MASTER BUILDERS
AUSTRALIA

BREAKING 'BUILDING BAD'

ESSENTIAL ACTION TO PERMANENTLY PREVENT CORRUPTION, CRIMINALITY AND IMPROVE CULTURE IN BUILDING AND CONSTRUCTION

INTRODUCTION

Fresh revelations involving allegations of criminal activity involving the CFMEU and links to organised crime have once again shone a light on the unlawful conduct and toxic culture that thrives amongst organisations and who operate in the building and construction industry.

While many parts of the community will be shocked and disappointed to learn of these allegations, it is nothing new to those who work in the construction sector.

Sadly, the building and construction industry has a long history of being plagued by a range of illegal and unlawful behaviour by certain people and organisations which, as one Royal Commission found, has created a "*culture of systematic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats and intimidation*".

There have been several Royal Commissions of Inquiry, dozens of government reviews and reports, and hundreds of Federal Court judgements that forensically and methodically identify the people, organisations and conduct giving rise to this culture. [1]

All of these reports demonstrate that we know what the problems are, how they are caused, and why the culture still exists. What we need now is real and tangible action to fix these problems and tackle the culture once and for all.

COMPREHENSIVE ACTION IS ESSENTIAL

The current circumstances and culture facing the industry show that comprehensive action is necessary and essential.

That the attempts of previous governments at all levels have tried and failed to drive cultural change demonstrate the need for a 'whole of government' approach which must be lasting and tangible.

Recent announcements from the Federal Government have been long-awaited and were strongly welcomed by industry. But a permanent solution is fundamental and necessary to avoid a repeat of history and drive lasting and tangible change.

The only way to tackle the problems is through a comprehensive and coordinated approach involving a range of immediate actions and future permanent law reform.

This document outlines a range of options for government action to adopt in order to:

- Ensure the organisations and individuals who thrive and promote the culture are identified and removed;
- Target the practices, opportunities and avenues that give rise to illegal activity, unlawful conduct and culture of disregard for the law;
- Monitor and quickly respond to any situation where illegality and unlawful conduct reoccurs;
- Recognise the important and lawful role of unions, and promote the responsible and productive exercise of their duties and purpose; and
- Put in place lasting and effective measures designed to ensure the criminality, corruption, and poor culture is stopped from ever happening again.

This is a unique opportunity for governments of all levels to ensure that the building and construction industry can be lawful, modern, safe and productive both now and for the future.

1 See Annexure A – Drivers of Poor Culture

THE BUILDING AND CONSTRUCTION INDUSTRY DESERVES BETTER

The entire building and construction industry deserves an environment which is safe, modern, productive and free from the poor culture and attitudes of those who think they are above the law.

- The approximately 1.3 million people (or around 1 in every 11 workers) directly employed by the industry deserve better;
- The over 120,000 apprentices and trainees trained by the industry every year (around one third of the total number of trades-based apprentices) deserve better;
- The over 445,00 business entities who operate in the industry (of which almost 99 per cent are small and family businesses) deserve better;
- The entire community, who benefit from the over $230 billion worth of work performed by the industry each year, deserve better; and
- The entire Australian economy, to which the industry contributes over 10.4 per cent of gross domestic product each year, deserve better.

Building and construction is essential to the economy, jobs and community. Everyone deserves a better industry that isn't held back by an ingrained culture of a few individuals and organisations.

UNIONS DESERVE BETTER

Everyone in building and construction recognises the important role that unions play in workplaces.

They are an integral part of the industrial relations system and workers deserve to be represented by organisations and individuals that focus on looking after their workplace needs and acting in their best interests.

While the vast majority of unions in Australia seem able to do this in compliance with the law, the experience in building and construction is different. Everybody knows the record, reputation and culture of the CFMEU in building and construction and how they operate.

One Federal Court Judge said this record was "*notorious*" and "*that record ought to be an embarrassment to the trade union movement.*"

Workers in building and construction deserve to have a union that operates like other unions. They deserve to be represented lawfully and honestly. And the entire trade union movement deserves a construction union that isn't "*an embarrassment*".

GOVERNMENT ACTIONS TO DATE: A GOOD FIRST STEP

The announcements of various levels of Government in response to allegations about criminal conduct and the CFMEU have been welcomed by industry and represent a good first step towards achieving improved outcomes for building and construction

Master Builders is particularly supportive of moves by the Federal Government regarding the appointment of an independent administrator for the CFMEU and its commitment to related legislative action if required.

Appointing independent administrators is a strong first step towards achieving positive change in the industry and tackling the poor culture promoted by some that allows corruption and criminality to flourish.

However, there is much more to be done to ensure actions taken to date are efficient, effective and deliver real outcomes.

History shows that unless permanent and lasting changes are made, there is a very real risk that the sector will just return to the same old bad days sooner rather than later.

Now is the time for governments of all levels to build upon the measures recently announced, avoid repeating the mistakes of the past, and take a comprehensive approach to make permanent change that delivers comprehensive solutions to solve the long-standing problems faced by the industry once and for all.

DELIVERING A COMPREHENSIVE APPROACH: ESSENTIAL ACTIONS FOR GOVERNMENTS

It is therefore absolutely essential that Governments of all levels should consider implementing a range of actions to improve industry culture and stamp out criminality or corruption.

This will require action both now and, in the future, and involve a mix of ongoing cooperation, coordination and permanent changes to the law.

The actions outlined in this document are divided into two categories: immediate actions for implementation now and future actions and permanent law reform to be pursued by governments as soon as is practicable.

> *There is widespread disrespect for, disregard of and breach of the law in the building and construction industry.* ***The criminal, industrial and civil law is breached with impunity****. Agreements made are not honoured. The result is that industrial power, not right or entitlement, determines outcomes. Short term commercial expediency prevails.*
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> ***The culture in the industry is that the criminal law does not apply because industrial circumstances are involved****. The attitude is that the applicability of industrial law is optional because there is no body whose function it is to enforce it, or which has the will, capacity and resources to do so.* ***Orders of industrial tribunals, and even courts, are disregarded if such orders are contrary to the views or interests of a participant.*** *If unlawful action causes loss to others, that loss is not recovered. That is because of the difficulty, cost and time involved in bringing proceedings for recovery, the uncertainty of outcome, the view that continued relationships with unions are important, and the knowledge that if recovery action is taken the likelihood is that further industrial action will be taken causing yet further loss. Litigation for loss recovery is regarded as a bargaining chip to be used in future resolution of industrial disputes, rather than as a serious attempt to hold those causing loss responsible for it.*
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> *Head contractors and subcontractors are subject to severe cost penalties for delayed completion. Industrial unrest and stoppages cause immediate loss from standing charges and overheads, and prospective loss from liquidated damages.* ***These losses place intense pressure upon head contractors and subcontractors to accede to industrial demands****. If the short term cost of such demands is less than the actual and prospective loss on the specific project, the usual result is the demand is acceded to. That is because of the short term project profitability focus in the industry.*
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> ***In contrast, unions suffer no loss from unlawful industrial action. They know they will not be held accountable for unlawful industrial action by the criminal, industrial or civil law.*** *The result is inevitable. Concessions are made based on short term, pragmatic, project profitability considerations.*
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> ***The result is the rule of law is diminished. Productivity is diminished to the disadvantage of the Australian economy, contractors, subcontractors and employees.*** *Established freedoms protected by law, such as freedom of association, are ignored in favour of union power, and attempts to achieve industrial peace.*
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> ***Governments of both political persuasions, and at the Commonwealth and State level have been endeavouring to change the culture of the industry for at least 20 years****. The findings of this Commission make plain that* ***those attempts have failed****.*
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> ***To achieve cultural change, and re-establish the rule of law in the building and construction industry, a comprehensive package of reforms is necessary.***
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> **COLE ROYAL COMMISSION 2003 – Vol 11 p.10**

PART 1 - IMMEDIATE ACTIONS

The following is a list of immediate actions that Governments at all levels should consider adopting or, where they are already underway, supporting.

These immediate actions are necessary in order to:

- support the actions already announced and ensure they are effective; and
- compliment existing actions while underway to ensure that the problems they are designed to target aren't made worse or circumvented.

Appointment of Independent Administrators

- Governments at all levels should support any moves to appoint independent administrators to the CFMEU;
- Independent administrators should be appointed to all branches and levels of the CFMEU in Australia, not just in specified jurisdictions or branches. While recent reports have focussed on particular States and branches, a holistic and all-encompassing approach is necessary to ensure consistent outcomes and remove the ability to shift or transfer resources or personnel;
- To demonstrate faith and trust that Governments are serious about lasting change in the industry, any administrators appointed must be genuinely independent and able to operate without any interference; and
- In the event of any impediment or barrier to appointing independent administrators, Government should deliver on its promise to pass legislation to remove those impediments or barriers.

Rapid police response and clear authority to address disruption on worksites

- For the immediate future, additional resources should be given to police and law enforcement agencies to enable a rapid response to any disruption arising on building and construction sites; and
- Police must be given clear instructions that they hold overall authority to take actions as necessary to address any disruption on building sites, and not be held back or restrained by assertions that the disruption is a matter covered by workplace or other laws.

Encouraging industry confidence and cooperation by protecting witnesses and whistle-blowers

- There must be strong and comprehensive protections in place for people wishing to come forward with evidence, information or materials to support the various investigations and inquiries underway; and
- These protections must be complimented through stronger powers for regulators to receive information, obtain materials and conduct investigations in a manner that protects everyone from reprisals, payback or future adverse consequences. This should include enabling representatives of industry, including employer groups, to receive information from industry for referral to ongoing investigations in a manner that deidentifies individuals and businesses.

A central body to coordinate action and foster cooperation

- Governments should move to temporarily establish one central overarching committee or working group to coordinate, oversee and monitor the various processes, investigations, reviews and inquiries currently underway;
- This coordination committee should be underpinned by cross-jurisdictional police, law enforcement and regulatory agencies with appropriate powers to ensure information, evidence and materials can be shared ensuring all processes currently underway are thorough and effective;
- The existing FWO and FWC investigations should be coordinated by the committee; and
- ACCC, ASIC, ACNC, ASQA and Financial Service regulators should commence investigations into circumstances publicly revealed and be coordinated by the committee.

Temporary changes to workplace laws

- While various investigations announced to date are underway, Government should move to direct the Fair Work Commission to:
    - take a more comprehensive approach to ensure that enterprise agreements to which the CFMEU are a party are in fact genuinely agreed;
    - urgently review any current proceedings involving the CFMEU, and determine if those matters should continue or be temporarily paused;
    - not issue any right of entry permits involving the CFMEU;
    - take steps to ensure that any individual CFMEU personnel, officers, officials or agents are not recognised if nominated as bargaining agents in a personal capacity; and
    - prevent the CFMEU from intervening in any matters involving enterprise bargaining where they are not already parties.

Outcome of investigation into enterprise agreements

- Where it is determined that enterprise agreements have not been 'genuinely agreed,' Government should, while allowing those agreements to continue for their nominal life, move to excise those parts of these agreements that have the effect of:
- Limiting the free and genuine choice of individual workers over payments or remuneration made on their behalf, such as choice their own redundancy fund, superannuation fund, or portable long service leave fund or sick leave fund;
- Mandating that employers take out insurances with particular providers on behalf of all workers, regardless of whether the workers want or need the insurance;
- Mandating or requiring union approval of a particular provider of workplace training, employee assistance or other support service;
- Giving unions the right of veto over the selection and use of subcontractors, or restricts the deployment and use of particular types or classes of workers, or when work is performed; and
- Imposing any arrangement, process or approach regarding the resolution of workplace disputes, right of entry or arrangement to stop work other than the default processes prescribed by workplace laws.
- Any agreement found to not have been 'genuinely agreed' in circumstances which also involve criminal conduct should be capable of being terminated.

Government entities with CFMEU involvement

- State and Territory governments should review all governmental advisory bodies, consultative groups, boards, reference groups or other like consultative bodies to identify if they contain any nominee or current or former official of the CFMEU and take steps to review their involvement until administrators have been appointed.

State and Federal government procurement

- State and Federal governments should take steps to ensure that any tenders awarded for building works are conditional upon the outcomes of reviews and investigations publicly announced dealing with the infrastructure projects and contracting; and
- All Governments should take additional steps to comprehensively ensure that any tenders so received involving contractors who have enterprise agreements with the CFMEU have been genuinely agreed, and are free form coercion and intimidation. The results of these actions should be reported to the overarching coordination committee.

Delegates rights provisions

- Government should move to temporarily suspend the operation of new 'delegates rights' provisions in both the Fair Work Act and modern awards as they relate to the CFMEU.

PART 2 - ONGOING ACTIONS AND RELATED LAW REFORM

Measures in this section outline actions necessary to ensure the existing actions and investigations announced by governments are worthwhile and generate ongoing, tangible permanent outcomes. They are designed to avoid a repeat of the past where actions taken have failed to generate lasting and meaningful cultural change.

The Federal Government should move to establish permanent special rules, laws and oversight for the building and construction industry in an effort to improve compliance, tackle poor culture, and stamp out criminality and corruption once and for all.

This will require two core elements:

A. Industry specific changes to the law

Government should move to permanently change a range of existing laws to create rules, regulations and obligations specific to the building and construction industry and its participants.

B. Industry specific regulator dedicated to enforcing those laws

The Federal Government should move swiftly to establish a dedicated specific building and construction industry regulator with sole responsibility for enforcement of those industry specific laws, underpinned by strong investigation, compliance and enforcement powers.

The above two core elements would:

- Enable the parliament to take a 'whole of government' approach to tackle the causes and drivers of poor culture, corruption and unlawful behaviour;
- Allow for greater coordination and cooperation of regulator activity, ensuring a comprehensive approach is taken with outcomes that are effective and lasting;
- Ensure that changes to the law are applicable only to the building and construction industry and are specifically targeted towards fixing the problems known to exist; and
- Represent an effective and long-term solution to cleaning up construction once and for all.

The functions and operations of a dedicated regulator, and the laws it would enforce, are detailed below.

A – INDEPENDENT REGULATOR DEDICATED TO THE BUILDING AND CONSTRUCTION INDUSTRY

Government should establish a Construction Industry Compliance & Corruption Agency (CICCA) as an independent statutory agency dedicated to the building and construction industry.

The purpose of the CICCA would be to oversee, investigate and enforce compliance with a range of special industry specific rules, laws and obligations that would be applicable only to the building and construction sector and participants therein.

CICCA would have dedicated units within its operation to enforce special construction specific laws covering a range of matters, including workplace, safety, competition, corporations, governance, training and other industry specific changes outlined later in this document.

In addition, CICCA would be home to a permanent cross-jurisdictional police unit dedicated to targeting criminal activity and organised crime linked to the building and construction industry. The police unit would also provide support for other units within the agency and support their investigations and enforcement processes.

CICCA is necessary as it would represent a coordinated and comprehensive 'whole of government' approach to enforcing building and construction industry compliance, underpinned by strong investigation and compliance powers with higher penalties available for non-compliance in order to prevent poor culture and practices from ever returning.

In short, CICCA would be a 'one stop shop' regulator for the building and construction industry to improve compliance, prevent corruption and criminality, and drive lasting improvements to industry culture ensuring that the problems of the past can never again return.

See also: Why is this reform necessary? What it would mean? How it would improve industry culture?

B – INDUSTRY SPECIFIC LAW REFORM TO BE ENFORCED BY CICCA

See also: Why is this reform necessary? What it would mean? How it would improve industry culture?

Coordinated and targeted police and law enforcement to stop corruption and criminality

CICCA would maintain dedicated cross-jurisdictional police unit to oversee and coordinate a strong law enforcement presence in the building and construction industry. It would be tasked with ensuring existing criminal laws can be more effectively used in a coordinated and comprehensive way to identify and prosecute any criminal or corrupt activity in the sector and prevent it from returning.

Importantly, this police unit would have the ability to ensure that there is a clear delineation between criminal and civil laws as they apply on building sites, to the overall benefit of both workers and employers in the sector.

The police unit would also be able to provide assistance for other units within CICCA to support their relevant compliance, investigation and enforcement work.

A strong, permanent and dedicated police unit is essential for cleaning up corruption and criminality in the industry once and for all.

See also: Why is this reform necessary? What it would mean? How it would improve industry culture?

Enforcing bans to rid criminals and serial lawbreakers from the industry

The Government should move to create laws that give CICCA the ability to obtain and enforce bans or other orders relating to persons found in breach of criminal laws in circumstances involving building and construction, or serial lawbreakers of industry specific laws.

Such bans and orders would be a 'last resort' option and available only in circumstances wherein other industry-specific laws contained in this document do not effectively remove criminals and those who display an ongoing disregard for the rule of law.

While there should be flexibility as to the types and length of bans and orders available, they should aim to ensure that criminals and serial lawbreakers are prevented from wielding ongoing influence or promoting poor industry culture.

See also: Why is this reform necessary? What it would mean? How it would improve industry culture?

Stronger protections for witnesses and whistleblowers

CICCA would maintain a dedicated unit focussed on gathering and receiving information about breaches of all industry specific laws within its remit.

This unit should be underpinned by a strong and solid system of legal protections to encourage whistleblowers and protect persons coming forward with information.

Existing laws and protections aren't sufficient to protect the industry and workers. As such, legislation to create CICCA should also create strong and clear protections for both companies and individuals, creating criminal penalties for any person or organisation engaging in conduct against another person or company as a form of recrimination, reprisal or other form of 'payback' for giving evidence or insisting on complying with industry specific laws.

See also: Why is this reform necessary? What it would mean? How it would improve industry culture?

Stronger competition law and better enforcement

CICCA would maintain a dedicated competition law unit with responsibility for enforcing stronger competition laws specific to the building and construction industry.

To support the work of a dedicated competition unit, a range of changes should be made to the *Competition and Consumer Act 2010* that would only apply to the building and construction industry, and participants therein.

These changes should include, as a minimum, that the *Competition and Consumer Act 2010* be amended to strengthen laws about cartel behaviour, better target secondary boycott behaviour, clarify that enterprise agreements under the Fair Work Act made in the building and construction industry are a contract, arrangement or understanding for the purposes of competition laws and give CICCA the powers necessary enforcement and investigation powers.

See also: Why is this reform necessary? What it would mean? How it would improve industry culture?

Strong enforcement of industry specific workplace laws

CICCA would establish a dedicated industry-specific workplace regulator with responsibility for ensuring compliance and enforcement of special additional rules specific only to building and construction workplaces.

A range of changes would be made to both the *Fair Work Act 2009* and *Fair Work (Registered Organisations Act) 2009* that would have specific application to building and construction workplaces, participants and organisations. These changes would create specific rules and additional obligations covering matters such as:

- Stronger duties for unions and their officials, such as:
  - A stronger fit and proper person test for officers, officials and employees of registered organisations of employees in the building and construction industry, including any workplace delegates;
  - Tighter disqualification of officials for breaching workplace or industry-specific laws;
  - The availability of bans on those disqualified from holding or standing for office in a union, or from holding a future right of entry permit;
  - Stronger laws to ensure right of entry powers are exercised in a proper and appropriate manner, and not exploited for non-industrial purposes, and to ensure right of entry permits are only available to those who satisfy the stronger 'fit and proper person' test.
- Better rules to support genuine and productive workplace bargaining for building and construction workplaces, including:
  - Requiring the Fair Work Commission to adopt a more comprehensive and inquisitorial approach to ensuring that enterprise agreements made in building and construction are in fact genuinely agreed. FWC should not be able to approve any building industry agreement unless it is comprehensively satisfied that this obligation has been met underpinned by rules including:
    - automatically application to 'pattern' based agreements where a union is a party;
    - powers to make sure negotiations have been free from coercion, misrepresentation, intimidation or any other similar conduct designed to undermine genuine and free workplace bargaining;
    - only recognising individuals appointed as bargaining agents if satisfied that they have not been previously found in breach of any workplace law, that their involvement is genuine and bona fide, and is not an attempt to circumvent other laws or stymie the negotiation process; and
    - more stringent rules for FWC to ensure that persons seeking to intervene in an EBA approval process or appeal the approval of an EBA are not current or former personnel, officers, officials or agents of the CFMEU and are genuinely representative of the majority of workers in the relevant workplace.
- Ensuring enterprise agreements in building and construction do not contain any provision that restricts the free choice of individual workers covered by the agreement, restrains or prevents the exercise or managerial discretion, or otherwise requires consent or agreement of a building industry organisation or official. This would require creating industry specific enterprise

bargaining laws prevent any enterprise agreement in building and construction containing any clause that has the effect of:

- Limiting the free and genuine choice of individual workers over payments or remuneration made on their behalf, such as choice their own redundancy fund, superannuation fund, or portable long service leave fund or sick leave fund;
- Mandating that employers take out insurances with particular providers on behalf of all workers, regardless of whether the workers want or need the insurance;
- Mandating or requiring union approval of a particular provider of workplace training, employee assistance or other support service;
- Giving unions the right of veto over the selection and use of subcontractors, or restricts the deployment and use of particular types or classes of workers, or when work is performed;
- Imposes any arrangement, process or approach regarding the resolution of workplace disputes, right of entry or arrangement to stop work other than the default processes prescribed by workplace laws.

- A range of new and clear offences be introduced in workplace laws to specifically target and eliminate industry specific workplace practices, including for example laws that ban:
  - 'no ticket, no start',
  - workplace picketing;
  - action, threats or conduct designed to pressure participants to use, or not use, particular subcontractors;
  - threats or taking illegal stoppages;
  - making agreements, understandings or arrangements with unions that circumvent default workplace laws regarding dispute resolution, entry, work stoppages or election of worker representatives;
  - engaging in any behaviour to pressure workplaces into accepting union pattern agreements; or
  - engaging in any behaviour, conduct, arrangement or tactic designed to circumvent or override the effect of industry specific laws preventing the inclusion of certain clauses in building and construction enterprise agreements.

To support the above laws, Government should move to establish specific building and construction industry division within the Fair Work Commission. This division should have dedicated members familiar with the industry and be responsible for all matters involving enterprise bargaining in building and construction and be tasked with swiftly hearing and determining disputes affecting or impacting the performance of work on building and construction sites.

See also: Why is this reform necessary? What it would mean? How it would improve industry culture?

Improved industry safety outcomes and preventing misuse of safety rules

CICCA would maintain a dedicated workplace safety unit to enforce industry specific safety laws that prevent the exploitation of safety for non-safety purposes and drive better safety outcomes.

This would require changes to the *Work Health and Safety Act 2011* and equivalent state laws including changes that:

This would require changes to the *Work Health and Safety Act 2011* and equivalent state laws to:

- make it an offence for officials or delegates to exploit or abuse workplace safety rights for non-safety purposes;
- repeal and replace right of entry provisions in the *Work Health and Safety Act 2011* and the equivalent provisions of the equivalent State Acts new provisions which provide that prior written notice of entry is to be provided except where the permit holder has a reasonable concern that (a) there has been or is contravention of the Act and (b) that contravention

gives rise to a 'serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard';

- make it clear that the burden of proving that a permit holder has a suspicion that is reasonable for the purposes of s 117(2) or a concern that is reasonable for the purposes of s 119A lies with the person asserting that fact;
- require that permit holders exercising rights under safety laws must leave a site within a reasonable time if requested to do so by a CICCA inspector who is on the site;
- require that right of entry to worksites on safety grounds can only be exercised by persons holding a valid ROE permit; and
- ensure persons seeking entry on safety grounds are also subject to the 'three strikes' rule.

In addition, the existing Australian Government Building and Construction Work Health and Safety Accreditation Scheme as administered by the Office of the Federal Safety Commissioner should be homed within CICCA.

See also: Why is this reform necessary? What it would mean? How it would improve industry culture?

Using government procurement to drive compliance and improve culture

CICCA would maintain a dedicated unit responsible for compliance with all Government procurement processes and rules involving building works, infrastructure and tenders involving participants in the building and construction industry.

Existing procurement rules should be modified to create industry specific changes requiring contractors tendering for federal government funded projects comply with additional rules and maintain workplace practices or face tough sanctions. Compliance with these rules would be overseen by CICCA and include obligations such as requiring contractors bidding to:

- ensure enterprise agreements have been genuinely agreed, made free from any coercion or intimidation, and meet the requirements of industry specific workplace laws;
- guarantee that they will report to the CICCA police unit any conduct, behaviour or information about any conduct, practices or information that may represent a breach of criminal laws or be conducive to criminal activity;
- adopt and maintain business, governance and workplace practices to meet and ensure ongoing compliance with all industry specific laws under the purview of CICCA;
- take steps to immediately report breaches or threatened breaches of industry specific laws to CICCA;
- cooperate and support any CICCA investigation relating to breaches of industry specific laws; and
- ensure all employees working on their sites have undergone thorough police checks, with a requirement that persons with a history of relevant convictions involving dishonest, violence or drugs being reported to CICCA.

In addition, Government must move to:

- clarify that Federal Government procurement rules apply on any project involving Federal Government funding to the complete exclusion of any and all state and territory procurement rules, including on projects that are jointly funded with states and territories; and
- make Federal Government funding to state or territory governments for projects involving building works conditional upon acceptance that Federal procurement rules will exclusively apply.

See also: Why is this reform necessary? What it would mean? How it would improve industry culture?

Stronger rules for providers of workplace training and other support services

CICCA would house a dedicated training and workplace services unit to ensure that providers of workplace training and any other workplace support services to the building and construction industry are dedicated to their core objectives, through additional rules that require higher levels of governance, transparency and financial accountability.

To achieve this, Government should amend a range of applicable laws creating rules specific to building and construction to implement changes to:

- increase financial transparency and reporting obligations;
- obliging the provider of any workplace training or support service to cooperate with any CICCA investigation; and
- improve governance arrangements where providers have directors nominated by building unions.

See also: Why is this reform necessary? What it would mean? How it would improve industry culture?

Preventing direct payments to building unions

CICCA would contain a dedicated financial compliance and governance unit tasked with identifying and enforcing industry specific laws designed to ensure that financial transactions made by building and construction companies to building unions are lawful and for legitimate purposes.

To achieve this, Government should move to create laws that:

- ban direct payments, donations or any other financial support to the CFMEU from any business, employer or entity in the building and construction industry unless such payments are permitted by law (such as payroll deductions for employee membership fees);
- require industry participants to record and account for any such payments and services as permitted by law;
- submit records of any financial transactions made by building and construction companies to building unions to CICCA;
- make it an offence for any person to solicit, compel, direct or otherwise influence a building and construction company to make a payment or provide financial support to a building union or any other organisation on or for their behalf, or at their direction; and
- require specific disclosure by building unions of the direct and indirect pecuniary benefits obtained by them in connection with worker entitlement funds, training or workplace support services, and employee insurance products.

See also: Why is this reform necessary? What it would mean? How it would improve industry culture?

Worker Entitlement Funds

A CICCA financial compliance and governance unit would also have responsibility for ensuring that worker entitlement funds operating in building and construction are more accountable and transparent to members and operate with higher standards of governance.

PART 3 – WHY REFORM IS NECESSARY | WHAT IT WOULD MEAN | HOW IT WOULD IMPROVE INDUSTRY CULTURE

This section expands on the measures outlined above and explains how these are necessary elements to drive lasting and tangible improvements for building and construction. It outlines how targeting the known causes and drivers of the conduct, giving rise to an attitude of disregard for the law, is key to eliminating the poor culture that allows corruption and criminality to flourish.

INDUSTRY SPECIFIC REGULATOR

Why this is necessary

Previous endeavours by various governments have established industry specific regulators but history shows these have not worked to achieve lasting change, were abolished far too soon, limited in remit or spread throughout various existing departments or agencies with ineffective coordination mechanisms.

The proposed CICCA would be a 'whole of government' and independent approach to ensure compliance with, and enforcement of, industry specific laws. It would allow maximum cooperation amongst various units proposed in this paper, allowing a coordinated and efficient approach to investigation and enforcement, involving greater sharing of information and better identification of practices and behaviours that drive poor culture and allow criminality and corruption to flourish.

What it would mean

The proposed CICCA would be widely known amongst industry participants, government agencies and regulators, and the broader community as 'the' dedicated agency responsible for ensuring the rule of law is observed in building and construction.

The proposed CICCA would be independent and should be established by specific legislation that gives it strong and consistent investigation, compliance and proactive enforcement powers. That same legislation should create a range of industry specific changes to the law (see below) and vest responsibility for enforcing those laws to CICCA.

There would be a range of dedicated units operating within CICCA with dedicated personnel who are familiar with the operation and practices within building and construction, and knowledge of how these can be exploited or abused for unlawful or illegal purposes.

How it would improve industry culture

The creation of CICCA would enable a new approach to enforcement of industry specific laws that are all designed to remove the previously identified causes and drivers of the ingrained culture that has existed in the sector for decades and which give rise to criminality and corruption.

It would take a proactive approach to investigation and enforcement and be able to commence proceedings and prosecutions for breaches of the law. This will mean that individual companies or persons don't have to risk reprisal, recrimination and 'payback' for initiating legal action and significantly removes a key driver for organisations and individuals to apply forms of commercial, industrial or other pressure designed to deter industry from speaking up, insisting on compliance with the law or enforcing their rights.

INDUSTRY SPECIFIC CHANGES TO THE LAW

Why this is necessary

A range of previous inquiries, Royal Commissions, and other various reports have all identified that the structure and operation of the building and construction industry is unique and contains a range of features and practices that make it highly susceptible to unlawful conduct and illegal practices.

Many of these earlier reports have recommended changes to a range of existing laws specifically designed to tackle these problems, however such changes often involve laws with broad application and may result in unintended consequences for other industries, organisations and entities. Similarly, changes to the law with broad application rely on existing regulators and agencies to enforce those laws, most of whom already have a very broad remit and stretched resources.

The amendment of existing laws to create industry specific rules and obligations for the building and construction industry would mean that the impact and effect of these changes are limited in their application and specifically targeted towards fixing problems that only exist in building and construction.

The proposed industry specific amendments to existing laws are all designed to remove the previously identified causes and drivers of the ingrained culture that has existed in the sector for decades and which give rise to criminality and corruption.

What it would mean

Government would amend a range of existing laws to create specific rules and obligations that only apply to the building and construction industry and the participants and organisations therein. The laws requiring industry specific amendments should, at a minimum, include:

- *Competition and Consumer Act 2011;*
- *Corporations Act 2010;*
- *Fair Work Act 2009;*
- *Fair Work (Registered Organisations) Act 2009;*
- State and Federal Government procurement rules applicable to government funded infrastructure and building works; and
- *Work Health and Safety Act 2011* (and associate State laws);

Industry specific changes to these laws would give CICCA the tools and powers it needs to ensure the broader aims of these laws are better achieved and that problems unique to building and construction can be targeted and fixed.

Vesting responsibility for enforcement of these laws with one central regulator would enable a more effective and coordinated approach, undertaken by dedicated personnel who are familiar with the operation and practices within building and construction, and knowledge of how these can be exploited or abused for unlawful or illegal purposes.

How it would improve industry culture

Industry specific changes to existing laws would have the effect of removing the incentives for any industry participant and organisation to engage in any unlawful or illegal conduct, and ensure the entire industry operates on a level playing field where there is no room for anyone to apply pressure or seek to gain advantage over another.

These changes would specifically target the practices and causes that have given rise to poor industry culture which has allowed criminality and corruption to flourish.

COORDINATED POLICE AND LAW ENFORCEMENT

Why this is necessary

While earlier endeavours to establish cross-jurisdictional police taskforces to investigate criminality and corruption have generated some positive results and outcomes, these have usually been temporary measures with a limited life.

What it would mean

CICCA would be home to a permanent and ongoing taskforce of national and state police and law enforcement agencies. The taskforce would support and facilitate a coordinated and national approach to enforcement of criminal laws would enable police activity and operations to be more comprehensive and effective. It would ensure greater sharing of information and more efficient use of law enforcement resources, enabling targeted and swift deployment of personnel as and where required to stop corruption and criminality wherever it occurs.

How it would improve industry culture

A permanent police taskforce would seek to identify, target and remove any elements of criminal activity and corruption that exist in building and construction, including persons or organisations linked to outlaw motorcycle gangs, organised crime and other criminal syndicates that prey on participants in the construction sector.

ENFORCING BANS TO RID CRIMINALS AND SERIAL LAWBREAKERS FROM THE INDUSTRY

Why this is necessary

History demonstrates that previous attempts to crack down on criminal elements and serial lawbreakers operating within building and construction have been mostly unsuccessful.

Attempts to ensure that the industry is free from persons known to thrive in, and promote, a culture of intimidation, thuggery and disregard for the law, have only resulted in their reappearance within the industry in a capacity that enables their poor culture and practices to get even worse and spread more broadly.

While other measures proposed in this document will go far in terms of driving permanent and positive change for the industry, there needs to be a 'last resort' option available if necessary.

What it would mean

CICCA would be able to seek bans of various lengths and order types to ensure that criminal elements and serial lawbreakers have no capacity to continue operating in, or having influence over, the building and construction industry and its worksites.

How it would improve industry culture

The only way to change culture is the change the people and organisations that thrive in, and promote, poor culture. Bans and orders would be a last resort option to ensure that CICCA has the power to not only remove those who cause the culture that allows criminal and corrupt activity to flourish, but also ensure that they can't return in some other capacity in the future.

STRONGER PROTECTIONS FOR WITNESSES AND WHISTLEBLOWERS

Why this is necessary

In short, there are a large number of companies and people in the building and construction industry that are that are too afraid to speak up, report wrongdoing or take steps to enforce their rights under existing laws.

Even recently, industry continues to report that in response to the recent Government measures announced, the CFMEU will only serve to 'unleash hell' on the industry and that anyone who assists the various inquiries 'will pay for it'. There are reports that persons are saying 'we've been through this before, we will survive it again, and will only make things worse for those who get involved'

Participants in the industry have long memories and they are cognisant that officials, officers and employees of some building unions have a track record of making public comments to the effect that they 'will never forget' and 'we know where you live and work, and where your kids go to school' and 'we will hunt you down' etc.

Existing laws simply aren't enough to protect the industry and workers – greater protections are needed to overcome the culture of silence and turning a blind eye to lawbreaking.

What it would mean

CICCA would be the one central agency to which anyone can report information, materials or concerns about organisations or individuals in the building and construction industry, or breaches of any laws that fall within its remit.

Legislation to create CICCA should also create strong and clear protections for both companies and individuals, creating penalties for any person or organisation engaging in conduct against another person or company as a form of recrimination, reprisal or other form of 'payback' for giving evidence or insisting on complying with industry specific laws.

How it would improve industry culture

A solid system of legal protections will encourage whistleblowers and protect persons coming forward with information. It will ensure that there is no longer a culture of fear and intimidation, and the culture of not speaking up lest there be payback will be eroded and eventually removed.

A strong system of penalties that is proactively enforced will send a message to industry that any person or organisation that engages in any type of coercion, intimidation, pressure or other conduct to unduly influence someone else, has no place in the building and construction industry and will feel the full force of the law.

Put simply, the culture of turning a blind eye to criminality, corruption and breaches of the law must end.

STRONGER COMPETITION LAW AND BETTER ENFORCEMENT

Why this is necessary

Every single one of the previous Royal Commissions of Inquiry into the building and construction industry have found examples where industry participants have engaged in conduct leading to contraventions of the boycott and cartel provisions of the Competition and Consumer law.

Industrial coercion creates an environment within which criminal and anti-competitive behaviours ripple throughout the industry. The result is that emerging small-to-medium sized competitors are excluded from the market when faced with union dictated pattern EBAs which are unaffordable at their economy of scale. For companies that meet union demands, the inflated costs of union pattern agreements make it impossible for them to compete, unless they are protected from competition by the union.

The CFMEU's tactics are a ready-made vehicle for market manipulation, whereby contractors can either acquiesce or cooperate with the union to suppress competition and even fix prices.

The effect of this 'system' is obviously severely restricted competition, which tends to entrench the market dominance of larger commercial subcontractors and impede the entry of emergent contractors into the commercial market.

What it would mean

Industry specific changes to the law would give the CICCA the tools it needs to effectively identify, target and eliminate anti-competitive behaviours which are known to exist in building and construction.

This would allow CICCA to drive increased levels of competition and innovation in building and construction, while ensuring that building and construction works are delivered in a way that ensures clients and taxpayers get value for money.

How it would improve industry culture

Stronger industry specific competition laws backed by better enforcement would remove a key driver of unlawful conduct and poor culture by creating a genuine level playing field for all industry participants.

It would remove the incentive for building unions and officials to engage in industrial coercion, and eliminate the commercial pressure felt by many industry participants to acquiesce to these and other illegal tactics in order to obtain or receive ongoing work.

Allowing industry participants to compete on merit would drive competition and support industry innovation, and remove a key driver of corrupt and criminal behaviour as identified by recent media reports.

STRONG ENFORCEMENT OF INDUSTRY SPECIFIC WORKPLACE LAWS

Why this is necessary

All previous Royal Commissions of Inquiry and a range of other reports have all reached the exact same conclusion - that there is a need for industry specific industrial relations laws that appropriately recognise and tackle the problems and conduct which are unique to the building and construction industry – enforced by a dedicated industry specific regulator.

The Heydon Royal Commission, for example, found that:

> *"One consideration which supports the need for an industry specific regulator is the high level of unlawful conduct in the industry. This is demonstrated by Appendix A to this Chapter. The sustained and entrenched disregard for both industrial and criminal laws shown by the country's largest construction union further supports the need.*
>
> ***Given the high level of unlawful activity within the building and construction sector, it is desirable to have a regulator tasked solely with enforcing the law within that sector**."*[2]
>
> *"**There should continue to be a building and construction industry regulator**, separate from the Office of the Fair Work Ombudsman, **with the role of investigating and enforcing the Fair Work Act 2009 (Cth) and other relevant industrial laws in connection with building industry participants."**[3]*

What it would mean

[2] *Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8, para 83*

[3] *Ibid refer to recommendation 61*

A range of industry specific amendments would be made to the *Fair Work Act* and the *Fair Work Registered Organisations Act 2009* that are designed to:

- create stronger duties for registered organisations of employees and higher standards of governance;
- support genuine and productive workplace bargaining for building and construction workplaces;
- ensure enterprise agreements in building and construction do not contain any provision that restricts the free choice of individual workers covered by the agreement, restrains or prevents the exercise or managerial discretion, or otherwise requires consent or agreement of a building industry organisation or official;
- introduce a range of industry specific offences to target and eliminate commonly deployed unfair workplace practices and unlawful activity; and
- provide the FWC with a designated division to rapidly resolve workplace disruption and disputation.

Responsibility for ensuring compliance and enforcement with these laws would rest with CICCA.

How it would improve industry culture

Industry specific laws enforced by a dedicated industry workplace regulator would stamp out the ability for organisations and officials to exploit or manipulate workplace laws to apply unlawful or illegal industrial pressure to builders and workplaces.

This would remove a key driver of poor culture and leading cause of unlawful tactics, such as thuggery, intimidation and other forms of illegal workplace and commercial pressure and coercion.

This culture has been forensically examined, identified and known to exist within the industry for decades. Certain organisations and individuals thrive in, and promote the spread of, this poor culture and this creates the environment in which criminal and corrupt activity and grow and flourish.

Industry specific workplace laws are essential to ensuring that the causes of poor industry culture are not available to anyone in the sector, removing a key driver of unlawful conduct that gives rise to broader corruption and criminality, while also maintaining strong protections for workers, including their pay and conditions.

IMPROVED INDUSTRY SAFETY OUTCOMES AND PREVENTING MISUSE OF SAFETY RULES

Why this is necessary

Registered organisations and their officials have rights and privileges to enter workplaces and exercise certain powers under both state and federal work health and safety laws.

However, there have been dozens of Federal Court cases and judgements that have found that the CFMEU and its officials have misused and exploited the issue of workplace safety to achieve other industrial objectives or for other reasons completely unrelated to safety.

In some of these cases, officials from the CFMEU have actually been found to be responsible for causing the alleged safety problem as a means to shutting down a worksite as a way to force builders into signing a union dictated pattern enterprise agreement. Other cases have shown that officials have disregarded site safety rules and placed themselves and others in unsafe situations.

See for example:

- *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] FCA 42 (7 February 2018);*
- *Australian Building and Construction Commissioner v Hanna & Anor (No.3) [2017] FCCA 2519 (19 October 2017)*
- *Australian Building and Construction Commissioner v Auimatagi & Ors [2017] FCCA 1772*

- *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Footscray Station Case) [2016] FCA 872 (5 August 2016)*
- *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Footscray Station Case) [2017] FCA 1555*

What it would mean

Safety is crucial for everyone in construction workplaces and its importance should not be undermined through abuse and exploitation to achieve unrelated purposes.

Industry specific changes to work health and safety laws would tackle this practice in an effective and balanced way that ensures safety rights can only be used for genuine safety issues.

It would mean that only fit and proper people can have the right to enter a workplace under safety grounds, and that officials who exploit or misuse their rights under safety laws will be subject to effective penalties that deter future abuse.

How it would improve industry culture

These changes would remove a key lever by which safety rights can be used as another tool to apply unfair or illegal pressure to builders and through which unlawful stoppages to work can be threatened or actioned.

It would improve safety culture by ensuring rights under safety laws are used in a genuine way for their intended purpose and remove any concern or scepticism about the bona fides of officials when raising safety grounds.

USING GOVERNMENT PROCUREMENT TO DRIVE COMPLIANCE AND IMPROVE CULTURE

Why this is necessary

Governments have a longstanding practice of using government procurement rules to drive cultural change. This ensures that the use of taxpayer's money can be made conditional for companies that adopt practises which are consistent with the broader policy goals of the government of the jurisdiction in which the work takes place.

However, some state and territory governments have procurement practices that create special conditions and rights for the CFMEU, including oversight of processes that give approval to companies being eligible to tender for government funded building works and/or the requirement that companies adopt a pattern union enterprise agreement.

What it would mean

The Federal government should amend procurement rules to support its stated aim of stamping out criminality and corruption on building sites. This would mean contractors bidding for work must adopt specific rules and practices that avoid practices and proactively work to ensure they comply with the law. The Federal government should make it clear that where building works are funded jointly by them and another state or territory, the Federal procurement rules will override any maintained at the state or territory level.

How it would improve industry culture

By requiring contractors bidding for work to be compliant with these rules, Government can drive positive cultural change amongst some of the largest building contractors in Australia. Such practices will ensure all government funded building sites are free from corruption, criminality and meet high standards of compliance with the law.

It will also remove a key driver of corruption and criminality by removing the capacity for unions to influence which building companies are successful in bidding for government funded work, or forcing them to adopt union pattern enterprise agreements as a condition of tendering for work.

STRONGER RULES FOR PROVIDERS OF WORKPLACE TRAINING AND OTHER SUPPORT SERVICES

Why this is necessary

Various earlier Royal Commissions of Inquiry and other similar reports have identified how enterprise agreements can contain clauses that mandate the use of particular workplace training and workplace support services which are run by, or provide financial support, to the CFMEU.

The current pattern CFMEU agreement in NSW, for example, contains clauses that mandates that all employees must be given almost ten different types of training and workplace support services, all of which are either run by, provide financial support to, or have links with, the CFMEU.

What it would mean

Amending industry specific laws would prevent the naming of such funds being mandatory in enterprise agreements and oblige such funds to increase financial transparency and improve governance levels.

How it would improve industry culture

These changes would remove a key driver of poor culture and corrupt behaviour, by removing the ability for pressure and action to be taken that force employers into enterprise agreements that mandate the use of workplace training and support services that funnel money into the CFMEU.

This would remove a key driver of unlawful behaviour and give workers and employers the capacity to choose the best training provider for their needs.

PREVENTING DIRECT PAYMENTS TO BUILDING UNIONS

Why this is necessary

Various Royal Commission reports have found that the CFMEU has been involved in workplace practices that are designed for coerce employers into making payments to unions in a bid to maintain industrial peace. Such practices have included requiring employers to buy 'casual tickets' (union memberships) for workers without their consent or knowledge, fund union coordinated workplace events, and other similar actions designed to take advantage of unions capacity to disrupt work on building sites.

What it would mean

Industry specific laws should be created that make it illegal for contractors and employers to make payments to building unions, except where expressly permitted by law.

This would also make it illegal for building officials and organisations to solicit or take payments directly from contractors and employers, unless it is for specified and lawful purposes.

The obligation to report any payments made from contractors to building unions to CICCA, would enable the agency to monitor compliance with the law and ensure that money flows in the industry are for legal and proper purposes.

How it would improve industry culture

This change would improve industry culture by removing a common cause of unlawful pressure and coercion frequently experienced by contractors and employers on building sites. This change would be essential in stopping the unlawful flows of monies to building unions, remove a temptation giving rise to criminal and corrupt behaviour, and ensure greater financial transparency of all building industry participants.

ANNEXURE "A" - DRIVERS OF POOR CULTURE

The existence of a poor culture in some registered organisations and their officials that operate in building and construction has been examined many times over decades. This poor culture has become ingrained and is a key driver of corruption and criminality within the sector. Some examples of findings of earlier inquiries are below:

HEYDON ROYAL COMMISSION 2015

> *"The Commission's inquiries have revealed a worrying and recurring phenomenon, particularly within the CFMEU, of union officials deliberately disobeying court orders or causing the union to disobey court orders. Officials who deliberately flout the law should not be in charge of registered organisations".*[4]
>
> *"There is a longstanding malignancy or disease within the CFMEU. One symptom is regular disregard for industrial laws by CFMEU officials. Another symptom of the disease is that CFMEU officials habitually lie rather than 'betraying' the union. Another symptom of the disease is that CFMEU officials habitually show contempt for the rule of law. What can be done to cut out the malignancy and cure the disease?"*[5]
>
> *"Large national unions, such as the CFMEU….. have substantial assets. They have many thousands of members. They operate branches across different jurisdictions. They employ large numbers of employees. They generate tens of millions in membership dues annually. They generate millions in commercial enterprise and agreements with third parties. They are trading corporations in the constitutional sense. They are big businesses."*
>
> *"The conduct that has emerged discloses systemic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats, intimidation, abuse of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court."*[6]
>
> *"The issues identified are not new. The same issues have been identified in reports of three separate Royal Commissions conducted over the past 40 years: the Winneke Royal Commission in 1982, the Gyles Royal Commission in 1992 and the Cole Royal Commission in 2003."* [7]
>
> *"The continuing corruption and lawlessness that has been revealed during the Commission suggests a need to revisit, once again, the regulation of the building and construction industry."*[8]
>
> *"The evidence in relation to the CFMEU case studies indicates that a number of CFMEU officials seek to conduct their affairs with a deliberate disregard for the rule of law. That evidence is suggestive of the existence of a pervasive and unhealthy culture within the CFMEU, under which:*
>
> *(a) the law is to be deliberately evaded, or crashed through as an irrelevance, where it stands in the way of achieving the objectives of particular officials;*
>
> *(b) officials prefer to lie rather than reveal the truth and betray the union;*
>
> *(c) the reputations of those who speak out about union wrongdoing become the subjects of baseless slurs and vilification."*[9]

4 Heydon Vol 5 p226
5 Heydon Royal Commission, Volume 5, p401
6 Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8, para 1
7 Ibid at para 2
8 Ibid at para 3
9 Royal Commission into Trade Union Governance and Corruption, Interim Report (2014), Vol 2, ch 8.1, p 1008.

'The case studies considered in this Report only reinforce those conclusions'[10]

'The evidence has revealed possible criminal offences by the CFMEU or its officers against numerous provisions of numerous statutes including the Criminal Code (Cth), the Crimes Act 1900 (NSW), the Crimes Act 1958 (Vic), the Criminal Code 1899 (Qld), the Criminal Law Consolidation Act 1935 (SA), the Corporations Act 2001 (Cth), the Charitable Fundraising Act 1991 (NSW) and the Competition Policy Reform (Victoria) Act 1995 (Vic)'[11]

'The conduct identified in the Commission is not an isolated occurrence. As the list in the previous paragraph reveals, it involves potential criminal offences against numerous laws. It involves senior officials of different branches across Australia.'[12]

Key conduct uncovered during the Heydon Royal Commission

The widespread misconduct described within the report traverses a range of behaviours that it suggested 'may' have occurred including but not limited to:

- actions favouring the interests of the union over the members;
- financial misconduct and the misappropriation and use of union funds for private purposes;
- arranging for right of entry tests to be sat by persons other than the candidate;
- abuses of rights of entry;
- use of blackmail and extortion for the purposes of achieving industrial ends;
- commission of criminal offences such as the making of death threats and conspiracy to defraud;
- procuring payments from employers for the purposes of 'industrial peace';
- false inflation of membership numbers and payment of bogus membership dues;
- creation of false records, insufficiency or absence of proper records and destruction of records;
- engaging in contraventions of the boycott and cartel provisions of the Competition and Consumer Act 2010 (Cth);
- misuse of private information of superannuation fund members for industrial purposes.

10 Heydon Report, Chapter 5, page 396
11 Ibid
12 Ibid

COLE ROYAL COMMISSION

> *"Underlying much of the conduct of unions, and in particular the CFMEU, is a disregard or contempt for the law and its institutions, particularly where the policy of the law is to foster individualism, freedom of choice or genuine enterprise bargaining. Overwhelmingly, industrial objectives are pursued through industrial conduct, rather than reliance on negotiation or the law and legal institutions."*[13]

Key conduct uncovered during the Cole Royal Commission:

Commissioner Cole found that, within building and construction, there was a range of unlawful conduct including:

- widespread disregard of, or breach of, the enterprise bargaining provisions of the workplace laws
- widespread disregard of, or breach of, the freedom of association provisions of workplace laws
- widespread departure from proper standards of occupational health and safety;
- widespread requirement by head contractors for subcontractors to have union-endorsed enterprise bargaining agreements (EBAs) before being permitted to commence work on major projects in State capital central business districts and major regional centres;
- widespread requirement for employees of subcontractors to become members of unions in association with their employer obtaining a union-endorsed enterprise bargaining agreement;
- widespread requirement to employ union-nominated persons in critical positions on building projects;
- widespread disregard of the terms of enterprise bargaining agreements once entered into;
- widespread application of, and surrender to, inappropriate industrial pressure;
- widespread use of occupational health and safety as an industrial tool;
- widespread making of, and receipt of, inappropriate payments;
- unlawful strikes and threats of unlawful strikes;
- threatening and intimidatory conduct;
- disregard of contractual obligations;
- disregard of National and State codes of practice in the building and construction industry;
- disregard of, or breach of, the strike pay provisions of workplace laws;
- disregard of, or breach of, the right of entry provisions in workplace laws'
- disregard of Industrial commission and court orders; and
- disregard by senior union officials of unlawful or inappropriate acts by inferior union officials; and
- disregard of the rule of law.

13 Royal Commission into the Building and Construction Industry, Final Report (2003), Vol 1, p 11, para 22.

SELECTION OF JUDICIAL COMMENTARY INVOLVING CFMEU

"The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct."

(Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243)

"The circumstances of these cases … nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account."

(Tracey J, 1 May 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 407)

"There is clearly, as other judges have recorded, a strong record of noncompliance on the part of the Union through its officers with provisions of industrial relations legislation, although that does not mean that a disproportionate penalty can or should be imposed. I note that significant past penalties have not caused the Union to alter its apparent attitude to compliance with the entry provisions and restrictions under the FW Act."

(Mansfield J, 14 August 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 3) [2015] FCA 845)

"The conduct has in common features of abuse of industrial power and the use of whatever means the individuals involved considered likely to achieve outcomes favourable to the interests of the CFMEU. The conduct occurs so regularly, in situations with the same kinds of features, that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action, and impervious to the prospect of prosecution and penalties."

(Mortimer J, 13 May 2016, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2016] FCA 436)

"In the period between 1 January 1999 and 31 March 2014, the CFMEU itself or through it officials had been dealt with for 17 contraventions of s 500 or its counterparts in earlier legislation, and for 194 contraventions of s 348 of the FW Act or other provisions proscribing forms of coercive conduct."

(White J, 22 April 2016, Director of the Fair Work Building Industry Inspectorate v O'Connor [2016] FCA 415)

"The schedule paints, one would have to say, a depressing picture. But it is more than that. I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised."

(Jessup J, 4 November 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case) [2015] FCA 1173)

"…the litany of contraventions…[and] the many prior contraventions of relevant statutory proscriptions by the Union…indicating a propensity, on the part of the Union, to engage in proscribed conduct."

(Goldberg, Jacobson and Tracey JJ, 10 September 2009, Draffin v CFMEU & Ors [2009] FCAFC 120; (2009) 189 IR 145)

"...the history tends to suggest that the Union has, with respect to anti-coercion and similar provisions of industrial laws, what the High Court in Veen described as 'a continuing attitude of disobedience of the law'..."

(Jessup J, 29 May 2009, Williams v Construction, Forestry, Mining and Energy Union (No 2) [2009] FCA 548; (2009) 182 IR 327)

"There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts."

(Burnett J, 28 February 2014, Director, Fair Work Building Industry Inspectorate v Myles & Ors [2014] FCCA 1429)

"The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct."

(Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243)

"The overwhelming inference is that the CFMEU, not for the first time, decided that its wishes should prevail over the interests of the companies and that this end justified the means."

(Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226)

"The CFMEU is to be regarded as a recidivist rather than as a first offender."

(Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226)

"The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry."

(White J, 23 December 2014, Director of the Fair Work Building Industry Inspectorate v Stephenson [2014] FCA 1432)

"…the pattern of repeated defiance of court orders by the CFMEU revealed by those four cases is very troubling."

(Cavanough J, 31 March 2014, Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2) [2014] VSC 134)