**ROYAL COMMISSION INTO THE BUILDING AND CONSTRUCTION INDUSTRY**

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**FROM THE OFFICE OF THE COMMISSIONER**

24 February 2003

His Excellency the Right Reverend Dr Peter Hollingworth, A.C., O.B.E.
Governor-General of the Commonwealth of Australia
Government House
CANBERRA. A.C.T. 2600

Your Excellency,

In accordance with the Letters Patent issued to me on 29 August 2001, as extended by Letters Patent dated 5 December 2002 and 23 January 2003, I have the honour to present to you my final report of my inquiry into certain matters relating to the building and construction industry.

The report comprises twenty-three volumes. The Letters Patent directed me to inquire into whether any practice or conduct, that might have constituted a breach of any law, should be referred to the relevant Commonwealth, State or Territory agency. My findings in that respect are contained in Volume 23 which I have marked 'Confidential'. I recommend that Volume 23 not be made public.

Yours sincerely

T. R. H. Cole

The Honourable T.R.H. Cole, R.F.D., Q.C.
Commissioner

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

# Summary of Findings and Recommendations

**Volume One**

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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This summary is prepared for the assistance of those who wish to gain a rapid understanding of the findings and recommendations of the Royal Commission. It does not explain the detail of the findings or the reasoning behind the recommendations. That is contained in Volumes 2-22 inclusive. A reading of this Volume is not a substitute for a reading of the balance of the Report.

# Summary of findings and recommendations

# Summary of findings and recommendations

1 This Royal Commission is the first national review of the conduct and practices in the building and construction industry in Australia. The findings demonstrate an urgent need for structural and cultural reform.

2 The building and construction industry is critical to welfare and prosperity in Australia. The total production of the industry in 2001-2002 was $59.7 billion of which $40.7 billion was within the scope of my Letters Patent. In 2001-02 it directly accounted for 5.5 per cent of Australia's gross domestic product, and 7.5 per cent of employment. Indirectly it has a much greater impact. Every Australian business, and every Australian citizen, uses the built environment.

3 Productivity growth in the building and construction industry was less than the average for the market sector over the past five years. Were productivity growth to match that of the market sector[1], economic modelling shows that the accumulated gain in real gross domestic product between 2003 and 2010 would approximate $12 billion. All industries would benefit from an increase in output as a result of the reduction in the cost of building and construction.

4 If average wages in the industry increase by 12 per cent over the three year period 2003-2005, a productivity increase of 7.6 per cent is required during that period to maintain the building and construction industry's competitiveness. Modelling shows that if that occurs, all sectors of the economy benefit:

- workers benefit from the 12 per cent pay rise in the first three years;
- the building industry benefits from output growth of 0.6 per cent by 2010;
- Australia benefits from an accumulated increase in real gross domestic product of $11.5 billion by 2010;
- exports would grow and imports fall; and
- output of all industries would grow with particular benefits to manufacturing and processing industries.

5 To unlock these benefits, productivity must increase. To achieve these or greater benefits by increasing productivity, structural and cultural reform is necessary.

6 Structural reform is required in four areas.

7 First, structural changes are necessary to ensure that bargaining at the enterprise level occurs. At present, it does not. Pattern bargaining in this industry should be prohibited by statute.

8 Second, mechanisms should be in place to ensure that any participant in the industry causing loss to other participants as a result of unlawful industrial action is held responsible for that loss. To achieve this, there must be clarity and certainty regarding what constitutes unlawful industrial action, the circumstances in which unions are responsible for the actions of their officials, employees, delegates and members, and the establishment of a quick, cheap mechanism for determining loss caused by unlawful industrial action. Union assets must be available to meet losses suffered by industry participants resulting from unlawful industrial action for which the union is responsible.

9 Third, mechanisms must be in place to ensure that where disputes occur within the industry, such disputes are resolved in accordance with legislated or agreed dispute resolution mechanisms rather than by the application of industrial and commercial pressure. The rule of law must replace industrial might.

10 Fourth, there needs to be an independent body, free of the pressures on the participants in the industry, which will ensure that participants comply with industrial, civil and criminal laws applicable to all Australians, and thus operating on building and construction sites, as well as industry specific laws applicable to this industry only.

11 Culturally, first, there needs to be a recognition by all participants that the rule of law applies within the industry. The rule of law requires that parties honour and implement agreements they have made. It requires that they abide by industrial, civil and criminal laws. At present, they do not. The structural reforms will assist this necessary cultural change.

12 Second, there needs to be recognition, principally by the unions but also by the major contractors and subcontractors, that in Australia there exists freedom of choice to either join or not join an association of employees. All actions of unions, head contractors and subcontractors which impinge upon this basic right are either presently prohibited by law or will be if my recommendations are accepted and implemented. Breaches of those laws must be vigorously prosecuted. However, more deeply, there needs to be fostered an understanding and acceptance of the existence of that right within individuals. At present, that right is diminished, if not eliminated in the central business districts of the major cities, by doctrinal dogmatism on the part of unions, and commercial expediency on the part of head contractors and subcontractors. The structural changes recommended will assist this cultural change.

13 Third, there needs to be an attitudinal change of participants regarding management of building and construction projects. It is the function of head contractors and major subcontractors to manage their businesses and to assume control of the processes necessary to achieve productive and successful outcomes for the benefit, not only of their companies and employees, but also for the industry and the Australian economy as a whole. Head contractors, to a significant extent, and in critical areas have surrendered management control to the unions. It is the function of unions to represent, advance and protect the interests of their members in a variety of ways. It is not a function of unions to manage or control the operation of building and construction projects. The benefits to the industry and the Australian economy from improved productivity flowing from this cultural change are very significant.

14 Fourth, there needs to be an attitudinal change to safety. This change must come from all participants – governments, clients, contractors, subcontractors, unions and workers. The new paradigm must be that projects are completed safely, on time and within budget rather than just on time and within budget.

## Findings regarding conduct and practices

15 In the building and construction industry throughout Australia, there is:

(a) widespread disregard of, or breach of, the enterprise bargaining provisions of the *Workplace Relations Act 1996 (C'wth)*;

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

(c) widespread departure from proper standards of occupational health and safety;

(d) widespread requirement by head contractors for subcontractors to have union-endorsed enterprise bargaining agreements (EBAs) before being permitted to commence work on major projects in State capital central business districts and major regional centres;

(e) widespread requirement for employees of subcontractors to become members of unions in association with their employer obtaining a union-endorsed enterprise bargaining agreement;

(f) widespread requirement to employ union-nominated persons in critical positions on building projects;

(g) widespread disregard of the terms of enterprise bargaining agreements once entered into;

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

(i) widespread use of occupational health and safety as an industrial tool;

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

(k) unlawful strikes and threats of unlawful strikes;

(l) threatening and intimidatory conduct;

(m) underpayment of employees' entitlements;

(n) disregard of contractual obligations;

(o) disregard of National and State codes of practice in the building and construction industry;

(p) disregard of, or breach of, the strike pay provisions of the *Workplace Relations Act 1996 (C'wth)*;

(q) disregard of, or breach of, the right of entry provisions of the *Workplace Relations Act 1996 (C'wth)*;

(r) disregard of Australian Industrial Relations Commission (AIRC) and court orders;

(s) disregard by senior union officials of unlawful or inappropriate acts by inferior union officials;

(t) reluctance of employers to use legal remedies available to them;

(u) absence of adequate security of payment for subcontractors;

(v) avoidance and evasion of taxation obligations;

(w) inflexibility in workplace arrangements;

(x) endeavours by unions, particularly the Construction, Forestry, Mining and Energy Union (CFMEU), to regulate the industry; and

(y) disregard of the rule of law.

16 These findings demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular. They indicate an urgent need for structural and cultural reform.

17 At the heart of the findings is lawlessness. It is exhibited in many ways. There are breaches of the criminal law. There are breaches of laws of general application to all Australians where the sanction is a penalty rather than possible imprisonment. There are breaches of many provisions of the *Workplace Relations Act* 1996 (C'wth). The unsatisfactory record in respect of occupational health and safety indicates breaches of the various State acts addressing that matter. There is disregard of or breach of the revenue statutes, both Commonwealth and State. When courts or tribunals become involved and make orders, some union participants, particularly the CFMEU, regard such orders as not binding upon them. There is the commonly held view, translated into practice, that agreements entered into are binding upon unions only insofar as they confer upon the union or its members a benefit, but not insofar as they confer an obligation. Underlying all of this lawlessness is an understanding and expectation, which reflects the reality, that those engaging in unlawful conduct will not be held to account by criminal proceedings, proceedings for penalties, or for loss occasioned to others by unlawful conduct.

18 Apart from the breaches of the law which I have found, there is much conduct which while not in some circumstances offending the law, is plainly inappropriate. It is inappropriate for a variety of reasons. Some infringes the objects of the *Workplace Relations Act 1996 (C'wth)*, if not its detailed provisions. Some unnecessarily interferes with the building and construction process. Some reduces productivity for no reasonable commensurate purpose. Other conduct impinges upon a person's right of free choice. Some conduct departs from recognised norms of civility and behaviour, and some conduct interferes with what most Australians would recognise as their freedom to conduct their businesses and their lives without interference from third parties. This conduct is widespread. It causes concern and uncertainty in the industry and inhibits any relationship of trust and confidence.

19 The types of inappropriate conduct which exist throughout the building and construction industry include:[2]

- industrial action, or threats thereof, on a site and other related or unrelated sites, if all subcontractors did not have a union-endorsed EBA;[3]
- stoppage of work by a union because a subcontractor would not enter into a union-endorsed EBA;[4]

- harassment by union officials of a subcontractor because it would not enter into a union-endorsed EBA;[5]
- union officials restricting, or threatening to restrict, a subcontractor's opportunity to obtain work if it did not sign a union-endorsed EBA;[6]
- unions taking industrial action on government sites to pressure a government to adopt a policy that contractors have a union-endorsed EBA in order to do government work;[7]
- unions demanding that if all subcontractors cannot be required to have a union-endorsed EBA, EBA terms and conditions are to be applied by all subcontractors irrespective of other agreements;[8]
- union officials pressuring head contractors to replace subcontractors on a site because they did not have a union-endorsed EBA;[9]
- the threat by union officials to prevent subcontractors with Australian Workplace Agreements (AWAs) from working on site;[10]
- disregard by union officials of the wishes of employees, or their failure to consult with employees;[11]
- the initiation of a bargaining period by a union, although uninvited to do so by employees, and where no employees were union members;[12]
- interference by unions in industrial and safety issues where no employee had made a complaint and no employee was a union member;[13]
- unions seeking to have subcontractors enter into a union-endorsed EBA, without seeking the views of employees, or where that was contrary to the wishes of employees;[14]
- a union refusing to sign an agreement agreed by its members with their employer, despite the unanimous wishes of the members that it do so;[15]
- agreement between a head contractor and a union about the appointment of a job delegate, without regard to the wishes of workers on site;[16]
- the lack of flexibility in union pattern EBAs;
- the payment to workers, pursuant to a pattern EBA, of a productivity allowance, with no corresponding increase in productivity;[17]
- head contractors and unions making agreements which overrule agreements made between subcontractors and their employees;[18]
- agreements between head contractors and unions restricting the way subcontractors can conduct their business;[19]
- unions insisting on the payment of a travel allowance to workers who did not travel in their work;[20]
- a union taking or threatening to take industrial action in its own interests;[21]
- union members engaging in sympathy action in support of matters not related to the site on which they are working;[22]

- a union taking industrial action against an employer because of the public expression of an opinion with which it disagrees;[23]
- unlawful industrial action by a union forcing businesses to move outside the state, or to determine not to work in that state;[24]
- unions seeking to act as the arbiter of who can and cannot work in the industry or in an industry sector;[25]
- union officials attempting to regulate an industry by seeking 'donations' from contractors to fund the salary of a union organiser;[26]
- a union circulating 'approved subcontractor lists'.[27]
- a union requiring a contractor to submit to a wage book inspection before permitting a contractor to start work;[28]
- a union requiring a contractor to submit to a wage book inspection by a third party nominated by the union, but paid for by the contractor;[29]
- a union issuing notices purporting to have a statutory basis and authority, which they do not;[30]
- the calling of unauthorised meetings by union officials;[31]
- union officials acting with the apparent belief that their right of entry was effectively unlimited;[32]
- the refusal by union officials to leave a site upon request by the head contractor or occupier;[33]
- the making by unions of groundless, unspecified or disputed wage claims, and supporting such claims with threats of black bans or other industrial action;[34]
- the failure of union officials to refer asserted breaches of awards and other industrial issues to the relevant authorities;[35]
- the failure by a union to provide particularisation of wage claims, while maintaining pressure in support of the alleged claim;[36]
- threats by a union to conduct wage book inspections to achieve its industrial aims[37]
- payment by a head contractor of unpaid debts of its subcontractor, pursuant to an implicit or explicit union demand;[38]
- a union pressuring a head contractor to withhold payments from a subcontractor, in turn placing pressure on the subcontractor to accede to the union's industrial aims;[39]
- the employment by a contractor of a particular person at the behest of a union;[40]
- the enforcement of union-endorsed EBAs or union membership by union delegates;[41]
- a union asserting a right to dictate when work may take place on a site;[42]
- a union asserting a right to require the engagement of unnecessary labour;[43]
- a union asserting a right to determine who may work on a project;[44]

- a union asserting a right to determine who will be employed as a crane operator;[45]
- unions preventing access to site;[46]
- unions preventing the removal of equipment from site;[47]
- union officials using abusive language and intimidatory behaviour;[48]
- demarcation disputes between unions, occasioning loss and delay;[49]
- inadequate accounting procedures within a union;[50]
- a union handling money received in settlement of wage claims differently from the way it represented that the money would be handled;[51]
- the failure of unions to account to employers for moneys paid following book audits;[52]
- a practice within the industry that the response to the unlawful or inappropriate exercise of power by a union is the payment of money or a 'commercial solution' rather than resort to the law;[53]
- contractors paying money to a union (or to an organisation nominated by the union) in an endeavour to buy industrial peace;[54]
- a union imposing informal 'penalties' upon contractors;[55]
- the disguising of payments of money by contractors to a union;[56]
- a union using industrial power to raise money for its own purposes;[57]
- unions accepting membership fees in respect of employees who did not wish to join a union;[58]
- unions demanding that they be paid money equivalent to membership fees for particular persons, even though they did not want those persons to join the union;[59]
- head contractors bowing to, accepting and supporting demands made by a union on subcontractors by the application of commercial pressure;[60]
- contractors paying union subscriptions for employees in order to enable those employees to work on a site;[61]
- head contractors acceding to union pressure to withhold payments from a subcontractor, in turn placing pressure on the subcontractor to accede to the union's industrial aims;[62]
- a head contractor engaging a union-nominated delegate, who is allowed to exercise an inappropriate level of control over the site, such as determining which subcontractors may commence on site, performing site inductions or having responsibility for safety and compliance issues;[63]
- head contractors ceding control to unions over the erection of cranes;[64]
- a head contractor stopping a subcontractor from working as a result of a complaint by a union official, without the head contractor undertaking any investigation of the matter;[65]
- a head contractor co-operating with a union to render ineffective the work of an industry task force;[66]

- the unwillingness of contractors to take legal action against unions to protect their property or rights, or to recover loss;[67]
- a head contractor and a subcontractor agreeing to disguise from a client payments to the subcontractor, which payments were required by a union;[68]
- unions or head contractors applying pressure upon subcontractors in support of union membership on sites;[69]
- union 'show card' days;[70]
- unions asserting the right not to work with non-union labour;[71]
- compulsion upon non-members to attend meetings called by union officials;[72]
- the use by a union of occupational, health and safety (OH&S) issues as an industrial tool, intermingled with legitimate OH&S issues;[73]
- the raising of alleged OH&S issues by a union in pursuit of industrial ends;[74]
- unions making unqualified and incorrect assertions about OH&S processes;[75]
- unions refusing to accept the results of repeated independent and expert safety inspections of a site;[76]
- union officials failing to refer asserted OH&S breaches to the relevant authorities;[77]
- union officials preventing persons from working on site to rectify asserted safety hazards;[78]
- employers failing to observe proper OH&S standards;[79]
- disregard of the provisions of agreements entered into;[80]
- disregard of dispute resolution procedures, both legislative and agreed;[81]
- head contractors paying money to unions to entice them to adhere to dispute resolution procedures;[82]
- a government department divulging confidential information to unions;[83]
- a government department intervening in an industrial dispute in a way that lent support to activity by unions which was unlawful;[84]
- a government department using a prequalification mechanism to pressure a contractor to sign a union-endorsed agreement.[85]
- a government being unwilling to award a tender to a contractor, despite it being satisfactory in all relevant respects, because of fears of possible disruption by a union;[86]
- a Workcover authority being susceptible to pressure from officials of a union;[87]
- an industrial relations consultant to a State government being willing to arrange for payments to be made to a contractor for services which were not provided; and[88]
- the covert commitment by a State government of public monies to assist a private company to overcome the effects of unlawful and inappropriate industrial action by unions.[89]

20 The reason why unlawfulness, in all its forms, and inappropriate conduct and practices occur, is because of the structure of the industry, and the different focus of industry participants. There is a clash between the short term project profitability focus of the providers of capital, clients, head contractors and subcontractors on the one hand, and the long term aspirations of the union movement, especially the CFMEU, to dominate, control and regulate the industry for its benefit, and what it perceives to be the benefit of its members, on the other hand.

21 This clash of short-term focus with a longer-term objective usually results in those with the short-term focus surrendering to those with the longer-term objective. The short-term project driven profitability focus means that surrender to demands is the better immediate economic alternative to long drawn out conflict. It means that quick fix solutions driven by commercial expediency supplant insistence on legal rights, adherence to ethical and legal norms and the pursuit of legal remedies. Those with longer-term objectives know that those with a short-term focus are vulnerable to delay and cost. There is thus an inequality of bargaining power, when conflict occurs. Sometimes unlawful or inappropriate conduct occurs for the sole reason of exploiting or reinforcing that power.

22 The unions with coverage of workers in the building and construction industry have the capacity to organise and engage in industrial conflict which can cause debilitating disruption to major projects with little risk of being held to account. They have long-term objectives but often take a short-term view towards the interests of their members and the resolution of disputes. Short-term outcomes for members, such as increased entitlements or benefits, tend to prevail over long-term outcomes, such as increased employment in the industry or more flexible work practices. Underlying much of the conduct of unions, and in particular the CFMEU, is a disregard or contempt for the law and its institutions, particularly where the policy of the law is to foster individualism, freedom of choice or genuine enterprise bargaining. Overwhelmingly, industrial objectives are pursued through industrial conduct, rather than reliance on negotiation or the law and legal institutions.

23 The unwillingness and incapacity of head contractors to respond to unlawful industrial conduct causing them loss is due, principally, to two structural factors. The first relates to their desire to be long-term participants in the industry. To be so, having regard to the competitive nature of the industry and the low profit outcomes, requires them not only to address the short-term focus on profitability of a given project, but to consider the long-term relationship with union participants. They know that unless there is significant acceptance of union demands, there will be continuous industrial disruption on other current and future projects. Clients, including governments, who are major participants in the industry, will not select contractors who are unable to deliver projects on time and within budget. The prospect of industrial disruption is a disqualifying feature for the obtaining of future work, and thus being a long time participant in the industry. This is well understood both by the contractors, and by the unions. It places enormous power in the hands of unions. It encourages unions to use that power to obtain otherwise unattainable outcomes. The threat of the use of power is as effective as its exercise. Each of the unions and the contractors know this and factors this circumstance into their relationships.

24 The second structural factor is the weakness in the mechanisms for enforcing laws of general application, including the criminal law, the industrial law, especially the *Workplace Relations Act 1996 (C'wth)*, and the civil law for recovery of loss caused by unlawful action. The industrial

tribunals and court mechanisms are too cumbersome, too uncertain and too expensive. This results in the mechanisms being underutilised. Further, there is no entity whose function it is to ensure that the industry operates within the law.

25 Financiers and clients, be they government or private sector, do not wish to accept risks of delayed construction. They usually require that risk to be accepted by the head contractor. Head contractors are thus liable for heavy liquidated damages for delayed completion. In addition, delays result in additional standing and overhead charges being incurred. Accordingly, head contractors seek to avoid a delayed construction process. They know, as does the union, what the costs of those delays are. Head contractors seek to assign the risk of delay to subcontractors. Subcontractors normally provide 90 per cent to 95 per cent of the labour to do the construction work. Head contractors provide little labour, but manage the construction process. The assignment of risk to subcontractors means that they also are vulnerable to liquidated damages for delay in their subcontract work.

26 The organisation of a major construction project is a matter of great complexity. There is a close interrelationship of sequential trades and trades working concurrently on site. Flexibility on the part of subcontractors and their employees is required to adjust the construction process to accommodate unforeseen circumstances, including weather.

27 It is against this structure of pre-planning, dependent interrelationships, and flexible requirements that contractors and subcontractors confront the unions' desire for control of major projects, rigidity and uniformity of wage and conditions outcomes, and the recognised potential of unions through industrial action, either lawful or unlawful, to cause them loss. It is against this background that unions sought pattern enterprise bargaining agreements with commonality of wages and conditions, fixed hours of work, fixed rostered days off (RDOs) and limited flexibility. As will be obvious, the more rigid the employment structures, the greater potential to impact upon productivity on a given project, or in the case of subcontractors, who frequently work concurrently on many projects, on those projects.

28 Head contractors and subcontractors recognise the real risk of loss. They also recognise that even if the loss be caused by unlawful industrial conduct, the reality is, at present, it is irrecoverable.

29 The potential for loss from standing charges and liquidated damages is readily assessed. Head contractors and subcontractors know the potential loss suffered from a delay. They can assess the cost of demands made by unions, whether lawful or unlawful. They take a pragmatic commercial decision whether to concede the demands or not, based on economic criteria.

30 The subcontractors in the building and construction industry are typical of small business in Australia. Of the 692 800 people who are engaged in the industry, 248 100, or 36 per cent, are subcontractors or 'own account workers'. Less than 25 per cent of the total workforce belongs to a union. These figures are indicative of an industry where more than three-quarters of the workforce do not wish to be involved with unions, and more than one-third have an attitude of independence and self reliance. However, most subcontractors are small with 94 per cent employing fewer than five employees. They are frequently undercapitalised and depend upon continuous cash flow for their continued existence. They are thus immensely vulnerable to disruption to their work flow. They have no prospect of resisting union demands or, at present,

of recovering losses suffered from unlawful industrial action by unions. The legal processes at present available to enforce industrial or civil rights, and to recover losses are slow, cumbersome and expensive. Whilst losses from unlawful industrial action may be immediate, recovery of those losses may take some years. Outcomes are uncertain, technical difficulties of recovering losses caused by union officials from the union are significant, and above all, contractors and subcontractors know that if they seek recovery of loss from unions, their future prospect of uninterrupted work is remote. Clients and head contractors will not engage contractors or subcontractors who are in dispute with a union because of the prospect that their project will be disrupted. There are many other competing contractors and subcontractors who can be chosen who do not have this impediment. The result is that unlawful action and loss goes unpunished and unrecovered. If proceedings are taken against a union, they are usually bargained away in future industrial negotiations. Thus, the culture of disregard for the law is fostered because of the short term project profitability focus of all those in the industry, other than the unions.

31 All past attempts to reform the conduct and culture of the industry have failed. This failure is due, principally, to two factors. First, there has been an insufficient determination on the part of government to establish structures which will enable the industry to operate fairly and productively and in a manner respecting the rights of individuals. There has been an inadequate structure to enforce the law and usual standards applicable in other industries. Second, there has been an unwillingness within industry leadership to recognise the long term advantages of structural and cultural change, accepting instead a short term project driven profit process. Pragmatism and self-interest have dominated.

32 If the reforms recommended are adopted and implemented, the mechanisms will be in place to restore the rule of law to the building and construction industry. Those who breach the law will be prosecuted and penalised. The penalties will be significant. Those breaching the law will find they can no longer participate in the industry. Those who disregard proper standards of behaviour expressed both in an Act of special application to the building and construction industry, provisionally called the *Building and Construction Industry Improvement Act*, or do not adhere to codes of practice for the industry, will be denied Commonwealth work if they are contractors or subcontractors. Losses caused by unlawful industrial action will be immediately assessed by independent assessors and will be recoverable from those causing loss by an abbreviated form of legal proceedings. No longer will there be any excuse for those who say they suffer loss, not to recover it from those who cause it.

33 I have also recommended the establishment of an independent commission, provisionally called the Australian Building and Construction Commission (ABCC), to monitor conduct in the industry. There will be obligations imposed upon contractors, subcontractors, union officials and workers to advise the ABCC of possible unlawful conduct, be it underpayment or non-payment of wages, taxation avoidance, departures from proper standards of occupational health and safety, breaches of freedom of association provisions, unlawful industrial activity, or any other form of unlawfulness. It will be the responsibility of the ABCC either itself to address this unlawfulness, or where there is another State or Federal body more suited to its investigation, to refer the matter to that body but with the obligation to monitor and ensure any complaint is properly addressed. This body will remove any reason that any participant in the industry has

to engage in unlawful or inappropriate conduct. It will also ensure that unlawful conduct comes to the attention of an entity established to ensure the law is adhered to.

34 A major task of the ABCC will be to enforce a new statutory norm which specifies, with clarity, what industrial conduct is unlawful. The statutory norm specifying unlawful industrial action simplifies and clarifies the existing law, and is expressed in terms which leave no room for misunderstanding by any participant regarding whether conduct is lawful or unlawful.

## Reform

35 The reform package includes the following elements:

- an act of special application to the building and construction industry, called the *Building and Construction Industry Improvement Act*. This Act will amend aspects of the *Workplace Relations Act* 1996 (C'wth) as it applies to the industry. It will also legislate for many other reform proposals;
- the creation of the Australian Building and Construction Commission (ABCC). This body will be responsible for monitoring conduct in the industry, and prosecuting unlawful industrial action, breaches of freedom of association laws, and addressing all complaints of unlawfulness in the industry. It will become a 'one stop shop' for all complaints. It will have the power to commence proceedings to restrain unlawful industrial action, and to restrain secondary boycotts;
- the abolition of pattern bargaining in the industry;
- the rendering void of unregistered project and industry agreements;
- the implementation of genuine bargaining at the enterprise level;
- the introduction of industrial democracy at the enterprise level;
- the Commonwealth dealing only with contractors and subcontractors:
  - (a) who are pre-qualified as exhibiting excellence in occupational health and safety;
  - (b) who agree to adhere, and do adhere to the National Code of Practice for the Construction Industry as amended, and Commonwealth Implementation Guidelines;
- those obligations will attach to:
  - (a) all projects in which the Commonwealth is the client;
  - (b) all projects which the Commonwealth funds in whole or in part;
  - (c) all other projects of the contractor and subcontractor, not merely those on which the Commonwealth is the client or for which it provides funds;
- the ABCC will monitor performance of the National Code of Practice and the Implementation Guidelines;

- the establishment of a Commissioner for Health and Safety in the Building and Construction Industry to monitor occupational health and safety on all projects on which the Commonwealth is the client, or to which it provides funds;
- a clear definition of unlawful industrial action;
- where conduct occurs which might constitute unlawful industrial action:
  (a) it must immediately be notified to the ABCC;
  (b) if loss is occasioned, the quantum and details of such loss must be advised to the ABCC within 14 days; and
  (c) an independent body of assessors will assess and certify loss suffered, with the certificate of such loss being prima facie evidence of loss in recovery proceedings;
- if the ABCC prosecutes for a penalty for engaging in unlawful industrial action, and such action is established, then:
  (a) a penalty will be imposed on the party found to have engaged in such conduct; and
  (b) the victim of loss may join in such proceedings and recover any loss suffered as certified;
- registered organisations will, by statute, be responsible for the acts of officials, employees, organisers and delegates, and for the consequences of their acts, such that loss caused by officials, employees, organisers and delegates will be recoverable from the registered organisations;
- officials, organisers and delegates who engage in unlawful conduct, including unlawful industrial conduct, failure to adhere to legislated or agreed dispute resolution clauses, or disobedience of orders of the Australian Industrial Relations Commission (AIRC) or a court, may, on application of the ABCC, be disqualified from holding any position in a registered organisation;
- registered organisations will be responsible for ensuring that their officials, organisations and delegates are aware of the rights, obligations and entitlements attendant upon holding such positions. Failure to do so has serious consequences;
- clarification and definition of the circumstances in which powers of entry and inspection may be exercised. The ABCC will be given notice of all notices to enter and inspect before such entry occurs. This will enable it to attend and determine if the employer has committed any breach, and ensure the right of entry and inspection is properly exercised;
- the ABCC having the power to seek suspension or cancellation of permits to enter and inspect where such permits are abused. The ABCC also having power to prosecute for a penalty in defined circumstances;
- clarification and expansion of freedom of association protection;
- conferring upon the ABCC the power to make applications to the Federal Court for orders in respect of contraventions of freedom of association;

- prohibiting coercion in relation to the employment of particular persons or employment to particular positions;
- simplification of award allowances;
- removal of constraints in awards regarding the commencing and finishing times for work, the days on which work may occur, and the days upon which rostered days off (RDOs) must be taken;
- conferring upon the AIRC, in relation to awards, the power to determine the maximum number of overtime hours a worker may perform in a week;
- the development of a code of conduct and practice for labour hire in the industry;
- encouraging the States and Territories to adopt measures to prevent evasion of payroll tax obligations;
- the sharing of information between Commonwealth, State and Territory revenue authorities with the objective of preventing the avoidance of revenue obligations;
- the sharing of information between the Australian Securities and Investment Commission and the Australian Taxation Office with a view to eliminating or diminishing phoenix company activity;
- provisions regarding the distribution of recovered wage claims;
- legislation to improve security of payments to subcontractors;
- improved measures to enhance payment of superannuation entitlements;
- improved measures to reduce avoidance of the payment of workers' compensation premiums;
- improved measures to reduce tax avoidance;
- improved measures for the recovery of unpaid wages and entitlements;
- improved measures to encourage training, school-based traineeships and apprenticeships in the industry;
- measures to encourage the employment of women in the industry;
- prohibition upon registered organisations alienating assets or income so as to defeat creditors, or persons to whom they cause loss by unlawful industrial action;
- improved transparency in the published accounts of registered organisations;
- surpluses in redundancy funds to be retained for payment of redundancy benefits, or to permit reduced contributions; and
- provisions to provide real choice by an employee as to the superannuation fund into which he or she wishes the contributions to be paid.

36 This Commission, in addition to considering the present law and practices in relation to establishing employment conditions, and occupational health and safety in the industry, and making recommendations for reform of those aspects of the industry, also considered and, where appropriate, has made recommendations for reform in relation to the following topics:

(a) Abuses of privacy;

(b) Ambiguities in the *Workplace Relations Act 1996 (C'wth);*

(c) Codes of practice for the building and construction industry;

(d) Demarcation disputes;

(e) Entry and inspection rights;

(f) Freedom of association;

(g) Illegal workers in the building and construction industry;

(h) Inflexible practices;

(i) Inappropriate employment and related demands;

(j) Labour hire;

(k) Payroll tax obligations – compliance;

(l) Phoenix companies;

(m) Retention of wage claim amounts;

(n) Security of payments;

(o) Superannuation contributions – compliance;

(p) Taxation obligations – avoidance and evasion;

(q) *Trade Practices Act 1974 (C'wth)* implications for activity in the building and construction industry;

(r) Training in the building and construction industry;

(s) Under-representation of women;

(t) Unions acting as regulators;

(u) Unlawful and inappropriate payments;

(v) Workers' compensation premiums; and

(w) Workers' entitlements.

37 Set out below is a brief statement of each issue which raised a matter where reform is thought desirable, together with the recommended reform. The detail of the problem, the current law, the current practice, and the reasons for reform are expressed more fully in Volumes 5-11 inclusive.

# Recommendations

# Volume 2

# Conduct of the Commission – Principles and Procedures

## Issue

Over the life of the Commission, a number of situations have arisen that have demonstrated deficiencies in the *Royal Commissions Act 1902 (C'wth)*. As a result, there are various changes to the Act that I recommend for consideration.

## Recommendation 1

The *Royal Commissions Act 1902 (C'wth)* be amended:

(a) to empower Royal Commissions to require any person to provide the Commission, within a reasonable time, with a statement of information concerning that person's knowledge of any matters specified by the Royal Commission and that fall within the Commission's terms of reference;

(b) to empower Royal Commissions to investigate, in addition to the matters set out in their Terms of Reference, any breach or suspected breach of the *Royal Commissions Act 1902 (C'wth)* that occurs in relation to that Commission;

(c) to amend s6P of the *Royal Commissions Act 1902 (C'wth)* to enable Royal Commissions to communicate evidence or information that relates to the contravention of any law to *'any agency or body of the Commonwealth, a State or a Territory prescribed by the regulations'* (thus overcoming the uncertain operation of s6P(1)(e) in relation to certain types of organisations.) Section 59(7) of the *Australian Crime Commission Act 2002 (C'wth)* provides a useful model;

(d) to extend the operation of s6DD of the *Royal Commissions Act 1902 (C'wth)* so that it provides a use immunity in relation not just to statements in evidence before the Commission, but also to statements made either orally or in writing to an officer of the Commission in connection with or in preparation for giving evidence to the Royal Commission (such an immunity not to apply to false or misleading statements, and not to be conditional upon the person having first being served with a summons because, following an interview, a summons may not be necessary);

(e) to empower a Commission, by appropriate notice attached to a summons or notice to produce, to prohibit a person from disclosing the fact that he, she or it had received a summons or notice or had spoken with a Royal Commission investigator, subject only to the right to disclose this information for the purpose of obtaining legal advice, with contravention of such a prohibition to be a criminal offence punishable by a fine of $2000 or imprisonment for one year (ss29A and 29B of the *National Crime Authority Act 1984 (C'wth)* provide an appropriate model);

(f) to increase the penalties for failure to attend when summonsed, failure to answer questions, and failure to produce documents to five years jail or a $20 000 fine. The proposed penalties are the same as those recently introduced into the *National Crime Authority Act 1984 (C'wth)* for the identical offences. Before that amendment the penalties in that Act were exactly the same as the current penalties in the *Royal Commissions Act 1902 (C'wth)*. The fine of $1000 has not increased since 1912 (although the option of six months jail was added to the Act in 1983);

(g) to increase the fine for contravention of s6O(1) (contempt of Royal Commission) to $5000;

(h) to amend s6G and s8 of the *Royal Commissions Act 1902 (C'wth)* to allow persons, companies and organisations to be paid a reasonable sum for their expenses in complying with notices to produce documents or summonses to produce documents;

(i) to state expressly that:

  (i) a person must, unless otherwise excused by a Royal Commission, produce original documents in answer to a notice to produce;

  (ii) where a document falls within the category of documents described in a notice to produce, the whole document must be produced, rather than just the part of it that falls within the description in the notice;

  (iii) it is not a reasonable excuse for non-production of documents that the person needs, wants, or asserts that it requires copies of documents before they can be produced and that the Commission has refused to meet the cost of those copies;

  (iv) it is not a reasonable excuse for non-production of documents that a person has not yet been reimbursed for the cost of complying with a notice to produce documents or a summons to produce documents;

(j) to provide for the service of summonses and notices by means of facsimile, and to authorise the service of copies of summonses or notices (both of which would alleviate substantial practical problems that otherwise arise in the conduct of national inquiries);

(k) to provide that no challenge may be made to a notice or summons on the basis that the information sought does not fall within the Terms of Reference of a Royal Commission, except on the basis that the notice or summons is not a bona fide attempt to investigate matters into which the Commission is authorised to inquire.

Chapter 8 – Proposed amendments to the *Royal Commissions Act 1902 (C'wth)*

# Volume 5

# Reform – Establishing Employment Conditions

## Issue

The *Workplace Relations Act 1996 (C'wth)* contemplates the establishment of employment conditions by various forms of agreements. Section 170LJ of the Act provides for agreements between an employer and one or more organisations of employees which have members employed by the employer. Section 170LK provides for agreements between an employer and a majority of its employees. Most agreements made in the building and construction industry are made under s170LJ. The Act contemplates that agreements made under ss170LJ and 170LK will be made following discussions between workers and their employers or representatives of workers and employers. The major purposes served by such discussions are ensuring that the needs of individual workers and individual businesses can be identified and considered and, where possible, accommodated; that arrangements can be made to enhance the productivity of the business; and that provision can be made for flexibility so that the employer and the workers can adjust to variations to the operational demands of the business and the personal circumstances of the workers.

In the central business districts of capital cities and in some regional cities and on major regional projects where there is a high proportion of union membership, the process of enterprise level bargaining which is contemplated by the Act has been effectively circumvented and displaced by pattern bargaining leading to pattern agreements. Under these arrangements large numbers of agreements contain a common nominal expiry date. As that date approaches, union officials and representatives of major contractors and employer associations meet and negotiate a pattern agreement. The employers represented employ relatively few workers. The subcontractors who are the major employers in the industry are not involved in the negotiations. Once an agreement is struck pressure is applied by unions and major contractors to smaller contractors and subcontractors to enter into agreements which contain the same terms and conditions as appear in the pattern agreement. Such agreements are known as 'union-endorsed EBAs'. The pressure on smaller contractors and subcontractors to enter into such agreements with unions takes various forms. They include industrial action (both lawful and unlawful) and the demand of head contractors that subcontractors must have union-endorsed EBAs before they will be engaged to perform work for the major contractors.

The result is that no discussions take place between workers and their employer at the workplace level and no consideration is given to the individual interests and needs of the employer and the workers. Productivity improvements which could flow from such discussions are prevented. The benefits of such improvements are denied to all involved in the business. The scope for competition is minimised because all contractors are committed to providing the same wages and conditions.

There is nothing in the *Workplace Relations Act 1996 (C'wth)* which directly prohibits pattern bargaining and pattern agreements. Bills which have been introduced in an attempt to control pattern bargaining and pattern agreements have not been passed by Parliament.

Pattern bargaining and union-endorsed EBAs are entrenched in sections of the building and construction industry.

True enterprise bargaining requires the direct input of those whose interests are most directly affected by its outcomes – workers and their employer. The circumstances of individual businesses will differ. So too will the needs and aspirations of individual workers. If they are to be considered and accommodated in ways that are mutually beneficial and acceptable, the workers and their employers

need to discuss how an agreement can be structured which advances their respective interests. Ninety four percent of employers in the building and construction industry have less than five employees. Given the relatively small number of employees engaged by most contractors in the building and construction industry, there is clearly scope for discussions to take place, both formally and informally, at the workplace in order to arrive at mutually beneficial outcomes. Pattern bargaining and the impact of project agreements have meant that both workers and employers have become accustomed to merely adopting a common form of agreement which has been determined by others.

One form of centralised wage and condition fixation has been replaced by another. Initiative is stifled; the scope for creativity is denied. The reforms introduced by successive Governments, to make agreements struck at enterprise level the principal instruments whereby terms and conditions of employment are established, are circumvented and negated. The results have been detrimental to both workers and employers, to the industry and to the national economy.

The unions and the major contractors which negotiate pattern agreements perceive it to be in their best interest to adopt this method of determining wages and conditions in the industry. They have the economic and industrial strength to enforce their wishes on workers and their employers. Unless pattern bargaining is prohibited by legislation it will continue to be the principal means by which many important terms and conditions of employment are determined in the commercial sector of the industry.

### Recommendation 2

An Act dealing specifically with the building and construction industry, provisionally called the Building and Construction Industry Improvement Act:

(a) prohibit 'pattern bargaining', that term being defined broadly along the lines adopted in the *Workplace Relations Amendment Bill 2000 (C'wth)*;

(b) provide that, on application of an interested person or the proposed Australian Building and Construction Commission, the Federal Court may grant an injunction (interim, interlocutory or permanent) restraining any person or the servants or agents of any person from engaging in pattern bargaining; and

(c) provide that it is a ground for the deregistration of any employer organisation or union registered under the *Workplace Relations Act 1996 (C'wth)* that such an organisation has contravened or failed to comply with the terms of such an injunction.

### Issue

One device used to facilitate pattern bargaining is the fixing of a common nominal expiry date in a large number of agreements. Pattern bargaining would be less likely to occur if this practice were to be discouraged.

### Recommendation 3

The Building and Construction Industry Improvement Act provide that the nominal expiry date of any enterprise bargaining agreement be determined by reference to the expiry of a fixed period (say three to five years) after the date on which the agreement is entered into.

Chapter 11 – Reform – Pattern bargaining

### Issue

The Australian Industrial Relations Commission regularly certifies pattern agreements. If pattern bargaining is prohibited it should follow that pattern agreements which are the product of such bargaining should not be certified.

### Recommendation 4

The Building and Construction Industry Improvement Act:

(a) make it a precondition for the certification of any enterprise bargaining agreement made in the building and construction industry that the Australian Industrial Relations Commission is satisfied that the enterprise bargaining agreement is not a pattern agreement. If the Australian Industrial Relations Commission is not so satisfied it must refuse to certify the enterprise bargaining agreement;

(b) provide that the Australian Building and Construction Commission has a right to intervene in any proceeding in the Australian Industrial Relations Commission in which an application is made for certification of an enterprise agreement; and

(c) provide that the Industrial Registrar provide seven days notice to the Australian Building and Construction Commission of any hearing of such an application and a copy of all documents lodged in the Registry in support of the application.

Chapter 11 – Reform – Pattern bargaining

## Issue

Many employees presently do not have an opportunity to vote on who should represent them in enterprise bargaining negotiations. In practice the issue does not arise because bargaining does not occur at enterprise level. If pattern bargaining is replaced by genuine enterprise level negotiations there will be a need for workers to have the opportunity to influence the negotiating process and to have their views represented by persons of their choice.

## Recommendation 5

The Building and Construction Industry Improvement Act:

(a) require that no later than two months before an existing enterprise bargaining agreement is due to expire the employees at an enterprise whose employment is covered by the enterprise bargaining agreement meet and vote (by secret ballot if the enterprise employs ten or more employees whose employment will be regulated by the proposed agreement) on whether or not:

  (i) each of the employees will participate directly in negotiations with the employer for a new enterprise bargaining agreement; or

  (ii) they wish to be represented in the negotiations by a negotiating committee chosen by and from their number or by a union or other agent.

  The answer to each question be determined by a majority of those eligible to vote; and

(b) provide that those chosen to represent the employees in negotiations have the power and authority to determine the particulars to be included in the notice initiating the bargaining period and serve the notice.

Chapter 11 – Reform – Pattern bargaining

### Issue

It is in the interests of all parties for agreement to be reached on the terms of a new enterprise bargaining agreement before any existing agreement reaches its nominal expiry date. There is a need for legislative encouragement for negotiations for new enterprise bargaining agreements to take place and be concluded, if possible, prior to the nominal expiry date of any existing enterprise bargaining agreement.

### Recommendation 6

The Building and Construction Industry Improvement Act:

(a) provide that the objective of enterprise negotiations should be to reach a new agreement prior to the nominal expiry date of any existing agreement; and

(b) provide that any obligation imposed on an employer under an enterprise bargaining agreement to pay any wages, allowances, contributions or any other monetary benefits to or on behalf of employees cannot be made retrospective beyond the date of agreement unless the Australian Industrial Relations Commission is satisfied that the employer has unreasonably delayed negotiations.

Chapter 11 – Reform – Pattern bargaining

### Issue

Where all employees do not choose to be represented by the same agent or agents in enterprise negotiations, the minority should have the opportunity to make their position known to the employer.

### Recommendation 7

The Building and Construction Industry Improvement Act provide that, if the workers, by majority, vote against being represented by a union in negotiations, and any union members wish to have representations made on their behalf by a union, the employer must provide an opportunity to the union to make such representations prior to the finalisation of any negotiations with its employees but, in that situation, the union is not entitled to participate in the negotiations between the employer and other employees. A similar right should be granted to a minority of employees when the majority vote for union representation.

Chapter 11 – Reform – Pattern bargaining

## Issue

Enterprise-level bargaining should occur when a new enterprise bargaining agreement is being negotiated. Such bargaining will not achieve its objectives unless all parties involved engage in 'genuine' bargaining.

## Recommendation 8

The Building and Construction Industry Improvement Act:

(a) require that enterprise bargaining take place at each enterprise and that the employer and the workers (or their representatives) engage in genuine bargaining;

(b) contain a note, subjoined to the section which imposes this obligation, identifying the following elements of genuine enterprise bargaining. The parties would engage in such bargaining by:

  (i) agreeing to meet face to face at reasonable times proposed by another party;

  (ii) attending meetings that the party has agreed to attend;

  (iii) complying with negotiating procedures agreed to by the party;

  (iv) disclosing relevant information, as appropriate, taking into account the employer's need to protect its commercial interests;

  (v) disclosing in writing any direct or indirect financial benefit that may be derived by them arising from the agreement, such as any commission or other income;

  (vi) stating a position on matters at issue, and explaining that position;

  (vii) considering and responding to proposals made by another negotiating party;

  (viii) adhering to commitments given to another negotiating party or parties in respect of meetings and responses to matters raised during negotiations;

  (ix) dedicating sufficient resources and personnel to ensure genuine bargaining;

  (x) not capriciously adding or withdrawing items for negotiation;

  (xi) not refusing or failing to negotiate with one or more of the parties;

  (xii) in or in connection with the negotiations, not refusing or failing to negotiate with a person who is entitled to represent an employee or with a person who is a representative chosen by a negotiating party to represent it in the negotiations; and

  (xiii) in or in connection with the negotiations, not bargaining with, attempting to bargain with or making offers to persons other than another negotiating party, about matters which are the subject of the negotiations.

Chapter 11 – Reform – Pattern bargaining

### Issue

Workers are rarely consulted at enterprise level before protected industrial action is taken. This is so even though many forms of industrial action can cause them to lose wages and other benefits. Workers are directed by union officials to impose bans or to withdraw their labour. In many instances no action would be taken in the absence of a direction. The practice is so well entrenched in the culture of the industry that it will continue unless legislation is introduced which will give workers the opportunity to vote on whether or not to take protected action and which requires a majority vote in favour of such action as a precondition to industrial action being protected.

### Recommendation 9

The Building and Construction Industry Improvement Act provide that, before any protected industrial action is taken in support of any claims made in respect of a proposed agreement, a majority of the employees whose employment would be covered by the enterprise bargaining agreement must vote, at an enterprise level, in favour of taking such action. Where there are more than ten employees the vote be by secret ballot.

Chapter 11 – Reform – Pattern bargaining

### Issue

In the building and construction industry unprotected industrial action is frequently taken in support of claims made in respect of proposed agreements. Those taking the action are not held responsible for their unlawful conduct or for the losses suffered by those against whom the action is taken and others who are affected by it.

### Recommendation 10

The Building and Construction Industry Improvement Act prohibit industrial action taken in support of any claims made in respect of a proposed agreement unless such action is protected action within the meaning of the *Workplace Relations Act 1996 (C'wth)* as varied by the Building and Construction Industry Improvement Act.

Chapter 11 – Reform – Pattern bargaining

## Issue

Protected industrial action can, presently, continue indefinitely. In the building and construction industry protected industrial action has the potential to cause serious concurrent economic harm not only to those directly involved but also to many third parties.

## Recommendation 11

The Building and Construction Industry Improvement Act provide that:

(a) if protected action is taken, it can proceed for no more than 14 days;

(b) if it continues for 14 days it must then stop;

(c) if, for any reason, it stops within the 14 day period, it may not resume;

(d) once protected industrial action ceases, a 21 day cooling off period shall ensue, during which time negotiations should continue, with the assistance, if one or more of the parties wish it of the Australian Industrial Relations Commission;

(e) any industrial action which is taken during this cooling off period is unprotected;

(f) any party which takes such action be liable to a penalty and for the losses suffered by those affected by it; and

(g) further protected action not be taken without the leave of the Australian Industrial Relations Commission which, in making its decision, shall have regard to the following considerations:

  (i) the matters that are at issue between the parties;

  (ii) the merits of the parties' cases;

  (iii) the interests of the negotiating parties and the public interest;

  (iv) the anticipated effect of any industrial action on third parties;

  (v) whether any party has failed to engage in genuine bargaining;

  (vi) the extent to which the conduct of the negotiating parties during the bargaining period has been reasonable; and

  (vii) any relevant principles which a Full Bench of the Australian Industrial Relations Commission might formulate for the purposes of guiding the exercise of this power.

Chapter 11 – Reform – Pattern bargaining

## Issue

The legislative provisions which are designed to protect persons from being coerced to enter into enterprise bargaining agreements, and, in particular, s170NC of the *Workplace Relations Act 1996 (C'wth)*, are not adequate to deal with some forms of pressure which are brought to bear on many participants in the building and construction industry. In particular, refusal by head contractors to engage subcontractors which do not have union-endorsed enterprise bargaining agreements and the making of threats of industrial action or the taking of such action by unions and their members because a subcontractor does not have a union-endorsed enterprise bargaining agreement should be rendered unlawful.

## Recommendation 12

The Building and Construction Industry Improvement Act:

(a) prohibit all forms of discrimination for or against a contractor on the ground that the contractor has or does not have a particular form of workplace agreement with its employees, whether or not the discriminatory conduct constitutes coercion, unless the conduct is protected action under the *Workplace Relations Act 1996 (C'wth)*; and

(b) provide for penalties for breaches of the prohibition fixed at a maximum of $100 000 for corporations and $20 000 in other cases.

Chapter 13 – Reform – Prevention of coercion to enter into pattern agreements

## Issue

Unregistered project agreements operate to prescribe terms and conditions of employment for subcontractors and their employees which ought to be determined through enterprise-level bargaining. They are objectionable for the same reasons that pattern agreements are objectionable. With few exceptions project agreements are not presented for certification under the *Workplace Relations Act 1996 (C'wth)* because they would not satisfy the pre-conditions for certification. Nevertheless they are enforced against subcontractors by head contractors and unions. Unless project agreements are proscribed and rendered ineffective by legislation they will continue to be imposed on subcontractors.

## Recommendation 13

The Building and Construction Industry Improvement Act provide that:

(a) the only form of project agreement which can have force and effect in the building and construction industry is an agreement made under ss170LC or 170LL of the *Workplace Relations Act 1996 (C'wth)* and certified, pursuant to that Act, by the Australian Industrial Relations Commission;

(b) where a project agreement has been made and application for it to be certified has not been made to the Australian Industrial Relations Commission within 21 days, that agreement is deemed to be void, unlawful and unenforceable either directly or by incorporation in another agreement; and

(c) where the Australian Industrial Relations Commission has refused to certify a project agreement, that agreement is deemed to be void, unlawful and unenforceable either directly or by incorporation in another agreement.

Chapter 15 – Reform – Project agreements

## Issue

Some unions in the building and construction industry have sought to have clauses included in enterprise bargaining agreements which require non-members to pay fees to the unions purportedly to cover the cost to the unions of pursuing improvements to wages and conditions from which non-members benefit. Doubt has arisen as to whether claims for such bargaining fees and some other matters are matters which pertain to the employer–employee relationship. This doubt should be resolved by making it plain that bargaining fees in any form cannot be included in enterprise bargaining agreements and that enterprise bargaining agreements which contain such clauses should not be certified. Where doubt arises as to whether or not a claim, made during enterprise bargaining, pertains to the employer–employee relationship there should be a simple procedure under which a ruling can be obtained from the Federal Court. In the meantime industrial action in support of the disputed claim should not occur.

### Recommendation 14

The Building and Construction Industry Improvement Act include a provision to the effect that, in order for an application to be made to certify an agreement, the agreement must be in writing and contain *only* terms and conditions that pertain to the relationship between an employer which is a constitutional corporation, the Commonwealth or a Territory and all persons who, at any time when the agreement is in operation, are employed in a single business or a part of a single business of the employer and whose employment is subject to the agreement or terms and conditions that are incidental thereto. A request that an employee or employer pay, directly or indirectly, to a third party a fee be deemed not to be a term relating to the relationship between the employer and its employee or incidental thereto.

### Recommendation 15

The Building and Construction Industry Improvement Act provide that industrial action is not protected action if it is:

(a) taken in support of a proposed agreement that contains any claim that has been declared by the Federal Court not to pertain to the employer–employee relationship; or

(b) taken in support of a claim at a time after an application has been made to the Federal Court seeking a declaration that the particular claim does not pertain to the employer–employee relationship and before that application has been finally determined.

Chapter 16 – Bargaining fees

## Issue

There is presently no direct proscription, in industrial relations legislation, of secondary boycotts being used to support enterprise bargaining. Secondary boycotts have been employed for this purpose in the building and construction industry. It is often difficult or impracticable for those who suffer loss as a result of such unlawful action to obtain redress.

## Recommendation 16

The Building and Construction Industry Improvement Act:

(a) proscribe secondary boycotts being imposed in support of claims being made in respect of a proposed agreement;

(b) provide that any breach of the proscription attract a civil penalty up to a maximum of $100 000 for a corporation and $20 000 for individuals;

(c) provide that, on application of an interested person or the Australian Building and Construction Commission, the Federal Court may grant an injunction (interim, interlocutory or permanent) restraining any person from engaging in the proscribed conduct; and

(d) provide for the payment, by any person who contravenes the proscription, of compensation to any person who suffers loss as a result of the contravention.

Chapter 17 – Penalties for unlawful industrial action in support of negotiations constituted by secondary boycotts

# Volume 6

# Reform – Occupational Health and Safety

### Issue

The occupational health and safety performance of the building and construction industry is unacceptable. The powerful competitive forces in the industry too often work against occupational health and safety. The industry strives to complete projects on budget and on time. Too often safety is neglected. There must be cultural and behavioural change. That can come about by harnessing the competitive forces in the industry to work for occupational health and safety.

### Recommendation 17

The Commonwealth foster a new paradigm in the building and construction industry. Work must be performed safely, as well as on budget and on time.

Chapter 1 – Introduction

### Issue

The Commission examined no more important subject than occupational health and safety in the building and construction industry. The Commission's approach to improving occupational health and safety in the industry was guided by two concerns. The first was for the people in the industry. They are entitled to expect, when they attend at work, that they will leave their workplace uninjured. Too often this expectation is unrealised. The Commission's second concern was with the future. Accidents are carefully investigated. Their causes are well known. However, in spite of this knowledge, the industry is unsafe. The Commission therefore concentrated on formulating proposals that would improve the future prospects of a safer industry. To this end, a great deal of evidence was collected. Submissions were sought and received from governments, employer and employee organisations and head contractors. A Workplace Health and Safety Conference was convened, to which were invited representatives of employee and employer organisations, workplace health and safety practitioners with employee and employer backgrounds, representatives of government and regulatory authorities, academics and experts with practical experience. The unions declined to attend; it is to be regretted that they put political considerations ahead of the health and safety of workers in the industry. The Workplace Health and Safety Conference provided an opportunity for the industry to raise and discuss proposals to improve occupational health and safety. It was valuable and productive. Conferences of this kind should become a regular feature of the industry.

### Recommendation 18

The National Occupational Health and Safety Commission at regular intervals convene a conference of representatives of employer and employee organisations, occupational health and safety practitioners with employer and employee backgrounds, representatives of government and regulatory authorities, and academics and experts with practical experience for the purpose of considering occupational health and safety in the building and construction industry. The conference should be linked to the National Occupational Health and Safety Strategy 2002-2012.

Chapter 1 – Introduction

### Issue

The volume and range of the material gathered by the Commission, and the fact that the Commission has concentrated on recommendations that can be effected by the Commonwealth, has meant that not all of the material can be mentioned in the Final Report. Much of the material that the Commission has gathered will be of great value to the National Occupational Health and Safety Commission and the regulatory authorities of the States and Territories. It should be preserved and passed on to those who can make best use of it.

### Recommendation 19

The Commonwealth refer submissions, evidence and other material tendered before the Commission that relates to occupational health and safety to the National Occupational Health and Safety Commission. The National Occupational Health and Safety Commission retain and use that material for its purposes, and refer to any other Commonwealth, State and Territory occupational health and safety authorities such of that material as it considers might be used for their purposes.

Chapter 1 – Introduction

## Issue

There is at present a fragmented, disjointed and uncoordinated system of occupational health and safety law and regulation in Australia which, when applied to a national industry such as the building and construction industry, is inequitable, wasteful and inefficient. Workers in the industry are entitled to a regime of the highest possible standard regardless of where they are working in Australia. In view of these considerations, there could be no more salutary reform to occupational health and safety law and regulation than a single national scheme comprehensively regulating occupational health and safety generally throughout Australia. There is strong support for this in the industry. However, the long failure of attempts to achieve national uniformity, and then national consistency, in occupational health and safety regulation indicates that there is no realistic prospect that the Commonwealth, States and Territories will co-operate to bring about a single national system regulating occupational health and safety generally. It would be wrong to establish a national system regulating only the building and construction industry. However, this does not mean that nothing can be done to achieve at least some improvement in the regulation of occupational health and safety in the industry. After a long hiatus, work has resumed on drawing up national building and construction industry standards. These can operate in the context of existing State and Territory laws, but should apply to the industry uniformly in every jurisdiction. They should stipulate clear and objective requirements in relation to the hazards that are critical to the industry. A timetable should be set for the work of drawing up and giving effect to these standards. That work should be part of, and given priority in, the National Occupational Health and Safety Strategy 2002-2012 under the oversight of the Workplace Relations Ministers' Council.

## Recommendation 20

The Commonwealth take such steps as are available to it to ensure that:

(a) the work of drawing up and giving effect to uniform national standards to be applied in the building and construction industry in every State and Territory in Australia is taken up in the National Occupational Health and Safety Strategy 2002-2012 as a matter of priority under the National Priority Action Plans;

(b) the Workplace Relations Ministers' Council, its members and the National Occupational Health and Safety Commission adopt a timetable for the progress and completion of this work;

(c) the Workplace Relations Ministers' Council, its members and the National Occupational Health and Safety Commission are accountable for the progress and completion of this work in accordance with the timetable; and

(d) adequate resources are provided to enable the timetable to be met.

Chapter 2 – Improving occupational health and safety in the building and construction industry

## Issue

The National Occupational Health and Safety Strategy 2002-2012 represents a long overdue consensus between governments and the representatives of employers and employees about the way forward in improving occupational health and safety. It offers the best opportunity in many years to effect such improvements. However, having regard to the failure of attempts to improve occupational health and safety in the past, it is important that those who have subscribed to the National Occupational Health and Safety Strategy 2002-2012 should be accountable for its implementation, and that reports of progress are exposed to public scrutiny and debate.

### Recommendation 21

The Commonwealth take appropriate steps to ensure that any annual or other report made by the National Occupational Health and Safety Commission to the Workplace Relations Ministers' Council on progress made in implementing the National Occupational Health and Safety Strategy 2002-2012 contains:

(a) in so far as it is possible having regard to the information that is available, a statement of the incidence of work-related fatalities and workplace injury in the building and construction industry in each State and Territory, and an express comparison between the incidence of such fatalities and injuries and the targets stipulated in the National Occupational Health and Safety Strategy 2002-2012;

(b) a statement setting out the opinions of the National Occupational Health and Safety Commission, including those of the Chairperson and Chief Executive Officer thereof, as to progress in implementing the National Occupational Health and Safety Strategy, and in particular in meeting the targets stipulated therein, and as to whether any aspect of the National Occupational Health and Safety Strategy 2002-2012 or its implementation could be refined or improved;

(c) a statement setting out the action that has been, is being or is proposed to be taken by each of the Commonwealth, the States and Territories, the Australian Chamber of Commerce and Industry and the Australian Council of Trade Unions, to implement the National Occupational Health and Safety Strategy 2002-2012, and stipulating the time that has or will be taken to undertake and complete each such action; and

(d) a statement setting out the action that has been, is being or is proposed to be taken by each of the Commonwealth, the States and Territories, the Australian Chamber of Commerce and Industry and the Australian Council of Trade Unions to draw up or give effect to uniform national building and construction industry standards, and stipulating the time that has or will be taken to undertake and complete each such action.

### Recommendation 22

The Minister for Employment and Workplace Relations cause to be tabled in each House of the Parliament a copy of each annual or other report made by the National Occupational Health and Safety Commission to the Workplace Relations Ministers' Council on progress made in implementing the National Occupational Health and Safety Strategy 2002-2012.

### Recommendation 23

The Comparative Performance Monitoring project be continued, and be developed so that it can be used to measure, understand and improve the implementation of the National Occupational Health and Safety Strategy 2002-2012, and to allow as far as possible measurements and comparisons at the project level.

Chapter 2 – Improving occupational health and safety in the building and construction industry

### Issue

To improve the occupational health and safety performance of the industry cultural and behavioural change is necessary above all else. To promote that change, a driver beyond more legislation and regulation must be found. It is to be found in part in a proper appreciation of the effect that the fiercely competitive nature of the industry can, and does, have on occupational health and safety, and the role that clients can have in introducing competition into the contractual chain. Clients can be a force for good in the industry. Too often they are not. It is time to bring clients into the requirement to promote occupational health and safety on their projects. One way to do that would be to adopt the prescriptive approach best exemplified in the *Construction (Design and Management) Regulations 1994 (UK)*. However, it is premature to recommend such an approach. It requires consideration and debate. The Commonwealth should promote and lead that consideration and debate. The National Occupational Health and Safety Commission is the ideal vehicle.

### Recommendation 24

The Commonwealth take the appropriate steps to:

(a) cause the National Occupational Health and Safety Commission to investigate and report on whether any measures in the *Construction (Design and Management) Regulations 1994 (UK)* should be adopted in Australia, whether in whole, in part or with variations, such investigation and report to give special attention to the effect that adopting those measures might have on occupational health and safety in, and any other aspect of, the building and construction industry; and

(b) ensure that the National Occupational Health and Safety Commission has adequate resources for this purpose.

Chapter 2 – Improving occupational health and safety in the building and construction industry

## Issue

Occupational health and safety should begin at the design stage of a project and not await the commencement of construction. It is time to give the principles of safe design in construction real focus and practical application in the industry in Australia. One way to do that would be to adopt the model of the *Construction (Design and Management) Regulations 1994 (UK)*, which imposes obligations on designers to consider the occupational health and safety of building and construction workers. This should be the subject of consideration and debate led by the Commonwealth. The National Occupational Health and Safety Commission is the ideal vehicle.

## Recommendation 25

In order to build momentum for safe design in the building and construction industry the Commonwealth take appropriate steps, either itself or with the assistance of the National Occupational Health and Safety Commission or such other Commonwealth, State or Territory body as it considers appropriate, to:

(a) develop and publish guidance for public and private sector organisations to use, to measure and report on safe design performance;

(b) develop and publish criteria for investment funds to use to assess the performance of building and construction industry participants in relation to safe design; and

(c) encourage investment funds, including superannuation funds, to use the criteria so developed.

Chapter 2 – Improving occupational health and safety in the building and construction industry

## Issue

The Commonwealth has a substantial influence on the industry in its roles as a client and provider of capital. It has the capacity to lead the industry. It should do so. It should assume the obligations of a model client. In this regard, the Commonwealth Procurement Guidelines do not give sufficient prominence to occupational health and safety.

## Recommendation 26

The Commonwealth amend the Commonwealth Procurement Guidelines and the Best Practice Policy Guidance issued by the Department of Finance and Administration to provide that the health and safety of building and construction workers, and occupational health and safety more generally, are factors that must be considered as a core principle in assessing Value for Money in the procurement of any public work in the building and construction industry.

Chapter 2 – Improving occupational health and safety in the building and construction industry

### Issue

Another way in which the Commonwealth can conduct itself as a model client is to insist on the application of safe design principles on all projects for which it (including its departments or agencies) is the direct client, or in relation to which it provides or contributes funds or other assistance (Commonwealth projects).

### Recommendation 27

The Commonwealth require, in relation to Commonwealth projects, that the designer of the project or any aspect thereof:

(a) ensure that any design the designer prepares and which the designer is aware will be used for the purposes of construction work includes among the design considerations adequate regard for the need:

  (i) to avoid foreseeable risks to the health and safety of any person carrying out construction work in or on the structure at any time, or of any person who may be affected by the work of such a person;

  (ii) to combat at source risks to the health and safety of any person carrying out construction work in or on the structure at any time, or of any person who may be affected by the work of such a person; and

  (iii) to give priority to measures which will protect all persons who may carry out construction work at any time and all persons who may be affected by the work of such persons over measures which only protect each person carrying out such work; and

(b) ensure that the design includes adequate information about any aspect of the project or structure or materials (including articles or substances) which might affect the health or safety of any person carrying out construction work in or on the structure at any time or of any person who may be affected by the work of such a person.

Chapter 2 – Improving occupational health and safety in the building and construction industry

### Issue

The Public Works Committee can be an effective watchdog as to the extent to which occupational health and safety is actually considered in the context of Commonwealth public works, but the *Public Works Committee Act 1969 (C'wth)* does not give sufficiently clear guidance in this regard.

### Recommendation 28

The Commonwealth amend the *Public Works Committee Act 1969 (C'wth)* to ensure that the Public Works Committee shall have regard to the measures taken to ensure the occupational health and safety of building and construction workers undertaking public work within the meaning of that Act.



### Issue

I have concluded that:

(a) the effect that the fiercely competitive nature of the industry can, and often does, have on occupational health and safety;

(b) the part that clients, including governments, can, and often do, have in introducing these forces to the contractual chain, particularly at the tendering stage of a project; and

(c) the powerful driver for change that could be generated by the risk of losing the opportunity to obtain work,

point to the need to harness these aspects of the industry to work for, and not against, occupational health and safety in the building and construction industry. Governments are well placed to do this by means of pre-tender qualification on occupational health and safety grounds. The Commonwealth should introduce such a scheme, and take the lead in developing and promoting the concept. A contractor's opportunity to tender for any project for which the Commonwealth (or its departments or agencies) is the direct client or in relation to which it provides or contributes funds or other assistance (Commonwealth projects) should depend on the contractor attaining and maintaining its qualification. The tests and standards that are applied should be practical and rigorous. The qualification held by each contractor should be a matter of public record. A Commonwealth pre-tender occupational health and safety qualification will identify those contractors whose capacity and performance in this area has been rigorously tested against an exacting standard. The Commonwealth should refuse to accept a tender from any relevant contractor in relation to any project to which the scheme applies unless the contractor has the requisite pre-tender occupational health and safety qualification. Once qualified, and a tender for a Commonwealth project is accepted, a contractor should continue to be audited throughout the project, both as to the adequacy of the contractor's safety management system for the project, and the contractor's actual performance during the project. The information that these audits will produce should be collected and reviewed.

### Recommendation 29

The Commonwealth introduce a pre-tender occupational health and safety qualification scheme which has at least the following attributes:

(a) The guiding principle of the pre-tender occupational health and safety qualification scheme is that the Commonwealth will only deal, whether directly on those projects for which it or its departments or agencies is the client, or indirectly in relation to those projects for which it provides or contributes funds or other assistance, with relevant contractors if they attain and maintain a current pre-tender occupational health and safety qualification.

(b) Each applicant for pre-tender occupational health and safety qualification must be audited by or on behalf of a new Commonwealth Office of the Commissioner for Occupational Health and Safety in the Building and Construction Industry (Commissioner for Health and Safety) against identified criteria. Each aspect of the audit criteria should be determined from time to time by the Commissioner for Health and Safety. They should include at least:

  (i) the applicant has adopted at the highest level of direction and management a safety policy which complies with such principles or standards as the Commissioner for Health and Safety shall promulgate from time to time;

  (ii) the applicant's chief executive officer has ultimate responsibility to the applicant's board of directors for the applicant's compliance with its safety policy in every aspect of its operations;

  (iii) the applicant has employed a person or persons with express responsibility for the applicant's compliance with its safety policy in such intermediate positions of responsibility and authority as the Commissioner for Health and Safety considers appropriate having regard to the circumstances of the applicant, including matters such as the size, standing and organisation of the applicant;

  (iv) the applicant has taken such steps as the Commissioner for Health and Safety considers appropriate to communicate its safety policy to every person who it employs or engages to manage its work on building and construction projects and sites, and to ensure that they comply with the policy; and

  (v) the applicant satisfies the Commissioner for Health and Safety that on projects that are the subject of an audit it has in place effective controls against identified hazards. The Commissioner for Health and Safety should determine from time to time the list of hazards and controls against which applicants will be audited, and the standard required at audit in order to attain a pre-tender occupational health and safety qualification. The Commissioner for Health and Safety should determine these matters in consultation with at least the National Occupational Health and Safety Commission; regulatory authorities; workers compensation and other relevant insurers; and employer and employee representatives, including such unions as have the right to enrol employees engaged in the relevant work. The Commissioner for Health and Safety periodically review determinations in relation to these matters to ensure their currency and effectiveness.

(c) The audit process not cease when a contractor attains pre-tender occupational health and safety qualifications. It be carried out at at least three stages:

(i) pre-tender qualification;

(ii) post tender award of a project safety management system for the project at hand; and

(iii) at intervals during the course of a project.

(d) The audits are to be external to both the Commissioner for Health and Safety and the contractor. The Commissioner for Health and Safety will accredit external auditors to conduct the pre-tender occupational health and safety qualification audits, the post award of tender audits of contractors' project safety management system and the audits during the currency of the project.

(e) The audits must be more than an audit of paper systems. There must be a significant element of effective on-site random physical inspections of the existence, application and effectiveness of controls in place to guard against the selected range of identifiable hazards.

(f) A contractor with, or applying for, pre-tender occupational health and safety qualification must agree to make available for audit all of its sites, and not just those where the Commonwealth is the client or has provided funding or made a capital contribution. The sites to be audited be selected by, and at the absolute discretion of, the Commissioner for Health and Safety. Contractors must agree to co-operate in the conduct of the audit, including by making available to the Commissioner for Health and Safety such reasonable opportunities and facilities for the audit as the Commissioner for Health and Safety may require, including opportunities and facilities to inspect sites, work, plant, equipment and documents, and to interview any person.

(g) The costs associated with an application for pre-tender occupational health and safety qualification be borne by the applicant. Pre-tender health and safety qualifications for Commonwealth projects be a matter of public record. Such qualifications are intended to be of such a standard that they will indicate to the world at large the attainment and maintenance of a level of excellence in occupational health and safety.

(h) With time one would expect a number of important benefits of the pre-tender occupational health and safety qualification scheme to be transferred to the wider industry beyond the immediate reach of the Commonwealth. In order to facilitate and promote this transfer:

(i) State and Territory Governments be encouraged to recognise and adopt the pre-tender occupational health and safety qualification scheme, and in order to promote this the details of the scheme be designed with a view to complementing so far as possible existing State and Territory schemes of pre-qualification; and

(ii) the insurance industry be encouraged to take the pre-tender occupational health and safety qualification scheme into account in fixing workers compensation and other insurance premiums. This encouragement might begin with the involvement of that industry in the process of identifying the list of hazards, controls and standards against which audits are to be conducted and in the process of accrediting auditors.

(i) The cost of the post award of tender audit of the contractor's project safety management system and of the periodic audits during the life of a project be absorbed by the Commonwealth on Commonwealth projects.

(j) The Commissioner for Health and Safety, at the end of a Commonwealth project, and otherwise at reasonable intervals, review the health and safety performance of a pre-tender health and safety qualified contractor and, in cases where the review is not favourable, have the authority to implement a range of sanctions, reflective of those recommended by the Final Report of the Queensland Building and Construction Industry (Workplace Health and Safety) Taskforce including but not limited to:

    (i) a notice to show cause to the Commissioner for Health and Safety requiring an explanation regarding any aspect of a contractor's occupational health and safety performance;

    (ii) the imposition of special conditions for future tenders;

    (iii) the imposition of a period of probation to enable the contractor to implement specific occupational health and safety measures identified by the Commissioner for Health and Safety;

    (iv) the imposition of limitations on projects for which the contractor will be considered for tender;

    (v) suspension from tender lists for all or some classes of projects for a specified period of time; and

    (vi) the cancellation of the contractor's pre-tender occupational health and safety qualification.

(k) The Commissioner of Health and Safety, in relation to each Commonwealth project, determine the contractors or class thereof to which the pre-tender occupational health and safety qualification scheme should apply, provided that in relation to each project the scheme must apply to the head contractor and any subcontractors that will perform work that in the opinion of the Commissioner for Health and Safety may involve a particular or unusual risk to health and safety.

(l) Once the Commissioner for Health and Safety has made such a determination, no such contractor be allowed the opportunity to tender in relation to any Commonwealth project, unless the contractor has pre-tender occupational health and safety qualification.

(m) The success of the pre-tender occupational health and safety qualification scheme be measured periodically against the national and industry targets set by and under the National Occupational Health and Safety Strategy 2002-2012 using such measures and benchmarks as are developed for the purposes of the National Occupational Health and Safety Strategy and the Comparative Performing Monitoring project.

### Issue

There are real questions about how safety can be managed cohesively on a building site made up of many separately managed groups working closely together. The head contractor should take responsibility for coordinating the safety practices of all subcontractors.

### Recommendation 30

The Commonwealth require that the head contract relating to any project for which the Commonwealth (or its departments or agencies) is the direct client, or in relation to which it provides or contributes funds or other assistance must require the principal contractor to have responsibility to co-ordinate the safety practices of all subcontractors in conformity with the principal contractor's safety policy. In some cases, such as projects that pose some special safety problem, it may be appropriate for the head contract to lay down some more particular requirements, but in most cases it can be left to the principal contractor to determine how it will discharge its responsibility.

Chapter 2 – Improving occupational health and safety in the building and construction industry

### Issue

There is persuasive support for the view that the extent of compliance with occupational health and safety obligations is strongly influenced by a reasonable expectation of the likelihood of being inspected, prosecuted, convicted and having a meaningful penalty imposed. The presence of occupational health and safety inspectors is important. While this is primarily a matter for the States and Territories, the Commonwealth can provide funds for more inspectors by means of a system of tied grants.

### Recommendation 31

The Commonwealth consider the introduction of a system of tied grants whereby additional funding is made available to the States and Territories on condition that the funding is applied so as to provide additional occupational health and safety inspectors in the building and construction industry.

Chapter 2 – Improving occupational health and safety in the building and construction industry

### Issue

The Commonwealth can also provide funds for an increased level of inspection on Commonwealth projects.

### Recommendation 32

A scheme be implemented to apply on all projects where the contract value of the works exceeds $3 million, where the Commonwealth is the client or in relation to which the Commonwealth has provided or contributed funds or other assistance, which has the following elements:

(a) The Commonwealth seek to enter an agreement with the relevant State or Territory occupational health and safety regulatory authority whereby, in return for an enhanced system of regular worksite health and safety inspections (including an agreed regime for inspections at predetermined intervals and prompt response to notification of health or safety disputes relating to the project), the Commonwealth would agree to provide funding to support the increased level of inspection.

(b) The precise detail of the regime and the level of contribution are matters to be negotiated on a project by project basis. The negotiations are to be the responsibility of the Commissioner for Health and Safety in the Building and Construction Industry following consultation with employee representatives, the site safety committee, representatives of the head contractor and such of the subcontractors as the Commissioner deems appropriate having regard to the size of the project, the nature and timing of the works and the size and skill base of the workforce and other matters within the Commissioner's discretion.

(c) The arrangements with the relevant State or Territory occupational health and safety authority must be struck in a way that ensures the preservation of the independence of that authority and of the health and safety inspectors who have responsibility for the project in question and does not compromise the ability of the inspectors to attend the site at times of their choosing and otherwise to conduct their duties as they see fit, in addition to the duties that may be imposed upon them as a result of any regime of periodic inspection or otherwise as may be agreed.

(d) Depending upon the size and nature of the project and any other relevant consideration, the regime of periodic inspection to be agreed might well extend to require the full time on site presence of one or more health and safety inspectors for part of or all of the life of a project. Detail of this nature must be left to be determined in relation to projects on an individual basis.

Chapter 2 – Improving occupational health and safety in the building and construction industry

## Issue

An Office of the Commissioner for Health and Safety in the Building and Construction Industry is necessary to implement and drive the reforms recommended above.

## Recommendation 33

The Commonwealth establish the Office of the Commissioner for Occupational Health and Safety in the Building and Construction Industry (Commissioner for Health and Safety), the essential features of which are as follows:

### *Primary object*

The primary object of the Commissioner for Health and Safety is to promote and enhance occupational health and safety in the building and construction industry. Every other consideration, including the cost of building and construction work, is subordinate to this purpose.

### *Independence*

The Commissioner for Health and Safety must be independent and have control of an adequate budget. This is essential in order to protect the integrity of the reforms for which the Commissioner will have responsibility.

### *Place in the Australian Public Service*

The Commissioner for Health and Safety be located within the Safety, Rehabilitation and Compensation Commission (SRC Commission) which is established under the *Safety, Rehabilitation and Compensation Act 1988 (C'wth)*. Given its role in relation to occupational health and safety matters within the Commonwealth the SRC Commission seems ideally suited to house the Commissioner for Health and Safety.

### *Functions of the Commissioner for Health and Safety*

The principal functions of the Commissioner for Health and Safety include:

(a) Administering the scheme requiring contractors to have a pre-tender health and safety qualification prior to being eligible to tender for work on projects where the Commonwealth is the client or has provided funding or other capital (Commonwealth projects).

(b) Supervising all contracts for building or construction work of or above the prescribed contract value on Commonwealth projects, with a view to ensuring that that the pre-tender health and safety qualification scheme applies.

(c) His or her duties under the pre-tender occupational health and safety qualification scheme shall include:

  (i) consulting widely with participants in the industry including the major builders, employer representatives, employee representatives, occupational health and safety experts and consultants with a view to establishing a list of health and safety hazards against which the health and safety performance of applicants for a pre-tender occupational health and safety qualification will be audited;

(ii) accrediting and maintaining a register of occupational health and safety auditors to be used for the purpose of conducting the audits at the three levels required as part of the scheme;

(iii) determining the categories of available qualification under the pre-tender occupational health and safety qualification scheme. Initially the pre-tender occupational health and safety qualification might be offered to major builders. Once the scheme is bedded down it might be extended to smaller builders and major subcontractors. The evolution of the scheme will in turn take account of the particular hazards which the consultation process referred to above will identify. Thus the scheme might be extended at an early time to subcontractors whose work exposes them to those particular hazards;

(iv) entering into memoranda of understanding on behalf of the Commonwealth with such entities as from time to time seek pre-tender occupational health and safety qualification which embody the obligations and responsibilities of those seeking the qualification and the Commonwealth under the scheme;

(v) promoting the pre-tender occupational health and safety qualification scheme so as to encourage all State and Territory Governments and private clients to adopt it;

(vi) promoting the pre-tender occupational health and safety qualification scheme with insurers with a view to gaining recognition of the scheme and its benefits for occupational health and safety, and thereby securing incentives reflected in lower insurance premiums for workers' compensation and employers, and public liability;

(vii) promoting pre-tender occupational health and safety qualification as a badge of honour in the industry, which would necessarily involve favourable publicity for those that achieve pre-tender occupational health and safety qualification status; and

(viii) adjudicating upon the performance of those contractors that have pre-tender occupational health and safety qualification status during the life of, and after the completion of, projects with a view to monitoring their occupational health and safety performance, imposing such sanctions as may be appropriate in the circumstances and monitoring the performance of the pre-tender occupational health and safety qualification scheme generally.

(d) Supervising the scheme for increased inspections on Commonwealth projects. This will involve requiring the Commissioner to consult with employee representatives, the site safety committee, representatives of the head contractor and such of the subcontractors as the Commissioner deems appropriate having regard to the size of the project, as to the proposed detail of a scheme of regular inspections by workplace health and safety inspectors, to be negotiated by the Commissioner with the relevant State or Territory occupational health and safety regulatory authority.

(e) Reporting to the Minister for Employment and Workplace Relations on the operation of the pre-tender occupational health and safety qualification scheme and the scheme for increased inspections on Commonwealth projects. This ought to be a periodical report. In recognition of the likelihood that many of the projects covered by the scheme are likely to be large and therefore likely to have lives measured in years rather than months I suggest that the reporting

intervals be in the order of three years. The Minister should cause a copy of each such report to be tabled in each House of the Parliament.

(f) Educating the building and construction industry about the pre-tender occupational health and safety qualification scheme, and promoting occupational health and safety in the industry.

(g) Promoting, monitoring and reporting on compliance with the occupational health and safety aspects of the National Code of Practice for the Construction Industry and the Implementation Guidelines.

Chapter 2 – Improving occupational health and safety in the building and construction industry

### Issue

The National Code of Practice for the Construction Industry usefully sets out principles in relation to occupational health and safety. The Commonwealth Implementation Guidelines, however, do not provide sufficient guidance for the implementation of those principles. Both the Code and the Commonwealth Implementation Guidelines need to be amended to reflect the reforms recommended above in relation to occupational health and safety.

### Recommendation 34

The National Code of Practice for the Construction Industry, and the Commonwealth Implementation Guidelines, be amended to reflect and complement the reforms proposed in Recommendations 27, 29, 30, 31,32, 33 and 35.

Chapter 2 – Improving occupational health and safety in the building and construction industry

## Issue

Occupational health and safety is often misused by unions as an industrial tool. This trivialises safety, and deflects attention away from real problems. Unions have a legitimate interest in the safety of their members. This should not be altered. However, the scope for misuse of safety must be reduced and if possible eliminated. There must be a proper mechanism for identifying, isolating and safely resolving real questions of safety, preferably co-operatively with the workers and managers directly involved, but if necessary with the aid of a responsible occupational health and safety authority.

## Recommendation 35

The Commonwealth introduce by legislation a new scheme to apply in the building and construction industry which has the following features:

*(a) Model safety dispute resolution procedures*

The promulgation of a model safety dispute resolution procedure. This can be set out in regulations made under the Building and Construction Industry Improvement Act. The Victorian *Occupational Health and Safety (Issue Resolution) Regulations 1999* are a useful guide. However it would be necessary to supplement that model with mandatory requirements that project management be involved in discussions to resolve safety issues, and that in circumstances where the parties fail to resolve the safety dispute, and prior to the withdrawal of labour, the facts and circumstances giving rise to the safety issue in dispute be referred to the appropriate occupational health and safety regulatory authority or inspectorate.

*(b) Prerequisites for payment in relation to work stoppages for safety matters*

The introduction of a legislative provision, to apply in the building and construction industry subject to the provisions set out in (d), so as to make it unlawful for any person to demand, claim, receive, or pay any amount on account of the remuneration of any person for a period in which the person to whom the demand, claim, receipt or payment relates, has refused or failed to work in accordance with the lawful directions of his or her employer on account of what is claimed to be or involve a matter of occupational health or safety unless that person can first demonstrate that:

(i) the employee complied with a relevant dispute resolution procedure, prior to such demand, claim, payment or receipt, or the employer failed or refused to comply with a relevant safety dispute resolution procedure; and

(ii) at the time the demand, claim or payment, as the case may be, was made, the work that the employee refused or failed to perform was the subject of a prohibition notice issued by a lawful occupational health and safety regulatory authority or inspectorate, which notice has not been revoked or stayed.

*(c) Notification to the Australian Building and Construction Commission*

The introduction of a legislative provision to apply in the building and construction industry requiring the Australian Building and Construction Commission to be notified of any such payment. The notification should be in the form of statutory declarations from both the person in respect of whom the payment is made and the person who is proposing to make the payment or their representatives, evidencing satisfaction of the pre-conditions set out above.

*(d) Payment while safety dispute resolution procedure is being followed up to time of notification of referral to the occupational health and safety authority or inspectorate*

The enactment of a legislative provision, to apply in the building and construction industry, to provide for the liability of employers for payment of the remuneration of any person, for a period in which the person to whom a demand, claim, receipt or payment relates has refused or failed to work in accordance with the lawful directions of his or her employer on account of what is claimed to be or involve a matter of occupational health or safety, up until the time of referral to a relevant occupational health and safety authority or inspectorate in the following circumstances:

(i) there is compliance with the relevant dispute resolution procedure by the person on whose behalf the demand or claim is made and on behalf of any other worker to whom the dispute resolution procedure applies in the circumstances of the dispute, or there is non-compliance with the relevant dispute resolution procedure by the employer concerned; and

(ii) the person on whose behalf the demand or claim is made and any other worker to whom the dispute resolution procedure applies in the circumstances of the dispute has not unreasonably failed to comply with a direction of his or her employer to perform other available work, whether at the same or some other workplace, that was safe and appropriate for the employee to perform.

Chapter 3 – Misuse of safety issues for industrial purposes

# Volume 7

# Reform – National Issues Part 1

## Issue

In the building and construction industry, personal and sensitive information about employees and contractors is routinely collected and maintained by, among others, contractors, unions and industry funds into which contributions are made on behalf of employees or contractors. Most major contractors, unions and industry funds will satisfy the definition of an 'organisation' for the purposes of the *Privacy Act 1988 (C'wth)*.

Maintaining the privacy of personal and sensitive information about individuals is an important social objective. Against that objective must be balanced competing interests such as the free flow of information and the ability of an organisation to operate efficiently.

Head contractors, for example, may quite properly need to obtain and record personal information about employees of subcontractors engaged on their projects in order to manage those projects and safeguard the interests of the workforce, particularly in the context of occupational health and safety. Industry funds will need to maintain certain records of personal information in order to operate and administer the requirements of their clients. Unions will need to maintain databases of personal information in order to deal with and service their membership. The National Privacy Principles (NPPs) in Schedule 3 to the *Privacy Act 1988 (C'wth)* set out the guidelines which must be adhered to by 'organisations' in obtaining and maintaining information of this kind.

Evidence was presented to the Commission of practices and conduct that would have been, on its face, contrary to the NPPs. Most of the evidence, however, related to practices and conduct occurring before the private sector amendments to the *Privacy Act 1988 (C'wth)* came into effect on 21 December 2001. Much of the evidence presented to the Commission, therefore, while disclosing breaches of privacy in the broad sense, did not constitute unlawful conduct.

Nonetheless, it is likely that a great deal of conduct currently occurring in the building and construction industry contravenes the *Privacy Act 1988 (C'wth)*. There is a need for all participants in the industry to become better educated about their privacy obligations.

## Recommendation 36

(a) A privacy code be developed for the building and construction industry in accordance with Part IIIAA of the *Privacy Act 1988 (C'wth)*.

(b) The Australian Building and Construction Commission play a leading role in the development of the privacy code. It should consult with all key industry participants, including employer organisations, unions, industry funds, head contractors, employers and employees. All participants in the industry should be encouraged to consent to and abide by the privacy code. The Australian Building and Construction Commission may be an appropriate body for the handling of privacy complaints made under the proposed code.

Chapter 1 – Abuses of privacy

### Issue

A need has arisen to resolve the ambiguity which the Federal Court, in Emwest Products Pty Ltd v AMWU [2002] FCA 61, has identified in relation to the construction of s170MN of the *Workplace Relations Act 1996 (C'wth)* because of the serious effect such ambiguity could have in the building and construction industry. That ambiguity concerns the extent to which industrial action taken by parties to a certified agreement in support of claims for matters not included in the agreement can constitute protected industrial action.

### Recommendation 37

A provision, modelled on s170MN of the *Workplace Relations Act 1996 (C'wth)*, be included in the Building and Construction Industry Improvement Act. That provision be drafted so as to make clear that during the currency of a certified agreement, any industrial action, taken by parties to the agreement in support of claims for terms and conditions of employment of any of the parties which are not dealt with in the agreement, is not protected industrial action.

Chapter 2 – Ambiguities in the Workplace Relations Act 1996 (C'wth)

### Issue

Where, during enterprise bargaining, an issue arises as to whether a particular matter pertains to the employer–employee relationship, questions arise as to how best authoritatively to resolve the dispute and whether protected industrial action can be taken in support of such a disputed claim.

### Recommendation 38

The Building and Construction Industry Improvement Act:

(a) provide for applications for declarations to be made to the Federal Court to determine whether particular matters do or do not pertain to the employer–employee relationship for the purposes of s170LI of the *Workplace Relations Act 1996 (C'wth)* or any equivalent provision which is included in the Building and Construction Industry Improvement Act; and

(b) contain a provision to the effect that industrial action cannot be protected action if it is:

  (i) taken in support of a proposed agreement that contains any claim that has been declared by the Federal Court not to pertain to the employer–employee relationship; or

  (ii) taken in support of a claim at a time at which an application has been made to the Federal Court seeking a declaration that the particular claim does not pertain to the employer–employee relationship and that application has not been finally determined.

Chapter 2 – Ambiguities in the Workplace Relations Act 1996 (C'wth)

### Issue

Unions ignore orders of the Australian Industrial Relations Commission, and the Federal Court, with impunity. Section 127 of the *Workplace Relations Act 1996 (C'wth)* has proved to be ineffectual in preventing unlawful industrial action taking place in the building and construction industry.

### Recommendation 39

The Building and Construction Industry Improvement Act contain a provision modelled on s127 of the *Workplace Relations Act 1996 (C'wth)* with the addition of subsections to the following effect:

(a) insert a new subsection (127(8)) to require any person in the building and construction industry who applies for and obtains an order from the Federal Court under s127(6) or (7) of the *Workplace Relations Act 1996 (C'wth)* to notify the Australian Building and Construction Commission of the fact of the order having been granted, and its terms, within 24 hours of any such order being granted; and

(b) insert a new subsection (127(9)) to empower the Australian Building and Construction Commission to apply to the Federal Court on no less than 24 hours notice for an order varying any injunction granted under s127(6) or (7) or for an order that any person be charged with contempt of court for breaching any order made by the Federal Court under s127(6) or (7) or for any other consequential relief.

Chapter 2 – Ambiguities in the Workplace Relations Act 1996 (C'wth)

## Issue

The National Code of Practice for the Construction Industry (the National Code), and the Commonwealth Implementation Guidelines (the Implementation Guidelines) which operate under it, were introduced as reforms aimed at complementing the objectives of the *Workplace Relations Act 1996 (C'wth)*.

They apply on projects operated or funded by the Commonwealth. They are an example of Government using its purchasing power to change industry behaviour to promote efficiency and productivity, and to ensure compliance with the spirit as well as the letter of the *Workplace Relations Act 1996 (C'wth)*. In contrast to legislation, codes are more flexible in their application, making and amendment.

There are complementary State and Territory Codes, but the National Code is the central code within the building and construction industry.

The core principles within the National Code command universal support from Australian Governments, and from the Construction, Forestry, Mining and Energy Union. That common agreement is rare in this industry and should be capitalised upon.

The National Code and the Implementation Guidelines have not always been applied strictly and appropriately by the Commonwealth. The Alice Springs to Darwin Railway project is a notable example of the significant benefits of absence of industrial disputes, improved occupational health and safety outcomes and improved productivity which result from a strict and appropriate application of both the National Code and the Implementation Guidelines.

Subject to the changes I recommend in the chapter on *Codes of Practice for the Building and Construction Industry* contained in Volume 7, *Reform – National Issues Part 1*, of this report, the National Code and the Implementation Guidelines will state appropriate and necessary principles and standards of conduct for the Australian building and construction industry generally, not just on projects owned, operated or funded by the Commonwealth. The Commonwealth should, by its leadership, act to invigorate these and extend their application.

### Recommendation 40

The National Code and the Implementation Guidelines apply to all projects to which the Commonwealth directly or indirectly provides funds for construction.

### Recommendation 41

It be a requirement that any person who contracts to work on a building site owned, operated, or funded, wholly or partly, by the Commonwealth, comply with the National Code and the Implementation Guidelines, not only in relation to that project, but generally. That is, the Commonwealth should agree only to do business with those who comply with the National Code and the Implementation Guidelines on both publicly and privately funded projects.

### Recommendation 42

There be a national system of prequalification based initially on self-assessment and self-certification by way of statutory declaration, to this end. The system of pre-tender qualification recommended in Volume 6, *Reform – Occupational Health and Safety,* of this report is an appropriate model. (However it is important, for reasons explained in that volume, that occupational health and safety pre-tender qualifications be treated separately.)

Chapter 3 – Codes of Practice for the Building and Construction Industry

### Issue

It is undesirable that the substantive portions of the principal document dealing with the Commonwealth Procurement Policy make no reference to the existence of, or the requirement to comply with, the National Code and the Implementation Guidelines.

### Recommendation 43

The obligation of all Commonwealth departments and agencies to comply with the National Code and the Implementation Guidelines in all building and construction procurement activities be emphasised by prominently stating that obligation in the substantive section of the Procurement Guidelines, and making that obligation clear to all those Commonwealth departments and agencies which are bound by them.

Chapter 3 – Codes of Practice for the Building and Construction Industry

## Issue

Adherence to the National Code is necessary to establish structural positions in which productivity may be unlocked by contractors.

The Commonwealth's interest as a client in the short term in relation to matters such as prompt completion of a project may need to be subordinated to the Commonwealth's interest as a government in promoting the operation of the National Code and the Implementation Guidelines on its own projects. It will be necessary for Commonwealth officers to assist contractors and subcontractors in applying the National Code and the Implementation Guidelines in a rigorous fashion. Opposition to strict application of the National Code is likely as the private sector has declined voluntarily to adopt the National Code and the unions are opposed to its implementation.

## Recommendation 44

Where there is a direct and quantifiable loss to the Commonwealth, contractors or subcontractors, arising from unlawful industrial action in consequence of the insistence by the Commonwealth on compliance with the National Code and the Implementation Guidelines, the loss should be recovered from whoever caused that loss to be incurred (this is a matter dealt with further in Volume 11, *Reform – Achieving Cultural Change,* of this report).



## Issue

The Implementation Guidelines refer to the eight principles set out in the National Code. Only one of these principles, namely, industrial relations, contains detailed guidance as to what the Commonwealth expects.

The Implementation Guidelines need to be reviewed and revitalised so as to give greater guidance on how the principles in the National Code may be implemented. There are inadequate mechanisms in the National Code and the Implementation Guidelines for monitoring the operation of the National Code and the Implementation Guidelines in particular cases, or generally.

Responsibility for implementation of the National Code and the Implementation Guidelines within the Commonwealth is shared between the Department of Finance and Administration and the Department of Employment and Workplace Relations. Improved accountability would result if one agency were appointed as the lead agency within the Commonwealth in relation to the National Code and the Implementation Guidelines. That agency should be the Department of Employment and Workplace Relations which should monitor the performance of the Department of Finance and Administration in meeting its responsibilities under the Implementation Guidelines. In relation to the occupational health and safety aspects of the National Code and the Implementation Guidelines, the Department should work with the Commissioner for Health and Safety in the Building and Construction Industry.

### Recommendation 45

(a) The Department of Employment and Workplace Relations (DEWR) be the lead agency within the Commonwealth in relation to the National Code and the Implementation Guidelines.

(b) The Department of Finance and Administration (DOFA) report to DEWR, and the Australian Building and Construction Commission on the exercise of DOFA's responsibilities under the Implementation Guidelines.

(c) DEWR advise agencies and other interested parties about their respective responsibilities under the National Code and the Implementation Guidelines.

(d) The responsibilities of DEWR include the development of, and subsequent promulgation of, Implementation Guidelines providing guidance to agencies and other interested parties about the 'broader construction related aspects of the Code', which should include the National Code principles (including occupational health and safety) not already the subject of specific guidance in the present Implementation Guidelines.

(e) DEWR be provided with specific resources for the purpose of providing advice to agencies and other interested parties about the areas of the National Code for which it is given responsibility. DEWR should promote the National Code's principles and have capacity to respond to particular enquiries from agencies and other interested parties.

### Recommendation 46

The Commonwealth review its arrangements for the oversight and monitoring of the National Code and its implementation, with a view to devising review mechanisms that seek to:

(a) identify and evaluate best practice in relation to each of the National Code's principles;

(b) promote practices so identified;

(c) audit projects against the Implementation Guidelines (as developed in accordance with my previous recommendation to deal with all eight Code principles) to establish to what extent these principles are successfully applied;

(d) maintain an ongoing and periodic dialogue with stakeholders in significant government projects regarding the National Code, and any difficulties which have arisen in its application. The role of the Project Code Monitoring Group used on the Alice Springs to Darwin Railway may be an appropriate model for all significant government projects; and

(e) involve the relevant government client in the above processes as an active stakeholder to ensure that the desired outcomes of the National Code are delivered, rather than permit the client to use the standard clauses provided in the Implementation Guidelines to pass downstream to its contractor(s) the obligation of ensuring compliance with the National Code.

### Recommendation 47

The Australian Building and Construction Commission have a presence on the revitalised Code Monitoring Group and have the capacity to investigate breaches of the National Code and the Implementation Guidelines and make recommendations to the Code Monitoring Group.

### Recommendation 48

The Department of Employment and Workplace Relations take a lead role in sponsoring a periodic, cross-portfolio review of the Commonwealth's performance in implementing the National Code, with a view to:

(a) identifying any systemic breaches, or other issues of concern;

(b) identifying best practice as a basis for reviewing and revising performance benchmarks so as to bring about continuous improvement; and

(c) continually reviewing the appropriateness of the Implementation Guidelines and Industry Guidelines in the light of practices and outcomes on its projects.

### Recommendation 49

Parties bound by the National Code be required to report breaches of the National Code, as well as breaches of the Implementation Guidelines, to the Australian Building and Construction Commission.

Chapter 3 – Codes of Practice for the Building and Construction Industry

## Issue

The Department of Employment and Workplace Relations and the Code Monitoring Group established by the Commonwealth adopt more active means of ensuring that contractors comply with the National Code on Commonwealth projects.

### Recommendation 50

The Australian Building and Construction Commission and the Department of Employment and Workplace Relations, on the recommendation of the Code Monitoring Group, be authorised to publicise non-compliance with the National Code and the Implementation Guidelines by contractors and Commonwealth departments and authorities, using the model of the *Ombudsman Act 1976 (C'wth)*.

Chapter 3 – Codes of Practice for the Building and Construction Industry

### Issue

The National Code and the Implementation Guidelines deal with Project Agreements in a manner which is potentially inconsistent with the recommendations in Volume 5, *Reform – Establishing Employment Conditions*, of this report.

### Recommendation 51

The National Code and the Implementation Guidelines be amended to ensure that they are consistent with the terms of the Building and Construction Industry Improvement Act once the precise terms of the new statute are known.

Chapter 3 – Codes of Practice for the Building and Construction Industry

### Issue

The Implementation Guidelines require parties to comply with applicable obligations arising from awards, certified agreements, other industrial agreements approved under relevant industrial legislation, and legislative requirements. There are other relevant sources of legal obligations, namely orders and directions of courts and tribunals.

### Recommendation 52

The Implementation Guidelines, when dealing with the requirement to comply with applicable obligations arising from awards, certified agreements, other industrial agreements approved under relevant industrial legislation, and legislative requirements, also specify an obligation to comply with orders and directions of courts and tribunals.

Chapter 3 – Codes of Practice for the Building and Construction Industry

## Issue

The industrial relations principle contained in the National Code seeks to enshrine the notion of Freedom of Association. It lists examples of practices which undermine the principle, such as 'no ticket – no start' signs, 'show card days', and providing the names of new or potential employees to unions. The principle of freedom of association may be undermined in ways other than those contained on the current list of examples.

## Recommendation 53

The following items be added to the list of examples given of practices inconsistent with the National Code:

(a) the existence, whether in a certified agreement or otherwise, of any requirement for any person or enterprise to pay a fee to a registered organisation of which he or she is not a member, including, but not limited to, any requirement that a person pay a 'bargaining fee' however described, to an industrial association in respect of services provided by it in respect of any workplace arrangement that might regulate that person's employment or employment by that enterprise;

(b) the imposition, or attempted imposition, by a union of a requirement for any contractor, subcontractor or employer to employ a non-working shop steward or job delegate, or other person, on a construction site; and

(c) any attempt by a union to compel any contractor, subcontractor or employer to hire an individual nominated by the union.

Chapter 3 – Codes of Practice for the Building and Construction Industry

### Issue

The scope for entry and inspection by a union official to be misused on a building or construction site, where typically more than one, and sometimes many, employers are located at the one time, is substantial. It is appropriate in such circumstances for the Implementation Guidelines to ensure that such rights are not misused.

### Recommendation 54

A provision be inserted in the Implementation Guidelines in the following terms:

(a) no union official is to seek, and no principal, contractor, subcontractor, consultant or employee is to grant, admission to a site where building or construction activity that is subject to the National Code is being carried on, other than in strict compliance with the procedures governing entry and inspection under the *Workplace Relations Act 1996 (C'wth)*, the Building and Construction Industry Improvement Act or under relevant State legislation; and

(b) any principal, contractor, subcontractor, consultant or employee who is aware of a union official having entered such a site otherwise than in accordance with any such procedure must refer the matter to the Australian Building and Construction Commission for consideration.

Chapter 3 – Codes of Practice for the Building and Construction Industry

## Issue

Demarcation disputes, involving inter-union rivalry over the right to enrol and represent workers, have been a cause of disputation in the building and construction industry in Australia for many years. Although the level of disputation has declined in recent years, it has not been eliminated.

Demarcation disputes have the potential to cause serious economic damage to participants in the industry and the economy generally. Time and energy which might be better directed towards productive work is taken up with negotiations to resolve the demarcation dispute. If the dispute leads to industrial action, it can have wider ramifications, particularly if the action impinges on work which is on the critical path for a project.

Most importantly, demarcation disputes involving two or more unions usually affect entirely innocent parties. In the building and construction industry, those parties include clients, contractors and workers.

The most important objective of any law in relation to demarcation disputes must be to prevent demarcation disputes from causing collateral loss to innocent parties.

## Recommendation 55

The recommendations I have made elsewhere in my report in relation to reforming the law of unlawful industrial action apply to industrial action which is organised, threatened or taken in connection with demarcation disputes between unions.

The Building and Construction Industry Improvement Act provide that industrial action is not protected action if the reason, or one of the reasons, for the action is the existence of a demarcation dispute between unions.

## Issue

The secondary objective of laws concerning demarcation disputes is to provide an effective mechanism for resolving such disputes as between the competing unions.

Under s118A(1) of the *Workplace Relations Act 1996 (C'wth)*, only a registered organisation, an employer or the Minister may apply for orders in relation to a demarcation dispute. In the building and construction industry, however, demarcation disputes have the potential to affect persons other than registered organisations and employers. It is therefore desirable that the right to apply for orders and the range of available orders should be extended.

### Recommendation 56

The right to apply for orders under s118A of the *Workplace Relations Act 1996 (C'wth)* be extended, in the Building and Construction Industry Improvement Act, to any person (including a body corporate) who is or may be adversely affected by a demarcation dispute between unions.

### Recommendation 57

The Building and Construction Industry Improvement Act provide that a person who suffers loss by reason of a contravention of an order under s118A be entitled to bring proceedings to recover a civil penalty and compensation from the responsible party or parties.

### Recommendation 58

The Australian Building and Construction Commission have standing to apply for orders in relation to demarcation disputes, including orders for the imposition of a civil penalty.

Chapter 4 – Demarcation Disputes

## Issue

The *Workplace Relations Act 1996 (C'wth)* and the industrial relations legislation of each State (other than Victoria) contain provisions regulating entry to premises and inspection of employment records by unions. Underlying each piece of legislation is the premise that unions have a legitimate interest in having their officers and employees enter premises for the purpose of investigating suspected breaches of industrial instruments, and of holding discussions with persons who are or are eligible to become members of the relevant union. In addition, in New South Wales and Western Australia, entry to premises by authorised union officers and employees is expressly permitted for the purpose of investigating suspected breaches of occupational health and safety standards.

This myriad of potentially applicable laws makes it difficult for participants in the building and construction industry to know their rights and obligations concerning entry to premises and inspection of employment records.

Statutory provisions which entitle officers and employees of unions to enter premises authorise conduct which would otherwise constitute a trespass. Because they are a statutory intrusion into the premises and business affairs of another and because of their potential to cause disruption to workplaces, the circumstances in which entry is permitted need to be precisely defined and limited to what is necessary to achieve the purpose for which entry is permitted.

The evidence presented at the public hearings of the Commission disclosed widespread disregard in the building and construction industry of obligations concerning entry to premises and inspection of employment records in New South Wales, Victoria, Queensland, Western Australia, Tasmania and the Australian Capital Territory. Most of the evidence of lawlessness related to misconduct by officers and employees of the Construction, Forestry, Mining and Energy Union.

Ensuring that provisions regulating entry and inspection by unions operate properly in the building and construction industry is a matter of considerable importance. Overwhelmingly, the evidence presented to the Commission was that industrial disruption on building and construction sites followed upon union officers and employees entering sites pursuant to the exercise or purported exercise of a statutory entitlement. Industrial disruption was almost always the result of intervention in workplace relations by union officers. That intervention was often uninvited and sometimes unwanted by the affected employees.

Entry and inspection provisions are routinely contravened in the building and construction industry. If the rule of law is to be restored to the industry, entry and inspection provisions are in need of urgent and substantial reform.

A statement of objects for entry and inspection provisions applying to the building and construction industry would be likely to contribute to an environment in which participants in the industry understand their rights and obligations.

## Recommendation 59

Entry and inspection provisions in the Building and Construction Industry Improvement Act contain a statement of objects to the following effect:

**Section [x] Objects of Division**

As well as the objects set out in section [y], this Division has these objects:

(a) to establish a framework which balances:

  (i) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected breaches of industrial legislation and instruments; and

  (ii) the right of occupiers of premises and employers to conduct their business without undue interference or harassment;

(b) to ensure that permits to enter premises and inspect records are only granted to persons who understand their rights and obligations under this Division;

(c) to ensure that occupiers of premises and employers understand their rights and obligations under this Division; and

(d) to ensure that permits are suspended or revoked where rights granted under this Division are abused.

Chapter 5 – Entry to premises and inspection of records

## Issue

The *Workplace Relations Act 1996 (C'wth)* does not give any guidance as to the circumstances in which Registrars should exercise their discretion to grant permits to officers or employees of unions to enter premises and inspect records. Permits are frequently granted in the building and construction industry to persons who have little or no understanding of their rights and obligations as the holders of such permits.

Ignorance on the part of permit holders as to their rights and obligations has contributed to a culture in which obligations attaching to entry and inspection permits are widely disregarded in the building and construction industry.

Significant problems can arise where permit holders inspect employment records. Unless the permit holder has an adequate understanding of statutory and award requirements, or the requirements of certified agreements, the exercise of a power of inspection is prone to abuse. There is no cogent reason why a union officer or employee who has no adequate understanding of the terms and conditions of employment applying to members of the union should hold a permit entitling the officer or employee to demand to inspect and make copies of employment records.

### Recommendation 60

Under the Building and Construction Industry Improvement Act, a Registrar not be permitted to grant a permit to an officer or employee of a union unless:

(a) the union has certified that it has provided the relevant officer or employee with training as to the rights and obligations of permit holders;

(b) the Registrar is satisfied that the training was adequate and appropriate and that the officer or employee understands the rights and obligations of holding a permit; and

(c) the Registrar is satisfied that the officer or employee is a fit and proper person to hold a permit, taking into account any matters the Registrar considers appropriate, including whether any permit previously granted to the officer or employee under Commonwealth or State industrial relations legislation has ever been suspended or revoked, or issued subject to conditions.

### Recommendation 61

A range of remedies be available where an organisation falsely certifies that it has provided an officer or employee with training as to the rights and obligations of permit holders. Those remedies include civil penalties and the payment of compensation.

### Recommendation 62

In appropriate cases, such as cases of repeated contravention of entry and inspection provisions by officers or employees of the same union, or where a union has provided inadequate training to its officers and employees who hold permits, the Australian Building and Construction Commission be entitled to apply to a Presidential member of the Australian Industrial Relations Commission for orders that:

(a) the right of the union to apply for permits to be issued to its officers or employees be suspended for a fixed period or revoked or made subject to such conditions as may be appropriate; and

(b) all permits issued to officers and employees of a union be suspended or revoked, or made subject to such conditions as may be appropriate.

### Recommendation 63

Registrars have the power to impose conditions on the granting of permits, including conditions that the permit holder not be permitted to enter specified premises.

Chapter 5 – Entry to premises and inspection of records

## Issue

Differences between Commonwealth and State regimes concerning entry to premises and inspection of records are highly undesirable. Under the current system, conduct which is permitted under Commonwealth legislation may not be permitted under State legislation and vice versa. It is not always possible to identify whether a person claiming a right to enter premises or inspect records is acting under Commonwealth or State authority or both. The obligation to give notice differs between States. Inconsistent entry and inspection provisions in awards override statutory provisions in some State legislation but not in the Commonwealth legislation. Persons who have had their permits revoked under the *Workplace Relations Act 1996 (C'wth)* might continue to be permitted to enter premises and inspect records under State industrial relations legislation and vice versa.

The lack of uniformity of entry and inspection provisions in Commonwealth and State law has the effect of making it difficult for employers, employees, occupiers of premises, unions and union officers and employees to know their rights and obligations. It leads to the law being disregarded or flouted.

It is too easy for permit holders to exploit jurisdictional differences to their own advantage and avoid being held accountable for conduct which is plainly inconsistent with the rights and privileges attaching to permits, whether issued under Commonwealth or State law.

### Recommendation 64

Entry and inspection provisions in the Building and Construction Industry Improvement Act be implemented to the full extent of Commonwealth Constitutional power.

### Recommendation 65

The Commonwealth seek to persuade each State (other than Victoria, which does not have a separate State entry and inspection regime) to enact entry and inspection provisions for the building and construction industry which mirror those recommended for inclusion in the Building and Construction Industry Improvement Act.

## Issue

In order for the rule of law to operate in the building and construction industry, permit holders must not be allowed to abuse their powers of entry and inspection.

Abuses of entry provisions in the building and construction industry will be less likely to occur if notice requirements are adhered to and occupiers of premises and employers understand their rights and obligations and have the opportunity to seek advice, if necessary.

If the exploitation of jurisdictional differences is to be minimised, permit holders should be compelled to declare in advance whether they are entering premises for the purpose of exercising powers under a permit granted pursuant to Commonwealth legislation (a Federal permit) or pursuant to some other entitlement.

### Recommendation 66

Persons who seek to rely on the benefits which flow from holding a Federal permit be required to give to the relevant occupier or employer, no less than 24 hours before entering premises or inspecting records, a statement of rights and obligations in a prescribed form (a Federal notice).

To be valid, a Federal notice must contain the following matters:

(a) the name and permit number of the permit holder, and the union he or she represents;

(b) the time and date of the proposed entry or inspection (being a specific time and date – as distinct from a range of dates or period – not less than 24 hours and not more than 14 days after delivery of the notice to the relevant occupier or employer);

(c) the purpose of the proposed entry or inspection, being a purpose permitted by Commonwealth legislation (including, where applicable, particulars of any suspected breach of industrial legislation or an industrial instrument – see Recommendation regarding the obligation to give particulars); and

(d) a summary of relevant statutory requirements; that is, the purposes for which Federal permit holders may enter premises, the obligation to give prior notice, the times at which permit holders may enter premises and at which they may conduct discussions with workers, the obligation on permit holders not to intentionally hinder or obstruct employers or employees, the documents which permit holders are permitted to inspect, the obligation to show a permit upon request, the obligation on occupiers and employers not to refuse or unduly delay entry to premises, the obligation to allow the permit holder to inspect relevant employment records and conduct interviews with employees about suspected breaches of industrial legislation and instruments, the obligation not to intentionally hinder or obstruct a permit holder, relevant penalties, and the right to report abuses of power by permit holders to the appropriate authority.

### Recommendation 67

(a) Federal permit holders not be entitled to the benefits which flow from holding a Federal permit unless a Federal notice has been given.

(b) Where a Federal permit holder enters premises, having given a Federal notice, he or she not be entitled to the benefits which flow from holding the Federal permit if he or she engages in conduct other than that specified in the notice.

(c) Federal permit holders only be entitled to the benefits which flow from holding a Federal permit if they enter the premises on the date, and at about the time, specified on the face of the Federal notice.

Chapter 5 – Entry to premises and inspection of records

## Issue

Under s285B of the *Workplace Relations Act 1996 (C'wth)*, permit holders exercising a right of entry or inspection for the purpose of investigating a suspected breach of the Act or a relevant award, order of the Australian Industrial Relations Commission or certified agreement are not required to tell the relevant employer the nature of their suspicion, or to give any particulars of their suspicion. There is no requirement that the suspicion be reasonable or based on credible information.

The evidence presented to the Commission established that permit holders routinely gain access to premises and records simply by asserting a suspicion that a relevant breach has occurred. Often the assertion is made on the basis of no evidence at all. It is difficult or impossible for employers to challenge the assertion, because permit holders typically refuse to give any details of their suspicion.

This conjunction of circumstances has led to a situation where the power of entry and inspection under s285B is abused and exploited by permit holders.

The purpose of the power of entry and inspection under s285B, broadly, is to facilitate adherence to the law. That objective cannot be effectively achieved if those alleged to be in breach of the law do not know the nature of the allegation against them.

### Recommendation 68

In the Building and Construction Industry Improvement Act:

(a) permit holders be required in a Federal notice in the prescribed form to identify the breach which they suspect has occurred or is occurring, by identifying whether the suspicion relates to a breach of the Act, an award, an order of the Australian Industrial Relations Commission or a certified agreement and specifying the nature of the breach (without there being any obligation to identify any complainant);

(b) any suspicion on the part of a permit holder be reasonable; that is, objectively reasonable having regard to the information in the possession of the permit holder at the time he or she purported to exercise the relevant power of entry or inspection;

(c) a reverse onus of proof apply, so that in proceedings in which it is alleged that a permit holder did not reasonably suspect that a breach had occurred or was occurring, the onus is on the permit holder to establish that he or she held a reasonable suspicion;

(d) permit holders be required to provide a copy of the Federal notice to the Australian Building and Construction Commission not less than 24 hours before the time and date specified in the notice for entering the premises or inspecting documents (as the case requires);

(e) a civil penalty attach to any employer who, having been given a notice setting out a suspected breach, destroys or conceals any documents relevant to the suspected breach;

(f) unions and the Australian Building and Construction Commission have standing to apply to a Registrar for orders in respect of the alleged destruction or concealment of documents relevant to a suspected breach; and

(g) unions be able to apply, on an *ex parte* basis, to a Registrar for a certificate which entitles a permit holder to enter premises or inspect documents relevant to a suspected breach without giving prior notice, if the Registrar is satisfied that there are grounds for believing that the relevant employer would destroy or conceal documents if notice were given.

Chapter 5 – Entry to premises and inspection of records

## Issue

Entry and inspection provisions in Federal awards and orders are unenforceable by virtue of s127AA of the *Workplace Relations Act 1996 (C'wth)*. The position is different, however, with entry and inspection provisions in Enterprise Bargaining Agreements (EBAs). Many EBAs contain expansive entry and inspection provisions.

The fact that such provisions are enforceable means that on the same building and construction site, different rights of entry and inspection might simultaneously apply under Commonwealth legislation, State industrial relations legislation, State awards, or the workplace agreements of any contractor working on the site.

## Recommendation 69

The Building and Construction Industry Improvement Act provide that the Australian Industrial Relations Commission:

(a) must, on application, vary an award or certified agreement to exclude a provision providing any union, or any officer or employee of a union, with an entitlement to enter premises or inspect records;

(b) must refuse to certify any agreement that applies to conduct in the building and construction industry if it contains such a provision; and

(c) does not have power to include such a provision in an award.

The operation of this reform be reviewed after a period of three years.

Chapter 5 – Entry to premises and inspection of records

### Issue

Despite evidence that entry and inspection provisions are routinely abused, it appears that, with notable exceptions, permits are rarely revoked.

Under the *Workplace Relations Act 1996 (C'wth)*, there is currently no power to suspend a permit. This is undesirable. If abuses of entry and inspection privileges are to be adequately addressed in the building and construction industry, real, substantial and certain penalties must apply. Permit holders should know that if they abuse the rights and privileges attaching to a permit, their permit will be suspended for a minimum known period or revoked entirely.

An appropriate authority needs to be empowered to investigate complaints and enforce the law in relation to entry and inspection by permit holders.

Effective remedies need to be available to prevent and deter permit holders from exceeding their powers.

### Recommendation 70

The Australian Building and Construction Commission be given the power to receive and investigate complaints concerning abuses of privileges by permit holders, and to make application to a Registrar to suspend or revoke a permit, or to have conditions attached to a permit.

### Recommendation 71

Registrars be required to suspend or revoke a permit if satisfied that the person to whom it was issued has, in exercising a Federal power of entry or inspection:

(a) intentionally hindered or obstructed any person;

(b) failed to provide the necessary Federal notice in the prescribed form;

(c) provided a Federal notice, or repeatedly provided Federal notices, for vexatious or frivolous reasons or in vexatious or frivolous circumstances;

(d) failed to comply with a condition attaching to a Federal permit;

(e) other than in cases involving an inadvertent or minor breach, failed to comply with any of the statutory obligations of a Federal permit holder; or

(f) otherwise acted in an improper manner.

### Recommendation 72

The expression 'otherwise acted in an improper manner' referred to in Recommendation 71 be taken to include:

(a) exercising a right of entry or inspection in a vexatious, unreasonable or inappropriate manner;

(b) making unreasonable, vexatious or inappropriate use of information obtained from an inspection of a record; and

(c) unreasonably failing to comply with a request by a relevant occupier or employer that discussions or interviews with employees take place in a particular room or area of the premises.

### Recommendation 73

Where a ground for suspension or revocation of a Federal permit is made out, the following mandatory minimum penalties apply:

(a) for a first contravention: minimum suspension of three months;

(b) for a second contravention: minimum suspension of 12 months; and

(c) for a third or further contravention: minimum suspension of five years.

### Recommendation 74

A right of appeal from a mandatory suspension period referred to in Recommendation 73 be preserved, with the Australian Industrial Relations Commission having the power to shorten or lengthen a suspension period, or overturn a suspension period entirely, if satisfied in all the circumstances that the mandatory period of suspension is manifestly unreasonable having regard to the nature of the contravention in question and any other circumstances the Australian Industrial Relations Commission considers relevant.

### Recommendation 75

(a) Where a permit to enter premises or inspect documents issued to a person under a State law has been suspended or revoked, a Registrar be required, on application, similarly to suspend or revoke the person's Federal permit.

(b) A person be prevented from applying for a Federal permit while any permit held by that person under Commonwealth or State industrial relations legislation is suspended or revoked.

### Issue

Civil penalties should be available to deter participants in the industry from failing to observe obligations concerning entry to premises and inspection of records.

### Recommendation 76

In light of the other recommendations made in the Chapter on *Entry to premises and inspection of records* contained in Volume 7, *Reform – National Issues* of this report, the categories of conduct attracting a civil penalty in the building and construction industry be expanded as follows:

(a) permit holder failing or refusing to return an expired, suspended or revoked permit to the Registrar within 14 days;

(b) permit holder intentionally hindering or obstructing any person while exercising a right of entry or inspection;

(c) person impersonating a permit holder, or falsely representing that he or she is a permit holder;

(d) union falsely certifying that it has provided an officer or employee with training as to the rights and obligations of permit holders;

(e) occupier of premises refusing or unduly delaying entry to premises by a permit holder who has complied with all relevant statutory obligations, including the obligation to give a Federal notice in the prescribed form at least 24 hours before seeking to enter the premises;

(f) employer who, having been given a Federal notice setting out a suspected breach, destroys or conceals any documents relevant to the suspected breach; and

(g) employer refusing or failing to make relevant employment records available for inspection and copying, or failing to produce documents properly requested by a permit holder.

Chapter 5 – Entry to premises and inspection of records

## Issue

The maximum civil penalty for contravening the provisions of Division 11A of Part IX of the *Workplace Relations Act 1996 (C'wth)* is currently $10 000 for a body corporate and $2000 in other cases.

The widespread abuse of entry and inspection requirements in the building and construction industry suggests that those penalties are inadequate.

## Recommendation 77

In the Building and Construction Industry Improvement Act:

(a) the maximum penalty for contravening an entry or inspection provision attracting a civil penalty be $100 000 for a body corporate and $20 000 in other cases;

(b) there be a mandatory period of suspension of at least 3 months for permit holders who fail to comply with their statutory obligations (see Recommendation 73);

(c) other remedies, including compensation for loss and damage, and suspension or disqualification from holding an office or paid position in a registered organisation, be available where contravention of a right of entry and inspection provision is proved; and

(d) unions be accountable for contraventions of entry and inspection provisions by their officers and employees.

Chapter 5 – Entry to premises and inspection of records

## Issue

Central to the objects of the *Workplace Relations Act 1996 (C'wth)* is 'ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association'. Part XA of the Act contains provisions which are intended to implement that objective. In addition to the objective already identified, Part XA has the objects of ensuring 'that employers, employees and independent contractors are free to join industrial associations of their choice or not to join industrial associations' and ensuring 'that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations'.

Provisions aimed at guaranteeing freedom of association are also enshrined in the industrial relations legislation of most States.

In its public hearings, the Commission heard a great deal of evidence of conduct which had as its object undermining freedom of association in the building and construction industry. For the most part, the conduct was directed to ensuring that the workforce on building and construction sites, particularly on large sites and sites in the central business districts of the major State capitals, was as highly unionised as possible. The broad objective of maintaining or establishing a highly unionised workforce was shared, in many instances, by the major unions with coverage in the industry and

head contractors. The individual rights of workers to freedom of association were subordinated to the interest of unions in obtaining new members and the interest of head contractors in ensuring that their projects proceeded on time, on budget and without industrial disruption.

Some of the conduct identified in the public hearings pointed to contraventions of existing Commonwealth or State freedom of association legislation. In most cases, alleged contraventions had not been reported to relevant authorities and had not been the subject of civil penalty proceedings. In some cases, where contraventions of freedom of association legislation had been the subject of proceedings, only small civil penalties were imposed with limited or no deterrent effect.

Other conduct identified in the public hearings of the Commission offended the spirit of Commonwealth or State freedom of association legislation, and had the effect of forcing workers to join a union against their wishes, but for a range of reasons did not fit within the currently prescribed prohibitions.

The evidence established beyond any doubt that the objects of Part XA of the *Workplace Relations Act 1996 (C'wth)* are being thwarted in the building and construction industry. Participants in the building and construction industry feel free to undermine principles of freedom of association because, among other reasons, Part XA is not adequately enforced and contains inadequate penalties.

There is an urgent need for substantial reform of the freedom of association provisions applicable to conduct in the building and construction industry.

### Recommendation 78

Freedom of association provisions in the Building and Construction Industry Improvement Act include a statement of objects to the following effect:

> As well as the objects set out in section [x], this Part has these objects:
>
> (a) to ensure that employers, employees and independent contractors are free to join industrial associations or not to join industrial associations;
>
> (b) to ensure that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations;
>
> (c) to provide effective relief to employers, employees and independent contractors who are prevented or inhibited from exercising their right to freedom of association; and
>
> (d) to prescribe effective remedies to penalise and deter persons who engage in conduct which prevents or inhibits employers, employees and independent contractors from exercising their right to freedom of association.

Chapter 6 – Freedom of association

### Issue

Natural persons may apply under s267 of the *Workplace Relations Act 1996 (C'wth)* to a Registrar for a certificate of conscientious objection to membership of industrial associations of employers or employees. This provision is anomalous. It implies that the freedom not to join a union is contingent upon holding a conscientious objection to joining a union. If the right to freedom of association is to be upheld in the building and construction industry, legislation must recognise the right to join, and not to join, a union as equal and complementary rights.

### Recommendation 79

The Building and Construction Industry Improvement Act contain a provision to the effect that s267 of the *Workplace Relations Act 1996 (C'wth)* does not apply in respect of the building and construction industry.

Chapter 6 – Freedom of association

### Issue

Currently, the Commonwealth and each State other than Victoria have separate freedom of association laws with substantially different contents. This is undesirable for a number of reasons. Most importantly, it makes it almost impossible for participants in the industry to know their rights and obligations with any precision. This contributes to a culture in which other interests prevail over the rule of law and in which the law tends to be disregarded and unenforced.

It would therefore be highly desirable for freedom of association provisions applying to the building and construction industry to operate uniformly throughout Australia. The Commonwealth Parliament, however, does not have the Constitutional capacity to enact freedom of association provisions which cover all participants in the industry in all circumstances.

### Recommendation 80

The regulation of freedom of association in the Building and Construction Industry Improvement Act apply as broadly as possible having regard to Constitutional limitations.

### Recommendation 81

Freedom of association provisions in the Building and Construction Industry Improvement Act have generally the same coverage as Part XA of the *Workplace Relations Act 1996 (C'wth)* but with the following additional coverage:

(a) they shall apply to conduct carried out wholly or partly with intent to affect adversely a constitutional corporation; and

(b) conduct shall be taken to affect adversely a constitutional corporation if an employee of, or a person engaged by, a constitutional corporation is the person referred to in the provision in question and against whom the conduct has been, is being or would be carried out, and the conduct affected, affects or would affect the person in that capacity.

In order to correct an apparent drafting anomaly the word 'the' be substituted for the word 'this' in a provision equivalent to s298G(2)(a) of the *Workplace Relations Act 1996 (C'wth)*.

The definitions in s298B(1) and (4) of the *Workplace Relations Act 1996 (C'wth)* be replicated in freedom of association provisions in the Building and Construction Industry Improvement Act.

### Recommendation 82

The Commonwealth seek to persuade each State to enact complementary freedom of association provisions of specific application to the building and construction industry in terms which mirror those in the Building and Construction Industry Improvement Act. An alternative means of establishing a uniform regulatory environment would be for States to refer relevant powers to the Commonwealth.

Chapter 6 – Freedom of association

## Issue

Evidence presented to the Commission established that a great deal of conduct which undermines freedom of association in the building and construction industry involves the making of indirect and implied threats.

Part XA of the *Workplace Relations Act 1996 (C'wth)* does not contain a definition of 'threat'.

### Recommendation 83

Freedom of association provisions in the Building and Construction Industry Improvement Act include a definition of 'threat' which specifies that threats may be direct, indirect, express or implied.

Chapter 6 – Freedom of association

## Issue

A deficiency in Part XA of the *Workplace Relations Act 1996 (C'wth)* is that it does not contain simple and easily understood provisions which apply to all participants in a workplace to prohibit the most common forms of conduct that have a tendency to undermine freedom of association.

Having a small number of key prohibitions in legislation applying to the building and construction industry will be likely to lead to greater understanding among participants in the industry of their rights and obligations concerning freedom of association, and facilitate enforcement of those rights and obligations.

## Recommendation 84

Freedom of association provisions in the Building and Construction Industry Improvement Act contain general prohibitions which apply to all participants in the industry to the following effect:

(a) A person must not organise or take, or threaten to organise or take, any action with the intent, directly or indirectly, of coercing another person to become, not become, remain or cease being an officer, delegate or member of an industrial association.

(b) A person must not knowingly make a false or misleading statement to another person with intent to encourage, persuade or coerce that other person, or any other person, to become, not become, remain or cease being an officer, delegate or member of an industrial association.

(c) In addition, a person must not make any statement to the following effect:

  (i) that a building or construction site, or any part thereof, is a 'no ticket no start' site or a 'union site';

  (ii) that it is a requirement that any person entering or working on a building or construction site, or any part thereof, must be a member of an industrial association or must not be a member of an industrial association; or

  (iii) that a person must disclose whether he or she or any other person is, or is not, a member of an industrial association,

  with intent to encourage, persuade or coerce another person to become, not become, remain or cease being an officer, delegate or member of an industrial association.

(d) For the purpose of paragraphs (b) and (c):

  (i) whether or not the recipient of the statement could become, not become, remain or cease being (as the case requires) an officer, delegate or member of an industrial association is irrelevant; and

  (ii) a statement includes words, writing, signs and conduct, and may be express or implied.

(e) A person must not:

  (i) organise or take, or threaten to organise or take, any industrial action or other action; or

  (ii) refrain or threaten to refrain from organising or taking any action,

  on the ground, or on grounds that include the ground, that another person is, has been, proposes to become, has at any time proposed to become, is not, or proposes not to become, an officer, delegate or member of an industrial association.

(f) Industrial action cannot be protected action if it is threatened, organised or taken on the ground, or on grounds that include the ground, that a person is, has been, proposes to become, has at any time proposed to become, is not, or proposes not to become, an officer, delegate or member of an industrial association.

Chapter 6 – Freedom of association

### Issue

Section 298K of the *Workplace Relations Act 1996 (C'wth)* does not prohibit an employer from engaging in conduct of the kind set out in s298K, where the employer intends to engage in that conduct for one or more of the prohibited reasons set out in s298L, if there is in fact no basis for the prohibited reason or reasons.

For example, s298K would not be contravened if an employer dismissed an employee because the employer believed the employee to be a union member, if the employee was not in fact a union member. In such a case, however, the employer would plainly intend to undermine the right to freedom of association and to thwart the objects of Part XA.

### Recommendation 85

Freedom of association provisions in the Building and Construction Industry Improvement Act provide that a person who engages in prohibited conduct, and intends to engage in that conduct for a prohibited reason, is taken to have engaged in the conduct for that prohibited reason.

Chapter 6 – Freedom of association

### Issue

Section 298M of the *Workplace Relations Act 1996 (C'wth)* prohibits employers or persons who engage independent contractors from inducing (whether by threats or promises or otherwise) employees or contractors to stop being officers or members of an industrial association.

It does not prohibit employers or persons who engage independent contractors from inducing employees or contractors to become or remain officers or members of an industrial association. This is a significant flaw in the current provision.

### Recommendation 86

In freedom of association provisions in the Building and Construction Industry Improvement Act, an expanded provision similar to s298M be included which prohibits employers or persons who engage independent contractors from inducing employees or contractors to stop being, become or remain officers or members of an industrial association.

Chapter 6 – Freedom of association

### Issue

Section 298P(3) of the *Workplace Relations Act 1996 (C'wth)* has been interpreted in a way which requires courts to have regard to the capacity and subjective intentions of the recipient of a communication in order to determine whether an industrial association, or an officer or member of such an association has advised, encouraged or incited an employer to take action in relation to a person that would, if taken, contravene s298K. The vice which needs to be addressed, however, is industrial associations and their officers and members making demands that are calculated to undermine an individual's right to freedom of association.

### Recommendation 87

Freedom of association provisions in the Building and Construction Industry Improvement Act prohibit industrial associations and their officers and members making demands of employers or contractors that would, if acceded to, contravene a freedom of association provision. The prohibition to apply where the person making the demand intends to cause the recipient to take action that would constitute a contravention of a freedom of association provision, regardless of whether the recipient of the demand intends to take, has in contemplation taking, or could in fact take that action.

Chapter 6 – Freedom of association

### Issue

The prohibition in s298S(2)(a) of the *Workplace Relations Act 1996 (C'wth)* against industrial associations taking 'discriminatory action' against 'eligible persons' has been interpreted as applying only where there is a contractual relationship between the person who is advised, encouraged or incited to take 'discriminatory action' against an 'eligible person' and the eligible person. This narrow construction leads to undesirable outcomes because, for example, it does not prohibit union organisers from advising, encouraging or inciting head contractors to exert pressure on their subcontractors to engage individual independent contractors only where they are union members.

### Recommendation 88

A provision equivalent to s298S(2)(a) be included in the Building and Construction Industry Improvement Act, but with an expanded definition of 'discriminatory action' which includes advising, encouraging or inciting another person to engage in discriminatory action.

Chapter 6 – Freedom of association

### Issue

The prohibition in s298S(2)(b) of the *Workplace Relations Act 1996 (C'wth)* applies only to industrial action taken or threatened against *an employer* with intent to coerce the employer to take 'discriminatory action' against an 'eligible person' because the eligible person is not a member of an industrial association.

### Recommendation 89

A broader prohibition be included in the Building and Construction Industry Improvement Act: namely a prohibition against an industrial association, or an officer or member of an industrial association, taking or threatening to take industrial action against any person, whether an employer or not, with intent to coerce that person to take discriminatory action against an eligible person because he or she is, has been, proposes to become, has at any time proposed to become, is not, or proposes not to become, an officer, delegate or member of an industrial association.

Chapter 6 – Freedom of association

### Issue

Section 298S of the *Workplace Relations Act 1996 (C'wth)* applies to conduct against an 'eligible person' engaged in because the eligible person is not a member of an industrial association or with intent to coerce the eligible person to join an industrial association.

### Recommendation 90

The Building and Construction Industry Improvement Act prohibit conduct engaged in because an eligible person, or a person employed or engaged by the eligible person, is not a member of an industrial association, or with intent to coerce the eligible person, or a person employed or engaged by the eligible person, to join an industrial association.

Chapter 6 – Freedom of association

### Issue

Section 298B(2) of the *Workplace Relations Act 1996 (C'wth)* deems action done by various representatives of industrial associations to have been done by the industrial association.

Section 298V of the *Workplace Relations Act (C'wth)* imposes a reverse onus of proof in cases where proof that conduct was carried out for a particular reason, or with a particular intent, is required to establish a contravention of Part XA.

These provisions are desirable because:

(a) the cultural change which is necessary in the building and construction industry is more likely to be achieved if industrial associations are held accountable for the conduct of their representatives; and

(b) a reverse onus of proof provision overcomes the practical difficulties which plaintiffs would face in proceedings for contraventions of freedom of association provisions if they had to prove the state of mind of the defendant.

### Recommendation 91

Provisions equivalent to ss298B(2) and 298V of the *Workplace Relations Act 1996 (C'wth)* be replicated in the Building and Construction Industry Improvement Act.

Chapter 6 – Freedom of association

### Issue

An employee may apply to the Federal Court for an order under s298U of the *Workplace Relations Act 1996 (C'wth)* only if he or she is 'the person, referred to in the provision in question, against whom the conduct has been, is being or would be carried out'.

Employees can be affected by conduct carried out against their employers. Independent contractors can be affected by conduct carried out against the persons who engage them.

Persons who are affected by conduct should have standing to apply for orders in respect of that conduct.

### Recommendation 92

Freedom of association provisions in the Building and Construction Industry Improvement Act permit any employee of a person referred to in a freedom of association provision, against whom conduct has been, is being or would be carried out and who has been affected, is being affected, or would be affected by the conduct, to bring an application for a contravention of the relevant provision.

A similar right be accorded to any independent contractor engaged by a person referred to in a freedom of association provision against whom conduct has been, is being or would be carried out.

Chapter 6 – Freedom of association

### Issue

In Volume 11, *Reform – Achieving Cultural Change*, this report recommends the creation of a body, provisionally called the Australian Building and Construction Commission, with powers to investigate contraventions of and enforce the law in the building and construction industry.

If the Australian Building and Construction Commission is to be effective, it needs to have powers to investigate complaints and enforce the law in relation to freedom of association in the building and construction industry. Its powers should mirror those of the Employment Advocate.

### Recommendation 93

The Australian Building and Construction Commission have the power to:

(a) make applications to the Federal Court for orders in respect of contraventions of freedom of association provisions in the Building and Construction Industry Improvement Act;

(b) investigate contraventions of those provisions; and

(c) provide free legal representation to a party in a proceeding concerning a contravention of those provisions.

Chapter 6 – Freedom of association

## Issue

The maximum penalty currently available in cases where contraventions of Part XA of the *Workplace Relations Act 1996 (C'wth)* are proved is $10 000 for a body corporate and $2000 in other cases. These penalties are inadequate. The extent to which freedom of association laws are disregarded or flouted in the building and construction industry strongly suggests that the current penalties are ineffective as a deterrent.

Building and construction projects frequently have values of tens or hundreds of millions of dollars. The incidence of liquidated damages clauses and other commercial factors have led to an environment in which short term expediency too often prevails over adherence to the rule of law.

## Recommendation 94

The maximum civil penalty for a contravention of freedom of association provisions in the Building and Construction Industry Improvement Act be $100 000 in the case of a body corporate, and $20 000 in all other cases.

Additional remedies be prescribed in cases where freedom of association contraventions are proved, including, in appropriate cases:

(a) payment of compensation; and

(b) suspension or disqualification of an individual from holding office or a paid position in a registered organisation.

Chapter 6 – Freedom of association

## Issue

Clauses encouraging union membership in awards and agreements applying to the building and construction industry are frequently used by unions and employers as an industrial tool to coerce or pressure workers into joining unions. This is contrary to the objects of freedom of association.

There is an incongruity between an Act of the Parliament stating that each individual has an unfettered freedom to decide whether he or she will, or will not, join an association, and an instrument made under an Act of the Parliament providing encouragement for a person to exercise that freedom in a particular way. If the freedom to decide is truly unfettered, the person should neither be encouraged nor discouraged towards an outcome. The focus should be on the individual's freedom, not upon the effect the exercise of that freedom might have on the officers of trade unions, or upon its consequences in the workplace. Freedom of association relates to the rights of an individual, and the absence of compulsion upon that individual in making his or her choice. Encouragement from the legislature or by an instrument created under legislation is a step towards restricting that freedom because even-handedness in making that choice is removed by the scales being weighted in favour of one outcome.

## Recommendation 95

The Building and Construction Industry Improvement Act include provisions which:

(a) prohibit the inclusion of clauses in awards and agreements that:

  (i) require or permit any conduct which would contravene freedom of association provisions; or

  (ii) directly or indirectly require a person to encourage another person to become, not become, remain or cease being a member of an industrial association, or discourage another person from becoming, remaining or ceasing to be a member of an industrial association; and

(b) require all awards and agreements to include a clause which expressly states the principle of freedom of association, in terms to the following effect:

> *Every person has the legal right to choose, freely and without interference, whether he or she wishes to join, or not to join, an industrial association. Heavy penalties apply to any person, including an employer or union, who coerces another person into becoming, not becoming, remaining or ceasing to be an officer, delegate or member of an industrial association.*
>
> *No person has the right to discriminate in favour of or against, or victimise another person because he or she is a member, or is not a member, of an industrial association.*

Chapter 6 – Freedom of association

### Issue

In order to implement the recommendations in this report in relation to freedom of association in the building and construction industry, provisions implementing those recommendations will need to be formulated for inclusion in the Building and Construction Industry Improvement Act.

### Recommendation 96

The draft model provisions set out in Appendix B to the *Freedom of association* chapter contained in Volume 7, *Reform – National Issues Part 1*, of this report be referred to the Office of Parliamentary Counsel for it to consider when drafting a Bill for introduction into Parliament.

Chapter 6 – Freedom of association

# Volume 8

# Reform – National Issues Part 2

## Issue

In the building and construction industry, unions and their officers and employees routinely make inappropriate demands that contractors engage or reinstate particular workers or subcontractors, or allocate particular duties or responsibilities to particular individuals.

This practice assumes three main forms:

(a) unions demanding that contractors, particularly head contractors, employ nominated workers in strategic positions, such as shop stewards, site delegates, induction officers, safety officers and crane drivers;

(b) unions demanding that contractors employ or reinstate particular workers in ordinary labouring or other positions, even where the contractor has no need for the services of those workers; and

(c) unions demanding that contractors engage specific union-nominated subcontractors; typically, subcontractors who have signed union-endorsed enterprise bargaining agreements.

There is nothing intrinsically wrong with a union or a union officer or employee encouraging or seeking to persuade an employer to employ a particular union member. The vice in demands of the kind revealed by the evidence presented to the Commission is that they cross the line between encouragement and coercion, and involve an interference with the right of businesses to determine who they wish to employ and the terms on which they are employed.

The culture in the industry is such that contractors tend to accede to these demands, even where it involves them paying fulltime wages to persons who do no productive work on site other than engaging in union business, or where it involves them engaging employees or subcontractors against their wishes or interests or for whom they have no need.

A related problem which emerges in the building and construction industry where demands are made for contractors to employ nominated persons as shop stewards or site delegates is that the workers on a site are denied meaningful or democratic involvement in the choice of their representatives.

## Recommendation 97

The Building and Construction Improvement Act prohibit any registered organisation, or any officer or member of a registered organisation, from organising or taking, or threatening to organise or take, any action with intent to coerce a person:

(a) to employ or engage another person or subcontractor;

(b) not to employ or engage another person or subcontractor;

(c) to allocate particular duties or responsibilities to any employee or person;

(d) not to allocate particular duties or responsibilities to any employee or person;

(e) to designate any employee or person as having particular duties or responsibilities; or

(f) to designate any employee or person as not having particular duties or responsibilities.

## Issue

The principal award of the Australian Industrial Relations Commission which bears upon the building and construction industry in Australia is the *National Building and Construction Industry Award 2000* (NBCIA).

Despite attempts to simplify the NBCIA and circumscribe the number of allowable award matters, the NBCIA is highly prescriptive. Among other matters, it prescribes some 21 allowances and 41 special rates, and contains complicated provisions in relation to rostered days off (RDOs), crib time, overtime, special time, shift work and weekend work.

Many of the special rates in the NBCIA are to compensate workers for having to perform unsafe work. Those rates do not sit well with what should be a primary goal of all employers and workers in the building and construction industry, namely establishing and maintaining a safe working environment. If proper occupational health and safety standards are observed in the building and construction industry, there is no reason why any worker should be exposed to the risk of serious accidents or death while at work. There should be no trade-off of increased wages for unsafe work conditions.

The rates and allowances in the NBCIA are detailed and intricate, and the amounts properly to be paid to employees vary constantly depending upon the specific activity carried out and the length of time during which it is carried out. In these circumstances, it is no wonder that there is frequent disagreement about the precise amount payable to workers, and that allegations of underpayment or non-payment of entitlements are made so frequently in the building and construction industry.

It is doubtful whether many workers covered by the NBCIA would have a comprehensive understanding of their rights and entitlements. For employers, ensuring that their workers covered by the NBCIA are paid the precise amount to which they are entitled is a major exercise. The complexity of the allowances and rates in the NBCIA therefore serves neither workers nor employers.

In the building and construction industry, allegations of underpayment or non-payment of entitlements regularly translate to unprotected industrial action, or costly intrusions into the affairs of businesses while allegations are investigated. The current system leads to inflexibility and impedes productivity.

There is thus a clear need to simplify the current array of allowances and rates in the NBCIA.

Reducing the myriad of allowances and rates under the NBCIA would simplify the process of determining workers' entitlements. It would enable workers to know their rights and entitlements. It would reduce administrative costs to business and minimise the risk of confusion and disagreement and the potential for industrial disruption arising from allegations of underpayment or non-payment of entitlements.

### Recommendation 98

(a) The Building and Construction Industry Improvement Act include a provision that restricts the Australian Industrial Relations Commission, in determining awards applicable to the building and construction industry, to the determination of four allowances only, namely:

  (i) a general allowance, payable to all workers;

  (ii) a living away from home allowance;

  (iii) a meal allowance; and

  (iv) a travelling allowance.

(b) The Australian Industrial Relations Commission be permitted to set varying rates for the allowances, based on:

  (i) the State in which the worker is employed; and

  (ii) whether the work is carried on within or outside a set radius of a capital city or major regional centre.

(c) The purpose of the general allowance is to compensate workers for whom it replaces the current raft of special allowances and rates.

Chapter 9 – Inflexible practices

## Issue

Building and construction projects demand flexible work practices. The large number of workers engaged on a project at any given time, the range of tasks on which they are likely to be engaged, and the organisational demands of building and construction projects mean that substantial productivity improvements can be achieved with planning and co-operation between head contractors, subcontractors and workers.

A critical aspect of the flexibility in work practices that is necessary to achieve improvements in productivity concerns hours of work. Flexibility in hours of work is also an important matter for many workers, who may have different preferences depending on their home or other commitments.

Many workers in the building and construction industry, particularly on major projects, work excessive hours and excessive amounts of overtime. In some cases, workers perform up to 70 or 80 hours of paid work a week, including up to 40 hours of overtime. Excessive work hours and overtime have implications for productivity, quality of life and occupational health and safety.

While the *National Building and Construction Industry Award 2000* (NBCIA) provides for flexibility in start and finish times and the timing of rostered days off (RDOs), the industrial reality is that flexibility is extremely limited in much of the building and construction industry.

The great majority of businesses in the building and construction industry employ fewer than five people. There is therefore obvious scope for increasing the level of co-operation between employers and employees with respect to hours of work.

Honest employers want to pay their employees fair pay for a fair day's work, and to reach sensible accommodations with their employees as to hours of work having regard to the needs of the business. Honest employees want to receive fair pay for a fair day's work, and to have the flexibility to manage competing work, family and social obligations. It is not in the interests of either employees or employers for excessive hours to be worked, or for there to be restrictions on the hours and days on which work may occur.

Under the current inflexible arrangements, building and construction projects sit idle or operate at skeletal capacity over weekends, RDOs and the four week Christmas shutdown. In some States a 'calendar' is agreed between unions and major contractors in which RDOs and shutdown days are fixed for the coming year. They are then rigidly enforced throughout the industry.

The cost of these inactive periods is substantial:

(a) workers are effectively prevented or restricted from working at times of their choosing;

(b) fewer people are employed in the industry than should be the case;

(c) contractors are prevented from implementing more flexible practices which would make them more productive and give them a competitive edge;

(d) expensive equipment remains unused; and

(e) projects take longer to complete than should be the case, to the cost of clients and ultimately the economy.

Employers and employees should have the freedom to choose arrangements which best suit them, rather than have arrangements imposed on them at an industry level. Freedom of choice at the enterprise level is at the heart of the objectives of the *Workplace Relations Act 1996 (C'wth)*.

### Recommendation 99

(a) The Building and Construction Industry Improvement Act include provisions that:

(i) prohibit the Australian Industrial Relations Commission, in determining awards applicable to the building and construction industry, from prescribing the times or days on which ordinary and overtime work and RDOs must occur or be taken;

(ii) require existing clauses having that effect to be removed by the Australian Industrial Relations Commission from awards applying to the building and construction industry; and

(iii) give the Australian Industrial Relations Commission the express power, in determining awards for the building and construction industry, to set a maximum number of overtime hours a worker may perform in a week.

(b) In determining awards applying to the building and construction industry, the Australian Industrial Relations Commission should not be prevented from prescribing:

(i) maximum numbers of ordinary hours of work;

(ii) rest breaks, notice periods and variations to working hours;

(iii) rates for work on public holidays;

(iv) the rates at which overtime should be paid; or

(v) the number of RDOs to which workers are entitled.

Chapter 9 – Inflexible practices

## Issue

The use of workers provided through labour hire firms has become increasingly common in the building and construction industry. There have been significant issues raised about the use of labour hire businesses as a source of employees in the building and construction industry. These issues include who is the employer of labour hire workers and who is responsible for the safety of their workplace and for the payment of their entitlements. Calls have been made for greater certainty about these issues.

### Recommendation 100

The Commonwealth initiate, through the Workplace Relations Ministers' Council, the development of a Code of Conduct and Practice for Labour Hire in the building and construction industry.

Chapter 10 – Labour hire

## Issue

The Commission received submissions and heard evidence concerning the evasion of taxation obligations in the building and construction industry, including in relation to payroll tax.

There is substantial evidence of evasion of payroll tax obligations in the building and construction industry, particularly by persons engaged in phoenix company activity. While the administration of payroll tax is a matter for the State and Territory governments which impose it, the evasion of payroll tax is an issue of importance in the building and construction industry. Apart from the obvious desirability of eliminating fraudulent conduct from the industry, businesses and individuals who evade payroll tax often evade other revenue obligations, and the proper payment of employee entitlements and obtain a competitive advantage over businesses which comply with their obligations.

The Commonwealth should take the lead in encouraging States and Territories to introduce measures which eliminate fraudulent conduct such as the evasion of revenue obligations in the industry. The recommendations in respect of payroll tax contain measures that the Commonwealth can propose to the States and Territories for their consideration.

Payroll tax is governed by legislation which applies to all industries, accordingly amendments which will benefit the building and construction industry will need to be made to that legislation.

## Recommendation 101

The Commonwealth encourage the States and Territories to consider the adoption of the provisions contained in s16LA of the *Pay-Roll Tax Act 1971 (NSW)* to address phoenix company activities in the building and construction industry. These provisions make all members of a group jointly liable for the payroll tax debts of other group members.

Chapter 11 – Payroll tax obligations – Non-compliance

### Issue

The experience of the States emphasises the importance of data sharing between revenue authorities including payroll tax authorities, particularly in the detection of fraudulent phoenix company activity. Consideration should be given to the modification of legislative restrictions on the sharing of information by Commonwealth, State and Territory revenue authorities relevant to the detection of payroll tax evasion in the building and construction industry.

### Recommendation 102

The Commonwealth discuss with the States and Territories appropriate methods of permitting their revenue authorities to share information relevant to the detection of payroll tax evasion in the building and construction industry where this does not already occur.

Chapter 11 – Payroll tax obligations – Non-compliance

### Issue

The harmonisation of the key definitions of the payroll tax system, particularly the definition of wages, between the different jurisdictions is an important object, particularly in the building and construction industry where many large contractors operate nationally. The harmonisation of key definitions has been addressed in the *Review of Employers Compliance with Workers Compensation Premiums and Pay-Roll Tax in NSW* report published in 2002. Harmonisation of key definitions will enhance the clarity of obligations in the building and construction industry.

### Recommendation 103

The Commonwealth encourage the States and Territories to continue efforts to harmonise between jurisdictions the key definitions of the payroll tax system, particularly the definition of wages.

Chapter 11 – Payroll tax obligations – Non-compliance

## Issue

There has been significant incidence of fraudulent phoenix company activity in the building and construction industry. Since 1998 the Australian Taxation Office has raised at least $110 million in taxes and penalties from the detection of fraudulent phoenix company activity in the building and construction industry. For every $1 spent by the Australian Taxation Office on the detection of phoenix company activity in the period 1 July 2001 to 30 June 2002 $8 in revenue was raised. Efforts must continue to eliminate fraudulent phoenix company activity in the building and construction industry. Apart from the contraventions of law involved, fraudulent phoenix company activity can adversely affect the public revenue, contractors, employees and creditors. I have made a number of recommendations in connection with fraudulent phoenix company activity in the building and construction industry. Other chapters of this report: *Payroll Tax Obligations – Non-compliance and Taxation Obligations – Evasion* contained respectively in Volumes 8 and 9, *Reform – National Issues Parts 2 and 3*, also contain recommendations in respect of phoenix company activity. Some of these recommendations relate to the *Corporations Act 2001 (C'wth)* and other legislation which is not confined to the building and construction industry. I have made such recommendations with the aim of achieving benefits for the building and construction industry.

There appear to be no clear guidelines at the Commonwealth level as to which Commonwealth agencies are responsible for detecting and policing fraudulent phoenix company activity in the building and construction industry.

## Recommendation 104

The Commonwealth establish guidelines on the separate responsibilities of the major government agencies, particularly the Australian Securities and Investments Commission and the Australian Taxation Office, in combating fraudulent phoenix company activity in the building and construction industry. The agencies given major responsibilities should be given appropriate resources to combat fraudulent phoenix company activity in the building and construction industry.

Chapter 12 – Phoenix companies

### Issue

The sharing of information between government agencies involved in the collection of public revenue and the detection of corporate fraud is essential if fraudulent phoenix company activity in the building and construction industry is to be eliminated. There are secrecy and confidentiality provisions in relevant legislation which restrict the flow of information.

### Recommendation 105

The Commonwealth convene a working party consisting of representatives of the Australian Taxation Office, the Australian Securities and Investments Commission and State and Territory revenue authorities, together with the Privacy Commissioner, to address the issue of appropriate amendments to relevant legislation to permit the exchange of information which may assist in the detection of fraudulent phoenix company activity in the building and construction industry.

Chapter 12 – Phoenix companies

### Issue

There is evidence of persons associated with fraudulent phoenix company activity in the building and construction industry being appointed as directors of companies operating in the building and construction industry, although they are bankrupt and disqualified to act as directors, without being detected by the regulatory authorities.

### Recommendation 106

The measures developed by the Australian Securities and Investments Commission to check all new company officers against the National Personal Insolvency Index and to check that current directors have not been declared bankrupt appear to address this issue and should be implemented without further delay.

Chapter 12 – Phoenix companies

### Issue

There is evidence of company directors associated with fraudulent phoenix company activity in the building and construction industry not being replaced after they have been made bankrupt and consequently disqualified from acting as directors.

### Recommendation 107

The Australian Securities and Investments Commission ensure that its procedures identify when companies in the building and construction industry are left without a director following the bankruptcy of a serving director.

Chapter 12 – Phoenix companies

### Issue

There is evidence that low levels of penalties have been imposed by the courts where persons have been convicted in relation to phoenix company activity in the building and construction industry. It is important that the penalties imposed reflect the significance of the adverse effect on the building and construction industry of fraudulent phoenix company activity and serve as a deterrent to such conduct.

### Recommendation 108

The Commonwealth, after consultation with the Australian Securities and Investments Commission, consider the need for an increase in the maximum penalties provided in the *Corporations Act 2001 (C'wth)* for offences that may be associated with fraudulent phoenix company activity.

Chapter 12 – Phoenix companies

### Issue

The power of the Australian Securities and Investments Commission to disqualify a person from managing corporations contained in s206F of the *Corporations Act 2001 (C'wth)* is significant in the policing of fraudulent phoenix company activity in the building and construction industry but is dependent upon the person having been an officer of two or more corporations which have been wound up and been the subject of liquidators' reports under s533(1) of the *Corporations Act 2001 (C'wth)*. The question arises whether the power should be available in appropriate circumstances after one such incident.

### Recommendation 109

The Commonwealth, after consultation with the Australian Securities and Investments Commission, consider the need for an amendment to s206F of the *Corporations Act 2001 (C'wth)* to provide for the power of disqualification contained therein to be exercisable in appropriate circumstances after a person on one occasion has been an officer of a corporation that has been wound up and been the subject of a liquidator's report under s533(1) of the *Corporations Act 2001 (C'wth)*.

Chapter 12 – Phoenix companies

## Issue

An important function of unions is to ensure that their members receive all their lawful entitlements from their employers. The statutory provisions permitting officers and employees of unions to enter premises and inspect records in Division 11A of Part IX of the *Workplace Relations Act 1996 (C'wth)* and in State industrial relations legislation exist in part to facilitate that function.

Allegations of underpayment or non-payment of entitlements are often resolved by unions, as agents for their members, pursuing wage claims against employers. In many cases, employers pay moneys in settlement or resolution of wage claims directly to the union, rather than to the affected employees. In most cases, the union then deducts outstanding or future union dues from the sum received, and pays the balance to the employees.

Evidence presented to the Commission has established, however, that in some cases, all or most of the entitlements recovered by the union from an employer end up being retained by the union, rather than being disbursed to the affected employees. This typically occurs when:

(a) wage claim cheques are not collected by a worker or are not collected until after a considerable period of time has elapsed; and

(b) the union on a periodic basis deducts union fees from the moneys held by it on the worker's behalf, in reliance on a general authority given by the worker at the time the claim was lodged.

It is doubtful whether many workers who lodge wage claims appreciate the potential effect of such an authority. It seems highly unlikely that an informed worker would agree to the union deriving some or all of the benefit of moneys properly belonging to the worker because of a failure on the worker's part to collect a cheque, or a delay in doing so.

Under s264A of the *Workplace Relations Act 1996 (C'wth)*, legal proceedings for the recovery of an amount payable by a person in relation to the person's membership of an organisation registered under the Act must not be commenced after the end of the period of 12 months starting on the day on which the amount became payable. The amount ceases to be payable at the end of the period if legal proceedings to recover the amount have not been commenced by then. However, s264A does not preclude a union from deducting union membership fees from moneys recovered as a result of a wage claim with the consent of the member. Nor does it prevent a union from continuing to deduct union membership fees as they fall due from moneys held by the union on the member's behalf.

There is no cogent reason why unions should be entitled to deduct union fees, in perpetuity, from moneys recovered as a result of wage claims, if the union has not sought and obtained the express authority of the member for more than 12 months.

### Recommendation 110

Registered organisations in the building and construction industry be prohibited from deducting:

(a) from moneys held by the organisation on behalf of a person, more than one year's membership fees for that person in any 12 month period; and

(b) any amount in relation to a person's membership of the organisation from moneys held by the organisation on that person's behalf unless the person has provided prior written consent to the deduction. There should be a requirement that the consent be provided no more than 12 months before the date on which the organisation deducts the amount. In other words, fresh consent should have to be obtained by the organisation at least once a year.

These restrictions should apply despite any authorisation to the contrary given by the person.

### Recommendation 111

The Commonwealth encourage State and Territory governments to amend their unclaimed moneys legislation so that unions are required to treat moneys recovered by them on behalf of workers as a result of wage claims as unclaimed moneys if they have remained unclaimed (in whole or in part) for more than two years.

Chapter 13 – Retention of wage claim amounts

## Issue

Prequalification involves assessing the financial viability and the capacity of firms to undertake various types of building and construction work. This assessment is then used by clients and contractors to select firms for particular projects. Prequalification can reduce the risk that the contractors chosen for the project will experience financial difficulty and then fail to pay subcontractors.

### Recommendation 112

All governments, including the Commonwealth, continue to monitor, review and improve their approach to prequalification with a view to improving security of payments within the building and construction industry.

Chapter 14 – Security of payment

### Issue

The Australian Industry Group and Australian Constructors Association have proposed that the Commonwealth could influence the industry towards better security of payment practices by requiring States or Territories that receive Commonwealth funding to adopt good payment practices in projects substantially funded by Commonwealth. That suggestion has merit.

### Recommendation 113

The Commonwealth require, as a condition of the provision of Commonwealth funding to State or Territory projects, that tenderers be required to promote good payment practices to subcontractors on those projects.

Chapter 14 – Security of payment

### Issue

It is clear that a compulsory insurance scheme would benefit subcontractors facing security of payment difficulties. The real debate concerns whether those benefits are sufficient to outweigh the costs of the scheme.

The Commission has not been in a position to attempt to evaluate the likely cost of a compulsory insurance scheme on a national basis within the building and construction industry. The Commonwealth, through the Department of Employment and Workplace Relations, has indicated that it does not believe the arguments advanced against such a scheme are compelling, and that it believes compulsory insurance warrants further investigation.

I agree with that view. It must, however, be recognised that the cost of such a scheme will, ultimately, be borne by the client. Before any finalised position is adopted regarding compulsory insurance it is necessary that there be an assessment of the cost of any such scheme, its impact upon the building and construction industry, and a quantitative assessment of the likely benefits of such a scheme.

### Recommendation 114

The Commonwealth, in consultation with industry participants, commence a study to assess:

(a) the costs of a compulsory insurance scheme to secure payments to contractors, subcontractors and suppliers in the building and construction industry;

(b) the likely benefits from such a scheme; and

(c) the impact upon clients and the industry of such a scheme.

This should not delay the introduction of the rapid adjudication legislation which has been recommended in the proposed Building and Construction Industry Security of Payments Act (see Recommendation 116).

Chapter 14 – Security of payment

### Issue

Education is an important part of any reform package. Education and training would improve the expertise of subcontractors, and the ability of companies to assess the commercial risk of those they deal with. It will assist understanding of any new security of payments arrangements.

### Recommendation 115

The Commonwealth initiate an education campaign, aimed primarily at small subcontractors, to explain the Commonwealth's security of payments arrangements and improve subcontractors' understanding of the various mechanisms, including State mechanisms, which they can use to protect their interests and their understanding of their rights and obligations under common forms of contract.

Chapter 14 – Security of payment

### Issue

Security of payments was raised with the Commission during the public hearings, in meetings that I held with interested parties, in interviews conducted by Commission investigators, and in submissions to the Commission. It quickly became apparent that it is an issue that critically affects the ability of participants in the industry to make a living, and to be rewarded for work that they have performed. During the course of their investigations, Commission investigators were repeatedly told of the suffering and hardship caused to subcontractors by builders who are unable or unwilling to pay for work from which they have benefited. The subcontractors who experience payment problems are often small companies or partnerships. Frequently they do not have the expertise or resources to enforce their legal rights, because enforcement would require protracted litigation against much better resourced and more sophisticated companies. Consequently, subcontractors that have operated profitably and well for many years can be forced into liquidation through no fault of their own, often with devastating consequences for the owners of these businesses, their families, their employees and their creditors.

### Recommendation 116

The Commonwealth enact a Building and Construction Industry Security of Payments Act in the form of the Building and Construction Industry Security of Payments Bill 2003, which is set out in Appendix 1 to the *Security of Payment* Chapter contained in Volume 8, *Reform – National Issues Part 2,* of this report.

### Recommendation 117

The detailed submissions made on behalf of the Civil Contractors Federation, the National Electrical and Communications Association, the Housing Industry Association Limited and Mr Graham Pearce in relation to the Building and Construction Industry Security of Payments Bill 2003 be considered in any debate concerning the development or enactment of that Bill.

Chapter 14 – Security of payment

# Volume 9

# Reform – National Issues Part 3

### Issue

The payment of superannuation contributions forms an important part of employee entitlements in the building and construction industry. The welfare of workers during retirement is dependent on the contributions.

Superannuation contributions are required by Commonwealth legislation and Commonwealth and State awards and agreements.

The Commonwealth superannuation legislation is industry wide legislation. It is not proposed that separate superannuation legislation be enacted for the building and construction industry. However, I have made recommendations concerning superannuation matters to address issues that have arisen in the building and construction industry.

### Recommendation 118

After 12 months operation, the Australian Taxation Office review the impact of the amendments to the Superannuation Guarantee legislation which will commence on 1 July 2003, in relation to the effect on the levels of compliance with the payment of contributions within the building and construction industry. Such review include in its terms of reference whether superannuation compliance within the building and construction industry would be enhanced by a requirement for monthly payments by employers. Any recommendation for such change should be subject to a cost-benefit analysis.

Chapter 15 – Superannuation contributions – compliance

### Issue

The Australian Taxation Office holds significant amounts of superannuation contributions, including in respect of the building and construction industry, because it does not have the employees' authority to pay them to particular funds or lacks other required details of the employees.

### Recommendation 119

The Australian Taxation Office be empowered to notify an employee that it intends to pay moneys held on behalf of that employee to the fund of which that employee is a member unless the employee advises otherwise. (The object of this recommendation will be implemented if the *Superannuation Legislation Amendment Bill 2002*, currently before the Commonwealth Parliament is enacted.)

Chapter 15 – Superannuation contributions – compliance

### Issue

There are uncertainties about the lawfulness of the provision of information by superannuation funds operating in the building and construction industry to third parties concerning the contributions made by persons to the funds.

### Recommendation 120

The Commonwealth consult with the superannuation industry to ensure that superannuation funds operating in the building and construction industry review their policies and practices so that the provision of information to third parties is consistent with any requirements of confidentiality and privacy attaching to member information.

Chapter 15 – Superannuation contributions – compliance

### Issue

Questions have been raised in the Commission's hearings about whether procedures used by organisations and others to collect unpaid superannuation contributions in the building and construction industry which, when collected are then paid to industry funds, are proper and lawful.

### Recommendation 121

The Commonwealth consult with the superannuation industry to ensure that superannuation funds operating in the building and construction industry review their policies and practices to ensure that only lawful means are used to recover unpaid employer contributions.

Chapter 15 – Superannuation contributions – compliance

### Issue

Persons in the building and construction industry making complaints to the Australian Taxation Office about non-payment of the contributions required by the Superannuation Guarantee legislation do not always receive a response informing them of the action taken by the Australian Taxation Office. This is due to the secrecy or confidentiality provisions of relevant legislation.

### Recommendation 122

The Australian Taxation Office ensure that persons in the building and construction industry making complaints about non-payments of superannuation contributions receive a response stating in reasonable detail the outcome of the complaint.

### Recommendation 123

The Commonwealth amend the secrecy or confidentiality provisions in relevant legislation to permit such responses by the Australian Taxation Office.

Chapter 15 – Superannuation contributions – compliance

## Issue

The evidence, including evidence provided by the Australian Taxation Office, establishes that there is significant evasion of income tax by persons and entities in the building and construction industry. Since 1998, the Australian Taxation Office has recovered over $370 million in unpaid tax in the industry. In the case of the detection of phoenix company activity, for every $1 spent by the Australian Taxation Office between 1 July 2001 and 30 June 2002, $8 in revenue was raised and for every $1 spent on general building and construction matters $6 in revenue was raised. While the legislation governing the administration of income tax applies to the entire community, there are aspects of taxation law, particularly the Alienation of Personal Services Income legislation, the Australian Business Number System and matters relating to fraudulent phoenix company activity, of particular relevance to the building and construction industry. I have therefore made recommendations to address matters concerning the income tax system and its administration of relevance to the building and construction industry.

### Recommendation 124

The Commonwealth consider providing increased funding to the Australian Taxation Office for additional resources to be utilised for compliance activities in the building and construction industry.

### Recommendation 125

The Australian Taxation Office consider dedicating additional resources to audit, monitor and review compliance by the building and construction industry with the Alienation of Personal Services Income legislation.

### Recommendation 126

The Australian Taxation Office review the impact of the Alienation of Personal Services Income legislation for the year ended 30 June 2003 (following 12 months of operation within the building and construction industry) and critically examine the results of the review to determine the effectiveness of the legislation in ensuring contractors in the building and construction industry comply with their taxation obligations.

Chapter 16 – Taxation obligations – evasion

### Issue

There appear to be justified concerns about the use of Australian Business Numbers in the building and construction industry. There are suggestions that Australian Business Numbers are misused to justify the treatment of persons, who hold Australian Business Numbers but who are employees, as contractors.

### Recommendation 127

Senior Australian Taxation Office staff responsible for the oversight of the Australian Business Number system implement an auditing process of Australian Business Numbers issued to persons participating in the building and construction industry.

### Recommendation 128

The Australian Taxation Office provide an opportunity for persons and businesses in the building and construction industry holding Australian Business Numbers, to which they are not entitled, to surrender them without penalty.

### Recommendation 129

The Australian Taxation Office increase its educative activities within the building and construction industry to endeavour to ensure that industry participants, at all levels, understand their taxation obligations and the purpose of Australian Business Numbers.

Chapter 16 – Taxation obligations – evasion

### Issue

The evidence, including evidence provided by the Australian Taxation Office, establishes that significant taxation revenue is lost by fraudulent phoenix company activity in the building and construction industry. This question is the subject of a chapter, *Phoenix Companies* contained in Volume 8, *Reform – National Issues Part 2*, of this report. Two areas that require consideration in the context of the evasion of taxation in the building and construction industry are the extent to which members of a group of companies should be jointly and severally liable for the taxation debts of the other group members and the opportunity directors of phoenix companies have to avoid the consequences of a Director's Penalty Notice issued under the *Income Tax Assessment Act 1936 (C'wth)* by placing the company of which they are a director into voluntary administration or liquidation.

### Recommendation 130

The Commonwealth and the Australian Taxation Office consider, as a matter of priority, the utility for the building and construction industry of an amendment to the *Income Tax Assessment Act 1936 (C'wth)* in the form of s16LA of the *Payroll Tax Act 1971 (NSW)* making all the members of a group jointly and severally liable for the taxation debts of other group members.

### Recommendation 131

The Commonwealth and the Australian Taxation Office consider, as a matter of priority, the utility for the building and construction industry of an amendment to s222AOB of the *Income Tax Assessment Act 1936 (C'wth)* to remove the right of a director of a phoenix company involved in fraudulent activity to avoid the consequences of a Director's Penalty Notice by placing the company into voluntary administration or into liquidation.

Chapter 16 – Taxation obligations – evasion

### Issue

The evidence establishes that there has been a lack of exchange of information by Government agencies, Commonwealth, State and Territory, involved in the investigation of fraudulent activity affecting public revenue in the building and construction industry.

### Recommendation 132

The Australian Taxation Office enhance or establish its links with and, to the greatest degree possible, share information relevant to the detection of tax evasion in the building and construction industry with relevant Commonwealth, State and Territory government agencies.

### Recommendation 133

The Commonwealth, after consultation with the Australian Taxation Office and the Australian Securities and Investments Commission, amend relevant legislation to permit Commonwealth agencies to provide, subject to appropriate safeguards, information relevant to the detection of tax evasion in the building and construction industry to State and Territory revenue authorities and workers compensation authorities.

### Recommendation 134

The Commonwealth discuss with the States and Territories the steps that they might take to obtain the amendment of relevant State and Territory legislation to permit State and Territory revenue authorities and workers compensation authorities to provide, subject to appropriate safeguards, the Australian Taxation Office with information relevant to the detection of tax evasion in the building and construction industry.

Chapter 16 – Taxation obligations – evasion

## Issue

The community consultation currently undertaken by the Australian Taxation Office in respect of the building and construction industry does not include any formal means of consultation with unions which may have information relevant to the detection of tax evasion in that industry.

### Recommendation 135

(a) The Australian Taxation Office establish a Building and Construction Industry Forum:

  (i) to examine taxation issues of significance to the building and construction industry including phoenix company activity; and

  (ii) to develop workable solutions to the issues and problems identified, including where necessary proposals for taxation policy changes and legislative amendments.

(b) Membership of the Building and Construction Industry Forum should include representatives of all major industry participants including unions and employer organisations.

Chapter 16 – Taxation obligations – evasion

## Issue

The *Trade Practices Act 1974 (C'wth)* has significant implications for activity in the building and construction industry. There are industry wide agreements made in the building and construction industry in Victoria and Tasmania, and until 1 January 2003, in Queensland. The question of whether such industry agreements made in the building and construction industry between head contractors and unions breach the *Trade Practices Act 1974 (C'wth)* is important and can only be answered after a detailed examination of relevant facts.

## Recommendation 136

The Australian Competition and Consumer Commission investigate whether the industry agreements in the building and construction industry in Victoria, Queensland and Tasmania breach or have breached the *Trade Practices Act 1974 (C'wth)*.

Chapter 17 – *Trade Practices Act 1974 (C'wth)* – Implications for activity in the building and construction industry

## Issue

While the Commonwealth, States and Territories have agreed to model legislation to underpin structured training, industrial relations impediments continue to adversely affect the implementation of agreed arrangements.

An incorrect perception has permeated the training sector that building and construction industry training must fit into an outmoded, inflexible industrial relations model. Vocational education and training policy makers appear to have misconstrued the purpose of tripartite arrangements in the development of a nationally consistent training system. The unions and employers should be encouraged to support and be involved with the development of training policy and products. They should be involved in negotiating and determining conditions of employment relating to training, for example leave and hours of work. However they should be discouraged from using training as an instrument to pursue an industrial relations agenda.

### Recommendation 137

The Commonwealth through the Department of Employment and Workplace Relations prepare a paper for the consideration of the ANTA Ministerial Council:

(a) outlining the issues raised in submissions to the Royal Commission, pertaining to impediments to the implementation of Training Packages in the building and construction industry caused by industrial relations issues and occupational licensing requirements across jurisdictions, including those impacting on:

  (i) apprenticeship training; and

  (ii) traineeship training;

(b) identifying methods of addressing these issues; and

(c) including a critical analysis of the option of limiting Commonwealth funding to the delivery of nationally endorsed building and construction competencies for training, where nationally endorsed competencies are available.

Chapter 18 – Training in the building and construction industry

## Issue

The guidelines for funding vocational education and training (VET) skill centres require that industry must contribute half of the proposed costs. There should be mechanisms in place to ensure that the Commonwealth is provided with documentary evidence that industry contributions have been collected and that the methods used comply with the intent of the *VET Funding Act 1992 (C'wth)*. The Commission heard evidence of instances of failure by Commonwealth and State agencies to ensure compliance with the conditions under which grants are made.

### Recommendation 138

(a) The Commonwealth request an independent audit, preferably overseen by the Australian National Audit Office, of past funding arrangements for all building and construction industry related skill centres that have received Commonwealth funding through the Australian National Training Authority.

(b) This audit be undertaken within six months of the recommendation being approved.

(c) The findings of the audit be:

  (i) presented to the ANTA Ministerial Council through the Australian National Training Authority (ANTA);

  (ii) made public; and

  (iii) inform the Commonwealth's future funding of building and construction skill centres under the Skills Centre Program.

Chapter 18 – Training in the building and construction industry

### Issue

Data are not available to adequately inform training policy and planning decisions by government or industry in relation to the building and construction industry.

### Recommendation 139

The Commonwealth, through the Australian National Training Authority, identify a method of determining:

(a) an accurate measure of the value of funds provided by the Commonwealth, States, Territories and industry in the building and construction industry; and

(b) whether there is an appropriate balance between public sector and industry funding for training in the building and construction industry to increase productivity in the industry. This information should be published regularly.

Chapter 18 – Training in the building and construction industry

### Issue

Because the various vocational education and training jurisdictions adopt differing definitions for structured training, it is impossible to obtain data required for training needs analysis on an Australia-wide basis.

### Recommendation 140

The Australian National Training Authority seek a revised agreement from the States and Territories on consistent terminology for apprentices and trainees in the building and construction industry, following input from industry stakeholders.

Chapter 18 – Training in the building and construction industry

### Issue

The industrial relations arrangements, that should follow new forms of training, should include wage rates that reflect the skill levels of trainees. The determination of suitable rates that can then underpin collective and individual bargaining should diminish resistance to the introduction of school-based apprenticeships and traineeships by those in the building and construction industry with an industrial relations agenda.

### Recommendation 141

The Commonwealth take steps to facilitate the introduction of wage structures and conditions that encourage the adoption of school-based apprenticeships and traineeships.

Chapter 18 – Training in the building and construction industry

### Issue

All governments should encourage the employment of apprentices and trainees on government-funded projects in the building and construction industry.

### Recommendation 142

(a) The Commonwealth implement a policy aimed at increasing the employment of apprentices and trainees working on publicly funded building and construction projects. (This policy should be informed by existing State and Territory policies.)

(b) Compliance with the Commonwealth policy be monitored by the Commonwealth department responsible for vocational education and training with an annual report on its implementation.

Chapter 18 – Training in the building and construction industry

## Issue

Other than in administrative and clerical positions, women are under-represented at all levels of the building and construction industry. The explanations for the low levels of participation by women are both structural and cultural.

A range of strategies is required if the levels of representation of women in the building and construction industry are to increase. Those strategies include:

(a) encouraging women to enter engineering degree courses and to undertake apprenticeships;

(b) making curricula for training courses relating to the industry more relevant to women;

(c) encouraging training schemes and support groups that support the entry of women workers to the industry;

(d) enhancing opportunities for part-time work and job-sharing and child-care facilities, and focussing on other issues found to cause resistance to the employment of women in the industry, including consideration of maternity leave, equal pay, equal career opportunities, structured mentoring and equal opportunity programs;

(e) fostering greater teamwork and recognition of different skill sets, discouraging stereotyping and promoting the benefits of balancing home and work life, in the workplace;

(f) education in relation to, and enforcement of, sex discrimination and harassment laws;

(g) including in Codes of Practice for the industry provisions that increase the employment of women on building and construction projects; and

(h) governments refusing to deal with companies which contravene sex discrimination and harassment laws.

## Recommendation 143

The Australian Building and Construction Commission, as part of its educative function, be empowered to encourage and monitor strategies to increase the representation of women at all levels in the building and construction industry.

### Issue

A great deal of evidence was presented to the Commission of occasions when, following a period of unprotected industrial action:

(a) employees demanded strike pay in respect of the period of industrial action;

(b) unions, or officers, members or employees of unions, made a claim for employers to pay strike pay to employees in respect of such a period; and

(c) employers paid strike pay to employees in respect of such a period.

Paying, receiving and demanding strike pay in these circumstances contravenes ss187AA and 187AB of the *Workplace Relations Act 1996 (C'wth)*. Those provisions are widely disregarded in the building and construction industry.

One senior union official told the Commission, in relation to strike pay, 'every time there's been a strike, I've asked for it'. Strike payments are sometimes concealed, disguised or misrepresented in invoices and records.

Widespread disregard for laws of the Commonwealth Parliament should not be tolerated.

The solution is to provide an incentive for participants in the industry to comply with the law, and penalties that deter those who would be disposed to contravene it.

### Recommendation 144

(a) The Building and Construction Industry Improvement Act impose an obligation on employers to notify the Australian Building and Construction Commission of the substance of any demand or claim to make a payment to an employee in relation to a period during which the employee engaged or engages in industrial action.

(b) Employers be required to notify the substance of the demand or claim to the Australian Building and Construction Commission within 24 hours.

(c) Failure to notify the Australian Building and Construction Commission attract a substantial civil penalty.

Chapter 21 – Unlawful and inappropriate payments

## Issue

Evidence presented to the Commission established that 'donations' are regularly made by contractors in the building and construction industry to or at the direction of unions. 'Donations' may be made for the direct benefit of the union, such as for the purposes of a union picnic day, or may be for the benefit of a third party, such as a bereavement fund for families of deceased workers or a charity. Some such payments are genuine donations. Many others are not. In each case, they are frequently made in the expectation of securing industrial peace or of averting industrial disruption.

There is nothing wrong with a union asking a client or contractor to make a genuine donation to a worthwhile cause, or with a client or contractor making such a donation. The position is different, however, where a payment is not made freely and voluntarily. In the building and construction industry, the evidence suggests that 'donations' are often made out of fear that not donating will lead to industrial unrest or some other adverse consequence.

Section 269 of the *Workplace Relations Act 1996 (C'wth)* imposes on organisations registered under that Act an obligation, as soon as practicable after the end of each financial year, to lodge in the Industrial Registry a statement showing particulars of each loan, grant or donation made by the organisation during that financial year that exceeded $1000. There is no obligation to report individual donations made to the organisation.

Disclosure is an important tool in discouraging unlawful and inappropriate practices and conduct. Union representatives would be less likely to suggest or promise that industrial unrest or some other adverse consequence would be averted if a 'donation' is made to the union if they know that such donations must be included in statements of the organisation that might be scrutinised by a third party. Clients and contractors would be more likely to resist inappropriate demands for payments if they know that such payments will come to the attention of a regulatory body.

The threshold for reporting donations should be set at $500. For many smaller subcontractors, payments of that magnitude represent a considerable impost. For a union, the obligation to record and report donations of $500 or more should not prove onerous.

## Recommendation 145

The Building and Construction Industry Improvement Act require registered organisations, as soon as practicable after the end of each financial year, to lodge with the Industrial Registrar a statement showing the following particulars in relation to each donation exceeding $500 received by the organisation during that financial year:

(a) the amount of the donation;

(b) the purpose for which the donation was made; and

(c) the name and address of the person who made the donation.

### Recommendation 146

Registered organisations be required to lodge copies of the statements referred to in Recommendation 145 with the Australian Building and Construction Commission to assist it in its function of monitoring compliance with and enforcing the law.

### Recommendation 147

The Building and Construction Industry Improvement Act require clients, head contractors and subcontractors to notify promptly the Australian Building and Construction Commission of any request or demand that a donation exceeding $500 be made to, or at the direction of, a registered organisation or an official, employee, delegate or member of a registered organisation.

### Recommendation 148

Substantial civil penalties apply where it is proved that:

(a) a registered organisation failed to report a donation to the Industrial Registrar or the Australian Building and Construction Commission as required; or

(b) a client, head contractor or subcontractor failed to notify the Australian Building and Construction Commission as required of a request or demand that a donation exceeding $500 be made to, or at the direction of, a registered organisation or an official, employee, delegate or member of a registered organisation.

Chapter 21 – Unlawful and inappropriate payments

## Issue

The maximum penalties which currently apply in the *Workplace Relations Act 1996 (C'wth)* for contraventions of provisions attracting a civil penalty are $10 000 for a body corporate and $2000 in other cases.

Building and construction projects frequently have values of tens or hundreds of millions of dollars. Liquidated damages clauses and other commercial factors have led to an environment in which exposure to civil penalties of $10 000 for bodies corporate or $2000 in other cases offers no deterrent at all to unlawful conduct in the building and construction industry.

If the rule of law is to be restored to the industry, much more substantial maximum penalties must be available in cases where serious contraventions of the law are proved.

## Recommendation 149

The maximum penalty for non-compliance with the following obligations in the Building and Construction Industry Improvement Act be set at $100 000 for a body corporate and $20 000 in other cases:

(a) failure by an employer to notify the Australian Building and Construction Commission of any demand or claim for payment to an employee in relation to a period during which the employee engaged or engages in industrial action, within 24 hours of receiving that demand or claim;

(b) failure by a registered organisation to include all donations exceeding $500 received by the organisation in a statement lodged with the Industrial Registrar and the Australian Building and Construction Commission as soon as practicable after the end of each financial year; and

(c) failure by a client, head contractor or subcontractor to notify the Australian Building and Construction Commission of any request or demand that a donation exceeding $500 be made to, or at the direction of, a registered organisation or an official, employee, delegate or member of a registered organisation.

Chapter 21 – Unlawful and inappropriate payments

## Issue

The Commission received submissions and heard evidence concerning non compliance with workers compensation obligations in the building and construction industry, principally in the areas of underestimation of workers' remuneration and nomination of incorrect tariffs. There was substantial evidence of non compliance. While the evidence related to State and Territory systems, it has significance for the building and construction industry. Those employers who do comply with workers compensation obligations subsidise those who do not. Those who do not comply can tender for projects at a lower rate. Those who do not pay any premiums have no incentive to adopt safe work practices to keep their premium ratings.

The Commonwealth should take the lead in encouraging States and Territories to introduce measures which will lessen non compliance with workers compensation obligations in the building and construction industry. My recommendations concerning workers compensation premiums contain measures that the Commonwealth can propose to the States and Territories for their consideration. Because workers compensation is mostly governed by legislation which applies to all industries, amendments which will benefit the building and construction industry need to be made to that legislation.

Quarterly payment of workers compensation premiums may be of assistance in the building and construction industry where some businesses will have a short existence. Imposing liability on head contractors for workers compensation premiums not paid by subcontractors when the head contractor has not received a written statement that the premiums have been paid, as is the case under recent New South Wales legislation, will make it more likely that subcontractors will pay their premiums.

## Recommendation 150

The Commonwealth propose to the States and Territories that they consider:

(a) legislation requiring workers compensation premiums in the building and construction industry to be paid quarterly in jurisdictions where there is currently no such provision; and

(b) enacting legislation modelled on s175B of the *Workers Compensation Legislation Amendment Act 2002 (NSW)*, in jurisdictions where there is no such provision, to make a principal contractor liable for workers compensation premiums not paid by a subcontractor in respect of the current project unless the subcontractor supplies the principal contractor with a statement advising that appropriate workers compensation premiums have been paid.

Chapter 22 – Workers compensation premiums

### Issue

The sharing of data by revenue authorities and workers compensation insurers is important in the detection of avoidance of obligations in the building and construction industry. Consideration should be given to the modification of legislative restrictions on the sharing of information by revenue authorities and workers compensation authorities relevant to the detection of the avoidance of workers compensation obligations.

### Recommendation 151

The Commonwealth discuss with the States and Territories appropriate methods of permitting their workers compensation authorities to share information with revenue authorities relevant to the detection of avoidance of obligations in the building and construction industry.

### Recommendation 152

The Commonwealth consider as a matter of priority giving State and Territory workers compensation authorities access to relevant information in Business Activity Statements filed with the Australian Taxation Office for the purpose of detection of non-compliance with obligations in the building and construction industry, subject to safeguards against the information being used for a purpose other than for which it was provided.

Chapter 22 – Workers compensation premiums

### Issue

The harmonisation of the key definitions of the various Commonwealth, State and Territory workers compensation systems, particularly of the definition of 'worker', in the different jurisdictions is an important object, particularly in the building and construction industry where many large contractors operate nationally. The harmonisation of key definitions was addressed in the *Review of Employers' Compliance with Workers Compensation Premiums and Pay-roll Tax in NSW* report published in 2002. Harmonisation of key definitions will enhance the clarity of obligations in the building and construction industry.

### Recommendation 153

The Commonwealth encourage the States and Territories to continue efforts together with the Commonwealth to harmonise between jurisdictions the key definitions of the various workers compensation systems, particularly the definition of 'worker'.

Chapter 22 – Workers compensation premiums

## Issue

The Commission heard considerable evidence and received submissions concerning the mechanisms available to workers in the building and construction industry to recover unpaid entitlements.

It is of particular importance that workers receive their lawful entitlements and have adequate mechanisms to recover them when they are not paid. For most workers, their entitlements to wages and associated benefits are their major source of financial support. Disputes about non payment of entitlements are a cause of industrial disputation. In addition, businesses that do not pay the proper entitlements gain an illegitimate advantage over those that do.

Whilst unions have long played a role in connection with employees' entitlements, in recent years Government agencies responsible for the recovery of employees' entitlements appear to have played little role in connection with the commercial sector of the building and construction industry. I have made recommendations to address this (see Recommendations 157–160).

The hearing of such claims in small claims jurisdictions and Magistrates' Courts should be encouraged (see Recommendation 161).

The Commission heard evidence of the increase in the use of contractors, including labour only contractors, in the building and construction industry and allegations of high levels of sham subcontracting. Contractors have infrequent access to Government agencies to assist in the recovery of their entitlements.

I have made recommendations concerning the need for workers, including labour only contractors earning less than $50 000 per annum, to have access to advice and, where appropriate, representation by Government agencies in the recovery of their entitlements.

Contractors, including labour-only contractors, form a large sector of the building and construction industry. There is a need for an effective and affordable legal remedy for contractors in the building and construction industry faced with unfair contracts.

### Recommendation 154

The Building and Construction Industry Improvement Act provide that the jurisdiction conferred on the Federal Court by s127A, s127B and s127C of the *Workplace Relations Act 1996 (C'wth)* also be conferred upon the Federal Magistrates' Court in the case of matters arising in or in connection with the building and construction industry.

### Issue

Labour-only contractors in the building and construction industry, in most jurisdictions, do not have access to the services of a Government agency to advise or assist them in the collection of unpaid entitlements.

### Recommendation 155

The Commonwealth, through the Australian Building and Construction Commission and the Department of Employment and Workplace Relations through its workplace services function, provide a service in connection with the recovery of unpaid entitlements for labour-only subcontractors in the building and construction industry whose annual earned income does not exceed $50 000.

### Recommendation 156

The Commonwealth encourage the States and Territories, that do not already do so, to provide a service in connection with the recovery of unpaid entitlements by labour-only subcontractors in the building and construction industry whose annual earned income does not exceed $50 000.

Chapter 23 – Workers' entitlements and working arrangements

### Issue

For most workers their entitlements to wages and associated benefits are likely to be their major source of financial support. It is important that workers have an effective government system available to them for the recovery of entitlements.

### Recommendation 157

The Commonwealth, through the Australian Building and Construction Commission and the Department of Employment and Workplace Relations through its workplace services function adopt a greater role in the enforcement of employee entitlements in the building and construction industry, including by conducting regular random inspections of employers' time and wages records and publicise the role that they play in the industry.

### Recommendation 158

The Commonwealth encourage the States and Territories to adopt a greater role, through their respective departments and agencies, in the enforcement of employee entitlements in the building and construction industry, including by conducting regular random inspections of employers' time and wages records and publicise the role that they play in the industry.

Chapter 23 – Workers' entitlements and working arrangements

## Issue

Many claims by employees for unpaid entitlements in the building and construction industry are made by workers who may be unable to afford the cost of litigation.

### Recommendation 159

The Commonwealth take the necessary steps so that the Australian Building and Construction Commission, and the Department of Employment and Workplace Relations through its workplace services function and those State agencies which provide advisory and compliance services to the Commonwealth in connection with employee entitlements, provide advice and where appropriate representation for all employees in the building and construction industry in respect of genuine claims for unpaid entitlements arising under Commonwealth awards, agreements or industrial instruments.

### Recommendation 160

The Commonwealth encourage State and Territories, where they do not do so already, to provide advice and where appropriate representation for all employees in the building and construction industry in respect of genuine claims for unpaid entitlements owing under State awards, agreements industrial instruments or common law contracts.

### Recommendation 161

The Building and Construction Industry Improvement Act provide that for the purposes of matters arising in or in connection with the building and construction industry the maximum amount of any claim brought under the small claims procedure contained in s179D of the *Workplace Relations Act 1996 (C'wth)* be $25 000.

### Recommendation 162

The Building and Construction Industry Improvement Act provide that for the purposes of proceedings brought under Part VIII of the *Workplace Relations Act 1996 (C'wth)* arising in or in connection with the building and construction industry the definition of court of competent jurisdiction in s177A in the *Workplace Relations Act 1996 (C'wth)* include the Federal Magistrates' Court.

Chapter 23 – Workers' entitlements and working arrangements

### Issue

The importance of workers in the building and construction industry having effective legal mechanisms available to them to recover unpaid entitlements justifies ongoing monitoring of the mechanisms available to them.

### Recommendation 163

The Australian Building and Construction Commission monitor the availability and efficiency of mechanisms available to employees in the building and construction industry to recover unpaid entitlements and report to the Minister for Employment and Workplace Relations any changes that would improve those recovery mechanisms at the Commonwealth level, or that the Commonwealth might encourage States or Territories to make.

Chapter 23 – Workers' entitlements and working arrangements

### Issue

The traditional common law definition of the term 'employee' has been affected by statutory definitions adopted for various purposes. This has led to uncertainty, particularly in the building and construction industry where there is a significant group of labour-only contractors. Working arrangements constantly raise the question of whether a person is an 'employee'. There have been calls for a uniform definition of 'employee'. Whilst a definition for all purposes is impractical, a uniform definition for employee entitlement purposes would be of assistance in the building and construction industry in which major contractors operate nationally.

### Recommendation 164

The Commonwealth encourage the Workplace Relations Ministers' Council to foster the development of a uniform definition of 'employee' for employee entitlement purposes in the building and construction industry.

Chapter 23 – Workers' entitlements and working arrangements

## Issue

It is important that there be adequate penalties in legislation applicable to the building and construction industry to deter employers from deliberately failing to pay employees their lawful entitlements.

The current penalties provided in s178 of the Workplace Relations Act 1996 (C'wth) for breaches of awards, certified agreements and orders under s111(1)(e) are not adequate deterrents against breaches by employers, unions or others bound by them.

## Recommendation 165

(a) The Building and Construction Industry Improvement Act provide that for the purposes of proceedings brought under s178 of the *Workplace Relations Act 1996 (C'wth)* in or in connection with the building and construction industry the maximum penalty provided for in s178(4) and s178(4A) be $100 000 in the case of body corporate and $20 000 in any other case.

(b) The Commonwealth encourage the States to review the level of penalties in their legislation applicable to the breach of awards or agreements by employers not paying employee entitlements in the building and construction industry.

Chapter 23 – Workers' entitlements and working arrangements

# Volume 10

# Reform – Funds

### Issue

Employee associations enjoy many privileges under industrial legislation. In particular, they may engage in protected action against employers on behalf of their members and thus cause irrecoverable loss. They also have, and often use, the capacity to cause great financial loss through unlawful industrial action. That loss is recoverable. The assets of the union should be available to meet such losses. Assets should not be able to be 'quarantined' so as to defeat creditors, and those to whom the union has caused loss.

### Recommendation 166

Legislation be enacted to prohibit employee associations from directing income or assets of that employee association to any person or body where the effect is, or might be, to put that income or those assets beyond the reach of creditors of that employee association. All assets and liabilities, income and expenses of an employee association should be required to be declared in consolidated accounts of that employee association. Registration conditions under the *Workplace Relations Act 1996 (C'wth)* and equivalent State legislation may be a suitable means of implementing this recommendation.

Chapter 1 – Overview

### Issue

Employers are required under long service leave legislation to contribute to long service schemes for the purpose of funding their employees' long service entitlements, yet much of the money contributed, or raised from capital investment of the long service leave fund, is used for other purposes. Money compulsorily acquired should be used for the purpose for which it is collected.

### Recommendation 167

The Commonwealth encourage the States and Territories to ensure that moneys held or received by long service leave funds should be used only for the purpose of paying employees' long service leave entitlements.

Chapter 12 – Long service leave funds in the building and construction industry

## Issue

Redundancy funds were set up for the benefit of employees to ensure payment of entitlements in the event of redundancy. They should operate solely for the benefit of employees. With the exception of the Australian Construction Industry Redundancy Trust (ACIRT), they instead provide significant income streams for others. Other funds distribute surpluses for training, or to sponsors or their nominees.

At present, surpluses from ACIRT are distributed annually as additional income to employee members irrespective of redundancy. Surpluses should either be credited to member employees' accounts to be applied towards meeting redundancy entitlements and payable only in the event of redundancy or, if funds held are sufficient to meet redundancy obligations, used to reduce any contributions required.

## Recommendation 168

(a) Surpluses in redundancy funds either be credited to the employee members' accounts to be payable only in the event of redundancy or, if funds held are sufficient to meet redundancy obligations, used to reduce any contributions required.

(b) The distribution of surpluses in accordance with this recommendation should be a prerequisite for a redundancy fund being prescribed as a fund exempt from fringe benefits tax.

Chapter 13 – Redundancy in the building and construction industry

### Issue

Redundancy funds have matured throughout Australia to become a significant component of the industry's financial structure. Approximately $500 million is currently under management yet they function without any prudential control. The repercussions would be enormous should any of these funds diminish or collapse for reasons of mismanagement, misappropriation or abuse. The opportunity for any of these events to occur is manifest.

### Recommendation 169

Legislation be enacted to implement a uniform system of financial reporting, external auditing, actuarial assessment and annual reporting to a prudential authority for redundancy funds. The systems presently applying for superannuation and long service leave funds should be points of reference. Documents produced, in compliance with the legislation, be public documents.

### Recommendation 170

Compliance with those requirements be a prerequisite to a redundancy fund being prescribed as a fund exempt from fringe benefits tax.

Chapter 13 – Redundancy in the building and construction industry

### Issue

The Commission found that employer and employee associations often receive income from arrangements entered into for the provision of income protection insurance, either generally or as a consequence of pattern agreements. Non-disclosure of commissions or other benefits to be received by any party to an industrial agreement, arising from that agreement, during the course of agreement negotiations may amount to unlawful conduct. Parties should disclose all benefits to be received or the benefit should not be obtained.

### Recommendation 171

The proposed obligation to genuinely bargain in the Building and Construction Industry Improvement Act include the requirement that there be full disclosure, in writing, of any direct or indirect financial benefit that may by derived by any negotiating party to an industrial agreement from any term sought in the enterprise bargaining agreement, such as commissions or other income (see also Recommendation 8).

Chapter 14 – Income protection insurance in the building and construction industry

## Issue

Registered organisations that receive income by way of commission, management or 'spotter's' fees arising from insurance arrangements established to provide benefits to employees or their members should identify each separate commission in their published accounts. This should especially be the case where such arrangements are actively promoted by them in industrial agreements. Transparency is necessary. Members and others reading such accounts should be able to see the extent of commissions, from whom they are received, and the reason for the payments.

The *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002 (C'wth)* will require registered organisations to prepare general purpose financial reports and operating reports in accordance with Australian Accounting Standards. The Industrial Registrar will issue reporting guidelines which will specify information required in notes to general purpose financial reports; the form and content of any reports or statements forming part of the general purpose financial reports and other requirements in relation to the disclosure of information as the Industrial Registrar considers appropriate.

## Recommendation 172

(a) To the extent that it is necessary, the reporting guidelines issued by the Industrial Registrar include a requirement that a reporting unit disclose all commissions and other benefits received, directly or indirectly:

  (i) by that reporting unit; and

  (ii) by any officer, member or employee of that reporting unit where a commission or benefit was received in their capacity as an officer, member or employee of that reporting unit.

(b) Disclosure shall include details of:

  (i) the source of all such commissions and benefits; and

  (ii) the reason for receipt of such commissions and benefits.

## Issue

Case studies examined by the Commission found that significant income derived by a union was transferred into two trusts established by it. The audited accounts of that union for the year ended 30 December 2000, filed in the Industrial Registry, were not consolidated accounts and did not include the financial statements of the two trusts.

The *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002 (C'wth)* will require registered organisations to prepare general purpose financial reports and operating reports in accordance with Australian Accounting Standards. It is important that adherence to the new financial reporting requirements of the *Workplace Relations Act 1996 (C'wth)*, when commenced, be monitored by the relevant authorities.

## Recommendation 173

(a) The Industrial Registrar prepare a report as soon as possible after the end of each financial year addressing the completeness of the financial and operating reports prepared by reporting units of registered organisations with coverage in the building and construction industry. Such a report be based on information provided in financial and operating reports provided to the Industrial Registry pursuant to the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002 (C'wth)* and note the extent of compliance with the requirements of that Act by each such reporting unit.

(b) The Industrial Registrar provide the report to the Minister for Employment and Workplace Relations and to the Australian Building and Construction Commission.

Chapter 14 – Income protection insurance in the building and construction industry

## Issue

Industrial agreements within the building and construction industry generally require contributions be paid into a specified superannuation fund or scheme. Some agreements allow for a choice of superannuation fund or scheme, some do not. Whether or not an agreement provides for choice, the fact is that industrial and commercial pressure is brought to bear on employers in the building and construction industry to compel contributions to funds favoured by unions.

Superannuation is for the retirement welfare of the individual worker. Employees in the building and construction industry should therefore be able to exercise true choice between complying superannuation funds into which their employer is to make contributions on their behalf. Such choice should not be constrained by award or industrial agreement requirements and should not be influenced by commercial or industrial pressures from third parties. The right to that choice outweighs any administrative inconvenience to the employer.

Enactment of the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002 (C'wth) will protect the right of employees to choose their own superannuation fund or scheme. However, such legislation will not prohibit clauses in enterprise bargaining agreements and other industrial arrangements which restrict the choice of fund. Legislation proscribing this in the building and construction industry is necessary.

## Recommendation 174

The Building and Construction Industry Improvement Act provide that the Australian Industrial Relations Commission not certify any industrial agreement or instrument or make any award which restricts the choice of superannuation funds or schemes available to an employee, or requires an employer to make contributions on behalf of an employee to a particular superannuation fund or scheme.

### Issue

The Commission received evidence of industrial and commercial pressure being brought to bear on employers in the building and construction industry to compel contributions to superannuation funds or schemes favoured by unions. Seeking to influence an employee's choice of superannuation fund or scheme, or to compel an employer to contribute to a specified fund or scheme through the use of coercion, threats or intimidation should render a person liable to a civil penalty under Commonwealth law.

### Recommendation 175

The Building and Construction Industry Improvement Act provide that:

(a) a person shall not, by threat of industrial action, coercion or other form of intimidation, persuade or attempt to persuade:

  (i) an employee or prospective employee to nominate a particular superannuation fund or scheme; or

  (ii) an employer to make contributions to a particular superannuation fund or scheme on behalf of an employee; and

(b) a person contravening this provision be liable to a civil penalty.

Chapter 15 – Superannuation in the building and construction industry

### Issue

Officials of unions and employer associations are often also directors of industry superannuation, long service leave, redundancy or other industry funds. There is a risk of conditions impinging upon freedom of association and freedom of bargaining between employer and employees being attached to the provision of development moneys by industry funds, if those directors do not keep distinct their two functions and roles. The prospect of conflict of interest is very real.

### Recommendation 176

The Australian Building and Construction Commission be authorised to monitor projects where development funds are provided by building and construction industry superannuation, long service leave, redundancy or other industry funds to ensure that conditions are not attached to such loans or equity interests which infringe provisions of the Building and Construction Industry Improvement Act or the *Workplace Relations Act 1996 (C'wth)*.

Chapter 15 – Superannuation in the building and construction industry

# Volume 11

# Reform – Achieving Cultural Change

## 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.

Chapter 1 – Achieving cultural change

### 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

## 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

### 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

### 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

### 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)*.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

### 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

## 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

### 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

### 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

### 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

### 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

### 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

### 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

### 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

### 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.

Chapter 3 – The Australian Building and Construction Commission – National taskforce

### 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.

Chapter 5 – Industrial action

## 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.

### 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.

Chapter 6 – A new statutory norm

### 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.

Chapter 7 – Compensation for unlawful industrial action causing loss

### 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.

Chapter 7 – Compensation for unlawful industrial action causing loss

### 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.

Chapter 7 – Compensation for unlawful industrial action causing loss

## 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).*

Chapter 7 – Compensation for unlawful industrial action causing loss

## 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.

Chapter 7 – Compensation for unlawful industrial action causing loss

## 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.

Chapter 8 – Damages

## 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.

Chapter 8 – Damages

## 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.

### 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.

Chapter 8 – Damages

### 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.

Chapter 9 – Cancellation of registration

## 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.

Chapter 9 – Cancellation of registration

## Notes to Summary of findings and recommendations

1 Multifactor productivity measures are calculated for the 'market sector', a special industry grouping comprising the following industries: Agriculture, Forestry, and Fishing; Mining; Manufacturing; Electricity, Gas and Water; Construction; Wholesale Trade; Retail Trade; Accommodation, Cafes and Restaurants; Transport and Storage; Communication Services; Finance and Insurance; and Cultural and Recreational Services. This industry grouping relates broadly to marketed activities for which there are satisfactory estimates of the growth in the volume of output.

2 Some instances of the types of conduct set out below, drawn from the case studies in the Hearings Volumes (Volumes 13-21), are provided.

3 Eastlands Cinema Project case study (Tas).

4 Kenoss Contractors Pty Ltd case study (ACT).

5 Kenoss Contractors Pty Ltd case study (ACT).

6 A J Bignell Pty Ltd case study (NSW); Eastlands Cinema Project case study (Tas); Hobart Private Hospital Redevelopment Project case study (Tas).

7 The Nambour Hospital Dispute case study (Qld).

8 Lavarack Barracks case study (Qld).

9 PanelCraft Coolrooms (NSW) Pty Ltd case study (NSW); Neale Jones Civil Contracting Pty Ltd case study (NSW).

10 A J Bignell Pty Ltd case study (NSW).

11 National Gallery of Victoria case study (Vic); Townsville case study (Qld); No 1 The Esplanade, Glenelg case study (SA); Timbercraft Pty Ltd case study (SA).

12 Peri Australia Pty Ltd case study (Qld); Advanced Electrical Pty Ltd case study (Tas).

13 Matthews Contracting Pty Ltd case study (NSW); Klesteel Pty Ltd trading as Bassett Demolitions case study (NSW).

14 J K Williams Contracting Pty Ltd case study (NSW); PanelCraft Coolrooms (NSW) Pty Ltd case study (NSW); Lockrey Holdings Pty Ltd case study (NSW).

15 Mobile crane dispute 1997-1998 case study (NSW).

16 Bosform Pty Ltd case study (Qld).

17 Many pattern EBAs provide for the payment of such an allowance, with no corresponding increase in productivity. Some examples taken from the case studies are: Ace Contractors Pty Ltd case study (NSW); Masonry Contractors Association – Nevada Contractors Pty Ltd case study (NSW).

18 Abigroup Contractors Pty Ltd case study (Qld); Barclay Mowlem Construction Limited case study (Qld); Watpac Australia Pty Ltd case study (Qld); MarGra Pty Ltd case study (Qld); Royal Hobart Hospital Stage 2 Development case study (Tas).

19 No. 1 The Esplanade, Glenelg case study (SA).

20 Peri Australia Pty Ltd case study (Qld).

21 Neale Jones Civil Contracting Pty Ltd case study (NSW).

22 Bovis Lend Lease Pty Ltd case study (NSW).

23 Grocon Limited case study (Vic).

24 Monarch Group Pty Ltd case study (Vic).

25 Ingleside Bricklaying case study (NSW); Christies People Pty Ltd case study (NSW); Labour Hire in Queensland case study (Qld).

26 Alkene Asbestos Removal Pty Ltd case study (NSW).

27 Gillespie's Cranes Nominees Pty Ltd case study (NSW); Bitz Excavations Pty Ltd case study (NSW).

28 Jim Morrissey Bricklaying Pty Ltd case study (NSW); Jim Godfrey Earthmoving Pty Ltd case study (NSW); Grindley Construction case study (NSW).

29 Betaform Constructions Pty Ltd case study (NSW).

30 Jim Morrissey Bricklaying Pty Ltd case study (NSW).

31 Worsley Expansion Project case study (WA).

32 The Nambour Hospital Dispute case study (Qld); Kenoss Contractors Pty Ltd case study (ACT).

33 Network Project Developments Pty Ltd case study (NSW).

34 Neale Jones Civil Contracting Pty Ltd case study (NSW); Bitz Excavations Pty Ltd case study (NSW).

35 Ingleside Bricklaying case study (NSW).

36 Neale Jones Civil Contracting Pty Ltd case study (NSW); Alkene Asbestos Removal Pty Ltd case study (NSW).

37 Fineline Painting Pty Ltd case study (NSW); Kenoss Contractors Pty Ltd case study (ACT).

38 Abigroup case study (Qld); Townsville case study (Qld); Kenoss Contractors Pty Ltd case study (ACT).

39 MarGra Pty Ltd case study (Qld).

40 Cranes case study (Vic); Bosform Pty Ltd case study (Qld); John Holland case study (Qld).

41 Floreat Forum case study (WA); The Western Australian Cricket Association Demolition Project case study (WA).

42 Doric Group Holdings Pty Ltd case study (WA).

43 Floreat Forum case study (WA); 240 St George's Terrace, Perth case study (WA).

44 240 St George's Terrace, Perth case study (WA).

45 Woodman Point Wastewater Treatment Plant case study (WA).

46 Everwilling Cranes & Platforms Pty Ltd case study (NSW); Jim Godfrey Earthmoving Pty Ltd case study (NSW).

47 Wilson Mobile Cranes Pty Ltd case study (NSW).

48 CFMEU Subcontractor Audits case study (Vic); Royal Hobart Hospital Stage 2 Redevelopment case study (Tas).

49 National Gallery of Victoria case study (Vic); Barclay Mowlem Pty Ltd case study (Qld); The Sun Metals Dispute case study (Qld); Chadwick Construction Technology Pty Ltd case study (SA).

50 Payments to the Construction, Forestry, Mining and Energy Union (WA).

51 Ideal Interior Linings Pty Ltd case study (Qld).

52 CFMEU Subcontractor Audits case study (Vic).

53 Zlatar Partitions Pty Ltd case study (NSW); Anzac Day case study (Vic); CFMEU Subcontractor Audits case study (Vic); Cranes case study (Vic); Fastform Systems Pty Ltd case study (Vic); Grocon Limited case study (Vic); Herschell-Stent Pty Ltd case study (Vic); Intreepit Pty Ltd case study (Vic); Kessaris and Dawson case study (Vic); Monarch Group Pty Ltd case study (Vic); National Gallery of Victoria case study (Vic); Saizeriya case study (Vic); Shaun Hughes case study (Vic); The Age Print Centre case study (Vic); The Federation Square case study (Vic); The Victorian State Hockey and Netball Centre case study (Vic); Walter Construction Group Pty Ltd case study (Vic); Westfield Design and Construction Pty Ltd case study (Vic); Woolworths case study (Vic).

54 Betaform Constructions Pty Ltd case study (NSW); Bovis Lend Lease Australia Pty Ltd case study (NSW); Anzac Day case study (Vic); Fastform Systems Pty Ltd case study (Vic); Herschell-Stent Pty Ltd case study (Vic); Intreepit Pty Ltd case study (Vic); Kessaris and Dawson case study (Vic); National Gallery of Victoria case study (Vic); Nu-Line Aluminium Windows case study (Vic); Saizeriya case study (Vic); Shaun Hughes case study (Vic); Walter Construction Group Pty Ltd case study (Vic); Westfield Design and Construction Pty Ltd (Vic); Woolworths case study (Vic).

55 Betaform Constructions Pty Ltd case study (NSW); Union Matters case study (NSW); Shaun Hughes case study (Vic); Donation to the Guide Dogs Association case study (Qld).

56 Payments to the Construction, Forestry, Mining and Energy Union case study (WA).

57 Payments to the Construction, Forestry, Mining and Energy Union case studyt (WA).

58 Crestway Constructions Pty Ltd case study (NSW); Walter Construction Group Pty Ltd case study (Vic).

59 The Events of 21 April 1998 in Townsville case study (Qld).

60 Norske Skog Boyer Paper Mill case study (Tas).

61 Townsville case study (Qld); The Woolstore Apartments Redevelopment Project case study (Tas).

62 Salmon & Son Pty Ltd case study (NSW).

63 PanelCraft Coolrooms (NSW) Pty Ltd case study (NSW); Saxona Pty Ltd trading as Campbelltown Coolrooms case study (NSW); Mirvac Constructions Pty Ltd case study (NSW); Cranes case study (Vic); Shaun Hughes case study (Vic); The Age Print Centre case study (Vic); National Gallery of Victoria case study (Vic); The Victorian State Netball and Hockey Centre case study (Vic); Homezone Home and Garden Centre case study (Qld).

64 Watpac Australia Pty Ltd case study (Qld).

65 Hackett Laboratory Services Pty Ltd case study (NSW).

66 Dependable Roofing Scissor Lift Incident case study (WA).

67 Salmon & Son Pty Ltd case study (NSW); Bovis Lend Lease Pty Limited case study (NSW); Anzac Day case study (Vic); Cranes case study (Vic); Fastform Systems Pty Ltd case study (Vic); The Age Print Centre case study (Vic); The Victorian State Netball and Hockey Centre case study (Vic); Woolworths case study (Vic); Abigroup case study (Qld); Lavarack Barracks case study (Qld); Watpac Australia Pty Ltd case study (Qld); The Sun Metals Dispute case study (Qld); The Nambour Hospital Dispute case study (Qld).

68 Lavarack Barracks case study (Qld).

69 New Era Balustrading Pty Ltd case study (NSW); Blue Circle Southern Cement Ltd case study (NSW); Geelong Code of Practice case study (Vic); Nu-Line Aluminium Windows Pty Ltd case study (Vic); The Age Print Centre case study (Vic); Woolworths case study (Vic); Westfield Design and Construction Pty Ltd case study (Vic); Walter Construction Group case study (Vic); Homezone Home and Garden Centre case study (Qld); Joe Battaglia case study (Qld); Farley Concreting Pty Ltd case study (Qld); Labour Hire case study (Qld); John Holland case study (Qld); MarGra Pty Ltd case study (Qld); Multiplex Constructions (Qld) Pty Ltd case study (Qld); Peri Australia Pty Ltd case study (Qld); Townsville case study (Qld); Casuarina Shopping Centre case study (NT).

70 Westfield Carousel Shopping Centre case study (WA).

71 The Events of 21 April 1998 in Townsville case study (Qld).

72 Westfield Carousel Shopping Centre case study (WA).

73 OH&S case study (Tas).

74 Bitz Excavations Pty Ltd case study (NSW); The Age Print Centre case study (Vic).

75 Alkene Asbestos Removal Pty Ltd case study (NSW).

76 The Nambour Hospital Dispute case study (Qld).

77 Ingleside Bricklaying case study (NSW); Grindley Construction Pty Ltd case study (NSW).

78 Betaform Constructions Pty Ltd case study (NSW).

79 Sebastian Builders & Developers Pty Ltd case study (NSW); Citylink case study (Vic); Tiwi Campus case study (NT); Mitchell Street case study (NT).

70 Mobile Crane Dispute 1997 – 1998 case study (NSW).

81 The Age Print Centre case study (Vic); The Victorian State Netball and Hockey Centre case study (Vic).

82 Leighton Contractors Pty Ltd case study (Qld).

83 The Nambour Hospital Dispute case study (Qld).

84 The Nambour Hospital Dispute case study (Qld).

85 The Nambour Hospital Dispute case study (Qld).

86 National Gallery of Victoria case study (Vic); Holland Estate case study (Vic); LaTrobe Regional Hospital Demolition Project case study (Vic).

87 Port Melbourne Flats case study (Vic).

88 Saizeriya case study (Vic).

89 Saizeriya case study (Vic).