industries. What comes next? The education industry? The mining industry? Or some other "troublesome" sector of the workforce? This mentality will lead to a plethora of industry specific regulating bodies duplicating the resources and processes of the AIRC.

5.1.8. This approach to industrial regulation smacks of history repeating itself. There have been many attempts in the past to create separate processes and regulatory regimes for industries perceived to have "special" needs. Each of these has come and gone. For instance, we have had the Coal Industry Tribunal, the Public Service Arbitrator, the Flight Attendants Tribunal and separate aviation and maritime tribunals, all of which have re-merged with the AIRC after whatever purpose they were established for disappeared into the mists of history.

5.1.9. That the AIRC is more than adequately equipped to deal with the settlement of industrial disputes across the board was recognised when the activities of each of these specialist tribunals were re-merged with those of the AIRC.

5.1.10. It was recognised by the Government of the day that the needs of the targeted industry were just as easily, if not better served, by the AIRC itself as opposed to a specialist tribunal. This same mentality should be applied to the building and construction industry. Whatever perceived difficulties there are in the industry should be dealt with by giving the AIRC the requisite powers to resolve them. It seems the lesson of history is that specialist tribunals are not the answer.

6. The practical operation of provisions of the Bill

6.1. Allowable Matters

Skill based career paths & education and training are not allowable matters

6.1.1. In Australia for most of the twentieth century almost all aspects of training were prescribed in industrial awards. The award system prescribed rules on formal indentures, recruitment, numbers, proportions of apprentices to skills tradesmen and apprentice wages and conditions[13]. In this way; *"training and skill formation has been historically coupled to the industrial relations system in Australia through the award system."*[14]

6.1.2. In this context, Hall and others have noted; *"International commentators ... are intrigued by the resilience of the apprenticeship system in Australia into the early 1990s, noting that a strong award system and trade union support had helped its survival."*[15] However, perceptively, he also stated; *"At the present time the Australian apprenticeship system is under severe strain and stands at a crossroads in terms of its future development."*[16]

6.1.3. The Bill impacts adversely on the award system in two ways. First, it removes "skill based career paths" from the list of allowable award matters. Second, it expressly lists "training and education" as non-allowable award matters. The CEPU submits that the combination of these two measures will do nothing but exacerbate the current chronic skills shortage.

6.1.4. Section 51(2) of the Bill lists the allowable award matters the AIRC can exercise arbitration powers in respect of building industry disputes.

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[13] Gospel H (1994) "The Survival of Apprenticeship Training in Australia" 36 *Journal of Industrial Relations* 1, pp.37-56 at p41

[14] Dr Toner P (2003) *Declining Apprentice Training rates: Causes, Consequences and Solutions, Research Paper* prepared for VET Conference organised by Group Training Australia and the Dusselldorp Skills Forum, Sydney, July 2003, p.19 quoting Roan A and Lafferty G (2001) "Skills, Training and Workforce Bargaining – the Implications of Australian Workplace Agreements", paper presented at *The AWA Experience: Evaluating the Evidence*, University of Sydney, 7 September, p.7

[15] Hall R, Bretherton T and Buchanan J (2000) *The Growth of Non Standard Work and its Impact on Vocational Education and Training in Australia*, NCVER at p.24 quoting Gospel H (1994), op cit, pp.37-56 at p51, emphasis added.

[16] Gospel (1994) ibid p.37

Significantly, this subsection is different (more limited) than s.89A(2) of the Workplace Relations Act which it replaces in relation to building disputes.

6.1.5. *Building industrial dispute* is defined in section 4 as any *industrial dispute that relates to building employees* ***whether or not the dispute also relates to other employees.*** According to the Explanatory Memorandum[17]; *"The definition is broad to ensure the provisions of the Bill dealing with industrial disputes have appropriate and effective coverage."*

6.1.6. This means that any industrial dispute between the CEPU and electrical contractors is a building industrial dispute with restrictions on the allowable matters the award may contain.

6.1.7. Of particular concern in this paring down of the list of allowable matters is that the current reference to "skill based career paths" is dropped. Subsection 4(b) of the Bill further limits the scope of allowable matters by expressly excluding *training or education matters* as allowable matters except in relation to leave and allowances for apprentices. Apparently, the reason for this is that; *"... these matters are more appropriately dealt with at an enterprise or workplace level and, if regulation by industrial instrument is necessary, by a certified agreement or an Australian Workplace Agreement (AWA)."*[18]

6.1.8. The same claim was made by the Howard Government to the Full Bench of the AIRC in the 1997 *Safety Net Review case*[19]. The Government argued that:

> *"...Matters associated with classification relativities* [skill based career paths] *should be left for determination by the parties at the enterprise level."*

6.1.9. The Full Bench rejected the claim saying:

> *"If an award system is to be fair, then it is no answer ...to leave it to workplace agreements to establish appropriate relativities .... Furthermore, the provision of skill-based career structures in awards is a significant way in which employees are encouraged to improve their skills, contribute to higher productivity and advance to higher wages."*

6.1.10. The CEPU is concerned about the impact that the removal of skill based career paths, training and education as allowable matters will have on the ongoing training and education of electrical and electronic employees. The Electrical Contracting Industry Award is an important vehicle for the skill formation of electrical and electronic workers. Some 75% of electricians are trained in the electrical contracting industry. This is in jeopardy by the operation of the Bill.

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[17] *Building and Construction Improvement Bill 2003 Explanatory Memorandum* p.39
[18] *Explanatory Memorandum*, ibid
[19] Australian Industrial Relations Commission, (1997) *Safety net Review – Wages*, April, Print P1997 at p.72

6.1.11. By removing training and education from the list of allowable matters, the operation of this Bill will hinder skill acquisition and inhibit ongoing training. CEPU members often undertake additional technical training throughout their working career. Training is inextricably linked to their career path. Clause 15.11 of the Electrical Contracting Industry Award provides that training undertaken under the award must be in accordance with the national electrotechnology training packages. This is the key to ensuring that broad based and portable skills are developed. If current award career path and award training provisions are not retained our members skill base will be eroded and Australia's future skill needs will not be satisfied.

6.1.12. As noted above, time has proven the worth of the award system in helping to maintain a strong skills base. The weakening of the award system in favour of enterprise bargaining has been accompanied by the severe skills shortage we now face. This prompts the CEPU to argue that the Government should again adopt the conclusion of the AIRC Full Bench and leave skill based career structures in awards.

6.1.13. So bad is the current skills shortage that there was a recent Senate Inquiry into the matter undertaken by this Committee.[20] The Inquiry was prompted by "... *industry concerns about persistent, widespread skill shortages over the past decade and concerns about future shortages resulting from ... a serious erosion of the skills base.*"[21] The proposal to remove skills, training and education from the list of allowable award matters will only exacerbate the huge skills shortages already being experienced.

6.1.14. Ironically over a decade ago commentators were predicting that the weakening of the award system would lead to this skills shortage. As far back as 1993[22] it was predicted that enterprise bargaining would contribute to the decline in the apprenticeship system. In what one commentator has called "a prescient statement"[23] Curtain in 1993 argued:

> *"Existing forms of regulated training are likely to decline substantially within the next five years as a result of the shift in the center of gravity of industrial relations away from highly centralised forms of determining wages and conditions to agreements that are negotiated closer to the workplace."*

6.1.15. This is reflected in a recent study[24] of Australian Workplace Agreements (AWAs), which promote bargaining at an individual level, found that 153

[20] Senate Employment, Workplace Relations and Education References Committee (2003) *Bridging the Skills Divide*, November

[21] Senate *Bridging the Skills Divide* (2003) p.2

[22] See for instance, Curtain R., (1993) *Has the Apprenticeship System a Future? The impact of labour market reform on structured entry- level training* Department of Employment, Education and Training as quoted by Toner p.19

[23] Toner (2003) op cit

[24] Roan A and Lafferty G (2001) "Skills, Training and Workforce Bargaining – the Implications of Australian Workplace Agreements", paper presented at *The AWA Experience: Evaluating the Evidence*, University of Sydney, 7 September

AWAs or 71.6% of the sample contained no reference to training, which the authors interpreted as indicating "*a lack of importance accorded to training in many agreements.*" Secondly, 47 (30.7%) of AWAs with training provisions had very limited content related to training. Typically this content consisted of one or more sentences along the lines of "*undertaking training as directed*". Moreover, only 8 of the 153 AWAs with training provisions (however superficial) specified that training could occur during working hours. This leads Dr Philip Toner to conclude; "*there is prima facie evidence that industrial relations changes have contributed to reduced training rates.*"[25]

6.1.16. The award system with its clear provision for training and skills formation has cushioned the labour market from the full impact of the spread of enterprise bargaining on the apprenticeship system. Removing 'skill based career paths' and expressly excluding 'training and education' from the list of allowable matters is ill conceived. A better approach to the current crisis would be to leave the awards intact while well conceived policies are debated. There is no imperative to remove these provisions from awards now without some other substitute mechanism being put in place.

6.1.17. The rationale behind the Bill, that these training matters are more appropriately dealt with at an enterprise or workplace level and if necessary, by an EBA or AWA, is wrong. We agree with ACIRRT which says in some circumstances a shift to firm specific training can result in workers being trained only "*to acquire the minimum competencies to get the job done*".[26] A decade ago it was predicted "*if competencies are narrowly defined and acquired more off the job they may undermine the well-rounded skill base of the best traditional apprenticeships.*"[27]

6.1.18. Training workers in minimum firm specific competencies is not only bad for the individual as it militates against portability, it is bad for the industry as it does not create a pool of skilled labour with common core competencies.

6.1.19. What the Government hopes to achieve by removing the current safety net with respect to training matters is not clear. Presumably the proposal is in response to a perception that it will remove union influence over the training agenda; that by getting rid of union involvement the Government will somehow solve the training crisis; that unions are to blame for market rigidities and inflexibility with respect to training. From where we stand the more the training system has been geared to the needs of individual employers, the more the skills shortage has worsened.

6.1.20. In the mid 1990s employers and the Government took the view that the award system was a market impediment imposing constraints on growth and

[25] Toner (2003) op cit, p.19
[26] ACIRRT (2002) *Renewing the Capacity for Skill Formation: The Challenge for Victorian Manufacturing*, A Report for the Manufacturing Industry Consultative Council, p.38
[27] Gospel H (1994) "The Survival of Apprenticeship Training in Australia" 36 *Journal of Industrial Relations* 1, pp.37-56 at p54

profitability. They wanted flexibilities which were in theory being restrained by the operation of the award system. The market reality is that employers want fully trained and competent tradespeople not partly trained people with sector specific and even firm specific skills. This was the experiment of the late 1990's and it failed miserably. The research bears this out. Of all the factors seen as being responsible for the chronic skill shortage, awards and unions are not mentioned once as an impediment to training.

6.1.21. In response to the weakening of the award system and the reduced role of unions, industry has not capitalised on the opportunity to take control of the training agenda in any meaningful way to create a substitute system which facilitates skills formation. They have filled the vacuum created by the increasing skills gap by increasing their use of labour hire and outsourcing, leading one researcher to conclude; *"reduced union influence and a reduced share of the workforce covered by industry based awards has also facilitated management use of labour hire and casual and part time employment."*[28]

6.1.22. The Cole Royal Commission notes that;

> *"Historically the construction industry invested little in training. This is partly because so many firms had fewer than five employees and partly because the industry is project based. Those working in the industry have been traditionally recognised as a '...comparatively low educational attainment...' Prior to the trend towards outsourcing government building and construction projects, industry could recruit skilled workers from a large pool of tradespeople who had been employed as apprentices by governments across Australia. That pool no longer exists."*[29]

6.1.23. This training profile is quite different for electrical and electronic tradespersons. 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.

6.1.24. Skills based career paths have played an important role in encouraging our members to undertake further vocational training. Had these career paths not been evident in awards, many employees might not have aspired to further training. It is crucial that the link between higher wages and a career path created by ongoing training is maintained.

6.1.25. Employers, especially smaller employers, rely on the award training provisions to know what skills are required, which training package is appropriate for the training, and to offer an incentive to their employees to undertake ongoing

[28] Toner, op cit
[29] *Final Report National issues* Part 3 Volume Nine p.153

training and apply that additional skill in their employment. As stated above, the rationale for removing skills and training from the list of allowable matters is that it is more appropriate to deal with training at a workplace level. This is a ludicrous proposition for the majority of employers in the electrical contracting and probably the building industry generally. As also already noted, the industry is dominated by small employers who lack the time, resources or expertise to become training experts. They are in the business of supplying electrical services not training services.

6.1.26. Retaining the training provisions, skill based career paths and the related classification definitions in awards, makes the system:

(a) transparent and certain - everyone knows what is involved in advancing up the career path and there is no disagreement about the appropriate training required. It also creates an incentive for employees to advance up the career path.

(b) enforceable – if there is a problem with an employer refusing to recognise the training and skills of an employee, the aggrieved party has an impartial party available to hear his/her grievance (the AIRC).

(c) transportable – employees skills are recognised from employer to employer; it guards against employer specific training which is not transportable.

6.1.27. The origins and ramifications of the skills crisis is further dealt with under "Skills Shortages and Adequacy of Support for the Apprenticeship System" where we submit that further devolving responsibility for skill formation to a workplace level would compound the skill shortages already being experienced.

7. Bargaining Process Frustrated

7.1. The Bill inhibits collective bargaining

7.1.1. A key object of the Bill is *"..improving the bargaining framework so as to further encourage genuine bargaining at the workplace level .."*[30]

7.1.2. We submit that far from improving the bargaining framework the Bill acts to inhibit it. The system seems designed to discourage the certification of agreements in the industry. Unworkable and impractical provisions have been added to ensure that every step of the way to certifying an agreement is more difficult than at present.

7.1.3. Provisions regarding a secret ballot initiate a bargaining period[31] followed by a secret ballot to take protected industrial action[32], coupled with a mandatory

[30] Explanatory Memorandum p.19
[31] Where there are 10 or more employees – s.54(2)

cooling off period, extra notice requirements for bargaining periods and so on, are all designed to make the process more technical and so fetter the bargaining process as to make it practically unworkable. Quite apart from the cost of compliance, nothing in the new provisions exists to streamline or make the process easier.

7.1.4. The philosophical approach of the proposed Bill is to retard collective bargaining. In a "free" system, the parties come together to negotiate an outcome each having and needing leverage to achieve that outcome. The sole leverage of employees is industrial action. Employers on the other hand have a multiplicity of ways of ensuring employees 'toe the line'.

7.1.5. Industrial action is a legitimate means of putting pressure on the employer to negotiate. In fact, the good faith bargaining procedures, upon which this current system of enterprise bargaining was modelled, allow employees to take industrial action in the context of collective bargaining. This Bill so fetters the ability to take industrial action, that it makes a mockery of the term "collective bargaining".

7.1.6. The ridiculous, complex and largely unworkable provisions for bargaining periods and protected industrial action, have been drafted by the Government to be confrontational and tip the scales forever more firmly in favour of employers. We believe the scales are already tipped in favour of employers with the resources and readiness to resort to all manner of legal sanction. Introducing additional complex and unnecessary brakes in the process of collective bargaining between the parties will only make the process more litigious (profiting only the lawyers), favouring lengthy delays and outcomes characterised by bitterness and resentment.

7.1.7. All an employer has to do is wait things out. The way the Bill is drafted there is no advantage to an employer to work and negotiate to diffuse a situation. It in fact encourages employers NOT to bargain, knowing that if they wait, "time will be up".

7.1.8. What the Government seems to have forgotten is that the negotiating parties are actually supposed to able to work together after a dispute is resolved or the bargaining process complete. The view of the CEPU is that the yardstick of good industrial relations or "best practice industrial relations", is the speed with which there is a negotiated outcome mutually satisfactory to all the parties.

7.1.9. Supposedly the aim of the Bill is *".. to improve the workplace relations framework for the building and construction industry ..."* Yet it seems the real aim of this proposed legislation is to create as much confrontation and disharmony as possible. This can only be detrimental to ongoing industrial relationships. The aim of good industrial relations should be an outcome where both parties can feel somewhat vindicated but still able to "get on with the job". These provisions are designed to create outcomes where the ensuing bitterness

[32] s.81

caused by the intentional brakes in the negotiating process, will greatly impede ongoing relations between the parties and do nothing to improve the framework.

7.1.10. *We have attempted to show the complexity of the new bargaining process diagrammatically*[33]. We have compared the current system with the proposed system. It can readily be seen that the new system is more complex, legally technical and will involve time delays before the parties can certify an agreement. An agreement cannot even be certified without a bargaining period being initiated[34] and a ballot of employees being conducted prior to the union initiation of a bargaining period[35]. There was nothing in the findings of the Cole Royal Commission to indicate there was a problem with the current process to initiate a bargaining period. All the new procedures will achieve is delay and extra paperwork and potential legal arguments over technicalities.

7.1.11. The current system is streamlined and can fast track the certification of agreements if parties are able to reach agreement quickly. The CEPU submits that this should be the aim of the certification process.

7.2. What are the new obligations being imposed on the parties?

Bargaining Period Ballot

7.2.1. A s.64 ballot of employees must be held 21 days before a bargaining period can be lodged with the AIRC. Currently a bargaining period is a machinery matter paving the way for the possibility of protected industrial action.

Industrial Action Ballot Order

7.2.2. During a bargaining period if employees wish to take industrial action a Ballot Order must be applied for from the AIRC[36]. There is no similar requirement on the employer in the event of a lockout[37]. The applicant must also have initiated the bargaining period and be able to show they have genuinely tried to reach agreement with the employer.

7.2.3. At this point employers and anyone else wishing to delay the matter can argue a number of things before the AIRC including the validity of the bargaining period and lack of genuineness in trying to reach agreement. The real difficulty for unions here is that the onus is on the applicant (generally the union) for a ballot order to prove they have complied with s.62. Section 62 is a list of indicators to which the AIRC can refer to assess whether the union has genuinely tried to reach agreement. If the employer refuses to negotiate it can make satisfying the requirements of s.62 difficult.

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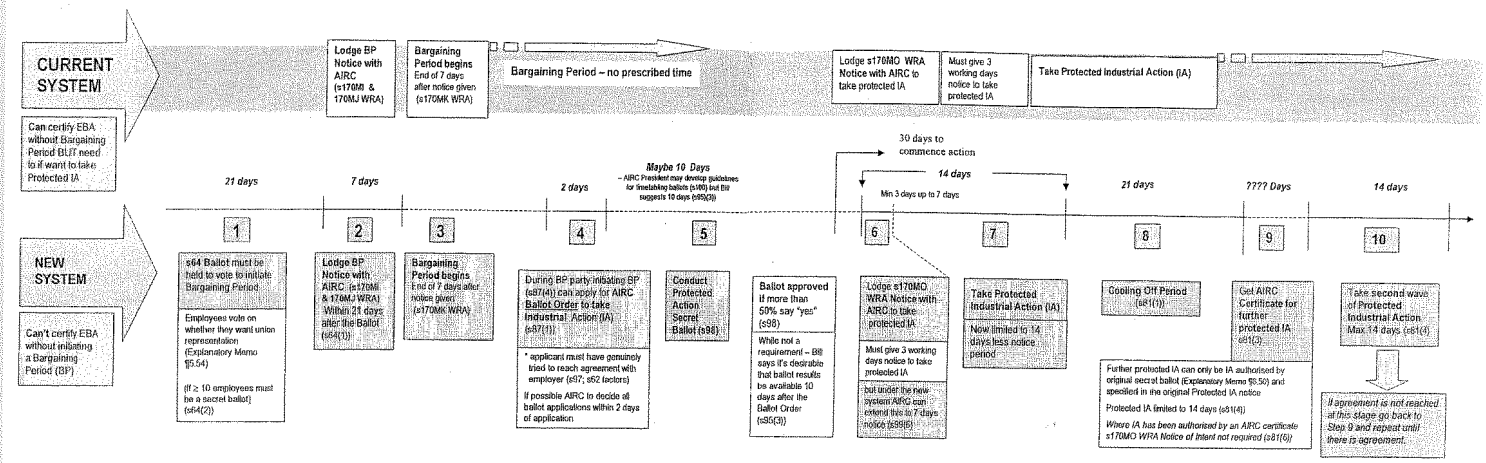
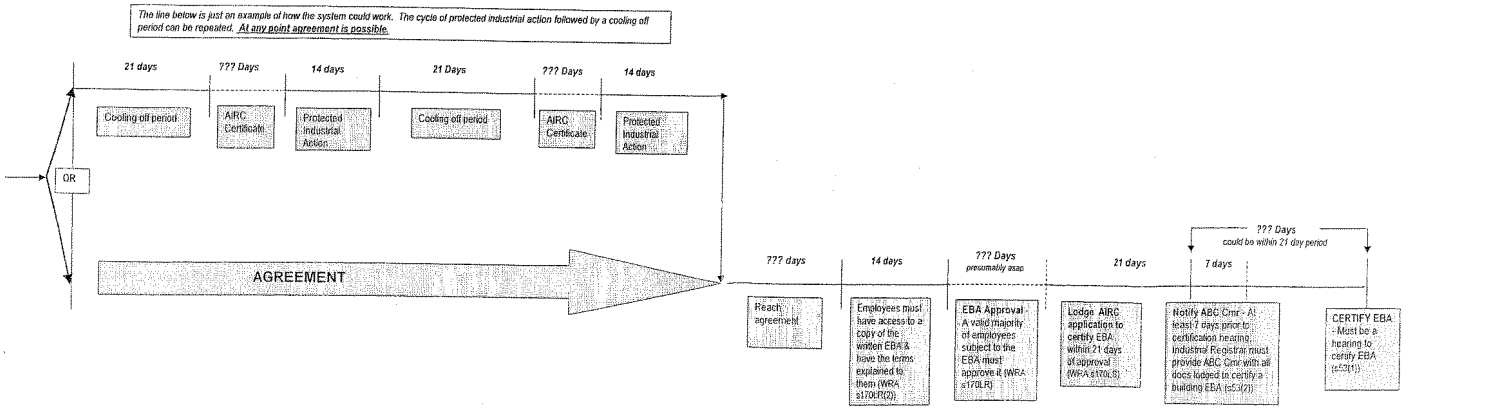
[33] Please see Attachment 1
[34] Section 59
[35] Section 64
[36] Section 87(1)
[37] It seems notice must still be given under s.170MO of the WRA

10 HURDLES TO FRUSTRATE THE BARGAINING PROCESS UNDER THE NEW ACT





Secret ballot for Protected Action

7.2.4. Provided the AIRC issues the Ballot Order, the secret ballot to authorise protected industrial action then goes ahead[38]. Section 100 provides that the President of the AIRC would be given the power to develop guidelines for the conduct of ballots to assist the AIRC in speedily determining such applications. While there is no time frame prescribed for this, the Bill states that it is desirable but not mandatory if the ballot results are available within 10 days of the ballot order[39].

Timing & Procedure

7.2.5. Given the procedural requirements, the possibility of the results being available within 10 days of the Ballot Order seems laughable. The procedure involves determining who will conduct the ballot, preparation of the roll of voters, provision for postal voting where applicable, preparation of the ballot paper and notification of the applicant, the affected employer and the Industrial Registrar of the results of the ballot[40]. The process is more likely to stretch to weeks. Already a significant period of time has elapsed since the expiry of the current agreement[41] - we conservatively estimate it could be 2-2½ months[42] before industrial action can take place.

Question to be put to Ballot

7.2.6. The drafting of the question/s on the ballot paper is important because the Bill limits later industrial action to the terms of the initial ballot question. The Bill says that the question must state *"the nature of the proposed building action"*[43] which is similar to the requirement in s170MO(5) of the WRA to describe the *"nature of the intended action"* in the notice to the employer. This has become an area of litigation where the notices have been found to be deficient for being too vague and paradoxically, being too specific. It is reasonable to assume the same rules would apply to the Bill and the same problems will arise in relation to the ballot paper.

Timing of Industrial Action

7.2.7. The industrial action commences within a 30 day period[44] after the later of the date of the declaration of the ballot or in theory the nominal expiry date of the existing agreement[45]. This can be extended another 30 days if both the

[38] Section 98
[39] Section 95(3)
[40] Sections 101, 102, 103, 104, 108, 109, 110, 111, 112
[41] No part of this process can be initiated until the expiry of the current agreement
[42] Comprising the 21 days required for the first secret ballot (for more than 10 employees) before the lodgement of the initiation of the bargaining period plus 7 days notice before the bargaining period can begin (but not taking into account any time delay here from actually being involved in the bargaining process) plus an estimated 2 days for the AIRC to decide the application for a ballot order plus 10 days to make the second ballot results available plus 3-7 working days notice before the protected action can take place.
[43] Section 88(1)
[44] Section 114
[45] The possibility that the two ballots, notification of the bargaining period and some attempt at genuinely trying to reach agreement could all take place within 30 days from the expiry of an agreement is laughable.

employer and the applicant (union or employee/s) jointly apply for the extension.

7.2.8. The time prescribed for protected industrial action is 14 days[46] which may include the notice time of 3 working days which can be extended to 7 days by the AIRC if required[47]. It is not clear whether the notice time is included or not. Section 81(1) provides that building industrial action won't be protected if the action continues beyond the 14th day after the day notified.

What is the "Notified Day"?

7.2.9. The difficulty is, what is the "notified day"? Is the "notified day" the day notice is given or the day the notice specifies the action will start? If it is the day the notice is given, then in effect the time period to take action is reduced to 7-10 days depending on how much notice is required before the action can occur (3 working days or up to 7 days). This is further complicated by the requirement that the notice period be working days.

7.2.10. For example, if the union gives the employer notice on a Wednesday, industrial action cannot take place until Tuesday because there must be 3 working days given[48]. Wednesday does not count. Thursday, Friday and Monday are the 3 working days notice. The action can occur *after* the third day. By this time 5 days of the 14 day window to take action have elapsed, leaving only 9 days in which industrial action can be taken. If the notice is extended to the full 7 days possible, it can be seen that the window of opportunity is limited.

7.2.11. Further, in allowing the AIRC to extend the notice period, s.100(6) of the Bill does not specify whether the 7 days must be working days. However, it also fails to make this distinction when it refers to the 3 days notice whereas s.170MO(2)(b) of the WRA clearly specifies that the 3 days notice must be 3 *working* days notice. This is no doubt an oversight but it creates uncertainty in practice.

Cooling Off Period & AIRC Certificate

7.2.12. At the expiry of the 14 days, there is a mandatory cooling off period[49] of 21 days.

7.2.13. After 21 days the applicant can seek a certificate from the AIRC to take further protected action[50]. If successful, then action is again limited to 14 days without the complication of the notice period[51], after which time the cooling off period cuts in again. The caveat is that the action must be the action approved by the original secret ballot to approve the action thus making the drafting of that

[46] Section 81(1)
[47] Section 100(6)
[48] For the purposes of this example we will put aside the complications that occur with weekend work and the notice requirement and assume we are dealing with a 5 day working week.
[49] Section 81(1)
[50] Section 81(3)
[51] Section 81(6) specially excludes the operation of s170MO of the WRA which includes the requirement to give notice, in relation action that is covered by an AIRC certificate.

notice quite problematic. The applicant will have to take great care in drafting the ballot notice to ensure it can cover different subsequent types of action without being too vague or too specific to nullify later action. This has proved hard enough in relation to current protected action notices without adding the requirement that the applicant be able to crystal ball gaze into the future and predict the type of action that may be appropriate.

Currently, if we wish to change the intended action we simply notify the employer of the change. Under the Bill we would need to conduct a new secret ballot. This is ridiculous and unworkable.

7.2.14. Once the cycle of protected action, followed by cooling off periods has in theory enabled the parties to reach agreement, then the process is further delayed and complicated by the requirement that at least 7 days before the certification hearing, the Industrial Registrar must provide the ABC Commissioner with all the documentation[52]. Despite the employees having approved the final agreement, if the ABC Commissioner wants to intervene in the proceedings he can.

[52] Section 53(2)

7.3. Cost of the Ballot

7.3.1. The liability for the cost of the ballot must be borne by the applicant[53] who will in the majority of cases be the union. The Australian Electoral Commission (AEC), or the industrial Registrar if the authorised ballot agent is not the AEC, can assess the cost of the ballot and discharge the applicant from 80% of the reasonable cost of the ballot.[54]

7.3.2. Interestingly, if a bargaining period is initiated by an employee or employees, that employee or employees can apply for a ballot order for protected action[55]. This would seem to suggest that the employee would bear 80% of the reasonable costs of the ballot. Further, and perhaps more worrying, an employee to make such an application must have the support of at least the prescribed number of employees. This sounds quite democratic until it is realised that the prescribed number of employees where there are less than 80 relevant employees is a mere 2 employees.[56] So two employees can decide an outcome on behalf of 80.

7.4. Timing

7.4.1. In our diagrammatic representation of the process we have not allowed for delays. We have assumed everything flows expeditiously. Even then, it can be seen that months after the expiry of an enterprise agreement, the parties will still be trying to get a new agreement certified.

7.4.2. Taking into account the possibility of appeals which could delay the holding of the ballot/s, it can be seen that this process could drag on interminably. It is virtually impossible to predict the time between the application for a ballot and its commencement but weeks and even months is a certainty.

7.5. Process more complex for contractors who employ both building and non building workers

7.5.1. The complexity of the bargaining provisions is exacerbated for enterprises where some of the employees work in the building and construction industry, whilst other employees do not work within the industry.

7.5.2. For example, an electrical contractor may employ eight electricians four of whom are normally engaged on installation in the commercial sector and are bound by the provisions of the proposed Bill. The other four employees are normally engaged in the maintenance of factories or other plant and equipment and never go on to a construction site and are not undertaking *building work*.

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[53] Section 118(1)
[54] Section 119
[55] Section 87(4) - Without the protection of a union this is highly unlikely in practice of course
[56] Section 86

7.5.3. It appears that Chapter 6 – Industrial Action of the Bill, applies to *building industrial action* which is defined to mean bans/limitations/etc on *building work*[57]. It also appears that the need for a secret ballot prior to taking protected action[58] only applies to *building industrial* action and does not apply to employees engaged outside of building work as defined.

7.5.4. In the example given above where some of the employees of a contractor do not perform *building* work, for example work on maintenance, the proposed legislation creates significant difficulties. Because those employees are not engaged in *building work* and hence are not involved in *building industrial action* it appears that they can take protected industrial action in accordance with the provisions of the WRA rather than the Bill. In other words, the small contractor may have to contend with the application of two different processes for negotiating an agreement for his/her 8 employees.

7.5.5. The same difficulties will be encountered by larger electrical contracting employers whose employees work both within and outside of the building industry as defined.

7.6. Pattern Bargaining

What does the Bill provide with respect to Pattern Bargaining

7.6.1. The Bill provides that "pattern bargaining" is not genuine bargaining and the AIRC can suspend or terminate a bargaining period where a party (union) engages in pattern bargaining.

7.6.2. Further, an agreement may be considered a pattern agreement even if only part of the agreement resulted from pattern bargaining[59]. This is a nonsense. There are some provisions such as related to skill based career paths and occupational health and safety, provision for the recovery of employee entitlements and so on, that by definition must apply across an industry. There is nothing to be gained by trying to sit down with each individual employer to renegotiate industry standards designed to protect employees in the industry.

7.6.3. The current WRA provides choices for employers and employees as to the type of agreement best suits their needs. The Bill's prohibition on pattern bargaining reduces the choice or options available to employers and employees. This is an unreasonable and unnecessary restriction on the bargaining process particularly for small businesses that have no objection to 'pattern bargaining'.

7.6.4. In this regard it is significant that most of the employer submissions to the Cole Royal Commission wanted to retain pattern and project bargaining.

[57] Section 72
[58] and all of the elements of the complex bargaining process set out in Chapter 6 of the Bill
[59] Section 56

7.6.5. The AiG considers all of the existing bargaining options should continue to be available in the construction industry.[60]

7.6.6. The Air Conditioning and Mechanical Contractors Association of Victoria said that; *"employers do not wish to compete on the basis of wages rates ..."* The Cole Commission paraphrased the Association's submission; *" It proposed that the Act be amended to enable those involved in the industry, or part of the industry, to engage in pattern bargaining if they so wish."*[61]

7.6.7. According to Cole, while the MBA supported the principle of decentralised wage negotiations it acknowledged that the current model under the WRA is;

> *"awkward for the building and construction industry. It discourages multi-employer, sector or industry types of agreements. In its view the single enterprise model .... is not practicable for building and construction industry enterprises .... because building and construction work sites comprise ad hoc collections of independent or subcontractor enterprises, which are temporarily engaged, in an interdependent manner, in the construction of discrete projects. This creates problems on large projects which have literally hundreds of such enterprise agreements on their work sites during construction, the single enterprise model ... is inconsistent with large project work where the common denominator is the site ..."*[62]

7.6.8. MBA considered that this blurring of culture, work pattern and work arrangements results in projects becoming in effect the 'enterprise' in practice. This blurring effect extends beyond individual project work sites because subcontractors typically have a number of contracts running simultaneously on a number of work sites and rotate their employees between them as required[63].

7.6.9. This comment is particularly relevant to electrical contractors and their employees. It makes no sense for a single employer to pay different rates and conditions to the same group of employees because their work site changes. A pattern agreement standardises wages and conditions so the employer is not faced with practical and operational difficulties in both reaching agreement in the first place and then rotating employees across different sites and projects.

7.6.10. John Holland, while saying the company was in principle opposed to pattern bargaining, acknowledged that in the industry it is preferable to have reasonable wages and conditions that apply to all, and then award projects on the basis of safety, performance and technical competence. This company saw it as more important to remove contractors who pay low rates (undercut) and breach safety requirements from the industry[64].

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[60] Cole Royal Commission, *Final Report – Reform Establishing Employment Conditions* Volume 5, p.30
[61] As quoted in the *Final Report Volume 5*, ibid, p.31
[62] *Final Report Volume 5*, ibid, p.26
[63] *Final Report Volume 5,* ibid
[64] *Final Report Volume 5,* ibid, p.33

7.6.11. Despite the main industry players being against the removal of pattern bargaining as a bargaining option, the Commonwealth is still for its removal. Not surprisingly the response of the Cole Royal Commission was to disregard all the sound arguments in favour of pattern and project outcomes and has prohibited pattern bargaining and has even gone so far as to prohibit agreements where some of the clauses may be common. This is clearly not what the industry wants.

What are the arguments for Pattern Bargaining

7.6.12. Pattern bargaining is not an evil to be stamped out by this legislation. Often employers actually prefer pattern bargaining as it creates a level playing field dissuading employers to continually undercut each other.

7.6.13. The industry is characterised by small businesses and contractors who lack the skill and industrial relations resources to individually negotiate an unique EBA for every site or project they work on. They also do not want separate agreements with differing wages and conditions for every site they may deploy their workforce to over the course of a week. This is not workable. They need consistency and certainty, as do their employees.

7.6.14. In 1998 Professor Rimmer (Deakin University) found with respect to enterprise agreements that small businesses were content with the award system. Professor Rimmer found that:

> *"AWIRS 95 found that 76 per cent of businesses with five to nineteen employees agreed or strongly agreed with the proposition 'the award system has worked well in the past for your workplace' (Morehead et al., 1997: 318). Small business satisfaction with awards is a complex phenomenon that need not be explained here. The point is that there is little sustained pressure within this segment of business to formally exit the award stream and enter the bargaining stream"*[65].

7.6.15. As small businesses, electrical contractors lack the expertise and/or resources (and often the desire) to negotiate agreements which are entirely unique to their enterprise. This is quite consistent with the findings of Professor Rimmer with respect to awards. While Professor Rimmer was concerned with the lack of pressure by small businesses to move away from awards to enterprise bargaining, it follows that there is also little pressure to move from 'pattern agreements' to agreements entirely unique to each workplace (which is the objective of the Bill).

7.6.16. 'Pattern bargaining' creates a level playing field in the same way as the award system in that it ensures that employers in the industry pay the same minimum rates of pay and conditions to employees. This creates equity between

[65] Rimmer M (1998) "Enterprise Bargaining, Wage Norms and Productivity" 40 *Journal of Industrial Relations* 605 at 611

competitors in terms of wages and conditions, which is important when contractors are tendering for work.

7.6.17. The 'pattern agreements' in the electrical contracting industry can still allow for significant flexibility as to how hours of work, leave and other prescribed matters can be applied at each business. This provides for significant productivity improvements.

7.6.18. Cole[66] accuses unions of using pattern agreements for strategic and practical reasons. He argues that given the number of small businesses in the industry, it is impractical for the union to service all enterprises. This is no less true for those businesses. Pattern agreements require less resources to negotiate. This is a practical consideration and is an important issue for small businesses with limited resources. *Why should small businesses who employ an average of 5 employees be forced by Parliament to devote substantial resources to negotiating an agreement which is entirely unique to their business when they are happy with a 'pattern agreement'?* It should be a matter for each employer and employees to decide.

7.6.19. Pattern agreements allow the employer to focus on non wage changes to improve productivity such as skill development, client focus and innovative human resource management practices which have been found by independent academic research to provide superior productivity gains.[67]

7.6.20. The electrical contracting employers are represented and serviced by the National Electrical and Communications Association (NECA). NECA is a long standing advocate of a level playing field for wages and conditions in the industry. Before enterprise bargaining became available, NECA consistently argued in support of paid rates awards in the industry.[68] NECA and the Electrical Division have also devoted substantial resources to establishing a single national award for the industry. The aim being to establish a level playing field. In its submission to this Cole Royal Commission NECA expressed the view that *"generally contractors would prefer that wages and conditions of employment are common across each workplace".*[69]

The argument against Pattern Bargaining

7.6.21. The real argument against pattern agreements is that they do not foster productivity. That pattern bargaining entrenches the existing culture by reinforcing a uniform approach which does not allow for innovation and change and does not allow the industry to realise its productivity potential[70].

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[66] *Final Report – Reform Establishing Employment Conditions*, Volume 5 p.37
[67] See for instance, the work of Professor Rimmer, ibid
[68] See for example the comments made by NECA in establishing a national electrical contracting industry award in 1990; AIRC C.No 21680/1990; Transcript of proceedings, 5 October 1990 at pp.8-11
[69] NECA (2002) Submission to the Royal Commission as quoted in the *Final Report Volume 5*, p.31
[70] Explanatory memorandum, op cit, pp.12-13

7.6.22. Early independent academic analysis of the relationship between enterprise bargaining and productivity growth shows that there is little conclusive evidence that enterprise bargaining is an engine of productivity growth.

7.6.23. For example, David Peetz from the School of Industrial Relations and Centre for Research on Employment and Work, Griffith University has reviewed the relationship between enterprise bargaining and productivity and found that:

> *"In short, single-employer agreements have probably led to a small increase in productivity and competitiveness at a majority of workplaces that have engaged in bargaining, but the contribution has been substantial in only a small minority of workplaces. And a majority of workplaces without agreements or where employees were reliant on safety net adjustments experienced increases in productivity and work intensity anyway".*[71]

7.6.24. Although the studies review the effect of enterprise bargaining *vis a vis* awards and centralised wage fixation rather than the effect of 'pattern bargaining' *vis a vis* enterprise agreements that are unique to each enterprise, the research is still informative as 'pattern bargaining' is similar to the award system in that they are both an attempt to provide a level playing field for wages and conditions.

7.6.25. In this regard Professor Rimmer reviewed the move to the hybrid Australian system of enterprise bargaining grafted onto a central wage fixing of 'safety net adjustments' and found that factors other than the actual industrial instrument are important to realising productivity gains. He found:

> *"The justification for adopting such a wage system must rest on the productivity gains released by enterprise bargaining. On this question there is little conclusive evidence, and the more we learn of the role of enterprise bargaining in workplace innovation, the less it appears to be a sufficient key. Studies of 'bundled' human resource management practices in the United States suggest that productivity gains can be made through the implementation of innovative human resource management and management practices, the road to which may entail enterprise bargaining"*[72].

7.6.26. It seems communication is the key to positive employee/employer relationships. Cole argues that opening lines of communication between management and employees is a key factor in developing working conditions suitable to the enterprise. He points to the requirement that under the WRA the employer must take reasonable steps to explain the terms of the agreement to employees *prior* to their approval and finalisation of the agreement. However, this is no less true of the process to certify pattern or project agreements. The requirements are the same; the lines of communication must be open. It is the

[71] Peetz, D (1998) 'The Safety Net, Bargaining and the Role of the Australian Industrial Relations Commission', 40 *Journal of Industrial Relations*, 533 at p.539

[72] Rimmer,M (1998) 'Enterprise Bargaining, Wage Norms and Productivity' 40 *Journal of Industrial Relations* p621)

process that matters rather than the vehicle. In this industry the vehicle which seems to suit most of the parties is a pattern or project style ageement.

7.6.27. The Cole Commission argued that pattern agreements cause a significant increase in the cost of building and construction. The Commission states that estimates of that increase vary but, on any view "it is significant". 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.*"[73] 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. So it is not a very convincing argument to use the award as the basis of comparison to "prove" pattern agreements add significantly to costs. In fact, because pattern agreements are a known quantity their finalisation should be fast and cost efficient.

7.6.28. Cole also summarises evidence from large employers of their estimate of the amount pattern bargains added to their costs[74]. These numbers are meaningless. Even without a pattern agreement, an agreement would have been negotiated between the parties. That agreement would have updated the rates and conditions. Those estimates fail to assess what the true updated costs would have been.

7.6.29. 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.

7.6.30. Enterprise agreements containing some pattern clauses should not invalidated or refused certification.

7.6.31. Pattern agreements should be certifiable as they facilitate a level playing field.

7.7. Fixed Term Agreements

7.7.1. Section 55 of the Bill directs the AIRC to refuse to certify a building agreement if its term is less than three years, unless the AIRC is satisfied that an earlier date is justified by special circumstances. This further restricts the options or choices available to employers and employees when reaching agreement. There is no rational reason for the insistence that all agreements be of three years duration. The employer and employees may have compelling reasons to

[73] *Final Report – Reform Establishing Employment Conditions*, Volume 5 p.37
[74] *Final Report – Reform Establishing Employment Conditions*, Volume 5, ibid, p.37

seek a one or two year agreement to suit the needs of the enterprise, which do not constitute 'special circumstances'.

7.7.2. The term of an agreement should be a matter left to the parties at an enterprise level rather than being stipulated by Parliament.

7.8. Restrictions on the Right of Entry

7.8.1. The Bill restricts the right of entry of union officials to investigate alleged breaches or to talk to employees to the extent that the right is effectively curtailed and of little utility. Compared to the right of entry provisions of the WRA (Part IX – Div 11A), the right of entry provisions of the Bill (Chapter 9) is unnecessarily restrictive and frustrates the employees' right to be assisted by the union when attempting to resolve industrial or safety disputes.

7.8.2. The Bill requires 24 hours notice to the employer (and to the ABCC) of a request for right of entry, and restricts the permit holder to enter and move about the workplace only in accordance with the employer's request and to conduct interviews in a particular room or area requested by the employer (s192(3),s202(3)).

7.8.3. A concrete example illustrates how the provisions of the Bill will frustrate the settlement of disputes rather than assisting in their resolution. It is universally accepted that safety is a key concern on building and construction sites. The record of death and injury within the industry is testimony to the need to improve safety on site. If members of the union hold a genuine concern for their immediate safety on a particular site, how are they to obtain timely and effective on-site representation from the union when the union has to provide at least 24 hours notice before entering the site, and the employer decides what parts of the site are accessible?. By the time the union is allowed on site the unresolved safety issue could have resulted in injury or alternatively the 24 hours provides sufficient time for the employer to quickly cover up the problem in anticipation of the entry on site.

7.8.4. It should be remembered that members of the union pay a substantial membership fee to the union in return for services provided by the union, including assistance on-site. Those employees are entitled to be able to exercise their membership rights by having the on-site assistance of the union – that is what they pay for. The employees' right to the representation which they have paid for obviously needs to be balanced against the employers right to efficiently run his/her business without unnecessary interference from union officials. Unfortunately the Bill makes no attempt to balance the competing needs of employees vis a vis their employer: it simply attempts to deny the employees right to timely and effective on-site representation.

7.8.5. Right of entry is also necessary to assist employees in resolving disputes other than safety disputes. The Bill frustrates the union's ability to represent members on site in relation to pay and other conditions of employment.

8. Australia's obligations under international labour law

8.1.1. We adopt the submission of the ACTU regarding this part of the Senate Inquiry.

9. The National Building Code proposal

9.1.1. Exactly what will comprise the Building Code is not clear. Section 26 authorises the Minister to issue one or more documents which together comprise the Building Code. This is the extent of what we are told about the Building Code. Other provisions about the Code go to compliance with and enforcement of the Code. We do know it is also to include unspecified occupational health and safety provisions. How the content is to be determined and by whom is not specified. It seems the Minister has a broad discretion. While there is detail about directing compliance with the Code, there is no requirement on the Minister to consult about its content.

9.1.2. The lack of scope specified particularly for the occupational health and safety part of the Code, if of concern. The Bill does not say what the relationship will be between the Federal operation of the Code and the various State and Territory OH&S regimes. Will the Code replace or supplement the State and Territory systems? Will the Code add another layer of regulatory complexity to the system adding confusion where there is currently none? It seems the business of building and construction is made more and more complex by this Bill.

10. Occupational health and safety

10.1. Federal Safety Commissoner

Do we need a new independent office to improve OH&S in the industry?

10.1.1. The basis for the Cole recommendation to establish this new Safety Commissioner was a token examination of OH&S in the industry, some anecdotal evidence in relation to selected building sites and a one-day conference that consisted of a limited number of players involved in the industry. It was notable that not one union supported or attended the conference. Cole states that OH&S performance in the building and construction industry is unacceptable. As we have stated, any death or injury in the industry is unacceptable and the union's goal is to aim for an industry free from injury or death. However, it is worthwhile to look at the factual position before considering Cole's comments in relation to that performance.

10.1.2. Overall statistics for injury and death in industry in Australia are not completely accurate. They are mainly based on workers' compensation figures and do not include people who are independent contractors nor do they include deaths from occupational diseases. They are however all we have to work with at this stage.

10.1.3. The Royal Commission's own figures[75] show that in the construction industry there has been an average of 50 deaths per year in the industry over the last 5 years (one a week given the two week shut down over Christmas and New Year). If you examine the figures you will see that in 1994-1995 there were 60 deaths in the industry. So the figure has actually been decreasing. The deaths in the year 1999-2000 were reduced to 32 deaths in the industry. While 32 deaths are still unacceptable, it cannot be argued there has not been a marked improvement in industry OH&S performance over the last five years.

10.1.4. When we look at the building and construction industry in relation to OH&S we need to do so in the context of other Australian industries. Both manufacturing and transport and storage have had historically higher fatality rates than construction. If we were to compare the trends in transport and storage, which has similar risk factors to construction for the five-year period of 1994-1995 to 1999-2000, we would see that both sectors had 60 deaths per annum in 1994-95 but by 1999-2000 construction had reduced to 32. However transport and storage had only reduced to 42. Based on the logic of underperformance by Cole, we should be setting up additional provisions in transport and storage – not construction. These reductions have been achieved by the current system however flawed it is perceived to be.

10.1.5. Internationally our performance in the sector, whilst not perfect, is by comparison favourable when compared with recent European community figures, so it is clear that claims of underperformance must be viewed with scepticism.

10.1.6. That the current system can produce these improvements in performance supports the argument that the resources to be ploughed into a new separate regulator would be better placed in supporting and better resourcing the infrastructure already in place.

10.1.7. 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. Anecdotal evidence is that the some WorkCover agencies lack the resources to investigate OH&S complaints and breaches and are not readily able to conduct surprise audits and checks as proposed for the new regulator. Were this possible many of the compliance failures may have been dealt with before they presented OH&S hazards.

10.1.8. We acknowledge that Work Cover agencies are State Government bodies but believe that there must be a better way to deal with uniformity of approach on OH&S problems and national standards for the industry other than simply setting up yet another regulator.

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[75] *Final Report of the Royal Commission into the Building and Construction Industry Reform Occupational Health and Safety* Appendix B The occupational health and safety performance of the building and construction industry pp133-158

10.1.9. The proposal in the Bill to create this new watchdog flies in the face of how successful OH&S initiatives are currently negotiated and enacted. The main players in the industry addressing issues of workplace safety have always been employers, employee representatives and governments. All OH&S authorities within Australia have Commissions or Boards which are tripartite in nature ensuring the interests of all parties involved are considered. Conversely with respect to the new Federal Safety Commissioner these parties have no role. His office is not answerable to anyone other than the Minister. Neither is there any requirement to consult with anyone over OH&S breaches or standards.

10.2. Duplication & Jurisdictional Overlap

10.2.1. The Bill seeks to establish a new statutory office of the Federal Safety Commission on the pretext that occupational health and safety performance in the Building and Construction industry is unacceptable. We believe that far from improving its OH&S performance, the creation of this new office will add duplication and confusion and have no positive effect.

10.2.2. The simple view that creating the office of Federal Safety Commissioner will improve OH&S in the industry is naïve. The Commonwealth and each State and Territory has legislation and regulation that binds the building and construction industry and its workforce. The Commonwealth has already set up the National Occupational health and Safety Commission (NOHSC). Section 8 of the National Occupational Health and Safety Act 1985 prescribes some[76] of the functions of the Commission as being:

- to formulate OH&S policies and strategies;
- to review laws and awards relating to OH&S matters;
- and significantly - to declare national standards and codes of practices and evaluate the effectiveness and implementation of those standards and codes.

10.2.3. 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?

10.2.4. 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. The new Safety Commission will be a law unto itself answerable only to the

[76] There are many more listed.

Minister and not obliged to seek the input of anyone in particular in developing standards and the code of practice.

10.2.5. To overlay a new body that duplicates and confuses responsibility will not improve performance but likely lower the standard of performance in the industry as parties bicker over jurisdiction. In a given OH&S situation who has the relevant jurisdiction could be a point of argument. The scene is set for legal arguments over jurisdiction that have nothing to do with the merits of the OH&S threat at hand.

10.2.6. The establishment of the Federal Safety Commissioner will:

(a) overlay yet another system of responsibility and reporting on already burdened small and medium building and construction employers

(b) subject employers to a dual system of responsibilities – how is an employer to resolve State/Federal conflicts and issues?

(c) potentially have employers being prosecuted under different regimes for offences associated with the same OHS failure – who is the appropriate agency to enforce standards on sites? How will the competition between State enforcement bodies and the Federal Commission work in practice?

(d) subject employees to a confusion of regulatory arrangements – again who is the appropriate enforcement agency?

10.3. OH&S and the National Building Code of Practice

10.3.1. Under s.26, the Minister would be empowered to issue OHS documents as part of the Building Code for corporations and territory or Commonwealth places. The Minister is required only to take into account any relevant recommendations of the Federal Safety Commissioner.

10.3.2. As with the Building Code the Bill does not identify the scope of OHS provisions of the Building Code or whether OHS provisions in the Building Code would replace or supplement the State and Territory OHS provisions which apply in the industry.

10.3.3. Corporations could be subject to Commonwealth OHS arrangements under the Building Code, while others working on the same site (eg. subcontractors who are not incorporated) would not be subject to those Commonwealth arrangements.

10.3.4. Health and safety protection could be undermined if different employees at a worksite or related worksites in the same state or territory were to be subject to different provisions of different governments. The Cole Royal Commission

itself argued that: *" the confusion that inevitably would arise from having two systems on one site would compromise and undermine safety on that site".*[77]

10.3.5. The Commonwealth intends via its role as a client and through the creation of Federal Safety Commissioner to force employers and employees in the industry to embrace its national code on OH&S and a new system of accreditation schemes. Accreditation schemes, the majority of which are OH&S Management Schemes, already exist in all States and Territories and are customarily adopted by principal contractors and sub-contractors in the building and construction industry. They are comprehensive systems that require ongoing training, monitoring and auditing. Embracement of these OH&S Management Schemes should be the cornerstone of any accreditation or preferred contractors scheme.

10.3.6. To overlay another OH&S code and a new system of accreditation for some sites, will create a management burden for small contractors which is unlikely to improve overall industry performance.

10.4. Commonwealth Government caused current lack of uniform standards

10.4.1. The *Explanatory Memorandum*[78] notes that prequalifications and State and Territory OH&S management schemes are not harmonised and the creation of the Federal Safety Commission will assist this problem. The CEPU disagrees with this conclusion. 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.

10.4.2. 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.

10.5. How do we improve OH&S in the building and construction industry?

10.5.1. The only way to tackle the problem is via tripartite cooperation with all stakeholders involved. A best practice example of this is the National Road Safety Strategy, which involved all stakeholders. The collective embracement

[77] *Final Report* Volume 6, p.22
[78] Building and Construction Improvement Bill 2003 *Explanatory Memorandum*

of this strategy has led to a reduction of fatalities of 26.6 per 100,000 of population in 1975 to 9.5 per 100,000 of our population in the year 2000.

10.5.2. This dramatic improvement was achieved by ongoing work on safety which included uniform national standards, investment in infrastructure and equipment, increasing penal provisions, increased enforcement and most importantly, better education and training based on improved research and data.

10.5.3. The Road Safety Strategy recognised the importance of involving all levels of Government and other stakeholders.

10.6. Do we already have a body that could achieve this?

10.6.1. We already have the National Occupational Health and Safety Commission which was established to help improve OH&S performance in all industry sectors based on national standards and uniformity of approach. The Minister only needs to have genuine commitment to direct a similar strategy that was embraced in road safety. A bureaucratic watchdog will not improve OH&S performance in the building and construction industry but a comprehensive inclusive and well resourced strategy will.

10.7. How would NOHSC interact with State Work Cover Authorities?

10.7.1. NOHSC should set up a central industry tripartite body which would include State Work Cover authorities representatives to deal with issues of OHS management specifically for the building and construction industry. This practice is currently widely embraced in the European community to deal with micro management of issues in that sector. The functions of this subcommittee would be:

- uniform accreditation
- development national standards
- national enforcement and regulation
- national programs of education and training

11. The Government's Response - Other Matters

11.1. Sham Corporate Structures to avoid legal obligations

11.1.1. Sham contracting has been defined by the Cole Commission as the practice where employers set their workers up as a contractor when in fact they are still employees. Even the ATO[79] acknowledges the employee is often given little choice in the matter, as subcontracting may be imposed as a condition precedent to engagement. Sometimes they may not even be aware of their change in status or at least the implications of their change in status[80]. The practice leads to tax evasion and non-payment of employee entitlements. Employees lose the benefits of annual leave, sick and long service leave, superannuation etc as these have been incorporated into an all up rate. Significantly, even the Royal Commission agrees that the recovery of employee entitlements in the cases of sham contracting does not seem to be a prominent feature of the activity of state industrial relations or labour inspectors.[81]

11.1.2. The Cole Commission quotes a Research Paper produced by the Productivity Commission[82] which states:

> *"... there are concerns that employers can avoid obligations in areas like payroll tax, superannuation, unfair dismissal and workers' compensation if they hire workers as contractors. This phenomenon is .. an indication that labour law is failing to protect a group of workers that because they are essentially working in employee-employer type relationships should be covered by the law."*

11.1.3. The Cole Commission agreed sham contracting is a problem and recommended something be done;

> *"In the case of employee entitlements there are indications that the operation of illegitimate subcontracting is not often addressed by the relevant authorities. This should change. It is proposed ... that Government agencies should provide the services in respect of unpaid entitlements to labour only contractors earning less than $50,000 a year."*[83]

11.1.4. The Government however failed to implement this recommendation and placed this matter "under consideration."

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[79] ATO evidence Royal Commission *Final Report – National Issues* Volume Nine p.323

[80] Evidence from the ATO was that *"it seems in some instances people have had their contractual arrangements change to subcontracting form employment without being aware of the implications. In other cases, subcontracting may have been imposed as a condition of engagement."* Royal Commission *Final Report – National Issues* Volume Nine p.323

[81] Royal Commission *Final Report – National Issues* Volume Nine p.320

[82] Ibid p.322

[83] Ibid p.325, Recommendations 155 and 156, p.338

11.1.5. This is an unsatisfactory response to a serious and growing problem and the CEPU believes that labour only contractors should be deemed employees for the purposes of industrial legislation and taxation.

11.2. Phoenix companies

11.2.1. The union movement has been pressuring the Government for some time to improve the accountability of business with respect to the creation of company structures which avoid their legal obligations. Typically the group which suffers the most from these structures are workers who are denied their legal entitlements in the event of corporate collapse. The current law needs to be reviewed and capacity of the courts to lift the corporate veil must be improved.

11.2.2. The Cole Royal Commission identified the use of complex corporate structures and phoenix companies as a significant problem. It devoted considerable time to a case study of Emerson Industries, where despite finding that the companies in those case studies incurred significant debts and were guilty of insolvent trading, still found that there was insufficient evidence to act against the director concerned.[84] This was despite finding that Harkin; *"was able to survive a number of corporate collapses and continue to gain work because of inadequate checking of his financial history and solvency carried out by major contractors."*[85] *[emphasis added]*

11.2.3. The Cole Royal Commission recommended[86] that a person be disqualified from managing a company if on *one* occasion that person has been an officer of a corporation that has been wound up and been the subject of a liquidator's report. Currently, s.206F of the *Corporations Act 2001 (Cwth)* requires that a person can only be disqualified from managing a corporation where they have been an officer of two or more corporations that have been wound up and the subject of a liquidator's report. The Government is eager to provide for the disqualification of union officials involved in any breach of a civil penalty provision irrespective of the harm done or the scale of the contravention. However, it is not as eager to adopt the same approach for employers involved in flagrantly flouting the law by using phoenix companies to avoid their obligations and failed to pick up recommendation 109. Even the Royal Commission notes that the penalties for this activity are low[87]

11.2.4. The corporate entity was created to encourage entrepreneurialism by allowing company directors to limit their personal liability in the event that the company failed. The corporate veil was devised in the era of small companies to encourage risk and expansion. It made the company a legal personality with the rights and liabilities of an individual person, to limit the legal liability of the

[84] See the case study of Emerson Corporation where finding that both Emerson Corporation and Emerson Services incurring large debts while Gregory Harkin was a director, there was insufficient evidence to find Harkin had breached s.588G of the Corporation Act 2001 (Cwth) *Final Report* Volume 8, p.194
[85] Ibid p.167
[86] *Final Report* Volume 8 National Issues Part 2 Recommendation 109 p.166
[87] *Final Report* Volume 8 National Issues Part 2 p.166

creators of the company. It was not devised to protect against illegality. To equate the legal personality of today's corporations with that of a real person is farcical.

11.2.5. The corporate veil was never intended to be used as a sham device to hide from normal legal obligations. The law in this regard has allowed the bastardisation of the corporate veil and the time has come to allow the courts the discretion to lift that veil where there is obvious corporate skullduggery at work. Often the court can see a transaction or corporate structure for what it is but is constrained by the law.

11.2.6. The CEPU believes the courts should be given the power to do something about companies created to avoid legal obligations such as payment of employees legal entitlements. The Government must legislate to allow the courts wider discretion to go behind the corporate veil in the event of a corporate collapse. There are better public policy arguments in favour of this approach than the arguments that currently allow directors to hide their wrongdoing behind the corporate veil.

11.2.7. Company law makes it too easy to set up a company but doesn't ensure that companies have adequate resources to meet their ongoing obligations.

11.2.8. If the Government is not going to enshrine initiatives like the National Entitlements Security Trust (NEST) in the manufacturing industry, we need to give the courts more discretion regarding the corporate veil and greater investigative powers regarding sham corporate structures. This is the only protection workers have in the absence of a proper scheme of insurance to protect their entitlements against corporate collapse.

11.2.9. Opponents of lifting the corporate veil argue it will fetter the entrepreneurial spirit. If the argument about fettering entrepreneurial spirit is serious perhaps a better approach is to put all personal assets into a trust on the establishment of a new company. The idea of allowing the corporate veil to be pierced is not to take away the family home and other assets but to ensure that the intention in setting up that company was honest. If there is nothing to hide, no-one will be concerned about lifting the corporate veil.

11.2.10. We submit that companies can't have it both ways. It can't be made so easy to establish a company which lacks the resources to provide for basic entitlements in the event of company collapse, while protecting that company from investigation in the event of a collapse.

11.2.11. There have been a number of high profile collapses in recent years. The Government now has a prime opportunity to create a regime to overcome both the problems with sham structures and the failure of legitimate companies to adequately provide for employee entitlements. Union proposals for NEST type arrangements arose out of the dust of numerous corporate collapses where workers were left out to dry. Had an effective mechanism been in place or proposed by the Government then proposals such as NEST would not be

necessary. But the fact remains that despite numerous corporate collapses the Government has done little to protect employee entitlements[88].

11.2.12. The Government now has the opportunity to legislate to create a NEST type funding arrangement which will both remove the need to create sham structures and protect entitlements in the event of a corporate collapse.

11.2.13. The Government is making it more and more difficult for unions to gain right of entry which in turn will restrict the role of the unions in inspection and enforcing compliance. While acknowledging the unions' vital role, the Government is making it more difficult for unions to inspect time and wages records and ensure that employees' entitlements are protected. The ACTU points out in its submission[89] that *"tellingly the Government has accepted and implemented all the recommendations arising from the Royal Commission's consideration of 'unions acting as a regulators'"* but done nothing to fill the vacuum created by trying to remove the unions from the equation.

11.2.14. Recommendations

- The CEPU calls on the Government to make company directors personally liable to pay the debts of the company where the circumstances make it clear that the directors have been involved in sham corporate structures to avoid their legal obligations. This should be a matter of fact to be determined by a court.

- The CEPU calls on the Government to support initiatives such as NEST which act as a buffer to protect employee entitlements.

- The CEPU further calls on the Government to increase the resourcing of the ATO to continue its work in investigating sham corporate structures and tax avoidance. The Government should pursue these companies with the same zeal it is pursuing construction unions.

11.3. Security of payments - Under & non-payment of workers' entitlements

11.3.1. It is often difficult to quantify the level of underpayment of entitlements in the building and construction industry. The very nature and mobility of workforce in the building and construction industry make measurement difficult. There is a continued history in the industry of company collapse and resurrection of phoenix companies and small sub-contractor business bankruptcy. This volatility has been recognised to a degree by State Governments and has led to universal industry schemes for the protection of long service leave entitlements. Likewise, unions and employers in the building industry have set up various schemes to protect redundancy entitlements.

[88] GEER does not provide an appropriate safety net because of the ceilings imposed on payouts. For example it provides payment for redundancy based on the award provisions when many certified agreements provide in excess of the award. The provisions of the certified agreement are not paid under GEER.

[89] ACTU Submission to Senate Reference Committee p.50

11.3.2. The Cole Royal Commission acknowledges that the industry "is vulnerable to the problem of non-payment of workers' entitlements"[90]. Under payment is also a feature of the industry[91]. Coupled with the use of sham companies and phoenix companies with no real assets in the event of a corporate collapse the incidence of employers failing to pay accrued entitlements is high. So we have under payment, non-payment of some entitlements and complete loss of accrued entitlements.

11.3.3. The Commission notes in practice; *"... unions are heavily involved in the collection of employee entitlements. In most jurisdictions workplace relations legislation gives the unions a legitimate role in the recovery of employee entitlements."*[92] However, the unions are criticised for their role in the recovery of workers entitlements. The Commission questions whether the use of industrial pressure is the appropriate method of enforcement.

11.3.4. Yet even in the face of union evidence concerning the amounts they have been recovering, employer bodies deny there is a problem. For instance, the Housing Industry Association; "does not consider there is a practice or culture of underpayment of workers' entitlements in the housing industry."[93] How can this conclusion be reconciled with the money amounts recovered by the unions? This is not accounting for employees working in non unionized areas who simply fail to recover their entitlements.

11.3.5. The Federal Department of Employment and Workplace Relations (DEWR) stated that employees in the industry do not regularly contact the Department to have compliance issues addressed but then said;

> *"This is consistent with other more highly unionised sectors of the workforce .... Disputes regarding non-compliance are typically resolved at the workplace level without the requirement for intervention by an outside party such as the Department. On this basis, [Office of Workplace Services] allocates its targeted resources sectors where employees are less organised, having less effective alternative avenues for redress and therefore disproportionately higher levels of enquiries and claims lodged with [Office of Workplace Services].."*[94] *[Emphasis added]*

11.3.6. All Australian jurisdictions have legislation providing for the recovery of entitlements owed to employees covered by awards and enterprise agreements. Apart from these legislative remedies, the other principal means of recovering such monies [95] is via ordinary court processes.

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[90] *Final Report - National Issues* Volume 9 p.290

[91] Evidence was put before the Commission by the unions see for instance *Royal Commission Discussion Paper 11* "Working Arrangements – Their Effects on Workers' Entitlements and Public Revenue" pp41-42

[92] Ibid p.46

[93] Ibid p.43

[94] Ibid p.42

[95] For instance, in suing for a contractual debt in the ordinary courts. For monies due under over award agreements of contracts not regulated by awards/agreements, recovery is by way of action for a civil debt. In other instances, monies may be recovered by an action in quantum meruit. This may arise to enforce an

11.3.7. These are not easy options for the average employee. They can involve the use of a legal practitioner and a lengthy costly legal process. In the instance of business insolvency there is little point anyway. Even the Government's own Department acknowledged that these are less effective means of redress than by using the union. It may be that the sum of money owing cannot justify the cost of recovery. A compelling reason for joining a union is so that your interests can represented cost effectively by an organisation experienced in dealing with these matters.

11.3.8. For most workers the speed of the recovery process is likely to be vital as their earnings are their only form of income. Once of the reasons union intervention is so successful is that it is informal and fast.

11.3.9. The Cole Royal Commission puts some of the problem of employee non-compliance down to honest employer ignorance of its obligations! This beggars belief. Many of these employers are adept at setting up companies in which the assets are in one company and the employees employed by another so that in the event the company collapses, there is nothing to pay the employees. This is a deliberate mechanism to avoid payment and should be punished for what it is. Equally adept are employers at going out of business one day and setting up with exactly the same employees, directors etc in a different company the next. These employers are not stupid or confused about the 'complexity in determining the right rates of pay and conditions.'[96]

11.3.10. Significantly, the CFMEU argued anecdotally that the majority of disputes in the industry are compliance disputes. Every union official spends a significant portion of his or her time chasing monies owed to members. Often compliance activity will be accompanies by some kind of stoppage or restriction on normal work.

> *"if the Royal Commission can find the key to improving employer compliance it will simultaneously reduce a significant cause of industrial disputation in the building industry."*[97]

11.3.11. Cole recommends that the ABC Commission to be established play a great role in enforcement including regular random inspections[98]. We argue that the mechanism are already in place for this and rather than duplicating the role of other bodies such as the OWS that the funds be ploughed into allowing those agencies to better to their job.

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implied obligation to pay a reasonable sum for work done. See further *Royal Commission Discussion Paper 11* "Working Arrangements – Their Effects on Workers' Entitlements and Public Revenue" p45

[96] *Final Report National Issues* Volume Nine p.290

[97] *Royal Commission Discussion Paper 11* "Working Arrangements – Their Effects on Workers' Entitlements and Public Revenue" p46

[98] Recommendations 157 and 159, see *Final Report, National Issues* Volume 9 pp.339-340

10.3.11 The CEPU recommends that the Government:

- increase the funding of the OWS to enable it to better enforce compliance with awards, agreements and other relevant legislation.
- establish a small claims mechanism in a less formal setting than a court. Rather than engaging lawyers to do the work, underpayments could be handled by union industrial officers or organizers through a simplified small claims process which discourages legal representation and aims at a speedy informal inexpensive resolution of claims;
- to discourage employers from setting up multiple companies to avoid their obligations, provision for unpaid entitlements to be paid from a related company/corporation in cases of insolvency.

11.4. Underpayment or non-payment of superannuation

11.4.1. Most CEPU members employed in the industry have their superannuation payments made into industry funds (C+BUS, BUSQ, Connect, NESS and SPECQ). All of these funds require that payments must be made monthly by employers in accordance with Deeds of Adherence signed with the funds. All of the above funds are continually pursuing non and under payments of contributions. If the default against payments is not pursued in a timely manner by funds there is a strongly likelihood that the workers entitlements will not be recoverable because of the level of insolvency in the industry.

11.4.2. One area that has been problematic for employees in the industry is superannuation entitlements. Whilst there is legislation which makes it compulsory for employers to contribute a minimum level of superannuation (Superannuation Guarantee Act) across all industries, the enforcement of this payment requirement, which is the responsibility of the Australian Taxation Office in the Building and construction industry, is poor. Until recently an employer could argue that he complied with the Superannuation Guarantee Act if held his employees entitlements with his company structure and made payment at the end of each financial year. The superannuation legislation was recently amended to require employer to now pay contributions on a quarterly basis. However if there is poor enforcement the amendment will mean little.

11.4.3. As an example of the levels of non-compliance in the industry, with respect to CBUS, generally 10-12% of employers fail to pay each month[99]. When followed up, a number of these either pay or fill out a return saying they did not employ anyone during the month concerned. CBUS have no way of knowing if this information is correct. Many of these employers are small employers.

11.4.4. Enforcement of timely payment of superannuation contribution is very important. Given that the vast majority of employers in the industry are

[99] Information supplied by Peter Tighe, CBUS Board Trustee, 4 December 2003.

employed by small businesses, quite often these businesses are critically affected by cash flow problems associated with security of contract payments. When cash flow is tight, the first obligation payment that is not met is superannuation. Again with respect to CBUS, during the year ended 30 June 2003, $10.7 million was collected from employers in arrears for more than 3 months[100]. If the employer goes bust in that time then clearly the money is never paid.

11.4.5. The Cole Royal Commission notes[101] that the obligations to provide for superannuation have developed over the last two decades without full consideration of the appropriate means of recovering contributions that are not made. 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.

11.4.6. 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.

11.4.7. This systems needs fixing across the board as the problems are not confined to the building and construction industry. (The same goes for recovery of employee entitlements).

11.4.8. The ATO has the responsibility for enforcement of the superannuation guarantee legislation but seems to lack the will and resources to effectively investigate and enforce current under and non-payers. The Government needs to set up a more friendly mechanism to assist employees recover their superannuation. A central problem with the current system is that employees do not know where to go and probably would need help to approach the ATO and this would take money. The system needs reviewing.

11.4.9. Companies needs to be regularly audited to ensure they are regularly paying their super contributions and this includes checking that all employees are on the books and being paid their full entitlements. It is not an easy job to force employers to make these payments so such an agency must be well resourced with sufficient inspectors to spot check employers.

11.4.10. In summary, the CEPU seeks the improved enforcement of current laws; wants the establishment of an agency (not the ATO) to assist employees to ensure that

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[100] Ibid.

[101] *Royal Commission Discussion Paper 11* "Working Arrangements – Their Effects on Workers' Entitlements and Public Revenue" pp56-60

contributions are made. Funding could be redirected from the building industry Task Force to fund such an agency.

11.5. Portable LSL and funds for severance pay and income protection

11.5.1. The Cole Royal Commission acknowledged that;

> *"The establishment of industry funds for long service leave and redundancy payments ensures these payments are available if the employer has complied with its obligations."*[102]

11.5.2. 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.

11.5.3. These funds are necessary to ensure that employees are not disadvantaged if their employer becomes insolvent as the funds are kept in the external industry fund on behalf of the employee and so are not lost.

11.5.4. The funds are also necessary to ensure that employees in the industry are not disadvantaged by the cycle of short term employment which characterises the industry. For example, long service leave would be denied to most employees under the normal long service leave legislation as few employees in this industry work ten years for one employer. As the portable LSL funds are based on 'service in the industry' rather than 'service with an employer', employees in the industry receive the same long service leave as do employees in other industries.

11.5.5. The unions deserve commendation for the establishment and efficient operation of such funds and for the provision of income protection insurance for members.

11.5.6. The redundancy and income protection entitlements are not generally prescribed in awards of the AIRC but are generally made available to employees via certified agreements. It is the certified agreements that compel employers to make contributions and the agreements are enforceable under the provisions of the WRA.

11.5.7. The use of consistent clauses in certified agreements to provide employees with appropriate redundancy payment protection, income protection and superannuation contributions has proved to of substantial benefit to employees and also provides a level playing field for employers.

[102] *Final Report, National Issues* Part 3 *para 357*

11.5.8. Rather than assisting the unions in securing such entitlements via consistent clauses in certified agreements, the Government's Bill seeks to remove the ability of unions to negotiate such agreements.

11.5.9. The Bill proscribes 'pattern bargaining' (s 56) which is defined as 'a *course of conduct or bargaining , or the making of claims, by a person that: (a) involves seeking common wages or other common conditions of employment.... '(s8(1))*. This prohibition appears to disallow the continuance of using certified agreements to protect the entitlements of employees in this industry in respect to redundancy payments and income protection. How does the Government propose to ensure that each employee receives those benefits, if industry funds become inoperable because the employees and the employer cannot include in their agreement 'common conditions of employment' clauses for such entitlements?

11.5.10. In the absence of any government or employer scheme to protect these entitlements for employees, the Government should not legislate to proscribe the continuance of common conditions of employment clauses in agreements which provide cost effective protection for employees.

12. REGULATORY NEEDS IN WORKPLACE RELATIONS

12.1. Is there a regulatory failure & a need for a new regulator

Is there a regulatory failure and therefore a need for a new regulatory body, either industry-specific such as the proposed Australian Building and Construction Commissioner, or covering all industries.

12.1.1. The CEPU submits there is no regulatory failure. Any regulation should cover all industries. Any perceived failure of the AIRC emanates from the emasculation of AIRC powers that has been a hallmark of this Government.

12.1.2. We do not agree with the need for specific legislation for a single industry. Nor do we support an industry specific regulatory watchdog. The current *Workplace Relations Act 1996* (WRA) is specifically and uniquely designed to cater to the industrial relations needs of employers and employees across the board. There is no good reason to specifically separate the building and construction industry from that Act.

12.1.3. The WRA already provides sufficient remedies for employees, including those employed in the building and construction industry. The Australian Industrial Relations Commission already has the experience, expertise and track record to deal with the building and construction industry. Any concerns the Government has with the conduct of the building and construction industry should be addressed within the context of the existing regulating institutions and infrastructure.

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

12.1.4. There should not be a separate independent regulator. Any new functions and /or powers that are perceived to be necessary for the building and construction industry should be added to those of the AIRC. We need to avoid duplication and overlapping jurisdictions.

12.2. Powers of the AIRC

Should workplace relations regulatory needs be supported by additional AIRC conciliation and arbitration powers

12.2.1. The CEPU strongly supports amendment of the Workplace Relations Act 1996 to reinstate the conciliation and arbitration powers that the AIRC exercised under the Industrial Relations Act 1988[103].

12.2.2. The restriction on the AIRC's powers by virtue of the 'allowable matters'(s.89A) and the prohibition on arbitration in relation to certified agreements have not resulted in any positive results. The AIRC should be vested with sufficient power to settle disputes which the relevant parties are unable to resolve.

12.2.3. In addition to the WRA being amended to restore the AIRC arbitration powers, s.127 Orders (to stop or prevent industrial action) should be repealed as that part of the Act currently discriminates against the unions and employees with no comparable provision to effectively curtail excessive employer behaviour.

13. Lawlessness/whistleblowing

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

13.1.1. If the current laws (in relation to lawlessness or criminality) are adequately enforced via the current court system then there is no need to provide new mechanisms. The CEPU views the current laws to be adequate as are the mechanisms to enforce those laws.

13.1.2. In relation to public exposure (whistleblowing) there is a need for improving the protection available to whistleblowers. The most important 'whistleblowers' are the union shop stewards and OH&S representatives on site. These 'whistleblowers' perform their duties on a voluntary basis and are often the victims of discrimination and coercion on site.

[103] That is, the Act as it was prior to the WRA coming into force in 1996

13.1.3. The WRA and Chapter 7 (Freedom of Association) of the Bill provides some protection to union delegates from victimisation, but it is inherently difficult to enforce the freedom of association provisions to protect delegates. Prosecutions of employers are difficult because the employer denies that the dismissal or the injury to a delegate's employment was occasioned by anything but the delegate's role as a delegate.

13.1.4. In relation to the OH&S representatives the situation is worse. The 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 can be immense.

13.1.5. 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.

13.1.6. Section 154(1) sets out the actions (of discrimination) which an employer is proscribed by the Bill from taking. Section 155 sets out the 'prohibited reasons' or the activities which the union members/delegates are entitled to perform without having their employment injured or terminated by the employer because of those activities.

13.1.7. Section 155 provides protection to union members/delegates from victimization for joining or not joining a union etc. In particular the Bill protects employees (including delegates) from victimisation for making an inquiry or complaint to a person or body having the capacity under an *industrial law* (s155(1)(j); or participating in a proceeding under an *industrial law* (s155(1)(k),(l).

13.1.8. *Industrial law* is defined in s.4 of the Bill separately and distinct from the definition of *OHS law*. As the protections set out in Chapter 7 of the Bill refer to activities performed under *industrial law* without reference to *OHS law*, then it appears that the OHS representatives may not have the same protections as the union delegates.

13.1.9. In any event OHS representatives and union delegates are victimised by employers for their activities as a delegate or OHS representative. If the delegate or OHS representatives perform their role with conviction he/she will find it difficult to obtain work at the next workplace as there is an 'blacklist' run informally by employers in the industry to stop active delegates or OHS representatives from obtaining work in the future.

13.1.10. This 'blacklisting' of delegates and OHS representatives 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.

13.1.11. 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.

13.1.12. The Cole Royal Commission was critical of the unions 'placing' delegates and interpreted the 'placements' as an attempt to further the interests of the union on that site. 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'.

13.1.13. 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. These employees sacrifice a lot of personal time and energy to improve safety and conditions for their fellow employees. They deserve to be able to perform their essential functions without the threat of victimisation or being blacklisted from the industry.

13.1.14. The restrictions on the right of entry for union officials contained in the Bill makes the role of the delegate/OHS representatives even more crucial in the settlement of wages, conditions and safety disputes on site. The Bill restricts the right of entry provisions applying to other industries via the WRA. With 24 hours notice required before a union official can enter a site, and with movement around the site being determined by the employer, the ability of union officials to be able to effectively represent the interests of members during disputes on site is severely and unfairly curtailed. This lack of access to sites by union officials means that the delegate/OHS representatives must take on greater responsibility for resolving site issues as they cannot rely upon timely external support from the union.

14. Employment-related matters in the industry, including:

14.1. Skill shortages and adequacy of support for the apprenticeship system

14.1.1. As this Reference Committee would be aware, skills shortages and the adequacy of support for the apprenticeship system was one of the issues recently considered by this Committee in its Inquiry titled "Bridging the Skills Gap" (The Skills Inquiry). As the Skills Inquiry was specifically aimed at examining skills shortages and the adequacy of current programs and strategies we direct this Committee generally to the findings of that Inquiry. However, in the context of this Reference we still make some specific observations.

14.1.2. According to DEETYA, the economic implications of these shortages are severe;

> *"Skill shortages if extensive and sustained, can limit investment and growth opportunities, give rise to upward pressure on earnings, and thereby dampen the pace of economic growth and jobs growth and make it more difficult to reduce unemployment".*[104]

14.1.3. Dr Phillip Toner has looked at aggregate apprentice and selected trade occupation training rates from 1974 to 2001[105] and found there has been a sustained decline in the training rate with *"over two thirds of the aggregate decline is due to a fall in training rates for metal, electrical and construction apprentices."*[106] Training in electrical and electronic trades declined by nearly a quarter after 1993. The training rate for construction declined by close to 15 per cent even though the industry recorded a significant increase in trades employment over the 1990s.[107] Clearly, the decline is contributing to the deficit in the supply of skilled trades.

	Average Level of Apprentices in Training 1987-1992	Average Level of Apprentices in Training 1993-2001	Contribution to decline in percent %	% Change in average Apprentices in Training 1987-1992 to 1993-2001[108]
Metal	27,195	20,054	31.5	-26.3
Electrical	21,473	16,540	21.7	-23.0
Building	29,129	26,405	12.0	-9.3
Print	4,070	2,514	6.9	-38.2
Vehicle	24,317	21,790	11.1	-10.4
Food	13,817	16,927	-13.7	22.5
Other	28,780	21,869	30.5	-24.0
Total	148,780	126,099	100	-15.2

[104] Department of Employment Education Training and Youth Affairs (1999) *Skill Shortages in the Trades – An Employment Perspective*, Labour Market Policy Group as quoted by Toner, ibid p.12

[105] Toner looked at the figures over a much longer time period (1974-2001) than previous studies, incorporating the effect of several business cycles, to answer speculation that low training rates evident over the last decade were not unusual if a longer run perspective had been used.

[106] Toner, ibid, p.6

[107] Toner, op cit, p.8

[108] To calculate this figure divide the difference in the average level of apprentice training in 1987-1992 to 1993-2001. For example, 21,473-16540=4,933 ; 4,933/21,473=-23.0

14.1.4. Declining training rates have also reduced the share of full time job opportunities offering good career paths for young people.

14.1.5. One obvious implication of declining training rates is declining employment opportunities in apprenticeships and consequently trade occupations. Toner reports that if the training rate for each of the trade occupations for 1987-1992 had been maintained in 2001 there would have been an additional 21,700 apprentices in training in 2001.[109]

14.1.6. The decline in apprentice training positions represents a significant loss of nearly 19,000 full time positions from the Australian youth labour market. Had the training rates not declined the share of young people aged 15-24 in full time employment would have increased by 5% in 2001.

14.1.7. In addition the quality of these jobs are high. A recent NCVER (2001) Report found people in trade occupations (AQF III or IV) have a much higher probability of employment than do holders of other vocational qualifications; have the highest rates of full time and self employment; earn on average 16% more than average weekly earnings and have higher rates of upward mobility in management and associate professional occupations than do holders of lower level vocational qualifications.

Causes of declining training rates

14.1.8. The CEPU submits that the cause of the problem is not the apprenticeship per se. We agree with Toner who argues that:

> *"Variation in training rates across the major trade occupations does not reflect a systemic problem with the apprenticeship institution, instead it suggests a range of industry and/or occupationally specific factors inhibiting employer investment in training. Structural changes over the last ten to fifteen years, disproportionately affecting those industries that employ metal, electrical and to a lesser extent construction apprentices, largely account for declining training rates."*[110] *[emphasis added]*

14.1.9. Structural changes in the economy which have reduced the capacity of employers to engage apprentices include:

> *" ...a set of self reinforcing factors, such as greatly increased competition leading to downsizing and contracting out; growth of labour hire companies; increased in the proportion of small firms;*

[109] Toner says that the data after 1998 contains a certain percentage of trainees and as such the sustained decline in training rates "is a conservative estimate of this trend."
[110] Toner, op cit, p.4

and privatisation and corporatisation of public services."[111] *[emphasis added]*

14.1.10. Nowhere does Toner mention unions or even industrial relations as being a factor in the equation whereas Cole is quick to find fault with the unions, constantly accusing us of; *"using training as an instrument on the industrial relations agenda."*[112]

14.1.11. What he does mention however, is the adverse effect changes to the industrial relation system have had on skill shortages.

> *"Many of the changes ... such as those related to the intensification of work, growth of labour-hire and increased outsourcing of functions have been facilitated by reduced union influences in workplaces, the broader deregulation of the labour market and retreat from a centralised wage fixing and industrial relations system. In turn, these changes to the industrial relations system have also contributed to the decline in apprentice training rates."*[113] *[emphasis added]*

14.1.12. By implication, the role unions and the industrial system have played in the past has helped create and sustain an enviable training system. Instead of always painting the role of unions as being so negative perhaps we could be applauded for the positive role we have played in maintaining a strong training system.

14.1.13. While change to the industrial system were implemented to reduce what was seen as unwanted union influence over the training agenda via award provisions, nothing was put in place to cushion the labour market from the fallout. The New Apprenticeship Scheme has not solved the problem.

14.1.14. The critical skills shortage has not been alleviated by the introduction of new apprenticeships because industry demand is for fully trained employees with a broad skills base. The reluctance to take on apprentices is doubly so with respect to trainees, as trainees 'below the trade' amount to little more than labourers, of which supply is not a particular problem.

14.1.15. What has happened as a result of the changes to the industrial relations system is that the demand for skilled trades has been met by resort to labour hire and outsourcing and not by increasing the pool of labour in training. Further, according to Toner[114]; *"... a reduced share of the workforce covered by industry based awards has ... facilitated management use of labour hire and casual and part time employment."*[115]

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[111] Toner, ibid, p.13
[112] Final Reform,
[113] Toner, ibid p.18
[114] Toner op cit p.19
[115] Toner, ibid

14.1.16. Two major developments since the mid 1990's have impacted on the availability to employers of a pool of skilled labour:

- the first has been market deregulation with huge reductions in corporate workforces; downsizing being the buzz word of the 1990's. The pressure to reduce staff has lead to the increased use of labour hire and the contracting out of even core functions of business.[116]

14.1.17. - the second major development has been the privatisation and corporatisation of large public utilities. The public sector was responsible for training in excess of its needs and to a high standard.

14.1.18. According to ANTA the significance of this outsourcing of trade based work to labour hire companies is that:

> *"labour hire firms primarily rely upon the pool of skilled people in the labour market, and are not large providers of formalised training of the type involved in the traditional apprenticeship."*[117]

14.1.19. At the same time, firm size is decreasing in the construction industry[118]. The propensity to train increases with the size of the business. This stands to reason as larger employers have the resources that smaller employers lack. So it is of great concern that the number of large employers is declining, a factor which has and will continue to contribute to the skills shortage. Significantly, Toner[119] has found that in many industries, such as construction and electricity, gas and water, that were traditionally large employers, there has been a marked reduction in the average firm size. For instance, in the 7 years to 1996-97 the share of total employment in construction firms employing less than 5 persons increased from 42.6% to 68.6%. All of the employment growth over the period occurred in businesses with less than 5 employees. Employment in larger firms actually declined, with the level of employment in firms with 20 or more employees falling by more than 50%. While Toner's main focus with respect to this change in firm size is with apprenticeship training, the ramifications extend to ongoing training.

14.1.20. The Cole Royal Commission did not focus on this area. No recommendations of any note were made in relation to labour hire and its impact on skills shortages except to encourage the employment of apprentices and trainees on publicly funded building and construction projects[120]. This is one area in which the Commission could have had a constructive input.

14.1.21. The Skills Inquiry also notes the concern expressed by inquiry participants[121] about the adequacy of industry investment in the training of its workforce and

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[116] Senate Review ibid p.55
[117] Toner op cit p.17 citing Australian National Training Authority (ANTA) (1998) *Impact of the Growth of Labour Hire on the Growth of the Apprenticeship System*, Brisbane
[118] Toner, ibid p.18
[119] Toner, ibid p.18
[120] Recommendation 142
[121] Senate Inquiry (2003) p.197

unequal access to training opportunities, particularly for the increasing corps of casual and contract employees [emphasis added]. It has been well documented[122] that labour hire workers receive less training and much less portable training and skills development than permanent employees. According to Hall[123] this labour hire training deficit not only disadvantages individual workers but has also led to the serious depletion in available labour market skills.

14.1.22. Clearly, there are two problems with labour hire and outsourcing. First, labour hire firms do not like to invest in training, including providing ongoing training opportunities for their employees. Second, they have traditionally "poached" skilled labour from employers who train. For a number of reasons employers who have traditionally provided the pool of skilled labour, especially the public sector, are either failing to train or ironically outsourcing their requirement for skilled labour. The upshot of the growth of labour hire is less training and a smaller pool of skilled labour, which over time is driving up the price of skilled labour and leading to the chronic skills shortages we are now experiencing.

14.1.23. Increased casualisation is also an outcome of labour market deregulation. Casual employees suffer many of the same problems as labour hire employees, have less training opportunities made available to them. The net effect is less training and less skill formation.

14.1.24. It also means less apprenticeships in traditional areas with the result that over time there will be less skilled tradespersons to oversight and teach new apprentices.

14.1.25. The Senate Review on Skill Shortages noted that:

> *"industry submissions and company owners at hearings told the committee about how their training levels had dropped, or how association members were reluctant to take on trainees, particularly traditional apprentices, in an environment which was increasingly project driven or contract based. They had reported how their capacity to maintain or find appropriately trained trainees was limited by changes in the nature of their industries, small and large. Some had downsized because of competitive forces, others had outsourced aspects of their business or resorted to the use of casual, part time or labour hire to meet employment needs."*[124]

14.1.26. Some commentators take this to mean that there is now a mismatch between what the system is offering and what the majority of employers need to address their skills requirements. We disagree. We believe that the evidence shows

[122] Dr Richard Hall (2002) *Labour Hire in Australia Motivation, Dynamics and Prospects*, ACIRRT University of Sydney, Working paper 76; Department of Industrial Relations (2001) *Labour Hire Taskforce Final Report*, Report of Taskforce to DIR, NSW; Lafferty G and Roan A (1999) "Public Sector Outsourcing: Implications for Training and Skills" 22 *Employee Relations Journal* 1

[123] Hall (2002) ibid p.6 Also quoted by the Royal Commission as document 020.0306.0455.0012

[124] Senate Review on Skills Shortages (2003) p.54

that employers are doing what they can to make do. Complaints about skills shortages mean that if the skilled employees were available they would employ them but they are reluctant to train them themselves.

The Government response to the shortage

14.1.27. The solution and the focus of Government has been the introduction and rapid growth of the New Apprenticeships system and traineeships in particular. This growth has masked what has been happening with respect to apprenticeships as the figures were aggregated, ceasing to make a distinction between apprentices and trainees.

14.1.28. The Cole Royal Commission criticised the building and construction industry for its slow uptake of trainees;

> *"There are criticisms that industry is not honouring the new apprenticeship and traineeship process and is not making full use of trainees. The unwillingness of unions for cultural reasons, and a large number of employers for economic reasons, to embrace the benefits of using trainees is a central cause of the problem."*[125]

14.1.29. The CEPU believes that the New Apprenticeship system is not being "honoured" because it fails to deliver the skills industry requires. The New Apprenticeship system introduced in 1998 mixes "traditional" trades with trainees. The vast majority of entry level skills training in the electrotechnology trades occurs through apprenticeships leading to an AQF III and IV qualifications. The traditional apprenticeship (AQF III) pathway accounts for almost all those in contracts of training as electricians, refrigeration and air conditioning mechanics and other related electrical and electronic trades. In respect to the building and construction industry traineeships are most prevalent with respect to trades assistants. When the Government reports on the success of new apprenticeships, it is a success based on the growth of traineeships at the expense of apprenticeships. Traineeships being much more relevant in industries other than electrical contracting.

14.1.30. The New Apprenticeship system is meant to be able to deliver the flexibility required by employers for a faster response to skills needs. We agree with the Senate Review that it also means training shortcuts[126]. In its submission to the Senate review on Skills DEWR noted that Workplace Agreements are the main way to provide enterprises with the flexibility needed for training under New Apprenticeships. Under trainee provisions in the agreements, employers can negotiate part time and casual training arrangements not allowed under parent awards.

14.1.31. We agree with the Senate Committee who found that a policy change was needed whereby the unequal treatment of trainees as against traditional apprentice sunder Commonwealth law be addressed. The issue that trainees

[125] *Final Report National Issues*, Volume Nine p.154
[126] Senate Review *Bridging the Skills Gap* (2003), p.69

have less protection under the law in the workplace and less certain avenues of complaint against inadequate training or employment conditions was addressed by a recommendation[127] that the Workplace Relations Act 1996 be amended to ensure that s170VR(2) applies equally to all New Apprenticeships, that is both apprentices and trainees. We urge the Government to pick up this recommendation.

14.1.32. Another concern of the Senate Committee was the potential for flexibility to drive deskilling. In this regard the Committee expressed concern about proposals to modularise or breakdown traditional apprenticeships into lower qualification components. Some industry representatives argued this was the way to address the skills shortage. The Senate Committee however feared this approach may encourage an even more short term view of training on the part of some employers, with an absence of a commitment to further training to develop a broader skills base. It noted;

> *One result could be an even greater erosion in the skills base in particular industries, and a vicious cycle where there are not enough experienced tradespeople to train and supervise new entrants. For trainees the consequences may be that opportunities to gain full qualifications and transportable training will be more limited; for industry and the community this could mean less safe workplaces, buildings and public infrastructure."*[128]

14.1.33. Our reservations about the New Apprenticeship system is not driven by "cultural reasons", presumably related to control over labour supply as accused by Cole, but a genuine concern over both the quality of the skills base and the usefulness of the training received by the trainee. Skills need to be transferable, portable and there must be a market for that labour. There is no point in trainees undertaking training so specialized and employer specific that they are useful to no-one else. The system must focus on building career and skill pathways in a training market that supports that development.[129]

14.1.34. The Government focus on New Apprenticeships has resulted in inadequate funding for apprenticeships as the Commonwealth incentives for New Apprenticeships are channelling an increasing proportion of Commonwealth and State government training expenditure into lower skills (traineeships) at the expense of investment in areas which are of greater strategic economic or social importance[130].

14.1.35. New apprenticeships are making little contribution to higher skills development.[131] The outcome of the New Apprenticeships has been; *"... a growing imbalance between rapidly increasing numbers of lower level skills*

[127] Senate Review *Bridging the Skills Gap* (2003), p.71 Recommendation 7
[128] Senate Review *Bridging the Skills Gap* (2003), pp.72-73
[129] Mr P Jones, Director School of Manufacturing and Engineering, Chisholm Institute of TAFE, Dandenong as quoted by the Senate Review at p.72.
[130] Senate Employment Workplace Relations and Education References Committee
[131] Curtain Submission 101 p.12 quoted by the Senate Review *Bridging the Skills Gap* (2003), p.67

outcomes compared to low growth in higher level skill outcomes in vocational education and training." [132]

14.1.36. The Senate Review on the Skills Gap, quotes both Curtain and DETWA who point to a significant difference in the duration of both on the job experience and off the job training associated with the same qualifications in different occupations, with the required amount of both on the job and off the job training associated with AQF 3 in the traditional trades being much higher than the associated AQF 3 levels in other occupations. Yet under the current Commonwealth New Apprenticeship Incentives program, the same incentive is paid for an AQF qualification irrespective of the average duration of the contract or the off the job training required. This leads the Senate Review to conclude:

> *In this circumstance it is easy to see why employers of traditional apprentices argue that the current incentive is inadequate, while in some other occupations, where the same incentive is paid for a much smaller investment of time and effort, the incentive is leading to a significant increase in New Apprenticeship training."*

14.1.37. Significantly the Senate Committee expressed concern that the anomalies described above will devalue some vocational pathways in the eyes of the community. Further the Committee believes that employer incentives based on AQF level alone; *"will result in a distorted investment towards 'lower cost, lower skill' qualifications ... and away from 'higher cost, higher skill' qualifications at the same AQF level."*[133] *[emphasis added]*

14.2. What are the solutions?

14.2.1. Practical skills must be learned in a practical environment which means for the most part some on the job training is crucial. It seems we can either reward employers for training or penalize those who fail to train or we can do both. The CEPU believes the system needs to do both. Traineeships via New Apprenticeships are not the answer.

14.2.2. Increase number of commencements

- *Increase capacity of Group Training Companies to enable more young people to find training placements*

  There is anecdotal evidence that young people cannot find placements. We need to be able to match demand to opportunities and encourage employers who have not traditionally trained to do so.

[132] *A Report on Skill Shortages in Electrotechnology* (2000) produced by the Electrotechnology Working Group for Hon David Kemp MP Minister for Education Training and Youth Affairs, at p.26.
[133] Senate Review *Bridging the Skills Gap* at paras.3.78 and 3.79, p.68

- *Improving the funding of group training schemes*

  Improving the funding of group training schemes as GTS are the only real training mechanism that has stepped into the vacuum created by downsizing public and private, corporatisation of the public sector and the resort to labour hire and outsourcing.

- *Introduce a levy*

  In the face of the reluctance of the industry to train and take on apprentices the industry could be levied to compensate. This may militate against poaching and make it more attractive to train. The levy could be used to offset the training costs of employers who train. The employer could be better subsidized and the employee could also be better paid to stay in the trade.

  This levy should be administered more rigorously than the previous National Training Levy which was cynically manipulated by business to avoid its social obligation to train.

- *Increase the incentives for smaller companies to take on apprentices.*

- *Remove the proposed prohibition on pattern bargaining*

  The rationale for removing the proposed prohibition on pattern bargaining is that there is ample evidence the award system has supported the apprenticeship system. It is important to translate that success to enterprise agreements and the only way to do that is to support the inclusion of pattern clauses which support the apprenticeship system.

14.2.3. Increase number of completions

There is a high rate of attrition during training in electrical and electronic apprenticeships. Statistics show that about one third of those commencing contracts do not complete their training[134]. It is a critical issue for the industry that the number of completions in 2000 was 3,500 annually while the projected employment growth of 2.5% per year means a market demand for 5,000 new tradesperson each year. One of the reasons is the poor pay, especially in the early years and the poor working conditions. To address this wastage:

- *Pay a training bonus*

  Employees could be paid an annual bonus for completing each year of their apprenticeship. Once the initial couple of years are completed, the work gets more interesting and is better paid. However, we recommend that the bonus is paid for every year until completion of the trade. This could be funded from the training levy.

[134] *A Report on Skill Shortages in the Electrotechnology Trades* p.28

14.2.4 Fix the current system of incentives

We agree with recommendation 5 of the Senate Review into the Skills Gap[135] which provides:

> *"The Committee recommends that ANTA in consultation with stakeholders, should consider developing a set of skill performance indicators in addition to the relevant AQF level to better distinguish between the basic, intermediate and higher vocational training outcomes. These could be modeled on the OECD benchmarks and provide an improved basis for targeting incentives under the New Apprenticeship scheme."*

14.3. Awards, wages and agreements

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

Widening gap between award and agreement outcomes

14.3.1. A logical outcome of the enterprise bargaining system is that awards have become increasingly irrelevant, particularly with respect to rates of pay and allowances. This is because the awards are only updated for safety net increases. We believe there should be some formal mechanism where by the awards can be regularly updated to maintain relevance to enterprise agreements in the industry. Unless the gap between employees working under awards and those on enterprise agreements is addressed:

- the system is unfair to employees working under awards;
- awards become increasingly irrelevant and
- the concept of a safety net is a nonsense

14.3.2. Concern over the widening gap between awards and agreements is not confined to the building and construction industry. Accordingly any proposal to constructively deal with this issue should not be confined to the industry but apply across the board.

Differences between agreements

14.3.3. Differences between entitlements create problems in the industry. Enterprise agreements with different wages and conditions have the potential to exacerbate these differences. Where tenders are not based on a level playing field difficulties can arise as scrupulous employers have difficulty competing with less scrupulous employers. This is why unions and many employers favour pattern bargaining. Pattern bargaining encourages a level playing field.

[135] Senate Review *Bridging the Skills Gap* (2003) op cit, at p.68

14.3.4. This argument has been acknowledged in a decision of the Full Bench of the NSW Industrial Relations Commission Unions giving the green light to clauses in NSW enterprise agreements requiring host employers to pay site rates to labour hire workers and only engage labour hire companies that have union agreements[136].

14.3.5. This landmark decision means the Electrical Trades Union NSW Branch can finalise its pattern bargaining campaign. It has had 15 to 20 pattern agreements struck with the major electrical contractors banked up in the Commission awaiting this crucial ruling. It will now spread the pattern to the 150 or so smaller employers.

14.3.6. The Full Bench ruled in favour of clauses requiring employers to:

(a) source any labour hire workers from labour supply companies that had agreements with the union;

(b) pay site rates to subcontractors and "endeavour" to obtain subcontractors who had deals with the union; and

(c) pay site rates to apprentices and trainees of group training companies and ensure those companies had a deal with the union.

14.3.7. Significantly, the Bench accepted the argument put by the union that the intention of the clauses was to create a level playing field in the industry, so no company could use the cost of labour for commercial advantage.

14.3.8. The group training and subcontractor clauses had the "clear purpose" of protecting the terms and conditions of employees in the enterprise, the bench said, while the labour hire clause had a similar purpose.

14.3.9. The current WRA provides for choices and flexibility with less formal paperwork/obligations on parties than is proposed with respect to the certification of agreements under the Bill. The CEPU believes that the system should be as informal and simple as possible to minimise delays associated with form and technicality. The Government is trying to restrict this choice by not allowing for pattern agreements in the industry. The parties should be free to choose the type of agreement which best suits their situation.

14.3.10. The CEPU urges the Government to reject the proposal to create a new enterprise bargaining system focused solely on the building and construction industry. No evidence was produced by the Cole Commission to justify the onerous new obligations being introduced under the Bill to prolong and retard the certification of agreements.

14.3.11. There should be a formal mechanism whereby awards are be regularly updated to maintain relevance to enterprise agreements in the industry.

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[136] *Electrical Contractors Association of New South Wales v Electrical Trades Union of Australia, New South Wales Branch & John Goss Projects Pty Ltd.* NSW Industrial Relations Commission 404, 2 December 2003

14.4. Independent Contractors & Labour Hire

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.

14.4.1. The impact of labour hire and in particular, labour only contractors, on workers' entitlements was discussed above. We are concerned over the widespread use of labour hire in the industry as it is often used as a vehicle for companies to avoid their legal obligations.

14.4.2. We expressed our concern over the lack of support given by Government authorities to such so-called subcontractors in combating underpayment and non-payment of entitlements.

14.4.3. We also put forward the view that the Bill should contain an expanded definition of "employee" to include labour-only and dependent contractors so that those workers have access to awards and enterprise agreements and other protective provisions of the WRA.

14.4.4. Our main concern with the incidence of labour hire in the electrical contracting industry is its impact on skill formation. The widespread use of labour hire is one of the main causes of skill shortage in this country as labour hire companies are known poachers and reluctant trainers. Although there are signs this reluctance to train is changing much needs to be done in this area to ensure the chronic skills shortage does not worsen. This has been discussed in detail above.

14.4.5. Various State Governments have or are conducting inquiries into the incidence and impact of labour hire in their State. We believe the issues are national, the skills shortages across the board and a such there should be a dedicated national inquiry into the industry.

15. Conclusion

15.1.1. The CEPU urges this Senate References Committee to view the proposals of the Cole Royal Commission to 'reform' the industry (the unions) for what they are – nothing more than an ideological motivated witch hunt.

15.1.2. Accordingly, we urge this Committee to reject the proposal to create a new enterprise bargaining system focused solely on the building and construction industry and reject the Building and Construction Industry Improvement Bill 2003 in its entirety.

15.1.3. We believe the evidence uncovered by the Cole Commission of the widespread use of sham employment arrangements and phoenix companies, problems with security of employee entitlements, and the massive tax avoidance and lack of compliance with Federal and State tax regimes was the most constructive work of the Commission. We are disappointed at the lack of focus and strong

recommendations regarding these areas as we see it as an opportunity lost to do something constructive about the real problems in the industry.

Attachment XXX

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			COMMERCIAL	DATA & COMMUNICATION	RESIDENTIAL	ELECTRICITY SUPPLY SECTOR	FIRE DETECTION	HAZARDOUS LOCATION	HIGH VOLTAGE	INDUSTRIAL	MANUFACTURING	REFRIGERATION & AIR CONDITIONING	SECURITY	OTHER
Aldersea & Higgins Electrical Contractors	Heyfield	03 5148 3200	•		•					•				
Alister E Roberts P/L	Rowville	03 9764 3688												
Alkimatt Electrics	Mooroolbark	03 9726 5753	•		•									
All Essential Fire & Security P/L	Ringwood	03 9876 0971												
All Grade Electrics	Caulfield South	03 9533 0794		•			•							•
All Trades Air Electrical Serv. P/L	Glenroy	03 9306 3267	•		•					•	•			
Allan McLeans Electrical Serv.	Shepparton	03 5829 2414	•		•									
Allen & O Brien P/L	Sunshine	03 9312 1155						•		•				•
Allfire P/L	Moreland West	03 9387 0611	•		•		•			•				
Alltron Electrics	Blackburn	03 9877 5353		•									•	
Allway Electrical & Buxton Security	Oakleigh	03 9568 1111												
Alstom Australia Limited	Clayton	03 9535 6555				•				•				•
Altaire Servicing P/L	Sunbury	03 9744 4699	•							•	•			
Altitude Electrics	Altona	03 9315 0788	•		•					•	•			•
Alto Electrical Serv.	Croydon	03 9725 6783	•	•	•	•	•			•	•	•		•
Alton Personnel P/L	West Footscray	03 9314 8144												•
AMAC Electrical Serv. P/L	Frankston Heights	03 9783 9722	•							•	•	•		
Ampower Electrics Construction	Northcote	03 9489 6859	•	•	•					•			•	
Anbro Electrical Contractors	Clayton South	03 9551 8255												
Andar Electricals	Rowville	03 9764 5955	•	•	•					•	•			•
Andca Serv.	Rosebud	03 5986 7166	•	•	•	•	•			•	•	•		•
Andersons Electrical Service P/L	Rochester	03 5484 3000	•		•					•				
Andrew Heap Electrical P/L	Ferntree Gully	03 97597059	•		•					•	•	•	•	•
Andrew Thomson Electrics	Kew East	03 9819 7103	•	•	•									
ANG Elec	Heidelberg	03 9455 9577	•	•	•					•				
Anglesea & Aireys Inlet Electrics	Lorne	03 5289 2201	•		•					•				
Ansir Electrical Contractors	Thomastown	03 9465 0266	•							•	•	•		•
Anstis Electric	Keysborough	03 9769 0099												
Any Hour Electrics	Knoxfield	03 9763 0844	•	•	•		•	•	•	•		•		
Anzec Electrical Serv.	The Basin	03 9761 0368			•					•				•
Apex Eastern Electrical Contractors P/L	Knoxfield	03 9764 1942	•	•						•	•			•
Apex Electrical Contracting P/L	North Melbourne	03 9328 1172	•	•	•	•	•	•		•	•			•
Apex Western Electrical P/L	Altona	03 9315 9147	•							•				
APPS Electrics P/L	Moorabbin	03 9555 2711	•	•	•									
APT Electrics P/L	Wantirna South	03 9800 2522								•	•			•
ARA Electrical Serv. P/L	Montmorency	03 9439 2250	•					•		•				
Arena Electrics	Frankston	03 5971 4001												
Arvcon P/L	West Heidelberg	03 9457 1199		•										
Aspen Electrical	Aspendale	03 9587 3528	•		•					•	•			
Asplundh Tree Expert (Aust) P/L	Frankston	03 9783 4966				•			•					
Asset Electrical Serv. P/L	Greensborough	03 9432 6692										•		•
Astro Electrics	Narre Warren	03 9704 8123	•		•					•				
Attard S Electrical Service P/L	Vermont	03 9874 6006	•		•					•				
Australasian Electrical Serv. P/L	Alice Springs	08 8952 6630												
Automation & Control Electrics P/L	Notting Hill	03 9543 2022		•	•	•		•		•	•			•

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			COMMERCIAL	DATA & COMMUNICATION	RESIDENTIAL	ELECTRICITY SUPPLY SECTOR	FIRE DETECTION	HAZARDOUS LOCATION	HIGH VOLTAGE	INDUSTRIAL	MANUFACTURING	REFRIGERATION & AIR CONDITIONING	SECURITY	OTHER
Automation Mechatronics Ind P/L	Cheltenham	03 9585 2166								•	•			•
Avex Service	Caulfield	03 9532 4994												
Axcell Electrical Engineering & Contractors	Tullamarine	03 9335 1799	•											
B & B Kershaw	St Arnaud	03 5495 1887	•		•					•		•		•
B & E Trevena & Sons	Ballarat Mail Cntr	03 5339 2099								•				
B & G Electrics P/L	Research	03 9437 1576	•	•						•	•			
B & K Lewis Elec. & Pumping Contractors P/L	Mansfield	03 5775 2751	•											
B & K Reed Electrical Contractors P/L	Rye	03 5988 6565	•		•	•							•	•
B & M Fulton	Horsham	03 5382 4988	•		•									•
B & R Nicholes P/L	Bairnsdale	03 5152 2474												
B A M Electrics	East Keilor	03 9337 2134	•							•				
B A P Electrics (Aust) P/L	Bayswater	03 9729 5226	•		•					•	•			•
B B & A Belcher	Tongala	03 5859 0797	•		•	•				•				•
B C & N M Willoughby P/L	Healesville	03 5962 5379	•		•					•				•
B F Machinery P/L	Dandenong South	03 9799 8800	•							•				•
B G & J Bell P/L	Dandenong South	03 9769 2444	•	•						•				
B G & R M Williams Electrical	Strathfieldsaye	03 5439 3732	•				•			•				
B J Davidson	Ararat	0418 145 203	•	•	•									•
B J Electrics	Cranbourne	03 5996 2108											•	
B M & J A Magill Nominees P/L	Donvale	03 9874 6320												
B N Atwell Electrical Contractors	Doncaster	03 9857 8741												
B P & C Darmody	Wodonga	02 6056 4191	•	•	•	•								
B P Fire & Electrical P/L	McWaverley	03 9547 8333	•		•		•						•	
B R B Electrical Contracting & Serv.	Bendigo Mail Cntr	03 5449 6284	•	•										
B S & M A Male	Maryborough	03 5461 1691			•									
B.E.S. (Vic) P/L	Norlane	03 5275 0800	•	•	•	•	•	•						
B.R. Reeve Engineering	South Melbourne	03 9699 7355								•				•
Baker & Hancock P/L	Fitzroy North	03 9489 3889	•											•
Ballard Electrics P/L	Newport	03 9397 5681	•		•					•				
Balwyn Electrical Contractors	Camberwell	03 9830 4825	•				•			•	•			
Bamco Electrics	Ellydale	03 9735 5229												
Banyule Electrics	Ivanhoe	03 9499 6263												
Barclay Mowlem Construction Limited	Homebush South	02 9764 1344	•	•		•		•		•				
Barlec Electrical Serv. P/L	Mckinnon	03 9555 7588												
Barry Baxter	Yarrawonga	03 9375 1088												
Barry J Mitchell Electrical Contractor	Croydon South	03 9725 3991												
Bartley Electrics P/L	Endeavour Hills	03 9700 5004	•		•					•				
Barton Electrical Serv. (Vic) P/L	Dromana	03 59873650	•		•		•			•	•			
Batwon Valley Electrics	Brighton	03 5244 0210		•										
Bauld Electrics P/L	East Brighton	03 9592 4570	•		•					•		•		•
Bayley & Grimster Electrical & Plumbing	Kew	03 9499 9555	•	•	•					•				•
Bayside Electrical Serv. P/L	Black Rock	0411 186 120		•	•					•	•	•		
Bayway Electrics	Frankston	03 9787 4090												
Beacon Electrical Serv. Aust P/L	Greenvale	03 9333 4445	•											•
Beca Electrics (Vic) P/L	Lyndhurst	03 9702 9401	•		•	•	•	•	•	•	•	•		•