

**SUBMISSION TO THE SENATE STANDING
COMMITTEE ON EDUCATION AND
EMPLOYMENT**

**INQUIRY INTO FAIR WORK AMENDMENT
(CORRUPTING BENEFITS) BILL 2017**

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Introduction

The Final Report of the *Royal Commission into Trade Union Governance and Corruption* by Justice, Dyson Heydon found evidence of blackmail, theft, intimidation and death threats, use of motorcycle gangs and other criminal groups as hired muscle, interference in union elections and illegal agreements with employers. The Final Report highlighted poor union record keeping, false invoicing and destruction of documents, union 'rubber stamp' committees which failed to enforce rules, payment of large sums by employers to unions for dubious 'training' schemes and 'services', and influence peddling in the Labor Party through inflation of union membership figures. The sums of money involved were also significant, with many officials benefiting from their positions through fraud or theft from the union or through arrangements with employers for work on properties owned by officials.

Based on that evidence over 40 people, unions and companies were referred to various authorities for possible prosecution, including police and public prosecutors, the Australian Securities and Investments Commission (ASIC) and the Fair Work Commission. Some of the large private companies caught up in the inquiry were Thiess, John Holland, ACI, Downer EDI, Cbus, Winslow Constructors and Mirvac. Companies were found to have made payments to unions to get onto tender lists. The Final Report, released in December 2015, had 79 recommendations, over half concerned with the regulation of unions (24) and union officials (14). The first recommendation was "Commonwealth and State governments give consideration to adopting a national approach to the registration, deregistration and regulation of employee and employer organisations, with a single regulator overseeing all such organisations throughout Australia." This Registered Organisations Commission would have investigative powers similar to ASIC, and focus on financial compliance with new rules on management and disclosure.

This submission supports the proposed amendments to legislation on registered organisations.

Background

Before the Heydon Royal Commission there were two previous Royal Commissions into the building and construction industry, both headed by judges. Roger Gyles headed the *Royal Commission into Productivity in the Building Industry in NSW* (1991-1992) and Terence Cole the *Royal Commission into the Building and Construction Industry for the Commonwealth Government* (2001-03). Both concluded the fundamental problem was a lack of respect for the rule of law, a phrase found repeatedly throughout both final reports, and this was a problem on both the employer and union sides. Cole said "Culturally, first, there needs to be recognition by all participants that the rule of law applies within the industry" and Gyles suggested those who break the law should be punished.

Gyles also said "Observance of the law and law enforcement in general play very little part in the industry. The law of the jungle prevails. The culture is pragmatic and unprincipled. The ethos is to catch and to kill your own ... Once it becomes acceptable to break, bend, evade or ignore the law and ethical responsibilities, there is no shortage of ways and means to do so." Gyles found illegal activities "...range from physical violence and a threat of physical violence at one end to petty pilfering of building materials at the other. In between there is a great variety of illegal activities, essentially economic in nature or effect, from collusive arrangements involving giant corporations and industry associations to labour-only subcontractors paying small amounts of graft to project managers. Those involved range from managing directors of large corporations to labourers on site. No sector of the industry has been immune."

Ten years after Gyles the same problems were still prevalent. In his final report Commissioner Cole envisaged an industry where "... 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 the law must replace industrial might." His view was "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. At the heart of the findings is lawlessness. It is exhibited in many ways." The final report proposed an Australian Building and Construction Commission to monitor illegal behaviour by unions.

It is worth asking if the recommendations of the Gyles and Cole Commissions, the other State efforts and the APCC codes, had all been implemented and followed through, would a third Royal Commission have been necessary? While the recommendations from Gyles and Cole did become legislation, and Heydon's are in process, perhaps the real underlying issue that should be addressed is why the building and construction industry operates the way it does. None of these Royal Commissions produced a vision of a different industry, apart from a law abiding one, and made no recommendations on the direction that strategic development of the industry might take.

The three Commissioners agreed the problem is a culture of lawlessness, and the three inquiries found widespread illegal behaviour by both union officials and contractor managers. Their recommendations, in various ways, focused on increased regulation and enforcement through legislative action. In this they had "well developed and precise views". However, while necessary, increased regulation does not address the issue of why the building and construction industry has such a culture and the causal factors at work in creating this culture.

Construction has a reputation for corruption and collusion, and is ranked by Transparency International as the world's most corrupt industry, mainly due to issues in developing countries. But this is also a problem across countries in the OECD, not just for Australia, because many countries have found entrenched anti-competitive practices and criminal involvement in the industry. For example, the 2016 Charbonneau Commission in Canada into awarding of public contracts in Montreal concluded corruption and collusion are "far more widespread than originally believed" and organised crime had "infiltrated" the industry. The Commission revealed complex webs of collusion with sophisticated mechanisms' for extracting funds from public

construction projects. Politicians, high level public officials, consultants, and contractors were all involved.

Project Preparation and Procurement

The current approach to procurement of building and construction projects by both public and private clients facilitates corrupt payments by allowing the increase in project costs they cause to be hidden in tender bid prices or claims for reimbursement. This is primarily due to clients' under-investing in project preparation in the initiation phase, as they seek to minimise the design costs of a feasibility study. Because many projects are then put to tender with incomplete documentation, their cost cannot be estimated accurately and tenderers have to add a significant risk premium to their bids.

Project costs cannot be accurately estimated without detailed design and engineering specifications, and high cost estimates allow the later diversion of funds. On the other hand, incomplete design can lead to estimates below project costs, with consequent claims and disputes obscuring the eventual recipients of funds. Contractors' claims for reimbursement can lead to significant cost increases, and an unscrupulous contractor will also cheat on materials, compromise on quality, and deliver below the specification, resulting in poor quality assets with high maintenance costs.

Failures in project preparation opens up opportunities for corruption during the later stages of a project. For example, inadequate project preparation may lead to subsequent implementation delays and work changes that can be manipulated to benefit individuals or companies. The preparation stage is likely to facilitate corruption during construction when failures at this stage are opportunistic or deliberate. Incomplete design inevitably requires adjustments after the work has started, although many are due to unexpected events and circumstances. However, starting without a complete plan opens the door to post-contract negotiation and opportunistic behaviour.

To improve project preparation both public and private sector clients would have to take more responsibility for project initiation and definition, and employ larger and more capable client teams to manage their projects' procurement and delivery strategies. The cost of a client project management team is not an added extra to the project, and the task is essential if the scope for collusive and corrupt behaviour in the building and construction industry is to be reduced.