The Cole Royal Commission – the case for bias

by David McElrea, CFMEU Industrial Officer (NSW Branch)

For the past twelve months the Federal Government's Royal Commission into the Building and Construction has conducted public hearings in every Australian capital city. The Commission wound up the hearings on 18 October with a final report due in December this year. Newspapers have had a field day with the hearings, splashing lurid and salacious headlines referring to union thugs, standover tactics and union rorts across the pages of all major broadsheets and tabloids. The Royal Commission has ensured there has been plenty to write about, a statistical analysis of the proceedings of the Royal Commission shows that a staggering 97% of the Commission's time was spent hearing allegations damaging to unions. This article will attempt to demonstrate that the Royal Commission has been a deliberate, partisan and political exercise which has sought to destroy the most powerful and effective trade union in the country – the Construction, Forestry, Mining & Energy Union (CFMEU).

Establishment of the Cole Commission

The letters patent establishing the Royal Commission, signed by the Governor-General on 29 August 2001, provided for an enquiry into "unlawful or otherwise inappropriate practice or conduct…in the building and construction industry". The Federal Liberal government, then facing almost certain defeat at the upcoming election, appointed former NSW Supreme Court Justice Terrence Cole QC to head the Commission.

At the press conference held to announce the establishment of the Royal Commission, Minister for Employment & Workplace Relations Tony Abbot, stated:

"we [will] try to ensure that bad practices are, as far as is humanly possible, eliminated. That's what we want to happen. Now, bad practices are bad practices, whether they're perpetrated by site delegates for the union or whether they're perpetrated by foremen for the companies. But we want a clean industry."

After listening to Mr Abbot's public utterances, union officials could be forgiven for thinking the government were genuinely trying to address the wide-ranging problems that exist in the building industry. Perhaps they would address issues such as the appalling record of health and safety in one of the country's most dangerous occupations; address the fear every building worker carries on their way to work in the morning an knowing that on average one worker is killed on a construction site in Australia every single week. Unfortunately, despite the government's rhetoric it soon became clear the Commission had been set up with one outcome in mind – the public hanging of the CFMEU.

Natural Justice and the Royal Commission

Hearsay, leading of witnesses, departing radically from written submissions and prevention of an accused person cross-examining their accuser are all contrary to established rules of evidence and henceforth are normally disallowed in courts of law. However, they were a daily occurrence in the Royal Commission.

Royal Commissions are granted extraordinary powers by the parliament; they are regarded as inquisitorial arms of executive government and operate in much the same manner as a police force. However, by tradition they are quasi-judicial in procedure; court etiquette and evidential rules are expected to be observed, at least in part. The Cole Royal Commission departed radically from this formula and the result was a denial of natural justice to the CFMEU and its legal representatives.

The ability to cross-examine an accuser was drastically curtailed with trade union legal representatives severely handicapped by procedural disadvantage. For instance, following the giving of evidence adverse to the CFMEU, on occasions the Commissioner would instruct union Counsel to forecast in detail the content of their proposed cross examination of the witness – whilst the witness remained in the box. .

Of particular practical effect was an early ruling by Commissioner Cole restricting the granting of cross-examination rights and confining its proposed content and timing to matters pre-approved by the Commission. Cross-examination was also restricted to matters where there was a specified and direct conflict between the evidence – with the Commissioner having the exclusive arbitral power to determine the existence of a conflict - meaning much evidence which was prima facie in conflict with union beliefs was allowed to go unchallenged. When queried on these rulings, Commissioner Cole could only find one precedent for such a restriction on the right of the accused – the widely discredited and highly partisan Royal Commission on Communism occurring at the height of Cold War paranoia and at the time Prime Minister Menzies was attempting his unsuccessful proscription of Communist Party. I will leave it to the reader to draw any comparisons.

The effect of this ruling at the commencement of hearings was that objections made by Counsel to statements made in the witness box were uniformly overruled. Accordingly, all manner of hearsay and baseless allegations were aired in the witness box – and reprinted in damaging headlines in the media the next day with no chance of rebuttal from the union. By the time the union's solicitors received their opportunity to respond and lead contradictory evidence, which was usually weeks later, the allegations had been accepted as truth – in any case a hostile media didn't bother to report the other side of the story. The Commission ensured the damning evidence got out - the media department of the Royal Commission was allocated a budget of $750,000. In contrast the HIH Royal Commission, set up to investigate the largest corporate collapse in Australian history, managed to get by with a media budget of $140,000.

There were countless incidences but a classic example is that of a union organiser in New South Wales whose reputation was shattered by a subcontractor giving evidence that he had threatened and intimidated her. The story became front-page news in Sydney and around Australia –'Union Thug Threatens Family Of Subcontractor'.

About six weeks after that story was supplied as evidence and filed as truth, the Counsel Assisting the Royal Commission quietly tabled a report from the Commission's own investigators showing that the evidence on which that story was based was clearly false. The statement from the subcontractor that she had received phone calls and had reported the incident to the police was found to be untrue – the phone call had not happened and no incident had been reported to the police.

But of course this didn't make front page - it didn't make it into the news at all.

Another example was an allegation made by Counsel Assisting at the commencement of hearings in Sydney when the statement was made that Bovis Lend Lease had made a suspicious payment of $750,000 to the NSW Branch of the CFMEU in December 1999 – with the innuendo being that the CFMEU had dishonestly pocketed the money. Whilst this "fact" was widely reported, later evidence led by the union proving that this was a tax debt owed by a dodgy sub-contractor, subsequently recovered by the union and remitted to the tax office, did not receive any attention.

None of this was accidental – indeed an express purpose of the Royal Commission was to gain headlines tarnishing the reputation of the CFMEU and the union movement.

In the box, treatment of witnesses by Counsel Assisting and the Commissioner varied dramatically depending on whether the witness was giving evidence adverse to the union or not. Most employers were merely required to swear to the truth of a pre-prepared statement, whilst union witnesses were subject to lengthy, probing and hostile cross examination – sometimes for up to a day.

It was not just union officials that held this view on proceedings, for example the manager of JR Rigging John Chandler, signed a statutory declaration swearing that Commission investigators brushed evidence of insurance fraud, stand-over tactics, bogus inspection records and major health and safety breaches because the union was not implicated. After supplying documentation in response to a request by the investigators to back up his criminal allegations, he heard nothing. When he phoned the commission to enquire on progress four months later, he was told it would not be investigating his allegations

Bias and the Royal Commission

On August 5 2002 Commissioner Cole handed a secret report to Minister Tony Abbott. The interim report, not released until 20 August, recommended the immediate establishment of a Building Industry taskforce, on the basis of the evidence presented to the Commission up until that time. This was despite the fact that, due to the Commissioner's procedural ruling discussed above, the union was yet to present its evidence and submissions in response to the allegations made by employers and the government. Coincidentally (or not), the taskforce is headquartered in Melbourne and has commenced its operations just prior to the announcement of the Victorian State election and a three-yearly campaign by building workers to increase their wages under the system of enterprise bargaining (the only time the Federal *Workplace Relations Act* accords them the legal right to strike in contravention of international law – see International Labour Organisation Convention No. 87 on Freedom of Association and Protection of the Right to Organize, 1948; Convention No. 98 on the Right to Organize and Collective Bargaining, 1949).

The NSW Branch of the CFMEU decided to take action and made application to the Commissioner that the Commissioner disqualify himself from further hearings on the basis of bias. The initial application was made in open hearings at the Commission. In response the Commissioner released a lengthy written decision denying the application, which in essence hinged on the argument that he there was no grounds for a finding of bias as, in his interim report, he had made "no findings".

The response from the union was simple. How could the Commissioner make "no findings" at the same time as recommending the establishment of a $7 million dollar taskforce? How can you make a recommendation when you don't have a finding? We were not alone in this interpretation, it was apparent that Tony Abbot shared this view - when announcing the formation of the taskforce he stated that it was clear from the report that unlawful practices "particularly intimidation and coercion designed to secure a closed shop" occurred right across Australia.

The NSW Branch appealed Cole's refusal to disqualify himself to the Federal Court. The case was heard between the 14th and the 16th of October before Justice Branson who has reserved her decision. If we are unsuccessful we intend to appeal the matter as far as possible – to the High Court if necessary.

Abuse of Civil Liberties

The Royal Commission has engaged in many abuses of the civil liberties of union officials and union employees. For instance, many CFMEU clerical staff, some as young as 16, were compelled to hand over their personal diaries under the terms of a "Notice to Produce" served on the NSW

Branch by the Commission. Further, in Senate Estimate Hearings, investigators admitted that, although the Royal Commissions Act did not grant them the power to tap the phones of private citizens, they had seconded the Federal Police and NCA to tap the phones of a number of union officials.

But perhaps the most galling action is the court action currently being taken against CFMEU Victorian Branch Secretary Martin Kingham. Kingham is facing two charges of failing to supply documents to the Cole Commission. Each charge carries a penalty of $1,000 or six months jail.

The documents Kingham have refused to supply relate to the identity of union delegates who have attended union training courses into matters such as Occupational Health & Safety and Industrial Law. The union was repeatedly asked to also identify the workers' employers, and give details of the course trainers. Kingham suspects that if the names are handed over the delegates, who attended training on the assumption that they would be kept secret, will be blacklisted by employers and refused work on future building projects because of their union activism. He is not prepared to take that risk.

Even Alan Jones, who himself admits he is no fan of the union movement, is incensed by the proceedings. I quote from his editorial on 25 September on his Today Show:

"There has been a fairly major exercise in union-bashing going on for some months, calling itself a Royal Commission into the building industry…. Now surely in all of these things fairness has to be real as well as apparent. But a bloke refuses to give up the names of his shop stewards and he faces criminal charges. It sounds fairly un-Australian."

If Kingham is jailed it will be the first jailing of a union official for defying a government order since 1969. In that year Victorian Secretary of the Australian Tramways and Motor Omnibus Federation, Clarrie O'Shea, was jailed for contempt after failing to produce the financial records of the union to the court. In 1969 this led to a national strike; unfortunately in 2002 the potential jailing of a union official in similar circumstances has barely rated a mention in the media.

Cost of the Royal Commission

In the Federal government's 2002-3 the Royal Commission into the Building and Construction industry was allocated $65 million dollars, a massive squandering of taxpayer's money. To put this waste in perspective, in the same budget this figure represented just under half the additional funding allocated to rural and regional cancer patients over the next 4 years, half the additional funding to given to aged care in 2002-03 and over 8 times the additional funding going to recognising and improving the capacity of people with disabilities.

Again, a contrast with the HIH Royal Commission is instructive, it received a budget off just 29 million dollars in total.

Throughout the proceedings an incredible 19 million dollars was spent on legal fees, with Commission lawyers earning between $2,400 and $3,800 per day (not including travel and other allowances).

Cole was also paid handsomely for his services: he received an annual salary of $660,000 plus accommodation, meals and expenses. This makes him the highest paid public servant in Australia; as he sits in judgement on construction workers he earns approximately 25 times that of a builders labourer on award wages. On top of this he continued to receive an indexed NSW government pension of $140,000 per year.

The Political Agenda

The Commission heard 12 months of a relentless assault upon the credibility of the union and its officials. All sorts of unsubstantiated and scurrilous hearsay and muck was raked up and splashed across the front pages of our daily newspapers. The union's analysis shows that there were 663 appearances by employers or their representatives and 36 appearances from workers – in other words workers were allocated a total of 3.35% of appearances.

It is widely acknowledged, even by the man himself, that this was Tony Abbott's version of the war on the wharves, his attempt to gain credibility within his own government and stamp his mark on the Australian industrial relations system. However, it has been much more sophisticated than the government's attack on the MUA in 1998, instead of balaclavas and dogs on the wharves it has been a dry and brutal dissection of a trade union. The aim is the same was one of the most zealous governments and ministers of all time – destroy a powerful opponent and gain political capital to use against the ALP at a State and Federal level.

The CFMEU has never denied there is corruption in our industry or even corruption within our ranks. When the activities of two corrupt characters from the NSW Branch came to light over two years ago, we threw them out of the union and reported them and their connections to the NSW police. In any event, as the HIH and One-Tel enquiries have demonstrated, corruption is not confined merely to blue collar industries. But what the Royal Commission is actually doing is redefining union strength and organisation as corruption. We are a strong and militant union and our members expect and demand that kind of representation. Building workers are employed in a dangerous and uncertain occupation, by its very nature the work is project-based and comes and goes. And our members have never expected a job for life, but they do want safe working conditions and a fair share of the profits from this most profitable of industries. And that is the job they expect their union to carry out.

We would have liked to have seen a Royal Commission that investigated the issues that matter to workers in the building industry. Issues such as:

- health and safety – one Australian building worker dies on a worksite every single week of the year;
- phoenix companies that go bust owing millions to the taxation department and to employees and then re-emerge a week later with the same directors but under a different name;
- widespread use by employers of illegal immigrants, particularly in the Sydney area;
- evasion of workers compensation payment by employers;
- systematic underpayment of wages and entitlements throughout the industry;

The Final Report

When Commissioner Cole hands down his report in December I can confidently make the following predictions:

- Commissioner Cole will hand down a report scathing of the CFMEU;
- Tony Abbott will seize on it as proof of crisis in the construction industry;
- the Howard Government will seek to introduce legislative changes, including a national taskforce, laws to ban pattern bargaining, laws to restrict union rights on safety in the workplace, a special building industry tribunal; and
- possible legislation to deregister some or all of the CFMEU.

There is no doubt that this will trigger a long and hard fight between the union movement and the government. They have not spent $65 million dollars on an enquiry where 97% of the time has

been spent on allegations damaging to unions for nothing. When this time comes you can expect a strong and untied response from the CFMEU and indeed the entire union movement. Our union traces its history back to the 1830's and in that time we have faced a lot of challenges and difficulties from a lot of powerful opponents – and you can be sure we will see this one off.