THE COLE ROYAL COMMISSION DELIVERS ITS FINAL REPORT

David Cross
Partner, Sydney
Allens Arthur Robinson

NEW LEGISLATION

The final report of the Cole Royal Commission (the Report), which makes 211 recommendations and was presented to Federal Parliament on 24 February this year, proposes that a new Act be created, called the *Building and Construction Industry Improvement Act* (the Act). The Act is the vehicle by which most of the Report's recommendations (including those discussed below) are to be implemented.

A NEW COP ON THE BEAT

The Report recommends the establishment of a new regulatory body, the Australian Building and Construction Commission (the ABCC). The role of the ABCC is to monitor industrial conduct in the industry and to investigate and prosecute any breaches of the law by persons in the building and construction industry. Many of those laws will be the new laws recommended by the Report, apart from existing industrial relations (IR) laws (for example, freedom of association).

The existing IR laws are not presently the subject of specific central organisation through a regulatory body—it is left for the parties themselves to bring proceedings if they so choose. A complaint about a breach of the freedom of association rules, for example, is generally prosecuted by the aggrieved party in the Federal Court. Few cases were ever brought by employers under these provisions. Although the opportunity always existed for the Employment Advocate to commence such proceedings, this happened infrequently and largely came to an end after some disastrous litigation brought by the Employment Advocate against the Construction, Forestry, Mining and Energy Union (CFMEU), where the chief witness for the prosecution was found to have been dishonest.

Implicit in the Report is a belief that participants in the industry cannot be trusted to use the available laws to suppress industrially undesirable conduct, and so a permanent body must be created to take on that role.

BARGAINING

The Commission found that pattern bargaining and union-endorsed certified agreements are entrenched in sections of the industry, with the result that employees and employers have become accustomed to merely adopting a common form of agreement that has been determined by others. The Report proposes that pattern bargaining in the industry be made unlawful and that the Australian Industrial Relations Commission (the AIRC) be prohibited from certifying agreements that result from pattern bargaining. Pattern bargaining is a feature of other industries and has been the subject of attempts by the Federal Government to thwart it. Most recently, the Government amended the *Workplace Relations Act* so as to introduce new requirements for 'genuine' bargaining. The Commission's proposals for the building and construction industry are more far-reaching. If they are adopted in practice, it is difficult to see why they ought to be confined to the building and construction industry.

The Report recommends the introduction of procedural requirements to ensure employees' views are heard during enterprise-level bargaining. Employees would be required to meet and vote on whether they wished to participate directly in the negotiations or appoint a union or bargaining agent. Similarly, protected industrial action could not occur unless it was approved by a vote of the majority of employees. This would impose substantial procedural hurdles to the use of industrial action—which,

in practice, is normally generated by unions/employees. The Government has long proposed similar reforms to existing IR laws but the plans have foundered due to lack of Democrat support in the Senate.

Employers, unions and employees would also be required to engage in 'genuine bargaining'. This would require the parties to, among other things, have face-to-face meetings, comply with agreed negotiation procedures, consider and respond to proposals made by other parties and adhere to commitments given to other parties. This proposal is largely consistent with general developments in IR law and would not be difficult to accommodate in practice.

INDUSTRIAL ACTION

The Commission proposes that industrial action would be unlawful unless that action is protected action. At present, industrial action is protected if it is taken after due notification and at a time after the nominal term of any applicable enterprise agreement has passed.

Under the Commission's proposals, industrial action would not be protected at any time if it is taken in support of a claim that does not pertain to the employer and employee relationship, a claim for terms and conditions of employment that are not dealt with in the relevant certified agreement, or a claim concerned with a demarcation dispute between unions.

The duration of protected action would be limited to a maximum of 14 days. In addition, there would be a cooling off period of 21 days following the first episode of protected action, during which time no further protected action could occur without leave of the AIRC. This would be a substantial change to the current law, under which protected action can last indefinitely unless the action threatened the economy or health and safety.

A party who engaged in unlawful industrial action would be liable for a penalty of up to $100,000. In addition, the victim of unlawful industrial action could seek to recover any loss suffered. An independent panel of expert assessors would be established to assess and certify the loss. Again, this is markedly different to the law as it currently stands. Presently, parties who wish to prove for loss suffered as a result of unprotected industrial action have to sue in the civil courts.

AWARD PROVISIONS

The Commission recommended simplification of award allowances, removing constraints in awards regarding commencing and finishing times for work, the days on which work may occur and the days upon which rostered days off may be taken. Further, the AIRC would be empowered to determine by award the maximum number of overtime hours a worker may perform in a week.

This last element is a significant change. In 2002, the AIRC heard a lengthy test case concerning the issue of overtime and refused union submissions to impose a cap on overtime of the kind seen in much of Europe. The Government and major employer bodies had resisted the unions' claim. The Commission's recommendation is at odds with that position.

UNION RIGHT OF ENTRY

The Commission found widespread disregard of obligations concerning unions' 'power' to enter work premises and inspect employment records.

The Commission proposes that the law be changed so that a permit for union entry to a workplace is required and the permit would not be granted unless the union officer had received training about the rights and obligations of permit

In addition, it recommends that the Commonwealth only deal with contractors and subcontractors who adhere to this code and exhibit excellence in OHS generally (including in relation to non-Commonwealth projects). In this way, the Report aims to use the code to influence OHS practices in the industry outside of Commonwealth projects.

holders. The ABCC would be given copies of all notices to enter and inspect workplaces before entry occurred to enable it to determine if the employer had committed any breach and to ensure that the right of entry was properly exercised.

The ABCC would have power to investigate abuses by permit holders, apply to have a permit suspended or revoked and, in cases where there is repeated contravention of entry and inspection provisions, apply to the AIRC to suspend or revoke a union's right to apply for permits.

FREEDOM OF ASSOCIATION

Specific freedom of association provisions would be created to prohibit unions from requiring contractors to engage only those subcontractors that utilise particular forms of industrial agreements. Coercion in relation to the employment of particular persons or employment to particular positions would be prohibited.

UNIONS AND EMPLOYER ASSOCIATIONS

Organisations would be made responsible for the acts of officials and employees and for the consequences of those acts (including losses). Registered organisations would be responsible for ensuring that their officials and delegates were aware of the rights and obligations attendant upon holding their positions. In addition, those officials who engage in unlawful conduct, including unlawful industrial conduct or disobedience of orders of the AIRC or court orders, may be disqualified from holding a position in a registered organisation.

OCCUPATIONAL HEALTH AND SAFETY ISSUES

The Commission's findings in relation to occupational health and safety (OHS) issues are generally limited to the Commonwealth's involvement in the industry.

The Report recommends that the National Code of Practice for the Construction Industry should apply to all projects in which the Commonwealth is either the client or which the Commonwealth funds in whole or in part. In addition, it recommends that the Commonwealth only deal with contractors and subcontractors who adhere to this code and exhibit excellence in OHS generally (including in relation to non-Commonwealth projects). In this way, the Report aims to use the code to influence OHS practices in the industry outside of Commonwealth projects.

The Report also recommends the establishment of a Commissioner for Health and Safety to monitor OHS issues in relation to all projects in which the Commonwealth is the client or to which it provides funds.

LABOUR HIRE

The Report recommends that the Commonwealth initiate the development of a Code of Conduct and Practice for Labour Hire in the industry to deal with issues such as who employs labour hire workers and who is responsible for the occupational health and safety of labour hire workers.

WILL THE REPORT'S RECOMMENDATIONS BECOME LAW?

The recommendations made by the Commission are wide ranging and, in many cases, extremely detailed. While the Federal Government has indicated a desire to implement the Report's key industrial relations recommendations, it is not clear whether any legislation embodying those recommendations would be passed by the Senate.

David Cross's article was previously published in Allens Arthur Robinson's *Focus: Cole Royal Commission* (May 2003).
It is reprinted by permission.
