

# Inquiry Into The Victorian Building And Construction Industry - Final Report - The BLF Assets

## Terms of Reference

The Inquiry Into The Victorian Building and Construction Industry's Terms of Reference were:

(No. 1)

The Governor in Council under Section 4EC of the *Parliamentary Committees Act 1968* requires the Economic Development Committee to review the tendering procedures for government works and, if appropriate, recommend Codes of Practice or other appropriate measures that will ensure equity in the tendering process.

The activities of the Committee in undertaking this review will have regard to the provisions of the Government Procurement Agreement.

(No. 2)

The Governor in Council under Section 4EC of the *Parliamentary Committees Act 1968* requires the Economic Development Committee to enquire into issues that restrict the development of the Victorian Building and Construction Industry, and in particular:

- to review and recommend changes to the building and planning process in Victoria; and
- to investigate improvements in industry productivity and identify and where appropriate recommend changes to further improve productivity.

## CHAIRMAN'S INTRODUCTION

This is the sixth and final report of the Economic Development Committee. This report addresses the issue of the Builders Labourers Federation (BLF) assets currently held by the custodian Dr Ian Sharp AO, who was appointed pursuant to the *BLF (De-Recognition) Act 1985 (Vic)* to administer the funds.

The Committee recommended in its third report that these assets be released for the benefit of the Victorian building and construction industry.

The Construction Forestry Mining Energy Union (CFMEU) has lodged a claim for the assets which is currently the subject of proceedings in the Industrial Relations Court in Sydney. It is anticipated by the Committee that these proceedings will continue for some time - possibly years - and therefore the Committee has resolved not to pursue the matter further or indeed make any recommendations on the

disbursement of the funds.

The Committee has thus far tabled five reports in response to its terms of reference.

The first report into "Corruption of the Tendering Process" revealed widespread collusion and other forms of corruption in the tendering practices for Victorian government works and services. The second report titled "Evidentiary Powers of Parliamentary Committees" identified the problems encountered by this Committee in exercising its powers to obtain evidence, and made recommendations to alleviate the difficulties faced by Parliamentary Committees in conducting inquiries.

The third report on "Productivity" examined issues such as those relating to restrictive work practices and poor management practices, which adversely affect productivity and retard the development of the VBCI.

In its fourth report titled "Code of Tendering" the Committee addressed some of the problems identified in its first report and introduced initiatives to reduce the incidence of collusive tendering practices and improve State public sector tendering outcomes. The Committee also identified the need to examine the purchasing practices of all State government departments and agencies in the procurement of non-building and construction goods and services. This issue has subsequently been addressed by the Auditor General and Minister for Finance.

In this regard, the Auditor-General in his Special Report No. 31 "Purchasing Practices" (May 1994) identified serious deficiencies in State public sector purchasing and recommended the creation of a Government Purchasing Board to correct these deficiencies. The Auditor General has also held discussions with the Public Accounts and Estimates Committee about the need to further review all aspects of government purchasing. This review has already been initiated by the Department of Finance which has taken into consideration some of the findings of the Economic Development Committee's Report into tendering practices. The findings of this review are now being implemented.

The Committee's fifth report into "Security of Payments" reviewed the case for secure, long-term, guaranteed arrangements for payment for work preformed by participants in the building and construction industry.

As this is the final report of the Committee's inquiry into the Victorian Building and Construction Industry it is worth noting that the Committee received 89 formal submissions, held 10 public hearings, met formally on 48 occasions and

held 34 sub-committee meetings. In addition committee members met informally on a significant number of occasions.

The work load associated with the conduct of this reference has been high and the issues at times difficult to identify and resolve. It is therefore incumbent on me to thank all the research staff and the committee members for their contributions in bringing the reference to a close.

The outcome and implementation of our reports and recommendations to the Parliament now rest with the Government of Victoria.

- **Gerald Ashman, MLC, Chairman, Economic Development Committee.**

## OVERVIEW OF THE INQUIRY

This is the sixth and final report by the Economic Development Committee on the Committee's Reference to inquire into issues and activities affecting the Victorian building and construction industry. This Reference initially required it to:

- review the tendering procedures for government works and recommend, if appropriate, codes of practice or other measures that would ensure equity in the tendering process;
- review and recommend changes to the building and planning process in Victoria; and
- investigate improvements in productivity and identify and recommend changes to further improve productivity.

Since this time the key issues concerning the building and planning process have been addressed following a comprehensive review and reforms introduced by the Minister for Planning and Development. As a result the Hon. Phillip Gude and the Chairman of the Economic Development Committee sought an amendment to the terms of reference of the Inquiry by deleting the reference to the planning process. This amendment was approved by the Governor in Council on 27 April 1994.

Also subsequent to this Reference being given to the Committee, the Minister for Housing, The Hon. Rob Knowles asked the Committee to investigate the question of security of payments in the Victorian building and construction industry. This followed concerns by a number of participants in the industry that subcontractors in particular have been experiencing major financial losses and insolvencies as a result of the collapse of principal contractors and the non payment of monies owed for work undertaken. The issue was therefore added to the terms of the Committee's Inquiry.

During the course of the Inquiry the Committee has tabled five reports to Parliament.

The first report entitled "The Corruption of the Tendering Process" was tabled on 29 May 1993 and inquired into the incidence in Victoria of collusive tendering practices. The Committee found evidence of widespread collusion and other forms of corruption in the tendering process.

The second report inquired into the "Evidentiary Powers of Parliamentary Committees" following difficulties the Committee experienced in obtaining evidence from key

interstate witnesses. This report was tabled on 5 October 1993.

The third report titled "Productivity" was tabled on 3 May 1994 and looked at various issues affecting productivity in the Victorian building and construction industry. One of the issues arising in this Report was the question of the BLF assets which are currently being held by a custodian appointed pursuant to the BLF (De-recognition) Act 1987. The Committee undertook to investigate this matter and issued a statement regarding such assets to the 1994 spring session of Parliament. ...

The fourth report titled "Code of Tendering" addressed some of the problems identified in the Committee's first report and recommended initiatives to improve efficiency in both the public and private sector tendering process. In the course of investigating this issue the Committee also reached the conclusion that there is scope for further reform of purchasing practices across all Government departments and agencies, and indeed it expressed its intention to investigate this matter further. Since this time however, the issue has been addressed by the Auditor-General and Minister for Finance. In May 1994 the Auditor-General tabled in Parliament his Special Report No 31 "Purchasing Practices" which investigates the procurement of all non building and construction related goods and services and recommends inter alia, the creation of a Government Purchasing Board. This was subsequently pursued by the Auditor-General with the Public Accounts Committee at its Meeting (No.15) on 30 June 1994, when he recommended that that Committee undertake an investigation into all aspects of Government purchasing.

In the meantime on 26 May 1994 the Minister for Finance the Hon. Ian Smith issued a News Release announcing a revamp of Victorian Government purchasing practices as well as a Report by Andersen Consulting which undertook a Review of Victorian Government Purchasing Arrangements (October-December 1993). The Minister wrote to the Economic Development Committee on 16 June 1994 enclosing a copy of this Report together with the Project Brief which specified the Terms of Reference and required consultancy outputs.

In subsequent a letter to the Committee dated 7 July 1994 (see Appendix B), the Minister for Finance responded in part to the Committee's Tendering Report, acknowledging there are deficiencies in tendering and supply processes across government. He again noted the above mentioned review as well as the fact that its findings are now being implemented.

At the time of writing this Report the *Financial Management (Amendment) Bill* has been prepared and was introduced in the 1994 Spring Session of Parliament, (with the second reading occurring on 8 September 1994). This Bill provides inter alia, for the establishment of a Victorian Government Purchasing Board as discussed above. It is expected this Bill will be debated in the current session. ...

The fifth Report to Parliament was on "Security of Payments" and considered the ongoing issue that some form of security of payment measures are needed to protect subcontractors and other participants in the industry who have suffered financial hardship as a result of non payment

of monies owed by others further up the contractual chain. The Security of Payment Report was tabled in Parliament on 5 October 1994.

## DISPOSAL OF THE BLF ASSETS

### Introduction

In its third report to Parliament on Productivity the Committee found -

“that in regard to the assets of the Builders Labourers Federation, that:

- such assets are of little advantage to ex-members of the B.L.F. or the building industry in general whilst they remain frozen in trust;
- it is, after a seven year lapse, extremely difficult to locate the beneficiaries of the trust and further impossible to fairly apportion the equity between any such beneficiaries; and
- such assets as remain should be utilised for the benefit of the Victorian building and construction industry.”

It therefore recommended:

“... that legislation concerning the former assets of the Builders Labourers Federation be amended to release such assets for the benefit of the Victorian building and construction industry”.

The Committee also reported that it will undertake a thorough investigation of the uses of such assets and issue a definitive statement regarding such assets by the commencement of the 1994 Spring session of Parliament.

This report gives a brief background into the current situation in relation to those assets and makes recommendations as to how these might equitably be deployed in the best interests of the Victorian building and construction industry.

### Background

The BLF has been a subject of controversy for the last twenty years:

- in 1974 the BLF was deregistered because it had breached obligations under the industrial relations system;
- in 1976 it was reregistered after undertakings were given it would work within the rules;
- in 1981 the BLF Secretary Norm Gallagher was jailed for receiving secret commissions, and the union was again deregistered because it could not be trusted to meet minimum standards of responsible behaviour;
- in 1987 the BLF office was raided by police and assets in the order of \$3 million was seized by the Victorian Government;
- in 1990 it was involved in violent confrontations at 417 St Kilda Road;
- in 1991 John Cummins defeated Norm Gallagher in a ballot for secretaryship; and
- in 1994 four state registered branches of the BLF in

Tasmania, Western Australia, Queensland and South Australia, and the deregistered Victorian branch merged with the CFMEU.

Also in 1994 proceedings were instituted in the Federal Industrial Relations Court in Sydney in which the CFMEU are seeking to have determined whether it is beneficially entitled to the funds and property of the BLF. The funds and property are presently in the possession and control of the Custodian (Dr Ian Sharp) who was appointed pursuant to the BLF (De-Recognition) Act 1985 (Vic).

Under this Act and the *BLF (De-recognition) (Amendment) Act 1987* ..., the Custodian has subsequently lodged numerous reports to Parliament on his responsibilities as Custodian. The most recent (Report No 28 ...) was lodged on 31 August 1994, and sets out his understanding of the present stage of the legal proceedings as well as providing details of the current status of the assets.

At the instigation of Mr Ian Sutherland QC, Counsel for the Office of the Custodian and the State of Victoria, the Industrial Relations Court ordered that any person wishing to lay claim to the funds, besides the CFMEU, should be notified of the proceedings. In a memo from Mr Tony Burchill (Employee Relations Advisor) on 22 July 1994, it is noted that virtually all the former members who contacted the Government and the Custodian expressed the desire to fight the CFMEU in court for a share of the funds. ... These documents provide a good summary of the case to that date.

On 1 June two letters were sent to Dr Sharp (Custodian) and Mr Douglas Graham QC, Solicitor General by the Chairman of this Committee. The letter to Dr Sharp suggested it would be appropriate to obtain an updated valuation of the BLF properties to allow a more realistic indication of the sums of money involved ... The letter to the Solicitor General asked for advice on the implications of the claim lodged by the CFMEU. ...

On 22 August a response was received from the Solicitor General ..., noting:

- the recommendations of this Committee in its Report on Productivity;
- the proceedings in the Industrial Relations Court, following an agreement made (or purportedly made) between the CFMEU and the BLF, changing the rules of the CFMEU to give entitlement to the BLF assets;
- that some members of the BLF in their capacity as members of the unincorporated Association have been joined in the proceedings and are contending that the BLF assets should be divided amongst its members. (According to the last report by the Custodian, orders were made to join 70 persons to the proceedings who claim to be former members of the BLF.);
- that on 2 September, the Industrial Relations Court would be hearing an application by the added respondents that the Court has no jurisdiction to make the orders which are being sought by the CFMEU; and
- that in the meantime, the added respondents

(numbering 56 of the above mentioned 70) have instituted proceedings in the Supreme Court of Victoria seeking orders for the winding up of the BLF as an unregistered corporation and for the disposal of its assets. No date had been fixed for that hearing.

The Solicitor General also advised:

- he did not think the action of the Committee in continuing with its Inquiry would of itself prejudice the outcome of either of the proceedings;
- on the other hand, if legislation were to be introduced into the Victorian Parliament designed to resolve questions concerning ownership and destination of the assets of the BLF there would be conflict. While that would not of itself provide a reason why such legislation should not go forward, questions might arise as to the validity of the Victorian legislation; and
- it would not be possible for the Committee to intervene in the proceedings in the Industrial Relations Court, however he understands the State of Victoria is presently considering whether the application of the added respondents should be supported.

The Committee is of the view that any legislation would almost certainly be challenged in the Industrial Relations Court.

On 26 August a response was received from the Custodian

... The main points raised were that:

- he notes the deliberations of the Committee in its Productivity Report;
- he sees no point in obtaining an updated valuation of the BLF real estate; and
- he summarized the potential outcome of the proceedings by the CFMEU as follows -

“If the CFMEU is successful in its claim that it has legitimately incorporated the BLF within its federally registered organisation or that the *BLF (De recognition) Act* of the Victorian Parliament is invalid by reason of conflict with Federal legislation, the Custodian will have no option but to hand over the BLF assets in whatever manner the Court orders.

“If on the other hand, the CFMEU is unsuccessful in these proceedings the BLF in Victoria remains an unincorporated association and as such action may be taken by present members of it to dissolve the Association and distribute the assets in accordance with its constitution.”

The most recent information at the time of writing this Report come from two letters from the Victorian Government Solicitor dated 19 and 27 September respectively ... These letters report on the most recent hearings in the Industrial Relations Court on the 2nd and 16 September 1994. His key comments are as follows:

“On 2 September 1994, Chief Justice Wilcox dismissed the application of the Respondents and found that the Court had jurisdiction. An application for leave to appeal from this decision has been filed on behalf of the State of

Victoria and Dr Sharp, however, a decision has not yet been made by Chief Justice Wilcox as to whether leave will be granted.

“If the application for leave to appeal is granted, a Full Court of the Industrial Relations Court will hear the appeal. Alternatively, if refused, the applicants would be entitled to seek relief in the High Court of Australia.”

In relation to the proceedings by former members of the BLF in the Supreme Court he noted that these proceedings have been stayed pending the determination of the proceedings in the Industrial Relations Court.

“On 16 September, his Honour (Chief Justice Wilcox) gave further directions to the parties in relation to two matters;

1. In relation to the hearing of the application by Mr Sutton and the CFMEU, directions were given in relation to the exchange by the parties of pleadings and submissions.
2. In respect of the application of the State of Victoria and Dr Sharp for leave to appeal on the jurisdictional issue, His Honour indicated that he proposed to deliver his reasons for judgement shortly.

Following receipt of his reasons, the State of Victoria and Dr Sharp have been directed to serve the other parties with submissions in support of the application for leave to appeal. ... I expect that his honour will then give his decisions on the question of leave to appeal. ...”

**Concluding Comments**

The above narration of recent events indicates that litigation on this matter is going to be spread out over some considerable time. The Committee has therefore resolved not to spend further time deliberating on this matter.

The Committee has concluded that if the outcome of the current round of litigation favours the State of Victoria, then it would be pleased to receive a further reference.

**- The kind permission of the Economic Development Committee to publish these extracts from its Final Report is gratefully acknowledged.**