
Final Report of the Royal Commission into the Building and Construction Industry

# Reform – Achieving Cultural Change

**Volume Eleven**

Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC

February 2003

# Final Report of the Royal Commission into the Building and Construction Industry – Volume Titles

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ISBN: 0 642 21160 4

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# Abbreviations

## General

| | |
|---|---|
| Australian Building and Construction Commission | ABCC |
| Australian Building Construction Employees and the Builders' Labourers' Federation | BLF |
| Australian Competition and Consumer Commission | ACCC |
| Australian Construction Industry Council | ACIC |
| Australian Federal Police | AFP |
| Australian Industrial Relations Commission | AIRC |
| Australian Industry Group | AIG |
| Australian Securities and Investments Commission | ASIC |
| Australian Taxation Office | ATO |
| Australian Workers' Union, | AWU |
| Australian Workplace Agreement | AWAs |
| Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (referred to as the Australian Manufacturing Workers Union) | AMWU |
| Building Industry and Special Projects Inspectorate | BISPI |
| Building Workers Industrial Union | BWIU |
| Central Business District | CBD |
| Code of Practice for the Western Australian Building and Construction Industry | WA Code of Practice |
| Commonwealth | C'wth |
| Commonwealth Director of Public Prosecutions | DPP |
| Commonwealth Implementation Guidelines for the Code of Practice | Implementation Guidelines |
| Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia | CEPU |

| | |
|---|---|
| Construction, Forestry, Mining and Energy Union | CFMEU |
| Construction Industry Consultative Committee | CICC |
| Construction Industry Development Agency (C'wth) | CIDA |
| Department of Productivity and Labour Relations | DOPLAR |
| Director of Public Prosecutions | DPP |
| Electrical Trades Union of Australia, New South Wales Branch | ETU NSW |
| Enterprise Bargaining Agreement | EBA |
| Housing Industry Association Limited | HIA |
| Information technology | IT |
| International Labour Organisation | ILO |
| Master Builders Association | MBA |
| Master Builders Association of Victoria | MBAV |
| Master Builders Association of Western Australia (Union of Employers) Perth | MBAWA |
| National Building and Construction Committee | NatBACC |
| National Code of Practice for the Construction Industry | National Code |
| New South Wales Building Industry Task Force | NSW BITF |
| New South Wales Code of Practice for the Construction Industry | NSW Construction Code |
| New South Wales Industrial Relations Commission | NSWIRC |
| Occupational health and safety | OH&S |
| Office of the Employment Advocate | OEA |
| Office of the New South Wales Director of Public Prosecutions | NSW DPP |
| Queensland Industrial Relations Commission | QIRC |
| Royal Commission into Productivity in the Building and Construction Industry | Gyles Royal Commission |
| Tasmanian Industrial Commission | TIC |
| Trade Practices Commission | TPC |
| Victorian Building Industry Agreement | VBIA |
| Western Australian Industrial Relations Commission | WAIRC |
| Western Australian Task Force for the Building and Construction Industry | WA BITF |

## Contractors

| | |
|---|---|
| Kane Constructions Pty Ltd | Kane Constructions |

# 1 Achieving cultural change

## Introduction

1 The building and construction industry in Australia requires significant cultural change. Such change is necessary if the rule of law is to be reintroduced to conduct and activities within the industry, if individuals' freedoms are to be maintained, and if the industry is to achieve its economic potential. Change is required in the attitudes of all sectors of the industry, including governments, clients, head or subcontractors, industrial organisations and employees.

2 In summary, I recommend that cultural change be achieved by:

- The Commonwealth Parliament enacting a statute of special application to the industry.
- Creating a new statutory norm which clearly delineates between unlawful and lawful industrial conduct.
- Creating a Commission with responsibility for investigating unlawful conduct occurring in the industry.
- Rendering those causing loss from unlawful industrial action liable for such loss and prosecuting such conduct.
- Establishing a just, quick and cheap method of assessing and recovering loss caused by unlawful industrial action.
- Imposing a statutory obligation to report actual or threatened industrial action to the Commission.
- Providing that only fit and proper persons may hold office in, or exercise official functions on behalf of, industrial organisations.

3 The nature and extent of the unlawful and inappropriate conduct disclosed in the hearings before me and recorded in this report should not continue uncorrected.

4 Achieving cultural reform will not be easy or quick. Opposition to change will be robust, especially from unions. Head contractors and subcontractors will be loath to take commercial risks to achieve a change. It will take time for head contractors and subcontractors to realise the cost benefits and productivity improvements which can be achieved. There will be an unwillingness on the part of contractors to take the initial steps of recovering loss caused by unlawful industrial conduct from those who cause it. It will take time for those causing loss by such conduct to realise that, finally, they will be held responsible for their actions.

5 However, the benefits for Australia, and for the industry participants, including employees, are great. Tasman Economics estimated that if productivity in the building and construction industry was increased to match the average for the market sector over the past five years, then, between 2003 and 2010, the accumulated gain in real gross domestic product would be about $12 billion. All industries would benefit from an increase in output as a result of the fall in the price of building and construction. Building and construction industry output was estimated to expand by one per cent. Consequently, exports would grow. Imports would fall. In a sector of the economy producing 5.5 per cent of Australia's gross domestic product, and 7.5 per cent of employment, these benefits are significant indeed.

## An industry like no other?

6 There is no one characteristic that sets the building and construction industry apart from all other industries. Building and construction is project based with projects varying from short to long terms, but this is also true of the information technology industry. Building and construction workers move between employers relatively frequently, but the same can be said for hospitality workers. The large number of small contractors in building and construction is also a characteristic of the agricultural industry. The work is dangerous, as is mining and much of manufacturing. Together, however, all these and other characteristics do distinguish building and construction from other industries. The other characteristics include the following.

7 The work is project based. Each 'product' is constructed in a different location under different circumstances. The 'product' is discrete in nature, location, time and cost. While the processes used in building or construction may be repetitive in concept, each production process is unique.

8 As the work is project based the workforce on the site is not constant throughout the project. Each project involves different workers with differing skills and for differing but overlapping periods of time.

9 This work structure requires flexibility in work arrangements. Almost universally, businesses are looking for alternative ways of managing the workforce. The largest companies employ very few tradespeople on site. They rely on contractors that have a small number of employees or work as individual subcontractors.

10 Continuity of employment is, in the main, not assured and usually depends on the success of very small businesses operating in a highly competitive environment. Workers face great uncertainty about the availability of future work. They look to unions to provide new employment for them. They develop stronger ties to their union than to their employer of the day. But they do not protest when union officials act in an undemocratic, unresponsive or unlawful fashion.

11 The head contractor of the project has no direct relationship with most of the workers on the project. Nevertheless the head contractor requires workers to work in sequence, and in co-operation and close proximity to others who have different employers with no prior or continuing association. This increases the risk of accidents.

12 The mobilisation and co-ordination of labour, plant and materials is an organisational task of great complexity. That task continues throughout the whole building project. Disruption can impose large costs on the parties involved. As a result building and construction is a risky industry. Plant, capital and labour are mobile and the cost of disruptions is high.

13 Overall, this has resulted in the following key characteristics:

- while having specialist trade skills, subcontractors often lack broader business management skills;
- the level of bargaining power of those who employ the bulk of the workforce is limited;
- subcontractors are dependent on head contractors for continuity of work;
- the relationship between head contractors and the unions results in conditions adopted on one site quickly flowing through to others;
- head contractors have a short term, project-based focus on profitability and performance;
- clients only select head contractors with a reputation for delivering on time and on budget;
- head contractors are responsible for most of the project-based risk, including industrial relations risk – they seek to pass on that risk to subcontractors, or limit that risk by insisting that subcontractors conform to union demands such as 'no ticket no start', and 'no EBA no start';
- workers feel insecure about their long term employment and the safety of their workplace;
- the level of unionisation is high on major projects;
- the cost of industrial unrest is high; and
- industrial action or the threat of industrial action is highly effective in obtaining what is demanded.

14 Such an environment can quickly result in an industry where all participants pursue short term commercial expediency at the expense of the industry's long term performance.

15 Such an environment also accounts, in part, for the culture of the industry.

16 My initial impression of the culture and characteristics of the building and construction industry, particularly on major central business district (CBD) sites throughout Australia (except in South Australia and the Northern Territory) was set out in my First Report. That impression has since been confirmed by findings. The precise details are in the case studies. The particular characteristics of each State are summarised in the State and Territory Overview volumes of this report. As is there explained, the lawlessness on civil construction sites in certain Australian jurisdictions is less pronounced than those that apply on almost all CBD building sites outside of South Australia and the Northern Territory. There is a serious departure from the rule of law on building sites and on many construction sites.

17 Generally, the perpetrators of this conduct are unions, acting initially through their officers, employees, delegates, and members, but also through pressure upon head contractors. The behaviour of the particular branches or divisions of, or groups within, the unions that operate on major CBD building sites (which, for convenience, I call 'the unions') is, in many respects, unacceptable.

18 The unions arrogate to themselves a 'right' to interfere with employer-employee relations that goes well beyond what is appropriate. Thus, unions regularly insist (not merely recommend), upon a sub or head contractor employing, and paying the wages of, a particular individual whom the union has decided is to be the site delegate or the site occupational health and safety representative. Not infrequently demands, coupled with actual or threatened industrial action, are made that particular unemployed union members become paid employees of the general site workforce.

19 The unions are substantial institutions with considerable assets. So, for example, the most recently available figures show their net assets to be:

- Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (referred to as the Australian Manufacturing Workers Union) (AMWU) – $37.3 million;
- The Australian Workers' Union (AWU) – $12.3 million;
- Construction, Forestry, Mining and Energy Union (CFMEU) – $71.2 million; and
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) – Electrical Division and Electrical Trades Union of Australia, New South Wales Branch (ETU NSW) – $51.3 million.[1]

These assets are far greater than those of all but the largest building contractors.

20 Many union organisers and delegates display a disregard or contempt for the rule of law. They are used to taking unlawful action for industrial ends which frequently causes loss to others within the building and construction industry. They are rarely held to account by the legal or industrial system. Even where they are, the orders of tribunals and courts that are adverse to them are frequently disobeyed. Those who suffer from this unlawful behaviour fear that if union demands are not met further loss will be inflicted. It is unhealthy in our democracy that any group of persons be able to act in these ways outside the law. My recommendations address this matter.

21 Head contractors, who face powerful commercial pressure from their clients, take a 'commercial' approach to this unlawfulness by union officials, delegates and members, frequently giving in to union demands or becoming the instruments for meeting those demands. An example is the frequent insistence by head contractors that subcontractors enter into the union's pattern agreement before commencing work on site (or even before being listed as a pre-qualified subcontractor for tender purposes).

22 Governments have considerable capacity to influence behaviour through their purchasing power as clients, through the various Codes of Conduct which apply on Government projects, and, of course, as bodies politic with responsibility to ensure that the rule of law is upheld. All

too often they fail to act. I elsewhere recommend how Codes of Conduct may be reinvigorated and enforced.

23 Lawless behaviour is not engaged in only by union participants. As is explained in other volumes in my report, there are significant failings by employers in such matters as underpayment of employee entitlements, avoidance of taxation obligations, use of 'phoenix' companies and, most importantly, failure to adhere to proper standards of occupational health and safety. These problems have been well known to the regulatory authorities for some time. The Commission's focus on these issues, therefore, was to assess the effectiveness of the regulatory structure in force to deal with these problems. In contrast, this volume deals with problems that have not been sufficiently identified or acted upon by regulators, or adequately dealt with by the law and by legal institutions.

## Past attempts at reform

24 To achieve cultural change in the industry, specific legislation targeted at all participants in the industry is necessary. Over the past decade there have been a number of attempts to reform and improve the building and construction industry. Appendix A contains is a summary of those attempts. The work of this Commission has shown that, despite improvements in some areas as a result of previous reform attempts, there remain substantial impediments to the building and construction industry operating in a productive, efficient, harmonious and safe manner where the rights of individual Australians and, in particular, small business to operate are respected.

25 There is no point in attempting to reform the culture in the industry by revisiting particular reforms. A comprehensive package of reforms implemented on a long term basis is required. There must be a determination within government and by participants in the industry to effect the necessary change.

26 There were recurrent themes evident from the review of past endeavours at reform. They include the following:

- Industrial relations problems plague the building and construction industry and are a major impediment to the development of an efficient, productive and harmonious industry.
- Delays due to industrial disputation are rife in the building and construction industry. Projects are vulnerable to disruption for a range of reasons including the high cost of delays, the conduct of unions, characteristics of project delivery unique to the industry, and the inadequacy of available legal remedies.
- The building and construction industry is characterised by adversarial and confrontational relationships between major stakeholders.
- Many of the major participants in the industry show a lack of respect for the law and lawful authority, and lack the qualities of integrity and probity.
- Governments play a critical role as major clients to the building and construction industry and can facilitate cultural change and labour market reform by insisting on best practice on public sector construction sites. Codes of Practice can play an important role.

- The lack of national uniformity in legislation regulating the industry is a substantial cause of inefficiencies.
- The building and construction industry has a number of unique features which, taken together, set it apart from other industries, including the temporary and cyclical nature of workplace relationships, an absence of international competition, and a process of project delivery that typically does not encourage all parties to work co-operatively to achieve common goals or objectives.
- Genuine enterprise bargaining has eluded the building and construction industry. Instead, pattern bargaining has substantially replaced a process of genuine discussion and agreement between contractors and their employees. Pattern agreements as they currently operate grant increases in wages and conditions without corresponding productivity increases.
- Industry, project and enterprise agreements between employers, unions and employees have not led to a reduction in dispute-related delays.
- The existence of industry or trade agreements and project agreements hamper the ability of contractors to enter into genuine enterprise agreements with their workers. There is no reason why all matters relating to employment could not be negotiated between contractors and their employees at the enterprise level, and matters affecting project delivery accommodated through appropriate flexibility.
- Productivity and efficiency in the industry are adversely affected by abuse of inclement weather and safety procedures, a lack of flexibility in relation to rostered days off and work hours, and restrictive labour practices such as 'no ticket no start' and 'last on first off'.
- Productivity is adversely affected by the prevalence of disputes over payments to subcontractors and an absence of security of payments in cases where contractors' businesses collapse.

27 From the study of past attempts at reform of the building and construction industry it can be deduced that:

- the fundamental challenge is to reform the culture of the industry in a way which reasserts the primacy of the rule of the law, and encourages the development of an environment in which trusting relationships and teamwork can flourish;
- recommendations for reform of the industry will have a greater chance of achieving cultural change if governments at all levels are committed to their acceptance and implementation;
- lasting and beneficial changes to the industry are more likely to occur if they comprise a comprehensive package of reforms and are implemented nationally in a uniform manner;
- there is a powerful case for legislative reforms aimed at improving the building and construction industry to be industry-specific, having regard to the unique nature of the industry, and the fact that key objectives of industry-neutral legislation, especially the

*Workplace Relations Act 1996 (C'wth)*, have not been achieved in the building and construction industry; and

- the creation of a taskforce with a mandate to enforce the rule of the law in the building and construction industry is likely to be instrumental in the implementation of reform recommendations at the site level.

28 The brief review of reports on the industry since 1990 (see Annexure 2 of Volume 4, *National Perspectives Part 2*, of this report), highlights that the problems revealed in the evidence before me are not new but are part of a longstanding pattern of industry problems, particularly in industrial relations. Problems persisting through the last decade include:

- unsafe work practices;
- disregard for occupational health and safety and misuse of safety issues;
- hiring practices such as 'last on first off' and 'no ticket no start';
- the operation of sites in central business districts as effective closed shops;
- compulsory union membership
- misuse of inclement weather provisions;
- payment for time lost due to industrial action; and
- avoidance of dispute resolution procedures.

29 The problems have now been joined by:

- pattern bargaining;
- an effective requirement for subcontractors on major sites to have a union-endorsed enterprise bargaining agreement (EBA) (or pay EBA rates) and a high level of union membership;
- an increase in the power of job delegates and safety committees; and
- frequent abuse of power by union delegates and safety committees.

30 Most importantly, there is a culture whereby agreements made for three years and intended to secure industrial peace, to resolve disputes and (notionally at least) increase productivity and the capacity for employees to participate in determining their own employment conditions, are disregarded in favour of direct industrial action to the disadvantage of all participants in the industry, with the exception of unions. A short term, project specific, 'commercial solution' approach has prevailed, at the expense of compliance with contractual and statutory obligations.

31 The present state of the industry makes plain that prior attempts at reform have not succeeded. Some have had temporary success in ameliorating disruption and discontinuity, but none has achieved lasting reform for the benefit of participants in the industry. There needs to be a body created to restore the rule of law to all participants in the industry, in lieu of commercial expediency and the surrender to economic and industrial pressure.

32 A consideration of:

- the extent of the unlawful conduct and inappropriate pressures applied by head contractors and unions forcing subcontractors to enter into union-endorsed enterprise bargaining agreements;
- the undermining of freedom of association by the activities of head contractors, subcontractors and unions;
- the disregard of Commonwealth and State industrial laws;
- the non-adherence by employers to proper standards of occupational health and safety;
- the use by unions of safety as an industrial tool;
- the disregard by many participants in the industry for agreements made by them, and the breaching of those agreements;
- the disregard for orders of courts and industrial tribunals by participants in the industry;
- the acceptance of pragmatic 'commercial' solutions involving payment of money or surrender to unlawful demands as 'normal';
- the attitude of unions that it is right to make unreasonable demands and conditions because of their capacity to cause loss to contractors and subcontractors without loss to themselves; and
- the attitude that because conflict arises within an industrial environment, laws generally applied to other citizens of Australia are somehow inapplicable in the building and construction industry,

compels the view that cultural change is required in the industry.

33 Underlying the attitude of participants in the industry is a disregard of the rule of law, and the adoption of a short term attitude, commercially driven, of expediency. In particular, unions know that the prospect of being held civilly responsible for losses they cause is remote. As Transfield Pty Ltd put it in a submission to the Commission:

> *In summary, employers in the building and construction industry face:*
>
> - *onerous commercial deadlines;*
> - *intense competition;*
> - *extensive liquidated damages in the event of delay;*
> - *no alternative supply chain;*
> - *unions and union officials who are safe in the assumption that their activities will not be legally challenged, or if they are, that the proceedings will not be taken through to completion;*
> - *uncertainty as to efficacy and outcome in the courts and tribunals; and*
> - *massive legal costs in seeking the enforcement of the Act.*
>
> *Under these conditions, inappropriate behaviour, short-term commercial solutions that may be unethical or unlawful, and outright corruption are systemic in nature…*[2]

## Principles governing cultural change

34 There are four tenets that should drive reform and cultural change.

35 First, there should be as clear a definition as possible of that industrial activity which is permitted, and that which is not.

36 Second, the rule of law should be re-established so that conduct which is not permitted attracts serious consequences. Penalties for breaches must be increased substantially.

37 Third, those who engage in unlawful conduct or practices should bear the loss suffered by other participants in the industry. A quick, cheap and effective method of establishing and imposing liability for that loss must be established.

38 Fourth, it should become widely known and accepted within the industry that there is an independent body, not subject to the pressures applicable to participants in the industry, which will, with vigour, uphold the law and prosecute any participant in the industry who breaches it.

## Steps to achieve cultural change

39 I recommend the following steps to produce this cultural change.

40 The Commonwealth Parliament should enact a statute, provisionally called the Building and Construction Industry Improvement Act Building and Construction Industry Improvement Act. This would contain special provisions applicable in the industry. The Act should define unlawful industrial conduct and practices in the industry. The Building and Construction Industry Improvement Act would prevail to the extent of any inconsistency over the *Workplace Relations Act 1996 (C'wth),* although the latter Act would still otherwise apply.

41 The Building and Construction Industry Improvement Act should establish a permanent body, provisionally called the Australian Building and Construction Commission (ABCC), the overall function of which is to enforce the rule of law in the industry.

42 The Building and Construction Industry Improvement Act should substantially codify the present law concerning when industrial action is lawful and when it is unlawful. It should specify the consequences of participants in the industry engaging in unlawful industrial conduct or practices. Those are as follows.

- There will be a mandatory requirement to notify the ABCC within 24 hours of threatened or actual unlawful industrial action, with significant penalties for failing to do so. The ABCC would investigate and, if appropriate, prosecute those engaging in unlawful industrial conduct.
- There will be significant monetary penalties for breaching the Building and Construction Industry Improvement Act by engaging in unlawful industrial conduct. Penalty proceedings will be able to be brought by a person who suffers loss or by the ABCC. Penalties will be paid into the Consolidated Revenue Fund.
- Those who engage in unlawful industrial action that causes loss to others will be liable in damages.
- Within 14 days of notifying the ABCC of possible unlawful industrial conduct, any entity suffering loss in consequence must advise the ABCC of the alleged loss. Failure to do so will attract a penalty.

- Such loss will be assessed by an independent panel of qualified persons, and if established to be in consequence of unlawful industrial action will be promptly recoverable upon acceptance by an appropriate court, frequently as an adjunct to proceedings brought by the ABCC in respect of penalties for the unlawful industrial action.
- Industrial associations will, by statute, be civilly responsible for the acts of their officials and delegates, so overcoming the archaic and unsatisfactory rules concerning attribution of liability to unions for action caused by their officials.
- Those found to have engaged in unlawful industrial conduct will, in certain circumstances, be disqualified from holding office or doing the work of an official in organisations of employers or employees, or a delegate of those organisations.
- It will be an offence carrying a heavy penalty for a corporation or an association to pay, directly or indirectly, a penalty imposed upon an individual, whether that individual is or is not a member of that corporation or association or associated with it.

## A special Act for the industry

43 An Act of particular application to the building and construction industry is required for several reasons.

(a) The industry employs 7.5 per cent of the Australian work force. It produces approximately $41 billion or 5.5 per cent of the Australian gross domestic product annually. Its outcomes have a significant flow-on effect to all other industries. It is thus of sufficient size, value and importance to justify special legislation.

(b) The industry has special characteristics not, in total, found in other industries. A detailed investigation has shown particular problems. There is disregard for the criminal, civil and industrial law. The law is difficult to enforce because arrangements in the industry are short term. The cost of industrial unrest is high and immediate. Industrial action or the threat of it is effective in obtaining industrial outcomes, whether or not such outcomes are earned, justified, or lawful.

(c) Improved productivity will bring significant rewards to the Australian economy, through employment, growth in exports and reduction in imports.

(d) Prior reforms, not involving a comprehensive industry-specific package, have failed.

## The Code as a vehicle for reform

44 The Commonwealth should insist upon compliance with the National Construction Code for the Construction Industry (National Code) including the Commonwealth Implementation Guidelines (Implementation Guidelines) for the building and construction industry in all contracts in which it is the principal, and all projects which it wholly or partially funds. It should deal only with those bodies which adhere to the National Code and Implementation Guidelines, not only in their contracts with the Commonwealth, but in private sector work. I have addressed this issue in Recommendations 40 and 41 in Chapter 3, *Codes of Practice for the Building and Construction Industry*, contained in Volume 7, *National Issues Part 1*, of this report.

### Issue

There is widespread disrespect for, disregard of and breach of the law in the building and construction industry. The criminal, industrial and civil law is breached with impunity. Agreements made are not honoured. The result is that industrial power, not right or entitlement, determines outcomes. Short term commercial expediency prevails.

The culture in the industry is that the criminal law does not apply because industrial circumstances are involved. The attitude is that the applicability of industrial law is optional because there is no body whose function it is to enforce it, or which has the will, capacity and resources to do so. Orders of industrial tribunals, and even courts, are disregarded if such orders are contrary to the views or interests of a participant. If unlawful action causes loss to others, that loss is not recovered. That is because of the difficulty, cost and time involved in bringing proceedings for recovery, the uncertainty of outcome, the view that continued relationships with unions are important, and the knowledge that if recovery action is taken the likelihood is that further industrial action will be taken causing yet further loss. Litigation for loss recovery is regarded as a bargaining chip to be used in future resolution of industrial disputes, rather than as a serious attempt to hold those causing loss responsible for it.

Head contractors and subcontractors are subject to severe cost penalties for delayed completion. Industrial unrest and stoppages cause immediate loss from standing charges and overheads, and prospective loss from liquidated damages. These losses place intense pressure upon head contractors and subcontractors to accede to industrial demands. If the short term cost of such demands is less than the actual and prospective loss on the specific project, the usual result is the demand is acceded to. That is because of the short term project profitability focus in the industry.

In contrast, unions suffer no loss from unlawful industrial action. They know they will not be held accountable for unlawful industrial action by the criminal, industrial or civil law. The result is inevitable. Concessions are made based on short term, pragmatic, project profitability considerations.

The result is the rule of law is diminished. Productivity is diminished to the disadvantage of the Australian economy, contractors, subcontractors and employees. Established freedoms protected by law, such as freedom of association, are ignored in favour of union power, and attempts to achieve industrial peace.

Governments of both political persuasions, and at the Commonwealth and State level have been endeavouring to change the culture of the industry for at least 20 years. The findings of this Commission make plain that those attempts have failed.

To achieve cultural change, and re-establish the rule of law in the building and construction industry, a comprehensive package of reforms is necessary.

There are four principles which should drive cultural change:

(a) the boundary between lawful and unlawful industrial activity must be clearly delineated;

(b) unlawful conduct must attract serious consequences so that the rule of law may be re-established;

(c) those who, by unlawful conduct or practices cause other participants in the industry loss should bear the cost of the losses they cause; and

(d) there should be an independent monitoring and prosecuting authority in the industry to monitor conduct, and uphold the rule of law.

### Recommendation 177

The Commonwealth Parliament enact a statute of special application to the building and construction industry, provisionally called the Building and Construction Industry Improvement Act, containing provisions designed to enforce the rule of law in that industry. The Act would prevail to the extent of any inconsistency over the *Workplace Relations Act 1996 (C'wth)*.

### Recommendation 178

There be established a statutory authority, provisionally called the Australian Building and Construction Commission, the function of which is to enforce the provisions of the Building and Construction Industry Improvement Act, the *Workplace Relations Act 1996 (C'wth)* and other laws applicable to the building and construction industry.

# 2 The taskforces

## Introduction

45 In my First Report I foreshadowed a recommendation that there should be established a national agency to deal with any unlawful and inappropriate conduct which I might find to be prevalent in the building and construction industry.[3]

46 The concept of a national ABCC has been considered in many submissions which have been made to the Commission. Overwhelmingly, the submissions favour the establishment of such an agency.[4]

47 For reasons which I gave in my First Report I recommended that there be established an Interim Taskforce. The Commonwealth accepted my recommendation. On 20 August 2002 the Minister for Employment and Workplace Relations announced that an Interim Building Taskforce would be set up and that its members would be given the existing powers of the executive government to monitor and police the building and construction industry. The Minister said that the Interim Building Taskforce would work closely with the Australian Federal Police (AFP), the Australian Taxation Office (ATO) and the Australian Competition and Consumer Commission (ACCC).[5]

48 On 26 September 2002 Minister Abbott announced that the Interim Building Taskforce would commence operations on 1 October 2002.[6] The Taskforce headquarters would be in Melbourne with offices in Sydney and Perth.[7]

49 The Minister outlined the powers of the investigators of the Interim Building Taskforce as follows:

(a) Taskforce officers were to be appointed as inspectors under the *Workplace Relations Act 1996 (C'wth).*[8]

(b) this would allow them to enter premises, inspect documents and interview persons of interest;[9]

(c) breaches of the *Workplace Relations Act 1996 (C'wth)* (including breaches of Federal awards and agreements) were to be investigated and prosecuted by members of the taskforce in accordance with the *Workplace Relations Act 1996 (C'wth);*[10] and

(d) breaches of other industrial, criminal or other relevant laws were to be referred to the appropriate agencies, including State agencies where appropriate.[11]

50 It was envisaged that the Interim Building Taskforce would investigate any person working within the building and construction industry suspected of breaching the law.[12] It would not have AFP, ATO or other Commonwealth agency staff seconded on a fulltime basis.[13]

51 In framing my proposals for a national industry taskforce I have had regard to the manner in which similar taskforces in New South Wales and Western Australia have performed their functions. An analysis of the functions, powers and day to day operations of these taskforces has been undertaken on the basis of evidence received by the Commission. Given that this analysis has influenced my detailed recommendations about a national ABCC I will summarise the relevant evidence.

## The New South Wales Building Industry Task Force

### General

52 The New South Wales Building Industry Task Force (NSW BITF) was created on the recommendation of the Royal Commission into Productivity in the Building and Construction Industry (Gyles Royal Commission). The Gyles Royal Commission's First Interim Report recommended the establishment of a multidisciplinary Taskforce to continue and complete the investigations that the Commission had commenced, particularly in relation to alleged criminal activity. The Third Interim Report recommended that the NSW BITF also have a civil remedies unit.[14]

53 There were three key recommendations of the Gyles Royal Commission which determined how the NSW BITF operated:

(a) there had to be enforcement of the law within the industry;

(b) this included enforcement of the criminal law and also the pursuit of civil remedies when available; and

(c) the client needed to be more involved in industrial relations, and the New South Wales Government should lead that change by using its position as a major client in the industry to promote and enforce certain standards of conduct. This was to be done by making the New South Wales Code of Practice for the Construction Industry (NSW Construction Code) a condition of Government building contracts.[15]

54 The NSW BITF was created administratively. From its inception in September 1991 until April 1993, it was an office within the New South Wales Premier's Department, and from April 1993 to its disbandment in 1995, it was an office within the New South Wales Attorney-General's Department.[16]

55 The NSW BITF did not operate under specific legislation, but obtained its power to enforce existing criminal, industrial and other relevant laws by having seconded to it[17] officers from the relevant agencies and authorities who held the necessary powers.

56 Mr Ross Dalgleish, who had been the Director of Operations at the Gyles Royal Commission, was the Director of the NSW BITF.[18] This appointment ensured continuity of the work of the Royal Commission. It also ensured that the body of knowledge accumulated by the Commission was passed on to and utilised by the Taskforce.

57 The Director was responsible for ensuring that the NSW BITF operated within its budget. Monthly expenditure reports were provided to the Attorney-General's Department. The Director also provided quarterly reports on the progress of the organisation to the Attorney-General who reported on a quarterly basis to the Premier.[19] There was thus close government monitoring of progress.

58 The NSW BITF employed between 40 and 50 people. Many of the staff were transferred from the Gyles Royal Commission.[20] In general, the criminal investigators were seconded from the New South Wales Police. The NSW BITF had lawyers (some seconded from the Office of the New South Wales Director of Public Prosecutions (NSW DPP), civilian investigators, financial, general and industry analysts and registry staff.[21]

59 The staff were employed under the *Public Sector Management Act 1988 (NSW)* as staff of the Attorney-General's Department. They were responsible through the NSW BITF Director to the Director-General of the Attorney-General's Department and were subject to the Attorney-General's Code of Conduct.[22]

60 The police on secondment from the New South Wales Police remained responsible to the Commissioner of Police through the Taskforce Commander who was a senior police officer.[23]

61 There were no formal administrative arrangements with other enforcement bodies.[24]

62 As it was established administratively, the scope of the NSW BITF's operations was based on Commissioner Gyles' recommendations.

63 The role and function of the NSW BITF was set out in three documents which were made available to the public:[25]

(a) a brochure entitled 'Cleaning up the Building Industry' produced by the NSW BITF setting out its objectives and functions;[26]

(b) a document entitled 'Guidelines – Civil Remedies Function of the Building Industry Taskforce' issued by the Attorney-General setting out when the Attorney-General would intervene to bring proceedings for injunctive relief on Government sites and when provision of legal advice and what type of assistance regarding civil remedies was permitted for private parties (the A-G Guidelines);[27] and

(c) a document entitled 'Building Industry Taskforce – Strategic Plan' setting out the mission, objectives, key activities and performance indicators.[28]

64 The Premier issued a memorandum which included the 'Code of Conduct for Special Purpose Bodies' and 'Manager's Guidelines for Special Purpose Bodies' which were applicable to the NSW BITF.[29]

### The Operations Unit

65 The NSW BITF consisted of two branches. The Operations Unit dealt with criminal investigations, both of new allegations and those first made during the Gyles Royal Commission. The Civil Remedies Unit dealt with breaches of industrial and other laws for which a civil remedy was available.[30] The NSW BITF enforced the New South Wales Code,[31] the New South Wales Code of Tendering[32] and reported any suspected non-compliance with the Deed

of Agreement between the CFMEU and the New South Wales Government (entered into to prevent deregistration proceedings) to the Deed Monitoring Committee.[33] It also fulfilled certain educative functions.[34]

66 In addition to the two branches, there was an administration section which included a library, an information technology (IT) section, property and registry section and several support officers.[35]

67 The Director of the NSW BITF was responsible for the Operations Unit and reported to the Attorney-General through the NSW DPP on criminal matters.[36]

68 The Operations Unit had the following personnel:

(a) a Crown Prosecutor;

(b) a Taskforce Commander who was a Police Chief Inspector from the New South Wales Police;

(c) three lawyers who were directly responsible to the Director for the conduct of investigations;

(d) three NSW Director of Public Prosecutions (DPP) lawyers who monitored the major investigations and gave advice on evidence and brief preparation;

(e) twelve investigators including a Chief Investigator who reported directly to the ABCC Commander and three Senior Investigators;

(f) eight analysts consisting of two industry specialists, three financial analysts and three general analysts; and

(g) four support officers.[37]

69 They worked in close co-operation with other enforcement bodies such as Independent Commission Against Corruption, the AFP, the Trade Practices Commission (TPC) and the ATO. Matters of a serious criminal nature were referred to the New South Wales Crime Commission and the NSW BITF staff were bound by secrecy provisions in the *NSW Crimes Commission Act 1985* in respect of those matters.[38]

70 The most common criminal allegations investigated by the Operations Unit were of fraud, collusive tendering, bribery, forgery, false testimony and corruption.[39]

71 Initially the NSW BITF Operations Branch continued the criminal investigations of the Gyles Royal Commission. A team was established for each investigation, led by a lawyer, with two or more investigators, a financial analyst and an industry analyst.

72 The NSW BITF relied on the powers of the police constables seconded to it to collect evidence. The Crown Prosecutor gave advice regarding the investigations and on whether there was sufficient evidence to warrant prosecution.[40]

73 Some of the NSW BITF investigators liaised with the National Crime Authority and the New South Wales Crime Commission because, often, there were common targets, and the investigators were able to take advantage of the coercive powers granted to members of those organisations.[41]

74 The inclusion of the Crown Prosecutor and the DPP lawyers within the NSW BITF meant that briefs could be prepared and sometimes prosecuted without being referred outside the NSW BITF.[42]

75 Weekly case management meetings were held, where the lawyers reported on the progress of each investigation to the Director, Taskforce Commander, Chief Investigator and senior industry analyst. There were weekly meetings for all staff which were addressed by the Director and Taskforce Commander.[43]

76 The investigators ran education campaigns for WorkCover and the New South Wales Police on law enforcement in the building and construction industry.[44]

77 One of the major criminal investigations of the NSW BITF concerned collusive tendering and payment of unsuccessful tenderers fees by the head contractor to the other tenderers. The investigation was referred to the New South Wales Crime Commission. This enabled the NSW BITF officers to proceed, taking advantage of the various powers of that Commission, including compulsory acquisition of documents and witness examination in private hearings. The *NSW Crimes Commission Act 1985* allowed witnesses to object to questions that were potentially self-incriminating but then gain a limited use immunity. Mr Tom Galloway, Solicitor Assisting the Gyles Royal Commission and later a NSW BITF lawyer, thought that this power was important, because many of the witnesses were otherwise reluctant to come forward with information.[45] Both the New South Wales Government and the Commonwealth Government collectively recovered more than $10 million as a result of the investigation.[46]

## The Civil Remedies Unit

78 The Director reported to the Attorney-General through the Crown Solicitor on civil matters.

79 Mr David Rushton was the head of the Civil Remedies Unit. He told this Commission that the Civil Remedies Unit was able to investigate most complaints because its power was not limited by statute.[47]

80 The Civil Remedies Unit comprised the following staff:

- two senior lawyers;
- one general legal analyst;
- two civilian investigators; and
- two support officers.[48]

81 The role of the Civil Remedies Unit was to advise parties involved in the building and construction industry of their rights and obligations under industrial laws and other industrial instruments. It investigated allegations of the use of occupational health and safety (OH&S) issues as an industrial tool, breaches of right of entry laws and right to inspect books, forced increase of employee entitlements, particularly in relation to industry funds, breach of freedom of association laws and the NSW Construction Code.[49]

82 In accordance with the Attorney-General's Guidelines the Civil Remedies Unit could apply for injunctions to prevent persons engaging in unlawful industrial action, or could assist victims to

institute civil proceedings where appropriate. It was also responsible for co-ordinating the use of criminal and civil remedies, and, where appropriate, working with the Operations Unit for that purpose.[50]

83 Where appropriate, complaints were referred to specialist agencies. For example, claims that wages had been underpaid were referred to the Department of Industrial Relations. OH&S issues were referred to WorkCover.[51]

84 The Civil Remedies Unit would commonly receive complaints about incidents occurring on a building site at the time the complaint was being made. Subcontractors would call the NSW BITF to complain that they were being subjected to demands or threats by the union or head contractor on a particular site.[52] Any such complaint would be assessed to determine whether there was any breach of a law or industrial instrument, whether there was potential for the obtaining of any civil remedies and whether the NSW BITF could provide any assistance.[53]

85 The Attorney-General's Guidelines relating to the civil remedies function of the NSW BITF provided that, if the complaint involved the New South Wales Government (that is, if it concerned a government site, or involving a government agency) in any way, the Attorney-General could bring an action in his own name for injunctions to stop unlawful industrial action and secondary boycotts. The NSW BITF was to assist the Attorney-General in such actions, and assist any small businesses affected by the same unlawful conduct to bring similar actions.[54]

86 If the complaint did not involve the New South Wales Government, the Attorney-General would not bring an action in his own name but the NSW BITF could assist a private party subject to unlawful industrial action or boycott to institute proceedings for an injunction. The assistance extended to the collection of evidence necessary to support an application for an injunction and the seeking of counsel's advice, through the Crown-Solicitor, as to whether the evidence was sufficient to support such an application. The private party could assist the NSW BITF to select suitable counsel. After provision of the evidence and counsel's advice by the NSW BITF, it was left to the private party to decide whether or not to bring the action, although the NSW BITF would continue to assist in the collection of evidence if needed.[55] The NSW BITF had discretion to assist private parties in civil matters other than injunction proceedings where it was thought appropriate. The guidelines did not fetter the Attorney-General's discretion to bring an action in his name in relation to any complaint if he thought it was warranted.[56]

87 In one instance, the NSW BITF received a complaint from a head contractor regarding the picketing of a building site by a union. The NSW BITF conducted an investigation and collected evidence, including statements from relevant parties. Counsel was then briefed, through the Crown-Solicitor, to provide advice on the likely outcome of injunctive proceedings under s45D of the *Trade Practices Act 1974 (C'wth)*. Counsel advised that it was likely that an injunction would be granted. A conference was held between the head contractor, the head contractor's solicitor and counsel regarding the advice. Proceedings were instituted by the builder and developer in the Federal Court and an interlocutory injunction was granted against the picketers. The picket line was disbanded and work resumed as normal the following day. The NSW BITF did not receive any further complaints regarding the site.[57]

88 In another example, the NSW BITF received a similar complaint from a head contractor, Stuart Brothers, regarding picketing at Richmond College of Technical and Further Education, a New South Wales Government site. The NSW BITF went through the same process of collecting evidence including obtaining statements from relevant parties, and briefed counsel to advise on the likelihood of obtaining an injunction. Counsel advised that an application for an injunction should be made. Just prior to the institution of such proceedings, the union involved agreed with Stuart Brothers to remove the picket line, rendering the institution of proceedings unnecessary.[58]

89 It was the experience of the NSW BITF that many of the civil disputes regarding unlawful bans and boycotts were resolved when the NSW BITF investigators attended the sites, and, for this reason, resort to litigation to resolve disputes and complaints was unnecessary.[59]

90 An important strategy, adapted by the Civil Remedies Unit, was to have investigators attend the site within one to two hours to advise parties of their respective rights and obligations. If need be the investigators would contact the lawyers when they were out on site to obtain legal advice.[60] It was found that, despite the role of the NSW BITF being to enforce the law, generally their attendance on site had the effect of settling the dispute. Often the dispute would be resolved even before the investigators arrived on site.[61] This approach was judged, by those involved, to be very effective.[62]

91 Compliance with the Code of Practice was made a condition of Government building contracts from October 1992. The NSW BITF actively investigated compliance with the Code by attending Code sites and reporting breaches to the relevant committee within the Department of Public Works.[63]

92 Contractors who breached the Code were rendered potentially ineligible for further New South Wales Government contracts, or could be restricted in the range of Government contracts that they could obtain.[64]

93 A Code of Practice for Tendering was also issued by the New South Wales Government in response to the findings of collusive tendering made by the Gyles Royal Commission.

94 The NSW BITF developed and maintained relationships with key industry participants, and often provided information sessions. The NSW BITF produced the Subcontractor's Handbook in December 1994, which advised subcontractors in the industry of their rights and obligations, and made practical suggestions for management of issues.[65]

95 A Special Industrial Office, located near the NSW BITF, was set up to investigate the potential deregistration of the Building Workers Industrial Union (BWIU). It was part of the New South Wales Crown Solicitor's office.[66] The outcome of these investigations was the Deed of Adherence between the CFMEU and the New South Wales Government as referred to above.

96 The New South Wales Government implemented an industry reform program. The NSW BITF was a part of this scheme. It was overseen by the Building Industry Royal Commission Implementation Secretariat. The program covered policy and legislative reform as well as law enforcement.[67]

## Assessment

97 The NSW BITF was abolished in June 1995 after a change of government and was replaced by the Construction Industry Consultative Committee (CICC) which was a forum for key industry stakeholders to discuss matters relevant to the industry. The new arrangement has largely been ineffective in promoting any change in the industry.[68]

98 It is generally thought that the NSW BITF was effective in promoting change in the industrial climate of the industry in New South Wales. The evidence supports the view that the industrial and commercial improvements experienced as a result of this change have receded since the abolition of the NSW BITF.[69]

99 It was found that the provisions of s45D of the *Trade Practices Act 1974 (C'wth)* which proscribe secondary boycotts were particularly useful in promoting a change in conduct with respect to bans and boycotts. Interlocutory injunctions would often be sought under these provisions.[70]

100 A number of factors are thought to have contributed to the success of the NSW BITF.

(a) The Gyles Royal Commission had received much publicity and made the issues widely known.[71]

(b) The NSW BITF was established prior to the end of the Gyles Royal Commission.[72]

(c) Many of the personnel from the Gyles Royal Commission transferred to the NSW BITF. This meant that there was a transfer of expertise and knowledge of the industry.[73]

(d) The Deed of Adherence between the New South Wales Government and the CFMEU which was actively monitored by the NSW BITF and Deed Monitoring Committee.[74]

(e) The New South Wales Government used its commercial position as a client to promote change.[75]

(f) The NSW BITF took a rigorous approach to managing and controlling investigations and had a team approach which was highly successful.[76]

(g) An even-handed approach was employed with the selection of investigations.[77]

(h) The immediate attendance on site by the NSW BITF investigators following a complaint was highly effective in encouraging disputing parties to settle their differences.[78]

101 The NSW BITF was active in its pursuit of compliance with the law in the building and construction industry. It was able to achieve its objective of law enforcement because its members had significant powers to investigate and prosecute unlawful behaviour. This was achieved, primarily, because of the police powers of its New South Wales Police secondees, and the special membership of the New South Wales Crime Commission. The Civil Remedies Unit was highly successful because it was so visible to industry participants through its regular attendance on building sites and because it responded to complaints immediately and assisted with the resolution of disputes in a fast and efficient manner.

## The Western Australian Task Force for the Building and Construction Industry

### General

102 The Western Australian Task Force for the Building and Construction Industry (WA BITF) was much smaller than the NSW BITF and its members had fewer powers.

103 The WA BITF was established by the Code of Practice for the Western Australian Building and Construction Industry (WA Code of Practice) and commenced operations in September 1994.[79] It was established as an office within the Western Australian Government's Building Management Authority, which later became known as the Contracts and Management Service.[80] It reported to the Minister for Industrial Relations on operational matters and the Minister of Works on administrative matters.[81]

104 In 1998, as a result of changed Ministerial arrangements the WA BITF was transferred to the former Department of Productivity and Labour Relations (DOPLAR). It appears that the level of Ministerial support was significantly reduced at this time.[82]

### Structure

105 The objectives of the WA BITF were set out in the WA Code of Practice. Its official objective was industry reform, which in practice meant stopping '…intimidation, extortion and other illegal and improper conduct on building sites, regardless of who the perpetrators were[83].

106 The WA BITF had three staff and an annual budget of $300 000. Mr Jeff Marsh was the Executive Officer and Mr Allen Shuttleton was the Senior Industrial Inspector. Mr James Zaknich was the Manager of Compliance. Marsh was responsible for the administrative functions of the WA BITF and Shuttleton and Zaknich were responsible for the operational functions.[84]

107 The WA BITF staff were appointed as Industrial Inspectors under the *Industrial Relations Act 1979 (WA*) in November 1994.[85]

### Operations

108 Upon receiving a complaint, the WA BITF would conduct an investigation. If breaches of the industrial and other laws were detected the matter would be referred to the Crown Solicitor's office for it to decide whether or not to prosecute.[86] This process was later changed. Under the revised arrangements the WA BITF would refer a fully settled prosecution brief to the Crown Solicitor's office. The case would be prosecuted unless the DPP determined that there was a good reason why it should not be.[87] This meant that prosecutions occurred more quickly because there were fewer people involved in the decision making process.[88]

109 When a complaint was received by the WA BITF that union officials were trespassing on a building site, the WA BITF Inspectors would attend the site, and call the police to have charges laid. The police would attend the building site, but only for the purpose of restoring peace on the site, and would not follow up with trespass charges. The WA BITF considered this to be an ineffective response because of the damage caused by work delays. The WA BITF wanted to establish an effective deterrent to unlawful entry and presence of the union on building sites.

Zaknich was appointed as a Special Constable of the Western Australian Police in 1996. This gave him the power of arrest and police powers to collect evidence, which enabled him to lay charges and prosecute criminal offences. It meant that offenders knew that they would be prosecuted.[89]

110 Initially the Western Australian Police were reluctant to be involved in industrial relations issues and were reluctant to appoint Zaknich as a special constable. Over time, this attitude changed and the Western Australian Police began to take a more active role in law enforcement within the building and construction industry.[90]

111 The WA BITF established relationships with all the key industry participants, including the building contractors and unions. The WA BITF also established working relationships with the Western Australia Police, the Crown Solicitor's Office and the DPP, but there were no formal Memoranda of Understanding in place.[91]

112 Standard operating procedures were developed by the Western Australian Police for joint management of industrial matters with the WA BITF. Intelligence and information regarding disputes and actions arising from breaches of criminal, industrial laws or other industrial instruments were shared.[92]

113 Arrangements were made between DOPLAR and the Office of the Employment Advocate (OEA) that the WA BITF would enforce the *Workplace Relations Act 1996 (C'wth)*, and provide fully prepared briefs to the OEA. The OEA provided funding to the WA BITF and officers were readily available to provide legal advice and assist the WA BITF in its work. This relationship was governed by a formal Memorandum of Understanding.[93]

114 The WA BITF had a role in actively enforcing the WA Code of Practice, but compliance was mainly achieved through persuasion because there were no effective sanctions for a breach of the WA Code of Practice.[94]

115 The WA BITF maintained a good relationship with WorkSafe and referred matters to that body where appropriate.[95]

116 The WA BITF assisted in educating persons within the building and construction industry about their rights and obligations and methods of dispute resolution. It would often work with parties when a dispute arose on site to resolve the issue by providing such advice. The WA BITF assisted in educating the Western Australian Police on law enforcement in relation to industrial relations matters.[96] A freedom of association advertising campaign was launched during the life of the WA BITF.

### Assessment

117 Like the NSW BITF, the WA BITF established a reputation as a very effective agency.[97] The success of the WA BITF was attributed to the following factors:[98]

(a) As the WA BITF vigorously enforced the law, the industry participants became increasingly aware that, if they breached the law, they would be charged and prosecuted by the WA BITF. The presence of the WA BITF had a deterrent effect. Unlawful industrial action increased following the disbanding of the WA BITF.

(b) The WA BITF worked in partnership with other law enforcement agencies and established a good relationship with both the Western Australian Police and the OEA.

(c) The WA BITF was always quick to respond to complaints and advise parties of their respective rights and obligations. They advised the Western Australian Police on industrial law when the Western Australian Police were responding to industrial relations matters.

(d) The effectiveness of the WA BITF increased significantly when Zaknich was appointed a Special Constable and obtained the powers of a police officer.

118 When the WA BITF was dismantled there was a significant increase in the number of acts of industrial misconduct reported to the Western Australian Police. This pattern has continued into 2002.[99]

119 The Master Builders Association of Western Australia (Union of Employers) Perth (MBAWA) contacted the Western Australian Police to ascertain what sort of support they could expect from the Western Australian Police in the absence of the ABCC. The Western Australian Police met with nominated building industry and construction managers and the MBAWA in February 2001 to discuss procedures to be put in place for the management of industrial disputes. The Western Australian Government established a Building Industry Inspectorate (later named the Building Industry and Special Projects Inspectorate (BISPI)) within DOPLAR. A Memorandum of Understanding between the Western Australian Police and BISPI is yet to be finalised.[100]

## The State Taskforces – overview

120 It is clear that the two Building and Construction Industry Taskforces, while very different bodies, were both very effective in their respective States.

121 Both Taskforces were very active in maintaining a presence in the industry, and developed a reputation for taking the initiative in enforcing the law.

122 Both Taskforces established co-operative working relationships with other law enforcement agencies, and, because both Taskforces were created administratively, without supporting legislation granting specific powers to them, both utilised the powers of already existing agencies to achieve their objectives.

123 The administrative establishment of the Taskforces had the advantage of not restricting the Taskforces' powers to investigate complaints, but left the Taskforces reliant on both the powers of the persons seconded from other agencies, particularly police officers, and the active co-operation of other agencies.

124 The work of the Taskforces was not confined to investigation and prosecution of breaches of the criminal law. It extended to advising parties of their rights with regard to civil matters. This was highly effective, as industrial disputes often do not necessarily involve criminal behaviour, and remedies for the commercial damage suffered as a result of the industrial disputes, are, generally, more easily obtained through civil actions.

125 The NSW BITF and the WA BITF both adopted an educative role within the industry. The NSW BITF made subcontractors a specific focus, with the production of the Subcontractors'

Handbook. The evidence presented before this Commission has demonstrated that the subcontractors, as the employers of the vast majority of labour, were often at a disadvantage when compared with the head contractors and unions.

126 The WA BITF placed particular emphasis on its relationship with the Western Australian Police and changed the way in which the Western Australian Police dealt with industrial relations. The evidence received by the Commission has shown that, in the majority of States, the police services are reluctant to be involved in industrial disputes, and do not actively enforce the law in this area because they perceive it to be a civil matter and therefore outside their jurisdiction. The experience of the WA BITF demonstrated how a State police service could play a valuable role in law enforcement in the building and construction industry.

127 Both the quality of the personnel involved in the Taskforces and the support of the relevant government were factors crucial to their success in achieving their objectives.

# 3 The Australian Building and Construction Commission – national taskforce

## Reasons for the establishment of a national taskforce

128 A combination of factors emerging during the course of my enquiries has persuaded me that it is necessary to establish a national ABCC. Factors include:

(a) Investigations commenced but not completed by the Commission need to be continued.

(b) Subcontractors and employees who provided information to the Commission need to be protected from retribution.

(c) The current law enforcement authorities having some responsibility for the building and construction industry, are responsible for other industries and lack expertise in dealing with industrial matters in the building and construction industry. A specialist body is required.

(d) Some existing Commonwealth authorities, such as the OEA, lack the resources and powers sufficiently to police the industry (a matter elaborated upon elsewhere in this Report).

(e) Some organisations, such as the ACCC and State Police consider that 'industrial' matters are outside their sphere of responsibility.

(f) The civil remedies available to resolve industrial disputes and compensate for unlawful conduct are underutilised by industry participants. Subcontractors and employees in particular are reluctant to use them for fear of repercussions and commercial damage.

(g) The nature of contractual and other relationships within the building and construction industry are unique and necessitate specialist attention.

(h) State taskforces, while they existed, succeeded in enforcing the rule of law within the industry. Widespread lawlessness currently characterises large sections of it.

129 In my view, as is explained elsewhere in this report, Commonwealth legislative power would support legislation establishing the ABCC which I have proposed and conferring on it the functions, powers and protections which I have recommended.

130 The principal heads of legislative power which would provide support are:

- the conciliation and arbitration power;[101]
- the corporations power;[102] and
- the territories power.[103]

131 Other powers which would support certain aspects of the scheme include:

- the banking power;[104]
- the insurance power;[105]
- the taxation power;[106] and
- the interstate trade and commerce power s51(i).

132 In addition, the incidental power[107] may also be called in aid.

133 It would be possible to establish part of the scheme by administrative action. However, legislation will be necessary if certain important elements of the regime are to be implemented. In particular, legislation would be required to:

(a) create the new statutory norm I later propose;

(b) confer coercive powers on the ABCC;

(c) create offences supporting those powers;

(d) overcome statutory secrecy provisions;

(e) govern the relationship between the ABCC and other agencies; and

(f) confer immunity on ABCC officers.

134 It is important that both the determination to re-establish the rule of law in the industry, and the ABCC as the instrument chosen to achieve this, have Parliamentary endorsement.

135 I therefore recommend that the ABCC be established by legislation.

### Issue

A question arises whether it is desirable to create an Australian Building and Construction Commission based on the executive power of the Commonwealth, which is the basis for the existing Interim Building Taskforce, or whether it is preferable to establish the Australian Building and Construction Commission with a legislative base. Legislation is necessary, among other reasons, to create the new statutory norm proposed in Recommendation 199, to confer coercive powers on the Australian Building and Construction Commission, to overcome statutory secrecy provisions, to confer immunity on Australian Building and Construction Commission officers, and to create, where appropriate, penalties for breach of the new Act. Available heads of Commonwealth constitutional power, particularly the conciliation and arbitration power, the corporations power, the incidental power, and the Territories powers are available to support the Australian Building and Construction Commission's powers and functions, and the creation of a new statutory norm. A major advantage of establishing the Australian Building and Construction Commission by legislation is that it sends an unequivocal message to the building and construction industry that the Parliament intends to restore the rule of law in the industry.

### Recommendation 179

An Australian Building and Construction Commission be established and its functions, duties and powers be regulated by legislation.

### Need for impartiality

136 It will be vital to the success of the ABCC for it to emphasise that its services are available equally to all groups involved in the industry, and for it to be seen to act even-handedly and independently.

137 The ABCC will have greater independence from Government than the OEA in that it will be an independent statutory body, not subject to ministerial direction in its operations. It will have freedom of action in deciding what matters to investigate and when to prosecute or take other action against an organisation or individual.

138 The ABCC's task will be to ensure that all participants in the industry comply with their legal obligations, whether they are governments, clients, head contractors, subcontractors, individual workers or unions.

139 Confidence in the ABCC's impartiality will develop over time and assist it in the performance of its principal functions.

## Functions, powers and organisation

140 The functions, powers and organisational structure of the permanent ABCC will depend upon a number of considerations including the extent of Commonwealth legislative and executive powers, the kind of conduct which the ABCC would be called upon to combat, the nature of

any additional roles which might be conferred on it and the scope for it to operate co-operatively and constructively with other Commonwealth and State agencies.

141 Elsewhere in this report I have identified various forms of conduct that I consider to be unlawful or inappropriate. I envisage that the ABCC will be charged with the responsibility of taking appropriate action to discourage those who might be minded to engage in such conduct and, if they do, to ensure that, if the conduct is unlawful, legal action is brought.

142 The types of conduct with which the ABCC should be concerned include:

(a) disregard of, and breaches, of the enterprise bargaining provisions of the *Workplace Relations Act 1996 (C'wth)*;

(b) disregard of, or breach of, the freedom of association provisions of the *Workplace Relations Act 1996 (C'wth)*;

(c) the requirement, by head contractors, for subcontractors to have union-endorsed enterprise bargaining agreements before being permitted to commence work on major projects in State capital central business districts;

(d) the imposition of a requirement for employees of subcontractors to become members of unions when their employer enters into a union-endorsed enterprise bargaining agreement;

(e) abuse of the right of workplace entry provisions of the *Workplace Relations Act 1996 (C'wth)*;

(f) breaches of the terms of awards, enterprise bargaining agreements and other industrial instruments;

(g) underpayment of employees' entitlements;

(h) the application of, and surrender to, inappropriate industrial pressure;

(i) misuse of occupational health and safety requirements as an industrial tool;

(j) the making of, and receipt of, inappropriate payments;

(k) unlawful strikes, and threats of unlawful strikes;

(l) threatening and intimidatory conduct;

(m) physical violence and threats of physical violence;

(n) use of company structures and bankruptcy laws so as to avoid obligations to employees and taxation authorities;

(o) disregard of contractual obligations;

(p) disregard of national and state codes of practice and implementation guidelines; and

(q) employment of migrant labour where workers are subject to visa requirements that prohibit them from engaging in paid employment.

143 Some of these forms of misconduct are criminal in nature. Some involve breaches of statutory provisions that have prescribed civil consequences. Some involve breach of the law of contract or torts.

144 The resources, both human and physical, which are needed to respond to these varying forms of misconduct will differ. For example, if the ABCC is to enforce the criminal law, it may be necessary for serving police officers to be seconded or special constables to be appointed. On the other hand, investigation of alleged underpayments of wages could be undertaken by persons who were not police officers but who were familiar with awards, their terms and relevant enforcement provisions. It is, therefore, essential to consider whether the proposed ABCC should deal with all, or only some, of the misconduct that is prevalent in the industry.

145 In my First Report I foreshadowed a recommendation that the ABCC would

> *monitor, investigate and prosecute any breaches of industrial law, the criminal law, and aspects of civil law in relation to the building and construction industry.*[108]

I adhere to this view.

146 The ABCC can be expected to become aware of contraventions of the law within the industry in various ways. It may receive complaints from the victims of misconduct. It may receive reports under the mandatory reporting regime which I have proposed. It may also detect breaches in the course of monitoring developments in industry practices. For convenience, the term 'complaints' will be used in this section of my report to comprehend these and any other means by which the ABCC becomes aware of misconduct.

147 Many of the submissions received by the Commission suggested that the ABCC should be a 'one stop shop' to which anyone complaining of misconduct in the industry could have resort. I consider that these submissions have merit. This does not necessarily mean that every complaint which is received must be dealt with by ABCC staff. It may be that, depending on the nature of the complaint, there is another agency which might more appropriately respond. In each case the guiding principle should be that the ABCC would only direct complaints which it receives to other agencies if those other agencies were better equipped by way of legislative powers, experience, resources and expertise to provide an adequate response.

148 Thus, in the case of a complaint of underpayment of worker's entitlements, the ABCC will be authorised to investigate the allegations. In the course of doing so it might discover a breach of the taxation, company or insolvency laws (federal responsibilities) or the workers compensation laws (a state responsibility). It would work with the government agencies with responsibility for enforcing those laws by passing on and seeking information, possibly conducting a joint inquiry, but, importantly, reporting back to the complainant on what has been discovered.

149 Complaints about breaches of occupational health and safety standards would normally best be dealt with by Commonwealth and State occupational health and safety inspectors and regulatory authorities.

150 Allegations concerning the employment of illegal migrant labour can best be dealt with by, or in conjunction with, compliance officers from the Department of Immigration, Multicultural and Indigenous Affairs.

151 I consider that the ABCC should have primary responsibility for the investigation of complaints of all forms of misconduct that I have identified. Where secondary boycotts are involved this responsibility will be shared with the ACCC (see Recommendation 182). If the circumstances warrant, the ABCC should also have the necessary power to seek appropriate remedies in courts and tribunals.

### Issue

There is a wide range of unlawful and inappropriate conduct in the building and construction industry. The question arises whether the Australian Building and Construction Commission should have responsibility for investigating all such conduct. The guiding principle should be that the Australian Building and Construction Commission is a one stop shop to which anyone complaining of misconduct in the industry may resort. This does not mean that every complaint which is received must be dealt with by Australian Building and Construction Commission. Depending on the nature of the complaint, there may be another agency better equipped by way of legislative powers, experience, resources and expertise to provide an adequate response. If matters are referred to another agency, the Australian Building and Construction Commission should monitor the progress of any matter and inform the complainant of the result of the complaint.

### Recommendation 180

(a) The Australian Building and Construction Commission have responsibility for the investigation of all forms of unlawful and inappropriate conduct which occur in the building and construction industry unless there is an agency better equipped by way of legislative power, experience, resources and expertise. For example:

  (i) breaches of occupational health and safety standards should be dealt with by Commonwealth and State occupational health and safety inspectors and regulatory authorities;

  (ii) illegal migrant labour issues are best dealt with by the Department of Immigration, Multicultural and Indigenous Affairs; and

  (iii) breaches of revenue laws are best dealt with by the Australian Taxation Office.

(b) If possible, the Australian Building and Construction Commission monitor the progress of any matter referred and inform complainants as to the results of their complaints.

152 The ACCC presently undertakes enquiries into allegations that secondary boycotts have been imposed in support of industrial demands in the industry. It has not been active in the industry in these matters. The victims of such unlawful conduct have rarely sought to pursue their remedies through the courts. The result has been that few of the many instances of secondary boycotts which have occurred in the building and construction industry and which have come to the Commission's attention have been referred to or pursued by the ACCC.

153 I consider the better course is that there be parallel avenues for investigation and enforcement by the ACCC and the ABCC. This could be achieved by enacting in the Building and Construction Industry Improvement Act provisions which mirror ss45D – 45E of the *Trade Practices Act 1974 (C'wth)* with such provisions to be limited in their operation to the building and construction industry. The ABCC would have the same authority as the ACCC currently possesses under the *Trade Practices Act 1974 (C'wth)* to investigate breaches of the secondary boycott provisions, and to undertake enforcement action.

**Issue**

The Australian Competition and Consumer Commission presently has exclusive responsibility for investigating allegations of secondary boycotts in the building and construction industry. It has not been active in doing so. A question arises whether the Australian Building and Construction Commission should be given a concurrent power identical to that of the Australian Competition and Consumer Commission to investigate and prosecute breaches of the secondary boycott provisions of the *Trade Practices Act 1974 (C'wth)* affecting the building and construction industry.

**Recommendation 181**

The Building and Construction Industry Improvement Act contain secondary boycott provisions mirroring ss45D–45E of the *Trade Practices Act 1974 (C'wth),* but limited in operation to the building and construction industry.

**Recommendation 182**

The Australian Building and Construction Commission share jurisdiction with the Australian Competition and Consumer Commission in investigating and taking legal action concerning secondary boycotts in the building and construction industry.

## Structure

154 The ABCC should be established as a statutory body. It should be constituted by a Chairman and a small number of fulltime members each appointed by the Governor-General for a fixed but renewable term of five (or perhaps seven) years. There should be sufficient numbers for a member to be located in each major State ABCC office.

155 Only the chairman and the members should be able to exercise the coercive powers of the ABCC, but each should be able to do so individually so as to ensure that there is efficient operation of the State offices without delays which would be caused by authorisation needing to be processed interstate. The chairman and the members must have appropriate experience, stature, and independence, having regard to the extensive powers and important responsibilities conferred upon them.

156 Staff should be appointed under the *Public Service Act 1999 (C'wth)* or seconded from other agencies such as police forces and the office of the Director of Public Prosecutions. The legislation should make provision for the ABCC's powers (other than its coercive powers) to be delegated to senior staff.

157 The NSW BITF structure, which I have described above, is a useful model for the proposed ABCC. In particular, the division between its civil and criminal areas of operation and the range of skills possessed by its staff are features which should be replicated. Given that it will operate nationally there will need to be State offices. These offices should be under the control of local directors and should be staffed to meet local need. At minimum, they should each have lawyers, investigators and support officers. Each should also have access, locally or through the central office, to financial analysts and industry experts. Initially, special attention should be given to the Sydney, Melbourne, Brisbane and Perth offices when resources are being allocated.

**Issue**

The structure by which the Australian Building and Construction Commission should be established, have capacity to operate nationally and have suitably qualified staff, needs to be determined.

**Recommendation 183**

The Australian Building and Construction Commission:

(a) be established as a body corporate by statute;

(b) be constituted by a chairman and a small number of other statutory office holders, each of whom must have appropriate experience, stature and independence, and each of whom is appointed for a fixed but renewable term. Only the chairman and members should be able to exercise coercive powers. They should be able to do so individually;

(c) have regional offices, initially, at least, in Sydney, Melbourne, Brisbane and Perth; and

(d) employ suitably qualified lawyers, investigators, financial analysts, industry experts and support staff.

## Functions and powers – Commonwealth law

### Civil matters

158 Powers needed by the ABCC in order to be able to respond adequately to any particular complaint will vary with the nature of the complaint. I will deal first with misconduct that is subject to Commonwealth law.

159 Some of the forms of misconduct which I have proposed should be dealt with by the ABCC are presently dealt with by inspectors and authorised officers appointed pursuant to the *Workplace*

*Relations Act 1996 (C'wth)*. It is, therefore, convenient first to identify the powers conferred by the *Workplace Relations Act 1996 (C'wth)* on these officers and then to consider any additional powers which the ABCC would need in order properly to respond to complaints of such misconduct.

160 Inspectors appointed under Part V of the *Workplace Relations Act 1996 (C'wth)* are responsible for securing observance of the *Workplace Relations Act 1996 (C'wth)*, awards and certified agreements.[109] Their powers are prescribed by s86 as follows:

> *86(1) For the purpose of ascertaining whether awards and certified agreements, and the requirements of this Act, are being, or have been, observed, an inspector may, at any time during ordinary working hours or at any other time at which it is necessary to do so for that purpose:*
>
> *(a) without force, enter:*
>
> *(i) premises on which the inspector has reasonable cause to believe that work to which an award or certified agreement applies is being or has been performed; or*
>
> *(ii) a place of business in which the inspector has reasonable cause to believe that there are documents relevant to that purpose; and*
>
> *(b) on premises or in a place referred to in paragraph (a):*
>
> *(i) inspect any work, material, machinery, appliance, article or facility;*
>
> *(ii) as prescribed, take samples of any goods or substances;*
>
> *(iii) interview any employee;*
>
> *(iv) require a person having the custody of, or access to, a document relevant to that purpose to produce the document to the inspector within a specified period; and*
>
> *(v) inspect, and make copies of or take extract from, a document produced to him or her.*

161 It is an offence under the *Workplace Relations Act 1996 (C'wth)* to obstruct an inspector in the exercise of his or her powers or, without reasonable excuse, to contravene a direction given by an inspector under s86.[110] Inspectors have power to apply to a court for the imposition of a penalty for a breach of an award, order or agreement.[111]

162 Under Part IVA of the Act, the Employment Advocate may appoint certain persons as authorised officers.[112] Those officers are given certain powers, relevantly, for the purpose of ascertaining whether the provisions of Part XA of the Act (which deals with freedom of association) have been complied with, or are being complied with.[113] Their powers are broadly the same as those conferred on inspectors.[114] It is an offence under the Act to obstruct an authorised officer in the exercise of his or her powers or, without reasonable excuse, to contravene a direction given by an inspector under s83BH.[115]

163 The powers conferred on inspectors and authorised officers are limited. In certain respects they are less than ideal, even in relation to the performance of the particular functions for which they are conferred. Inspectors are not able to require anyone to provide even basic information such as names and addresses. The power to 'interview any person' is of little use if the interviewee is unco-operative. There is no obligation on an interviewee to answer any questions. It is quite conceivable that documents relevant to a particular inquiry might be found elsewhere than at 'a place of business' or premises at which work that is regulated by industrial instruments is being performed, but inspectors and officers have no wider rights of entry.

164 The powers of inspectors are, generally speaking, not adequate for the purpose of enforcing compliance with awards and enterprise bargaining agreements. They lack power to ensure there is no coercion in making or varying such agreements. There are other forms of unlawful conduct, which I have suggested should fall within the ABCC's area of responsibility, where the inspectors' powers would prove inadequate.

165 The ABCC can be expected to face considerable lack of co-operation and, indeed, opposition if the conduct of my Commission is any guide. When giving the Opening Address on 10 December 2001, Senior Counsel Assisting the Commission said this:

> *When the establishment of the Commission was announced in July [2001], statements were made by at least one building organisation and one union which could be interpreted as indicating that assistance would be forthcoming. Part of the statement released by the CFMEU stated that the union had resolved to adopt a proactive approach towards the Commission and that it was committed to doing its utmost to try and steer the Commission onto the real issues that plagued the industry.*
>
> *However, the fact is that with one exception, the Commission has not received from any of the major building companies in Australia evidence of practices or conduct which they consider to be inappropriate or which they consider should be the subject of investigation by this Commission, or which they consider should be the subject of legislative attention. Again, with one exception, the same can be said of the owners who build the large buildings or who are in the business of purchasing them.*
>
> *Likewise, the Commission has not received an offer of assistance from any union, nor has any of them voluntarily produced any evidence of conduct which they consider to be inappropriate, or which they consider should be investigated by the Commission, or which they consider should be the subject of legislative change.*
>
> *The Victorian Government and its instrumentalities and the Commonwealth Government have indicated a preparedness to assist but no other State or Territory Government has given a similar indication. Thus, almost all of the major stakeholders in the industry have not voluntarily produced evidence to the Commission which is relevant to its Terms of Reference. As a result, it has been up to the Commission alone to seek out witnesses and to seek to learn from them what are the practices which might be considered to be unlawful or inappropriate.*[116]*…if it transpires at the end of this Commission that there is credible evidence of unlawful or otherwise inappropriate practice or conduct in the industry, the following question will have to be asked: Did the employer and union interests, being aware of that practice or conduct, make a deliberate decision not to*

*assist the Commission in uncovering them? A second question will also arise: Did the employer and union interest by their silence condone or encourage those practices or that conduct?*[117]

166 In the event, very few industry participants volunteered to the Commission material addressing the detail of the industry as it actually operates, especially in relation to unlawful conduct. There was, plainly, a deliberate decision by a number of influential persons in the industry, in both the employer and the union camps, not to assist the Commission, as well as many persons who, by their conduct and silence, condoned the unlawful or inappropriate practices and conduct that the Commission has uncovered.

167 Further, evidence that I heard in many States disclosed the existence of a climate of fear under which people who had been the victims of unlawful industrial action declined to volunteer information because of the adverse consequences that they apprehended in doing so.

168 The ABCC can likewise be expected to confront serious obstacles gaining information that it needs to perform its functions.

169 The Parliament has established a number of regulatory agencies in order to ensure compliance with legislative requirements. It is instructive to identify an example of the type of powers which it has been considered desirable to give to an agency with comparable functions to the proposed ABCC.

170 The ACCC provides such a useful comparison. Section 155 of the *Trade Practices Act 1974 (C'wth)* confers a range of powers on the ACCC. Of central importance is the power conferred by ss155(1) of the Act. Relevantly, it provides:

> *(1)…if the Commission, the Chairperson or the Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act…a member of the Commission may, by notice in writing served on that person, require that person:*
>
> *(a) to furnish to the Commission, by writing signed by that person, or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any such information;*
>
> *(b) to produce to the Commission, or to a person specified in the notice acting on its behalf, in accordance with the notice, any such documents; or*
>
> *(c) to appear before the Commission at a time and place specified in the notice to give such evidence, either orally or in writing, and produce any such documents.*

171 By ss156 of the Act, the ACCC has power to inspect, copy and retain documents which are produced to it pursuant to a notice given under ss155.

172 The ACCC may require a person to give evidence before it on oath or affirmation.[118]It is an offence to refuse or fail to comply with a notice, knowingly to furnish information or give evidence that is false or misleading and to obstruct or hinder an officer authorised to act on behalf of the ACCC.[119] The privilege against self-incrimination is abrogated.[120] Some protection is provided to persons who are required to produce documents or give evidence to

the ACCC. Information given by them which may tend to incriminate them is not admissible in criminal proceedings other than those brought under the section (where an individual is involved) or the Act (where a corporation may be liable to prosecution).[121]

173 The ACCC can direct that a person who appears before it to give evidence, and any legal advisor who attends to assist the person, should refrain from disclosing to other parties information acquired, and any evidence given by the person during the examination.[122]

174 Section 155 in its present form does not abrogate legal professional privilege.[123]

175 I recommend that the ABCC should be given the same powers as those possessed by the ACCC under ss155 and 156 of the *Trade Practices Act 1974 (C'wth)*, with one qualification. It is as follows. The use immunity provided in s155(7) of the *Trade Practices Act 1974 (C'wth)* is limited to criminal proceedings. In my opinion a use immunity which applies to all civil and criminal proceedings is necessary, and s6DD of the *Royal Commissions Act 1902 (C'wth)* is an appropriate model.

176 This is because the ABCC will need to penetrate the veil of silence behind which many decisions to take unlawful industrial action are hidden. Those who will be best placed to give information concerning breaches of the civil law, will often, even usually, be complicit in these breaches. Were there to be a use immunity limited to criminal proceedings, the incentive for persons to provide information, truthfully to answer questions or to produce documents, would be less likely to occur than if the provisions in the *Royal Commissions Act 1902 (C'wth)*, which are of course more generous to such persons, applied. This will mean that, except in relation to offences against the Building and Construction Industry Improvement Act (for example, perjury), a statement or disclosure made by a person in the course of giving evidence to the ABCC, or production of information, documents or a thing in answer to a requirement made or imposed under that Act, is not admissible in evidence against a natural person in any civil or criminal proceedings in any Court of the Commonwealth, of a State, or of a Territory.

177 The experience of those assisting this Commission was that the existence and operation of the use immunity in the *Royal Commissions Act* was a significant encouragement to witnesses who were initially reluctant to assist the Commission and to give evidence, in fact to do so. For these reasons, I recommended that a similar provision be included in the Building and Construction Industry Improvement Act.

### Issue

In view of the functions of the Australian Building and Construction Commission, and the problems for Australian Building and Construction Commission investigations posed by the closed culture of the industry, the Australian Building and Construction Commission will not be able adequately to perform its functions unless it has the power to enter upon premises, inspect any relevant premises or documents found on premises, take copies of documents or of an extract from documents, summon witnesses and documents and be able to require a person to provide a written statement specifying answers to questions posed by it. As lay witnesses and informants will often be complicit in unlawful conduct, necessary information will not be forthcoming unless there is a wide form of use immunity.

### Recommendation 184

The Building and Construction Industry Improvement Act provide that the Australian Building and Construction Commission be given powers equivalent to those conferred upon the Australian Competition and Consumer Commission by sections 155 and 156 of the *Trade Practices Act 1974 (C'wth),* but with the proviso that such a provision contain a use immunity provision in the form of s6DD of the *Royal Commissions Act 1902 (C'wth)*.

## Further powers

178 It is also necessary that the ABCC have certain ancillary powers and protections. These should include:

(a) standing for the ABCC, or authorised officers of the ABCC, to commence and prosecute applications in courts for the imposition of penalties for any breaches of the Building and Construction Industry Improvement Act and the *Workplace Relations Act 1996 (C'wth)* in the building and construction industry;

(b) a right of intervention in the Australian Industrial Relations Commission (AIRC) for the ABCC in any proceedings in that Commission in the building and construction industry;

(c) standing for the ABCC to bring proceedings to enforce judgments imposing civil penalties where the respondent has declined or failed to pay the penalty;

(d) standing for the ABCC, or authorised officers of the ABCC, to commence and prosecute applications in courts for the cancellation of registration of a registered organisation, or the exclusion of persons from eligibility to hold office in a registered organisation;

(e) power to seek and enforce injunctions and to seek and enforce orders under the Building and Construction Industry Improvement Act modelled on s127 of the *Workplace Relations Act 1996 (C'wth);*

(f) power to refer industrial relations matters coming to the attention of the ABCC, where appropriate, to specialist agencies and tribunals which have jurisdiction to deal with such matters;

(g) a right of access by the ABCC to the records of material, including, evidence, information and submissions, presented to this Commission;

(h) power to obtain information from other agencies (both Commonwealth and State) notwithstanding any relevant secrecy or privacy provisions, and to use that information subject to any existing statutory limitations;

(i) recognition as a law enforcement agency with a right of access to public official records where such access is necessary in order to perform its functions;

(j) power to enter into protocols with other agencies to facilitate prompt access by it to public official records;

(k) power to refer information to other agencies with a proper interest in having the information (for example the Australian Crime Commission, the ATO, the Australian Securities and Investment Commission, the ACCC, the police);

(l) power to monitor the operation of the Building and Construction Industry Improvement Act and the *Workplace Relations Act 1996 (C'wth)*; and, where it considers it necessary to do so, recommend statutory amendments or other arrangements to the responsible Minister; and

(m) immunity of its officers from liability for acts undertaken in good faith in the performance of their duties and exercise of their powers.

### Issue

To perform its functions properly, the Australian Building and Construction Commission will require appropriate ancillary powers and protections. A question arises as to what the extent of the powers conferred should be.

### Recommendation 185

The Australian Building and Construction Commission:

(a) have standing to commence and prosecute applications in courts for the imposition of penalties for any breaches of the Building and Construction Industry Improvement Act and the *Workplace Relations Act 1996 (C'wth)* arising in the building and construction industry;

(b) have a right of intervention in the Australian Industrial Relations Commission in any proceedings in that Commission arising in the building and construction industry;

(c) have standing to bring proceedings to enforce judgments imposing civil penalties where the respondent has declined or failed to pay the penalty;

(d) have standing to commence and prosecute applications in courts for the cancellation of registration of a registered organisation, or the exclusion of persons from eligibility to hold office in a registered organisation;

(e) have standing to seek and enforce injunctions and to seek and enforce orders under provisions of the Building and Construction Industry Improvement Act modelled on s127 of the *Workplace Relations Act 1996 (C'wth)*;

(f) have authority to refer industrial relations matters coming to its attention, where appropriate, to specialist agencies and tribunals which have jurisdiction to deal with such matters;

(g) have a right of access to the records of material, including evidence, information and submissions, presented to this Commission;

(h) have power to obtain information from other agencies (both Commonwealth and State) notwithstanding any relevant secrecy or privacy provisions, and authority to use that information subject to any existing statutory limitations;

(i) be recognised as a law enforcement agency with a right of access to public official records where such access is necessary in order to perform its functions;

(j) have power to enter into protocols with other agencies to facilitate prompt access by it to public official records;

(k) have power to refer information to other agencies with a proper interest in having the information (for example the Australian Crime Commission, the Australian Taxation Office, the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission, the police);

(l) have power to monitor the operation of the Building and Construction Industry Improvement Act and the *Workplace Relations Act 1996 (C'wth),* and, where it considers it necessary to do so, recommend statutory amendments or other arrangements to the responsible Minister; and

(m) be given statutory immunity for its officers from liability for acts undertaken in good faith in the performance of their duties and exercise of their powers.

## The meaning of 'building and construction industry'

179 In volume 2 of my report *'Conduct of the Commission – Principles and Procedures'* I discuss the meaning of the term 'building and construction industry and there state:

> *The most important words in my Terms of Reference are the words 'building and construction industry'. Those words identify the subject matter of my inquiry by reference to a particular industry. The building and construction industry encompasses:*
>
> *(a) multi-unit and high rise residential developments;*
>
> *(b) non-residential buildings, such as office blocks, shopping centres, retail premises, educational institutions, and hospitals; and*
>
> *(c) engineering construction work.*
>
> *As other parts of this report will demonstrate, each of the sectors of the industry just identified is different in terms of, among other things: the coverage of industrial awards; the degree of unionisation of the workforce; the union with major coverage; the types of contracting arrangements used; the types of employment arrangements used; and the level of public and private involvement.*
>
> *The building industry includes activities associated with design, demolition, excavation, assembly and erection of buildings and other structures, and the alteration or renovation of such buildings and structures. It also includes the instillation of fixtures such as heating, air-conditioning, fire alarms, electrical wiring and blinds and awnings.*

180 The Building and Construction Industry Improvement Act should contain a definition of the building and construction industry that takes account of this report and other appropriate definitions, but excludes single dwelling houses unless part of a multi-dwelling development.

### Issue

The Building and Construction Industry Improvement Act should contain a definition of the building and construction industry, to which the Act will apply.

### Recommendation 186

The Building and Construction Industry Improvement Act define the building and construction industry. That definition should take into account the terms of reference of this Commission, as outlined in Volume 2, *Conduct of the Commission – Principles and Procedures*, of this report and other appropriate definitions, but exclude single dwelling houses unless part of a multi-dwelling development .

## Injunctions

181 The ABCC should be empowered to seek injunctions to restrain contraventions of the Building and Construction Industry Improvement Act and the *Workplace Relations Act 1996 (C'wth)*, other Commonwealth legislation relevant to the building and construction industry and the National Code of Practice and the Commonwealth Implementation Guidelines. This power should be widely drawn.

182 Subsection 80(1) of the *Trade Practices Act 1974 (C'wth)* would provide a useful model.[124] Interim injunctions may be granted pending determination of an application under this subsection.[125] The Court also has power to vary or rescind an interim injunction or one made under s80(1).[126] The circumstances in which an injunction might be sought and granted are further widened by the provisions of subsections (4) and (5).[127]

183 As the ACCC acts in the public interest it is not required to give an undertaking as to damages as a condition of obtaining an injunction or an interim injunction.[128] Similar provisions should be incorporated in the legislation establishing the ABCC.

184 The ABCC should also have power to bring proceedings to enforce injunctions which have been disobeyed and for penalties to be imposed on those found responsible for such disobedience.

**Issue**

To properly restore the rule of law, and restrain contraventions of the Building and Construction Industry Improvement Act and other relevant legislation, the Australian Building and Construction Commission should have standing to seek injunctions. The provisions of the *Trade Practices Act 1974 (C'wth)* are a suitable model.

**Recommendation 187**

For the purpose of restraining contraventions of the Building and Construction Industry Improvement Act, the *Workplace Relations Act 1996 (C'wth),* other Commonwealth legislation relevant to the building and construction industry and the National Code of Practice for the Construction Industry and the Commonwealth Implementation Guidelines, the Australian Building and Construction Commission:

(a) be given equivalent powers to the Australian Competition and Consumer Commission under s80 of the *Trade Practices Act 1974 (C'wth)* including powers to obtain interim, interlocutory and permanent injunctions, in all cases without being required to give an undertaking as to damages; and

(b) have power to bring proceedings for contempt to enforce injunctions or orders which have not been obeyed.

## Criminal matters – Commonwealth laws

185 Certain of the forms of unlawful conduct which I have identified constitute criminal offences. Most of these are offences under State law. Depending on the circumstances, it may be that an offence is committed against the criminal law of the Commonwealth. Commonwealth criminal law may apply if a relevant nexus is established with Commonwealth land, Commonwealth funds or Commonwealth officers.

186 Australian Federal Police officers may be seconded to investigate Commonwealth offences of this kind.[129]

187 I am not suggesting that police officers seconded to the ABCC should supplant the role of existing regulatory agencies, except as previously indicated. It is important however, that if in the course of investigating unlawful conduct occurring in the building and construction industry, evidence of Commonwealth criminal offences is discovered, there is no impediment to the ABCC continuing with its inquiry, albeit with the view to passing on the evidence gained during the investigation to the appropriate authorities.

188 The Commonwealth Director of Public Prosecutions (DPP) has the function of undertaking prosecutions for Commonwealth criminal offences.[130] If police or ABCC investigations reveal criminal conduct the matters could be referred to the DPP with a view to prosecutions being commenced. Depending on the volume of work which develops it may be that the DPP could assign designated officers to work with or as part of the ABCC. The experience of the NSW BTIF would suggest that such an arrangement would work well.

**Issue**

In order to investigate and ensure the appropriate prosecution of offences committed against the criminal law of the Commonwealth, federal police officers and prosecutors should be seconded to work with the Australian Building and Construction Commission, and authorised to investigate breaches of any Commonwealth law applicable to the building and construction industry.

**Recommendation 188**

The Australian Building and Construction Commission have attached to it Australian Federal Police officers and officers of the Commonwealth Director of Public Prosecutions.

**Recommendation 189**

The Building and Construction Industry Improvement Act authorise the Australian Building and Construction Commission and its officers to investigate breaches of any Commonwealth law applicable to the building and construction industry.

## Monitoring the National Code and the Implementation Guidelines

189 One of the responsibilities which should be conferred on the ABCC will be the monitoring of compliance with the National Code of Practice for the Construction Industry and the Commonwealth Implementation Guidelines, as amended in accordance with my recommendations. Such monitoring is presently undertaken by the OEA pursuant to a Memorandum of Understanding entered into with the Department of Employment and Workplace Relations.

190 The OEA lacks the resources which are needed to monitor the application of the National Code if it is to be applied more widely, as I have recommended elsewhere in this report.

191 The power to exercise this function should be conferred on the ABCC by legislation. Detailed consideration of the National Code and Implementation Guidelines is contained in Chapter 3, *Codes of Practice for the Building and Construction Industry*, contained in Volume 7, *Reform – National Issues Part 1*, of this report.

**Issue**

The National Code of Practice for the Construction Industry and the Commonwealth Implementation Guidelines need to be monitored to ensure compliance with those documents.

**Recommendation 190**

The Building and Construction Industry Improvement Act provide that a function of the Australian Building and Construction Commission is to monitor the National Code of Practice for the Construction Industry and the Commonwealth Implementation Guidelines.

## Educative functions

192 The experience of both the New South Wales and Western Australian Taskforces was that many of their objectives were achieved, in part at least, by establishing and developing working relationships with those engaged in the industry. Through formal discussions, information sessions and the widespread distribution of pamphlets the role of the Taskforces was made known. So too were the legal rights and obligations of those engaged in the industry and the means by which they might be enforced.

193 I consider that the ABCC should also have such an educative function and the necessary powers to pursue it. It is important that this function should be carried out in such a way as to ensure that those with language difficulties, low educational standards and other disabilities are assisted to understand their entitlements and obligations and the role of the ABCC in protecting them from the effects of unlawful conduct. Publications should be written in simple language and, where need be, in languages other than English. They should be widely distributed and readily available on request. The ABCC should also conduct regular briefing sessions for participants in the industry.

### Issue

Dissemination of information regarding the law applicable to the building and construction industry is important if there is to be compliance with the law. To ensure that the Australian Building and Construction Commission is effective and that its role is understood, its functions should be widely known.

### Recommendation 191

The Australian Building and Construction Commission engage in a range of educative functions, including formal discussions with industry participants, information sessions for interested persons, and distribution of literature about its role, and the law applicable to the building and construction industry.

## Ombudsman role

194 The Commission heard a good deal of evidence, particularly from union officials, about an asserted failure on the part of agencies such as the ATO, Australian Securities and Investments Commission (ASIC) and the Department of Immigration, Multicultural and Indigenous Affairs to respond adequately to complaints about conduct such as the use of illegal migrant labour, the avoidance of taxation liabilities and the resort by unscrupulous contractors to 'phoenix' companies in order to avoid obligations to their employees. As I have recorded elsewhere in this report, some of these complaints were justified. Some were not. The result was a perception in the industry that these agencies were not meeting their statutory obligations.

195 Under the 'one stop shop' option which I have proposed for the ABCC many of these complaints of misconduct would be received by it. Some would be dealt with by it; some would be referred to other agencies. The ABCC would be able to monitor the processing of complaints referred by it to those agencies. The ABCC should have a statutory right to request

information from another Government agency (both Commonwealth and State), including information concerning the fate of a complaint or referral to that agency. In the absence of a satisfactory response to the ABCC, the ABCC should have the capacity to report the matter to the Minister responsible for the relevant agency.

196 Over time the ABCC would be in a position to form judgments about the performance of other regulatory agencies in dealing with complaints about misconduct in the industry. If the ABCC comes to the view that another agency is not dealing effectively with such complaints the ABCC should be empowered, of its own motion, to advise the Minister. It should also be able to provide such advice if a valid complaint is made to it by an aggrieved party. In either case the ABCC should be able to make constructive recommendations for improving the processing of complaints.

**Issue**

It is important that the Australian Building and Construction Commission be recognised as a 'one stop shop' for complaints concerning the building and construction industry. Even if complaints are referred to other agencies, it is necessary that there be a monitoring body to ensure that such complaints are addressed.

**Recommendation 192**

The Australian Building and Construction Commission have the statutory capacity:

(a) to satisfy itself, and complainants to it, that a complaint or an issue which has come to its attention has been satisfactorily dealt with; and

(b) in the absence of a satisfactory response to a request for information from other Government departments and agencies (both Commonwealth and State), including information about the fate of a complaint or referral to that other body, to report the matter to the Minister responsible for the relevant department or agency.

## Functions and powers – State law

### Civil matters

197 As noted earlier in this volume, the NSW BITF sought to assist parties who suffered damage as a result of unlawful industrial action to pursue civil remedies. This was done by providing preliminary legal advice and then making available legal assistance for action to be brought in the name of the aggrieved person. The available remedies include injunctions and damages arising from breaches of tort and contract law. It is appropriate that such proceedings should be brought in the name of the party who has suffered damage or who apprehends damage as a result of unlawful civil action. This, of course, assumes a willingness on the part of the victim to pursue available remedies. I recommend that the ABCC be given power to provide assistance by way of advice where it considers it appropriate to do so.

198 Where a company or a registered and incorporated trade union is an appropriate but unwilling plaintiff, the corporations power would support a legislative provision empowering an officer of

the ABCC to bring the civil proceeding in the name of the plaintiff who would be entitled to a remedy. On one view such statutory provisions would be essential in order to uphold the principle that any person who causes damage by taking unlawful industrial action should bear the financial consequences of the action. If, for any reason, a party which has a cause of action in damages chooses not to seek to recover its losses the person or body which has acted unlawfully will not be held accountable. However, on balance, I do not consider that it would be desirable for the ABCC to undertake this role. The victims of unlawful industrial action should be encouraged and assisted to pursue remedies available to them but, ultimately, they must accept responsibility for the decision to make an application to or commence proceedings in a court if the presently prevailing culture is to be changed for the better.

199 Where the Commonwealth is the appropriate plaintiff under State law, the Attorney-General can authorise the commencement of civil proceedings for injunctions or damages in the name of the Commonwealth. Commonwealth agencies can sue either in the name of the Commonwealth or their own name depending on the terms of their governing statute.

**Issue**

Where a body suffers loss from unlawful industrial action, but is unwilling to commence proceedings to recover that loss, a question arises whether the Australian Building and Construction Commission should be empowered to commence such action in the victim's name. Such action would ensure those causing loss are held accountable. The alternate view is that a party is entitled to choose whether it wishes to take action to recover loss suffered by it.

**Recommendation 193**

The Australian Building and Construction Commission's role in relation to civil litigation involving actions for damages be limited to:

(a) investigations;

(b) providing legal advice to aggrieved persons concerning their right to bring legal action; and

(c) bringing appropriate proceedings for the imposition of pecuniary penalties.

### State law – criminal matters

200 Most unlawful conduct of a criminal character will constitute an offence under State law. Examples of such offences include assault, threatening and intimidatory conduct, theft, malicious damage to property, riot and affray.

201 It is uncertain whether Commonwealth legislation can confer upon ABCC officers power to investigate, and then to prosecute in the State courts, those who breach State criminal laws.

202 It would assist with the maintenance of the rule of law if State police officers were attached to the ABCC. They could exercise their powers of investigation of offences under State law. In addition, administrative arrangements should be establish to allow Commonwealth officers to refer offences against State criminal law to State Directors of Public Prosecutions.

**Issue**

Most criminal conduct occurring in the building and construction industry involves a breach of State law rather than Commonwealth law. It is uncertain whether Commonwealth law can confer power to investigate and prosecute breaches of State criminal laws. To uphold the rule of law arrangements need to be made to facilitate investigation and prosecution of criminal offences against State laws encountered by the Australian Building and Construction Commission in its investigations.

**Recommendation 194**

The Commonwealth encourage the States to second State police officers to the Australian Building and Construction Commission.

**Recommendation 195**

Administrative arrangements be established between the Australian Building and Construction Commission and the State Directors of Public Prosecutions whereby offences can be referred by the Australian Building and Construction Commission to the State Directors for prosecution.

## Oversight of ABCC's operation

203 The Australian Industry Group submitted that the work of any taskforce should be overseen by an independent Ombudsman and that its Charter should be reviewed every three years.[131]

204 As a Commonwealth agency, the ABCC will be subject to the jurisdiction of the Commonwealth Ombudsman. I do not consider that it is necessary to duplicate this function by establishing a separate industry Ombudsman.

205 As the chairman and members of the ABCC will be 'officers of the Commonwealth', such persons will be amenable to judicial review pursuant to s39B of the *Judiciary Act 1903 (C'wth)*.

206 The terms of the *Administrative Decisions (Judicial Review) Act 1977 (C'wth)* ought to apply to the ABCC, according to its terms. In this regard I note that, by operation of Schedule 2 of the Act the statutory obligation arising from s13 of that Act to provide reasons for certain decisions, does not apply to decisions relating to the administration of criminal justice or decisions in connection with the institution or conduct of proceedings in a civil court, including for the recovery of pecuniary penalties arising from contraventions of enactments and related matters.

207 The *Freedom of Information Act 1982 (C'wth)* also ought to apply, according to its terms, to the ABCC, although, of course, a number of exemptions will be available in relation to information held by the ABCC.

208 The ABCC should submit an Annual Report to its minister on its operations. The report should be sufficiently detailed to allow analysis of the scope and effectiveness of its work. In particular the report should contain statistics about the number and categories of complaints and reports made to the ABCC, and the manner of their disposition. It should also contain estimates of the

cost of unlawful industrial action in the year concerned and the amount of employee entitlements recovered from employers found to have breached awards and agreements. The Minister would table the Annual Report in the Parliament.

209 These two methods of oversight, coupled with the capacity to seek judicial review of the exercise of the ABCC's statutory powers, should prove adequate, while not interfering with its independence.

### Issue

As a Commonwealth agency, the Australian Building and Construction Commission should be subject to prudential oversight. One alternative is the creation of a special Ombudsman to oversee its operations. An alternate method of prudential oversight is for the Australian Building and Construction Commission to fall within the jurisdiction of the Commonwealth Ombudsman, and to require the Australian Building and Construction Commission to report annually upon its operations.

### Recommendation 196

The Australian Building and Construction Commission report annually to the responsible Minister, such report to be tabled in each House of the Parliament. Such report shall include information on the number and types of matters investigated, the amount of employee entitlements recovered from recalcitrant employers, and the aggregate cost of unlawful industrial action in the industry.

### Recommendation 197

The Australian Building and Construction Commission be subject to the jurisdiction of the Commonwealth Ombudsman.

# 4 Civil and industrial responsibility

## Outline

210 The evidence before me establishes that, far too often, industrial organisations operating in the building and construction industry are not held accountable for the consequences of unlawful actions by them, their officers, their members or their agents.

211 One reason for this is that the present state of the law defining permitted industrial action is inadequate, both in its content and its operation in practice. This chapter summarises the existing law and considers its adequacy.

212 To change the culture of the industry it must be unambiguously clear that those who act unlawfully by breaching the civil or industrial law, and thereby cause loss, will be held responsible and accountable for such loss, and that it will be recovered from them.

## Industrial action – an introduction

213 One legacy of Australia's federal structure and common law heritage is that it is not possible to state simply and definitively the circumstances in which employers, employees and unions will be legally entitled to engage in industrial action. The law relating to industrial action in Australia is outlined in Discussion Paper 18, which was prepared for the Commission by the Faculty of Law at Monash University. As is plain from that paper, the law in relation to industrial action has been affected, influenced and shaped by the common law, by Commonwealth, State and Territory legislation, by jurisprudence of the courts and industrial tribunals, and by Australia's international obligations.

214 Central to my task of formulating conclusions and recommending reforms is a need to consider whether the present state of the law regarding the circumstances in which industrial action occurs in the building and construction industry is appropriate. I have formed the view that the present law is complex and should be simplified so that all may understand their rights and obligations. The simplification proposed does not change the existing substantive law in any material way. Simplification will assist enforcement of the law, and the re-establishment of the rule of law in the industry.

## Forms of industrial action

215 The forms of industrial action engaged in by participants in the building and construction industry are many and varied. I use the term 'industrial action' for this purpose to refer to action taken by employers, employees and their representative organisations which affects the performance of work, and which is engaged in for the purpose of supporting or advancing some workplace or other related cause.

216 Overwhelmingly, the evidence before me concerned industrial action which had been engaged in by employees and unions, rather than by employers or their representative organisations. The industrial action included conduct of the following kinds, or threats to engage in conduct of the following kinds:

- strikes, bans, limitations and restrictions on work:
  - in support of claims made in proposed workplace agreements;
  - in protest at employers not having made workplace agreements, or for the purpose of coercing, encouraging, inducing or persuading employers to enter into workplace agreements;
  - imposed for a range of reasons in contravention of dispute resolution clauses prohibiting such action in workplace agreements or awards;
  - in support of claims in contravention of 'no extra claims' clauses in workplace agreements;
  - having nothing at all to do with claims made in existing or proposed workplace agreements;
  - imposed by reason of genuine safety issues on building and construction sites;
  - imposed by reason of manufactured or exaggerated safety issues;
  - for the purpose of coercing, encouraging, inducing or persuading a contractor not to have dealings with, or to terminate dealings with, another contractor;
  - imposed for the purpose of coercing, encouraging, inducing or persuading a contractor to dismiss or not engage an employee or subcontractor;
  - imposed for the purpose of coercing, encouraging, inducing or persuading others to join a union or in support of demands for particular sites to be closed shops or effectively closed shops;
  - on work in defiance of recommendations or orders of the AIRC, State Industrial Commissions or court orders;
- sites being 'black-banned' for a range of reasons;
- demands for strike pay;
- peaceful picket lines;

- picket lines in which picketers engaged in conduct aimed at persuading others not to enter premises for the purpose of making deliveries, picking up goods or reporting for work;
- picket lines in which picketers physically prevented access to premises;
- picket lines involving verbal harassment, intimidation, physical violence, blocking and hindering police, and wilful destruction and damage of property;
- picket lines involving secondary boycotts directed at preventing deliveries of supplies, preventing goods from leaving premises, or preventing workers from gaining access to premises;
- other forms of secondary boycotts, including 'sympathy' strikes on sites in support of workers on other sites for some cause unrelated to the site; and
- strikes and widespread stoppages in support of political causes.

## The law in relation to industrial action

217 Not all of the conduct which I have identified is unlawful or necessarily inappropriate. Most of the conduct, however, involves contraventions of Commonwealth or State legislation or the commission of torts, crimes or breaches of contract.

218 Subject to statutory restrictions, the criminal law and the law of tort and contract have potential application to industrial action on all building and construction sites. The potential application of the *Workplace Relations Act 1996 (C'wth)* depends principally on whether the action in question falls within the scope of the definition of 'industrial action' in s4(1) of that Act.

219 Broadly speaking, by reason of that definition, the *Workplace Relations Act 1996 (C'wth)* will have potential application to industrial action taken by employers, employees or their representative organisations where:

- the action concerns the terms or conditions of work prescribed by a federal award, an order of the AIRC, a federally certified agreement or Australian Workplace Agreement (AWA), or an award, determination or order made by another tribunal under a law of the Commonwealth or otherwise by or under a law of the Commonwealth;[132]
- the action is taken in connection with an actual, threatened, impending or probable industrial dispute which extends beyond the limits of any one State *and* that is about matters pertaining to the relationship between employers and employees (including demarcation disputes), or with a situation that is likely to give rise to such a dispute;[133]
- the action involves employees of the Commonwealth or a constitutional corporation, or persons employed in a Territory, failing or refusing to attend for work or to perform any work at all;[134] or
- the action involves persons who are members of an organisation registered under the Act (such as a union) who fail or refuse to attend for work or to perform any work at all in accordance with a decision made or direction given by the organisation, the committee of management of the organisation, or an officer or group of members of the organisation acting in that capacity.[135]

220 Relevant action is:

- the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
- a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work; or
- a failure or refusal by persons to attend for work, or a failure or refusal to perform any work at all by persons who attend for work.

221 The definition of 'industrial action' in the *Workplace Relations Act 1996 (C'wth)* does not include action which is authorised or agreed to by the employer or employees, and action taken by an employee based on a reasonable concern about an imminent risk to his or her health or safety, provided that the employee has not unreasonably failed to comply with a direction of his or her employer to perform other available work that is safe and appropriate.[136]

222 There is, at the federal level and in some States, a statutory right to engage in limited forms of industrial action, most notably 'protected action' during periods of bargaining with respect to enterprise agreements. If a right to engage in industrial action might be said to exist under Australian law, it is mostly a negative or residual right, permitted only to the extent that it has not been regulated by the common law or prohibited by legislation.

223 Whether Australian domestic law concerning the right to engage in industrial action accords with Australia's international obligations is a debated question. Article 8(1)(d) of the *International Covenant on Economic, Social and Cultural Rights* recognises '[t]he right to strike, provided that it is exercised in conformity with the laws of the particular country'.[137] Supervisory bodies of the International Labour Organisation (ILO) have consistently said that a right to strike is to be implied from the *Freedom of Association and Protection of the Right to Organise Convention* (1948, No 87)[138] and the *Right to Organise and Collective Bargaining Convention* (1949, No 98).[139] Australia is a party to each Convention. The ILO's Committee of Experts on the Application of Conventions and Recommendations and its Committee on Freedom of Association have each criticised restrictions on the right to strike in Australia. Those criticisms have consistently been rejected by the Commonwealth Government.[140]

224 Whatever the precise intersection between Australian domestic law and Australia's international obligations, the starting point for a consideration of the extent to which there is a right to engage in industrial action under Australian law must be the presumption that everybody is free to do anything, subject only to the provisions of the law.[141] One must turn to Australian law to discover what industrial action is unlawful.

225 As Goldberg and Finkelstein JJ observed in *Australian Industry Group v Automotive Food, Metals, Engineering, Printing and Kindred Industries Union:*

> *It is widely believed that workers have an unconstrained right to take industrial action in support of claims against employers. Nothing could be further from the truth. The common law has long imposed constraints on labour's ability to take concerted action against capital. Not only are there actions available under contracts of employment, the so called intentional torts (conspiracy, procuring breach of contract and interference with*

*business relations among others) took their modern form to provide additional remedies against industrial action taken by organised labour.*[142]

226 I next turn to consider relevant provisions of the *Workplace Relations Act 1996 (C'wth)* and the *Trade Practices Act 1974 (C'wth)*. Discussion of relevant provisions in State jurisdiction is found in Appendix B.

## *Workplace Relations Act 1996 (C'wth)*

### Overview

227 The *Workplace Relations Act 1996 (C'wth)* touches in various ways on the rights and obligations of employers, employees and unions in respect of industrial action. As already noted, the *Workplace Relations Act 1996 (C'wth)* will not apply to all industrial disputes on all building and construction sites. It will, however, generally apply to 'industrial action' as that term is defined in s4(1) of the Act (see above).

228 Most significantly, by s127(1) of the *Workplace Relations Act 1996 (C'wth)*, the AIRC may order that industrial action stop or not occur if it appears to the Commission that such action is happening, threatened, impending or probable in relation to an 'industrial dispute', the negotiation or proposed negotiation of a (federally) certified agreement, or work that is regulated by a federal award or certified agreement. By s4(1) of the Act, an 'industrial dispute' is an actual, threatened, impending or probable industrial dispute that extends beyond the limits of any one State *and* that is about matters pertaining to the relationship between employers and employees (including a demarcation dispute), or a situation that is likely to give rise to such a dispute.[143]

229 The *Workplace Relations Act 1996 (C'wth)* contains two important express prohibitions on industrial action:

- Section 170MN of the Act prohibits industrial action by employees, unions and union officials where there is a certified agreement in force to which the employees or unions are bound which has not reached its nominal expiry date, where the action is engaged in for the purpose of supporting or advancing claims against the employer in respect of employees whose employment is subject to the certified agreement.[144] The limitation as to purpose in s170MN substantially limits its scope.
- Section 170VU(1) of the Act prohibits employees, during the period of an AWA and before its nominal expiry date, from engaging in industrial action in relation to the employment to which the AWA relates. Under s170VU(2), an employer must not lock out an employee for the purpose of supporting or advancing claims in respect of the employee's employment during the period of operation of an AWA before its nominal expiry date.

230 Those provisions aside, the Act does not contain express prohibitions on other forms of industrial action.

231 Furthermore, the Act expressly authorises industrial action in certain limited circumstances: employers, employees and unions are entitled to engage in 'protected action' during

bargaining periods for certified agreements;[145] and employers and employees may engage in 'AWA industrial action' for the purpose of compelling or inducing an employer or employee to make an Australian Workplace Agreement.[146] The Act also limits the right of employers to bring certain actions in tort to recover losses suffered by reason of industrial action, prohibits the payment or receipt of strike pay, and prohibits industrial action which is taken for the purpose of undermining freedom of association.

### Section 127 orders

232 The Commission may make orders under s127 that industrial action stop or not occur, of its own motion or on the application of a party to the industrial dispute, a person who is directly affected or who is likely to be directly affected by the industrial action, or an organisation of which such a person is a member.[147] The Commission must hear and determine an application 'as quickly as practicable'. A person to whom an order under s127(1) is expressed to apply 'must' comply with the order.[148]

233 The power conferred on the AIRC by s127 is discretionary. In *Coal and Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*, a Full Bench of the Commission found that the discretion under s127 was at large and that its exercise should be guided by the objects of the Act and an understanding of the relationship of the power and the effect of its exercise to the scheme of the Act.[149] In *Transfield Services v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*,[150] Munro DP observed that an order under s127 was 'about the only step that is within the Commission's repertoire to indicate the degree to which it seeks to discourage industrial action'.

234 An order under s127 is not an injunction; rather, it has the effect of making any behaviour which is the subject of the order a contravention of the *Workplace Relations Act 1996 (C'wth).* Contravention of an order under s127 triggers a right to apply to the Federal Court for an injunction. The Federal Court may grant an injunction or an interim injunction if it is satisfied that a person or organisation has not complied with such an order or is proposing to engage in conduct which does not comply with such an order.[151] The Court is not, however, bound to grant an injunction.[152] The ordinary equitable principles relating to the grant of injunctive relief apply.

### Examples

235 Evidence was presented regarding non-compliance with orders of the AIRC and State industrial commissions by unions in New South Wales, Queensland, Victoria and Western Australia. I do not propose to set out all relevant findings in this section of the report. The findings are contained in the Hearings volumes (refer Volumes 13 – 21) of this report. The following examples illustrate the nature and extent of the problem.

236 The ANZAC Day 1999 case study in Victoria is an illustration of non-compliance by a union with orders of the AIRC made under s127 of the *Workplace Relations Act 1996 (C'wth)*. In 1999 ANZAC Day fell on a Sunday. The CFMEU launched an industrial campaign for a substitute public holiday on Monday 26 April 1999. The Australian Industry Group (AIG) and the Master Builders Association of Victoria (MBAV) lodged an urgent s127 application in the AIRC for an order to prevent industrial action from being taken in support of the campaign.

237 The AIRC granted an order prohibiting the CFMEU from advising, inciting or encouraging its members to engage in industrial action in support of, or in connection with, demands that 26 April 1999 be treated as a public holiday. The order required employers who wanted normal work to be performed on 26 April 1999 to notify employees in writing no later than 3 pm on Thursday 22 April 1999. From the time an employee received such a notice, the employee was prohibited from engaging in any industrial action on 26 April 1999. The order came into effect at 12 noon on 19 April 1999 and was to remain in force until Wednesday 28 April 1999.

238 On Monday 26 April 1999 many CFMEU members were absent from their employment on a large proportion of commercial construction sites in Melbourne due to industrial action being taken in support of the CFMEU's industrial campaign.

239 Kane Constructions Pty Ltd (Kane Constructions) gave notice to its employees on the Western Hospital Acute Upgrade project, in accordance with the AIRC order, that they were required to attend work on 26 April 1999. On the days from 19 April 1999 to 23 April 1999 the CFMEU placed bans on crane usage on the project in support of the industrial campaign. On 26 April 1999 24 employees of Kane Constructions went on strike.

240 Industrial action instigated by the CFMEU continued after 26 April 1999 in support of a claim that those employees who went on strike on 26 April 1999 be paid. Eventually payments were made and industrial action ceased.

241 Payment of strike pay, acceptance of strike pay and claims for strike pay are prohibited by ss187AA and 187AB of the *Workplace Relations Act 1996 (C'wth)*.

242 Despite receiving advice regarding legal remedies that were available against the CFMEU, Kane Constructions' Construction Director made a pragmatic decision not to pursue those remedies. He concluded the remedies available to enforce the order of the AIRC were not a reasonable alternative to making the payment to its workers in respect of the period of industrial action. Employees on other sites who went on strike on 26 April 1999 were also paid strike pay by their employers.

243 Mr William Oliver, a senior official of the Construction, Forestry, Mining and Energy Union, Construction and General Division, Victorian Building Unions Divisional Branch, acknowledged that during the ANZAC Day dispute, the CFMEU determined that its members should disregard orders made by the AIRC and directions given by employers pursuant to those orders. He said that on other occasions the CFMEU had chosen to act consistently with orders of the AIRC. In the course of Mr Oliver's evidence, the following exchange occurred with Counsel Assisting:

> *What I am now asking you, and please be quite clear on it, on the application of what principle did you on that occasion elect to ignore an order of the Commission as distinct from other occasions in respect of which you have given evidence where the union has complied with section 127 orders? —- On that particular occasion, as I said before, that was a substituted holiday that our members had enjoyed for the last 20 or 30 years; when Jeff Kennett came in and took away the substitution of the Anzac Day - and when it comes up every five or seven years, it falls like that - our position was that it would still be a substituted day.*

> *You are obviously misunderstanding me, Mr Oliver? —- I understand that, but can't define it and answer that - the Commission handed down a ruling on that particular occasion. The Executive, other rank and file, our members, wanted to go ahead with taking a day off.*[153]

244 A recent example of non-compliance with orders of the AIRC was the subject of the Federal Court's decision in *Transfield Construction Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union.*[154] Transfield Construction Pty Ltd and Basin Oil Pty Ltd applied to the Federal Court for interim injunctions requiring three unions and certain union officials to cease industrial action. The unions concerned were the CEPU, the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (referred to as the Australian Manufacturing Workers Union) (AMWU) and the Australian Workers' Union (AWU). The industrial action, involving a picket line at a gas processing plant, was being taken by the unions because Upstream Petroleum Pty Ltd, the contractor responsible for operating the plant once construction was complete, proposed to engage its employees under AWAs rather than under an EBA. The unions had initiated a bargaining period for the negotiation of an EBA with Upstream Petroleum Pty Ltd. The effect of the industrial action, however, was to prevent employees of Transfield Construction Pty Ltd and Basin Oil Pty Ltd from working on the site.

245 The AIRC made orders on 11 October 2002 under s127 of the *Workplace Relations Act 1996 (C'wth)* that the industrial action should cease. The unions did not take any steps to ensure that the industrial action stopped. On 6 November 2002 Transfield Construction Pty Ltd made a further application under s127 and was granted further orders by the AIRC requiring the industrial action at the gas plant to cease. The orders were to operate on 7 November 2002 and to continue until 6 February 2003. The unions still did not take any steps to stop the industrial action.[155]

246 Transfield Construction Pty Ltd and Basin Oil Pty Ltd commenced proceedings in the Federal Court seeking injunctions under s127(6) and (7) and the imposition of penalties under s178 of the *Workplace Relations Act 1996 (C'wth)*. Before that application came on for hearing, the unions gave undertakings to the Court that they would not

> *by [their] officers, employees or agents, authorise, direct, incite, persuade or encourage any of [their] members to refuse or fail to attend for work or to perform work in a manner in which it is customarily performed at the [plant].*[156]

247 In the Federal Court Merkel J was satisfied to the requisite standard that the picket at the plant had been established, authorised and maintained by the union organisers as part of industrial action being undertaken by them jointly on behalf of the unions in an endeavour to cause Upstream Petroleum Pty Ltd to renounce the Australian Workplace Agreements it was proposing to enter into with its employees at the plant.[157] Merkel J thought it was likely that the picket had been established as a joint exercise by the unions, acting through their organisers, for the purpose of preventing, deterring or discouraging employees from attending and carrying out their work at the plant.[158] Merkel J was satisfied to the requisite standard that each of the orders made by the AIRC had been contravened, and granted injunctions against the unions on 20 November 2002.[159]

248 AIG referred the Commission to two recent cases which involved unions that operate in the building and construction industry:

- In 2000 an official of the AMWU and Mr Dean Mighell, the Secretary of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical Division, Victorian Branch were each fined $20 000 for contempt of the Federal Court arising out of non-compliance with orders requiring them to call off planned industrial action. Mighell's fine was paid within the 30 day period specified in the Court order, but the AMWU official's fine was not. The matter took 12 months to come back on before the Federal Court.[160]
- On 30 March 2001 the CFMEU was fined $200 000 for contempt of court, plus costs, for deliberately not complying with an order to stop industrial action at a BHP coal mine.[161]

### Conclusion

249 There is no point in having an umpire if the parties consider themselves at liberty to disregard the umpire's decision. Disregard of AIRC orders by participants in the building and construction industry, particularly orders under s127 of the *Workplace Relations Act 1996 (C'wth)* that industrial action stop or not occur, should not be tolerated.

250 Disruption to productive work occurs too often in the building and construction industry, at great cost to workers, contractors, clients and the economy. In too many cases, parties who go to the trouble and expense of obtaining orders from the AIRC under s127 with a view to bringing disruptive industrial action to an end do not enforce those orders when they are breached. Remedies are available in cases where orders under s127 are disregarded. What is lacking is a determination on the part of many participants in the industry to enforce orders of the AIRC by seeking injunctive relief under s127(6) and (7) or the imposition of penalties under s178.

251 While the creation of the new statutory norm that I later recommend will lessen reliance on a provision of the Building and Construction Industry Improvement Act modelled on s127, it is nevertheless appropriate that, as I have earlier recommended (see Recommendation 185), the ABCC should have to seek and enforce orders under that provision.

### Protected action

252 Broadly speaking, 'protected action' is industrial action taken for the purpose of supporting or advancing claims made in respect of a proposed certified agreement during a validly initiated bargaining period. To be protected, the action may only be taken by a union that is a negotiating party and its members, officers and employees, and employees and employers who are negotiating parties.[162]

253 Action will not be protected in a range of situations, namely:

- if it involves a secondary boycott; that is, if it is organised or engaged in with persons or unions who are not negotiating parties;[163]
- if the parties have not genuinely attempted to reach agreement or complied with relevant orders of the AIRC;[164]

- if it is engaged in for the purpose of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to a certified agreement which has not reached its nominal expiry date;[165]
- if it is engaged in by an employee during the period of operation of an AWA before its nominal expiry date in relation to the employment to which the AWA relates;[166]
- if an employer locks out an employee for the purpose of supporting or advancing claims in respect of the employee's employment during the period of operation of an AWA before its nominal expiry date;[167]
- if prior written notice of an intention to take protected action has not been given in accordance with s170MO. At least three working days' notice must be given, except where the action is taken in response to a lock-out by an employer or protected action by unions or employees, in which case action may commence immediately after written notice is given;[168] or
- if the AIRC has suspended or terminated a bargaining period on any of the grounds set out in s170MW(2)–(7).

254 'Protected action' carries a number of benefits, namely:

- orders made by the AIRC under s127 do not apply to protected action;[169]
- under s170MT(2) of the Act, no action lies under any written or unwritten law of a State or Territory in respect of protected action unless the action has involved or is likely to involve personal injury, wilful or reckless destruction of or damage to property, or the unlawful taking, keeping or use of property. Actions for defamation may also be brought in respect of matters occurring in the course of industrial action;[170] and
- employers must not dismiss or detrimentally alter the position of an employee for engaging or threatening to engage in protected action.[171]

  Employers may, however, stand down employees or refuse to pay employees for not performing work as directed. Employers may engage in protected action of their own.[172]

### Limitations on civil liability

255 Actions in tort may not be brought against unions in contemplation or furtherance of claims that are the subject of an industrial dispute (as defined in s4(1) of the Act) unless the AIRC has given a certificate in writing under s166A(6). The effect of s166A is really only to delay the bringing of an action for 72 hours. If an employer wishes to bring an action in tort of the kind contemplated by s166A, the employer gives written notice to the AIRC.[173] The Commission is then obliged to take immediate steps to try, by the exercise of its powers under the Act, to stop the conduct.[174] The Commission must then give a certificate in writing to the employer under s166A(6) if:

- it forms the opinion that it is not likely to be able to stop the conduct;
- it decides it would cause substantial injustice to the employer if the employer were prevented from bringing an action; or
- it has not stopped the conduct by the end of 72 hours after the notice was given.

256 The restriction on bringing actions in tort does not apply to conduct which results in personal injury or damage to or taking of property, demarcation disputes, claims relating to payments to employees in respect of periods of industrial action, or conduct in breach of a direction of the Commission or a State industrial authority.[175]

257 Section 170WC of the Act confers a similar, limited immunity from proceedings in respect of 'AWA industrial action', which is, broadly speaking, industrial action taken by employers or employees for the purpose of compelling or inducing a person to make an Australian Workplace Agreement.[176]

258 In *Patrick Stevedores (No 1) Pty Ltd v Maritime Union of Australia*,[177] Beach J held that s166A did not restrict a party from bringing proceedings seeking only injunctive relief, as such proceedings did not amount to an action in tort.[178]

# 5 Industrial action

## Problems with the current law

259 The current law in relation to industrial action in Australia is both complicated and confusing. Enforcement of the law is slow, uncertain and expensive. A number of points can be made by way of general observation.

260 First, most forms of industrial action will offend either the *Workplace Relations Act 1996 (C'wth)*, State industrial relations legislation or some other statutory prohibition, or constitute the commission of an industrial or other tort, a breach of contract or a criminal offence. It is undesirable that, in order to ascertain whether particular forms of industrial action are unlawful, it is necessary to have regard to this myriad of laws. The current law makes it difficult for employers, employees and unions to know their rights, and the resulting uncertainty fosters a culture in which respect for, and compliance with, the rule of law is low.

261 This problem is exacerbated by inconsistencies between State and Commonwealth industrial relations legislation which have the effect of making particular forms of industrial action unlawful in some places but not others, and the legality of particular forms of industrial action dependent on whether the action in question is governed by Commonwealth or State law.

262 Second, despite the fact that most forms of industrial action are unlawful, the principal Commonwealth Act, the *Workplace Relations Act 1996 (C'wth)*, does not set out clearly the circumstances in which industrial action is allowed or prohibited. The Act is silent as to most forms of industrial action. Section 127 gives the AIRC a discretion to make orders that industrial action stop or not occur, without clear guidance as to how that discretion ought to be exercised. Each of these matters leads to unnecessary and prolonged disputes. In particular, where a person has engaged in or proposes to engage in unlawful industrial action, it is difficult to see why the Commission should have any discretion in relation to the making of an order that the action stop or not occur.

263 Third, one consequence of the absence of an express prohibition on unlawful industrial action is that usually employers must apply to the AIRC for an order under s127 before they can apply to a court for injunctive relief to compel employees to cease such unlawful industrial action. That impediment may have a tendency to prolong some disputes. A simple express prohibition on unlawful industrial action would enable employers and employees to seek immediate injunctive relief from courts of competent jurisdiction in appropriate cases.

264 Fourth, s166A of the *Workplace Relations Act 1996 (C'wth)*, which restricts the right of employers to bring actions in tort against unions and their officers, impedes the ability of employers to act quickly to protect their rights in the face of unlawful industrial action. Section 166A has the effect of immunising unions against the consequences of a range of unlawful industrial action. I can see no compelling reason for maintaining that immunity.

265 For these reasons, and because loss and damage is caused so quickly by industrial action which takes place in the building and construction industry, there should be no restriction on the bringing of actions in tort of the kind currently set out in s166A of the *Workplace Relations Act 1996 (C'wth)* in relation to the building and construction industry – although if the simpler procedure recommended is adopted providing for recovery of loss, reliance on the industrial and economic torts will be unnecessary in most cases.

**Issue**

With the exception of protected action, most industrial action is unlawful as it offends either the *Workplace Relations Act 1996 (C'wth)*, State industrial relations legislation or some other statutory prohibition, or constitutes the commission of an industrial or other tort, a breach of contract or a criminal offence.

Despite this, the *Workplace Relations Act 1996 (C'wth)* does not, with clarity, specify which actions are unlawful. Further, there is no express prohibition on unlawful industrial action. These matters are addressed by reform proposals in this report. Unlawful industrial action causes immediate loss to others. Section 166A of the *Workplace Relations Act 1996 (C'wth)* restricts the bringing of actions immediately, and without the certificate of the Australian Industrial Relations Commission. This results in both unnecessary delay and cost. There is no adequate reason why those who cause loss by taking unlawful industrial action should not immediately be subject to action to recover that loss. Those who suffer immediate loss should be able immediately to seek its recovery.

**Recommendation 198**

The Building and Construction Industry Improvement Act provide that s166A of the *Workplace Relations Act 1996 (C'wth*) not apply to the building and construction industry.

266 There are also procedural problems involved in the pursuit of statutory remedies and in prosecuting actions at common law and in equity,

267 Although the AIRC is required to hear and determine applications for orders under s127 as quickly as practicable, many days often elapse between the making of an application and a decision by the AIRC as to whether or not to grant it. That experience obtains elsewhere in Australia under State industrial legislation.[179]

268 Even if the AIRC is satisfied that unlawful industrial action is taking place, it still has a discretion to decline to grant an order. If an order is made, and notwithstanding it is said by s127(5) to be binding, it is not enforceable against those responsible for the industrial action in the absence

of a Federal Court injunction. Further delays occur while the application is made to the Federal Court and is then heard and determined. In the meantime industrial action can, and usually does, continue causing economic loss to the victim. If the Court exercises its discretion and grants an injunction, the applicant is still left to bear the economic losses and the costs of the proceedings in both the AIRC and the Federal Court. It is hardly surprising, in these circumstances, that 'commercial decisions' are made to concede all or some of the demands made by those taking the unlawful industrial action, particularly where, as was disclosed in the evidence before me in relation to a major project, liquidated damages for delay in achieving completion may amount to $250 000 a day.

269 Similar problems attend attempts to pursue actions in tort. Delay occurs while an application is made to the AIRC under s166A of the *Workplace Relations Act 1996 (C'wth).* Proceedings must then be commenced in a State Court with the necessary jurisdiction. Relief may be granted to the applicant pending a trial but not before there has been a hearing and determination of an application for an interlocutory injunction. Until the injunction is granted the industrial action continues with impunity. Pre-trial preparation is then required before a hearing can take place in which the applicant seeks to establish that the defendant has committed one or more of the industrial torts. The trial would usually not take place for at least 12 months after the application was first made to the Court. It is rare that such actions are pursued to judgment. Frequently, by the time of hearing, the building works are complete, and parties are focussing on a new project.

270 Where damages are being sought there is little point in prosecuting a case unless there is a realistic prospect of establishing liability on the part of a union or a company. It is unlikely that individual officials or employees of such corporate bodies who may be involved in the industrial action would have the resources to meet any award of damages. Attempts are, therefore, regularly made by unions to distance themselves from the actions of officials or members. This also occurs when statutory remedies and injunctions are sought against unions as a result of unlawful industrial action being taken by members, or instigated or encouraged by officials.

271 A further complication arises when persons are simultaneously officials, employees and members of both a federally registered organisation and a State registered union. They may not turn their minds to the capacity in which they perform a particular act but, when liability for the consequences of the act becomes an issue, it may be convenient to claim that it was done in a capacity other than the one which would render liable the particular corporate defendant.

272 Following hearings in which evidence was given that union members and officials had engaged in unlawful industrial action, the Commission received many submissions by solicitors acting on behalf of unions to the effect that the unions could not be held legally responsible for the acts of the officials and members.

273 Applicants seeking redress for unlawful industrial action are regularly confronted with such arguments which lead to a justifiable apprehension that a considerable evidentiary burden will fall upon them if a proceeding goes to hearing or trial and the union concerned denies any responsibility for the unlawful acts or omissions, usually of its officials, which have caused economic loss. This is a significant problem and one I address further in some detail in Chapter 9, *Cancellation of registration*, of this volume.

274 A similar picture emerges from the evidence relating to proceedings in State industrial bodies. There is usually delay between the notification by a party suffering the effects of unlawful industrial action and the matter being called on for hearing. Further delay is often experienced during the conduct of the hearings. Often State Commissions express a preference for conciliation or the making of recommendations. They are reluctant to make coercive orders even when it is plain that unlawful industrial action has occurred and is continuing. If recommendations are made, they are often ignored. If orders are finally made, they, too, are frequently ignored. The union or union officials involved in the unlawful industrial action suffer no penalty or cost consequences as a result of their unlawful action. Good examples of these systemic shortcomings are to be found in the Queensland case studies on the Sun Metals, Nambour Hospital and Tarong North Power Station projects.

275 A clear message needs to be conveyed to all participants in the building and construction industry that unlawful industrial action which disrupts the performance of work is not an acceptable way of resolving disputes on building and construction sites, particularly in circumstances where certified agreements or awards are in place with dispute resolution mechanisms which prescribe processes for resolving disputes without recourse to such action.

# 6 A new statutory norm

276 In view of the Commonwealth's limited constitutional power, it is not intended that the reforms I now recommend would entirely codify the law in relation to industrial action or remove the rights of participants in the industry to bring common law actions or actions under other legislation.

277 Rather, the intention is to create a right to take industrial action in the building and construction industry in certain justified circumstances, but where those justifications do not apply, to create a simple prohibition on unlawful industrial action which can be readily understood by all participants, and enforcement mechanisms which can be engaged quickly and cheaply.

278 In effect, the proposed reform (which I call the 'new statutory norm') creates both a right to take industrial action and a civil cause of action based on engaging in unlawful industrial action, reinforced by a civil penalty in serious cases such as where persons have failed to abide by their agreements. There is also a simplified provision for compensation.

279 The proposed reform is not intended to and would not effect a radical change to the existing law in relation to what industrial action is unlawful. As I have already explained, most forms of industrial action are already unlawful by reason of Commonwealth or State industrial relations legislation, other legislation such as the *Trade Practices Act 1974 (C'wth)*, the law of torts, contract law and the general criminal law.

280 The object of the Part of the Building and Construction Industry Improvement Act in which the statutory norm will appear should be that 'disputes are resolved in accordance with law and without recourse to industrial action'.

281 I envisage that the statutory norm would be drafted along the following lines:

(1) This section applies only to industrial action in the building and construction industry that:

(a) occurs in a Territory;

(b) affects the Commonwealth or a Commonwealth authority;

(c) affects or is taken by an organisation registered under the Workplace Relations Act 1996 (C'wth); or

(d) affects or is taken by a constitutional corporation.

*(2) A person may engage in industrial action if:*

*(a) the action is protected action the [Building and Construction Industry Improvement Act will contain a definition of protected action which incorporates the corresponding definitions in the Workplace Relations Act 1996 (C'wth) as varied to implement Recommendations 10 and 11 in Volume 5, Reform – Establishing Employment Conditions, of this report];*

*(b) if the action is or is to be taken by or on behalf of employees, the action is authorised or agreed to in writing by the employer of the employees prior to the action being taken; or*

*(c) if the action is or is to be taken by an employer, the action is authorised or agreed to in writing by the employees of the employer prior to the action being taken;*

*(d) the action is taken by an employee based on a reasonable concern by the employee (proof of which shall lie on the employee) about an imminent risk to his or her health or safety, provided that the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe for the employee to perform.*

*(3) Other than in the circumstances set out in subsection (2), a person must not engage in industrial action.*

*(4) For the purposes of this section:*

*'Conduct that affects a constitutional corporation' means conduct which occurs in connection with the constitutional corporation's participation in the building and construction industry as a project manager, contractor or subcontractor, owner of a building or building or construction site, or as a party to a building or construction contract.*

***'Commonwealth authority'** means:*

*(a) a body corporate established for a public purpose by or under a law of the Commonwealth or the Australian Capital Territory; or*

*(b) a body corporate:*

*(i) incorporated under the law of the Commonwealth or a State or Territory; and*

*(ii) in which the Commonwealth has a controlling interest;*

*other than a prescribed body.*

***'Constitutional corporation'** means:*

*(a) a foreign corporation within the meaning of paragraph 51(xx) of the Constitution; or*

(b) *a body corporate that is, for the purposes of paragraph 51(xx) of the Constitution, a financial corporation formed within the limits of the Commonwealth; or*

(c) *a body corporate that is, for the purposes of paragraph 51(xx) of the Constitution, a trading corporation formed within the limits of the Commonwealth; or*

(d) *a body corporate that is incorporated in a Territory.*

***'Industrial action'*** *means:*

(a) *the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work;*

(b) *a ban, limitation or restriction on the performance of work, or acceptance of or offering for work, in accordance with the terms and conditions prescribed by an industrial instrument or by an order of an industrial body; or*

(c) *a failure or refusal by persons to attend to work or a failure or refusal to perform any work at all by persons who attend for work.*

282 This provision essentially codifies the present law with two exceptions.

283 First, the new provision will not excuse protected industrial action taken under State law. Removing the possibility of protected action operating under dual systems is an innovation. In my opinion the innovation is a recognition of the national character of the industry, the national problem posed by the extent of unlawful conduct exposed by this Commission, and a national solution which is proportional and appropriate.

284 Second, the new provision as drafted assumes acceptance of the recommendation I have made (see Recommendation 37 in Chapter 2, Ambiguities in the *Workplace Relations Act 1996 (C'wth)* contained in Volume 5 *Reform – Establishing Employment* Conditions, of this report) that s170MN of the *Workplace Relations Act 1996 (C'wth)* be amended to overcome the consequences of the decision of Kenny J in *Emwest Products Pty Ltd v AMWU*[180] in the building and construction industry. The proposed amendment of s170MN is essential to the effectiveness of the operation of the new statutory norm.

### Issue

There is a lack of clarity regarding what constitutes unlawful industrial action due to the complexity of statutes and the common law. Both simplification and clarity are desirable so that all participants may know with certainty their legal entitlements and obligations. To produce this clarity and certainty there should be enacted for the building and construction industry a new statutory norm which simply states what industrial action is permitted, and what is not. This will assist the re-establishment of the rule of law.

### Recommendation 199

The Building and Construction Industry Improvement Act contain a new statutory norm drafted along the following lines:

(1) This section applies only to industrial action in the building and construction industry that:

  (a) occurs in a Territory;

  (b) affects the Commonwealth or a Commonwealth authority;

  (c) affects or is taken by an organisation registered under the *Workplace Relations Act 1996 (C'wth)*; or

  (d) affects or is taken by a constitutional corporation.

(2) A person may engage in industrial action if:

  (a) the action is protected action [the Building and Construction Industry Improvement Act will contain a definition of protected action which incorporates the corresponding definition in the *Workplace Relations Act 1996 (C'wth)* as varied to implement recommendations 10 and 11];

  (b) if the action is or is to be taken by or on behalf of employees, the action is authorised or agreed to in writing by the employer of the employees prior to the action being taken;

  (c) if the action is or is to be taken by an employer, the action is authorised or agreed to in writing by the employees of the employer prior to the action being taken; or

  (d) the action is taken by an employee based on a reasonable concern by the employee (proof of which shall lie on the employee) about an imminent risk to his or her health or safety, provided that the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe for the employee to perform.

(3) Other than in the circumstances set out in subsection (2), a person must not engage in industrial action.

(4) For the purposes of this section:

'Conduct that affects a constitutional corporation' means conduct which occurs in connection with the constitutional corporation's participation in the building and construction industry as a project manager, contractor or subcontractor, owner of a building or building or construction site, or as a party to a building or construction contract.

'Commonwealth authority' means:

(a) a body corporate established for a public purpose by or under a law of the Commonwealth or the Australian Capital Territory; or

(b) a body corporate:

(i) incorporated under the law of the Commonwealth or a State or Territory; and

(ii) in which the Commonwealth has a controlling interest;

other than a prescribed body.

'Constitutional corporation' means:

(a) a foreign corporation within the meaning of paragraph 51(xx) of the Constitution; or

(b) a body corporate that is, for the purposes of paragraph 51(xx) of the Constitution, a financial corporation formed within the limits of the Commonwealth; or

(c) a body corporate that is, for the purposes of paragraph 51(xx) of the Constitution, a trading corporation formed within the limits of the Commonwealth; or

(d) a body corporate that is incorporated in a Territory.

'Industrial action' means:

(a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of work, or acceptance of or offering for work, in accordance with the terms and conditions prescribed by an industrial instrument or by an order of an industrial body; or

(c) a failure or refusal by persons to attend to work or a failure or refusal to perform any work at all by persons who attend for work.

## Presumption in relation to industrial action for OH&S reasons

285 Section 298V of the *Workplace Relations Act 1996 (C'wth)* provides a rebuttable presumption in relation to allegations of breach of Part XA Division 6 of that Act. It states:

> *298V If:*
>
> *(a) in an application under this Division relating to a person's or an industrial association's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason or with a particular intent; and*
>
> *(b) for the person to carry out the conduct for that reason or with that intent would constitute a contravention of this Part;*
>
> *it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person or industrial association proves otherwise.*

286 There is considerable evidence set out elsewhere in this report of misuse of occupational health and safety. I have elsewhere made recommendations to identify, isolate and resolve true occupational health and safety situations (see Recommendations 17 - 35 contained in Volume 6, *Reform – Occupational Health and Safety*).

287 Given the prevalence of the misuse of occupational health and safety issues as an excuse to take industrial action for which there is no justification in law, and given that the worker concerned subjectively knows best whether there was an imminent risk to their health and safety and whether they unreasonably failed to comply with an employer's direction to perform other work which was safe, it is appropriate that the respondent individual or union should bear the onus of proving these matters.

288 Accordingly the Building and Construction Industry Improvement Act should provide that:

> *If, in an application [relating to the statutory norm in Recommendation 199] it is alleged that industrial action was taken contrary to [paragraph 3 of the statutory norm] and the respondent seeks to assert that the conduct falls within the terms of [paragraph 2(d)], then it is presumed, in proceedings [relating to the statutory norm] that the conduct does not fall within the terms of [paragraph 2(d)], unless the respondent proves otherwise.*

### Issue

Misuse of non-existent occupational health and safety issues for industrial purposes is rife in the building and construction industry. Genuine occupational health and safety hazards are also rife. When industrial action is taken allegedly because of occupational health and safety concerns by workers or unions, the onus of establishing the legitimacy of the concerns should be on those taking that action on that basis. Individual workers know when occupational health and safety issues are, and are not, justified. The onus should therefore be on workers to establish that occupational health and safety concerns justified industrial action, and that they did not unreasonably refuse their employer's direction to perform other safe and available work. Section 298V of the *Workplace Relations Act 1996 (C'wth)* provides a comparable model for a provision capable of achieving this outcome.

### Recommendation 200

The Building and Construction Industry Improvement Act contain a provision to the following effect:

If, in an application [relating to the statutory norm in Recommendation 199] it is alleged that industrial action was taken contrary to [paragraph 3 of the statutory norm] and the respondent seeks to assert that the conduct falls within the terms of [paragraph 2(d)], then it is presumed, in proceedings [relating to the statutory norm] that the conduct does not fall within the terms of [paragraph 2(d)] unless the respondent proves otherwise.

# 7 Compensation for unlawful industrial action causing loss

## Jurisdiction

289 While the amount of loss caused by unlawful industrial action is often very large, this will not always be so, particularly if an injunction is promptly obtained to prevent the unlawful conduct, and the injunction is obeyed. For very large commercial disputes where a quick final determination of the dispute is vital, an applicant plaintiff should have the choice of commencing proceedings in the Federal Court, or, for example, the commercial list or division of a State Supreme Court.

290 For smaller and, perhaps, less urgent matters, the Federal Magistrates Court or the District, County or Local Courts may be appropriate. As with s86 of the *Trade Practices Act 1974 (C'wth)* there is no impediment to investing the State Courts with Federal jurisdiction under the proposed new statute within the limits of their jurisdictions, whether those limits are as to locality, subject-matter or otherwise.

**Issue**

Where unlawful industrial action causes loss parties should have a choice of courts in which to bring action to prevent continuing loss, or to seek recovery of loss suffered. The court selected would depend upon the size and complexity of the matter and the location of parties, witnesses and documents.

**Recommendation 201**

Jurisdiction for actions brought in relation to the new statutory norm be conferred upon:

(a) the Federal Court;

(b) the Federal Magistrates Court;

(c) the courts of the States within the limits of their several jurisdictions, whether those limits are as to locality, subject-matter or otherwise; and

(d) subject to the Constitution, the several courts of the Territories.

## Injunctions

291 I have earlier recommended that the ABCC be given powers analogous to the ACCC to seek injunctive relief.

292 An essential element of ensuring the effectiveness of the new statutory norm is that there should be an injunction provision, based on s80 of the *Trade Practices Act 1974 (C'wth)*, that would empower the Federal Court or any other court of competent jurisdiction to grant interim, interlocutory and final injunctions to restrain threatened or ongoing unlawful industrial action.

**Issue**

Loss caused by unlawful industrial action may be diminished by the grant of an injunction to cease such action. Injunctions are an effective remedy which require compliance with the law. Both the Australian Building and Construction Commission, and any party suffering loss, should be entitled to seek an injunction in an appropriate court.

**Recommendation 202**

The Building and Construction Industry Improvement Act contain an injunction provision, modelled on s80 of the *Trade Practices Act 1974 (C'wth)*, that would empower the Federal Court or any other court of competent jurisdiction to grant interim, interlocutory and final injunctions to restrain threatened or ongoing unlawful industrial action at the suit of the Australian Building and Construction Commission or any person suffering, or likely to suffer loss, as a result of unlawful industrial action.

## Civil penalties

293 I have already indicated there should be significant monetary penalties for breaching the Building and Construction Industry Improvement Act and engaging in unlawful industrial conduct. Penalty proceedings will be able to be brought by a person who suffers loss or the ABCC.

294 The new statute should provide for a maximum civil penalty of $100 000 for a body corporate or $20 000 for other persons who engage in industrial action contrary to the new statutory norm. The adequacy of these penalties should be reviewed in three years. The penalties should be paid into the Consolidated Revenue Fund.

### Issue

The remedy for breach of the statutory norm which defines unlawful industrial action should be the imposition of a pecuniary penalty in order to punish those who breach it and deter others. Penalty provisions are common in the *Workplace Relations Act 1996 (C'wth)*. Present penalties in that Act have not deterred the widespread contravention of the Act in the building and construction industry. The amount of the penalties should be increased. Penalties should be paid into the Consolidated Revenue Fund.

### Recommendation 203

Proceedings to recover a pecuniary penalty from persons who breach the new statutory norm by engaging in unlawful industrial action be able to be brought by a person who suffers loss or by the Australian Building and Construction Commission.

### Recommendation 204

The maximum penalty for each breach be $100 000 for a body corporate and $20 000 for other persons and the penalties be paid into the Consolidated Revenue Fund.

## Attribution of liability to unions

295 Most industrial action considered in the hearings was organised by unions or union officials. Most frequently it was organised by union organisers, but on other occasions by more senior officials or job delegates. It was extremely rare that industrial action was the result of spontaneous action by employees on a site. It was rare that it was not associated with the activities of a union official or delegate, and predominantly coincided with a union official or delegate visiting a site.

296 The coincidence of visits to sites of union organisers, and industrial activity, was remarkable. It may be that on a few occasions, industrial activity was not organised by union organisers or officials, but it was very rarely the case that it occurred without their presence or concurrence, and usually it was with their instigation or encouragement.

297 Whatever may be the position in other industries, in the building and construction industry the union domination and authority is such that if a union organiser or more senior official

'suggests' or 'encourages' or simply 'raises for discussion' a motion for industrial action, it will occur. The reality is that without the involvement of union officials, industrial action would be rare because most employees wish to work and earn their income.

298 The oft repeated mantra that union officials do not decide anything – that all is decided by men on the job – is in reality a nonsense. Three examples will suffice to make this point.

### Tom's Crane and Plant Hire Pty Ltd

299 In Perth on 1 March 2002, Mr Joe McDonald, Branch Assistant Secretary of the Construction, Forestry, Mining and Energy Union, Construction and General Division, Western Australia Divisional Branch, was concerned that a Mr Iti employed by a company associated with Tom's Crane and Plant Hire Pty Ltd was being 'harassed' by an officer of the Royal Commission who wished to interview him. Accordingly, on 2 March 2002 McDonald went to the site at 240 St George's Terrace, where Tom's Crane and Plant Hire Pty Ltd intended to service one of its cranes. McDonald called a meeting 'inviting' the workforce not to have any employees of Tom's Crane and Plant Hire Pty Ltd on the job that day. Tom's Crane and Plant Hire Pty Ltd was not permitted to carry out the service.

300 McDonald then went to a different site, the Panorama site, in Adelaide Terrace, being the site of a different contractor. Tom's Crane and Plant Hire Pty Ltd was supplying a 170 tonne crane for that project. Prior to arriving on site, McDonald had contacted Mr David Simpson, the Construction, Forestry, Mining and Energy Union delegate on the Panorama site and told him he wanted a meeting of the workers of Tom's Crane and Plant Hire Pty Ltd on that site. McDonald told Simpson to stop that crane operating. The crane did cease operating after McDonald addressed the workers on site. McDonald told the Panorama site management that they were free to bring in another crane company to do the necessary lift. Simpson told management on the Panorama site that the CFMEU was having 'some kind of a blue with Tom's Cranes'.

301 McDonald then went to a third site, the Q-Con site. Tom's Crane and Plant Hire Pty Ltd were there to remove a crane and gantry. McDonald said 'I'm stopping the cranes'. He told Mr Joseph Mulry, an employee of Tom's Crane and Plant Hire Pty Ltd, that 'there was a dispute with Tom's and an ex-employee of PPP Precast Systems (WA) Pty Ltd (the related company) and that was it…they were going home'.

302 It is obvious that none of these stoppages would have occurred except for the actions of McDonald.

### Nambour Hospital Case Study

303 On 31 May 2001 the 'CFMEU Qld Construction Workers Division' issued a press release stating there would be a rally that day against the employment practices of J M Kelly Project Builders Pty Ltd. Mr Peter Close, a Construction, Forestry, Mining and Energy Union organiser, told the Multiplex Constructions Pty Ltd Manager at the Republican site that 'he was going to meet the men on the Republican site and then march on the JMK office in the Valley due to problems on the JMK project at Nambour'. Such a meeting took place and 40 workers left the site.

304 The same day, on a different Multiplex Constructions Pty Ltd site – River Place – Close and another organiser, Mr Jack Bekavak, held a meeting with workers to 'gain their support for the dispute against J M Kelly at the Nambour Hospital Project'. After a meeting of an hour the workers resolved to leave the site. They did not return that day. On the same day, at the University of New England site there was a meeting resulting in a walk-out of the entire work force. On the Multiplex Constructions Pty Ltd site at Royal Brisbane Hospital, the Construction, Forestry, Mining and Energy Union organiser, Mr Doug Neiland, told the Multiplex Constructions Pty Ltd Project Manager that he was not going to stop the site but would take two delegates off the site to protest.

305 It is obvious that these stoppages were organised by union officials.

### National Gallery of Victoria

306 On 10 August 2000 Mr Martin Kingham, Mr Bill Oliver, Mr John Cummins and Mr John McPartland, among other union officials and delegates, in company with 300–400 workers, invaded the NGV site. The workers had come from various sites around Melbourne protesting against the award of work to Able Demolitions and Excavations Pty Ltd. They had obviously been organised by the CFMEU to do so. Kingham subsequently addressed the crowd advising that Able had not agreed to the union's demands to suspend the work on site. He said, addressing the crowd:

> *We have stopped the work and the work is stopped. We have had a quick talk among the officials and what we are going to ask you to do…we want to keep all of the shop stewards from the three jobs that the company has today. We want them to work a roster, we're going to keep twenty blokes here all the time for the rest of the day today, to keep a watching brief on the job. They'll stay here on the site. If any workers attempt to start, or if they get hassled by security guards or anybody else, they will only have to call you up on the job, so you can all steam back and occupy the site again with bulk numbers.*
>
> *We're going to roster it out, so we're not all losing money, just on your job over this issue. Everyone wants a share. So we're actually going to ask at the end of this meeting, I want you to sort of break up into three sites, with your shop stewards. Stewards will pick a few heads to stay for today. It will be your turn today. The rest of you, we want for you to go back to your site. After that get back to work on those jobs. Keep close to the phone obviously. If anything happens and we need you back here, the boys that stayed behind will ring you, we'll get you straight down here. Tomorrow, we'll do the same thing but we'll call youse up but we'll also be bringing other jobs from the other side of the river from the city down to beef it up if we need to.*
>
> *At the moment, the job's fucked. It's stopped and we reckon twenty blokes will be able to look after it, so again, thanks a lot for coming down here this morning. Speak to your shop steward and the steward will pick a few of you to stay with him for today…*

307 It is obvious that not only was the invasion organised by union officials but so was the roster of union members to continue the occupation.

308 I do not doubt that without the organisation by the officials, the stoppages would not have occurred.

## Attribution of liability – discussion

309 However, when any question of liability arises, the response of the unions is that the union has no responsibility for such actions. I repeat what I wrote in Volume 2, *'Conduct of the Commission – Principles and Procedures*' of this report. After discussing the existing state of the law, I there said:

> *In light of the above, it should be apparent that the law concerning the attribution to unions of the acts of their organisers and employees is uncertain, and in need of substantial reform. If the CFMEU's argument that it is not responsible for the actions of its Divisions, Branches and Divisional Branches or their officers is correct, then that creates obvious practical difficulties in ensuring that those who are, in truth, responsible for particular actions can be effectively visited with liability. In this regard it should be noted that, because Branches, Divisions and Divisional Branches have no legal existence, and therefore cannot have findings made against them, one consequence of the CFMEU's argument is that no part of the union could be made liable for any damage done by officers or employees of the CFMEU.*
>
> *If there is any doubt about the need for reform, that doubt should be dispelled by the CFMEU's submission that it could not be held responsible for a decision to take nationwide industrial action in connection with a dispute between the CFMEU and Thiess in relation to the Laverack Barracks in Queensland and the Kwinana Freeway in Western Australia that cost Thiess over $300 000.*
>
> *The decision to take the nation-wide industrial action against Thiess had been made during a telephone conference that had been arranged by Mr John Sutton, the National Secretary of the Construction and General Division of the CFMEU. The participants in the telephone conference were Mr Alex Bukarica, who at the time was the Assistant National Secretary of the Construction and General Division of the CFMEU, and the Secretaries of the Divisional Branches of the Construction and General Division in each State and Territory (including Mr Andrew Ferguson, Mr Martin Kingham, Mr Kevin Reynolds and Mr Wallace Trohear).*
>
> *Notwithstanding that the telephone hook-up involved almost all of the directing minds of the Construction and General Division of the CFMEU throughout Australia, the CFMEU submitted that it was not responsible for the nationwide industrial action that followed. It made that submission because '[t]he telephone hook-up was only between State Secretaries of the CFMEU and Bukarica. It was not a meeting of the CFMEU.' It submitted that '[t]he CFMEU did not coordinate any industrial action. The CFMEU did not coordinate anything.' These submissions were apparently based on the assertion that the CFMEU could not be responsible for the nation-wide industrial action unless it was implemented as a result of a decision of the National Executive of the CFMEU.*
>
> *Whatever its merits on the current state of the law, that submission is plainly absurd. The fact that it could be seriously submitted that the CFMEU was not responsible for*

*decisions taken by a group comprising the most senior representative of the Construction and General Division of the CFMEU in each State and Territory and the second most senior official in the Construction and General Division nationally, powerfully demonstrates the need for reform.*

310 Plainly, in such circumstances it is the union, through its officials, which causes the loss complained of. The fact that the employees may endorse or approve a proposal or recommendation put by an official should not relieve the union of responsibility.

311 It is to be remembered that the unions which, through their officials or delegates, organise such unlawful industrial conduct and which cause loss to others, frequently small business organisations, are themselves significant entities with very substantial organisational structures and assets. If, by unlawful industrial action, a union causes another organisation loss, there is no sensible basis upon which it should not be responsible for that loss.

312 It cannot be said in the modern day of e-mail, mobile telephone and facsimile machine that the union is not or cannot be made aware of the action. The rationalisation for the organisation of labour is to enable it to obtain collective benefits. The concomitant is collective responsibility for the unlawful acts of members acting in concert, or for unlawful acts arising in consequence of the acts of, or with the concurrence of, union officials or delegates. It should not be necessary for the victim of those acts to run legal risks related to attribution of responsibility when, in the real world, the union and its officials or its members acting as such, act in concert and unlawfully cause loss.

313 Attribution of liability to a union for the conduct of its members, officials and employees is not new. At common law, one way in which such attribution occurs is through application of the 'directing mind principle' expounded in *Tesco Supermarkets Limited v Natrass.*[182] The principles there espoused impose direct liability for the conduct of senior officials. Acts of individuals are in particular circumstances treated as if they were the acts of the body corporate.

314 In addition to the *Tesco* principles, attribution of liability may occur as a result of the law of agency, by which acts of individuals in particular circumstances are treated as if they were the acts of the body corporate.

315 Nonetheless, the conflicting authority addressed in the volume *Conduct of the Commission Principles and Procedures* means the law is not as clear as it ought to be in respect of attribution for loss in the building and construction industry.

316 Attribution of direct and vicarious liability to unions has, as a result of conflicting authority, proved to be unnecessarily difficult. This is particularly so where organisations are divided into a number of autonomous branches or divisions. Given the present state of the law it is preferable, in my view, for greater certainty to be achieved by the adoption of a generally applicable statutory formulation. The formulation should be as broad as Commonwealth legislative capacity permits, while at the same time ensuring that unions are not held accountable for the conduct of rogue members or officials whose conduct the unions have made reasonable but unsuccessful efforts to control.

317 The *Workplace Relations Act 1996 (C'wth)* already contains some attribution provisions.[183] The broadest is that contained in Part XA, which seeks to ensure that unions and employer organisations comply with the freedom of association provisions of that Act. It is a provision which has commended itself to the Commonwealth Parliament and has been held to be constitutionally valid. I consider that it should be adapted to form part of the separate Act which, I have recommended, should regulate industrial relations in the building and construction industry. The adapted provision should have application to all forms of conduct proscribed by the Act.

318 Part XA of the *Workplace Relations Act 1996 (C'wth)* is designed to ensure that employers, employees and independent contractors enjoy the freedom to choose whether or not to join an industrial association and that, when exercising their choice, they are not subject to discrimination or victimisation.[184] The term 'independent contractor' is here not limited to natural persons[185] and may include a corporation performing work under a contract for services. Part XA also protects employers, employees and independent contractors from discrimination or victimisation in respect of participation, or the failure to participate, in industrial action,[186] and also protects those persons where engaged in proceedings under the *Workplace Relations Act 1996 (C'wth)*, any other activity under the legislation or any conduct that pertains to an award.[187]

319 Subsections 298B(2) and (3) of the *Workplace Relations Act 1996 (C'wth)* have a significant role in giving effect to these purposes. The subsections are in these terms:

> *s298B*
>
> *(1) …**"officer"** in relation to an industrial organisation, includes:*
>
> *(a) a delegate or representative of the association; and*
>
> *(b) an employee of the association.*
>
> *(2) For the purpose of this Part, action done by one of the following bodies or persons is taken to have been done by an industrial association:*
>
> *(a) the committee of management of the industrial association;*
>
> *(b) an officer or agent of the industrial association acting in that capacity;*
>
> *(c) a member or group of members of the industrial association acting under the rules of the association;*
>
> *(d) a member of the industrial association, who performs the function of dealing with an employer on behalf of the member and other members of the association, acting in that capacity.*
>
> *(3) Paragraphs 2(c) and (d) do not apply if:*
>
> *(a) a committee of management of the industrial association; or*
>
> *(b) a person authorised by the committee; or*
>
> *(c) an officer of the industrial association;*
>
> *has taken reasonable steps to prevent the action.*

320 The subsections refer to the term 'industrial association'. The term includes any union or employer association registered or recognised under an industrial law, whether the *Workplace Relations Act 1996 (C'wth)* or any other Commonwealth or State law.[188] It also includes any association which has as its principal purpose the protection and promotion of its members' interests in matters concerning employment.[189] It thus includes incorporated and unincorporated associations, whether or not registered or recognised under a relevant industrial law.[190] An industrial association may be an association of employers, employees or independent contractors or a branch of any such association.[191] The definition of 'industrial association' is thus drawn very widely to include Federal and State associations, and the terms 'industrial law', 'industrial body' and 'industrial instrument' are accorded correspondingly wide meanings.[192]

321 The effect of subsection 298B(2) is to treat the actions of the bodies or persons specified to be actions of the relevant industrial association. There are exceptions. Paragraphs 298B(2)(c) and (d) do not apply where a committee of management of the industrial association, a person authorised by the committee or an officer of the industrial association has taken 'reasonable steps' to prevent the action.[193] In each such case the exculpatory provision attaches only where the 'reasonable steps' are taken by members of the industrial association. The legislation clearly intends that, where industrial associations contemplate unlawful action against employers, employees, independent contractors or members,[194] key committees and persons within the industrial association should take all reasonable steps to prevent it, even though it be authorised by the rules of the industrial association.[195] In *Rowe v Transport Workers' Union of Australia*[196] Cooper J pointed out that what constitutes 'reasonable steps' will depend on the circumstances of the case, but that, in the absence of some formal system within the association to ensure compliance, mere lack of knowledge will not be enough to satisfy the exculpatory provision.[197]

322 The statutory object of subsections 298B(2) and (3) is to prevent employees, agents, delegates or representatives of an industrial association from doing what the industrial association is prohibited from doing.[198] It is achieved in two ways. First, it makes the conduct of the person or body specified the conduct of the industrial association in circumstances where the industrial association may be vicariously liable for the conduct. Second, it makes that conduct the conduct of the industrial association where the association is in a position to prevent or attempt to prevent the conduct occurring by taking the reasonable steps contemplated by subsection 298B(3), and it fails to do so.[199] Subsections 298B(2) and (3) thus constitute part of the means of controlling the conduct and regulating the affairs of registered organisations, and of controlling the conduct of industrial associations in respect of the affairs of registered organisations and constitutional corporations.[200] Further analysis of s298B appears in Appendix C.

323 It is evident from this review of the legislation and case law that a deeming provision based on s298B of the *Workplace Relations Act 1996 (C'wth)* would provide the means of ensuring that industrial associations are not generally able to avoid taking responsibility for the acts of their officials, delegates and members. A provision along these lines, if included in the industry-specific Act, would overcome the uncertainty which presently attends the legal attribution of responsibility to organisations. Such a provision will be essential if unions are to be held accountable for the economic consequences of unlawful industrial action taken by their members.

### Issue

In the building and construction industry, industrial action rarely occurs without the presence and encouragement of union officials and delegates. They should be presumed to act for their union as in reality they do. Yet when unions are sued or prosecuted in respect of actions of their officials or delegates, they frequently seek to deny responsibility based on technicalities, including the provisions of their rules. The unions take credit for the benefits of collective action: they should be held liable for losses caused by unlawful industrial action. The Building and Construction Industry Improvement Act should reflect this reality and thus make unions presumptively responsible for the actions of their officials and employees.

### Recommendation 205

The Building and Construction Industry Improvement Act contain, for all relevant purposes, a deeming provision modelled on s298B of the *Workplace Relations Act 1996 (C'wth).*

## Accessories

324 In addition to the provision just proposed, the new statute should contain the accessorial provisions based on s75B of the *Trade Practices Act 1974 (C'wth)* so that any person involved in a contravention of the statutory norm is plainly amenable to relief.

325 The new statute should therefore provide that:

> *A reference to a person involved in a contravention of [the statutory norm] shall be read as a reference to a person who:*
>
> *(a) has aided, abetted, counselled or procured the contravention;*
>
> *(b) has induced, whether by threats or promises or otherwise, the contravention;*
>
> *(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or*
>
> *(d) has conspired with others to effect the contravention.*

326 If such a provision is introduced it will, together with the provision modelled on s298B, render individual officials, members and agents of unions and employer associations liable to penalties and liable to pay awards of damages to those who suffer from unlawful industrial action in which they are involved.

327 While I consider that, subject to certain exceptions, unions should be held responsible for the conduct of individuals in such circumstances, and while it is unlikely that most individuals would be in a position to pay damages, the proper operation of the statutory scheme which I am proposing requires that scope exists for orders to be made against individuals.

328 In a particular case, an applicant may decide, variously, not to take action against, or not to proceed to judgment against, or not to seek to enforce judgment against an impecunious individual who has been involved in contravention of the statutory norm. This does not mean that all persons involved in contravention ought not be amenable to the court's jurisdiction both for interlocutory and final relief. Depending on the circumstances (for example a violent picket), an injunction may not be effective unless it is directed to all the individuals who are engaged in unlawful industrial action.

### Issue

Where a registered organisation, or its officials, cause or are accessories involved in causing loss to others by unlawful industrial action, there is no adequate reason why the union and the officials should not be held responsible. Section 75B of the *Trade Practices Act 1974 (C'wth)* contains a model of suitable accessorial provisions.

### Recommendation 206

The Building and Construction Industry Improvement Act contain a provision to the following effect:

A reference to a person involved in a contravention of [the statutory norm which defines unlawful industrial action] shall be read as a reference to a person who:

(a) has aided, abetted, counselled or procured the contravention;

(b) has induced, whether by threats or promises or otherwise, the contravention;

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

# 8 Damages

329 A provision based on ss82 and 87(1) (insofar as it deals with monetary compensation) of the *Trade Practices Act 1974 (C'wth)* should be enacted, providing that 'a person who suffers loss and damage by conduct of another person that was done in contravention of the [statutory proscription] may recover the amount of the loss or damage against that other person or against any person involved in the contravention'.

330 The court exercising jurisdiction would have power to apportion responsibility between multiple respondents and make contribution orders against them.

331 If the damages provision is construed consistently with the way in which courts have approached the construction of ss82 and 87(1) (in so far as it deals with monetary compensation) of the *Trade Practices Act 1974 (C'wth)*, the following general propositions will emerge:

- The use of the word 'by' clearly expresses the notion of causation.[201]
- Causation is a question of fact. It will be determined by reference to common sense and experience. Policy considerations and value judgments will necessarily be made.[202]
- The assessment of loss and damage will often be difficult. A particular problem will arise when an assessment has to be made of likely future loss. For example, industrial action by a union may only continue for a few hours but, because it impinges on a critical path, it may delay building works for a week or more. Similarly, strike action which lasts a week early in the life of a large project may have limited impact if the time lost can be made up during the life of the project. Despite these difficulties it will be the duty of the court (and, as I will explain, the assessors) to do their best to quantify the loss.[203]
- There will be no scope for reduction of damages because of alleged contribution by the victim to the loss.[204]
- The assessment of loss and damage is not constrained by the law applicable to damages for breach of contract or tortious conduct.[205]
- Loss will include economic loss.
- A comparison must be made between the position in which the victim is placed and the position that person would have been in had there been no unlawful industrial action. However this is not an exclusive test.

- Actual loss and damage need not be proved. It is sufficient to establish that such loss is likely in the future. This concept will be of particular significance in an industry where head contractors and subcontractors are regularly subject to liquidated damages for late completion of projects.
- Exemplary damages will not be available.

**Issue**

Where any registered organisation or a person, by unlawful industrial action, causes loss to another, the person suffering such loss should be entitled to recover the loss so suffered in an action for damages. Section 82 of the *Trade Practices Act 1974 (C'wth)*, which has the advantage of many years of judicial interpretation, provides a suitable model for establishing this right.

**Recommendation 207**

The Building and Construction Industry Improvement Act contain a provision to the following effect:

A person who suffers loss and damage by conduct of another person that was done in contravention of the [statutory norm] may recover the amount of the loss or damage from that other person or from any person involved in the contravention.

## Notification of industrial action and loss to the ABCC

332 The ABCC must be able to monitor the state of industrial relations in the industry so that it can move swiftly to deter, and investigate industrial action. Accordingly, I recommend that the Building and Construction Industry Improvement Act require that the ABCC is notified of threatened or actual industrial action by the affected person (usually the employer) within 24 hours of it occurring.

333 I also recommend that, within 14 days of industrial action occurring, any person who has suffered loss must lodge, with the ABCC, a statement with supporting documentation of the quantum of loss or damage incurred or likely to be incurred as a result of the action.

334 Prompt notification of both matters will allow the ABCC swiftly to investigate the cause of the action to identify the instigators of the action, and to take such legal action, including for recovery of a penalty or obtaining an injunction, as may be appropriate.

### Issue

One function of the Australian Building and Construction Commission will be to monitor the level of unlawful activity in the industry and, by injunction or prosecution, seek to reduce that level. That will assist in reinstating the rule of law. To achieve this objective, the Australian Building and Construction Commission needs to be aware of prospective or actual unlawful industrial action. Such action or prospective action is obviously known to the person affected by or subject to the action. If the Australian Building and Construction Commission is promptly notified of the action or prospective action it will be in a position to move swiftly to investigate, deter, prevent or prosecute it. The Australian Building and Construction Commission should also be aware of the loss allegedly suffered. There was evidence before the Commission of pressure being placed upon contractors and subcontractors not to involve the police or task forces when industrial action was taken by unions. A provision which requires the person affected to notify the monitoring body will constitute a good reason why such pressure should be resisted.

### Recommendation 208

The Building and Construction Industry Improvement Act provide that:

(a) the Australian Building and Construction Commission be notified within 24 hours of threatened or actual industrial action, such notification to be made by the affected person; and

(b) within 14 days of unlawful industrial action occurring, any person who has suffered loss must lodge with the Australian Building and Construction Commission a statement of the quantum of loss or damage incurred or likely to be incurred as a result of the action, with supporting documentation.

## Assessors

335 It is appropriate to have a mechanism for compensation which will, to adopt the 'overriding purpose' of the *NSW Supreme Court Rules*, 'facilitate the just, quick and cheap resolution' of the compensation claim. This is particularly important when it is considered that the typical applicant for compensation will be an employer in the building and construction industry who employs less than five persons, and who will have limited means.

336 There are at least five reasons why there should be an early independent determination of loss caused by unlawful industrial action:

(a) a party suffering loss needs to know the true amount to determine if recovery should be sought;

(b) a party causing loss needs to appreciate the loss it causes by such unlawful action;

(c) a court considering the imposition of a penalty for such unlawful action is assisted in judging the seriousness of the offence by an appreciation of the amount of loss suffered;

(d) governments need to know the extent of loss caused by unlawful action to determine whether further legislative action is required; and

(e) the public should be informed of the effect of unlawful industrial action on the economy, and on participants in the industry.

337 As mentioned, it is important that those who suffer loss as a result of unlawful industrial action have an appreciation of the size of the loss. Too often in the building and construction industry the loss is not quantified because the victim never intends to take action to recover it, because of fears that such action would lead to retribution in the form of further unlawful industrial action.

338 If the loss is quantified early, this will focus the minds, for example, of the directors of a corporate victim. A prudent director, seeking to obtain the protection of the 'business judgment rule' contained in s180 of the *Corporations Act 2001 (C'wth),* would then consider whether the company ought to proceed to recover the loss.[206]

339 I recommend that there be created by statute a panel of expert assessors with appropriate experience approved by the courts exercising jurisdiction. There will need to be statutory provision conferring power on the assessors and providing them with guidance in the exercise of this power. If the assessor accepted the accuracy of the victim's assessment, he or she would certify to that effect. If the assessor did not agree then he or she would determine an alternative figure. Short reasons would be provided with the certificate.

340 There should be a statutory provision that the assessor's loss certificate is sufficient evidence of the amount of the loss in any proceedings where it has been determined that the statutory proscription has been breached by identified persons. The certificate would not prevent a respondent from challenging the amount, but if it did not do so, it would be open to the court to act on the certificate in the absence of any evidence to the contrary which put the matter in contest.

341 Thus, where unlawful industrial action was taken and the ABCC successfully took penalty proceedings against named respondents, it would be open to the victim to appear at the conclusion of the proceedings to present the certificate and obtain an order accordingly. Where the victim was the applicant, liability would be proved in the ordinary way, but the victim could then avail itself of the certificate to establish the amount of the loss.

342 I have, thus far, spoken of 'the victim' of unlawful industrial action being able to obtain compensation. Such unlawful action may, of course, be taken against a number of subcontractors simultaneously, in the course of a campaign or because they happen to be working on the same site when a site-specific issue arises. In these instances there will be multiple victims of the same form of unlawful industrial action.

343 There is at least one further possibility. It is that unlawful industrial action is taken against some contractors on a site or even against a single contractor. Because work is staged and contractors are often mutually dependent on each other, strike action or bans against one will frequently cause economic loss to others who are not subject to action but who cannot perform their tasks because the work schedule has been delayed. Head contractors may also suffer potential losses because they face standing charges and liquidated damages if the

project is not completed on time. Participants in the industry, including unions and their members and officials, may be taken to be well aware that industrial action against one contractor is likely to cause economic loss to others who are not directly involved.

344 It is my view that contractors, in addition to those against whom unlawful industrial action is taken should also be treated as 'victims' for present purposes and be able to obtain compensation for their losses, actual or anticipated, which may reasonably be attributed to the industrial action. Provisions mirroring ss82 and 87(1) of the *Trade Practices Act 1974 (C'wth)*, which I have already recommended be enacted, should ensure this.

**Issue**

There are at least five reasons why there should be an early independent determination of loss caused by unlawful industrial action. They are:

(a) a party suffering loss needs to know the true amount to determine if recovery should be sought;

(b) a party causing loss needs to appreciate the loss it causes by such unlawful action;

(c) a court considering the imposition of a penalty for such unlawful action is assisted in judging the seriousness of the offence by an appreciation of the amount of loss suffered;

(d) governments need to know the extent of loss caused by unlawful action to determine whether further legislative action is required; and

(e) the public should be informed of the effect of unlawful industrial action on the economy, and on participants in the industry.

To facilitate the quantification of loss, there should be appointed an expert panel of assessors who can determine the quantum of the loss suffered. A certificate of such loss should be prima facie evidence of loss in proceedings for recovery. Where the Australian Building and Construction Commission has brought proceedings for a penalty in respect of the unlawful industrial action said to cause the loss, there should be provision for the victim to appear and seek an immediate order from the court for compensation, relying upon the certificate, unless it is challenged.

This would provide a quick, cheap method of rendering those unlawfully causing loss, responsible for it. Delay and cost have been significant reasons why, in the past, proceedings have not been brought to recover loss caused by unlawful industrial action.

### Recommendation 209

The Building and Construction Industry Improvement Act provide:

(a) for the establishment of a panel of expert assessors with appropriate experience whose role will be to assess the victim's loss quickly, justly and cheaply;

(b) appropriate powers for the assessors;

(c) that if an assessor accepts the accuracy of the victim's assessment, he or she will certify to that effect. If the assessor does not agree then he or she will determine an alternative figure. Short reasons should be provided with the certificate;

(d) that an assessor's loss certificate be prima facie evidence of the quantum of the loss in any proceedings where it has been determined that the statutory proscription has been breached by identified persons. The certificate would not prevent a respondent from challenging the quantum, but if it did not do so, it would be open to the Court exercising jurisdiction to act on the certificate.

## Costs should follow the event

345 The new statutory norm which I recommend be enacted in the Building and Construction Industry Improvement Act creates a new civil cause of action for damages. Proceedings will be instituted in the civil courts which have the necessary jurisdiction. Costs should ordinarily follow the event in such proceedings, and in penalty proceedings in accordance with the terms of the relevant rules of court.

346 I am aware that s347 of the *Workplace Relations Act 1996 (C'wth)* prevents payment of costs unless proceedings were instituted vexatiously or without reasonable cause. Such a provision is inconsistent with the creation of a civil cause of action. It is also inconsistent with the notion, vital to achieving cultural change in the industry, that those who cause loss must pay for it. Costs are, of course, part of that loss.

### Issue

Consistently with the principle that persons who cause loss by unlawful industrial action should pay for it, and consistently with the creation of a civil cause of action maintainable in the appropriate Australian courts, costs should ordinarily follow the event and be obtainable in accordance with the normal rules of court.

### Recommendation 210

The Building and Construction Industry Improvement Act provide that, in proceedings brought under the Act, costs should normally follow the event.

# 9 Cancellation of registration

## Introduction

347 Just as each Australian jurisdiction which has its own industrial relations system provides for registration of organisations, so each provides mechanisms for cancelling that registration, placing conditions upon registration, or suspending certain privileges that attach to registration.

348 Theoretically, at least, cultural change in the building and construction industry could be achieved by cancelling the registration of recalcitrant organisations. The unlawful behaviour of one union and some of its officers is sufficiently serious to justify consideration of this course. I do not recommend taking this course at present, but, suggest that unions be held accountable within the civil and industrial relations system to legally enforceable standards of conduct, and that union officers and agents be required to be fit and proper persons in order to be elected or appointed to, or to maintain, such offices or positions.

## Federal cancellation of registration – the law

349 The *Workplace Relations Act 1996 (C'wth)*[207] provides for cancellation of registration of federally registered organisations by two different methods:

- applications may be made to the Federal Court based on the conduct of the organisation;[208] and
- designated Presidential Members of the AIRC may cancel the registration on technical grounds.[209]

350 The *Workplace Relations Act 1996 (C'wth)* provides that an application for the cancellation of the registration of a federally registered organisation may be made where the organisation, or a substantial number of the members of the organisation:

- have prevented or hindered the achievement of an object of the *Workplace Relations Act 1996 (C'wth)*, in relation to a continued breach of an award, an order of the AIRC, a certified agreement, or 'in any other respect';[210]
- have engaged in industrial action that has prevented, hindered or interfered with international or interstate trade or commerce, or governmental provision of a public service;[211]

- were or are engaging in industrial action which had or is likely to have a 'substantial adverse effect' on the safety, health or welfare of a community or a part of the community;[212] or
- failed to comply with an injunction.[213]

351 An application is heard by the Federal Court. Taking into account the gravity of the matters constituting the ground and any action taken by or against the a registered organisation that regard, if the Court considers that a ground of the application has been made out, the Court can cancel registration of the organisation provided it does not believe that it would be unjust to do so.[214] The Court can also set a minimum period before a deregistered organisation can re-apply for registration.[215]

352 There are similar although not identical provisions in each jurisdiction which has its own industrial relations system. The details are set out in Appendix D at the end of this section.

## Alternatives to cancellation of registration

353 There are two alternatives to cancellation of registration under the *Workplace Relations Act 1996 (C'wth)*.

354 First, where the conduct of a particular section or class of the organisation's members has led to the grounds justifying cancellation being established, the Court may order alterations to the organisation's eligibility rules to exclude persons belonging to that particular section or class from membership of the organisation.[216]

355 Second, the Court may:

- suspend any rights, privileges or capacities of the organisation or all or any of its members (as members), whether they arise under the *Workplace Relations Act 1996 (C'wth)*, orders or awards made under that or any other Act, or under any certified agreement. The Court can give directions as to the future exercise of any of the suspended rights, privileges or capacities; or
- make orders restricting the use of the funds or property of the organisation or of its branches, including consequential orders to ensure that those restrictions are observed.

356 Such orders, unless extended, only remain in force for six months.[217] Where such orders are made the decision whether or not to cancel the registration of the organisation is deferred until the orders cease to be in force or a party to the proceeding again applies for the question of cancellation to be determined (in which case the Court is to take account of any evidence of the observance or non-observance of the orders made, and other relevant circumstances).

## Consequences of federal cancellation of registration

357 The cancellation of a union's registration has significant legal consequences. The union loses its corporate status and ceases to be an organisation, as defined by the *Workplace Relations Act 1996 (C'wth),*[218] although it does not cease to be an association.

358 Cancelling the registration deprives members of the organisation of Federal award coverage and benefits. It may also leave employees in a national industry exposed to wages and

conditions that differ from one State to another.[219] It denies them direct access to the AIRC. Unregistered unions are not entitled to enter into union-endorsed enterprise agreements,[220] and lose their capacity lawfully to influence the wages and conditions of their members.

359 If one organisation's registration is cancelled, then another organisation may either, if unregistered, seek registration to cover the first union's members, or, if registered, seek to change the eligibility rules to cover some or all of the other union's members.[221]

360 If the second union is successful in either of these strategies, it may seek to block any subsequent attempted re-registration of the first union, as the Act allows a union to object to a proposed registration on the grounds that there is a registered organisation to which the applicant organisation's members might 'conveniently belong'.[222] Such a tactic might not only block Federal registration of the first union, but might also allow the rival registered union to obtain an award covering the relevant workers. This may function as a powerful incentive for members of the deregistered union to terminate their membership.

## Ground for cancellation of registration – evidence of industrial misconduct

361 On the evidence before the Commission, various officials and organisers of unions have, by their conduct, prevented or hindered the achievement of the objects of the *Workplace Relations Act 1996 (C'wth)*. In particular, a substantial number of officials and organisers of the Divisional Branches of the CFMEU's Construction and General Division in New South Wales, Victoria, Queensland and Western Australia, have engaged in such conduct. There was also considerable evidence of:

- breaches of awards, orders of the AIRC and certified agreements;
- prevention, hindrance and interference with trade or commerce; and
- breaches of the *Workplace Relations Act 1996 (C'wth).*

362 There is thus a powerful case for bringing an application to cancel the registration of the CFMEU.

363 The conduct of sections of the CFMEU is not dissimilar to that engaged in by the Builders' Labourers Federation before it was deregistered in 1974,[223] the conduct which led to the statutory deregistration of the Australian Building Construction Employees and the Builders' Labourers' Federation (BLF) in the 1980s,[224] and the evidence found by the Gyles Royal Commission, which led to Mr Gyles QC recommending deregistration of the BWIU (although this was not carried out).

364 I do not recommend cancellation of registration for the following reasons.

365 First, the unlawful action with which I am concerned has been perpetrated by individual officials and agents of a union. It is they who need to either change their conduct, or be made to accept the consequences of that conduct which will include paying for damage which results from unlawful industrial action, paying penalties for taking unlawful industrial action, and, in the manner in which I set out below, losing office or losing the capacity to exercise functions which they have shown they are not fit to hold.

366 Second, the procedures set out in the provisions of the *Workplace Relations Act 1996 (C'wth)* dealing with cancellation of registration are cumbersome, costly, time consuming and arguably ineffective, particularly where the real problem is with individual officials and agents of the union.

367 Third, the consequence of cancellation of registration would be that many members who are blameless would be denied representation of their choice.

368 There should, however, be a statutory amendment to permit cancellation of registration in the event that the CFMEU or any other industrial organisation defies the judicial system by failing to pay a judgment which they are liable to pay.

## Cancellation of registration for failure to pay judgments

369 In a submission to the Commission, the Housing Industry Association Limited said:

> Whenever a principal, head contractor or sub-contractor undertakes a significant project, they are putting their assets and businesses at risk, because the nature of the building industry makes it impossible to adequately price all risks. It is incongruous that unions, not being parties to either the head contract or subcontract, bear no risk, notwithstanding that they can be the principal factor in the risk manifesting. It is inherently unfair that a non–risk taker such as a union can jeopardise people's assets and businesses by engaging in industrial misconduct with impunity. To remedy this inequity, HIA recommends that unions be made responsible and accountable in two ways:
>
> Removal of the requirement in s.166A of the WRA (and corresponding State provisions) requiring industrial commission consent before tort action can be brought against unions; and
>
> Union funds be at risk and available to contractual parties where they engage in unlawful action occasioning loss and damage to the contractual parties. As a condition of their registration, unions should be required to lodge a bond or bank guarantee which is available to contractual parties after order of a superior court, to satisfy a judgement of tort liability against them. Unions should be required to maintain this fund and keep it topped up after recourse has been had to it in order to maintain continuity of registration.[225]

370 At least one union appears to have considered the consequences for its assets of being successfully sued. For example, Volume 10, *Reform – Funds,* of this report considers certain trusts established by the ETU. The September 2002 edition of the *ETU News* referred to the trusts in these terms:

> *Trusts are a commonly used vehicle for conducting business and safeguarding assets. They are used by families, businesses and charities.*
>
> *…*
>
> *Through the establishment of the ETU trusts, property held in the trusts is likely to be quarantined from any potential creditors for the benefit of ETU members and all beneficiaries.*[226]

371 Mr Dean Mighell, the Secretary of the Southern States Divisional Branch (formerly known as the Victorian Branch) of the Electrical Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, gave evidence to me that he wanted the money in these trusts safeguarded, irrespective of what happened to the union. He wanted the benefits to be available to the members, even if the union was sued.[227] This evidence therefore gives support to the HIA's submission.

372 On the other hand, as I have earlier indicated, the present total assets of the major unions operating in the industry are very large. In the event of union defiance of a court judgment, execution could be levied on the respondent's assets, and a writ of sequestration could be issued, as was ordered by Bowen CJ in the Mudginberri dispute.[228]

373 I therefore do not accept the HIA submission as to compulsory creation of a fund from which judgment be paid. This matter should, however, be reviewed after the Building and Construction Industry Improvement Act has been in operation for three years.

374 The failure to pay judgments for damages, whether that is caused by an unwillingness or an inability to pay, is nevertheless a serious problem which requires a statutory response.

375 It is conceivable, and perhaps even to be expected (although not justified) that a union which has caused loss for example to a constitutional corporation, by reason of unlawful industrial action, may seek to continue with that unlawful industrial action to intimidate or coerce the victim into not enforcing a judgment it has obtained.

376 Again, levying execution on assets or obtaining a writ of sequestration of the union's assets, are serious, costly, and time consuming steps that may have the tendency to defeat the aim of the new statutory norm, which is to provide a quick, just and cheap method of recovering the cost of unlawful industrial action which causes loss. There is no reason why an industry participant, particularly having regard to the predominance of such business organisations in the industry, should be delayed in recovering losses suffered by it from unlawful industrial action by a recalcitrant union. If failure by an individual or company to meet a judgment can result in bankruptcy or liquidation, and similar failure by a corporation can lead to it being wound up, then defiance of the judicial system by registered organisation in failing to meet a judgment debt is such a serious matter as to justify cancellation of registration. The method I propose will not, of course, prevent legitimate appeals.

377 I therefore recommend the following:

(a) where a judgment for damages against an industrial organisation is obtained but is not satisfied in accordance with its terms, either the person entitled to the benefit of the judgment or the ABCC may file a certificate of judgment together with evidence that the judgment has not been satisfied, with the Industrial Registrar of the AIRC; and

(b) on receipt of the judgment and evidence that the judgment has not been satisfied, the Registrar is bound immediately to issue a certificate cancelling the registration of the registered organisation, such cancellation to take effect on the expiration of 14 days. Unless the judgment debt is paid, set aside or stayed within that 14 day period, the union will be automatically deregistered.

378 The above provisions would be subject to the capacity of the court which has given judgment, to grant a stay of execution of the judgment to permit an appeal.

### Issue

Persons awarded compensation for loss caused by unlawful industrial action are entitled to recover promptly such compensation, particularly as more than 90 per cent of subcontractors are small businesses employing less than five employees.

Just as failure by an individual or company to meet a judgment can result in bankruptcy or liquidation, defiance of the judicial system by a registered organisation in failing to meet a judgment debt is of such seriousness as to justify cancellation of its registration. The method I propose will not prevent legitimate appeals.

### Recommendation 211

The Building and Construction Industry Improvement Act provide that where a judgment for damages against a registered organisation is obtained but is not satisfied in accordance with its terms, then:

(a) either the person entitled to the benefit of the judgment or the Australian Building and Construction Commission may file with the Industrial Registrar of the Australian Industrial Relations Commission the certificate of judgment, together with evidence that the judgment has not been satisfied; and

(b) on receipt of the certificate of judgment and evidence that the judgment has not been satisfied, the Registrar is bound immediately to issue a certificate cancelling the registration of the registered organisation, such certificate to take effect on the expiration of 14 days, unless the judgment debt is paid, set aside or stayed within that 14 day period.

The above provisions should be subject to the capacity of the court which has given judgment to grant a stay of execution of the judgment to permit an appeal against the judgment, providing that a timely application is made.

## Requiring fitness and propriety of officials

379 In my view the preferred method of dealing with unlawful behaviour of employer and employee organisations is, instead of seeking to cancel their registration, to ensure that their officials comply with their legal obligations upon pain of losing office or at least being prevented from acting in the offending official capacity.

380 The strengthening of sanctions against individuals and organisations who engage in industrial misconduct can be achieved by requiring union rules to preclude union officials (including shop stewards) who are not 'fit and proper' persons from holding such offices or positions in a registered organisation,[229] and to give a complementary power to the courts to remove such persons from office.

381 As this Report went to the printers, the *Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003 (C'wth)* was introduced into the House of Representatives. The Bill, if enacted, would generally result in officers and employees of federal industrial organisations being disqualified from holding office if they failed to comply with orders of the Federal Court or the AIRC. Such provisions would go some way to implementing the recommendations I now make.

382 I recommend that there be a new statutory provision which would:

(a) require that an official of a registered organisation, or an employee or agent of such an organisation who exercises functions in relation to the *Workplace Relations Act 1996 (C'wth)* or the Building and Construction Industry Improvement Act, be a fit and proper person to hold such office or exercise such functions; and

(b) the Federal Court or any other Court of competent jurisdiction should have jurisdiction to disqualify the official from holding such office, or from exercising such functions, if, in either case, they do not behave with fitness and propriety in that they either disobey the criminal or civil law (including the provisions of the *Workplace Relations Act 1996 (C'wth)* or the Building and Construction Industry Improvement Act) or act in any manner which the Court considers demonstrates a lack of fitness or propriety. It should expressly be provided that failure to follow a dispute resolution clause in an award or EBA may amount to evidence of lack of fitness or propriety.

383 The ABCC should have standing to bring such actions.

### Issue

Registered organisations act through individuals. There was much evidence before the Commission of unlawful conduct by many union officers, employees and delegates. It is essential that officers, employees and delegates of registered organisations be fit and proper persons. Officials may be granted exceptional powers of entry and inspection, powers not granted to other citizens, to trespass on others' land, and inspect another's records. They have the capacity to cause significant loss.

### Recommendation 212

The Building and Construction Industry Improvement Act:

(a) require that an official of a registered organisation, or an employee or agent of such an organisation who exercises functions for or on behalf of the organisation in relation to the *Workplace Relations Act 1996 (C'wth)* and or the Building and Construction Industry Improvement Act, be a fit and proper person to hold such office or exercise such functions, in relation to the building and construction industry;

(b) provide that the Federal Court or any other Court of competent jurisdiction have jurisdiction to disqualify the official from holding such office, or the agent or employee from exercising such functions, if they disobey either the criminal or civil law (including the provisions of the *Workplace Relations Act 1996 (C'wth)* or the Building and Construction Industry Improvement Act) or act in any manner which the Court considers demonstrates a lack of fitness and propriety. Failure to adhere to a dispute resolution clause in an award or enterprise bargaining agreement should amount to evidence of lack of fitness or propriety; and

(c) provide that the Australian Building and Construction Commission have standing to bring such disqualification proceedings.

# Appendix A

# Previous attempts to reform and improve the building and construction industry

# 1 Introduction

1 Several reviews of the building and construction industry have been conducted over the past decade. Reviews have tended to focus on productivity issues and on particular segments of the industry as well as on certain practices. This Commission has conducted the first comprehensive national review of the industry.

2 The Commission released Discussion Paper 9 in August 2002. The Discussion Paper summarised the following recent reviews and inquiries into the building and construction industry:

- *Industry Commission Report, 'Construction Costs of Major Projects', 1991;*
- *Construction Industry Reform Strategy, 1990–1997;*
- *Building Regulation Review Taskforce, 'Microeconomic Reform Building Regulation', 1991;*
- *Gyles Royal Commission into Productivity in the Building and Construction Industry in New South Wales, 1991–1992;*
- *Inquiry into the Victorian Building and Construction Industry, 1992–1994;*
- *Productivity Commission Report, 'Work Arrangements on Large Capital City Building Projects', 1999; and*
- *National Building and Construction Committee and the Commonwealth Building and Construction Industries Action Agenda, 1997–current.*

3 The Commission received six responses to Discussion Paper 9.[230] None of the responses took issue with the summaries set out in the Discussion Paper. Two of the responses drew the Commission's attention to a November 1991 report of the Building Regulation Review Taskforce, 'Microeconomic Reform Building Regulation'.[231] One response drew the Commission's attention to a November 2001 report commissioned by the Property Council of Australia, 'Projects as Wealth Creators'.[232]

4 Most of the reviews identified in the Discussion Paper and in the responses contained recommendations to Federal and State governments for reforming and improving the building and construction industry. Recommendations have not, however, been uniformly accepted and implemented. In some cases where reforms were accepted and implemented by the government of the day, they were reversed or undermined by decisions of later governments.

5 The work of this Commission has shown that, despite improvements in some areas as a result of previous reform attempts, there remain substantial impediments to the building and construction industry operating in a productive, efficient, harmonious and safe manner.

6 Some of the key points arising out of recent reviews of the industry are set out below. I shall then identify some important matters which should inform the consideration of this report.

# 2 Industry Commission Report, *Construction Costs of Major Projects, 1991*

7 In October 1989 the Industry Commission began an investigation into factors that lead to excessive construction costs on major projects. The Commission published its Final Report in March 1991.

8 Among other matters, the Industry Commission found that:

- In some areas (for example, certain mineral processing projects), Australian construction costs for major projects were comparable to or lower than costs in other countries. In other areas (for example, certain chemical and forest products), Australian costs were up to 20 per cent higher than in some other countries.
- Industrial relations problems, particularly in the central business districts of Sydney and Melbourne, and inefficient planning approval processes were the two most important factors subject to the influence of government that result in the capital costs of major projects in Australia being higher than necessary.
- Governments, being major clients of the industry, could facilitate labour market reform by insisting that more efficient labour and management practices are adopted on government construction sites. Avenues for change which could be usefully explored include: reduced payment for time-off as a result of inclement weather or safety disputes; the use of legislative remedies to enforce site agreements; and greater use of productivity bonuses.
- Governments needed to accelerate reviews of regulations, standards and associated administrative procedures in order to reduce uncertainty and delays, and reduce the costs resulting from variations in standards and regulations.
- The construction industry needed to adapt to its temporary and cyclical nature rather than to adopt features of more stable industries. Higher levels of permanent employment would alleviate industrial relations problems. Moves towards a greater enterprise focus for employer and employee bargaining could assist some firms in increasing the size of their permanent workforces.

- Competition among unions for non-union labour was limited. Competition could be introduced by giving a number of unions the right to represent workers on particular sites.
- The penalties for breaches of agreements were not effective. Sanctions were essential to constrain abuse of market power and should apply to employers, employees and unions who breach their agreements. Governments should set the example by resisting pressure on their own projects, and taking legal action where abuses occur.
- Secret ballots should be mandatory where strike action is contemplated. Votes in favour of industrial action should be reaffirmed every 24 hours.

9 The Commonwealth Government did not make a formal response to the Industry Commission report.

# 3 Construction Industry Reform Strategy, 1990–1997

10 In May 1990 a joint working party of the National Building and Construction Council and the National Public Works Committee published its *No Dispute* report, detailing more than 100 findings across 13 areas of project procurement and contract administration.[233] The *No Dispute* report provided a snapshot of difficulties facing the industry in the late 1980s.

11 In September 1990 the Commonwealth Government outlined its construction industry reform strategy. Four working groups were established to propose implementation strategies for reform in skills formation, industrial relations, contracts and industry development.[234] The consolidated reports of the four working groups recommended the:

- establishment of an agency funded by the Commonwealth Government;
- development of a Code of Conduct by the agency to regulate the terms upon which public sector clients would procure services from the industry;
- establishment of measurable performance standards as the basis for the selection of contractors for major projects;
- restructuring of the principal award to accommodate a radical change in skill formation policy and delivery;
- adoption of the *No Dispute* findings by all levels of government; and
- use of model projects to introduce reforms to the industry.[235]

12 In December 1991 the Construction Industry Development Agency (C'wth) (CIDA), a statutory authority, was established. CIDA's principal task was to develop a consistent set of standards for the selection of service providers enabling clients to use their market position to demand change.

13 In May 1993 CIDA held the first of three annual conferences aimed at giving the industry an opportunity to review CIDA's work and to become involved in the process.

14 In November 1993 CIDA launched a code of practice known as the *Australian Construction Industry Pre-qualification Criteria*. The criteria were published as two separate documents, one for contractors and subcontractors, and the other for consultants. CIDA also released two other documents, the *Building Best Practice Practitioners Guide* and the *Project Initiation Best Practice Guide*.

15 CIDA argued that old solutions and legislative prohibitions would not work as a means of reforming the building and construction industry, and that reform would be achieved by changes within individual workplaces. CIDA saw enterprise agreements as the best opportunity for workers and employers to work together, to deal with problems and develop a foundation for change. CIDA sponsored a series of discussions involving unions, major contractors and employer organisations to develop guidelines to assist contractors to develop their own enterprise agreements.

16 In May 1992 a Discussion Paper and draft framework enterprise agreement were released for comment but rejected by the employer associations involved in drafting it.[236]

17 Of relevance to industrial relations were the publications on restrictive practices. CIDA produced a report, and then conducted a series of informal meetings to explore whether a compact could be forged between the Construction, Forestry, Mining and Energy Union (CFMEU) and the Master Builders Association (MBA) to address restrictive practices. In March 1995 a Compact of Change was endorsed by the CIDA board addressing:

- occupational health and safety;
- 'last on first off';
- overtime;
- inclement weather;
- management practices;
- pay for time lost due to industrial action; and
- union membership.[237]

18 CIDA produced a model simplified award. It employed workplace change advisors whose work identified the central impediment to change as the lack of appropriate skills among managers and union organisers in dealing with the new approach of enterprise bargaining. The widespread adoption of pattern bargaining in the construction industry demonstrated a lack of genuine discussion and agreement between contractors and their employees.[238]

19 The major achievements of CIDA are set out in attachment 1 to Discussion Paper 9.

20 CIDA was wound up in mid-1995 and replaced by the Australian Construction Industry Council (ACIC). ACIC comprised industry, union and government representatives. Its functions were:

- to plan a future for the industry;
- to work on project initiation and contractual relationships; and
- the implementation of prequalification standards, labour market best practice and skills formation and training.

21 ACIC was wound up in June 1997 and its activities were taken over by the National Building and Construction Committee, which is discussed in 1.8 below.

# 4 Building Regulation Review Taskforce, *Microeconomic Reform Building Regulation, 1991*

22 A special Premiers' conference in 1989 led to the establishment of the Building Regulation Review Taskforce. The taskforce was charged with examining the scope for significant reforms of technical regulation of building.[239] Previous studies had estimated the cost of unnecessary regulation in building and construction development at about $1 billion a year. The taskforce estimated that some $250 million could be saved each year through reform of technical regulations.[240]

23 The key point arising from the taskforce's consultative program was the need for reform of the overall system of development approvals, by introducing an integrated approach, introduction of national standards wherever possible, and mutual recognition of regulations and standards where uniformity was not essential or could not be achieved.[241]

24 The taskforce advocated:

- the development of a national framework, involving an agreed set of legislative principles to facilitate a national approach towards building regulation reform;
- the creation of an Australian Building Regulation Corporation to be responsible for national management of building regulation;
- the introduction of a building regulation levy to provide annual funding of $5 million for the Australian Building Regulation Corporation's operations; and
- a five-year time limit for the achievement of the reform agenda.[242]

25 Although the report dealt almost exclusively with the need for reform of technical building regulation, the taskforce acknowledged the importance of substantially improving industrial relations and work practices.[243]

# 5 The Gyles Royal Commission into Productivity in the Building and Construction Industry in New South Wales, 1991–92

## Introduction

26 The Gyles Royal Commission was established in 1991 to review productivity in the building industry in New South Wales. By its terms of reference, Commissioner Gyles was commissioned to inquire into and report on:

1 *The nature, extent and effects of practices and conduct in, or in relation to, the building industry which may significantly affect efficiency and productivity within that industry.*

2 *The nature, extent and effects of illegal activities that occur in, or in relation to, the building industry in New South Wales including (but not limited to):*

(a) *intimidation and violence;*

(b) *secret commissions;*

(c) *extortion; and*

(d) *other corrupt conduct.*

3 *Whether, in view of your findings in relation to the matters set out in paragraphs 1 and 2, there are any measures (including legislative and administrative changes) which should be made to increase productivity or efficiency within the building industry or to deter illegal activities in, or in relation to, that industry.*[244]

27 After conducting public hearings, formulating Discussion Papers and reviewing responses and submissions, the Gyles Royal Commission produced its Final Report in 1992. The Report focussed on the following areas:

1 Illegal activities.

2 Practices and conduct significantly affecting efficiency and productivity.

3 Project creation and delivery.

4 Public sector.

5 Federal strategy.

6 Miscellaneous.

28 The recommendations arising out of the Gyles Royal Commission were many and varied and are set out in attachment 2 to Discussion Paper 9. Some of the key findings and recommendations are set out below.

## Illegal activities

29 Commissioner Gyles found that illegal activities in the industry in New South Wales included physical violence and threats of physical violence, collusive arrangements between corporations and industry associations or between subcontractors and project managers, and theft of building materials. Although he found no evidence of widespread corruption of union officials, or of systematic violence or intimidation by unions, Commissioner Gyles found strong evidence that the unions comprising the Building Trades Group, and in particular the Building Workers Industrial Union (BWIU), threatened direct industrial action to further their objectives, irrespective of whether such action was legal. He found evidence of widespread lack of integrity and probity among the management of contractors and employer associations. Overall, the Commissioner found limited observance of the law or law enforcement, and concluded that the effect of the illegal activities upon the culture of the industry was far more significant than any direct economic effect.[245]

30 In response to the level of criminal activity and industrial disputation, a Building Industry Task Force was established during the life of the Gyles Royal Commission. The task force was concerned with the pursuit of both criminal and civil remedies. In his Final Report, Commissioner Gyles recommended that the task force focus on a number of issues:

- 'No ticket no start' and 'closed shops'; payment for lost time; bans and boycotts of all descriptions; intimidation, threats and abuse; abuse of safety legislation, rights of entry and book inspections.
- The co-ordination and facilitation of injunction proceedings to restrain conduct in breach of the *Trade Practices Act 1974 (C'wth)*.
- The facilitation of action by small businesses affected by bans and boycotts.
- Establishment of co-ordination procedures with each government department to ensure observance of the law.
- The consideration of the formation of a body similar to the former Commonwealth Industrial Relations Bureau.
- The production of a report on the operation of legislation governing industrial relations.

31 The initial focus of the task force was to pursue criminal matters arising out of the Gyles Royal Commission hearings. The task force then pursued fresh allegations of misconduct. Complaints received by the task force overwhelmingly concerned the BWIU.

### Practices and conduct significantly affecting efficiency and productivity

32 The Gyles Royal Commission identified a number of practices and conduct in relation to industrial relations and safety that affected efficiency and productivity. These included the behaviour of the BWIU, the abuse of inclement weather provisions in the *National Building and Construction Industry Award 1990* and issues in relation to safety, such as the abuse of safety provisions to further industrial demands, misuse of safety committees to enhance union power and achieve union objectives, and disregard for WorkCover.

33 The Gyles Royal Commission received many complaints, both publicly and confidentially, about various aspects of union militancy and its severe effect on productivity and efficiency in the industry. This was due to persistent disruption of projects and restrictive work practices.

34 It attributed most of the industrial relations problems to the militancy of the BWIU. Commissioner Gyles found that the BWIU had a strong commitment to militant direct action as opposed to compliance with the rule of law and the obligations imposed on a registered union. As a consequence, the Gyles Royal Commission recommended that the BWIU be deregistered.

35 The Gyles Royal Commission found that employers, government and the AIRC were all prepared to turn a blind eye to the dominance of and abuse by the BWIU, and stated that by deregistration the power of the union would be significantly diminished.

36 It acknowledged the commercial imperatives which led to employers and associations adopting a 'spineless and expedient approach to industrial relations'.[246] However, it saw clients as the ones ultimately with the power to put a halt to such practices and, in particular, the New South Wales Government in its capacity as a client.

37 The Gyles Royal Commission did not regard a special regime as necessary for the building industry, as it saw most of the problems facing the New South Wales building industry being caused by the BWIU. It acknowledged the need for subcontractors to be more involved in relation to award restructuring, multi-skilling and workplace reform. It noted the importance of individual businesses in facilitating change to work practices.

38 The Gyles Royal Commission reported that lost construction time due to inclement weather was significantly greater in New South Wales, in particular in Sydney, than in Melbourne, Brisbane, Canada, Germany, Sweden, the United Kingdom and New Zealand.[247] It identified part of the problem as flowing from the interpretation of the relevant clauses in the National Building and Construction Industry Award 1990, and recommended specific changes to that award. The problem was compounded by outright abuses in workers taking time off for inclement weather.

39 It also found abuse of safety issues associated with inclement weather. Once rain had ceased, claims were made that a return to work was unsafe until all water was removed from the site. Unions were reluctant to cordon off a particular wet area, instead closing the entire floor.

40 The Gyles Royal Commission also found that practices in relation to rostered days off inhibited productivity and efficiency. It reported that the union policy on changing the day of the rostered day off was more restrictive than the terms of the award. For example, one of the restrictive practices imposed by the union was a refusal to work the weekend before a rostered day off.

Commissioner Gyles recommended that the government or other relevant party apply to the federal industrial relations tribunal for an appropriate variation to the award.

## Safety

41 The Gyles Royal Commission found that abuse of safety procedures and principles by employees and unions was prevalent. It concluded that:

- there was evidence of deliberate sabotage intended to create safety hazards;
- a large proportion of safety disputes were manufactured as part of a tactic to avoid dispute settlement procedures;
- safety committees on the larger sites were composed of union militants and used as a vehicle to further industrial objectives;
- there was limited co-operation to improve safety; rather, the committee members would provoke disruption;
- there was limited adherence to the law or industry agreements as to the size and composition of safety committees;
- rulings of WorkCover inspectors were routinely not accepted if unfavourable to the employee representatives on the safety committee; and
- the BWIU used safety committees as a strategy to capture control of a site.[248]

42 Commissioner Gyles noted that this perversion of the intended operation of the system detracted from the real and important objective of workplace safety. Instead of the safety committee being a valuable tool for the improvement of safety, it became part of industrial dispute campaigns. Employers were compliant in this arrangement. It was common practice for unions to nominate employees to be employed upon the site simply for the purpose of being on the safety committee, with the contractor complicit or acquiescent in the arrangement, employing such persons knowing they would do little actual work. Employers and unions had been involved in inventing safety issues to justify the employer paying employees for time not worked.

43 The Gyles Royal Commission saw a stronger role for WorkCover. It recommended conferring on WorkCover the ability to issue improvement or prohibition notices when required.

44 The Gyles Royal Commission recommended that safety committees be constituted by representatives of head contractors and subcontractors, with each subcontractor with more than 20 workers on the job creating a committee.

## Project creation and delivery

45 The Gyles Royal Commission noted that a linear process of project delivery, starting with the client and its financier and ending with the building materials supplier, typically impacted adversely on productivity and efficiency. The Commissioner proposed a process involving all of the stakeholders, where the goals or objectives were common or shared and each party worked co-operatively to achieve these goals or objectives. He recommended that the concept

of partnering be considered and, if adopted, applied throughout the contractual chain to ensure flexibility in arrangements.

## Public sector

46 Given the significance of public sector building in the New South Wales industry, the Gyles Royal Commission conducted a capital works survey to understand the structure and delivery of capital works. It supported a proposal by the Legislative Council's Standing Committee on State Development to appoint a Ministry of Construction and establish a Joint Standing Committee on Public Works.

47 Among other matters, the Commissioner recommended that:

- The Government reconsider the use of the Public Works Department as the contracting party for government works. He supported end users being involved throughout the building process.
- The task force work with the relevant public sector authorities to pursue civil and criminal remedies for collusive tendering, and the Ministry of Construction (or other body) co-ordinate the formation of an anti-fraud strategy in relation to tendering. He said there needed to be a clear Code of Conduct and procedure for tendering to ensure probity on behalf of the bidder and the public officers.

48 The Gyles Royal Commission examined the Building and Construction Industry Long Service Payments Corporation and concluded that it was overfunded and administratively costly. In 1991 it employed over 100 people, had total revenue of $38.8 million, made a surplus of $20 million, controlled total retained earnings of $360 million, but paid benefits of only $12.4 million.[249] Commissioner Gyles recommended a review of whether the industry required this unique scheme, and if so, an examination of its funding and administration.

## Federal strategy

49 The Gyles Royal Commission thought it inappropriate to make general recommendations in relation to the Commonwealth Government's construction industry reform strategy. The Commissioner did note, however, that the federal strategy adopted a centralised approach, with a preference for single employer bargaining units, the rationalisation of unions, a single industry award and a rationalisation of all agreements.

50 Commissioner Gyles noted that the federal Code of Practice for government works constituted a powerful use of government purchasing power to produce outcomes. The Government had the capacity to act as a licensing system for contractors, with sophisticated and prescriptive prequalification procedures. The Commissioner identified some issues that needed to be considered, including anticompetitive behaviour, the cost of compliance, and the lack of flexibility and its effect on joint venturing or partnering for major projects.

## Miscellaneous

51 The Gyles Royal Commission considered a range of other matters. Recommendations included:

- that the Construction Employees' Redundancy Trust be wound up;
- that the Ministry of Construction be responsible for implementing the Commission's recommendations and be the repository of the database of the Gyles Royal Commission;
- that the New South Wales Government support the proposition that unpaid wages should rank ahead of taxes on insolvency; and
- that the Government should not deal with the Master Builders Association in light of its involvement in collusive tendering and the Group Apprenticeship Scheme, and seek advice on its deregistration.

## Response to the Gyles Royal Commission

52 On 26 May 1992 the New South Wales Government announced, in broad terms, that it accepted the findings and conclusions of the Gyles Royal Commission.[250] On 28 May 1992 the Government sought advice on the deregistration of both the BWIU and the New South Wales Master Builders Association.[251] Later it sought advice on the deregistration of the Australian Federation of Construction Contractors.[252]

53 The Building Industry Taskforce, which was established to enforce the rule of law, pursued criminal investigations and co-ordinated the pursuit of civil matters. Despite the number of complaints received by the taskforce, it is generally accepted that the level of disruption to the building and construction industry in New South Wales fell considerably during the Gyles Royal Commission and the life of the taskforce. The taskforce was disbanded as of 30 June 1995 after a change of government.

54 Consistent with Commissioner Gyles' recommendation that the New South Wales Government, as a client, take a lead role in reforming the industry, the Government established the Construction Agencies Steering Committee to co-ordinate and facilitate the overhaul of government standards and policies, and to develop consistent building, consultant and contractual policies. The Government later published its Code of Practice for the Construction Industry, and a Code of Tendering.[253]

55 In May 1992 Premier Greiner asked all Ministers to sever official relations with the New South Wales MBA following the Gyles recommendations. In May 1993, following negotiations with the MBA to reform the organisation and ensure repayment of certain Government funds, Premier Fahey announced that official relations between the Government and the MBA could resume.[254]

56 The Government discontinued deregistration proceedings against the BWIU upon the BWIU and the CFMEU signing a Deed of Agreement with the Government. The unions gave a number of undertakings aimed at ensuring that, in future, they operated within the law and adhered to certain standards in their conduct.

# 6 Inquiry into the Victorian Building and Construction Industry, 1992–1994

## Introduction

57 In 1992 the Victorian Government established the Economic Development Committee to inquire into the Victorian building and construction industry. The Committee comprised nine members of Parliament.[255]

58 The Committee was given two references. The first reference required the Committee to review tendering procedures for government works and, if appropriate, recommend Codes of Practice or other appropriate measures to ensure equity in the tendering process. The second reference required the Committee to inquire into issues that restrict the development of the Victorian building and construction industry and in particular to review and recommend changes to building and planning processes, and to investigate improvements and recommend changes to improve productivity.

59 The Economic Development Committee produced six reports:

1 *The Corruption of the Tendering Process.*

2 *Evidentiary Powers of Parliamentary Committees.*

3 *Productivity.*

4 *Code of Tendering.*

5 *Security of Payments.*

6 *Final Report and Report on BLF Assets.*

## Corruption of the tendering process

60 The Committee found evidence of widespread corrupt practices in relation to collusive tendering and other matters on government projects.[256] The Committee recommended that a taskforce be established to investigate illegal practices and, among other things, recover any moneys owing to the State.[257] It found there was a lack of uniformity in tendering processes and recommended a review of accountability, and that consideration be given to the

development of a Code of Practice for tendering and the adoption of a standard form of statutory declaration.[258]

61 The first report was tabled in March 1993. As a result, a taskforce was set up and empowered to implement the recommendations of the Committee and to investigate collusive tendering practices, price fixing and collusion among subcontractors and suppliers, other corrupt activity, and to recover moneys owed as a result.[259]

## Evidentiary powers of parliamentary committees

62 The Committee's second report concerned difficulties in parliamentary committees obtaining evidence and identified options to resolve these difficulties. The Committee recommended that steps be taken to amplify powers to obtain evidence and summons witnesses.[260] The second report was tabled in October 1993.[261] The Government response accepted that the report raised issues of principle for Parliament to consider.[262]

## Productivity

63 The Committee's third report focussed on recommendations to improve productivity in the Victorian building and construction industry. The Committee divided along party lines, resulting in the publication of a majority and minority report. The findings and recommendations arising from the majority report are outlined in attachment 3 to Discussion Paper 9.

64 Some of the key findings of the majority report were as follows:

- A large number of witnesses would not come forward for fear of retribution.
- The cyclical nature of activity in the industry created problems in stability, solvency and labour-related problems such as wage explosions and industrial conflict.[263]
- There had been a decline in disputes since the introduction of the *Victorian Building Industry Agreement* (VBIA) and the deregistration of the BLF in Victoria. Witnesses attributed the reduction in disputation to low business activity, and a more realistic understanding of the industry by participants.[264]
- Productivity was inhibited by the lack of flexibility in relation to the use of rostered days off, and the impact of contractual arrangements between principals and subcontractors, particularly in disputes over payment for work undertaken, and the financial collapse of contractors.[265]
- There was evidence of election misconduct and ballot abuse within the CFMEU. Job delegates and shop stewards appeared to have considerable influence over site disputes. The majority report noted that additional payments to subsidise union delegates had been made, and over-award conditions or loose interpretations of the VBIA applied.
- The practice of 'no ticket no start' had declined, but not completely disappeared.
- Abuse of inclement weather conditions was still of concern.

- The practice of 'last on first off' was still pursued by unions, which affected flexibility for employers and hindered productivity in that the most appropriate employees may not be able to be retained.[266]
- Occupational health and safety disputes were sometimes motivated by matters unrelated to safety.
- There was evidence of intimidation, collusive practices and possibly the illegal collection of moneys.[267] The majority report found evidence of price-fixing in relation to building materials, and noted its impact on the overall cost of a project.[268]
- The CFMEU promoted standard enterprise agreements with flexibility only offered in relation to a small number of matters such as shift times, rostered days off, inclement weather and wage systems.
- The VBIA had assisted with communication, education and training and other benefits, and reduced the amount of lost time, but was not a true enterprise agreement because of its general application.[269]

65 The minority report argued that the majority had not met the terms of reference, that the findings and recommendations were determined by inaccurate information and sometimes unsubstantiated evidence, and that the majority report had no vision. The minority was critical of the majority for not developing recommendations consistent with, or complementary to, the work of CIDA. Among other matters, the minority report included the following observations and recommendations:

- The national industry reform process should be encouraged and supported.
- The building industry reform strategy, including the work of CIDA, facilitated workplace reform and higher productivity in the industry.
- Federal enterprise agreements led to higher productivity and workplace reform.
- The VBIA assisted in achieving stability and harmonious relationships in the industry and dramatically reducing lost time.
- Collusive tendering had an adverse effect on productivity.
- Employers who avoid responsibilities such as award obligations, insurance obligations, taxation payments, WorkCover obligations and safety obligations affect reform and productivity.
- The assets of the BLF should be released for use in training and skill development.
- No credible evidence indicated unions using intimidation to secure compulsory unionism.
- Award provisions relating to inclement weather could lead to disputation and lost productivity.

66 The third report was tabled in May 1994.[270] The Government response noted all findings, and expressed the view that legislation should be used as a last resort to enforce industry reform.[271] In relation to the assets of the BLF, the Government advocated a wait-and-see approach, having regard to litigation then underway.

## Code of tendering

67 In its fourth report, the Committee provided an overview of the economic contribution of the Victorian building and construction industry and reported on tendering practices for government works. It noted that the Victorian building and construction industry had the potential to increase productivity and efficiency through workplace reforms and improvements to public sector tendering processes. It found that the use of collusive tendering and other unethical business practices adversely impacted on tendering and industry efficiency.[272]

68 The report highlighted deficiencies in the public tendering process and suggested the development and implementation of uniform tendering policies, guidelines and procedures for the procurement of public works. It suggested independent audit procedures to ensure accountability and probity. It emphasised the need to develop and implement codes of tendering, training and processes to ensure greater accountability.[273]

69 The report was tabled in May 1994.[274] The Government noted the findings, and recognised the importance of Codes of Practice as a means of implementing reforms. It supported consistent contractual arrangements and stated it would continue to consult key players to facilitate efficiency improvements.[275] Together with the first report on collusive tendering, the report was considered in debate on the *Local Government (Competitive Tendering) Bill 1994 (Vic.)*.[276]

## Security of payments

70 In its fifth report, a majority of the Committee reviewed statistics on insolvencies and research undertaken by CIDA, and conducted its own survey to assess security of payment issues. The majority said it was unable to confirm claims that the problem was so serious as to warrant government or legislative intervention. The majority acknowledged that small firms and individuals suffered from the financial collapse of other parties in the contractual chain.

71 The majority report concluded that the public sector could assist in improving security of payments by using appropriate contractual conditions and other methods. It recommended increasing industry training opportunities to encourage changes in practices.[277]

72 A different emphasis was evident in the minority report on the issue of security of payments. The minority was of the opinion that security of payments was a serious problem in the Victorian building and construction industry. The minority supported some of the majority recommendations and proposed that the Victorian Government take a proactive role in facilitating industry discussions and introduce legislation to guarantee security of payments.[278]

73 The fifth report was tabled in October 1994.[279] The Government response supported measures to include financial and business management training in building and construction courses. It noted that specific and general tender selection criteria had been developed (largely based on the work of CIDA) and adopted. The Government encouraged all parties to adopt the Code of Practice on a voluntary basis.[280]

## Final Report and Report on BLF Assets

74 In its third report to Parliament, the Committee recommended that the BLF's assets be released for the benefit of the Victorian building and construction industry. The CFMEU subsequently lodged a claim for the assets. That claim became the subject of proceedings in the Industrial Relations Court in Sydney. As the proceedings were likely to continue for some time, the Committee resolved in its sixth and final report not to pursue the matter or make any recommendations as to the disbursement of the funds.[281] The final report was tabled in November 1994.[282]

# 7 Productivity Commission Report, *Work Arrangements on Large Capital City Building Projects 1999*

## Introduction

75 The Productivity Commission published its research on work arrangements on large capital city projects in 1999. The report, which was one of a series of four requested by the Commonwealth Treasurer, focussed on changes in work arrangements on large capital city building projects since the late 1980s.[283]

76 Some of the major factors which the Productivity Commission found to affect work arrangements on large capital city building projects are discussed below (see also attachment 4 to Discussion Paper 9).

## Market characteristics

77 The Productivity Commission highlighted the following characteristics of the market as affecting work arrangements:

- Clients tended to have very little to do with either design or production.
- Head contractors tended to employ only a small staff on site and sublet work to specialist subcontractors.
- Head contractors and subcontractors were generally selected at tender with fixed price contracts, leaving them vulnerable to industrial action.
- Head contractors minimised the risk of industrial action by requiring subcontractors to have union-endorsed enterprise agreements.
- Subcontractors were usually required to pay 'site allowances', which in effect buy industrial peace.[284]

- Union membership among building and construction employees fell from 47 per cent in 1988 to 34 per cent in 1997, most likely as a result of the abolition of compulsory unionism.[285]
- Unions were still in a strong position to maintain 'no ticket no start' policies on large capital city projects due to the vulnerability of these projects to industrial action.
- The relatively high mobility of workers between employers and the importance the unions had placed on safety contributed to high union membership on large capital city projects.
- Union amalgamations had reduced demarcation disputes.[286]
- Regional variations were evident, with the Victorian branches of the CFMEU and the CEPU less flexible than their New South Wales and Queensland counterparts.[287]
- Efficiency on large capital city building projects had improved since the 1980s. This was attributed to the 1990s recession, which placed pressure on contractors to increase efficiency and reduced the market power of the unions. Other contributing factors were the greater use of fixed price contracts, reduced demarcation disputes due to union amalgamations, and the impact of the Gyles Royal Commission and taskforce in New South Wales.[288]

## Negotiation processes and outcomes

78 The Productivity Commission reported that work arrangements in the building and construction industry were based on three layers of agreements: project, enterprise, and industry and trade. The Commission noted that:

- While a high level of collective representation for both employees and employers could, in theory, be an efficient way to set employment standards, it did not promote flexibility at the enterprise level.[289]
- Industry and trade level negotiations increasingly involved pattern bargaining, which involved wage increases being granted without corresponding productivity improvements.[290]
- Most of the financial benefits of project agreements flowed to the head contractors, unions and employees, whereas the financial costs were largely borne by subcontractors.[291]
- Project agreements were advantageous to head contractors as they minimised the risk of time lost due to industrial disputes. Project agreements could be a useful management tool, as they specify arrangements such as rostered days off, inclement weather procedures and workplace safety issues. The agreements increase a subcontractor's costs, however, by requiring increased payments to workers and reducing the flexibility to negotiate other arrangements.
- Enterprise level negotiations were less common in the building and construction industry than in many other industries. The ability to engage in genuine enterprise negotiations is inhibited by the existence of project and industry and trade agreements. Genuine enterprise agreements may result in employees of different subcontractors working on

the same building site with different work arrangements. This could affect co-ordination and planning of work, in which case head contractors might lose a degree of control over the site.[292]

## Workplace communication, training and safety

79 The Productivity Commission reported that there had been improvements in workplace management, communication and dispute resolution processes in the building and construction industry.[293] Instances of unions using occupational health and safety as an industrial tactic had reduced since the late 1980s. There was evidence that unions and management were becoming more co-operative in resolving safety disputes. Improvements were noted in relation to the management of problems caused by inclement weather, particularly in New South Wales and Queensland.[294]

## Work hours and hiring arrangements

80 The Productivity Commission reviewed arrangements in the building and construction industry concerning work hours, including rostered days off, hiring, terminating and redundancy issues on large capital city building sites. It noted that work hours, including overtime, were higher than the national average.[295]

81 The Productivity Commission report concluded that in most respects, work arrangements for labour on large capital city building projects had improved. It noted that the practice of 'one in all in' overtime no longer operated and there was increased flexibility with rostered day off arrangements, particularly in New South Wales and Queensland.[296]

82 The Productivity Commission examined the prohibition by unions of pyramid subcontracting on commercial building sites. The prohibition arose out of concerns about sham subcontractor arrangements which were designed to circumvent legal responsibility for employee entitlements and tax payments, and the poor occupational health and safety practices associated with some of these contractors. The prohibition was enforced more strictly in Melbourne and Sydney than in Brisbane. The Productivity Commission noted that, from an economic perspective, genuine pyramid subcontracting could deliver additional efficiencies to the industry. It proposed that the extent to which pyramid subcontracting was permitted on sites be at the discretion of the head contractor.[297]

## Wages and on-costs

83 The Productivity Commission noted that, under awards, employees were paid according to a sliding scale of relativities based on the remuneration of a skilled tradesperson. The main source of award increases in base pay had been through national wage cases, and these base increases tended to be similar across awards. Employees covered by pattern agreements had achieved above award increases and generally received similar total wage increases over time for comparable skills.[298]

84 Site allowances were an important component of remuneration for building and construction workers, and were usually specified in project or industry agreements negotiated between head contractors and unions. Site allowances were paid as an hourly rate to all employees. In

Queensland, the Statement of Intent specified the applicable site allowance based on the size of the project. In New South Wales, such allowances were described as site or productivity allowances. There had been some attempt to link site allowances with achievement of performance milestones in some project agreements.[299]

85 The Productivity Commission analysed on-costs for the industry including the payment of contributions in respect of redundancy, superannuation and long service leave.[300] Though the level of redundancy entitlements in all Federal building and construction awards was similar to other industries, pattern agreements had more generous provisions. Redundancy payments could be made even where employees resigned voluntarily. Unlike other industries, redundancy payments were portable between workplaces, and accrued for the duration of employment in the industry.[301] Unlike the position under superannuation legislation, which involves superannuation contributions being made based on a percentage of an employee's ordinary earnings, enterprise agreements in the building and construction industry often provided for a flat weekly payment for each employee.[302] The level of long service leave benefits for building and construction employees was similar to those in general long service leave legislation. As with redundancy, however, long service leave was portable, and continued to accrue even as an employee moved between different employers within the industry.[303]

## Conclusion

86 The Productivity Commission concluded that work arrangements on large capital city building projects had improved since the late 1980s but that further improvement was possible. The severe downturn in building activity during the recession of the early 1990s had been the major catalyst for improvements. The effect of the Gyles Royal Commission on the position of unions, the growing incidence of fixed price contracts and reduced inter-union rivalry following union amalgamations further contributed to the improvements.[304]

87 While many parties claimed that the incidence of site-specific disputes had reduced, since 1995 the rate of dispute-related delays in the building and construction industry had increased to the levels of the late 1980s. The increase in industrywide disputes had offset any reduction made through fewer site-specific disputes. The Productivity Commission suggested that fixed term contracts, which appear to have reduced the incidence of site-specific disputes, had come at a financial cost. Head contractors had required subcontractors to have union-endorsed enterprise agreements and to pay employees a site allowance. These costs were probably passed on to clients through higher building costs, with no overall reduction in industrial disputation.[305]

88 Improvements in efficiency and productivity had been achieved in relation to:

- inclement weather delays, due to a more reasonable interpretation of the relevant provisions in awards and agreements;
- occupational health and safety issues, through the use of committees and inspections;
- demarcation disputes, due to union amalgamations;
- the incidence of 'one in all in' overtime; and

- rostered days off, break times, and starting and finishing times, as a result of greater flexibility.[306]

89 The Productivity Commission found that the widespread use of pattern bargaining had meant that some enterprises were paying large wage increases for minimal, if any, improvement in productivity.[307]

90 The Productivity Commission found the most significant obstacle to change was the vulnerability of large capital city projects to industrial action. This vulnerability derived from:

- the high cost of delays;
- a contractual system that separated the control of building sites from the employment of workers (subcontracting);
- de facto compulsory union membership; and
- ineffective legal remedies against industrial action.[308]

91 The Productivity Commission listed a number of inefficient work arrangements that still affected the industry:

- restrictions on the use of enterprise level negotiations by subcontractors;
- subcontractors being required to pay sitewide wages and conditions;
- restrictions on the making of performance related payments;
- inflexible use of rostered days off in Victoria;
- de facto 'no ticket no start' policies;
- limits on self-employed subcontractors, casual labour and labour hire companies;
- site allowances applying automatically dependent only upon project size or proximity to the central business district.[309]

92 The Productivity Commission noted that industrial disputation reduced in New South Wales as a result of the Gyles Royal Commission. Delays in New South Wales had been below the national average since 1994, despite the boom in development associated with the Olympics. In comparison, since 1994, Victoria experienced delays twice those of New South Wales.[310]

93 The Productivity Commission suggested there was scope for reform in the negotiation process. Agreements negotiated at the project and industry or trade level had a tendency to discourage subcontractors from having a role in implementing efficient work arrangements in their own enterprises. While not all work arrangements could be negotiated at the enterprise level because of the need for head contractors to have a level of control over sites, issues such as remuneration and hiring arrangements could be left to subcontractors to negotiate in an enterprise agreement. Other matters could be negotiated at the project level, such as site safety and inclement weather procedures, site opening hours and rostered days off.[311]

94 The Productivity Commission saw an important role for Government in facilitating change through public policy and regulatory activities, such as enforcement of the *Workplace Relations Act 1996 (C'wth)* and the *Trade Practices Act 1974 (C'wth)*, and proposed legislation enabling

the AIRC to make orders to prevent unprotected industrial action. Codes of Practice were another means by which governments could facilitate change, although their impact was limited, having regard to the trend away from governments owning large capital city buildings.[312]

95 The Commonwealth and Victorian Governments jointly welcomed the Productivity Commission's report, and noted that further reform of the industry was needed.[313]

# 8 National Building and Construction Committee and the Commonwealth Building and Construction Industries Action Agenda, 1997–current

## The Action Agenda

96 In September 1997, the Federal Government established the National Building and Construction Committee (NatBACC) to foster a partnership between government and industry and to develop action agenda for the industry.[314] NatBACC comprised representatives from all major industry, commercial and professional groups in the building and construction industry. In May 1999 the Federal Government released NatBACC's action agenda for the building and construction industries.[315] The key points of the action agenda are set out in attachment 5 to Discussion Paper 9.

97 The agenda were designed to create a more value-focussed marketplace in five key areas:

1 creating a more informed marketplace;

2 maximising global business opportunities;

3 fostering technological innovation;

4 creating economically and ecologically sustainable environments; and

5 creating a best practice regulatory environment.[316]

98 In addition to the development of the action agenda, a number of research reports were produced on behalf of NatBACC.

99 The Government accepted the action agenda, which are being progressively implemented. The Australian Construction Industry Forum was established to assist with implementation of the

action agenda. The Government has committed funding of $3.6 million for action agenda initiatives. Key projects arising out of the action agenda include:

- an international benchmarking study;
- a major commitment to research projects;
- the establishment of a fund to assist innovation;
- funding to support research into project delivery mechanisms;
- assistance to improve market access and the export performance of firms; and
- a program to assist builders to establish networks and target export markets.[317]

## Industrial relations

100 The work of NatBACC and the action agenda included very little on workplace relations. Only one of NatBACC's research papers concentrated on workplace relations issues in the industry. NatBACC's *Report on Workplace Relations Issues in the Building and Construction Industry* recommended, among other matters, developing initiatives to simplify industrial awards, minimise disputes and provide more effective remedies. It recognised that there were a number of unique workplace relations issues in the industry.

101 The Federal Government accepted the need for further initiatives and said they would be addressed in the *Workplace Relations and Legislation Amendment (More Jobs, Better Pay) Bill 1999 (C'wth)*. The Government argued that workplace relations in the building and construction industry should continue to be regulated by the *Workplace Relations Act 1996 (C'wth)*, rather than industry-specific legislation.[318]

# 9 Property Council of Australia Report, *Projects as Wealth Creators Report, 2001*

102 In 2000, the Property Council of Australia commissioned a review of 28 highly successful building and construction projects with a view to determining whether they had common 'drivers of success'. Projects were selected for the study only if:

- end-users were 'delighted';
- clients attained or exceeded their investment goals;
- contractors and consultants achieved or exceeded their margins;
- project participants enjoyed the experience; and
- stakeholders appreciated the aesthetic and environment outcomes of the projects.

103 The report concluded that only about one project in ten satisfied these criteria.

104 The study identified ten main 'drivers of excellence' in project delivery, namely:

- client leadership;
- trusting relationships;
- successful and comprehensive project initiation;
- successful team selection and establishment;
- team pride;
- value management;
- stakeholder involvement;
- open and effective communication;
- understanding the client's business; and
- adequate budgeting.

105 Four 'critical turning points' were identified as being essential if excellence in project delivery were to become a possibility:

- creation by the client of an equitable and trusting project environment;
- establishment of a multidisciplinary project team;
- project initiation characterised by strategic ownership by the team of a rigorous project business plan; and
- successful completion of construction milestones.

106 The report supports the view that the project environment, trusting relationships and teamwork are fundamental to successful outcomes on building and construction projects.

# 10 Lessons for this Commission

107 Through the various reviews identified above, a great deal of valuable research was undertaken during the 1990s into causes of inefficiency in the building and construction industry.

108 Recurrent themes are evident in the material reviewed above:

- Industrial relations problems plague the building and construction industry and are a major impediment to the development of an efficient, productive and harmonious industry.
- Delays due to industrial disputation are rife in the building and construction industry. Projects are vulnerable to disruption for a range of reasons including the high cost of delays, the conduct of unions, characteristics of project delivery unique to the industry, and the inadequacy of available legal remedies.
- The building and construction industry is characterised by adversarial and confrontational relationships between major stakeholders.
- Many of the major participants in the industry show a lack of respect for the law and lawful authority, and lack the qualities of integrity and probity.
- Governments play a critical role as major clients to the building and construction industry and can facilitate cultural change and labour market reform by insisting on best practice on public sector construction sites. Codes of Practice for government projects play an important role.
- The lack of national uniformity in legislation regulating the industry is a substantial cause of inefficiencies.
- The building and construction industry has a number of unique features which set it apart from other industries, including the temporary and cyclical nature of workplace relationships, an absence of international competition, and a process of project delivery which typically does not encourage all parties to work co-operatively to achieve common goals or objectives.
- Genuine enterprise bargaining has eluded the building and construction industry. Instead, pattern bargaining has substantially replaced a process of genuine discussion and agreement between contractors and their employees. Pattern agreements grant increases in wages and conditions without corresponding productivity increases.

- Industry or trade, project and enterprise agreements between employers, unions and employees have not led to a reduction in dispute-related delays.
- The existence of industry or trade agreements and project agreements hampers the ability of contractors to enter into genuine enterprise agreements with their workers. Some matters, such as inclement weather procedures, work hours and rostered days off may be best negotiated at the project level. There is no reason, however, why matters such as remuneration and hiring arrangements could not be negotiated between contractors and their employees at the enterprise level.
- Productivity and efficiency in the industry are adversely affected by abuse of inclement weather and safety procedures, a lack of flexibility in relation to rostered days off and work hours, and restrictive labour practices such as 'no ticket no start' and 'last on first off'.
- Productivity is also adversely affected by the prevalence of disputes over payments to subcontractors and an absence of security of payments in cases where contractors collapse.

109 From the study of past attempts at reform of the building and construction industry, it can be deduced that:

- The fundamental challenge is to reform the culture of the industry in a way which reasserts the primacy of the rule of the law, and encourages the development of an environment in which trusting relationships and teamwork can flourish.
- Recommendations for reform of the industry will have a greater chance of achieving cultural change if governments at all levels are enthusiastically committed to their acceptance and implementation.
- Lasting and beneficial changes to the industry are more likely to occur if they comprise a comprehensive package of reforms and are implemented nationally in a uniform manner.
- There is a powerful case for legislative reforms aimed at improving the building and construction industry to be industry-specific, having regard to the unique nature of the industry, and the fact that key objectives of industry-neutral legislation, especially the *Workplace Relations Act 1996 (C'wth)*, have not been achieved in the building and construction industry.
- The creation of a taskforce with a mandate to enforce the rule of the law in the building and construction industry is likely to be instrumental in the implementation of reform recommendations at the site level.

110 This brief review of reports on the industry since 1990 highlights the continuing nature of industry problems, particularly in industrial relations. Problems with occupational health and safety, 'last on first off', 'no ticket no start' and effective closed shops on central business district sites, inclement weather problems, payment for time lost due to industrial action, compulsory union membership, avoidance of dispute resolution procedures and unsafe work practices have continued throughout the last decade. Those problems have now been joined by pattern bargaining, an effective requirement for subcontractors on major sites to have a

union-endorsed EBA and a high level of union membership, and an increase in the power of job delegates and safety committees, the powers of which are frequently abused. Most importantly, there is a culture whereby agreements made for three years and intended to secure industrial peace, to resolve disputes and increase productivity and the capacity for employees to participate in determining their own employment conditions are disregarded in favour of direct industrial action to the disadvantage of all participants in the industry, with the exception of unions. A short term, project specific, commercial solution approach has prevailed, at the expense of compliance with contractual and statutory obligations.

111 The present state of the industry makes plain that prior attempts at reform have not succeeded. Some have had temporary success in ameliorating disruption and discontinuity, but none has achieved lasting reform for the benefit of participants in the industry. There needs to be a body created to restore the rule of law to all participants in the industry, in place of commercial expediency and the surrender to economic and industrial pressure.

# Appendix B

# State legislation and industrial action

# 1 Introduction

1 State legislation also affects the circumstances in which industrial action is lawful in Australia. Each State, other than Victoria, has its own industrial relations legislation and system of industrial relations regulation which co-exist with the federal systems.

2 The following is a brief overview of the most important State laws affecting industrial action in the building and construction industry.

# 2 New South Wales

3 Section 141 of the *Industrial Relations Act 1996 (NSW)* prohibits tort actions from being brought or continued in respect of industrial disputes which are before the State Commission for conciliation. The prohibition does not apply, however, to actions to recover damages for death or personal injury, actions to recover damages for destruction of or damage to property, actions for conversion or detinue, actions for defamation, or actions where officials or members of a union were not acting in their capacity as officials or members. Section 142 of the same Act provides that injunctions may not be granted to restrain torts which are not actionable by virtue of the Act.

4 In exercising its powers of arbitration in respect of an industrial dispute, the State Commission in New South Wales may order that a person cease taking industrial action,[319] including secondary boycott action in connection with an industrial dispute.[320] The Commission may order the reinstatement of employees dismissed during an industrial dispute and order employers not to dismiss employees during industrial disputes.[321] Contraventions of such orders can result in the cancellation of enterprise agreements, the suspension or modification of entitlements, the cancellation of union registration, or the imposition of penalties on unions or employers.[322]

5 Generally, it is an offence for employers to make payments to employees in respect of periods during which they are engaged in industrial action,[323] although the State Commission may authorise payment if satisfied that the action was based on a reasonable concern for health and safety.[324] An employer may apply to the Commission for an order to stand down employees where, through no fault of the employer, they cannot be usefully employed because of industrial action.[325]

# 3 Victoria

6 Victoria referred the power to regulate industrial relations to the Commonwealth in 1996. As a result, the *Workplace Relations Act 1996 (C'wth)* applies to most Victorian workers.

7 Victoria did not refer to the Commonwealth the power to make laws in relation to occupational, health and safety. Under s26 of the *Occupational Health and Safety Act 1985 (Vic)*, work may cease in certain circumstances where there is an immediate threat to the health and safety of any person. Employees may be reassigned to suitable alternative work.[326] Where the relevant procedures have been followed, employees are entitled to be paid during periods when they cannot work due to a health and safety issue. Employers must not prejudice employees in their employment because they have assisted or given information to an inspector or health and safety representative or committee, or because they have made a complaint in relation to health and safety.[327]

# 4 Queensland

8 Section 181 of the *Industrial Relations Act 1999 (Qld)* prohibits industrial action while a certified agreement is in force. Section 147 of the same Act prohibits industrial action during the 'peace obligation period', which is a 21-day period after notice has been given of an intention to negotiate the terms of a certified agreement.[328]

9 Section 174 of the same Act makes provision for protected action after the peace obligation period and during the course of negotiations for a certified agreement. Industrial action is not protected if it takes place or is organised while the State Commission is exercising its powers of arbitration.[329] There are limitations on protected action:

- the industrial action must not involve personal injury, the wilful or reckless destruction of or damage to property or the unlawful taking or use of property;[330]
- the protection does not apply to defamation in the course of industrial action;[331]
- the party involved must have genuinely tried to come to an agreement before resorting to industrial action;[332] and
- the protected status of industrial action will be lost if application is not made to the State Commission to certify the agreement within 21 days after signing.[333]

10 Employees cannot be dismissed for engaging in protected industrial action.[334]

11 The State Commission in Queensland, in taking action to settle industrial disputes notified to it, can make various orders, including that industrial action either stop or not happen.[335] Contravention of such orders can lead to the imposition of fines, deregistration, or injunctions.[336]

12 The Commission may order a secret ballot to find out the number of employees who favour a strike.[337] If a majority of voters are not in favour of the strike, then an 'end date' for the strike must be advertised by the Registrar.[338] Employees or members who continue a strike beyond its end date without reasonable excuse are taken to have had their employment terminated from the end date.[339]

13 Strike pay is permitted in Queensland, but cannot be compelled – it is open to the employer to pay, or to refuse to pay a worker when on strike.[340] Unions cannot, however, organise strikes with intent to coerce the employer to make a strike payment.[341]

14 Nothing in the Queensland Act prevents an employee from refusing to perform work if the refusal is based on a reasonable concern about an imminent risk to his or her safety, provided that the employee does not unreasonably contravene a direction by the employer to perform other safe and available work that is appropriate for the employee.[342]

# 5 South Australia

15 Section 138 of the *Industrial and Employee Relations Act 1994 (SA)* provides a limited immunity from actions in tort in respect of acts or omissions done or made in contemplation or furtherance of industrial disputes. The immunity does not apply to actions for damages for death or personal injury, damage (other than economic damage) to property, conversion or detinue, and defamation.

16 A Full Bench of the State Commission may authorise the bringing of tort actions in any case where:

- an industrial dispute, resolved by conciliation or arbitration, either arose or was prolonged by unreasonable conduct on the part of a particular person;[343] or
- all means for resolution of the dispute have failed, or there is no immediate prospect for resolving the dispute, and it is in the public interest to bring the action having regard to the nature of the dispute and the gravity of the consequences.[344]

17 The State Commission in South Australia may rescind or vary an enterprise agreement on application of a person bound by the agreement where industrial action is being engaged in by a person bound by the agreement.[345]

18 Where there is an immediate threat to health and safety, a health and safety representative of a designated work group may give a direction to cease work until the problem is remedied.[346] The employer may assign the affected employees to suitable alternative work.[347] Employees are entitled to be paid for the period of cessation if an inspector determines that there was an immediate threat to health or safety justifying the cessation, or that the health and safety representative reasonably believed that such a threat existed.[348] An employer must not prejudice an employee because he or she assisted or gave information to an inspector or health and safety representative, or made a complaint in relation to a matter affecting health, safety or welfare.[349]

# 6 Western Australia

19 The industrial relations system in Western Australia is undergoing change. The principal legislation is the *Industrial Relations Act 1979 (WA)* and the *Workplace Agreements Act 1993 (WA)*. The latter Act has, however, been substantially affected by the passage of the *Labour Relations Reform Act 2002 (WA)*, which has already repealed part of the Act, with the remainder to be repealed in 2003. An important objective of the *Labour Relations Reform Act 2002 (WA)* is to return the focus of workplace bargaining in Western Australia to a system consisting primarily of collective bargaining.

20 The *Industrial Relations Act 1979 (WA)* does not contain any limitations on the bringing of actions in tort in respect of industrial action. Under s44 of that Act, the State Commission may summons any person to attend a conference before the Commission in various circumstances, including where industrial action has occurred or is likely to occur, or in relation to the bargaining of an industrial agreement. The Commission may make a broad range of directions, declarations or orders in relation to industrial matters.

21 Employees may refuse to work in Western Australia where they have reasonable grounds to believe that continuing work would expose them or any other person to a risk of imminent and serious injury or imminent or serious harm to their health.[350] Employees may be reassigned to alternative work.[351] Employees are entitled to be paid during a period when they cannot work due to a health and safety issue, unless they leave the workplace without authorisation or refuse to do alternative work.[352] It is an offence for an employee who improperly refuses to work on safety grounds to accept pay or other benefits from an employer.[353] An employer who pays employees in such circumstances also commits an offence.[354] Employers must not discriminate against employees on the ground that they have made a complaint in relation to safety or health.[355]

# 7 Tasmania

22 Section 54 of the *Industrial Relations Act 1984 (Tas)* prohibits strikes and lockouts on account of any matters for which provision is made in a State award. There is no limitation on civil liability for industrial action in the Tasmanian legislation. Employers may stand down employees without pay where they refuse to perform any or all of their normal duties or duties which they could reasonably be expected to perform.[356]

23 Employees may refuse to work if as a result of work being carried out at a workplace they have reasonable grounds to believe that there is a risk of imminent or serious injury or imminent or serious harm to the health of any person.[357] It must not be within the employee's ability to rectify the cause of the risk. The employee must immediately notify his or her employer and any employee safety representative. The employee is obliged to perform alternative work as directed by the employer.[358]

# Appendix C

# Section 298B of the *Workplace Relations Act 1996 (C'wth)* – its terms and its interpretation

## Section 298B of the *Workplace Relations Act 1996 (C'wth)* – its terms and its interpretation

1 In *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd*[359] the High Court gave consideration to the constitutional validity of s45D of the *Trade Practices Act 1974 (C'wth)*, and, in particular, whether it was supported by the corporations power in s51(xx) of the Constitution. The Court rejected the principal challenge, but it upheld by majority a challenge to s45D(5) of the *Trade Practices Act 1974 (C'wth)*. The subsection deemed the conduct of members or officers of a trade union acting in concert with one another, whether or not the conduct was also engaged in with other persons, to be the conduct of the union, unless the union took 'all reasonable steps to prevent the participants from engaging in that conduct'. Mason J said that subsection 45D(5) was 'a law about trade unions' with 'a very remote connection with corporations'.[360] As such, it was beyond power.

2 Those who drafted subsection 298B(2) of the *Workplace Relations Act 1996 (C'wth)* were plainly influenced by this decision. Subsection 298B(2) is limited to deeming an industrial association responsible for the actions of its committee of management, or others within the association acting in their respective capacities in the association or under its rules. In *Rowe v Transport Workers' Union of Australia*[361] Cooper J had reason to consider the constitutionality of subsections 298B(2) and (3). His Honour held that it was irrelevant that the legislation extends to the conduct of industrial associations that cannot be registered, because industrial associations must act through individuals, and fixing liability on an industrial association for their conduct by identifying it as the conduct of the industrial association is within either the conciliation and arbitration power (s51(xxxv)) or the corporations power (s51(xx)) of the Constitution. Rather, the question is whether the subsection goes too far by imputing to the industrial association conduct that could not be regarded as other than the conduct of the individual. Having traced the meaning and significance of paragraphs (a) to (d) of subsection 298B(2), His Honour concluded that subsection 298B(2) had a sufficient connection with the relevant heads of power and was valid.[362]

3 Thus, depending on the circumstances, the actions of persons or the groups of persons referred to in subsection 298B(2) may as a matter of law be the conduct of the association itself. In *Tesco Supermarkets Limited v Natrass*[363] Lord Reid pointed out that a corporation must act through living persons. In these circumstances a corporation cannot be vicariously liable. The person acts as the company and the person's mind is the mind of the company.[364] Undoubtedly there is a limit to the extent to which the 'directing mind principle' can be applied to make the conduct of individuals the conduct of the corporation. In this respect it is important to note that subsections 298B(2) and (3) are not intended to exclude the operation of this principle. Rather, the sections remove the necessity to distinguish between situations in which the persons concerned act as the directing mind of the industrial association and those in which they act only in a representative capacity. Thus, subsection 298B(2) operates to extend the categories of conduct which, for the purposes of Part XA of the *Workplace Relations Act 1996 (C'wth)*, may be treated as the conduct of the industrial association, in circumstances in which uncertainty may attend the application of common law principles dealing with the attribution of responsibility.[365]

4 Paragraph (a) of subsection 298B(2) refers to a 'committee of management'. The term is defined to mean a group of persons or body of persons, however described, which manages the affairs of an organisation, association or branch.[366] Prima facie it constitutes the controlling mind of the industrial association and the body through which the association acts in its collective capacity. It has the general authority to act in relation to the affairs of the industrial association, and its conduct must be regarded as the collective conduct of the individuals constituting the association. On ordinary agency principles the industrial association is liable for the conduct of the committee of management.[367]

5 Paragraph (b) of subsection 298(2) refers to an 'officer' or 'agent' of the industrial association, in either case 'acting in that capacity'. The word 'officer' connotes a person appointed or elected to a position of rank or authority. The meaning of 'officer' and the extent of the authority so held depends upon the context in which the word is used in the legislation.[368] In the *Workplace Relations Act 1996 (C'wth)* the word 'officer' takes it meaning from the definitions of 'officer' and 'office' in subsection 4(1) of the *Workplace Relations Act 1996 (C'wth)*, as extended by the categories referred to in s298B(1) of the Act.

6 Subsection 4(1) of the Act provides that, unless the contrary intention appears, 'officer' in relation to an organisation or one of its branches means a person who holds an 'office' in the organisation or branch.[369] In its ordinary meaning an 'office' exists independently of the holder of the office, and thus continues to exist through a succession of holders of the office. In the *Workplace Relations Act 1996 (C'wth)* the word 'office' is given a wide meaning. It includes certain defined positions such as president, vice president, secretary or assistant secretary of an organisation or branch.[370] It also includes a voting member of a collective body of the organisation or branch where the collective body has power to fulfil certain functions, such as management of the affairs of the organisation or branch, the determination of its policy, the making, alteration or rescission of its rules, the enforcement of its rules or the performance of functions in respect of enforcement.[371] The word 'office' is further extended to those who under the rules of the organisation or branch are entitled to participate directly in any of these functions (subject to certain exceptions).[372] The word 'office' also includes a person holding (as trustee or otherwise) property of the organisation or branch or in which the organisation or branch has a beneficial interest.[373]

7 Subsection 298B(1) extends the meaning of the word 'officer', in relation to any industrial association, to include a 'delegate' or 'other representative' of the association, and an 'employee' of the association. In its ordinary meaning the word 'delegate' encompasses those 'sent or deputed to act for or represent' other persons.[374] There is no requirement under the *Workplace Relations Act 1996 (C'wth)* that a delegate must carry administrative or executive authority or possess some substantial degree of responsibility. Furthermore, its meaning is not limited by the Federal Court decision in *Stapleton v African Lion Safari Pty Ltd*.[375] In that case it was held that it was not sufficient for a person to undertake the duties of a delegate of an association if that person were not appointed a delegate in accordance with its rules, but that limitation was imposed because of the wording of the rules under consideration.[376] In subsection 298B(1) the term 'delegate', and the terms 'other representative' and 'employee', are restricted only by paragraph 298B(2)(b) which requires that an 'officer' must be 'acting in that capacity'.

8 To establish that 'an officer' is 'acting in that capacity', it is necessary to conduct a factual enquiry concerning the nature of the person's position to ascertain whether the conduct of the person was undertaken in that capacity. In this enquiry, it will not be necessary, for a party who seeks to make an industrial association liable, to prove that the officer acted with express authority or in accordance with the rules of the association. Contrary propositions were expressly rejected by Einfeld J in *Employment Advocate v National Union of Workers*.[377] His Honour pointed out that, were these matters to be regarded as conditions to be satisfied before a person could be said to be 'acting in that capacity', s298B would not assist where it was sought to attribute unlawful conduct to a union.[378] In the case at hand an employer had engaged a person who had declined to join a union. The employer was threatened by a union organiser. Evidence was given by the union secretary that he did not authorise the union organiser to make the threats. However, His Honour found that the organiser represented the union in the particular region where these events took place, he had done so in the past and he had introduced himself as an organiser of the union. In these circumstances his authority to act in the capacity of an organiser had been clearly established.[379]

9 To satisfy paragraph 298B(2)(b) of the *Workplace Relations Act 1996 (C'wth)*, it is necessary to show that an 'agent' of the industrial association was 'acting in that capacity', and the comments of Einfeld J in respect of officers equally apply. The word 'agent' is not defined, and it would appear to have its ordinary meaning. Thus it would include a person who acts on behalf of an industrial association with its express authority or who is held out as having the authority of the association. The meaning of 'agent' should not be restricted save to give effect to the statutory requirement that the person alleged to be an 'agent' must be 'acting in that capacity'.

10 Paragraph (c) of subsection 298B(2) refers to a 'member' or 'group of members' of an industrial association 'acting under the rules of the association'. In *Rowe v Transport Workers' Union of Australia*[380] *Justice Cooper* pointed out that paragraph (c) takes as its premise the fact that an 'industrial association', as defined in subsection 298B(1), is a body whose principal purpose is the protection and promotion of the interests of its members in matters concerning their employment, or their interests as independent contractors. Accordingly, the rules of the association are treated as having been drawn to control the conduct of members as members in the achievement of this objective.[381] Authorisation from the committee of management or someone more senior in the union hierarchy is not, therefore, necessary in order for a member to be found to be 'acting under the rules of the association'. It is the membership which has the power to control the content of the rules and the disposition of authority between the various organs and elements of the industrial association.[382] Accordingly, the industrial association may escape liability in this situation only if, pursuant to subsection 298B(3) of the *Workplace Relations Act 1996 (C'wth)*, the committee of management, a person authorised by the committee or an officer of the industrial association has taken reasonable steps to prevent the action in question.

11 Paragraph 298B(2)(d) of the *Workplace Relations Act 1996 (C'wth)* is concerned with a member of an industrial association performing the functions of dealing with an employer on behalf of a member or other members of the association, and who is 'acting in that capacity'. The paragraph concerns the employment of persons with a particular employer and representation of the persons at the workplace level. It includes a situation where the rules of the industrial association provide for a member or members of the association to undertake the function stated, or where a particular person is approved or delegated by the committee of management to undertake the function. It also embraces those situations where, in default of the industrial association making provision for representation at the workplace level, the members of the association authorise a member to represent them in their dealings with the employer. In such a situation the conduct of the member so authorised is properly characterised as conduct engaged in to achieve the objects of the industrial association.[383] That the industrial association is liable for the acts of the individual members in such a default situation is reinforced by the presence of the exculpatory provision in subsection 298B(3) of the *Workplace Relations Act 1996 (C'wth)*.[384]

# Appendix D

# Deregistration in State jurisdictions

# 1 New South Wales

1 The *Industrial Relations Act 1996 (NSW)* empowers the New South Wales Industrial Relations Commission (NSWIRC) to cancel the registration of an industrial organisation on grounds which include mistaken registration and that the organisation is defunct. The grounds for cancellation relating to conduct and behaviour of the organisation or a substantial number of its members are:

- contravention of the industrial relations legislation, any industrial instrument or NSWIRC order;[385]
- industrial action which has or is likely to have a substantial adverse effect on the safety, health and welfare of the community, or part of the community;[386] or
- industrial action which has or is likely to have a major and substantial adverse effect on the provision of any public service by the State or an authority of the State contrary to the public interest and without reasonable cause.[387]

2 The NSWIRC may cancel the registration if one of these grounds is made out and it considers that deregistration is appropriate in the circumstances because of the gravity of the case.[388]

3 Where the NSWIRC orders cancellation of registration, the organisation ceases to be a body corporate and, subject to the NSWIRC's order, its property becomes that of an unincorporated association and must be held and used according to the rules of the association.[389]

4 There are alternatives to cancellation of registration. The NSWIRC is empowered, if the grounds for deregistration are made out and the action is wholly or mainly because of the conduct of a group or class of membership, to order the exclusion of that group from membership.[390] The Commission may defer the question of cancellation of registration and make orders:

- suspending the rights, privileges or capacities of the organisation and its members;
- giving directions as to the exercise of the suspended rights;
- restricting the use of funds and property.[391]

5 The NSWIRC is empowered to make any necessary ancillary or consequential orders in relation to its orders under the cancellation of registration or the alternatives to cancellation orders which it has made.[392]

# 2 Queensland

6 The *Industrial Relations Act 1999 (Qld)* sets out very detailed provisions for deregistration.[393] The Full Bench of the Queensland Industrial Relations Commission (QIRC) has power to order the deregistration of an organisation of employers or employees on grounds which broadly fall into two areas:

- industrial conduct ground; and
- internal affairs and other grounds.[394]

7 Internal affairs and other grounds includes such grounds as registration of the organisation by mistake[395] and the organisation's rules being harsh or oppressive[396]; it is the industrial conduct ground which is relevant to the sanction for an organisation's 'industrial behaviour'.[397] The details of industrial conduct grounds are set out below:

- conduct which has prevented the achievement of the objects of the *Industrial Relations Act 1999 (Qld)* as follows:
  - the continued contravention by the organisation or its members of a commission order or industrial instrument;[398]
  - the continued failure by the organisation to ensure its members do not contravene an instrument;[399] or
  - any other conduct by the organisation and its members;[400]
- industrial action by the organisation or its members which has prevented or is interfering with either trade or commerce, or with providing a public service;[401]
- industrial action by the organisation or its members which has or is likely to have a substantial adverse effect on the safety, health and welfare of the community or a part of the community.[402]

8 It should be noted that that the term 'members of an organisation' is expressly defined to mean either a substantial number of the organisation's members, or 'a section or class of its members'.[403] Thus the relevant ground for deregistration cannot be made out on the conduct of a few members not in a section or class. Application for deregistration can be made by an organisation, the Minister, the registrar, a person given leave by the Full Bench of the QIRC or the Full Bench of the QIRC on its own initiative.[404]

9 Hearings for deregistration on industrial grounds attract special provisions of the *Industrial Relations Act 1999 (Qld)*. When the QIRC finds that the industrial ground is made out and it does not consider deregistration to be unjust after taking into account both the circumstances about the ground and the organisation's action, it is obliged to order deregistration.[405]

10 There is an alternative to deregistration where the industrial ground is made out, either wholly or mainly because of the conduct of a section or class of the membership. The QIRC may either order amendments to the organisation's eligibility rules to exclude from eligibility the section or class, or order that a stated person be excluded from membership.[406]

11 In addition, the QIRC may make a deferral order which defers its decision on deregistration and may order the suspension to a stated extent of the organisation or its members rights, privileges or capacities under the *Industrial Relations Act 1999 (Qld)*, orders, awards, certified agreements, industrial instruments etc and restrict the organisation (or its branches) in the use of funds and property to enforce the restriction.[407] The deferral order has a limited life of six months, unless extended or discharged.[408]

12 The effects of deregistration in Queensland are:

- if the deregistered organisation was incorporated because of its registration, it becomes an association and loses its corporate status but its rules continue in force;[409]
- property owned by the organisation must be held and used under its rules and applied for the organisation's purposes under its rules;[410]
- any awards, QIRC orders, or agreements binding an organisation or its members prior to deregistration will cease to have effect and will confer no rights to benefits on the organisation or its members.[411]

# 3 South Australia

13 The *Industrial and Employee Relations Act 1994 (SA)* sets out the grounds for deregistration of an association of employers or employees which is registered under that Act.[412] The *Industrial and Employee Relations Act 1994 (SA)* also sets out the grounds for deregistration of a federally registered organisation or its branch.[413] In each case it is a ground for cancellation of registration where the body has wilfully contravened or failed to comply with a determination of the South Australian Industrial Relations Commission[414] or there is some other substantial reason for deregistering the body.[415]

14 The deregistration provisions enable the South Australian Industrial Relations Commission to suspend the order and make a direction that if a stated requirement is complied with to the South Australian Industrial Relations Commission's satisfaction within a stated period, the order will lapse but otherwise will take effect at the end of the stated period.[416] In the case of the registered association under the *Industrial and Employee Relations Act 1994 (SA)* the South Australian Industrial Relations Commission can alternatively order that the rules of the association be altered to exclude persons belonging to the relevant class or section which has been responsible for the relevant conduct.[417]

# 4 Western Australia

15 The Western Australian Industrial Relations Commission (WAIRC) is empowered by the *Industrial Relations Act 1979 (WA)* to direct the Registrar to issue a summons to an organisation to appear before the Full Bench to show cause why this registration should not be cancelled.[418] The WAIRC may make such a direction at the request of the Minister, any employer or organisation or of its own motion.

16 The Minister may make a request if:

- there is a risk to safety, health or community welfare;
- a number of a group or class of employees who are eligible for membership of that union are subject to a Federal award; or
- there is sufficient evidence of breaches of the following sections of *Workplace Agreements Act 1993 (WA)* which proscribe certain actions being taken to encourage or force a party to make an agreement:
  - false representations;[419]
  - threats or intimidation;[420]
  - misinformation;[421]
  - dismissal of employees;[422]
  - coercion of employers by commercial pressure.[423]

17 If the Minister makes such a request and it is accompanied by a declaration by that Minister that in his or her opinion one of these grounds exists, the WAIRC shall make such a direction.[424]

18 In any other case, the WAIRC may give a direction if by reason of the conduct of the organisation or its officers or members or any of them, either generally or in a particular case, it appears to the WAIRC that the continuance of registration is not consistent with the object of the *Industrial Relations Act 1979 (WA)*.[425] Before giving a direction under this subsection the WAIRC is required to invite the officers of the organisation to consult with it in respect of that conduct. The reasons for giving the direction should be included in writing and provided to the organisation which may then apply for further particulars.[426]

19 Upon return of the summons, the Full Bench of the WAIRC has the power to make a number of orders depending on its findings. If the WAIRC finds that by reason of the conduct of the

organisation or its officers or members or any of them, either generally or in any particular case, the continuance of the registration is not consistent with or will not serve the objects of the *Industrial Relations Act 1979 (WA)*, the WAIRC may make an order:

- cancelling the registration;[427]
- cancelling the rights of the organisation under the *Industrial Relations Act 1979 (WA)*, either generally or with respect to specified groups;[428] or
- suspending the registration and the WAIRC may choose whether to limit the duration of the suspension and impose conditions or exceptions.[429]

20 If the Full Bench of the WAIRC makes a finding based on the Minister's declaration,[430] it can make an order cancelling the rights of the organisation under *Industrial Relations Act 1979 (WA)* with respect to those employees.

21 The WAIRC also has the power to make additional orders in relation to suspending awards, orders or agreements in relation to any of the above findings. All orders come into effect on a date specified by the Full Bench of the WAIRC.

# 5 Tasmania

22 The *Industrial Relations Act 1984 (Tas)* provides for cancellation of registration under the *Industrial Relations Act 1984 (Tas)* of an organisation for reasons which include contravention of the *Industrial Relations Act 1984 (Tas)* or the Tasmanian Industrial Commission's (TIC) orders. The *Industrial Relations Act 1984 (Tas)* empowers the President of the Commission to refer the cancellation of registration application to a Full Bench of the TIC which, after the due hearing process, may cancel the registration of the organisation where the members or officers have:

- contravened or not complied with an order which applies to them or their union; or
- repeatedly engaged in conduct that contravenes a provision of the *Industrial Relations Act 1984 (Tas)*.[431]

23 Deregistration will take effect on a specified date. Application for deregistration on the grounds outlined above may be made by the Minister or by another organisation. Cancellation would seem to result in the loss of the rights conferred by registration[432] and include:

- the right to make applications to the TIC pursuant to the *Industrial Relations Act 1984 (Tas)*;
- to appear in proceedings before the TIC with respect to an industrial matter affecting the members of the organisation;
- the right to lodge an appeal; and
- to enter into an industrial agreement.

24 However unlike some States it cannot result in loss of corporate status because registration itself did not confer that status.

## Notes to Achieving Cultural Change

1 The basis for these figures is set out in the *National Perspective* Volumes of this report.

2 Transfield Pty Ltd, *Submission to the Royal Commission into the Building and Construction Industry,* July 2002, exhibit 820, paragraphs 8.17–8.18, document 057.0166.0542.0001 at 0032.

3 Royal Commission into the Building and Construction Industry 2002, *First Report*, 5 August 2002, www.royalcombci.gov.au/docs/first_report/pdf

4 The following submissions indicated support for establishment of a taskforce:

(a) Master Builders' Association Incorporated 2001, *Submission to the Royal Commission into the Building and Construction Industry,* 11 December, exhibit 6, paragraphs 127, 193 – 217, document 064.0681.0226.0003.

(b) Dempsey Statutory Declaration on behalf of Baulderstone Hornibrook, exhibit 905, paragraph 33, document 080.0566.0560.0003.

(c) Australian Industry Group 2002, *Submission to the Royal Commission into the Building and Construction Industry*, 28 March, exhibit 441, document 016.0672.0673.0001_001 at 0005–0006.

(d) National Electrical and Communications Association 2002, *Submission to the Royal Commission into the Building and Construction Industry,* May, exhibit 528, paragraphs 24–25, document 097.0993.0724.0002.

(e) Transfield Pty Ltd 2002, *Submission to the Royal Commission into the Building and Construction Industry,* July, exhibit 820, paragraph 8.2, document 057.0166.0542.0001.

(f) Grocon Pty Ltd 2002, *Statement on behalf of Grocon Pty Ltd to the Royal Commission into the Building and Construction Industry,* 22 July, exhibit 830, document 048.0949.0311.0094 at 0136–0137.

(g) Air-conditioning and Mechanical Contractors' Association of Victoria 2002, *Submission to the Royal Commission into the Building and Construction Industry,* 19 July, exhibit 857, paragraphs 23–26, document 031.0615.0400.0001.

(h) Australian Chamber of Commerce and Industry 2002, *Submission to the Royal Commission into the Building and Construction Industry,* October, exhibit 1730, paragraphs 25 & 27, document 096.0277.0315.0003.

(i) Air-conditioning and Mechanical Contractors' Association of Western Australia 2002, *Submission to the Royal Commission into the Building and Construction Industry,* 15 August, exhibit 1210, document 094.0781.0509.0002 at 0003. See also the Overview of Private Meetings, exhibit 446, paragraphs 119–122, document 088.0525.0010.0001.

5 Department of Employment and Workplace Relations, Minister Tony Abbott – Media Release – 'First Report of the Royal Commission into the Building and Construction Industry', 20 August 2002 [accessed 3 October 2002] http://www.dewr.gov.au/ministerAndMediaCentre/mediacentre/default.asp

6 Department of Employment and Workplace Relations, Minister Tony Abbott – Media Release – 'Interim Taskforce for the Building Industry – Opening for Business', 26 September 2002 [accessed 3 October 2002] http://www.dewr.gov.au/ministerAndMediaCentre/mediacentre/default.asp

7 Department of Employment and Workplace Relations, Minister Tony Abbott – Media Release – 'Interim Taskforce for the Building Industry – Opening for Business', 26 September 2002 [accessed 3 October 2002] http://www.dewr.gov.au/ministerAndMediaCentre/mediacentre/default.asp

8 Department of Employment and Workplace Relations, Minister Tony Abbott – Media Release – 'Interim Taskforce for the Building Industry – Opening for Business', 26 September 2002 [accessed 3 October 2002] http://www.dewr.gov.au/ministerAndMediaCentre/mediacentre/default.asp

9 Department of Employment and Workplace Relations, Minister Tony Abbott – Media Release – 'Interim Taskforce for the Building Industry – Opening for Business', 26 September 2002 [accessed 3 October 2002] http://www.dewr.gov.au/ministerAndMediaCentre/mediacentre/default.asp

[10] Department of Employment and Workplace Relations, Minister Tony Abbott – Media Release – 'Interim Taskforce for the Building Industry', 1 October 2002 [accessed 3 October 2002] http://www.dewr.gov.au/ministerAndMediaCentre/mediacentre/default.asp

[11] Department of Employment and Workplace Relations, Minister Tony Abbott – Media Release – 'Interim Taskforce for the Building Industry', 1 October 2002 [accessed 3 October 2002] http://www.dewr.gov.au/ministerAndMediaCentre/mediacentre/default.asp

[12] Department of Employment and Workplace Relations, Minister Tony Abbott – Media Release – 'Interim Taskforce for the Building Industry', 1 October 2002 [accessed 3 October 2002] http://www.dewr.gov.au/ministerAndMediaCentre/mediacentre/default.asp

[13] Department of Employment and Workplace Relations, Minister Tony Abbott – Media Release – 'Interim Taskforce for the Building Industry', 1 October 2002 [accessed 3 October 2002] http://www.dewr.gov.au/ministerAndMediaCentre/mediacentre/default.asp

[14] Rushton Statutory Declaration, exhibit 711, paragraph 3, document 091.0798.0313.0001.

[15] Rushton Statutory Declaration, exhibit 711, paragraphs 8–9, document 091.0798.0313.0001.

[16] Rushton Statutory Declaration, exhibit 711, paragraphs 3–4, 6–7, document 091.0798.0313.0001; Copeland Statutory Declaration, exhibit 572, paragraph 13, document 098.0027.0256.0001.

[17] Ure Statutory Declaration, exhibit 715, paragraph 9, document 049.0138.0338.0035.

[18] Rushton Statutory Declaration, exhibit 711, paragraph 11, document 091.0798.0313.0001.

[19] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0025 at 0026.

[20] Rushton Statutory Declaration, exhibit 711, paragraphs 11 & 28, document 091.0798.0313.0001.

[21] Copeland Statutory Declaration, exhibit 572, paragraph 14, document 098.0027.0256.0001.

[22] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0025 at 0026.

[23] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0025 at 0026.

[24] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0025 at 0027.

[25] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0025.

[26] Rushton Statutory Declaration, exhibit 711, paragraph 10, document 091.0798.0313.0001 and annexure B 091.0798.0313.0014.

[27] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0025.

[28] Rushton Statutory Declaration, exhibit 711, paragraph 10, document 091.0798.0313.0001 and Annexure C, document 091.0798.0313.0017.

[29] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0025 at 0028.

[30] Rushton Statutory Declaration, exhibit 711, paragraphs 13–16, document 091.0798.0313.0001.

[31] Rushton Statutory Declaration, exhibit 711, paragraph 29, document 091.0798.0313.0001.

[32] Rushton Statutory Declaration, exhibit 711, paragraph 31, document 091.0798.0313.0001.

[33] Rushton Statutory Declaration, exhibit 711, paragraph 39, document 091.01798.0313.0001.

[34] Rushton Statutory Declaration, exhibit 711, paragraphs 26–27, document 091.0798.0313.0001.

[35] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0014.

[36] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.014.

[37] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0014 at 0015.

[38] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0014 at 0015.

[39] Rushton Statutory Declaration, exhibit 711, paragraphs 6–7, document 091.0798.0313.0001; Ure Statutory Declaration, exhibit 716, paragraph 17, document 049.0138.0338.0035.

[40] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0025 at 0025–0027.

[41] Ure Statutory Declaration, exhibit 716, paragraph 11, document 049.0138.0338.0035.

[42] Ure Statutory Declaration, exhibit 715, paragraph 6, document 049.0138.0338.0035.

[43] Ure Statutory Declaration, exhibit 715, paragraph 13, document 049.0138.0338.0035.

[44] Ure Statutory Declaration, exhibit 715, paragraph 18, document 0419.0138.0338.0035.

[45] Galloway Statutory Declaration, exhibit 716, paragraphs 4, 6–7, document 081.0867.0696.0001.

[46] Galloway Statutory Declaration, exhibit 716, paragraph 4, document 081.0867.0696.0001.

[47] Rushton Statutory Declaration, exhibit 711, paragraphs 13–14, document 091.0798.0313.0001.

[48] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0014 at 0018.

[49] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0014 at 0018.

[50] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0014 at 0018.

[51] Rushton Statutory Declaration, exhibit 711, paragraph 15, document 091.0798.0313.0001.

[52] Rushton Statutory Declaration, exhibit 711, paragraph 16, document 091.0798.0313.0001.

[53] Rushton Statutory Declaration, exhibit 711, paragraph 14, document 091.0798.0313.0001.

[54] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0003.

[55] Rushton Statutory Declaration, exhibit 711, paragraph 14, document 091.0798.0313.0001; Copeland Statutory Declaration, exhibit 572, paragraph 18, document 098.0027.0256.0001.

[56] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 026.0706.0957.0003.

[57] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 054.0946.0031.0004 at 0005.

[58] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 054.0946.0031.0001 at 0002–0003.

[59] Documents relating to the New South Wales Building Industry Taskforce, exhibit 1917, document 054.0946.0031.0001 at 0003.

[60] Rushton Statutory Declaration, exhibit 711, paragraphs 16 & 25, document 091.0798.0313.0001; Copeland Statutory Declaration, exhibit 572, paragraph 19, document 098.0027.0256.0001.

[61] Rushton Statutory Declaration, exhibit 711, paragraphs 16 & 25, document 091.0798.0313.0001.

[62] Rushton Statutory Declaration, exhibit 711, paragraphs 16 & 19, document 091.0798.0313.0001.

[63] Rushton Statutory Declaration, exhibit 711, paragraph 29, document 091.0798.0313.0001.

[64] Rushton Statutory Declaration, exhibit 711, paragraph 30, document 091.0798.0313.0001.

[65] Rushton Statutory Declaration, exhibit 711, paragraphs 26–27, document 091.0798.0313.0001.

[66] Copeland Statutory Declaration, exhibit 572, paragraph 24, document 098.0027.0256.0001.

[67] Copeland Statutory Declaration, exhibit 572, paragraph 26, document 098.0027.0256.0001.

[68] Rushton Statutory Declaration, exhibit 711, paragraph 40, document 091.0798.0313.0001; Seidler Statement, exhibit 568, paragraphs 158–159, 161 document 001.0007.0419.0001 and annexure 'BS–20', document 002.0467.0323.0089 at 0093; Seidler T7469/25–43.

[69] Seidler Statement, exhibit 568, paragraphs 152–155, document 001.0007.0419.0001; Seidler T747/28–34, T7476/11–17.

[70] Rushton Statutory Declaration, exhibit 711, paragraphs 22–23, document 091.0798.0313.0001.

[71] Rushton Statutory Declaration, exhibit 711, paragraph 28, document 091.0798.0313.0001.

[72] Rushton Statutory Declaration, exhibit 711, paragraph 28, document 091.0798.0313.0001; Ure Statutory Declaration, exhibit 715, paragraph 4, document 049.0138.0338.0035.

[73] Rushton Statutory Declaration, exhibit 711, paragraph 28, document 091.0798.0313.0001; Statutory Declaration of John Ure, exhibit 715, paragraph 19, document 049.0138.0338.0035.

[74] Rushton Statutory Declaration, exhibit 711, paragraph 28, document 091.0798.0313.0001.

[75] Rushton Statutory Declaration, exhibit 711, paragraph 28, document 091.0798.0313.0001.

[76] Ure Statutory Declaration, exhibit 715, paragraph 19, document 049.0138.0338.0035.

[77] Ure Statutory Declaration, exhibit 715, paragraph 19, document 049.0138.0338.0035.

[78] Copeland Statutory Declaration, exhibit 572, paragraph 19, document 098.0027.0256.0001; Seidler Statement, exhibit 568, paragraph 152, document 001.0007.0419.0001.

[79] Zacknich Statutory Declaration, exhibit 307, paragraphs 5 &15, document 045.0167.0302.0001.

[80] Zacknich Statutory Declaration, exhibit 307, paragraphs 3 & 17, document 045.0167.0302.0001.

[81] Zacknich Statutory Declaration, exhibit 307, paragraph 18, document 045.0167.0302.0001.

[82] Zacknich Statutory Declaration, exhibit 307, paragraph 21, document 045.0167.0302.0001.

[83] Zacknich Statutory Declaration, exhibit 307, paragraph 16, document 045.0167.0302.0001.

[84] Zacknich Statutory Declaration, exhibit 307, paragraphs 5, 10 & 12, document 045.0167.0302.0001.

[85] Zacknich Statutory Declaration, exhibit 307, paragraph 19, document 045.0167.0302.0001.

[86] Zacknich Statutory Declaration, exhibit 307, paragraph 22, document 045.0167.0302.0001.

[87] Zacknich Statutory Declaration, exhibit 307, paragraph 23, document 045.0167.0302.0001.

[88] Zacknich Statutory Declaration, exhibit 307, paragraph 24, document 045.0167.0302.0001.

[89] Zacknich Statutory Declaration, exhibit 307, paragraphs 26–27, 31, document 045.0167.0302.0001; Standing Statutory Declaration, exhibit 849, paragraph 24, document 092.0174.0574.0001.

[90] Zacknich Statutory Declaration, exhibit 307, paragraphs 28–29, document 045.0167.0302.0001.

[91] Zacknich Statutory Declaration, exhibit 307, paragraphs 36, 273–276, document 045.0167.0302.0001.

[92] Standing Statutory Declaration, exhibit 849, paragraph 15, document 092.0174.0574.0001.

[93] Zacknich Statutory Declaration, exhibit 307, paragraphs 64, 269–270, document 045.0167.0302.0001, annexure JAZ 45.

[94] Zacknich Statutory Declaration, exhibit 307, paragraphs 96–97, document 045.0167.0302.0001.

[95] Zacknich Statutory Declaration, exhibit 307, paragraph 277, document 045.0167.0302.0001.

[96] Standing Statutory Declaration, exhibit 849, paragraphs 19–29, document 092.0174.0574.0001.

[97] Zacknich Statutory Declaration, exhibit 307, paragraphs 62–63, document 045.0167.0302.0001; Standing Statutory Declaration, exhibit 849, paragraph 19, document 092.0174.0574.0001. The present WA Government submitted that the WA Building Industry Task Force was not successful and exacerbated the antagonism between the industry participants and that the WA Government's current initiative, the BISPI, was more effective in maintaining a balanced approach to the management of industry participants relationships. Western Australian Government, *Submission to the Royal Commission into the Building and*

*Construction Industry*, exhibit 250, paragraphs 58 & 61, document 030.0157.0729.0006. This is contrary to the evidence received from James Zaknich, John Standing (the WA Assistant Police Commissioner for the Metropolitan Police Region) and Brian Seidler, see particularly Seidler Statement, exhibit 568, paragraphs 151–157, document 001.0007.0419.0001.

98 Standing Statutory Declaration, exhibit 849, paragraphs 19, 20, 22–25 & 29, document 092.0174.0574.0001.

99 Standing Statutory Declaration, exhibit 849, paragraphs 33 & 82, document 092.0174.0574.0001; see also Seidler Statement, exhibit 568, paragraphs 155 & 157 document 001.0007.0419.0001.

100 Standing Statutory Declaration, exhibit 849, paragraphs 34–78, document 092.0174.0574.0001.

101 *Commonwealth Constitution* s51(xxxv).

102 *Commonwealth Constitution* s51(xx).

103 *Commonwealth Constitution* s122.

104 *Commonwealth Constitution* s51(xiii).

105 *Commonwealth Constitution* s51(xiv).

106 *Commonwealth Constitution* s51(ii).

107 *Commonwealth Constitution* s51(xxxix).

108 Royal Commission into the Building and Construction Industry 2002, *First Report,* 5 August, paragraph 6, www.royalcombci.gov.au/docs/first_report.pdf

109 *Workplace Relations Act (1996) (C'wth)* s84(4).

110 See *Workplace Relations Act (1996) (C'wth)* s305.

111 *Workplace Relations Act (1996) (C'wth)* s178(5)(a) and 178(5A)(a).

112 *Workplace Relations Act (1996) (C'wth)* s83BG(1).

113 *Workplace Relations Act (1996) (C'wth)* s83BH(1)(b).

114 See *Workplace Relations Act (1996) (C'wth)* s83BH(2), (3) and (4).

115 *Workplace Relations Act (1996) (C'wth)* s305A.

116 The Lionel Robberds QC Opening Address 10 December 2001, p. 164, lines 11 to 40.

117 The Lionel Robberds QC Opening Address 10 December 2001, p. 167, lines 43 to p. 168 line 1.

118 *Trade Practices Act 1974 (C'wth)* s155(3).

119 *Trade Practices Act 1974 (C'wth)* s155(5) and (6A).

120 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

121 *Trade Practices Act 1974 (C'wth)* s155(7).

122 *Constantine v Trade Practices Commission* (1994) 48 FCR 141; *The Daniels Corporation International Pty Ltd v ACCC* [2002] HCA 49.

123 *The Daniels Corporation International Pty Ltd v ACCC* [2002] HCA 49 at paragraph 11.

124 It provides:

*(1) [W]here, on the application of the Commissioner or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:*

*(a) a contravention of any of the following provisions…;*

*(b) attempting to contravene such a provision;*

*(c) aiding, abetting, counselling or procuring a person to contravene such a provision;*

*(d) inducing, attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision;*

*(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or*

*(f) conspiring with others to contravene such a provision;*

*the Court may grant an injunction in such terms as the Court determines to be appropriate.*

[125] See *Trade Practices Act 1974 (C'wth)* s80(2).

[126] See *Trade Practices Act 1974 (C'wth)* s80(3).

[127] They provide:

*(4) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:*

*(a) whether or not it appears to the Court that the person intends to engage again, or continue to engage, in conduct of that kind;*

*(b) whether or not the person has previously engaged in conduct of that kind; and*

*(c) whether or not there is an imminent danger of substantial damage to any person if the first mentioned person engages in conduct of that kind.*

*(5) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:*

*(a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;*

*(b) whether or not the person has previously refused or failed to do that act or thing; and*

*whether or not there is an imminent danger of substantial danger to any person if the first mentioned person refused or fails to do that act or thing.*

[128] See *Trade Practices Act 1974 (C'wth)* s80(6).

[129] *Australian Federal Police Act 1979 (C'wth)* s8(1)(b).

[130] *Director of Public Prosecutions Act 1983 (Cwth)* s6.

[131] Australian Industry Group 2002, *Submission to the Royal Commission into the Building and Construction Industry*, 28 March, exhibit 441, document 016.0672.0673.0001_001 at 0005.

[132] See the definition of 'industrial action' in s4(1) of the *Workplace Relations Act 1996 (C'wth)*.

[133] *Workplace Relations Act 1996 (C'wth)* s4(1); see the definitions of 'industrial action' and 'industrial dispute'.

[134] *Workplace Relations Act 1996 (C'wth)* s4(1); see paragraphs (d)(iii) and (iv) of the definition of 'industrial action'.

[135] *Workplace Relations Act 1996 (C'wth)* s4(1); see paragraph (d)(i) of the definition of 'industrial action'.

[136] *Workplace Relations Act 1996 (C'wth)* s4(1).

[137] General Assembly Resolution 2200A (XXI), 21 UN GAOR Supp (No 16) 49, UN Doc A/6316 (1966), entered into force 3 January 1976, ratified by Australia on 10 December 1975.

[138] Entered into force 4 July 1950, ratified by Australia on 28 February 1973.

[139] Entered into force 18 July 1951, ratified by Australia on 28 February 1973.

[140] See Attachment 1 to Discussion Paper 18, prepared by Shae McCrystal of the Australian National University.

[141] *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283-4.

[142] [2002] FCAFC 386, [66].

[143] *Workplace Relations Act 1996 (C'wth)* s4(1) definition of 'industrial dispute'.

[144] *Workplace Relations Act 1996 (C'wth)* s170MN.

[145] *Workplace Relations Act 1996 (C'wth)* ss170ML, 170MT.

[146] *Workplace Relations Act 1996 (C'wth)* s170WC.

[147] *Workplace Relations Act 1996 (C'wth)* s127(2).

[148] *Workplace Relations Act 1996 (C'wth)* s127(5).

[149] (1997) 73 IR 311 at 316-7.

[150] PR 919758, Australian Industrial Relations Commission, Munro DP, 5 July 2002.

[151] *Workplace Relations Act 1996 (C'wth)* s127(6), (7).

[152] *Australian Paper Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (1998) 81 IR 15.

[153] Oliver, T370/25-38.

[154] [2002] FCA 1413 (20 November 2002).

[155] *Transfield Construction Pty Ltd v Automotive, Food, Metal, Engineering, Printing & Kindred Industries Union and Ors* [2002] FCA 1413 (20 November 2002), Merkel J, at paragraph 13.

[156] *Transfield Construction Pty Ltd v Automotive, Food, Metal, Engineering, Printing & Kindred Industries Union and Ors* [2002] FCA 1413 (20 November 2002), Merkel J, at paragraph 15.

[157] *Transfield Construction Pty Ltd v Automotive, Food, Metal, Engineering, Printing & Kindred Industries Union and Ors* [2002] FCA 1413 (20 November 2002), Merkel J, at paragraphs 38-39.

[158] *Transfield Construction Pty Ltd v Automotive, Food, Metal, Engineering, Printing & Kindred Industries Union and Ors* [2002] FCA 1413 (20 November 2002), Merkel J, at paragraph 40.

[159] *Transfield Construction Pty Ltd v Automotive, Food, Metal, Engineering, Printing & Kindred Industries Union and Ors* [2002] FCA 1413 (20 November 2002), Merkel J, at paragraph 42.

[160] AIG Submission, dated 12 November 2001, exhibit 17, document 100.0964.0072.0001 at 0036–0037.

[161] AIG Submission, dated 12 November 2001, exhibit 17, document 100.0964.0072.0001 at 0038.

[162] *Workplace Relations Act 1996 (C'wth)* s170ML.

[163] *Workplace Relations Act 1996 (C'wth)* s170MM.

[164] *Workplace Relations Act 1996 (C'wth)* s170MP.

[165] *Workplace Relations Act 1996 (C'wth)* s170MN.

[166] *Workplace Relations Act 1996 (C'wth)* s170VU(1).

[167] *Workplace Relations Act 1996 (C'wth)* s170VU(2).

[168] *Workplace Relations Act 1996 (C'wth)* s170MO.

[169] *Workplace Relations Act 1996 (C'wth)* s170MT(1).

[170] *Workplace Relations Act 1996 (C'wth)* s170MT(3).

[171] *Workplace Relations Act 1996 (C'wth)* s170MU(1).

[172] *Workplace Relations Act 1996 (C'wth)* s170MU(2).

[173] *Workplace Relations Act 1996 (C'wth)* s166A(3).

[174] *Workplace Relations Act 1996 (C'wth)* s166A(5).

[175] *Workplace Relations Act 1996 (C'wth)* s166A(2).

[176] *Workplace Relations Act 1996 (C'wth)* s170WB(1).

[177] (1998) 79 IR 268.

[178] See also *Tenix Defence Systems Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [1999] VSC 40.

[179] See, for example, the Multiplex Case Study in the Queensland case Studies Volume, paras 59-67; Multiplex Construction (Qld) Limited submission to the Commission, exhibit 400, pp 13-14, Document 068.0269.0210.0003.

[180] [2002] FCA 61 (6 February 2002)

[181] *Trade Practices Act 1974 (C'wth)* s86(2).

[182] 1972 AC 153 adopted by the High Court in *Hamilton v Whitehead* (1988) 166 CLR 121 at 127; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 514-5.

[183] See, for example, *Workplace Relations Act 1996 (C'wth),* s140(2) s187AB(2).

[184] *Workplace Relations Act 1996 (C'wth)* s298A, and note s3(f).

[185] *Workplace Relations Act 1996 (C'wth)* s298B(5).

[186] *Workplace Relations Act 1996 (C'wth)* s298E.

[187] *Workplace Relations Act 1996 (C'wth)* s298F.

[188] *Workplace Relations Act 1996 (C'wth)* s298B(1), reading the definition of 'industrial association' (a) with the definition of 'industrial law'.

[189] *Workplace Relations Act 1996 (C'wth)* s298B(1), 'industrial association' (b), (c).

[190] *Workplace Relations Act 1996 (C'wth)* s298B(1), 'industrial association' (b), (c).

[191] *Workplace Relations Act 1996 (C'wth)* s298B(1), 'industrial association', read with s298B(1), 'organisation'.

[192] *Workplace Relations Act 1996 (C'wth)* s298B(1), 'industrial law', 'industrial body', 'industrial instrument'.

[193] *Workplace Relations Act 1996 (C'wth)* 298B(3).

[194] *Workplace Relations Act 1996 (C'wth)* Part XA, Division 5.

[195] *Workplace Relations Act 1996 (C'wth)* s298B(2)(b)(c), s298B(3).

[196] (1998) 90 FCR 95.

[197] (1998) 90 FCR 95 at 117.

[198] (1998) 90 FCR 95 at 112-3.

[199] (1998) 90 FCR 95 at 113.

[200] (1998) 90 FCR 95 at 113.

[201] *Wardley Australia Ltd v Western Australia* (1992) 185 CLR 514 at 525.

[202] *March v Stramare* (E & M H) Pty Ltd (1991) 171 CLR 506.

[203] *Enzed Holdings Limited v Wynthea Pty Ltd* (1984) 57 ALR 167 at182.

[204] *Henville v Walker* (2001) 75 ALJR 1410 at 1434.

[205] *Wardley, Gates v City Mutual Life Assurance Society Limited* (1986) 160 CLR 1.

[206] Section 180 of the *Corporations Act 2001 (C'wth)* provides:

180 Care and diligence—civil obligation only

*Care and diligence—directors and other officers*

(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) were a director or officer of a corporation in the corporation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

*Business judgment rule*

(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

(a) make the judgment in good faith for a proper purpose; and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)—it does not operate in relation to duties under any other provision of this Act or under any other laws.

(3) In this section:

*business judgment* means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

[207] Note that the provisions of the *Workplace Relations Act 1996 (C'wth)*, relating to deregistration of federally registered industrial organisations is to be repealed and substituted by Chapter 2, Part 3, Division 4 of the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act* 2002 *(C'wth)*, which is yet to come into effect.

[208] *Workplace Relations Act 1996 (C'wth)* s294.

[209] *Workplace Relations Act 1996 (C'wth)* s296.

[210] *Workplace Relations Act 1996 (C'wth)* s294(1)(a).

[211] *Workplace Relations Act 1996 (C'wth)* s294(1)(b).

[212] *Workplace Relations Act 1996 (C'wth)* s294(1)(c).

[213] *Workplace Relations Act 1996 (C'wth)* ss294(1)(d) and (e), for injunctions granted under the *Workplace Relations Act 1996 (C'wth)* ss127(6), 127(7) or 187AD.

[214] *Workplace Relations Act 1996 (C'wth)* s296(4). The relevant employee organisation is to be given an opportunity to be heard on the matter: see s294(2). What is unjust in the circumstances was considered by the High Court in *R v Joske; Ex parte Australian Building Construction Employees and Builders Labourers' Federation* (1974) 130 CLR 87in relation to the deregistration provisions of the *Conciliation and Arbitration Act 1904 (C'wth*). Barwick CJ there stated:

> *Thus, the section gives the Court power by order to direct the Registrar, upon an application duly made to it by a party having a sufficient interest, and upon the ascertainment of existing facts, to cancel the registration. Upon finding any one of those facts, the Court must make the order unless it considers that, having regard to the degree of gravity of the facts which it has found and to the action that has been taken by or against the organisation in relation to those facts, it would be unjust to make the order. This discretion does not in any was vitiate the grant of power given to the Court. The basis for the exercise of the discretion is specifically set out. It clearly partakes of judicial function: the weighing of the gravity of ascertained facts and decision upon the claims of justice.*

[215] See *Workplace Relations Act 1996 (C'wth*) s294(5).

[216] See *Workplace Relations Act 1996 (C'wth*) s294(4). The declarations that may be made relate to the effect of agreements with State-registered unions under s202.

[217] *Workplace Relations Act 1996 (C'wth)* s295(5)(b)(i).

[218] Workplace Relations Act 1996 (C'wth) s4.

[219] Specifically, the *Workplace Relations Act 1996 (C'wth)* provides for the following consequences following deregistration:

- the organisation ceases to be an organisation and a body corporate under this Act, but does not, because of the cancellation, cease to be an association;
- the cancellation does not relieve the association or any of its members from any penalty or liability incurred by the organisation or its members before the cancellation;
- from the time of cancellation, the association and its members are not entitled to the benefits of any award, order of the Commission or certified agreement that bound the organisation or its members;
- a designated Presidential Member may, on application by an organisation or person interested, make such order as the Presidential Member considers appropriate about the other effects (if any) of such an award, order or agreement on the association and its members; 21 days after the cancellation, such an

award, order or agreement ceases, in all other respects to have effect in relation to the association and its members;

- the Federal Court may, on application by a person interested, make such order as it considers appropriate in relation to the satisfaction of the debts and obligations of the organisation out of the property of the organisation; and
- the property of the organisation is the property of the association and shall be held and applied for the purposes of the association under the rules of the organisation so far as they can still be carried out or observed.

220 Agreements under s170LJ of the *Workplace Relations Act 1996 (C'wth)*.

221 Unless the eligibility rules already overlap.

222 *Workplace Relations Act 1996 (C'wth)* s189(1)(j); see also *R v Coldham; Ex parte Brideson* (1989) 84 ALR 165.

223 *R v Coldham; Ex parte Brideson* (1989) 84 ALR 165, see comments of Joske, Smithers and Franki JJ at pp. 364, 367, 370, 371 and 403. The conduct of the BLF, which was relied upon by the Full Federal Court in *Master Builders' Association of New South Wales v Australian Building Construction Employees and Builders Labourers' Federation,* included continual conduct by the BLF, its officers, delegates, organisers and representatives of the following nature:

- stoppages of work and strikes, often without any prior opportunity for discussing claims made and often making fresh on-the-spot claims as soon as claims which had been made were granted;
- holding up jobs by banning overtime;
- placing bans on jobs by preventing work being done or by preventing equipment from being used;
- expanding bans from one building job to other building jobs controlled and operated by the same building contractor;
- disregarding the process of conciliation and arbitration either by:
  - ignoring it altogether;
  - refusing to accept decisions made or rulings given;
  - denying agreements were made;
  - repudiating agreements as soon as they were made and claiming they were not binding;
- deliberately contravened the provisions of the relevant award in terms of prohibiting work bans, regulating entry to employer's premises by representatives of the BLF and regulating work in wet weather.

In that case, the Federal Court rejected the claim by the BLF that its conduct was justified because:

- it achieved benefits for its members;
- its motives were sound as its conduct helped its members both in the long term and the short term;
- the imposition of 'green bans' on certain developments justified such conduct as it would help achieve protection of historic buildings, protection of the environment, provide low rental accommodation in new developments, freedom of disturbance to tenants of existing buildings and accorded with the view of local resident groups.

The Federal Court held that the conduct was contrary to industrial law and could not be justified even if the BLF thought its motives to be sound. In the Federal Court's view, the BLF had caused large scale industrial strife over many years and caused discord in the industry of a gross nature in undermining three main objectives of the then *Conciliation and Arbitration Act 1904 (C'wth)*, relating to promotion of goodwill, encouragement of conciliation and prevention and settling of industrial disputes and the provision for observance and enforcement of agreements and awards made in the settlement of industrial disputes.

224 Any consideration of possible deregistration of the CFMEU, or part thereof, would be incomplete without an examination of the deregistration processes which involved in the BLF in the 1970s and 1980s. In 1974 the Full Federal Court considered an application to deregister the BLF in *Master Builders' Association of New*

*South Wales v Australian Building Construction Employees and Builders Labourers' Federation* where it was deregistered under the provisions of the *Conciliation and Arbitration Act 1904 (C'wth)*. However, the BLF successfully reapplied for registration two years later. Later, Federal and State governments enacted specific legislation to deregister the BLF and its state equivalents which took effect in 1986. To enable deregistration to occur whereby the BLF would not only be deregistered but also rendered ineffective in the industrial sphere, the Federal Parliament enacted the *Building Industry Act 1985 (C'wth)* which started operation on 26 August 1985. The *Building Industry Act 1985 (C'wth)* did not provide for automatic cancellation of the BLF's registration but established a procedure where the Minister could apply to the Commission for a declaration in writing that it is satisfied of one of the grounds set out in the *Building Industry Act 1985 (C'wth)*. The grounds under s4 included engaging in certain industrial action, misconduct or behaviour. Once a declaration was made by the Commission, the *Building Industry Act 1985 (C'wth)* empowered the Minister to either direct that the Registrar cancel the registration of the BLF under the *Conciliation and Arbitration Act 1904 (C'wth)* or, alternatively, to terminate or suspend any of the rights, privileges or capacities of the Federation or its members under the *Building Industry Act 1985 (C'wth)* or the BLF's rules. The Minister applied to the Commission for a declaration. The BLF subsequently challenged the constitutional validity of the *Building Industry Act 1985 (C'wth)* but was unsuccessful. The Commission made a declaration on 4 April 1986 that the BLF had participated in some of the actions listed in the *Building Industry Act 1985 (C'wth)* between 1976 and 1985. However the Minister did not take one of the steps as required under *Building Industry Act 1985 (C'wth)*.

Instead, the Commonwealth Parliament passed two Acts on 14 April 1986. The first of the two pieces of legislation, the *Builders Labourers' Federation (Cancellation of Registration) Act 1986 (C'wth)* provided for the cancellation of the BLF's registration under the *Conciliation and Arbitration Act 1904 (C'wth)*. The second Act, the *Builders Labourers' Federation (Cancellation of Registration – Consequential Provisions) Act 1986 (C'wth)* dealt with the effect of the cancellation. It further provided that the BLF or any similar organisation could not apply for registration for a period of ten years. A further constitutional challenge to this legislation by the BLF was also unsuccessful.

At State level a number of similar measures were taken to complement the Federal legislation. The *BLF (De-recognition) Act 1985 (Vic)* removed the BLF from the Victorian industrial system and after the Act was proclaimed, the BLF ceased to be recognised as an Association under the Victorian system. In New South Wales the *Builders Labourers' Federal (Special Provisions) Act* 1986 (NSW) was passed to confirm the cancellation of the BLF's registration under the *Industrial Arbitration (Special Provisions) Act 1984 (NSW)*. A code of conduct to be observed by the Builders Labourers' Federation Union of Workers (WA Branch), was introduced in Western Australia by the *Building Industry (Code of Conduct) Act 1986 (WA)*. The *Building Industry (Code of Conduct) Act 1986 (WA)* did not specifically provide for the deregistration of the BLF but it did establish procedures to assist with deregistration under the *Industrial Relations Act 1979 (WA).*

225 Housing Industry Association, *Submission to the Royal Commission into the Building and Construction Industry,* 5 July 2002, exhibit 772, document 060.0113.0796.0002 at 0013.

226 ETU News, Victorian Branch, September 2001, exhibit 93, document 090.0002.0198.0001 at 0013; Mighell, T15543/36–15544/12.

227 Mighell, T15543/27-34.

228 Re *Mudginberri Station Pty Ltd and AMIEU*, decision dated 18 July 1985.

229 Dempsey Statutory Declaration, exhibit 905, paragraph 39, document 080.0566.0560.0003.

230 Australian Industry Group and Australian Constructors Association (exhibit 1371); Built Futures Communications (exhibit 1330); Department of Employment and Workplace Relations (exhibit 1322); Master Builders Australia Inc (exhibit 1477); Australian Building Codes Board (exhibit 1478); Tasmanian Department of Premier and Cabinet (exhibit 1480).

231 Australian Building Codes Board (exhibit 1478); Tasmanian Department of Premier and Cabinet (exhibit 1480).

232 Built Futures Communications, exhibit 1330, document 007.0572.0254.0071.

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[419] *Workplace Agreements Act 1993 (WA)* s67.

[420] *Workplace Agreements Act 1993 (WA)* s68.

[421] *Workplace Agreements Act 1993 (WA*) s69.

[422] *Workplace Agreements Act 1993 (WA*) s70.

[423] *Workplace Agreements Act 1993 (WA)* s71. Note: as at 20 November 2002, the *Workplace Agreements Act 1993 (WA)* is being repealed in stages by the *Labour Relations Reform Act 2002 (WA)* and new agreements can no longer be made. These general provisions about coercion continue to apply to agreements being made to cancel an existing agreement.

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[426] *Workplace Agreements Act 1993 (WA*,) s73(4) and (5).

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