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15 September 2005

The Hon Kevin Andrews MP
Minister for Employment and Workplace Relations
Parliament House
CANBERRA ACT 2600

Dear Minister

Upholding the Law - Findings of the Building Industry Taskforce

The Building Industry Taskforce has now been in operation for almost three years. On 26 and 27 March 2003, the Final Report of the Cole Royal Commission was tabled in Parliament. To mark the anniversary of this event, last year I produced a report based on the experiences of the Taskforce after 18 months of operations. In keeping with this practice, I have developed a paper in a similar vein in order to update you on the activities of the Taskforce.

The attached document outlines the operations of the Taskforce and makes observations about the environment in which it functions. Contempt for the law and hostility towards the Taskforce remains the culture, and continues to have consequences for those who would like to see reform. This document highlights the continuation of unlawful and inappropriate behaviour in the industry.

Yours sincerely

Nigel C Hadgkiss
Director

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1.0 EXECUTIVE SUMMARY

This report outlines the history, role and operations of the Building Industry Taskforce, based on its 35 months' experience to date. It also makes observations about the environment in which it functions. Contempt for the law and hostility towards the Taskforce remains the prevailing culture in the industry, and continues to have consequences for those who would like to see reform. This document highlights the continuation of unlawful and inappropriate behaviour in the industry.

The Taskforce commenced operations in October 2002 following the Cole Royal Commission into the Building and Construction Industry. Commissioner Cole's intention was to create an interim body to secure the law in the industry prior to the development of a national agency which the Federal Government has now established as the Australian Building and Construction Commission (ABCC).

The Taskforce has consistently performed beyond the Key Performance Indicators it was set when first established. As at 31 August 2005, the Taskforce had received 3,367 enquiries, 3,070 of which had been responded to in one working day. Over the last 35 months, the Taskforce has undertaken over 500 investigations and has placed 29 matters before the courts. Sixteen of those court actions have been completed following cases investigated and prepared by the Taskforce.

Despite this testimony to the active role that the Taskforce has played in the industry, a reflection on the issues that were prevalent since the tabling of the Taskforce's First Report, "*Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce*", shows that the industry remains plagued by a culture of civil disobedience, coercion, intimidation, threatening behaviour, and contempt for the law.

A cause for this ongoing culture of lawlessness is that the Taskforce has been at a loss to pursue complaints because a fair proportion of callers are reluctant to take them to the investigation level. Taskforce investigators maintain that callers often report instances of unlawful activity but do not want to assist any further in the investigation. Such decisions to acquiesce are invariably motivated by the commercial reality that if they do not succumb to this industrial pressure, they will lose their business and livelihood. As a result, it has become increasingly apparent to the Taskforce that industrial problems are very rarely resolved permanently, but rather go into remission.

The work of the Taskforce will continue until the ABCC commences operations on 1 October 2005.

Whilst there have been recent legislative changes enabling the Taskforce to more effectively gather evidence, there is still much to be done before the culture of lawlessness in the industry is eliminated.

The Taskforce has received anecdotal evidence that its presence has had a positive impact on behaviour in the industry. Once equipped with sufficient powers, it is considered that the Taskforce and, very shortly, the ABCC, will be able to regulate the building and construction industry to produce the permanent cultural change that is so desperately needed.

“In the rough and tumble of industrial relations, there will be from time to time robust exchanges between parties. But a descent into thuggish behaviour cannot be tolerated.”

Supreme Court Master Craig Sanderson, 8 December 2004, after banning three CFMEU officials from a Perth building site for intimidating and offensive behaviour

2.0 BACKGROUND

2.1 History of the Taskforce

The Interim Building Industry Taskforce (Interim Taskforce) commenced operations in October 2002 following the Cole Royal Commission into the Building and Construction Industry (the industry). It was established as a separate unit within the Department of Employment and Workplace Relations (DEWR) and has operated under a charter endorsed by the Minister for Employment and Workplace Relations. The Interim Taskforce has had powers available to it under the *Workplace Relations Act 1996* (WR Act).

Commissioner Cole's intention was to establish an interim body to secure the law in the industry prior to the establishment of the national agency he envisaged. On 25 March 2004, the Minister for Employment and Workplace Relations, The Hon Kevin Andrews, advised the Parliament that the Interim Taskforce was to become a permanent Taskforce which would operate until the establishment of the Australian Building and Construction Commission (ABCC).

2.2 Budget and functions of the Taskforce

For the financial year 2004-2005, the Taskforce was allocated a budget of \$9.3m. This was not an excessive investment considering the contribution that the industry makes to the Australian economy.

In 2003-04, the industry employed over 770,000 people and accounted for 6.8% of Australia's GDP, an amount equal to \$50 billion. Moreover, independent research has found that if labour productivity in the commercial construction sector matched that in the domestic housing sector there would be a gain of \$2.3 billion per year to the economy, a 1% decrease in CPI and a 6.8% decrease in the costs of construction.

Taskforce offices are located in Melbourne, Sydney, Brisbane, Perth, Adelaide and Hobart. There are currently 55 staff members. Taskforce investigators have regularly held meetings with industry participants to educate them about their rights and obligations. The Taskforce has also developed a suite of education materials. Information and advice has been available on the Taskforce's website (www.buildingtaskforce.gov.au) and a 1800 hotline has provided a whistleblowing function with confidentiality and anonymity.

2.3 Performance of the Taskforce

In its 35 months of operation, the Taskforce has placed 29 matters before the courts, consisting of four matters involving both unions and employers, nine matters involving only employers, 15 matters involving only unions and one matter involving the Victoria Government. Sixteen of these court actions have been completed following cases investigated and prepared by the Taskforce. As at 31 August 2005, an additional 11 briefs of evidence were being considered for prosecution by either the Taskforce's legal team or external legal providers.

As outlined in the DEWR *2004-05 Performance Review – Mid Year Report*, the Taskforce's level of performance has been judged by its Key Performance Indicators (KPIs). They were as follows:

1. *the level of satisfaction of clients with quality and timeliness of advice and assistance provided by the Building Industry Taskforce; and*

“We’re the biggest gang in town and we’ve got to remember that and start acting like we’re the biggest gang in town.”

CFMEU Secretary Martin Kingham,
Construction Contractor,
Vol 20, No. 4 May 2005

2. *timeliness in bringing actions against breaches of federal awards and agreements and the WR Act.*

Since inception, the Taskforce has consistently performed beyond its KPIs. As at 31 August 2005, the Taskforce had received 3,367 enquiries, 3,070 of which had been responded to in one working day and 1,732 of which had been resolved within three working days. Further, in a customer service survey conducted by the Taskforce, it was found that as at 30 June 2005, 90% of customers were satisfied with the service that was provided. Of those customers who were not satisfied, reasons offered were principally that the issues fell outside the scope of the Taskforce's operations or that the Taskforce had lacked the powers to provide adequate assistance.

The Taskforce has nine in-house lawyers but all briefs of evidence have been referred to external law firms prior to any court action commencing. The Taskforce has only initiated court actions when the external advice was that:

- a) requisite evidence existed; and
- b) it was in the public interest to proceed.

This process has ensured that an additional independent and objective assessment of the evidence was made.

The success of the Taskforce cannot be measured merely by the number of matters it brings before the courts or by the fines handed down by the courts. The mandate of the Taskforce is to secure lawful conduct and bring about long term cultural change to the building and construction industry. The Taskforce has taken important steps towards achieving this goal.

2.4 The behaviour continues

Throughout January 2005, the CFMEU Victoria held talks with a group of builders and subcontractors in the hope of them signing new three-year agreements before 1 July 2005, despite the sector's agreements not expiring until October. On 21 January 2005, the following extract appeared in *Workplace Express*:

"employers are talking because they know the union can make their life a misery anyhow - and will still be able to post-Cole (reform), though it will be harder".

The Taskforce has taken 15 matters to court since being established as a permanent body in March 2004 (making a total of 29 actions since inception in October 2002) thus demonstrating that inappropriate and unlawful behaviour has continued unabated.

In these 15 cases, the Taskforce has alleged breaches of the WR Act including coercion, intimidation and threatening behaviour, hinder and obstruct, demanding, paying and receiving strike pay, failure to comply with dispute resolution procedures and unprotected industrial action. The prosecutions were mounted as a result of complaints made to the Taskforce's hotline which led to extensive investigations by the Taskforce. All matters were put before the court based on recommendations from both internal legal advisors and external law firms.

"You have to cheat to compete."

Taskforce caller

Case study: *Trouble on the track*

The Taskforce continues to receive reports each year of unlawful activity on the Grand Prix site in Melbourne. This event is considered a hugely profitable venture for the State, with a hefty proportion of the proceeds going to charity. Therefore any industrial action on this site sees costs to the people of Victoria, as well as the recipients of the donations.

In 2004, the Taskforce received reports including:

- union representatives shutting down the site, purportedly for safety reasons, in an effort to coerce workers to sign union agreements; and
- verbal abuse by a union representative to the point where one contractor feared for his workers' safety.

In 2005, the Taskforce received reports including:

- union demands for \$110 payments (per employee) from contractors who were not union members;
- pressure being applied to contractors with threats that work would stop because of alleged unsatisfactory amenities; and
- pressure being applied to contractors to sign union agreements with threats that failure to sign would force the union to revoke concessions of being able to work on the 'lock down' weekend and the Rostered Day Off (RDO).

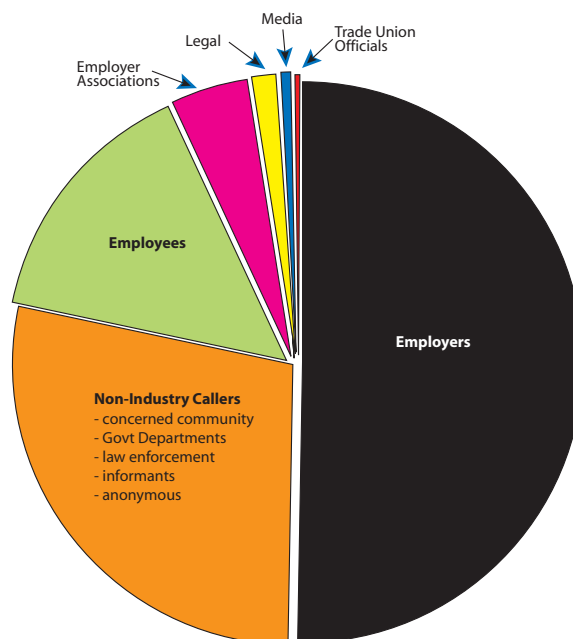
Small contractors get screwed over."

Taskforce caller

2.5 Nature of complaints received by the Taskforce

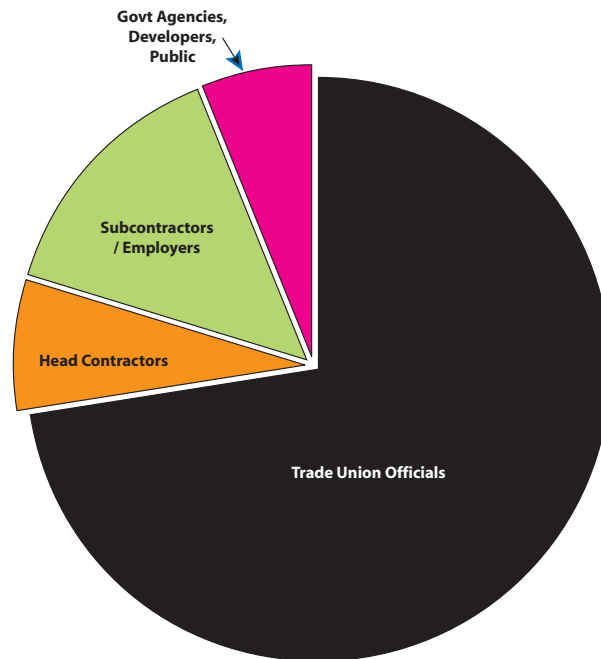
BREAKDOWN OF CALLERS

Of the 3,037 calls received by the Taskforce between 1 October 2002 and 30 June 2005, 523 matters proceeded to active investigations. The following chart shows a breakdown of the industry participants from whom the Taskforce received calls. The predominant industry sector seeking advice is employers, who account for 51% of callers.



ENTITIES COMPLAINED AGAINST

Disturbingly, trade union officials, who account for just 0.6% of callers, are the most prominent group against whom complaints are made, with 72% of complaints being made against them. The following chart shows a full breakdown of the entities complained against.

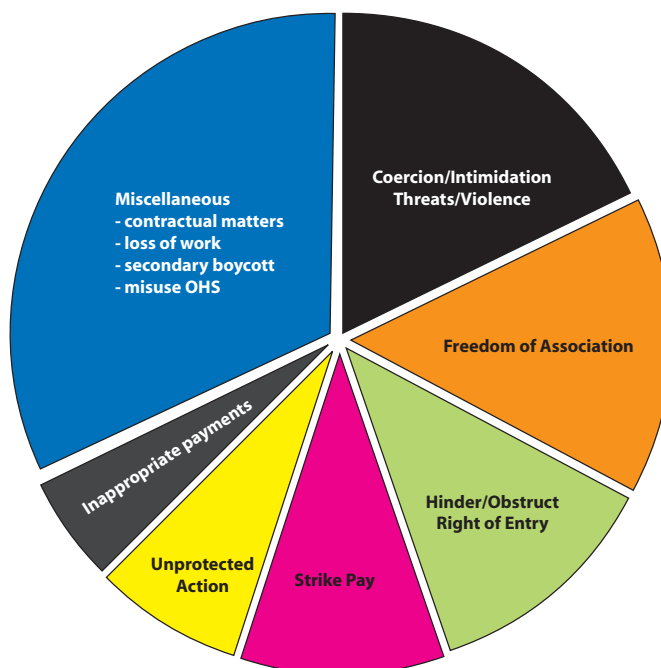


“One rotten egg in the industry and it’s the unions.”

Taskforce caller

ISSUES ARISING FROM INVESTIGATIONS

Of all investigations conducted by the Taskforce, 24% relate principally to threats, intimidation, coercion and violence. The other major issues relate to Freedom of Association, hinder and obstruct, and unlawful industrial action. Many also contain secondary elements of threats, intimidation, coercion and violence. A breakdown of the issues is shown in the following chart:



2.6 Limited powers of the Taskforce

Taskforce investigators have had the powers of ‘inspectors’ and ‘authorised officers’ under the WR Act. The provisions of the WR Act grant inspectors the power to ensure compliance with awards and agreements, as well as the power to investigate breaches of the WR Act relating to unprotected action and coercion in agreement making. Since inception, the Taskforce has enjoyed some success in ensuring compliance with the WR Act. The limitations of its powers, however, have until recently restricted the effectiveness of the Taskforce’s operations.

Case study: Powerless - a comparison with other agencies

On 2 October 2002, a picket was formed at the Patricia Baleen Gas Plant in Morwell as a result of frustrated negotiations between a head contractor and the Australian Workers Union, Australian Manufacturing Workers Union (AMWU) and Electrical Trades Union (ETU) about the use of Australian Workplace Agreements. The AIRC and the Federal Court issued return-to-work orders to break the picket. However, some employees chose to disregard these orders and continued to strike until 3 December 2002. Those who chose to return to work were blocked by the picket and, despite their wishes, could not enter the plant.

On commencing its enquiries, the Taskforce found that key parties and witnesses in this dispute would not provide any information. In the absence of powers to compel people to provide information, the Taskforce had to refer the matter to the Australian Competition and Consumer Commission (ACCC) for investigation under the *Trades Practices Act 1974* (TPA). By using the coercive powers provided under s.155 of the TPA, the ACCC was able to compel people to provide the necessary information in order to develop a Brief of Evidence for action before the Federal Court.

The Federal Court concluded this matter on 30 April 2004 with each union being found in contravention of the TPA. They were each fined \$100,000 and ordered to adhere to four-year good behaviour bonds.

In an interesting insight into this case study, and indeed the consequences of the paucity of powers provided under the WR Act at that time, an article on 5 May 2004 from the *Australian Financial Review* commented:

“the experiences of many firms show that the WR Act is not effective, because orders under the Act are routinely ignored. Without the force of the TPA, competition would systematically be rorted”.

“Play the game or get out of the industry. People are scared to testify.”

Taskforce caller

The lack of adequate penalties under the WR Act created situations where the punishment was not a deterrent and the unlawful behaviour has continued. For instance, in February 2005, the ACCC instituted proceedings in the Melbourne Federal Court relating to an alleged boycott of electrical contractors who did not have a union enterprise agreement. In this matter, the ACCC alleges that in August 2001 a power generation company, Edison Mission Operation and Maintenance Loy Yang Pty Ltd (Edison), entered into an arrangement with the CEPU. The arrangement

had the purpose of preventing Edison from engaging electrical contractors who did not have an enterprise agreement with the union to perform work at the power station. Further, the ACCC is alleging that by entering into, and giving effect to the arrangement, Edison contravened sections 45E and 45EA of the TPA. This conduct is a familiar scenario to the Taskforce, yet in this case the eventual penalties under the TPA will no doubt far exceed those handed out to date with similar Taskforce actions under the WR Act.

In July and August 2004, a number of workers took industrial action on the Thornlie Railway Station Perth to Mandurah Rail project in Western Australia. The CFMEU and two of its officials, Michael Powell and Walter Molina, were found to have called, arranged and attended meetings of workers which resulted in this industrial action. The WA Industrial Magistrates' Court found that the union and the two officials were directly involved in, and engaged in, illegal industrial action and also breached the dispute settlement procedures of their Certified Agreement. The CFMEU was fined \$6,000, with union organisers Powell and Molina fined \$1,500 and \$1,000 respectively. The CFMEU has filed an appeal from this decision to the Federal Court.

The Taskforce was advised that after the proceedings, a prominent WA union official allegedly said to one of the respondents, words to the effect of "You lost more than that playing two-up last weekend". This remark was followed by the other respondent allegedly replying "I've had bigger parking fines than that".

"There isn't a site you can get on without being members of the union or having an EBA."

Taskforce caller

Case study: 'Industrial offences' – not our problem

In September 2003, two union organisers attended a CBD demolition site unannounced and demanded to see their members and inspect the workplace for alleged OHS breaches. Company representatives informed the union organisers that they had no lawful right of entry and ordered them off the site. Both organisers refused to leave and the police were called. The organisers remained on the site taking photographs and generally disrupting workers. The organisers refused to leave even when police requested them both to do so. It was only after the police announced that they would call for a backup that the union organisers finally departed.

This incident caused considerable disruption to the site and was investigated by a Taskforce investigator. At the completion of enquiries no breach of Commonwealth law could be laid. However, it was the view of the investigator that both union organisers had committed the offence of wilful trespass. This view was supported by an experienced lawyer attached to the Taskforce.

On 25 June 2004, the Taskforce sent a letter to the police prosecutor querying the decision not to prosecute. Nine months later, on 23 March 2005, the Taskforce received a letter dated 14 July 2004, stating that whilst there was sufficient evidence to charge both union organisers with trespass it was not intended to interfere with the discretion that was exercised by police members on duty that day.

On 11 May 2005, the Taskforce Director sent a letter to the state's police Commissioner highlighting that this matter had not been prosecuted and seeking advice as to why this decision was made. To date, no reply has been received.

This case highlights the total disregard that some union officials have for the law, even in the presence of police.

*“We’re working in
an industry that
has no laws.”*

Taskforce caller

3.0 AN INDUSTRY GONE AWRY

As demonstrated by the type of complaints received by the Taskforce, and by evidence heard by the Cole Royal Commission, the industry norm is to disregard the WR Act and adhere instead to, as one Taskforce complainant put it, *“the law of the jungle”*. Incidences of inappropriate industrial pressure, which can, in many instances, involve violent and thuggish behaviour, contribute to the lawless culture that currently plagues the industry.

3.1 Culture of coercion and intimidation

In August 2004, Victoria’s Court of Appeal sentenced Craig Johnston, the former Victorian State Secretary of the AMWU, to a minimum sentence of nine months imprisonment. The charges were the result of organised rampages through two businesses in 2001 because of an industrial dispute. The raids caused over \$43,000 worth of damage to property and involved balaclava-clad unionists upending filing cabinets, smashing computers, tearing fittings from walls, spraying a pregnant woman with a fire extinguisher and photographing, threatening and abusing employees, some of whom, not surprisingly, had to obtain counselling. The abuse by Mr Johnston was reported as being so violent that while attempting to take a photograph of one of the managers, purportedly to hang on a “shame board” for the “scabs”, he shouted *“I know who you are, you are a _ _ _ _ing dead man”*. He repeated the threat adding that he knew where the manager lived.

Trial Judge Joe Gullaci stated, after 16 members of the AMWU and the ETU pleaded guilty to 18 counts of unlawful assembly relating to the invasions, he was satisfied that a *“well-organised, deliberate and unlawful”* assembly by a large group of people had endangered the public peace.

From his Victorian prison cell, Johnston subsequently sent a message to unionists to *“continue to break these laws”* urging them that *“if the law is wrong, break it and break it again and force the Government to repeal it”*. Further examples of civil disobedience were found on a website devoted to the Defend Craig Johnston movement, where Craig Johnston is quoted as saying:

“The only way that the Workplace Relations Act will be brought down is if there is a full-on onslaught of civil disobedience and breaking the law with political and industrial action”.

Notwithstanding such a clear example of thuggery, Mr Johnston continues to enjoy the support of prominent union officials in the industry. Those who have spoken out in support of Craig Johnston include Martin Kingham (CFMEU State Secretary Victoria), Earl Setches (CEPU — Plumbing Division National Secretary and Victoria State Secretary), Peter Tighe (CEPU National Secretary) and Kevin Reynolds (CFMEU WA State Secretary). It was also reported in Melbourne’s *Herald Sun* on 20 April 2005 that 5,000 Johnston supporters, led by members of the Black Uhlans Motorcycle Club, rallied in the city for his release from prison.

CFMEU Assistant Secretary for WA, Mr Joe McDonald, is recorded in the *Construction Worker* as saying that Johnston *“deserves a medal”* and is a *“hero of the working class and should be treated as one”*. Mr McDonald goes on to suggest that the weapon for fending off the purported *“Howard Government attack on unions”* was militant action, concluding *“we’re going to need a thousand Craig Johnstons”*.

Following his release from jail, Mr Johnston was reportedly said to be employed as a CFMEU organiser on a Geelong construction site.

“Contracts are awarded on who can put the most pressure on.”

Taskforce caller

As previously noted, of all complaints received by the Taskforce, 24% relate principally to threats, intimidation, coercion and violence. This conduct can be as violent as assaults on people and damage to property, all for the sake of advancing political and industrial agendas. For instance, on 24 March 2004, two homes, one currently owned by, and one formerly owned by, union officials, were firebombed and then investigated by the Arson Squad. The attacks on these two homes occurred in the same 12-month period as the 'torching' of a third union official's home and the 'drive-by' shooting on the same union's state offices.

Case studies: Flexing industrial muscle to get results

In October 2003, a contractor was appointed to finish building works on a site after a previous contractor had departed with 60% of work still to be completed. A union official approached the newly appointed contractor demanding that it not only employ the subcontractors who were previously engaged on the project, but also pay outstanding debts to the subcontractors for work they had completed to date. On refusing, the union commenced a campaign of threats of industrial action and intimidating workers on site. This behaviour became so violent that on attending work one morning, a company representative reported to police that a union organiser had attempted to run him over.

The same company had already experienced problems with the same union one month earlier, when the company had successfully prevented union officials from breaching lawful right of entry provisions. As a result, the company was told that it would face disruption on other sites in the future.

The industrial unrest on the new site continued well into 2004, with Taskforce investigators and police attending in April, having been informed that 80-100 men had broken through the site gates and caused serious amounts of damage. The intruders then cut electrical power cables which resulted in them hanging near puddles of water. Their actions shut down the power supply to a neighbouring aged care facility which had several patients on life support machines.

As a result of this intimidation, the company withdrew its services from the site and is currently pursuing action through the courts for breach of contract by the developer. The company estimates that this job was worth approximately \$5 million. They are not only seeking compensation for the loss of potential profit, but also a reimbursement for the costs that were incurred whilst they were working on the site. The company managing director has recently informed the Taskforce that they have been forced to mortgage three investment properties in order to avoid insolvency due to the financial losses incurred as a result of this dispute.

This is but one of the many instances of violent and thuggish behaviour that the Taskforce regularly investigates.

"Small companies are eaten up by big fish."

Taskforce caller

In an article in the *West Australian* of 17 December 2004, WA's CFMEU State Secretary Kevin Reynolds is quoted as saying

"If workers want to go on strike, they will go on strike no matter what the legislation says. We have just seen that with (the Perth to Mandurah) rail tunnel workers".

In the same article, Mr Reynolds also threatened that if union officials were not permitted to enter sites they would meet somewhere else and simply ignore strike restrictions and other aspects of the law. This same site continues to experience militant union activity with CFMEU assistant secretary, Joe McDonald, threatening in a *Sunday Times* article on 1 May, to turn Mandurah railway sites into "battlefields" unless the State Government awarded contracts to union-friendly companies.

"The unions keep moving the goal posts."

Taskforce caller

Case study: 70 year old migrant intimidated by hired heavy

On 21 February 2005, a report was received by the Taskforce relating to a Freedom of Association matter. Three weeks prior to the complaint, the head contractor, who was in business with his 70 year old migrant father, was approached by a union organiser who suggested that all workers would need to be union members in order to continue working on site. The same day, the contractor was given the number of somebody who could "fix" the problem for him.

The contractor called the contact, whom he described to the Taskforce as a "heavy". The "heavy" said he would "solve the union problem" for a fee of \$1,000 per week, as well as a \$1,000 bonus every three months, and a \$5,000 payment at the end of the job. After giving the matter some thought, the contractor declined the offer. The "heavy" responded by saying *"Mate you're making a mistake, they're going to screw you"*.

On 11 February, the site was visited by a union official who insisted that the contractor sign an EBA with his union, and that noone would be allowed to work on RDOs and other union closed days. The contractor would not agree. On 18 February, two union organisers arrived at the site. The contractor told them that he did not want it to be a union site. The organisers threatened that they would be back and that the contractor *"will get trouble"*.

On 21 February, a state safety authority officer visited the site to undertake a safety inspection. About ten minutes later, the "heavy" was back claiming that the site was not safe. The contractor asked the "heavy" to leave. The "heavy" said to the contractor *"this is unfair dismissal. I'll take you to arbitration and you'll be paying my wages for as long as this site is going"*. The contractor threatened to call the police if he would not leave. The "heavy" responded *"call the police mate, they don't scare me. You don't know who you are dealing with. I run this area"*. The police were called three times and eventually arrived on site. They ordered the "heavy" to leave.

Throughout March and April, the Taskforce received several calls from the head contractor who provided information about unlawful union activity on site. The Taskforce investigator assigned to this matter gave extensive advice to the complainant in relation to his rights and obligations. On 6 May, the investigator received a call from the head contractor who explained that he had “almost gone broke” as a result of the industrial unrest that had been experienced on site. He conceded that he was going to sign a union agreement in order that he could get the project completed. The contractor stated that he was coerced into signing this agreement, and he felt that he had absolutely no choice in the matter. He declined further assistance from the Taskforce for fear of repercussions.

The clear disregard for the legislation that governs the industry is a conclusion shared by many industry participants. For instance, Michael McLean, Director of the Master Builders Association stated recently:

“Regrettably, many of our industrial relations practices have become so entrenched that some practitioners have accepted them, even the unlawful ones, as the norm”.

“Unions have more power than the police, but they don’t have a uniform.”

Taskforce caller

Such is the contempt for the law, it has been reported to the Taskforce that one major contractor and defendant in a Taskforce court action, stood over a subcontractor and fellow defendant inciting him to fight the Taskforce prosecution, rather than plead guilty which was the subcontractor’s desire.

In addition to contempt for the law, the Taskforce continues to face hostility directed towards its investigators. This conduct demonstrates another clear example of the intimidation and thuggery prevalent in the industry. For instance, in late 2004, the Taskforce became aware of propaganda which had been erected in sheds on Adelaide sites. One particular poster shows photographs of South Australian investigators and bears the slogan “*Know Thy Enemy – Building Industry Taskforce Goons Found on Adelaide Site*”.

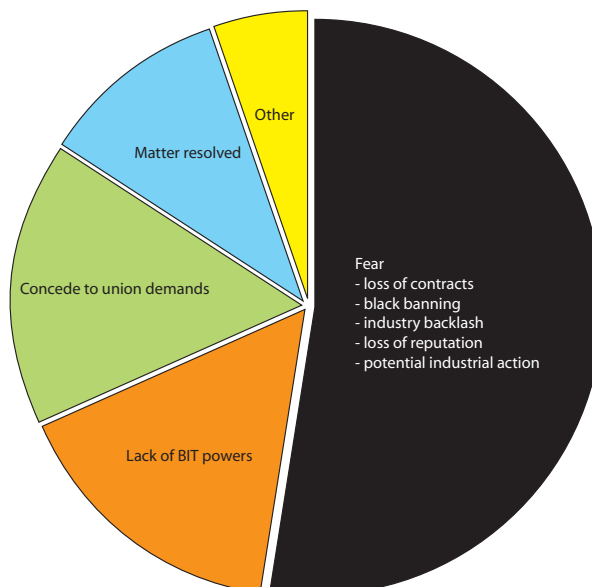
3.2 Industry’s reluctance to pursue matters

Notwithstanding those reports where legal action eventuates, the Taskforce is at a loss to pursue complaints because most callers are reluctant to take their complaints to the level of a formal investigation. Taskforce investigators maintain that callers often report instances of unlawful activity but do not want to proceed with any further investigations.

In addition, many of those victims who do have the courage to pursue their complaint to the investigation level, retreat by either withdrawing their complaint or refusing to provide a witness statement. In fact, of all investigations conducted by the Taskforce, half have not been successfully finalised due to an inability to gather evidence. This untenable situation is the result of several factors, but notably witnesses not wishing to make themselves available to assist the Taskforce.

A survey conducted on a number of clients who withdrew their complaint found that 52% had done so for fear of the ramifications they may face should they pursue the matter. In many instances, this involved withdrawing due to ‘commercial reality’ - where the punitive cost of pursuing the matter with the Taskforce was greater than the perceived future benefit. The ‘commercial reality’ was due to either potential industrial action and/or potential loss of contracts, both current and future.

REASONS FOR WITHDRAWING COMPLAINT



“I can say, without a doubt in my mind, that I will never again complain to any organisation about the actions of unions or their officials. Nor would I encourage or suggest that any colleague or work mate experiencing industrial problems make any complaint about a union or official.”

Taskforce caller

One Taskforce investigator suggested that being seen assisting the Taskforce can be like “*signing an economic death warrant*”. Given this reality, it is no surprise that industry participants have been unwilling to come forward.

The Taskforce is not alone in its views on victims’ reluctance to be involved in investigations. Following disseminations from the Cole Royal Commission, the WA State Police established a taskforce to investigate allegations of intimidation and illegal payments in the industry. On 1 May 2004, it was reported in the West Australian that the WA taskforce’s investigations had “*struggled to come to terms with uncooperative witnesses*” because “*many potential complainants, including big building companies, would not provide statements due to fear of reprisals from the CFMEU*”.

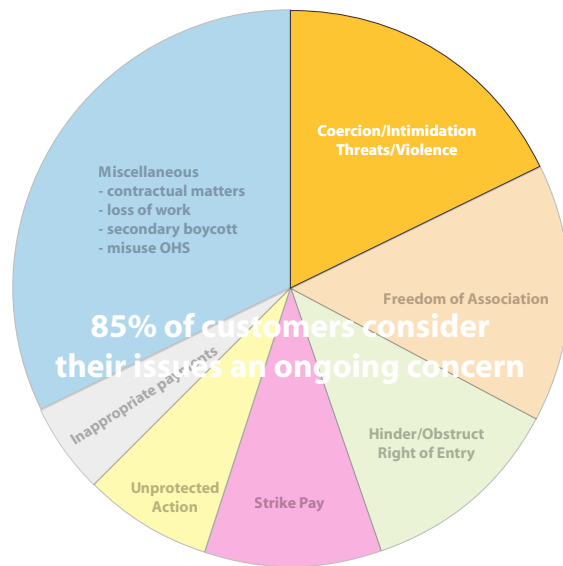
Further, ACCC Chairman, Mr Graeme Samuel is quoted in an *Australian Financial Review* article on 25 February 2005 as follows:

“the cause of a complaint such as a strike or picket line often disappeared “very quickly” and employers often declined to pursue it to avoid reprisals or re-opening the dispute”.

It has been the experience of the Taskforce that most builders and subcontractors readily surrender to demands, no matter how unlawful. An example of the apparent risks associated with proceeding with a complaint through to the prosecution stage is shown in a matter that has recently been put before the courts by the Taskforce. A site manager gave information to the Taskforce alleging threats of unprotected industrial action by union officials. He has since told the Taskforce that he has not been able to work on any CBD site since.

With the above situation in mind, it has become increasingly apparent to the Taskforce that industrial problems are very rarely resolved permanently, but rather go into remission. This conclusion is supported by the results of customer service research conducted by the Taskforce showing that 85% of callers who had a complaint investigated by the Taskforce considered it to be only a matter of time before their concerns resurfaced.

REMISSION SYNDROME



“Commercial reality is fix the problem by paying the union.”

Taskforce caller

Since the tabling by Minister Andrews of *“Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce”* there have been changes to legislation that have provided enhanced powers to the Taskforce in order to eliminate the culture of lawlessness in the industry. In particular, on 26 June 2004, the Parliament passed the *Workplace Relations Amendment (Codifying Contempt Offences) Act 2003*. This introduced Part VA in the WR Act providing for compliance powers to the Taskforce. These changes give the Secretary and his delegate (Director of the Taskforce) the power to compel people to provide information, produce documents, and attend and answer questions if the Director has reasonable grounds to believe that a person has information or documents, or is capable of providing evidence, relevant to a building industry investigation. Failure to comply with the law could incur heavy fines or up to six months jail. In addition to increasing the powers of the Taskforce, the legislation tripled some of the penalties provided for in the WR Act.

The legislation provided that the powers could not be used by the Director of the Taskforce until the Guidelines concerning the exercise of the powers were tabled in Parliament and had passed the disallowance period. On the 22 June 2005, the Senate agreed to the Guidelines.

These new powers promise to have a significant effect on the building and construction industry. The cases below are examples of the kind of circumstances where the Taskforce anticipates exercising the compliance powers, which are necessary in an environment where building and construction industry participants are too frightened and intimidated to give evidence voluntarily.

Case study: Compliance powers – how they will help

Case 1

The Taskforce investigated a matter whereby a fencing company was subject to black banning, with head contractors terminating their contracts

“Something has to be done about this. You can’t have CFMEU stewards and delegates walking around with that sort of power.”

Taskforce caller

allegedly because the company would not enter into an EBA with a particular union. When questioned by Taskforce investigators, the head contractors admitted that the termination of contracts was the direct result of union pressure. However, they were not prepared to make a formal statement. The directors of the fencing company initially provided full details of the matter but did not want to proceed for fear of being banned from future contracts. In this instance, hearings can provide vital information from the head contractors and site foremen who dealt directly with the union in question. This file was closed but can now be reopened.

Case 2

An AIRC Order was directed to employees to return to work on a major construction site which had experienced extensive industrial unrest. The employees continued with industrial action after the Order was issued. Those employees were made aware of the existence of the Order by letter that was served on them by process servers. The Taskforce, after exhausting all traditional forms of investigation, is at a loss to prove that the union was responsible for directing the workers to continue the unlawful industrial action. The compliance powers will enable the Taskforce to identify the primary agitators, determine what was discussed at various shed meetings, and prove that an offence has occurred.

Case 3

An allegation was received from a former site supervisor that employees took two-day strike action that would be considered a breach of an AIRC Order. Two former employees were interviewed, one confirming that unlawful strike action did occur. Two Notices to Produce were served on the operations manager of the head contractor seeking additional information and documentation. There are a few witnesses in this matter who would be content to provide evidence if they were compelled to do so but do not want to come forward voluntarily for fear of the consequences.

The use of hearing powers will greatly assist in developing those matters where witnesses are unwilling to speak of the events. Taskforce investigators have frequently been told by witnesses that if they were summoned to attend court they would do so and tell the truth. Regrettably, promises of such a nature are insufficient to mount prosecutions. Therefore, hearings will prove beneficial because the examination of crucial witnesses will provide the vital evidence necessary to proceed to prosecution.

It must be emphasised that the 29 matters which the Taskforce has brought before the courts to date are by no means a true indication of the current lawlessness in the industry. Although the Taskforce has had some success in tackling unlawful behaviour, the limitations of the Taskforce powers has meant that the process of reform has only just begun. The ABCC’s enhanced powers and statutory function promises to be immensely effective in eliminating the culture of lawlessness from the industry.

3.3 Unlawful industrial action– compromising competitiveness

Statistics from the Australian Bureau of Statistics (ABS) indicate that in 2003, 249 working days were lost per 1,000 employees across Australia due to industrial disputation in the construction industry. Further, the construction industry accounted for 58% of the total number of working days lost in the December quarter 2004. As a consequence of these high levels, huge additional costs are generated. For instance, a media release issued on 8 October 2005 by the Master Builders Association stated:

“the cost of strike action is estimated at \$12 million for the day in lost output, not to mention the untold damage to project delivery times, and to Victoria’s already damaged reputation”.

In another negative indictment of the industry, on 22 February 2005, *The Australian* reported that the four-quarter average of working days lost per thousand employees in Western Australia rose over a two-year period to September last year from 36.6 to 107.6 days. Whilst this figure was a reflection of industrial action across all industries, it was noted that a potential cause for this unrest was the *“refusal to stand up to construction unions taking advantage of skills shortages on big projects”*. In the same article, examples were provided about the types of issues that resulted in days lost in Western Australia. These ranged from demands for the Eureka flag to be flown over a site to inadequate television jacks at site accommodation.

“Breaking the law gets results...if you believe in rank and file unionism, you have to break the law...because I break the law every day and sooner or later we’re going to have casualties when we do, but if we do it en masse, then we’ll win.”

Chris Cain, WA branch of the Maritime Union of Australia, speaking at a conference of trade unions in Melbourne , 13 June 2005

Case study: On strike but job yet to start

On 6 January 2005, it was reported in the *West Australian* that 140 construction workers went on strike in support of negotiating better pay conditions for union colleagues on the Perth to Mandurah rail project. While this type of behaviour is not unusual in the industry, this strike took place when the other workers were not due to start work for another week. The strike lasted three days.

The striking workers returned to work on the following Monday on the proviso that negotiations be held that week. After these discussions had occurred, the media reported that the head contractor had struck a deal with the union, resulting in some rail workers winning a \$10 per hour pay rise. This compromise was at the cost of three days’ production for the industry. The Taskforce conducted enquiries, however, due to jurisdictional limitations, it was not able to proceed. State authorities failed to pursue this matter, with WA’s Minister, Ms Alannah MacTiernan, ruling out State Government involvement stating in the *West Australian* on 6 January 2005 that;

“The contractors are all experienced in dealing with the CFMEU and have taken the industrial relations risk on these projects.”

The July 2005 outbreak of the ‘blue flu’ in Perth, where up to 400 workers called in sick on the same day, is another example of costly unlawful industrial action. This systematic abuse of sick leave entitlements is reported to be part of a premeditated campaign of industrial action which has cost the industry millions of dollars. The ‘blue flu’ campaign is a fraudulent abuse of an important worker’s entitlement and only serves to undermine the public’s confidence in the building and construction

industry. This is an example of the lack of regard for the law experienced by the Taskforce and highlighted by the Cole Royal Commission.

Excessive levels of industrial disputation in the building and construction industry have an obvious impact on the productivity and cost of affected projects. Lower productivity levels, extended contract deadlines, penalties being imposed, costs associated with the delivery of goods and services, and wasted resources are just some of the potential repercussions associated with unlawful industrial action.

The Taskforce's 2004 Report provided a case study, which is now one of the Taskforce's matters currently before the court, in which a fatality occurred one Friday in Shepparton on a rural property. Despite workers returning to Melbourne sites on Saturday (and receiving overtime and penalty rates) and taking the Monday off as an RDO, Statements of Claim laid before the Federal Court set out how the CFMEU, CEPU and ETU illegally shut down at least 33 major building sites in Melbourne on the following Tuesday and Wednesday. This strike action, which was purportedly for a 'safety audit', resulted in millions of dollars lost to the industry. Proceedings have commenced in the Melbourne Federal Court against 37 respondents for breaches of the WR Act including demanding, paying and receiving strike pay, and failing to comply with dispute resolution clauses of Certified Agreements. Six of these matters have been finalised by the courts with the respondents in each case not contesting the claims made against them.

“Stop union thugs from doing what they’re doing.”

Taskforce caller

The Australian public should be under no misapprehension that the unlawful action which the unions and their members took had anything to do with workplace safety or the fatality. It must be emphasised, the tragic death in question did not occur on a building site in Melbourne. It occurred on a rural property outside Shepparton, nearly 200 kilometres from the Melbourne CBD. Despite this fact, at least 33 major building sites in CBD Melbourne were shut down for two days. The notion that the Taskforce is pursuing its own agenda because it is tackling the industry's crippling problem of strike pay is incorrect. Strike pay is an unlawful activity, therefore it is within the mandate of the Taskforce to investigate such breaches. The Taskforce will continue to investigate any unlawful activity in the industry and will pursue recourse through the courts where appropriate.

4.0 APPLICATION OF CURRENT LEGISLATION & THE NEED FOR REFORM

4.1 Freedom of Association

An editorial in *The Adelaide Advertiser* of 16 April 2004 succinctly stated:

"Freedom of choice is one of the most precious and fundamental privileges of the Australian lifestyle".

Freedom of choice may be considered a fundamental privilege of the Australian way of life but research by the Office of Employment Advocate (OEA) shows that this privilege is not afforded to many participants in the building and construction industry. In its report released on 29 April 2004, it was recorded that the building and construction industry had an alarmingly high incidence of workers (20%) who felt compelled to be union members. Even more concerning is that this figure incorporated the domestic and cottage sections of the industry. However, the majority of Taskforce complaints about Freedom of Association emanate predominantly from commercial CBD sites. The report also stated that since 1997, approximately 1,000 complaints about Freedom of Association made to the OEA were from the building and construction industry. This number accounted for approximately 40% of all Freedom of Association complaints received by the OEA.

"You can't afford to swim against the stream."

Taskforce caller

In response to these findings, on 29 April 2004, the National Secretary of the CFMEU, John Sutton, stated in a CFMEU press release that:

"Moral persuasion is currently used by CFMEU members to encourage fellow workers to join the union. Moral persuasion should continue to be used to ensure that all who benefit must contribute".

Freedom of choice is a core principle underpinning the WR Act, yet the Taskforce continually finds that this choice is denied to building and construction industry participants.

Case study: a trip not worth taking

A subcontractor was successful in obtaining a contract to complete work on a CBD site. The value of this project to the subcontractor was \$1.2m. The subcontractor was employing about five personnel at the time. He was approached by a union to sign an EBA. The subcontractor reluctantly agreed as he had been informed that he would not be permitted to work on the site unless he had a union-endorsed agreement and unless he employed the services of a particular union-friendly subcontractor.

The subcontractor arranged with an industry association to sign an agreement with the union. After filling in the relevant details, he returned the document to the association for them to have the union sign it and lodge it with the Commission. The subcontractor then boarded a plane to the West Indies in order to attend to another business matter.

Upon arrival in Jamaica, the subcontractor was informed by one of his employees that the *"boys were sitting in the sheds at the (site)"*. It was further revealed that the union had decided that as the subcontractor

“It’s (the building and construction industry) an absolute shit-fight.”

Taskforce caller

“didn’t have an agreement, they won’t be working until such time as they do”. The subcontractor then informed the union that he had in fact signed one, that it was with his industry association and with his solicitor, who had Power of Attorney over his affairs whilst he was overseas, and that they would be able to handle the matter.

Once the signed agreement was located the union objected that one page had not been initialled. The subcontractor then suggested that the union contact his solicitor and he would sign it on his behalf. The union refused to cooperate saying that *“they won’t be on site until this is signed”*. The subcontractor was then forced to board a plane in Jamaica, fly back to Australia, initial one page and take the document to the union. He then boarded a flight the same day and flew back to Jamaica. This whole trip was at his own expense.

4.2 Right of Entry and the abuse of Occupational Health and Safety legislation

On 5 December 2004, an industry expert was quoted in a *Sunday Herald Sun* article entitled *“Rort City”* as follows:

“Safety is now used by the unions as the major industrial relations weapon to achieve their goals”.

The Taskforce frequently receives complaints whereby industrial issues are dishonestly expressed as OHS concerns and it has found that abuse of OHS legislation is a major limitation to the industry’s efficiency. This conclusion is consistent with the Final Report of the Royal Commission which found many instances where safety issues were used as an excuse for creating industrial unrest.

It was recorded in the *Australian Financial Review* on 9 February 2005 that this view is also held by employers who claim that OHS laws are being used to gain access to workplaces under *“right of entry provisions which are more liberal than those under industrial relations laws”*.

Case study: RDO or OHS?

In April 2004, a union organiser attended a building site on an industry RDO, parking his car in a position that blocked all vehicular access to the site. In fact, his vehicle was left where a concrete pump truck was going to park for a concrete pour scheduled to take place that day. The project manager requested that the organiser move his vehicle. In response, the organiser replied:

“Look, you know your guys are working on an RDO, you realise this is a state-wide shutdown”.

The union organiser then informed the workers that they had no right to work on an RDO, despite the fact that they were party to their own EBA with their employer, which contained no clause relating to state-wide shutdowns.

Following his address, the organiser informed the project manager that a scheduled concrete pour was *“not going to happen”* as he had

"already taken care of that". The project manager called the concrete company to be informed that the pump truck had *"broken down"* and would not be able to attend. Following the telephone call, the project manager ordered the concreter to finish for the day.

Soon after, another union organiser entered the site. Both union organisers then began inspecting the site and declared that the sheds were unsafe and issued an improvement notice to address the problems. These minor problems were addressed immediately and the union organisers left.

In the half hour that the union organisers were on site, they were able to successfully disrupt the site to the point that a scheduled concrete pour had to be cancelled and all tradespeople were unable to complete their work. The company estimates that the cost of this aborted pour was between \$40,000 - \$60,000.

"Nobody can take the unions on."

A continuing difficulty for the Taskforce has been determining whether alleged OHS issues exist, or if legislation is being manipulated to advance some other agenda. Lack of cooperation from state agencies to assist in determining alleged OHS issues also hinders the Taskforce's ability to pursue complaints. Under s.87 of the WR Act, a member of the AIRC can request the Taskforce to investigate matters that affect the safety of employees. This action could be applied in circumstances where an alleged safety issue has caused work stoppages. An investigation would identify whether the safety issue was real and how significant it was. However, in its 35 months of operations to date, the Taskforce has yet to be asked to assist the AIRC in this or any other regard.

Taskforce caller

Similarly, the lack of uniformity between the Commonwealth, state and territory jurisdictions results in the abuse of OHS. The Taskforce is frequently informed that some industry players take advantage of the inconsistencies, advancing industrial agendas and using state laws to circumvent federal legislation. An example of this practice is when union officials hold right of entry permits under Federal legislation and state OHS safety laws. It has been well documented that some take advantage of their position as safety officers to gain access to sites where they would otherwise not be permitted under Federal laws. It is because of such malpractices that a stronger regulatory regime is required.

In the first action prosecuted by the Taskforce, CFMEU organiser, John Setka, was found guilty by the Magistrates Court of Victoria of threatening and intimidating a project manager prior to his appearance before the AIRC. Despite this conviction, a *Herald Sun* article dated 23 July 2005 entitled *'Anger at union officer's permit. Fine is no bar to visiting worksites'* reported that Setka was to be one of the first to be allowed on worksites in respect of safety issues.

This report has provided many examples of the less favourable side of the industry. That said, one of the crucial elements for ensuring that all parties comply with the law is to apply stringent conditions to minimise abuse of legislation by certain industry participants.

“Rule of law needs to be established in the industry.”

Taskforce caller

Case study: The naked truth – what really happens on site

In November 2004, an assistant national union secretary and two organisers attempted to enter a site. The OHS manager of the head contractor was subject to abuse and obscene language whilst trying to protect his rights. A transcript of parts of the ensuing conversation reads as follows:

Manager: G'day, you here with these bods today?

Union Secretary: Yeah.

Manager: Are you a union official?

Union Secretary: Yeah.

Union Organiser: Who are you?

Manager: G'day, I don't know you either. I'm (name).

Union Organiser: You don't want to know this ----, mate.
He's a ----ing maggot. A piece of ----.

Manager: Anyway, have you got your Right of Entry Card, please?

Union Secretary: No.

Manager: Do you have a State Right of Entry card?

Union Secretary: No, I don't.

The conversation continues and the manager asks one of the union organisers to show his identity card.

Manager: You're refusing to show me your identity card? As (company name's) management representative ...

Union Organiser: Hey go, go, talk to your ----ing, go talk to your boss. Go, go, go talk to your ----ing boss, pinhead.

Manager: I'm requesting to see your Industrial Relations Act...

Union Organiser: ---- off ----.

Manager: I'm requesting to see...

Union Organiser: ---- off, ----

Manager: I'm requesting to see...

Union Organiser: ---- you.

4.3 The consultative approach

A recommendation that arose during the *Senate's Building and Construction Industry Inquiry 2004* from certain industry participants was to establish consultative processes by facilitating 'roundtable' discussions between employers, unions and government. The idea of using consultation to resolve industrial dispute is not new to the industry. For well over ten years, industrial agreements have contained dispute resolution provisions to facilitate this form of remediation. Observing industrial relations in the industry for the past 35 months, it has been the Taskforce's experience that these provisions are invariably ignored, an opinion borne out of a number of relevant Taskforce prosecutions.

The success of this kind of consultative mechanism hinges on the ability of industry participants to act with trust and cooperation. Whilst there is the idealistic notion that cultural change will be borne out of a cooperative system, it is the conclusion of the Taskforce that such procedures are openly and actively disregarded because it is more financially viable to negotiate a quick cash settlement than it is to invoke timely dispute resolution provisions.

The following case study outlines an incident where the 'consultative approach' was used in an attempt to obtain industrial harmony. The case relates to an application lodged at the AIRC on 26 November 2004 when an international construction company sought an order to stop or prevent industrial action. The application followed a series of failed attempts to effectively consult with the union to reduce the industrial disputes that continued to occur.

"The whole industry is a kangaroo court".

Taskforce caller

Case study: Consultative approach yet still six work stoppages

Application One - 12 July. Reason for the work stoppage was alleged access to certain areas, inclement weather conditions and a first aid facility. Union claimed to commit to following the dispute procedures in the future. Application dismissed.

Application Two - 29 July. Reason for the second work stoppage was identified in the application as *"various issues pertaining to the operation of the Certified Agreements"*. Other issues, including demands that subcontractors *"be on EBAs"* also identified as reasons. Union stated that *"there is no reasonable evidence that there will be further industrial action forthcoming in the future"*. Application dismissed.

Application Three - 20 August. Reason for the third work stoppage was an alleged reduction in overtime, OHS concerns, allegations of an employee being encouraged to work when he was sick, and a dispute over the allocation of an area for a site meeting. The union denied that any industrial action was occurring or was likely to occur. The parties agreed to conciliate. Application dismissed.

Application Four - 12 October. The union argued that the fourth stoppage was due to a crane lift operating in windy conditions and asserted it was not industrial action because the stoppage was in accordance with wet weather procedures. The employer stated that there was no other CBD construction site where employees went home as a result of the same wet weather conditions. The parties were ordered to enter into discussions to resolve the issues.

“Unions insist on having industrial unrest”.

Taskforce caller

Application Five - 16 November. The fifth series of stoppages related to a refusal to work in “*inclement*” warm weather. The union submitted that there was no industrial action happening, threatened, impending or probable. The parties agreed to conciliation but matter was not resolved.

Application Six - 26 November. The employer submitted that the previous day an employee received a 47-volt shock from a welding machine. The employer conducted an investigation and the machine in question was removed. The union attended the site and allegedly told the workforce that the injured man was on a heart monitor and was still in hospital. In fact, he never went to hospital. A 24-hour stoppage ensued. The union requested the matter be dealt with by conciliation, however the employer’s representative submitted that conciliation would not solve the problem.

The first five applications were either adjourned or dismissed. This was done at the request of the employer who chose not to avail itself of possible remedies available under the WR Act. The parties on each occasion attempted but failed to negotiate a resolution. On 20 December, the AIRC made a final order substantially in the terms sought by the employer. The AIRC made a finding that industrial action had occurred on a number of occasions and the disputes and safety procedures had not been followed on any occasion.

In the case study just mentioned, industrial action occurred on a number of occasions, with the dispute resolution procedures and the standard safety procedures not being followed in any of the instances. The continuing plea by the union was that there was no reasonable evidence there would be further industrial action in the future. Despite these assertions, and the many attempts both parties had at ‘round-table discussion’, the matter could not be resolved.

Outspoken critics of the Taskforce continue to offer the opinion that the industry would be better served by a cooperative body that facilitates the restoration of trust by relying on industry participants to voluntarily comply with “10-point plans” and “good faith bargaining provisions”. For this approach to succeed, negotiating parties would need to be, at the very least, truthful in their pleadings. Unfortunately, the current culture plaguing the industry does not place a very high value on truth, facts or regard for the law.

5.0 CONCLUSION

It is not only those in the industry that face the consequences of unlawful and inappropriate behaviour. For every incident of unlawful industrial action, payment of strike pay and disruption to day-to-day activities, somebody has to pay the price. The building industry is vital to Australia's economy and the unlawful conduct of employers and unions is forcing up costs, which are ultimately borne by all Australians. As has been noted, if labour productivity in the commercial construction sector matched that in the domestic housing sector there would be a gain of \$2.3 billion per year to the economy, a 1% decrease in CPI and a 6.8% decrease in the costs of construction. These are the savings that could be enjoyed by all Australians.

Eliminating violence, thuggery and intimidation has been the primary goal of the Taskforce. To achieve this goal the Taskforce has strived to help decent, honest building and construction industry participants eradicate un-Australian, lawless behaviour in their industry.

During the 35 months of the Taskforce's existence it has uncovered an unparalleled disregard for the rule of law. While the Taskforce has been determined to rid this industry of intimidation, thuggery and illegal conduct, in reality, while it has had encouraging initial success, the process of reform has just begun.

Industry specific legislative reform is the only way that the challenges associated with establishing the rule of law in the industry can be met. With the passage of the *Building and Construction Improvement Bill 2005*, and the establishment of the ABCC on 1 October 2005, permanent and fundamental reform of the building and construction industry throughout Australia can finally be achieved.

“It’s like inviting a pet bear into the house - there is an omnipresent fear that the creature cannot be controlled, although it can be pacified temporarily by feeding it a rich diet.”

North American academic, Bruce Kaufman, on the attempt by employers to avoid unions in developing non-union employment involvement structures, *Australian Financial Review*, 22 June 2005