WORKPLACE SAFETY

ACHIEVEMENTS OF THE BUILDING INDUSTRY UNIONS

By Rita Mallia

Photo: Bill Madden

In all the recent rhetoric from the federal government about workplace reform and flexibility, not much has been said about safety in the workplace and what the government is going to do, if anything, about improving occupational health, welfare and safety.

The building and construction industry faces special legislation, the *Building and Construction Industry Improvement Act* 2005 (The Act), which is currently before the federal parliament. This legislation restricts, like never before, the rights of one group of workers, building and construction workers, and their union, from taking industrial action to achieve decent conditions of employment. It introduces record fines and penalties on workers and trade unions in the building industry taking unlawful industrial action, as defined by this new Act. There are fines of up to $110,000 for a body corporate, and up to $22,000 for an individual, if found guilty of a 'Grade A' offence. Engaging in unlawful industrial action attracts a Grade A civil penalty. In addition, a court also has the power to make an order for damages.

Unlawful industrial action is essentially all action not 'protected' or authorised in advance and in writing by an employer. The only exception is action that is based on a reasonable concern of imminent risk to the employee's health or safety, if the employee complies with any reasonable direction to perform other work.

Unlike the provisions of s4 of the *Workplace Relations Act* 1996 (WRA), employees carry the burden to prove that their concern was reasonable. The Act also implements a number of other measures, including establishing a special watchdog for the industry, the Australian Building and Construction Commissioner.

The union movement considers the WRA a direct attack on workers and trade unions by a government, and business >>

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sector, ideologically opposed to workers collectively bargaining and using their strength to bring about beneficial outcomes in wages and conditions. Building and construction workers and the Construction Forestry Mining and Energy Union (the CFMEU) have been able to use the enterprise-bargaining provision of the WRA to negotiate decent wages and conditions. There is no economic or social imperative for the changes that the federal government is introducing into the building and construction industry.

Government and the supporters of this legislation demonise trade unions, particularly effective ones like the CFMEU. The CFMEU has been a particular government target for the last few years.

In 2002 the Cole Royal Commission, at a cost of $66 million to the taxpayer, made very general findings of 'lawlessness' in the construction industry; yet only one prosecution has ever come out of it. However, the Commission findings formed the foundation of the Building Industry 'Improvement Bill' 2003 which, after being rejected by parliament in 2004, has been reintroduced in part by a new series of bills. In March 2005 the government introduced the Improvement Bill, which is to apply retrospectively, once passed, to 9 March 2005. This Act will make most workplace action by building workers unlawful, as described above. In August 2005, this bill was further amended by the parliament in its very first sitting after 1 July 2005.

The legislation follows amendments to Part VA of the WRA, in relation to compliance powers in the building and construction industry. The guidelines governing exercise of the compliance powers give the Building Industry Taskforce (BIT) unprecedented powers of investigation and inquiry, including the power to compel a person or organisation to provide evidence associated with investigations being undertaken by the BIT. Persons subject to these powers have no privilege against self-incrimination – there are hefty fines and/or prison terms if a person does not comply with BIT notices to give evidence or to provide documentation. The legislative changes represent possibly the most draconian attack on organised labour in the history of Australia. The government has made it clear that it has no compunction in using its Senate majority to rush through this legislation.

Yet despite paying lip-service to improving occupational health and safety, the government has not taken any substantive steps to make workplaces safer. The new legislation establishes the office of the Federal Safety Commissioner, whose role is to promote occupational health and safety in relation to building work; monitor and promote compliance; disseminate information and promote the benefits of accreditation schemes. Unlike the provisions of the new legislation, which provide for heavy penalties largely targeted at the activities of trade unions and workers at the workplace, the office of the Federal Safety Commissioner does not have any enforcement powers in relation to employers or principal contractors who do not comply with their occupational health and safety obligations.

OVERALL WORKER SAFETY

The attack on trade unions, particularly in the building and construction industry, ignores the substantial efforts made by trade unions and their members to secure safer workplaces for all workers. The CFMEU and its predecessor, the Building Workers Industry Union, have a proud history of bringing about change in the building and construction industry. Historically, the unions have not just focused on wages and employment conditions, but also on improved workplace safety. Indeed, the achievements of the trade union movement in co-operating with asbestos disease sufferers to bring James Hardie to the negotiating table, despite the lack of any strict legal responsibility, represent a significant accomplishment. These achievements contradict the picture often painted by our opponents of organisations that are 'lawless'.

From campaigns for amenities, toilets and lunch rooms on sites; the banning of brick hods to limits on the weight of cement bags; from the banning of lead paint in 1956 to demanding compulsory safety helmets (hard hats) in 1957; from bans on the use of asbestos in the early 1970s and of organo-chlorines in the 1990s; from the introduction of full-time job safety officers in 1972 to the promotion of site safety committees in more recent years – construction workers and >>

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their unions have been campaigning to make construction sites safer. Without strong and effective building unions there would be more fatalities and serious injuries on Australian building sites.

In the 1980s, building workers banned the use of asbestos in new construction. In one dispute on the Royal Prince Alfred site at Camperdown in Sydney, workers led by Casey Conway, a militant delegate of the Operative Plasterers and Plaster Workers Federation, took strike action to enforce a ban. They were not just taking strike action to protect their own safety but campaigning more broadly to protect others. The workers were also focused on the needs of hospital workers, patients and future maintenance workers. This campaign eventually culminated in a government prohibition years later on the use of asbestos in new construction. If it were not for this active trade-union campaign, government prohibition would have taken many more years to achieve.

The CFMEU has trained, and continues to train, hundreds of OH&S representatives in safe-work practices, as well as dealing with accident prevention on-site. In association with our training company, COMET, we have conducted OH&S training for tens of thousands of building workers.

CFMEU's organisers are highly trained in OH&S and are vigilant in ensuring, as far as they can, that workplaces are safe. This role of organisers in the building and construction industry was recently recognised in a decision of the Federal Court, *PG & LJ Smith Plant Hire Pty Ltd & Ors v Lanskey Constructions Pty Ltd & Ors*.[1] This was a prosecution brought by the BIT against the CFMEU, two of its officials and a builder. In dismissing the applications for relief under the *Trade Practices Act* 1974 and the WRA, his Honour Justice Wilcox commented:

> 'Officials of unions whose members are working in an inherently dangerous place, such as on a construction site, have an obligation to those members to take an interest in occupational health and safety issues and the adequacy of insurance arrangements affecting workers on site.'[2]

The CFMEU has also taken a leading role with employers, government and health and safety authorities to develop industry standards and regulations designed to reduce workplace accidents, including the national standards for tilt-up, roof-edge protection and demolition. Across the country, state branches of the CFMEU have been active in developing dozens of codes of practice and regulations for the industry.

RECENT CFMEU INITIATIVES

- Under the Crane Safe Assessment Program, all mobile cranes are subject to annual assessments by endorsed external assessors. The program is already required by law in Victoria and is being implemented in other states, with plans to extend it to all types of plant.
- Pre-cast and Tilt-Up Standards (pre-cast concrete panels used in construction): CFMEU safety officers have worked successfully for the introduction of these standards. The need for them has been highlighted by several deaths on tilt-up jobs over past years.
- OH&S legislation: CFMEU safety officers have contributed substantially to the *Occupational Health and Safety Act* 2000 (NSW) and Regulation 2001 and the Queensland government review of OH&S regulations. We have just completed a submission in relation to the review of the NSW legislation.
- NSW Government General Purpose Standing Committee Number 1 Inquiry into Serious Injury and Death in the Workplace: this review ultimately saw tougher laws introduced in relation to workplace fatalities.

ROLE OF UNIONS

Unionised workers ensure that they have effective OH&S representatives who fight for their rights. Given their position, these representatives feel confident to advocate and represent workers without feeling the pressure to put profit and job security in front of workplace safety. It is the CFMEU's experience that a site with union presence is a safer site.

The industry, however, remains a dangerous one. In August 2003 a young 15-year-old boy, Joel Exner, was on his third day of work on a Sydney building site, erecting a roof on a factory. He had received no safety induction, and no training of any sort regarding working safely from a height. Australian standards require a double-layered mesh to be used to prevent tools, materials, or workers, from falling through the roof to the ground below. If only a single-layer mesh is used, a harness is required. On this site, only a single layer mesh was used, and Exner had no harness. Joel fell to his death.

In investigating the fatality the coroner accepted a submission by counsel assisting that the failure to comply with the code of practice in relation to roofing in the case may well have been a cost-saving measure. The cost saving would come not only from the cost of the mesh alone, but also that associated with installing the mesh correctly.

It is the view of the CFMEU that such cost considerations play a significant part in the industry, to the detriment of workplace safety.

The accident is tragically similar to an accident that occurred in 2000. Seventeen-year-old Dean McGoldrick, like young Joel Exner, was in his first week of work on a Sydney building site and was working from a height. Like Joel, he had received no site induction, nor any safety training. He fell from the roof where he was working to the ground below. The employer had failed to provide any perimeter scaffolding for the protection of Dean and his workmates. Dean died later in hospital.

Dean McGoldrick's employer was prosecuted in the NSW Chief Industrial Magistrate's Court, and was fined $20,000.

In 2004 the CFMEU discovered that the employer had only paid $1,800. The CFMEU has not been able to find out if the employer ever paid the full amount. It is of concern to the union that young workers are put in such peril and that those prosecuted continue to flaunt the system.

The government approach to introducing laws like the *Building Industry Improvement* Act and other legislation will operate to undermine the building unions' capacity to ensure that workplaces are safe, particularly in tying up the unions in expensive legal cases, consuming resources that would be better spent in improving site safety.

The Federal Safety Commissioner does not have any enforcement powers in relation to employers or principal contractors who do not comply with their occupational health and safety obligations.

REFORMS CFMEU WOULD LIKE TO SEE

1. More resources – state and territory governments should allocate more resources to their workplace inspectorates, including the establishment of specialist units for the construction industry and sectors such as demolition and asbestos-removal, where such units do not currently exist.
2. National database – a national OH&S database should be established for the industry, administered by the National Occupational Health and Safety Commission or other appropriate body, and funded by the Commonwealth. Each jurisdiction should be required to report all OH&S incidents (including notices, accidents and fatalities) in the industry to that body on a regular basis.
3. A record should be kept as part of this database from which clients, contractors, trade unions and the public at large could obtain details of the safety record of all contractors in the industry. All the information collected should be made publicly available and an annual report tabled in the federal parliament. Such information could also be used by the relevant licensing bodies, which should be required to take an employer's safety record into account when issuing a license. Guidelines should be established for such licensing bodies to allow for 'repeat offenders' to be denied the necessary license and thereby be excluded from the industry.
4. Safety plans – each contractor should be obliged to produce a safety plan, either as part of the pre-qualification procedure or as part of a tender. Its safety plan should be taken into account in assessing the suitability of that contractor for the project. For successful tenderers, such safety plans should be made available upon request to the site safety committee and to the applicable trade unions with coverage for the site.
5. Taxation compliance – taxation non-compliance in the building and construction industry is widespread, and growing, a crisis that the ATO has failed to address. Employers who avoid tax obligations are systematically undercutting legitimate operators, which then lowers all standards, including safety.
6. Immigration sanctions – the federal government needs to introduce and enforce effective sanctions, penalties and prosecutions for employers caught using unlawful workers as cheap labour. These workers are generally forced to work in unsafe situations and are being injured and killed.
7. Penalties – OH&S laws applying in each state and territory should be reviewed to ensure that existing penalties, including financial or criminal sanctions, act as an adequate deterrent to poor OH&S practices.
8. Worker representation – each state/territory should review existing legislative provisions in respect of safety committees and safety representatives, with a view to ensuring that workers' rights to representation and involvement are guaranteed and that adequate and appropriate measures exist as mandatory minimum requirements.
9. Plant and equipment – all plant and equipment used in the industry (including tower cranes, mobile travel towers, scissor lifts, concrete pumps, hoists, pile drivers, compactors, skid steer loaders, dozers, excavators, and so on) should be inspected annually, certified as safe and as conforming to manufacturer' specifications. The 'Crane Safe' program applying to mobile cranes in Victoria could be used as a model for such a national program.
10. Right of entry – union officials should have a national unrestricted right to enter workplaces to investigate and address complaints about OH&S issues.
11. Government contracts – government contracts should not be given to contractors or subcontractors with a proven track record of non-compliance with OH&S standards.

Clearly, there is a very legitimate and necessary role for trade unions in the workplace. Indeed, many of the reforms in this country have been brought about by workers taking a stand with the support of their trade unions. The legislation that is before parliament and the wider industrial relations agenda are an attempt to intimidate workers and unions. The legislation will significantly impact on the civil liberties of workers and trade unions and, ultimately, on safety in the workplace. ■

Notes: **1** [2004] FCA 1618. **2** At p14.

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