Two and Two Make Five: Industrial Relations and the Gentle Art of Doublethink

Braham Dabscheck*

Abstract

The paper employs George Orwell's notion of doublethink in examining three contemporary industrial relations issues. They are the Cole Royal Commission into the building and construction industry, bargaining fees and employee entitlements. The Cole Royal Commission was an inquisition into the heresy of unionism. The decision of a Full Bench of the Australian Industrial Relations Commission on bargaining fees has found that collective bargaining does not pertain to the employer-employee relationship. This decision encourages free-riding to weaken unions. On the other hand, various employee entitlement schemes, developed by the Australian government, to meet obligations of companies to employees when the former collapse, enable, or encourage, companies to free-ride on the backs of taxpayers. The paper concludes with the observation that a bleak future awaits unions.

Introduction

> Doublethink means the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them... the process has to be conscious, or it would not be carried out with

* School of Organisation and Management, The University of New South Wales. This is a slightly revised and updated version of the The Sir Richard Kirby Lecture to The Industrial Relations Society of Victoria, Melbourne, Victoria 20 August 2003. This lecture was previously delivered at The Industrial Relations Society of New South Wales 2003 Annual Convention, 16-18 May 2003, The Entrance, New South Wales.

https://doi.org/10.1177/103530460501500202 Published online by Cambridge University Press

> sufficient precision, but it also has to be unconscious, or it would bring with it a feeling of falsity and hence of guilt... to forget any fact that has become inconvenient, and then, when it becomes necessary again, to draw it back from oblivion for just so long as it is needed, to deny the existence of objective reality and all the while to take account of that reality which one denies – all this is indispensably necessary.[1]

Industrial relations, that area of human behaviour where various individuals and organisations involved, or interested, in the world of work, struggle with and against each other, in trying to achieve their respective goals and objectives, is a fertile site for doublethink. Two brief examples will be provided to illustrate this point. The first concerns a speech by Tony Abbott, the Australian government's minister for Employment and Workplace Relations, to the H.R. Nicholls Society, in March 2002. In that speech he criticises 'key players' in industrial relations who 'only accept the umpire's verdict [decisions of courts and tribunals] when it goes their way'. Two paragraphs above this statement he says that the Australian government will join in an appeal against a decision of the Federal Court, which sanctions industrial action, over matters not previously considered, during the life of a certified agreement – the *Emwest* decision.[2]

The second example is a decision by Justice Kenny of the Federal Court in early 2001. The case involved consideration of whether BHP Iron-Ore's offer of workplace agreements, per the *Workplace Agreements Act 1993* (WA), breached the freedom of association provisions of the *Workplace Relations Act 1996* (Cth). Justice Kenny provides an account of a series of meetings and conferences held by senior management to improve the efficiency of BHP Iron-Ore's operation. Of particular interest here is material provided by a Mr Hannah saying 'That BHP Iron Ore could not reach its full potential with a unionised workforce'[3] Justice Kenny found that Mr Hannah's use of the term 'unionised' – note that he actually used the term 'unionised workforce' – 'should not be intended and understood as referring to union membership as such'.[4]

The context, or background, to this paper is a political/legal environment which is increasingly hostile to unions. Beginning with the H R Nicholls Society, in the mid-1980s, the Business Council of Australia's advocacy of enterprise bargaining, in the late 1980s and early 1990s, through to *Jobsback!*, the Coalition's industrial relations policy for the 1993 federal election, continuing with the stance of the Howard government in the 1998 waterfront dispute, unions have found themselves increasingly under attack.[5] This paper will focus on three contemporary is-

sues in examining industrial relations and the gentle art of doublethink. They are the Cole Royal Commission into the building and construction industry, bargaining fees and employee entitlements. The Cole Royal Commission was an investigation, or inquisition, into the heresy of unionism. Bargaining fees and employee entitlements demonstrate the application of doublethink to the issue of free-riders. The Australian Industrial Relations Commission handed down a decision which enables, or encourages, free-riders to reduce the ability of, or deplete the resources of, unions to act on behalf of members and workers. On the other hand, the approach of the Howard government to employee entitlements enables, if not encourages, companies to free-ride on the backs of taxpayers.

The Cole Royal Commission into the Building and Construction Industry

Royal Commissions are pretend courts, judicial facades. Chief Justice Gibbs in *Builders Labourers' Federation* described a Royal Commission as being 'A mere inquiry which cannot lead to judgment'.[6] While the persons who constitute Royal Commission may be judges, or retired judges, are granted the same protection and immunities as a justice of the High Court, and are granted extensive powers to obtain information, requiring witnesses to provide evidence and produce documents, even to the extent of self-incrimination, they are not courts. Royal Commissions are an arm, or extension, of the Executive. They derive their authority from the Letters Patent, focusing on the Commonwealth, from the *Royal Commissions Act 1902* (Cth). Section 1A of the Act empowers a Royal Commission 'to make inquiry into and report upon any matter specified in the Letters Patent'.[7] While Royal Commissions afford a degree of procedural fairness to those accused of 'wrong doing' – a chance to respond to such accusations – it is far from the standards of natural justice, rules of evidence, testing of witnesses and the use of cross examination associated with courts and judicial determinations.

Chief Justice Gibbs has described Royal Commissions 'as acting in a purely inquisitorial capacity'.[8] To paraphrase him a Royal Commission is an inquisition. Two alternative definitions of an inquisition will be provided here. First, an inquisition 'is an investigation, or commission of inquiry'.[9] Second, an inquisition is a tribunal created to enable judgments to be made against heretics, persons and institutions who are opposed to, or do not embrace, the values, ideology and interests of whoever constitutes the inquisition or brought the said inquisition into being. In Orwellian

terms, this second definition is a vehicle for a continuous 'hate' session.[10]

Royal Commissioner Cole was appointed by Letters Patent on 29 August 2001 'to inquire into and report on ... the nature and extent of any unlawful or otherwise inappropriate workplace practices or conduct' concerning the operation of the building and construction industry.[11] Evidence obtained by a Royal Commission cannot be used in subsequent court proceedings.[12] It can, of course, damage the reputations of those accused when such evidence is aired during proceedings of a Royal Commission.

Commissioner Cole produced a twenty-three volume report. Twenty-two of these volumes are publicly available. The twenty third comprises findings concerning 'unlawful' or 'criminal' conduct. Commissioner Cole decided that such material should only be made available to appropriate prosecutory bodies for their consideration.[13] Volume One of his report provides a summary of his findings concerning 'inappropriate' behaviour. He lists 179 such acts.[14] Of these, 166 were committed by unions and nine by government departments/instrumentalities because of 'inappropriate' pressure placed on them by unions. Four were other instances. These final four involved situations where employers had not observed occupational health and safety standards.

The building and construction industry has a high level of workplace deaths and injuries (see below). Commissioner Cole only found four examples where employers breached occupational health and safety standards. His findings do not include any material on 'inappropriate' behaviour by employers concerning 'phoenix' companies, non-payment of employee entitlements, tax evasion or avoidance and the use of illegal immigrant labour. He found many instances of 'inappropriate' union behaviour, hardly any instances of 'inappropriate' employer behaviour.[15]

Commissioner Cole is critical of the decision of the Full Court of the Federal Court of Australia in *Electrolux No. 2*.[16] This decision sanctioned the payment of bargaining fees by non-union members to unions[17] (see below). It might be interesting to contrast the position of Commissioner Cole with Sir Charles Lowe, who conducted a Royal Commission into the Communist Party in Victoria in 1949/1950. Sir Charles Lowe said,

> My present impression is that I ought not to embark upon enquiry which will tend in any way to call in question the correctness of a decision of a Court of competent jurisdiction ... Court proceedings would be impossible if each tribunal were invited, as matters in turn came before it, to reinvestigate decisions which had been

> come to by other tribunals. That can only be done by a Court of Appeal or by proceedings to set aside the original proceedings and neither of those matters is within my competence.[18]

In examining issues associated with communism, and communists, in the middle of the twentieth century, Sir Charles Lowe set himself a standard of not testing, commenting upon or rejecting the decisions of courts. This was not an approach employed by Commissioner Cole in his examination of issues associated with 'inappropriate' action by unions, and unionists, at the beginning of the twenty first century. The 'problem' of unionism, at the beginning of this century, 'demands' a different response, so it seems, to that of communism in the middle of the last century.

Behaviour which is not 'unlawful' or, to be more specific, which is lawful – such as the decision of the Full Court of the Federal Court in *Electrolux No. 2* – can be deemed to be 'inappropriate'. Legislative changes can be recommended which will transform that which is 'inappropriate' into that which is 'unlawful'. Through the interplay of 'unlawful' and 'inappropriate', contained in the Letters Patent of the Royal Commission, the vice of doublethink can be played out. That which is lawful is unlawful.

As already mentioned Commissioner Cole made a large number of findings concerning 'inappropriate' behaviour by unions, especially, if not mainly, the Construction, Forestry, Mining and Energy Union. Given that a Royal Commission does not employ the same standards of natural justice and procedural fairness as a court it is difficult to know how to evaluate the usefulness of his findings concerning 'inappropriate' union behaviour.

One way to test the veracity or reliability of Commissioner Cole's findings is to examine the inferences and conclusions he drew from documents and data, publicly available, which are not complicated by issues of natural justice and procedural fairness. Three examples will be given here – examples, which go to the heart of his rationale for reforming the building and construction industry.

The first concerns levels of industrial conflict. Commissioner Cole maintains that the 'culture in that part of the industry subject to the Commission's terms of reference is characterised by confrontation and conflict ... [There is] a high level of industrial disputes'.[19] This statement is not supported by data concerning the level of industrial disputation in the industry. In the period 1981 to 2002 – the Royal Commissioner provides data up to 2001;[20] data for 2002 has been included[21] –on average, each worker in the building and construction industry spent 0.481 of a day per year in industrial action. This translates into 3.85 hours per year, as-

https://doi.org/10.1177/103530460501500202 Published online by Cambridge University Press

suming an eight hour day (40 hour week) and 3.66 hours per year assuming a 7.6 hour day (38 hour week). If it can be assumed that workers in the industry work 200 days a year, this would mean that, on average, each worker in the period 1981 to 2002 spent 0.0024 of their total working time available to them in industrial disputes. Or alternatively, 0.9976 of total working time was devoted to activities other than industrial disputes.

The second example concerns productivity in the industry. In examining enterprise bargaining in major/large building sites Commissioner Cole said,

> There has never been true enterprise bargaining in projects in CBDs of major capital cities or major regional cities. The productivity gains from flexibility anticipated more than a decade ago have not been achieved because of union resistance to enterprise bargaining.[22]

In a section concerning inflexible practices with particular emphasis on the constraints that apparently flow from awards and agreements, Commissioner Cole said they 'prevent employers and employees from negotiating agreements to suit their circumstances. In effect there are key aspects of building and construction businesses where productivity improvements are impossible because the status quo is locked in'.[23]

The Royal Commission commissioned two reports on productivity. They do not support Commissioner Cole's findings of 'no productivity growth'. The first by Tasman Economics provides long run data on various measures of productivity. Both labour and multifactor productivity increased during the 1990s, with declines in the new century. Amongst other things Tasman Economics said that 'tackling industrial disputes is not a panacea for improving productivity. There is a poor direct correlation between the average number of days lost to industrial disputes and changes in the ... productivity measures.'[24]

The second was a report prepared by the School of the Built Environment, per Unisearch Limited of the University of New South Wales. This report compared and benchmarked, the performance of the Australian industry with that of other countries. It found that in terms of both cost and productivity Australia performed quite well. The report said,

> In terms of cost performance, Australia's building and construction industry has been rated highly in international research comparisons and published series in construction costs. The most common ranking for Australia was second place ... In two studies Australia was ranked highest ... Australia fell within the group of countries with a clear competitive advantage in the majority of studies described.

> In terms of productivity, international research comparisons indicate that Australia is on a par with Japan and Germany in value added per hour, performing slightly better than France and the UK, but lagging behind the US, Canada, and Singapore. In value added per employee the picture is similar with Australia on a par with Japan, performing slightly better than the UK, Germany and France. The US, Canada and Singapore have a clear competitive advantage in both cases, and the small differences between the other countries may not be statistically significant. Both indicators show an upwards trend in Australia over the ten year period shown.[25]

Notwithstanding his observations concerning 'no productivity growth' Commissioner Cole does acknowledge the findings of the Unisearch Report. He said, 'It is true that a number of international studies have concluded that the Australian building and construction industry is among the better performers internationally.' He then indulges in the lawyer's trick of finding an alternative term for productivity, and using this distinction to deny the evidence of research that he in fact commissioned. He says that 'The studies do not show that the industry is operating efficiently'.[26] *The Macquarie Dictionary* defines efficiency as 'the ratio of the work done or energy developed by a ... to the energy supplied to it.'[27] Efficiency and productivity are synonyms not antonyms.

The third example is Commissioner Cole's findings on the link between pattern bargaining and productivity. He maintains that 'The "one size fits all" approach of pattern bargaining impedes productivity, flexibility and in many cases the individual aspirations of workers'.[28] A report provided by the Australian Centre for Industrial Relations Research and Training (ACIRRT) of the University of Sydney, prepared for the Royal Commission, does not support the claims concerning the nexus between pattern bargaining and productivity. The ACIRRT report found that agreements in the industry had different productivity enhancing measures, hours of work provisions were designed to enhance flexibility in working arrangements, there was flexibility surrounding the way in which work was performed, and agreements contained numerous provisions – such as total quality management, quality assurance, continuous improvement and benchmarking – consistent with productivity enhancement.[29]

In addition, ACIRRT identified 23 different types of pattern bargains within the industry. Two reports provided by the Department of Employment and Workplace Relations identified 45 pattern bargaining agreements in the industry. The second of these reports found that patterns 'are linked to particular projects or sites or cover particular sectors of the industry

such as plumbing'.[30]

Pattern bargaining is normally taken to mean the pursuing and establishment of common terms and conditions of employment across a large number of companies, which are independent of each other contractually. Or in the words of Peter Reith, the then Minister for Employment, Workplace Relations and Small Business, in his second reading speech for the *Workplace Relations Amendment Bill 2000* (Cth), which was rejected in the Senate, pattern bargaining 'is the practice whereby unions demand common outcomes in respect of terms and conditions of employment across a swathe of employers or an industry'.[31]

A building project or site 'operates' like a chain. The completion of the building is undertaken by a series of interdependent operations involving the exercise of different and discrete skills and functions. Such tasks are co-ordinated by a head contractor. The description of that which occurs in a building site or project as pattern bargaining is different from the definition of Peter Reith above, and as the term is normally understood. Remember that the Department of Employment and Workplace Relations has found forty-five pattern agreements operating in the industry. A garment with forty-five patterns looks more like a mess than something that is planned and co-ordinated. An industry characterised by forty-five 'major' and numerous small other, agreements bespeaks flexibility and adaptability rather than the imposition of some form of control from above.

Remember Commissioner Cole's 'one size fits all' comment concerning pattern bargaining. A few pages after this passage, Commissioner Cole pointed out that the industry had increasingly made use of certified agreements under Part VIB of the *Workplace Relations Act 1996* (Cth). He says, 'Many of these agreements still include complex sets of allowances and special rates. The sheer number and complexity of these allowances makes it administratively costly for businesses to calculate their workers' rightful entitlements.'[32] The problem for Commissioner Cole here is that 'the sheer number and complexity of allowances' is inconsistent with his 'one size fits all' notion.

In the financial years July 1995 to June 2000, forty-nine deaths and 14,286 injuries occurred each year in the building and construction industry.[33] In the introduction to Volume Six of his report, Commissioner Cole said, 'The Commission examined no more important subject than occupational health and safety in the industry'.[34] Notwithstanding that he 'examined no more important subject' he did not collect information on 'unlawful' and 'inappropriate' occupational health and safety practices,[35] as

he had with other issues, such as the activities of unions and their negative impact on industrial relations. He said he was concerned with the future, rather than the past. He added,

> Criticisms were levelled at the Commission that it did not investigate in the hearing room occupational health and safety incidents in the same manner as it investigated other aspects of activity in the industry. That criticism was not soundly based.
>
> The public hearings of the Commission exposed to the public gaze aspects of practices in the industry not previously publicly known. In contrast, occupational health and safety incidents are well known to the public and well documented in public records ... To revisit examples of matters already fully investigated would not have improved our existing knowledge and, more importantly, would not have improved future safety.[36]

The Royal Commission devoted most of is resources and energy to investigating an issue which was not the most important – unions and their impact on industrial relations – and substantially less resources and energy to an issue which was most important - occupational health and safety. An issue of less importance was thoroughly investigated; the most important issue received substantially less investigation. The doublethink here is,

> That which is important is unimportant.
>
> That which is unimportant is important.

Commissioner Cole advances the proposition that the public, and public authorities, know less about the activities of unions and industrial relations, than they do about occupational health and safety. In various sections of his report Commissioner Cole provides extensive details of public inquiries, which have been held into industrial relations in the industry,[37] and references to numerous and various decisions of different courts and tribunals. It is cynical in the extreme to suggest that the public has been informed and has knowledge about the extent of, and various dimensions, of occupational health and safety problems in the building and construction industry.

The proposition that 'knowledge' will not help to 'improve the future' goes against the tenets of all research. Moreover, in responding to 'problems' of unions and industrial relations, the gathering of such knowledge was found to be indispensable – why else would twenty two volumes of a

twenty three volume report contain such information? – but not so when it came to occupational health and safety.

Commissioner Cole recommended that the focus of industrial relations negotiations should move away from a regime of pattern bargaining, involving unions, to one of decentralised enterprise bargaining involving sub-contractors.[38] Mayhew and Quinlan have found that occupational health and safety standards in the building industry are 'compromised' amongst sub-contractors and self employed workers. They also said, 'It can be predicted that morbidity levels amongst building workers will deteriorate as outsourcing becomes even more prevalent.'[39]

In adopting a 'no public hearings' stance on occupational health and safety, Commissioner Cole protected employers from the 'public gaze'. The industry experiences forty-nine deaths and over 14,000 injuries each year. Imagine, for a moment, if the employers or principals of the companies of workers killed in the last year had been required to testify in public hearings about their approach to and administration of occupational health and safety. Imagine, for a moment, say forty-nine individuals, one after the other, day in day out, trying to deflect the opprobrium of their occupational health and safety failures. Such hearings would have cast employers in a poor light and had the potential to demonstrate a positive role for unions.

Bargaining Fees

The payment of bargaining agents' fees to unions by non-union members, who avail themselves of the benefits from enterprise agreements, negotiated by unions, has become a major cutting-edge industrial relations issue. As far as unions are concerned bargaining fees are designed to stop 'free-riding' by non-members, enhance their bargaining strength and concomitant ability to negotiate improved terms and conditions for workers covered by enterprise agreements, member and non-member alike. In *Electrolux No. 1* part of the bargaining fee clause that was the bone of contention stated, 'The company shall advise all employees prior to commencing work for the company that a 'Bargaining Agents' fee of $500.00 per annum is payable to the union.'[40]

Among other things this issue has involved resolving tensions, or alternatively – and more correctly – not resolving tensions, between different sections of the *Workplace Relations Act 1996* (Cth). Section 170LI enables the Australian Industrial Relations Commission to certify agreements 'about matters' pertaining to the employer-employee relationship.

Section 170ML(2)(e) enables parties to participate in protected action (free from tortious claims) 'in supporting or advancing claims made in respect of the proposed agreement'.

The issue has been like a tennis ball bouncing backwards and forwards between the Australian Industrial Relations Commission and Federal Court, in the sense of both individual members of each institution and Full Benches of the former and a Full Court of the latter.[41]

One problem has been to discern the meaning of 'about matters'. Does the term mean what it says, or should it be interpreted, or re-read, to mean 'about all matters'? The problem has been in certifying a Section 170LI agreement, is it appropriate to certify such an agreement, comprehensive in nature, if it contains a clause which is not deemed to be 'about matters'? If bargaining fees are not deemed to pertain to the employer-employee relationship, and all other items are, can an agreement, which is 'about matters', be certified? If not, industrial action associated with the making of such an agreement may not be protected. Even though unions had used industrial action to pursue 'matters' pertaining to the employer-employee relationship such action would not be protected. Sections of the *Workplace Relations Act 1996* (Cth) enabling protected action would be nugatory, with unions being subject to actions in tort.

A second, and more important problem, which requires resolution, is do bargaining fees pertain to the employer-employee relationship? In *National Union of Workers* a Full Bench of the Australian Industrial Relations Commission heard submissions that bargaining fees improved the bargaining strength of employees as a whole and assisted in building solidarity between employees.

The Full Bench said, with respect to the first submission, 'The question is not whether the bargaining agents fee clause would assist in collective bargaining but whether it pertains to the relationship of employers and employees'. Note what the Full Bench is saying here - collective bargaining is different from and does not pertain to the employer-employee relationship. On the second submission the Full Bench said, 'At best it can be said to relate to the relationship between the unions and the employees concerned, but the existence of that relationship is we think of no relevance to the employer'.[42] The relationship of unions and employees is of no relevance, or interest to employers. What was the 1998 waterfront dispute about?[43] Think of all those employers over the years (and in so many nations) who have fought recognition disputes, who have tried to break the relationship between unions and employees – they were involved in battles which were 'of no relevance' to them.

National Union of Workers sees collective bargaining, which involves unions, and the union-employee relationship, which involves unions, as being outside the employer-employee relationship. Per *Phonogram Officers*[44] these findings by the Full Bench are binding on all members of the Australian Industrial Relations Commission.[45]

Employee Entitlements

Both the common law and statutes support the sanctity of contract. Once a contract has been entered into, it is incumbent on the parties to honour its various terms. Workers, for example, should not only expect, but are entitled to the terms contained in their contract (or other employment instruments) for which they provide their labour. Every year numerous companies find themselves placed into liquidation, receivership or operate under a deed of arrangement. Such companies are unable to meet their obligations to employees – unpaid wages, accrued annual and long service leave, pay in lieu of notice and redundancy pay.

This issue became more prominent in 2001 and 2002 with the collapse of a number of 'leading', or large, companies such as One-Tel, HIH and Ansett. The issue had an added edge, with directors of some companies walking away with large pay-outs, while workers looked forward to receiving none, or little, of their entitlements.

Companies can collapse or become insolvent for two reasons. First, a company qua company, finds itself unable to withstand competitive pressures and goes under. Second, a company may be one of many in a large corporate structure. Funds are channelled, redirected from this 'collapsing' company to other parts of the 'corporate empire'. The 'collapsing' company having liabilities, such as employee entitlements, has no assets and is unable to meet these liabilities; even though other companies within the corporate group, or the corporate group as a whole is solvent. Such schemes of arrangement were brought into national prominence during the 1998 waterfront dispute. Since *Salomon*,[46] a case decided more than a century ago, courts have been reluctant to look behind the 'corporate veil'.

There have been two major responses to this problem. First, a number of unions have sought to negotiate agreements with employers which involved the setting aside of funds to cover individual members or workers' entitlements, as they accrue, into a trust fund.[47] Second, there has been the development of different entitlement schemes by the Australian government. Employees who have not received their entitlements from an insolvent company are provided with tax payer funds.

In February 2000 the Australian government introduced the Employee Entitlement Support Scheme which provided payments to a maximum of $20,000. In 2000 it paid over three million dollars to 1,000 employees. A second scheme, entitled the General Employee Entitlements and Redundancy Scheme, was introduced in September 2001. It capped payments to $75,200 for 2001/2002 and $81,500 for 2002/03. Also in September 2001 it introduced the Ansett Employees Entitlement Scheme. This scheme is designed to ensure Ansett workers receive all their entitlements to be funded by a $10 levy on air passenger tickets.[48]

These schemes enable companies, who do not met their obligations to employees, to free-ride on the backs of Australian tax payers.

An Age Like This [49]

In the second reading speech of the *Workplace Relations and other Legislation Amendment Bill 1996* (Cth), the then Minister for Industrial Relations, Peter Reith said the 'legislation puts the emphasis on direct workplace relationships ... without unwanted third party intervention'.[50] Note the inclusion of the qualifier 'unwanted'. He did not say 'without third party intervention'. There are two elements to this notion. First, it does not rule out *wanted* third party intervention. Examples of such 'wanted intervention', as revealed by this paper, are the Cole Royal Commission, the creation of an Interim Task Force (which resulted from Commissioner Cole's First Report),[51] his recommendation to establish the Australian Building and Construction Commission to regulate the industry, the decision of the Full Bench of the Australian Industrial Relations Commission disallowing bargaining fees, and the Australian government's various employee entitlement schemes. The second element is to find a candidate, or candidates, who qualify as 'unwanted third party interveners'.

This paper has examined three contemporary industrial relations issues through the perspective of Orwellian doublethink. The Cole Royal Commission into the building and construction industry was an inquisition into the heresy of unionism. The Letters Patent asked Commissioner Cole to investigate 'unlawful' and 'inappropriate' practices in the industry. He made findings that 'lawful' behaviour, even a decision of an appeal court, was 'inappropriate'; and recommended, at times, extensive legislative changes to make such behaviour 'unlawful'. In terms of doublethink that which is lawful is unlawful. Commissioner Cole kept from the 'public gaze', and devoted little time, energy and resources of the Royal Commission – one report out of twenty three – to an issue which,

he claimed, was most important to the Royal Commission, namely occupational health and safety. On the other hand, he devoted most of the time, energy and resources of the Commission – in terms of hearing days, gathering and presentation of material, twenty two of twenty three volumes – to an issue of less importance – that of unions and associated 'poor' industrial relations. That which is important is unimportant. Moreover, the inferences and conclusions Commissioner Cole 'derived' from publicly available material, much of which he commissioned himself, does not engender confidence in his findings, which have not been subject to 'normal' standards of natural justice and procedural fairness.

Both the Federal Court and the Australian Industrial Relations Commission have handed down decisions which found actions by unions in pursuing collective bargaining to enhance the welfare of members and workers was foreign to the employer-employee relationship and/or not sanctioned by the *Workplace Relations Act 1996* (Cth). Justice Kenny's decision in *BHP Iron-Ore* and the Full Bench of the Australian Industrial Relations Commission in *National Union of Workers* has served to distinguish unions and collective bargaining from the employer-employee relationship.

Bargaining fees and employee entitlements reveal different approaches to free-riders. *National Union of Workers* enables, or encourages, free-riders to reduce the ability of, or deplete the resources of, unions to act on behalf of members and workers. The Australian government's entitlement schemes – given timidity to peer behind the 'corporate veil', or other legislative solutions – enables, if not encourages, companies to free-ride on the backs of taxpayers. In that other classic work by George Orwell, *Animal Farm*, the pigs decreed

> All Animals Are Equal
>
> But Some Animals Are More Equal Than Others.[52]

In *Nineteen Eighty-Four* Winston Smith, 'the last man', is enabled to read the fictitious treatise, *The Theory And Practice Of Oligarchical Collectivism*. He is about to examine a section explaining the motive which lies behind power, when he is disturbed by the silence of his female companion, Julia, sleeping. Later on, his protagonist, O'Brien, explains to him the purpose of power, O'Brien says,

https://doi.org/10.1177/103530460501500202 Published online by Cambridge University Press

> Power is not a means, it is an end ... The object of power is power ... power is power over human beings ... above all over the mind ... If you want a picture of the future, imagine a boot stamping on a human face – for ever.[53]

Figuratively speaking, this is the fate that awaits unions. Two and two make five. Industrial relations and the gentle art of doublethink.

Notes

1 George Orwell, *Nineteen Eighty-Four,* Penguin, Melbourne, 1969, p. 171.
2 Tony Abbott, 'Losing the Legislation Fixation', Proceedings of the XXIIIrd H.R. Nicholls Society Conference, Melbourne, 22-23 March, p. 4; *Emwest Products v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCA 1334; *Emwest Products v Automotive, Food, Metals, Printing and Kindred Industries Union* [2002] FCA 61; and *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCAFC 386.
3 *Australian Workers' Union v BPH Iron-Ore* [2002] FCA 3, at paragraph 104.
4 [2001] FCA 3, at 219.
5 For commentaries on these by the author see Braham Dabscheck, *Australian Industrial Relations in the 1980s*, Oxford University Press, Melbourne, 1989, pp. 113-141; Braham Dabscheck, 'The Coalition's Plan to Regulate Industrial Relations', The Economic and Labour Relations Review, June 1993; Braham Dabscheck, The Struggle for Australian Industrial Relations, Oxford University Press, Melbourne, 1995 pp.79-116; and Braham Dabscheck, 'The Waterfront Dispute: Of Vendetta and the Australian Way', *The Economic and Labour Relations Review*, December 1998.
6 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* [1982-1983] 152 CLR 25, at page 53. For an examination of the work of Royal Commissions see Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, Sydney, 2001. For a succinct critique of their operation see the minority judgment of Justice Murphy in *Building Labourers' Federation,* 152 CLR 25, at 104-112.
7 *Royal Commissions Act 1902* (Cth), Section 1A.
8 *Builders Labourers' Federation*, 152 CLR 25, at 53.
9 *The Macquarie Dictionary*, Macquarie Library, Sydney, 1981, p. 915.
10 Orwell, *Nineteen Eighty-Four*, p. 5.
11 Letters Patent to the Honourable Terence Rhoderic Hudson Cole RDF QC, Entered on Record Register of Patents No. 36, on 29 August 2001.
12 Donaghue, *Royal Commissions*, p. 32.
13 Final Report of the *Royal Commission into the Building and Construction Industry*. Volume Two, Conduct of the Commission – Principles and Procedures, Commonwealth of Australia, Canberra, 2003, p. 59.
14 *Royal Commission*, Volume One, Summary of Findings and Recommendations, pp. 6-10 and 175-7.
15 For critiques of the Royal Commission see *The Royal Commission into The Building and Construction Industry: A Howard Government Attack on the*

https://doi.org/10.1177/103530460501500202 Published online by Cambridge University Press

Construction Industry [Australian Council of Trade Unions] January D No:11/ 2003; Jim Marr, *First The Verdict: The Real Story of the Building Industry Royal Commission*, Pluto Press, Sydney 2003; and Peter Sheldon and Louise Thornthwaite, 'Employer Matters in 2002', *The Journal of Industrial Relations*, June 2003.

16 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products* [Electrolux No. 2] [2002] FCAFC 199. Also see *Electrolux Home Products v Australian Workers Union* [Electrolux No. 1] [2001] FCA 1600.

17 *Royal Commission*, Volume Five, Reform-Establishing Employment Conditions, p. 127.

18 Quoted in Murray V. McInerney, 'Procedural Aspects of a Royal Commission', Part 2, (1951) 24 *Australian Law Journal*, p. 443. See *Report of Royal Commission Inquiry into the origins, aims, objects and funds of the Communist Party in Victoria and other related matters,* Government Printer, Melbourne, 1950.

19 *Royal Commission,* Vol. 3, National Perspective Part 1, pp. 209-210.

20 *Royal Commission,* Volume Three, p. 319.

21 Australian Bureau of Statistics, *Industrial Disputes*, 6321.0, December 2002.

22 *Royal Commission,* Volume Three, p. 38.

23 *Royal Commission,* Volume Three, p. 215.

24 Tasman Economics, Productivity and the Building and Construction Industry Report, A report prepared for the Royal Commission into the Building and Construction Industry, 12 November 2002. The report is reproduced in *Royal Commission*. Volume Four, National Perspective Part 2. The quote is on page 13 of the latter.

25 Report prepared by Unisearch Limited University of New South Wales on Workplace Regulation, Reform And Productivity In The International Building And Construction Industry for Royal Commission into the Building and Construction Industry 2002. The report is reproduced in *Royal Commission,* Volume Four. The quote is on page 259 of the latter.

26 *Royal Commission,* Volume Three, p. 224.

27 *The Macquarie Dictionary*, p. 576.

28 *Royal Commission,* Volume Three, p. 212.

29 ACIRRT, University of Sydney, Key features and trends in building and construction industry enterprise agreements, Produced for Royal Commission into the Building and Construction Industry, 29 April 2002. The report is reproduced in *Royal Commission*, Volume Four. The material referred to is from pp. 208-9 of the latter.

30 Federal Collective Agreements in the Construction Industry, Data from the Workplace Agreements Database (WAD) maintained by the Department of Employment and Workplace Relations, 16 August 2002; and Federal Collective Agreements in the Construction Industry Pattern Agreements, Data from the Workplace Agreements Database (WAD) maintained by the Department of Employment and Workplace Relations, 6 September 2002. Both are reproduced in *Royal Commission*, Volume Four. The quote is from page 232 of the latter.

31 Peter Reith, Second Reading Speech, *Workplace Relations Amendment Bill 2000* (Cth), p. 2.

32 *Royal Commission,* Volume Three, p. 215.
33 *Royal Commission,* Volume Six, Reform - Occupational Health and Safety, p. 157.
34 *Royal Commission,* Volume Six, p. 5.
35 He did make four findings where employers had not observed occupational health and safety standards, and several more concerning unions inappropriately using disputes over occupational health and safety for broader, and 'inappropriate', claims. See note 13.
36 *Royal Commission,* Volume Six, pp. 6-7
37 See *Royal Commission,* Volume Four, Recent Reviews of the Building and Construction Industry, pp. 67-147.
38 *Royal Commission,* Volume One, Recommendations 2-13, pp. 25-36.
39 Claire Mayhew and Michael Quinlan, 'Subcontractors and occupational health and safety in residential building industry', *Industrial Relations Journal*, September 1997, p. 202. Commissioner Cole is aware of this negative effect of sub-contracting. See *Royal Commission,* Volume Six, p. 43.
40 *Electrolux No. 1*, at 6.
41 *Electrolux No. 1; Electrolux No. 2; Webforge,* AIRC, PR914378 (18 February 2002); *Knox City Council*, AIRC, PR914635 (22 February 2002); *Health Minders Limited*, AIRC PR9209906 (6 August 2002); *SGM Electrical*, AIRC, PR921937 (30 August 2002); *Graeme and Chris Herbert*, AIRC, PR922568 (17 September 2002); *Atlas Steels*, AIRC – Full Bench, PR917092 (29 April 2002), and *National Union of Workers*, AIRC – Full Bench, PR926554 (10 January 2003). For decisions from other jurisdictions see *Skills Training Mackay* [2002] QIRComm 14; and *Review of the Principles for Approval of Enterprise Agreements 2002*, [2002] NSWIRComm 342. Bargaining fees have not been found to breach the freedom of association provisions of the *Workplace Relations Act 1996* (Cth). See *Accurate Factory Maintenance No. 1*, AIRC, PR900919 (9 February 2001); and *Accurate Factory Maintenance No. 2*, AIRC – Full Bench, PR910205 (12 October 2001). For a general overview of bargaining fees see Graeme Orr, 'Agency Shops in Australia? Compulsory Bargaining Fees, Union (In)Security and the Rights of Free-Riders', *Australian Journal of Labour Law*, May 2001.
42 *National Union of Workers*, at 43.
43 See Braham Dabscheck, 'The Waterfront Dispute: Of Vendetta and the Australian Way', *Economic and Labour Relations Review*, December 1998.
44 *The Queen v Moore; ex Parte Australian Telephone and Phonogram Officers' Association*, (1982) 148 CLR 600.
45 In 2003 the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003* (Cth) outlawed the payment of bargaining fees. It became operative on 9 May 2003. On 2 September 2004 the High Court, by a majority of 6 to 1, in *Electolux Home Products v Australian Workers Union* [2004] HCA 40, found that bargaining fees were not 'about matters' pertaining to the employer employee relationship.
46 *Salomon v Salomon* [1897] AC 22.
47 See *Transfield*, AIRC, PR908287 (30 August 2001); *Transfield v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCA 1533 and *Electrolux No. 1*. Also see Joellen Riley, 'Bargaining for Security:

Lessons for Employees from the World of Corporate Finance', *The Journal of Industrial Relations*, December 2002.

48 Details of these schemes can be obtained from the Department of Employment and Workplace Relations website: http://www.workplace.gov.au.

49 This is the title of Volume One of George Orwell's collected works. See Sonia Orwell and Ian Agnus (editors), *The Collected Essays Journalism and Letters of George Orwell, Volume 1: An Age Like This 1920-1940*, Seeker and Warburg, London, 1968.

50 *Hansard*, House of Representatives, 23 May 1996, p. 1298.

51 *Royal Commission*, First Report, 5 August 2002.

52 George Orwell, *Animal Farm,* Penguin, Melbourne, 1968, p. 114.

53 Orwell, *Nineteen Eighty-Four*, pp. 173, 211-5.