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## Building Industry Royal Commission: Background, Findings and Recommendations

This paper follows the report of the Royal Commission into the Building industry. The Government has accepted the Royal Commission's arguments for the establishment of an Australian Building and Construction Commission with extensive powers. However, there is now a good deal of debate on those recommendations that address reforms in the industry as well as the specific powers of the proposed Commission.

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## **Executive Summary**

Terms of reference to conduct the Royal Commission into the Building Industry were signed by the Governor-General Dr Hollingworth and the Minister for Employment and Workplace Relations, the Hon. Tony Abbott on 29 August 2001. The Royal Commission's first report was received by the Government on 5 August 2002. All 23 volumes of the Royal Commission's report were provided to the Government at the end of February 2003 and released on 26 and 27 March 2003, bar the 23<sup>rd</sup> volume which remains confidential.

The principal reasons given by Minister Abbott for the commissioning of such an inquiry included the Employment Advocate's report of May 2001 which indicated that, since the commencement of the OEA's operations, more than half of all complaints about breach of 'freedom of association' principles came from the construction industry. This indicated that 'no ticket, no start' was, and still is, the reality in this industry. The construction industry strike rate in 2001 was five times that of the all industries average. It was said that tenderers for CBD construction in Sydney typically allow for one strike day every two months—while tenderers in Melbourne allow for one strike day every two weeks. Commercial construction costs in Melbourne are reportedly a quarter higher than in Sydney which, in turn, is said to be a quarter higher than comparable construction under the conditions operating in domestic construction. In February 2002, the abolition of the construction industry task force in Perth sparked a series of violent site invasions.

The Royal Commission report contains 212 recommendations, the bulk of which propose changes to federal workplace relations legislation governing the building and construction industry. The Royal Commission argues that the Government should introduce a Building and Construction Industry Improvement Bill to implement reforms specific to the industry what is to be administered by a proposed Australian Building and Construction Commission.

However academics and practitioners are starting to query the extensive powers proposed for the new Building Commission, and have asked whether one industry should be treated separately. Indeed the logic of accusations railed against the building and construction industry could have been made against other industries, such as the waterfront industry (and in 1998 the same or similar criticisms were made), yet no industrial legislation was drafted for that industry (other than to fund redundancies, the industry continues to be regulated under the *Workplace Relations Act*). As well, the major employers' group, the Australian Chamber of Commerce and Industry (ACCI) has baulked at certain of the Royal Commission's recommendations. Not surprisingly these recommendations concern the treatment of businesses, such as making all members of a group of companies liable for the taxation shortfalls of members (so as to counter the 'Phoenix Company' syndrome, Recommendation 130) and ACCI is against the use of Business Activity Statements (Recommendation 152), which proposes to clamp down on the non-payment of workers' compensation premiums by building enterprises by giving workers' compensation authorities access to BAS records filed with the Tax Office so as to ensure compliance.

Federal Cabinet has given support to the main thrust of the Royal Commission's findings by supporting the establishment of the Australian Building and Construction Commission and has agreed to draft separate legislation as also recommended. However it is not clear whether the Government supports the recommendations in full. Nevertheless, an allocation of \$17 million has been provided for in the 2003 Commonwealth Budget to fund the new Commission, continue to fund the Interim Building Authority until the proposed commission starts to function, and draft the new legislation.

## **Introduction**

A priority of the incoming Coalition Government in 1996 was the passage through Parliament of the *Workplace Relations and Other Legislation Amendment Act 1996* (WROLA Act). The last of its provisions came into effect on 25 May 1997 having been introduced to the Parliament some 12 months earlier. It amended and renamed the *Industrial Relations Act 1988* as the [Workplace Relations Act 1996](#) (WR Act) and provided for transitional requirements so that the existing industrial relations system could comply with the new workplace regime.

At this time, the re-named Department of Workplace Relations and Small Business formed a Workplace Reform Group at the direction of its Minister, the Hon. Peter Reith, in 1996. The group, initially comprising 17 officers commenced analysis of four industries targeted for reform, according to evidence subsequently provided to a [Senate Estimates Committee](#).<sup>1</sup> These were the meat processing industry, the coal mining industry, the building and construction industry and the waterfront industry. The new provisions of the WR Act, as well as existing provisions of the *Trade Practices Act 1974*, were to provide the legal weaponry to deliver reform. In essence, this meant re-asserting managerial prerogative within these industries, a point which [Minister Reith](#) made clear in a number of speeches throughout 1997. Thus reform of the building industry has been a priority industry for reform since 1996.

## **Legislative Reforms**

The reform program was centred on the Government's view of workplace relations, which of course moulded key provisions of the WR Act. The WROLA Act provided an 18 month time frame for key award protections to be removed such as 'last on first off' retrenchment selection processes and union consultation clauses under **award simplification**. The WR Act restricted **union right of entry** by removing this provision from federal awards and setting up a more restrictive statutory right of entry process. The Act also **banned the payment of 'strike pay'**, (although the International Labour Organisation's Freedom of Association Committee has made findings recommending the removal of the prohibition of [strike pay](#) from the WR Act).<sup>2</sup> Also, **alternative bargaining arrangements**, to that of bargaining with a registered industrial union were facilitated, indeed promoted, under the Act. Bans clauses which the Australian Industrial Relations Commission (AIRC) inserted into federal awards to prevent usually specific forms of industrial activity were replaced

with **orders of the Commission to cease industrial action** (section 127 orders which could be reinforced by the Federal Court).

The workplace reform agenda is also reflected in the WR Act's '**Freedom of Association**' (FOA) provisions. The term freedom of association is usually taken to refer to the legal protections a person enjoys when he/she decides to associate, i.e. join or form a union. However, in the context of workplace reform, FOA has come to be understood to be the freedom **not** to associate; in other words freedom in the negative, protection of an individual's decision to disassociate; what used to be called conscientious objection. Breaches of the FOA provisions can be pursued in the Federal Court, which might result in **injunctions and the award of damages**. These instruments are designed to blunt collective action and promote individual workplace agreements.

Taken together these provisions of the WR Act are central to the findings of the Building Industry Royal Commission, that both unions and building employers may have breached provisions of the law, and these provisions are also proposed in the Royal Commission's recommendations to be included (and strengthened) in a proposed Building and Construction Industry Improvement Act. It is therefore useful to be aware of key provisions of the WR Act in order to understand the Royal Commission's recommendations.

The [Office of the Employment Advocate](#) (OEA) was also set up under the WROLA Act as a form of 'independent body', i.e. independent of the Department of Employment and Workplace Relations, which nevertheless reports to the Minister. It is charged under the Act with administering the FOA provisions and may provide advice on workplace relations matters to employers and employees. The OEA is funded to take legal actions against those who may be infringing the freedom (not) to associate provisions and, apparently less often, the freedom to associate provisions. The OEA also has a broader role. It is charged with administering the registration (filing) of Australian Workplace Agreements (AWAs) which are individual contracts of employment, and if written correctly they can displace otherwise applicable awards and, possibly, applicable certified agreements which are collective instruments. They can also displace certain Commonwealth and State employment laws.

Since its inception in 1997 the OEA has pursued breaches of the FOA provisions both within the Australian Industrial Relations Commission and the Federal Court. It has also been revealed in the Federal Court that the OEA had sought to incriminate the [Construction Forestry, Mining and Energy Union](#) (CFMEU, the principal construction industry union) in 1999, by colluding with collaborators who taped CFMEU officials, with the aim of having the CFMEU admit to breaching the FOA provisions.<sup>3</sup> As the case failed, the [Federal Court](#) ordered costs to be paid by the two OEA collaborators (Messrs Lyten and Carson). Subsequently, it has been revealed in [Senate Estimates](#)<sup>4</sup> that Minister Reith had agreed to an indemnity for the two and the OEA met their legal costs (\$96 000, being the costs of the CFMEU and its organiser in defending the allegations). The case helps to illustrate why state Labor governments have refused federal funding for public

construction projects, e.g. [Victoria's MCG Redevelopment](#), where the Commonwealth offer of funding was conditional on right of entry for OEA inspectors to the site.<sup>5</sup>

## **National Building Industry Code of Practice and Employment Advocate Report**

In May 1997, the Government with agreement from the states prepared a '[National Building Industry Code of Practice](#)', through which the Government essentially attempted to run industrial relations for the major building companies. The Code, in essence, restates key provisions of the WR Act and tailors these for the idiosyncrasies of the building and construction industry. Where Commonwealth funding for a project was involved, it may be withdrawn if the building code was breached, as initially occurred with [Federation Square](#) in Melbourne during 1998 and 1999 after building unions included the project in a claim for, amongst other things, a shorter working week. On the other hand, construction for the 2000 Sydney Olympics was generally not interfered with, and, is usually agreed that it came out ahead of time and under budget.

In April 2001 the Government called for an initial report into the building industry, undertaken by the Employment Advocate (Mr Jonathan Hamberger) in May 2001.

[Mr Hamberger's report](#) aired many allegations including:

- money laundering and maltreatment of illegal immigrants
- collusion and intimidation by building unions, including 'no-ticket no-start' practices (union membership required to work)
- theft and re-sale of construction equipment, false invoicing and fraud, and
- involvement of 'well known' criminal figures in the industry.

Mr Hamberger's report resulted in heated debate in [Senate Estimates](#) on 5 June 2001.<sup>6</sup> Here, Mr Hamberger observed that there were problems with the WR Act which both protects individuals from employer persecution for joining a union but also enshrines individuals' rights not to join or be coerced. Provisions of the WR Act proscribe certain 'coercive' actions but only if done for a 'prohibited' reason. Thus he felt that many of the allegations which he reported were not offences over which he could take any action. He did recommend a broader inquiry into the building and construction industry.

Consequently, a Royal Commission into the Building and Construction Industry, conducted by Justice Terence Cole, was established by the Government on 16 July 2001 to carry on where Mr Hamberger felt, with its resources, the OEA could not succeed. The Royal Commission is also a response to certain issues arising in particular states. For example, in NSW references to 'organised crime' were made on ABC Television's [7.30 Report](#) with particular reference to the 'colourful' identity, Mr Tom Domican, and his industrial-consulting role for a NSW crane hire firm—concerns shared by the CFMEU.

## Findings of the [Building Industry Royal Commission](#)

The Government received the first [report](#) of the Building Industry Royal Commission on 5 August 2002. It received the [final report](#) on 24 February 2003 and 22 volumes of 23 were released on 26 and 27 March 2003 (the 23<sup>rd</sup> volume is believed to contain names of those recommended for prosecution and options for dealing with unions and thus far remains confidential). The industry was described by the Royal Commission as being characterised by widespread disregard for the rule of law. It found widespread use of inappropriate industrial pressure, disregard for enterprise bargaining and the freedom of association laws leading to unlawful strikes, as well as widespread use of 'inappropriate' payments. Thus:

- 31 individuals were referred for possible criminal prosecution
- 392 instances of unlawful conduct committed by individuals, unions and employers, which include 30 findings of unlawful conduct by employers mainly for strike pay breaches and freedom of association breaches, (i.e. that the employer agreed to a 'no ticket no start' policy operating at a site), and
- 25 different types of unlawful conduct and 90 types of inappropriate conduct.

### Royal Commission Findings: State by State

#### Western Australia

The construction industry in WA was described by the Royal Commission as being 'marred by unlawful and inappropriate conduct', with 'a culture of fear, intimidation, coercion and industrial unrest'. The Royal Commission **made 230 findings of unlawful conduct in WA**, the majority of which were against CFMEU officials and organisers for intimidation and threats of violence, breaches of FOA, secondary boycott and right of entry provisions, trespass and interference. CFMEU officials Kevin Reynolds and Joe McDonald are cited as repeat offenders.

Note however that *Workforce* (reports that a WA magistrate determined that certain allegations of trespass made against CFMEU officials (including Joe MacDonald in WA to be unfounded (and dismissed) and advised that the union's 'right of entry' authority should have been observed.<sup>7</sup>

Royal Commission findings against contractors included refusal or threatened refusal to use subcontractors whose workers were not union members, the payment of strike pay and breaches of inspection permits. Construction sites mentioned included the Bluewater Apartments, the Woodman Point water treatment plant and the Kwinana freeway extension. The Royal Commission also provides an extensive review of the former Western Australian Task Force for the Building and Construction Industry (WA BITF).

## **Victoria**

The Royal Commission suggested 'an urgent need for reform and cultural change' in Victoria, where the rule of law has 'long since ceased' to have application. It found that all the state's major construction projects 'were beset, on a regular basis, by industrial action, almost all of it unlawful'. The state government was cited as having tacitly accepted union dominance, an example being its failure to press charges against 'prominent [and] identifiable' union officials over \$100 000 in damages caused by 'wanton vandalism' to the National Gallery of Victoria site.

The Royal Commission found that Victorian Government inaction discouraged investment, including the decision by the food processing business, Saizeriya not to go ahead with a further five plants in Melton because of problems encountered building the first plant [although it may be recalled that this dispute arose over the company seeking to choose another union to that which has membership coverage in the food processing industry]. The Royal Commission made **58 findings of unlawful conduct in Victoria**, 27 against CFMEU officials, its organisers or delegates. One finding related to a raid by CFMEU officials Martin Kingham and Bill Oliver on Master Builders' Association premises. Findings against employers mostly related to the payment of strike pay, including by Grocon on the Queen Victoria project and CityLink contractors ABB Industry and Corke Instrument Engineering. The Australian Manufacturing Workers Union had findings made against it relating to The Age Print Centre and Federation Square.

## **Queensland**

The Royal Commission found **55 instances of unlawful conduct**, all of which were against CFMEU, BLFQ (Builders' Labourers Federation Queensland) or other union officials. The Commissioner agreed with one head contractor that the ineffectiveness of the law left builders with no choice but to embark on 'a course of controlled capitulation' to union demands. Unions attempted to control labour-hire to situations only of genuine top-up, having the effect of supporting 'preferred' labour-hire providers. Disputes cited included the Nambour Hospital project, the Sun Metals (foundry) construction site in 1999 and Laverack Barracks. The Royal Commission found the industry accounted for 18.5 per cent of the state's working days lost in 2000, despite employing only 8.2 per cent of the workforce.

## **New South Wales**

The Royal Commission made **25 separate findings of unlawful conduct**, 21 of which related to the CFMEU and its organisers in NSW. Most findings against organisers and officials related to calling stop-work meetings during work hours. There were two findings of CFMEU officials attempting to induce companies to break contracts with subcontractors. The three findings of unlawful conduct made against companies (Betaform Constructions and Austral Interior Linings) related to strike pay. There was one finding against the Communications, Electrical and Plumbing Union. The Royal Commission found that a

total of \$460 000 was paid to former CFMEU official Craig Bates and delegate Martin Warner by various subcontractors who forwarded cheques to a shelf company which in turn paid Bates and Warner cash, less a 10 per cent commission.

The Commissioner found the no-ticket, no-start policy was imposed to the maximum extent possible on major NSW building sites and cited evidence from a production supervisor at Blue Circle Southern cement plant who claimed that non-site union membership would cause problems for Blue Circle.

The Gyles Royal Commission recommendation that the (former) Building Workers Industrial Union (now part of the CFMEU) be de-registered had not been taken up by the State government after the CFMEU signed a deed of adherence that provided deregistration would not go ahead as long as the union abided by its terms, although [there was doubt in the early 1990s whether a division of a registered organisation could be deregistered]. The Royal Commission said evidence established beyond any doubt the CFMEU had breached the deed at least since 1996. The Royal Commission said the disbandment of the NSW Building Industry Taskforce in 1995 had led to a rise in disputation.

### **South Australia**

The Royal Commission found that SA had the lowest levels of disputation and unlawful industrial conduct of all states. It nevertheless made **eight findings of unlawful conduct**. Two findings were made relating to the Alstom Power project, but no individuals were named. CEPU (plumbing division) SA branch secretary David Smith was found to have told Chadwick Construction Technology to sign an EBA (Enterprise Bargaining Agreement) 'if you want Chadwick to survive in SA'. Boulderstone Hornibrook was found to have breached its EBA over pyramid subcontracting. The Royal Commission said FOA was 'generally observed' because major contractors had taken a stand in 1994.

### **Tasmania**

The Royal Commission identified a need for cultural change in Tasmania but contended that its industrial record was influenced primarily by union officials from outside the state. Pattern bargaining was found to be well-entrenched as a result of a year 2000 deal between the CFMEU, the MBA Tasmania and four contractors. The Royal Commission accused MBA of not doing enough to limit the impact of 'pattern' agreements on smaller builders. The Royal Commission also found FOA had come under 'strong attack' in Tasmania. It cited the Royal Hobart Hospital redevelopment, the Hobart Private Hospital and the Woolstore Apartments sites as instances where FOA had been undermined because of complicity between head contractors and unions. There were **13 findings of unlawful conduct**, five against the CFMEU, one against the CEPU and seven against contractors. Project Managers Hansen Yuncken were cited for telling a contractor it would not be considered for future projects because it did not have a union EBA.

## **Northern Territory**

The Royal Commission found little evidence of inappropriate industrial conduct in the NT, with a low incidence of industrial disputation and 'greater interest' in AWAs. There were **just two findings of unlawful conduct** against two companies for OH&S breaches.

## **Australian Capital Territory**

The Royal Commission identified a need for 'reform and cultural change' in the ACT, where laws were rarely enforced because contractors feared industrial action. Closed shops, pattern bargaining and breach of right of entry were also problems identified by the Royal Commission. There was **one finding of unlawful conduct** against CFMEU organiser Peter Primmer for threatening a contractor who refused to sign an Enterprise Bargaining Agreement.

## **Key Recommendations**

The Royal Commission report contains 212 recommendations, the bulk of which propose changes to federal workplace relations legislation governing the building and construction industry. The Royal Commission argues that the Government should introduce a Building and Construction Industry Improvement Bill to implement reforms specific to the industry. The first recommendation dealt with the inadequate powers afforded to royal commissions.

**Building industry defined?:** The proposed legislative changes can be limited to the building and construction industry by defining the industry. Recommendation 186 proposes the industry should be defined, in part, by considering the [Royal Commission's terms of reference](#), which is ironic since the terms of reference did not define the building and construction industry. They did make reference to what the industry may not include by excluding 'single dwelling houses unless part of a multi-dwelling development'.

**Building and Construction Industry Improvement Act:** Recommendation 2 proposes a Building and Construction Industry Improvement Act. Under its provisions an interested person could apply for the deregistration of a registered organisation if that organisation failed to comply with a court injunction preventing it from engaging in pattern bargaining. Also, under Recommendation 187, for the purposes of restraining contraventions of the B&CII Act, the WR Act and other Commonwealth legislation relevant to the B&C industry, the ABCC be given powers equivalent to those afforded the Australian Competition and Consumer Commission, including powers to obtain injunctions (but with immunity for the ABCC!) and have the powers to bring proceedings for contempt for injunctions disregarded.

**Pattern bargaining:** Recommendation 2 also proposes that the Federal Court should be able to issue injunctions to stop pattern bargaining. Recommendation 3 aims to prevent common certified agreement expiry dates by linking them to a fixed period from the date the particular agreement was made. Recommendation 4 proposes that the AIRC refuse to certify pattern

agreements. While the [Workplace Relations Amendment \(Genuine Bargaining\) Act 2002](#) came into force on 7 February 2003, ostensibly to promote enterprise bargaining over industry-wide bargaining, it is not referred to in the Royal Commission's recommendations.

**Industrial action:** Recommendation 199 proposes that all industrial action that is not protected, consented to or safety-related should be expressly prohibited, and the victims of industrial action should be able to recover losses determined by an expert panel of assessors (Recommendations 207, 209). Section 166A of the WR Act—requiring an AIRC certificate to pursue common law claims—should not apply to the industry (Recommendation 198), thus access to common law damages should be automatic. Under Recommendation 200, the onus would be on unions to prove an action was safety-related (thus 'protected') if it became subject to a damages claim. Recommendation 37 proposes that protected action could not be taken during the life of an agreement, even if it was over matters not covered by the deal. Thus the proposal refutes the Federal Court's findings in [Emwest](#)<sup>8</sup> that the wording of the WR Act provisions dealing with the certification of agreements does not exclude a matter not addressed in a current CA from being pursued in a 'parallel' agreement.

**Bargaining elections:** Recommendation 5 proposes a bargaining election (similar to that under the United States *National Labor Relations Act*). Workers would vote no later than two months before an agreement's expiry on whether they wished to negotiate directly with their employer, or be represented by a committee, union or agent. A limited right to minority representation is proposed in recommendation 7.

**Back-dating agreements:** To encourage agreements to be finalised before existing ones expire, Recommendation 6 proposes that agreements not be back-dated unless the AIRC is satisfied the employer unreasonably delayed negotiations.

**Genuine bargaining:** Recommendation 8 proposes under good faith bargaining principles, parties should disclose relevant information 'taking into account the employer's need to protect its commercial interest' and recommends written disclosure of any 'direct or indirect financial benefit' a party may derive from the agreement.

**Cooling off:** Recommendation 11 proposes compulsory 21-day cooling off periods after protected action reaches 14 days (meaning industrial action ceases), although the WR Act currently allows parties to apply for suspension or termination of bargaining periods without having to identify the specific bargaining periods involved (i.e. a cooling off period). Further protected action could only be taken with AIRC permission after it considered specified factors.

**Pertaining to the employment relationship:** Recommendations 15 and 38 would give the Federal Court power to make declarations on whether particular matters pertain to the employer–employee relationship. Protected action could not be taken in support of a claim including the particular matter while an application (by an employer) is active. These recommendations are designed to counter the view of the Full Federal Court in [Electrolux \(No.2\)](#)<sup>9</sup> that protected industrial action over a union log of claims was lawful if it included a

claim for bargaining fees. An AIRC Full Bench found in January 2003, however, that bargaining fees do not pertain to the employer-employee relationship and thus cannot be the subject matter of awards or certified agreements.

**Right of entry:** The report recommends new restriction and qualifications on the right of entry provisions in the industry (recommendations 59–77). Recommendation 71 proposes that registrars should have the powers to 'suspend' entry permits as an alternative to revoking them and it increases the number of grounds where the powers could be exercised. Recommendation 73 proposes three-month mandatory minimum suspension periods for a first offence, 12 months for a second and five years for a third. In respect of ROE breaches, Recommendation 77 advocates maximum civil penalties of \$100 000 for a corporation and \$20 000 for others. Recommendation 60 proposes that permits should only be granted to persons who have been properly trained. Under Recommendation 62, a union could lose entry rights if it repeatedly breached the provisions. Recommendation 68 would require a permit holder to provide details of any suspected award or other breaches before entering a workplace. Under Recommendation 64, the Royal Commission proposes to minimise differences between federal and state entry provisions, the federal government should use the full extent of its constitutional powers (i.e. override inconsistent right of entry provisions to the limit of constitutional authority).

**Freedom of association:** Recommendation 83 proposes the FOA provisions should be extended to cover 'indirect' and 'implied' threats, while recommendation 84 proposes a simplified version of prohibited conduct (see WR Act [Part XA](#), Divisions 3, 4 and 5) to promote 'greater understanding' in the industry. Recommendation 95 proposes that agreements should not contain 'union encouragement' clauses, as the Royal Commission believes they are incongruous with freedom of association.

**Award/agreement breaches:** Recommendation 165 proposes increased penalties for award and agreement breaches to \$100 000 for corporations and \$20 000 for others. Traditionally, the federal labour law under the AIRC has been a 'cost-free' jurisdiction, where costs are not imposed on the losing side/s. However, Recommendation 210 proposes that in proceedings brought under the proposed new Act, the losing party should pay the winning party's costs.

**Building industry award:** Recommendation 98 proposes further simplification of the *National Building and Construction Industry Award 2000* to reduce 21 allowances and 41 special rates down to four basic allowances: living away from home, meals, travel and a catch-all general rate payable to all workers. The report also proposes the AIRC should not be able to prescribe the times or days on which work must occur or Rostered Days Off (RDOs) to be taken, but should have the power to set maximum weekly overtime hours for a worker (Recommendation 99).

**Strike pay:** The Royal Commission proposes that employers should be required to notify the proposed authority, the Australian Building and Construction Commission, of any demands for strike pay within 24 hours, or face 'a substantial civil penalty' (Recommendation 144).

**Superannuation:** Recommendation 174 would prevent the AIRC from certifying any agreements restricting the choice of superannuation funds available to employees.

**Union responsibility:** The Royal Commission finds that unions 'frequently seek to deny responsibility' for industrial action taken by members 'based on technicalities, including the provisions of their rules'. As they take credit for the benefits of collective action 'they should be held liable for losses caused by unlawful industrial action'. Recommendation 205 proposes that the new legislation should contain a 'deeming' provision modeled on section 298B of the WR Act. That section deems conduct by union members and officers that breaches freedom of association provisions to have been taken by a union, unless—in the case of action by members—the union can show it took reasonable steps to prevent it.

## **Responses to the Royal Commission's Findings**

ACTU Secretary, [Greg Combet](#), said unions expected the government would use the commission findings to justify the introduction of new anti-worker legislation.

'Royal Commission was politically motivated in its establishment and biased in its conduct,' he said.

Mr Combet made the following points:

- The government will try to use the Commission's flawed conclusions to weaken the rights of employees and their unions across many industries. He also rejected the need for a new body to police the commercial construction industry, saying the existing law enforcement agencies were sufficient.
- instead of properly investigating issues such as multi-million dollar tax evasion, the loss of employee entitlements and safety on building sites, the Royal Commission spent 90 per cent of its hearing time on anti-union allegations
- most of the 392 allegations were trivial and pathetic incidents, with union organisers sitting down to negotiate enterprise agreements with employers interpreted as 'unlawful interference in contractual obligations
- none of the allegations that were made in the Royal Commission were tested because the Royal Commissioner would not allow cross examination. 'So at least now people are going to have an opportunity—if ultimately charges eventuate—to test them in a proper court'
- trade unions would continue to protect workers' rights and monitor the health and safety of worksites. 'If you take the union out of the equation there'll be more than one worker killed a week on those (construction site) jobs,' he predicted, and
- the Royal Commission's findings made no mention of the widespread tax avoidance by employers, the illegal labour rackets and the chronic underpayment of workers.

**Workplace Relations Minister, Mr Abbott**, has (so far) avoided speculating on whether the CFMEU could be deregistered, despite public urgings by his predecessor and architect of the government's Workplace Relations Act, Peter Reith, among others.

- [Mr Abbott](#) said the report made it clear that closed-shop union activities often involved unlawful coercion and intimidation through threats of violence. '(The dominant unions) have a tendency to hunt as a pack,' he said. 'This means on large building sites the CFMEU ... has a quasi-monopoly on the supply of labour.'
- 'The CFMEU, often in alliance with the Communications, Electrical and Plumbing Union and the Australian Manufacturing Workers Union, can only maintain this dominant position by enforcing a no-ticket, no start rule.'
- Mr Abbott also referred to economic modelling which showed that there could be considerable boosts to economic growth (of at least \$2 billion) from reforms to an industry worth around \$35 billion by adopting practices in the home and dwelling side of the building industry. [Note however that the [home renovation industry](#) is estimated to be worth \$17 billion and charges made by contractors (specialist trades) are reported to have increased by as much as 50 per cent in recent months, reflecting skilled labour shortages.<sup>10</sup> As the minister's [modelling](#) was based on work practices of this sector being emulated in CBD construction, it would not be unreasonable to question its assumptions continue to hold.]

**Construction, Forestry, Mining and Energy Union** Construction national secretary, [John Sutton](#), said the \$60 million royal commission had been a waste of money.

- the CFMEU believed that the royal commission report had been totally discredited in the eyes of the general public
- neither the building workforce or employers had wanted the government to interfere in their industry.
- he predicted none of the 23 union officials recommended for prosecution would be convicted. 'I don't say we are 100 per cent pure, particularly when we are working under (Workplace Relations Minister) Tony Abbott's legislation,' Mr Sutton told a news conference. 'I have no doubt we've committed technical breaches of the Act.'
- any such breaches were a result of poor industrial laws imposed by the federal government. The breaches detailed in the reports were so minor they were 'akin to jaywalking', he said. This opinion is also held by Jim Marr in his article '[Union jaywalkers face the death penalty](#)'.<sup>11</sup>

Australia's peak employers' association the [Australian Chamber of Commerce and Industry](#) (ACCI) supports the proposal to clarify lawful and unlawful industrial action, and indeed the formation of the proposed ABCC, including its proposed widespread

powers. However, three recommendations are specifically opposed and a fourth partially opposed, relating to:

1. group taxation (Recommendation 130), which relates to the Royal Commission's concern with the 'Phoenix Company' syndrome in the Construction industry and to counter the phenomenon by making all members of a company group liable for the tax liabilities of the members.
2. the use of Business Activity Statements for non-ATO (Tax Office) purposes (Recommendation 152). The Royal Commission's intention was to ensure that workers' compensation premiums were paid by builders by giving the authorities access to ATO records (BAS statements)
3. preventing workplace agreements nominating funds for superannuation purposes (Recommendation 174), and
4. also opposed is one aspect of Recommendation 99 for AIRC orders across the industry regulating maximum hours of work.

Professor Andrew Stewart has argued that the federal Government needs to demonstrate why the industry's problems were 'so unique' that Parliament should reverse the trend away from specialised institutions. He cited the coal and oil industries, academic salaries and the public service as areas that had increasingly been brought into the mainstream industrial relations system in recent years:

I think the government has a fairly heavy onus that it has to discharge to justify the cost and added complexity that will flow from new institutions and laws.

He also said building and construction was 'not the only industry in which employers and employees sometimes failed to comply with legal obligations'. He said it was 'a long way short of being an essential service' like police, firefighting, health and power. And building workers were not the only employees with 'significant industrial muscle':

If these amendments are worth introducing, why aren't they worth introducing more generally?<sup>12</sup>

Solicitor with Freehills (Solicitors), John Cooper, (Partner, Employee Relations, Melbourne) has also commented on the proposed extensive powers to be afforded to the ABCC:

The ABCC would have enormous powers. For example, under its proposed powers (Recommendation 185), it has the right to intervene in any case or hearing in the AIRC that involves the building and construction industry. In that regard alone, the Construction Commission would have more power than the Minister himself.<sup>13</sup>

## **Interim Measures—the Building Industry Task Force**

In November 2002, the Interim Building Industry Task Force (the task force) was set up in response to the first report of the Building Industry Royal Commission. Nigel Hadgkiss, a Federal Police officer is in charge of the BITF, and was formerly a senior investigator for the Royal Commission. The House of Representatives Standing Committee on Legal and Constitutional Affairs has been presented with allegations about Mr Hadgkiss being formerly linked with the instigation of [corrupt practices](#) arising from the NSW Wood Royal Commission. Mr Hadgkiss has been appointed in his role as delegate of the Employment Advocate under section 83BE(1) of the WR Act (pertaining to the role of the Employment Advocate).

Mr Hadgkiss's role is to:

- take legal action in relation to freedom of association
- investigate freedom of association breaches, and
- investigate breaches of part VID of the act, which relates to AWAs. The delegations make it clear that it is only in relation to the building industry, and the directions make it clear not to exercise that function in relation to matters involving AWA filing, approval or breach issues.

In four months of operation the task force has received many hundreds of reports of law-breaking in the industry. The task force has conducted more than 100 site visits and has launched some 46 investigations. It is preparing 18 prosecutions and has already launched two prosecutions. On 4 March 2003, it was alleged in the Senate that the task force was being used to facilitate the use of [strike breakers](#) in a Queensland building industry dispute.

## **Cabinet Decisions and Budget**

On 2 April 2003, Federal Cabinet decided to extend the operation of the task force, pending the establishment of the Australian Building and Construction Commission. Cabinet also supported

1. a separate act for the construction industry providing for secret ballots before strikes, compulsory cooling off periods after extended strikes, and damages in the event of unprotected industrial action. Indeed these provisions have been the subject of many Bills, and some Acts, since 1999. (They are cited under 'Legislation' in [Australian Workplace](#))
2. a new law enforcement agency for the industry with powers to compel witnesses to testify, bring prosecutions and enforce judgments and with sufficient on-the-ground presence to police CBD building sites, and

3. insistence on the National Construction Code of Practice (and its implementation guidelines) being applied to all significant new projects that are fully or partly federally funded.

The measures to continue the role of the Interim Building Taskforce until the proposed ABCC starts to function, as well funding to draw up the new legislation, have been supported under a [\\$17 million allocation](#) in the Employment and Workplace Relations Portfolio Budget Statement (13 May 2003) as the Government's initial response to implement many of the Royal Commission's recommendations.

## **Exposure Draft Legislation**

Minister Abbott released an [exposure draft of the Building and Construction Industry Improvement Bill](#) on 17 September 2003. The Bill will, if enacted:

- establish the Australian Building and Construction Commissioner and the Federal Safety Commissioner
- make unlawful any industrial action that is not protected action
- enable damages to be sought where unlawful action is taken
- improve the bargaining framework by focussing on bargaining at the enterprise level
- provide employees with a right to vote on whether to take protected action
- clarify right of entry arrangements
- strengthen freedom of choice, whether or not to belong to a union or employer association; and
- impose greater accountability on officials and employees of organisations.

Those interested in its provisions have one month (until 17 October) to make comments. In his [Ministerial Statement](#) on the draft legislation, Minister Abbott noted:

There is a big difference between effective law enforcement and "third party interference" in workplace relations in the construction industry. The Government wants an effective "umpire" to enforce the workplace relations rules – not a body which will take sides or dictate to people what's in their best commercial interests. This industry doesn't need a new entity to facilitate negotiations – it needs a new entity to ensure that breaking the law has serious consequences.

The ACTU Secretary, Greg Combet, commented on the leaked details of the confidential Volume 23 of the Building Industry Royal Commission's report, and made the observation

that the industry was productive and that there had been few breaches of Section 127 orders (to cease industrial action):

On our assessment when you go through the report, there are only two alleged findings of breaches of section 127 of the Workplace Relations Act over the last three years – two alleged breaches of s127 orders of the Workplace Relations Commission. This is not a pattern of illegality and inappropriate conduct.

The truth is that this industry is a productive one, that the overwhelming majority of projects are completed on time, on budget with no disruption industrially. It's the fourth most efficient from the point of view of labour productivity in Australia. It's the second or third most productive construction industry amongst the OECD countries. There is no case – no case – for separate treatment of this industry and its industrial relations as proposed by Mr Abbott ...

What the bill proposes to do is to apply a straight-jacket to workers and their unions in the major construction areas. Industrial action is to be severely limited. The capacity for employees to collectively bargain is to be severely limited. The capacity of union officials to enter workplaces is to be further constrained. The building industry awards are to be further stripped of their protection that they provide for workers, and there's to be further constraints on freedom of association – that is, the capacity of unions to organise and recruit members in the industry. This will place a straight-jacket on union organisation in the construction industry. That's the first major piece of this bill.

The second major component of it deals with the enforcement. That is, if in any way workers or their unions try to loosen the buckles on the straight-jacket and engage in legitimate union activity, then they are to be severely prosecuted. The new commission that's to be established will have extensive powers to investigate, gather evidence and launch prosecutions independent of the industrial parties themselves. Unions will carry liability basically for everything, even the conduct of workers on a construction project where there's some allegation that's caused some damage to a project, for example. (ACTU: [Response To Construction Industry Draft Bill](#))

Other industry associations such as the Master Builders' Association and the Australian Industry Group generally supported the draft legislation (for an overview of responses to the exposure legislation see '[Democrats put brakes on federal construction bill](#)'). The draft legislation re-introduces provisions now specific to the building industry which have been on the table in one form or another since the Workplace Relations Amendment (More Jobs Better Pay) Bill 1999, and related to it, the 'Registered Organisations' exposure legislation. It is also apparent that not all of the Royal Commission's 212 recommendations have been addressed in the draft legislation.

## **Conclusion**

Judging by the recommendations of the previous Royal Commissions targeting industrial relations issues, the Building Industry Royal Commission has been unique because of its determination to confine a new legal regime to the Building and Construction industry. In

previous Royal Commissions into industrial relations matters within industries, it has been the norm to make recommendations, for example in relation to the democratic control over the union or use of union funds, which were intended to apply to all industrial organisations registered under federal law. Also, many of the recommendations, i.e. tightening up right of entry and related 'trespass' issues, may require the cooperation of the States to be effective and such cooperation at this stage seems unlikely, in spite of threats to withhold Commonwealth funds for government construction projects.

Finally, a key recommendation is to set up a separate commission with oversight of the industry. As noted, the current Interim Building Industry Task Force derives its authority under the OEA, and the recommendations appear to create a body similar to the OEA but with search and enforcement powers of the Australian Competition and Consumer Commission, allowing a suspected breach of **any** Commonwealth law to be investigated. Such an exercise may produce the 'unintended consequence' of interfering in the day to day operation of particular firms, to a degree which might be regarded as unwarranted. Indeed issues and records, beyond the current right of entry matters typically pertaining to time and wages matters, could be made open for scrutiny.

## Endnotes

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1. Response to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee by the Department of Employment, Workplace Relations and Small Business, [Senate Hansard](#), 10 February 1999.
2. See report by Stephen Long, 'Reith attacks ILO finding on Workplace Relations Act', *The Australian Financial Review*, 13 March 2000.
3. Hamberger (Employment Advocate) v Williamson and Construction, Forestry , Mining and Energy Union 2000] FCA 1644 (23 November 2000).
4. Response to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee by the Office of the Employment Advocate, [Senate Hansard](#), 21 November 2002.
5. See Mark Phillips, 'Union digs in', *Herald Sun*, 22 June 2002.
6. Response by the Office of the Employment Advocate to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee [Senate Hansard](#), 5 June 2001.
7. Reported in *Workforce*, Issue 1393, March 2003.
8. Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union [2002] FCA 61.
9. Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Limited [2002] FCAFC 199.

10. C. Fitzsimmons and T. Ooi, 'National renovation Bill at \$17.6 billion', *The Australian*, 3 May 2003.
11. *Sydney Morning Herald*, 3 April 2003.
12. See interview with Professor Andrew Stewart on the Building Industry Royal Commission's recommendations in *Workplace Intelligence*, May 2003, <http://www.cpd.com.au/>
13. 'Update Cole Commission Report' in *Industrial Relations and Management Newsletter*, vol. 20, no. 4, May 2003, p. 15.