



Royal Commission into the Building and Construction Industry

OPENING ADDRESS: NEW SOUTH WALES

1. Years before Australia's federal compact was sealed, the Colony of New South Wales covered in its entirety the eastern part of mainland Australia. Today, indeed for over a century now, the borders of the State of NSW are more confined. Even so, the Commission's task of conducting its hearings for NSW will be one of sufficient magnitude to occupy a period of the order of 8 weeks in total.
2. In many ways, the State of NSW is, in relation to the other five States, the first among equals. It has the largest population. It has the largest capital city. It has the largest economy. It is also the State in which one finds one-third or more of Australia's building and construction industry.
3. The total area of the State (including 14 square kilometres of island) is 800,642 square kilometres. That is a lot of land on which to build multiple dwellings, office blocks, factories, shops, hospitals, schools, sports facilities and other public or community amenities; and on which to construct roads, highways, freeways, tunnels, overpasses and bridges, or lay railway tracks.
4. Hobart, historically Australia's second capital city, has one building 12 or more stories high. In the Sydney CBD alone, there are an estimated 3,000 buildings.
5. As at the end of the September quarter 2001, Australia's population was 19,442,300, the population of NSW being 6,549,700 or 33.69% of the national total. In the 12 months to June 2001, the national population growth rate was 1.2%, NSW population growth being 1% in the same period.
6. The national gross domestic product for the 2000-2001 financial year was \$641.370 billion, NSW's gross domestic product for that period being \$231.327

billion. That is more than 35% of the national GDP. The building and construction industry accounts for about 5% of Australia's GDP.

7. In August 2001, there were 225,800 employed in the building and construction industry in NSW, being about 31.72% of the national total.
8. With respect to industrial disputes, in 1999 nationally, there were 165,100 working days lost in the industry due to industrial disputes, 34,000 of which were in NSW, that is to say, 20.59% of the national total. In 1999, the national average of working days lost per 1,000 employees in the industry was 381, the average number of days lost per 1,000 employees in the industry in NSW being 215.

Organisations of employees

9. The industry in NSW has many players. There are many employer associations or organisations of employers and there are several organisations of employees.
10. The Construction, Forestry, Mining and Energy Union (CFMEU) describes itself on its website as "Australia's main trade union in construction, forestry and forest products, mining and energy production." According to the same source, it has 120,000 members and employs about 400 full-time staff and officials. Its National Secretary is John Maitland, John Sutton being Assistant National Secretary. The CFMEU has three divisions, the relevant one, for present purposes, being the Construction and General Division of which John Sutton is Secretary. The Secretary of that division, NSW Branch, is Andrew Ferguson. The CFMEU is an organisation of employees registered under the *Workplace Relations Act 1996*. According to papers from Daley & Co., Chartered Accountants, Auditors for the CFMEU (Construction & General Division), national office, as at December 2001, that Division in NSW had a total of 35,664 members, 18,810 (or 52.7%) of whom were financial. According to returns filed with the Australian Industrial Registry, as at 31 December 2000, the number of financial members of the Construction & General Division, NSW Divisional Branch, was 17,503. On 2 January 1997 the Construction, Forestry, Mining and Energy Union (New South Wales Branch), until then known as the Building Workers' Industrial Union of Australia, New South Wales Branch (BWIU, NSW), was registered as a State industrial organisation of employees on the amalgamation of the BWIU, NSW with:

- Australian Coal and Shale Employees' Federation, Northern District Branch;
- The Australian Coal and Shale Employees' Federation, Southern District Branch;
- Western District Branch of the Australian Coal and Shale Employees' Federation;
- The Furnishing Trades Society of New South Wales;
- The Operative Painters and Decorators' Union of Australia, New South Wales Branch;
- The Operative Plasterers and Plaster Workers' Federation of Australia, New South Wales Branch;
- The Federated Engine Drivers and Firemen's Association of Australasia (NSW); and
- Australian Timber Workers' Union, New South Wales Branch.

11. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) has two divisions of relevance to the Commission. They are the Plumbing and the Electrical Divisions. According to returns lodged in the Australian Industrial Registry, as at 31 March 2000, the number of members of the CEPU Plumbing Division – NSW Branch was 10,154. As at 31 December 2000, according to the Auditor's certificate, the CEPU Electrical Division – NSW Branch had 16,811 members. The New South Wales Plumbers and Gasfitters Employees' Union is registered as an industrial organisation of employees under the *Industrial Relations Act 1996* (NSW). The Electrical Trades Union of Australia, New South Wales Branch is likewise registered under the same Act. The State Secretary of the CEPU Plumbing Division – NSW Branch is Steve McCarney. Mr Earl Setches is the Federal Secretary. The CEPU Electrical Division – NSW Branch is also known as the Electrical Trades Union Division. Its State Secretary is Bernie Riordan.

12. The Australian Workers' Union (AWU) covers a miscellany of employees including some who are engaged in civil construction works. The AWU is divided into Branches and Divisions which include the Greater New South Wales Branch and Newcastle & Northern Regions Branch. The Secretary of the Greater NSW Branch is Russ Collison. The Secretary of the Newcastle & Northern Regions Branch is Kevin Maher. The national Secretary is Bill Shorten. The AWU is an organisation of employees registered under the *Workplace Relations Act*. The Australian Workers' Union, New South Wales is a State industrial organisation of employees registered under the *Industrial Relations Act 1996* (NSW). According to a certificate dated 13 August 2001 signed by Russell K Collison as officer responsible, as at 30 June 2001 the number of members of the Australian Workers' Union Greater NSW Branch was 21,398. According to a statement by the accounting officer, Kevin Joseph Maher, dated 21 November 2001, as at 30 June 2001, the number of members of the Australian Workers' Union, Newcastle and Northern Regions Branch was 6,397. Only a portion of those AWU members are engaged in the building and construction industry.
13. We shall afford evidence of competition for membership between the AWU and the CFMEU over employees engaged in civil construction.
14. Another organisation of employees which has eligibility to enrol employees engaged in the building and construction industry is the Transport Workers' Union of Australia. The TWU is an organisation of employees registered under the *Workplace Relations Act 1996*. The Transport Workers' Union of Australia, New South Wales Branch is an industrial organisation of employees registered under the *Industrial Relations Act 1996* (NSW).
15. Each of the federally registered organisations of employees we have mentioned is an affiliate of the Australian Council of Trade Unions. Each of the New South Wales registered organisations of employees we have mentioned is an affiliate of the Labor Council of New South Wales.
16. There are other organisations of employees about whom you will hear. One such is the Automotive Food Metals Engineering Printing & Kindred Industries Union (AMWU). The AMWU is an organisation of employees registered under the

Workplace Relations Act 1996. Its NSW Branch is engaged in the industry in NSW.

17. There is a body known as the Building Trades Group which is a grouping of unions engaged in the building and construction industry. Its Acting Secretary is Tony Papa, an organiser employed by the CFMEU. The BTG operates out of premises located at the Labor Council of New South Wales premises in Sussex Street, Sydney. We shall explore the role of the BTG within the industry.

Employer Bodies

18. The Master Builders Association of NSW (MBA NSW) is a member of the Master Builders Australia Incorporated. As with its parent body, the MBA NSW is registered as an organisation of employers under the *Workplace Relations Act* and as an industrial organisation of employers under the *Industrial Relations Act 1996* (NSW). The MBA NSW has about 4,600 members. Brian Seidler is its Executive Director.
19. The Newcastle Master Builders Association is registered as an industrial organisation of employers under the *Industrial Relations Act 1996* (NSW). It has about 900 members. About 95% of all commercial builders in the Hunter region belong to the Newcastle MBA. Robert Fuller is its Executive Director.
20. The Civil Contractors Federation (CCF) is an organisation of employers registered under the *Workplace Relations Act 1996*. It is the major representative body of civil engineering contractors in Australia, and in metropolitan and regional NSW. It has about 372 members and about 67 associate members in NSW. Craig Long is the Executive Director of the NSW Branch.
21. The Air-conditioning and Mechanical Contractors Association of Australia of NSW Limited is a public company limited by guarantee. It has 25 full members (major air-conditioning contractors), 38 associate members (specialist contractors) and 9 affiliate members (manufacturers and suppliers). Norman Argent is the Executive Director of AMCA NSW.

22. The Australian Industry Group (AIG) is an organisation of employers registered under the *Workplace Relations Act 1996*. The Australian Industry Group NSW is registered as a federal industrial organisation of employers under the *Industrial Relations Act 1996* (NSW). The AIG is a body brought about by the merger of the Metal Trades Industry Association of Australia and the Australian Chamber of Manufactures. It represents about 11,500 employers in all States and Territories. Among other industries, the AIG represents its members in the metal and engineering industries and in the construction industry.
23. The Housing Industry (industrial relations) Association is registered as an industrial organisation of employers under the *Industrial Relations Act 1996* (NSW). Membership of the HIA in NSW includes builders and building contractors who perform residential and commercial work. Most of its members work in the single dwelling/residential part of the industry with a minority working in the multi-unit housing and commercial sector. Membership (including the ACT) is about 10,000 including 1,000 – 1,200 in the Hunter region. Elizabeth Crouch is its Executive Director.
24. The Master Plumbers and Mechanical Contractors Association of NSW is registered as an industrial organisation of employers under the *Industrial Relations Act NSW*. The association consists of about 1,000 members. It comprises plumbing contractors, suppliers to the industry, and those involved in plumbing education. The Commission will hear from Robert Colquhoun who is a guardian of the association.
25. The Masonry Contractors Association of NSW Incorporated (MCA) represents bodies engaged in brick and block laying. The MCA is also a specialist contractor group of the MBA NSW. It has about 60 members and associate members. Its president is Gary Roberts; its Executive Officer, Jock Cameron.
26. There are other employer associations in the industry in NSW of whom you will hear. For example, there is a NSW Chapter of the federally registered organisation of employers, the National Electrical and Contractors' Association, whose Chief Executive Officer is James Tinslay. There is also The Building Industry Specialist

Contractors' Organisation of NSW Inc. whose Executive Director is Irving Warren.

Gyles' Royal Commission

27. On 8 May 1992, the Royal Commission into Efficiency and Productivity in the Building Industry in NSW delivered its final report. The Royal Commission was principally constituted by Mr R V Gyles QC (as he then was).

28. By his terms of reference, Commissioner Gyles was charged to make inquiry into and report on the following matters:

- (1) The nature, extent and effects of practices and conduct in, or in relation to, the building industry which may significantly affect efficiency and productivity within that industry.
- (2) The nature, extent and effects of illegal activities occurring in, or in relation to, the building industry in NSW including (but not limited to):
 - (a) intimidation and violence;
 - (b) secret commissions;
 - (c) extortion; and
 - (d) other corrupt conduct.
- (3) Whether, in view of his findings in relation to the matters set out in paragraphs (1) and (2), there are any measures (including legislative and administrative changes) which should be made to increase productivity or efficiency within the building industry or to deter illegal activities in, or in relation to, that industry.

29. To put it mildly, Commissioner Gyles returned an adverse verdict upon the building industry in NSW. He made many findings of illegal practices and conduct in the industry, as well as findings of intimidation and violence, having an adverse effect on efficiency and productivity within the industry.

30. In his third interim report given on 1 October 1991, Commissioner Gyles recommended that a Taskforce be established in order to consider properly whether criminal charges should be made arising out of matters dealt with in hearings and to complete or commence investigations into other matters which time did not permit his Commission to deal with. That recommendation was accepted and the Building Industry Taskforce (BITF) began operating from 30 September 1991 under the aegis of the Director of Public Prosecutions and included a number of seconded police officers. Initially, the BITF, an administrative unit, reported to the Premier's Department but about April 1993 the NSW Attorney-General took responsibility for it. Special funding was provided for its operation as a line item in the budget of the Premier's Department, and later the Attorney-General's Department.
31. In his final report, Commissioner Gyles recommended that the term of the Taskforce should be extended until 30 June 1993. In his view, modern law enforcement required co-ordinated use of civil as well as criminal remedies arising out of the same set of facts and he recommended that the Taskforce proceed accordingly.
32. Dealing with practices and conduct that affected efficiency and productivity, Commissioner Gyles said: "The most significant recurring theme of [the body of information that was before him] is that, given the fragmented nature of the industry, the relationship between the various parties was tending to be adversarial rather than co-operative. The consequence was a lack of proper planning, communication and co-ordination, and a lack of shared goals and the team work necessary to reach them."¹
33. On the question of industrial relations, Commissioner Gyles said that the submissions received by the Commission, with very few exceptions, identified and complained about various aspects of union militancy. "The complaints were from so many disparate sources and are so consistent that they amount to a powerful body of evidence in themselves to establish the proposition that the conduct of the members and officials of the former BWIU (New South Wales Branch) very severely affect productivity and efficiency of the industry in this

¹ Final Report, Volume 7, page 16.

State, both because of the persistent disruption of projects and businesses and because of the restrictive work practices instituted and defended whilst work is actually proceeding.”²

34. Commissioner Gyles said:

“All of the material to which I have referred, and particularly the material elicited in evidence before myself and the other Commissioners, establishes that the clique of activists and officials who conduct the affairs of the New South Wales Branch of the BWIU are responsible for the industrial mayhem which is reflected in the loss of time on Sydney major projects.”³

35. So it was that Commissioner Gyles recommended that the appropriate NSW authority move for the deregistration of the BWIU in both the Federal and NSW jurisdictions.

36. For reasons relating to findings which he made about the MBA NSW having engaged in collusive practices in relation to tendering, Commissioner Gyles also made a recommendation that the advice of the Crown Solicitor’s office be sought with respect to whether there were any grounds upon which to apply for the deregistration of the MBA NSW.

37. In the event, neither matter was pursued by way of any application for deregistration.

38. As regards the BITF, the material that we shall put before the Commission discloses that a special investigative task force was indeed set up to continue investigations into industry-related crime after the Commission ended. Commissioner Gyles also recommended a Civil Remedies Task Force be set up and attached to the existing BITF to address non-criminal breaches of the law within the industry including the *Trade Practices Act 1974 (Cth)*, the *Industrial Relations Act* and the common law.

39. Following on the Gyles Commission recommendations, a special industrial office was set up under the auspices of the NSW Crown Solicitor’s office. The special

² *ibid.* page 18.

³ *ibid.* page 20.

industrial office gathered evidence for deregistration proceedings against the BWIU NSW. In the event, a compromise was reached between the government of the day and the BWIU. In return for not commencing deregistration proceedings, the BWIU signed a Deed of Adherence under which it agreed to certain standards of behaviour including a Code of Conduct reviewed by a joint committee headed by an independent Chair.

40. The newly elected NSW Carr government took office in March 1995. As of 30 June 1995, the BITF was abolished.
41. We shall call evidence on the operation of the BITF, its resources and an assessment of its impact upon behaviour within the industry. A question will arise whether this Commission should recommend a national taskforce for the building and construction industry and, if so, when it should be set up and what powers should be assigned to such a body.
42. In a paper delivered on 4 September 1995 entitled “The Commission perspective”, Mr Gyles QC (who did not deliver the paper himself) wrote:

“... I did recognise ... that the cathartic effect of the Commission itself would be beneficial. Exposure of the problem in detail, and the exposure of the activities of many participants in the industry, would inevitably lead to a good deal of self help and rethinking by many including clients. ...

In my view, what was required was no more or no less than a cultural change on the part of the major participants in the industry. A significant period of normality was required where the law was observed and ordinary standards of commercial morality maintained. This would give a generation experience of working in an environment where concentration could be upon civilised arrangements between participants in the industry with a view to the efficient management of projects rather than confrontation in industrial relations and in relations between contractor and subcontractor and between contractor and client.”
43. There is a widely held view within the building industry in NSW that the work of the Gyles Commission brought about a number of industrial and commercial

benefits. There is also a view held by many that those benefits have petered out over the period since the Gyles Commission and the subsequent scrapping of the BITF. Still others of a more defeatist caste of mind ask: “Why bother ? Nothing’s going to change anyway.” Mr Robertson, Secretary of the Labor Council, will say that although the Council had no direct involvement with the BITF during its entire existence, the BITF’s involvement “would invariably prolong the resolution of matters in dispute.”

44. One of the issues that confronted Commissioner Gyles was whether within the building industry, the rule of law was being observed. He said: “The evidence dealt with in the reports of Commissioners Holland and Yeldham and my report of the Hearings reveal nothing less than industrial anarchy in which any pretence of the rule of law or the application of principle has been abandoned.”⁴ In NSW in the industry under examination, as the evidence we shall call will show, that question has not gone away in the interval of 10 years or more since Commissioner Gyles’ final report.

45. The rule of law can mean different things to different people. By “the rule of law” we mean what Chief Justice Gleeson meant when, speaking extra-judicially, his Honour said:

“ ... The rule of law is meant to be a safeguard, not a menace. It operates in many aspects of our lives. Our system of government is infused by the principle of legality. Trade and commerce are conducted under the assumption that legal obligations will be honoured and, if necessary, enforced by the power of the state, exercised by courts. Personal relationships, involving questions of property and status, are entered into against a background of established legal duties and entitlements. Workplace relations are governed by legislation and principles of common law. Civil law is working at its best when people do not need to go to court to make claims or enforce rights, because legal obligations are known, and accepted.

⁴ *ibid.* page 18.

The essential purpose of the criminal law is to keep the peace, so that people can lead their lives, and go about their affairs, in reasonable security.”⁵

46. Responsible participants in the industry in NSW look to the law as a safeguard or a windbreak.⁶ But all too often they find the law is disobeyed or ignored. Or they find the means of enforcement too cumbersome, costly or insufficiently responsive to provide a remedy. There are otherwise responsible participants in the industry who look the other way when the law is flouted or they adjudge it expedient to “wear” it. Their justification for doing so, it seems, is “survival” or “acting in their best commercial interests”. When such an attitude is struck, unprincipled players in the industry can smell the weakness. That being so, the scope for their exploiting such weakness is great. So long as that position prevails, the law can neither restrain nor civilise power. This is a matter in which all participants in the industry have an interest, and for which they have to accept and take responsibility.

Code of Practice

47. In July 1996, the NSW Government published a Code of Practice for the construction industry. That Code was a revision of a Code of Practice which the NSW Government of the day released to industry in October 1992. The 1996 Code establishes principles and addresses standards of behaviour expected of government agencies and members of the construction industry in dealings between the parties concerned with the procurement of public infrastructure in NSW. It applies to all government building, construction, maintenance and material supply contracts, consultant commissions and government funded projects and sites. Any contractor, subcontractor, consultant or supplier wishing to do business with the government or working on projects to which the Code applies must observe its principles and standards of behaviour.

48. Among its many objectives, the Code “seeks a commitment from unions, employer and industry associations to promote and comply with the Code and the

⁵ The Honourable Murray Gleeson AC, the Boyer Lectures 2000, page 2, *The Rule of Law and the Constitution*, ABC Books, 2000.

⁶ *ibid.* page 1.

full spirit and intent of all laws and regulations that impact on the construction industry.”

49. The Code took effect on all new projects tendered from 1 July 1996 (clause 1.3).

50. Under clause 2.3, all employer and industry associations are required, among other things, to encourage compliance by members with the Code and to operate within the law and comply with the standards of behaviour in the Code. Under clause 2.4, all unions are required, among other things, to encourage compliance by members and union officials with the requirements of the Code and, likewise, to operate within the law and comply with the Code’s standards of behaviour.

51. The Code deals with such matters as the encouragement of workplace reform (clause 5) and OH&S and rehabilitation (clause 6). On the subject of industrial relations, clause 7 of the Code:

- forbids contractors, directly or indirectly, from coercing other contractors, subcontractors, consultants or suppliers about who the parties to their enterprise agreement are to be and the content thereof (clause 7.2);
- forbids the payment of site allowances unless, after arbitration, an industrial tribunal awards such an allowance (clause 7.5);
- encourages willing membership of unions or employer associations through proper and lawful means (clause 7.6);
- unless ordered by the NSW Industrial Relations Commission or the AIRC, forbids payment to employees for time spent engaged in industrial action (clause 7.8).

52. Breaches of the Code, non-compliance, lack of commitment or unethical activity may result in the invocation of sanctions (clause 8.1). One such sanction is for the employer or employee organisation to have the breach of the Code referred to it for appropriate action under the rules of the organisation.

53. Whether a person acts in breach of the Code is a matter, we submit, capable of informing one of the questions facing the Commission, namely, whether that

person has engaged in inappropriate conduct or an inappropriate practice. The material, however, will raise a more fundamental question, namely, whether the Code is worth the paper it's written on.

54. There is a separate code of conduct and behaviour for officers of the CFMEU (Construction and General Division) NSW Branch which will be the subject of further evidence. There will be more than one version of the CFMEU code which we shall put into evidence. We shall explore the genesis of that code and the extent to which it is adhered to.

Prescription by award

55. In the building and construction industry as it affects New South Wales there is a complex of State and Federal awards. We have gathered these together and we shall tender a list of them and the awards themselves.

NSW Statutes

56. Among the many State Acts of Parliament that bear on the way in which the industry under examination is regulated, we mention:

- i. the *Industrial Relations Act 1996*;
- ii. the *Occupational Health & Safety Act 2000*;
- iii. the *Annual Leave Act 1944*; and
- iv. the *Building and Construction Industry Long Service Leave Act 1986*.

We shall tender each of those and various other Acts of the NSW Parliament which apply to the industry.

Sydney Matrix

57. There operates in NSW a framework of site allowances, agreed upon by the CFMEU and the major head contractors. This is known as the Sydney Matrix. The extent to which the matrix now operates in NSW calls into question whether the name "Sydney Matrix" remains an apt one. We shall examine the provenance of the matrix. The matrix prescribes what the allowances are depending upon the

monetary value of the project in question. The material will be that each site in the Sydney CBD and many in the suburbs and perhaps beyond attract payment of the rate specified in the matrix regardless of what other industrial instruments are in place. Usually when contractors tender for work, they are told what the allowance will be and they make provision for that sum in their tenders. We shall also explore the reason for the absence of site allowances in EBAs.

Enterprise Bargaining

58. Encouraged by a combination of economic theory, decisions of industrial tribunals, legislation and government policy, in the past decade or so there has been a visible shift of emphasis in Australia from collective industry-based award prescription to regulating the employment relationship by striking a bargain to cover the workplace. That shift has seen a corresponding diminution in the arbitral powers of Australia's premier industrial tribunal, the Australian Industrial Relations Commission. It has also brought with it less intervention and involvement by such bodies in disputes between an employer and employees over the terms and conditions to be accorded them at the workplace. The scheme, for example, of the *Workplace Relations Act 1996* encourages the parties to the employment relationship (or their representatives) to thrash out their differences on the premise that, eventually, enlightened self-interest will prevail on both sides, thereby sparing the need for an arbitral body to pronounce on how the controversy is to be settled. Thus in the absence of special circumstances warranting the AIRC's arbitration, the parties are left to their own devices. This is enterprise bargaining pared back to its essentials.

59. The move from a centralised system based on the collective to a model of agreement-making centered on the workplace, posed a big challenge to the organisations of employees on whose involvement that system had hinged. Those organisations had to adapt to a world where the industrial award or awards which they had initiated and serviced were moving from centre stage to the wings. This had implications for their relevance, their levels of membership and the levels of income derived from the payment of members' subscriptions without which no industrial organisation can survive. In contrast, under the new legislative regime, employees were free to make their own bargain one-on-one with their employer if

they so chose, that is to say, an Australian Workplace Agreement (AWA), an individual statutory contract. Alternatively, employees were free to make an enterprise agreement as a group with their employer, with or without the involvement of a bargaining agent. As a general rule, an AWA operates to the exclusion of any award that would otherwise apply to the employee's employment (see s170VQ(1) *Workplace Relations Act*). And while a certified agreement is in operation, as a general rule, it prevails over an award of the AIRC to the extent of any inconsistency: s170LY(1). This new order of an individual statutory contract's having primacy turned the old order on its head, central to which had been the statutory embargo on contracting out of the award.

60. Within the context we have just set down, we turn to survey the prevalence and common characteristics of EBAs in the building and construction industry in NSW. We shall also address ourselves to the use which the evidence indicates the CFMEU, in particular, makes of EBAs.
61. According to a whole of industry list generated by the EBA section of the CFMEU NSW, as at 8 June 2001, the CFMEU had 639 enterprise agreements. 225 of those agreements had been certified. The list does not disclose the forum in which certification took place. Our own researches disclose that in the industry there are 255 current EBAs in NSW to which the CFMEU is a party and which have been certified by the AIRC. It is instructive that of those 255 EBAs, 214 of them have an expiry date of 30 September 2002. Our equivalent researches with respect to EBAs to which the CEPU is a party in the industry in NSW disclose that there is a total of 129 current EBAs, 124 of which expire on 30 September 2002.
62. In a recently disseminated flyer entitled "More Leisure Days Now" the CFMEU State Secretary, Mr Ferguson, wrote:

"The CFMEU has 1,000 ... [EBAs] that expire on 1st October this year. The EBA's of the ETU, Plumbers and AWU also expire late this year. We will be campaigning together for more paid leisure time. ..."

Typical content of a CFMEU EBA

63. A typical CFMEU-endorsed EBA contains clauses that include the following:

- The awards that will apply to matters not contained in the EBA are the *National Building and Construction Industry Award* and the *Building Tradesmen (State) Construction Award* (clause 4).
- Employees covered by the EBA and union will not pursue any further claims against the company during its period of operation (clause 6).
- The company agrees to contribute redundancy payments monthly into ACIRT or another agreed scheme (clause 10(3)). The parties agree that \$1 per week from the redundancy contribution for each employee will be reallocated by ACIRT/AAS to the Construction Industry Drug and Alcohol Foundation (clause 10(3)). The current redundancy contribution is usually \$61 a week per employee.
- The company is to make superannuation payments into the C+BUS scheme or other agreed scheme at an agreed level (clause 10(4)). The superannuation contribution is \$90 a week per employee in a majority of the EBAs.
- There is a clause that deals with inclement weather (clause 14).
- The agreement is designed to place maximum emphasis on the peaceful settlement of all disputes. A procedure is set out relating to grievances of individual employees. There is also a procedure relating to disputes between the company and its employees. While the procedure is being followed, normal work is to continue (clause 18).
- All OH&S issues are to be resolved in strict accordance with the relevant legislation and the Building Industry Safety Code (clause 19).
- There is a proviso that any disagreements between the company and the site safety representative or safety committee are to be determined by the recommendation of a WorkCover NSW inspector (clause 19).

- Accredited union officials have a right of entry to any place or any premises where the company is undertaking work for the purpose of interviewing employees, checking on wage rates, awards/agreement breaches, or safety conditions or regulations (clause 22).
- The union has the power to undertake an audit of company time and wage books and related records. If the company is in minor/technical default with award, agreement or statutory obligations, there will be no stoppage of work while the audit proceeds. There is a prohibition of all-in payment systems, sham subcontractor arrangements and cash in hand payments in lieu of overtime (clause 23). Many CFMEU-endorsed EBAs make provision for a body called Construction Accreditation Services Pty Ltd (CAS) to step in and carry out audits for the CFMEU. The leading player of CAS is Rosemary Siridakis, of whose work we shall call evidence.
- The company is to require from an employee proof of his or her attendance at the industry picnic day. No work is to be scheduled on picnic day without agreement of the parties (clause 27).
- All prospective and current employees will be encouraged to join and remain financial members of the union. An employee elected as a job steward/union delegate shall, upon notification by the union to the company, be recognised as the accredited representative of the union. The delegate will be allowed reasonable time during working hours to submit to the company matters affecting employees (clause 28).
- The parties recognise that each has a responsibility to ensure the successful operation of the EBA (clause 29).

Uses to which the CFMEU puts EBAs

64. The material will be that as against many employers the CFMEU puts the absence of an EBA, the prospect of obtaining an EBA or the fact of having signed an EBA to uses which, without being exhaustive, include the following:

- A CFMEU site delegate said to a subcontractor on induction: “It’s no good going any further as you don’t have an EBA on site.” On the same site, a CFMEU organiser said to the subcontractor: “We don’t want to see the men out of work but we have to have everybody with an agreement and this is the agreement we want everybody to have.”
- A meeting in December 2000 between a subcontractor and two CFMEU organisers was called to discuss making an EBA. The subcontractor told them it wasn’t going to happen. One of the organisers said: “It’s got to happen. Are you sure want to do this? You know what’s going to happen if you bloody do this? It’s industrial suicide.” The same organiser said: “We have an EBA with the head contractor and everyone who works with the head contractor must have an EBA, otherwise there’s no start on site.” He told the subcontractor to put an EBA in place and to actively promote the idea of his workers joining the union.
- In the last six months, as a pre-condition of the State Secretary signing an EBA, employers had to provide information to the CFMEU including:
 - names and addresses of all employees;
 - their union numbers;
 - CTAS, long service leave payment details; and
 - C+BUS, ACIRT numbers, pay details and workers compensation certificates of currency.
- The CFMEU has said it will not sign an EBA unless all employees are financial members of the CFMEU and they contribute exclusively to the foregoing schemes.
- The CFMEU has asked for and carried out constant wage book inspections as a tactic of disruption to soften up a business to sign a union-endorsed EBA.

- A formworking company had signed an EBA with the CFMEU. The union would not sign off because there were employees who were unfinancial union members.
- On a building company's reaching agreement with the union to make an EBA, it sent the CFMEU the EBA which the company had signed, together with completed membership application forms for those employees who were not currently CFMEU members.

This is not to say, however, that the CFMEU or other unions are alone in the use they make of EBAs. We shall lead evidence that on CBD sites, for example, head contractors routinely require subcontractors to have a union-endorsed EBA to be even considered for work on such sites. The evidence will be that head contractors take an active role in imposing and enforcing that requirement.

65. We shall also lead evidence of the additional costs incurred as a consequence of EBAs being made. Enterprise bargaining has imposed a considerable cost time-wise on the unions. On employers who have made union-endorsed EBAs there is the imposition of an increased financial cost.

Entry on the premises and Occupational Health and Safety

66. Under State and Federal legislation employees or officers of unions can and do obtain permits giving them access to work sites and to hold discussions and inspect records. The dual legislative scheme produces anomalies. We shall examine these. Under NSW OH&S legislation union representatives who are safety officers are given important powers, the exercise of which we shall also explore.
67. Of its nature, activity in the building and construction industry is attended with risks. However, the Commission has heard evidence from other States about how the important issue of occupational health and safety is used as an industrial football. The evidence will be this also happens in NSW. There is, let it be said, sometimes a blurred line between genuine OH&S issues being raised by union representatives and a manipulation of the issue. As against that, sometimes the line is not at all blurred. We shall call evidence about a site at Quay Point in

October 2000. The episode clearly falls on the manipulation side of the line. A CFMEU organiser visited the site one Friday morning and addressed the men on site at a meeting. He told the company that the meeting had resolved to pursue a claim for \$200 per man per week backdated 6 weeks and that no work would progress until those demands were agreed upon straight away. The organiser said that if the demands were not met, he would carry out a safety inspection and would find faults that would close the site. If the demands were met, he would go away and not cause trouble on the site again. We shall afford evidence of how, on another occasion, a CFMEU organiser visited a site. He destroyed a hand rail and ripped an electrical lead out of its socket.

68. We shall also explore in the evidence whether and, if so, to what extent in the industry in NSW employers are engaged in delinquent conduct in relation to OH&S.

Freedom of Association

69. The material we shall put in shows that in NSW on many building and construction sites there remains a culture of compulsory unionism. It may not be as pervasive as it was 10 years ago. Whereas in the 1990s, employees seemed to think that they had no choice but to join a union, such a state of mind does not appear to be so prevalent today. There are, however, pressure points at which “encouragement” to join a union crosses over into coercion to join. Those pressure points manifest themselves particularly in the course of the induction process and the conduct of EBA negotiations. There will be evidence that, in effect, the old – and by no means extinct – practice of “no ticket, no start” has been largely succeeded by the practice of “no EBA, no start”. It is common practice for employers to ascertain, before entering sites, whether the industrial attitude on site is such that union membership is a requirement. In those cases, employers will enter into discussions with employees and agree among themselves that, to avoid trouble, the employees will join the union or ensure their membership is up to date.
70. Take one example of which we shall lead evidence. In November 1998 two CFMEU organisers approached an employer on a building site in Strathfield. One

of them said he wanted all the employer's workers to join the union. When the employer said that they did not want to, the organiser said the employer must get them to be members. The employer said he could not do that. The organiser told him that if he didn't, he (the organiser) would make it very hard for him. After a further exchange, the organiser said he would call up for an inspection of the employer's books and he guaranteed that he would find something in them and also put pressure on him by other means. When the employer said he would try to put the employees into the union, the organiser said: "If you don't, I will make sure I get you one way or another."

Office of the Employment Advocate

71. The functions of the Office of the Employment Advocate (OEA) and the various attitudes of the building and construction unions and employer bodies evinced towards it will be the subject of evidence. In NSW the CFMEU, in particular, has shown an implacable opposition to the OEA.

72. Mr Robertson, Secretary of the Labor Council, will tell the Commission that the Labor Council is regularly engaged in a constructive dialogue with the OEA, and whilst not always agreeing on a range of issues, continues the dialogue positively.

Matters of national importance and for NSW

73. On 6 May 2002, Commissioner, when you were sitting in Melbourne you announced certain initiatives of the Commission. You also reviewed the approach and processes of the Commission up to then. You identified a number of matters that had emerged which are of national importance in workplace relations in the industry, namely:

- (a) Workplace health and safety;
- (b) Security of payment for subcontractors;
- (c) Subcontracting of labour and labour hire firms;
- (d) Avoidance of payment of workers' compensation premiums;
- (e) Non-payment of employee entitlements; and

- (f) Use of illegal immigrant labour in the industry.

Not all of those lend themselves to examination in the hearing room. So far as practicable, however, we shall explore some of those matters in the evidence for the NSW hearings.

Allegations of criminal conduct and corruption within the industry

74. On 27 July 2000 Mr Ferguson, State Secretary of the CFMEU NSW, lodged a complaint with the NSW Police – Commercial Crime Agency, Sydney, alleging that Martin Warner, a union delegate and an employee of Leightons Constructions, had demanded substantial sums of money for assistance to subcontractors in finalising EBAs with the CFMEU and assisted or ensured that subcontractors who paid those sums obtained contracts for work or had a smooth run on such projects. Subsequently, the Commercial Crime Agency received a report from Bob Bush, Industrial Relations Manager for Leightons, supporting the allegations. On 7 December 2000, Mr Ferguson attended the Commercial Crime Agency where he participated in an informal meeting that was tape recorded and later transcribed. He attended a further interview on 19 December 2000, which was a continuation of the meeting held on 7 December 2000. In August 2001 the investigation was concluded. No charges were laid.

75. On 24 May 2001 John Maitland, National Secretary of the CFMEU, wrote to the then Commissioner of Police for NSW. Mr Maitland copied in the Premier, The Honourable Bob Carr. Mr Maitland wrote in relation to what were then recent media reports about allegations of corruption in the NSW building industry. He said:

“ ... the union is concerned that these allegations are damaging the reputation of both employers in the industry as well as the union and if they are allowed to continue further damage to reputation will incur [sic].

As these allegations involve activities in NSW and appear to concern criminal conduct, I am writing to request that the NSW Police act to investigate. In this regard I offer the full cooperation of the union. I understand that the NSW

Branch Secretary, Andrew Ferguson, has already been in contact with NSW Police regarding some of these allegations. ... ”

76. On 18 June 2001 the State Secretary, Mr Ferguson, wrote a letter to the membership as follows:

“I write to you in respect of some dangerous developments in the union and the industry. Late last year, the union uncovered a handful of individuals involved in corrupt practices.

These individuals were being backed by persons associated with the corrupt and discredited Norm Gallagher BLF from interstate and some Sydney crime figures. The Union State Executive acted swiftly and cleaned the individuals out of the union and advised the NSW Police. ...”

Mr Ferguson went on in his letter to refer to a major attack which individuals had launched on National Secretary, John Sutton. Having said Mr Sutton had majority support in the union and was due to be re-elected under the rules in October 2001, Mr Ferguson concluded his letter:

“ ... Members can be assured that the National Secretary, John Sutton, myself and NSW officials will continue our efforts to oppose corrupt elements trying to take over our union. We will also not hesitate in providing the police with evidence of any impropriety. Nor will we be intimidated by hooligans from interstate.

I appeal to you to continue your support for the union and our efforts to keep our union honest.”

77. We shall explore a number of matters arising out of allegations of the kind we have mentioned.

Inappropriate payments

78. We shall lead evidence directed to the question of the making of inappropriate payments within the industry. We shall also lead evidence about a number of funds into which builders, subcontractors and other participants in the industry are requested by the CFMEU to make payments.

Other matters

79. During these hearings in Sydney, we propose to call in excess of 100 witnesses. Each of the witnesses whom we propose to call will be appearing under summons. We venture to say that none of the witnesses will give evidence because he or she wants to. It has been said that there are no heroes in the building and construction industry. Be that as it may, the investigators of the Commission tell us that there are many to whom they have spoken who have shown great courage in an environment where what passes as industrial behaviour is, by community standards, often less than edifying. The Commission will hear accounts from many witnesses disclosing behaviour of a kind that would provoke a cry of moral outrage from ordinary men and women of Australia. Many of the accounts are of incidents which the man or woman in the street would regard as unacceptable.
80. It is probable that in the course of these hearings other matters will arise calling for the Commission's examination. It is possible too that members of the public will contact the Commission as a result of these hearings. We encourage those who have something to tell the Commission that falls within its terms of reference to come forward and make such contact.
81. Hearings of this kind serve a useful purpose in exposing inappropriate or unlawful conduct or practices. Such hearings are also useful in identifying many of the problems which the industry throws up. Identification of the problems is, of course, different from formulating a solution. We do expect, however, that the nature and extent of the evidence to be led in these hearings for New South Wales will go some way towards identifying the problems with some precision, demonstrating the need for a number of solutions, pointing towards solutions that

work, and supplying a basis upon which to demonstrate to the public that those solutions, whatever they may be, are necessary or desirable.

NICHOLAS GREEN

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3 June 2002