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

Conduct of the Commission – Principles and Procedures

Volume Two

Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC

February 2003

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

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ISBN: 0 642 21088 8

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Abbreviations

Administrative Appeals Tribunal	AAT
Attorney-General's Department	AGD
Australian Bureau of Statistics	ABS
Australian Federal Police	AFP
Australian Industrial Relations Commission	AIRC
Australian Industry Group	AIG
Australian Transaction Reports and Analysis Centre	AUSTRAC
Australian Workers' Union	AWU
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (referred to as the Australian Manufacturing Workers Union)	AMWU
Civil Contractors Federation	CCF
Commonwealth	C'wth
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia	CEPU
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical Division	CEPU Electrical Division
Communications, Electrical, Electronic, Energy, Information and Postal, Plumbing and Allied Services Union of Australia, Plumbing Division	CEPU Plumbing Division
Construction, Forestry, Mining and Energy Union	CFMEU
Department of Finance and Administration	DOFA
Housing Industry Association Limited	HIA
Independent Commission Against Corruption	ICAC
Master Builders Australia Inc	MBA Inc
National Companies and Securities Commission	NCSC
National Crime Authority	NCA
National Electrical and Communications Association	NECA
Victorian Civil and Administrative Tribunal	VCAT

1 The Terms of Reference

1 This Royal Commission was conducted pursuant to Letters Patent dated 29 August 2001. The Letters Patent set out my Terms of Reference, which defined the task that I was asked to perform. My Terms of Reference relevantly required me:

> *to inquire into and report on the following matters in relation to the building and construction industry:*
>
> *(a) The nature, extent and effect of any unlawful or otherwise inappropriate industrial or workplace practice or conduct, including, but not limited to:*
>
> *(i) any practice or conduct relating to the Workplace Relations Act 1996, occupational health and safety laws, or other laws relating to workplace relations; and*
>
> *(ii) fraud, corruption, collusion or anti-competitive behaviour, coercion, violence, or inappropriate payments, receipts or benefits; and*
>
> *(iii) dictating, limiting or interfering with decisions whether or not to employ or engage persons, or relating to the terms on which they be employed or engaged;*
>
> *(b) The nature, extent and effect of any unlawful or otherwise inappropriate practice or conduct relating to:*
>
> *(i) failure to disclose or properly account for financial transactions undertaken by employee or employer organisations or their representatives or associates; or*
>
> *(ii) inappropriate management, use or operation of industry funds for training, long service leave, redundancy or superannuation.*
>
> *(c) Taking into account your findings in relation to the matters referred to in the preceding paragraphs and other relevant matters, any measures, including legislative and administrative changes, to improve practices or conduct in the building and construction industry or to deter unlawful or inappropriate practices or conduct in relation to that industry.*
>
> *A reference to the 'building and construction industry' does not include the building or construction of single dwelling houses unless part of a multi-dwelling development.*

2 My Letters Patent dated 29 August 2001 are reproduced in full in Appendix 1. Under those Letters Patent I was required to report to the Governor General not later than 6 December 2002. By September 2002 it became apparent that I would not be able properly to complete my report by that date. On 20 September 2002 I sought an extension of the reporting date until 28 February 2003. Under amended Letters Patent dated 5 December 2002 the Commission's reporting date was extended to 31 January 2003. On 24 December 2002 I made a further request for an extension until 24 February 2003. Under amended Letters Patent dated 23 January 2003 the Commission's reporting date was extended to 24 February 2003. Both amending Letters Patent are set out in Appendix 2.

3 It is appropriate that I say something about what I understood the most important words or phrases used in my Terms of Reference to mean.

The meaning of 'building and construction industry'

4 The most important words in my Terms of Reference are the words *'building and construction industry'*. Those words identify the subject matter of my inquiry by reference to a particular industry. The building and construction industry encompasses:

(a) multi-unit and high rise residential developments;

(b) non-residential buildings, such as office blocks, shopping centres, retail premises, educational institutions, and hospitals; and

(c) engineering construction work.

5 As other parts of this report will demonstrate, each of the sectors of the industry just identified is different in terms of, among other things: the coverage of industrial awards; the degree of unionisation of the workforce; the union with major coverage; the types of contracting arrangements used; the types of employment arrangements used; and the level of public and private involvement.

6 The building industry includes activities associated with design, demolition, excavation, assembly and erection of buildings and other structures, and the alteration or renovation of such buildings and structures. It also includes the installation of fixtures such as heating, airconditioning, fire alarms, electrical wiring and blinds and awnings.

7 The building industry also includes domestic building but, as my Terms of Reference specifically excluded '*single dwelling houses unless part of a multi-dwelling development*', the domestic segment of the industry fell outside the scope of my inquiry. The Commission has estimated that this exclusion accounts for about 26 per cent, by value, of the building and construction industry.

8 The construction industry includes activities associated with the design, construction and maintenance of roads, highways and subdivisions, bridges, railways, harbours, water storage and supply, sewerage and drainage, electricity generation, transmission and distribution, pipelines, recreation, telecommunications and other heavy industry.

9 Projects involving any of these activities require the co-ordination of a broad range of people and skills. Participants in the industry who had information relevant to the work of the Commission

therefore included project designers, architects, project managers, major contractors, subcontractors, labourers and specialist trades such as electricians and plumbers. Australian Bureau of Statistics data indicates that, in August 2002, 692 800 people were employed either full time or part time in the building and construction industry.

10 Understood in the way just described, the building and construction industry is very large. According to the Australian Bureau of Statistics, in the 2001-02 financial year in dollar terms total building and construction work done in Australia was valued at approximately $59.7 billion. Taking into account the exclusion of single dwelling houses, the Commission estimated that the total activity in the part of the industry that was subject to investigation by this Commission was for that financial year in the region of $41 billion. The Commission estimated that about half of that total comprised activity related to engineering construction projects.

The meaning of 'practice or conduct'

11 Clause (a) of my Terms of Reference required me to investigate the *'nature, extent and effect of any unlawful or otherwise inappropriate industrial or workplace practice or conduct'*, while clause (b) required me to investigate the *'nature, extent and effect of any unlawful or otherwise inappropriate practice or conduct'* of certain financial matters and industry funds.

12 While clause (b) was not limited by the words *'industrial or workplace'*, both clauses required me to inquire into *'practice or conduct'*. The word *'practice'* involves repetitive acts. A single act does not constitute a practice. The word *'conduct'* may involve a singular act, or multiple acts. In context, it is to be interpreted in the singular because multiple acts each constituting conduct of a similar type would constitute, if of sufficient number, a practice.

13 The use of the word *'extent'* in clauses (a) and (b) required a determination of the frequency of any type of conduct or practice. The word required a characterisation of particular factual situations to determine if a particular factual situation fell within a type of conduct or practice.

14 The concept of a *'practice'* may involve repetitive activity by a category of persons, for instance, employers disregarding occupational health and safety laws, or union officials acting contrary to the provisions of the *Workplace Relations Act 1996 (C'wth)*. As I was required to investigate the *'nature, extent and effect'* of such practices, it followed that in relation to each category of relevant conduct I was required to investigate: the nature of conduct; the participants in that conduct and any position that they might occupy; the frequency of conduct; whether the conduct constituted part of a practice; by whom the practice was carried on; and whether the conduct or practice was *'unlawful'* or *'inappropriate'*.

The meaning of 'industrial or workplace'

15 In clause (a) of my Terms of Reference, the words '*any … practice or conduct'* were qualified by use of the words *'industrial or workplace'*. Those words limited the types of practices or conduct into which the Commission was empowered to inquire and report under clause (a).

16 The Terms of Reference illustrated the meaning of the phrase *'unlawful or otherwise inappropriate industrial or workplace practice or conduct'* by giving examples in paragraphs (i), (ii) and (iii) of clause (a). That these paragraphs were examples only of the content of that

phrase, rather than limiting words, was made clear by the words 'including, but not limited to' in the introduction to paragraphs (i), (ii) and (iii).

17 The word *'workplace'* is not defined in the *Oxford English Dictionary*. It is defined in the *Macquarie Dictionary* to mean simply *'a place of employment'*. That definition is consistent with the way in which 'workplace' is defined in a variety of legislative contexts.[1] I accept that definition.

18 The word *'industrial'* appears in the phrase *'industrial disputes'* in section 51(xxxv) of the *Constitution*. The High Court has observed that the correct approach to the construction of those words is that:

> *The words are not a technical or legal expression. They [the words 'industrial' and 'disputes'] have to be given their popular meaning – what they convey to the man in the street. That is essentially a question of fact.*[2]

19 The High Court went on to state that:

> *It is, we think, beyond question that the popular meaning of 'industrial disputes' includes disputes between employees and employers about the terms of employment and the conditions of work.… The popular meaning of the expression no doubt extends more widely to embrace disputes between parties other than employer and employee, such as demarcation disputes, but just how widely it may extend is not a matter of present concern.*[3]

20 In other words, the word 'industrial' includes at least matters pertaining to terms and conditions of employment and conditions of work, but its meaning extends beyond that to demarcation disputes and unspecified other matters. Those other matters must be determined as a question of fact, in light of the normal meaning of the word *'industrial'*. That word is not to be interpreted as limited by the meaning of the narrower word *'industry'*.[4]

21 The word *'industrial'* is not usually defined in legal dictionaries on its own. It is much more often defined as part of a phrase such as *'industrial dispute'* or *'industrial action'*. The *Oxford English Dictionary* gives the primary meaning of *'industrial'* as *'pertaining to, or of the nature of, industry or productive labour; resulting from industry'*. The *Macquarie Dictionary* defines the primary meaning of *'industrial*' as *'of or relating to, of the nature of, or resulting from industry or productive labour'*.

22 These definitions are wide. They suggest that a matter fell within the words *'industrial practice or conduct'* in my Terms of Reference if the matter pertained to or related to the building and construction industry. There is no warrant for reading the words as limited to things done directly connected with the relationship between employers and employees in their capacities as such.[5] That conclusion is consistent with the breadth of the examples of *'industrial or workplace'* conduct given in clause (a), which extend, for instance, to *'fraud, corruption, collusion or anti-competitive behaviour'*. These examples do not, or do not necessarily, have any connection with the relationship between employers and employees. The words *'collusion or anti-competitive behaviour'* would, for example, certainly embrace collusion between major builders in tendering for work.

23 Consequently, I was empowered under clause (a) of my Terms of Reference to investigate *'unlawful or inappropriate practices or conduct'* provided that they took place at a place of employment within the building or construction industry, or that they pertained or related to the building or construction industry.

The meaning of 'unlawful'

24 The use of the expression *'any unlawful or otherwise inappropriate'* practice or conduct necessarily meant that unlawful practice or conduct was a species of the genus *'inappropriate conduct'.* That meant it was not necessary to consider whether conduct was inappropriate unless the conduct was found not to be unlawful. Accordingly, it was important to determine what was meant by the word *'unlawful'.*

25 The word *'unlawful'* is defined in the *Oxford English Dictionary* as meaning *'contrary to law; prohibited by law; illegal.'* Similarly, the word's primary meaning in the *Macquarie Dictionary* is *'not lawful, contrary to law; illegal; not sanctioned by law.'* The definition is wide. At its narrowest, where *'unlawful'* means *'illegal'*, it may be confined to conduct that is prohibited by the criminal law. Fraud, corruption and violence, all of which were referred to in clause (a)(ii) of my Terms of Reference, were examples of such criminal illegality.

26 As the *Oxford English Dictionary* definition makes plain, however, *'unlawful'* extends beyond *'illegal'* and embraces activity that is *'contrary to law'.*[6] It does not involve any stretching of language to determine that tortious conduct, or conduct in breach of contract, is *'contrary to law'.* Gibbs ACJ in *Sankey v Whitlam* expressly acknowledged that *'a breach of contract is unlawful in the sense that it involves the violation of a legal right and creates a legal wrong'*.[7] The law discourages such conduct and attaches consequence to it if it occurs. In that respect, the civil law is no different to the criminal law; it is merely the nature of the consequence which may differ upon breach.

27 A submission to the effect that the word *'unlawful'* in my Terms of Reference should be interpreted as a reference only to conduct which has been determined in legal proceedings to be unlawful was rejected by Branson J in the Federal Court in *Ferguson v Cole*.[8] It follows from what I have said that I agree with Branson J that that submission was not well founded.

28 The conclusion that the word *'unlawful'* should be interpreted as extending to conduct that falls short of a contravention of the criminal law draws support from a number of different areas of law. Perhaps the clearest support is derived from the economic tort of unlawful interference with contractual relations or, if it exists in Australia, the tort of intentional unlawful interference with trade or business. In that context, it is clear that the *'unlawful'* act necessary to establish the tort may involve procuring a breach of contract or interfering with the performance of a contract,[9] fraudulent statements,[10] intimidation and other tortious conduct,[11] and (in certain circumstances) breach of a statutory prohibition.[12]

29 In *Sanders v Snell*,[13] the High Court discussed the element of *'unlawfulness'* in the definition of the emergent tort of unlawful interference with trade or business. There is no doubt that the Court considered that element to extend to civil wrongs such as torts and breaches of contract, although the Court's primary concern was to demonstrate that conduct that was beyond power was not relevantly *'unlawful'*. [14] The majority wrote:

> *The expression 'unlawful means', like other expressions used in this area, may be apt to mislead.*
>
> *'Infringement of some right' may well be a useful description of what is meant by saying in this context that the alleged tortfeasor engaged in an unlawful act …. But it may be doubted that 'infringement of some right' is, or is always, a sufficient description of what is unlawful means for the purposes of the economic torts generally or the tort now under consideration.*[15]

30 There are other contexts where the word *'unlawful'* has been held to extend to civil wrongs. The tort of intimidation, for example, which involves as one of its elements a threat to commit an unlawful act, is established not merely where the threatened act is criminal, but also where the threat is to engage in tortious conduct or breach of contract.[16]

31 Similarly, the tort of conspiracy by unlawful means occurs when two or more people combine to use unlawful means and the plaintiff is damaged by those unlawful means. *'Unlawful means'* for these purposes include acts that are criminal, tortious, in breach of contract, or in breach of statutory duty.[17]

32 In the context of the criminal law, the offence commonly described as blackmail involves a threat to cause detriment of any kind to any person without reasonable or probable cause.[18] It is sometimes said that it is only an 'unlawful' threat that can give rise to this offence, although the weight of authority seems to be against that proposition.[19] In any event, however, it is clear that a threat for these purposes clearly includes *'a threat to cause a detriment to another by inducing a violation of his legal right, contractual or otherwise'*.[20]

33 In a completely different context, the discretion to exclude evidence that has been *'illegally'* obtained is enlivened where evidence was obtained in circumstances not authorised by law, even if there is no suggestion that the evidence was obtained in breach of the criminal law.[21]

34 For these reasons, in my view, civil wrongs, including torts and breaches of contract, contraventions of statute, and illegal acts contrary to the criminal law, all fall within the meaning of the expression *'unlawful'* as that word is used in my Terms of Reference.

35 In this Final Report, I have adopted that meaning of the word when making findings. It follows that a finding that a person has engaged in unlawful conduct does not indicate that the person has committed a crime. It is normally a finding that the person engaged in conduct that violated one of the statutory provisions, or constituted one of the torts, described in the latter part of this volume.

The meaning of 'inappropriate'

36 My Terms of Reference empowered me to investigate not only '*unlawful*' practices and conduct, but also '*inappropriate'* practices and conduct.

37 I have found that many of the matters investigated by this Commission illustrated '*unlawful'* conduct. There were, however, some matters which did not involve 'unlawful' conduct in the sense I have described above. It was therefore necessary for me to consider whether I should find that those matters were examples of '*inappropriate'* conduct. That task raised issues that were not free from difficulty.

The need for an objective standard

38 Generally speaking, individuals, organisations and companies in Australia are entitled to order their affairs upon the basis of the law as it exists at the time they engage in particular conduct. That principle underlines, among other things, the common law presumption against the retrospective operation of statutes in a way so as to change accrued rights or liabilities (except as to matters of procedure) or to upset transactions stopped or closed.[22] Section 8 of the *Acts Interpretation Act 1901 (C'wth)* embodies the same policy. In other words, the starting point is that everybody is free to do anything, subject to the provisions of the law.[23]

39 It followed that care must be taken before individuals, organisations or companies were criticised and subjected to adverse public comment damaging to their reputation because I regarded their lawful conduct as '*inappropriate*'. As Finn J has pointed out, '*[w]ords that have a pejorative connotation need to be used with particular care. Used inappropriately they can damage unfairly*.'[24]

40 The above considerations gave rise to some concerns about my power to make findings that conduct was '*inappropriate*', as they gave rise to a question as to whether my Terms of Reference should be interpreted as requiring findings of that nature. My concern arose in large part from the decision in *Greiner v Independent Commission Against Corruption*.[25] In that case, the New South Wales Court of Appeal was concerned with the meaning of the word '*corrupt*', and in particular with whether the Commissioner of the Independent Commission Against Corruption (ICAC) had erred in finding that certain conduct that was lawful, and that was not inconsistent with generally recognised standards of honesty, was nevertheless '*corrupt*' within the meaning of the statutory definition of that word. The case therefore concerned the proper approach to the interpretation of the statutory definition of '*corrupt*', which was found in s8 of the *Independent Commission Against Corruption Act 1988* (*NSW*) when read with the limitations set out in s9(1) of that Act.

41 Gleeson CJ commented that:

> *It would be expected that Parliament would have provided for adverse determinations to be made by reference to objective and reasonably clearly defined criteria, so that at least people whose conduct had been declared corrupt would know why that was so, and would be in a position to identify, and, to the extent to which they were able, publicly dispute the process of reasoning by which that conclusion was reached.*[26]

42 Gleeson CJ held that, as a matter of statutory interpretation:

> *the standards by which it [s 9(1) of the Act] is applied must be objective standards, established and recognised by law, and its operation cannot be made to depend upon the subjective and unexaminable opinion of the Commissioner.*[27]

43 His Honour went on to say that legislation which exposes citizens to the possibility of being declared to have engaged in corrupt conduct:

> *should not be construed as to make that outcome turn upon the possibly individualistic opinions of an administrator whose conclusions are not subject to appeal or review on the merits …. the determination should be made by reference to standards established and recognised by law.*[28]

44 Finally, Gleeson CJ commented that:

> *The observance and application by the Commission of objective standards, established and recognised by law, in the performance of its task of applying s 9 to cases before it is essential. It is what was intended by Parliament, it is required by the statute, and it is necessary for the maintenance of the rule of law.*[29]

45 Priestley JA, the other member of the majority, found that the Commissioner had erred because his:

> *conclusion was not … based on any standard of corrupt conduct established or recognised by law or defined by the Act. Rather, in my view, the standard used by the Commissioner was one he thought appropriate, notwithstanding that it had not previously been established or recognised.*[30]

46 The above comments were made in the context of an Act that defined *'corrupt'* very largely by reference to objective standards. The legislative history of that Act also provided strong support for the conclusion that it was intended that only objective standards should be applied by the Commission. My Terms of Reference, by contrast, empowered me to investigate *'unlawful or inappropriate'* conduct, and did not provide any definition of either term. The word *'inappropriate'* necessarily referred to a standard the content of which was uncertain, providing a possible point of distinction from the approach of the Court of Appeal in *Greiner*.

47 On the other hand, in *Greiner* the conduct that had been adjudged to be *'corrupt'* by the ICAC Commissioner was taken at a time when the prohibition on *'corrupt'* conduct was known. The people found to be corrupt were, therefore, aware when they made their decisions to engage in the conduct in question that their actions may be assessed against the applicable standard. The vice identified by the Court of Appeal was that the content of that standard was not known or objectively ascertainable. By contrast, in circumstances considered by this Commission, in most cases the persons concerned did not know that their conduct might be judged to be *'inappropriate'* by a Royal Commission the existence of which had not yet been contemplated. In other words, not only was the *content* of the standard not known, the very existence of the standard was not known.

48 A Royal Commission's Terms of Reference define the circumstances in which powers can be invoked under the *Royal Commissions Act 1902 (C'wth).* They are therefore analogous to a statutory definition such as that considered in *Greiner*. For that reason, it seems to be appropriate that I interpret my Terms of Reference on the basis that the Governor-General intended, to adopt Gleeson CJ's words quoted above, *'adverse determinations to be made by reference to objective and reasonably clearly defined criteria'.* The question is whether any such criteria can be found.

An attempt at definition

49 The *Oxford English Dictionary* defines '*inappropriate'* as '*not appropriate; unsuitable to the particular case; unfitting; improper*'.[31] Other dictionaries give the word the same meaning, although often only by inverting the meaning of '*appropriate'*. Words such as '*unsuitable'* and '*unfitting'* suggest conduct which departs from a standard. The relevant standard is not, however, expressed, nor is it easy to identify.

50 As the word '*inappropriate'* is defined in part as meaning '*improper'*, some guidance as to the meaning of '*inappropriate'* can be derived from consideration of the meaning of '*improper'*.

51 In *Chew v The Queen*,[32] the High Court considered the meaning of '*improper'* in the context of a company law prosecution. It adopted an objective test of impropriety. Toohey J said:

> *The expression is, as the appellant accepted, one to be determined objectively; essentially the issue is whether the conduct impugned is inconsistent with the proper discharge of the duties of the office in question.*[33]

52 The High Court considered the meaning of *'improper'* again in *R v Byrnes.*[34] There, the Court said that Chew was correct to treat the word as requiring an objective test, and that:

> *Impropriety consists of the breach of the standards of conduct that would be expected of a person in the position of the alleged offender by responsible persons with knowledge of the duties, powers and authorities of the position and the circumstances of the case.*[35]

53 In *Grove v Flavel,*[36] the Full Court of the Supreme Court of South Australia considered the word *'improper'* in the context of another company law prosecution. Jacobs J, with whom Matheson and Olsson JJ agreed, held that:

> *What is 'improper' for the purposes of s 124(2) cannot be determined by reference to some common, uniform, or inflexible standard which applies equally to every person who is an officer, but rather must be determined by reference to the particular duties and responsibilities of the particular officer whose conduct is impugned. In this case the appellant is, and is charged as, a director of Constructions and it is by reference to his duties as a director of that company that his use of information acquired by virtue of that office must be judged.*[37]

54 In *Edwardes v Kyle,*[38] Owen J considered whether the findings of a local government inquiry involved *'improper'* conduct. He, too, held that the word *'improper'* required an objective test. He held that he was required to consider whether:

> *the ordinary reasonable observer would regard the impugned conduct as a gross departure from those standards of public administration the public are entitled to expect and which is otherwise inexplicable and thus … improper.*[39]

55 In *Robbins v Harness Racing Board,* O'Bryan J said that *'For behaviour to be improper it must be such that a right-thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.'* [40]

56 In the *Final Report of the Royal Commission into the Metropolitan Ambulance Service,* Commissioner Lasry said of the word *'improper'*, which was used in his Terms of Reference, that:

> *improper conduct is likely to be conduct which, within its context, is inconsistent with the proper discharge of the duties, obligations and responsibilities of the person whose conduct is being examined.… [T]hat conduct must be judged objectively … Importantly, the impropriety of conduct is to be judged by the context in which it occurred, which will include a consideration of the role, function, responsibilities, powers, codes of conduct, and duties of the position occupied by the person who carried it out.*[41]

57 Commissioner Lasry had earlier observed that:

> *Where applicable statutes, contracts, guidelines, directions or standards (including codes of conduct) make specific reference to the conduct under consideration, then that should be taken into account when determining whether the conduct is improper. However it is by no means conclusive of it.*[42]

58 While none of the above observations are decisive as to the meaning of the word *'inappropriate'* as it is used in my Terms of Reference, those observations are helpful in ascertaining the content of that word. They do not, however, provide a complete guide, as they tend to focus upon the proper discharge of a person's duties. I do not think that the word *'inappropriate'* in my Terms of Reference should be interpreted that narrowly.

59 The building and construction industry is a complex industry, the shape and operation of which is determined by the interplay of conflicting interests. Representatives of certain segments of the industry naturally endeavour to maximise the interests of the sector they represent. Thus, for example, unions understandably seek to advance the interests of their members. Companies seek to maximise their profits. Governments often see their interests largely from the perspective of their role as major clients of the industry, but they are also important regulators. In pursuing their individual interests, the participants in the industry may well discharge their duties, functions, obligations or responsibilities properly *from the point of view of the position that they hold*. In doing so, they would not act inappropriately in any objective sense.

60 Nevertheless, the results of the interplay of conflicting interests may not be appropriate from a public or national interest perspective. That could be because of structural imbalances within the industry, or deficiencies in its regulatory or legal structures. While no individual participant within the industry is obliged to act in a way that maximises the industry's overall good, part of my function is to attempt to determine what should be done to achieve precisely that outcome. I must recommend reforms with that objective in mind, while balancing the reasonable interests of the participants in the industry. One matter I must therefore consider is whether the pursuit by individual participants in the industry of their own best interests (which, in itself, is entirely appropriate) is producing inappropriate outcomes. That judgment is necessarily a somewhat subjective one.

61 Ultimately, therefore, as I explain more fully later in this volume, I decided that in most cases I would not make findings that inappropriate conduct occurred. I reached that conclusion in order to avoid the potential unfairness in finding that individuals, organisations or companies had departed from a standard that had not been articulated and may not have been ascertainable at the time the relevant conduct occurred. That does not mean, however, as I explain more fully later, that I did not determine that certain categories of conduct were inappropriate in the sense that reforms were needed to prevent conduct within those categories from continuing. I made many such determinations. It simply means that I did not assess the behaviour of individuals or organisations against the standard of *'inappropriateness'*.

The meaning of 'other relevant matters'

62 Paragraph (c) of my Terms of Reference required me to take into account my '*findings in relation to the matters referred to in the preceding paragraphs and other relevant matters*' when making recommendations '*to improve practices or conduct in the building and construction industry or to deter unlawful or inappropriate practices or conduct in relation to that industry*'.

63 The reference to '*other relevant matters*', and the instruction that I recommend measures '*to improve practices and conduct in the building and construction industry*' in addition to measures '*to deter unlawful or inappropriate practices or conduct*', required me to take into account material that did not relate to unlawful or inappropriate conduct when formulating my recommendations. Of course, I could not take '*other relevant matters*' into account unless I could first identify them, with the result that the Commission investigated certain matters which were instructive in determining the measures necessary to improve practices and conduct in the building and construction industry, even though in the final analysis they did not involve particular instances of unlawful or inappropriate conduct.

2 Independence

1 This Royal Commission was conducted entirely independently of the Commonwealth Government. I did not receive, nor would I have accepted, any instruction from the Government. At all times this Commission maintained its independence from the Government and, indeed, from all other institutions and persons.

2 I made it plain on many occasions since this Commission began that political considerations, whether relating to the establishment of the Royal Commission or otherwise, have played no part whatsoever in the conduct of, or the deliberations of, the Royal Commission. Whatever the reason for the establishment of the Commission, my function has been to perform the task given me by the Letters Patent. That is what I have done.

3 It was, of course, necessary that the Government provide such funds and other administrative support as were necessary to enable the Commission to perform its tasks. From my appointment until 26 November 2001, which included the establishment phase of the Commission, the Department of Finance and Administration (DOFA) was responsible for the provision of administrative support to the Commission. Under changes arising from Administrative Arrangements Orders, from that date those responsibilities passed to the Attorney-General's Department (AGD). Liaison with Government in relation to budgetary and support arrangements was the responsibility of the Secretary of the Commission. The Secretary played no part in determining the witnesses called or material placed before the Commission.

4 The management of the Royal Commission came under close scrutiny through the Senate Estimates Committee process. The Secretary and Director, Corporate Services appeared before the Senate Legal and Constitutional Committee on four occasions and were questioned on a wide range of matters relating to the expenditure and conduct of the Commission. In addition to attendance at hearings the Commission provided the Attorney-General with information relating to 96 Questions on Notice from the Committee.

3 Investigations and procedures prior to hearings

Sources of information

1 In order to investigate the matters set out in my Terms of Reference, the Commission adopted a multi pronged approach.

Submissions

2 At the opening hearings of the Commission which were conducted around Australia in October 2001, an invitation was extended to all governments, organisations, companies, unions and persons with an interest in the subject matter of the Commission to provide submissions addressing relevant matters. In addition, at about the same time the Commission sent requests for information to almost 6500 organisations throughout Australia, and established a 1800 telephone number that could be used to give information to the Commission. The advertisements placed in the national and state press before the preliminary hearing also invited interested persons to provide submissions to the Commission addressing any matters falling within the Terms of Reference. Similarly, towards the conclusion of hearings, the Commission again advertised in the national and state press seeking final submissions in relation to the Commission's investigations.

3 In response to these invitations, substantial submissions were received from the Commonwealth of Australia (including a number of separate submissions from various agencies and Departments) and from the State of Queensland. Submissions were also received from the Master Builders Australia Inc (MBA Inc), the Australian Industry Group (AIG), the Civil Contractors Federation (CCF), the National Electrical and Communications Association (NECA) and the Housing Industry Association Limited (HIA). Only two major construction companies put in submissions, and the Construction, Forestry, Mining and Energy Union (CFMEU), and the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) were the only unions to do so. A complete list of submissions received by the Commission is contained in Appendix 3. All submissions were tendered as exhibits and were available on the Commission's website.

4 Those submissions, together with submissions in response to discussion papers (discussed below) provided a valuable information source for the Commission. The Commission's Research Unit reviewed and analysed all of the submissions. This process assisted the

Commission to identify key issues for further consideration and investigation. In addition, the submissions gave people not called before the Commission an opportunity to present information to be considered by me as I was preparing this final report.

5 As is apparent, the response to the Commission's request for submissions was disappointing, and reflected the general lack of co-operation experienced by the Commission in the conduct of its investigations. In particular, it was disappointing that only sparse submissions were received from the governments of Tasmania, Western Australia, Northern Territory and New South Wales. No general submissions were received at all from the governments of Victoria, South Australia or the Australian Capital Territory.

Meetings with industry participants

6 In October 2001 I wrote to almost 150 major participants in the building and construction industry with an invitation to consult with me confidentially. I wrote to representatives of Commonwealth, State and Territory Governments, employer organisations, unions, major employers and individual unionists requesting meetings to consider structural problems in workplace relations in the building and construction industry, and to discuss any proposals for reform. I indicated at that time that a paper would be issued describing the results of the consultations, but not attributing content within the paper to any body or person consulted.

7 Twenty-nine organisations or people accepted that invitation and I consulted with those organisations or people, in the company of the Commission's Director of Legal Services. The paper giving the results of those consultations was published on 6 May 2001.[43] While information provided during the confidential discussions has been helpful in some respects, it must be said, in light of disclosures which have emerged at public hearings, that many of those consulted were less than frank with the Commission.

Discussion papers

8 Over its life, the Commission undertook significant research that resulted in the release for public comment of 18 discussion papers, dealing with a wide range of topics. The topics were selected by me in consultation with the Research Unit. The topics were identified from submissions provided to the Commission and from material arising as part of the Commission's public hearing process. The Research Unit analysed relevant public reports and reviews of interest, material tendered in hearings and submissions to identify areas of interest to the Commission and to develop material for public release. A list of those discussion papers, together with a brief description of each, is attached in Appendix 4.

9 The discussion papers were designed to stimulate community input to the Commission's Terms of Reference and to provide a focus for written submissions. When each paper was released I wrote to interested parties inviting their response. All papers were included on the Commission's website.

10 Over 140 responses were received in total, and they were tendered as exhibits and available on the Commission's website. All late submissions were accepted and taken into consideration. The discussion papers, and the responses thereto, contributed significantly to my Final Report.

A list of entities responding to the discussion papers is set out in Appendix 5 (excluding any persons who asked that their submissions be kept confidential).

11 The response of certain State governments was disappointing, particularly the Victorian Government where only one government agency made a submission in respect of one discussion paper, and New South Wales which made only two submissions.

Workplace Health and Safety Conference

12 One of the discussion papers released by the Commission, in July 2002, related to workplace health and safety. It raised matters for comment by the participants in the industry, and by those who have the present obligation to address matters concerning safety. Submissions were called for from industry participants and members of the public. The responses received were considered and consolidated.

13 The Commission then invited interested parties, and in particular employers and unions, to a conference to see whether industry agreement could be reached on steps which were either necessary or desirable to improve safety in the industry. The Conference was held in Melbourne over two days in September 2002. It was attended by representatives of industry groups, governments, regulators and academics, but not the unions, which chose to hold their own conference on workplace health and safety, also in Melbourne, on the same day as the Commission's conference commenced.

Memoranda of understanding

14 The Commission obtained information from permanent government agencies or bodies, the process of which was facilitated by memoranda of understanding entered into between the Commission and those agencies or bodies. An example of the type of memorandum of association entered into with these agencies is attached in Appendix 6.

15 The Commission entered into memoranda of understanding with the Australian Federal Police (AFP) and the police forces of New South Wales, Victoria, Western Australia, South Australia and the Northern Territory. There was no formal memorandum of understanding with either the Tasmania Police or the Queensland Police, but the Commission had an informal co–operative arrangement with both agencies.

16 The Commission also entered into memoranda of understanding with the Australian Transaction Reports and Analysis Centre (AUSTRAC), the then National Crime Authority (NCA), the ICAC (NSW), the Queensland Crime Commission, and the Anti-Corruption Commission (WA). There was no memorandum of understanding with the Australian Taxation Office or the Australian Competition and Consumer Commission but co–operative arrangements relating to the exchange of information between the Commission and both of these agencies were implemented.

17 With the exception of AUSTRAC, and one or two other agencies in relation to specific investigations, very little information was acquired by the Commission as a result of these memoranda of understanding. In particular, information obtained through the use of covert investigative powers by these agencies did not play any significant part in the work of the

Commission. That was not a function of any lack of co–operation, but instead reflected the fact that none of these agencies had a major focus on the building and construction industry.

18 An amendment to s 27 of the *Financial Transaction Reports Act 1988 (C'wth)* by the *Royal Commissions and Other Legislation Amendment Act 2001 (C'wth)* in late 2001 gave the Commission access to information collected by AUSTRAC. Such information was obtained from AUSTRAC in relation to a number of investigations conducted by the Commission throughout Australia and was of assistance to those investigations.

19 The Commission did obtain useful information from the Australian Taxation Office under its co–operative arrangement. The Commission was designated by its Letters Patent to be a '*Commission to which paragraph 16(4)(k) of the Income Tax Assessment Act 1936 applies*'. That designation was helpful, as it meant that the Commission could receive information from the Australian Taxation Office 'for the purpose of conducting its inquiries'. There were, however, restrictions under the *Income Tax Assessment Act 1936 (C'wth)* as to the use the Commission could make of information received as a result of that section. Those restrictions in effect prevented the Commission from using the information in a way that could have been used to identify the person to whom the information related. In June 2002 the Commission became eligible to receive information from the Commissioner of Taxation under s3E of the *Taxation Administration Act 1953 (C'wth)*, and some useful information was received by the Commission pursuant to that provision, but the power came too late to be of much assistance.

20 The Commission did not itself have the power to apply for telecommunications service or named person warrants, or the authority to apply to use listening devices. As a result of amendments to the *Telecommunications (Interception) Act 1979 (C'wth)* in late 2001, by the *Royal Commissions and Other Legislation Amendment Act 2001 (C'wth)*, however, the Commission became an eligible Commonwealth authority and therefore an authorised recipient of lawfully obtained information or designated warrant information obtained by an authorised agency. In relation to one investigation, the Commission did receive information from another agency which had been acquired as a result of telecommunications interceptions conducted by and for the purposes of that agency.

Search warrants

21 While the *Royal Commissions Act 1902 (C'wth)* empowered the Commission to apply for search warrants, such warrants were not a major source of information obtained by the Commission. Six search warrants were issued pursuant to this power and the information obtained advanced the investigations of the Commission.

Hearings

22 Finally, the Commission used its coercive powers to obtain information relevant to its Terms of Reference. Those coercive powers took a number of forms. The two most important powers were the power to issue notices to produce (which is discussed below) and the power to summons persons to attend and give evidence. Extensive use was made of both of those powers.

23 Summonses were used to require witnesses to give oral evidence at hearings. The hearings of the Commission were used to elicit material to inform the Commission, and also to make public practices and attitudes in the building and construction industry that the Commission's investigations identified. The hearings elicited material much of which was widespread and well-known by participants within the industry. It was not, however, well known to the general public. That function of hearings was therefore important, because it allowed the public to gain an appreciation of the unlawful and inappropriate conduct that industry participants have come to regard as commonplace, and therefore to understand the importance of and urgency behind the reforms proposed by the Commission.

The process of investigation

24 It was obviously not possible, because of time and monetary constraints, to investigate or call evidence relating to every instance of unlawful or otherwise inappropriate industrial and workplace practice or conduct of which the Commission became aware. It was similarly not possible to investigate all unlawful or otherwise inappropriate practices or conduct that came to the attention of the Commission relating to the financial matters referred to clause (b) of the Terms of Reference.

25 Paragraph 4 of the Commission's First Practice Note, which was adopted by the Commission on 10 December 2001, stated that '*Subject to the control of the Commission, Counsel Assisting the Commission will determine what witnesses are called, what documents are tendered to the Commission, and in what order they will call and examine witnesses*'. A copy of the First Practice Note is set out in Appendix 7.

26 Paragraph 4 of the First Practice Note reflected the fact that it was the role of Counsel Assisting to select the incidents that were investigated by the Commission in public hearings. In carrying out that task, Counsel Assisting called evidence of practices or conduct that they regarded as representative, or that were illustrative of particular problems, together with evidence of the extent and effect of such practices. Counsel Assisting were able to select appropriate matters for hearing because they supervised and directed all of the investigations carried out by the Commission. Those investigations were designed to explore the nature and extent of the various types of practice and conduct described in the Letters Patent.

Case studies

27 Within each State or Territory, investigations usually began either with the Commission receiving a lead from one of a variety of sources, or with the Commission issuing a notice to produce designed to discover whether certain practices that it considered might exist did in fact exist.

28 Once a lead was identified, Commission investigators or solicitors made contact with persons who appeared likely to have relevant information and sought to arrange an interview. If a person was prepared to be interviewed, the interview was usually taped, although if a witness objected to an interview being taped that objection was accepted. If the material disclosed during the interview was relevant, a transcript of the interview was typed up. A statement was then drafted by Commission staff, who used the transcript to keep as close to the words used by the

relevant witness as possible. Once a draft statement was complete, the draft was provided to the witness for alteration or approval. Once approved, after any amendments requested by the witness were made, the statement was signed.

29 The Commission generally refused to conduct interviews on a confidential basis. It adopted that policy because the purpose of interviews was to obtain evidence that could be led during public hearings, which evidence could then be used to inform its final report. Those purposes were not served by confidential interviews. Confidential interviews therefore took place only after the express approval of one of the Senior Counsel Assisting the Commission was obtained, and that approval was given only when the information that the Commission expected to obtain was thought likely to lead to other avenues of investigation.

30 Leads identified during the course of any initial interviews were followed up by Commission investigators, with the result that further interviews often took place or notices to produce or further notices to produce were issued. That process continued until Counsel Assisting formed the view either that the available evidence had been obtained, or that it was unnecessary or impractical to seek to obtain further evidence.

31 Counsel Assisting then made a judgment about whether the evidence that had been collected warranted being led in a public hearing. Very often it did. On some occasions, however, Counsel Assisting concluded that the evidence would not advance the understanding of the Commission beyond evidence that had already been led. On other occasions, they concluded that the evidence they had been given was not reliable in material respects, and that the investigation should not proceed.

32 The procedure adopted if a person who was not approached by the Commission wanted to provide a witness statement was set out in paragraph 9 of the First Practice Note. That paragraph provided that:

> *All witnesses will be called by Counsel Assisting the Commission. Any person wishing to have evidence of a witness or witnesses placed before the Commission is to notify Senior Counsel Assisting the Commission of the names of all such witnesses, and provide a signed statement of their expected evidence, if possible in the form of a statutory declaration. Counsel Assisting or Commission staff may interview such witnesses and take further statements from such witnesses, if considered necessary. It is not necessary that any such interviews or the obtaining of such additional statements occur in the presence of the person, or legal representatives thereof, who sought to have the evidence of such witnesses placed before the Commission. The orderly conduct of the Commission will be greatly facilitated if this evidence is made available without delay.*

33 In order not to prejudice the conduct of its inquiries, the Commission adopted a policy of neither confirming nor denying whether particular categories of persons were under investigation and the nature of any such investigation.

34 The Commission established internal procedures for dealing with complaints concerning investigations conducted by the Commission. These included the matter being reviewed by a Senior Counsel Assisting who was not responsible for the team which had undertaken the investigation. That procedure was used following the receipt of two formal complaints regarding investigations, both of which were found to be baseless.

35 After the Commission's hearings concluded, persons seeking to lodge new allegations of unlawful or inappropriate practices or conduct were advised that the Commission had concluded its investigations and was not accepting additional matters. Correspondence was returned with the suggestion that the person consider forwarding the matter to the Interim Taskforce into the Building Industry within the federal Department of Employment and Workplace Relations.

Unco-operative witnesses

36 There were many occasions upon which potential witnesses who were approached by Commission investigators refused to be interviewed. Some of those people were drawn from the employer side of the industry. Most, however, were union officials or employees. Commission investigators approached individual union organisers on many occasions during the course of the Commission's investigations. In no State or Territory was any current union official or employee prepared to be interviewed in relation to any particular incident. The only interviews in which any union official agreed to participate were a small number of meetings of a general nature held between Counsel Assisting and some senior union officials.

37 When a person refused to be interviewed, the Commission's normal practice was to invite the person to submit a statement dealing with the matter under investigation. The response to requests of that type varied considerably, particularly from State to State. On some occasions, people consulted with their own lawyers and provided statements. On others, they drafted statements themselves. Most commonly, however, the request that a statement be provided was refused or ignored.

38 On many occasions when people refused to provide statements, the Commission summonsed those people and required them to give oral evidence about the matters under investigation. It was not, however, practical to adopt that approach on a uniform basis. It would not have been possible for the Commission to complete its hearings within a reasonable time if large amounts of hearing time had to be devoted to eliciting evidence that could have been provided through a statement.

39 As a consequence, on many occasions the Commission notified unco-operative persons of evidence that was adverse to them (a process discussed below), but it did not compel those persons to respond to that evidence unless Counsel Assisting formed the view that the evidence of the unco-operative witness was necessary to fill gaps in the evidence that could otherwise be placed before the Commission. Unco-operative witnesses therefore usually were not compelled to give evidence simply so that they could either corroborate or contradict an existing body of evidence.

40 That approach was contemplated by the Second Practice Note, which was issued on 19 December 2001. A copy of the Second Practice Note is set out in Appendix 8. Paragraph 14 of the Second Practice Note provided that:

> *When a witness has adopted the whole or part of a witness statement, then those parts which have not been challenged by cross-examination, may be accepted by the Commissioner as an accurate statement of fact or opinion, if he considers it appropriate to do so.*

41 It followed from that paragraph, and from the fact that people who did not provide statements were generally not permitted to cross-examine witnesses who gave evidence adverse to them (see below), that people who chose not to provide statements did so in the knowledge that evidence adverse to them might, as a result of that choice, be accepted.

42 The *Royal Commissions Act 1902 (C'wth)* does not confer upon the Commission a statutory power to direct a person to provide a written statement. By comparison, such a power is specifically conferred by statutes such as the *National Crime Authority Act 1984 (C'wth)*,[44] the *Independent Commission Against Corruption Act 1988 (NSW)*,[45] the *New South Wales Crime Commission Act 1985 (NSW),*[46] and the *Police Integrity Commission Act 1996 (NSW)*.[47] Those powers often relate only to public officials, but there is no reason why they need be so confined.

43 I believe that the operation of this Commission would have been much enhanced had the Commission possessed the power to require any person to provide a statement in relation to matters falling within the Terms of Reference. That power would have enabled the Commission to avoid the very considerable costs in terms of both time and money of using oral hearings to obtain evidence that could be readily provided in written form. On one occasion, for example, the Commission sought information from a person who refused to speak to Commission investigators or to provide a statement. The Commission issued a summons to that witness, convened a hearing in Melbourne, and flew the witness to Melbourne from Perth for the hearing, only to have the witness state in the witness box that he did not know anything about the matter under investigation. The waste of public time and resources is obvious, and would have been avoided if the witness could have been required to provide a statement.

44 The timely and efficient conduct of future Royal Commissions would be greatly enhanced by an amendment to the *Royal Commissions Act 1902 (C'wth)* to empower Royal Commissions to require persons to provide statements.

Overview evidence

45 The examination of individual incidents was complemented by evidence of a type that came to be known as 'overview evidence'. Overview evidence was evidence that was intended to give the Commission an understanding of the structure of the building and construction industry in each State and Territory, the problems confronting the industry, the approaches from the employer and employee viewpoints to those problems, and the proposals for change which the various participants in the industry might make. Overview evidence was designed to give the Commission an awareness of the issues which, from an employer and employee viewpoint, were thought to fall within the Terms of Reference. In giving overview evidence, employer and employee participants often made reference not only to philosophical or industrial positions, but to particular examples that illustrated their positions. Overview evidence therefore provided a context within which the individual incidents investigated by the Commission might be examined.

46 Overview evidence was principally obtained from senior figures within the relevant employer organisations, such as the MBA Inc and CCF, and the State Secretaries or Assistant State Secretaries of the major unions that operate in the building and construction industry including, in particular, the CFMEU, the Australian Workers Union (AWU) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of

Australia (CEPU) or their State-registered equivalents. While the employer organisations often provided overview evidence in the form of statements, which were then expanded upon in oral evidence, in most cases the senior union officials refused to provide a statement, or at least a detailed statement, dealing with overview matters. In those circumstances, the relevant officials were in most cases summonsed and compelled to provide oral overview evidence.

Notices to produce

47 Late in 2001 a number of amendments were made to the *Royal Commissions Act 1902 (C'wth)* by the *Royal Commissions and Other Legislation Amendment Act 2001 (C'wth)*. The most important of those amendments was the insertion of a new s2(3A) into the *Royal Commissions Act 1902 (C'wth)*. That subsection introduced an important new power into the Act, as it enabled the Commission to issue notices that required the production of documents or things specified in the notice to a person, and at the time and place, specified in the notice. That enabled the Commission to compel the production of documents well in advance of hearings, assisting in the preparation of hearings, and generating leads for further investigation.

48 The Commission has taken advantage of this power, issuing a total of 1692 notices to produce. The notices were initiated by the investigating team, and drafted by Counsel Assisting or solicitors assisting the Commission. In each case, before a notice was issued, it was reviewed and approved by one of the Senior Counsel Assisting the Commission (or, if they were unavailable, one of the Junior Counsel Assisting), before being provided to me for my review and signature. When notices to produce were served, they were accompanied by a statement of rights and obligations that explained in plain language the obligations created by the notice and the consequences of non-compliance. A pro-forma notice to produce is attached in Appendix 9. A pro-forma statement of rights and obligations is attached in Appendix 10.

49 The Commission appreciated that the time that should reasonably be allowed for a person or organisation to respond to a notice was sometimes debatable, as the time that is reasonable depended, among other factors, on the amount of material sought, the difficulty in retrieving the information and the operational requirements of the Commission. When a person experienced difficulty in complying with a notice within the time period specified in the notice, the Commission endeavoured, so far as its operations would allow, to either narrow the range of documents required or accommodate requests for extensions of time.

50 The notices to produce issued by the Commission resulted in approximately 7.2 million pages of documents being produced to the Commission, approximately 1.6 million of which were scanned and placed onto the Commission's computer system.

51 One of the major tasks of Commission staff was to manage and master the large amount of material that was produced to the Commission. Very commonly large volumes of documents were produced which did not fall within the scope of the documents required to be produced by the notice to produce. The reasons for that no doubt varied. In some cases the persons upon whom notices were served did not wish to go to the expense of sorting through documents in order to produce only those documents described, so they produced anything that was potentially relevant, leaving Commission staff to sort through the material. In other cases, it appeared that persons served with notices sought to frustrate the Commission's

investigations by burying relevant material in a large number of irrelevant documents. Despite these difficulties, however, a great many of the matters investigated by the Commission have resulted from leads identified as a result of documents produced under notice.

52 The power to require documents to be produced in advance of the hearings to which those documents related meant that, almost invariably, the Commission was able to identify the documents that would be relevant to any particular hearing in advance of the hearing. When that was done, those documents were placed on to the Commission's Courtbook system, thereby enabling any persons with a relevant interest in the hearings of the Commission to study relevant documents in advance of the hearing. The documents on the Courtbook system were then, with some exceptions, tendered at the hearing to which the documents related and became exhibits.

4 Procedure during and after hearings

1 This Royal Commission was created to inquire into and report on the building and construction industry throughout Australia. It was not a Commission created to inquire into practices and conduct in each State and Territory. In order to obtain a national perspective of the matters identified in the Terms of Reference, however, it was necessary to obtain information and material from each State and Territory. One major way in which that was done was by holding hearings in New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, and the Northern Territory. Matters arising in the Australian Capital Territory were dealt with during the New South Wales hearings.

2 The holding of hearings in each State and in the Northern Territory enabled me to obtain a national perspective and to make a comparison between practices in each jurisdiction. It also facilitated participation by a local range of parties with interests in the areas, and assisted in promoting awareness of issues among local industry participants, and made it easier for them to bring their concerns forward to the Commission. A calendar of the Commission's hearing days, which shows the dates and locations of the public hearings (excluding the 11 days on which directions hearings were held), is attached to this volume as Appendix 11.

3 Initially, I contemplated that Commission hearing times would be 10am to 1pm and 2pm to 4pm Monday to Thursday. The First Practice Note reflected that position. It very quickly became apparent that the volume of material to be addressed in public hearings meant that that could not occur. The volume of material was such that the Commission, from very early in its hearing program, usually began hearings at 9.30am, and finished between 4pm and 6pm. The five day a week hearings, which continued essentially uninterrupted between mid-January 2002 and mid-October 2002, and the frequently long hearing hours, placed considerable pressure upon Commission staff, Counsel Assisting and me, because all preparations for the hearings had to take place outside of sitting hours. It placed similar pressure, although of shorter duration, upon Counsel representing persons interested in the matters under inquiry. That pressure was unfortunate, but it was also inevitable given the time available to the Commission to conduct its inquiries.

Hearing venues

4 On 27 September 2001 it was announced that the first hearing of the Commission would be held on 10 October 2001. That hearing was to be held in premises at the Victorian Civil and

Administrative Tribunal (VCAT). Following the announcement of the hearing, however, the Victorian Trades Hall Council announced that it planned a mass rally at the opening of the Commission. The Victoria Police then advised VCAT that they could not guarantee that the usual proceedings of the Tribunal would not be disrupted. As a result, VCAT's offer that the Commission could use its premises was withdrawn. The Commission then reached an agreement with the Commonwealth Administrative Appeals Tribunal (AAT) for the first hearing to be held at its premises. Again, however, following negotiations between the police and union representatives, the Victoria Police advised that the occupants of the building concerned could not be assured that there would not be serious disruption to normal use of that and surrounding buildings. Those premises thus became unavailable. Thus the first hearing was held in a temporary hearing room in the Commission's premises at some cost and disruption to the Commission, and inconvenience to those appearing, the media and the public. Those events were the first of many attempts to disrupt the hearings of the Commission.

5 The Commonwealth does not appear to have established any arrangements to facilitate access to suitable hearing rooms and associated facilities, in Commonwealth courts and tribunals, for Royal Commissions. The Commission had to make *ad hoc* arrangements itself, relying on the goodwill of a range of Commonwealth and State courts and tribunals. In some cases, there was reluctance to provide access and as indicated above, in the case of one State tribunal, its offer was subsequently withdrawn.

6 I conducted initial sittings in each capital city. Directions hearings were held:

(a) on 10 October 2001 in Melbourne (continuing on 10, 11, 12 and 25 October 2001);

(b) on 15 October 2001 in Adelaide;

(c) on 16 October 2001 in Perth;

(d) on 18 October 2001 in Darwin;

(e) on 19 October 2001 in Brisbane;

(f) on 22 October 2001 in Sydney;

(g) on 23 October 2001 in Canberra; and

(h) on 24 October 2001 in Hobart.

7 After the initial hearing discussed above, whenever the Commission sat in Melbourne it used the purpose built hearing room constructed at its premises. It used that venue for hearings related to industrial matters in Victoria, and also for hearings related to the funds matters identified under paragraph (b) of the Terms of Reference and for other hearings concerning issues of industry wide significance.

8 When the Commission conducted hearings interstate other premises were needed. The Commission acknowledges, in particular, the assistance of the AAT (Brisbane and Hobart), the Family Court of Western Australia, the Family Court of Australia (Sydney and Darwin), and the Supreme Court of South Australia in providing access to hearing rooms and associated facilities, and the professional manner in which their staff made arrangements to enable the

Commission to conduct its hearings. Others, while willing to assist, were limited in the facilities they could provide.

Public and private hearings

9 Royal Commissions have a discretion concerning whether they conduct their hearings in public or in private. I exercised that discretion in a way that resulted in almost all of the Commission's hearings taking place in public.

10 I conducted private hearings on parts of 22 days, during which 48 witnesses were examined.

11 By contrast, I conducted public hearings on 171 days, hearing 749 witnesses. The public hearings generated 15 986 pages of transcript, and 162 000 pages of documentary evidence were tendered, comprising about 1900 exhibits. A list of witnesses and persons whose statements were tendered during public proceedings is attached in Appendix 12.

12 In deciding to conduct hearings primarily in public, I was conscious that the conduct of hearings in public has the capacity to injure the reputation of both people about whom evidence was given and people who gave evidence. Often any damage to such a person's reputation resulted simply from the public revelation of his or her conduct. In that circumstance, it was really the person's conduct, rather than the Commission's revelation of it, that damaged their reputation. In other circumstances, however, where for example false, misleading or unfounded evidence was given to the Commission, people's reputations were damaged through no fault of their own.

13 It was necessary for me to weight the risk that reputations might be unfairly damaged against the public interest in the matters that I was required by my Terms of Reference to investigate. I had to make a judgment regarding the competing interests. Reasonable minds may differ in relation to which portions of evidence should be taken in public and which in private. But the public interest in a Royal Commission conducting its hearings in public should not be underestimated. Public hearings are important in enhancing public confidence in a Royal Commission as they allow the public to see the Commission at work. They also enhance the ability of Commissions to obtain information from the public, as they demonstrate to the public the types of matter with which the Commission is concerned, and they allow potential witnesses to see that they would not be alone in giving assistance to a Commission. Summarising concerns of this type, Mason J emphasised in the *Australian Building Construction Employees' and Builders Labourers' Federation case*[48] that conducting Royal Commission hearings in private:

> *seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report.*[49]

14 This Commission was required to inquire into a subject matter of widespread public interest and importance. In my judgment, because of the factors outlined above, it was appropriate that hearings were conducted in public wherever possible.

15 There were, however, some limits. Paragraph 15 of the First Practice Note stated that:

> *The Commission will so far as possible conduct hearings in public. However, the names and identifying details of informants, minors, and witnesses who show a legitimate need for protection will not be made public, unless the publication of such evidence is needed for some other sufficient reason, such as to alert potential sources of significant information to the possibility that they can assist the Commission. Evidence which suggests that the person who has otherwise been identified, whether or not as a witness, has acted as an informant will not be made public. Other evidence which cannot be made public as a matter of course includes evidence of activities which cannot be notified to criminals without serious community detriment, such as prejudice to ongoing covert police operations, police intelligence, police methods of investigation, or evidence which would prematurely release details of the Commission's own information and inquiries.*

16 Sitting in private was not the only way to protect reputations. Section 6D(3) of the *Royal Commissions Act 1902 (C'wth)* conferred upon me the power to make orders limiting the publication of evidence. That is an important power, although its too frequent exercise may lead to many of the problems that I have identified above in relation to private hearings. Nevertheless, in some cases, after evidence had been heard, it was clear that considerable harm might be done by the publication of that evidence, and that no public interest would thereby be served. In those cases I made orders under s6D(3). Those orders were published. An example of such an order is attached in Appendix 13. In addition, in some circumstances I restricted the publication of evidence, or sat in private, until a person likely to be affected by that evidence had also given evidence, thus giving me the opportunity to consider all the evidence before deciding whether I should allow the evidence to be published.

17 With one exception, I believe that the media complied with these orders. The exception was a Sydney newspaper that published material subject to a non-publication order. The publisher apologised to the Commission through Counsel the next day, claiming that the full effect of the order had been misunderstood by the journalist concerned. I accepted that apology. It was, however, a matter for the relevant prosecuting authorities, rather than a matter for me, to consider whether charges should be laid in relation to the criminal offence constituted by a breach of a non-publication order under the *Royal Commissions Act 1902 (C'wth*).

Authorisation to appear

18 As mentioned above, the Commission conducted its first hearing on 10 October 2001. Before that hearing, newspaper advertisements had been placed by the Commission inviting interested persons to apply for authority to appear. A large number of persons or organisations made applications in response to that invitation. They included the AWU, the AMWU, the CEPU, the CFMEU, the Australian Building and Construction Workers' Federation, the Victorian Trades Hall Council, the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia (Western Australian Branch) and the Western Australian Builders' Labourers, Painters and Plasterers Union of Workers. The latter three applicants claimed a State interest, while the remainder claimed a national interest in the matters the subject of the Royal Commission. Applications for authorisation to appear were also made by

the Commonwealth of Australia, the State of Victoria, the major employer organisations in the building and construction industry, and by many of the major building and construction companies in Australia.

19 Section 6FA of the *Royal Commissions Act 1902 (C'wth)* provides that:

> *Any legal practitioner appointed by the Attorney-General to assist a Commission, any person authorised by a Commission to appear before it, or any legal practitioner authorised by a Commission to appear before it for the purpose of representing any person, may, so far as the Commission thinks proper, examine or cross-examine any witness on any matter which the Commission deems relevant to the inquiry, and any witness so examined or cross-examined shall have the same protection and be subject to the same liabilities as if examined by any of the Commissioners, or by the sole Commissioner, as the case may be.*

20 As is apparent, s6FA confers a discretion in relation to the grant of authorisation to appear. It does not, however, identify the factors that are relevant to the exercise of that discretion. The High Court has held that *'where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard'*.[50]

21 In my opinion, Sir Gregory Gowens' well known remarks in the *Land Deals Board of Inquiry* are a helpful starting point in determining the matters to be considered in determining whether authority to appear should be granted. Sir Gregory said that representation:

> *is not to be accorded to everybody who merely feels interested in the subject matter. Representation should be confined to those who have a peculiar and material interest to protect or advance. I use the word 'peculiar' in the sense of an interest attaching to the individual and not merely shared by him or with a substantial section of the public. I use the word 'material' in the sense of describing something more than a self-inspired or merely temporary or passing interest.*
>
> *Applying those considerations … it would be appropriate to grant representation to anyone who is under attack, is* [sic] *suspicion in relation to the dealings which is the subject of the Inquiry, but not to a merely self-constituted accuser or a self-constituted helper of the Commission or to a mere witness who is doing nothing more than being a witness without any particular attack being made upon him.*[51]

22 There is nothing in the above statement to suggest that it was intended to constitute a code, nor could the statements of a particular Royal Commissioner have that effect. It is therefore neither impermissible nor inappropriate to have regard to circumstances beyond those referred to above. They are, in my view, minimum criteria for the grant of general authority to appear.

23 Bearing in mind Sir Gregory's comments, I had regard to the following questions in the exercise of my discretion concerning the grant of general authority to appear:

(a) Was the applicant for authorisation to appear substantially and directly interested in any of the matters referred to in the Letters Patent?

(b) Had the applicant demonstrated a special interest in any of those matters beyond that shared by members of the public?

(c) Might the applicant be in a better position to assist the Commission in carrying out its inquiry if it were authorised to appear?

24 Subject to acceptance of the conditions that I imposed on the grant of authorisation to appear, which are discussed below, I granted authorisation to appear if the applicant for authority to appear satisfied any one of the three conditions listed above.

25 Even if the above criteria had not been satisfied, I nevertheless granted limited authority to appear to interested persons, organisations or companies that might be adversely affected by particular evidence if an application for such authority was made. Similarly, where a person was summonsed to give evidence, on application I granted authority to appear to legal advisors for such a person. In both circumstances, leave was granted '*whilst ever the witness was giving evidence, or whilst ever any evidence adverse to the witness was being called*.'

26 At the initial hearing of the Commission on 10 October 2001 the above criteria for the grant of general authorisation to appear were set out by Senior Counsel Assisting. I then announced that I proposed to impose six conditions upon the grant of any general authorisation to appear. Those conditions were:

(a) Authorisation is conditional and may be withdrawn at any time.

(b) Participation will be limited to the issues in which the applicant has a substantial and direct interest.

(c) An applicant has no automatic right to cross-examine a witness.

(d) Cross-examination may be limited.

(e) A person or organisation granted authority to appear undertakes to co-operate with the Commission in the sense of not disrupting or disturbing or seeking to disturb or disrupt the proceedings of the Commission.

(f) A person or organisation granted authority abide by the directions of the Commission, which directions will be aimed at the fair, efficient, timely, and cost-effective performance of its tasks.

27 The source of my power to impose those conditions flowed, in my view, from two bases.

28 The first was the inherent power that a Royal Commission has to control its proceedings. There is a long history of Royal Commissions imposing such conditions. Sir Murray McInerney, in an article titled 'Procedural Aspects of a Royal Commission',[52] discussed '*the terms on which leave to appear was given*'. He did so largely by reference to the decision by Sir Charles Lowe when sitting as the Royal Commissioner on the *Royal Commission on Communism*. In that Royal Commission, authority to appear was granted upon restrictive terms denying Counsel the ability to adduce evidence by other witnesses, to duplicate by cross-examination evidence already given, and denying the right of address to the Commission in certain circumstances. Furthermore, the Commissioner required an undertaking when Counsel sought leave to appear for a witness that the witness would give evidence on oath.[53]

29 The imposition of conditions on authorisation to appear is not surprising. A Royal Commission is a body different in character to a court. The life of a Commission is defined as to time by its Letters Patent. The scope of a Commission's activity is similarly defined. The Commissioner is obliged to finish the defined task in the defined time.[54] That must mean that a Commissioner is entitled to give such directions and adopt such practices as will permit the completion of the task within the time defined by the Letters Patent. That implicit power to impose conditions is, of course, subject to statutory restriction, but there is no such restriction in the *Royal Commissions Act 1902 (C'wth)*. It is also subject to the rules of procedural fairness. Were those rules to require the grant of legal representation that would create a relevant limitation on the imposition of conditions, but those rules do not, in my view, at least in the ordinary case, require the grant of authority to appear.

30 It followed, in my view, that I was entitled to restrict appearances if to do otherwise would have prevented or inhibited the performance within time of my obligations under the Letters Patent. That conclusion is consistent with the fact that the *Royal Commissions Act 1902 (C'wth)* does not confer any right of appearance on a person otherwise having a peculiar and material interest to protect or advance, why it confers a discretion on the Commissioner to grant or refuse authority to appear, and why, if authority to appear is granted, nonetheless the Commissioner may restrict cross-examination. Unless there be an absolute right conferred by statute to appear, there must be a discretion to grant or refuse authority to appear. If there be such a discretion, it is implicit that the discretion may be exercised upon terms.

31 The second source of power to impose conditions upon grants of general authorisation to appear arose from the words '*so far as the Commission thinks proper*' in s6FA of the *Royal Commissions Act 1902 (C'wth)*. Those words confer a power on a Royal Commission to restrict the examination or cross-examination of a witness. That must mean that a Commission can impose as a condition of authorisation to appear the requirement that the applicant for authority accept the direction of the Commission restricting cross-examination. There is nothing in s6FA which suggests that a Commission may only grant unconditional authorisation to appear and, in my view, the power conferred by s6FA to restrict cross-examination by permitting it only '*in so far as the Commission thinks proper*' necessarily implies a capacity to impose conditions on grant of authority to appear.

32 At the first public hearing on 10 October 2001, in addition to setting out the six conditions discussed above, I also indicated that I proposed to make a direction (pursuant to the sixth of the conditions). The substance of the draft direction was that any person or organisation that received general authority to appear was to be required to provide the Commission with a statement setting out that person or organisation's knowledge of any unlawful or inappropriate activity in the building and construction industry. I subsequently amended the draft direction to make it clear that it did not require any person or body to provide information which would have incriminated that person or body. By making that direction, I hoped that organisations with authority to appear would assist the Commission in carrying out its very wide-ranging inquiries within the limited time available.

33 When I announced the six conditions governing the grant of general authorisation to appear, and circulated the draft direction that I proposed to make, the three employer associations that had sought authorisation to appear accepted the six conditions, and implicitly accepted the

draft direction. All three associations were granted general leave to appear. The Commonwealth of Australia, the State of Victoria, and one superannuation fund accepted the six conditions and were granted authority to appear.

34 By contrast, the three major contractors that had sought authorisations to appear withdrew their applications.

35 None of the unions that had sought authorisation to appear accepted the six conditions or the draft direction. They sought and were granted an adjournment to prepare submissions to the effect that the conditions should not be imposed. The next day I granted general authorisation to appear to two additional employer organisations which accepted the conditions and conditional authorisation to a third. I heard considered submissions from Senior Counsel and Counsel on behalf of the unions, who submitted that authorisation to appear should be granted subject only to the first four conditions outlined above. I rejected that application, for reasons that I published on 12 October 2001.

36 In the course of rejecting the application by the unions, I indicated that I would not make the draft direction that I had proposed. I decided not to make that direction because if I made the direction those who opposed it would either withdraw their application for authority to appear, in which case the direction would have no application to them, or they would accept the direction and then challenge it in the courts, while not complying with the direction until the legal avenues of appeal were exhausted. If the directions were upheld as a valid exercise of power, the unions would then simply have withdrawn and not complied with the direction. That would have involved the Commission in both delay and expense, and it would not have advantaged the Commission in any way. I therefore resolved not to make the draft direction.

37 I did, however, ask that each applicant for general authority to appear indicate the nature and extent of the manner in which they both could assist, and would assist, in the performance of the functions required of me by the Letters Patent. I asked all of the applicants for authority to appear to go away and consider my reasons, and to indicate by a specified date whether they sought authority to appear and, if so, what co-operation would be forthcoming.

38 When the specified date arrived, no such indications were forthcoming. Further time was sought and granted to the CFMEU and AMWU to consider their position, but those unions also did not pursue their applications for authorisation to appear. The consequence was that I treated the applications of all the unions for general authority to appear as having been withdrawn.

39 The events described above provided the first clear indication that the Commission received that, in general, the major participants in the industry, from both the employer and employee side, would not co-operate with the Commission. That indication was fulfilled as the hearings continued. If any further indication were needed, it was provided on 24 October 2001, when there was a rally of trade unions organised by the Victorian Trades Hall Council, the CFMEU, the CEPU, Electrical Division, the CEPU, Plumbing Division the CFMEU, FEDFA Division and the AMWU held at the Rod Laver Arena in Melbourne. It was reported that the unions agreed at that meeting to establish a fighting fund for legal costs associated with the Commission and further agreed not to co-operate with the Commission. It was reported 5000 unionists attended.

40 Substantial protests accompanied almost every hearing of the Commission in Melbourne, and protests against the Commission were also held on a regular basis in both Sydney and Perth.

Notification of adverse evidence

41 As I explained above, the Commission conducted the large majority of its hearings in public. That meant that any person, whether or not they had received authorisation to appear, could attend public hearings and monitor the evidence that was given at those hearings. In addition, for much of the life of the Commission the transcript of the Commission's public hearings was available to the public on the Internet through the Commission's website.

42 Furthermore, any person, organisation or company that had received general authorisation to appear was given access to Courtbook. So, too, was any person who might be adversely affected by any particular evidence, if access to Courtbook was requested. Finally, a large number of organisations that I regarded as centrally interested in or affected by the work of the Commission were given access to Courtbook without making application. That meant that each State Government, the Australian Constructors Association and each of its members (which included most of the major building and construction companies), the AWU, the AMWU, the CEPU, the CFMEU, the Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Unions of Employees (BLFQ), and the Victorian Trades Hall Council all had access to Courtbook throughout the life of the Commission. The relevant organisations which obtained access in this way were listed in full in the Second Practice Note.

43 Any person, organisation or company that received Courtbook access was able to view not just the complete transcript of the public hearings of the Commission, but also all of the exhibits that were tendered before the Commission, and all other documents and witness statements that were placed upon that system. Those persons therefore had access to the complete body of evidence that was placed before the Commission, unless Counsel Assisting determined that it was inappropriate that such access be provided in advance of the hearing.

44 Finally, the submissions of Counsel Assisting, which were provided to any person against whom an adverse finding was sought (see below), contained comprehensive reference to the evidence that it was submitted supported the findings sought. The evidential foundation for any findings was therefore exposed to any person who stood to be affected by a finding well before the finding was made. Any person against whom Counsel Assisting invited me to make an adverse finding was invited to respond to the submissions of Counsel Assisting, and had full access to the evidence in preparing any such response.

45 It is my view that the rules of procedural fairness did not impose any obligation upon the Commission to notify any person that evidence may be given that was adverse to their interests before that evidence was given. That conclusion is supported by the decision of the High Court in *National Companies and Securities Commission v News Corporation Ltd*,[55] a case in which News Corporation claimed that it was entitled to certain rights during a National Companies and Securities Commission (NCSC) investigation. Private hearings were to be held in the course of that investigation. The NCSC was required by statute to comply with the rules of natural justice. News Corporation had sought from the NCSC:

(a) some specification of the substance of the case which News Corporation might be required to meet at the hearing;

(b) directions that it and its legal representatives were entitled to be present throughout the whole of the hearing;

(c) directions that legal representatives of News Corporation be permitted to cross-examine witnesses called at the hearing;

(d) directions that it was entitled to make submissions concerning the subject-matter of the hearing before the NCSC made any findings in relation to News Corporation.

46 The High Court upheld the NCSC's decision to refuse the first three of the rights claimed by News Corporation. In relation to the question of what right News Corporation had to be made aware of the evidence against it, Mason, Wilson and Dawson JJ observed that:

> *there comes a time in the usual run of cases when the investigator will seek explanations from the suspect himself and for that purpose will disclose the information that appears to require some comment … [I]t would clearly be a denial of natural justice if the Commission in the present hearing received evidence adverse to News Corporation without providing an opportunity to News Corporation to be heard. An effective examination of such persons would require the substance of adverse information received during the investigation to be disclosed to them. Legal representation would be permitted to such witnesses with the opportunity for their further examination by counsel and for submissions to be made touching matters covered by the examination. There is no reason why the Commission should not welcome, time permitting, any request by News Corporation that further persons be called to give evidence. A hearing conducted along these lines …. would in our opinion be fair in all the circumstances.*[56]

47 Their Honours went on to hold that *'the Commission will comply with the statutory mandate to observe the rules of natural justice in the present case if it proceeds to allow each witness who is called to give evidence to be legally represented, with freedom for that representative to participate in the examination of the witness, and for the provision of a transcript of his evidence.'*[57]

48 *National Companies and Securities Commission v News Corporation Ltd* demonstrates that, even when a Commission conducts its hearings in private, with the result that it is not possible for any person to monitor whether evidence is being given that is adverse to his or her interests, a person does not have a right to be told that evidence has been given that is adverse to them until late in the investigative process.[58] The fact that the obligation to disclose the evidence upon which findings may be based does not arise until towards the end of an investigation if an investigation takes place in private makes it very difficult to see why that obligation would arise at an earlier point of time when an investigation takes place in public.

49 The procedures adopted by the Commission in relation to the notification of adverse evidence therefore went well beyond its obligations as a matter of procedural fairness. Paragraph 5 of the First Practice Note provided that:

> *a person who, to the prior knowledge of Counsel Assisting the Commission, will be the subject of adverse evidence given before a public hearing of the Commission will, if*

practicable, be notified of that fact before that hearing, with such particulars, if any, as are considered appropriate by Counsel Assisting the Commission, or will, if practicable, be notified as soon as reasonably convenient thereafter and provided with a copy of the material portion of the transcript, or such particulars, if any, as are considered appropriate by Counsel Assisting the Commission, and will be given an opportunity to contest that evidence, if the person so requests.

50 As is apparent, the First Practice Note contemplated that notification of adverse evidence would be given only where that was practicable. Such notice was, however, given on the vast majority of occasions. That was usually done in the form of an adverse evidence letter. The form of such letters varied somewhat across the life of the Commission. The letters indicated to their recipients that the Commission proposed to lead evidence that *'is or might be adverse to'* them, and then identified that evidence. That formulation was adopted so that the Commission could avoid any assertion that the evidence so notified was in fact adverse to the person to whom the letter was sent, because letters were often sent out of an abundance of caution in circumstances where, in all likelihood, the person who received the letter would not have regarded the relevant evidence as adverse to them. Adverse evidence letters usually indicated the procedure by which a person could obtain access to the Courtbook system, and thus examine the relevant evidence before the Commission. They also drew attention to the Commission's Practice Notes. An example of an adverse evidence letter is attached in Appendix 14.

51 Consequently, unless Counsel Assisting were of the view that it was inappropriate for there to be prior disclosure of factual material, persons interested or affected by a particular hearing usually had advance notice of the factual material to be called. That was, as I have said, a level of disclosure well beyond what I believe procedural fairness required of the Commission.

Witnesses, examination and cross-examination

Examination

52 Almost all of the witnesses who gave evidence before the Commission did so because they had been summonsed to attend. Very few provided evidence voluntarily. An example of the form of summons used by the Commission is attached in Appendix 15. Each summons was accompanied by a statement of rights and obligations. An example of the form of that statement is attached in Appendix 16.

53 The reasons that witnesses declined to give evidence without being summonsed were varied, but the principal reasons appeared to be either that witnesses were genuinely unco-operative, or that they were fearful of the consequences of being seen to be co-operative and thus wished to be coerced into providing evidence even if they were in fact happy to provide that evidence.

54 The examination of witnesses before the Commission was originally regulated by the First Practice Note, paragraph 12 of which provided that:

Any witness who is legally represented who has been examined (including cross-examination) by Counsel Assisting the Commission may next be examined by his or her

own legal representative and then cross-examined by or on behalf of any person considered by the Commission to have sufficient interest in so doing. The witness's own legal representative and finally Counsel Assisting the Commission may re-examine. At all times, duplication and repetition is to be avoided.

55 On 19 December 2001, after only a few days of hearings, I supplemented that paragraph and established a more detailed regime in relation to the examination and cross-examination of witnesses. That regime was set out in the Second Practice Note.

56 Paragraph 11 of the Second Practice Note stated that:

> *When a witness is called by Counsel Assisting the Commission to give evidence, the witness will be asked to adopt his or her witness statement and such statement may be expanded upon as necessary. The hearing of the evidence of that witness will be adjourned prior to any cross-examination.*

57 In other words, witnesses were not normally cross-examined by anyone other than Counsel Assisting on the occasion on which they were first called. That meant that in most cases the totality of the evidence concerning a particular matter was called before it was necessary for me to rule upon applications to cross-examine. That allowed me to see what matters were genuinely in dispute before ruling on such applications. For most of the Commission's hearings, that practice was followed.

58 On some occasions during later hearings of the Commission witness statements (often in the form of statutory declarations) were tendered without the relevant witness being called. That occurred if: Counsel Assisting considered that the statement or statutory declaration did not require clarification or expansion; Counsel Assisting did not believe there was any basis upon which they should test the evidence contained in the statements; and no application to cross-examine the witness who made the statement had been made by any person.

59 For a number of hearings with a duration of one week or less, the approach was altered. The Third Practice Note, which I published on 17 July 2002, stated that all persons wishing to cross-examine a witness giving evidence during a hearing of one week's duration or less *'should be ready to conduct such cross-examination immediately after that witness is examined by Counsel Assisting.'* That variation was necessary to allow the short hearings to be completed within the time available to the Commission. It did that by avoiding the necessity of recalling witnesses for cross-examination. A copy of the Third Practice Note is attached in Appendix 17.

Cross-examination

60 In my opinion, procedural fairness does not usually, and certainly does not invariably, require Commissions to permit cross-examination. That is so even where evidence has been given that is adverse to the interests of the person who wishes to conduct the cross-examination.[59] In *National Companies and Securities Commission v News Corporation Ltd*,[60] Gibbs CJ said:

> *If the Commission were to accord to all the persons whose reputation might possibly be affected by the hearing a right to cross-examine the witnesses and call evidence as though they were in a court of law, the hearing might become so protracted as to render*

it practically futile. In these circumstances … I find it quite impossible to say that the rules of natural justice require the Commission to proceed as though it were conducting a trial. It seems to be in no way unfair that, at a hearing of the kind which I have described, the respondents should not be entitled to cross-examine such witnesses as the Commission may call, or to call evidence of their own.[61]

61 In the same case Mason, Wilson and Dawson JJ observed that:

to permit News Corporation or their legal representatives to cross-examine witnesses called at the hearing and to call evidence in reply and make submissions concerning the subject-matter of the hearing would run counter to the need in many cases for a hearing to be conducted with expedition.[62]

62 That is not to say that procedural fairness will never require a body such as a Royal Commission to afford affected persons a right to cross-examine. Much depends upon the facts. But procedural fairness will rarely impose such a requirement.

63 That conclusion is supported by s6FA of the *Royal Commissions Act 1902 (C'wth)*, which expressly contemplates restrictions upon the circumstances in which cross-examination may occur. Consistently with that section paragraph 12 of the Second Practice Note provided:

Persons other than Counsel Assisting will not be permitted to cross-examine such witness unless and until they have provided to Counsel Assisting a signed statement of evidence advancing material contrary to the evidence of that witness. Any person providing such a statement will be called by Counsel Assisting and asked to adopt that statement and will be examined by Counsel Assisting.

64 Once the Second Practice Note was adopted, if a person disputed the accuracy of material called before the Commission, that person had an opportunity to provide a statement setting out the contradictory evidence. If that was done, the person was then called by Counsel Assisting, asked to adopt the statement, and examined or cross-examined upon its contents. After Counsel Assisting had concluded that examination, the legal representative for that person was invited to call any additional evidence from that witness as thought necessary. After that had occurred, the legal representative of that person was then entitled to cross-examine any witnesses who had given evidence that conflicted with that of their client.

65 The regime established by the Second Practice Note was challenged in the Federal Court by members of the Victorian Divisional Branch of the Construction and General Division of the CFMEU. In *Kingham v Cole*, Heerey J rejected that challenge.[63] His Honour said:

But Par 12 [of the Second Practice Note] on its face seems rationally and reasonably related to the efficient performance of the obligations of the Commissioner. Paragraph 12 is a means of ascertaining whether or not an applicant has demonstrated a sufficient interest in challenging the evidence of a particular witness. Further, a statement under par 12 will alert the Commissioner and all others concerned as to the true extent of factual disputes and thus promote the efficient resolution of those disputes. In a large and complex administrative inquiry where there is no equivalent to the pleadings and particulars used in civil litigation, the par 12 procedure has an obvious utility.

While it may be accepted that s.6FA does not confer an unfettered discretion, par 12 does not involve exercising the discretion in an unfettered way. On the contrary, par 12 will assist in the exercise of the discretion in a way that is both orderly and predictable and likely to assist in the efficient discharge of the Commissioner's task.[64]

66 A notice of appeal against the decision of Heerey J was withdrawn. Heerey J's judgment is attached in Appendix 18.

67 The Second Practice Note enabled me to consider the respects in which conflicting evidence had been placed before the Commission, to identify the areas of conflict, and then to rule in advance of a person being recalled for cross-examination on the areas in which cross-examination would be permitted. I did not give reasons in respect of each ruling in relation to cross-examination, as that would not have been practicable in light of the huge volume of material placed before me, but the principles which generally guided me were:

(a) If there was a disputed issue of fact relevant to a matter which I regarded as material to any issue I must determine, I allowed cross-examination upon it.

(b) If a person gave evidence on oath of an adverse matter, which evidence was not denied, I did not allow cross-examination. That was because no issue was raised regarding the evidence.

(c) If the disputing evidence was a matter of comment, as distinct from raising a factual conflict, I did not allow cross-examination.

(d) If a person gave evidence on oath of a fact, and the contestant stated that he had no recollection of the alleged fact, I did not allow cross-examination, unless there were surrounding circumstances casting doubt upon the veracity of the evidence alleged. That was because there was no sensible basis upon which a cross-examiner could contest the evidence.

(e) Overriding all considerations, if there were grave allegations against a person which may have been diminished or eliminated by an attack on the credit of the witness giving the evidence, I allowed cross-examination.

68 Where I thought it necessary, I did publish reasons when ruling on applications to cross-examine.

69 As a result of the above practices, the areas of factual dispute were often greatly narrowed. By way of example, in relation to the Nambour Hospital dispute objection was initially taken to hearsay statements that picketing workers had been paid $100 per day for manning the picket line. I disallowed the objection. Ultimately, when the union witnesses gave evidence, it was established that the CFMEU had set up a picket fund, that moneys had been collected by various unions and paid into the fund, and that union officials paid persons on the picket line $100 a day. There was thus no area for factual dispute or cross-examination, or objection to hearsay evidence.

Financial assistance for witnesses

70 When read together, the *Royal Commissions Act 1902 (C'wth)* and the *Royal Commissions Regulations* provide that witnesses may be paid expenses in accordance with the scale of witnesses' expenses prescribed for witnesses appearing before the High Court. Consequently, the statement of rights and obligations that was provided to witnesses who were summonsed to appear before the Commission made reference to witness allowances and expenses. Claims from witnesses were approved by the Secretary, with cheques for the approved amounts being forwarded by the AGD. No distinction was made between claims from witnesses who had been summonsed and those who appeared voluntarily.

71 Financial assistance for legal costs associated with the Commission was available in certain circumstances through the Legal Assistance Branch of the AGD. The Commission was not involved in the administration of applications for financial assistance. However, to assist persons who incurred costs associated with summonses to appear or appearances before the Commission or the production of documents to the Commission, the Commission included on its website a link to the AGD's guidelines for financial assistance under its scheme for financial assistance for legal and related costs before the Royal Commissions into HIH and the Building and Construction Industry. As this Commission was drawing its investigations to a conclusion, it became aware that some persons served with summonses or directions which required responses within short timeframes had found it difficult to make application for such financial assistance before costs were incurred.

Defiance of the Commission

Refusal to produce documents

72 One matter investigated by the Commission resulted in open defiance of the Commission, and in the deliberate frustration of its investigation. It is instructive to set out some details in relation to this matter, as it serves to illustrate that the coercive powers of the Commission were not effective to force a reluctant witness to provide information to the Commission. The Commission never obtained the information that it sought in relation to this matter. Had conduct of the type I am about to describe occurred more commonly, the Commission would have proved completely ineffective. For that reason, I recommend later in this volume of the Report that there be a substantial increase in the penalties set out in the *Royal Commissions Act 1902 (C'wth).*

73 On 11 December 2001 Mr Kingham, the Branch Secretary of the Construction and General Division, Victorian Building Unions Divisional Branch of the CFMEU, was examined by Counsel Assisting in relation to whether the CFMEU had a policy of '*no ticket no start*'. Counsel Assisting asked Mr Kingham whether he or his officials gave advice to shop stewards as to what they should do in the event that a contractor came onto a site with a non-union workforce. Mr Kingham said such advice was provided. He was, however, unable to provide specifics. He eventually indicated that the person who could say precisely what advice shop stewards in this position were given was the CFMEU's training manager, Ms Anne Duggan.

74 Ms Duggan was summonsed by the Commission to appear and produce documents. She appeared on 14 December 2001, and she produced some documents pursuant to the summons. Those documents included a copy of course plans for the shop stewards' training courses and advanced shop stewards' training courses conducted by the CFMEU in Victoria, and indicated the date on which training courses were to be held, a brief description of the subject matter of the intended courses, and the name, or part of the name, of the presenter of each course. It was unclear whether Ms Duggan had provided all documents the subject of the summons. In any event, on 14 December 2001 Ms Duggan, through her Counsel, undertook to provide a statement to the Commission that would include the names of presenters at the training courses. Although a statement was provided on 6 February 2002, it did not provide the names sought.

75 Ms Duggan was recalled on 7 February 2002, at which time she made it clear that she would not provide the information sought by the Commission. On 3 April 2002 Counsel Assisting wrote to Ms Duggan's solicitors advising that she would be recalled during the May sittings of the Commission and would again be asked to provide the material referred to in paragraphs (a) and (b) of the schedule to the summons to produce documents that was subsequently served on the CFMEU. When called on 6 May 2002 Ms Duggan again refused to provide the information to the Commission.

76 Later the same day, I signed the summons to produce documents directed to the CFMEU, by its Proper Officer. It required production of the full names and contact phone numbers of each and every person who taught or delivered training at any shop stewards training courses conducted by or on behalf of the Victorian Building Unions Divisional Branch of the Construction and General Division of the CFMEU in 2001 or 2002, including certain courses on identified dates, and the names of the shop stewards who took part in each of those courses.

77 The documents specified in the summons were required to be produced on 10 May 2002. They were not so produced. It had been intended to call Mr Kingham in relation to this matter on 31 May 2002, but that would have clashed with a union executive meeting and, at the request of the union, I deferred the taking of his evidence to suit the union executive's convenience. When Mr Kingham was called on 20 June 2002 in Sydney, Counsel Assisting returned to the matter of non-production of the documents. By that time it was clear, from material tendered before me, that the Divisional Secretary of the Construction and General Division of the CFMEU, Mr John Sutton, had referred the summons for production of documents to Mr Kingham. It was also clear that the particular documents sought had not been produced. From Mr Kingham's evidence, it was equally clear that the documents existed and that they were in the possession of the Victorian Branch of the CFMEU.

78 Mr Kingham advanced three reasons why the documents were not produced. The first was that giving information identifying rank and file delegates of the Branch might lead to those persons being subjected to approaches '*and potential harassment and intimidation by investigators employed by this Royal Commission*'. He said that:

> *I was not prepared myself to be an agent that would assist in those rank and file shop stewards, and many of the people that may be on that list were young people, first-time shop stewards, people with extremely young families who would be traumatised by the*

type of surveillance, the type of investigation that officers of the union have, unfortunately, been subjected to.[65]

79 I made clear that I regarded that reason as nonsense. There had been no such surveillance.

80 The second reason Mr Kingham advanced for refusing to produce the documents sought in the summons was that he was suspicious of the security of the Royal Commission and that he was not persuaded that improper use may not be made of the list of job delegates, and that if the names of job delegates became known they may have difficulty getting employment. That reason is equally nonsensical, as shop stewards would obviously be known to their employers, as Mr Kingham acknowledged. Furthermore, the privacy concerns asserted by both Ms Duggan and Mr Kingham did not prevent Ms Duggan from producing to the Commission in December 2001 a delegates' training mail-out list. The list contains the names, contact numbers and employers of elected shop stewards. I regarded any claim to justify non-production based on grounds of privacy as being without foundation.

81 The third reason for non-production advanced by Mr Kingham was that:

> *The decision making body of my organisation, or rather, the Victorian Branch of the CFMEU, has made a resolution and determination on this matter, and as such, all officers, including myself, and staff employed by the Victorian Branch of the CFMEU, are under directions from our rank and file Divisional Branch Management Committee, the decision making body under the rules, we are under direction not to provide this information and if I was to do so, I would be sacking myself from office, because I would be breaking a direction of the supreme decision making body.*[66]

82 The resolution of the Divisional Branch Management Committee (DBMC) of the Victorian Branch of the CFMEU was produced by Mr Borenstein SC, who appeared for Mr Kingham. The relevant portion provides:

> *That Howard's Royal Commission has made [certain demands] for production of documents which include confidential personal information about members of the union…*
>
> *That the members' personal information contained in the documents has been provided on a confidential basis and no permission has been given to release it.*
>
> *That any such documents are the property of the branch.*
>
> *The DBMC accordingly resolves that no documents be provided to Howard's Royal Commission which include personal details of members. No officer or employee of the branch is authorised to provide any documents of that kind to the Royal Commission.*[67]

83 It is plain that this resolution constituted a deliberate decision by the Divisional Branch Management Committee of the CFMEU Construction and General Division to defy the authority of this Commission, notwithstanding that it was established under a valid law of the Commonwealth of Australia. Lest there be any misunderstanding, I should make it plain that that resolution instructed all officers and employees of the Branch to ignore their legal obligations under the *Royal Commissions Act 1902 (C'wth)*. In adopting that resolution, the Divisional Branch Management Committee displayed complete disregard for the rule of law, and it instructed the members of the union to do the same.

84 It is possible that all those who participated in passing the above resolution engaged in a serious crime. Section 6I of the *Royal Commissions Act 1902 (C'wth)* provides that *'Any person who … attempts by any means to induce a person called or to be called as a witness before any Royal Commission to give false testimony, or to withhold true testimony … shall be guilty of an indictable offence'*. The maximum penalty for that offence is imprisonment for five years. On its face, the resolution appears intended to direct people to *'withhold true testimony'* from the Commission. Whether or not the resolution contravened s6I is, however, a matter for other authorities to consider.

85 After hearing detailed submissions from Counsel Assisting, I concluded that the documents sought fell within the Terms of Reference, and I directed Mr Kingham to produce the documents. He refused to do so. The matter was therefore referred to the Director of Public Prosecutions, following which charges were laid against Mr Kingham. The matter is yet to be determined.

86 I have no doubt that the willingness of Mr Kingham and Ms Duggan to defy the Commission in the way I have described was related in part to advice that the penalties for non-compliance were likely to be low. The maximum penalty for refusing to answer questions or refusing to produce documents to a Royal Commission is six months imprisonment or a $1000 fine. The applicable fine was changed from $500 to $1000 in 1966, on the introduction of decimal currency, but that did not increase the fine.[68] The fine had first been set at $500 in 1912.[69] It follows that there has been no increase in the fine for refusing to answer questions or produce documents to a Royal Commission since 1912. That, in itself, speaks volumes as to its adequacy. Even since 1950, Australian Bureau of Statistics inflation tables suggest that a $500 fine would now be equivalent to a $20 000 fine. If inflation tables were available back to 1911 the figure would be far higher. Clearly defiance of a Royal Commission was viewed as a very serious offence, but the penalty in the Act has failed to keep pace with inflation.

87 The penalty for refusing to answer questions or refusing to produce documents to a Royal Commission has not remained completely static since 1912. In 1983 the *Royal Commissions Act 1902 (C'wth)* was amended to provide, as an alternative to the $1000 fine, a possible sentence of six months imprisonment.[70] That sanction is also inadequate, even were it to be imposed (which, being the maximum sentence, would be reserved for the most egregious defiance). The penalties in the *Royal Commissions Act 1902 (C'wth)* are markedly lower than the penalties created by equivalent legislation throughout Australia, and they are clearly not adequate to create a sufficient incentive for unco-operative witnesses to provide information to a Royal Commission.[71]

88 I recommend that the *Royal Commissions Act 1902 (C'wth)* be amended to increase the penalty for failure or refusal to attend when summonsed, failure or refusal to answer questions, and failure or refusal to provide documents to at least five years jail or a $20 000 fine. That would bring the penalties in the Act into line with those found in other equivalent Commonwealth statutes. In particular, it would match the penalties recently introduced into the *National Crime Authority Act 1984 (C'wth)* for refusing to answer questions or provide documents in response to the exercise of coercive powers by that Authority.

'Contempt' of the Commission

89 There were many occasions on which the behaviour of persons present in the hearing room during public hearings of the Commission was poor. Large numbers of unionists frequently attended when senior union officials were summonsed to give evidence, and their behaviour often interfered with or interrupted the hearings.

90 At present, the provision of the *Royal Commissions Act 1902 (C'wth)* that relate to control of the hearing room are inadequate. Section 6O(1) of that Act, which is headed '*Contempt of Royal Commission*', makes it an offence intentionally to insult or disturb a Royal Commission, to interrupt its proceedings, to use any insulting language towards a Royal Commission, by writing or speech to use words false or defamatory of a Royal Commission, or to be '*in any other manner guilty of any intentional contempt of a Royal Commission*'. The penalty for committing that offence is, however, a $200 fine or imprisonment for three months. Those penalties are manifestly inadequate. The penalties for contravention of s6O(1) should be increased substantially to provide a real deterrent. I recommend that the *Royal Commissions Act 1902 (C'wth)* should be amended to make the fine for contravention of s6O(1) at least $5000.

91 Even with an increased penalty, as a tool for ensuring proper behaviour before a Royal Commission, s6O(1) is inadequate. The penalties under that provision cannot be imposed quickly enough to be useful. The section does not provide any mechanism for dealing immediately with a disruption in the hearing room. While I was able to eject people from the hearing room, I could do so only if the Commission had the right to control the property within which its hearings were conducted. I recommend that the *Royal Commissions Act 1902 (C'wth)* should be amended to introduce an explicit power to eject persons from the hearing room if the Commissioner considers that necessary for the proper conduct of the hearings. Contravention of a direction to leave the hearing room should be made an offence, punishable by a fine of at least $5000. Officers of the Commission should be protected from any legal consequences of using any reasonable force necessary to give effect to such a direction.

92 In addition to behaviour inside the hearing room, there were many occasions on which comments were made outside the hearing room that were demonstrably false and defamatory of the Royal Commission. Those comments were often made by very senior union officials to the press, as part of a concerted media campaign conducted by the CFMEU against this Commission. Many of those comments undoubtedly constituted an offence against s6O(1) of the *Royal Commissions Act 1902 (C'wth)*. That section again provided a manifestly inadequate deterrent to those who wished to attempt to discredit the work of the Commission by deliberately giving false accounts of the Commission's activities.

93 I am aware that, had I been a sitting judge, s6O(2) of the *Royal Commissions Act 1902 (C'wth)* would have purported to confer some power on me to take action immediately in relation to contempt in the face of the Commission. Doubts have, however, been expressed as to the constitutionality of that provision, as it may purport to confer judicial power. Even if it is valid, the maximum penalty is a $200 fine or three months imprisonment. That power therefore does not change my view that it is important that the penalties for contravention of s6O(1) are increased substantially.

5 Findings

The making of findings

1 My Terms of Reference required me to '*inquire into and report*' upon the matters enumerated in the Terms of Reference. In carrying out that function, the Terms of Reference proceeded on the assumption that I would make findings. Thus, clause (c) stated that '*taking into account your findings in relation to the matters referred to in the preceding paragraphs and other relevant matters*', I should make recommendations. That clearly implied that I would make findings in relation to matters falling within clauses (a) and (b). That is not surprising, for logically I was unable to express any view as to '*the nature, extent and effect of any unlawful or otherwise inappropriate*' practice or conduct of the types referred to in those paragraphs without making findings in relation to the specific incidents about which evidence was led. As a consequence, many volumes of this final report comprise findings of fact in relation to specific incidents investigated by the Commission.

2 The material placed before the Commission in relation to specific incidents was often uncontested. In those circumstances, no difficulty attached to the task of making findings as to what had occurred. The unchallenged evidence spoke for itself. The Second Practice Note, in making clear that unchallenged evidence may be accepted by the Commission, reflected the position accepted by the High Court in *Jones v Dunkel* that evidence which might have been contradicted can be accepted more readily if a person who could have contradicted it fails to give evidence.[72] While I do not suggest that *Jones v Dunkel* applied in its terms to the proceedings of a Royal Commission, the rule of logic that case is based upon is of more general application.

3 In many cases, however, particularly in relation to New South Wales and Queensland, in order to make findings in relation to specific incidents it was necessary for me to resolve conflicts in the evidence. Where the evidence of witnesses conflicted, my general approach was as follows. I considered whether there was any documentary evidence, or evidence from independent witnesses, that lent support to either version of events. Where there was such evidence, the version of events that was consistent with the documentary or independent evidence was generally preferred, even if that version was not completely corroborated by the documentary or independent evidence.

4 While I have tried to avoid making findings regarding the truthfulness of witnesses, it was occasionally necessary to make such findings where there were disputed issues of fact which were of importance and which could not be resolved by reference to empirical evidence.

5 I have made many findings in this report that unlawful conduct has occurred. Those findings do not, of themselves, carry any legal force. I have, however, recommended in the confidential volume of my report that material that has been acquired by the Commission should be referred to the appropriate authorities responsible for the enforcement of the relevant laws for consideration by them of whether proceedings should be commenced. If that recommendation is accepted, those authorities can in due course consider, in light of their own priorities, procedures and guidelines, whether proceedings should be instituted against persons for breaches of statues.

The rules of evidence

6 A number of persons who stood to be affected by findings of the Commission asserted in their submissions that certain findings should not be made because hearings had not been conducted in accordance with the rules of evidence. As a general rule, I rejected those submissions. It is therefore appropriate that I say something about the approach that was taken by the Commission to some of these matters.

7 The findings that I have made were based upon the material put before me during hearings of the Commission. Those hearings were part of an administrative inquiry in which the laws of evidence and the onus of proof as understood in judicial proceedings did not play a determinative part. Some of the material that was led during hearings would not have been admissible in either a civil or criminal trial. That was appropriate, and necessary if the Commission was to complete its task within the time permitted. It must, however, be remembered that any findings that I have made were not based upon an assessment of the relevant material from a judicial perspective. The assessment was made by me as part of an administrative inquiry only, in order to ensure that the material that has led to my recommendations was fully exposed.

8 While the rules of evidence did not apply during the Commission's hearings, however, it was appropriate to have regard to certain of those rules from time to time because, as Evatt J observed, the rules of evidence represent '*the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth*'.[73]

Standard of proof and onus of proof

9 The law does not mandate any particular level of satisfaction that must be achieved before a finding of fact, which carries no legal consequence, may be made by a Royal Commission. Nevertheless, I have been conscious that a finding that a particular individual, organisation or company has engaged in unlawful conduct may cause serious damage to the reputation of such an individual, organisation or company.

10 I have therefore acted in accordance with the general principle that the appropriate standard of proof varies with the seriousness of the matter in question. As Dixon J observed in *Briginshaw v Briginshaw*:

> *The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according*

to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes …. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. [74]

11 Those comments must be read in light of *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd,* where Mason CJ, Brennan, Deane and Gaudron JJ said:

> *The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matters as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance or probabilities, a party to civil litigation has been guilty of such conduct.*[75]

12 Consequently, while I have applied the civil standard of *'reasonable satisfaction'* in reaching findings, that standard has varied considerably depending upon the seriousness of the allegation in issue. I have not made any finding or adverse comment without having regard to the damage it may cause.

13 I do not regard the concept of the onus of proof as applicable in the context of a Royal Commission. That is because, in leading evidence during hearings of the Commission, Counsel Assisting were not putting a case. They were participants in an investigation. If, in accordance with the approach I have just outlined, I was reasonably satisfied that certain events had occurred, then I found that they had occurred. If I did not reach that level of satisfaction, I did not make that finding. That was, however, as a result of the application of the relevant standard of proof. It was not because Counsel Assisting had failed to discharge any onus.

Browne v Dunn

14 A great many persons have submitted that particular findings were not open to the Commission because either the relevant matters were not '*put'* to certain witnesses, or because particular evidence given by certain witnesses was inconsistent with the proposed findings and such evidence was not challenged by cross-examination.

15 These submissions were based, either explicitly or implicitly, upon the rule in *Browne v Dunn*.[76] That rule is a rule that is applicable to both civil and criminal proceedings.[77] In that context, it provides that if a court is to be invited to disbelieve a witness, the grounds upon which the evidence is to be disbelieved should be put to the witness in cross-examination so that the witness may have an opportunity to offer an explanation.[78] It was submitted that the Commission should adopt the same approach.

16 I did not accept submissions of this type. They failed to take account of the differences between the functions of the courts and the functions of an investigative body such as a Royal Commission. Those differences are considerable. They include the following:

(a) The nature of an investigation is such that Counsel Assisting a Royal Commission frequently do not know the entire state of the evidence at the time any particular witness is called. As a consequence, it is not possible, or reasonably practicable, for Counsel Assisting to put every matter to a witness that is contrary to his or her evidence, or to cross-examine on every topic in relation to which the witness may not ultimately be believed. If it were necessary that each such matter be put or tested, it would be necessary to recall some witnesses over and over again as further evidence came to light.

(b) Royal Commissions are frequently asked to carry out very wide-ranging investigations within a limited period of time. They must adopt procedures that are as expeditious as possible, subject to the requirement that they be fair to persons who may be adversely affected. In the context of an investigation, where any findings do not have a direct effect on any person's rights or interests, fairness does not require strict compliance with the rules of evidence.

(c) Compliance with *Browne v Dunn* is unnecessary during Royal Commission proceedings because the rules of procedural fairness remove the rule's policy foundation. That is because:

(i) The purpose of the rule in *Browne v Dunn* is to ensure that witnesses have an opportunity to answer the matters which are put against them. In the context of normal court proceedings, the only opportunity witnesses have to do this is when they are giving evidence (as a consequence of the rule against splitting). The rule in *Browne v Dunn* also allows a party to identify the matters in dispute, and thus to call corroborative evidence if necessary. In the context of a Commission, however, there is no rule against case splitting, and no right to call further witnesses. A Commission has the power to recall a witness in order to answer a particular matter if it considers that necessary in the interests of fairness. Any person is free at any time to ask a Commission to take that approach;

(ii) The only restraint on a Royal Commission's procedures is that it must comply with the rules of procedural fairness. As is discussed below, one requirement of procedural fairness is that witnesses must be given notice of any proposed adverse findings against them, together with an opportunity to answer those findings. In the context of a Commission investigation, compliance with that right provides

witnesses with an opportunity to answer matters that may be adverse to them, rendering compliance with *Browne v Dunn* unnecessary.

17 It follows that a Royal Commission is entitled to reject a witness' evidence even if the witness has not been cross-examined in relation to that evidence. Furthermore, the Commission's obligation to conduct an investigation within a specified period of time means that it may not be appropriate for Counsel Assisting to cross-examine a witness about every matter in relation to which his or her evidence may not be accepted. Where, for example, a matter was of peripheral importance to an investigation, or where the weight of evidence in one direction was such that a particular finding was inevitable, cross-examination was not appropriate, notwithstanding that it was subsequently submitted that the witness' evidence should be rejected. If an adverse finding has been made against a witness in this report, then that witness has been given notice of that proposed finding and has had an opportunity to answer it. If no adverse finding has been made, then the Commission's investigation will not damage the rights, interests or legitimate expectations of the witness. In either case, compliance with *Browne v Dunn* was unnecessary.

18 Accordingly, I have not rejected any findings of fact that Counsel Assisting submitted should be made solely on the ground that a matter was not '*put'* or was not the subject of cross-examination. That said, I of course made findings of fact only where I was satisfied that it was proper to do so, and it was sometimes the case that I attached less weight to evidence that had not been the subject of cross-examination than may have been the case had cross-examination occurred.

Inferences

19 On many occasions my findings have been based in part upon inferences drawn from the material that has been placed before me. In that respect, the fact finding process is no different from that which takes place in a court, where it has been said that '*[i]nferences from actual facts that are proved are just as much part of the evidence as those facts themselves'*.[79]

20 Before drawing any inference, it was necessary to establish the factual premises from which the inference could be drawn. I drew inferences only from facts that were established to my reasonable satisfaction,[80] and only where I was satisfied that it was appropriate to do so.

21 In considering whether it was appropriate to draw an inference, I had regard to the distinction between reasonable and definite inferences (which are permissible) and conjecture, speculation and guesswork (which are not).[81] As Dixon CJ once commented, the law '*does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others*'.[82] The same is true of a Royal Commission. But, as it was put in a unanimous judgment of the High Court to which Dixon J (as he then was) was a party:

> *All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the [relevant fact should be found] …. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood.*[83]

22 The question of what inferences should be drawn most commonly arose in relation to witnesses who had refused or failed to provide statements setting forth their version of events under investigation. As I mentioned above, union witnesses were very commonly in that position. The practical effect of union witnesses' frequent refusal to participate in interviews or provide statements was that often the only evidence before the Commission as to the events at, for example, a particular meeting, was the evidence given by non-union witnesses.

23 The specific question that confronted me was whether I should infer that the evidence that witnesses who declined to provide statements could have given would not have assisted them. That question fell to be answered in a context where I could not compel any witness to provide a statement, but where I could have compelled the relevant witnesses to give evidence orally at a hearing. I had to decide whether to do so, however, in the context that it would have been impossible to conduct the hearings of the Commission in a proper and timely fashion had all unco-operative witnesses been compelled to provide their evidence orally during hearings.

24 A majority of the High Court in *Jones v Dunkel* held that:

> *where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference.*[84]

25 In the same case Windeyer J described as *'plain commonsense'* the statement of general principle in *Wigmore on Evidence* that:

> *The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstances or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which made some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.*[85]

26 Of course, Royal Commission hearings are not court proceedings. The reasoning in *Jones v Dunkel* that an inference can be supported by the fact that a party who could have contradicted it has chosen not to do so, however, is derived from reasoning about human behaviour, rather than from some particular feature of court procedure or the rules of evidence. In particular, and importantly, the logic behind the *Jones v Dunkel* inference is not dependent on the inability of the party who seeks to draw the inference to compel the absent witness to give evidence, for in a civil case a party is able to compel even the other party to give evidence,[86] yet the inference is still available.

27 Ultimately, I have decided that I should not draw any inference that a witness could not have provided evidence which would have assisted them simply because that witness failed or refused to provide a statement to the Commission. I made that decision because that failure would in almost every case have been open to explanation by reference to circumstances other than the witness' fear of exposure of facts unfavourable to the witness. The unfortunate reality

is that this Commission has been conducted in an environment of political controversy. It was, from the outset, treated with hostility by the large part of the union movement. Some unions or union branches went so far as to resolve that no member should co-operate with the Commission. In those circumstances, refusal to provide a statement may be explained by hostility to the Commission, and a desire not to co-operate with it or be seen to co-operate with it, rather than by the fact that the witness had no relevant evidence to give.

28 That is not to say that I have not drawn other inferences from proven facts when that was appropriate. Furthermore, while I have not drawn the type of inference often referred to as a *Jones v Dunkel* inference, in circumstances where that inference could have been drawn the unchallenged evidence was usually adequate by itself to prove the matter in issue, without any need to rely upon inferences. Even if the failure of a possible contradictor to advance an alternative version of events is not treated as adding weight to the unchallenged evidence, that failure does not, and cannot, undermine unchallenged evidence.

Adverse findings

The requirements of procedural fairness

29 In *Annetts v McCann*,[87] Mason CJ, Deane and McHugh JJ made clear that:

> *when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.*[88]

30 This Commission had the power to prejudice rights, interests or legitimate expectations, as it is clear that a person or organisation's reputation is an *'interest'* for these purposes.[89] It is equally clear that there are no provisions in the *Royal Commissions Act 1902 (C'wth)* that exclude the application of the principles of procedural fairness. Consequently, the Commission was required to comply with the principles of procedural fairness, and its procedures were established with that in mind.

31 The content of the rules of procedural fairness is variable.[90] While those rules do apply to investigative bodies such as a Royal Commission, in that context they have limited content. That point was emphasised by Branson J in *Ferguson v Cole*,[91] which was a challenge to the operations and procedures of this Commission brought in the Federal Court by a group of officials from the New South Wales Branch of the Construction and General Division of the CFMEU. In the course of reasons in which she completely rejected the CFMEU's challenge, Branson J said:

> *It should, in my view, be stressed that it is not the role of this or any Court to oversee the day to day conduct of a Royal Commission so as to ensure, for example, that the openings of Counsel Assisting are complete and accurate, that evidence is fairly gathered and used, that individual witnesses are questioned fairly and that cross-examination is not restricted unfairly or arbitrarily. No inference should be drawn from this statement that I am satisfied that the criticisms made by the applicants of the specific instances of conduct referred to above are justified. Taken individually the criticisms are*

insufficiently significant to be relevant to the issues before this Court. Cumulatively, even if made out, they would be inadequate to establish that the applicants, or any of them, have or has been denied procedural fairness.[92]

32 Branson J's judgment is attached in Appendix 19.

33 In *Annetts v McCann*, Mason CJ, Deane and McHugh JJ said that the main requirement of procedural fairness in relation to an inquiry is that it *'cannot lawfully make any finding adverse to the interests of [a person] without first giving [that person] the opportunity to make submissions against the making of such a finding'*.[93]

34 Persons who may be affected by an adverse finding have no right to make submissions on the general subject of an inquiry. Mason CJ, Deane and McHugh JJ held, when speaking of persons who may be affected by an adverse finding, that:

> *Their legal entitlement is confined to making submissions in respect of matters which may be the subject matter of adverse findings against them personally or against the deceased. This does not mean that their submissions must be perfunctory or limited to assertions or denials. In opposing the making of any adverse finding, the appellants are entitled to put every rational argument open on the evidence and, where necessary, to refer to and analyse the evidence to support that argument.*[94]

35 In the same case Brennan J observed that:

> *The classes of persons with 'sufficient interest' to attend and to be allowed to examine and cross-examine witnesses are, or may well be, larger than the class of persons against whom [a Commission] may contemplate making an unfavourable finding. The duty to accord natural justice applies only with respect to the latter class, who alone are entitled to insist on being heard by addressing a submission that an unfavourable finding should not be made.*[95]

36 Brennan J also said that:

> *the [Commission's] duty to allow a person to make such a submission arises only when the [Commission] has reached the stage of contemplating the making of an unfavourable finding against that person. It is only at that stage that the [Commission] is bound to give that person notice of the possible finding and to allow that person an opportunity to submit why the finding should not be made.*

37 To assist in the exercise of the right to make submissions, a Commission must:

> *define the issues in respect of which there exists a possibility that he may make findings adverse to the appellants. By defining those issues he can effectively assist the identification of the topics on which counsel can relevantly and usefully address and limit the scope of that address.*[96]

38 In all of the above passages, the High Court focussed upon the right to make submissions, implying that this was the only right conferred by the rules of procedural fairness in circumstances where there was a risk that adverse findings might be made. The procedure that the Commission adopted in relation to submissions, which is described below, was designed not only to assist me in my fact finding task, but to comply with the requirements outlined above.

The submissions process

39 At the conclusion of each block of hearings, I made a direction requiring Counsel Assisting, within a defined time, to provide submissions to me and to all persons who might be adversely affected or who had been granted general authorisation to appear, in relation to the matters dealt with during that block of hearings. As the Commission progressed there were some variations in the form of those directions. The differences related principally to whether Counsel Assisting were directed to make submissions in relation to the findings of fact that should be made, and then to consider any responses by affected persons to those submissions of fact before making submissions as to the conclusions that they contended should be drawn, or whether Counsel Assisting should make submissions of fact and law in the one document (which reduced the time period that it took for the submission process to be completed). An example of the most common form of direction used by the Commission is attached in Appendix 20.

40 Whatever the precise form of the direction made, however, Counsel Assisting were on every occasion directed to set out, in submissions made available to any person who might be adversely affected, the findings of fact which Counsel Assisting contended I should make, to provide references to the evidence that supported those findings of fact, to provide references to the contrary evidence, and to set out the conclusions which Counsel Assisting contended should be drawn from the findings of fact sought, including any findings of unlawful conduct that Counsel Assisting contended I should make.

41 Within a defined time after receiving the submissions of Counsel Assisting, those who were or may have been adversely affected by those submissions were directed to respond to the submissions of Counsel Assisting if they wished to do so. The direction required any such persons to indicate the basis upon which they disputed the findings of fact sought, any contrary or further findings of fact sought, and any reasons why the conclusions sought to be drawn from those facts by Counsel Assisting should not be made.

42 This procedure meant that all persons, organisations, corporations or governments which might be adversely affected by my findings had the opportunity to make submissions in response to advocated findings before any such findings were made.

43 Finally, Counsel Assisting were directed to respond within a defined time, if appropriate, to the submissions of affected persons, organisations, corporations or governments.

44 After all submissions were received, I considered all of the material placed before me by way of submission and counter-submission. Only after all of the submissions were considered did I make any findings or draw any conclusions from the incident.

45 I made findings based on the contentions of Counsel Assisting only where I regarded such findings as proper, and only after considering any objections to those findings. I have not, however, made any findings in relation to particular incidents unless a submission inviting me to make those findings was provided by Counsel Assisting to a person who might be affected by such a finding.

46 In the report of the *Royal Commission into Productivity in the Building Industry in NSW* (1992), Commissioner Gyles wrote:

> *I do not accept that in this type of inquiry an adverse finding is the equivalent of a finding of disputed fact, of any criticism of a party, or of the exposure of evidence or material which might reflect badly on a person. Nor do I accept that a warning must be given of all possible ramifications of each piece of evidence before it can be referred to in the Report. I do agree that a party should not be confronted for the first time in the Report with a true adverse finding upon a totally new point or issue which it could not reasonably have anticipated. I do not accept that this anticipation can only come from an express statement or warning by the Commissioner or Counsel Assisting.*[97]

47 I agree with that observation. It follows from what I have said above, however, that a warning of the type Commissioner Gyles said was unnecessary has in fact been provided to any person who might have an adverse finding made against them.

48 If follows that, as a result of the directions made in relation to submissions at the conclusion of each block of hearings, no person in relation to whom I have made an adverse finding has been *'left in the dark as to the risk of the finding being made'* against them. On the contrary, all persons who might be adversely affected by any proposed finding had notice both of that finding, and of the evidence upon which it was based. The process adopted was, in my opinion, more than sufficient to comply with the Commission's procedural fairness obligations.

49 I note that Branson J expressed the same view. In *Ferguson v Cole*, which was a challenge brought in the Federal Court to the procedures of this Commission by a group of officials of the CFMEU in New South Wales, Branson J held, shortly after summarising the Commission's procedures in relation to submissions, that:

> *Having regard to the procedure adopted within the Royal Commission in respect of persons who may be adversely affected by findings of the Commissioner, I am not satisfied that the Commissioner's final report will include findings that will destroy, defeat or prejudice the rights, interests or legitimate expectation of the applicants, or any of them of which the applicants have not been or will not be put on notice and given an opportunity to adduce relevant material that might deter the Commissioner from making the findings.*[98]

A right to call further evidence?

50 There is no suggestion in any of the passages from the Australian authorities quoted above, in relation to the content of that procedural fairness, that it confers a right to call additional evidence to answer contemplated adverse findings. In this respect Australian law may be narrower than that in the United Kingdom, as the House of Lords in *Mahon v Air New Zealand Limited* held that procedural fairness required a Royal Commission to:

> *listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been made aware of the risk of the finding being made …*
>
> *[The above rule] requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of*

the finding being made and thus deprived of any opportunity to adduce material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result.[99]

51 Notwithstanding the decision in Mahon, in Australia it appears to remain the case that procedural fairness does not confer a right to require a Commission to afford any person an opportunity to call evidence. That is not surprising, as such a right could protract an investigation to such an extent as to render it futile. In *National Companies and Securities Commission v News Corporation Ltd*,[100] which was decided after Mahon, Gibbs CJ said:

> *If the Commission were to accord to all the persons whose reputation might possibly be affected by the hearing a right to cross-examine the witnesses and call evidence as though they were in a court of law, the hearing might become so protracted as to render it practically futile.*

52 The only hint in the Australian authorities that there may be any right to call evidence that is contrary to a contemplated adverse finding is found in *Ainsworth v Criminal Justice Commission.*[101] In that case, in the context of a discussion of remedies rather than a discussion of the requirements of procedural fairness, a majority of the High Court stated that:

> *The Commission's … failure to observe the requirements of procedural fairness would have entitled them to relief by way of prohibition preventing it from reporting adversely without first giving them an opportunity to answer the matters put against them and to put submissions as to findings or recommendations that might be made.*[102]

53 It appears to me that, given the context in which that passage appears and the contrary authority, it is to place altogether too much weight upon the word 'and' to treat that passage as authority that procedural fairness confers a right to call additional evidence in answer to a contemplated adverse finding.

54 In any event, as I mentioned above, paragraph 9 of the First Practice Note provided a procedure by which any person had an opportunity to put evidence before the Commission, initially by providing a written statement to Senior Counsel Assisting. That procedure could have been invoked at any time until the end of the Commission's hearings, meaning that persons who were notified that adverse findings might be made against them could have sought to put further evidence before the Commission if they wished to do so.

Findings of criminal conduct

55 My Terms of Reference did not expressly require that I make any findings in relation to the civil or criminal responsibility of any individual, organisation or company. The emphasis in clause (a) of my Terms of Reference was, however, upon directing me to inquire into and then make findings concerning the nature, extent and effect of practices or conduct which may be a breach of either civil or criminal laws, examples of which were given in paragraphs (i) and (ii).

56 In addition, my Terms of Reference required 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. That provision could be read as implying that I

should not make any findings of breach of the civil or criminal law, but rather that I should refer, if I considered it appropriate, any aspects of a practice or conduct which might constitute such a breach to the appropriate authorities. On examination, however, that is not the appropriate way to read the Terms of Reference. That is because most of the matters investigated by the Commission '*might'* have constituted a breach of a civil or criminal law. If I did not make any findings in relation to any such matters, then the number of findings that would be open to the Commission would be very small. That would not have been satisfactory, because it would have unduly limited the evidential material to which I could make reference in explaining the need for the reforms that I have recommended.

57 That does not mean, however, that I should make findings that criminal conduct had occurred. Many Royal Commissioners have in the past taken the view that they should not express conclusions of guilt or recommend prosecution. There are a variety of reasons for that approach, which include: that their Terms of Reference did not call for specific findings; that it was unfair to reach findings on disputed issues in circumstances where evidence produced under coercive powers could not be used in evidence at trial; that the ability of Commissioners to engage in wide inquiries would be curtailed if specific cases had to be examined in enough detail to allow conclusions to be reached to the requisite standard of proof to support findings of guilt; that prosecutors consider factors in deciding whether to commence proceedings that are not within the purview of a Royal Commission's functions; and that findings of criminality would be of no relevance to any prosecutions commenced as a consequence of an investigation, yet would be highly prejudicial.[103]

58 The Final Report of the *Royal Commission into Productivity in the Building Industry in New South Wales* records Assistant Commissioner Holland comments that:

> *The primary role of the Commission is not to express conclusions it may have reached concerning possible criminal liability in individual cases. It is consistent with such approach that it is permissible for the Commission to inform itself, by evidence that may not be admissible in a court of law. It is further consistent with the Commission's function as an investigative body and not a body the purpose of which is to make determinations as part of a criminal process. In short, it is not seen to be the function of the Commission to make or report a finding of guilt or innocence. The nature and implications, however of the collusive practices investigated will be established by the Commission's findings. The possible existence of any specific offences may ultimately be a matter for consideration of other authorities. On the question of the nature of the findings to be made, the Commission is not, however, precluded from making primary findings of fact in the course of reporting upon its investigations. Such findings do not, by their nature, intrude upon ultimate questions of guilt or innocence.*
>
> *… It would not be possible adequately or properly to report upon the conduct and practices investigated without making primary findings of fact and naming individual projects, persons, corporations or associations involved in or associated with projects in which collusive tendering conduct and practices are found to have occurred … [T]he terms of reference do not call for ultimate findings of individual culpability such as would be required on a trial of alleged illegal or criminal conduct. The Commission's attention is focused by the terms of reference on the nature of the conduct and practices generally*

> *rather than individuals engaged in them and, in this respect, their legality calls for consideration. As the conduct and practices in question are necessarily engaged in by individuals, and as it is necessary to report upon the extent of the activities, the naming of individuals in the course of stating the facts is both unavoidable and proper.*[104]

59 I agree with those comments. Consequently, I have not made findings to the effect that named individuals, organisations or companies have committed criminal offences. Instead, my views in relation to matters that might have constituted breaches of the criminal law have been set out in a separate volume, which I have recommended should not be made public. In that volume, I have set out the matters that I recommend be referred to appropriate law enforcement agencies for consideration and, if appropriate, further investigation with a view to determining whether criminal charges should be laid.

60 My reasons for submitting a private report concerning criminal conduct accord with those expressed by the three Royal Commissioners who conducted the W.A. Inc. Royal Commission (all of whom were judges or former judges). The Commissioners said:

> *The Commission has made a number of findings of serious impropriety. We have, however, refrained from detailing any findings in respect of illegal or corrupt conduct, reserving those matters for an appendix to our report which we recommend should be received in confidence and passed to the Director of Public Prosecutions for his consideration with a view to the institution of criminal proceedings. This course is recommended in order to safeguard against any prejudice that might otherwise arise. Whether or not criminal proceedings will eventuate will be a matter for the prosecuting authorities.*[105]

61 That approach was adopted during the W.A. Inc. Royal Commission notwithstanding that that Commission's Terms of Reference required it *'to inquire and report whether there has been, in the context of the specified terms of reference, corruption, illegal conduct or improper conduct.'*[106] The Commissioners refrained from expressing public views as to criminal conduct because *'[w]hile it is a function of a judge or a jury to determine issues, at least as far as the law is concerned, the purpose of a Royal Commission is to find facts and report them, and often, as in this case, to make recommendations. It has no power to affect the legal rights of individuals.'*[107] The Commissioners concluded that their task was:

> *to report whether there is material which should be considered by the appropriate authority charged with responsibility for the institution of criminal proceedings. It is for that authority, not this Commission, to determine whether there is a prima facie case warranting prosecution. Far less it is the task of the Commission to make an express finding of the Commission of a criminal offence. Such a finding would have no consequence in law and could be highly prejudicial.*[108]

62 As the learned Commissioners pointed out, *'the purpose of a Royal Commission is to find facts and report them'.*

63 In discharging that task, I made findings of fact in relation to conduct that may, on analysis, later be found to contravene the criminal law. But I did not express conclusions of criminality. The distinction between findings of fact that may, on analysis, reveal criminal conduct, and actual

findings that criminal conduct has occurred, has been emphasised by the High Court. In *Balog v Independent Commission Against Corruption,* the High Court said:

> *At least in theory there may be a fine line between making a finding and merely reporting the results of an investigation. But in practice the line should not be difficult to draw. It is clear enough that there is a distinction between the revelation of material which may support a finding of corrupt conduct or the commission of an offence and the actual expression of a finding that the material may or does establish those matters.*[109]

64 After careful examination of my Terms of Reference, I concluded that it was necessary for me:

(a) to examine closely, and to make factual findings concerning, activity that might constitute unlawful practices or conduct;

(b) to determine who the participants in that conduct were;

(c) to determine whether those participants fell within a category of participant sufficient to elevate their acts to an example of activity on behalf of a group; and

(d) to consider whether the activity was unlawful or inappropriate.

Findings of inappropriate conduct

65 A Royal Commission's Terms of Reference serve two functions. They define the scope of the Commission's inquiry, and they define the scope of its report. The two functions are not identical. A Commission may investigate a particular incident and decide not to make any findings adverse to any particular person, organisation or company, yet nevertheless regard the incident as demonstrating the need for reform in a particular area.

66 In accordance with my Terms of Reference, this Commission has *investigated* matters in order to determine whether they revealed '*inappropriate'* practices or conduct. For that purpose, I did not attempt exhaustively to determine the meaning of that word. That was because I took the view that the matters identified during the process of investigation were likely to influence the meaning that '*inappropriate'* should be understood to have in particular circumstances. Conduct can frequently only be characterised when the circumstances in which it occurred are known and understood.

67 Ultimately, however, I have decided that I should not make *findings* that any individual, organisation or company has engaged in '*inappropriate conduct*', unless there has been a concession that particular actions were '*inappropriate'*. A concession that particular conduct is inappropriate is a recognition by the entity making the concession that it knew of a sufficiently defined standard of conduct that it has breached or departed from.

68 In the absence of a concession, to make findings of inappropriate conduct may have involved judging individuals, organisations or companies in accordance with a standard of which they were not aware at the time that they acted. Even more likely, it may have involved finding that individuals, organisations or companies had departed from a standard of which they were aware, but from which they regarded themselves as free to depart in some situations. Such findings might have damaged an individual, organisation or company's reputation in circumstances where that individual, organisation or company considered that, because it was

acting within the confines of the law, it was free to pursue whatever it perceived as its best interests (including the best interests of its members or shareholders).

69 One major reason for avoiding making findings of '*inappropriate'* conduct, even if an individual, organisation or company had departed from an apparently objective standard of appropriate behaviour, was that such departures were often explained by those involved as a reasonable response, taking into account deficiencies in the law and law enforcement mechanisms within the building and construction industry, to threats of unlawful action by others. Those deficiencies may have meant that participants in the industry had no choice but to respond to, for example, threats of unlawful action, in ways that were less than ideal. They may, for example, have made payments to unions or charities, or put pressure on subcontractors to sign enterprise agreements, because they thought that that conduct was the best way that they could discharge their obligation to act in the best interests of their shareholders or members, which they may have felt obliged to do whether or not it was objectively appropriate.

70 Explanations of this type were common, particularly in relation to sizeable payments that have been made for the apparent purpose of securing industrial peace. In relation to one case study, for example, it had been submitted by Counsel Assisting that:

> *[a head contractor] engaged in inappropriate conduct when it responded to the threats employed by [a union organiser] by exerting pressure on [a subcontractor] to cause his employees to become members of the [union], and by agreeing to make, and making, payments to the [union] on account of their membership fees. In this regard, we submit that [the head contractor] surrendered to the unlawful and inappropriate conduct of [the organiser] and [the union].*

71 The relevant head contractor responded by submitting that it would be excessive and unfair to make such findings, because the head contractor *'was never anything more than a victim attempting to manage, as best it could, the unpleasant realities it faced. Put colloquially it was "caught between a rock and a hard place" and it would be an exercise in industrial naivety and unfairness to record this finding.'* In other words, the threat of unlawful action was said to render excusable behaviour that would otherwise have been inappropriate.

72 That example illustrates two points. The first point is that it was not possible to assess whether a threat reasonably justified a departure from objective standards of appropriate behaviour without making a judgment about the relative importance of resisting unlawful threats on the one hand, and the damage unlawful action might do to a person or company's best interests on the other. That meant that any finding that a departure from objective standards of appropriate behaviour was inappropriate would have involved a subjective rather than objective judgment, which would have been unfair because, to use Gleeson CJ's words from the *Greiner* case, it would have exposed the affected individual, organisation or company to the *'individualistic opinions of an administrator whose conclusions are not subject to appeal or review on the merits'*.[110]

73 Second, the example illustrates the importance of the distinction between findings in relation to past conduct, and recommendations in respect of the future. While the head contractor concerned may have been right to say that it should not have an adverse finding made against it because its conduct in surrendering to threats of unlawful action was a reasonable response

to circumstances with which it was faced, that does not remove the obvious need to try to minimise the circumstances in which head contractors find themselves confronted by such threats. Evidence obtained in the investigation of possible inappropriate conduct is therefore of vital importance to the recommendations that I have made, even though I have not generally made findings that past behaviour was *'inappropriate'*.

74 In addition to those two points, I am influenced also, as I explained above, by the fact that the interplay of conflicting interests within the building and construction industry may produce inappropriate outcomes, even though the individuals involved may each individually have acted in the proper discharge of their duties. Findings that outcomes were *'inappropriate'* in these circumstances could not have been made by reference to a sufficiently objective and determinate standard to be fair to any individual, organisation or company concerned, yet conclusions of this type are an important foundation for my recommendations for the future.

75 For reasons that I explain in other volumes of this report, I regard certain categories of practice or conduct that are common in the building and construction industry as inappropriate. While, in light of *Greiner's* case, that view should not result in findings against individuals in respect of past conduct, my views and the reasons that I hold them are important to my recommendations, because those recommendations are in some cases directed towards rectifying inappropriate structural imbalances.

76 I have, therefore, on many occasions made it clear that I regard particular categories of conduct as inappropriate, and that reforms should occur in order to prevent conduct that falls within those categories from occurring in the future. In making such observations, I should not be taken to find, or to imply, that the conduct that occasioned those observations was inappropriate at the time that it occurred, although it may have been. I am concerned instead to look forward and to explain why I have suggested a different standard of behaviour which should apply in the future.

77 It is important that I express my conclusions in the way just described, because otherwise it would be impossible to discharge my Terms of Reference. My recommendations are based upon my inquiry, and must therefore relate to both unlawful and inappropriate practices and conduct within the building and construction industry.

The categories of person against whom findings were made

78 I have made findings only in relation to legal entities. It seemed to me to be insufficiently precise and, perhaps, meaningless, to make findings in relation to groups of persons that did not have any legal existence.

79 That limitation did not present any difficulties in relation to individuals, and it presented very few in relation to companies. It was, however, of real significance in relation to unions.

Attribution of the acts of individuals to a union

80 There are three processes by which it may be concluded that a union is liable for the conduct of its officials or organisers. A union may be:

(a) liable by reason of a statutory deeming provision, such as s349(2) or s298B(2) of the *Workplace Relations Act 1996 (C'wth)* (or State equivalents);

(b) directly liable in accordance with the principles in *Tesco Ltd v Nattrass*,[111] if when the official or organiser engaged in the relevant conduct he or she was acting as the '*directing mind and will'* of the union;[112] or

(c) vicariously liable in accordance with common law principles; that is, if the relevant acts were done in the '*course of employment*', and were '*authorised'*.

81 Section 349 of the *Workplace Relations Act 1996 (C'wth)* provides, in part:

> *(1) Where it is necessary to establish, for the purposes of this Act, the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:*
>
> *(a) that the conduct was engaged in by an officer, director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; and*
>
> *(b) that the officer, director, employee or agent had the state of mind.*
>
> *(2) Any conduct engaged in on behalf of a body corporate by:*
>
> *(a) an officer, director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; or*
>
> *(b) any other person at the direction or with the consent or agreement (whether express or implied) of an officer, director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the officer, director, employee or agent;*
>
> *shall be taken, for the purposes of this Act, to have been engaged in also by the body corporate.*
>
> *(3) A reference in this section to the state of mind of a person includes a reference to the knowledge, intent, opinion, belief or purpose of the person and the person's reasons for the intent, opinion, belief or purpose.*

82 In *Hanley v AMWU*[113] Ryan, Moore and Goldberg JJ discussed the circumstances in which a union is vicariously liable for actions of its organisers or employees who are in breach of a penalty provision under the *Workplace Relations Act 1996 (C'wth)*. Their Honours held that s349 did not exclude the operation of common law principles of vicarious liability or direct corporate liability.[114] Instead, it provides an alternative statutory mechanism for imposing direct liability on a body corporate.[115]

83 The consequences of the decision in *Hanley* are unclear in a number of respects. One of those respects is that the Court does not always make it clear whether its comments relate only to common law vicarious liability, or also to s349 of the *Workplace Relations Act 1996 (C'wth)*. So, for example, in the course of its analysis the Full Court noted the conflict between some cases that suggested that simply showing that a person was acting in the '*course of their employment'* was sufficient to attribute his or her conduct to a union (which approach would

result in liability for unauthorised acts of the organiser, as such acts are regarded as wrongful or unauthorised modes of performing an authorised task), and cases that required '*proof of authority*' before vicarious liability will be found.

84 The Full Federal Court favoured the latter view, holding that '*to establish vicarious liability under s 170NC it is necessary to adduce evidence which establishes, on the balance of probabilities, that the act complained of was authorised'*. The Full Court approved[116] the observation of Pincus JA in *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)*[117] that:

> *The fact of authority had to be proved beyond reasonable doubt and there was nothing to prove it. Inferences from what union organisers generally do could not fill the gap, nor could it be filled by judicial knowledge.*[118]

85 Those observations make sense only if they relate exclusively to common law vicarious liability, and not to s349 of the *Workplace Relations Act 1996 (C'wth).* That is because s349(2) expressly uses the words *'actual or apparent authority'.* The Full Federal Court cannot be taken to have intended to say that *'proof of authority'* – that is, actual authority – is required to fall within s349(2), because that would be directly inconsistent with the statutory statement that *'apparent'* authority is sufficient. The statements in *Hanley* that *'proof of authority'* is required should therefore be understood as statements directed to the requirements of common law vicarious liability in the context of a penalty provision under the *Workplace Relations Act 1996 (C'wth).* It is not clear how far beyond this particular context the authority of the case extends. In other contexts, and in other jurisdictions, there is strong support for the *'course of employment'* test.[119]

86 Even accepting that, following *Hanley, 'proof of authority'* is required if reliance is to be placed upon common law vicarious liability or upon the concept of *'actual'* authority in s349, it is clear that all that must be proved is authority to engage in the relevant task. It is not necessary to prove that the *mode of conduct* used to carry out that task was authorised. The Full Court regarded it as clear that *'once authority to engage in certain tasks is proved, vicarious liability extends to unauthorised modes of performing those tasks'*.[120] For practical purposes, that approach can be difficult to distinguish from the course of employment test. The Full Court did appear to see a distinction, as is demonstrated by its approval of Pincus JA's comments that authority to engage in the task in question cannot be proved simply by showing *'what union organisers generally do'*. Hanley's case does not, however, provide any guidance as to how the requisite authority should be proved, because in that case a concession had been made in the pleadings concerning the functions of union organisers. It is therefore not at all clear what must be proved to satisfy the requirement in *Hanley* that there be *'proof of authority'*.

87 In any event, if s349 applies then, notwithstanding *Hanley*, there is no need to focus upon whether or not there is *'proof of authority'*, because *'apparent'* authority is sufficient. In that context the Full Federal Court stated that:

> *To establish apparent authority, it is not sufficient to show merely that an 'officer, director, employee or agent' held himself or herself out as having authority. Rather, there must at least be circumstances which would justify a belief on the part of a person dealing with*

the 'officer, director, employee or agent' that that 'officer, director, employee or agent' is acting with authority.[121]

88 Section 349 will therefore deem an organisation to be responsible for the actions of an officer, director, employee or agent of the organisation provided that there are circumstances which would justify a belief on the part of a person dealing with that officer, director, employee or agent that they are acting with authority. That test seems very likely ultimately to lead back to the *'course of employment'* test, as it is difficult to see how else it is possible to determine whether there are *'circumstances'* that justify a belief that a particular person is acting with authority.

89 The unions affected by this Commission often denied responsibility for the unlawful acts of their organisers by asserting that those organisers had not been authorised to engage in unlawful conduct. To the extent that that submission was based upon the argument that unlawful conduct is intrinsically outside the scope of an organiser's contract of employment, the point is answered by Toohey J's comment that:

> *It may be assumed to be an implied term in every contract of employment that the servant or agent will not act unlawfully. And that will have consequences between employer and employee. Yet unlawful conduct has not been held inevitably to be outside the scope of employment.*
>
> *On the contrary, if a servant or agent has authority to enter into transactions of the sort in question, it is no answer for a principal to say that in the particular circumstances the servant or agent acted wrongfully.*[122]

90 In *Hanley*, it was alleged that a union had contravened s170NC of the *Workplace Relations Act 1996 (C'wth)* as a result of the conduct of one of its organisers. Among other matters the organiser had:

(a) told the employer that its employees could not come and work on a site unless the employer had an Enterprise Bargaining Agreement (EBA);

(b) told a site foreman that the employer '*either goes in there and fixes up the EBA or he won't be working*' and that the employer '*won't be working until he signs it*';

(c) told the employer that if he did not sign the EBA, he would be out looking for him on all other jobs;

(d) told the employer that if he wanted to keep his '*blokes'* working, he should sign an EBA.

91 Those facts closely resemble the facts in many of the individual incidents investigated by the Commission. On those facts, the Full Federal Court found:

(a) that the relevant union organiser had acted on behalf of the union when he engaged in conduct that contravened s170NC of the *Workplace Relations Act 1996 (C'wth)*;[123]

(b) that at the time of the conduct he was performing tasks falling within the scope of his apparent authority from the union, notwithstanding that the actions were unlawful;[124] and

(c) that accordingly the union was vicariously liable, or liable under s349, for the organiser's breach of s170NC.[125]

92 It follows that, applying the approach taken by the Full Court in *Hanley*, in many of the incidents investigated by the Commission a union will be responsible for the conduct of its organisers both as a result of s349 and the common law of vicarious liability. That conclusion will follow provided the acts in question take place when the organiser or employee is performing tasks of a type that the union organiser or employee has actual authority to perform, even if the organiser pursues those objectives by unlawful means. It will also follow if there are circumstances which would justify a belief by a person dealing with the organiser or employee that that organiser or employee is acting with authority, as in that circumstance the organiser or employee will have '*apparent authority*' within the meaning of s349(2).

93 Both tests direct attention to what kinds of task an organiser would be expected to perform. In *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)*,[126] Williams J observed that an organiser's duties include the following:

> *Checking union membership on site; ensuring union members are financial; explaining advantages in union membership; dealing with employers and employees; dealing with industrial disputes; arranging meetings of members on site; ensuring compliance with industrial agreements; checking wages and conditions under which workers are employed; increasing employment on site; checking safety issues and raising such issues with management; ensuring members received all entitlements; checking employers make all necessary contributions to funds for workers; checking hours of work of members.*[127]

94 Leaving aside statutory deeming and vicarious liability, it seems that unions will not normally be directly liable for the conduct of their organisers or employees under the principles in *Tesco Ltd v Nattrass,*[128] the Full Federal Court having pointed out in *Hanley* that a union will not be liable under these principles unless the relevant organiser or employee was acting not merely as a servant, representative, agent or delegate of the union, but rather as the *'directing mind and will'* of the union when he or she engaged in the relevant conduct.[129]

The relevance of branches and divisions

95 Particular issues arose concerning the attribution of the conduct of individuals to a union in relation to unions that by their rules have divided themselves into a number of Branches, Divisions or Divisional Branches.

96 The CFMEU, in particular, has denied that it is responsible for the unlawful actions of its organisers in part because of the structure of the CFMEU. The CFMEU has frequently pointed out to the Commission that it is an organisation that is the result of the amalgamation of a number of different unions, some having nothing to do with the construction industry. The significance of this point is, however, diminished by the fact that upon amalgamation the amalgamating organisations are deregistered and cease to exist, and what remains is one organisation with a single set of members.[130] The predecessor unions are relevant only in that they provide the historical basis for the divisional structure of the CFMEU.

97 The Construction and General Division is just one Division within the CFMEU. Furthermore, within the Construction and General Division, Divisional Branches have been established in

each State and Territory, and officers of those Divisional Branches are elected to carry out duties within each State and Territory. Rule 27(ii) of the Rules of the CFMEU states that:

> *Each Division shall have autonomy to decide matters which do not directly affect the members of another Division without any interference by any other body within the Union, including but not limited to:*
>
> *(a) The industrial interests of its members.*
>
> *(b) The election of officers within the Division.*
>
> *(c) Matters arising from the Objects of the Division.*
>
> *(d) Structure of the Division.*

98 The CFMEU, by virtue of its registration and the operation of s192 of the *Workplace Relations Act 1996 (C'wth)*, has a corporate existence, and thus a legal personality. By contrast, Branches, Divisions and Divisional Branches of the CFMEU have no legal existence as a juristic person. Nor are they unincorporated associations. They are merely sections of the membership of the CFMEU, which ultimately derive their authority from the rules of the CFMEU, and exist only as an integral part of the CFMEU.[131] In this context, it is significant that applicants are admitted to membership of the CFMEU, and are only then deemed to be attached to a Divisional Branch. It would, therefore, have been pointless for me to make findings in relation to particular Branches, Divisions or Divisional Branches of the CFMEU. If any findings were to be made beyond the level of the individuals involved, they had to be made in relation to the CFMEU itself.

99 Many of the matters investigated by the Commission involved the conduct of union organisers. The CFMEU submitted, in relation to these incidents, that the acts of organisers could not be attributed to it. It stated that the capacity in which organisers of the Construction and General Division act is set out in that Division's rules. Rule 48(1) sets out the duties of organisers, making them subject to the control and supervision of the Divisional Branch Management Committee of the jurisdiction in which they work. Rule 42(e) makes it clear that all Branch officers are under the control of the Divisional Branch Management Committee:

> *(e) They shall be responsible for the control and supervision of all officers. They may delegate this responsibility in respect to nominated classes of officers to the Divisional Branch Secretary for the exercise of this responsibility on a daily basis in between meetings of the Divisional Branch Management Committee on a temporary or ongoing basis and upon any terms or conditions they see fit; provided that such delegation may be revoked at any time by a subsequent meeting of the Divisional Branch Management Committee. They shall also deal with the proposed Divisional Branch Council Agenda prepared by the Divisional Branch Secretary.*

100 The CFMEU has submitted on many occasions that the effect of the above rules is that I could not make findings in relation to the CFMEU itself, as the CFMEU was not responsible for acts taken by its Branches, Divisions or Divisional Branches, or officers thereof. It was said that, given its structure, there is no basis for suggesting that the acts of organisers of one Divisional Branch of the CFMEU, which occur in the context of a particular local dispute, should be

treated as the conduct of the CFMEU as an organisation registered under the *Workplace Relations Act 1996 (C'wth)*. Furthermore, the CFMEU submitted that it was necessary for Counsel Assisting, if asserting that a union acted in a certain way, to demonstrate much more than that an officer or member of that union was involved in the relevant action. It was submitted that it must also be demonstrated that the officer was acting in his capacity as an officer of the union and that there was evidence of authority from that union (and not merely from the relevant section of the union) to so act.

101 The submission is surprising. It implies that a consequence of a union dividing itself into Branches, Divisions and Divisional Branches and granting them a measure of autonomy is that a union can protect itself from ever being found to be responsible for anything, because once an autonomous Branch, Division or Divisional Branch is created, by definition the union will not give directions to that Branch, Division or Divisional Branch about how it should pursue the objects of the union. Unless the grant of autonomy is itself sufficient to evidence that the Branch, Division or Divisional Branch had authority to bind the union, it is unlikely that there will ever be evidence of the type required to prove that the union authorised the unlawful conduct of the Branch, Division or Divisional Branch because the fact of autonomy would preclude such a direction.

102 A grant of autonomy in the context of the rules of the CFMEU is really no more than a grant of authority to carry out the objects of the CFMEU in relation to a section of the CFMEU's members. If otherwise, a grant of autonomy would constitute an abdication of the objects of the union, and an abandonment of the members who fall within the newly autonomous Branch, Division or Divisional Branch. The grant of autonomy to Divisions by rule 27(ii) of the CFMEU's rules therefore does not mean that the CFMEU can wash it hands of everything done by a Division. In fact, the opposite conclusion follows, because a grant of autonomy *precludes* the CFMEU from advancing the interests of its members *other* than through the actions of its autonomous Divisions, Branches or Divisional Branches. The CFMEU, of course, says that it does advance the interests of its members. That claim can be true if and only if the CFMEU can properly claim credit for the activities of its Divisions, Branches and Divisional Branches. If it can take credit for those activities, it must also accept responsibility for them.

103 That said, there is undoubtedly uncertainty in the law regarding the circumstance in which a union can be held legally liable for the acts of its Divisions, Branches and Divisional Branches, and their officers.

104 In support of its submissions that it should not be held responsible for the actions of sections of the union, the CFMEU has relied upon several early High Court authorities. The first such authority is *Waterside Workers Federation of Australia v Burgess Brothers Limited.*[132] In that 1916 case the High Court held that, in the absence of express authority or of ratification, a registered organisation of employees was not liable for tortious acts arising out of strike action by its Tasmanian branch without the knowledge of the governing body of the organisation.

105 Griffith CJ set out the basis upon which the case had proceeded as follows:

> *It is manifest that the appellants [the union], being a corporation, can only act through agents. It was, therefore, necessary for the plaintiff to establish that the acts complained of were done by their authorised agents. There is no question of express authority. The*

> *governing body of the appellant organisation had in fact no knowledge of the acts complained of until after they had been done, and then, so far from approving or ratifying them, expressed its disapproval. The persons doing the acts did not even purport to act on behalf of the organisation.*
>
> *…*
>
> *Before this Court the respondents relied entirely upon the authority which, they contended, was established by the rules … It is impossible to construe rule 16, which is the one mainly relied on, as implying a general authority to a branch or to its individual members to act as agents for the organisation collectively.*[133]

106 Rule 16, to which Griffith CJ referred, provided that *'every branch may conduct its local business and settle its own disputes without interference from the organization'.*[134] As the above passage makes clear, that rule was of critical importance to the disposition of the case, as it was the only basis for the submission that the organisation was responsible for the acts of its branch.

107 In the principal passage that has been relied upon by the CFMEU, Griffith CJ said:

> *It is, perhaps, not surprising that when a branch of a great organization like the appellants takes action in the nature of a strike some person should impute the blame to the organization itself, but in a Court of Justice mere surmise or suspicion is not sufficient. A person or a corporation is not in a Court of Justice held liable for the actions of others unless his or its authority to do the actions on his or its behalf is established by evidence. In the present case, there is no foundation for even surmise or suspicion.*[135]

108 As the first quotation above from Griffith CJ's judgment makes clear, on the facts before the High Court, the branch officials: acted without the knowledge of the federal organisation; did so in a way of which the federal organisation disapproved; and did not in fact purport to act on behalf of that organisation. Furthermore, the plaintiff relied *entirely* upon the rules of the federal organisation to establish that the persons in question had authority to do the acts they did in a way that bound the federal organisation. It follows from these facts that *Waterside Workers* has nothing to say about whether it is possible to establish that a branch had authority to bind a union for reasons other than the rules or, more importantly for present purposes, whether rules in a form different than those considered by the Court can be sufficient to establish authority (which may well be the case, given the history of the organisation, its constituent parts, and the rules of those parts, with which the Court was concerned in *Waterside Workers*).

109 The other decision relied upon by the CFMEU was *Commonwealth Steamship Owners Association v Federated Seamen's Union of Australasia.*[136] In that case the High Court held that acts done by members or a Branch secretary of a registered organisation of employees could not be attributed to that registered organisation so as to make it liable for breach of an award. The High Court cited *Waterside Workers Federation of Australia v Burgess Brothers Limited* with approval and again spoke about the need for evidence and not acting on mere suspicion. Isaacs and Rich JJ rejected an argument that the decision of a Branch was a decision of the registered organisation stating, in a passage that the CFMEU has regularly quoted:

It was said that the mere fact of that decision being made at the Branch meeting constituted a breach by the organization of the term of the award referred to. The way the argument was presented was as follows: By the registered rules of the respondent organization, Branches are established; and it was contended that each Branch so completely represented the whole organization at its own locality that whatever it did, rightly or wrongly, must be taken to be the act of the whole organization … We cannot accept so sweeping an argument. The Union is composed of members as its units. For convenience, Branches are established … but the government and control of the Union as a corporate or quasi-corporate body is vested in a general meeting of the members, the chief executive authority being committed to a Committee of Management following the instructions of the meeting of members. A Branch has its own business; but its own Branch business is not the business of any other Branch, and still less the business of every other Branch, or of the Union as a whole.[137]

110 In the same case, Higgins J, relying on two English cases, said that *'a Branch cannot usually be treated as an agent of the Union, so as to make the acts of the Branch the acts of the Union'.*[138]

111 The above cases, and particularly *Commonwealth Steamship Owners Association v Federated Seamen's Union of Australasia*, do appear to support the CFMEU's argument that the union is not necessarily responsible for decisions made by, or conduct engaged in by, its Branches.

112 The authorities do not, however, all point in the same direction. In particular, *Williams v Hursey,*[139] a more recent decision of the High Court to which the CFMEU did not refer, suggests a different approach. In that case Fullagar J, with whom Dixon CJ and Kitto J agreed, said:

But, if the branch had been a separate body having an independent existence distinct from that of the federation, and capable of being made liable for the 'picketing' episodes, I should have doubted whether the federation also could have been held liable. It may be taken to have given sympathy and encouragement to the branch, but I should have felt doubt as to whether it could have been held to have made the acts of the branch its own acts in the sense which would have made it equally liable in damages with the branch.

But in truth, as has been said, the branch has in law no existence separate from that of the federation. It is merely an aggregate of members which is an integral part or section of the whole federation, having that degree of autonomy which is permitted to it by or under the constitution of the federation. It represents the federation in the port of Hobart. In and for the port of Hobart it is, so to speak, the federation…. [Subject to certain limitations in the rules, the branch] is set up and organized in the port of Hobart to do in that port whatever the federation may do in any Australian port. Because it has that character and those functions, it seems to me that acts of the branch within its local limits are prima facie acts of the federation itself. The branch is in all respects subject to the control of the governing body of the federation, and that body could no doubt interfere and prohibit the branch from proceeding, or from proceeding further, with any particular course of action, and the federation would not be liable for anything done in breach of such a prohibition: cf. Waterside Workers' Federation v Burgess & Sons Ltd

(1916) 21 CLR 129. But in the present case there was no such prohibition and no such interference.[140]

113 In the above passage, Fullagar J appears to reason that, because branches do not have any legal existence, in circumstances where a union has structured itself so that its activities in a particular place are carried out through the branch, the branch is, in effect, the union in that place. As a consequence *'acts of the branch within its local limits are prima facie acts of the federation itself'*. In so reasoning, Fullagar J did not overlook *Waterside Workers' Federation v Burgess*, as he cited it at the end of the quotation above, but he did not appear to regard it as inconsistent with the approach that he took. That approach, with respect, seems to me to have much to recommend it, particularly when applied to the workings of a modern union. It is an approach that appears to have been followed by Northrop J in *Australian Postal Corporation v CEPU,*[141] where His Honour said:

> *'The organisation, quite properly, has submitted that a branch is not the organisation; it has no separate legal identity. However on the material before the Court it is quite clear that here it is the branch and other officers of the organisation and of the branch who are supporting and encouraging the action being taken by the workers and which has been organised by the shop stewards of the organisation. The material supports a finding that it is the Union, through its relevant branch, which is taking the action.*[142]

114 In *GTS Freight Management v TWU*,[143] another case relied upon by the CFMEU, Keely J considered whether the conduct of certain Victorian Branch officials should not be treated as the conduct of the federally registered organisation in an action for contempt. Keely J relied upon *Waterside Workers v Burgess* and found:

> *In the present case the evidence does not establish that (in the words of Barton J) the Union 'was at that time even consulted as to the course of action to be taken' i.e. consulted by the Victorian Branch, or by any organizers or officers of that Branch in relation to any of the acts relied upon by the applicant as the basis for the charges. There was no evidence that the applicant or its solicitors, at any time relevant to the present proceedings, ever discussed – or even attempted to discuss – with any Federal officer of the union any aspect of the matters, including, for example, whether Mr Connors or Mr Weir had any authority to speak on behalf of the union.*[144]

115 In response to the argument that the federal union, which had knowledge of the conduct in question, was responsible because it had failed to control officer holders within the Branch, and had not taken steps to discipline them, Keely J said:

> *In the present case … the real position of the Union is no more than one of inaction. The reason for such inaction is not known and as Griffith CJ said in Burgess case 'mere surmise or suspicion is not sufficient'.*[145]

116 Keely J considered the apparent conflict between the passages from *Waterside Workers v Burgess* and *Commonwealth Steamship Owners Association v Federated Seamen's Union of Australasia* on the one hand, and *Williams v Hursey* on the other, and held that Fullagar J's comments in *Williams v Hursey* were dependent upon particular findings of fact, including that the federation had taken steps to make it known to the public that the Branch in question had

its full support. Keely J therefore declined to treat *Williams v Hursey* as limiting the operation of the earlier cases discussed above.[146]

117 In *Rowe v Transport Workers Union,*[147] Cooper J said that *'A body or group of persons which is not authorised by the constitution, rules or membership of an industrial association, cannot bind the industrial association and it is not liable for such conduct unless it ratifies the conduct or takes the benefit of it.'*[148] Cooper J cited a number of authorities in support of that proposition, including *Waterside Workers v Burgess*. Nevertheless, Cooper J went on to approve certain comments of Murphy J to the effect that *'it can rationally be presumed that action, including industrial action … taken by a committee of management, or a branch committee of management or an officer, employee or agent acting as such, is the action of the industrial association'*.[149]

118 All of the above authorities were reviewed by Beach J in Yallourn Energy Pty Ltd v CFMEU.[150] His Honour ultimately concluded that, in light of those decisions, *'it is strongly arguable … that the CFMEU is not responsible for the unauthorised actions of the members of the Latrobe Valley Branch of the Union in striking'*.[151]

The need for reform

119 In light of the above, it should be apparent that the law concerning the attribution to unions of the acts of their organisers and employees is uncertain, and in need of substantial reform. If the CFMEU's argument that it is not responsible for the actions of its Divisions, Branches and Divisional Branches or their officers is correct, then that creates obvious practical difficulties in ensuring that those who are, in truth, responsible for particular actions can be effectively visited with liability. In this regard it should be noted that, because Branches, Divisions and Divisional Branches have no legal existence, and therefore cannot have findings made against them, one consequence of the CFMEU's argument is that no part of the union could be made liable for any damage done by officers or employees of the CFMEU.

120 If there is any doubt about the need for reform, that doubt should be dispelled by the CFMEU's submission that it could not be held responsible for a decision to take nation-wide industrial action in connection with a dispute between the CFMEU and Thiess in relation to the Lavarack Barracks in Queensland and the Kwinana Freeway in Western Australia that cost Thiess over $300 000.

121 The decision to take the nation-wide industrial action against Thiess had been made during a telephone conference that had been arranged by Mr John Sutton, the national Divisional Secretary of the Construction and General Division of the CFMEU. The participants in the telephone conference were Mr Alex Bukarica, who at the time was the national Divisional Assistant Secretary of the Construction and General Division of the CFMEU, and the Secretaries of the Divisional Branches of the Construction and General Division in each State and Territory (including Mr Andrew Ferguson, Mr Martin Kingham, Mr Kevin Reynolds and Mr Wallace Trohear).

122 Notwithstanding that the telephone hook-up involved almost all of the directing minds of the Construction and General Division of the CFMEU throughout Australia, the CFMEU submitted that it was not responsible for the nation-wide industrial action that followed. It made that

submission because '*[t]he telephone hook-up was only between State Secretaries of the CFMEU and Bukarica. It was not a meeting of the CFMEU.*' It submitted that '*[t]he CFMEU did not coordinate any industrial action. The CFMEU did not coordinate anything*.' These submissions were apparently based on the assertion that the CFMEU could not be responsible for the nation-wide industrial action unless it was implemented as a result of a decision of the National Executive of the CFMEU.

123 Whatever its merits on the current state of the law, that submission is plainly absurd. The fact that it could be seriously submitted that the CFMEU was not responsible for decisions taken by a group comprising the most senior representatives of the Construction and General Division of the CFMEU in each State and Territory and the second most senior official in the Construction and General Division nationally, powerfully demonstrates the need for reform.

The approach adopted

124 No legal consequence follows from my concluding that any particular individual, organisation or company has violated any particular criminal or civil law.[152] No fine or other sanction will be imposed upon any person as a result of any finding that I make. One consequence of that fact is that, to a very real extent, technical legal questions concerning the attribution of the conduct of union officials to the relevant union are not important. They are questions that concern vicarious liability, but this Commission is not concerned with liability. It is concerned with responsibility. What is important is that the Commission's investigations reveal the conduct in which participants in the industry have engaged, and expose for consideration whether that conduct should be permitted to continue.

125 Often the conduct exposed by the Commission was conduct of union organisers or officers who were carrying out functions of the type they were required to perform by the union (whether or not they are carried out in a manner approved by the union). Common sense dictates that the union is responsible for those actions. Whether a union that is divided into Branches, Divisions or Divisional Branches is also vicariously liable for them is uncertain as the law presently stands. I have recommended elsewhere in this report that the law be altered so that conduct that is, as a matter of fact, clearly that of a union, should be readily attributed to that union.

126 In cases where the principles discussed above meant that there was any doubt about whether a union that had been divided into Branches, Divisions or Divisional Branches (which does not include most State unions) could be held vicariously liable for the conduct of its officers or organisers in accordance with existing law, I have made findings in relation to the actions of the relevant official or organiser only. In almost every case, I regard it as clear that the union should properly be considered responsible for the actions of its officers and employees, but there was no need to make that finding given that I was not concerned, as a court would be, with determining the vicarious liability of any union and the legal consequences of such liability.

127 The above discussion is not, of course, relevant to the operation of statutory deeming provisions, such as s349 of the *Workplace Relations Act 1996 (C'wth)* or s45DC of the *Trade Practices Act 1974 (C'wth).* Where those provisions applied to deem a registered organisation or association to be responsible for the actions of its officials, organisers or employees, I have made findings in relation to that organisation or association.

6 First Report

1 On 5 August 2002 I sent my First Report to the Governor General. The reasons that I did so are set out in that report, and I will not repeat them here. A copy of my First Report is set out in Appendix 21.

2 In *Ferguson v Cole*,[153] a group of officials from the New South Wales Branch of the Construction and General Division of the CFMEU challenged operations and procedures of this Commission in the Federal Court. Part of the challenge was based upon the contention that I had made findings against those officials in my first report without having accorded them procedural fairness. The officials also argued that my first report constituted a prejudgment of the matter under investigation, and that I should therefore be disqualified from continuing to investigate the building and construction industry in New South Wales.

3 Branson J comprehensively rejected those contentions. Her Honour's reasons for doing so are reproduced in Appendix 19.

7 Communication of information

1 The Commission entered into memoranda of understanding with the AFP and the police forces of New South Wales, Victoria, Western Australia, South Australia and the Northern Territory. It also entered into memoranda of understanding with the Australian Transaction Reports and Analysis Centre (AUSTRAC), the (former) NCA, the ICAC (NSW), the (former) Queensland Crime Commission, and the Anti-Corruption Commission (WA). Some other bodies did not wish to enter into formal memoranda of understanding, but by an exchange of letters they agreed to co-operate with the Commission.

2 In so far as the memoranda of understanding mentioned above contemplated that the Commission would share information with those agencies that was relevant to their work, the mechanism by which the Commission was empowered to do this was s6P of the *Royal Commissions Act 1902 (C'wth)*. That section empowered me to communicate information or evidence that the Commission acquired in the course of inquiring into a matter to various specified persons or bodies, provided that in my opinion it was '*appropriate so to do*', and that the information or evidence '*relates, or…may relate, to a contravention of a law*'. A '*contravention of a law*' is defined for these purposes to include a contravention for which a person may be liable to a criminal penalty or a civil or administrative penalty.

3 The persons or bodies to whom information could be communicated under s6P included the Attorney-General of the Commonwealth and the Attorney-General of each State and Territory, the Commissioner of the AFP and, in paragraph (1)(e), the *'authority or person responsible for the administration or enforcement'* of the law that mat have been contravened. There is some uncertainty as to the applicability of paragraph (1)(e) to investigate bodies such as another Royal Commission, the New South Wales Crime Commission or the (former) Queensland Crime Commission, as there may be a distinction between the '*enforcement*' of a law and the investigation of breaches of a law. The uncertainty is increased by the fact that, when the NCA was created, a specific subsection was inserted into s6P to enable Royal Commissions to communicate information to the NCA, suggesting some doubt as to whether the NCA was a body of the type described in s6P(1)(e). There is also specific provision under s6P(2) for the communication of information to another Royal Commission. Section 6P(1)(e) in its present form also imposed restraints upon the ability of the Commission to communicate information to the Interim Building Taskforce that was created as a result of my First Report.

4 Section 6P empowered me to share information with the organisations with whom the Commission entered into memoranda of understanding and others. If an organisation did not fall within the terms of s6P, then information was not communicated to that organisation. It could, however, be communicated to the relevant Attorney-General who could, if he or she thought it appropriate, pass it on to another agency.

5 The difficulties experienced by the Commission in relation to s6P would be removed if paragraph 6P(1)(d) was replaced with the following:

> *(d) any law enforcement agency, or any agency or body of the Commonwealth, a State or a Territory prescribed by the regulations.*

The definition of law enforcement should appear in s1B of the *Royal Commissions Act 1902 (C'wth)* as follows:

> *law enforcement agency means:*
>
> *(a) the Australian Federal Police;*
>
> *(b) a Police Force of a State; or*
>
> *(c) any other authority or person responsible for the enforcement of the laws of the Commonwealth, a Territory or a State.*

This amendment accords with a provision approved by a Parliament in the *Australian Crime Commission Act 2002 (C'wth)*.

6 Paragraph 6P(1)(e) would also need to be amended to remove the reference to 'enforcement'.

7 At various times throughout the life of the Commission I have exercised the power conferred by s6P. On each occasion I exercised that power personally, and a record of decision was made. An example of such a record of decision is attached in Appendix 22.

8 On most occasions on which information was communicated by the Commission to bodies that were not statutorily obliged to keep information confidential, my decision was made, and the information was communicated, subject to the condition:

> *That any material that has been provided to the Commission either as a result of the exercise of its coercive powers or in any other circumstances that give rise to a duty of confidence shall not be made public or given to any person or body that may make it public without the person who provided the material to the Commission first being afforded the opportunity to be heard by the [recipient of the information] on the question of whether the information should be made public or given to any person or body that may make it public. This condition does not apply in circumstances where providing such an opportunity to be heard would prejudice a criminal investigation.*

9 That approach was adopted where it was considered necessary to comply with the Commission's obligations in accordance with the rules of procedural fairness, as discussed in *Johns v Australian Securities Commission*.[154]

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

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* 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.

1 I have explained in earlier parts of this report the need for some of those proposed amendments, such as the recommendation that Royal Commissions be empowered to require persons to provide statements, and the need to increase the penalties for refusing to answer questions or produce documents.

2 I have not previously explained the need for other amendments proposed above. That does not, however, make those proposals any less important.

3 The ability to investigate breaches of the *Royal Commissions Act 1902 (C'wth)* is important because without that power, the Commission has very limited ability to protect witnesses who come forward to provide evidence. It is vitally important that Royal Commissions be able to protect those who assist them, if investigations are to generate the momentum necessary for them to be effective. The various provisions in the *Royal Commissions Act 1902 (C'wth)* that create offences in relation to interference with witnesses would be far more effective if a Commission was empowered to investigate breaches of these provisions, and the evidence obtained was admissible in subsequent prosecutions.

4 Similarly, the extension of the use-immunity in s6DD of the *Royal Commissions Act 1902 (C'wth)* would make it easier to convince witnesses to speak with Commission investigators before a hearing, because at present, properly advised, witnesses may refuse to do so because the evidence they divulge could be used against them.

5 Other amendments proposed above, such as those involving the meaning of 'reasonable excuse' and the suggested restriction on challenges to summonses or notices on grounds of relevance unless there is evidence that a Commission is not acting bona fide, in effect propose the codification of the common law. That is important, however, because as the law currently stands the effectiveness of Royal Commissions can be greatly hampered by the threat of court action. Court action will inevitably delay a Commission and involve very considerable time and expense. It can easily derail an investigation. This Commission naturally sought to avoid litigation. That meant, however, that it was sometimes possible for baseless objections to frustrate an investigation, particularly where the person or organisation concerned was prepared to fight a matter in the courts largely irrespective of its merits. The benefits of frustrating the Commission's investigations were, apparently, thought to outweigh the costs of court action even though that action was unlikely to be successful. The prospect of such an approach undermining an investigation is reduced if the rules governing a Commission's rights and powers are defined as precisely as possible. A number of the amendments proposed above are suggested with that consideration in mind.

9 Relevant substantive law

Major types of 'industrial or workplace practice or conduct'

1 Much of the evidence before the Commission related to industrial action or threats of industrial action. I use the term '*industrial action*' to refer to action taken by employers, employees and their representative organisations which affects the performance of work, and which is engaged in for the purpose of supporting or advancing some workplace or other cause. Overwhelmingly the evidence before me revealed that industrial action in the building and construction industry is engaged in by employees and unions, rather than by employers or their representative organisations.

2 The reasons employees and unions in the building and construction industry engage in industrial action are many and varied. I heard evidence of strikes, bans, limitations and restrictions on work, or threats thereof, imposed or made:

(a) in support of claims made in proposed enterprise bargaining agreements between the relevant employer and the relevant union (EBAs);

(b) for the purpose of coercing, encouraging, inducing or persuading employers to enter into EBAs;

(c) in protest at employers not having entered into EBAs;

(d) in protest at employers not having complied with unregistered industry agreements;

(e) to highlight safety issues, real or contrived, on particular building and construction sites;

(f) for the purpose of coercing, encouraging, inducing or persuading a contractor not to have dealings with, or to terminate dealings with, another contractor (usually because the second contractor did not have an EBA, or had employed non-union labour);

(g) for the purpose of coercing, encouraging, inducing or persuading a contractor to dismiss or not engage an employee or subcontractor (usually because that employee or subcontractor was not a member of the relevant union);

(h) for the purpose of coercing, encouraging, inducing or persuading others to join a union;

(i) for the purpose of coercing, encouraging, inducing or persuading a contractor to make payments alleged to be due to workers (whether employees of that contractor or not);

(j) for the purpose of securing the payment of strike pay;

(k) for the purpose of securing the allocation of work, or payment in lieu, to members of one union rather than another;

(l) for the purpose of securing the engagement, or the extension of the engagement, of a particular person;

(m) for the purpose of supporting political or other causes,

and for a variety of other purposes.

3 Action undertaken to advance some of the purposes identified above will for that reason alone be unlawful, whatever form the action takes. An example of conduct in that category is industrial action that is subject to the *Workplace Relations Act 1996 (C'wth)* and that is undertaken for the purpose of securing the payment of strike pay.[155]

4 Conduct engaged in to advance other purposes listed above may, however, be lawful. Industrial action undertaken in support of claims made in a proposed EBA, for example, may be lawful if a bargaining period has commenced in accordance with the *Workplace Relations Act 1996 (C'wth)*. Similarly, industrial action taken by an employee based on a reasonable concern by the employee about an imminent risk to his or her health or safety is lawful, provided that the employee has not unreasonably failed to comply with a direction of his or her employer to perform other available work that is safe and appropriate.[156]

5 Nevertheless, industrial action will often be unlawful. As Goldberg and Finkelstein JJ observed in *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*:

> *It is widely believed that workers have an unconstrained right to take industrial action in support of claims against employers. Nothing could be further from the truth. The common law has long imposed constraints on labour's ability to take concerted action against capital. Not only are there actions available under contracts of employment, the so called intentional torts (conspiracy, procuring breach of contract and interference with business relations among others) took their modern form to provide additional remedies against industrial action taken by organised labour.*[157]

6 The evidence before me revealed that industrial action often took place or was threatened in circumstances where it was unlawful. Industrial action or threats of industrial action occurred, for example:

(a) with intent to coerce companies to enter into an EBA;

(b) with intent to coerce persons to join a union or employer association;

(c) in circumstances that constituted secondary boycotts in contravention of the *Trade Practices Act 1974 (C'wth)*;

(d) in circumstances that constituted the tort of unlawful interference with contractual relations;

(e) in circumstances that constituted the tort of intimidation;

(f) in circumstances that constituted the tort of conspiracy;

(g) during the life of an EBA, in contravention of s170MN of the *Workplace Relations Act 1996 (C'wth)*, or in support of claims in contravention of '*no extra claims*' clauses in EBAs;

(h) in circumstances that constitute an unlawful picket line;

(i) in contravention of dispute resolution clauses prohibiting such action in EBAs or awards;

(j) in defiance of court orders or orders of the Australian Industrial Relations Commission (AIRC).

7 It is appropriate that I outline the major elements of the laws that support the statements made in the above paragraph, in so far as they require explanation. Many of those laws are also relevant to the evaluation of conduct that did not constitute industrial action, but instead involved, for example, threats of industrial or other consequences if certain action was not taken by the person threatened. These laws were, therefore, the main laws that were relevant to the question of whether industrial activity investigated by the Commission was unlawful.

8 My conclusion that any particular conduct investigated by the Commission was unlawful was based, in the large majority of cases, upon the evaluation of the facts that I have found against one or more of the laws summarised below.

Coercion in relation to enterprise bargaining agreements

9 Much of the evidence before the Commission involved the enterprise bargaining process, and distortions of that process.

10 The primary means by which the *Workplace Relations Act 1996 (C'wth)* proscribes conduct which undermines freedom of bargaining in relation to EBAs is s170NC. In *Hanley v AMWU*,[158] the Full Federal Court held that s170NC was to be treated '*as proscribing conduct which might result in an agreement which is not the product of free bargaining*.'[159]

11 Section 170NC relevantly provides:

> (1) *A person must not:*
>
> *(a) take or threaten to take any industrial action or other action; or*
>
> *(b) refrain or threaten to refrain from taking any action;*
>
> *with intent to coerce another person to agree, or not to agree, to:*
>
> *(c) making, varying or terminating, or extending the nominal expiry date of, an agreement under Division 2 or 3 [of Part VIB]; or*
>
> *(d) approving any of the things mentioned in paragraph (c).*

12 Contravention of s170NC is not an offence.[160] Instead, s170NC is a penalty provision.[161] The penalty for its contravention is a fine not exceeding $10 000 for a body corporate, or $2000 in other cases.[162] Those penalties are low. It is, however, possible to obtain an injunction requiring a person not to contravene, or to cease contravening, s170NC.[163] Section 170NC does not apply to action that is '*protected action*' (see below).[164]

The meaning of 'industrial or other action'

13 In its terms, s170NC proscribes taking or threatening *'industrial action or other action'* with the relevant intent. In *National Tertiary Education Industry Union v Commonwealth*,[165] Weinberg J held that the words *'other action'* had to be construed in light of the surrounding text. His Honour observed that, as s170NC is penal in character, the expression *'other action'* should not be given undue width.[166] It therefore appears that the words *'or other action'* should be read as including conduct of a kind which relates to the performance of work but is not included within the definition of *'industrial action'*. Picketing is one example of such conduct.[167]

The requisite intention

14 Section 170NC is contravened if a person engages in conduct *'with intent to coerce'* a person to agree to make an EBA. The Full Federal Court has held that that intention can be established even if the relevant conduct had one or several other purposes or objectives. It is sufficient that *'the proscribed reason is a substantial or operative reason'.*[168]

15 Intent is established for the purposes of s170NC by *'knowledge of the circumstances which give the act in question its coercive character, rather than knowledge of the probability of the result.'*[169] To contravene the section, a person must have actual knowledge of the circumstances that make the conduct coercive, or have deliberately refrained from making inquiries because he or she knew the probable consequences of the inquiries.[170]

16 In *Hanley*[171] it was alleged that the AMWU and one of its organisers had contravened s170NC. Among other matters, the organiser had:

(a) told the employer that its employees could not come and work on a site unless the employer had an EBA;

(b) told a site foreman that the employer '*either goes in there and fixes up the EBA or he won't be working*' and that the employer '*won't be working until he signs it*';

(c) told the employer that if he did not sign the EBA, he would be out looking for him on all other jobs;

(d) told the employer that if he wanted to keep his '*blokes'* working, he should sign an EBA.

17 Those facts are very similar to many of the matters about which evidence was led before the Commission. Ryan, Moore and Goldberg JJ held on those facts that the language used by the organiser was '*plainly directed to procuring the signing of an EBA*'.[172] Their Honours said the proper inference was that the organiser's threats were made to coerce the employer into signing an EBA, in contravention of s170NC.[173]

The meaning of 'coerce'

18 The meaning of the word *'coerce'* in s170NC has received extensive examination by the Federal Court. The word's dictionary definition is *'constrain', 'force'* or *'compel'*.[174] The authorities suggest, however, that in the context of s170NC the word *'coerce'* requires conduct to be taken or threatened that is:

(a) compulsive in the sense that the pressure brought to bear, in a practical sense, negates choice; and

(b) unlawful, illegitimate or unconscionable.[175]

19 In relation to the first of these requirements, in *National Tertiary Education Industry Union v Commonwealth*[176] Weinberg J held that what is required for an '*intent to coerce*' is:

> *an intent to negate choice, and not merely an intent to influence or to persuade or induce. Coercion implies a high degree of compulsion, at least in a practical sense, and not some lesser form of pressure by which a person is left with a realistic choice as to whether or not to comply.*[177]

20 Weinberg J went on to state that there is *'a clear distinction between offering a person an incentive to do something, and acting with intent to coerce. An incentive, no matter how powerful, can still, as a matter of practical reality, be refused. Coercion involves negation of choice.'*[178]

21 In *Finance Sector Union of Australia v Commonwealth Bank of Australia,*[179] Gyles J said that the decision of the Full Federal Court in *Schanka v Employment National (Administration) Pty Ltd*[180] provided authoritative guidance on the meaning of the word *'coerce'* in s170NC. That case concerned the meaning of the word *'duress'*, in the context of the prohibition in s170WG of the *Workplace Relations Act 1996 (C'wth)* on applying duress in connection with an Australian Workplace Agreement. Gyles J said, however, that *'[i]f there is a difference between duress and coercion, it is not, in my opinion, material here.'*[181]

22 In *Schanka*[182] Ryan, Lee and Branson JJ had cited with approval Lord Scarman's definition of *'duress'* in *Universe Tankships Inc of Monrovia v International Transport Workers Federation.*[183] His Lordship had held that there were two elements to the wrong of duress, namely pressure amounting to compulsion of the will of the victim, and the illegitimacy of the pressure exerted. His Lordship went on to say that the *'classic case of duress is … not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him.'*[184]

23 It appears that s170NC can be contravened even if the threat or conduct in question did not result in an EBA being signed.[185] There is a superficial inconsistency between that outcome and the requirement that, in order to be relevantly coercive, conduct must *'negate choice … in a practical sense'*. The fact that, notwithstanding the relevant threat or conduct, no EBA was signed, is powerful evidence that the action taken or threatened did not in fact negate choice. But s170NC does not require conduct to be taken that is in fact coercive. It applies in terms to conduct undertaken *'with intent to coerce'.* An act could, therefore, be taken or threatened with *'intent to coerce'* even if, in the event, that conduct or threat ultimately proved not to be coercive (because, for example, the relevant employer had an unexpected capacity to resist the threat made).

24 More difficult questions arise in relation to the second requirement outlined above, which is that conduct will not be coercive for the purposes of s170NC unless the conduct threatened or undertaken is *'unlawful, illegitimate or unconscionable'*. That requirement appears to have been superimposed upon the ordinary meaning of the word *'coerce'* in order to prevent s170NC from having too wide an operation.[186]

25 No difficulties arise in relation to this requirement if the threatened action is unlawful, as will often be the case in light of the breadth of some of the torts discussed below (including, most notably, the torts of intimidation and interference with contractual relations). If the conduct taken or threatened is not unlawful, however, the meaning of the words *'illegitimate'* and *'unconscionable'* assume importance.

26 In *National Tertiary Education Industry Union v Commonwealth*[187] Weinberg J said that he had*:*

> *some doubts as to whether the concept of unconscionability, as it has developed through the authorities, has any direct application to the operation of s 170NC… It is difficult to extrapolate from such cases any principle which can usefully be said to underlie the meaning to be accorded to the term unconscionable as a criterion for delimiting the scope of coercion in the context of industrial relations, and in particular, enterprise bargaining under the Act.*[188]

27 Similar problems arise in relation to the word *'illegitimate'*, for there is no obvious touchstone by which the meaning of that word can be identified. That is particularly so where the conduct in question was undertaken by a government. As Weinberg J has acknowledged, the *'implementation of policy by a democratically elected government, however contentious in political or moral terms that policy may be, is not easily translated into conduct which is in any relevant sense "illegitimate" or "unconscionable"'.*[189]

28 In *Schanka* Ryan, Lee and Branson JJ upheld a decision of Moore J at first instance, in which Moore J had commented that:

> *The conduct of the contravening party must involve illegitimate pressure. I doubt that the mere fact that an employer offers employment on the basis that an AWA in certain terms must be made is illegitimate pressure. It would do no more than place the potential employee in the position of either declining or accepting the employment on those terms and regulated that way, that is by an AWA. Something more is probably necessary and whether pressure is illegitimate will ultimately depend on the factual context in which the allegation of duress arises. But it must be pressure that is likely to have the effect of denying the exercise of free will if an AWA was made. It also must be intended to have that effect.*[190]

29 The above comment would appear to apply equally in the context of s170NC. It follows that it will not generally involve the application of *'illegitimate'* pressure for a head contractor to offer a contract to a subcontractor only on condition that the subcontractor sign an EBA. That would, to adapt Moore J's words, involve no more than placing the subcontractor in a position of either declining or accepting the subcontract on those terms. That is not illegitimate, and it may not even be coercive absent the additional requirement of *'illegitimacy'*, for normally such a condition would not negate choice. The subcontractor could choose to decline the work rather than sign an EBA, which may be a perfectly rational decision given that the EBA, once signed, would apply to all projects for several years.

30 It follows that the *Workplace Relations Act 1996 (C'wth)* appears not to prohibit discrimination on the basis of whether a subcontractor does or does not have an EBA. I regard that as a major deficiency in the Act, as it allows unions to put pressure on head contractors not to give work to subcontractors who do not have an EBA with that union without either the union or the

head contractor contravening the *Workplace Relations Act 1996 (C'wth)*. That in fact frequently occurs, greatly undermining the notion that an EBA should be an agreement which is the product of free bargaining. I have made recommendations in relation to this matter elsewhere in this report.

Freedom of Association

31 The objects of Part XA of the *Workplace Relations Act 1996 (C'wth)* are to ensure '*that employers, employees and independent contractors are free to join industrial associations of their choice or not to join industrial associations*' and '*that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations'*.[191]

32 Part XA is complex, and '*not necessarily easy to construe'*.[192] It is dealt with in detail elsewhere in this report. I am concerned here only with those provisions of Part XA that were of most importance to the investigations of the Commission.

33 The contravention of Part XA is not an offence,[193] and the penalties for breaches are often minimal.[194] If a contravention is proved, the Federal Court may, among other things: impose a penalty not exceeding $10 000 in the case of a body corporate or $2000 in other cases; order the reinstatement of an employee or the re-engagement of an independent contractor; or order the payment of compensation of such amount as the Court thinks appropriate.[195]

34 If it is alleged that a person or industrial association engaged in conduct for a particular reason or with a particular intent, and proof of that reason or intent is necessary in order to establish a contravention of Part XA, the onus of proof is reversed, meaning that it is presumed that the conduct was carried out for that reason or with that intent unless the person or industrial association proves otherwise.[196] The reverse onus is discharged if the respondent proves, on the balance of probabilities, that no proscribed reason was included among the operative reasons for the conduct.[197]

35 For the purposes of Part XA, an '*industrial association*' is defined in a way that encompasses State registered unions and unincorporated unions, as well as federally registered unions.[198] '*Industrial instrument'* is defined for the purposes of Part XA to include awards and agreements that are made or recognised under industrial laws of the Commonwealth, States and Territories.[199]

Conduct by employers

36 Section 298K is the principal provision of Part XA that governs conduct by employers which has a tendency to undermine freedom of association. It prohibits certain *conduct* which is done or threatened for reasons that include a *prohibited reason*. The objective of the section:

> *is to ensure the threat of dismissal or discriminatory treatment cannot be used by an employer to destroy or frustrate an employee's right to join an industrial association and to take an active role in that association to promote the industrial interests of both the employee and association.*[200]

37 Section 298K(1) will apply only where it can be said of an employee *'that he or she is, individually speaking, in a worse situation after the employer's acts than before them; that the*

deterioration has been caused by those acts; and that the acts were intentional in the sense that the employer intended the deterioration to occur'. [201] The section is aimed at the *'active, intentional, conduct'* of an employer.[202]

38 The *conduct* prohibited by s298K is: dismissing an employee; injuring an employee in his or her employment; altering the position of an employee to the employee's prejudice; refusing to employ a person; and discriminating against a person in the terms or conditions on which the employer offers to employ the person. There are equivalent prohibitions that protect independent contractors essentially as if they were employees.[203]

39 Injuring an employee in his or her employment *'covers injury of any compensable kind'*, while altering the position of an employee to the employee's prejudice is *'a broad additional category which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question'*.[204] A diminution in the opportunity to obtain work compared to other employees will generally amount to a prejudicial alteration of employment.[205]

40 Conduct occurs for a *'prohibited reason'* if it is carried out or threatened[206] for a number of specified reasons. It is not necessary to show that the prohibited reason was a substantial reason for the employer's action.[207] Prohibited reasons for conduct include that the employee, independent contractor or other person the subject of the relevant *conduct*:

(a) is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association;[208]

(b) is not, or proposes not to become, a member of an industrial association;[209]

(c) has refused or failed to join in industrial action;[210]

(d) in the case of a refusal to engage another person as an independent contractor, has one or more employees who are not or propose not to become members of an industrial association; or has not paid or proposes not to pay a fee (however described) to an industrial association.[211]

41 A threat to engage in conduct of one or more of the kinds referred to in s298K for what appears to be a prohibited reason does not contravene the section if there is, as a matter of fact, no basis for the prohibited reason. [212]

42 In addition to s298K, employers must also take care not to violate s298M, which prohibits attempts, whether by threats or promises or otherwise, to induce an employee or independent contractor to stop being an officer or member of an industrial association.[213] The words '*or otherwise*' are intended to forbid an employer '*from inducing an employee to the forbidden end by any means*', including by conduct which is not in the nature of a threat or promise.[214]

Conduct by industrial associations or their officers and members

43 Part XA of the *Workplace Relations Act 1996 (C'wth)* prohibits a range of conduct by industrial associations or their officers and members which has a tendency to undermine freedom of association. The most relevant prohibitions are found in ss298P(3), 298Q and 298S.

44 For the purposes of Part XA, action is taken to have been done by an industrial association if it was done by the committee of management of the association; an officer or agent of the association acting in that capacity; a member or group of members of the association acting under the rules of the association; or a member of the association who performs the function of dealing with an employer on behalf of the member and other members of the association acting in that capacity.[215] An *'officer'* of an industrial association includes, for these purposes, a delegate or other representative of the association, and an employee of the association.[216] An industrial association is not, however, responsible for actions of its members if its committee of management, a person authorised by the committee of management, or an officer of the association took reasonable steps to prevent the action.[217]

45 Section 298P(3) provides that an industrial association, or an officer or members of an industrial association, must not:

(a) advise, encourage or incite an employer; or

(b) organise or take, or threaten to organise or take, industrial action against an employer with intent to coerce the employer;

to take action in relation to a person that would, if taken, contravene s298K.

46 Section 298P(3) can be contravened whether or not the employer acted upon the advice, encouragement or incitement, as the section prohibits action which would, *if taken*, contravene s298K.[218] The words '*advise, encourage or incite*', indicate that the legislature '*did not wish to limit possible contraventions to cases where coercion was involved but also to constitute as a breach the mere act of putting the contravening proposition to an employer (whether a willing recipient or a shocked rejectionist)*'.[219]

47 Nevertheless, it may be that s298P(3) is not contravened unless there is some conduct in contemplation that the recipient of the communication is being advised, encouraged, incited to take which, if taken, would contravene s298K. Gray J has observed that:

> *For there to be a contravention of s 298P(3), there needs to be in contemplation a person, or perhaps a class of persons, having the characteristics described in one of the prohibited reasons, in respect of whom the recipient of the communication could act in a way that would cause that recipient to contravene s 298K.*[220]

48 That reasoning led Gray J to find that a union shop steward who wore a *'no ticket – no start'* sticker on his hat and who said to a contractor that *'Everybody who comes here to work has to be in the union'*[221] had not contravened s298P(3), because there was no evidence to suggest that the contractor was in the process of engaging, or planning to engage, any more employees.[222] If that approach is correct, it severely limits the effectiveness of s298P(3), as it requires the court to have regard to the subjective intentions of the recipient of the communication rather than simply to the actual conduct of the industrial association or officer in question.

49 Another prohibition of importance is found in s298Q, which provides in part that an industrial association, or an officer or members of an industrial association, must not take, or threaten to take, action having the effect, directly or indirectly, of prejudicing a person in his or her

employment or possible employment with intent to coerce the person to join in industrial action.

50 Part XA prohibits certain conduct by industrial associations and their officers and members not only in relation to employees, but also in relation to independent contractors. Most relevantly, s298S(2) provides that associations and their officers and members must not:

(a) advise, encourage or incite a person (whether an employer or not) to take '*discriminatory action*' against an '*eligible person*' because the person is not a member of an industrial association: s298S(2)(a);

(b) take, or threaten to take, industrial action against an employer with intent to coerce the employer to take '*discriminatory action*' against an '*eligible person*' because the person is not a member of an industrial association: s 298S(2)(b); or

(c) take, or threaten to take, industrial action against an '*eligible person*' with intent to coerce the person to join an industrial association: s 298S(2)(c).[223]

51 An '*eligible person*' is a person who is not an employee, but who is eligible to join an industrial association or would be eligible to join such an association if he or she were an employee.[224]

52 '*Discriminatory action*' means a refusal to make use of, or to agree to make use of, services offered by an eligible person, or a refusal to supply, or to agree to supply, goods or services to an eligible person.[225]

53 A threat to procure industrial action by a person with the capacity to take steps to initiate the participation of workers in such action can constitute a threat to take that action for the purposes of s298S.[226]

54 The Full Federal Court has held that no contravention of s298S(2)(b) can occur unless the relevant action to be taken by or against the employer was to be taken by or against it in its capacity as an employer of labour.[227] That ruling would not, however, cut down the operation of s298S(2)(a).

55 By reason of s298S, it is unlawful for industrial associations or their officials to make threats against head contractors because independent contractors with which those head contractors deal are not, or refuse to become, members of an industrial association. The existing provisions of Part XA do not, however, have any operation when pressure is directed not at the membership of the independent contractor him or itself, but at the membership status of the contractor's employees.[228] If the principal contractor is itself an employer, it may be protected against such threats if the threatened industrial action is directed against it in its capacity as an employer, but not if it is directed against it in its capacity as a principal contractor.[229] That is a substantial gap in the freedom of association regime, and I heard a great deal of evidence directed to pressure being applied to head contractors because some employees of subcontractors were not union members.

56 Furthermore, threats by industrial associations and their officers against subcontractors are unlawful under Part XA only if those threats are made with an intention to coerce the employer to take action in relation to an employee that, if taken, would contravene other freedom of association provisions (such as, for example, dismissing the employee[230]). It is not clear

whether Part XA applies where industrial action is threatened against the employer unless he ensures that his employees become union members, but those threats are not accompanied by any indication, whether express or implied, that the employer should use prohibited means to achieve that end. That is important because often the evidence did not reveal any indication as to the means that should be used to bring about an end. Employers were simply told they must bring about that end. As an employer could take action that led an employee to become a union member by means that are not prohibited, there are difficulties under the present provisions of Part XA in determining whether a person who advocates a certain objective should also be taken to have advocated that prohibited means be used to achieve that objective.

Secondary Boycotts

General elements

57 A secondary boycott is defined by s45D(1) of the *Trade Practices Act 1974 (C'wth)* as occurring when two or more people, acting in concert, engage in conduct:

(a) that hinders or prevents a third person from supplying or acquiring goods or services to a fourth person, where the fourth person does not employ either of the first two people; and

(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person, again where the fourth person does not employ either of the first two people.

58 Section 45D(1) will not apply unless either the fourth person (who is the target of the secondary boycott action) is a corporation or, if the third person alone is a corporation, the conduct was such as would cause substantial loss or damage to the business of the third person.[231]

59 Threats and verbal intimidation, as well as physical interference, can constitute hindering or preventing the supply or acquisition of goods or services for the purposes of s45D.[232] '*Services*', for these purposes, include benefits to be provided under a contract for the performance of work.[233] That means the section can apply to conduct that hinders or prevents the supply or services by a subcontractor to a head contractor.

60 Conduct is engaged in '*in concert*' for the purposes of s45D if it results from communication between the parties concerned, who act with '*contemporaniety and community of purpose*'.[234] The relevant conduct of the first two people need not coincide precisely in time.[235]

61 Thus, to give a concrete example, if a union organiser or delegate (the first persons), in concert with the employees (the second persons) of a subcontractor (the third person) working on a particular building site, engage in conduct action that hindered or prevented the subcontractor from supplying services to the head contractor (the fourth person), with intent to and in a way likely to cause substantial damage to the head contractor, then the union organiser or delegate and the employees will contravene s45D(1). That analysis is supported by the judgment of Wilcox J in *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union.*[236]

The prescribed purpose

62 A secondary boycott will not contravene s45D(1) unless it is engaged in for the purpose of, and with the likely effect of, causing substantial loss or damage to the business of the fourth person ('the prescribed purpose'). *'Substantial'*, in the context of s45D, means real or of substance.[237] Where conduct is engaged in for multiple purposes, s45(1) is breached if one of the purposes of engaging in the conduct was the prescribed purpose.[238]

63 Provided that the first and second person acted with the prescribed purpose, it does not matter whether or not their conduct actually caused damage.[239]

64 Deane J has pointed out that:

> *The question of whether conduct has been engaged in for a particular purpose is to be determined by reference to the real reasons for, or purpose of, the conduct in question and to what was the object in the minds of those engaging in conduct, rather than by determining whether those engaged in the conduct appreciated the effect of the conduct and are therefore to be assumed to have engaged in it for a purpose that produces that result.*[240]

65 It follows that mere proof that the first and second person knew that damage would result from certain actions is insufficient to establish a violation of s45D(1).

66 That said, however, the infliction of damage as a means to an end reveals a sufficient intention to cause substantial loss and damage to support a finding that s45D(1) had been breached. In *Jewel Food Stores Pty Ltd v Amalgamated Milk Vendors Association Inc*, the Federal Court said:

> *Conduct falling within the opening words of s 45D will rarely be adopted out of disinterested malice. Ordinarily, the purpose of inflicting damage upon the business of a person is to cause that person to modify its behaviour in some way for the advantage of the person occasioning the damage, or its members. In other words, the damage is a means to an end. Consequently, although a primary purpose of the milk vendors was to protect their own businesses, another purpose which they had was to damage or injure the appellant's business. That was the means by which they intended to achieve their primary purpose. Upon the view of s 45D(1) long accepted in this court, that is enough.*[241]

Attribution of conduct to a union

67 Section 45DC of the *Trade Practices Act 1974 (C'wth)* provides that if two or more persons ('the participants'), each of whom is a member or officer of the same organisation of employees, engage in conduct in concert with one another, then, unless the organisation proves otherwise, the organisation is taken for the purposes of s45D(1):

(a) to engage in that conduct in concert with the participants; and

(b) to have engaged in that conduct for the purposes for which the participants engaged in it.

68 Consequently, there is a rebuttable presumption that, whenever members or officers of a union engage in conduct in concert with one another for a particular purpose in contravention of s45D(1), the union also engages in that conduct for the same purpose.

69 When s45DC applies, any loss or damage suffered by a person as a result of the conduct is taken, for the purposes of the *Trade Practices Act 1974 (C'wth)*, to have been caused by the conduct of the union.[242]

Defences

70 Section 45DD provides a range of defences to the secondary boycott provisions in the *Trade Practices Act 1974 (C'wth).* Most importantly, a person does not contravene s45D(1) if the *'dominant purpose'* of engaging in the relevant conduct was *'substantially related to remuneration, conditions of employment, hours of work or employment conditions of that person, or of another person employed by an employer of that person'*.[243] By its own terms, that defence applies only to conduct undertaken by a person in relation to their own terms and conditions of employment, or those of a fellow employee *of the same employer.* It cannot therefore apply to conduct undertaken by employees of one subcontractor in relation to the terms and conditions of employees of another subcontractor, even if that second subcontractor is working on the same site as the first subcontractor. That fact means that s45DD will rarely apply to exempt site-wide industrial action from the secondary boycott provisions of the *Trade Practices Act 1974 (C'wth).*

71 A similar defence applies to unions and officials of unions who engage in conduct with two or more employees who have the same dominant purpose.[244]

72 A further defence applies where the conduct in question is not industrial action and is engaged in for a dominant purpose substantially related to environmental or consumer protection.[245]

73 The onus is on those who would seek to take the benefit of these defences to prove that they fall within their terms.[246]

Industrial action during the life of an EBA

74 Where an EBA has been entered into and its nominal expiry date has not yet passed, s170MN of the *Workplace Relations Act 1996 (C'wth)* prohibits industrial action by an employee whose employment is subject to the EBA, or by a union bound by the EBA or officer of such a union, '*for the purpose of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement*'. The prohibition against industrial action is a limited one, as it does not extend to industrial action taken for a non-prescribed purpose, even where there is an EBA the nominal expiry date of which has not passed.

75 Section 170MN is one of very few express prohibitions upon industrial action in the *Workplace Relations Act 1996 (C'wth)*. Goldberg and Finkelstein JJ have commented that:

> *This provision is founded on the not unreasonable premise that when parties (usually a union and an employer) have resolved an industrial dispute by an agreement which is to operate for a minimum period (until its nominal expiry date) they should be restricted, at*

least to some extent, from using industrial action to support further claims during the currency of the agreement.[247]

76 Section 170MN has recently caused some controversy. In *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*,[248] Emwest sought a declaration that the AMWU was taking impermissible industrial action during the currency of a certified agreement. Emwest's employees were covered by a EBA, but the provisions of that EBA did not deal with redundancy. The threatened industrial action related to redundancy. The union argued that s170MN only struck at industrial action which related to the matters that were covered by the EBA. It argued that industrial action in support of claims not covered by the EBA could not offend against that section. The alternative construction, for which Emwest contended, was that s170MN prohibited all industrial action in relation to terms and conditions of employment during the life of an EBA.

77 When the matter came before Kenny J, her Honour stated:

> *Emwest also submitted that the construction of s 170MN(1) for which the union contends 'would severely limit the scope of s 170MN, as unions and employees would be able to take industrial action in relation to claims about matters arguably not in the certified agreement' and 'would undermine the purpose and effect of parties reaching agreements and having them certified'. Assuming the policy behind s 170MN is to encourage parties to adhere to the bargain they have struck, then the policy would not, in my view, be defeated by permitting the parties to negotiate effectively in respect of matters that were not the subject of a relevant certified agreement. The policy is sufficiently protected if s 170MN(1) is construed as prohibiting parties to a certified agreement from resorting to industrial action to undo the matters they have agreed upon in the certified agreement, if its nominal expiry date has not passed. If the parties so desired, they could agree that a certified agreement made by them was intended to cover the whole field of relevant employment, thereby excluding the possibility of industrial action during the currency of the agreement.*[249]

78 Emwest did not seek to appeal against Kenny J's decision, but the AIG, which was not a party before Kenny J, did seek to do so. On 29 November 2002 a majority of the Full Federal Court gave the AIG leave to appeal.[250] The appeal has not yet been determined. Whether Kenny J's construction of s170MN is upheld therefore remains to be decided.

The tort of interference with contractual relations

79 The tort of interference with contractual relations can involve either direct or indirect interference with a contract.

Direct interference

80 The tort is committed as a result of *direct* interference with contractual relations if:

(a) there is a valid contract that is legally binding upon Person B and Person C;[251]

(b) Person A (the tortfeasor) knew of that contract, and *intentionally* interfered with Person B performing his or her contractual obligations to Person C,[252] whether by:

(i) persuading, inducing or procuring Person B not to fulfil the contract (for example by argument, bribery, force or threats of force[253]); or

(ii) preventing or hindering Person B from performing the contract, even though the defective performance does not amount to an actual breach of the contract;[254]

(c) as a result of Person A's actions, Person B did not, or did not fully, perform his or her obligations under the contract, causing Person C to suffer damage;[255] and

(d) Person A's actions were not justified.[256]

81 It has been said that '*the gravamen of the tort is intention*'.[257] That is true in the sense that Person A must intend that his or her actions will interfere with the contract. An intention merely to perform the act that constitutes the interference, without intending that that act interfere with the contract, is not sufficient.[258] But the High Court has emphasised that liability does *not* depend upon proving that Person A had a *predominant* intention, or even had an intention, of injuring Person C.[259] The tort depends upon an intention to harm only in the sense that such an intention '*is necessarily involved if a person knowingly interferes with the enjoyment by another of a positive legal right, whether such knowledge [of the terms of the contract] is actual or constructive*'.[260]

82 The element of intention is therefore closely tied up with knowledge of the contract that is interfered with.

> *If a third party, with knowledge of a contract between the contract breaker and another, has dealings with the contract breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference'.*[261]

83 The requisite intention can only be established if Person A knew of the existence of the contract between Person B and Person C in sufficient detail to know that the action Person A persuaded or procured Person B to perform or not perform would interfere with that contract.[262] That level of knowledge is all that is required. There is no need for knowledge of the specific term interfered with,[263] and constructive knowledge of the contract is sufficient.[264] Reckless indifference to, or disregard of, the requirements of the contract provides proof of the requisite intention.[265]

84 There is no need for the action taken by Person A to be unlawful. The direct interference is wrongful in itself.[266] *'[Person] A may have used violence or given [Person] B a monetary consideration, or may have used mere persuasion or argument. The bringing about of the breach of contract as such is the wrongful act which, damage being proved, constitutes the cause of action.'*[267]

85 Thus, for example, a union organiser (Person A) who persuades employees (Persons B) to engage in industrial action will normally commit this tort by directly interfering with the contracts between the employees and their employer (Person C).[268] That is because the organiser will have induced the employees to strike knowing that strike action would breach an express or implied term of the employees' contracts of employment. That is because employment contracts rarely if ever contain an express or implied right to strike.[269]

86 There is a defence of justification to the tort of interference with contractual relations, but its area of operation is limited, and the boundaries of the defence are not clear.[270] The defence applies if the defendant can show that, *'upon consideration of the relative significance of all the factors involved, the defendant's conduct should be tolerated despite its detrimental effect on the interests of others'*.[271] In a commonly cited passage, Romer LJ said that:

> *[I]n analysing or considering the circumstances, I think that regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and I think also to the object of the person in procuring the breach.*[272]

87 It appears that claims that interference with a contract was justified by industrial objectives are unlikely to be accepted. A claim of justification was rejected in a case in which the union argued that its conduct was justified as it was necessary in circumstances where the employers' conduct was designed to eliminate the union itself.[273] The defence similarly failed where a union argued its action was justified in order to eliminate the practice of employers undermining award conditions by engaging workers as independent contractors rather than employees.[274]

Indirect interference

88 The tort of interference with contractual relations can result from *indirect* interference with a contract, meaning interference that does not operate directly on one of the parties to the relevant contract. In that situation Person A (the tortfeasor) operates at one remove, *'typically by procuring the withdrawal of the contractor's labour with a view to making it impossible for him [Person B] to perform his contract with the plaintiff [Person C]'*.[275]

89 *In addition* to the elements outlined above in relation to the tort of direct interference with contractual relations, to establish the tort of indirect interference with contractual relations it is necessary to show that:

(a) the conduct that constituted the indirect interference involved '*unlawful means'*,[276] which for these purposes include crimes, torts, breaches of legislation, awards or contracts,[277] and, apparently, lies;[278]

(b) it was a *necessary* consequence of the conduct that Person A induced or procured that Person B would breach his or her contract with Person C.[279]

90 Thus, for example, if a union organiser induced employees of a subcontractor to go on strike in breach of their contracts of employment, and the subcontractor was at that time contractually obliged to provide services to a head contractor, the head contractor could sue the union organiser for the tort of indirect interference with contractual relations if it could be shown that:

(a) the union organiser had knowledge of the contract between the subcontractor and the head contractor;

(b) the union organiser persuaded, induced or procured the employees to breach their contract of employment with the subcontractor with the intention of procuring the subcontractor's breach of its contract with the head contractor (the '*unlawful means*'

resulting from the fact that that persuasion or inducement would constitute the tort of direct interference with contractual relations, being the contracts of employment);

(c) the employees did in fact breach their contracts of employment with the subcontractor;

(d) it was a necessary consequence of the breach by the employees of their contract of employment with the subcontractor that the subcontractor would breach its contract with the head contractor;

(e) as a result of the breach by the subcontractor of its contract with the head contractor, the head contractor suffered damage.[280]

91 The requisite intention is not established simply by proving that a person advocating an objective that could have been achieved by either lawful or unlawful means, such as by giving a proper notice to quit. '*A person who advocates the object without advocating the means is [not] to be taken to have advocated recourse to unlawful means*'.[281] In addition, it appears that the requisite intent may be absent if a person acts in a way that he or she believes, albeit mistakenly, is lawful.[282]

Other variations

92 The tort of interference with contractual relations, in its indirect form (requiring as it does *unlawful* interference) may be simply a subset of a wider tort of interference *with trade or business* by unlawful means, which appears to be emerging at common law.[283] In *Sanders v Snell* the High Court noted the existence of this emerging tort, but did not decide whether it ought to be recognised in Australia.[284]

93 In *Beaudesert Shire Council v Smith,*[285] the High Court held that *'a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts or another is entitled to recover damages from that other'.* That decision appeared to create an economic tort of very wide application. *Beaudesert* was overruled by the High Court in *Northern Territory v Mengel.*[286] It follows that one of the more precise torts must be established before action will be unlawful.

The tort of intimidation

94 The classic species of the tort of intimidation is committed if:

(a) Person A (the tortfeasor) threatens to use unlawful means against, or to commit an unlawful act against, Person B;[287]

(b) the threat compels or coerces Person B to do or refrain from doing something that causes harm to Person C (the plaintiff);[288]

(c) when making the threat, Person A intended to cause harm to Person C;[289]

(d) Person A's conduct was not justified (Person A bearing the burden of proving that it was, if Person A wishes to rely on this defence).[290]

95 As to paragraph (a), the relevant question is whether the act threatened, if carried out, would have been unlawful. The question is *not* whether the threat itself was unlawful.[291] A threat to use unlawful means includes a threat to commit a crime, a tort (including inducing another to

break his or her contract[292]), or a breach of contract (so long as the breach of contract is of sufficient consequence to induce the other to submit to the threat).[293]

> *All that matters to the plaintiff is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made of – whether it is a physical club or an economic club, a tortious club or an otherwise illegal club. If an intermediate party is improperly coerced, it does not matter to the plaintiff how he is coerced.*[294]

96 As to paragraph (b), the tort of intimidation is committed only where Person B gives in to, and acts as a result of, the threat. Otherwise Person C would not be damaged as a result of the threat.[295] Provided that Person B has given in to the threat, it does not matter that the action taken by Person B is something Person B was perfectly entitled to do, such as to withdraw his or her custom from Person C.[296] That is because Person B may have chosen not to do the thing that harms Person C if not for the threat from Person A. Person B may, for example, lawfully terminate Person C's employment as a result of a threat made by Person A, and while Person C may have no recourse against Person B, the tort of intimidation allows Person C to sue Person A.

97 As to paragraph (c), Person C must prove that Person A had an intention to cause harm, but that intention need not have been the predominant object of Person A in making the threat to use unlawful means to coerce Person B to act in a way that harmed Person C.[297] *'A certain result foreseen but not aimed at is not enough. Nevertheless, it is no wit less the ingredient of the tort if the harm sought is but a stepping stone to an ultimate objective.'*[298]

98 As to paragraph (d), while the authorities are unclear as to the circumstances in which a threat of unlawful action will be *'justifiable'*, it does appear that in some cases that defence can be made out.[299] That said, the defence rarely succeeds.

> *Self-interest, alone or with others, or the fulfilment of an undertaking to protect others in the same interest, will not of themselves amount to justification…; nor where there is an honest belief that there is a duty to act …; nor where a person is induced to break a contract because the other party to it has breached his contract with the intervenor …. These are but a few of the cases in which it was decided that pleas of justification could not prevail.*[300]

99 It has been held that the circumstances in which the defence of justification applies *'are not matters for definition but for a consideration of the individual circumstances of each case'.*[301]

100 An academic commentary has suggested that the classic situation in which the tort of intimidation occurs:

> *is where the union (A) threatens to undertake industrial action on the part of its members which would be a breach of their contracts of employment in order to 'persuade' the employer (B) to dismiss a particular employee (C). Usually this threat is in the context of some dispute between the union and that employee. The employer may quite lawfully dismiss the employee in the sense that the employer gives the employee adequate notice to terminate that employee's contract of employment, so that, unfair dismissal laws aside, the employee will not have a cause of action against the employer. However, the*

threat of unlawful action causing the employer to act in this way gives the dismissed employee a right of action against the union officials in the tort of intimidation.[302]

101 The tort of intimidation is also committed if:

(a) Person A (the tortfeasor) threatens to use unlawful means against, or to commit an unlawful act against, Person B;

(b) the threat compels or coerces Person B to act to his or her own detriment;[303]

(c) when making the threat, Person A intended to cause harm to Person B; and

(d) Person A's conduct was not justified (Person A bearing the burden of proving that it was).

102 That species of the tort of intimidation is committed where, for example, an unlawful threat coerced a person to agree to pay money to a third party (such as an employee who has made a disputed wage claim), or to the person who makes the threat (such as a union demanding payment to the union or some third party fund), in circumstances where that money was not properly owing.

The tort of conspiracy

103 There are two relevant forms of the tort of conspiracy: conspiracy to injure (or '*unlawful purpose*' conspiracy); and conspiracy by unlawful means. In both versions of the tort, damage is an essential element.[304] It follows that the tort cannot be committed unless the agreement that is the foundation of the conspiracy has been executed. '*[T]he tort … consists not of agreement, but of concerted action taken pursuant to the agreement*'.[305]

104 The tort of conspiracy to injure is committed where:

(a) two or more people act together to carry out a certain course of conduct;

(b) in doing so, they have the *predominant intention* of causing injury to a third party.[306]

105 A conspiracy having the real purpose of causing injury to another is itself unlawful. There is no need to prove any other element of unlawfulness to establish the tort.[307]

106 The tort of conspiracy to injure is of limited application in an industrial relations context, because the predominant intention of industrial action is usually the attainment of some gain or benefit, rather than causing injury to a third party such as an employer.[308] That requirement is strictly enforced. A combination for the predominant purpose of victimisation or punishment is actionable, but it is lawful if the real object in acting deliberately to cause damage to a person is to deter others from acting similarly in a manner which those combining honestly believe to be detrimental to their legitimate interests.[309]

107 The other version of the tort, conspiracy by unlawful means, is established where:

(a) two or more people (the conspirators) act together to pursue an otherwise lawful object by unlawful means;

(b) the conspirators intend to injure the plaintiff;

(c) the conspirators do cause damage to the plaintiff.[310]

108 The motive for the conspirators combining is irrelevant, provided they combined with the intention of employing unlawful means in the pursuit of their object.[311] The concept of '*unlawful means*' for this purpose includes breaches of contract or statute, tortious acts, and criminal acts, such as assaults occurring on a picket line.[312] That is, it includes '*something that is itself and independently of any element of combination, a criminal or civil wrong*'.[313]

109 While it is necessary to prove intent to injure the plaintiff, for this version of the tort of conspiracy it is unnecessary to prove that there was a predominant intention to injure.[314] The mere fact that injury to the plaintiff was a consequence of the conspirators' actions in not, however, sufficient.[315]

110 The tort of conspiracy by unlawful means adds little to the tort of unlawful interference with contractual relations, which is, of course, available without proving the added element of conspiracy.[316]

Picketing

111 Picketing involves a person or persons standing outside an establishment to make a protest, or to dissuade or prevent employees, suppliers, clients or customers from entering the establishment.[317] The term encompasses a range of conduct, from peaceful informational protests through to violent, rowdy and intimidatory blockades.

112 Picketing is not inherently unlawful.[318] Peaceful picketing may not involve any civil or criminal wrong.[319] Picketing may, however, involve a range of civil wrongs, including:

(a) assault, where conduct on a picket puts a person in fear of physical force;[320]

(b) battery, where actual force is inflicted, even where no injury is sustained;[321]

(c) false imprisonment, where a person is physically restrained and detained by those on the picket;[322]

(d) defamation, where (for example) placards or slogans injure a person's reputation;[323]

(e) trespass to land;[324]

(f) public and/or private nuisance;[325]

(g) industrial torts, including direct and indirect interference with contractual relations, intimidation, civil conspiracy to injure, and civil conspiracy by unlawful means;[326] and

(h) secondary boycotts in contravention of the *Trade Practices Act 1974 (C'wth)*.[327]

113 Pickets may also involve criminal conduct, including trespass, assault, damage to property, watching and besetting or obstruction. The most significant offence is watching and besetting, which involves a person, together with others, wilfully and without lawful authority, besetting any premises for the purpose and with the effect of obstructing, hindering or impeding by an assemblage of persons the exercise by any person of any lawful right to enter, use, or leave such premises.[328] As Creighton and Stewart have warned:

> *Picketing is, and always has been, an extremely precarious activity in legal terms. Even entirely peaceful picketing which involves nothing more than advising the public and*

fellow workers of the existence of an industrial dispute, and of the nature of the workers' grievances, can easily fall foul of the criminal law.[329]

114 Interlocutory injunctions restraining picketing by unions have been granted in many cases.[330]

115 Picketing does not fall within the definition of *'industrial action'* in s4(1) of the *Workplace Relations Act 1996 (C'wth),* apparently because the words *'ban, limitation or restriction on the performance of work'* which are used in the definition of *'industrial action'* are to be read as applying only to limitations on the work of those imposing the ban.[331] Picketing may limit the work of those not involved in imposing the ban or limitation, and therefore may not involve *'industrial action'* as that term is defined. As Giudice J observed:

> [*I*]*t is axiomatic that picketing is conduct engaged in outside the workplace by persons who are either not employees or who, being employees, have absented themselves completely from work. Whilst employees in the latter category may be engaging in industrial action in that they are on strike, the picketing activity is distinct.*[332]

116 If picketing is not *'industrial action'* for the purposes of the *Workplace Relations Act 1996 (C'wth),* it cannot be *'protected action'* for the purposes of that Act. Picketing that involves a civil wrong is therefore actionable whenever it occurs.[333]

117 As picketing is not relevantly *'industrial action'*, the AIRC may not make an order under s127 of the *Workplace Relations Act 1996 (C'wth)* that picketing stop or not occur. The fact that picketing has occurred incidentally to industrial action falling within the jurisdiction of the Commission will, however, be a relevant matter for the Commission to consider in deciding whether or not to direct that the industrial action stop or not occur.[334]

Strike pay

117 Section 187AA(1) of the *Workplace Relations Act 1996 (C'wth)* generally prohibits employers from making payments to employees in relation to periods during which the employees were engaged in industrial action. Under s187AA(2), employees must not accept such payments from an employer.

119 Section 187AB prohibits a union or an officer, member or employee of a union making a claim for payment in relation to periods during which the relevant employees were engaged in industrial action, and from organising or engaging in, or threatening to organise or engage in, industrial action with intent to coerce the employer to make such a payment.

120 Contravention of these provisions is not an offence, but a court may grant a range of relief for contravention, including fines not exceeding $10 000, orders for compensation, and injunctions.[335]

121 The prohibitions in ss187AA and 187AB relate to all '*industrial action*' as defined in the *Workplace Relations Act 1996 (C'wth)*, whether or not it is '*protected action*'.[336] They have been said to reflect the underlying common law rule that denies remuneration to an employee who has refused to perform the work required by his or her contract of employment.[337]

Protected action

The concept of protected action

122 Part VIB, Division 8 of the *Workplace Relations Act 1996 (C'wth)* concerns negotiations for EBAs. That Division identifies certain categories of action as '*protected action*'. In essence, it provides that, during a '*bargaining period*',[338] industrial action may be undertaken directly against the employer with whom an EBA is sought for the purpose of supporting or advancing claims made in respect of the proposed EBA.[339]

123 To be protected, industrial action may be taken only by a union that is a negotiating party, by that union's officers or employees, by members of that union who are employed by the relevant employer, or by employees who are themselves negotiating parties.[340]

124 The *Workplace Relations Act 1996 (C'wth)* prescribes the manner in which a '*bargaining period*' can be initiated. In substance, it requires a written notice containing certain specified particulars to be served on each other '*negotiating party*'.[341] The particulars must be reasonably precise. If picketing is to take place, for example, that should be expressly stated.[342] Unless such a notice has been served, action cannot be '*protected action*'.

125 In respect of any industrial action that is protected action, no action lies under any law, whether written or unwritten, in force in a State or Territory in respect of that industrial action unless it has involved or is likely to involve:

(a) personal injury;

(b) wilful or reckless destruction of or damage to property; or

(c) the unlawful taking, keeping or use of property.[343]

126 Actions for defamation may also be brought in respect of matters occurring in the course of industrial action.[344]

127 In substance, therefore, most of the laws discussed above cannot be contravened if the industrial action taken is '*protected action*'.

128 In addition, orders made by the AIRC under s127 of the *Workplace Relations Act 1996 (C'wth)* do not apply to protected action.[345]

129 Finally, employers must not dismiss or detrimentally alter the position of an employee for engaging or threatening to engage in protected action.[346] Employers may, however, stand down employees, refuse to pay employees for not performing work as directed, or engage in protected action of their own.[347]

Unprotected action during a bargaining period

130 Even if a bargaining period has commenced (which occurs seven days after the last notice is served on a negotiating party[348]) and remains current,[349] industrial action will not be protected in a number of circumstances, including:

(a) if it is engaged in in concert with, or organised partly by, one or more persons who are not negotiating parties, or officers, employees or members employed by the employer of an organisation that is a negotiating party; [350]

(b) if it is engaged in for the purpose of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to a certified agreement which has not reached its nominal expiry date;[351]

(c) if written notice of an intention to take protected action has not been given to the employer at least three working days prior to industrial action taking place, except where the action is taken in response to a lock-out or as a response to industrial action that has already occurred;[352]

(d) if the parties have not genuinely attempted to reach agreement and complied with any applicable orders of the AIRC;[353]

(e) if the industrial action is engaged in by members of an organisation of employees that is a negotiating party in circumstances where the industrial action has not, before it begins, been duly authorised by a committee of management or appropriately authorised person within the organisation, in compliance with any relevant rules of the organisation, and unless written notice of the giving of authorisation is given to the Registrar;[354]

(f) if the AIRC has suspended or terminated a bargaining period.[355]

131 In addition, industrial action that would otherwise have been protected action ceases to be protected action if an application to certify an agreement is not made to the AIRC within 21 days after the agreement was made.[356]

Notes to Conduct of the Commission – Principles and Procedures

1 See, for example, *Occupational Health and Safety Act 1989 (ACT)* s5; *Occupational Health and Safety (Commonwealth Employment) Act 1991 (C'wth)* s5; *Sex Discrimination Act 1984 (C'wth)* s28B(7); *Workplace Health and Safety Act 1995 (Qld)* s9(1); *Occupational Health Safety and Welfare Act 1986 (SA)* s4; *Occupational Health and Safety Act 1985 (Vic)* s4; *Occupational Safety and Health Act 1984 (WA)* s3; *Anti-Discrimination Act 1977 (NSW)* s22B; *Workplace Video Surveillance Act 1998 (NSW)* s3.

2 *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297, 312.

3 *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297, 312-313.

4 See, for example, *Re Australasian Meat Industry Employees' Union; Ex parte Aberdeen Beef Co Pty Ltd* (1992) 176 CLR 154, 159.

5 The State of Victoria submitted that the words should be limited in that way in submissions dated 24 April 2002 in relation to the National Gallery investigation.

6 This is regarded as the proper meaning of the term in *Mogul SS Co v McGregor, Gow and Co* [1892] AC 25, 39 per Lord Halsbury LC in a context where this meaning is preferred to the use of the term 'unlawful' to extend to contracts that are unenforceable because, for example, they are contrary to public policy.

7 (1978) 142 CLR 1, 28. Gibbs ACJ found that the relevant conduct was not '*unlawful under a law of the Commonwealth*', but that was because a breach of contract is unlawful by reason of the common law, not by reason of a law of the Commonwealth. Stephen J's reasoning at 74-75 and Mason J's reasoning at 89 are similar.

8 *Ferguson v Cole* [2002] FCA 1411, [29]-[33].

9 *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211; *Merkur Island Shipping Corporation v Laughton* [1983] 2 AC 570, 608-610. In *Sanders v Snell* (1998) 196 CLR 329, 339-340 the High Court focussed on the fact that the direction alleged to constitute the unlawful direction or inducement to breach a contract of employment could have been carried out without breaching the contract. The Court appeared to assume that, if the direction could only have been carried out by breaching the contract, then the direction would have been '*unlawful*'.

10 *Lonrho Plc v Fayed* [1990] 2 QB 479, 491-492.

11 *Kitano v Commonwealth* (1973) 129 CLR 151, 175; *The Tubantia* [1924] P 78.

12 *Lonrho Ltd v Shell Petroleum Co Ltd [No 2]* [1982] AC 173, 188-189; *Lonrho Plc v Fayed* [1990] 2 QB 479, 488; *Kitano v Commonwealth* (1973) 129 CLR 151, 175. A breach of a statute may, however, be unlawful for these purposes only if, on its true construction, the statute has to impose a prohibition which gives rise to a civil remedy. Compare, however, the conclusions and cases cited in Sales, P and Stilitz, D, 'Intentional Infliction of Harm by Unlawful Means' (1999) 115 *Law Quarterly Review* 411, 416.

13 (1998) 196 CLR 329.

14 For this reason, a direction in breach of the rules of natural justice was not relevantly 'unlawful': see *Sanders v Snell* (1998) 196 CLR 329, 344. See also *Northern Territory v Mengel* (1995) 185 CLR 307, 336-337, where the requirement of an '*unlawful act*' in *Beaudesert* required an act '*forbidden by law*' rather than simply an authorized or ultra vires act.

15 (1998) 196 CLR 329, 343.

16 See, for example, *Sid Ross Agency v Actors and Announcers Equity Association of Australia* [1971] 1 NSWLR 760, 768; *Rookes v Barnard* [1964] AC 1129, 1209.

17 See, for example, *Williams v Hursey* (1959) 103 CLR 30, 76; *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211, 264.

18 The precise definitions vary from State to State: see, for example, *Criminal Code (WA)* s338; *Criminal Code (Qld)* s415.

[19] See *Tracey v R* (1999) 20 WAR 555, 573, cf 569-570; *Hodges v Webb* [1920] 2 Ch 70, 89; cf *Thorne v Motor Trade Association* [1937] AC 797, 806; *R v Jessen* [1997] 2 Qd R 213, 219; Dietrich, J, 'Lawful coercive threats and the infliction of harm' (2000) 8 *Torts Law Journal* 187.

[20] *R v Zaphir* [1978] Qd R 151.

[21] See, for example, *Bunning v Cross* (1978) 141 CLR 54.

[22] *Kraljevich v Lake View Star Limited* (1945) 70 CLR 647, 658, 652; *Maxwell v Murphy* (1957) 96 CLR 261; *Esber v The Commonwealth* (1992) 174 CLR 430, 445.

[23] *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283-284.

[24] *Kelson v Forward* (1995) 60 FCR 39, 52.

[25] (1992) 28 NSWLR 125.

[26] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 130.

[27] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 143.

[28] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 145. To similar effect was the judgment of Mahoney JA at 166-167 and Priestley JA at 181.

[29] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 147.

[30] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 179.

[31] Note that the ordinary meaning of the word '*inappropriate'* was held to be '*unsuitable'* in the Supreme Court of Canada in *Francise v Baker* [1999] 3 SCR 250, 267-270.

[32] (1992) 173 CLR 626.

[33] *Chew v The Queen* (1992) 173 CLR 626, 647.

[34] (1995) CLR 501.

[35] *R v Byrnes* (1995) CLR 501, 514-515.

[36] (1986) 43 SASR 410.

[37] *Grove v Flavel* (1986) 43 SASR 410, 416-417.

[38] (1995) 15 WAR 302.

[39] *Edwardes v Kyle* (1995) 15 WAR 302, 314.

[40] [1984] VR 641, 464.

[41] *Report of the Metropolitan Ambulance Service Royal Commission*, November 2001, Vol 5, p 51.

[42] *Report of the Metropolitan Ambulance Service Royal Commission*, November 2001, Vol 5, p 47. Earlier in the inquiry, the Commissioner had issued a preliminary ruling on the meaning of 'improper conduct', which is reproduced in Appendix 10 of Vol 5 of the *Report*, pp. 140-164.

[43] Exhibit 442.

[44] *National Crime Authority Act 1984 (C'wth)* s20(1). Compare s 19A of the same Act.

[45] *Independent Commission Against Corruption Act 1988* (*NSW*) s21(1).

[46] *New South Wales Crime Commission Act 1985 (NSW)* s10(1).

[47] *Police Integrity Commission Act 1996* (*NSW*) s25.

[48] *State of Victoria and Commonwealth of Australia v Australian Building and Construction Employees' and Labourers' Federation* (1982) 152 CLR 25, 97.

[49] See also *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21, 30, 53-54.

[50] *Minister for Aboriginal Affairs v Peko Wallsend* (1986) 162 CLR 24, 40 (Mason J, Gibbs CJ and Dawson J in agreement).

[51] This quotation is reproduced from Donaghue, S, 2001, *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, Sydney, pp. 184-185.

[52] (1951) 24 *Australian Law Journal* 386.

[53] (1951) 24 *Australian Law Journal* 386, 392.

[54] This was recognised in *Ferguson v Cole* [2002] FCA 1411, [74].

[55] (1984) 156 CLR 296.

[56] *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 324.

[57] *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 325-326.

[58] See *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 323-324; *Finch v Goldstein* (1981) 36 ALR 287, 302

[59] See *University of Ceylon v Fernando* [1960] 1 WLR 223; *Cains v Jenkins* (1979) 28 ALR 219, 229.

[60] (1984) 156 CLR 296.

[61] (1984) 156 CLR 296, 314.

[62] *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 (1984) 156 CLR 296, 323.

[63] (2002) 190 ALR 679.

[64] (2002) 190 ALR 679, [12]-[13].

[65] *Transcript of the Royal Commission into the Building and Construction Industry*, p. 8796-8797.

[66] *Transcript of the Royal Commission into the Building and Construction Industry*, p. 8798.

[67] Exhibit 677.

[68] See *State Law Revision (Decimal Currency) Act 1966 (C'wth)*, which amended the penalty from $500.

[69] See *Royal Commissions Amendment Act 1912 (C'wth)* ss5 and 6.

[70] See *Royal Commissions Amendment Act 1982 (C'wth)* s4, which inserted a new s3 substantially in its present form.

[71] See Donaghue, S, 2001, *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, Sydney, pp. 69-71, for a summary of the penalties in equivalent legislation.

[72] *Jones v Dunkel* (1958) 101 CLR 298, 308 (Kitto J), 312 (Menzies J), 320-321 (Windeyer J).

[73] *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256.

[74] *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361.

[75] *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449-450.

[76] (1894) 6 R 67.

[77] *R v Birks* (1990) 19 NSWLR 677, 688-689.

[78] *Allied Pastoral Holdings Pty Limited v Commissioner of Taxation* [1983] 1 NSWLR 1, 16. See also *R v Birks* (1990) 19 NSWLR 677, 688 (per Gleeson CJ).

[79] *Robson, Richard Evans & Co Ltd v Astley* [1911] AC 674, 687.

[80] *Luxton v Vines* (1952) 85 CLR 352, 358; *Gurnett v Macquarie Stevedoring Co Pty Ltd* (1955) 55 SR(NSW) 243, 248; *Jones v Dunkel* (1958) 101 CLR 298, 304; *Briginshaw v Briginshaw* (1938) 60 CLR 336.

[81] *Jones v Dunkel* (1958) 101 CLR 298, 305; *Luxton v Vines* (1952) 85 CLR 352, 358; *Nominal Defendant v Owens* (1978) 45 FCR 430, 434-435; *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207, 211; *Gurnett v Macquarie Stevedoring Co Pty Ltd* (1955) 55 SR(NSW) 243, 248.

[82] *Jones v Dunkel* (1958) 101 CLR 298, 305.

[83] *Bradshaw v McEwants Pty Ltd* (unreported, delivered 27 April 1951, Dixon, Williams, Webb, Fullagar and Kitto JJ). That judgment is quoted in *Jones v Dunkel* (1958) 101 CLR 298, 310.

[84] *Jones v Dunkel* (1958) 101 CLR 298, 312 (Menzies J). See also pp. 308 (Kitto J), 320-321 (Windeyer J).

[85] *Jones v Dunkel* (1958) 101 CLR 298, 320-321.

[86] See, for example, *Evidence Act 1995 (C'wth)* s12.

[87] (1990) 170 CLR 596.

[88] *Annetts v McCann* (1990) 170 CLR 596, 598.

[89] *Annetts v McCann* (1990) 170 CLR 596, 608, approved in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 578, 592. See also *New South Wales v Canellis* (1994) 181 CLR 309, 330.

[90] See, for example, *Kioa v West* (1985) 159 CLR 550, 584-585, 613; *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118.

[91] [2002] FCA 1411.

[92] *Ferguson v Cole* [2002] FCA 1411, [81].

[93] *Annetts v McCann* (1990) 170 CLR 596, 600-601, 609-610, 619. See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581.

[94] *Annetts v McCann* (1990) 170 CLR 596, 601.

[95] *Annetts v McCann* (1990) 170 CLR 596, 609-10.

[96] *Annetts v McCann* (1990) 170 CLR 596, 601.

[97] *Royal Commission into Productivity in the Building Industry in NSW* (1992) Vol 7, p. 129.

[98] *Ferguson v Cole* [2002] FCA 1411, [78].

[99] *Mahon v Air New Zealand Limited* [1984] 1 AC 808, 820-821.

[100] (1984) 156 CLR 296, 314.

[101] (1992) 175 CLR 564.

[102] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581.

[103] See, for example, *Royal Commission into the New South Wales Police Service*, 1997, Vol 1, p. 20; *Royal Commission into Commercial Activities of Government and Other Matters*, 1992, Vol 1, p. 7; *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, 1989, pp. 8-9.

[104] *Royal Commission into Productivity in the Building Industry in New South Wales*, 1992, Vol 2, p. 9.

[105] *Royal Commission into Commercial Activities of Government and Other Matters* (1992) Vol 6, para 27.1.2.

[106] *Royal Commission into Commercial Activities of Government and Other Matters* (1992) Vol 1, paragraph 1.26.

[107] *Royal Commission into Commercial Activities of Government and Other Matters* (1992) Vol 1, paragraph 1.26.

[108] *Royal Commission into Commercial Activities of Government and Other Matters* (1992) Vol 1, paragraph 1.27.

[109] *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 635.

[110] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 145. To similar effect was the judgment of Mahoney JA at 166-167 and Priestley JA at 181.

[111] [1972] AC 153.

[112] [1972] AC 153, 170 (Lord Reid).

[113] (2000) 100 FCR 530, [44].

[114] *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [59].

[115] *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [59].

[116] *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [75].

[117] [2001] 2 Qd R 118.

[118] *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] 2 Qd R 118, [23].

[119] See, for example, *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] 2 Qd R 118.

[120] *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [76].

[121] *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [79].

[122] See *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719, 742. Toohey J cited *Australasian Brokerage Ltd v Australian and New Zealand Banking Corporation Ltd* (1934) 52 CLR 430, 451-452. This passage was applied by the Full Court of the Federal Court in *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [83].

[123] *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [78].

[124] *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [85].

[125] *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [85].

[126] [2001] 2 Qd R 118.

[127] *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] 2 Qd R 118, [88].

[128] [1972] AC 153, 170.

[129] *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [65]; *Hamilton v Whitehead* (1988) 166 CLR 121, 127; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 514-515.

[130] *Workplace Relations Act 1996 (C'wth)* Div 7, Sub-div F.

[131] This proposition follows from *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations* (1995) 184 CLR 620, 640, 663, although that case did not concern the CFMEU. See also *Williams v Hursey* (1959) 103 CLR 30, 54-55, 89-90, 130.

[132] (1916) 21 CLR 129.

[133] *Waterside Workers Federation of Australia v Burgess Brothers Limited* (1916) 21 CLR 129, 133.

[134] *Waterside Workers Federation of Australia v Burgess Brothers Limited* (1916) 21 CLR 129, 132.

[135] *Waterside Workers Federation of Australia v Burgess Brothers Limited* (1916) 21 CLR 129, 133-134.

[136] (1923) 33 CLR 297.

[137] *Commonwealth Steamship Owners Association v Federated Seamen's Union of Australasia* (1923) 33 CLR 297, 307.

[138] *Commonwealth Steamship Owners Association v Federated Seamen's Union of Australasia* (1923) 33 CLR 297, 310-311. The English cases were *Denaby and Cadeby Main Collieries Ltd v Yorkshire Miners' Association* [1906] AC 384; *Smithies v National Association of Operative Plasterers* [1909] 1 KB 310.

[139] (1959) 103 CLR 30.

[140] *Williams v Hursey* (1959) 103 CLR 30, 81.

[141] (1998) 87 IR 105.

[142] *Australian Postal Corporation v CEPU* (1998) 87 IR 105, 107.

[143] (1990) 25 FCR 296, 305.

[144] *GTS Freight Management v TWU* (1990) 25 FCR 296, 306.

[145] *GTS Freight Management v TWU* (1990) 25 FCR 296, 307.

[146] *GTS Freight Management v TWU* (1990) 25 FCR 296, 309.

147 (1998) 90 FCR 95.

148 *Rowe v Transport Workers Union* (1998) 90 FCR 95, [31].

149 (*Rowe v Transport Workers Union* 1998) 90 FCR 95, [31].

150 [2000] VSC 479.

151 *Yallourn Energy Pty Ltd v CFMEU* [2000] VSC 479, [35].

152 *Ferguson v Cole* [2002] FCA 1411, [31]; *McGuiness v Attorney-General (Victoria)* (1940) 63 CLR 73, 86, 88, 90, 102.

153 [2002] FCA 1411.

154 (1993) 178 CLR 408.

155 See *Workplace Relations Act 1996 (C'wth)* ss187AA and 187AB.

156 See *Workplace Relations Act 1996 (C'wth)* s4(1), which excludes conduct in this category from the definition of 'industrial action' in that Act.

157 [2002] FCAFC 386, [66].

158 (2000) 100 FCR 530 at [44].

159 *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [44].

160 *Workplace Relations Act 1996 (C'wth)* s170NF(1).

161 *Workplace Relations Act 1996 (C'wth)* s170ND(e).

162 *Workplace Relations Act 1996 (C'wth)* s170NF(2).

163 *Workplace Relations Act 1996 (C'wth)* s170NG.

164 *Workplace Relations Act 1996 (C'wth)* s170NC(2).

165 (2002) 114 IR 20.

166 *National Tertiary Education Industry Union v Commonwealth* (2002) 114 IR 20, [96].

167 *National Tertiary Education Industry Union v Commonwealth* (2002) 114 IR 20 (2002) 114 IR 20, [95].

168 *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [45].

169 *Seven Network (Operations) Ltd v Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)* (2001) 109 FCR 378, [33].

170 *Seven Network (Operations) Ltd v Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)* (2001) 109 FCR 378, [36]-[37].

171 *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530.

172 *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [41].

173 (200) 100 FCR 530, [41], [46].

174 See the dictionary references collected in *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 FCR 16, [10].

175 See *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378, [38]-[42]; *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 FCR 16, [18]-[38]; *National Union of Workers v Qenos* (2001) 108 FCR 90, [128].

176 (2002) 114 IR 20.

177 *National Tertiary Education Industry Union v Commonwealth* (2002) 114 IR 20, [103].

178 *National Tertiary Education Industry Union v Commonwealth* (2002) 114 IR 20, [115].

[179] (2000) 106 FCR 16.

[180] (2000) 97 FCR 186.

[181] *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 FCR 16, [21].

[182] (2000) 97 FCR 186, 191.

[183] [1983] 1 AC 366, 400.

[184] *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, 400. See the similar remarks of McHugh JA in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, 45-46.

[185] *Schanka v Employment National (Administration) Pty Ltd* (2000) 97 FCR 186, [24], [34]; *Schanka v Employment National (Administration) Pty Ltd* (1999) 166 ALR 663, [39], [42]; *Canturi v Sita Coaches Pty Ltd* (2002) 116 FCR 276, [35]-[36].

[186] *Seven Network (Operations Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378, [42].

[187] (2002) 114 IR 20.

[188] *National Tertiary Education Industry Union v Commonwealth* (2002) 114 IR 20, [121].

[189] (2002) 114 IR 20, [116].

[190] *Schanka v Employment National (Administration) Pty Ltd* (1999) 166 ALR 663, [43].

[191] *Workplace Relations Act 1996 (C'wth)* s298A. See also *Employment Advocate v National Union of Workers* (2000) 100 FCR 454; *CFMEU v BHP Steel (AIS) Pty Ltd* [2000] FCA 1008, [48]; *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* (2002) 112 FCR 232, [71]-[72].

[192] *Employment Advocate v Williamson* (2001) 111 FCR 20.

[193] *Workplace Relations Act 1996 (C'wth)* s298X.

[194] *Employment Advocate v National Union of Workers* (2000) 100 FCR 454, [9]; *Hamberger v CFMEU* [2002] FCA 586; *Hamberger v CFMEU* [2002] FCA 585.

[195] *Workplace Relations Act 1996 (C'wth)* s298U. For a discussion of the factors relevant in determining a penalty for a contravention of Part XA see *CFMEU v Coal and Allied Operations Pty Ltd (No 2)* (1999) 94 IR 231.

[196] *Workplace Relations Act 1996 (C'wth)* s298V.

[197] *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34; *Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia Ltd* (2000) 175 ALR 173.

[198] *Workplace Relations Act 1996 (C'wth)* s298B(1).

[199] *Workplace Relations Act 1996 (C'wth)* s298B(1).

[200] *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, [106].

[201] *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 106 FCR 482, [54]. See also *BHP Iron Ore Pty Ltd v Australian Workers' Union* (2000) 102 FCR 97, [35]; *Health Services Union of Australia v Tasmania* (1996) 73 IR 140; *Finance Sector Union v Commonwealth Bank of Australia* (2000) 106 IR 139, [32].

[202] *BHP Iron Ore Pty Ltd v Australian Workers' Union* (2000) 102 FCR 97, [48].

[203] *Workplace Relations Act 1996 (C'wth)* s298K(2)(a)-(e).

[204] *Patrick Stevedores Operations [No 2] Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, 18. See also *Employment Advocate v National Union of Workers* (2000) 100 FCR 454; *Community and Public Sector Union v Telstra Corporation Ltd* (2001) 107 FCR 93; *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* (2001) 112 FCR 232; *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155; *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34.

[205] *Employment Advocate v National Union of Workers* (2000) 100 FCR 454, [73]-[76]. See also *Linehan v Northwest Exports Pty Ltd* (1981) 57 FLR 49; *Australasian Meat Industry Employees' Union v R J Gilbertson (Qld) Pty Ltd* (1988) 26 IR 237.

[206] *Workplace Relations Act 1996 (C'wth)* s298L(2).

[207] *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34, 69; *Australian Workers' Union v John Holland Pty Ltd* (2001) 103 IR 205, [56].

[208] *Workplace Relations Act 1996 (C'wth)* s298l(1)(a). There is nothing in this paragraph to suggest that it is concerned with a person's activities as a member, officer or delegate or an industrial association: *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 106 FCR 482, [66].

[209] *Workplace Relations Act 1996 (C'wth)* s298L(1)(b); *Employment Advocate v Williamson* (2001) 111 FCR 20, [18]-[20].

[210] *Workplace Relations Act 1996 (C'wth)* s298L(1)(d).

[211] *Workplace Relations Act 1996 (C'wth)* s298L(1)(c).

[212] *Employment Advocate v Williamson* (2001) 111 FCR 20, [23].

[213] *BHP Iron-Ore Pty Ltd v Australian Workers' Union* (2000) 102 FCR 97, [61]-[64].

[214] *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 106 FCR 482, [72].

[215] *Workplace Relations Act 1996 (C'wth)* s298B(2).

[216] *Workplace Relations Act 1996 (C'wth)* s298B(3).

[217] *Workplace Relations Act 1996 (C'wth)* s298B(3). The relationship between this statutory presumption of liability on the part of an industrial association for acts done by its representatives with common law principles of vicarious and direct corporate liability is discussed in *Rowe v Transport Workers' Union of Australia* (1998) 90 FCR 95.

[218] *Employment Advocate v National Union of Workers* (2000) 100 FCR 454, [36].

[219] *Employment Advocate v National Union of Workers* (2000) 100 FCR 454, [40]. See also *Employment Advocate v Williamson* (2001) 111 FCR 20, [24], [72].

[220] *Employment Advocate v Williamson* (2001) 111 FCR 20, [26].

[221] *Employment Advocate v Williamson* (2001) 111 FCR 20, [28].

[222] *Employment Advocate v Williamson* (2001) 111 FCR 20, [29].

[223] *Workplace Relations Act 1996 (C'wth)* s298S(2).

[224] *Workplace Relations Act 1996 (C'wth)* s298S(1).

[225] *Workplace Relations Act 1996 (C'wth)* s298S(1).

[226] *Australian Building Construction Employees and Builders' Labourers' Federation v Hamberger* (2001) 114 FCR 22, [34].

[227] *Australian Building Construction Employees and Builders' Labourers' Federation v Hamberger* (2001) 114 FCR 22, [65].

[228] *Workplace Relations Act 1996 (C'wth)* s298S. Although see ss 298K(2) and 298L(1)(c), which would prohibit the head contractor giving into pressure of this type.

[229] *Workplace Relations Act 1996 (C'wth)* ss298P(3) and 298S(2). See *Hamberger v CFMEU* [2000] FCA 1924, [60]-[63].

[230] *Workplace Relations Act 1996 (C'wth)* ss298P(3), 298K(1), and 298L(1)(b).

[231] *Trade Practices Act 1974 (C'wth)* s45D(3), (4).

[232] *Australian Broadcasting Corporation v Parish* (1980) 29 ALR 228

[233] *Trade Practices Act 1974 (C'wth)* s4.

[234] *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch)* (1992) 44 IR 264.

[235] *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch)* (1992) 44 IR 264; *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331, 337.

[236] (1987) 15 FCR 31.

[237] *Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331, 348; *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104, 140.

[238] *Trade Practices Act 1974 (C'wth)* s45D(2).

[239] *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104, 139.

[240] *Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331, 349 (Deane J).

[241] *Jewel Food Stores Pty Ltd v Amalgamated Milk Vendors Association Inc* (1989) 24 FCR 127, 135. See also *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104, 139.

[242] *Trade Practices Act 1974 (C'wth)* s45DC(3).

[243] *Trade Practices Act 1974 (C'wth)* s45DD(1).

[244] *Trade Practices Act 1974 (C'wth)* s45DD(2).

[245] *Trade Practices Act 1974 (C'wth)* s45DD(3). 'Industrial action' is defined for these purposes in ss 45DD(4), (5).

[246] *Trade Practices Act 1974 (C'wth)* s45DD(8).

[247] *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCAFC 386, [67].

[248] [2002] FCA 61.

[249] *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCA 61, [55].

[250] *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCAFC 386, [81].

[251] *Woolley v Dunford* (1972) 3 SASR 243, 266-267.

[252] See, for example, *Allstate Life Insurance Co v ANZ Banking Group Ltd* (1995) 130 ALR 469, 484-485; *Independent Oil Industries Ltd v Shell Co of Australia Ltd* (1937) 37 SR(NSW) 394, 414-415; *Thomson v Deakin* [1952] Ch 646; *Stratford v Lindley* [1965] AC 269; *Short v City Bank of Sydney* (1912) 15 CLR 148, 160; Fox, C, Howard, WA and Pittard, M, 1995, *Industrial Relations in Australia: Development, Law and Operation*, Longman, Melbourne, pp. 102-103.

[253] *Woolley v Dunford* (1972) 3 SASR 243, 267.

[254] *Woolley v Dunford* (1972) 3 SASR 243, 267. See also *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211, 262; *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106.

[255] Fleming JG, 1998, *The Law of Torts* (9th edn) p. 758, stating the plaintiff must prove special damage.

[256] *Woolley v Dunford* (1972) 3 SASR 243, 266; *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104,141; *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, 442-443.

[257] *Allstate Life Insurance Co v ANZ Banking Group Ltd* (1995) 130 ALR 469, 484.

[258] *Allstate Life Insurance Co v ANZ Banking Group Ltd* (1995) 130 ALR 469, 484, relying on *Independent Oil Industries Ltd v Shell Co of Australia Ltd* (1937) 37 SR(NSW) 394, 420.

[259] *Northern Territory v Mengel* (1995) 185 CLR 307, 342. See also *Lonhro Pty Ltd v Fayed* [1990] 2 QB 478, 491-492, 494; Fleming, 1998, *The Law of Torts* (9th edn), (n255) p. 761.

[260] *Northern Territory v Mengel* (1995) 185 CLR 307, 342. See also *Woolley v Dunford* (1972) 3 SASR 243, 266.

[261] *Thomson v Deakin* [1952] Ch 646, 694, approved in *Allstate Life Insurance Co v ANZ Banking Group Ltd* (1995) 130 ALR 469, 486.

[262] *Allstate Life Insurance Co v ANZ Banking Group Ltd* (1995) 130 ALR 469, 479, 484; *Woolley v Dunford* (1972) 3 SASR 243, 270. See also the authorities collected by Isaacs J in *Short v City Bank of Sydney* (1912) 15 CLR 148, 159-160.

[263] *Allstate Life Insurance Co v ANZ Banking Group Ltd* (1995) 130 ALR 469, 479, 485; *Thomson v Deakin* [1952] Ch 646, 687; *Woolley v Dunford* (1972) 3 SASR 243, 282; *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691, 703-704.

[264] *Northern Territory v Mengel* (1995) 185 CLR 307, 342; *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691, 700-701; *Woolley v Dunford* (1972) 3 SASR 243, 271.

[265] *Northern Territory v Mengel* (1995) 185 CLR 307, 342; *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691, 700-701; Fleming, 1998, *The Law of Torts* (9th edn), (n255) p. 762.

[266] *Woolley v Dunford* (1972) 3 SASR 243, 267.

[267] *Williams v Hursey* (1959) 103 CLR 30, 77 (Fullagar J, Dixon CJ and Kitto J in agreement).

[268] Fleming JG, 1998, *The Law of Torts* (9th edn), (n255) p. 758, citing *SW Miners Federation v Glamorgan Coal Co* [1905] AC 239.

[269] See *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211, 230.

[270] *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104, 142; Fleming JG, *The Law of Torts* (9th edn), (n255) p. 762-765.

[271] Fleming JG, 1998, *The Law of Torts* (9th edn), (n255) p. 762. The defence is discussed in Heydon, JD, 'Defence of Justification in Cases of Intentionally Caused Economic Loss' (1970) 20 *University of Toronto Law Journal* 139, 161-171.

[272] *Glamorgan Coal Co Ltd v South Wales Miners' Federation* [1903] 2 KB 545, 574-575. See also, for example, *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104, 142-143.

[273] *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211, 255.

[274] *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104, 141-145. See also Fox, C, Howard, WA and Pittard, M, 1995, *Industrial Relations in Australia: Development, Law and Operation*, Longman, Melbourne, (n 252) p. 106.

[275] Fleming JG, 1998, *The Law of Torts* (9th edn), (n255) p. 758.

[276] *Thomson v Deakin* [1952] Ch 646; *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104, 141; *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, 138-139.

[277] See, for example, *Rookes v Barnard* [1964] AC 1129, 1184; *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104, 141.

[278] *Mogul Steamship Co Ltd v McGregor Gow & Co* [1892] AC 25, 43, 44, 53; *Rookes v Barnard* [1964] AC 1129, 1172; *Lonhro Plc v Fayed* [1992] 1 AC 448.

[279] For the requirement that breach be a 'necessary' consequence of indirect interference, see *Stratford v Lindley* [1965] AC 269, 333.

[280] For a similar summary of the elements of the tort see Fleming JG, 1998, *The Law of Torts* (9th edn), (n255) p. 760.

[281] *Thomson v Deakin* [1952] Ch 646, 697-698.

[282] See *James v Commonwealth* (1939) 62 CLR 339, 372-373; *Northern Territory v Mengel* (1995) 185 CLR 307, 351, although these authorities did not concern unlawful interference with contractual relations, but related economic torts. See also Fleming JG, 1998, *The Law of Torts* (9th edn), (n255) p. 762.

[283] *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211, 245-246; *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762 (Lord Denning). See also *Lonrho Plc v Fayed* [1992] 1 AC 448.

[284] *Sanders v Snell* (1998) 196 CLR 329, 341. See also *Northern Territory v Mengel* (1995) 185 CLR 307.

[285] (1966) 120 CLR 145, 156.

[286] (1995) 185 CLR 307, 344-345.

[287] See *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] NSWLR 760, 766; *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211, 269; *Latham v Singleton* [1981] 2 NSWLR 843, 857-858; *Rookes v Barnard* [1964] AC 1129, 1205-1206, 1234; *Morgan v Fry* [1968] 2 QB 710, 724.

[288] *Rookes v Barnard* [1964] AC 1129, 1166, 1182-1183.

[289] *Northern Territory v Mengel* (1995) 185 CLR 307, 342; *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] NSWLR 760, 766; *Latham v Singleton* [1981] 2 NSWLR 843; *Rookes v Barnard* [1964] AC 1129, 1208.

[290] *Latham v Singleton* [1981] 2 NSWLR 843, 867, 872; *Rookes v Barnard* [1964] AC 1129, 1206, 1209.

[291] *Rookes v Barnard* [1964] AC 1129, 1199-1200, 1206; *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] NSWLR 760, 767.

[292] *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] NSWLR 760, 768-769.

[293] *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211, 269; *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] NSWLR 760, 768; *Latham v Singleton* [1981] 2 NSWLR 843, 857-858; *Rookes v Barnard* [1964] AC 1129, 1168, 1182-1183, 1188, 1201, 1206, 1209, 1235; *Morgan v Fry* [1968] 2 QB 710, 724.

[294] *Rookes v Barnard* [1964] AC 1129, 1209.

[295] *Rookes v Barnard* [1964] AC 1129, 1172, 1208; *Latham v Singleton* [1981] 2 NSWLR 843, 861; *Morgan v Fry* [1968] 2 QB 710, 724.

[296] *Rookes v Barnard* [1964] AC 1129, 1167, 1205; *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] NSWLR 760, 768.

[297] *Lonrho v Fayed* [1990] 2 QB 479; Fleming JG, *The Law of Torts* (9th edn), (n255) p. 769.

[298] *Latham v Singleton* [1981] 2 NSWLR 843, 872.

[299] See, for example, *Morgan v Fry* [1968] 2 QB 710, 729; *Latham v Singleton* [1981] 2 NSWLR 843, 869; *Rookes v Barnard* [1964] AC 1129, 1206 (noting that the House of Lords did not consider the role of justification in the tort of intimidation). See also Fleming JG, 1998, *The Law of Torts* (9th edn), (n255) p. 768, who regards the part, if any, of justification in the tort of intimidation as an 'open question'.

[300] *Latham v Singleton* [1981] 2 NSWLR 843, 868.

[301] *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, 496; *Conway v Wade* [1909] AC 506, 511. See also *Glamorgan Coal Co Ltd v South Wales Minters' Federation* [1903] 2 KB 545, 574, applied to the tort of intimidation in *Latham v Singleton* [1981] 2 NSWLR 843, 869.

[302] Fox, C, Howard, WA and Pittard, M, 1995, *Industrial Relations in Australia: Development, Law and Operation*, Longman, Melbourne, (n 252) p.105. See, for example, *Stratford v Lindley* [1965] AC 269, 285.

[303] See *Stratford v Lindley* [1965] AC 269, 283, 305-306, 336; *Northern Territory v Mengel* (1995) 185 CLR 307, 350; *Rookes v Barnard* [1964] AC 1129, 1183, 1205. *James v Commonwealth* (1939) 62 CLR 339, 374 appears similar. Brooking J appeared to regard the question of whether the tort was available in the two party situation as open: see *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211, 265.

[304] *Williams v Hursey* (1959) 103 CLR 30, 122.

[305] *Lonhro v Shell [No 2]* [1982] AC 173, 188.

[306] As to the requirement of predominant intention, see *Williams v Hursey* (1959) 103 CLR 30, 105; *McKernan v Fraser* (1931) 46 CLR 343, 362, 399; *Latham v Singleton* [1981] 2 NSWLR 843, 857; *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211, 265. See also Fox, C, Howard, WA and Pittard, M, 1995, *Industrial Relations in Australia: Development, Law and Operation*, Longman, Melbourne, (n 252) p.105.

[307] *Williams v Hursey* (1959) 103 CLR 30, 123.

[308] See, for example, the two leading cases of *McKernan v Fraser* (1931) 46 CLR 343; *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435, 471, where conduct that demonstrably damaged the interests of an opponent of the relevant unions was held not to constitute the tort because it was undertaken to improve the industrial position of union members or to maintain union bargaining strength.

[309] *McKernan v Fraser* (1931) 46 CLR 343, 395-396, 402-405; Fleming JG, 1998, *The Law of Torts* (9th edn), (n255) p. 775.

[310] *Williams v Hursey* (1959) 103 CLR 30, 108-109, 127. Fox, C, Howard, WA and Pittard, M, 1995, *Industrial Relations in Australia: Development, Law and Operation*, Longman, Melbourne, (n 252) p.105.

[311] *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211, 264-265.

[312] *Williams v Hursey* (1959) 103 CLR 30, 76; *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211, 264.

[313] *Williams v Hursey* (1959) 103 CLR 30, 123.

[314] *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211, 264. See also *Lonrho Plc v Fayed* [1992] 1 AC 448.

[315] *Lonhro v Shell* [1982] AC 173.

[316] Fleming JG, 1998, *The Law of Torts* (9th edn), (n255) p. 777.

[317] *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, [69].

[318] *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] NSWLR 760, 767; *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383, 389; *Barloworld Coatings (Aust) Pty Ltd v Australian Liquor, Hospitality and Miscellaneous Worker's Union* (2001) 108 IR 107, [16].

[319] See, for example, *Australian Builders' Federation Union of Workers v J-Corporation Pty Ltd* (1993) 42 FCR 452, 461-462; *Caterpillar Australia Ltd v Gorman* [2000] VSC 267.

[320] *Barton v Armstrong* [1969] 2 NSWR 451.

[321] *Fontin v Katapodis* (1962) 108 CLR 177.

[322] See, for example, Balkin, RP, and Davis, JLR, 1996, *Law of Torts* (2nd edn), Butterworths, pp. 52-62; Trindade, FA, and Cane P, 1999, *The Law of Torts in Australia* (3rd edn), Oxford University Press, pp. 50-62.

[323] *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] NSWLR 760.

[324] *Plenty v Dillon* (1991) 101 CLR 635; *Maritime Union of Australia v Patrick Stevedores Operations Pty Ltd* [1998] 4 VR 143.

[325] *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383; *Patrick Stevedores Operations Pty Ltd v Maritime Union of Australia* [1998] WASC 120; *Hubbard v Pitt* [1976] QB 142.

[326] See, for example, *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] NSWLR 760, 767; *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383.

[327] See *Trade Practices Act 1974 (C'wth)* s45D; *Australian Builders' Federation Union of Workers v J-Corporation Pty Ltd* (1993) 42 FCR 452; *Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 477.

[328] See *Summary Offences Act 1966 (Vic)* s52(1A) which reflects the elements of the common law offence. See also *Crimes Act 1900 (NSW)* s545B; *Criminal Code Act 1899 (Qld)* ss543(1)(e), 543A; *Criminal Code (WA)* s338A. See also *Crimes Act 1914 (C'wth)* s30K (violence, threats or intimidation to compel or induce a person who is employed in the Commonwealth public service or in the area of interstate or overseas transport to surrender or depart from that employment).

[329] Creighton, B and Stewart, A, 2000, *Labour Law: An Introduction (*3rd ed), Federation Press, Sydney, p. 391.

[330] *Amcor Packaging (Australia) Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCA 127; *Auspine Ltd v Construction, Forestry, Mining & Energy Union* (2000) 97 IR 444; *Borgcraft Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*

[2000] FCA 1685; *Cadbury Schweppes Pty Ltd v Australian Liquor Hospitality and Miscellaneous Worker's Union* (2000) 106 FCR 148; *Hayman Reese a Division of Trimas Corp Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2001) 108 IR 433; *Shell Refining (Australia) Pty Ltd v Australian Workers' Union* [1999] VSC 297.

331 *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, [52].

332 *Coal and Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union* (1998) 80 IR 14 (AIRC). See also *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, [73].

333 *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, [71]-[76].

334 *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, [74].

335 *Workplace Relations Act 1996 (C'wth)*, s187AD(1).

336 *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, [66]; *Independent Education Union of Australia v Canonical Administrators* (1998) 87 FCR 49, 72-74.

337 See *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, [67], citing, among others, *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435, 466; *Miles v Wakefield Metropolitan District Council* [1987] 1 AC 539, 552, 561, 565, 574.

338 *Workplace Relations Act 1996 (C'wth)* ss170MI, 170MK.

339 *Workplace Relations Act 1996 (C'wth)* s170ML, which defines 'protected action'.

340 *Workplace Relations Act 1996 (C'wth)* s170ML. See also s170MI(3), which defines 'negotiating party' for the purposes of the Division.

341 *Workplace Relations Act 1996 (C'wth)* ss170MI(2), 170MJ.

342 *David's Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, [89]-[91].

343 *Workplace Relations Act 1996 (C'wth)* s170MT(2).

344 *Workplace Relations Act 1996 (C'wth)* s170MT(3).

345 *Workplace Relations Act 1996 (C'wth)* s170MT(1).

346 *Workplace Relations Act 1996 (C'wth)* s170MU(1).

347 *Workplace Relations Act 1996 (C'wth)* s170MU(2).

348 *Workplace Relations Act 1996 (C'wth)* s170MK.

349 *Workplace Relations Act 1996 (C'wth)* s170MV sets out when a bargaining period ends, which is when an agreement is made, when the party who initiated the bargaining period indicates that it no longer seeks and agreement, or when the AIRC terminates the bargaining period.

350 *Workplace Relations Act 1996 (C'wth)* s170MM.

351 *Workplace Relations Act 1996 (C'wth)* s170MN.

352 *Workplace Relations Act 1996 (C'wth)* s170MO.

353 *Workplace Relations Act 1996 (C'wth)* s170MP.

354 *Workplace Relations Act 1996 (C'wth)* s170MR.

355 *Workplace Relations Act 1996 (C'wth)* s170MW, listing a number of possible grounds.

356 *Workplace Relations Act 1996 (C'wth)* s170MS.

List of Appendices

Appendix 1:

Letters Patent dated 29 August 2001

ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO the Honourable Terence Rhoderic Hudson Cole RFD QC

WHEREAS it is desired to have an inquiry into certain matters relating to the building and construction industry:

BY these Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and pursuant to the Constitution of the Commonwealth of Australia, the *Royal Commissions Act 1902* and other enabling powers, We appoint you to be a Commissioner to inquire into and report on the following matters in relation to the building and construction industry:

(a) the nature, extent and effect of any unlawful or otherwise inappropriate industrial or workplace practice or conduct, including, but not limited to:

  (i) any practice or conduct relating to the *Workplace Relations Act 1996*, occupational health and safety laws, or other laws relating to workplace relations; and

  (ii) fraud, corruption, collusion or anti-competitive behaviour, coercion, violence, or inappropriate payments, receipts or benefits; and

  (iii) dictating, limiting or interfering with decisions whether or not to employ or engage persons, or relating to the terms on which they be employed or engaged;

(b) the nature, extent and effect of any unlawful or otherwise inappropriate practice or conduct relating to:

  (i) failure to disclose or properly account for financial transactions undertaken by employee or employer organisations or their representatives or associates; or

  (ii) inappropriate management, use or operation of industry funds for training, long service leave, redundancy or superannuation;

(c) taking into account your findings in relation to the matters referred to in the preceding paragraphs and other relevant matters, any measures, including legislative and administrative changes, to improve practices or conduct in the building and construction industry or to deter unlawful or inappropriate practices or conduct in relation to that industry.

ENTERED ON RECORD by me in Register of Patents No. 36 , page 39 , on 29 August 2001.

Secretary to the Federal Executive Council

AND We declare that, in these Letters Patent:

A reference to the 'building and construction industry' does not include the building or construction of single dwelling houses unless part of a multi-dwelling development;

A reference to 'practice or conduct' includes acts and omissions;

A reference to 'law' includes a law of the Commonwealth, a State or a Territory and the common law.

AND We declare that the Commission established by these Letters Patent:

(a) is a relevant Commission for the purposes of sections 4 and 5 of the *Royal Commissions Act 1902*; and

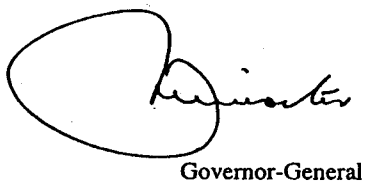
(b) is a Commission to which paragraph 16 (4) (k) of the *Income Tax Assessment Act 1936* applies.

AND We direct that you 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.

AND We require you as expeditiously as possible to make your inquiry and, not later than 6 December 2002, to furnish to Our Governor-General of the Commonwealth of Australia the report of the results of your inquiry and such recommendations as you consider appropriate.

WITNESS the Right Reverend Dr Peter John Hollingworth, Companion of the Order of Australia, Officer of the Most Excellent Order of the British Empire, Governor-General of the Commonwealth of Australia.

Dated 29. 8. 2001



Governor-General

By His Excellency's Command

Minister for Employment, Workplace Relations and Small Business
for the
Prime Minister

9620389

Appendix 2:

Amending Letters Patent

Letters Patent dated 5 December 2002

ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO the Honourable Terence Rhoderic Hudson Cole RFD QC

WHEREAS it is desired to amend the Letters Patent issued to you in relation to an inquiry into certain matters relating to the building and construction industry:

BY these Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and pursuant to the Constitution of the Commonwealth of Australia, the *Royal Commissions Act 1902* and other enabling powers, We amend the Letters Patent, dated 29 August 2001, appointing you to be a Commissioner to inquire into certain matters relating to the building and construction industry by omitting the words:

'not later than 6 December 2002,'

and substituting the words:

'not later than 31 January 2003,'

WITNESS the Right Reverend Dr Peter John Hollingworth, Companion of the Order of Australia, Officer of the Most Excellent Order of the British Empire, Governor-General of the Commonwealth of Australia.

Dated 5. 12. 2002

Governor-General

By His Excellency's Command

Prime Minister

ENTERED ON RECORD by me in Register of Patents No. 37, Page 33, on 5 December 2002.

Secretary to the Federal Executive Council

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Letters Patent dated 23 January 2003

ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO the Honourable Terence Rhoderic Hudson Cole RFD QC

WHEREAS it is desired to amend the Letters Patent issued to you in relation to an inquiry into certain matters relating to the building and construction industry:

BY these Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and pursuant to the Constitution of the Commonwealth of Australia, the *Royal Commissions Act 1902* and other enabling powers, We amend the Letters Patent, dated 29 August 2001, and amended by further Letters Patent dated 5 December 2002, appointing you to be a Commissioner to inquire into certain matters relating to the building and construction industry by omitting the words:

'not later than 31 January 2003,'

and substituting the words:

'not later than 24 February 2003,'

WITNESS the Right Reverend Dr Peter John Hollingworth, Companion of the Order of Australia, Officer of the Most Excellent Order of the British Empire, Governor-General of the Commonwealth of Australia.

Dated 23 January 2003

Governor-General

By His Excellency's Command

Minister for Transport and Regional Services
for the Prime Minister

ENTERED ON RECORD by me in Register of Patents No. 38, Page 1, on 23 January 2003

Secretary to the Federal Executive Council

Ex Co.Letters Patent 7/01/2003 10:58 a58/p58

Appendix 3:

List of general submissions

List of general submissions

- Air Conditioning and Mechanical Contractors' Association of Victoria Ltd
- Air Conditioning and Mechanical Contractors' Association of Western Australia (Inc)
- Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (known as the Australian Manufacturing Workers' Union)
- Australian Chamber of Commerce and Industry
- Australian Competition and Consumer Commission
- Australian Industry Group
- Australian Securities and Investments Commission
- Australian Taxation Office
- Building and Construction Council NSW Inc
- Chamber of Commerce and Industry of Western Australia (Inc)
- Civil Contractors Federation
- Commonwealth Government
- Construction Forestry Mining and Energy Union
- Grocon Pty Ltd
- Housing Industry Association Limited
- Institute of Public Affairs Ltd
- Master Builders Australia Inc
- National Electrical and Communications Association
- New South Wales Government
- Northern Territory Government
- Peregrine Management Group Pty Ltd
- Queensland Government
- Tasmanian Government
- Transfield Pty Ltd
- Western Australian Government

Appendix 4:

List of discussion papers

Discussion Paper 1: Overview of the Nature and Operation of the Building and Construction Industry

Discussion paper 1 described the building and construction industry and the businesses and organisations working within it. It drew upon literature relevant to the scope of the Commission's work in order to identify:

- the types of firms in the industry;
- the regulatory framework within which the industry functions;
- the role of building and construction, industrial and employer organisations and associations;
- the role of unions;
- the size of the industry, including the level of employment and public and private sector activity;
- the building and construction process, including the risks and contractual arrangements; and
- the parties in the industry's project delivery process.

The purpose of this discussion paper was to set out the background information relevant to addressing the issues identified in the Commission's terms of reference.

Discussion Paper 2: Statistical Compendium for the Building and Construction Industry

This discussion paper compiled some of the key building and construction industry statistics, particularly in the areas of industry and labour force data, published by the Australian Bureau of Statistics. Although much of the information related to the total construction industry the data provided a good background to the Commission's work and a reasonable indication of the characteristics of the industry.

Discussion Paper 3: Productivity and Performance in the Building and Construction Industry

Discussion paper 3 was prepared by the Research Unit with the assistance of Mr Gerard de Valence of Shoreday Proprietary Limited. Drawing on previous reviews and other information available to the Commission, this paper outlined a wide range of factors that affect productivity and performance in the industry. The paper looked at three aspects of productivity and performance that are directly linked to workplace relations issues:

- the competitive environment facing the building and construction industry and the impact this has on the various parties within the industry;
- the way processes and relationships have developed in the industry and the incentives this creates for parties to adopt productive and efficient approaches to work in the industry; and
- the specific industry practices that have developed and the impact these have on productivity.

Discussion Paper 4: Enterprise Bargaining Issues Facing the Building and Construction Industry

The concept of enterprise bargaining, in one form or another, has existed in Australia for many years. The last decade, in particular, has witnessed formal legislative structures specifically designed to embrace and promote enterprise bargaining.

The building and construction industry, because of the project nature of its work, involves multiple employers and employees working on different sites for short periods in a flexible and changing environment. There is a conflict in this industry between the need to co-ordinate the many and differing employer-employee relationships flowing from concurrent use of subcontractors in order to ensure the successful project outcome, and the preservation of employer-employee relationships formed and agreed off site.

This paper examined enterprise bargaining issues (including regulatory framework issues) facing the Australian building and construction industry. It examined pattern bargaining and the governmental response to it.

Discussion Paper 5: Key Features and Trends in the Building and Construction Industry

The Commission appointed ACIRRT, an academic and commercial research organisation based at the University of Sydney, to prepare a discussion paper to examine and assess the key features and trends in building and construction industry enterprise agreements. The paper examined the scope of agreement, award and other coverage in the building and construction industry. It identified key features of building and construction industry agreements held in ACIRRT's database. In particular, it focussed on similarities and differences in the contents of agreements between: jurisdictions; union and non-union agreements and Australian Workplace Agreements; and changes in agreements over time.

Discussion Paper 6: Workplace Health and Safety in the Building and Construction Industry

The workplace health and safety performance of the building and construction industry is clearly unacceptable. In the past, various bodies have reported on the health and safety performance of the building and construction industry. Drawing on these reviews and other information available to the Commission, discussion paper 6 outlined a range of factors that affect workplace health and safety in the industry. This paper was prepared by Barry Durham of PeopleD Ltd.

The primary objectives of this paper were to identify what prevents or impedes compliance with workplace health and safety requirements, and to raise for consideration strategies or issues which may improve the industry's workplace health and safety performance.

Discussion Paper 7: A History of Recent Industrial Relations Events in the Australian Building and Construction Industry

The Commission appointed the Commonwealth Scientific and Industrial Research Organisation (CSIRO) and a consultant, Michael Thompson, to prepare this discussion paper which provided a history of recent industrial relations events in the Australian building and construction industry. The discussion paper was a chronology of contemporary industrial relations events in the industry. Its purpose was to assist in placing current industrial relations events in their more immediate historical context.

The paper provided a brief examination of the period from 1970 to 1990. These years witnessed a number of events that had ramifications through subsequent years. The paper then provided a comprehensive chronology of industrial relations events in the industry from 1990 to 2002.

Discussion Paper 8: Codes of Practice for the Building and Construction Industry

Discussion paper 8 examined aspects of the National Code of Practice for the Building and Construction Industry, and the separate Codes established by the Governments of each State and Territory. The examination was intended to assist the Commission in its consideration of legislative and regulatory mechanisms applicable to the building and construction industry, and to assist in consideration of any necessary reforms.

Discussion Paper 9: Recent Reviews of the Building and Construction Industry

In preparing its final report, the Commission will consider the work of previous reviews that are relevant to its own areas of inquiry. It will consider why the recommendations of these reviews and the government action in response to them have not generated the outcomes expected. This Commission will need to consider how to achieve lasting change in the industry.

Discussion paper 9 summarised the following recent reviews and inquiries into the building and construction industry that were considered significant to the work of the Commission and outlined government responses to these inquiries:

- Industry Commission, Construction Costs of Major Projects, 1991;
- Construction Industry Development Agency, 1991 to 1995;
- The Gyles Royal Commission into Productivity in the Building and Construction Industry in New South Wales, 1992;
- Economic Development Committee, Inquiry into the Building and Construction Industry in Victoria, 1992 to 1994;
- Productivity Commission, Work Arrangements on Large Capital City Building Projects, 1999; and
- National Building and Construction Industry Council and the Commonwealth Building and Construction Industries Action Agenda, launched in 1999 and still being implemented.

Discussion Paper 10: Training Issues in the Building and Construction Industry

This discussion paper examined national training issues impacting on the building and construction industry, which were raised in recent research papers and in submissions and responses to the Commission's earlier discussion papers. An overview of the national training sector and the funding arrangements for the delivery of training in the building and construction industry was presented to provide context to these issues.

The paper focussed on the impediments to training in the industry, particularly those relating to national consistency and those leading to a decline in the number of entry-level positions. It identified potential policy initiatives that were being considered by the Commission to enhance training in the industry and provide a lever for improving productivity.

The Commission appointed Professor Ken Wiltshire AO of the University of Queensland Business School to referee discussion paper 10. He was contacted directly because of his extensive experience and knowledge of vocational education and training. This experience included being the former special advisor to the Australian National Training Authority.

Discussion Paper 11: Working Arrangements — Their Effects on Workers' Entitlements and Public Revenue

This discussion paper considered the coverage and enforcement of working arrangements in the building and construction industry that affect employee entitlements and public revenue. It discussed the various forms of engaging workers, the reasons for the high level of subcontracting and the significance of that level. It outlined the development of labour hire and attempts to regulate it.

The paper examined the problems that have been identified in the collection of public revenue and workers compensation premiums, underpayment of employee entitlements and superannuation, statutory remedies to prevent unfair treatment of contractors, phoenix companies and the employment of illegal migrant labour. It called for discussion on a uniform definition of employer and employee.

Discussion Paper 12: Security of Payments in the Building and Construction Industry

Discussion paper 12 provided a basis for feedback discussion on mechanisms to address the problems of security of payments to contractors. It looked briefly at the current State arrangements that apply to security of payments. It then outlined the issues that have already been raised with the Commission and presented a proposal for improving security of payments in the building and construction industry.

The paper proposed a model for Commonwealth legislation that the Commission was considering recommending.

Discussion Paper 13: Trade Practices Act Implications of Activity in the Building and Construction Industry

Certain practices within the building and construction industry may have implications for the enforcement of the *Trade Practices Act 1974 (C'wth)*. Discussion paper 13 analysed possible scenarios regarding industry agreements and statements of intent, boycotts, withholding of payments and requirements to make payments to specific funds. These scenarios were:

- the negotiation and agreement of statements of intent and industry agreements;
- coercion of subcontractors to sign pattern enterprise bargaining agreements (EBAs);
- boycotts by head contractors of subcontractors without union EBAs;
- the monopoly position of unions and employer organisations in negotiating pattern EBA agreements;
- boycotts that result from strike and picket action;
- withholding payments due to subcontractors;
- withholding or redirecting payments due to subcontractors at the insistence of a union, for example, to a superannuation fund when the subcontractor disputes that anything is owing; and
- requirements to make payments to particular superannuation, long service leave and redundancy funds.

Discussion Paper 14: Long Service Leave in the Building and Construction Industry

The arrangements for long service leave in the building and construction industry are different from the entitlements available to most workers. Discussion paper 14 reviewed the evolution of portable long service leave in the building and construction industry in Australia and raised questions about portable long service leave schemes. It considered the performance and management of the schemes; emerging issues for their effective and efficient management; and the extent of the differences in long service leave schemes in the building and construction industry.

Discussion Paper 15: Workplace Regulation, Reform and Productivity in the Building and Construction Industry

The Commission appointed Unisearch Ltd at the University of New South Wales to prepare discussion paper 15, which compared building and construction industry performance internationally and workplace reform strategies in several countries.

The paper found that while Australia is generally well placed in such international comparisons, building and construction industry performance is lagging behind other industries. The paper analysed construction industry reform case studies for three countries: Australia, the United Kingdom and Singapore and concluded that continued improvements in performance in the Australian building and construction industry are important for two reasons:

- the increasing global competition in construction services; and
- the aggressive attempts of other countries to make their own building and construction industries more internationally competitive.

The paper noted that reform was especially relevant for Australia given its location in one of the world's most dynamic economic regions. This posed special competitive challenges, risks and opportunities for both Australia generally and the industry specifically.

Discussion Paper 16: Demarcation Disputes in the Building and Construction Industry

Discussion paper 16 followed up on matters raised in discussion paper 3 on Productivity and Performance, in particular:

- the nature and cause of demarcation disputes in the building and construction industry;
- the impact demarcation disputes are having on all sections of the industry;
- the role and status of demarcation agreements between unions and the effectiveness of dispute settlement procedures; and
- deficiencies in the way such disputes are dealt with in the industry, including any comments on inadequacies in the existing legislation.

This discussion paper developed these issues in order to give interested parties the opportunity of contributing their views prior to the completion of the Commission's final report.

Discussion Paper 17: Productivity and the Building and Construction Industry

The Commission engaged Tasman Economics to prepare this discussion paper to review the industry's productivity and performance and identify the importance of productivity growth to the Australian economy.

The paper compared productivity in the building and construction industry with other Australian industries. It modelled the gains to the Australian economy of improving productivity in the building and construction industry. It analysed two scenarios:

- improving growth in building and construction industry labour productivity so it catches up with the market sector; and
- a 12 per cent wage rise in the building and construction industry linked to productivity growth.

The Commission also appointed Peter Crowley, from ACIL Economics, to referee discussion paper 17. Dr Crowley was contacted directly because of his extensive experience in applying several of Australia's general equilibrium models to various Australian Industries.

Discussion Paper 18: The Law Relating to Industrial Action in the Building and Construction Industry

The Commission appointed the Faculty of Law at Monash University to prepare this discussion paper which examined the law relating to industrial action in Australia.

The purpose of the paper was to detail Commonwealth and State statutory laws and the common law relating to industrial action and the right to strike in Australia. The paper examined the law relating to protest and picketing and essential services legislation and powers of emergency which regulate industrial action.

The paper concluded that the law relating to industrial action has had a varied history in Australia. The law has been shaped by the common law in both the United Kingdom and Australia; by federal and state industrial, and other, legislation; and by the jurisprudence of federal and state industrial relations tribunals and courts. This has resulted in an array of laws which impact on industrial action. These laws include legislation on industrial relations, trade practices, occupational health and safety and essential services and emergency, as well as criminal laws and the common law.

The discussion paper also contained an attachment which examined the right to strike in the context on international treaties and conventions. This included a discussion of Australia's obligations with respect to ratified conventions; an outline of relevant treaties and conventions; International Labour Organisation conventions and recommendations and interpretations within Australian law; implementation of treaties and conventions in Australia, and their interpretations in Australia. While these treaties and conventions are relevant, they are not binding in Australia unless incorporated into domestic law.

Appendix 5:

Entities responding to discussion papers

Entities Responding to discussion papers

Discussion Paper 1

Australian Industry Group

Construction Forestry Mining and Energy Union

Master Builders Australia Incorporated

Transfield Pty. Ltd.

Discussion Paper 2

Australian Industry Group

Master Builders Australia Incorporated

Transfield Pty. Ltd.

Discussion Paper 3

Australian Industry Group

Building Industry Specialist Contractors Organisation (BISCO Tasmania)

Commonwealth Government

Construction Forestry Mining and Energy Union

National Building and Construction Industry Training Council (Construction Training Australia)

Housing Industry Association Limited

Master Builders Australia Incorporated

Transfield Pty. Ltd.

Discussion Paper 4

Australian Industry Group

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union
(known as the Australian Manufacturing Workers' Union)

Construction Forestry Mining and Energy Union

Housing Industry Association Limited

Master Builders Australia Incorporated

Transfield Pty. Ltd.

Discussion Paper 5

Australian Industry Group

Commonwealth Government

Construction Forestry Mining and Energy Union

Master Builders Australia Incorporated

Discussion Paper 6

Australian Industry Group and Australian Constructors Association

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (known as the Australian Manufacturing Workers' Union)

Baulderstone Hornibrook Pty Ltd

Civil Contractors Federation

Chamber of Commerce and Industry of Western Australia (Inc)

Commonwealth Government

Construction Forestry Mining and Energy Union

Construction Industry Institute Australia Inc.

Housing Industry Association Limited

J & K Nominees Pty Ltd

Master Builders Association of Victoria

Master Builders Association of Western Australia

Master Builders Australia Incorporated

Master Painters Group Training Company Pty Ltd

Master Plumbers and Mechanical Services Association of Australia

Myles J. Whelan & Associates

National Electrical and Communications Association

Queensland Government

Queensland Department of Main Roads

Royal Australian Institute of Architects (WA Chapter)

South Australian WorkCover Corporation and Department of Administrative and Information Services

Tasmanian Department of Premier and Cabinet

Victorian Workcover Authority

Western Australian Department of Consumer and Employment Protection

Worksafe Western Australia Commission

Discussion Paper 7

Australian Industry Group and Australian Constructors Association

Civil Contractors Federation

Master Builders Australia Incorporated

Queensland Department of Main Roads

Discussion Paper 8

ACT Workcover

Australian Industry Group and Australian Constructors Association

Chamber of Commerce and Industry of Western Australia Inc

Civil Contractors Federation

Commonwealth Government

Construction Forestry Mining and Energy Union

Housing Industry Association Limited

Master Builders Association of Western Australia

Master Builders Australia Incorporated

Queensland Government

Queensland Department of Main Roads

Discussion Paper 9

Australian Building Codes Board

Australian Industry Group and Australian Constructors Association

Built Futures Communications Pty Ltd

Commonwealth Government

Master Builders Australia Incorporated

Tasmanian Government

Discussion Paper 10

Australian Industry Group and Australian Constructors Association

Civil Contractors Federation

Commonwealth Department of Education, Science and Training

Construction Forestry Mining and Energy Union

Construction Industry Training Advisory Board (NSW)

Construction Industry Training Board

Construction Industry Training Council (Inc) Qld (Construction Training Queensland)

Housing Industry Association Limited

Master Builders Australia Incorporated

Master Painters Group Training Company Pty Ltd

National Electrical and Communications Association

ACT Government

South Australian Department for Administrative and Information Services

South Australian Department of Transport and Urban Planning

Tasmanian Building and Construction Industry Training Board

Tasmanian Government

Discussion Paper 11

Australian Industry Group and Australian Constructors Association

ACT Workcover

Civil Contractors Federation

Commonwealth Government

Construction Forestry Mining and Energy Union

Housing Industry Association Limited

Independent Contractors of Australia

Master Builders Australia Incorporated

Professor Andrew Stewart, Faculty of Law, Flinders University

Queensland Government

South Australian Department of Transport and Urban Planning

Tasmanian Government

Main Roads Western Australia

Discussion Paper 12

Air Conditioning and Mechanical Contractors' Association of Victoria Ltd

Australian Construction Industry Forum

Australian Industry Group and Australian Constructors Association

AT Scurr MBE

Bovis Lend Lease Pty Limited

Building Industry Subcontractors and Consultants Organisation of Queensland Inc

Civil Contractors Federation

Commonwealth Government

Construction Forestry Mining and Energy Union

Housing Industry Association Limited

Leighton Contractors

National Electrical and Communications Association

Queensland Government

Tasmanian Government

Main Roads Western Australia

Discussion Paper 13

Air Conditioning and Mechanical Contractors' Association of Victoria Ltd

Australian Industry Group and Australian Constructors Association

Building Industry Subcontractors and Consultants Organisation of Queensland Inc

Commonwealth Department of Employment and Workplace Relations

Construction Forestry Mining and Energy Union

Housing Industry Association Limited

HR Nicholls Society Incorporated

Independent Contractors of Australia

Master Builders Association of Western Australia

National Electrical and Communications Association

Queensland Government

Tasmanian Government

Main Roads Western Australia

Discussion Paper 14

Australian Industry Group

Civil Contractors Federation

Commonwealth Department of Employment and Workplace Relations

Construction Forestry Mining and Energy Union

Master Builders Association of Western Australia

Queensland Government

Queensland Department of Main Roads

Stephen Brown

Tasbuild Limited

Tasmanian Government

Discussion Paper 15

ACT Workcover

Australian Industry Group and Australian Constructors Association

Commonwealth Government

Construction Forestry Mining and Energy Union

Master Builders Association of Western Australia

Discussion Paper 16

Australian Industry Group and Australian Constructors Association

Civil Contractors Federation

Commonwealth Department of Employment and Workplace Relations

Construction Forestry Mining and Energy Union

Housing Industry Association Limited

Master Builders Association of Western Australia

Queensland Government

Discussion Paper 17

Australian Industry Group and Australian Constructors Association

Civil Contractors Federation

Construction Forestry Mining Energy Union

Discussion Paper 18

Air Conditioning and Mechanical Contractors' Association of Victoria Ltd

Australian Industry Group and Australian Constructors Association

Commonwealth Government

Appendix 6:

Example memorandum of understanding with other organisations

ROYAL COMMISSION INTO THE BUILDING AND CONSTRUCTION INDUSTRY

MEMORANDUM OF UNDERSTANDING BETWEEN THE [NAME OF ORGANISATION] AND THE ROYAL COMMISSION INTO THE BUILDING AND CONSTRUCTION INDUSTRY REGARDING OPERATIONAL AND ADMINISTRATIVE ARRANGEMENTS

Objectives

1 This Memorandum of Understanding (Memorandum) constitutes an agreement between the [NAME OF ORGANISATION] and the Honourable TERENCE RHODERIC HUDSON COLE RFD QC, a member of the Royal Commission into the Building and Construction Industry (the Royal Commission) concerning co-operative operational and administrative arrangements to apply in relation to the performance of the respective roles of both organisations.

Functions

[NAME OF ORGANISATION]

2 Pursuant to [APPROPRIATE SECTION OF APPROPRIATE ACT], THE [NAME OF ORGANISATION] is required to:

(a) [SET OUT RELEVANT FUNCTIONS OF ORGANISATION];

3 Pursuant to [APPROPRIATE SECTION OF APPROPRIATE ACT], THE [NAME OF ORGANISATION] may liaise with, give information about criminal activity to, and receive information about criminal activity from, if the management committee approves, other entities, including entities outside the State or Australia.

4 Pursuant to [APPROPRIATE SECTION OF APPROPRIATE ACT], THE [NAME OF ORGANISATION] may enter into operational arrangements with other entities.

The Royal Commission

5 The functions of the Royal Commission by virtue of the *Royal Commissions Act 1902* (Cth) (the Royal Commissions Act) are making inquiry into and reporting upon any matter specified in the Letters Patent.

6 Subsection 6P(1) of the Royal Commissions Act relevantly provides that where a Royal Commission obtains information that relates, or may relate, to a contravention of a law, or evidence of a contravention of a law, of the Commonwealth, of a State or of a Territory, the Commission may, if in the opinion of the Commission it is appropriate to do so, communicate the information or furnish the evidence, as the case may be, to:

(a) The Attorney-General of a State; or

(e) the authority or person responsible for the administration or enforcement of that law.

7 The Royal Commission was established by Letters Patent signed on [DATE] to inquire into and report on the following matters:

[SET OUT TERMS OF REFERENCE]

Cooperation and coordination

8 In performing their functions under their respective Acts, the [ORGANISATION] and the Royal Commission shall, so far as is practicable, work in cooperation with each other.

9 The [ORGANISATION] and Royal Commission agree that:

(a) both organisations will ensure that each is briefed at [specify level of briefing] on a regular basis, and not less than quarterly, on areas of mutual interest, including the ambit and nature of current investigations relevant to both parties;

(b) both organisations undertake to advise each other of areas of interest in matters which have the potential to duplicate or overlap with the other organisation's areas of interest or investigations;

(c) where advice has been provided by either the [ORGANISATION] or the Royal Commission in accordance with paragraphs (a) and (b), both organisations will cooperate to avoid areas of duplication or overlap;

(d) they will share information in accordance with paragraph 9 below;

(e) the [ORGANISATION] will, where practicable, provide support to the Royal Commission (including the use of its powers of investigation, and joint investigations arranged and coordinated by its management committee) in those investigations undertaken by the Royal Commission which involve matters within the statutory responsibilities of the [ORGANISATION];

(f) the Royal Commission will, where practicable, provide support to the [ORGANISATION] on investigations of mutual interest; and

(g) notwithstanding these arrangements, the [ORGANISATION] and the Royal Commission each recognise the other's capacity to enter into investigative arrangements with other agencies on matters of mutual interest, independently of the other.

10 This Memorandum does not:

(a) restrict the exercise of the legislative or operational responsibilities of the Royal Commission under the Royal Commissions Act; or

(b) restrict the exercise of the legislative or operational responsibilities of the [ORGANISATION] under the [APPROPRIATE ACT].

Exchange of Information

11 The [ORGANISATION] and the Royal Commission recognise that the proactive exchange of information and intelligence is necessary for both organisations to achieve their maximum potential. As a result:

(a) the [ORGANISATION] undertakes:

(i) to consider, on no less than a monthly basis, disseminating to the Royal Commission any information and intelligence in its possession that is, or may be relevant to the Royal Commission's inquiry;

(ii) to disseminate to the Royal Commission any information or intelligence that the [ORGANISATION] decides it is appropriate to disseminate, unless prevented from doing so by any legislative constraints, or by restrictions imposed by the source of the relevant information or intelligence;

(iii) not to make public any information, evidence, document or thing provided to it by the Royal Commission without first obtaining the prior approval of the Royal Commission;

(b) the Royal Commission undertakes:

(i) that it will consider:

- on at least a monthly basis, whether any information, evidence, document or thing in the possession of the Royal Commission that it is proposed to release to the [ORGANISATION], is relevant or may relate to an investigation being conducted by the [ORGANISATION]; and
- whether it is appropriate to communicate any such information or furnish any such evidence, document or thing to the [ORGANISATION] or to the Attorney General of [RELEVANT JURISDICTION] as may be appropriate having regard to section 6P of the Royal Commissions Act.

(ii) that it will communicate any information and furnish any evidence, document or thing to the [ORGANISATION] if the Commissioner considers it appropriate to do so, unless prevented from doing so by any legislative constraints, or by restrictions imposed by the source of the relevant criminal information or intelligence;

(iii) that it will abide by any conditions imposed upon it in relation to the use of criminal information and intelligence provided to it by the [ORGANISATION].

Media

12 In cases where both the [ORGANISATION] and the Royal Commission are jointly involved in an investigation, the organisation having the lead role shall be responsible for the release of information to the media.

13 No information is to be provided without agreement on release by both organisations. Releases, where made, must be in accordance with pre-trial publicity guidelines and adequately reflect the contribution made by each organisation.

Disputes

14 Where there is any disagreement over any matter related to issues covered in this Memorandum such issues must be resolved at the level of the Royal Commissioner in respect of the Royal Commission, and the [MOST SENIOR POSITION] of the [ORGANISATION].

Variations

15 Any variation or amendment to this Memorandum must be made in writing and formally agreed to by both the [ORGANISATION] and the Royal Commission.

Review and liaison

16 The effectiveness of this Memorandum will be reviewed 12 months after the date on which it is signed. An informal review process will be agreed between the [ORGANISATION] and the Royal Commission.

17 Communication on any aspect of this Memorandum will be between Liaison Officers nominated by each organisation.

Timeframe

18 This Memorandum will take effect from the date of signing and shall remain in place, as amended from time to time, until [REPORT DATE], unless:

(a) the term of the Memorandum is extended by a written document signed by both the [ORGANISATION] and the Royal Commission; or

(b) there is a significant alteration in the circumstances underlying the Memorandum, in which case, it shall lapse immediately.

Joint responsibilities

19 This Memorandum is to be widely circulated within the [ORGANISATION] and the Royal Commission to ensure that members of both organisations are aware of the Memorandum and their respective responsibilities.

Signed and dated on {date}	Signed and dated on {date}
	The Honourable TRH COLE RFD QC
[Head of Organisation]	Commissioner
[Name of Organisation]	Royal Commission in the Building and Construction Industry

Appendix 7:

The First Practice Note

PRACTICE NOTE
10 DECEMBER 2001

HEARING ADMINISTRATION

1. The Commission proposes to sit from Monday to Thursday each week, and usual hearing hours will be from 10.00 am to 1.00 pm, and from 2.00 pm to 4.00 pm.

2. The Commission's proceedings will be as orderly and expeditious as possible. The Commission will endeavour to ensure that those who may be adversely affected by the evidence are treated fairly, while protecting confidentiality where that is appropriate.

3. The Commission accepts no obligation to notify persons, organisations or corporations (hereinafter referred to as "persons") with authorisation to appear or other interested parties of the times and places of its hearings. Details of the public hearings arranged from time to time can be obtained by inquiries of the Commission's Media Liaison Officer, Mr Rick Willis, whose telephone number is 8633 0111 or from the Commission's website at www.royalcombci.gov.au.

   However, a person who, in the opinion of Counsel Assisting the Commission, may be substantially and directly interested in evidence to be produced to the Commission at a hearing will, if practicable, be notified prior to that hearing of the fact that it is proposed to produce the evidence to the Commission.

4. Subject to the control of the Commission, Counsel Assisting the Commission will determine what witnesses are called, what documents are tendered to the Commission, and in what order they will call and examine witnesses.

5. The details of evidence to be produced to the Commission will not be published in advance of the hearing at which it is produced and generally will not be opened before it is called.

   However, a person who, to the prior knowledge of Counsel Assisting the Commission, will be the subject of adverse evidence given before a public hearing of the Commission will, if practicable, be notified of that fact before that hearing, with such particulars, if any, as are considered appropriate by Counsel Assisting the Commission, or will, if practicable, be notified as soon as reasonably convenient thereafter and provided with a copy of the material portion of the transcript, or such particulars, if any, as are considered appropriate by Counsel Assisting the Commission, and will be given an opportunity to contest that evidence, if the person so requests.

AUTHORISATION TO APPEAR BEFORE THE COMMISSION

6. Persons may be authorised to appear before the Commission. That authorisation may be withdrawn by the Commissioner, or made subject to altered or additional limitations or conditions at any time.

7. Such authorisation to appear entitles the person to whom it is granted to participate in the proceedings of the Commission, subject to the Commission's control and to such extent as the Commission considers appropriate. In particular, the Commission may:

   (a) limit the particular topics or issues upon which the person may examine and cross-examine;

   (b) impose time limits upon examination and cross-examination;

   (c) require that submissions be presented in writing only.

8. Counsel for all persons given authorisation to appear shall give advance notice of any legal issues which they propose to raise. Counsel Assisting will likewise advise other counsel if it appears to them that questions of law may arise in particular situations.

APPLICATION FOR WITNESS TO APPEAR BEFORE THE COMMISSION

9. All witnesses will be called by Counsel Assisting the Commission. Any person wishing to have evidence of a witness or witnesses placed before the Commission is to notify Senior Counsel Assisting the Commission of the names of all such witnesses, and provide a signed statement of their expected evidence, if possible in the form of a statutory declaration. Counsel Assisting or Commission staff may interview such witnesses and take further statements from such witnesses, if considered necessary. It is not necessary that any such interviews or the obtaining of such additional statements occur in the presence of the person, or legal representatives thereof, who sought to have the evidence of such witnesses placed before the Commission. The orderly conduct of the Commission will be greatly facilitated if this evidence is made available without delay.

10. Application may be made directly to the Commissioner to call witnesses or place documentary material before the Commission only in the following circumstances:

   (a) Application has been made to Senior Counsel Assisting to call such witness or tender such documents which application has been refused;

   (b) Thereafter, the applicant has given to Senior Counsel Assisting written notice of the reasons why such witnesses' evidence or documentary material should be placed before the Commission.

   (c) Either:

      (i) Senior Counsel Assisting has reaffirmed his decision not to place the evidence before the Commission; or

      (ii) Two working days have passed since the notice referred to in (b) has been received by the Commission without response from Senior Counsel Assisting.

11. Where a witness has been introduced to the Commission by a person authorised to appear before the Commission, an attempt will be made to give that person reasonable advance notice of the calling of that witness.

EXAMINATION AND CROSS-EXAMINATION OF WITNESSES

12. Any witness who is legally represented who has been examined (including cross-examination) by Counsel Assisting the Commission may next be examined by his or her own legal representative and then cross-examined by or on behalf of any person considered by the Commission to have sufficient interest in so doing. The witness's own legal representative and finally Counsel Assisting the Commission may re-examine. At all times, duplication and repetition is to be avoided.

13. A copy of any document proposed to be put to a witness in cross-examination must be provided to Counsel Assisting the Commission as soon as possible after a decision is made to use the document for this purpose, and in all cases prior to its intended use.

CONFIDENTIALITY

14. Procedures will be implemented by the Commission to ensure that confidentiality is maintained with respect to the identity of persons who assist the Commission, and the information and documents which they provide, insofar as this is appropriate and consistent with the discharge of the Commission's functions. Any person who feels particular concern in this area may communicate his or her concern directly to Counsel Assisting the Commission for determination.

15. The Commission will so far as possible conduct hearings in public. However, the names and identifying details of informants, minors, and witnesses who show a legitimate need for protection will not be made public, unless the publication of such evidence is needed for some other sufficient reason, such as to alert potential sources of significant information to the possibility that they can assist the Commission. Evidence which suggests that the person who has otherwise been identified, whether or not as a witness, has acted as an informant will not be made public. Other evidence which cannot be made public as a matter of course includes evidence of activities which cannot be notified to criminals without serious community detriment, such as prejudice to ongoing covert police operations, police intelligence, police methods of investigation, or evidence which would prematurely release details of the Commission's own information and inquiries.

16. In respect of all oral and documentary evidence, the following practices will apply until vacated or varied either generally or in respect of particular evidence or categories of evidence:

    (a) The testimony of any witness given in public session before the Commission may be published unless an order is made prohibiting the publication of particular evidence;

    (b) No person may take or obtain a copy of any book, document or writing tendered in evidence before the Commission, except by leave, and then only subject to the condition that it not be used or be permitted to be used except for the purpose of appearance before the Commission. Any application for leave to obtain a copy of an exhibit should be made in writing to the Solicitor for the Commission.

    (c) Any person or the legal representative for that person having been authorised to appear before the Commission may inspect and take extracts from any book, document or writing tendered in evidence for the purpose only of appearance before the Commission.

(d) For the purpose of and to the extent necessary for the public reporting of the proceedings of the Commission, any authorised media representative may inspect and take extracts from any book, document or writing tendered in evidence after it has been notified as available for inspection by Counsel Assisting the Commission, subject to the conditions that:

(i) it not be used or permitted to be used for any purpose other than the public reporting of the proceedings of the Commission; and

(ii) any part of the contents thereof indicated by Counsel Assisting the Commission as unsuitable for publication not be published without the leave of the Commission, which can be sought if, for example, there is a restriction which is believed to obstruct proper reporting of any matter of significance. Any application for leave should be made in writing, in the first instance, to the Solicitor for the Commission via the Media Relations Officer of the Commission.

ADDRESSING THE COMMISSION AND SUBMISSIONS

17. At the conclusion of the evidence, it will be decided who will have the right to address the Commission, on what issues and in what order and whether by way of written submission or otherwise.

18. It is presently intended that submissions will be received immediately after the conclusion of evidence in each State or Territory. Specific directions regarding submissions will be given as appropriate. The Commission will, after considering the written submissions from Counsel Assisting and other persons, decide if oral submissions are required.

VARIATION OF PRACTICES

19. The Commission reserves the right at any time to vary the above practices.

Appendix 8:

The Second Practice Note

Royal Commission into the Building and Construction Industry

PRACTICE NOTE No 2

ACCESS TO THE ROYAL COMMISSION'S DATABASES AND MATTERS RELATING TO PROCEDURES AT HEARINGS

This practice note describes the facilities which will be available to authorised persons, organisations or corporations (hereinafter referred to as 'persons') and addresses procedures to be followed in relation to the provision and calling of evidence contrary to that initially called by Counsel Assisting, and aspects of cross examination.

COURTBOOK

1. Ringtail CourtBook is the Commission's hearing database that will operate, in effect, as an electronic court bundle. It will also house exhibits and transcript. It is presently proposed that it will contain the following sections:

   - Documents identified for tender (including statements) which, until tender, will be subject to a confidentiality regime (see paragraph 17);
   - Exhibits (including statements once tendered);
   - Realtime transcript ("Today's Pages" tab);
   - Edited transcript ("Transcript" tab); and
   - Exhibit and MFI lists with hypertext links ("Folders" tab).

2. CourtBook will be made available to persons authorised to appear before the Commission and to the persons referred to in subparagraphs 3(a) - (m) below, on application to the Solicitor to the Commission for log-on access.

3. CourtBook will also be made available to:

   (a) each State Government not authorised to appear before the Commission;

   (b) The Australian Constructors Association and each of its members;

   (c) The Australian Workers' Union (AWU);

   (d) The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU);

   (e) Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU);

   (f) Construction, Forestry, Mining and Energy Union (CFMEU);

(g) Australian Building & Construction Workers' Union (AB&CWF);

(h) Construction, Mining, Energy, Timberyards, Sawmills & Woodworkers' Union of Australia – Western Australian Branch (CMETU);

(i) Victorian Trades Hall Council;

(j) Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees (BLF(Q));

(k) Construction, Forestry, Mining and Energy Union – NSW Branch (CFMEU NSW);

(l) authorised media representatives; and

(m) any other person or corporation authorised by the Commissioner to have access to it.

4. CourtBook will be available to the persons described in paragraphs 2 and 3 above both inside the hearing room and, via a dial-in facility, outside the hearing room.

TENDERING DOCUMENTS

5. The process for tendering documents will be as follows:

(a) Documents tendered will primarily be documents already included in CourtBook which will be flagged in the database as exhibits once tendered.

(b) It will be possible for documents to be displayed on the data projectors and on the individual computer screens in the hearing room by way of a document camera and a video distribution system. At the conclusion of the day, these documents will be imaged and uploaded to CourtBook.

(c) Where possible, there will be a process for editing witness statements and exhibits to take account of rulings on admissibility. Edited versions will be placed on CourtBook.

(d) Where possible, documents referred to in witness statements will be hyperlinked, as will documents referred to in transcript.

TRANSCRIPT

6. Transcript of the Commission's public hearings will be available in read only form via CourtBook and in Word, ASCI or PDF form by request in accordance with the Commission's Transcript Policy via the Transcript Application Form.

7. Three versions of transcript will be published:

(a) Realtime transcript, which is unedited, and which it is proposed will become available on CourtBook during hearings.

(b) Edited transcript, which is revised by the Commission's transcript contractor and revised by the Commission *for confidentiality issues only*, and which it is proposed will become available on CourtBook by close of business on each hearing day.

(c) Authorised transcript, which is revised by the Commission, which will be held by the Commissioner's Associate.

8. The process for correction of transcript will be as follows:

   (a) Corrections to the "edited transcript" should be sought by notice in writing to the Commissioner's Associate. Those applications will be dealt with administratively, that is, the party seeking the correction will be notified of the Commissioner's determination by his Associate.

   (b) The Commissioner will not entertain applications for transcript corrections during hearings except in exceptional circumstances.

WEB-SITE

9. The Commission's website www.royalcombci.gov.au is available to all members of the public via the internet. The website will include:

   - Terms of Reference
   - Media Releases
   - Information about the Royal Commissioner and Counsel Assisting
   - Hearings
   - Contact Information

WITNESSES

10. Where possible, and subject to Counsel Assisting the Commission deciding otherwise, the proposed order in which witnesses are to give evidence and the statement of each witness will be included in CourtBook before the witness is called to give evidence.

11. When a witness is called by Counsel Assisting the Commission to give evidence, the witness will be asked to adopt his or her witness statement and such statement may be expanded upon as necessary. The hearing of the evidence of that witness will be adjourned prior to any cross-examination.

12. Persons other than Counsel Assisting will not be permitted to cross-examine such witness unless and until they have provided to Counsel Assisting a signed statement of evidence advancing material contrary to the evidence of that witness. Any person providing such a statement will be called by Counsel Assisting and asked to adopt that statement and will be examined by Counsel Assisting.

13. Counsel Assisting the Commission and any person with a demonstrated sufficient interest to do so, and granted leave by the Commissioner, may cross-examine each witness. Cross-examination will be limited to the matters in dispute, and may otherwise be restricted by the Commissioner in accordance with the power conferred by Section 6FA of the *Royal Commissions Act* 1902.

14. When a witness has adopted the whole or part of a witness statement, then those parts which have not been challenged by cross-examination, may be accepted by the Commissioner as an accurate statement of fact or opinion, if he considers it appropriate to do so.

15. Two of the purposes of publishing this Practice Note are to enable those persons referred to in paragraphs 2 and 3 above to follow and analyse the evidence given at the public hearings of the Commission, and to provide to the Commission evidence in the form of statements or documents relating to material placed before the Commission which the person considers to be adverse to such person.

DIRECTION NOT TO PUBLISH

17. Pursuant to paragraph 6D(3)(b) of the *Royal Commissions Act* 1902 and pending further direction, I, The Honourable Terence Rhoderic Hudson Cole, RFD, QC, the Commissioner established under Letters Patent dated 29 August 2001, direct that:

    (a) Until their tender, the contents of documents placed into CourtBook are not to be published to any persons other than persons to whom the Commission has granted log-on access to CourtBook as recorded in a register of such persons kept by the Commission, and are not to be used for purposes other than in connection with the proceedings of the Royal Commission.

    (b) Persons who are granted log-on access to CourtBook are not to make available their log-on details to other persons who have not been granted log-on access to CourtBook or otherwise facilitate persons who have not been granted log-on access to CourtBook obtaining access to CourtBook.

CONFLICT

18. Insofar as there may be any conflict between this Practice Note and the Practice Note published on 10 December 2001, then this Practice Note prevails.

DATED 19 December 2001

……

The Honourable TRH Cole RFD QC
Commissioner

Appendix 9:

Example notice to produce

Notice No. N

COMMONWEALTH OF AUSTRALIA

Royal Commissions Act 1902

NOTICE TO PRODUCE DOCUMENTS
TO THE COMMISSION INQUIRING INTO
THE BUILDING AND CONSTRUCTION INDUSTRY

To [*insert name of person and address*]

In pursuance of sub section 2 (3A) of the Royal Commissions Act 1902, I, The Honourable TERENCE RHODERIC HUDSON COLE RFD QC, a member of the Commission established under Letters Patent dated 29th of August 2001 to inquire into and report on the following matters in relation to the building and construction industry*:

(a) the nature, extent and effect of any unlawful or otherwise inappropriate industrial or workplace practice or conduct, including, but not limited to:

  (i) any practice or conduct relating to the Workplace Relations Act 1996, occupational health and safety laws, or other laws relating to workplace relations; and

  (ii) fraud, corruption, collusion or anti-competitive behaviour, coercion, violence, or inappropriate payments, receipts or benefits; and

  (iii) dictating, limiting or interfering with decisions whether or not to employ or engage persons, or relating to the terms on which they be employed or engaged;

(b) the nature, extent and effect of any unlawful or otherwise inappropriate practice or conduct relating to:

  (i) failure to disclose or properly account for financial transactions undertaken by employee or employer organisations or their representatives or associates; or

  (ii) inappropriate management, use or operation of industry funds for training, long service leave, redundancy or superannuation;

(c) taking into account my findings in relation to the matters referred to in the preceding paragraphs and other relevant matters, any measures, including legislative and administrative changes, to improve practices or conduct in the building and construction industry or to deter unlawful or inappropriate practices or conduct in relation to that industry.

AND 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

HEREBY REQUIRE YOU:

to produce this notice and the documents and other things described in the Schedule, annexed hereto and marked with the letter 'A',

to [*insert name of person to receive the documents*]

at [*insert time*] on [*insert date*]

at [*insert address*]

Dated this day of 2002

……....
The Honourable Terence R H Cole RFD QC
Commissioner

***For the purposes of the inquiry a reference to the 'building and construction industry' does not include the building or construction of single dwelling houses unless part of a multi-dwelling development.**

Section 3 of the *Royal Commissions Act 1902* creates obligations for a person served with a notice under section 2 to produce documents or other things before the Commission. Under section 3 a person who contravenes any of the subsections is guilty of an offence punishable upon conviction by a fine not exceeding $1000 or imprisonment for a period not exceeding 6 months.

Annexure 'A'

SCHEDULE

1. [*Details of documents to be produced*]

For the purposes of this notice, the term "document" includes:

(a) any paper or other material on which there is writing;

(b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and

(c) any article or material from which sounds, images or writings are capable of being reproduced

Dated this day of 2002

……..……..
The Honourable Terence R H Cole RFD QC
Commissioner

Appendix 10:

Example statement of rights and obligations accompanying notice to produce

STATEMENTS OF RIGHTS AND OBLIGATIONS OF A PERSON SERVED WITH A NOTICE UNDER THE *ROYAL COMMISSIONS ACT 1902*

1 A person served with a notice pursuant to subsection 2(3A) must not refuse or fail to produce a document or thing that the person is required to produce in accordance with the notice: s 3(4)

The penalty for this offence is a fine of $1000 or imprisonment for 6 months.

2 Subsection 3(5) provides that subsection (4) does not apply if the person has a reasonable excuse.

3 Subsection 3(6) provides that it is a defence to a prosecution for an offence under subsection (4) if the documents or thing is not relevant to the matters into which the Commission is inquiring.

4 Pursuant to subsection 6A(1), it is not a reasonable excuse for the purpose of subsection 3(5) for a person to refuse or fail to produce a document or other thing on the ground that such production might tend to:

(a) incriminate the person; or

(b) make the person liable to a penalty

5 Subsection 6A(1) does not apply to the refusal or failure to produce a document or thing if:

(a) the production might tend to incriminate the person in relation to an offence or make the person liable to a penalty; and

(b) the person has been charged with that offence, or proceedings in respect of the penalty have commenced; and

(c) the charge, or penalty proceedings, have not been finally dealt with by a court or otherwise disposed of: s6A(3), (4).

6 Pursuant to subsection 6D(3), the Commissioner may direct that the contents of any document, or a description of any thing, produced under a notice served pursuant to subsection 2(3A), shall not be published, or shall not be published except in such manner, and to such persons, as the Commission specifies.

The penalty for the offence of failing to comply with a direction, is, on summary conviction, a fine not exceeding $2000 or imprisonment not exceeding 12 months.

7 The production of a document or other thing by a person pursuant to a notice is not admissible in evidence against the person in any civil or criminal proceedings in any court of the Commonwealth, a State or a Territory, except in proceedings for an offence against the *Royal Commissions Act 1902:* s6DD.

8 Pursuant to subsection 6F(2), where the retention of a document or other thing by the Commission ceases to be reasonably necessary for the purposes of the inquiry to which the document or other thing is relevant, the Commission shall, if a person who appears to the Commission to be entitled to the document or other thing so requests, cause the documents or other thing to be delivered to that person unless the Commission has furnished the document or other thing to a person or body referred to in subsections 6P(1), (2) or (2A).

9 Pursuant to subsection 6K(1), a person commits an offence if:

(a) the person acts or omits to act; and

(b) this results in a document or other thing being concealed, mutilated, destroyed, or being made unidentifiable, or, in the case of documents, rendered illegible or indecipherable; and

(c) the person knows, or is reckless as to whether, the documents or thing is or may be required in evidence before the Commission; or the person has been, or is likely to be, required to produce the document or thing pursuant to the notice.

This is an indictable offence, which is punishable on conviction on indictment by imprisonment for a period not exceeding 2 years or by a fine not exceeding $10,000, or, on summary conviction, by imprisonment for a period not exceeding 12 months, or by a fine not exceeding $2000.

Appendix 11:

Hearing calendar

Hearing calendar

(not including initial sittings held in each capital city in the period 10-24 October 2001)

1.1 Hearing days: Dates and locations

Month	State	Sitting Date(s)
2001		
December	Victoria	10-14
2002		
January	Queensland	14-17, 21-25, 29-31
February	Queensland	1, 4-5
	Victoria	6-7, 12-14, 18-21, 25-28
March	Victoria	1
	Tasmania	4-7, 12-14
	Western Australia	18-21, 25-28
April	Western Australia	2-5, 8-11
	Queensland	15-19, 22-24
May	Victoria	3, 6, 13-15, 17, 20-24, 27-30
June	New South Wales	3-7, 11-13, 17-21, 24-28
July	New South Wales	1-5
	Victoria	19
	Western Australia	22-26, 29-31
August	Western Australia	1-2
	Queensland	5-9
	Victoria	12-16
	New South Wales	19-23, 26-30
September	Victoria	2, 6, 19-20, 23-27
	New South Wales	9
	South Australia	10-11
	Northern Territory	13,16
October	Western Australia	1-3
	Victoria	7-9, 11, 14-18

1.2 Hearing days: Total by State

State	Total Sitting Days
Victoria	58
New South Wales	34
Queensland	28
Western Australia	29
South Australia	2
Northern Territory	2
Tasmania	7

Appendix 12:

List of witnesses

List of witnesses

Surname	First Names	Title
Abbott	Michael Charles	Plumber, Mick Abbott Plumbing Pty Ltd
Ackerley	Steven	General Manager, Ackerley Plumbing Pty Ltd
Aird	Alan	Labourer
Akins	Barry John	Mechanic, Tiwi Site, RUB Pty Ltd
Alexopoulos	George	Director, J A Concreting [Mitchell Street development]
Ali	Mohammad	Civil engineer, JR Silva concrete [director, Hitex concrete Pty Ltd]
Allan	Donald Leslie	Director of the Industrial Policy Unit in the Building Division of the Queensland Department of Public Works
Allen	John Barry	General Manager, Elegant Landscapes Pty Ltd
Amarant	Gerard Francis	Shop Steward, Elecraft Pty Ltd
Amos	John Anthony	Director, Zadro Constructions Pty Ltd
Anderson	Ian Frederick	Owner, RMB Metalwork Pty Ltd
Anderson	Mark Anthony	Director, Jay Star Investments, trading as Dependable Roofing and Tierson's Metal Industries
Anderson	Warren Perry	Principal, Anderson Formrite Pty Ltd
Andrews	Donna Marie	Contract and Administration Manager for Graham Andrews Builders Pty Ltd
Ann Le Courteur	Pennelope	Co-author of the Review of Employers' Compliance with Workers Compensation Premiums and Payroll Tax in New South Wales
Antic	Slavica Sava (Sue)	Employee, Moss Lake Drilling [previously employee, Eurest Murrin Murrin]
Appleby	Paul Christopher	General Manager, Crown International Holdings
Argent	Norman George	Executive Director of the Air Conditioning and Mechanical Contractors Association of NSW Ltd
Arthur	Leslie William	Chief Project Manager, FKP Constructions Pty Ltd
Arthy	Kareena Maree	Director Research Planning and Reporting, ANTA
Ashman	Leigh	Chairman, Building Employees Redundancy Trust (BERT)
Atkins	Christopher	Executive Director of the Master Builders Association of Tasmania Inc
Auld	Stephen J	Principal, Auld Constructions Pty Ltd
Auty	William	Police Inspector, Mirrabooka Police Complex, WA
Axam	Stephen James	Project Manager, Leighton Contractors Pty Ltd
Baird	Robert Irvine	Acting Director Business Practices, Infrastructure Division, Department of Defence
Baker	Matthew Dirk	Project Manager, Stuart Pty Ltd
Baker	Warren Michael	Organiser, The Australian Workers' Union, Greater NSW Branch

List of witnesses *continued*

Surname	First Names	Title
Baker	Christopher Joseph John	Crane co-ordinator and rigging foreman, CBI Constructions Pty Ltd
Ball	Andrew Clifford	Sole Trader, Ingleside Bricklaying
Banks	Kenneth Gregory	Sales Representative [previously Construction Manager, John Holland Pty Ltd]
Barker	Peter William	Electrical Estimator and Project Manager
Barker	Fay Lorraine	Deputy Chair, Townsville Chamber of Commerce
Barlow	Graeme	Delegate, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Plumbing Division, Victorian Branch. Employed by Tullamarine Plumbing
Barlow	William George	Group Manager, Property Acquisition Group
Barrios	Jose Mario	Delegate and Trustee, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch. Employed as a construction worker by Multiplex Constructions (NSW) Pty Ltd
Bassett	Stephen	Sole Director and Shareholder, Klesteel
Bates	Craig Rodney	Builder [previously Assistant Secretary, NSW Branch, Construction and General Division, CFMEU]
Bates	Russell	Site Manager, Hansen Yuncken Pty Ltd [Victorian Institute of Forensic Mental Health]
Battaglia	Joe	Director, Joe Battaglia Pty Ltd
Battaglia	Roberta Rosina	Secretary, Joe Battaglia Plastering Pty Ltd
Beacom	Allan Edward	Executive Officer, Construction Industry Program Division, Victorian Workcover Authority
Beattie	Mark Timothy	Managing Director, B and B Merino Pty Ltd [Portal Community Business Centre site]
Becerra	Christian Jorge	Business Development Manager, Civil Management Group Pty Ltd
Bechara	Raymond Youseff	Company Director, Deemah Marble and Granite Pty Ltd
Beck	Andrew David	Development Project Manager, Ross Neilson Properties Pty Ltd
Becker	Peter Hermann	Safety Training Officer, Master Builders Association NSW
Beckett	Grant David	Site Manager, Baulderstone Hornibrook Pty Ltd
Bekavac	Jack Jacob	Union Official, BLF
Bell	Gordon Douglas	Construction manager, Anderson Formrite Pty Ltd
Benjamin	Jeffrey	Contracts Administrator, Abigroup Contractors
Benkesser	Robert Anthony	Builders Labourer, Floreat Forum redevelopment

List of witnesses *continued*

Surname	First Names	Title
Benson	Anthony Ross	Branch Secretary, Construction, Forestry, Mining and Energy Union, Construction and General Division, Tasmanian Divisional Branch. Assistant Secretary, CFMEU, Tasmanian Branch
Benson	John Robert	Business Developer
Berging	Arne	Site Foreman and Concreter, Quality Concrete Pty Ltd
Berquist	Wayne Geoffrey	Construction Manager, Watpac Australia Pty Ltd
Bickerdike	Gary Walter	Construction Manager, Multiplex Constructions Pty Ltd
Bickley	John Cecil	Casual Truck Driver [previously Field Officer, Transport Workers Union]
Biggs	Bernard Milford	Executive Officer, Association of Wall and Ceiling Industries of South Australia
Bignell	Mark Alexander	Director, AJ Bignell Pty Ltd
Bishop	Alexander Adrian	Construction Manager, Bricon Constructions Pty Ltd
Bishop	Leanne Margaret	Director and Office Manager, Bricon Constructions Pty Ltd
Bitz	Peter John	Director, Bitz Excavations Pty Ltd
Boggis	Douglas	Retail Project Manager, Bovis Lend Lease
Bolton	Paul Dalziel	Project Manager, Hansen Yuncken Pty Ltd
Bos	Romano	Employee, Bosform Formwork Contractors
Bosa	Peter Joseph	Managing Director, Maslock Pty Ltd trading as Troubleshooters Available
Botic	Nikola	Delegate, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch. Employed by Westfield as a first aider/carpenter
Boyce	Christopher Anthony	Industrial Inspector, Building Industry and Special Projects Inspectorate
Boyce	Gregory	Construction Manager, Cretecon Pty Ltd
Boyes	James Charles	Project Manager, Watpac Pty Ltd
Bradley	Brian Thomas	Acting Director-General, Department of Consumer and Commerce Protection and Commissioner for Worksafe, Western Australia
Bradshaw	Robert Brian	Southern Project Manager, Vos Constructions and Joinery Pty Ltd
Bradstreet	Ann	Director, Brolik Pty Ltd
Brady	Peter Samuel Henry	Director, PCB Holdings Pty Ltd
Brajkovich	Adrian Peter	Director, Brajkovich and Son Demolition Pty Ltd
Brawley	Scott Stanley	Factory Hand, Ritepak
Brcic	Joseph (Andrew)	Organiser, CFMEU Construction and General Division NSW Divisional Branch and CFMEU (NSW Branch)

List of witnesses *continued*

Surname	First Names	Title
Bredyk	Reiner 'Bert'	Construction Worker, Multiplex Constructions Pty Ltd and Shop Steward, CFMEU
Breen	Raymond Charles	Director, RUB Pty Ltd
Brendas	Spiros	General Manager, Kenoss Contractors Pty Ltd
Brewer	Tracey Thomas	Inspector, Victorian WorkCover Authority
Brighton	Murray Roy	Safety Officer, Meriton Apartments Pty Ltd
Brind-House	Peter Collin	Concrete Contractor
Brittain	Lesa Michelle	Investigator, Royal Commission into the Building and Construction Industry
Brown	Christopher Leonard	Services Manager, Baulderstone Hornibrook
Brown	Darren Harmer	Plant Operator, Lazer Excavation 2000
Brown	Keith Edwin	Chief Executive Officer, WorkCover Corporation of South Australia
Brown	Wayne Anthony	Construction Manager, GWH Building Pty Ltd
Brown	Robert Marshall	Project Manager, CBI Constructors, Woodside LNG project
Browne	Anna	Branch Manager, Trojan Workforce Group Pty Ltd
Brundell	Jeffrey Richard Harold	Director, General Manager and Sole Employee, Manitowoc Potain Pty Ltd
Buchanan	John Duncan Anselan	Deputy Director of Research, The Australian Centre for Industrial Relations, Research and Training
Buchanan	Robert James	Queensland Manager, Superpartners Pty Ltd
Bukarica	Branco Alexander	Legal Industrial Officer, Construction, Forestry, Mining and Energy Union, Mining and Energy Division. [previously Assistant National Secretary, CFMEU, Construction and General Division]
Burge	Kenneth James	Director, Martian Demolitions Pty Ltd
Burke	John Stewart	Managing Director, Rescrete Industries Pty Ltd
Burke	Paul Michael	Installation Manager, AAB Australia Pty Ltd
Burley	Daniel John	Structural Foreman, Barclay Mowlem Construction Ltd
Bush	Robert Bruce	Industrial Relations and Safety Manager for NSW and ACT, Leighton Contractors Pty Ltd
Butterworth	Lee Stuart	Contract Administrator, Multiplex Construction Pty Ltd
Byerley	Keith	Truck Driver, Tom's Cranes
Byrne	Paul	General Manager, BUSQ
Byrne	Dwaine Edward	Construction foreman, Shamrock enterprises Pty Ltd
Caccioppoli	Anthony Raphael	Site superintendent, Theiss Construction Pty Ltd
Caelli	Guy	Construction Manager, Caelli Constructions

List of witnesses *continued*

Surname	First Names	Title
Cairns	Robert William Shaw	Project Manager, Baulderstone Hornibrook
Caldwell	Steven Douglas	Acting Manager Work Health, Office of Work Health and Electrical Safety
Callipari	Robert	Director, Keystone Installations Pty Ltd
Cameron	James Robert	General Manager, Rhino Steel Pty Ltd, Rhino Holdings Pty Ltd, Jedda Steel Pty Ltd, Prestons Steel Pty Ltd
Cameron	Steven Lesley	Director, TLS Steelfixing
Campbell	Gary Raymond	Owner/Manager, Saxona Pty Ltd trading as Campbelltown Cool Rooms
Campbell	Joanna Helen	Project Manager, Bovis Lend Lease Pty Ltd
Campisi	Victor John	Project Manager, Able Demolitions and Excavations Pty Ltd
Canham	Trevor Stewart	Director, Canham Commercial Interiors
Canzarri	Colin	Fitter, Tom's Cranes
Cappadona	Dorothy	Administration Manager, Mindgrove Pty Ltd
Cariss	Anthony	Project Manager, Theiss Construction Pty Ltd
Carmichael	Anthony Maxwell	Director, T C Bricklayers Pty Ltd
Carmichael	James Thomas	Director, Program Services, Division of Workplace Health and Safety
Carpenter	Adam	Group Manager, Employee Relations, United Group Ltd
Carroll	Wayne	Self-employed [previously labourer, Trojan]
Carslake	Bentleigh Edgar Bryce	President, CFMEU South Australian Branch
Carstons	Alan Arthur	Managing Director, Grindley Construction Pty Ltd
Carter	Gary John	Unemployed [former site labourer and shop steward, CFMEU]
Carter	Peter Arthur	Construction Director, Mirvac Constructions Pty Ltd
Casotti	George Florian	Self-employed building contractor
Cecala	Robbie	Builders labourer
Chambers	Barry William	Chief Executive, The Northern Territory Department of Infrastructure Planning and Environment
Chapman	Geoff Charles	Site Foreman, Adco Constructions Pty Ltd
Charylo	Rick	Director, Able Demolitions and Excavations Pty Ltd
Chesterman	Michael Hope	Compliance Manager, Queensland Building Services Authority
Chidgey	Judith Mary	Administrator, Arch System Fabrication Pty Ltd
Chiera	Mario	Director, Ceramic Tile Engineering Pty Ltd
Childs	Rodney John	Sole trader, Hobart Electronic Service
Chittick	John Anthony	Site superintendent, Theiss Construction Pty Ltd

List of witnesses *continued*

Surname	First Names	Title
Chong Kok Chuen	Tony	Security Officer, MSA Security Services, Western Australian Cricket Association Ground
Christian	John Robert	Director, Construction Skills Training Centre Pty Ltd
Christopher	Paul Charles	Construction Manager, Prime Constructions Pty Ltd
Chugg	Harry Richard	Branch General Manager, Tasmanian division of AE Smith and Son Pty Ltd
Cipolla	Dean	National Safety Manager, Transfield Construction Pty Ltd
Clark	Andrew John	Partner, Channel Bricklaying
Clarke	Colin Ross	Managing Director and Proprietor, Focus Property Services Pty Ltd
Clarke	Andrew John	Partner, Channel Bricklaying
Clarke	Steven James	Self employed sole trader [Blue Water site]
Clarke	Allen	Managing Director, Penders Hire Pty Ltd
Clavarino	Ross William	Owner, Kirway Constructions
Clayton	Terry Raymond	Managing Director, T C Electrical Pty Ltd
Clifton	Leigh	Director, Ovington Pty Ltd
Clifton	Pieternella Dymphma	Director, Ovington Pty Ltd
Clifton	Daniel James	Principal, Supreme Cleaning
Close	Peter	Organiser, Construction Forestry Mining & Energy, Industrial Union of Employees, Queensland
Coates	Martin Francis	Project Manager, Major Projects Victoria, Department of State and Regional Development
Coburn	James	Site manager, Doric constructions
Cochrane	Robert Bruce	Organiser Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch.
Cocomero	Robert Aldo	Director, Marble and Granite Fitters Pty Ltd
Cody	Patrick David	Director and Construction Manager, Chadwick Technology Group of Companies
Coker	Stephen Edward	Project Manager, Grocon Pty Ltd
Collier	Berna Joan	Commissioner, Australian Securities and Investments Commission
Collins	Stuart Matthew	Industrial Relations and Legal Services Manager, Queensland Branch Housing Industry Association Ltd
Collison	Russell Kerry	Secretary, The Australian Workers' Union, Greater New South Wales Branch. Secretary, The Australian Workers' Union, New South Wales
Colquhoun	Glenn Allan	Development Manager, Australand Holdings Ltd

List of witnesses *continued*

Surname	First Names	Title
Colquhoun	Robert Allan	Plumbing Contractor, Guardian, Master Plumbers and Mechanical Contractors Association of New South Wales
Conforti	Michael	Construction Manager, Maison a la Mode
Connolly	Michael John	Public servant
Convery	Bernard John	Business Development Manager, Corke Instrument Engineering (Australia) Pty Ltd
Cooke	Anthony	Associate professor, social work and social policy, Curtin University of Technology
Coombs	Trevor Colin	Regional Manager, Commerce Queensland [formerly Queensland Chamber of Commerce and Industry] for Gold Coast and Hinterland region
Cooper	Russell Lawrence	Acting Director, Building and Construction Industry Training Board
Copeland	John Scott	Compliance Manager (Central), Office of the Employment Advocate, Department of Employment and Workplace Relations
Corcoran	Mark	Manager Employee Relations, Queensland Master Builders Association
Corcoran	Phillip Martin	Construction Manager, Construction Division, Watpac Australia Pty Ltd
Cordner	Barry William	Site Manager, Multiplex Constructions (Vic) Pty Ltd
Corke	Reginald Douglas	Managing Director, Corke Instrument Engineering (Australia) Pty Ltd
Coull	John Alexander	Director, Timbercraft Pty Ltd
Cowie	Adrian	Executive Officer and Secretary, Master Plumbers Association of Tasmania
Cox	Peter Kenneth	Project Manager, Property Services Group, Department of Human Services
Cox	Richard Lionel	General Manager, National Electrical and Communications Association of Queensland. Secretary, National Electrical Contractors Association, Queensland Chapter
Cox	Joseph John	Managing Director, King Formwork Pty Ltd
Cranfield	Kerry Patrick	Managing Director, Weatherfoil Pty Ltd
Crang	Barry Trevor	Steel Fixer, B and P Crang
Creedy	Michael Peter	Workplace Relations Manager, Woodman Alliance, Clough Engineering Ltd
Cross	Lawrie Vincent	Manager Industrial Relations and Occupational Health and Safety, Master Builders Association of Victoria
Cross	Lester Charles	Director of Investigations, Royal Commission into the Building and Construction Industry
Crossin	Mark Richard	Director, Office of Work Health and Electrical Safety

List of witnesses *continued*

Surname	First Names	Title
Cull	Bruce Christopher	Building Operations Manager, Leighton Contractors Pty Ltd (Qld)
Cummins	John	Branch President, Construction, Forestry, Mining and Energy Union, Construction and General Division, Victorian Building Unions Divisional Branch
Cunningham	Mark Paul	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Cush	Michael Norman	Operations Director for Project Management Group, Department of Public Works
Cuthbert	Graham Thomas	Deputy Executive Director, Queensland Master Builders Association
Cvitanovic	Daniel Ivan	Chartered Accountant and Partner, Ferrier Hodgson Chartered Accountants
D'Amico	Sam	Director, Safeway Electrical Pty Ltd
Dadour	Ian Robert	Director of Studies, Centre for Forensic Science
Dagg	Gregory Francis	Industrial Relations Officer, Newcastle Master Builders Association
Dahl	Michael James	Site Manager, Stuart Pty Ltd
Daly	Brendan Michael Shane	Estimator, Independent Roofing Services Tasmania Pty Ltd
Dalzell	Michael	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Daoud	Andrew	Sole Director, Formbrace Pty Ltd
David	Edwin Joe Sherring	Director of Property Services, Department of Human Services
Davidson	Gordon Sam	Building Project Manager, John Holland Constructions Pty Ltd
Davidson	James Alexander	Ministerial Adviser to the Minister for Business Industries and Resource Development
Davine	Matthew Francis	Director, M F Davine and Co Pty Ltd
Davis	Barry Paul	Manager, AMS Fabrications
Davis	Frederick Alan	General Manager, Bregma Pty Ltd
Davis	Hedley Charles	Director (Southern Region), Baulderstone Hornibrook Pty Ltd
Davison	Warren Ronald	Divisional General Manager, Boral Windows, Boral Formwork & Scaffolding, Crane Windows and Doors and Wunderlitch Plastics, each divisions of Boral Ltd
De Carvalho	Richard Anthony	Corporate Counsel, Meriton Apartments Pty Ltd, Karimbula Constructions Pty Ltd
De Fazio	Peter	Owner, Superior Interior Designs
De Groot	Robert Marinus	Owner/Operator, Robert DeGroot Painting Services
De Jong	Adam	General Manager, Classic Home Constructions Designer and Builders
Dean	Paul Edwin	Fire Systems Manager, Fire Fighting Enterprises Building Services

List of witnesses *continued*

Surname	First Names	Title
Dekazos	Nicholas	Site Manager, Transfield Pty Ltd
Demio	Terrence Martin	Acting Manager of City Development, City of Greater Geelong
Dempsey	Peter John	Chief Executive Officer, Baulderstone Hornibrook Pty Ltd
Densley	John Francis	Construction Manager, Global Construction Management
Di Petta	Salvatore	Managing Director, Samita Constructions (Vic) Pty Ltd
Di Scerni	Sam	Acting regional director, Australian Competition and Consumer Commission's Western Australian office
Dicks	Gavin Lloyd	Site Manager, formerly employed by J M Kelly (Project Builders) Pty Ltd
Dilizia	Frank	Operations manager, Transfield Pty Ltd
Divall	Andrew George	Director, Denrith Pty Ltd trading as Divall's Earthmoving and Bulk Haulage
Dixon	Steve	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Dixon	Archibald	Resident Engineer, AAB Alstom Power, Pelican Point Site
Dobson	Tomaes Ivan Peter	Proprietor, Perth Asbestos Removal Company
Dobson	Trevor	Human resources manager, Western Australia, Thiess Pty Ltd
Docherty	James	Director and Shareholder, 3D Scaffolding Pty Ltd
Dodd	Graham Ernest	Executive Director, Queensland Branch of the Civil Contractors Federation
Dolso	Laurie	Managing Director, Dolso Fastform Group
Donaldson	Leslie Gordon	Project Manager, Multiplex Constructions Pty Ltd
Doppler	Ian Adrian	Construction Manager, Buildcorp Pty Ltd
Douglas	Malcolm Howard	Proprietor, Rioconda Pty Ltd trading as Malcolm Douglas Construction
Drollett	Victor	Managing Director, T and R Management Services Pty Ltd
Duggan	Anne Michelle	Education and Training unit coordinator, Construction, Forestry, Mining and Energy Union, Victorian Building Unions Divisional Branch
Duggan	David Lyall	Foreman, Leighton Contractors Pty Ltd
Dunlop	Grant James	Project Leader, Payroll Tax Investigations, State Revenue Office of Victoria
Dunlop	Stuart John	National Director, Pay As You Go law interpretation team in the Business and Personal Taxes Centre of Expertise, Office of the Chief Tax Counsel
Dunne	David McIntyre	Project Manager, John Holland Pty Ltd
Dunstan	Jennifer Helen	Office Administrator, Corplink
Durnthaler	Glen Raymond	General Foreman, Bovis Lend Lease Floreat Forum redevelopment

List of witnesses *continued*

Surname	First Names	Title
Eden	Alan Robert	Director, Airport Ceilings Pty Ltd
Edmonds	Rex Joseph	Director, Roofclad Constructions
Edwards	Neil Raymond	Secretary, Victorian Department of State and Regional Development
Eleisaway	Mick	Director, MDS Tiling Pty Ltd
Elevato	Gaetano Joseph [Tom]	Manager, V and N Goskov Plastering Services Pty Ltd
Elfenbein	Roger John	Director, Ivory International Pty Ltd trading as Elfenbein and Associates
Elkington	Robert	Director, Elkington Safety solutions Pty Ltd
Ellis	Albert Charles Richard	Construction Manager, Universal Constructions Pty Ltd [now retired]
Elvery	William Allwyn	Construction Manager, Berela Ltd [06/98 – 12/98]
Engelen	Johannes Hendrikus Van	Corporate division, Baulderstone Hornibrook Pty Ltd
English	Patrick	Director, Balclutha Pty Ltd trading as English Engineering
Eriksen	Peter John	Project Manager, Multicom Queensland Pty Ltd
Evans	Stephen Frederick	Builders labourer
Evans	Trevor Thomas	Construction Manager, Becon Constructions Pty Ltd [Saizeriya site]
Farley	David John	Director, Farley Concreting Pty Ltd, Farley Constructions Pty Ltd
Farr	David John	Manager, Hackett Laboratory Services
Farrell	Michael Colin	Construction manager, Baulderstone Hornibrook Pty Ltd
Fary	Geoff	Executive Director, Industrial Relations Victoria [National Gallery of Victoria Project]
Fayad	Sam	Managing Director, Dyldan Developments Pty Ltd
Fearne	Ross	Industrial Relations Officer, National Electrical Contractors Association [01/00 – 10/00]
Ferguson	Andrew James	Branch Secretary, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Ferguson	John	Secretary, Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Western Australian Branch
Ferguson	Jennifer Anne	Director, Direct Personnel
Fernan	Dennis	Operations Manager, Holts Crane Hire [previously Operations Manager, Brambles Industrial Services]
Ferris	Paul Philip	Director, Covecorp Constructions Pty Ltd
Ferris	Timothy John	Foreman, Kane Constructions Pty Ltd [Western General Hospital Refurbishment Project]

List of witnesses *continued*

Surname	First Names	Title
Finlay	Ronald Arthur	Company Secretary and General Counsel, Walter Construction Group Ltd
Fisher	Kelvin Liam	Senior Investigator, Office of the Employment Advocate
Fitzmaurice	Louise	Licensee, Territory Kidz Childcare and Education Centre
Flecker	John Paul	Director, Multiplex Constructions (WA) Pty Ltd
Fletcher	Anthony McKenzie	Project Director, Baulderstone Hornibrook Pty Ltd [240 St Georges Terrace]
Fodor	John	Employee co-ordinator, Cbus
Fokes	Gregory Maxwell	Project Manager, Leighton Contractors Pty Ltd
Fonti	Angelo	Certified Practising Accountant, Senior Financial Investigator, Royal Commission into the Building and Construction Industry
Forbes	Richard Andrew	Site Project Manager, JM Kelly (Project Builders) Pty Ltd
Forde	Liam Gerard	Director of Finance and Group Services, Baulderstone Hornibrook Pty Ltd
Forkosh	Sandor (Alex) Laszlor	Business Unit Manager, Facilities Management and Building Services Unit, ABB Australia Pty Ltd
Forrester	George Birrell	General Manager, Sergi Cranes
Forrester	Thomas Michael	General Manager, FKP Constructions Pty Ltd
Forsyth	Geoffrey Ross	Managing Director, Building Skills Pty Ltd, Industries Services Training Pty Ltd, Northern Territory Constructions Pty Ltd, ForSand Holding Pty Ltd
Fox	Brian	Organiser, Construction Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch. Organiser, CFMEU (New South Wales Branch)
Fox	James Leonard	Shop Steward/nipper, Consolidated Constructions Pty Ltd
Frame	Murray Gordon	Project Manager, Theiss Pty Ltd
Francis	Scott	Labourer [employee of Perth Asbestos Removal Company at Western Australian Cricket Ground site]
Fraser	Alan Bruce	Principal, Fraser PM Services Pty Ltd [Project Manager, Bellerive Oval redevelopment project]
Fraser	Rebecca	Human Resource Consultant, University of Melbourne [previous employee of National Electrical Contractors Association as Employee Relations Advisor and Industrial Officer]
Frattali	Umberto	Managing Director, Castoro Constructions Pty Ltd
Frazzica	Joe	Security Guard, Chubb Security Australia Pty Ltd [Victorian Institute of Forensic Mental Health site]
French	Malcolm George	Organiser, Construction Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch

List of witnesses *continued*

Surname	First Names	Title
Fresta	Raphael	General Manager, De Lorenzo Ceramics Pty Ltd. Sole Director, On Time Tiling Pty Ltd
Frost	Michael Denis	Construction Director, Baulderstone Hornibrook Pty Ltd
Fryer	Lincoln Gary	Organiser, Construction Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Fuller	Randell John	Human Resources Manager, Multiplex Constructions (Vic) Pty Ltd
Fuller	Robert William	Executive director, Newcastle Master Builders Association
Furminger	Andrew Paul	Managing Director, APF Welding Pty Ltd
Fusca	Rosario	Investigator, Royal Commission into the Building and Construction Industry
Gabrielsen	Mark Christopher	Roofing Subcontractor [previous employee, then competitor of John Halikos]
Gagliardo	Graziano Lorenzo	Managing Director, Mar.Gra Pty Ltd
Gagliardo	Mariangela	Assistant Manager, Mar.Gra Pty Ltd trading as Mar Gra
Gaglio	Carlo Antonio	Sole Director, Grandace Nominees Pty Ltd trading as WA Furniture Industries
Galea	Percy	Managing Director, P and C Galea trading as Express Concrete Pumping
Gallagher	Joseph Hugh	Organiser, Construction Forestry, Mining and Energy Union, Construction and General Division, Northern Territory Sub-branch. CBUS Coordinator
Gallaugher	Brian John	Employee, Department of Infrastructure, Planning and Environment seconded to NT Treasury
Galloway	Thomas John	Solicitor, Supreme Court of New South Wales
Gamble	Ian Rodney	Director, Focus Shopfitters Pty Ltd
Ganderton	Ian John	Company Director, Ganderton Earthmoving Pty Ltd
Gardiner	Russell Keith	Senior Sergeant and Officer in Charge, Cannington Police Station
Gardner	Graham Lee	Executive Manager, Industrial Relations, Alstom Power Ltd
Gardner	Brenton Paul	Executive Director, Housing Industry Association of South Australia
Garland	Robert	Cabinet Maker
Gartrell	Scott	Manager for Corporate and Industrial Affairs, Baulderstone Hornibrook Pty Ltd
Gaskin	John	General Manager, Queensland Operations, Multiplex Constructions Pty Ltd
Gatto	Dominic	Consultant, Building Industry

List of witnesses *continued*

Surname	First Names	Title
Gavin	Ian	Occupational Health and Safety Consultant, Comet Training Pty Ltd
Gavranich	Benjamin Baldo	General manager, Building Division, GRD Kirfield.
Gear	George Arthur	Company Director [previously Manager, Construction Skills Training Centre]
Geeves	Peter Max	Executive Director, Housing Industry Association
Geldert	Ross Alan	Crane Driver, Tom's Crane and Plant Hire Pty Ltd
George	Christopher Leonard	Labourer [previous employee of Brajkovich & Son Demolition Pty Ltd]
Geraghty	Robert John	Secretary, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical Division, South Australian Branch. Secretary, Electrical Trades Union of Australia, South Australian Branch
Giameos	George	Giameos Constructions & Developments
Giles	Robert Walter John	Manager Contracts, Legal and Contractual Division, Department of Public Works
Gillespie	John William	Managing Director, Gillespies Cranes Nominees Pty Ltd
Gillespie	Drew	Constructin Manager, Q Con
Gillingham	Frank James	Director, Industrial Relations, Master Builders Association ACT
Ginns	Rees Isaac	Scaffolder [previously involved in various capacities with Access Australia, Proactive Consultants]
Glasby	Stephen William	Project Manager
Glass	David	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Glasson	John Arundel Stewart	Chief Executive Officer, Incolink [previously Director Industrial Relations, MBAV]
Glen	Andrew	Construction Manager, Traditional Golf Links Construction
Godfrey	Randall Craig	Plumber, Tacoma Plumbing Pty Ltd
Gooderham	Scott Andrew	Managing Director, Lorikeet Developments Pty Ltd
Gordon	Christopher John	Managing Director, Crestway Constructions Pty Ltd
Gorrie	Eric Clyde	Director, KBE Contracting Pty Ltd
Gosling	Graham Leslie	Human Resources Manager, Theiss Pty Ltd
Gower	Peter Cameron	Site Supervisor, Eaton Group Pty Ltd
Granger	Adrian John	Construction Manager, Civil Construction Corporation. Executive Member and National Councillor, Civil Contractors Federation
Gray	Simon James	Director, Multiplex Constructions (Vic) Pty Ltd

List of witnesses *continued*

Surname	First Names	Title
Greedy	Kenneth John	Associate Director Office of Human Resource Management, Griffith University
Green	Kenneth Stuart	Senior Inspector, Division of Workplace Health and Safety, Queensland Department of Industrial Relations
Green	Martin John	Principal and Head of Business Reconstruction and Insolvency, Stockford Accounting Services Pty Ltd
Green	Philip John	CEO and Secretary, National Electrical Contractors Association Victorian Chapter trading as National Electrical and Communications Association
Gregory	Brent John	Night Shift Supervisor, Veem Engineering
Greiner	Nicholas Frank	Chairman, Baulderstone Hornibrook Pty Ltd
Grieve	Gavin John	Formwork Carpenter/Leading Hand, Wallahra Apartments Project Site
Grollo	Daniel	Director, Grocon Pty Ltd
Grosse	Alison Robyn	Chairperson, Sunshine Coast Regional Group Apprentices Ltd
Grzonkowski	Peter Alexander	Managing Director, IUS Holdings Pty Ltd
Guit	Dick Martin	Northern Territory Manager, Building Group, Barclay Mowlem Construction Ltd
Gullestrup	Jorgen	Secretary, Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Plumbing Division, Queensland Branch. Secretary, Plumbers and Gasfitters Employees Union of Australia, Queensland Branch, Union of Employees.
Hackett	Kenneth John	Company Director, Hackett Laboratory Services Pty Ltd
Haddock	Daniel	Plasterer, Chadwick
Hale	Rodney James	Executive Director, Electrical Contractors Association of WA (Inc)
Hall	Peter Ashley	Proprietor, Hall & Son Painting and Decorating
Hall	Arthur Winston	Account Manager, BHPSteel Lysaght
Hall	Leonard Rex	Commercial Manager, Baulderstone Hornibrook Pty Ltd
Hamey	Anthony Dennis	Sales Consultant, Centurian Garage Doors
Hamilton	Ashley Reginald	Manager, Might Constructions
Hanby	Warrick Ashley John	Senior Human Resource Advisor, John Sands (Aust)
Handbury	David John	Company Director, Fairfax Painting
Hanley	John	Project Manager, Multiplex Constructions (NSW) Pty Ltd
Hanson	Wayne Thomas	Branch Secretary, The Australian Workers' Union Greater South Australian Branch. State Secretary, Amalgamated AWU (S.A.) State Union
Hare	Terence	Regional Operations Manager, Bovis Lend Lease
Harkin	Gregory Stephen	Unemployed [previously Company Director, Emerson Group of Companies]

List of witnesses *continued*

Surname	First Names	Title
Harkin	Liberina Lidia	Unemployed [previously Director, Emerson Industries Pty Ltd, Parallax Corporation Pty Ltd, Deerfield Investments Pty Ltd]
Harkins	Kevin Brian	Secretary, Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical Division, Tasmanian Branch
Harnisch	Wilhelm	Chief Executive Officer, Master Builders Australia
Harris	Donald Bruce	Truck Driver [formerly operated Roitram Pty Ltd]
Harris	Peter Charles	Organiser, CFMEU (NSW Branch)
Hartley	John	Chief Executive Officer, CoInvest Ltd
Hartog	Leigh David	Managing Director and General Manager, JK Williams Contracting Pty Ltd
Harty	Raymond Kenneth	General Manager, Comet Training Pty Ltd
Haselmore	John Winston	Formerly Employee Relations Manager Kaiser Bechel Joint Venture, Worsley Alumina Expansion Project
Hassed	John Michael	General Manager, Training Services, Department of Employment and Training, Queensland Government
Hatfield	Ian George	Deputy Executive Director, Major Projects Victoria
Havercroft	Geoffrey	Association Secretary, Western Australian Cricket Association. Administration Manager, WACA ground refurbishment
Hayes	Philip	Company Secretary, Structural Systems, Engineers & Contractors
Haywood	Nigel Anthony	Director of System Planning and Industry Analysis, WA Department of Training
Hazelle	Graham	Subcontractor, Adelaide Convention Centre, Chadwick Group
Heath	Douglas Charles	Unemployed [previously an organiser with the CFMEU (NSW Branch)]
Hedgcock	David James	Director/Secretary, Pro-Tect Investment Holdings Pty Ltd
Hellings	David	Financial Investigator, Royal Commission into the Building and Construction Industry
Helmers	Kel	Site superintendent, Abigroup Contractors Pty Ltd
Henderson	Donald Roy	Carpenter/Painter [previously an organiser, Australian Workers Union]
Henderson	Gordon William	Director, Eveready Cranes Pty Ltd. Director, Everwilling Cranes Pty Ltd
Henderson	John	Product Manager – Industrial, Adecco Pty Ltd [previously an organiser, CFMEU (NSW Branch)]
Hensley	Eric Leo	Employee Relations Manager, Bovis Lend Lease Autralia Ltd
Henson	Peter John	Manager, User Choice, Department of Training
Hersee	John Martin	Proprietor, John Hersee, Master Painter and Signwriter Pty Ltd
Hetesi	Joseph Endre	Managing Director, PERI Australia Pty Ltd

List of witnesses *continued*

Surname	First Names	Title
Hewett	Helen Claire	Fund Secretary, CBUS Superannuation Fund
Hickey	Mark William	General Manager of Operations, Jigsaw Personnel Pty Ltd
Hicks	David Hedley	Chartered Accountant, David Hicks & Co Chartered Accountants
Higgon	David Peter	Employee Relations Manager, Multiplex Constructions (NSW) Pty Ltd
Hildebrand	Barry John	Head of Security, Burswood International Resort Casino WA
Hill	Anne Kathryne Louise	Managing Director and Financial Controller, Christies People Pty Ltd
Hill	Frank	Managing Director, FHRC Pty Ltd. Chairman, Roof Contractors Division, Master Plumbers Association of Tasmania
Hills	Rebecca Kaye	Inspector, Building and Construction Industry Program, Victorian WorkCover Authority
Hinchey	Derrick John	Director, DJ Hinchey, steel fixers and concreters
Hindle	Michael John	Director, Adelaide Contracting Services Pty Ltd
Hitchen	Len	Acting Chairman, Building and Construction Industry Training Board
Hobday	Andrew Garth	Managing Director, Mainline Plastering Pty Ltd
Hockings	Barry Selwyn	Director, Trident Construction Resources Pty Ltd
Hodder	Anthony Peter	Project Manager, Federation Square Project, Multiplex Constructions Pty Ltd
Hodge	Kevin Leonard	Occupational Health and Safety Coordinator, MPL Environment Health Safety and Environmental Solutions [previously Project Manager, removal of asbestos, WACA]
Hogan	Patrick Steven	Director, Trojan Group of Companies
Holden	Philip George Lancashire	Earthmoving Driver and Excavator Operator, Maiden Earthmoving
Holland	John Richard	Project Manager, E.P.M & C Pty Ltd
Holland	Wayne Barrett	Construction Manager, Manu Enterprises Pty Ltd
Holmes	Scott Michael	Queensland Manager, Peri Australia Pty Ltd
Honeycombe	Peter Ernest	Managing Director, Honeycombe's Property Group Pty Ltd
Hooker	Gary John	Truck owner [previously Partner, Endeavour Scaffolding Pty Ltd]
Hooker	Barry Edward	Production manager, Lotus Folding Doors and Walls
Hopkins	Ian	Chief Executive Officer, Construction Industry Long Service Leave Board
Horneman	Neville John	Sergeant of Police, Nambour Police Station
Horskins	Ben Gary	Painter, G.A Horskins Painters and Decorators

List of witnesses *continued*

Surname	First Names	Title
Hough	Terrance Joseph	Managing Director, Walsos Pty Ltd
Hough	Derek	Director, South Australian Operation, Baulderstone Hornibrook Pty Ltd
Hourihan	Gregory Michael	Steel fixer, Quality Concrete Pty Ltd
Howard	Maurice John	Industrial Relations Manager, Master Builders Association of South Australia
Howard	Robert Charles	National Industrial Relations Manager, Grocon Pty Ltd
Howcroft	Gary John	Assistant Branch Secretary, Construction, Forestry, Mining and Energy Union, Construction and General Division, Queensland Construction Workers' Divisional Branch. Assistant State Secretary, Construction, Forestry, Mining, and Energy Industrial Union of Employees, Queensland
Hubbert	Graham Denis	Owner/Operator, Advanx.
Hughes	Shaun	Builders labourer, shop steward, health and safety rep and first aider, employed by Build Corp Commercial
Hungerford	David William	Project Manager, FKP Constructions Pty Ltd
Hunter	Trevor Terrance	Senior Workplace Adviser, Office of the Employment Advocate, Darwin
Hunter	Chris	Contract Manager, Transfield Services (Aust) Pty Ltd
Hurford	Terry Ronald	Director, Morey and Hurford
Hutchings	Gordon	Safety and Industrial Relations Manager, John Holland Pty Ltd
Hutchinson	Peter Donald	Managing Director, PDH Partitions Pty Ltd
Hutton	Craig Alan	Workplace Health and Safety Inspector, Division of Workplace Health and Safety, Queensland Department of Industrial Relations
Hyslop	Graeme	Occupational Health and Safety Coordinator, Richard Crookes Constructions Pty Ltd
Imgraben	Fred	Construction Manager, Baulderstone Hornibrook Pty Ltd
Inglis	Antony Charles	Project Manager, John Fairfax Holdings Pty Ltd
Ioffrida	Robert	Project manager, Abigroup Contractors Pty Ltd
Ipsro-Passione	Claudia	Wife, Joe Passione
Ireland	Derek Forbes	Workplace Relations Consultant and Managing Director, Ireland Consulting Services Pty Ltd
Irving	Ian Hunter	State Manager, Hansen Yunken New South Wales [previously Building Construction Manager, Walter Constructions Group (Victoria)]
Irwin	Ian Harold	General Manager, Human Resources, Theiss Pty Ltd
Isaacson	Antony Peter Grant	Managing Director, Kane Constructions Pty Ltd
Isbester	Victor John	Technical Officer – Hydraulics, Construction Division, NT Department of Infrastructure Planning and Environment

List of witnesses *continued*

Surname	First Names	Title
Iti	Dean Ralph Clarry	Carpenter [previously employee, PPB Constructions
Jackson	Matthew Kevin	Director, Matthew Jackson Building Services Pty Ltd
James	Andrew Damien	Project Manager, Baulderstone Hornibrook Pty Ltd
James	Robert Leslie	Director, Industrial Relations Services and Chief Inspector, Department of Industrial Relations, Queensland
Janakievski	Jordan	Carpenter, J M & Z Carpentry Australia Pty Ltd
Janmaat	Luke	Project Manager, Baulderstone Hornibrook Pty Ltd
Janni	Peter John	Membership/Industrial Officer, Master Painters Association
Jenkins	Ronald Charles	Company Director, Jenkins Formwork Pty Ltd
Jobe	Phillip John	General Manager, Boral Group
John	David Howard	Project Director, Burswood International Resort Casino
Johnson	Anthony Robert	Site Manager, Cretecon Pty Ltd
Johnston	Craig	State Secretary, Victorian Branch, Australian Manufacturing Workers' Union
Johnston	Alexander Collin	Construction Manager, Walter Construction Group
Jones	Christopher James	Company Director, QR Concrete
Jones	Don Clarke	Director, Business Improvement Compliance Services Division, New South Wales Department of Industrial Relations
Jones	Peter Neale	Director, Neale Jones Civil Contracting Pty Ltd
Jones	Stephen Rodney	Technical Manager, Monarch
Jones	Paul	Project Manager, Becon Constructions Pty Ltd
Jordan	Adam Louvain	Managing Director, Newcastle Scaflink Pty Ltd
Josef	Daniel Richard	Director, Civil Management Group Pty Ltd
Judson	Wayne Brewer	Director, Probuild Construction (Services) Pty Ltd
Kaine	Peter Leon	Branch Vice President, Construction, Forestry, Mining and Energy Union, Construction and General Division, South Australian Divisional Branch. President, The Australian Building and Construction Workers' Federation (State Registered); Employed by Baulderstone Hornibrook
Kalveram	Wolfgang	Industrial Relations and Occupational Health and Safety Manager, Hansen Yuncken Pty Ltd
Kamper	Stephen	Partner, Kamper & Co Chartered Accountants
Kane	Thomas John Supple	Partner, Peregrine Management Group Pty Ltd
Keenan	Steven	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, New South Wales Divisional Branch
Kellaway	Trevor John	Managing Director, Kellaway Wall and Ceilings Pty Ltd

List of witnesses *continued*

Surname	First Names	Title
Kelly	David John	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch. Organiser, Construction, Forestry, Mining and Energy Union, (New South Wales Branch)
Kelly	Christopher John	Co-Director, Joinery Products Sales Pty Ltd
Kelly	Paul John	Owner/Operator, Paul Kelly Homes Pty Ltd and Quality Brick Homes Pty Ltd
Kelly	Garry Ross	Director General Project Delivery, Defence Estate Organisation
Kendle	Edward	Partner, Capable Property Maintenance
Kennedy	Anthony	Civil Engineer
Kennedy	Ian Roderick	Director of Regional Industries, Department of Innovation, Industry and Regional Development
Kennon	Steven James	Operations Manager, Hydralift Cranes
Kent	Jamie Wayne	Precast Manager, Duggans Pty Ltd
Kent	Tony Aubrey	Transport Allocations Manager, Divall's Earthmoving and Bulk Haulage
Keough	Clayton McNichol	Project Manager, Glenzell Pty Ltd [previously Site Manager, Berala Constructions]
Kerr	Andrew John	Project Manager – Delivery, Bovis Lend Lease, Homezone construction site
Kerr	Warren Merton	President, Royal Australian Institute of Architects
Kerr	George	Facility manager, CBI Kwinana facility.
Kesby	Terry	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch. Organiser, Construction, Forestry, Mining and Energy Union, (New South Wales Branch)
Kiely	Narelle	Office Manager, Ideal Interior Linings
Killick	Peter	Southern Manager, Fairbrother Pty Ltd
King	Colin Clinton	WA state manager, Lotus folding walls and doors
Kingham	Martin Leonard	Branch Secretary, Construction, Forestry, Mining and Energy Union, Construction and General Division, Victorian Building Unions Divisional Branch
Knight	Patrick Richard	Senior Workplace Relations Advisor, Queensland Chamber of Commerce and Industry
Kodomichalos	Gerard Anthony	Corporate Counsel and Company Secretary, Barclay Mowlem Construction Ltd
Kokkinos	Con	Independent Contractor, BK Taylor and Co
Konarski	Richard Stephen	Manager Compliance East, Investigations and Borders NSW, Department of Immigration and Multicultural and Indigenous Affairs

List of witnesses *continued*

Surname	First Names	Title
Kondowski	Carolina	Consultant, KMB Resources Pty Ltd
Kroesen	John	Construction manager, Kell & Rigby Pty Ltd
Kuczmenda	John Paul	Formworker, Kozwin Constructions Pty Ltd
Kulmar	Kerry	Director, Buildscaff Pty Ltd
Kupsch	Royce Graham	Union Organiser, BLF
Lambert	Scott James	Assistant Director – Legal and Contracts, Housing Industry Association
Lamond	Mark Alexander	Structured Project Director, Baulderstone Hornibrook Pty Ltd
Lamplough	Robert Lance	Employee Relations Manager, Bechtel
Lane	Michael Richard	Organiser, CFMEU NSW Branch
Larkham	Russell James	Site Foreman, Civil Management Group Pty Ltd
Lawler	Michael Matthew	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Lawler	Michael Matthew	Official, CFMEU NSW Branch
Lawrence	Edward	Director, Whitemore Holdings Pty Ltd
Lawrie	Gordon James	Former Product Quality Representative, BHP
Lawson	Gordon Eric	General Manager, Insurance Services of WorkCover Queensland
Lazar	Peter John	Senior Estimator, Budget Scaffolding
Le	Tan	Paralegal, Royal Commission into the Building and Construction Industry
Lean	Nigel Leonard	Secretary, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Plumbing Division, South Australian Branch; State Secretary, The Plumbers & Gas Fitters Employees Union of Australia – Adelaide Branch
Leane	Shaun Leo	Organiser, ETU
Lee	Joseph Paul	Senior Investigations Officer, Building Industry Inspectorate, WA Department of Consumer Employment Protection
Lee	Philip Michael	Director Employee Entitlements Branch, Workplace Relations Implementation Group, Federal Department of Employment and Workplace Relations
Leidtke	Peter Kyle	Engineer, Walter Construction Group Ltd
Lendowski	Peter	Australian Colour Enterprises Pty Ltd
Libreri	Steven Paul	Dogman/Crane Operator, Whyco Cranes
Lind	Warwick David	Site Supervisor, Mirvac Fini
Ling	Allan Charles	State Manager, Fire Fighting Enterprises
Linley	John Gordon	Chief Executive Officer, Suncorp Metals Corporation Pty Ltd

List of witnesses *continued*

Surname	First Names	Title
Lipple	Jamie Rodney	Director, Systec Ceilings Pty Ltd and Systec Commercial Pty Ltd
Lobb	Steven Frank	Organiser, CFMEU, Construction and General Division, NSW Branch
Lombardo	Edward (Eddie)	Supervisor, TCB Concreters Pty Ltd
Long	Craig Neil	Executive Director, NSW Branch, Civil Contractors Federation
Long	Steven Robert	Shop Steward building worker,
Lonsdale	Andrew Robert	Corporate Counsel, Abigroup Ltd
Lord	Denis Andrew	Director, Tom Moore & Son Southern Tasmania Pty Ltd
Loughman	Dominic Mark	Project Manager, Fimma Pty Ltd
Love	Trevor Bruce	Director, Site-Safe Risk Health Safety and Risk Management Consultants Pty Ltd
Lovett	Ronald Charles	Business Development and Marketing Manager, Abigroup Contractors Pty Ltd
Lowe	Jamie Stuart	Analyst, Royal Commission into the Building and Construction Industry
Lucas	Narelle Marie	Office Manager, Jim Godfrey Earthmoving Pty Ltd
Ludwig	William Patrick	National President, The Australian Workers' Union; Secretary, The Australian Workers' Union, Queensland Branch; Secretary, The Australian Workers' Union of Employees, Queensland
Lunedei	Mark	Managing Director, MC Labour Services
Lunedi	Marcelle	Managing Director, MC Labour Services
Luppi	Peter	Project Manager, Multiplex Constructions Pty Ltd
Lynch	Mark	National Legal Counsel, Theiss Pty Ltd
Maccheroni	Paul	Business Unit Manager, JM Kelly Project Builders Pty Ltd
Macchiusi	Allison Lee	Student, HR Course
Mace	Warwick	Industrial Relations Manager, Adrail Services Pty Ltd
MacGregor	David James	Director, T.F Woollam and Sons Pty Ltd
MacGregor	Robert James	Site Supervisor, TF Woollam and Sons Pty Ltd
MacLeod	Ian	Corporate Human Resources Manager, CBI Constructions Pty Ltd
Maher	Bruce Anthony	Tasmanian Manager, Hansen Yuncken Pty Ltd
Maiden	Malcolm James	Owner/Operator, Maiden Earthmoving
Major	Andrew Charles	Managing Director, Major Rigging
Majstorovic	Constantina Melanie	Operations Manager, Kenoss Contractors Pty Ltd
Maletic	Radenko	Supervisor, Sebastian Builders and Developers Pty Ltd
Malone	David Anthony	General Manager, Territory Construction Association

List of witnesses *continued*

Surname	First Names	Title
Maloney	Timothy James	Director, Training Operations, Department of Employment and Training, Queensland
Manlow	William	Industrial Manager, Downer RML Pty Ltd
Manna	Salvatore (Sammy)	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch.
Mansfield	Andrew David	Manager, Northern Territory Pre-Stress
Manson	Gavin Edward	Site Supervisor, Bregma Pty Ltd
Margetic	Peter Nicholas	Project Manager – Delivery, Bovis Lend Lease, Floreat Forum Construction site
Markiewicz	Alexander Eric	Industrial Advocate, Engineering Employers Association South Australia
Markovic	Tom	Crane Driver, Tom's Cranes
Marris	Ian	Member, Plumbing Advisory Council to the Plumbing Industry Commission
Marshall	David	Director, Welding and Fabrication Pty Ltd
Marsland	Mary Patricia	Executive Director of Building Management, Department for Administrative and Information Services
Martinazzo	Giovanni Renato	Principal, Construction Plant Hire (WA) Pty Ltd trading as Tom's Crane and Plant Hire Company
Martinazzo	Thomas Gaetano	Principal, Construction Plant Hire (WA) Pty Ltd trading as Tom's Crane and Plant Hire Company
Maslin	Hugh Charles	General Manager, Shaw Contracting Pty Ltd
Mason	Douglas Vincent	Plaster Board Carpenter, Ideal Interior Linings Pty Ltd
Matesic	Denis	Director, NSW Painting Services Pty Ltd
Mathieson	Robert Leslie	Industrial Relations/Management Consultant, National Constructors Incorporated Pty Ltd
Matthews	Kevin	Director, Constructor Scaffolding Pty Ltd
Matthews	Stephen	Director, Matthews Contracting Pty Ltd
Matthews	Allan Edward	Site Foreman, Hutchinson Builders, Brisbane
Matthews	Gregory John	Administration Manager – Construction, St Hilliers Pty Ltd
May	Gary John	Deputy Director-General, Queensland Department of Public Works
Mazlin	Arthur James	Project Manager, RUB Pty Ltd
Mazzarolo	Louie Angelo	General Manager, De Martin and Gasparini Pty Ltd
Mazzotta	Christopher Anthony	Director, Maslock Pty Ltd trading as Troubleshooters Available
McArthur	Dean Edward	Director, Meribold Interiors (NSW) Ltd

List of witnesses *continued*

Surname	First Names	Title
McCarney	Stephen James	Secretary, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union Plumbing Division, New South Wales Branch; Secretary, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union, Newcastle Sub-Branch Plumbing Division; State Secretary, New South Wales Plumbers and Gasfitters Employee's Union
McCaughey	Paul	Estimator, Morley Glass and Aluminium
McClelland	Dean Phillip	Plasterer, GH Multitrades
McClelland	Peter	Branch President, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
McCormick	Wayne Robert	Principal and Shareholder, Go Crete Pty Ltd
McCosh	Ronald	Construction Administrator, QR Concrete
McCrudden	Patrick	Organiser, CEPU
McCullough	Campbell George	Organiser and Trustee, Construction, Forestry, Mining and Energy Union, Construction and General Division, Western Australian Divisional Branch
McCullough	Stephen Alexander John	Freelance sub-contract plasterer, Unique Linings Pty Ltd
McDonald	Joseph	Assistant Secretary, Construction, Forestry, Mining and Energy Union, Construction and General Division, Western Australian Divisional Branch
McDonald	Geoffrey	Partner, Hall Chadwick Chartered Accountants and Business Advisors
McFarland	George Edward	Consultant
McGahan	John Joseph	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch. Organiser, Construction, Forestry, Mining and Energy Union, (New South Wales Branch)
McGivern	Ian	Site manager, Doric constructions Pty Ltd
McGoldrick	Robyn	Mother, work-site fatality victim
McGovern	Brendon	Project Manager, Premier Building Solutions
McGrath	Stephen Anthony	Senior Vice President, Master Painters, Decorators and Signwriters Association of South Australia
McGrillen	Robert	Manager, Technical and Industrial Staff Division, Labour Hire Industry
McHugh	Jamie Lee	Organiser, Builders Labourers Federation
McHugh	Kevin John	Director and Field Manager, Work Force One
McIntosh	Nelson Douglas	Company Director, Nelmac Pty Ltd

List of witnesses *continued*

Surname	First Names	Title
McIntyre	Terrence James	Branch Assistant Secretary, Construction, Forestry, Mining and Energy Union, Construction and General Division, Queensland Construction Labourers Divisional Branch
McIntyre	Gary	Safety Organiser and Trainer, CFMEU
McIntyre	Malcolm	Project Manager, Corke Instrument Engineering (Australia) Pty Ltd
McKay	Ian William	Small Business Operator [previously Safety Officer, Grocon Constructions (NSW) Pty Ltd
McKenzie	Catherine Mary	Chief Executive Officer, WorkCover NSW
McKenzie	Ian Donald	Builders Labourer, Adelaide Convention Centre site
McKinley	Arnold John	Crane operator, Thiess Construction Pty Ltd
McKinnon	Peter Rodney	Managing Director, Mainbrace Constructions (NSW) Pty Ltd
McLean	David Malcolm	Director, Tacoma Plumbing Pty Ltd; Director, Maloolaba Plumbing Pty Ltd
McLean	Greg Darcy Douglas	Executive Director, Queensland Master Builders Association
McLean	Michael Gordon	Executive Director, Master Builders Association of Western Australia
McLeish	Ian James	Employee Relations and Safety Manager, Engineering Construction Group, Barclay Mowlem Constructions Ltd
McSwaine	Anthony Mark	Project Manager, Multiplex Constructions Pty Ltd
McWhinney	Robert Percival	Employee Coordinator, Cbus
Meadows	David John	Projects Coordinator, Woolworths Ltd
Meiklejohn	Barry Kenneth	President, Australian Workers Union of Employees
Membrey	Craig William	Operator, Membrey Transport
Menera	Scott	Site supervisor, Ceramic Tile Engineering,
Messer	William	Project Manager, Delta Facilities Management
Messina	Tony	Director, Cemtool Pty Ltd [previously Managing Director, TCB Concreters Pty Ltd]
Messina	Joanne	Director, shareholder, Cemtool Pty Ltd
Mickell	Richard Stirling	General Manager and Director of the western region, John Holland Pty Ltd
Mickle	Richard Stirling	Manager, Western region, John Holland Group
Mier	David	Organiser, Electrical Trades Union [City Link project]
Mighell	Dean Jonathan	Secretary, Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical Division, Victorian branch; National President, Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical Division

List of witnesses *continued*

Surname	First Names	Title
Milford-Cottam	Graham John	Construction Manager, Multiplex Constructions Pty Ltd
Miller	Brian (Jock)	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Milne	Peter Malcolm	Site Foreman, Austraform Pty Ltd
Minuzzo	Gary Reno	CEO, Minuzzo Constructions
Misdale	Wayne Edward	National Employee Relations Manager, Fletcher Construction Australia Pty Ltd
Mitchell	Thomas James	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, New South Wales Divisional Branch
Mitchell	Barry James	Partner, Office Furniture Business [previously Organiser, AMWU, Sun Metals site]
Mitchell	James Joseph	Director, General and Civil Contracting Pty Ltd
Mitchell	Ross William	Managing Director, Ross Mitchell and Associates Pty Ltd; President, Asbestos Removal Contractors Association of NSW
Mitsopolous	Christopher	General Manager – Employee Relations, Clough Engineering Ltd
Mogg	Norman Fletcher	Director, Fineline Painting Pty Ltd; Director, Online Labour Hire Pty Ltd
Mohi	Russell	Director, Raffia Contracting Pty Ltd
Moise	Robert Vincent	Construction Manager, Grant Constructions Pty Ltd
Molfetas	Gregory Stephen	Managing Director, Triton Corporation Pty Ltd
Moller	Ian William	Semi retired, Consultant – Employee Relations
Mollison	Peter Noel	Project Director, Department of Defence
Molloy	Richard	Project Manager, Theiss Pty Ltd
Mooney	Anthony John	Mayor, City of Townsville
Moore	Peter Douglas	General Manager, Water Corporation
Moore	Laurence John	Chief Executive Officer, South Australian Chapter, National Electrical Contractors Association
Moorehouse	David John	First Assistant Secretary, Board of Control and Compliance Division, Department of Immigration, Multicultural and Indigenous Affairs
Moran	Terence Francis	Secretary, Victorian Department of Premier and Cabinet
Morgan	John Phillip	Carpenter/Leading Hand, Vos Construction and Joinery Pty Ltd
Morris	Christopher David	Managing Director, MPL Health Safety and Environmental Solutions
Morris	Shane Richard	Director, Top End Scaffolding
Morrissey	James Patrick	Managing Director, Jim Morrissey Brick Laying Pty Ltd

List of witnesses *continued*

Surname	First Names	Title
Moulton	Rodney John	Senior Estimator, Multiplex Constructions (Qld) Pty Ltd
Mulry	Joseph	Crane Driver/Rigger, Tom's Cranes
Murdoch	Douglas Arthur	Approved Manager, Railway Motel, Kalgoorlie
Murphy	Anthony John	Organiser, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Plumbing Division
Murphy	Daniel James	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch; Organiser, Construction, Forestry, Mining and Energy Union, (New South Wales Branch)
Murphy	Geoffrey John	Managing Director, JM Kelly (Project Builders) Pty Ltd
Murphy-Smith	John	Subcontractor, CSR Emoleum
Murray	Daniel Alan	Industrial Advocate, Master Builders Association of New South Wales
Murray	Kevin	Site Manager, Q Con Pty Ltd
Murray	William James Christopher	Director, CJS Plumbing and Roofing
Murray	Chris William	Director, CJS Plumbing and Roofing
Nash	Michael John	Human Resources Manager, Queensland, Northern Territory and Papua New Guinea, Theiss Pty Ltd
Neesham	Henry Thomas	Executive Director, WorkCover Western Australia
Neophytou	Charalambos	HR management director, DORIC Constructions
Nesci	Frank	Cabinet Maker, Superior Interior Designs
Newton-Brown	Damien	General manager, McCorkell Constructions
Neylon	Brian Joseph	Information Logistics Controller, Saizeriya Australia Pty Ltd
Nicol	John Alan	Manager/Consultant, Transition Nominees Pty Ltd trading as QVS Shopfitters and Interior Designs
Nicol	Thomas David	Director, TK Steel Fixing
Nisbet	Timothy Laurence	Temporary organiser, Construction, Forestry, Mining and Energy, Industrial Union of Employees, Queensland
Nolan	Daniel John	News Editor, WIN Television Queensland Pty Ltd
Noonan	Dave	Vice President, Construction and General Division, Construction, Forestry, Mining and Energy Union
Norup	John Mosegaard	Director, Broad Constructions Pty Ltd
Nuske	Ross Walter	State Sales Leader for SA and NT, Coated Steel Australia, BHP Steel Ltd
O'Brien	Natalie Jane	Branch Manager, Westaff Australia
O'Brien-Brown	Anthony John	General Manager, Aus Mining Personnel Pty Ltd
O'Carrigan	Damien Victor	Administration Manager, Leighton Contractors Pty Ltd, Queensland

List of witnesses *continued*

Surname	First Names	Title
O'Carroll	Bradley Michael	Safety and Training Officer, Plumbers and Gasfitters Employees Union of Australia, Queensland Branch, Union of Employees
O'Connor	Kevin Charles	Company Director, Yorkshire Masonry Pty Ltd
O'Donnell	Grant Lawrence	Senior Executive, Tracey Brunstrom and Hammond Pty Ltd
O'Driscoll	William John	Industrial Relations Consultant, WTWT Human Relations Consultants Pty Ltd
O'Grady	Francis	Union organiser, CFMEU
O'Malley	Martin James	Branch Secretary, Construction, Forestry, Mining and Energy Union, Construction and General Division, South Australian Divisional Branch; Secretary, Construction, Forestry, Mining and Energy Union, South Australian Branch
O'Neill	John	Site manager, DORIC Constructions Pty Ltd
O'Carrigan	Damien	Administration Manager, Leighton Contractors Pty Ltd
Ochota	George	Business Development Manager, John Hindmarsh (SA) Pty Ltd
O'Hagan	John Peter	Partner, Ryan and O'Hagan Pty Ltd
Olesen	Kjeld	Senior Project Manager, Consolidated Constructions Pty Ltd
Oliver	William Martin	Branch Assistant Secretary, Construction, Forestry, Mining and Energy Union, Construction and General Division, Victorian Building Unions Divisional Branch
Olman	Neill Bryson	Director, CQ Crane Hire
Ong	Peter	Organiser, Electrical Trades Union of Employees of Australia, Queensland Branch.
Ong	Charles	General Practitioner
Onley	Louis James	OP (Industries) Melbourne Pty Ltd
Orazio	Anthony Renar	Operations Manager, Bovis Lend Lease
Orchard	Alfred Jamie	Director, Enforcement, Australian Securities and Investments Commission
Orvad	Paul Martin	Managing Director, Orvad (WA) Pty Ltd
Osborne	Rory Michael	Labourer, JM Kelly (Project Builders) Pty Ltd
Osborne	Robert Samuel	Executive Director, South Australian Branch, Civil Contractors Association
Oswin	Graham	Operations Manager, Baulderstone Hornibrook
Pace	Neil Fenton	Audit Partner, Moore Stephens BG
Paget	Clifford Raymond	Chief Financial Officer, West Australian Cricket Association
Palethorpe	Shane Frederick	Labourer/Safety Officer, Watpac Australia Pty Ltd
Palmer	Jeffrey Herbert	Construction Manager, Abigroup Contractors Pty Ltd
Palmer	John Robert Victor	Sales Contractor, Tyco Services Pty Ltd

List of witnesses *continued*

Surname	First Names	Title
Palmer	Neville Graham	Director, Gordyn and Palmer Pty Ltd; President, Victorian Chapter, National Electrical and Communications Association
Palmer	Michael John	Project Manager, Connell Wagner
Papan	Mark James	Claims Officer, Construction, Forestry, Mining and Energy Union, Construction and General Division, Victorian Building Unions Divisional Branch
Papan	Michael	Retired [formerly Claims Officer, CFMEU]
Papp-Horvath	Andrew Leslie	Director, LPH Painting Company Pty Ltd
Parker	Brian	Branch Assistant Secretary, Construction Forestry Mining Energy Union, Construction and General Division, NSW Divisional Branch
Partridge	Wendy Louise	Director and Principal, Alawen Pty Ltd trading as Accounting Information Management
Passione	Joe	Builder and Project Manager, Anderson Formrite.
Patty	Paul John	Director, Naylor Business Solutions
Paynter	Michael	Company Director, Peregrine Management Group Pty Ltd
Pearce	Shirley Eileen	Administrative Assistant, Royal Commission into the Building and Construction Industry
Pearce	Peter John	Project Manager, Rosehill Project, Baulderstone Hornibrook Pty Ltd
Peck	Algy James	Estimator, Halikos Roofing (Aust) Pty Ltd
Peppercorn	Andrew John	Managing Director, Consolidated Constructions Pty Ltd
Peronace	Francesco	General Manager, Ace Contractors Pty Ltd
Perrett	William James	BERT Coordinator, CFMEU
Perrott	Robert	Site manager, DORIC Commercial Pty Ltd
Peters	Ken	Acting Chief Executive Officer, Sunshine Coast Regional Group Apprentices Ltd
Peterson	Graham Ivan	Company Director, Saizeriya Australia Pty Ltd
Peterson	Rowland Roy	Partner, PriceWaterhouseCoopers, Townsville
Phelan	Terence Gerard	Director of General Operations, Alfasi Steel Constructions Pty Ltd
Philips	Christopher	General Manager, Arco Commercial Door Systems
Pickard	Robert Colin	Concreter and Steel Fixer, Quality Concrete Pty Ltd
Pillar	David Ingles	Organiser, CFMEU
Pisani	Joseph Peter	Work Health Officer and Dangerous Goods Inspector, Northern Territory Work Health Administration
Pitt	Roger Michael	General Manager, Rapid Building Services (SA) Pty Ltd

List of witnesses *continued*

Surname	First Names	Title
Pobje	Daryl William	Retired [formerly an Organiser, Australian Building Construction Employees and Builders Labourers Federation (Queensland Branch)]
Poirier	Michel Raymond	Construction Manager, Theiss Pty Ltd
Politis	Peter	Director, Politis Roofing Pty Ltd
Portlock	Patrick John	Amputee from workplace accident [M5 project]
Potts	Reginald Robert	Area Manager, Housing Industry Association
Potts	John Stuart	Registered Liquidator, Australian Securities and Investment Commission
Powell	Adrian John	Project Manager, Westfield Design and Construction
Power	Denis Peter	Crane Driver, Tom's Cranes
Power	Patrick Douglas	Secretary, Elecnet (Aust) Pty Ltd the trustee of the Electrical Industry Severance Scheme trading as Protect
Prentice	John Wade	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Prentice	Mark	Site Manager, Multiplex Constructions (Vic) Pty Ltd [Federation Square project]
Preston	Patrick George William	Occupational health and safety manager for the safety unit of the CFMEU
Pretto	Rino Anthony	Site Manager, Probuild Constructions
Primmer	Peter Robert	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Primrose	James George	Contracts Administrator, Ideal Interior Linings Pty Ltd
Pruiti Sorella	Salvatore	Subcontractor and tiler
Pugliese	John	General Manager Construction, Grocon Pty Ltd
Puki	Ranui Kent	Labourer, Brajkovich and Son Demolition Pty Ltd [WACA]
Pulham	Brian	Manager, Theiss Pty Ltd
Purcell	Carl	Branch President, Construction, Forestry, Mining and Energy Union, Construction and General Division, Queensland Construction Labourers Divisional Branch; State President, Australian Building Construction Employees and Builders' Labourers' Federation, (Queensland Branch) Union of Employees
Purcell	Geoff Stuart	Project Manager, Kane Constructions Pty Ltd
Pyers	Michael Peter	Manager, Housing Industry Association Ltd
Quill	Brian Charles	Employee, Commercial Plumbing
Radler	Siegfried	Sole Director, Austraform Pty Ltd

List of witnesses *continued*

Surname	First Names	Title
Ravbar	Michael	Branch Assistant Secretary, Construction, Forestry, Mining and Energy Union, Construction and General Division, Queensland Construction Workers Divisional Branch; Assistant State Secretary, Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland
Raward	Malcolm John	Trustee, Morlock Trust, Raward & Co Pty Ltd
Rayner	John	Project Development Manager, Australand Holdings Ltd
Read	Ian Charles	Assistant Commissioner, Australian Taxation Office
Rech	Corrado	State Coordinator, Asbestos and Demolition, WorkCover Authority of NSW
Redfern	Brian Trevor	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Redgrave	Raymond Donald	Director and Shareholder, Milray Developments Pty Ltd
Reeman	Rosemary Ann	Managing Director, Master Planner Interiors Pty Ltd
Reeves	Terrence Fred	Executive Officer, Master Plumbers and Mechanical Services Association of South Australia
Reynolds	Kevin Noel	Secretary, Construction, Forestry, Mining and Energy Union, Construction and General Division, Western Australian Divisional Branch; Secretary, Construction, Forestry, Mining and Energy Union of Workers
Rhykers	Christopher Paul	Construction Manager, Crestway Constructions Pty Ltd
Ricanek	Rudolf	Construction Manager, SES Structural Erectors International Pty Ltd
Richards	Peter	Industrial Registrar, Australian Industrial Registry
Richardson	Paul	General Manager, Shepherd Contracting Pty Ltd
Richardson	Bill	Owner, Prestige Painting Services Cairns Pty Ltd
Rigby	Anthony Peter	Contract Administrator, Glenzeil Pty Ltd
Riggs	Leslie May	Group Manager, Workplace Relations Services Group
Riordan	Bernard Martin	Secretary, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical Division, New South Wales Branch; Secretary, Electrical Trades Union of Australia, New South Wales Branch
Rizzo	Antonio Guiseppe (Tony)	Senior Project Manager, United Group Ltd
Roberts	Gary Paul	President, Masonry Contractors Association of New South Wales; Manager, Nevada Contractors Pty Ltd
Roberts	John Charles	Director and Chairman, Multiplex Constructions Pty Ltd
Roberts	Trevor Hedley	Logistics Consultant
Robertson	Alan James	Senior Project Manager, Walter Construction Group
Robertson	John Cameron	Organiser, Electrical Trades Union of Australia

List of witnesses *continued*

Surname	First Names	Title
Robins	Richard Peter	Project Manager, Stockport (NQ) Pty Ltd
Robinson	Albert Desmond	Manager Financial Services, Sunshine Coast Regional Group Apprentices Ltd
Robson	John Derek	Director, Multiplex Constructions Pty Ltd; Managing Director, Multiplex Constructions (WA) Pty Ltd; Managing Director, Multiplex Constructions (WA) Pty Ltd
Roebig	Peter John	Manager, Queensland Construction Training Fund
Roennfeldt	Richard John	Formerly Director, Major Projects Unit, Victorian Office of Major Projects
Rogers	Gary William	Managing Director, Coastwide Civil Pty Ltd
Rogers	Peter Shane	Director, Lockrey Holdings Pty Ltd
Rolland	David Michael	General Manager, Construction, Department of Infrastructure, Planning and Environment
Romano	Michael	Roads and Traffic Authority Operations Manager
Rosati	Emilio	Construction Supervisor, Fastform Systems Pty Ltd
Rossignoli (Rossi)	Paul John	Managing Director, Able Demolitions and Excavations Pty Ltd
Ruloff	Johannes	Project Manager, Theiss Construction Pty Ltd
Rummakainen	Kari Martti	Managing Director, Broad Constructions Pty Ltd
Rumsley	Geoff	Ceiling Contractor
Rushton	David Charles de Blaquiere	Senior Legal Manager, Office of the Employment Advocate
Russell	Andrew Robert	Managing Director, PanelCraft Coolrooms (NSW) Pty Ltd
Russell	Ian (Ike) Ivan	Director, Interior Linings Pty Ltd
Russo	Angelo Phillip	Shareholder/director, Construction Accreditation Services
Russo	Steven Giuseppe	Project Manager, Riogold Holdings – Frontline Interiors
Ryan	Denis Bernard	Construction Manager, Bells Constructions and Technologies Pty Ltd
Ryan	Richard Vincent	Chief Executive Officer, Henry Walker Eltin Group Ltd
Ryan	Stephen Michael	Inspector, Victorian WorkCover Authority
Saarikko	Tero	Foreman, Bosform
Saddington	John Allan	Able Demolitions and Excavations Pty Ltd,
Sadler	John Keith	Managing Director, CEC Constructions
Saggers	John Charles	State Manager, Tyco Services
Sales	Adam	Plumber/Excavator, Commercial Plumbing
Saliadarre	Serge	Organiser, CFMEU, NSW
Salisbury	Norman Francis	Union Official, Australian Services Union and Australian Workers Union
Salmon	Garry Allen	Managing Director, Salmon & Son Pty Ltd

List of witnesses *continued*

Surname	First Names	Title
Salmon	Shane William	Administration Manager, Salmon & Son Pty Ltd and Salmon Earthmoving Services
Salverson	Peter John	Construction manager, Hansen Yuncken Pty Ltd
Sampsonidis	Nick	OH&S representative, John Hollands
Sanna	Ferdinando	Supervisor, Betaform Constructions Pty Ltd
Sasse	Stephen Michael	General Manager, Human Resources and Industrial Relations, Transfield Pty Ltd
Scales	William Ivan	Manager of Human Resources and Chief of Staff, Telstra, formerly Secretary of the Victorian Department of Premier and Cabinet
Schmidt	Ann Marie	Employee Relations Manager, Baulderstone Hornibrook
Schwarten	Robert Evan	Minister for Housing and Minister for Public Works, Queensland Government
Scott	Terrence Ronald	Company Director, Commercial Plumbing
Scott	David	Construction and Site Manager, Honeycombe Property Group
Scott	Edward	Former Chair, Townsville Enterprise Ltd
Scott	Greg	Operations Manager, Mainbrace Constructions Ltd
Scott	Darryn John	Site Manager, Vos Construction and Joinery Pty Ltd
Sebastian	Francois Phillipe	Managing Director, Sebastian Builders and Developers Pty Ltd
Seidler	Brian	Executive Director, Master Builders Association of NSW
Setka	John	Organiser, CFMEU
Sharp	Courtney Woods	Manager of Building Operations, W Stronach Pty Ltd
Sharp	William	Unemployed, formerly Electrician, ABB Industry Pty Ltd
Shaw	Daniel Mansbridge Davidson	Construction Manager, Baulderstone Hornibrook
Shaw	Michael Ronald	Facilities Manager, Western Australia Cricket Association offices
Sheens	John Edward	Operations manager, Built Environs Pty Ltd
Shell	Peter Charles	Industrial relations manager, Civil Contractors Federation
Shepperd	Michael Raymond	Accountant, Dawson Partners; State Director, Building Industry Specialist Contractors Organisation of Tasmania
Shirbin	Michael	Project Director, Burns Bridge Australia Pty Ltd
Shorten	William Richard	National Secretary, The Australian Workers' Union; State Secretary, The Australian Workers' Union, Victorian Branch
Siegenthaler	Urs	Managing Director, Swisslog Australia Pty Ltd
Silva	Patricia	Cleaner, HI Lo Cleaning

List of witnesses *continued*

Surname	First Names	Title
Simcoe	Gregory Michael	Branch Secretary, Construction, Forestry, Mining and Energy Union, Construction and General Division, Queensland Construction Labourers Divisional Branch; State Secretary, Australian Building Construction Employees and Builders' Labourers' Federation, Union of Employees.
Simons	David James	OH and S inspector, Workplace Services
Simpson	Malcolm	Project manager, Kane Constructions
Simpson	David	Labourer, Mirvac Fini
Sinclair	Stephen	A cabinet-maker [Pier Hotel site at Glenelg, Adelaide Contracting Services]
Sisic	Fahudrin	Director, Brighton Ceilings Pty Ltd
Smith	Jason	Executive Manager Licensing for QLD Building Services Authority
Smith	Maxwell Harvey	General manager, Project Services business unit, Department of Public Works, Queensland Government
Smith	Paul Wayne	Managing Director, Parmic Pty Ltd
Smith	Philip Barry	Union official, New South Wales branch CFMEU
Smith	Ronald John	Formerly Project Manager, ABB Industry Pty Ltd;
Smith	Wayne Francis	Industrial Relations and Human Resources consultant, Queensland; Master Plumbers Association; Director, Hoolism Pty Ltd
Smith	Christopher Todd	Manager, Contracts Division, Smith Brothers Plumbing
Smith	John Alexander Ross	Director, IUS Holdings Pty Ltd; Director, The Very Good Company Pty Ltd; Sole Director, Smith Consulting Services Pty Ltd
Snell	William Charles	Director, Alkene Asbestos Removal Pty Ltd; Vice President, Asbestos Removal Contractors' Association
Soltysik	Chester	Managing Director, Australia Colour Enterprises
Sommer	Walter H	Managing Director, Sommer and Staff Constructions Pty Ltd
Sosenko	Stan	Superintendent, Theiss Pty Ltd
Southwell	Michael	Senior Reporter, The West Australian
Spence	John Robert	Project manager, Westfield Design and Construction.
Spencer	Gary	Building and Construction Industry Training Board
Spernovasilas	Elias	Organiser, CFMEU
Spina	Peter John	Solid plasterer, Joe Battaglia Pty
Spink	Anthony	Manager Specialist Projects, Leighton Contractors Pty Ltd
Sporn	David Bernard	Manager, Palms Accomodation
Spry	Mark	Project manager, John Holland Pty Ltd
Stack	James William	Construction Manager, JM Kelly (Project Builders) Pty Ltd

List of witnesses *continued*

Surname	First Names	Title
Stagg	Matthew Hotchkin	Director and Chairman, Multiplex Constructions (NSW) Pty Ltd
Stainer	Mark Patrick	Sales manager, Novatec Construction Systems
Standing	John Richard	Assistant Police Commissioner, Metropolitan Police Region, Perth WA
Stapleton	John Brendan	Public Servant, Strategic Industry Group of Industrial Relations Victoria
Steel	David George	General Manager, Industrial Employee Relations of Business South Australia
Steele	Jonathon William	Safety Officer, formerly organiser with the BLF
Stevens	Keith William	Project manager, Multiplex constructions (Vic) Pty Ltd
Stevens	Kevin James	Concreter, Mark Stevens Quality Concrete Pty Ltd
Stevens	Mark	Director, Quality Concrete Pty Ltd
Stewart	Andrew John	Professor of Law, Flinders University South Australia
Stewart	Gene Eric	Managing Director, Affective Services Pty Ltd
Stewart	Robert Norman	Chief Executive Officer, Master Builders Association (SA) Incorporated
Stibbard	Norman	Former Owner, Monarch Group Pty Ltd
Stillman	Peter	Senior Employee Relations Advisor, Chamber of Commerce and Industry of Western Australia
Stitfall	Mark Allen	Site Manager/Project Manager, Link Projects Australasia.
Stowers	Ron Moni	Company Director/Scaffolder
Strain	Douglas D	Chief Executive Officer, Construction Industry Training Board
Stratti	Daniel Sam	Operations Manager, recycling depot.
Stratti	Troy Kenneth	Managing Director, Stratti Ocean and Earthworks Pty Ltd
Strong	Barbara	Office Manager, S&B Industries (NSW) Pty Ltd
Strong	Stephen Peter	Director, S&B Demolitions and Excavations NSW Pty Ltd
Stuchbery	John Francis	Project Manager, Multiplex Constructions Pty Ltd
Suckling	Kim Alan	Director, Klas Pty Ltd
Sulley	William Anthony	Chairman, College of Electrical Training
Sulsters	Antonio	Manager, Westfield Design and Construction Pty Ltd
Suridge	Alan	Fund Manager, South Australian Building Industry Redundancy Scheme Trust
Sutcliffe	Paul Edward	Managing Director, Sutcliffe Earthmoving Pty Ltd
Sutton	John David	National Assistant Secretary, Construction, Forestry, Mining and Energy Union; Divisional Secretary, Construction, Forestry, Mining and Energy Union, Construction and General Division
Sutton	Tony	Director, Can Lah Industries
Swan	Anthony	State Manager, Hansen Yuncken Pty Ltd

List of witnesses *continued*

Surname	First Names	Title
Swinburne	Robert	Carpenter and joiner
Sydes	Desmond	Manager, EM Miller Building Co. Pty Ltd
Sydes	Paul Joseph	Manager, EM Miller Building Co. Pty Ltd
Symington	Roy Alan	Operations Manager, Russell Smith Pty Ltd
Synot	Paul	Consultant, Night Owl Plumbing Pty Ltd
Sypkes	Rolfe Rudolph	Company Director, Radiata Investments Pty Ltd
Tabaczyinski	Ray	Director, Nu-line Aluminium Windows Pty Ltd
Tabak	Bulent	Director, Tabak Cement Rendering Pty Ltd
Tabak	Hayrani	Director, Tabak Cement Rendering Pty Ltd
Tabikh	Talal	Tenancy coordinator, Westfield Design and Construction Pty Ltd
Taddei	Antonio	Director, Ceramic Tile Engineering Pty Ltd
Tagliabue	John William	Chief Executive Officer, Finishing Trades Association of Australia
Taig	David Ian	Police Officer, NSW Police
Tallon	Christopher	Sales Representative
Tallon	Jacqueline	Receptionist, ARCO Systems and Doors
Taylor	Thomas Walter	Scaffolder, CBI Constructions
Templar	Terry	Team leader, DIMA
Tessmann	Andrew Noel	Director, Tessmann Concreting Pty Ltd
Thomas	Geoffrey Charles	Senior Industrial officer, Master Builders Association of New South Wales
Thomas	James Kevin	General Manager, Business Development, Chifley Financial Services Ltd
Thomas	Julia	Paralegal, Royal Commission into the Building and Construction Industry
Thompson	Peter	Technical Assistant Consultant, Salvation Army Employment Service [Murrin Murrin]
Timmins	Malcolm Paul	Assistant Director, Building Industry and Special Projects Inspectorate, WA Department of Consumer and Employment Protection
Tinmouth	Darryn	Organiser, CFMEU
Tinsley	James Clifford	Secretary and CEO, New South Wales Chapter of the National Electrical Contractors Association; Electrical Contractors Association of New South Wales
Tobler	Lesley Raymond	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Tokatlidis	Paul	Project manager, demolition project – Housing Commission units at the Holland Estate

List of witnesses *continued*

Surname	First Names	Title
Tollman	Irwin	Group Financial Director, Monadelphous Group Ltd.
Tomlinson	Bradley Roy	Glazier, Morley Glass
Topp	Alan	Chartered Accountant – Senior Employee, Sims Lockwood Chartered Accountants and Business Advisors
Torbay	Paul	Owner, Operator, Director, Hurricane Earthworks and Demolition Pty Ltd
Tornya	Andrew George	Managing Director of New Era Balustrading Pty Ltd
Touhill	Glen	Director, Austral Interior Linings Pty Ltd
Tozer	Louise	Director, Lateral Projects and Developments Pty Ltd
Trenwith	Dean Wayne	Account Manager, Coated Steel Australia, BHP Steel Ltd
Trohear	William Wallace	Branch Secretary, Construction, Forestry, Mining and Energy Union, Construction and General Division, Queensland Construction Workers Divisional Branch; State Secretary, Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland
Tropeano	Samuel J	Associate Member, Chartered Institute of Secretaries, Sole Proprietor, Madison Partners
Trounce	Peter Michael	Accountant
Tupicoff	Alan	Contract Superintendent, Business Development Portfolio, Project Services, Department of Public Works
Turnbull	Adrian	Sole Director, Foxrun Building Services Pty Ltd
Tye	Terry	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, Queensland Construction Labourers Divisional Branch; Organiser, Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees
Upton	Wayne	Managing director, Brock Plastering Pty Ltd
Ure	John	Retired Police Officer, formerly Director Australian Bureau of Criminal Intelligence
Uren	Norman Ross	Owner, Intreepit Pty Ltd
Urwin	Dean	Project manager, Total Lift Management
Ussher	Andrew Ronald Edgeworth	Delegate, Construction, Forestry, Mining and Energy Union
Van Brussel	Emlyn	Town steward, Construction, Forestry, Mining and Energy Union Construction and General Division, NSW Divisional Branch, Port Macquarie
Van Camp	John	National manager industrial relations, Grocon Constructors.
Van Steenis	Roel	Managing director, Tascon Constructions Pty Ltd
Van Vuuren	Dirk	Production supervisor, Blue Circle Southern Cement Ltd Berrima
Varcoe	Ray	Sales representative, Mirage Industries

List of witnesses *continued*

Surname	First Names	Title
Vaughan	Peter	Chief Executive Officer, South Australian Employers Chamber of Commerce and Industry trading as Business South Australia
Vega	Viduar Gonzalo	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Vickers	Michael	Director, Zadro Constructions Pty Ltd
Vieusseux	Jason	Project manager, Bovis Lend Lease Pty Ltd
Vining	Mark	Human resources manager, Barclay Mowlem Construction Ltd
Vizard	Stephen William	President, Council of Trustees, National Gallery of Victoria
Vlahov	Dennis	Contract administrator, John Holland
Wakeling	Keith	Construction manager, Mirvac Fini
Wales	Sid	Union organiser, CFMEU New South Wales
Wallace	Edwin George	Director, Hi-Lo Cleaning and Maintenance Pty Ltd
Wallace	Bill	Secretary, Construction Income Protection (Qld) Pty Ltd
Wallbank	David	Director, Advanced Electrical Pty Ltd
Walsh	Michael James	Project Manager, Paynter Dixon Building Improvements Division
Walter	Andrew John	Managing Director and Joint shareholder, AJ & MH Walter Pty Ltd – Andrew Walters Construction
Walters	Leigh	Project Manager, Bovis Lend Lease
Walton	Patrick James	Managing Director, P R Electrics Pty Ltd
Warner	Martin John	Fist Aid Officer and Union Delegate, Leighton Contractors
Warren	Neil Alistair	Co-author, Review of Employers' Compliance with Workers Compensation Premiums and Payroll Tax in New South Wales
Washington	Noel	Branch President, FEDFA Division of the CFMEU
Waters	Bernard William	Assistant Secretary, Business Branch, Migration and Temporary Entry Division, Department of Immigration and Multicultural Indigenous Affairs
Watkins	Joseph Stanley	Site Manager, Abigroup Contractors Townsville
Watson	Paul Leslie	Director, Building (Northern) Baulderstone Hornibrook Pty Ltd.
Watson	William Bresson	Chairman, Master Plumbers Contractors of Australia. Chairman, Plumbers and Draining Licensing Board of Queensland
Webster	Rhett Laurence	Senior Project Manager, Walter Construction Group Ltd
Webster	Wally	Formerly supervisor/operations manager, various crane hire companies
Weight	Robert	Project Manager, DHA Project, Multiplex Constructions Pty Ltd
Weir	Robert	Director, SJ Weir Pty Ltd
Welch	Brian	Executive director, Master Builders Association of Victoria

List of witnesses *continued*

Surname	First Names	Title
West	Warren Charles	Formerly Secretary CEPU Plumbing Division
Weston	William John	Project Director, Office Major Projects, Major Projects Victoria
Whatmore	Neil Bradley	Construction Supervisor, Transfield
Wheeler	Kevin	Managing Director, Garner and Wheeler Crane Hire Pty Ltd
White	William Thomas Charles	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, Tasmanian Divisional Branch
White	Christopher Ronald	General Manager, National Sub-Contractors Association
White	Gary David	Administration Manager, FKP Constructions
White	Katharine Marie	Chief Executive Officer, West Australia Cricket Association
White	Timothy Christopher	Safety Officer, Honeycombes Property Group
White	Timothy Andrew	Project Manager, St Hilliers Victoria
White	Colonel Neville John	Director, Project Delivery, Department of Defence
Whyte	Terry Donald	Director, Whyco Crane Services Pty Ltd
Wild	William [Bill] Joseph	Managing Director, John Holland
Wilkins	Robert Adrian	Managing Director, Wilkins Constructions Pty Ltd
Wilkinson	Graeme Robert	Acting Assistant Commissioner, Australian Taxation Office
Wilkinson	Neil Arthur	Company Secretary, SCRGAL
Wille	Alfred Eric	Unemployed steel fixer
Williams	Richard Lawrence	Secretary, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical Division, Queensland Branch; Secretary, Electrical Trades Union of Employees of Australia, Queensland Branch
Williams	Alan James	Builders Labourer
Williams	Douglas	
Williams	Peter John	Managing Director, Elecraft (Aust) Pty Ltd
Williams	Robyn Leagh	Account Manager Field Services/Finance, National Credit Management Ltd
Williamson	Ian	Dogman
Wilson	Albert John	Former Rigger/Dogman, Victorian Building and Construction Industry
Wilson	Laurence Edwin	Managing Director, Skymaster Plant Hire Pty Ltd
Wilson	Robert Daddingston	Retired Accountant, Tom's Cranes
Wilson	Jan	Director and General Manager, Multiplex Constructions (SA) Pty Ltd
Wilson	James Joseph	State Manager, Trojan Workforce, Queensland

List of witnesses *continued*

Surname	First Names	Title
Winslow	Hugh Alfred	State President, Concrete Institute of Australia; Managing Director, The Precasters Pty Ltd
Winter	Christopher Anthony	HR Manager, BHP
Witts	Stephen James	Manager, Industrial Relations and Safety, Leighton Contractors Pty Ltd
Wolpers	Wayne	Director, Wolpers and Flowers Constructions (NT) Pty Ltd
Wood	Peter Steven	President, Queensland Major Contractors Association
Wood	Bruce Robert	Project Supervisor, G James Glass and Aluminium [Princess Alexander Hospital site]
Wood	Robert Kendall	Carpenter
Woodham	Janette Ellen	General Manager, Human Resources, MacMahon Holdings Ltd
Worth	Andrew Oliver	Project Manager, Kirway Constructions
Wotherspoon	John	Site Supervisor, Bregma Pty Ltd
Wright	Paul Vincent	Contract Manager, HPS construction
Wyer	Martin	Organiser for the Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Yates	Robin john	Retired, [project manager, RML Pty Ltd]
Yazbek	Lewis	Managing Director, Southern Cross Constructions (NSW)
Yencken	Edward Roberts	Director, Probuild Constructions (Services) Pty Ltd
Young	Frank John	State Organiser, CFMEU
Young	Alexander George	Project Manager, Construction Managers and Contractors
Young	Stephen Mark	Construction superintendent, CBI Constructions
Zaboyak	Peter Boden	Branch Assistant Secretary, Construction, Forestry, Mining & Energy Union, Construction and General Division, NSW Divisional Branch; Assistant Secretary, Construction, Forestry, Mining and Energy Union (New South Wales Branch), Construction and General Division
Zaknich	James Anthony	previously Manager, Compliance, West Australian Taskforce for the Building and Construction Industry
Zdrilic	Ante	Delegate and Trustee, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Zeltner	Trevor John	Organiser, Construction, Forestry, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
Zinni	Andrew Mario	Senior Project Manager, Probuild Constructions (Services) Pty Ltd
Zlatar	Petar	Managing Director, Petar Zlatar Partitions

Appendix 13:

Example non-publication order

ROYAL COMMISSION INTO THE
BUILDING AND CONSTRUCTION INDUSTRY

ROYAL COMMISSIONS ACT 1902

DIRECTION NOT TO PUBLISH

I, the Honourable TERENCE RHODERIC HUDSON COLE R.F.D. Q.C., a member of the Commission established under Letters Patent dated 29 August 2001, pursuant to subsection 6D(3) of the *Royal Commissions Act* 1902, direct that the evidence given by [ ] this day in respect of the [ ] not be published beyond the confines of this Hearing Room.

Dated this [ ] day of [ ] 2002

……...…….....
The Honourable Terence R H Cole R.F.D. Q.C.
Commissioner

Appendix 14:

Example adverse evidence notice

ROYAL COMMISSION INTO THE BUILDING AND CONSTRUCTION INDUSTRY

[DATE]

[NAME]
[TITLE]
[COMPANY]
[ADDRESS]

Dear [NAME]

New South Wales Hearings

The Royal Commission into the Building and Construction Industry has set down public hearings in Sydney, commencing on 3 June 2002.

Counsel Assisting the Commission wish to bring the following to your attention:

1. [PARTICULARS OF STATEMENT/TRANSCRIPT]

The purpose of this letter is to put you on notice that the above transcript and/or statement contains material that is or might be adverse to you. You will be given an opportunity to contest any such evidence, if you so request.

A copy of the above statement has been put on the Commission's Ringtail CourtBook database. You can find this statement by looking in a folder marked 'Sydney Hearings 01 – Witness Statements'. If you have any difficulties in accessing Ringtail CourtBook, I invite you to contact Alison Lane of the Royal Commission by email address: alison.lane@royalcombci.gov.au The email should set out that you have received a notice of adverse evidence; your full name and title; the nominated users of CourtBook; and the telephone numbers of the nominated users.

A copy of the above transcript has been put on the Commission's website at www.royalcombci.gov.au You can find this transcript by looking under the handle marked 'hearings, orders, directions & transcripts', then further looking under the handle marked 'transcripts'.

I also draw your attention to the Commission's Practice Notes, copies of which may be downloaded from www.royalcombci.gov.au/hearings/practicenote.htm. Those Practice Notes govern matters including the conduct of hearings, applications for authorisation to appear before the Commission, the examination and cross-examination of witnesses, the provision of witness statements, and other matters.

Please note that pursuant to paragraph 12 of Practice Note 2, no person other than Counsel Assisting the Commission will be permitted to cross-examine any witness unless and until that person has

provided to Counsel Assisting a signed statement of evidence advancing material contrary to the evidence of that witness.

I invite you to comply with paragraph 12 of Practice Note 2, should you wish to apply for permission to cross-examine any witness appearing before the Commission.

If you wish to discuss this letter, or any other matters about the Sydney hearings of the Commission, please telephone [COMMISSION CONTACT], on [LANDLINE NUMBER] or [MOBILE NUMBER].

Yours faithfully

[Name]
Senior Counsel Assisting

Appendix 15:

Example summons to attend

Summons No. S

COMMONWEALTH OF AUSTRALIA

Royal Commissions Act 1902

SUMMONS TO APPEAR BEFORE THE COMMISSION
INQUIRING INTO THE BUILDING AND CONSTRUCTION INDUSTRY
TO GIVE EVIDENCE

To [*insert name of person and address*]

In pursuance of sub-section 2 (1) paragraph (a) of the Royal Commissions Act 1902, I, The Honourable TERENCE RHODERIC HUDSON COLE RFD QC, a member of the Commission established under Letters Patent dated 29th of August 2001 to inquire into and report on the following matters in relation to the building and construction industry*:

(a) the nature, extent and effect of any unlawful or otherwise inappropriate industrial or workplace practice or conduct, including, but not limited to:

  (i) any practice or conduct relating to the Workplace Relations Act 1996, occupational health and safety laws, or other laws relating to workplace relations; and

  (ii) fraud, corruption, collusion or anti-competitive behaviour, coercion, violence, or inappropriate payments, receipts or benefits; and

  (iii) dictating, limiting or interfering with decisions whether or not to employ or engage persons, or relating to the terms on which they be employed or engaged;

(b) the nature, extent and effect of any unlawful or otherwise inappropriate practice or conduct relating to:

  (i) failure to disclose or properly account for financial transactions undertaken by employee or employer organisations or their representatives or associates; or

  (ii) inappropriate management, use or operation of industry funds for training, long service leave, redundancy or superannuation;

(c) taking into account my findings in relation to the matters referred to in the preceding paragraphs and other relevant matters, any measures, including legislative and administrative changes, to improve practices or conduct in the building and construction industry or to deter unlawful or inappropriate practices or conduct in relation to that industry.

AND 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

HEREBY SUMMON YOU:

(a) to appear before the Commission at the hearing to be held at [*insert address*] on [*insert date*] at [*insert time*] to give evidence in relation to the matters into which the Commission is inquiring; and

(b) to attend from day to day unless excused or released from further attendance.

Dated this …..day of 2002

……...……....
The Honourable Terence R H Cole RFD QC
Commissioner

*For the purposes of the inquiry a reference to the 'building and construction industry' does not include the building or construction of single dwelling houses unless part of a multi-dwelling development.

Section 3 of the *Royal Commissions Act 1902* creates obligations for a person served with a summons under section 2 to appear before the Commission at a hearing to give evidence. Under section 3 a person who contravenes any of the subsections is guilty of an offence punishable upon conviction by a fine of $1000 or imprisonment for a period of 6 months.

Appendix 16:

Example statement of rights and obligations accompanying summons

STATEMENTS OF RIGHTS AND OBLIGATIONS OF A PERSON SERVED WITH A SUMMONS UNDER THE *ROYAL COMMISSIONS ACT 1902*

1. A person served with a summons to appear as a witness at a hearing before the Commission shall not without reasonable excuse fail to attend as required by the summons, or fail to attend from day to day unless the person is excused or released from further attendance by the Commissioner: s3(1), (1B).

   The penalty for each of these offences is a fine of $1000 or imprisonment for 6 months: s3(1).

   If you fail to attend the Commission in answer to a summons, the Commissioner may issue a warrant for your apprehension: s6B(1). You would then be apprehended and brought before the Commission, and detained in custody until released by order of the Commissioner: s6B(2).

2. Pursuant to subsection 6(1), if any person appearing as a witness before the Commission refused to be sworn or to make an affirmation, or to answer any question relevant to the inquiry put by the Commissioner, the person shall be guilty of an offence.

   The penalty for each of these offences is a fine not exceeding $1000 or imprisonment for a period not exceeding 6 months: s6(2).

3. Pursuant to subsection 6A(2), a person appearing as a witness is not excused from answering a question that the person is required to answer by the Commissioner on the ground that answering the question might tend to:

   (a) incriminate the person; or

   (b) make the person liable to a penalty.

   Subsection 6A(2) does not apply to the answering of a question if:

   (a) the answer might tend to incriminate the person in relation to an offence or make the person liable to a penalty; and

   (b) the person has been charged with the offence, or proceedings in relation to the penalty have commenced; and

   (c) the charge, or penalty proceedings, have not been finally dealt with by a court or otherwise disposed of: s6A(3), (4).

4. If any witness appearing before a Royal Commission requests that the witness's evidence relating to a particular subject be taken in private on the ground that the evidence relates to the profits or financial position of any person, and that the taking of evidence in public would be unfairly prejudicial to the interests of that person, the Commission may if it thinks proper, take that evidence in private, and no person who is not expressly authorised by the Commission to be present shall be present during the taking of that evidence: s6D(2).

5. Pursuant to subsection 6D(3), the Commission may direct that any evidence given before it shall not be published, or shall not be published except in such manner, and to such persons, as the Commission specifies.

   The penalty for the offence or failing to comply with such a direction, is, on summary conviction, a fine not exceeding $2000 or imprisonment not exceeding 12 months: s6D(4).

6. A statement or disclosure made by a person in the course of giving evidence before the Commission is not admissible in evidence against the person in any civil or criminal proceedings in any Commonwealth, State or Territory court, except in proceedings for an offence against the *Royal Commissions Act:* s6DD.

7. A witness appearing before the Commission shall be paid a reasonable sum for the expense of the person's attendance in accordance with the scale prescribed by the Regulations: s6G. A witness may also be entitled to allowances for travelling expenses and maintenance while absent from home: s8(1).

8. Pursuant to section 6H, a person shall not, at a hearing before the Commission, intentionally give evidence that the person knows to be false or misleading with respect to any matter, being a matter that is material to the inquiry being made by the Commission.

   This is an indictable offence punishable on conviction by imprisonment for a period not exceeding 5 years or by a fine not exceeding $20,000, or on summary conviction, by imprisonment for a period not exceeding 12 months or a fine not exceeding $2000.

9. A person summoned as a witness at a hearing before the Commission shall not fail to produce a document or other thing that the person is required to produce by a summons issued under the Act or that the person is required to produce by the Commissioner presiding at the hearing: s3(2).

   The failure to produce a document or other thing, as required, is punishable by a fine of $1000 or imprisonment for 6 months: s3(2).

10. Subsection 3(2B) provides that subsection 3(2) does not apply if the person has a reasonable excuse.

11. Subsection 3(3) provides that it is a defence to a prosecution for an offence under subsection 3(2) if the document or thing is not relevant to the matters into which the Commission is inquiring.

12. Pursuant to subsection 6A(1), a person appearing as a witness at a hearing is not excused from refusing or failing to produce a document or thing on the ground that such production might tend to:

    (a) incriminate the person; or

    (b) make the person liable to a penalty.

Subsection 6A(1) does not apply to the failure or refusal to produce a document or thing if:

(a) the production might tend to incriminate the person in relation to an offence or make the person liable to a penalty; and

(b) the person has been charged with the offence, or proceedings in respect of the penalty have commenced; and

(c) the charge, or penalty proceedings, have not been finally dealt with by a court or otherwise disposed of: s6A(3), (4).

13. Pursuant to subsection 6F(2), where the retention of a document or other thing by the Commission ceases to be reasonably necessary for the purposes of the inquiry to which the document or other thing is relevant, the Commission shall, if a person who appears to the Commission to be entitled to the document or other thing so requests, cause the document or other thing to be delivered to that person unless the Commission has furnished the document or other thing to a person or body referred to in subsections 6P(1), (2) or (2A).

14. Pursuant to subsection 6K(1), a person commits an offence in the following circumstances:

(a) the person acts or omits to act; and

(b) this results in a document or other thing being concealed, mutilated, destroyed, or being made unidentifiable, or, in the case of documents, rendered illegible or indecipherable; and

(c) the person knows, or is reckless as to whether, the document or other thing is one that may be required in evidence before the Commission, or a person has been, or is likely to be, required to produce the document or thing to the Commission pursuant to a summons.

The offence under subsection 6K(1) is an indictable offence, punishable on conviction by imprisonment for a period not exceeding 2 years or by a fine not exceeding $10,000, or, on summary conviction, by imprisonment for a period not exceeding 12 months, or by a fine not exceeding $2000: s6K(2), (4).

15. A document or other thing produced by a person pursuant to a summons is not admissible in evidence against the person in any civil or criminal proceedings in any Commonwealth, State or Territory court, except in proceedings for an offence against *the Royal Commissions Act*: s6DD.

Appendix 17:

The Third Practice Note

ROYAL COMMISSION INTO THE BUILDING AND CONSTRUCTION INDUSTRY

PRACTICE NOTE 3

1. Subject to paragraph 2 of this practice note, in respect of the hearings of 1 week or less, presently scheduled as follows:

   12 August 2002: Melbourne
   9 September 2002: Adelaide
   13 September 2002: Darwin

   a. all statements to be tendered before the Commission should be placed on Courtbook not less than 10 working days prior to the scheduled commencement of the hearing; and

   b. all statements in response and applications to cross examine based on such statements should be served on the Solicitor and Counsel Assisting the Commission not later than the close of business on the working day preceding the scheduled commencement of the hearing.

2. In light of the proximity of the hearings scheduled to commence in Brisbane on 5 August 2002, in respect of those hearings:

   a. all statements to be tendered before the Commission should be placed on Courtbook not less than 5 working days prior to the scheduled commencement of the hearing, and

   b. all statements in response and applications to cross examine based on such statements should be served on the Solicitor and Counsel Assisting the Commission not later than the close of business on the working day preceding the scheduled commencement of the hearing.

3. All persons wishing to cross examine a witness giving evidence at a hearing to which paragraph 1 or 2 applies should be ready to conduct such cross examination immediately after that witness is examined by Counsel Assisting. The Commission ordinarily will not excuse a witness and then recall that witness for subsequent cross-examination, although it may proceed in that way if the Commission regards it as appropriate to do so. For the avoidance of doubt, this paragraph prevails over paragraph 11 of Practice Note 2.

4. The purpose of this practice note is to endeavour to ensure that cross examination of all witnesses can be encompassed within the scheduled hearing time.

5. This practice note does not derogate from Practice Note 1 which envisages that, in some circumstances, it may not be appropriate for statements of evidence to be served on persons adversely affected in advance of the hearing.

Dated this 17th day of July 2002

……..

The Honourable TRH Cole RFD QC

Commissioner

Appendix 18:

Kingham v Cole

FEDERAL COURT OF AUSTRALIA

Kingham v Cole [2002] FCA 45

ROYAL COMMISSIONS – cross-examination – direction by Commissioner that persons will not be permitted to cross-examine a witness until they have provided a signed statement of evidence advancing material contrary to the evidence of the witness – whether beyond power of Commissioner – whether contrary to natural justice

Royal Commissions Act 1902 (Cth) s 6FA

Geographical Indications Committee v O'Connor (2000) 32 AAR 169 at [20] mentioned

McGuinness v Attorney-General for Victoria (1940) 63 CLR 73 at 98-99 mentioned

Herald & Weekly Times Limited v Woodward [1995] 1 VR 156 at 159 mentioned

Wragg v New South Wales (1953) 88 CLR 353 at 387-8 mentioned

Caltex Oil (Australia) Pty Ltd v Best (1990) 170 CLR 516 at 522 mentioned

Annetts v McCann (1990) 170 CLR 596 at 598 applied

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564 applied

Mahon v Air New Zealand [1984] AC 808 at 820-821 applied

Victoria v Commonwealth (1926) 38 CLR 399 mentioned

Pye v Renshaw (1951) 84 CLR 58 mentioned

National Companies and Securities Commission v The News Corporation Limited (1984) 156 CLR 296 applied

Australian Postal Commission v Hayes (1989) 23 FCR 320 not followed

Giannarelli v The Queen (1983) 154 CLR 212 mentioned

MARTIN LEONARD KINGHAM & ORS v TERENCE RHODERIC HUDSON COLE and COMMONWEALTH OF AUSTRALIA
V 19 OF 2002

HEEREY J
1 FEBRUARY 2002
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **V19 OF 2002**

BETWEEN:	**MARTIN LEONARD KINGHAM & ORS (according to the schedule attached) APPLICANTS**
AND:	**TERENCE RHODERIC HUDSON COLE FIRST RESPONDENT**
	COMMONWEALTH OF AUSTRALIA SECOND RESPONDENT
JUDGE:	**HEEREY J**
DATE OF ORDER:	**1 FEBRUARY 2002**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The second respondent's objection to competency is dismissed with no order as to costs.
2. The application is dismissed.
3. The applicants pay the respondents' costs of the application including reserved costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **V19 OF 2002**

BETWEEN:	**MARTIN LEONARD KINGHAM & ORS (according to the schedule attached) APPLICANTS**
AND:	**TERENCE RHODERIC HUDSON COLE FIRST RESPONDENT**
	COMMONWEALTH OF AUSTRALIA SECOND RESPONDENT
JUDGE:	**HEEREY J**
DATE:	**1 FEBRUARY 2002**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

INTRODUCTION

1 The first respondent the Honourable Terence Rhoderic Hudson Cole RFD QC (the Commissioner) was appointed by Letters Patent dated 29 August 2001 pursuant to the Constitution, the *Royal Commissions Act 1902* (Cth) (the Act) and other enabling powers as a Commissioner to investigate certain matters in relation to the building and construction industry. Those matters were defined in the Letters Patent as follows:

> *"(a) the nature, extent and effect of any unlawful or otherwise inappropriate industrial or workplace practice or conduct, including, but not limited to:*
>
> *(i) any practice or conduct relating to the* Workplace Relations Act 1996, *occupational health and safety laws, or other laws relating to workplace relations; and*
>
> *(ii) fraud, corruption, collusion or anti-competitive behaviour, coercion, violence, or inappropriate payments, receipts or benefits; and*
>
> *(iii) dictating, limiting or interfering with decisions whether or not to employ or engage persons, or relating to the terms on which they be employed or engaged;*
>
> *(b) the nature, extent and effect of any unlawful or otherwise inappropriate practice or conduct relating to:*
>
> *(i) failure to disclose or properly account for financial transactions undertaken by employee or employer organisations or their representatives or associates; or*
>
> *(ii) inappropriate management, use or operation of industry funds for training, long service leave, redundancy or superannuation;*

(c) taking into account your findings in relation to the matters referred to in the preceding paragraphs and other relevant matters, any measures, including legislative and administrative changes, to improve practices or conduct in the building and construction industry or to deter unlawful or inappropriate practices or conduct in relation to that industry."

2 By a Practice Note No 2 dated 19 December 2001 the Commissioner made certain directions as to the conduct of the Commission, including directions as to the examination and cross-examination of witnesses. These were in the following terms (the present proceeding is concerned with pars 12-15, and particularly par 12):

"WITNESSES

10. Where possible, and subject to Counsel Assisting the Commission deciding otherwise, the proposed order in which witnesses are to give evidence and the statement of each witness will be included in CourtBook before the witness is called to give evidence.

11. When a witness is called by Counsel Assisting the Commission to give evidence, the witness will be asked to adopt his or her witness statement and such statement may be expanded upon as necessary. The hearing of the evidence of that witness will be adjourned prior to any cross-examination.

12. Persons other than Counsel Assisting will not be permitted to cross-examine such witness unless and until they have provided to Counsel Assisting a signed statement of evidence advancing material contrary to the evidence of that witness. Any person providing such a statement will be called by Counsel Assisting and asked to adopt that statement and will be examined by Counsel Assisting.

13. Counsel Assisting the Commission and any person with a demonstrated sufficient interest to do so, and granted leave by the Commissioner, may cross-examine each witness. Cross-examination will be limited to the matters in dispute, and may otherwise be restricted by the Commissioner in accordance with the power conferred by Section 6FA of the Royal Commissions Act 1902.

14. When a witness has adopted the whole or part of a witness statement, then those parts which have not been challenged by cross-examination, may be accepted by the Commissioner as an accurate statement of fact or opinion, if he considers it appropriate to do so.

15. Two of the purposes of publishing this Practice Note are to enable those persons referred to in paragraphs 2 and 3 above to follow and analyse the evidence given at the public hearings of the Commission, and to provide to the Commission evidence in the form of statements or documents relating to material placed before the Commission which the person considers to be adverse to such person."

3 The persons referred to in pars 2 and 3 of the Practice Note are persons authorised to appear before the Commission, each State Government not so authorised, various named unions and authorised media representatives.

4 The forty-five applicants are members of the Construction, Forestry, Mining and Energy Union in its Construction and General Division and hold various offices in the Victorian Divisional Branch. The Commissioner has permitted and is likely to continue to permit Counsel Assisting to call evidence adverse to the reputations of the applicants. It is possible that the Commissioner, who is directed to report by 6 December 2002, may make findings adverse to the reputations of the applicants or some of them.

5 In this setting the applicants seek administrative law relief to prevent the Commissioner conducting the Royal Commission in accordance with the provisions of pars 12 to 15 of the Practice Note. His decision to do so is challenged under ss 5 and 6 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In the alternative, a declaration is sought under s 39B of the *Judiciary Act 1903* (Cth) that for the Commissioner to conduct the Commission in accordance with the Practice Note's provisions would be a breach of procedural fairness. Prohibition, an injunction and mandamus are also sought.

6 The application has been contested by the second respondent the Commonwealth of Australia. The Commissioner submits to the jurisdiction of the Court and reserves his right to make submissions as to costs but otherwise has taken no part in the proceeding.

JURISDICTION

7 The Commonwealth objected to the jurisdiction of this Court to try the application under the AD(JR) Act on the grounds that the decision of the Commissioner to issue the Practice Note was not a decision which was final or operative or determinative nor was it given force or effect by an enactment. It was also said that the conduct of the Commissioner in issuing the Practice Note was not conduct for the purpose of making a decision to which the AD(JR) Act applied. Reference was made to the decision of a Full Court of this Court in *Geographical Indications Committee v O'Connor* (2000) 32 AAR 169 at [20]. However the Commonwealth accepted that the essential relief sought by the applicants could be granted under s 39B of the Judiciary Act. Accordingly no argument was addressed on the objection as to competency. The appropriate order will be to dismiss that objection without any determination as to its merits.

THE ROYAL COMMISSIONS ACT

8 Section 1A of the Act authorises the Governor-General by Letters Patent to issue commissions to persons requiring or authorising them to make enquiry into and report on any matter specified in the Letters Patent and which relates to or is connected with the peace, order and good government of the Commonwealth or any public purpose or any power of the Commonwealth.

9 Section 2 empowers a member of a Commission to summon persons to give evidence or to produce documents and to take evidence on oath or affirmation. Section 3 prescribes penalties for failure to attend or produce documents. Section 4 authorises the issue of search warrants upon application to a judge of a prescribed court. Section 6 prescribes penalties for persons refusing to be sworn or give evidence. Section 6A limits the operation of the privilege against self-incrimination. In effect the privilege can only be relied on in respect of answering questions or producing documents or things if proceedings for an offence or recovery of a penalty have been commenced and not finally dealt with. Various other provisions deal with the giving of evidence before a Commission. For present purposes reference need only be made to s 6FA which provides:

"Any legal practitioner appointed by the Attorney-General to assist a Commission, any person authorized by a Commission to appear before it, or any legal practitioner authorized by a Commission to appear before it for the purpose of representing any person, may, so far as the Commission thinks proper, examine or cross-examine any witness on any matter which the Commission deems relevant to the inquiry, and any witness so examined or cross-examined shall have the same protection and be subject to the same liabilities as if examined by any of the Commissioners, or by the sole Commissioner, as the case may be."

THE APPLICANTS' CASE

10 Senior counsel for the applicant attacked the validity of par 12 of the Practice Note on two grounds. First it was put that at common law Royal Commissions have no coercive powers: *McGuinness v Attorney-General for Victoria* (1940) 63 CLR 73 at 98-99, *Herald & Weekly Times Limited v Woodward* [1995] 1 VR 156 at 159. Any coercive powers must be found in the relevant statute under which the Royal Commission is established. Nothing in the Act compels the provision of a witness statement or its adoption in the witness box as prescribed in the Practice Note. It is impermissible to require, as a condition precedent to the exercise of the right to cross-examine, the performance of an obligation which is beyond the power of the Commissioner to impose. Paragraph 12 of the Practice Note is an attempt by the Commissioner to do indirectly what he cannot do directly: *Wragg v New South Wales* (1953) 88 CLR 353 at 387-8, *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516 at 522. Further, it was said that the Commissioner did not have an unfettered discretion to grant or refuse leave to cross-examine. Secondly, it was put that the rules of natural justice may in some circumstances include the right to cross-examine a witness giving evidence adverse to a person affected. Paragraph 12 of the Practice Note was in absolute terms and applicable to all cross-examination, including cross-examination which was an exercise of rights conferred by the rules of natural justice.

WANT OF POWER

11 It is beyond doubt that a Royal Commissioner does not have any coercive powers apart from those conferred by statute. However, par 12 is not coercive. It does not compel a person to do anything. The first case cited by senior counsel for the applicants dealt with the prohibition against interference with interstate trade contained in s 92 of the Constitution. The second dealt with a statutory prohibition against contracting out of the statute in question (the *Petroleum Retail Marketing Franchise Act 1980* (Cth)). Such prohibitions cannot be avoided by indirect means. However, the present case is concerned not with prohibition but with power. To continue the constitutional analogy, the Commonwealth may make a grant to the States under s 96 conditional on the States performing acts of a kind which the Commonwealth does not have legislative power to require: *Victoria v Commonwealth* (1926) 38 CLR 399, *Pye v Renshaw* (1951) 84 CLR 58.

12 Of course, if in the exercise of his discretion under s 6FA the Commissioner imposed a condition that had no reasonable connection with his function under the Act or the Letters Patent, that would not be a valid exercise of power. To take an extreme example, a direction that leave to cross-examine would not be granted unless an applicant made a donation to a political party would be plainly invalid. But par 12 on its face seems rationally and reasonably related to the efficient performance of the obligations of the Commissioner. Paragraph 12 is a means of ascertaining whether or not an applicant has demonstrated a sufficient interest in challenging the evidence of a particular witness. Further, a statement under par 12 will alert the Commissioner and all others concerned as to the true extent of

factual disputes and thus promote the efficient resolution of those disputes. In a large and complex administrative enquiry where there is no equivalent to the pleadings and particulars used in civil litigation, the par 12 procedure has an obvious utility.

13 While it may be accepted that s 6FA does not confer an unfettered discretion, par 12 does not involve exercising the discretion in an unfettered way. On the contrary, par 12 will assist in the exercise of the discretion in a way that is both orderly and predictable and likely to assist in the efficient discharge of the Commissioner's task.

14 I should add that a question of the construction of par 12 was debated. Senior counsel for the applicants put his argument on the assumption that persons seeking permission to cross-examine not only had to provide a signed statement of evidence but would be examined by Counsel Assisting before any evidence was taken from the witness sought to be cross-examined. I do not agree with that construction. The second sentence of par 12 merely alerts persons concerned to the fact that they are liable to be cross-examined upon their statements. This need not necessarily occur before such a person cross-examines the witness in question.

NATURAL JUSTICE

15 It was accepted that the Commissioner is bound by the rules of natural justice: *Mahon v Air New Zealand* [1984] AC 808 at 820-821, *Annetts v McCann* (1990) 170 CLR 596 at 598, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. In *Mahon*, in a passage relied upon by senior counsel for the applicants, the Privy Council said:

> *"The rules of natural justice that are germane to this appeal can, in their Lordships' view, be reduced to those two that were referred to by the Court of Appeal of England in* Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore *[1965] 1 Q.B. 456, 488, 490, which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the judge inquiring into the Mt. Erebus disaster. The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.*
>
> *The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon* some *material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.*
>
> *The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker,* might *have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result."* (Emphasis in original)

16 The critical issue is just what the rules of natural justice require in the particular setting of the present case. Senior counsel for the applicants did not contend that cross-examination, let alone an unrestricted right to cross-examine, was always a component of the rules of natural justice. Rather, he said that cross-examination may in some circumstances be comprehended by the rules of natural justice and where that is the case it is unfair to take away or restrict that right.

17 Of course, s 6FA makes express provision for cross-examination in terms which plainly contemplate some limitations being imposed ("may, so far as the Commission thinks proper"). One way of looking at the issue is to ask whether the rules of natural justice, as applicable in the present case, prevent the Commissioner from exercising the s 6FA discretion in the way he has.

18 First it is necessary to say something about an aspect of the applicants' argument which stressed what was said to be the inflexible and absolute nature of the restriction imposed by par 12. But it is of the essence of a Practice Note that it may be revoked or varied from time to time in the light of the changing nature of the proceedings or unexpected eventualities. On 10 December 2001 the Commissioner issued his first Practice Note which included the following:

> *"19. The Commission reserves the right at any time to vary the above practices."*

19 It is true that Practice Note No 2 of 19 December 2001 contains no equivalent statement, but there can be no doubt that if the Commissioner were to issue subsequent Practice Notes varying or revoking anything in Practice Notes 1 or 2 that in itself would be valid. More fundamentally, a Practice Note of the kind under consideration does not purport to create legally binding rights and obligations. It is obviously useful for the guidance of all concerned to have an indication of what procedures are likely to be adopted. But even without formal amendment or revocation the Commissioner would always be able to deal with a situation where fairness and efficiency suggested a different procedure from that laid down in a Practice Note.

20 Senior counsel for the applicants was unable to point to any authority for the proposition that cross-examination is a right always conferred by the rules of natural justice, whenever they are applicable. The passage from *Mahon* where reference is made to the "opportunity to adduce additional material of probative value" is not to be taken as necessarily including adducing material by cross-examination. Cross-examination or limitation of cross-examination was not an issue in that case. Further, in *National Companies and Securities Commission v The News Corporation Limited* (1984) 156 CLR 296 the High Court set aside an order of the Full Court of the Federal Court which included a direction

> *"that legal representatives of* News *be permitted to cross-examine witnesses called at the hearing."*

21 A feature of that case was that it was no part of the Commission's function to publish adverse findings, conclusions or evidence. At most the Commission's determination might result in subsequent proceedings in a court. Moreover the hearings were held in private: see per Brennan J (at 326). So senior counsel for the applicants was correct in saying that the statutory regime was relevantly different from that with which the present case is concerned. That said, the case certainly provides no positive support for cross-examination being an inevitable concomitant of natural justice. The majority (Mason, Wilson and Dawson JJ) said (at 325):

"In our opinion the Commission will comply with the statutory mandate to observe the rules of natural justice in the present case if it proceeds to allow each witness who is called to give evidence to be legally represented, with freedom for that representative to participate in the examination of the witness, and for the provision of a transcript of his evidence. The conduct of an investigation in such a manner is fair and nothing more is required."

22 Gibbs CJ said (at 314):

"… I find it quite impossible to say that the rules of natural justice require the Commission to proceed as though it were conducting a trial. It seems to me in no way unfair, that at a hearing of the kind which I have described, the respondents should not be entitled to cross-examine such witnesses as the Commission may call, or to call evidence of their own. If proceedings are subsequently brought in the Supreme Court against the respondents, they will of course be able to test by cross-examination the evidence adduced, and to call evidence themselves."

23 The high point of the authorities cited by senior counsel for the applicants was *Australian Postal Commission v Hayes* (1989) 23 FCR 320, which arose out of a hearing by the Administrative Appeals Tribunal of a claim under the *Compensation (Commonwealth Government Employees) Act 1971* (Cth). Prior to the hearing the solicitors for the claimant became aware that the Commission proposed to use a video film portraying her activities. The Tribunal acceded to a submission that the claimant should be given access to the video prior to the completion of her evidence-in-chief. The Tribunal rejected a submission by the Commission that the claimant's credit could best be tested if the film were first shown to her during the course of cross-examination. The Commission's challenge under the AD(JR) Act to this ruling was upheld by Wilcox J. His Honour (at 327) accepted an argument that

"… the testing of opposing relevant material by cross-examination is an essential feature of the opportunity to correct or contradict that material; it is not enough that the party against whom the evidence is led has the right to present evidence in reply. Moreover, although counsel accept there exists some discretion to control cross-examination so as to ensure relevance and to guard against repetition and prolixity, it is said that the right to cross-examine means the right effectively to cross-examine. If directions given by a court or a tribunal have the effect of so fettering cross-examination that a witness's evidence cannot properly be tested, procedural fairness has been denied."

24 His Honour observed (at 327) that

"(i)t is the everyday experience of those who attend courts that cross-examination is at its most effective when the evidence of a witness is able to be confronted by documents. But, as with any other cross-examination, it is normally necessary for the cross-examiner first to have the witness commit himself or herself to a precise version of relevant matters; the process which the late Mr J W Smyth QC called "closing the gates", see "The Art of Cross-examination" (Autumn 1988) Bar News at 12-13. It is important, in that process, that a mendacious witness not be aware of the material available of the cross-examiner to contradict the evidence under manufacture."

25 The observation as to the frequency with which such an approach is adopted in cross-examination is perhaps not all that easy to reconcile with a later observation of his Honour where in dealing with what was said by the Tribunal as to the open conduct of proceedings his Honour said (at 329):

"Openness is a notable feature of the Tribunal's procedures. It is a feature which has contributed significantly to the Tribunal's efficiency and which has enhanced the status of its decisions. There is everything to be said, in the vast majority of cases, for insistence upon the full and early disclosure of all material documents. But in an exceptional case in which a party can demonstrate that the temporary suppression of a document is necessary for the proper presentation of its case, the ideal of openness must give way to the Tribunal's statutory obligation to give to all parties a reasonable opportunity to present their cases."

26 The judgment in *Hayes* makes no reference to the decision of the High Court in *NCSC* some five years earlier. *Hayes* appears to elevate a useful forensic technique to the status of a mandatory legal rule binding an administrative decision-maker. I would respectfully decline to follow it.

27 In any case, I note that par 12 does not require a statement of evidence advancing *all* material contrary to the evidence of the witness or which might be otherwise relevant. To take a hypothetical example, if witness A gives evidence of B's participation in unlawful conduct at a given place and time, B's signed statement under par 12 might say that he was then present but engaged in different, and lawful, conduct or perhaps that he was not present at all but was on holiday at an interstate location. However, if B had in his possession a letter written by A to C expressing hostility towards B, par 12 would not require the production of that letter in the statement and A could be confronted with it in cross-examination, no doubt after appropriate gate closing.

28 There is some basis for thinking that the Commissioner has already taken an approach consistent with this view. At a hearing on 24 January 2002 (transcript p 1113) the following exchange took place:

"MR PERRY: May I raise a number of matters, please. In terms of cross-examination, earlier in the week, I think in response, perhaps, to Mr Crawshaw, you indicated that what you required was a notice or indication of the areas of cross-examination, I think was the way you described it. Is that still your requirement, that it be done in that form, that is, by reference, obviously, to witnesses required for cross-examination and the areas of those witness's evidence to be (indistinct) for summary. Is that sufficient for your purposes?

COMMISSIONER: Yes, that is sufficient. What I have in mind is that witness A will have said X, witness Z will say, 'I don't agree with X because W,P,Q happened.'

MR PERRY: I understand. As long as that is sufficient for your purposes.

COMMISSIONER: I don't want the detail, I just want the area."

29 Moreover, as I have already mentioned, par 12 is not set in stone. If some unforeseen circumstance arose in which a person would be unfairly disadvantaged by the application of it, the Commissioner would presumably deal with that situation on its merits.

30 Further, I am not persuaded that par 12 creates unfairness in the broad sense which the law relating to natural justice postulates. As the authorities make clear, the fact that it might prescribe a procedure not normally adopted in civil or criminal litigation is not to the point. When asked to demonstrate what was wrong or unfair about par 12, senior counsel for the applicants gave an example (which he said had in fact already occurred) of a person who might have the protection of the privilege against self-incrimination in the limited circumstances prescribed by s 6A (that is, proceedings already having been commenced). Such a person would have to either give a statement and be liable to cross-examination, thus waiving the privilege, or forgo any opportunity to cross-examine the adverse

witness. However, the same result would follow if the Commissioner reached a tentative conclusion that an adverse finding should be made against the person. The rules of natural justice would require that the person be given an opportunity to respond, which usually would involve that person giving his or her version of the events on which the Commissioner's tentative conclusion was based. It is hard to see that this could be done without waiving the privilege. If the privilege were maintained and no contrary version proffered, the Commissioner might well make a final finding in adverse terms. Par 14 contemplates the acceptance of unchallenged evidence, but there is nothing revolutionary or unfair in this. So maintaining the privilege necessarily runs the risk of an adverse finding, whether or not there is cross-examination by the person subject to the finding. Moreover, if the privilege is waived and evidence given, that evidence cannot be used against the person in any civil or criminal proceedings in any Australian court, other than in proceedings for an offence against the Act: s 6DD, *Giannarelli v The Queen* (1983) 154 CLR 212.

ORDERS

31 The second respondent's objection to competency will be dismissed with no order as to costs. The application will be dismissed. There will be an order that the applicants pay the respondents' costs of the application including reserved costs.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Heerey.

Associate:

Dated: 1 February 2002

Counsel for the Applicants:	H Borenstein SC and K Hanscombe
Solicitor for the Applicants:	Slater and Gordon
Counsel for the Respondents:	S Gageler SC and S Lloyd
Solicitor for the Respondents:	Australian Government Solicitor
Date of Hearing:	29 January 2002
Date of Judgment:	1 February 2002

Appendix 19:

Ferguson v Cole

FEDERAL COURT OF AUSTRALIA

[2002] FCA 1411

FERGUSON v COLE
EXPLANATORY MEMORANDUM

1 Each of the applicants is a member or official, or ex-member or ex-official, of the Construction, Forestry, Mining and Energy Union, Construction and General Division, New South Wales Divisional Branch. The first respondent, the Honourable Terence Rhoderic Hudson Cole RFD QC ('the Commissioner') was by Letters Patent dated 29 August 2001 appointed to inquire into and report on certain specified matters in relation to the building and construction industry.

2 Hearings have been conducted before the Commissioner as part of his inquiry. The hearings have included hearings held in Sydney concerning the building and construction industry in New South Wales.

3 On 5 August 2002 the Commissioner gave to the Governor-General a document entitled 'First Report'. As at the date of the First Report evidence had been given in five states over 126 days by 445 persons. The First Report did not address the specific evidence, material and submissions received by the Royal Commission but it recorded that the Commissioner was satisfied that material received by the Royal Commission 'evidences' practices and conduct which were unlawful or inappropriate in various ways. The First Report foreshadowed that the Commissioner's final report would recommend substantial reform, including the establishment of a national agency to monitor, investigate and prosecute breaches of industrial law, the criminal law and aspects of civil law in relation to the building and construction industry. The First Report, for reasons outlined therein, recommended the establishment of an interim taskforce to continue investigations not completed by the Royal Commission and to monitor conduct and enforce industrial, criminal and civil laws pending consideration of the recommendations to be made in the final report of the Royal Commission.

4 On 29 August 2002 the applicants made an application to the Commissioner that he disqualify himself from, in effect, making findings of fact or recommendations in relation to New South Wales which may have an adverse impact on the applicants. On 6 September 2002 the Commissioner published reasons for his decision to dismiss the application made to him.

5 In this proceeding the applicants claimed that the Commissioner has shown actual bias towards them or, alternatively, by his conduct has given rise to a reasonable apprehension that he is biased towards them. They also asserted that they have been denied procedural fairness by reason of the process of inquiry adopted by the Royal Commission.

6 The Court has dismissed the application made to it by the applicants.

7 The Court rejected the contention that the Commissioner by the First Report made findings which directly and adversely affected the interests of the applicants. The Court also rejected the contention that the First Report shows that the Commissioner is, or could reasonably be apprehended to be, so committed to conclusions which he has already formed that he would be incapable of altering those conclusions.

8 The applicants also argued before the Court that the scope and nature of the task committed to the Royal Commission is such that a denial of procedure fairness to them is inevitable. They further argued that the conduct of the Commissioner and Counsel Assisting the Royal Commission has been such as to demonstrate actual bias towards them or such as to give rise to a reasonable apprehension of bias towards them. These arguments were also rejected by the Court.

9 The Court noted that it was not the role of the courts to oversee the day-to-day conduct of a Royal Commission. Relevantly the role of the Courts is limited to ensuring that the Royal Commission does not act in a way that destroys, defeats or prejudices a person's rights, interests or legitimate expectations without according that person procedural fairness.

10 This memorandum is intended to assist understanding of the outcome of this proceeding. Such memoranda are commonly prepared by the Court in cases of general public interest, but they are not a substitute for the judge's reasons which remain the only authoritative statement of the Court.

11 The reasons for judgment and this memorandum will be available on the internet at www.fedcourt.gov.au after the delivery of judgment.

Federal Court of Australia
Sydney
20 November 2002

FEDERAL COURT OF AUSTRALIA

Ferguson v Cole [2002] FCA 1411

ADMINISTRATIVE LAW – Royal Commission into the building and construction industry – production of an interim report by the Royal Commissioner – pre-judgment bias – whether Royal Commissioner displayed actual bias towards the applicants – whether report of the Royal Commissioner gave rise to apprehended bias – duty to ensure that persons should know of the risk of adverse findings being made against them - whether the applicants given sufficient opportunity to adduce material in response that might have deterred adverse findings from being made – whether the report contained findings adverse to the applicants in a sufficiently individual, direct and immediate way to give rise to duty – whether later statements of the Royal Commissioner about the meaning of the report relevant to consideration of actual and apprehended bias

ADMINISTRATIVE LAW – Royal Commission into the building and construction industry – procedures adopted by Royal Commission– whether Royal Commission complied with requirements of procedural fairness – whether Royal Commissioner displayed actual bias towards the applicants – whether conduct of the Royal Commission gave rise to apprehended bias on the part of the Commissioner – role of Counsel Assisting the Royal Commissioner - whether the applicants given sufficient opportunity to adduce material in response to material adverse to them – alleged restriction of cross-examination and unfair questioning of witnesses

ADMINISTRATIVE LAW – Royal Commissions – role of the Court in reviewing the conduct of Royal Commission

Administrative Decisions (Judicial Review) Act 1977 (Cth) ss 5, 6
Judiciary Act 1903 (Cth) s 39B

Kingham v Cole [2002] FCA 45 cited
McGuinness v Attorney-General of Victoria (1940) 63 CLR 73 cited
Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25 cited
Mahon v Air New Zealand Ltd [1984] 1 AC 808 cited
Annetts v McCann (1990) 170 CLR 596 referred to
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 considered
Minister for Immigration and Multicultural Affairs v Rajamanikkam [2002] HCA 32; 190 ALR 402 cited
Kennedy v Lovell [2002] WASCA 21
Minister for Immigration and Multicultural Affairs v Jia Legeng [2001] HCA 17; 205 CLR 507 cited
Livesey v New South Wales Bar Association (1983) 157 CLR 288 cited
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70 cited
Johnson v Johnson [2000] HCA 48; 201 CLR 488 cited
Re Polites; Ex parte The Hoyts Corporation Pty Limited (1991) 173 CLR 78 cited
Shrubb v Air Pilots' Guild of Australia (FC) (1979) 40 FLR 374 cited

Botany Bay City Council v Minister of State for Transport and Regional Development (1996) 66 FCR 537 referred to
Queensland Medical Laboratory v Blewett (1988) 84 ALR 615 referred to
Re JRL: Ex parte CJL (1986) 161 CLR 342 referred to
Ainsworth v Criminal Justice Commission (1992) 175 CLR 564 cited

ANDREW FERGUSON (and others according to the schedule of applicants) v TERENCE RHODERIC HUDSON COLE AND THE COMMONWEALTH OF AUSTRALIA

N 912 of 2002

BRANSON J
20 NOVEMBER 2002
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 912 of 2002**

BETWEEN:	**ANDREW FERGUSON** **(and others according to the schedule of applicants)** **APPLICANT**
AND:	**TERENCE RHODERIC HUDSON COLE** **FIRST RESPONDENT**
	THE COMMONWEALTH OF AUSTRALIA **SECOND RESPONDENT**
JUDGE:	**BRANSON J**
DATE OF ORDER:	**20 NOVEMBER 2002**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicants pay the costs of the second respondent including reserved costs.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N912 of 2002**

BETWEEN:	**ANDREW FERGUSON** **(and others according to the schedule of applicants)** **APPLICANT**
AND:	**TERENCE RHODERIC HUDSON COLE** **FIRST RESPONDENT**
	THE COMMONWEALTH OF AUSTRALIA **SECOND RESPONDENT**
JUDGE:	**BRANSON J**
DATE:	**20 NOVEMBER 2002**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

INTRODUCTION

1 By Letters Patent dated 29 August 2001 the Governor-General appointed the first respondent, the Honourable Terence Rhoderic Hudson Cole RFD QC ('the Commissioner'), to be a "Commissioner" to inquire into and report on certain specified matter in relation to the building and construction industry. The appointment was expressed by the Letters Patent to be made pursuant to the Constitution, the *Royal Commissions Act 1902* (Cth) ('the Royal Commissions Act') and other 'enabling powers'. The Letters Patent may be understood to constitute the Commissioner as a Royal Commission ('the Royal Commission'). The Commissioner is required by the Letters Patent to conduct his inquiry '*as expeditiously as possible*' and to furnish the report of the results of his inquiry and such recommendations as he considers appropriate by no later than 6 December 2002.

2 Each of the applicants is a member or official, or ex-member or ex-official, of the Construction, Forestry, Mining and Energy Union, Construction and General Division, New South Wales Divisional Branch. The Construction, Forestry, Mining and Energy Union ('CFMEU') is an organisation registered under the *Workplace Relations Act 1996* (Cth). The CFMEU is one of a number of organisations that has claimed to have an interest in the subject matter of the Commissioner's inquiry. It has not been granted authorisation to appear before the Commission. However, the Commission's hearing database, which is known as the Ringtail Court Book, has been made available to the CFMEU and the CFMEU – NSW Divisional Branch. Counsel has been granted leave to appear for most of the applicants while they are giving evidence or while evidence adverse to them is being called. There is no reason to think that the leave granted would not be extended as appropriate to those of the applicants not covered by the existing leave.

3 The Commissioner has issued practice notes touching on the proposed practices and procedures of the Royal Commission including the conduct of hearings before the Commissioner. Hearings have been conducted before the Commissioner as part of his inquiry. The hearings have included hearings held in Sydney in respect of matters pertaining to the building and construction industry in New South Wales ('NSW hearings'). Further hearings, including NSW hearings, before the Commissioner are

proposed or, at least, were proposed at the time of the hearing of this application. Each of the applicants has received a letter from Counsel Assisting the Commission advising that he would be the subject of 'adverse evidence' to be given before a public hearing of the Royal Commission (see [5] of the Practice Note set out in [13] below).

4 The NSW hearings commenced on 3 June 2002. The first phase of the NSW hearings continued for twenty-four hearing days concluding on 5 July 2002. Approximately 158 witnesses were examined during this period. On 5 July 2002 the Commissioner issued a direction, which is reproduced in [15] below, requiring Counsel Assisting the Commission to provide to certain persons, corporations and organisations, including the applicants, advice as to adverse findings of fact which might be sought against them.

5 On 5 August 2002 the Commissioner furnished to the Governor-General a document entitled 'First Report' ('the First Report').

6 The second phase of the NSW hearings commenced on 19 August 2002. It continued for ten hearing days during which approximately seventy-two witnesses were examined.

7 On 29 August 2002 an application was made to the Commissioner on behalf of thirty-five of the present applicants. Subsequently five more of the present applicants were treated as parties to the application to the Commissioner. The application to the Commissioner was ultimately formulated during the course of a hearing on 2 September 2002, as follows:

> *'That the Commissioner disqualify himself from*
>
> *(1) making any findings of fact;*
>
> *(2) making any findings as to inappropriate or illegal conduct;*
>
> *(3) making any reports or recommendations to the Government of the Commonwealth –*
>
> *in relation to New South Wales which does or may have an adverse impact on the Applicants (or any of them) in their individual or representative capacity, if any, or recommending action prejudicial to the interests of the Applicants (or any one of them) in their individual or representative capacity, if any.'*

8 On 6 September 2002 the Commissioner published reasons for his decision to dismiss the application that had been made to him. In the meantime, on 30 August 2002 the thirty-five individuals who had initially made the application to the Commissioner instituted this proceeding. By leave the total number of applicants in this proceeding has subsequently been increased to forty-three. In effect, the applicants seek from this Court the relief that the majority of them failed to obtain from the Commissioner. They assert that the Commissioner has shown actual bias towards them or alternatively by his conduct has given rise to a reasonable apprehension that he is biased towards them. They also assert denials of procedural fairness by reason of the process of inquiry adopted by the Royal Commissioner.

9 The application to this Court was purportedly made pursuant to s 5, or alternatively s 6, of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the ADJR Act') or in the further alternative pursuant to s 75(v) of the Constitution and s 39B of the *Judiciary Act 1903* (Cth) ('the Judiciary Act'). The way in which the application, and a later amended application, to this Court are framed is open to criticism, particularly insofar as reliance is placed on ss 5 and 6 of the ADJR Act. In

view of the manner in which the matter was argued and the conclusions which I have reached it is not necessary for these criticisms to be explored.

10 The Commissioner has filed an appearance in the proceeding and, by his solicitor, has advised that he will abide by any order of the Court save as to costs. The second respondent has appeared to ensure that the Court has the benefit of a contradictor.

11 For the reasons set out below I have concluded that the application to this Court should be dismissed.

LETTERS PATENT

12 The Letters Patent appointed the Commissioner:

> *'to inquire into and report on the following matters in relation to the building and construction industry:*
>
> *(a) the nature, extent and effect of any unlawful or otherwise inappropriate industrial or workplace practice or conduct, including, but not limited to:*
>
> *(i) any practice or conduct relating to the* Workplace Relations Act 1996, *occupational health and safety laws, or other laws relating to workplace relations; and*
>
> *(ii) fraud, corruption, collusion or anti-competitive behaviour, coercion, violence, or inappropriate payments, receipts or benefits; and*
>
> *(iii) dictating, limiting or interfering with decisions whether or not to employ or engage persons, or relating to the terms on which they be employed or engaged;*
>
> *(b) the nature, extent and effect of any unlawful or otherwise inappropriate practice or conduct relating to:*
>
> *(i) failure to disclose or properly account for financial transactions undertaken by employee or employer organisations or their representatives or associates; or*
>
> *(ii) inappropriate management, use or operation of industry funds for training, long service leave, redundancy or superannuation;*
>
> *(c) taking into account your findings in relation to the matters referred to in the preceding paragraphs and other relevant matters, any measures, including legislative and administrative changes, to improve practices or conduct in the building and construction industry or to deter unlawful or inappropriate practices or conduct in relation to that industry.*
>
> …
>
> *AND We direct that you 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.'*

PRACTICE NOTES AND DIRECTIONS

13 As is mentioned above, the Commissioner has issued a number of practice notes. The first was dated 10 December 2001 ("the First Practice Note") and provided general guidance as to the practices to be adopted with respect to hearings before the Commissioner. Paragraphs 4-13 of the First Practice Note provide:

> *"4. Subject to the control of the Commission, Counsel Assisting the Commission will determine what witnesses are called, what documents are tendered to the Commission, and in what order they will call and examine witnesses.*
>
> *5. The details of evidence to be produced to the Commission will not be published in advance of the hearing at which it is produced and generally will not be opened before it is called.*
>
> *However, a person who, to the prior knowledge of Counsel Assisting the Commission, will be the subject of adverse evidence given before a public hearing of the Commission will, if practicable, be notified of that fact before that hearing, with such particulars, if any, as are considered appropriate by Counsel Assisting the Commission, or will, if practicable, be notified as soon as reasonably convenient thereafter and provided with a copy of the material portion of the transcript, or such particulars, if any, as are considered appropriate by Counsel Assisting the Commission, and will be given an opportunity to contest that evidence, if the person so requests.*
>
> ***AUTHORISATION TO APPEAR BEFORE THE COMMISSION***
>
> *6. Persons may be authorised to appear before the Commission. That authorisation may be withdrawn by the Commissioner, or made subject to altered or additional limitations or conditions at any time.*
>
> *7. Such authorisation to appear entitles the person to whom it is granted to participate in the proceedings of the Commission, subject to the Commission's control and to such extent as the Commission considers appropriate. In particular, the Commission may:*
>
> *(a) limit the particular topics or issues upon which the person may examine and cross-examine;*
>
> *(b) impose time limits upon examination and cross-examination;*
>
> *(c) require that submissions be presented in writing only.*
>
> *8. Counsel for all the persons given authorisation to appear shall give advance notice of any legal issues which they propose to raise. Counsel Assisting will likewise advise other counsel if it appears to them that questions of law may arise in particular situations.*
>
> ***APPLICATION FOR WITNESS TO APPEAR BEFORE THE COMMISSION***
>
> *9. All witnesses will be called by Counsel Assisting the Commission. Any person wishing to have evidence of a witness or witnesses placed before the Commission is to notify Senior Counsel Assisting the Commission of the names of all such witnesses, and provide a signed statement of their expected evidence, if possible in the form of a statutory declaration. Counsel Assisting or Commission staff may interview such witnesses and*

take further statements from such witnesses, if considered necessary. It is not necessary that any such interviews or the obtaining of such additional statements occur in the presence of the person, or legal representatives thereof, who sought to have the evidence of such witnesses placed before the Commission. The orderly conduct of the Commission will be greatly facilitated if this evidence is made available without delay.

10. Application may be made directly to the Commissioner to call witnesses or place documentary material before the Commission only in the following circumstances:

(a) Application has been made to Senior Counsel Assisting to call such witness or tender such documents which application has been refused;

(b) Thereafter, the applicant has given to Senior Counsel Assisting written notice of the reasons why such witnesses' evidence or documentary material should be placed before the Commission.

(c) Either:

(i) Senior Counsel Assisting has reaffirmed his decision not to place the evidence before the Commission; or

(ii) Two working days have passed since the notice referred to in (b) has been received by the Commission without response from Senior Counsel Assisting.

11. Where a witness has been introduced to the Commission by a person authorised to appear before the Commission, an attempt will be made to give that person reasonable advance notice of the calling of that witness.

EXAMINATION AND CROSS-EXAMINATION OF WITNESSES

12. Any witness who is legally represented who has been examined (including cross-examination) by Counsel Assisting the Commission may next be examined by his or her own legal representative and then cross-examined by or on behalf of any person considered by the Commission to have sufficient interest in so doing. The witness's own legal representative and finally Counsel Assisting the Commission may re-examine. At all times, duplication and repetition is to be avoided.

13. A copy of any document proposed to be put to a witness in cross-examination must be provided to Counsel Assisting the Commission as soon as possible after a decision is made to use the document for this purpose, and in all cases prior to its intended use.'

14 The second practice note issued by the Commissioner was dated 19 December 2001 ('the Second Practice Note'). By the Second Practice Note the Commissioner made certain additional directions as to the conduct of the Royal Commission including directions as to the examination and cross-examination of witnesses. Forty-five members of the CFMEU – Victorian Divisional Branch applied to this Court for relief in respect of the Second Practice Note alleging that for the Commissioner to conduct the Royal Commission in accordance with the provisions of the Second Practice Note would be a breach of procedural fairness. On 1 February 2002 Heerey J dismissed the application for relief (*Kingham v Cole* [2002] FCA 45).

15 By a Direction dated 5 July 2002 ('the Direction') the Commissioner made the following directions concerning the hearings held in Sydney between 3 June 2002 and 5 July 2002:

> *'1. By close of business on 26 July 2002, Counsel Assisting provide to the Solicitor to the Commission and to the persons, corporations or organisations listed in the Schedule annexed to this direction, submissions specifying the findings of fact which they contend are available and ought to be found on the basis of evidence presented at the hearings at Sydney which commenced on 3 June 2002 and concluded on 5 July 2002. Such submissions are to be appropriately referenced to the evidence, including reference to contrary evidence.*
>
> *Where submissions are not made in respect of the evidence of any person who gave evidence at the said hearings, Counsel Assisting are to include with their submissions the name of each such person.*
>
> *2. By close of business on 16 August 2002, the persons, corporations and organisations listed in the Schedule annexed to this direction, provide to the Solicitor to the Commission their submissions in reply to Counsel Assisting's submissions on findings of fact, such submissions in reply to specify:*
>
> *a. Any disputed findings of fact, and the basis for such dispute; and*
>
> *b. Any additional findings of fact sought.*
>
> *Such submissions in reply are to be appropriately referenced to the evidence, including reference to contrary evidence.*
>
> *3. If Counsel Assisting seeks any adverse finding of fact against any government, organisation, corporation or person which or who is not listed in the Schedule annexed to this direction (hereafter referred to as "second persons"), by close of business on 26 July 2002, Counsel Assisting provide to each of those second persons, the submissions provided by Counsel Assisting pursuant to paragraph 1 above.*
>
> *4. By close of business on 16 August 2002 the second persons provide to the solicitor for the Commission, any submissions in reply they wish to make to Counsel Assisting's submissions, such submissions in reply to specify:*
>
> *a. Any disputed finding of fact and the basis for such dispute; and*
>
> *b. Any additional findings of fact sought.*
>
> *Such submissions are to be appropriately referenced to the evidence, including reference to contrary evidence.'*

THE FIRST REPORT

16 The First Report commences by referring to the Letters Patent dated 29 August 2001 and outlining the task that was thereby given to the Commissioner. The paragraphs of the First Report of which the applicants complain are the following:

> *'3. It is not appropriate, at this time, for me to address the specific evidence, material and submissions received by the Commission in relation to the conduct of any particular corporation, organisation or person. That is because the hearings are at present incomplete and all submissions have not yet been received. Detailed findings of fact will be made in my final report after consideration of all such evidence, material and submissions.*
>
> *4. Nonetheless, after taking 126 days of evidence in Victoria, New South Wales, Queensland, Western Australia and Tasmania, hearing from 445 witnesses, having extensive private consultations the outcome of which is the subject of a public exhibit, and otherwise considering material placed before the Commission, I am satisfied that the material received evidences practices and conduct which exhibit:*
>
> *(a) widespread disregard of, or breach of, the enterprise bargaining provisions of the* Workplace Relations Act 1996*;*
>
> *(b) widespread disregard of, or breach of, the freedom of association provisions of the* Workplace Relations Act 1996*;*
>
> *(c) widespread departure from proper standards of occupational health and safety;*
>
> *(d) widespread requirement by head contractors for sub-contractors to have union endorsed enterprise bargaining agreements before being permitted to commence work on major projects in state capital central business districts;*
>
> *e) widespread requirement for employees of sub-contractors to become members of unions in association with their employer obtaining a union endorsed enterprise bargaining agreement;*
>
> *(f) widespread disregard of the terms of enterprise bargaining agreements once entered into;*
>
> *(g) widespread application of, and surrender to, inappropriate industrial pressure;*
>
> *(h) widespread use of occupational health and safety as an industrial tool;*
>
> *(i) widespread making of, and receipt of, inappropriate payments;*
>
> *(j) unlawful strikes, and threats of unlawful strikes;*
>
> *(k) threatening and intimidatory conduct;*
>
> *(l) underpayment of employees' entitlements;*
>
> *(m) disregard of contractual obligations;*
>
> *(n) disregard of federal and state codes of practice in the building and construction industry;*
>
> *(o) disregard of the rule of law.*

5. *Much of the evidence of such conduct and practices is not in dispute. Such conduct and practices are not restricted to any one category of participant within the building and construction industry.*

6. *In my final report I will be recommending substantial reform. Included as one aspect of that reform will be the establishment of a national agency to monitor, investigate and prosecute any breaches of industrial law, the criminal law, and aspects of civil law in relation to the building and construction industry. The recommendations will include changes to federal laws which, if adopted by government, will require legislative enactment. The parliamentary cycle is such that there will be delay between the delivery of my recommendations and the placing before, and consideration of, any legislative changes by the Parliament, after consideration of my recommendations by government.*

7. *The Royal Commission has a finite life. That means that its inquiries and investigations must shortly cease. It has collected a wealth of information including a great number of probes for investigations and related material. Not all investigations are complete. Constraints of time and resources will prevent such incomplete matters being further addressed by the Commission.*

8. *It is important that the uncompleted work of the Commission, in respect of which I will not be in a position to make findings in my final report, not be stockpiled for delayed further investigation and analysis by a future body which may be created by future legislative change. Continuity of the investigative function in respect of past events is necessary.*

9. *There are two further material factors. First, many persons gave evidence to the Commission, both publicly and privately, in circumstances where they feared retribution at the conclusion of the Royal Commission. It is important that there be a continuing body during the winding down and after the termination of the Royal Commission, and prior to any legislative establishment of a new national agency, which can monitor the building and construction industry and act swiftly to deter and, if possible, ensure such retribution does not take place, or if it does, to penalise any such conduct. Second, between September and November 2002, when the investigative tasks of the Commission will be winding down or concluded, the expiration of pattern bargaining agreements and the negotiation of a new wave of agreements is likely to result in heightened industrial activity. It is important that there be a body ready to monitor, and capable of monitoring, any such activity to ensure that it occurs within the law and to facilitate compliance and, if appropriate, prosecution, if it does not.*

10. *The evidence before me makes plain that the Office of Employment Advocate is insufficiently funded and staffed to undertake the tasks referred to. It does not have the specialist capacity or experience necessary to monitor the building and construction industry, nor was it designed to give the necessary concentrated focus on the building and construction industry.*

11. *These factors mandate establishment of an interim taskforce, established administratively, to continue incomplete investigations, and monitor conduct and enforce industrial, criminal and civil laws pending the consideration by government, and if appropriate, the Parliament, of the legislative changes I will recommend.*

12. I accordingly recommend the establishment of an interim body to monitor conduct, to investigate and, if appropriate, facilitate proceedings to ensure adherence to industrial, criminal and civil laws pending the delivery and consideration of my final report and establishment of any permanent agency. The interim body should have power to receive material from this Commission, complete investigations and instigate or facilitate any necessary proceedings.

13. The body should be staffed by a multi-disciplinary group comprising lawyers, building and construction industry investigators, police investigators, financial analysts and general analysts. The body should have all skills necessary to continue with the investigative work of the Commission and be sufficiently resourced to be able to respond promptly to complaints received, and to investigate matters on its own initiative. It should have a presence in at least Melbourne, Sydney, Brisbane and Perth. If possible, the interim body should be operative by 1 September 2002.

14. This body should be regarded as an interim measure. The full powers and scope of the national agency or agencies which I will recommend in my final report will be addressed in that report.

15. If this recommendation is adopted, the Secretary and other officials of the Commission are available to ensure a smooth transition of information, processes and, if appropriate, personnel from the Commission to the interim body. The Commission has built up contacts, and a level of expertise in investigation and analysis of industrial, financial and other matters related to the building and construction industry which should not be dissipated by delay."

REASONS OF THE COMMISSIONER

17 As is mentioned above, on 6 September 2002 the Commissioner published written reasons for his decision to dismiss the application that he disqualify himself from, in effect, making any findings concerning, or making any report or recommendation that might have an adverse impact on, the forty individuals whom he treated as having made the application to him.

18 The written reasons of the Commissioner note that the Royal Commission is an administrative inquiry established by the executive arm of Government and that its proceedings are not judicial in character. The reasons acknowledge that, nonetheless, persons who may be adversely affected by findings of the Royal Commission are entitled to natural justice.

19 Following a careful analysis of the material circumstances common to the applicants, the content of the First Report and the circumstances surrounding its publication, and the submissions of the applicants in support of their contention that the processes of the Royal Commission had not been fair to them in respect of particular issues and generally, the written reasons of the Commissioner at [115] set out the following conclusion:

> *'I should disqualify myself from making any findings as to fact, making any findings as to inappropriate or illegal conduct or making any reports or recommendations to the Government of the Commonwealth of Australia in relation to New South Wales which may have an adverse impact on the forty named applicants or any of them either in their individual or representative capacities, only if I am satisfied that a fair-minded lay observer might, acting objectively,*

reasonably apprehend that I might not bring an impartial mind to the making of any findings concerning the applicants because of pre-judgment. In my view, such a fair-minded lay observer would not be so satisfied principally because the First Report does not contain any findings concerning any of the applicants either in their personal or representative capacity, or indeed, any findings at all. A fair-minded lay observer would not disregard paragraph 3 of the First Report, nor would he translate "evidences" into "establishes". Further, a fair-minded lay observer would not be satisfied that there has been any unfair hearing process denying the applicants or any of them natural justice. Each applicant who has been the subject of adverse evidence has been given notice of that evidence, has been given the opportunity to cross-examine in respect of relevant disputed facts, and has been called to give his account of matters in contest. The procedures implemented to enable performance of the tasks set by the Terms of Reference were upheld as appropriate by Heerey J. in Kingham v Cole. *Since that judgment, additional protection has been given to the applicants and others, by the requirement that Counsel Assisting provide to the applicants and all person who might be adversely affected by any findings which they seek, notice of the proposed findings, and such persons have been given the opportunity to respond to such submissions before I consider the findings I should make.'*

CONTENTIONS OF THE APPLICANTS

20 The applicants were directed to file a Statement of Facts, Issues and Contentions. The document filed in purported compliance with the direction ('the Statement') identifies no issues. The precise contentions which it is intended to advance are not readily identified.

21 Paragraph 21 of the Statement is in the following terms:

> *'The Applicants have a right to expect that the First Respondent as the Commissioner inquiring into the Building and Construction Industry shall:*
>
> *'(i) Hear them with an unbiased mind;*
>
> *(ii) Not hear them in such a manner that leads to a reasonable apprehension of bias;*
>
> *(iii) Not make findings against their interests without giving them the opportunity to be heard and make submissions on the evidence.'*

22 The applicants assert by the Statement that the First Report *'applies to the* [a]*pplicants and their conduct'*. They further assert that the First Report contains *'a number of conclusions about the conduct of the* [a]*pplicants'* and that those conclusions *'are a pre-judgment of the issues and actual bias'*. An invitation to counsel for the applicants to identify the conduct of the applicants to which the First Report applies and about which it contains conclusions and to provide particulars of the issues which the First Report prejudges remains unanswered. However, senior counsel for the applicants, Mr Rothman SC, indicated that:

> *'… it would defy both logic and the proper construction of paragraph 4 to assume that it was intended to deal with conduct other than conduct of the officers of the union.'*

The 'union' to which he intended to refer, as I understood him, was the CFMEU – NSW Divisional Branch.

23 It further appears that the applicants contend that the Commissioner has exhibited actual bias or that his conduct has given rise to an apprehension of bias by:

(a) issuing the First Report before the conclusion of the evidence of the applicants;

(b) issuing the First Report before hearing any submissions from the applicants;

(c) adopting a procedure *'within the Royal Commission'* that is *'grossly unfair'* to the applicants (no particulars of the *'grossly unfair'* procedure are provided by the Notice although allegedly *'unfair'* procedures are identified (see [24] –[25] below);

(d) displaying "*such procedural unfairness to the* [a]*pplicants that he should disqualify himself or be disqualified in the absence of a decision to disqualify himself*"; and

(e) acting outside the terms of reference contained in the Letters Patent *'against the interests of the applicants'*.

24 In addition it appears that the applicants contend that the Commissioner has breached a duty to provide procedural fairness to the applicants during the course of the Royal Commission. At the heart of the applicants' complaints in this regard is dissatisfaction with the procedures outlined in the First Practice Note. In particular it is contended that the Commissioner has adopted a process which is unfair to the applicants in that it provides for:

(a) incomplete and inaccurate openings by Counsel Assisting;

(b) the gathering of evidence in an unfair way and in particular the use of generalised evidence which is not able to be challenged by the applicants;

(c) questioning by Counsel Assisting of the applicants as witnesses by reference to documents which were seen by them for the first time during the course of their evidence;

(d) questioning by Counsel Assisting of the applicants in the course of which Counsel Assisting and the Commissioner adopted pejorative descriptions of the applicants' conduct;

(e) questioning by Counsel Assisting of the applicants as witnesses by reference to documents which Counsel Assisting misdescribed and in doing so mislead the witnesses;

(f) the leading of employer witnesses through their evidence by Counsel Assisting;

(g) the leading of employer witnesses through their evidence by the Commissioner;

(h) the unfair and arbitrary restriction of cross-examination on behalf of the applicant; and

(i) the making of adverse findings, conclusions or statements by the Commissioner in relation to the evidence of the applicants before that evidence was complete.

25 It is further contended that the Commissioner has adopted a process which is unfair to the applicants in that it fails to provide for:

(a) the recall of witnesses on application by counsel for the applicants; and

(b) the calling of probative contrary evidence by Counsel Assisting in the course of the inquiry by the Commissioner.

26 Paragraphs [39] and [40] of the Statement are in the following terms:

> *'The scope and nature of the task required by the Letters Patent, and the time within which the task must be performed, are material factors in demonstrating there has been a denial of natural justice in that insufficient time to prepare and adduce evidence has been allowed to deal with the volume and nature of the evidence adduced by the Royal Commission and Counsel Assisting.*
>
> *The First Respondent, having embarked on a process that allows cross examination, has adopted a process or practice that is not one that affords procedural fairness to the Applicants.'*

27 The Court's request for the deficiencies in the Statement to be addressed have largely gone unanswered. It is unfortunate that in a matter of public importance requiring urgent hearing and determination the case sought to be advanced by the applicants was not more precisely formulated and the real issues requiring determination by the Court more clearly identified.

28 The submissions of the applicants touched on three broad issues. The first issue was the proper construction of the Letters Patent. The second issue was the First Report. The third issue concerned the matter in which the Royal Commission had been and is being conducted. The submissions touching on the second and third issues were clearly intended to address the procedural fairness obligations of the Commissioner. It would seem that the submissions touching on the second issue must also have been intended to address the procedural fairness obligation but exactly how they did so was not identified.

CONSIDERATION

Proper Construction of the Letter Patent

29 The applicants contended that the Letters Patent, to the extent that they require the Commissioner to inquire into and report on the nature, extent and effect of any unlawful industrial or workplace conduct, do not authorise the Commissioner to inquire into particular conduct and determine for himself whether that conduct is unlawful. Rather, the applicants argued, the reference in the Letters Patent to *'unlawful… industrial or workplace conduct'* is a reference to conduct which has been determined in legal proceedings to be unlawful.

30 The above contention was advanced as a matter of construction of the Letters Patent.

31 Although the applicants issued notices under s 78B of the *Judiciary Act* 1903 (Cth) they ultimately did not press any arguments arising under the Constitution or involving its interpretation. It is not open to doubt, at least in this Court, that the Executive Government has power to appoint a commission to inquire into and report on whether any person has been guilty of a crime (*McGuinness v Attorney-General of Victoria* (1940) 63 CLR 73; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25). Of course, a determination of a commission that an individual was guilty of a crime would carry no legal consequences (*McGuinness v Attorney-General of Victoria* per Latham CJ at 86, Rich J at 88, Starke J at 90 and Dixon J at 102).

32 The relevance in this proceeding of the contention that the Commissioner has acted outside the terms of reference against the interests of the applicants is not clear. No allegation of a lack of *bona fides* in this regard was advanced. However, as the contention can be dealt with briefly I do so.

33 In my view, the contention is unsustainable as being inconsistent with the Letters Patent read as a whole. The Letters Patent require the Commissioner to inquire into and report on *'the nature, extent and effect of any unlawful or otherwise inappropriate industrial or workplace practice or conduct'*. The task so imposed on the Commissioner would be likely to become frustrated by technicalities were it necessary, as to any apparently relevant industrial or workplace practice or conduct, to identify whether it might have involved the commission of a criminal offence, and if so, whether charges in relation thereto had been laid and prosecuted. Perhaps more importantly, the direction to the Commissioner 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'* would appear to be wholly inconsistent with the contention advanced by the applicant. The only purpose of any referral to a Commonwealth, State or Territory agency would presumably be to allow consideration to be given to the launching of a prosecution.

Procedural Fairness

34 It is not in dispute that the rules of natural justice, or procedural fairness as it is now commonly described, impose obligations on the Commissioner acting as a Royal Commission. Except in one respect there is no dispute as to the content of those obligations. It is agreed that the content includes:

(a) a duty to ensure that any person represented at the inquiry who might be affected adversely by a finding should know of the risk of such a finding being made and be given an opportunity to adduce additional material that might deter the Commissioner from making that finding (see *Mahon v Air New Zealand Ltd* [1984] 1 AC 808 at 820; *Annetts v McCann* (1990) 170 CLR 596 per Mason CJ, Deane and McHugh JJ at 599) ("the hearing rule"); and

(b) that the Commissioner neither be biased nor appear to be biased ("the rule against bias").

35 The Commonwealth argued that it is no part of the common law of Australia that the rules of natural justice require that a person in the position of a Commissioner make findings based upon material that logically tends to show the existence of facts consistent with those findings. Reference was made to the observation of Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356-357, with which observations Toohey and Gaudron JJ appear generally to have agreed (see at 387), that the approach adopted in, for example, *Mahon v Air New Zealand Ltd*, to the extent that it reflected the above position *'has not so far been accepted by this Court'*.

36 However, in *Australian Broadcasting Tribunal v Bond* at 367 Deane J said:

> *'If a statutory tribunal is required to act judicially, it must act rationally and reasonably. Of its nature, a duty to act judicially (or in accordance with the requirements of procedural fairness or natural justice) excludes the right to decide arbitrarily, irrationally or unreasonably. … When the process of decision-making need not be and is not disclosed, there will be a discernible breach of such a duty if a decision of fact is unsupported by probative material. When the process of decision-making is disclosed, there will be a discernible breach of the duty if findings of fact upon which a decision is based are unsupported by probative material and if inferences of fact upon which such a decision is based cannot reasonably be drawn from such findings of fact.'*

37 In *Minister for Immigration and Multicultural Affairs v Rajamanikkam* [2002] HCA 32; 190 ALR 402 both Gleeson CJ at [65] and Kirby J at [100] cited the above passage from the judgment of Deane J in *Australian Broadcasting Tribunal v Bond* with apparent approval.

38 It may be that in 2002 the approach to which Mason CJ referred in *Australian Broadcasting Tribunal v Bond* (see [35] above) does reflect the common law of Australia. It is not necessary in the circumstances of this case for a concluded view on the question to be reached.

The Tests for Actual and Apprehended Bias

39 The applicants pressed a contention that the Commissioner has exhibited actual bias. The bias alleged was pre-judgment bias as opposed to, for example, personal interest bias. It is therefore necessary for consideration to be given to the test for actual bias on the basis of prejudgment.

40 In *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507 Gleeson CJ and Gummow J, with whom Hayne J agreed, said at [72]:

> *'The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented.'*

41 The test with respect to apprehended bias was stated by the High Court in *Livesey v New South Wales Bar Association* (1983) 157 CLR 288 at 293 as being whether:

> *'… the parties or the public might entertain a reasonable apprehension that* [the decision-maker] *might not bring an impartial and unprejudiced mind to the resolution of the question involved in it.'*

42 In *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 100 Gaudron and McHugh JJ said:

> *'A reasonable bystander does not entertain a reasonable fear that a decision-maker will bring an unfair or prejudiced mind to an inquiry merely because he has formed a conclusion about an issue involved in the inquiry. When suspected prejudgment of an issue is relied upon to ground the disqualification of a decision-maker, what must be firmly established is a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented to him or her.'* (citations omitted)

The First Report

43 The applicants allege that in producing the First Report, the Commissioner breached the hearing rule in that the First Report contains findings adverse to the applicants and the applicants were not given sufficient opportunity to adduce material that might have deterred the Commissioner from making those findings. The applicants also allege that the First Report demonstrates actual bias in the Commissioner and gives rise to apprehended bias in the Commissioner.

44 The applicants' concerns with respect to the First Report apparently arise principally from the opening words of paragraph 4, and in particular the words *'I am satisfied that the material received evidences practices and conduct …'*. The applicants argue that the plain and ordinary meaning of the word *'evidences'* is to make evident or to manifest.

45 The Commissioner, in his written reasons for his decision at [47] said:

> *'The use of the word "evidences" in paragraph 4 was intentional. It was intended to reinforce the statement in paragraph 3 that, at the time of the report, no findings of fact in respect of material which "evidenced" aspects of practice and conduct had been made nor would be made until the final report. If I had intended to convey in paragraph 4 that a finding had been or was being made I would have used the word "establishes". I did not do so. Plainly, when material was placed before the Commission as it was in some States and was not put in contest, there is a likelihood that the material will be accepted. That is not the case where material is in contest. In those circumstances, it will be necessary for me to make findings of fact after weighing competing submissions.'*

46 The applicants argued that although the Commissioner's reasons for decision might be relevant to consideration of the question of whether the Commissioner is actually biased against the applicants, his reasons have no relevance to the question of apprehended bias. It was argued that if an apprehension of bias truly arises then "*that apprehension is not dissipated by an exculpatory statement made thereafter*".

47 In *Johnson v Johnson* [2000] HCA 48; 201 CLR 488, a case concerning apprehended bias, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [14] said:

> *'There was argument in this Court, prompted by Anderson J's explanation of what he intended to communicate, about whether the effect of a statement that might indicate prejudgment can be removed by a later statement which withdraws or qualifies it. Clearly, in some cases it can. So much has been expressly acknowledged in the cases. No doubt some statements, or some behaviour, may produce an ineradicable apprehension of prejudgment. On other occasions, however, a preliminary impression created by what is said or done may be altered by a later statement. It depends upon the circumstances of the particular case. The hypothetical observer is no more entitled to make snap judgments than the person under observation.'* (footnote omitted)

48 In an earlier case of *Re Polites; Ex parte The Hoyts Corporation Pty Limited* (1991) 173 CLR 78 at 89 the Court (Brennan, Gaudron and McHugh JJ) had observed that in determining whether grounds appeared for reasonably apprehending that Deputy President Polites might not bring an impartial and unprejudicial mind to the resolution of the issues before the Australian Industrial Relations Commission *'some weight must be given to the views of Mr Deputy President Polites'*.

49 I therefore proceed on the basis that it is appropriate for me to have regard to the written reasons for decision of the Commissioner both on the issue of actual bias and on the issue of apprehended bias. However, the written reasons are not conclusive of the issues which this Court is required to determine. They must be considered as part of the total circumstances of the case.

50 The explanation given by the Commissioner in [47] of his written reasons as to the meaning which he intended the word *'evidences'* to bear in [4] of the First Report is supported by the content of [3] of the First Report. Paragraph 3 of the First Report makes it plain that the First Report is not intended to address specific evidence, material or submissions. A perusal of the First Report reveals that it does not do so. I reject the submission that the First Report contains findings based on specific evidence, material and submissions received by the Royal Commission concerning the conduct of any organisation or person.

51 Although the applicants contend that the First Report in its terms applies to the applicants and their conduct I find that it does so, if at all, only indirectly. I accept the evidence of Andrew Ferguson ('Mr Ferguson') that as at December 2001 the New South Wales Branch of the CFMEU had 35,664 members. It is agreed that 18,810 of those members were at that time financial members of the CFMEU. I also accept Mr Ferguson's evidence that:

(a) the CFMEU has more members in the building and construction industry in New South Wales than any other union; and

(b) that a substantial amount of the evidence that has been led in the NSW hearings has concerned the CFMEU – NSW Divisional Branch.

On that basis it may be assumed that some of the material that the Commissioner is satisfied *'evidences'* practices and conduct of the kinds referred to by him in [4] of the Final Report is material touching on the conduct of some of the applicants. However, as to each individual applicant, it cannot be known whether any of the material touches on his conduct.

52 The submission of the applicants that the Commissioner has by the First Report made findings that the applicants have engaged in criminal conduct must be rejected. The First Report identifies no individual either expressly or by implication. No instance of allegedly criminal conduct is particularised in the First Report. Indeed the First Report, as [3] of the report states, contains no detailed findings of fact of any kind.

53 As is mentioned above, the applicants' legal representatives did not respond to the Court's invitation to particularise as to each of the applicants how he was adversely affected by the publication of the First Report. For this reason I do not know the details of the particular findings which the applicants' claim are made in the First Report. However, senior counsel for the applicants submitted that the First Report *'is a pre-judgment of material affecting* [the applicants'] *interests qua their position, both as to reputation and as to* [their] *position as officers of the union ….'* Again, I understand the 'union' referred to by senior counsel to be the CFMEU – NSW Divisional Branch.

54 It is not in dispute that the First Report was provided by the Commission to the Governor-General, and thereafter published, before all of the applicants had given evidence and without the applicants being given an opportunity by their counsel to make submissions as to the conclusions that might appropriately be drawn from the evidence and other material that was before the Commission. I accept that the applicants as a class have an interest in the finding recorded in [4] of the First Report which exceeds the interests of the public at large. Their special interest is, as Mr Rothman contended, an interest in the industrial sense (see *Shrubb v Air Pilots' Guild of Australia* (FC) (1979) 40 FLR 374 at 377).

55 However, the finding of the Commissioner which is recorded at [4] of the First Report is of a general nature. It is a finding of satisfaction based upon:

(a) evidence given in five States (of which New South Wales was one) over 126 days by 445 persons;

(b) extensive private consultations; and

(c) other material placed before the Commission.

56 It is a finding concerning practices and conduct of specified kinds but practices and conduct which are not particularised as to individual incidents or as to individual participants. The finding could, without disrespect, be summarised as a statement by the Commissioner that he has strong reason to suspect that all is not well in the Australian building and construction industry in the regards specified in subparagraphs (a)-(o). Paragraph 5 of the First Report makes it plain that the Commissioner's concern is not limited to the employee side of the industry but reaches also, at least, to the employer side.

57 In *Botany Bay City Council v Minister of State for Transport and Regional Development* (1996) 66 FCR 537 Lehane J gave consideration to the authorities touching on the common law duty, which exists in the absence of clear manifestation of a contrary statutory intention, to act fairly (in the sense of according procedural fairness) in the making of administrative decisions which affect rights, interests and legitimate expectations. His Honour at 553–554 observed:

> *'There is a clear distinction, and authorities binding on me treat it as an important distinction for these purposes, between decisions affecting the rights or interests of particular individuals and those affecting the interests, indiscriminately, of the members of the public at large or of the members of a section of the public. Thus in* Kioa *at 584, immediately following the passage to which I have already referred Mason J, said:*
>
> > *"But the duty does not attach to every decision of an administrative character. Many such decisions do not affect the rights, interests and expectations of the individual citizen in a direct and immediate way. Thus a decision to impose a rate or a decision to impose a general charge for services rendered to ratepayers, each of which indirectly affects the rights, interests or expectations of citizens generally does not attract this duty to act fairly."*
>
> …
>
> *All of the authorities to which I have referred, however, make it clear that though a decision for which an Act or delegated legislation provides is to be characterised as administrative rather than legislative, nevertheless if it affects the interests of the public, or a section of the public, at large rather than the interests of particular individuals it will, usually at least, be a decision in relation to which no particular individual or body can claim an entitlement to procedural fairness: particularly, an entitlement to be heard, in relation to a proposed decision, before it is made.'*

58 The interest of the applicants, or at least those most readily identified with the CFMEU – NSW Divisional Branch, in the First Report seems to me to be to some extent comparable to the interest which pathologists, patients and medical practitioners had in the recommendation considered by Gummow J in *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615. In that case at 637 his Honour said of the recommendation:

> *'It affected the interests of those providing the pathology services, of the patients and their medical advisors for whom the services are provided and of government (that is to say of the Australian community as a whole) in efficient administration of the law and proper disbursement of public moneys. I believe there is much to be said for the view that the making of a recommendation by the committee and the decision of the Minister to make a determination in accordance with the recommendation of the committee, did not affect the rights, interests and expectations of pathologists, other medical practitioners and patients* ***in a***

sufficiently individual direct and immediate way *as to attract with regard to persons in these groups the duty to act fairly …'* (emphasis added)

59 In my view, it has not been demonstrated that the Commissioner's finding affected the interest of any applicant, or the applicants as a group, "*in a sufficiently individual direct and immediate way*" to give rise to a duty in the Commissioner to afford that applicant, or the applicants generally, an opportunity to adduce additional material in the manner required by the hearing rule.

60 The applicants' claim to be entitled to the protection provided by the hearing rule is, in my view, even less strong with respect to [6] – [15] of the First Report. These paragraphs foreshadow recommendations for administrative and legislative change. Mr Rothman argued that the recommendations impact on the applicants in their capacity as officers of a State union as the recommendation, if adopted, might lead to Commonwealth legislation which would reduce the sphere of operation of the State union. He further argued that a successful challenge to the Commissioner's findings of fact would result in the recommendations falling. However, although the amended application includes a reference to *'the State Union'* the union intended to be referred to is not identified. The Statement (see [20] above) makes no mention of a State union. The applicant did not give evidence concerning a State union. The applicants' claims so far as they were supported by reference to a State union must fail.

61 In any event, in my view, neither any individual applicant, nor the applicants as a class, is or are sufficiently affected in a personal or political way by the content of paragraphs [6] – [15] of the First Report to give rise to a duty in the Commissioner to comply with the hearing rule. The recommendations relate to the establishment of institutions of government which will impact on the applicants, if at all, only tangentially. Even if there were material before me that identified the applicants with a State union and demonstrated that acceptance of the recommendations and foreshadowed recommendations would reduce the sphere of operation of that union, I would not take a different view.

62 I conclude that the Commissioner was under no duty to afford the applicants, or any of them, an opportunity to adduce additional material that might have deterred the Commissioner from making the findings and recommendations set out in the First Report before making those findings and recommendations.

63 I turn to consider whether the conclusions contained in the First Report *'are a pre-judgment of the issues and actual bias'* (see [22] above). As is mentioned above, I am required to undertake this exercise without having the benefit of any particularisation of the issues intended to be referred to by the applicants. However, the relevant issues must, it seems to me, be the issues or some of the issues to be determined by the Royal Commission.

64 The Letter Patent (see [12] above) appoints the Commissioner to, amongst other things, inquire into and report on the nature, extent and effect of any unlawful or otherwise inappropriate industrial or workplace conduct or practice in the building and construction industry. The Commissioner's inquiry is thus intended to be a wide ranging one and his final report intended to be formulated, at least in part, at a level of generality. The Commissioner is not engaged in an exercise of determining issues between parties to litigation. He is free, at the level of particular instances of industrial or workplace conduct or practice, to inquire into them or not to inquire into them, as he considers appropriate. For

these reasons the 'issues' which will be determined by the Commissioner in his final report, other than issues of a general nature, cannot now be identified.

65 Having regard to the nature and the extent of the inquiries undertaken by the Commissioner as at the date of the First Report, it would be unrealistic to hold an expectation that the Commissioner would not by that time have gained some general appreciation of whether or not there were unlawful or otherwise inappropriate industrial or workplace practices and conduct in the building and construction industry. He can also be expected to have formed at least preliminary views as to the measures that would be appropriate to improve practices and conduct in the industry and to deter unlawful and inappropriate practices. Indeed, the task of providing to the Governor-General by no later than 6 December 2002 the report required by the Letters Patent would be virtually overwhelming had he not by 5 August 2002 formed some such preliminary views which could give added focus to his ongoing inquiries and his consideration of possible legislative and administrative changes.

66 However, as is made clear above (see [50]), the First Report contains no detailed findings of fact of any kind. The Commissioner has not by the First Report published any conclusions which are directly referrable to any of the applicants. The foreshadowed recommendations for legislative and administrative change are expressed with considerable generality. The language of the First Report is measured in tone.

67 In *Minister for Immigration and Multicultural Affairs v Jia Legeng* Gleeson CJ and Gummow J, with whom Hayne J agreed, at [71] – [72] rejected the argument that all that was necessary to constitute bias was an inclination or predisposition of mind. Their Honour's observed:

> *'Decision-makers, including judicial decision-makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion.'*

68 In my view, the First Report, having regard to the circumstances surrounding publication, provides no basis for a finding that the Commissioner is so committed to any conclusion already formed as to be incapable of altering it, whatever additional material may be presented (see [40] above). In particular the First Report provides no basis for a finding that the Commissioner is so committed to conclusions already formed concerning the applicants, or touching on their respective interests, as not to be open to persuasion by their evidence, or by submissions advanced on their behalves.

69 I turn to the issue of apprehended bias. In *Re JRL: Ex parte CJL* (1986) 161 CLR 342 at 352 Mason J observed with respect to apprehended bias in a judicial officer:

> *'It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But that does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way.'*

The significance of Mason J using the word *'will'* rather than *'may'* or *'might'* in the above passage can for present purposes be put to one side.

70 As I have already stated, the Commissioner is not acting judicially to determine issues between parties. He is conducting an inquiry of a general nature at the request of the Executive Government. The publication of the First Report may well have generated an expectation that the Commissioner's final report will make findings and recommendations of a particular kind. However, as already mentioned, the language of the First Report is measured in tone. The First Report contains no findings of fact. The views expressed in it are of a general nature. The First Report does not single out the building and construction industry in New South Wales or any of the applicants for particular attention.

71 I do not consider that by the publication of the First Report the Commissioner has become so identified with, or apparently committed to, a view concerning the building and construction industry in New South Wales that it could be reasonably apprehended that he might not able to address issues touching on that aspect of the national industry impartially and with an unprejudiced mind within the meaning of the authorities. In my view, nothing in the First Report, or the circumstances surrounding its publication, is such as to cause the applicants or the public a reasonable apprehension that the Commissioner might be so prejudiced in favour of a conclusion or conclusions already formed that he will not alter that conclusion or those conclusions irrespective of the evidence of the applicants or the submissions advanced on their behalves.

72 The application for relief so far as it is dependent on the First Report must fail.

The Conduct of the Royal Commission Generally

73 It appears that the applicants contend that the scope and nature of the task committed to the Commissioner by the Letters Patent is such that a denial of procedural fairness to them is inevitable (see [26] above). This contention faces two principal difficulties. First, it anticipates the content of the final report of the Royal Commission. Secondly, it overlooks the steps taken by the Commissioner to ensure that the applicants have notice of findings adverse to them that might be made.

74 Where the Executive Government has a need for information it has the option of seeking to obtain that information by one or more of various means. The establishment of a Royal Commission is one way in which the Executive Government may obtain information. In this case the Royal Commission is charged with making inquiries directed to the gathering of information both to ascertain matters of fact and to provide a basis for the formulation of policy. Indeed, the Commissioner is himself charged with identifying and reporting on legislative and administrative measures to achieve reform within the building and construction industry. The time provided to the Commissioner to provide the report required of him is a matter for the Executive Government. The nature and extent of the Commissioner's inquiries and the detail of the measures recommended by him will be influenced by the time frame within which he is required to work and the resources provided to him. These are not matters with which the law is directly concerned. However, the law does have a role to play where, because of the time or other restraints imposed on the Royal Commission, the Royal Commission acts in a way that destroys, defeats or prejudices a person's rights, interests or legitimate expectations without according that person procedural fairness (see *Annetts v McCann* per Mason CJ, Deane and McHugh JJ at 598).

75 The role which the applicants may legitimately expect to play by their counsel during the course of the Royal Commission is a limited one. In *Annetts v McCann* at 601, Mason CJ, Deane and McHugh JJ said:

> "*Counsel for the appellants argued that, as he could not know what findings the Coroner would make until the case was over, he was entitled to address on the whole of the evidence. The conclusion does not follow from the argument. The issues in respect of which findings adverse to the appellants may possibly be made can be isolated and, once isolated, counsel for the appellants is not entitled to address the Coroner on matters which are not relevant to those issues. At the same time, the Coroner has a responsibility to define the issues in respect of which there exists a possibility that he may make findings adverse to the appellants. By defining those issues he can effectively assist the identification of the topics on which counsel can relevantly and usefully address and limit the scope of that address*."

76 In this case the Commissioner has acted to define the issues in respect of which there exists a possibility that he may make findings adverse to the applicants. The Commissioner set out in [34] of his reasons for decision the procedures adopted within the Royal Commission in respect of persons who may be adversely affected by any findings of the Commissioner. I did not understand the applicants to challenge the accuracy of the content of that paragraph. It reads as follows:

> *'To ensure that persons who may be adversely affected by any findings which I might make in the final report are accorded natural justice, the following procedures have been put in place:*
>
> *(i) Statements of evidence containing adverse material are placed on Courtbook being an electronic filing system for evidence. Access to Courtbook is given to any party who might be adversely affected.*
>
> *(ii) Practice Notes issued by the Commissioner require that material to be placed on Courtbook in advance of the hearings, normally two weeks in advance.*
>
> *(iii) The solicitors for the Commission give to the person who might be affected notice of adverse evidence thus drawing their attention to the material which might be adverse to them.*
>
> *(iv) Lawyers for persons who might be adversely affected are uniformly given a right of appearance whilst any evidence is being given by such persons or whilst any evidence which might be adverse to such persons is being called.*
>
> *(v) If the person potentially adversely affected wishes to deny the material alleged against him, he or she is required to file a statement specifying the factual matters which are disputed by that person. In this way, an issue is raised for determination. In view of the enormous bulk of material called in hearings around Australia, any alternative system would not be practicable having regard to the obligation to report within a limited time, and the dimension of the material required to be investigated.*
>
> *(vi) In advance of the person making the adverse allegation being called, Counsel seeking to cross-examine on behalf of the party potentially affected is required to indicate the areas of conflict by reference to the paragraphs in the disputing statements.*

(vii) In advance of the person giving the potentially adverse evidence being called for cross-examinations, I publish a ruling indicating the areas in which cross-examination will be permitted. I do not give reasons in respect of each ruling on each paragraph of the contesting statements, for that would not be practicable, but the principles which have generally guided me are:

(a) If there is a disputed issue of fact relevant to a matter which I regard as material to any issue I must determine, I allow cross-examination upon it.

(b) If a person gives evidence on oath of an adverse matter, which evidence is not denied, I do not allow cross-examination. That is because no issue is raised regarding the evidence.

(c) If the disputing evidence is a matter of comment, as distinct from raising a factual conflict, I do not allow cross-examination.

(d) If a person gives evidence on oath of a fact, and the contestant states that he has no recollection of the alleged fact, I do not allow cross-examination, unless there are surrounding circumstances casting doubt upon the veracity of the evidence alleged. That is because there is no sensible basis upon which a cross-examiner can contest the evidence.

(e) Overriding all considerations, if there are grave allegations against a person which may be diminished or eliminated by an attack on the credit of the witness giving the evidence, I allow cross-examination.'

See also the First Practice Note and the Direction.

77 The applicants argued that the burden imposed on their legal representatives by adherence to these procedures is excessive in the circumstances. I am unable on the evidence before me to make a finding that this is so. There is no detailed evidence as to the resources which are, or could reasonably be made, available to the applicants' legal representatives. More importantly, however, the applicants have not demonstrated that reasonable requests addressed to the Commissioner for modification of the standard procedures, particularly as to time, have met or will be met with refusal. As Mason CJ, Dawson, Toohey and Gaudron JJ observed in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 578, where a decision making process involves different steps or stages the issue is whether *'the decision-making process, viewed in its entirety, entails procedural fairness'* (quoting *South Australia v O'Shea* (1987) 163 CLR 378 at 389 per Mason J).

78 The applicants assert that the Commissioner has unfairly and arbitrarily restricted cross-examination on behalf of the applicants. They further assert that evidence has been gathered and used unfairly and that witnesses have been questioned unfairly. One difficulty facing the applicants concerning assertions of this kind is that the final report of the Commissioner is not yet available. It is not known precisely what findings will be made by it. It may well be that issues that assumed importance, or apparent importance, during the course of hearings will be found by the Commissioner to be without significance so far as his final report is concerned. Having regard to the procedure adopted within the Royal Commission in respect of persons who may be adversely affected by findings of the Commissioner, I am not satisfied that the Commissioner's final report will include findings that will destroy, defeat or prejudice the rights, interests or legitimate expectations of the applicants, or any of

them of which the applicants have not been or will not be put on notice and given an opportunity to adduce relevant material that might deter the Commissioner from making the findings.

79 The applicants have sought to demonstrate that the conduct of the Commissioner and of Counsel Assisting the Commission during the course of the Royal Commission has already been such as to demonstrate actual bias towards them or such as to give rise to a reasonable apprehension of bias towards them (see [24] – [26] above). So far as the applicants rely on the general procedures adopted within the Royal Commission they have, in my view, plainly failed to establish this aspect of their case.

80 So far as the applicants place reliance on specific instances of conduct, I also conclude that they have failed to make out a case of actual or apprehended bias. I do not consider it necessary to rehearse each of the specific instances of conduct relied upon. In my view, seen in the context of the conduct of the Royal Commission as a whole, they are of limited significance. No basis has been identified upon which the conduct of Counsel Assisting the Commission is to be attributed to the Commissioner. Subject to limited exceptions, the remaining instances of conduct relied upon relate to the applicants, whether considered individually or as a group, only indirectly. It has not been shown that they, or any of them, are likely to be material to the findings that will be contained in the Commissioner's final report.

81 It should, in my view, be stressed that it is not the role of this or any Court to oversee the day to day conduct of a Royal Commission so as to ensure, for example, that the openings of Counsel Assisting are complete and accurate, that evidence is fairly gathered and used, that individual witnesses are questioned fairly and that cross-examination is not restricted unfairly or arbitrarily. No inference should be drawn from this statement that I am satisfied that the criticisms made by the applicants of the specific instances of conduct referred to above are justified. Taken individually the criticisms are insufficiently significant to be relevant to the issues before this Court. Cumulatively, even if made out, they would be inadequate to establish that the applicants, or any of them, have or has been denied procedural fairness. I have not found it necessary to determine whether, as the second respondent contended, the applicants have waived their rights, if any, in relation to the conduct of which they complain.

CONCLUSIONS

82 For the reasons given above the application pursuant to s 5 of the ADJR Act for review of the decisions of the Commissioner to:

> *'(i) refuse to disqualify himself upon an application for disqualification made by the Applicants on the basis of apprehended bias;*
>
> *(ii) fail to give the Applicants, or any one of them, the sufficient ability to challenge and/or explain allegations made against them;*
>
> *(iii) fail to have evidence put fairly to the Applicants or any one of them;*
>
> *(iv) fail to provide the Applicants with procedural fairness before the Commission; and*
>
> *(v) further and in the alternative to (ii), (iii) and (iv) above, failure to ensure that contrary or exculpatory evidence is gathered and presented to the Commission by counsel assisting or made available to all parties affected thereby'*

must be dismissed. Similarly, the application under s 6 of the ADJR Act to review the conduct, or the proposed conduct, of the Commissioner similarly described must also be dismissed.

83 Also for the reasons given above applications made under s 39B of the Judiciary Act for a:

> *'… declaration that the First Respondent has acted with bias, or in the alternative has displayed apprehended bias, or acted in such a way that the Applicants entertain a reasonable apprehension that the First Respondent will not bring an impartial and unprejudiced mind to the issues'*; and a
>
> *'… declaration that the First Respondent has not provided a fair process for the Applicants'*

must be dismissed. The claim for consequential relief under s 39B of the Judiciary Act must also fail.

84 The application will be dismissed with costs.

I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated: 20 November 2002

Counsel for the Applicant:	Mr S Rothman SC and Mr I Latham
Solicitor for the Applicant:	Taylor & Scott
Counsel for the First Respondent:	No appearance at hearing
Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	Mr A Robertson SC and Ms K Eastman
Solicitor for the Second Respondent:	Australian Government Solicitor
Date of Hearing:	14 & 15 October 2002
Date of Judgment:	20 November 2002

SCHEDULE OF APPLICANTS

Peter McClelland	Second Applicant	David Glass	Twenty-third Applicant
Tom Mitchell	Third Applicant	Brian Fitzpatrick	Twenty-fourth Applicant
Peter Primmer	Fourth Applicant	Alan Duff	Twenty-fifth Applicant
Steve Dixon	Fifth Applicant	Brian (Jock) Miller	Twenty-sixth Applicant
Steve Keenan	Sixth Applicant	Peter Harris	Twenty-seventh Applicant
Joe McGahan	Seventh Applicant	Viduar Vega	Twenty-eighth Applicant
Martin Wyer	Eighth Applicant	Serge Saliadarre	Twenty-ninth Applicant
Terry Kesby	Ninth Applicant	Mike Dalzell	Thirtieth Applicant
John Prentice	Tenth Applicant	Jose Maria Barrios	Thirty-first Applicant
Lincoln Fryer	Eleventh Applicant	Ante Zdrilic	Thirty-second Applicant
Mark Cunningham	Twelfth Applicant	Nick Botic	Thirty-third Applicant
Peter Zaboyak	Thirteenth Applicant	Trevor Zeltner	Thirty-fourth Applicant
David Kelly	Fourteenth Applicant	Daniel Murphy	Thirty-fifth Applicant
Mick Lane	Fifteenth Applicant	Ludwig Strutzenberger	Thirty-sixth Applicant
Michael Lawler	Sixteenth Applicant	Les Tobler	Thirty-seventh Applicant
Emlyn Van Brussel	Seventh Applicant	Darryn Tinmouth	Thirty-eighth Applicant
Brian Parker	Eighteenth Applicant	Salvatore Manna	Thirty-ninth Applicant
Joe Bricic	Nineteenth Applicant	Malcolm French	Fortieth Applicant
Brian Redfern	Twentieth Applicant	Sid Wales	Forty-first Applicant
Brian Fox	Twenty-first Applicant	Robert Cochrane	Forty–second Applicant
Phil Smith	Twenty-second Applicant	Stephen Lobb	Forty-third Applicant

Appendix 20:

Example direction regarding submissions

ROYAL COMMISSION INTO THE
BUILDING AND CONSTRUCTION INDUSTRY

DIRECTION

It is hereby directed that:

1. By close of business on [date], Counsel Assisting provide to the Solicitor to the Commission and to [relevant persons], submissions in relation to [relevant matter/evidence]. Such submissions are to specify:

    a. the findings of fact which they contend are available and ought to be found;

    b. the conclusions which it is then contended should be drawn;

    on the basis of the [relevant evidence]. Such submissions are to be appropriately referenced to the evidence, including reference to contrary evidence.

2. By close of business on [date], the [relevant persons] provide to the Solicitor to the Commission their submissions in reply to Counsel Assisting's submissions on findings of fact, such submissions in reply to specify:

    a. Any disputed findings of fact, and the basis for such dispute; and

    b. Any additional findings of fact sought; and

    c. Any submissions in reply to Counsel Assisting's submissions pursuant to paragraph 1(b) of this direction.

    Such submissions in reply are to be appropriately referenced to the evidence, including reference to contrary evidence.

2. By close of business on [date], Counsel Assisting provide to the Solicitor to the Commission submissions in reply, if any, to submissions pursuant to paragraph 2 of this direction, and also provide those submissions to the persons whose submissions are the subject of the reply.

Dated this [date] day of [month] [year]

……..
The Honourable TRH Cole RFD QC
Commissioner

Appendix 21:

First Report

ROYAL COMMISSION INTO THE BUILDING AND CONSTRUCTION INDUSTRY

FIRST REPORT

1. By letters patent dated 29 August 2001 issued under the hand of the Governor - General, I am required to inquire into and report on the following matters in relation to the building and construction industry:

(a) the nature, extent and effect of any unlawful or otherwise inappropriate industrial or workplace practice or conduct, including but not limited to:

(i) any practice or conduct relating to the *Workplace Relations Act 1996*, occupational health and safety laws, or other laws relating to workplace relations; and

(ii) fraud, corruption, collusion or anti-competitive behaviour, coercion, violence, or inappropriate payments, receipts or benefits; and

(iii) dictating, limiting or interfering with decisions whether or not to employ or engage persons, or relating to the terms on which they be employed or engaged;

(b) the nature, extent and effect of any unlawful or otherwise inappropriate practice or conduct relating to:

(i) failure to disclose or properly account for financial transactions undertaken by employee or employer organisations or their representatives or associates; or

(ii) inappropriate management, use or operation of industry funds for training, long service leave, redundancy or superannuation;

(c) taking into account my findings in relation to the matters referred to in the preceding paragraphs and other relevant matters, any measures,

including legislative and administrative changes, to improve practices or conduct in the building and construction industry or to deter unlawful or inappropriate practices or conduct in relation to that industry.

2. The Letters Patent require me to report by 6 December 2002.

3. It is not appropriate, at this time, for me to address the specific evidence, material and submissions received by the Commission in relation to the conduct of any particular corporation, organisation or person. That is because the hearings are at present incomplete and all submissions have not yet been received. Detailed findings of fact will be made in my final report after consideration of all such evidence, material and submissions.

4. Nonetheless, after taking 126 days of evidence in Victoria, New South Wales, Queensland, Western Australia and Tasmania, hearing from 445 witnesses, having extensive private consultations the outcome of which is the subject of a public exhibit, and otherwise considering material placed before the Commission, I am satisfied that the material received evidences practices and conduct which exhibit:

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

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

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

(d) widespread requirement by head contractors for sub-contractors to have union endorsed enterprise bargaining agreements before being permitted to commence work on major projects in state capital central business districts;

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

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

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

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

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

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

(k) threatening and intimidatory conduct;

(l) underpayment of employees' entitlements;

(m) disregard of contractual obligations;

(n) disregard of federal and state codes of practice in the building and construction industry;

(o) disregard of the rule of law.

5. Much of the evidence of such conduct and practices is not in dispute. Such conduct and practices are not restricted to any one category of participant within the building and construction industry.

6. In my final report I will be recommending substantial reform. Included as one aspect of that reform will be the establishment of a national agency to monitor, investigate and prosecute any breaches of industrial law, the criminal law, and aspects of civil law in relation to the building and construction industry. The recommendations will include changes to federal laws which, if adopted by government, will require legislative enactment. The parliamentary cycle is such that there will be delay between the delivery of my recommendations and the placing before, and consideration of, any legislative changes by the Parliament, after consideration of my recommendations by government.

7. The Royal Commission has a finite life. That means that its inquiries and investigations must shortly cease. It has collected a wealth of information including a great number of probes for investigations and related material. Not all investigations are complete. Constraints of time and resources will prevent such incomplete matters being further addressed by the Commission.

8. It is important that the uncompleted work of the Commission, in respect of which I will not be in a position to make findings in my final report, not be stockpiled for delayed further investigation and analysis by a future body which may be created by future legislative change. Continuity of the investigative function in respect of past events is necessary.

9. There are two further material factors. First, many persons gave evidence to the Commission, both publicly and privately, in circumstances where they feared retribution at the conclusion of the Royal Commission. It is important that there be a continuing body during the winding down and after the termination of the Royal Commission, and prior to any legislative establishment of a new national agency, which can monitor the building and construction industry and act swiftly to deter and, if possible, ensure such retribution does not take place, or if it does, to penalise any such conduct. Second, between September and November 2002, when the investigative tasks of the Commission will be winding down or concluded, the expiration of pattern bargaining agreements and the negotiation of a new wave of agreements is likely to result in heightened industrial activity. It is important that there be a body ready to monitor, and capable of monitoring, any such activity to ensure that it occurs within the law and to facilitate compliance and, if appropriate, prosecution, if it does not.

10. The evidence before me makes plain that the Office of Employment Advocate is insufficiently funded and staffed to undertake the tasks referred to. It does not have the specialist capacity or experience necessary to monitor the building and construction industry, nor was it designed to give the necessary concentrated focus on the building and construction industry.

11. These factors mandate establishment of an interim taskforce, established administratively, to continue incomplete investigations, and monitor conduct and enforce industrial, criminal and civil laws pending the consideration by government, and if appropriate, the Parliament, of the legislative changes I will recommend.

12. I accordingly recommend the establishment of an interim body to monitor conduct, to investigate and, if appropriate, facilitate proceedings to ensure adherence to industrial, criminal and civil laws pending the delivery and

consideration of my final report and establishment of any permanent agency. The interim body should have power to receive material from this Commission, complete investigations and instigate or facilitate any necessary proceedings.

13. The body should be staffed by a multi-disciplinary group comprising lawyers, building and construction industry investigators, police investigators, financial analysts and general analysts. The body should have all skills necessary to continue with the investigative work of the Commission and be sufficiently resourced to be able to respond promptly to complaints received, and to investigate matters on its own initiative. It should have a presence in at least Melbourne, Sydney, Brisbane and Perth. If possible, the interim body should be operative by 1 September 2002.

14. This body should be regarded as an interim measure. The full powers and scope of the national agency or agencies which I will recommend in my final report will be addressed in that report.

15. If this recommendation is adopted, the Secretary and other officials of the Commission are available to ensure a smooth transition of information, processes and, if appropriate, personnel from the Commission to the interim body. The Commission has built up contacts, and a level of expertise in investigation and analysis of industrial, financial and other matters related to the building and construction industry which should not be dissipated by delay.

Dated 5th August 2002

The Honourable TRH Cole, RFD, QC
Royal Commissioner

Appendix 22:

Example record of decision under section 6P(1)

Record of decision to communicate information under s6P(1)

I am authorised to communicate information under sub-section 6P(1) of the *Royal Commissions Act 1902 (C'wth).*

The Commission has obtained information during the course of inquiry into a matter that relates or may relate to a contravention of a law, or evidence of a contravention of a law, of the Commonwealth, of a State or of a Territory, being:

- [*section and name of Act*]

In my opinion it is appropriate to communicate the information, or furnish the evidence, to:

- [*Title of office or name of authority or person responsible for the administration or enforcement of that law*]

I have resolved this day to furnish information as follows:

Information to be furnished:

[*Description of information to be communicated, including an attached schedule specifying the material*]

The information in the attached schedule is to be provided to…on the condition that any material therein that has been provided to the Commission either as a result of the exercise of its coercive powers or in any other circumstances that give rise to a duty of confidence shall not be made public or given to any person or body that may make it public without the person who provided the material to the Commission first being afforded the opportunity to be heard by…on the question of whether the information should be made public or given to any person or body that may make it public. This condition does not apply in circumstances where providing such an opportunity to be heard would prejudice a criminal investigation.

Signed: ……

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

Commissioner

Dated this day of 2003.