Formal Review into Victorian Government Bodies' Engagement with Construction Companies And Construction Unions

Final report

November 2024

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Final Report

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Acknowledgement

The Formal Review acknowledges the traditional Aboriginal owners of country throughout Victoria and recognises their continuing connection to land, sea, culture and community. The Review pays its respects to Elders past, present and emerging.

Contents

Executive summary

The issues on government-funded construction sites that led to this Review's establishment have occurred within a context of intersecting Commonwealth laws, criminal laws, state laws and government procurement policies and practices.

The Terms of Reference (Appendix A) for the *Formal Review into Victorian Government Bodies' Engagement with Construction Companies and Construction Unions* (the Review) require the Review to set out these responsibilities and consider how Victorian government bodies can be strengthened to respond to the types of criminal and unlawful behaviour alleged.

Many of the most powerful levers and interventions to respond to these allegations sit with the Commonwealth, as the jurisdiction responsible for industrial relations law, and with the administration of the CFMEU. However, any steps Victorian government agencies can take to improve oversight and management of government-funded construction projects will assist in creating an environment in which it is more difficult for the behaviours reported to occur.

As this report describes, a system this complex requires a multifaceted set of responses to effect change – cultural, regulatory, legal, policy and contractual. No agency on its own can resolve these issues. Therefore, the Review considers that the responses open to Victoria centre around driving a concerted and collective effort by relevant employers, agencies and law enforcement officers to encourage complaints and to share and act on information they receive.

The Review's recommendations recognise the need to be flexible, agile and proportionate. They consider the existing roles of the Commonwealth and law enforcement bodies and aim to address gaps between these responsibilities. This Review recommends changes that can be implemented rapidly enough to work in concert with the administrative and cultural changes that are being driven by the CFMEU administration. In some key areas, such as regulation of labour hire, legislative backing is required to ensure an agency has sufficient powers to respond.

The recommendations made by the Review therefore centre around creation of a central body to handle and refer complaints, supporting an alliance of law enforcement, delivery and regulatory agencies, and strengthening the Labour Hire Authority's ability to respond to criminal and unlawful conduct by operators of labour hire firms.

The Review further recommends introduction of a requirement for contractors to report issues on their sites and take action where possible, and a focus on information-sharing among agencies. It recommends these arrangements be reviewed after two years and presents additional ideas for future consideration, should additional strengthening be required.

The Review considers that if Victorian government bodies have the powers they need, good visibility of emerging issues, and work together to address problems when they arise, then

Victoria will be well-positioned to capitalise on actions taken by the Commonwealth and CFMEU Administrator, and to deter the re-emergence of the behaviours that have led to this Review.

In parallel with the changes being made at the Commonwealth level, these actions will make construction projects more difficult to access and more hostile environment in which to operate for those with unlawful intent, while continuing to protect the health and safety of Victorian construction workers.

Recommendations

Recommendation 1

That government establish a complaints referral body to receive and refer complaints relating to Victorian government construction sites.

Recommendation 2

That government establish an alliance involving state and federal law enforcement and regulators and other relevant entities with a role in addressing allegations of criminal or unlawful conduct on Victorian government construction sites. This alliance should share information, coordinate action and inform government of emerging issues on these sites.

Recommendation 3

That government amend the *Labour Hire Licensing Act 2018* to add the following discretionary considerations to the fit and proper person test, so the Authority may find that an applicant is not a 'fit and proper person' if the applicant:

- has any conviction or finding of guilt for an indictable offence, other than those specified in s22(a), in the previous 10 years
- held any role as an officer in other companies in the previous 5 years, where that company became insolvent or had a labour hire licence cancelled, suspended or revoked within 6 months of that person's departure from the company
- has a close associate who would not be found to be a 'fit and proper person'
- is a member of a Part 5C organisation as defined in the *Criminal Organisations Control Act 2012.*

Recommendation 4

That government amend the *Labour Hire Licensing Regulations,* to define certain activities connected to construction to be work within the construction industry. This would ensure clarity about when providing workers in connection with a construction site brought an organisation within the remit of the Labour Hire Authority.

Recommendation 5

That government amend the *Labour Hire Licensing Act* to give the Authority the power:

- to request in writing that a person provide information or documents that the Authority reasonably believes is necessary for monitoring compliance with the *Labour Hire Licensing Act.* This request should provide its recipient with the authority to provide the information, and preserve the recipient's right to refuse to provide the information; and
- to require, by written notice, that a person provide specified information for the purpose of monitoring compliance with the *Labour Hire Licensing Act* within the time specified and in the manner specified. Failing to comply with a notice should be an offence.

Recommendation 6

That government amend the *Labour Hire Licencing Act 2018* to enable the Register of Licenced Labour Hire Providers to include contextual information in relation to suspensions and cancellations of licences. Publication should be limited to information that is not confidential under other state or federal laws, and information that does not breach the privacy of people other than the licence holder.

Recommendation 7

That construction policies and contracts for Victorian Government-funded construction projects include clauses that cover *criminal or other unlawful conduct* that require principal contractors to:

- report any suspected criminal or other unlawful conduct to the new complaints referral body
- ensure that where possible, they and their contractors act to address criminal and unlawful conduct

- promote, support and work with the new complaints referral body
- have systems and processes in place to fulfil these obligations with respect to the overall construction project, including its subcontractors.

Recommendation 8

That the implementation of these recommendations and their impact be evaluated two years after delivery of this Review, and that government consider whether further reforms are needed to provide Victorian government bodies with the powers to investigate and respond to allegations of criminal or other unlawful conduct in the Victorian construction sector.

Introduction

Background

On 20 July 2024, the Premier announced that the Victorian Government would establish a Formal Review (the Review) to strengthen the power of Victorian government bodies that engage with construction companies and construction unions to respond to allegations of criminal or other unlawful conduct in the Victorian construction sector.

The allegations of criminal activity and associations on these sites, primarily involving the Construction, Forestry and Maritime Employees Union (CFMEU), that have given rise to this review were broadly publicised by the *Age, Australian Financial Review* and Channel 9 through the 'Building Bad' series of programs and articles that began in July 2024.

The Review's understanding of the conduct involved has been further informed by discussion with a wide range of individuals and agencies, as well as by Geoffery Watson's Interim Report, *Investigation into allegations against the CFMEU* commissioned by Zach Smith, the National Secretary of the CFMEU.[1] Mr Watson was subsequently re-engaged by the Administrator with updated terms of reference.

Mr Watson found that violence was an accepted part of the culture within the union and that reports were rarely made to the police. He also found that organised crime figures and outlaw motorcycle gangs (OMCG) have infiltrated the CFMEU and placed themselves and colleagues in delegate positions through employment with third parties, often through labour hire agencies, with the aim of being "placed in positions of commercial, as well as industrial, power."

The Interim Report for this Review was provided to the Premier on 29 August 2024 and provided initial observations on current arrangements and powers, and outlined areas for more detailed examination, including:

- whether the remit of the state's integrity agencies should be expanded to bolster the protections against misconduct and corruption in Victorian government construction projects
- practices in relation to the selection of health and safety representatives, right-of-entry permit holders and union delegates on Victorian government construction projects
- how to encourage and better manage complaints from those who observe unlawful conduct on Victorian government construction projects in a more coordinated way to better respond to allegations, and how to protect complainants from reprisals.

[1] Watson G, 2024, *Watson Interim Report Investigation into allegations against the CFMEU* https://cg.cfmeu.org/cfmeu-administrator/watson-interim-report.

- how oversight of compliance with procurement and contractual requirements can be strengthened, particularly in relation to sub-contractual arrangements.
- the effectiveness of collaboration between the relevant state and federal bodies that operate in this area, and opportunities to improve information sharing between them.

Subsequent discussions and events have added additional focus on other aspects of the sector, in particular the role and regulation of labour hire firms, which have been identified as "opening a path for corruption."[2]

This report uses the term 'Victorian government construction projects' to describe the various government-funded construction projects that are the focus of the Review. While this term can relate to a wide range of construction led by government bodies to deliver projects in areas such as education, health and housing, it appears the bulk of the issues raised relate to large transport projects funded by the Victorian Government.

As noted in the interim report, the industrial relations and occupational health and safety systems relating to Victorian government construction projects are complex and are overseen by these bodies and governed by a range of different Commonwealth and state legislation, policies and regulations. They are delivered by thousands of workers, within multiple layers of contractor and sub-contractors, and there is a mix of employees, consultants, owner-operators and workers engaged through labour hire on each project at any time.

This complexity has led to gaps in oversight and a tacit acceptance that some undesirable behaviour is simply a 'cost of doing business' over many years, not just in Victoria but around the country. Any solutions therefore require a multi-agency and cross-jurisdictional response, one that also necessarily requires effort across the public and private sectors in cooperation with the relevant unions and employer groups.

This report has been informed by extensive discussions with, and submissions from, relevant Victorian government bodies as well as with stakeholders from across the construction sector, who have engaged with the Review on a confidential basis.

Developments since the Review was established

Issues in the construction sector and with construction unions, have generated a wide range of responses across jurisdictions.

On 23 August 2024, the Commonwealth Attorney General placed the Construction and General Division of the CFMEU and all its branches into administration, appointing Mr Mark Irving KC as the Administrator. Since Mr Irving was appointed, he has:

[2] Marin-Guzman D, 17 September 2024, CFMEU administrator takes on labour hire as industry model, *Australian Financial Review*.

- accepted all the recommendations made in the CFMEU commissioned report noted above by Mr Geoffrey Watson SC to investigate allegations of criminal and corrupt conduct made against the Victorian and Tasmanian Branch of the CFMEU's Construction and General Division and asked Mr Watson to continue his investigation in Victoria;
- established an integrity unit within the CFMEU administration to investigate the allegations that have been and continue to be raised with him;
- advised of his intention to commence a broader investigation into labour hire, particularly in Victoria, of how labour hire agencies enter into union agreements, their links with bikies and organised crime and any illegal payments to union officials or their relatives. The inquiry will also examine the appropriateness of labour hire being the mode of engagement of a large section of the construction workforce;
- established a whistleblower service for members, delegates and employees to anonymously report wrongdoing in both the union and industry as well as publishing a Whistleblowing and Complaints Policy[3];
- issued interim guidelines and directions on the issue of menacing behaviour[4];
- stated he will issue directions to CFMEU employees involved in the EA process regarding their obligations to act in the best interests of members and not misuse their position, declare conflicts of interest and not act in their own self-interest; and
- commenced building relationships with regulatory authorities.

Additionally, the Fair Work Ombudsman has promoted a dedicated website with a reporting facility to encourage information about workplace non-compliance by the CFMEU[5] and has reported it has 23 active investigations underway into the CFMEU and its officials' conduct.[6] The Minister for Employment and Workplace Relations has indicated he is open to extending CFMEU whistleblower protections to contractors.[7]

In July 2024 the Australian Federal Police established Operation Rye, which has been established to investigate alleged criminal conduct of the CFMEU.[8]

Similarly, Victoria Police is undertaking investigations into potentially criminal matters, advising in November 2024 that the total number of allegations received by Victoria Police has increased to 25 allegations of criminal activity connected with the CFMEU. One allegation has

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[3] https://cfmeuadministrator.elker.com/report

[4] https://cg.cfmeu.org/cfmeu-administrator/whistleblowing-and-complaints-policy

[5] https://www.fairwork.gov.au/newsroom/news/report-concerns-about-cfmeu

[6] Marin-Guzman D, 6 November 2024, AFP sets up operation to investigate CFMEU corruption, *Australian Financial Review*.

[7] Marin-Guzman D, 6 November 2024, AFP sets up operation to investigate CFMEU corruption, *Australian Financial Review*.

[8] Senate Legal and Constitutional Affairs Legislation Committee Estimates, 5 November 2024 p 114.

resulted in a male offender being charged with a criminal offence which is currently before the courts, and a separate allegation where a male offender has been charged and is subject to further legal advice. 12 matters have been referred to other agencies, including the Australian Federal Police and the Fair Work Commission.

On 28 August 2024, the Victorian Government announced that it would introduce new laws to allow organised crime groups to be banned from entering Victorian Government worksites. Those laws received Royal Assent on 22 October 2024 and are expected to commence in 2025.

On 1 September 2024, the Victorian Government made changes to the Fair Jobs Code by lowering the threshold for preassessment certificate applications from $3 million for direct contracts and $10 million for subcontracts to $1 million for all contracts. In addition, changes were made to the Code to improve transparency and ensure suppliers on Victorian Government-funded projects meet expected standards. These include requiring director identification numbers of all directors associated with the applicant ABN to be provided on application, and additional requirements that an applicant holds relevant licences and registrations for relevant employment, industrial relations and workplace health and safety laws.

Applicants will also need to disclose any receipt of Provisional Improvement Notices by workplace regulators within the last three years, if an enforceable undertaking and/or adverse ruling has been made and provide the names of all certificate applicants as well as certificate holders on the Fair Jobs Code public register at Buying for Victoria.

The Victorian Government has also initiated a separate review into the powers, functions and support provided to authorised representatives of registered employee organisations (ARREOs) and HSRs in all sectors under the *Occupational Health and Safety Act* to ensure these provisions remain effective and fit-for-purpose to deliver improved health and safety outcomes for all workers.

1. Current roles, responsibilities and powers

The terms of reference for this Review required it to inquire into and report on the current roles, responsibilities and powers of the Commonwealth and the Victorian Government to investigate or respond to allegations of criminal or other unlawful conduct in the Victorian construction sector.

The Interim Report set out an overview of the statutory roles and responsibilities of the relevant State and Commonwealth bodies. As this final report will comment further on the interactions between these bodies, that overview is included here for ease of reference.

Industrial relations

Australia has traditionally operated a dual state and federal industrial relations system.

Limited by constitutional law, federal awards covering employee minimum terms and conditions were the result of arbitration of industrial disputes by the federal tribunal that existed beyond the limits of any one state. Each of the states regulated the remaining employees who were not covered by federal awards, however, over time Australia saw continued growth in the scope of employees covered by these awards.

In the early 1990s the Commonwealth used its constitutional powers to make laws to give effect to International Labour Organisation termination of employment conventions to enact the unfair dismissal laws which covered many Australian employees.

A major shift came in 2006 when the Commonwealth used the corporations power in the Constitution to underpin its national industrial relations law-making powers. The federal laws were able to cover many more employees, as long as they were employed by an incorporated body, irrespective of their location and the existence of an industrial dispute.

This left a diminished role for the states to make laws, because of the constitutional principle that federal laws override state laws where there is an inconsistency or because the federal laws are otherwise intended to exclusively cover the subject matter field.

By that stage, Victoria had already transferred its industrial relations powers (in 1996) to the Commonwealth, shifting virtually all its employees into the federally regulated system.

Most employees are regulated by federal laws, primarily the *Fair Work Act 2009* (Cth), but the states, including Victoria, retain powers to make workplace laws in some areas including health and safety, discrimination, and workers' compensation.

As a result, and despite the shift to the prominence of the federal system, the rights and obligations of private and public sector employers and employees and their industrial associations, remain regulated by a variety of means including federal and state legislation and regulations, Commonwealth workplace agreements, federal awards, employment agreements, common law and policies including those enacted by the executive governments.

The *Fair Work Act 2009* (Cth)

The *Fair Work Act 2009* regulates the terms and conditions of employment of most employees and employers. Its provisions set out the major features of Australian industrial arrangements, including:

Enterprise bargaining

Enterprise agreements are made at a workplace level between employers and employees. In a highly unionised industry, the relevant union will be the bargaining representative of the employees. On major projects it is common for the principal contractor to have an enterprise agreement for the project with its own employees and for each of the subcontractors it uses on the project to have their own enterprise agreement with employees they engage on the project.

Union right of entry into workplaces

The *Fair Work Act* requires union officials to hold valid entry permits issued by the Commission to enter workplaces. The Commission may revoke or suspend the entry permits in certain circumstances such as where the official engages in conduct contrary to their responsibilities as a permit holder.

Union officials may also hold work health and safety entry permits under state or federal occupational health and safety legislation. Holders of these permits must also hold a corresponding entry permit under the *Fair Work Act* or applicable state legislation.

Note, however, that this does not apply to health and safety representatives employed within a workplace who do not require an entry permit.

Appointment of union delegates

A worker who is elected or appointed to represent union members in their workplace has certain protections and rights under the *Fair Work Act*, including protection from discrimination and the ability to undertake their role as a delegate without unreasonable interference by the employer.

A workplace delegate is entitled to represent the industrial interests of members of the organisation who work in a particular enterprise, and any other persons eligible to be such members, including in disputes with their employer. In doing so they are entitled to reasonable communication with those members in relation to their industrial interests, reasonable access to the workplace and workplace facilities where the enterprise is being carried on, and (except in a small business) reasonable access to paid time, during normal working hours, for the purposes of related training.

Freedom of association

The *Fair Work Act* protects workers and some contractors against discrimination, coercion, undue influence and misrepresentation associated with union membership, industrial action

or participation in industrial activities. Significant civil penalties can be imposed for breaches of these protections.

The Fair Work Commission

The Fair Work Commission is the national workplace tribunal with a range of powers including:

- making and varying modern awards and determining the minimum wage
- conciliating general protections and unfair dismissal claims and arbitrating unfair dismissal claims
- resolving disputes under enterprise agreements and national employment standards
- making stop bullying and sexual harassment orders
- approving, varying and terminating enterprise agreements.

The Fair Work Commission can resolve disputes about entry permits and issue and revoke entry permits. The Commission also has powers in connection with the taking of industrial action, including making orders in relation to protected industrial action and the power to make orders stopping certain unprotected industrial action.

In a role which is separate and independent from providing administrative support to the tribunal arm of the Fair Work Commission, the General Manager of the Fair Work Commission regulates registered organisations, which are union and employer associations under the *Fair Work (Registered Organisations) Act 2009* (Cth*).*

The Fair Work (Registered Organisations) Act provides for the registration of organisations, their rules and election requirements and reporting and governance obligations. The legislative scheme also sets out the duties of officers and employees in relation to the financial management of registered organisations.

The Registered Organisations Services Branch of the Fair Work Commission receives, assesses and publishes a range of documents that registered organisations are required to lodge, and can conduct inquiries and investigations into compliance with a registered organisation's rules regarding finances, financial administration, and financial reporting obligations.

The Fair Work Ombudsman

The Fair Work Ombudsman is the national body that provides education, assistance, advice and guidance to employers, employees and organisations and promotes and monitors compliance with workplace laws.

The Ombudsman's powers include assessing complaints or suspected breaches of workplace laws, awards, and enterprise agreements. It investigates the complaints or alleged

contraventions. It can take court action to seek to enforce contraventions of those laws and agreements in the federal court system including asking the courts to impose civil penalties against parties who have breached the laws.

The Ombudsman engages inspectors to discharge its functions. The inspectors have powers to enter workplaces and interview people and compel production of documents. The inspectors can investigate, amongst other things, freedom of association breaches and right of entry by unions.

Occupational health and safety

Responsibility for occupational health and safety is shared across Commonwealth and state legislation.

WorkSafe Victoria

WorkSafe Victoria regulates health, safety, and wellbeing at Victorian workplaces under the *Occupational Health and Safety Act 2004* (Vic). Relevantly for the Review, WorkSafe's functions include:

- monitoring and enforcing compliance with the Occupational Health and Safety Act, including an employers' duty to protect the health and safety of employees while at work by ensuring they provide and maintain a working environment that is safe and without risks to health. Behaviours or conduct that can create unsafe working conditions include bullying, harassment, discrimination, hindrance, obstruction, intimidation, or coercion
- receiving and acting on complaints about health and safety concerns
- inspecting worksites to assess health and safety conditions and give advice, guidance or direction on what an employer needs to do to provide and maintain a safe workplace
- educating and working with employers to ensure safe conditions for workers in their employ and / or on their site
- outlining and supporting the role of and protections for health and safety representatives (HSRs) and
- enforcing the provisions related to authorised representatives of registered employee organisations (ARREOs).

The Review notes the Victorian Government is currently considering options for the development of the *Occupational Health and Safety Amendment (Psychological Health) Regulations* to clarify the existing employer duty set out in section 21 of the *Occupational Health and Safety Act* concerning the management of workplace psychosocial hazards, including the impact of bullying, sexual harassment and occupational violence or aggression.

The proposed regulations will strengthen the occupational health and safety framework and recognise that hazards that pose a risk to psychological health are no less harmful to workers' safety and wellbeing than physical hazards.

WorkSafe has a dedicated Major Construction Projects team which oversees Victorian Government major infrastructure projects. This team undertakes proactive inspections on a regular basis to ensure compliance with the *Occupational Health and Safety Act*, especially for high-risk activities undertaken on the projects as well as responding to incidents and complaints which are notified through to WorkSafe.

Comcare

Comcare is responsible for the national workers' compensation insurance scheme and the national occupational health and safety scheme. Both schemes apply to the Commonwealth Government, its agencies, and their employees as well as some licensed private sector employers operating nationally. Those private sector employees therefore cease to be covered by the state occupational health and safety and workers compensation schemes. Some Victorian government infrastructure projects are delivered by private sector businesses operating nationally and regulated and insured by Comcare.

For these businesses, the *Work Health and Safety Act 2011* (Cth) is the primary legislation that regulates work health and safety. It covers duties to ensure health and safety and eliminate or minimise risks in the workplace; rights and obligations relating to consultation, representation and the cessation of work; rights, obligations, powers and functions of health and safety representatives; right of entry of union officials; powers of Comcare, the Fair Work Commission and inspectors; and the enforcement regime.

Comcare inspectors' powers and functions are broad and include:

- providing information and advice about compliance with the *Work Health and Safety Act*
- assisting in the resolution of disputes relating to health and safety issues at workplaces, access to a workplace and the exercise of rights of entry
- issuing notices requiring compliance with the Act
- investigating contraventions of the Act.

Where work sites also have employers that are regulated by state laws, the state regulator's inspectors also have jurisdiction to investigate safety for employers under the state scheme that operates on those sites.

WorkSafe is party to a memorandum of understanding (MOU) with Comcare and the other principals of workplace safety authorities in Australia, which sets out cross-jurisdictional arrangements in relation to conducting parallel or joint inspections, and otherwise supporting each other's investigations. WorkSafe is limited to sharing information with, and referring

matters to, Comcare where the relate to an occupational health and safety issue at an entity it regulates.

Criminal activity

Victoria Police

Victoria Police is responsible for preventing, responding to and investigating crime, and collecting evidence to support prosecutions.

The Commissioner of Police has a broad discretion to direct police resources to meet Victoria Police's role to '...serve the Victorian community and uphold the law so as to promote a safe, secure and orderly society.[9]' While some conduct may be technically criminal, it may not result in a criminal charge. This may include complaints of bullying, harassment, and intimidation, which may be more effectively dealt with as a health and safety, or a workplace issue.

Victoria Police is also responsible for applications for declarations and control orders under the *Criminal Organisations Control Act 2012* (Vic).

Australian Federal Police

The Australian Federal Police (AFP) is the national policing agency responsible for enforcing Commonwealth criminal law. This includes enforcing criminal offences under the *Fair Work (Registered Organisations) Act 2009*, complementing the regulatory role of the Fair Work Commission under that Act. The AFP, with state police forces, also combats transnational serious and organised crime.

Other relevant bodies (state)

Independent Broad-based Anti-Corruption Commission

The Independent Broad-based Anti-Corruption Commission (IBAC) investigates and takes complaints about police misconduct and corruption in the public sector. Its remit is governed by the *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic).

IBAC's remit to investigate corruption in the Victorian public sector covers employees, contractors, volunteers and secondees in state government departments and agencies; and

[9] Victoria Police, *Keeping You Safe Victoria Police Strategy 2023-2028.*

statutory authorities[10]. It has broad investigative powers, including the ability to require answers to questions put in an examination and to use covert surveillance.

IBAC's investigations can result in criminal charges; and can address systemic problems through public reports that make recommendations to address corruption.

Victorian Auditor General's Office

The Auditor General is an independent officer of the Victorian Parliament, who provides assurance to Parliament and the Victorian community about how effectively public sector agencies provide services and use public money.

The *Audit Act 1994* (Vic) establishes the Auditor-General's mandate and the Victorian Auditor-General's Office (VAGO) and provides the legal basis for its powers. The *Constitution Act 1975* (Vic) establishes the role of the Auditor-General and gives complete discretion in how the functions and powers of the role are performed and exercised.

As with the other integrity bodies, VAGO's focus is 'public bodies', which includes government departments, state-controlled entities and local government[11]. VAGO's role is to conduct performance audits, assurance reviews and financial audits of the public sector, and the outcomes of these are made publicly available.

Unlike IBAC and the Victorian Ombudsman, VAGO's powers in relation to its performance audits or assurance reviews can extend to 'associated entities' with 'follow the dollar' powers. This definition covers a contracted service provider or subcontractor, a body that has entered a partnership or joint venture with a public body and a third-party contractor[12].

These powers enable VAGO to audit community sector and for-profit organisations contracted to provide government services, as well as how government grant recipients use their funds. However, VAGO can only use the powers to consider matters related to the use of the specified public funds by the associated entity. In its final report VAGO's recommendations can only be directed to a public body, not to an associated entity.

Victorian Ombudsman

The Victorian Ombudsman receives and investigates complaints about actions or decisions made by Victorian public organisations. The *Ombudsman Act 1973* (Vic) establishes that the principal functions of the Victorian Ombudsman include resolving complaints about administrative action taken by an authority and enquiring into or investigating administrative

[10] *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic) s6.
[11] *Audit Act 1994*, (Vic) s3.
[12] *Audit Act 1994*, s3.

action of an authority[13]. Complaints that involve corrupt conduct must be referred to IBAC, and the Victorian Ombudsman will only consider these complaints if they are referred back to it by IBAC[14].

An 'authority' under the *Ombudsman Act* includes a department and a public body, and a 'public body' is a body that is performing a public function on behalf of the state or an authority[15]. Although a 'public body' is not exhaustively defined in the *Ombudsman Act*, the Victorian Ombudsman can investigate most Victorian public organisations, their employees and contractors.

The Victorian Ombudsman's main tool is its ability to table a report in Parliament, shining light on the matters that have been investigated and making recommendations to avoid issues in the future, and to help other public organisations to improve their performance.

The Labour Hire Authority

The Labour Hire Authority regulates the supply and use of labour hire services by administering the licensing scheme established by the *Labour Hire Licensing Act 2018* (Vic). This scheme applies across all industries and requires all providers of labour hire services to be licensed. To obtain a licence, providers must be 'fit and proper' people and demonstrate compliance with relevant workplace laws. In June 2024, there were 720 licensed labour hire operators in the construction industry.

It is an offence to provide or advertise labour hire services without a licence; and to enter an arrangement for the provision of labour with an unlicensed provider. All licensed providers are included in a public register, and the Labour Hire Authority can impose conditions on a licence and terminate a provider's licence.

The Labour Hire Authority has a broad remit to consider compliance with other schemes. An applicant for a licence must declare that they are compliant with all the relevant state and federal laws listed in s23 of the *Labour Hire Licensing Act.* This includes laws relating to taxation, occupational health and safety, workplace laws and migration laws. For the Labour Hire Authority to grant a licence, it must be satisfied that the applicant complies with each of those laws.

The Labour Hire Authority is not limited to considering formal findings from the various courts or regulators that enforce those laws but is able to make its own assessment of an applicant's compliance. Similarly, the Authority can cancel a labour hire licence if it is no longer satisfied

[13] *Ombudsman Act 1973* (Vic) s13.
[14] *Ombudsman Act 1973* s16E.
[15] *Ombudsman Act 1973* s2(1).

that the licensee is compliant with those laws, and can make its own assessment of that compliance, rather than relying on a formal finding from another court or regulator.

The Labour Hire Authority's remit is defined in relation to the provision of labour hire, which requires a provider to supply workers to a host, and, to perform work 'in and as part of a business or undertaking of the host[16]'. Although this is a general definition, it has been clarified via the *Labour Hire Licensing Regulations 2018* (Vic) in relation to three industries: commercial cleaning, horticulture and meat processing[17]. For those industries, there is a specific list of activities that will be 'work' within the scope of the Act. This provides a clear and comprehensive jurisdiction for the Authority in relation to these three industries, which have been identified as industries of particular concern[18].

Other relevant bodies (Commonwealth)

The Australian Securities and Investment Commission

The Australian Securities and Investment Commission (ASIC) oversees compliance with the *Corporations Act 2001* (Cth). The *Corporations Act* is the primary legislation that sets out the legal framework for companies operating in Australia. Broadly, it governs the formation, operation and regulation of companies, financial products and services and the duties of company officers and directors. In doing so, it establishes rules and regulations to ensure fair and transparent business practices, protects shareholders' rights and the integrity of the corporate sector.

ASIC may receive complaints of criminal and unlawful conduct about entities or directors of those entities. This includes companies within the construction industry.

Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission (ACCC) regulates Australian business practices under the *Competition and Consumer Act 2010* (Cth).

This Act regulates competition, consumer protection and fair trading in the marketplace. It contains provisions dealing with, among other things: cartel activity (e.g. price fixing, bid rigging and controlling output), anti-competitive agreements, the imposition of minimum resale prices, exclusive dealing and boycotts.

The ACCC has a unit dedicated to construction industry oversight and has conducted previous investigations into trade union practices in the construction and transport industries. It has also

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[16] *Labour Hire Licensing Act 2018* (Vic), s7.

[17] *Labour Hire Licensing Regulations 2018* (Vic), r5.

[18] Victorian Inquiry into the Labour Hire Industry and Insecure Work, 2016, *Final Report*.

brought proceedings in the Federal Court alleging that a union engaged in boycott conduct in breach of the *Competition and Consumer Act*[19].

[19] *Australian Competition and Consumer Commission* v *J Hutchinson Pty Ltd & Anor* [2024] FCAFC 18.

2. Effectiveness of Victoria's regulatory regime – opportunities to strengthen collaboration

This chapter considers how Victorian government bodies can better work together to collectively investigate and respond to allegations of criminal or other unlawful conduct on Victorian government construction sites.

The Review acknowledges that this is a complex set of problems that intersect with Commonwealth laws, criminal laws, state laws and state government procurement and industry policies. As noted above, most relevant interventions sit with the Commonwealth in industrial relations and with the CFMEU administration.

However, if Victorian government agencies can take steps to improve oversight of major construction projects, it will assist in creating an environment less welcoming to those wishing to engage in criminal or unlawful activity.

In addition to ensuring existing bodies have the powers to fulfil their various remits in relation to oversight of Victorian government construction sites, the Review also aims to provide avenues to bring problems to light, and to promote cooperation between the existing bodies.

To this end, the Review has specifically considered the potential for:

- establishing a body to receive and refer complaints received in relation to conduct on Victorian government construction sites;
- using existing procurement and related policies and contractual levers to encourage contractors to support and report issues to a complaints body; and
- convening a dedicated group involving all the relevant law enforcement bodies and regulators, to consider matters raised through complaints, to share information, and to ensure that all the bodies are working together effectively to address criminal and unlawful conduct, and the systemic drivers of that conduct, on Victorian government construction sites.

A complaints referral body

Complaints provide a window into emerging problems in any system. For law enforcement bodies and regulators that are responsible for addressing problems as they arise, complaints are a valuable source of information and can assist them to target their investigation and enforcement efforts. Reforms to improve communication between agencies, or to strengthen their powers, will only be effective if the people who see unlawful behaviour can complain about it and alert the relevant agencies to that behaviour.

There is no single body responsible for encouraging a culture within the construction industry that supports the raising and addressing of complaints about conduct. The current landscape is confusing, with multiple state and federal entities responsible for responding to different

aspects of conduct that can arise on a government construction site, and uneven application of whistleblower protections for those that do complain.

The Review's interim report noted that the final report would explore potential models to provide a single doorway for complaints about issues arising on Victorian government construction sites, and options for a complaints referral scheme. It noted that any referral scheme should:

- allow any worker, subcontractor or supplier (including prospective suppliers) to complain to a central and clearly identified point
- enable complaints to be made anonymously
- allow for local resolution of a complaint where appropriate
- facilitate referral of a complaint to an appropriate body.

The Review does not consider that this body should have the power to conciliate, mediate or investigate complaints. The existing regulatory and law enforcement agencies have the necessary powers to address individual complaints, and adding an extra body would further complicate the landscape. Rather, the Review envisages that this body will act as a clearing house and referral body for complaints, ensuring that complaints are received, referred to the appropriate agency, and monitored. The first step in addressing the conduct that has led to this Review is to ensure that the conduct is visible. Even if complaints cannot be resolved, they can be counted, analysed and used to inform any future changes in laws and policies.

One doorway for complaints

To feel confident to complain, people need to know to where they can direct a complaint, that their complaint will reach the right place, and that there is a body with sufficient power to deal with complaints appropriately.

In the current system, complaints of unlawful conduct can be made to a range of bodies, both state and federal, for different matters. There is no clear 'doorway' for a complaint about unlawful conduct on Victorian government construction workplaces, and no easy way to work out which body is best placed to receive which complaint. In addition, only some complaints will attract whistleblower protections and the eligibility for these protections differs between bodies.

With no single point of entry to a complaints scheme, complaints will remain fragmented across employers, unions, regulators both state and federal, and police. There will be no way of detecting a trend in complaints, and emerging problems may be treated as isolated incidents.

A single doorway for complaints could allow for a body to operate as a clearing house for complaints and refer the complaint to the most appropriate place for it to be dealt with. Ideally, it would also be able to track complaints to see if they were investigated, and to ensure that

complainants were told of the outcome. It would also be able to identify trends and emerging issues and provide an evidence base for future reforms.

Model for a complaints referral body

The Review considered several potential models for a complaints body, including:

- a contractor-based complaints scheme that would require the principal contractor for a project to establish and maintain an effective complaints scheme for managing complaints across an entire project, beyond those made by its own employees, and for referring complaints to the agency best placed to deal with them;
- a complaints oversight panel in which all the parties involved in a major project could form a committee to oversight the response to any complaints arising from that project;
- a legislated, state-run complaints referral scheme;
- a complaints referral body established by the state to provide supported referral and oversight of complaints, with reporting requirements formalised in contracts and agreements between Victorian government agencies.

Either basing the scheme on principal contractors or establishing a panel that addressed individual complaints would miss an opportunity to provide visibility across multiple worksites. While a legislated scheme would provide a strong legal backing, the Review considers that it would take too long to establish, and that this level of formality is not required to create an effective complaints framework.

Although the Review does not support a legislated complaints scheme at this stage, it does recommend that a complaints referral scheme be established by the state, rather than by industry. Only the state can draw together all the complaints across all Victorian government construction sites, refer complaints to the appropriate bodies, and analyse complaints in order to provide government with a full picture of the issues arising in the sector.

As this report will discuss later, government may want to consider legislating a complaints referral body and attaching whistleblower protections in the future, when it has had an opportunity to evaluate the impact of the Review's recommendations.

Functions of the complaints referral body

Any person who has a specific complaint about an issue that has arisen in connection with a Victorian government building project can, of course, take that complaint directly to the appropriate body, whether that is Victoria Police, the Fair Work Ombudsman or elsewhere. However, the Review has heard from several sources that it is difficult for people to find the right place to direct their complaint, that some complaints are multifaceted and fall under the remit of different agencies, and that there are instances of complainants being passed between agencies without resolution. As noted in the interim report, the Review is aware of cases where there have been attempts to complain about conduct on a building site but the

complainants have struggled to find a body that is able to address their problem. One person described approaching 10 entities over two years, including state and federal bodies and major contractors, and being unable to find anyone who could deal with the issue they were raising.

The purpose of a dedicated complaints referral body will be to provide this place to complain to, and to then direct the complaint to the agency best able to address it. In the process, it will be able to provide valuable insights into the types of conduct that is leading to complaints and give complainants the confidence that their complaint is heard and will be followed up.

This confidence should, in time, create an environment when people become more willing to complain about criminal or unlawful conduct, and this conduct is less able to fly under the radar or be accepted as the cost of doing business.

The core functions of this body will be to:

- receive complaints from any person about issues arising on or connected to a Victorian government construction site
- receive complaints anonymously, if the complainant chooses
- refer complaints to the most appropriate body to address that complaint and track those complaints to ensure they are followed up by the appropriate agency
- act when one agency (i.e. Victoria Police) does not take on an investigation, to refer the matter instead to a regulator that may be able to address the complaint in a different way
- ensure that the complainant, where they have opted to identify themselves, is informed of the outcome of the complaint
- record and analyse the complaints it receives, to identify trends in complaints or emerging issues
- report to the responsible Minister regularly on these trends, to provide government with visibility of the conduct that is being complained of
- coordinate and act as a secretariat for the Alliance that the Review recommends below.

It has been suggested that there should be mandatory reporting of some complaints. The Review does not recommend that it should be mandatory for workers to report complaints as this would require legislation and would be enforced through prosecution or other sanctions placed on those who fail to report. This would be slow to implement and may not be effective. It also places the burden on those who may be the victims of the conduct.

As the Watson interim report pointed out, there is a culture of reluctance to report criminal and unlawful conduct, even amongst those who may be victims of that conduct. The Review does not consider that placing further obligations on people, some of whom may already be victims

of unlawful conduct, is an effective way of helping to build a culture in which there is confidence that complaints will be heard and followed up.

However, the Review does consider that there should be an obligation on principal contractors and subcontractors to support the complaints referral function by:

- reporting any suspected criminal or unlawful conduct to the referral body – including when that conduct is also reported directly to another body.
- ensuring that the availability of the complaints referral service is publicised on worksites and that workers are encouraged to share their complaints with the body.

This obligation should be imposed through procurement policies and contractual terms, rather than legislated. This is discussed in more detail in Chapter 4. The Review also canvasses the possibility of a legislated scheme in the future, in Chapter 6.

It should be possible for workers and other individuals to make complaints anonymously, even though those complaints may never be able to be pursued by a law enforcement agency or a regulatory body due to a lack of evidence. It is still worth collecting the intelligence and referring the information to the appropriate body, as it may bolster other evidence that has been collected, or at least add to the analysis of trends and emerging issues.

As an example, some of the complaints that may be received, and the bodies best placed to address them are set out below.

Complaint	Referred to	Comment
Assaults and threats	Victoria Police	These are criminal matters and should be referred to Victoria Police. If Victoria Police declines to investigate, it can inform the complaints referral body, which would allow it to instead refer the complaint to WorkSafe, to consider as a risk to health and safety.
Bullying, intimidation	Victoria Police WorkSafe	If the complaint raises behaviour that is potentially criminal, it should be referred to the police. If it is not criminal, it can be referred to WorkSafe, to consider as a risk to health and safety.
Passive intimidation – presence of OMG members on site.	Victoria Police CFMEU administrator	Once the amendments to the *Criminal Organisations Control Act* commence, this may be a matter for VicPol. It may also be a matter that can be raised with the administrator of the CFMEU.

Complaint	Referred to	Comment
Bribery of union officials	AFP Victoria Police	The AFP is investigating claims of corruption involving the CFMEU, and is cooperating with state police, the Fair Work Ombudsman and CFMEU administrators[20].
Refusal to hire non-CFMEU-endorsed subcontractors.	VIDA Principal contractor ACCC if amounts to boycott conduct.	As noted earlier in this Report, this may not be unlawful conduct. However, the complaints referral body can at least ensure it is raised with VIDA and the principal contractor for the relevant project, and keep a record of the complaint. Developing an evidence base may provide impetus for future reforms.
Alleged misuse of union entry powers for industrial motives.	Fair Work Ombudsman	The Fair Work Ombudsman can consider whether there has been a breach of the *Fair Work Act (CW)* duties.

To demonstrate the potential of such a body, the Fair Work Commission has created an online portal accepting complaints against the CFMEU. Noting this has a national reach, the portal has received (at 31 October 2024) 793 complaints and pieces of intelligence. The Executive Director of the Registered Organisations Services Branch of the Commission told Senate estimates[21] that it had referred 230 matters to other agencies, including:

- 205 to the Fair Work Ombudsman
- 12 to the Australian Federal Police
- 3 to the Australian Competition and Consumer Commission
- 1 to Work Health and Safety Queensland.

Governance of a state-based complaints referral body

The Review's preferred model for a complaints body is an administrative office established under the *Public Administration Act 2004* (Vic). This can be done through an order made by

[20] AFP sets up operation to investigate CFMEU corruption. David Marin-Guzman, *Australian Financial Review*, 6 November 2024.

[21] Senate Education and Employment Legislation Committee Estimates, 6 November 2024, p 102.

the Governor in Council and so, while it is formally established, it is a quicker process than enacting legislation. VIDA, for example, is established as an administrative office.

An administrative office is connected to a department, and while there are several departments that could have the general responsibility for this office, the Review suggests that the Government consider establishing this Office as removed from any of the Victorian Government's project delivery authorities to ensure independence.

The Review also recommends that this office be established and after two years the efficacy of the office, in conjunction with the other recommendations of this Review and actions taken at the federal level, should be assessed. As we will discuss later, after two years there should be an evidence base to allow Government to consider whether these arrangements need to continue, and whether they should be formalised legislatively.

Recommendation 1

The Review recommends that government establish a complaints referral body to receive and refer complaints relating to Victorian government construction sites.

Whistleblower protections

In addition to a lack of a body responsible for ensuring there is a culture within the construction industry that supports the raising and addressing of complaints about conduct, there is also an uneven application of whistleblower protections.

The terms of reference direct this Review to consider protections for whistleblowers and complainants. The number and variety of bodies that can receive a complaint mean that there is no consistent approach to protections. Each body takes a different approach, which increases the complexity of this landscape.

The highest level of protection available for any complainant is the witness protection program. This program, established in Victoria under the *Witness Protection Act 1991*, is used to protect people whose lives may be in danger because they have agreed to provide evidence to the police or to the courts about a crime. The witness protection program can be used to give a person and their family a new identity, to protect them from reprisals for their cooperation. This is not what is meant by whistleblower protections.

Whistleblower protections, in general terms, are a set of laws that deter employers or others from taking certain kinds of actions against a person who has reported misconduct. The laws can create offences or make civil remedies available. Whistleblower laws usually provide protection against reprisals such as loss of employment, demotion or harassment. The existence of these laws provides assurance to those who may be considering reporting misconduct and so supports reporting; and deters those who may be the subjects of those reports from punishing the person who reports.

At the Commonwealth level, for example, complaints to the Registered Organisations Services Branch with the Fair Work Commission do attract whistleblower protections, but only if they fall within the specific definitions of a 'protected concern'. To be a 'protected concern', the complaint must be made by a person with a connection to the registered organisation, either as a member, employee or as a contracted supplier to the registered organisation, and the concern must be about a breach of the law. If a concern meets these requirements, then the complainant will be protected from reprisals.

It may be difficult for a complainant to know if their complaint will qualify as a 'protected concern', which may discourage reporting.

The protections, once a person qualifies for them, are broad and cover harassment or intimidation of a person, and damage to reputation, by any other person – not just an employer. The remedy is a civil proceeding in which the Federal Court can make a wide range of orders, including an injunction or compensation for a person's loss. It can also be a criminal offence for a person to take a reprisal, or threaten to take a reprisal, against a complainant.[22]

At the state level, complaints to police of criminal conduct are not generally protected by whistleblowing protections, although there are offences relating to interfering with a witness. Nevertheless, for a successful prosecution, a victim will have to be identified and will usually be called to give evidence.

Any person who raises an issue or concern about health or safety to their employer, an inspector or to WorkSafe is protected from being discriminated against by their employer under the *Occupational Health and Safety Act.* It is an offence for an employer to dismiss an employee or alter their position to that employee's detriment, if the employer takes that action because of the employee's complaint[23]. If the employer is found guilty of the offence, the court may order damages be paid to the complainant, and that the complainant be reinstated in their former role.

Civil action is also available, which can also lead to orders that damages be paid to the complainant, and that the complainant be reinstated in their former role.

While there are several relevant schemes at both the state and Commonwealth levels, the Review notes that for a person considering complaining about an issue that has arisen in relation to a Victorian government construction site, it is difficult to know what, if any, protection they may be entitled to.

The complaints referral body recommended by the Review is an administrative office and will have no powers to offer any protections to complainants. It will be able to accept anonymous complaints, although it will be challenging to take action in response to an anonymous complaint, without further evidence.

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[22] *Fair Work (Registered Organisations) Act 2009* Chapter 11, Part 4A, Division 2: Protections.

[23] *Occupational Health and Safety Act 2004*, s76.

In Chapter 6 the Review will discuss the Public Interest Disclosure system, and whether, in the future, there may be a case for creating a legislative basis for the complaints body that could support a similar scheme in relation to Victorian government building sites. However, at this point in time, and in the interests of making recommendations that can be acted on more quickly, the Review does not recommend a comprehensive legislated whistleblower protection scheme.

A collective effort

While no one agency can address all the issues that have led to this Review, between them they should have the necessary powers and tools to tackle individual problems that arise.

However, addressing individual problems from separate silos may miss the opportunity to take coordinated action on systemic problems that cut across multiple areas of regulatory responsibility. The Review noted in the interim report that ideally, in an area where there are multiple players, the different entities will collaborate and, where their jurisdictions overlap, will work together to address issues.

The Review considers that there is an opportunity for a formal group to be convened and proposes an alliance to support information sharing and appropriate action in relation to Victorian Government construction ('the Alliance'), involving state and federal law enforcement and regulators and other relevant entities.

The aims of such an Alliance would be:

- to share information about criminal and unlawful activities on Victorian government construction sites
- where there are barriers to sharing information, address them as far as possible through information sharing agreements between Alliance members
- to facilitate cooperation when investigations cross the boundaries of two or more organisations
- to ensure allegations are being considered by the most relevant powers to address the conduct
- for members to work together to address systemic drivers of criminal and unlawful conduct.

It would be supported by the complaints referral body, to identify and address trends and gain a systemic view of issues arising on Victorian government construction sites.

As a model for this kind of Alliance, the Review has considered the national Phoenix Taskforce, convened by the Australian Taxation Office (ATO), and involving federal, state and territory law enforcement and government agencies. This Taskforce was established in 2014 to 'detect, deter and disrupt illegal phoenixing'. The ATO states that "Up until 30 September 2024, we've

raised more than $2.45 billion in liabilities from audits and reviews of illegal phoenix activities. We've also returned more than $1.08 billion to the community."[24]

Form of the Alliance

To give the Alliance sufficient status, it should be established by the Premier or a government minister in collaboration with the Chief Commissioner of Police. It should be chaired by Victoria Police and supported by the complaints referral body that this Review outlines above. Its terms of reference should include the aims set out above.

The Alliance would be a forum for state and Commonwealth bodies to meet and share information. The Review suggests membership includes:

State	Federal
Victoria Police	Australian Federal Police
WorkSafe	Comcare
The Labour Hire Authority	Fair Work Ombudsman
Victoria Infrastructure Delivery Authority/ Suburban Rail Loop Authority	Fair Work Commission – Registered Organisations Services Branch.
Fair Jobs Code Unit, DJSIR	

There may be an opportunity for other bodies to join, such as the Australian Consumer and Competition Commission, if specific issues arise. But the Review thinks that initially the above-listed bodies should comprise the Alliance.

The State regulatory bodies, other than Victoria Police, could be directed by their responsible Minister to participate under their general powers to direct each statutory entity, or Ministers could encourage participation through a statement of expectations. The Review notes that WorkSafe has a statement of expectations issued by the Minister for WorkSafe and the Transport Accident Commission, while the Labour Hire Authority does not have a specific letter from the Minister for Industrial Relations but is covered by the general statement of expectations for regulators.

[24] Phoenix Taskforce | Australian Taxation Office (ato.gov.au).

The Review recommends that Victorian Infrastructure Delivery Authority (VIDA) and Suburban Rail Loop Authority (SRLA) also participate in this Alliance, so they can gain visibility of issues as they arise on worksites, and use any available contractual remedies, or suggest these remedies to other agencies that may hold relevant contracts. VIDA, as an administrative office, can also be directed to participate in the Alliance by its Minister, the Minister for Transport Infrastructure.

The state cannot compel Commonwealth agencies to participate, and it may be that the best approach is for the state parties to initially form the Alliance and invite Commonwealth participation when the Alliance is established. But the common interest shared by the state and the Commonwealth in addressing the issues that have led to this Review should encourage Commonwealth agencies to participate in the Alliance.

Information sharing

Each body involved in the Alliance will hold information that is subject to privacy obligations, due to the information privacy principles, commercial-in-confidence arrangements and specific secrecy provisions in the bodies' enabling legislation. Some members may also be subject to Commonwealth privacy legislation.

Police in particular will be unable to share information if doing so could reveal sensitive criminal intelligence or jeopardise an investigation or a prosecution. Criminal investigations and prosecutions are the most appropriate response to criminal conduct in the first instance, and these processes should be given primacy.

However, evidence must be sufficient to justify a prosecution and, particularly as there may be a reluctance to report to police in many cases, there will be allegations of criminal conduct that will not reach a prosecution. In these cases, once the decision not to proceed to a prosecution is made, information held by Victoria Police may be able to be used by a regulator as a basis for regulatory action. The key purpose of the Alliance in this scenario would be to ensure that Victoria Police inform the other agencies if a matter was not going to proceed, and that the available information was shared with any other agency that could use it to address the conduct in a different way.

Similarly, if any other body in the Alliance finds that it holds information that it cannot act on, then ideally that information will be shared with any other member of the Alliance that may be able to use it to support its own legal or regulatory action.

While members of the Alliance will have to be mindful of their privacy obligations, these will not necessarily prevent them from sharing information. Both WorkSafe and the Labour Hire Authority have provisions in their legislation allowing them to use information they collect to

perform their functions and exercise their powers.[25] In addition, the Information Privacy Principles include the ability to use and disclose personal information when an organisation suspects unlawful activity is being engaged in, and when an organisation reasonably believes that use and disclosure is reasonably necessary for a law enforcement agency to prevent, detect, investigate, prosecute or punish breaches of the law.[26]

In establishing the Alliance, members should clearly set out the purposes for which they will collect and share information and consider what frameworks could support reasonable and proportionate information sharing. The Review would encourage the members of the Alliance to identify any remaining barriers to sharing information and to work together to overcome those.

Duration of Alliance

As the Review suggested in relation to the complaints referral body above, the Alliance should be established and reviewed after two years. During those two years, it should report periodically to the Premier or Minister who established the Alliance, noting its progress and any barriers to its efficacy. It should also provide the Premier or Minister with an overview of any systemic issues it has identified. This reporting could be combined with the reporting that the Review suggests above in relation to the complaints body.

As previously outlined, the Review has prioritised recommendations that can be implemented quickly. At this stage, an Alliance should not require any statutory backing. If barriers to effective information sharing prove to be insurmountable, this can be noted in a review of the Alliance's efficacy. After two years, there should be an evidence base to allow government to consider whether legislation is necessary to ensure the Alliance is meeting its full potential.

Recommendation 2

The Review recommends that government establish an Alliance involving state and federal law enforcement and regulators and other relevant entities with a role in addressing allegations of criminal or unlawful conduct on Victorian government construction sites. This Alliance should share information, coordinate action and inform government of emerging issues on these sites.

[25] *Occupational Health and Safety Act 2004,* s8AA; *Labour Hire Licensing Act 2018*, s103.

[26] *Privacy and Data Protection Act 2014*, Principle 2 – Use and Disclosure, 2.1(g).

3. Effectiveness of Victoria's regulatory regime - opportunities to strengthen legal basis

In this chapter, the Review will consider the limits of Victoria's legal powers to respond to allegations of criminal or other unlawful conduct in Victoria's construction sector.

Criminal or other unlawful conduct

The terms of reference refer to allegations of 'criminal or other unlawful conduct' in the Victorian construction sector.

Criminal Conduct

Criminal activity refers to conduct that is prohibited by law and is considered serious enough to warrant prosecution by the state. Most significant crimes in Victoria are contained in the *Crimes Act 1958* (Vic), although there are criminal offences included in a range of other legislation.

Crimes are typically investigated by police (the Victorian Police and the Australian Federal Police depending on the crime) and can result in penalties such as fines, imprisonment, or community service.

Relevant examples of potentially criminal conduct cited in media and other reports occurring on Victorian government sites include assault, threats of violence, and bribery. These offences would all be investigated by Victoria Police.

Criminal offences also exist in regulatory schemes. For example, the *Occupational Health and Safety Act* creates criminal penalties for a range of failures to comply with occupation health and safety duties. Some regulatory agencies, such as WorkSafe, have the ability to investigate and prosecute the criminal offences that are within their remit.

Unlawful Conduct

While some conduct that may occur on Victorian government construction sites may be criminal, other conduct may be better characterised as 'unlawful'. This relates to actions prohibited by law, but that do not attract a criminal penalty.

This conduct is generally covered in regulatory laws. The *Occupation Health and Safety Act*, as well as establishing criminal offences, contains provisions creating a civil liability for discriminatory conduct. WorkSafe therefore has a jurisdiction that covers both criminal and unlawful conduct. Similarly, the *Labour Hire Licensing Act 2018* contains both criminal and civil penalties. In addition to civil penalties, regulatory regimes can include sanctions such as injunctions or other remedies, including de-registration as a business in a particular industry.

The Review has taken 'criminal and unlawful conduct' to mean any conduct that breaches a statute, whether that breach can be met with a criminal penalty, a civil penalty or some other regulatory sanction.

Coercive, bullying or intimidatory practices or conduct

Coercion, bullying and intimidation will generally be either criminal or unlawful conduct. Depending on its severity, this conduct may be criminal or a health and safety or workplace matter. Criminal conduct such as bribery, threats to kill or inflict serious injury and blackmail can be dealt with through *Crimes Act*.

At the Commonwealth level, the *Fair Work Act* prohibits the coercion of individuals to prevent them from exercising a workplace right. Under the *Work Health and Safety Act 2011* (Cth) it is an offence to coerce or induce a person to exercise or not to exercise a power, to perform or not to perform a function, or to exercise or not to exercise a power or perform a function, in a particular way; or to refrain from seeking, or continuing to undertake, a role under this Act.

At the state level, under the *Occupational Health and Safety Act* employers have obligations to provide a working environment for their employees that is safe and without risk to health, including psychological health, so far as reasonably practicable.[27] This extends to an obligation on employers to identify hazards and assess risks that may lead to workplace bullying. The Act also prohibits an authorised representative of a registered employee organisation from hindering, obstructing, intimidating or threatening any employer or employee.[28]

Other Conduct

In addition to the criminal and unlawful conduct noted above, many of the allegations that have been raised are of conduct that may be undesirable but is neither criminal nor unlawful. Typical of this are the claims that the CFMEU effectively dictates which subcontractors can work on a site and uses this power to advantage subcontractors it is associated with, while excluding other businesses from the work available on Victorian government construction sites.

While this behaviour may be unfair, unless it reaches a level where the ACCC can address it as boycott activity, it is difficult for any regulatory agency to address this kind of allegation. The choice of sub-contractor is within the discretion of the contractor in control of each piece of work, and there are few objective measures available to assess those decisions against.

The Review is also aware that through health and safety representatives and union delegates (who can be the same person under the *Occupational Health and Safety Act*), unions may use the powers granted to these roles to raise claims that are not legitimately related to an occupational health or safety risk, 'weaponising' health and safety powers to achieve other ends. It can be difficult to prosecute such behaviour and prove that the raising of health and safety concerns was not legitimate.

By focussing on the steps that Victorian regulatory agencies can take to address criminal and unlawful conduct, and providing a pathway for complaints about any conduct on Victorian

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[27] *Occupational Health and Safety Act 2004, s21.*

[28] *Occupational Health and Safety Act 2004, s91.*

government construction sites, the Review expects that the environment will begin to change, lessening the ability of any party to unfairly restrict the availability of work on these sites. These changes will also be driven by the significant steps being taken at the Commonwealth level.

As we discuss above in Chapter 2, creating the ability to receive and analyse complaints about conduct, be it criminal, unlawful, or unfair, will create an evidence base that may allow further steps to be taken in the future.

Limitations in Victoria's legislative powers

The terms of reference ask this Review to consider any legal or procedural deficiencies in the Victorian regulatory regime. The Review has identified limitations in Victorian bodies' ability to act in response to many of the sorts of allegations raised, because of the division of powers between the states and the Commonwealth in relation to industrial relations.

As described in Chapter 1, the Commonwealth is responsible for almost all aspects of industrial relations and holds the most powerful levers to respond to the types of allegations that are the context for this Review. It is also the Commonwealth, through the Registered Organisations Services Branch of the Fair Work Commission, that can conduct inquiries and investigations into compliance with a registered organisation's rules regarding finances, financial administration and financial reporting obligations. The Fair Work Commission is responsible for the approval of Enterprise Agreements, and the Fair Work Ombudsman can investigate contraventions of them. The Fair Work Commission has powers in relation to industrial action, and can approve an application for protected industrial action, and can make orders to prevent or stop unprotected industrial action.

As the reforms that have been taken since the Review began demonstrate, the Commonwealth is best placed to directly address many of the issues that have been reported.

The Review will focus, as its terms of reference require, on opportunities for Victorian government bodies to strengthen their ability to respond to the allegations of criminal or unlawful conduct on Victorian government construction sites that have led to this Review.

Criminal Organisations Control Amendment Act 2024

The Victorian Government has recently expanded what can be considered to be criminal conduct on a building site through the passage of the *Criminal Organisations Control Amendment Act 2024*. The Act received Royal Assent in October 2024 but is yet to be

proclaimed and so these new offences have not yet commenced. The government has stated that the laws will commence in 2025[29].

When it does commence, this Act will amend the *Criminal Organisations Control Act 2012* to add a new Part 5C, prohibiting members of prescribed organisations from entering certain areas at Victorian government worksites. These changes will mean "specified organised crime groups will be banned from entering Victorian government worksites – ensuring these sites are free from the influence of outlaw gangs and criminal groups.[30]

The specific organisations and worksites are not set out in the Act and will be prescribed in regulations. The Act limits what can be prescribed, and an organisation may only be prescribed if the Attorney-General has consulted with the Chief Commissioner of Police, and the Attorney-General is satisfied on reasonable grounds that applying the offence to that organisation is likely to substantially assist in disrupting or preventing criminal activity in relation to public construction and is reasonably necessary to prevent or disrupt that activity.

Similarly, a worksite may only be prescribed where it meets certain criteria and must be located in a 'project area', which is defined to include project areas under the *Major Transport Projects Facilitation Act 2009*; the *Suburban Rail Loop Act 2021*, and the *Development Victoria Act 2003*, or a nominated project under the *Project Development and Construction Management Act 1994*. The Attorney-General must also be reasonably satisfied that prescribing the area is likely to substantially assist in, and is reasonably necessary to, prevent or disrupt criminal conduct in relation to public construction.

The offence will penalise an adult member of a prescribed organisation who enters a defined worksite, where public access is restricted and where development is taking place. The maximum penalty for this provision is three years' imprisonment.

As this Review has noted, any steps Victorian government agencies can take to improve oversight and management of major construction sites will assist in creating an environment in which it is difficult for the behaviours that have led to this Review to grow unchecked.

This new offence is one more tool that will be available to Victoria Police and so should help to deter individuals who are members of the prescribed groups from being physically present at a Victorian government worksite, limiting their ability to use their status as a member of the prescribed 'outlaw gang or criminal group' to threaten or intimidate others.

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[29] Premier of Victoria, 18 October 2024, New Laws Pass To Combat Organised Series Crime, media release, Victorian Government.

[30] Premier of Victoria, 28 August 2024, Tougher Laws to Combat Serious Crime, media release, Victorian Government.

Opportunities for improvement in criminal and integrity laws

Criminal laws

The conduct referenced earlier of violence, standover tactics and bribery are all criminal offences under the *Crimes Act*, covered by provisions relating to causing injury, threats to kill or inflict serious injury, blackmail and secret commissions.

The barriers to prosecuting criminal conduct appear to be the reluctance to report the activity, and the difficulty in securing evidence, rather than deficiencies in the law. The Review notes Watson's findings that he '…found a stubborn refusal, amongst officials, to involve the police.' and his recommendation that the Victorian Branch build cooperative relationships with law enforcement '…so that criminal conduct can be dealt with in accordance with the law. [31]

The Review does note that the law relating to secret commissions is difficult to understand in its current form. Modernising the offence may make it easier to investigate and prosecute. However, the Review does not expect that this would have a material impact on the conduct that has been alleged.

IBAC

The Review's Interim Report asked whether there were opportunities to expand the remit of the state's integrity agencies to bolster the protections against misconduct and corruption in Victorian government construction projects. The interim report noted that although Victoria's integrity agencies can investigate and expose misconduct and corruption in public office, they cannot investigate the sub-contractual arrangements in place between private sector providers on major government construction and infrastructure projects.

The behaviour that has been complained of, and that has led to this Review, does not centre on allegations of public sector corruption but rather relates to allegations of corrupt behaviour between private bodies, unions and individuals involved in publicly funded major capital projects[32].

The rationale for integrity bodies to have a role in this area is not that the allegations raised regarding government-funded construction projects are linked to suspected corruption or misconduct in public office, but that these projects are a significant taxpayer-funded state enterprise. That the contracting arrangements mean that they are delivered largely by the private sector does not remove the state's interest in ensuring that its money is not misused, or that operations the state funds are not creating opportunities for corruption.

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[31] Watson G, 2024, *Watson Interim Report Investigation into allegations against the CFMEU* https://cg.cfmeu.org/cfmeu-administrator/watson-interim-report.

[32] McKenzie N and Marin-Guzman D, 20 July 2024, The footballer, the underworld and the union deal that exposes construction's dark secrets, *The Age*.

The Review has considered the approach to this in other jurisdictions. The Northern Territory is the only jurisdiction where the integrity agency, the Independent Commissioner Against Corruption (ICAC), can investigate corrupt conduct engaged in by owners and employees that have a contract with, or deliver services on behalf of, the Northern Territory Government or local councils. That is because the definition of 'corrupt conduct' extends to investigating the conduct of any person that could impair public confidence in public administration in respect of certain matters or that constitutes certain specified offences, irrespective of whether that person is a public officer or a public body.

In both Queensland and NSW, the definition of corrupt conduct extends beyond public officers to any person who could, or does adversely affect, the performance of functions or the exercise of powers of a public authority or a person holding an appointment. The National Anti-Corruption Commission can also investigate a person who is not a public official if they do something that has an adverse effect on the honest or impartial exercise of powers or performance of official duties of a public official. In Western Australia, Tasmania and South Australia integrity investigative powers only apply to public officers.

As is the case for integrity bodies in most other jurisdictions, IBAC's mandate is to prevent and expose public sector corruption and police misconduct in Victoria. The core definition in the IBAC Act is the definition of 'corrupt conduct', and corrupt conduct is defined in relation to the role of public officers and public bodies, noting that a 'public body' includes a body that is performing a public function on behalf of the State.[33]

For IBAC to have a role in oversight of Victorian government construction projects, it would need a new specific jurisdiction and a new definition of 'corrupt conduct', that both specified the projects that were within its remit, and the people within those projects who would be regarded in a similar way as 'public officers'.

The Victorian definition of corrupt conduct also requires that the conduct would constitute a 'relevant offence', and a relevant offence is an indictable offence against an Act, or a nominated common law offence.

As IBAC can only investigate corrupt conduct where it would also constitute a relevant offence, an expanded jurisdiction could only result in IBAC investigations of cases that can already be considered by Victoria Police. There may be little to be gained by granting IBAC powers to look at crimes that can already be investigated by police. IBAC would bring the ability to coercively examine individuals, but if an individual is required to incriminate themselves as part of this process, that evidence is not admissible in proceedings against that person. IBAC can issue public reports that shine a light on corrupt conduct and these reports can consider systemic issues. Although this would assist in revealing criminal and unlawful conduct

[33] *Independent Broad-based Anti-corruption Commission Act 2011*, s6.

connected to Victorian government construction sites, it may not justify the significant change to IBAC's purpose that this reform would require.

Broadening IBAC's purpose beyond identifying, investigating and exposing corrupt conduct that is linked to public officers and public officials (in addition to its police misconduct jurisdiction) would fundamentally change the nature of the Commission. Applying the concept of 'corrupt conduct' to one part of the private sector economy risks distorting the concept of the Act, which creates a Commission explicitly tasked with combating public sector corruption.

It would also stretch the resources of IBAC, if it were expected to expand its remit without further funding. It would either need to seek more funding from the Government or dilute its current focus on public sector corruption and police misconduct to enable it to take on a new jurisdiction covering Victorian government construction.

While IBAC's ability to investigate and report publicly on allegations of corrupt behaviour, and its focus on systemic issues may be a useful addition to the range of available interventions under Victorian law, the Review, on reflection, does not consider that this justifies a major reform to IBAC's remit.

Opportunity for improvement in regulatory laws

In relation to the wider category of regulatory laws that can be used to address allegations of unlawful conduct, the Review found each of the Victorian government agencies described earlier in this report has a role to play in addressing this conduct. As discussed in Chapter 2, as each agency has a statutory basis that provides them with relevant powers to fulfil their remit, the most effective action that the regulatory bodies could take is to ensure that they are working effectively together to share information and coordinate their activities to address allegations of unlawful behaviour collaboratively.

However, since the interim report, the Review has become aware that there are opportunities to strengthen the powers of the Labour Hire Authority to enable it to more effectively fulfil its remit concerning the regulation of labour hire firms.

Labour Hire Authority

Labour hire has been identified as a problematic area in relation to the allegations that have led to this review. For example, Watson's interim inquiry found that an EA connected to a labour hire firm was particularly valuable and sought after, increasing the risks of corruption

and conflicts of interest relating to agreeing an EA between the labour hire firm and the CFMEU[34]

Construction is a major user of labour hire services. The Labour Hire Authority's annual report notes that the construction industry is the third largest area in which labour hire providers operate, after cleaning and professional, scientific and technical services[35]. The Authority has actively pursued licensing interventions and prosecutions in the construction industry. Labour hire operates across many industries and strengthening the Labour Hire Authority's powers in response to issues arising in construction will benefit its operations in other areas of the economy.

Media reports have alleged that labour hire provides a pathway for OMCG members to find roles on worksites[36] and that members of the CFMEU who had been removed from positions in the CFMEU were returning to worksites as labourers[37]. Labour hire provides a potential route for workers who may have been dismissed by one subcontractor to return to a site as a worker provided by a labour hire firm.

For these reasons, it is important to ensure that the regulation of labour hire firms is efficient and effective. The Review considers that legislative change is required to strengthen the regulatory scheme.

Fit and Proper Person Test

Under the *Labour Hire Licensing Act*, the Labour Hire Authority must grant an applicant a licence to provide labour hire services if, among other things, the Authority is satisfied that each relevant person in relation to the application is a 'fit and proper person'. Relevant people for an application include the applicant, each person who participates in making decisions that affect the business and, if the applicant is a body corporate, each officer of that body corporate[38].

Section 22 of the *Labour Hire Licensing Act* sets out when a person is a fit and proper person. The test presumes that people are fit and proper, *unless* they fall into defined categories. The categories (in brief) are a person or a body corporate of which the person was an officer:

a. That has been found guilty of an indictable offence against the person, or an offence involving fraud, dishonesty or drug trafficking offence in previous 10 years.

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[34] Watson G, 2024, *Watson Interim Report Investigation into allegations against the CFMEU* https://cg.cfmeu.org/cfmeu-administrator/watson-interim-report.

[35] 7.55% of labour hire providers operate in the construction industry. See: *Labor Hire Authority Annual Report 2023-24*. P 8.

[36] Drill S and Dowsley A, 27 October 2024, Push to outlaw labour hire to flush out bikies, *Herald Sun*.

[37] Drill S, 27 October 2024, Secret battle in building union, *Herald Sun*.

[38] See the definition of 'relevant person' at s3 of the *Labour Hire Licensing Act 2018*.

a. That has been found to have contravened a workplace law, or labour hire industry law (or given an enforceable undertaking in respect of an alleged contravention of such laws) in the previous 5 years.

b. That was a holder of a labour hire licence that was cancelled, suspended or revoked in the previous 5 years.

c. That was insolvent or an externally administered company in the previous 5 years.

d. For applicants who are a body corporate – if any officer of that body corporate was also an officer of another company whose labour hire licence was cancelled

e. For applicants who are individuals – a person who was disqualified from managing corporations in the previous 5 years.

While this test is comprehensive, the Labour Hire Authority has noted that it has been required to consider that people are 'fit and proper' in cases where an applicant:

- has been convicted and imprisoned for serious offences that are not listed in s22
- was a director of another company but left just before it became insolvent
- was under the direction or control of a person who would not have qualified as a fit and proper person.

The Review considers that the test that determines whether an applicant is a 'fit and proper person' to provide labour hire services should remain clearly defined. However, the Review does consider that the fit and proper person test should be broadened so that the Labour Hire Authority *may* also consider the following factors:

- Any other conviction or finding of guilt for an indictable offence in the previous 10 years.
- Any role as an officer in other companies in previous 5 years that have been insolvent or had a labour hire licence cancelled within 6 months of that person's departure from the company.

Unlike the existing matters listed in s22, none of these factors should automatically disqualify a person from being considered a fit and proper person. These should be matters that the Labour Hire Authority *may* take into account, but there may be situations where these matters should not disqualify a person, including if, for example, an applicant can demonstrate that their role in a previous company was not linked to that company's subsequent insolvency, or loss of a labour hire licence.

Close Associates

The concept of a 'close associate' is used in other regulatory schemes, to avoid situations where an unsuitable person puts forward a spouse or other family member as the holder of a licence or other permission, when the unsuitable person intends to effectively run the operation.

The concept is used in the *Social Services Regulation Act 2021 (Vic)*, which regulates (among other things) the operation of a supported residential service. There are several prohibitions

that apply to an operator of a supported residential service, including a prohibition on becoming the guardian of a resident (s222). These prohibitions extend to a 'close associate' of a proprietor, to ensure that a proprietor does not evade the prohibition by nominating a family member for the role.

Section 213 of the *Social Services Regulation Act* defines a close associate to include:

close associate, in relation to a provider, means—

(a) if the provider is an individual—

(i) the spouse, domestic partner, parent, child or sibling of the provider; or

(ii) the parent, child or sibling of the spouse or domestic partner of the provider; or

(iii) a body corporate of which the provider is a director or secretary;

(b) if the provider is a body corporate—

(i) a director or secretary of the body corporate or of a related body corporate; or

(ii) the spouse, domestic partner, parent, child or sibling of a person referred to in subparagraph (i); or

(iii) the parent, child or sibling of the spouse or domestic partner of a person referred to in subparagraph (i); or

(iv) a related body corporate; or

The Review considers that a similar definition should be added to the *Labour Hire Licensing Act*, and that the fit and proper person test should also include as a discretionary consideration:

- Whether an applicant has a close associate who is not a fit and proper person.

Criminal Organisations Control Amendment Act 2024

While the Review considers that the test for a fit and proper person should be certain and objective, the passage of the *Criminal Organisations Control Amendment Act 2024* does provide a rationale for considering a person's membership of an outlaw gang or criminal organisation as part of this test. If it is illegal for a person to enter a prescribed Victorian Government worksite, then there is an argument that that person should not be able to hold a licence to provide labour hire services. Given the important role that labour hire plays in providing workers to Victorian government construction sites, and the concerns about the industry noted above, the Review considers that the controls that the government is placing on entry to prescribed worksites should be reflected in the labour hire area.

While membership of an outlaw gang or criminal organisation is a broad concept, under these new provisions the government will be prescribing which groups will be considered a 'Part 5C organisation' and will be bound by the requirements in the Act that are noted above in making the regulations.

Labour hire covers many more industries than construction, and there may be cases where membership of a prescribed organisation should not necessarily preclude a person who would otherwise be a 'fit and proper person' from providing labour hire services. The Review recommends that membership of a 'Part 5C organisation' should be a discretionary consideration for the Labour Hire Authority to weigh-up as part of the fit and proper person test, rather than a mandatory exclusion from being considered a fit and proper person. It's noted that this discretionary consideration will not be operational until the new provisions in the *Criminal Organisations Control Act* come into effect.

Scope of 'Labour Hire' in Construction.

The Labour Hire Licensing Act relies on definitions of when a person provides labour hire services, and who is a 'worker' to define the boundaries of the licensing scheme. The general definition of 'provides labour hire services' requires that workers work 'in and as a part of' the business undertaking of the host. As with any scheme of this nature, there will be grey areas at the edges of those definitions that lead to disputes about whether an enterprise is, in fact, providing labour hire services and subject to regulation by the Labour Hire Authority.

The *Labour Hire Licensing Act* allows for regulations to prescribe circumstances when an individual will be taken to perform work within the meaning of the Act, to clarify when a business is within the remit of the Act. The *Labour Hire Licensing Regulations 2018* explicitly define when a person is taken to be a worker as part of a host business in respect of three industries that have been identified as high risk. These industries are:

- Commercial cleaning
- Horticulture
- Meat and poultry manufacturing or processing.

Specifically defining certain tasks in these industries as labour hire activities ensures that organisations supplying labour to perform these tasks are within the Labour Hire Authority's scope, even if the organisations have attempted to structure themselves as a different type of service provider.

Given the prevalence of labour hire in the construction industry, and the issues that have arisen in relation to it, government may wish to consider defining certain activities connected to construction to be work within the construction industry. This would ensure clarity about when providing workers in connection with a construction site brought an organisation within the remit of the Labour Hire Authority. Without this clarity, there is a risk that some forms of labour supply could be structured to fall outside the Authority's scope and avoid regulation.

Compliance powers

The Labour Hire Authority, like other regulators, has legal powers to seek information. Labour Hire Authority inspectors can:

- Issue a written notice to a licence holder or former licence holder requiring the production of documents relating to the business of providing labour hire services

- exercise enter and search powers at premises connected to labour during 'normal business hours'
- during a search may require a person to produce a document located at the premises
- during a search may require a person at the premises to answer any questions put by the inspector
- apply for a search warrant in relation to particular premises if the inspector believes on reasonable grounds that there is evidence of contravention of the Act at those premises.

These are standard powers for an industry regulator, but the Labour Hire Authority's information-gathering powers are limited in comparison to some other regulators and could be strengthened. Again, while this alone will not address the behaviour that has led to this Review, any improvement in the powers of the regulators who operate in relation to construction will help to create an environment in which it becomes increasingly difficult to engage in criminal or unlawful conduct.

Other regulators can require documents to be produced and can use this power in relation to a broad class of people, provided the request is connected to the administration of the relevant legislation. Referring again to the *Social Service Regulation Act*, the Regulator can, by written notice, request a person to provide information or documents that the Regulator reasonably believes is necessary for monitoring compliance with the Act. A person may refuse to provide the information, in which case the Regulator may serve a more formal written notice, requiring a person to provide specified information within the time and in the manner specified. Failing to comply with a notice is an offence.[39]

Adding a power of this nature to the *Labour Hire Authority Act* would increase the Authority's ability to enforce the Act by allowing it to request documents from *any* person, provided that the information is reasonably necessary for monitoring compliance with the Act. It would also allow the Authority to move away from requiring physical inspections of documents, and allow it to specify the manner of production, which could include electronically.

Publication Powers

The Labour Hire Authority has the power to publish limited information about the details of a licence holder whose licence is suspended or cancelled, or against whom the Authority is taking enforcement action. While the Authority can publish the name and business name of a licence holder, it cannot provide any context around the reasons for its actions in relation to the licence.

[39] See sections 108 and 109 of the *Social Services Regulation Act 2021*. See also the information gathering powers of the Essential Services Commission, and the Victorian Gambling and Casino Control Commission.

Some regulators, such as the Victorian Gambling and Casino Control Commission, do publish details of their disciplinary action where the action is in response to non-compliance that merits suspension or disqualification of a licence. Other regulators, such as the Victorian Liquor Commission, publish details about their prosecutions which are conducted in an open court, but only publish the basic details of a licence disqualification.

The Labour Hire Authority's functions include promoting compliance with the Act and disseminating information about the duties, rights and obligations under the Act. If the Authority were able to publish information about why it had cancelled a licence may help to deter breaches of the Act and educate labour hire providers and their clients about the requirements of the Act. However, given the broad remit the Authority has to consider compliance with legal obligations under other schemes (such as laws relating to taxation and migration), the content of the information published needs to be carefully considered to avoid publication of information that may be protected by other schemes or by the *Privacy and Data Protection Act 2014*. In addition, the broadening of the fit and proper person test that the Review recommends may reveal the criminal records of other people. For example, if a licence is revoked because a close associate is not a fit and proper person, it may not be appropriate to share that close associate's criminal record.

The Review considers that there *is* a case for broadening the Labour Hire Authority's ability to share information, so that it can be clear about the standards it expects of licence holders. However, there should be constraints on the type and degree of detail in information shared, so that it does not reveal information that is confidential under another scheme, or inappropriate personal information about a third person.

The Review recommends that government amends the *Labour Hire Licencing Act* to enable the Register of Licenced Labour Hire Providers to include contextual information in relation to suspensions and cancellations of licences. Contextual information should be limited to avoid publication of information:

- that may be protected by other schemes or by the *Privacy and Data Protection Act 2014*
- that breaches the privacy of people other than the licence holder.

Recommendation 3

The Review recommends that government amend the *Labour Hire Licensing Act* to add the following discretionary considerations to the fit and proper person test, so the Authority *may* find that an applicant is not a 'fit and proper person' if the applicant:

- has any conviction or finding of guilt for an indictable offence, other than those specified in s22(a) in the previous 10 years.
- held any role as an officer in other companies in the previous 5 years, where that company became insolvent or had a labour hire licence cancelled, suspended or revoked within 6 months of that person's departure from the company.

- has a close associate who would not be found to be a 'fit and proper person'.
- is a member of a Part 5C organisation as defined in the *Criminal Organisations Control Act 2012.*

Recommendation 4

The Review recommends that government amend the *Labour Hire Licensing Regulations,* to define certain activities connected to construction to be work within the construction industry. This would ensure clarity about when providing workers in connection with a construction site brought an organisation within the remit of the Labour Hire Authority.

Recommendation 5

The Review recommends that government amend the *Labour Hire Licensing Act* to give the Authority the power:

- to request in writing that a person provide information or documents that the Authority reasonably believes is necessary for monitoring compliance with the *Labour Hire Licensing Act.* This request should provide its recipient with the authority to provide the information, and preserve the recipient's right to refuse to provide the information; and
- to require, by written notice, that a person provide specified information for the purpose of monitoring compliance with the *Labour Hire Licensing Act* within the time specified and in the manner specified. Failing to comply with a notice should be an offence.

Recommendation 6

The Review recommends that government amend the *Labour Hire Licencing Act* to enable the Register of Licenced Labour Hire Providers to include contextual information in relation to suspensions and cancellations of licences. Publication should be limited to information that is not confidential under other state or federal laws, and information that does not breach the privacy of people other than the licence holder.

4. Role of Victorian government bodies managing construction projects

The terms of reference require the Review to inquire into the role of Victorian government bodies managing construction projects in relation to:

- workplace relations, operations and practices, and health and safety matters applying under both Victorian and Commonwealth law and practices; and
- the apportionment of responsibility and oversight for these matters between parties to contracts delivering construction projects.

Delivery of construction projects

The State does not directly deliver construction projects and is therefore not a direct employer of construction workers. For most State construction projects, departments and delivery agencies procure a principal contractor to perform the works. Principal contractors do not typically have a direct or large construction workforce and procure separate sub-contractors and/or labour hire firms to undertake the construction works.

The delivery models regularly used by the Victorian Government are the 'design and construct' approach and managing contractor models, along with the Public Private Partnership and alliance models often used to deliver major infrastructure.

A 'design and construct' model involves the engagement of a contractor to deliver a project on a fixed-price basis, with pre-determined processes for variations, by a fixed date. A managing contractor model involves the appointment of a principal contractor (the managing contractor) who is responsible for project delivery, including tendering and award of trade packages. Public Private Partnerships typically involve a long-term contract with a private consortium to build, operate, maintain and finance a project over the long-term. Other models include more collaborative forms of contract such as 'alliances' which involve a greater sharing of risk and information between the state delivery bodies and the parties engaged for project construction and/or operation.

Irrespective of the delivery model, the principal contractor is solely responsible for managing all aspects of industrial relations. Regarding occupational health and safety, the State typically appoints the principal contractor as principal contractor to discharge the occupational health and safety duties under legislation. The State also requires the principal contractor to, so far as is reasonably practicable, proactively work to ensure the safety and health of all persons working on the project and keep the State informed of any issues or actions affecting the project. While the State requires this of the principal contractor, occupational health and safety duties exist concurrently amongst each employer working on the project.

Delivery agencies for large-scale projects in Victoria can be established as an administrative office, such as VIDA (which was established by the Premier under s11 of the *Public Administration Act 2004*) or as a statutory authority, under its own legislation, as in the case

of the Suburban Rail Loop Authority (SRLA) or dedicated units within Departments, such as the School Building and the Community Safety Building Authorities which are not statutory authorities.

VIDA's Director-General is legislatively accountable to the Secretary of the Department of Transport and Planning, and ultimately to the relevant portfolio minister, while the SRLA is accountable directly to the Minister for the Suburban Rail Loop.

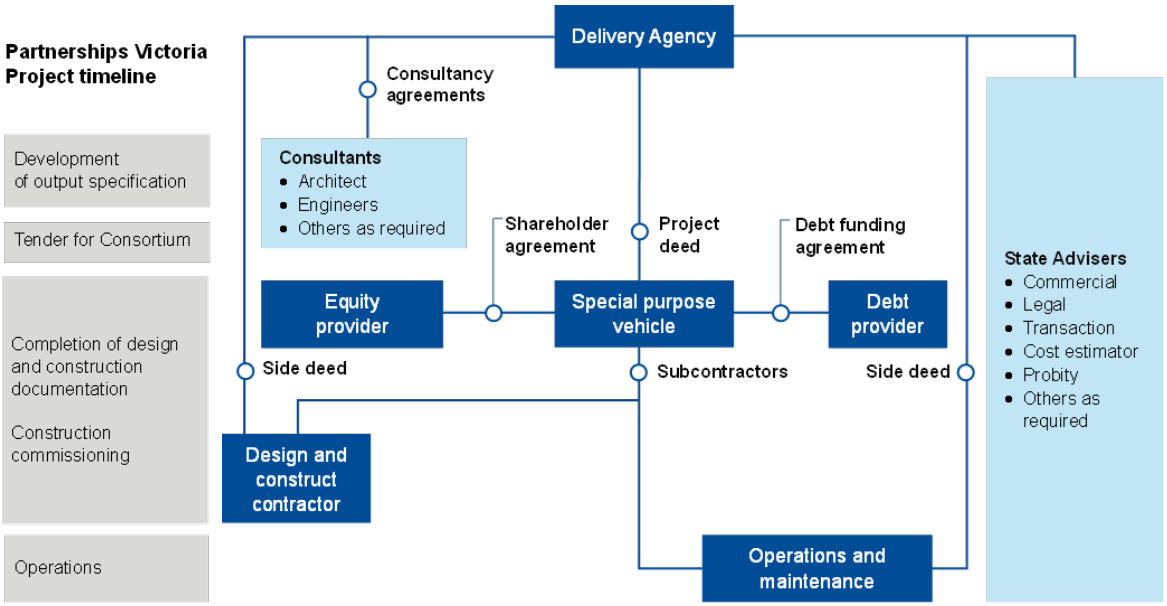
The Secretary of the Department of Transport and Planning is responsible for the general conduct and the effective, efficient and economic management of the department and any administrative office in relation to the department (s13 *Public Administration Act*).

The administrative office or statutory authority has overall responsibility for project delivery including project plans, budgets, safety and risk management. The relationship between the Departments and the administrative office is generally documented through a series of memorandums of understanding and other agreements.

VIDA and SRLA have a strong interest in ensuring that projects are delivered not only in a timely and cost-effective way but also act as informed parties. As part of the tendering and contract process, these agencies require contactors to prepare Industrial Relations Management Plans that, among other things, address the use and engagement of labour hire and the management of subcontractors - including measures to select subcontractors who have the skills, capacity and resources to manage industrial relations and comply with prevailing laws.

The arrangements put in place by private sector construction entities vary in terms of scale and complexity. A straightforward project might involve dozens of sub-contractors, whereas large scale transport projects may involve thousands of sub-contractors, representing small to medium enterprises (SMEs), individuals, labour hire firms and consultants, many of whom may be engaged under tiered contracting structures. **Figure 1** below illustrates the Public Private Partnership contracting structure to demonstrate this complexity.

Figure 1. Public Private Partnership contracting structure



Roles and responsibilities of government bodies and parties to construction contracts

The roles and responsibilities of Victorian Government bodies and the parties to the contracts delivering construction projects are determined by a complex combination of:

1. the laws covering workplace relations and occupational health and safety;
2. the laws and various policies that apply to infrastructure investment and procurement; and
3. the contractual arrangements between the Victorian Government bodies and principal contractors.

These roles and responsibilities are outlined below.

Legal responsibilities: workplace relations and occupational health and safety

Workplace relations

Industrial relations responsibilities are spelled out in the Fair Work Act, which provides a framework for Enterprise Agreements (EAs). EAs are made at the workplace level between employers and employees. Employees can appoint a bargaining representative to negotiate the enterprise agreement on their behalf.

EAs in the construction industry tend to contain very comprehensive and detailed terms including with respect to matters such as union delegate training and rights.

An EA must be between an employer and its employees. On major projects it is common for the principal contractor to have an EA for the project with its own employees and for each of the subcontractors it uses on the project to have their own enterprise agreement with the employees they engage on the project. The principal contractor will enter an EA with its employees that is endorsed by a union – or multiple unions – such as the CFMEU. This may be described as a project agreement, but technically will only cover the principal contractor's employees. In practice, when the principal contractor enters into an EA with the CFMEU at the beginning of a major project, it could set up an expectation that everyone who works on a site *will* sign up to an EA that is consistent with the CFMEU EA with the principal contractor.

Occupational health and safety

The State and Commonwealth occupational health and safety regimes can overlap on Victorian government construction sites. Employers on these sites may be regulated by the state or Commonwealth workplace safety authorities, depending on the jurisdictional scheme that applies.

Comcare is responsible for the national workers' compensation insurance scheme and the national occupational health and safety scheme. The scheme applies to the employees of the Commonwealth Government, its agencies and their authorities as well as to some licensed private sector employers operating nationally. Victorian Government infrastructure projects delivered by large private sector businesses that operate nationally may be regulated by Comcare.

Duties are often owed concurrently by a principal contractor and other employers at a construction workplace. An appointed or deemed principal contractor is the duty holder with overall management and control of a workplace including the management of other contractors and subcontractors. Principal contractors and sub-contractors also have obligations as employers under the *Occupational Health and Safety Act* to provide a working environment that is safe and without risks to health (s21).

WorkSafe can take regulatory action against a state-regulated employer, or other sub-contractors involved in a joint venture, even if the principal contractor is regulated by Comcare. WorkSafe will have jurisdiction provided the state-regulated employee has control over a particular health and safety matter that relates to their employees at a workplace.

Under the *Occupational Health and Safety Act* and the *Occupational Health and Safety Regulations 2017,* the duties of an employer extend to a sub-contractor engaged by the employer and to employees of the sub-contractor, in relation to matters over which the employer has control. A labour hire worker is also treated as an 'employee' of the host employer for the purposes of the *Occupational Health and Safety Act*.

WorkSafe is party to a memorandum of understanding with Comcare and the other heads of workplace safety authorities in Australia, which sets out cross-jurisdictional arrangements in

relation to conducting parallel or joint inspections, and otherwise supporting each other's investigations. WorkSafe will share information with, and refer matters to, Comcare where the matters relate to an occupational health and safety issue at an entity Comcare regulates.

Investment and procurement legislation and policies

There are several intersecting Victorian infrastructure investment and procurement legislation, policies and guidance that collectively set out processes, requirements and guidance about the way Government should procure public construction and infrastructure projects.

The Victorian Government commissions and procures construction and infrastructure projects under the *Project Development and Construction Management Act 1994* (Vic), which allows the relevant minister to set standards and issue directions in relation to public construction.

The *Ministerial Directions and Instructions for Public Construction Procurement* in place for public construction in Victoria contain both mandatory instructions and non-mandatory guidelines. These set out processes, rules and standards required by Government (through departments and delivery agencies) for the procurement of public construction and infrastructure.

Under the Ministerial Directions for Public Construction Procurement in Victoria, mandatory IR management criteria apply when the Fair Jobs Code applies to construction works and construction services. Tenderers must have an IR Policy Statement, a project-specific IR Plan, a declaration of compliance with IR management criteria and with relevant legislation on wages and conditions.[40]

The tendering requirements in the ministerial directions and instructions require agencies to ensure that any supplier engaged to perform works or construction services satisfies the mandatory evaluation criteria, including OHS and IR requirements. Suppliers must have a comprehensive OHS policy, qualified OHS advisors, effective consultation and issue resolution processes, and maintain awareness of OHS regulations.

Additionally, they must have robust induction and training systems, hazard identification and risk control measures, and manage the safety of all workers, including subcontractors.

The OHS and IR criteria and requirements that contractors (and consultants) are required to meet also need to be demonstrated for registration on the Construction Supplier Register (CSR). The CSR is a mechanism that streamlines the procurement / tendering process for contractors (and consultants) interested in bidding for government work through a select tender process.

[40] Department of Treasury and Finance, 1 September 2024, *Detailed Guide on the Mandatory Industrial Relations Management Criteria,* Victorian Government.

Suppliers must show that they comply with relevant policies, including those relating to OHS and IR, before they are able to tender for certain packages of work. Once contracts are entered into, the policies are enforced through the contractual arrangements between the commissioning bodies and the suppliers that contract with them.

Victorian Government policies such as the Victorian Fair Jobs Code also apply to the delivery of major projects in Victoria. In combination with the Local Jobs First Policy, the Social Procurement Framework and the Supplier Code of Conduct, the Code is part of the Victorian Government's commitment to use its purchasing power to ensure businesses and suppliers "put workers first and recognise and reward those who provide secure employment and fair work practices; operate sustainably, promote equality and diversity; and focus on creating local jobs and supporting local industry.[41]

To give contractual effect to these policies, government agencies include them in their tender documentation and contracts. Agencies must also annually report on, or attest to, their compliance with these requirements.

The Fair Jobs Code, administered by the Department of Jobs, Skills, Industry and Regions (DJSIR) enables the Victorian Government through its construction contracts to:

- promote secure employment and fair labour standards
- ensure compliance with employment, workplace and industrial laws.

The code requires agencies to ensure suppliers hold a Fair Jobs Code pre-assessment certificate when tendering for contracts that meet value thresholds. Agencies must ensure:

- public construction tender documents and processes comply with the Code
- principal contractors and subcontractors delivering work hold a pre-assessment certificate where works meet certain value thresholds
- commitments made in Fair Jobs Code Plans or Plan Addenda are monitored and reported to DJSIR as part of their annual attestation process.

When suppliers are bidding for procurements with a value of $20 million or more, they must prepare and submit a Fair Jobs Code Plan outlining how the requirements of the code will be met. The plan must address the code's standards, which are:

- compliance with employment, industrial relations and workplace health & safety obligations
- secure employment and job security
- cooperative and constructive relationships between employers, employees and their representatives

[41] Fair Jobs Code - Fact sheet | buyingfor.vic.gov.au.

- workplace equality and diversity
- supply chain compliance with employment, industrial relations and workplace health and safety.

Enshrined in legislation under the *Local Jobs First Act 2003 (*Vic*)*, the Local Jobs First Policy consists of the Victorian Industry Participation Policy (VIPP) and the Major Projects Skills Guarantee (MPSG). The VIPP component of Local Jobs First ensures that small and medium-sized enterprises in Victoria are provided an opportunity to compete for Victorian Government contracts.

The MPSG ensures that at least 10 per cent of the total estimated labour hours worked on construction projects valued at or over $20 million is undertaken by apprentices, trainees and cadets.

Contractual arrangements: apportionment of responsibilities

In addition to legislative and regulatory obligations, other requirements are imposed on principal contractors and suppliers. As mentioned above, as well as agreed project deliverables, these requirements generally also include a commitment to comply with all workplace laws, requirements to meet certain criteria in relation to industrial relations management and obligations to consult and report on defined industrial relations issues, incidents and risks. Contractors on government projects are required to adopt and implement appropriate processes to manage risks and report on their performance, for example preparation of monthly health and safety reports, and to ensure all necessary training is provided.

The apportionment of responsibilities can be summarised as the head or principal contractor being solely responsible for managing all aspects of industrial relations and occupational health and safety (so far as is reasonably practicable), and the Victorian Government delivery bodies (e.g. VIDA and SRLA) being responsible on behalf of the State for actively monitoring the extent to which the principal contractors are meeting their obligations. Principal contractors therefore typically have obligations to keep the state delivery bodies fully informed of any issues or actions affecting each project.

VIDA has adopted an “active client” safety model for OHS to support the safe delivery of the VIDA program which places VIDA in a position of actively overseeing, supporting, monitoring and influencing improved health and safety management of the delivery program where required, without looking to ‘direct’ or ‘supervise’ how expert contractors should perform those works. In some contracts, additional incentives are included, such as payments linked to performance against key performance indicators (KPIs) for OHS. For example, in alliance procurement models, KPIs related to safety are common.

The principal contractor is solely responsible for these workplace and operational matters. Responsibility for the risk of industrial relations issues in relation to the project (including time

and cost impacts) will also typically sit with the principal contractor but may be shared with the State in certain circumstances depending on the contractual structure. A cost reimbursable approach will mean more costs are borne by the State if these risks eventuate, relative to competitively tendered fixed amount models.

Powers to remove personnel from worksites and prevent unauthorised access

The Review has been asked to consider if VIDA has the power to direct the removal of individuals engaging in criminal or other unlawful conduct from Victorian worksites.

VIDA has broad contractual powers in transport project contracts to direct the removal of personnel from VIDA work sites. However, the Review understands these have rarely (if ever) been used in respect of on-site personnel.

The extent of VIDA's powers varies across contracts, including with:

- some contracts providing VIDA with a general power to direct the removal of individuals who are considered 'unsatisfactory'
- other contracts providing VIDA with a more limited power to direct the removal of individuals in certain circumstances, for example:
    - where VIDA forms the opinion that the individual is not appropriately skilled, qualified or experienced;
    - where VIDA forms the opinion that the individual is incompetent, negligent, dishonest or guilty of misconduct; or
    - for safety reasons.

Notwithstanding these broad contractual powers, there are significant practical challenges in VIDA exercising the powers to direct the removal of individuals engaging in criminal or unlawful conduct, the key one being that VIDA's ability to obtain and use information around who may be engaging in criminal or unlawful conduct is limited.

There may also be issues regarding the interaction of such contractual powers with the right of entry powers given to people under the *Fair Work Act*. For example, a person may not refuse entry onto premises by a *Fair Work Act* entry permit holder who is entitled to enter the premises under the Act.

There is, and it is noted this would apply in any workplace context, also legal risk in removing people from the workplace without due process.

Some of the practical limitations in obtaining the necessary information include:

- relying on contractors to know whether people onsite are engaging in criminal or unlawful conduct

- The willingness of those contractors to share that information if they do have such knowledge
- a lack of legal basis for Victoria Police to share information regarding such conduct with the employer or VIDA.

Outside of contractual provisions, VIDA from time to time engages with principal contractors in relation to the performance of management personnel which has on occasion led to the principal contractor taking decisions to change personnel.

Unauthorised access to worksites

In terms of individuals who are not currently employed on a worksite and do not have valid right of access permits, control of access to sites rests with the contractor. The *Occupational Health and Safety Act* requires, amongst other things, that a person who has management or control of a workplace, such as a builder with management or control of a construction site, ensures, so far as is reasonably practicable, that the workplace and the means for entering and leaving it are safe and without risks to health. Delivery contracts typically impose an obligation on the principal contractor to prevent unauthorised access to the project site.

This general duty applies even when work is not taking place, such as outside of working hours. It extends to visitors including members of the public, who may enter an unoccupied construction site, exposing them to serious health and safety risks. The principles of health and safety protection require that members of the public, along with employees and other persons at work, are given protection against risks to their health and safety that is reasonably practicable in the circumstances. [42]

Individuals who enter a site without authorisation and refuse to leave may potentially be charged with trespass under section 9(1) of the *Summary Offences Act 1966.* Under that Act it is an offence to wilfully trespass in any public place or enter a private space without authority and neglect or refuse to leave after being warned to do so; or to enter a place in a way likely to cause a breach of the peace without a lawful excuse. Action under this law would require a report to Victoria Police to be made. There may also be actions under the Occupational Health and Safety Act open to WorkSafe.

Oversight

Compliance with the ministerial directions and instructions is primarily monitored through annual reporting or an annual attestation process. The attestation requirements to the Ministerial Directions are enabled through the *Financial Management Act 1994* which requires departments and agencies through the accountable officer to establish effective governance

[42] https://www.worksafe.vic.gov.au/construction-site-security-fencing.

frameworks for public construction procurement that are appropriately scaled to the profile of the procurement.

As part of this, departments and agencies must assess and report any material compliance deficiencies as part of the attestation. This is supported by comprehensive guidance for departments and agencies. Monitoring is devolved to the procuring departments and agencies, which must develop appropriate and effective governance frameworks to ensure compliance with the Ministerial Directions and Instructions.

Generally, government measures whether the objectives of procurement-related policies are met via monitoring and reporting of contractual obligations.

Under Local Jobs First, and as prescribed in the *Local Jobs First Act 2003*, each agency must include in its report of operations, under Part 7 of the *Financial Management Act*, a report on the agency's compliance with the Local Jobs First Policy in the financial year to which the report of operations relates.

In the case of the Fair Jobs Code, since 1 September 2024, public bodies mandated under the Victorian Government Purchasing Board's goods and services policies and agencies listed in Schedule 1 to the Fair Jobs Code are required to complete annual attestation and reporting.

For both policies, departments and agencies must assess and report any compliance issues as part of the report or attestation. This is supported by comprehensive guidance for departments and agencies.

Under the Fair Jobs Code, decisions about awarding a pre-assessment certificate, and whether a business or supplier has complied with all applicable employment, workplace relations and health and safety obligations, are based on adverse rulings made by independent bodies, such as a court or the Fair Work Ombudsman. These adverse rulings may be used by the Fair Jobs Code Unit in DJSIR when it is determining whether to reassess or renew a pre-assessment certificate. The Fair Jobs Code Unit may also receive and investigate complaints about a pre-assessment certificate holder. The Local Jobs First Commissioner also has an advocacy role under the Fair Jobs Code.

The *Local Jobs First Act* includes a compliance framework to help deliver the best outcomes for local industry and workers. The Local Jobs First Commissioner is responsible for overseeing and enforcing compliance under the Act and has power to investigate non-compliance with the Local Jobs First Policy where the Commissioner has reasonable grounds to believe non-compliance has occurred, including where the matter has been raised by way of a written complaint.

If there is a reported breach, the Commissioner will review the available evidence and proceed with an investigation if justified.

Opportunities to strengthen procurement and contracting

The terms of reference require this Review to consider the role of Victorian government bodies managing construction projects in relation to workplace relations, operations and practice and health and safety matters.

In the Interim Report, the Review flagged it would further consider whether oversight of procurement and contractual requirements could be strengthened, particularly in relation to sub-contract arrangements. One line of enquiry was whether contractual arrangements could be used to require principal contractors to establish broad complaints handling mechanisms, either independently or as part of a panel of all parties engaged on a building site.

As discussed above, having considered the options the Review recommends that, given the need to ensure a single point of oversight and referral, the government rather than principal contractors should establish an office to manage complaints across all Victorian government construction sites.

The Review has also made recommendations for law enforcement and regulatory agencies to form an alliance to work together in addressing unlawful conduct in the construction sector.

Having made recommendations to establish these State-based arrangements, the Review has considered the role that principal contractors, and sub-contractors, can play in strengthening the collective effort to better respond to allegations of criminal or other unlawful conduct.

Contribution of principal contractors to the collective effort

Principal contractors sit at the middle of the eco-system of Victorian government construction sector. Government and its agencies are tackling the problems that have emerged on construction sites through interventions at the Federal and State level. The Review recommends that the State add to those interventions by creating a new complaints referral body and formalising an Alliance of law enforcement and regulatory bodies. Those interventions focus on revealing and addressing the conduct on worksites, creating opportunities to detect and disrupt criminal and unlawful behaviour at a granular level.

Between government and the workforce sit the principal contractors. They are impacted by conduct, such as unprotected industrial action, or health and safety stoppages that may have been called for an industrial motive. They have an incentive to ensure industrial harmony to minimise delays and increases in costs.

The Review expects that the combined impact of Federal and State interventions in the construction sector will reduce some of the pressures on these contractors. Ideally, these interventions will make their projects more sustainable as disingenuous actors are removed from the CFMEU, and the environment becomes more hostile to criminal and unlawful conduct.

Principal contractors should play their part in supporting government actions. To maximise the effectiveness of those government interventions, the Review considers that construction policies[43] and contracts include clauses that cover a *criminal or other unlawful conduct* and create specific obligations on contractors to respond where that conduct occurs within their projects.

In order to help overcome the current reluctance to report misconduct, the Review recommends that principal contractors be **required** to report complaints of criminal and unlawful behaviour arising on the sites that they control. It will not be enough to pass on complaints they happen to hear.

In addition to reporting these matters, principal contractors should ensure that, where possible, they and their subcontractors **act** to address criminal and unlawful conduct. Many of the available responses, from termination of employment to taking action to disqualify a Health and Safety Representative, are *only* available to an employer. The Review understands that there are strong disincentives to taking this action. However, as these disincentives reduce through the efforts being taken at the Commonwealth level, principal contractors need to contribute to the collective effort by using the powers they do have to respond to employees who are engaging in criminal and unlawful conduct.

VIDA will be part of the Alliance recommended by the Review, and so should gain visibility of inappropriate conduct on worksites, through the work of the complaints referral body. VIDA should then be able to work with principal contractors, to ensure they are also aware of issues, and are taking the actions they are contractually obliged to take in response to those issues.

The Review expects that these entities will willingly cooperate with the new complaints referral body and promote awareness of its existence; and that principal contractors will create and implement systems to capture complaints of criminal and unlawful behaviour and pass relevant information on to the complaints referral body.

To make these actions a clear obligation, and to create remedies for breaches of the obligation, these requirements should be added to current and future construction contracts.

Recommendation 7

The Review recommends that construction policies and contracts include clauses that cover *criminal or other unlawful conduct* that require principal contractors of construction projects to:

- report any suspected criminal or other unlawful conduct to the new complaints referral body

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[43] Amendments as required to the Fair Jobs Code (the requirement to have Fair Jobs Code Plan), Ministerial Directions for and Instructions for Public Construction; Construction Supply Register.

- ensure that where possible, they and their contractors act to address criminal and unlawful conduct
- promote, support and work with the new complaints referral body
- have systems and processes in place to fulfil these obligations with respect to the overall construction project, including its subcontractors.

The Review expects that changing the policies will have the effect of imposing these obligations on principal contractors of *existing* projects by virtue of the contractual clauses that require compliance with policies, including if and when these policies are amended. If this is not the case, the Review recommends variations to the existing contracts.

5. Law and practices applying to union and workplace representatives

Control of physical access to a site.

While not all the criminal and unlawful conduct complained of happens physically on a building site, access to these sites is a key enabler of much of the conduct that has led to this Review.

Both State and Federal laws require union representatives to hold permits to access worksites, and these permits are conditional on the union representatives meeting certain standards. The permits can be suspended or revoked or, at the Commonwealth level, issued subject to conditions.

In addition to union representatives with access to sites, the role of Health and Safety Representatives (HSRs) under the *Occupational Health and Safety Act* also provides significant powers, including to issue provisional improvement notices and, after consultation with an employer, to issue directions to cease work. HSRs are also entitled to bring other people onto worksites to assist an HSR with their duties and these assistants are not required to hold permits.

It has been suggested to the Review that these permits and powers have been misused and this misuse contributes to the problems that have led to this review. The Review has heard that there should be higher bars for entry permits, or for appointment as a health and safety representative, and quicker and more effective ways of removing a person from a worksite.

There is a tension between the need to ensure that union representatives can enter a worksite to legitimately protect the rights and safety of workers, and the need to exclude people who use those powers disingenuously, or whose known links with organised crime create a risk. Similarly, although there are allegations that HSRs have used their powers inappropriately for industrial purposes, the primary objective of the HSR system is to ensure workers in all areas of the economy have a representative who can advocate effectively for their safety.

There is no simple way to balance these objectives, particularly as the legislation that controls entry rights and the appointment of HSRs applies to all workplaces in the State.

In this Chapter, the Review has considered the existing controls on entry to a site, the appointment of HSRs and whether any changes should be made in this area.

Existing controls on entry

Employees

Obviously, employees of the various contractors and subcontractors are permitted on site. This group includes workers engaged through labour hire firms. There have been reports that labour hire arrangements allow inappropriate people to enter worksites as employees,

even if those individuals may have previously been prevented from entering the site as a union representative.[44]

Workplace laws apply to all these workers, and their employment can be terminated and they can be removed from the workplace under the terms of their various engagements subject to legislation.

Any blanket restrictions based on a person's criminal history or links with crime need to be carefully targeted. In his interim report, Watson notes the important role construction plays as an employer of people with a criminal record who can find it difficult to find work and draws an important distinction between people who are working on these sites taking an opportunity to change their lives and those who are engaging in on-going corrupt or criminal conduct[45]. The Review has focused on interventions targeted on those in the latter group and does not recommend any broad intervention based on a person's criminal history that would have the general impact of making the search for work any more difficult.

Criminal Organisations Control Amendments.

As set out in Chapter 3, recent amendments to the *Criminal Organisations Control Act 2012* will make it an offence for members of prescribed organisations to enter certain areas at Victorian government worksites. While this offence will not commence until regulations are made, defining both what are the prescribed organisations and which worksites are covered, these changes will mean "specified organised crime groups will be banned from entering Victorian government worksites – ensuring these sites are free from the influence of outlaw gangs and criminal groups."[46].

This offence is tightly targeted, as it will only apply on prescribed government worksites, which will be designated only if the Minister is 'satisfied on reasonable grounds that applying the prohibitions under this Part in relation to that area is likely to substantially assist in disrupting or preventing criminal activity in relation to public construction.'[47]. This offence will apply to any person on the worksite, regardless of whether they are there as an employee, a union representative or as an HSR.

VIDA's powers

In Chapter 4, the Review sets out VIDA's powers to remove people from worksites, if they are engaging in criminal or other unlawful conduct. We note that although these powers exist, there are significant practical challenges in VIDA exercising the powers to direct the removal of individuals suspected of engaging in criminal or unlawful conduct. These include the

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[44] Drill S and Dowsley A, 27 October 2024, Push to outlaw labour hire to flush out bikies, *Herald Sun*.

[45] Watson G, 2024, *Watson Interim Report Investigation into allegations against the CFMEU* https://cg.cfmeu.org/cfmeu-administrator/watson-interim-report.

[46] Media release: *Tougher Laws to Combat Organised and Serious Crime*, 28th Aug 2024.

[47] Criminal Organisations Control Amendment Act 2024, s98, at new s124ZZE(3).

difficulty for VIDA of having enough information about an individual worker to justify the use of these powers.

Union officials' ability to enter a worksite.

At the Commonwealth level, entry permits can be issued to union officials under the *Fair Work Act 2009,* and the *Work Health and Safety Act 2011*. Union officials who hold a Fair Work Act Entry Permit may enter a site for industrial purposes, such as to hold discussions with workers. If the Union official wants to address an occupational health and safety matter under Commonwealth law, they will need an additional Work Health and Safety permit or, for a Victorian worksite, an Occupational Health and Safety permit.

Fair Work Entry Permits (Commonwealth)

Under the *Fair Work Act*, to enter a work site, union officials must hold an entry permit. This entry permit gives them the right to enter work premises to meet with employees and investigate if they suspect the employer has breached the *Fair Work Act* or another instrument.

The entry permit is issued to a union official by the Fair Work Commission if the Commission is satisfied the union official is a '**fit and proper person'**. Under s513 of the *Fair Work Act*, in deciding whether the official is a fit and proper person the Fair Work Commission must take into account whether the proposed permit holder has (among other things):

- received appropriate training about the rights and responsibilities of a permit holder;
- been convicted of an offence against an industrial law;
- been convicted of an offence involving entry onto premises; or fraud or dishonesty; or intentional use of violence against another person or intentional damage or destruction of property;
- been ordered to pay a penalty under the Fair Work Act or any other industrial law in relation to action taken by the official;
- had a previous permit revoked or suspended or made subject to conditions.

The Commission can also consider any other matter it thinks is relevant to the permit application and can impose conditions on a permit, based on any of these considerations. A permit must **not** be granted if the official is already subject to a suspension or disqualification of their right of entry under a State or Territory industrial relations or occupational health and safety law[48].

Once a permit has been issued, it can be suspended or revoked by the Fair Work Commission. Section 510 of the Act sets out circumstances when the Commission **must** impose conditions on, revoke or suspend entry permits. These circumstances include when the permit holder has been ordered to pay a penalty for a contravention relating to the entry permit. The

[48] *Fair Work Act (Cth) s514.*

Commission may also suspend or revoke an entry permit if it is satisfied that the permit holder's organisation, or officials of that organisation, have misused their entry rights[49].

Work Health and Safety (Cth) entry permits

If a union representative wants to investigate an occupational health and safety issue on a Commonwealth work site, they will also need a Work Health and Safety entry permit under the *Work Health and Safety Act 2011 (Cth)*. These permits are also granted by the Fair Work Commission and bring with them the power to inspect documents that relate directly to a suspected breach and consult and advise workers.

A permit holder must be an elected officer of a union; or be an employee of a union and have completed training in the *Work Health and Safety Act 2011* and hold a Fair Work entry permit. WHS permits may also be revoked for contraventions of any condition of the permit.

Occupational Health and Safety (Vic) entry permits

To exercise a right under state occupational health and safety law, union officials must hold an entry permit issued by the Fair Work Commission **and** an entry permit issued by the Victorian Magistrates' Court under *the Occupational Health and Safety Act*.

The state law refers to union officials as 'authorised representatives of registered employee organisations; or ARREOs. The Magistrates' Court may grant an ARREO an OHS entry permit if it is satisfied of several things, including that the ARREO has completed a training course approved by WorkSafe, and if it has had regard to whether the ARREO has had any other entry permits revoked, or has been found guilty of any indictable offence in the previous five years[50].

Once a permit has been granted, the ARREO can enter a workplace during working hours if they reasonably suspect that the *Occupational Health and Safety Act* has been contravened and if the registered employee organisation has the right to represent the workers affected by the suspected contravention, or there is another defined nexus between the workers and the employee organisation. They are permitted by the Act to exercise certain powers such as inspecting plant and substances, observing work, and consulting with employees and employers.

WorkSafe or an employer can apply to the Magistrates' Court to have an ARREO's OHS permit revoked for a period of up to 5 years. An application for revocation can be made on the basis that an ARREO intentionally hindered or obstructed an employer or employee or acted unreasonably or not for the purposes of exercising a power.

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[49] *Fair Work Act (Cth) s508.*

[50] *Occupational Health and Safety Act 2004*, Part 8, Division 2.

Unlike the *Fair Work Act*, the *Occupational Health and Safety Act* does not provide for conditions to be imposed on an entry permit.

Employee rights

Union delegates

A union delegate, or workplace delegate, is an employee elected or appointed to be an onsite representative of the union. The *Fair Work Act* does not regulate who can be appointed to be a union delegate or their qualifications or the process for election or appointment. Delegates have the right to represent the industrial and health and safety interests of employees in their workplace.

Once appointed or elected, union delegates have certain protections and rights under the *Fair Work Act* such as protection from discrimination and the ability to undertake their role as a delegate without unreasonable interference by the employer. Depending on the size of the employer and any provisions in an EA that may apply they may also have rights to benefits such as paid training and the ability to represent other workers in matters involving discipline or consultation generally.

Health and Safety Representatives (HSRs)

The responsibility for providing a healthy and safe workplace rests with the employer or the person who manages or controls a worksite. HSRs have an important role under the *Occupational Health and Safety Act*, in representing workers and bringing issues to the attention of their employer.

Election

The *Occupational Health and Safety Act* sets up a system to appoint HSRs. Workers are grouped into 'designated work groups' (DWGs) and DWGs then elect one or more HSRs. The establishment of a DWG can be initiated by either employees or an employer, with the Act providing for negotiations between those parties to agree on the number and composition of work groups to be represented by the HSRs, the number of HSRs to be elected; and the workplace to which the work groups will apply.

HSRs are elected by members of their work group, rather than being appointed by an employer. To stand for election as an HSR, an employee must be a member of the DWG and must not be disqualified by a Magistrates' Court from acting as an HSR. Members of the DWG decide how to run the election and, if there are as many candidates as there are HSR roles, an election is not held and the candidates are taken to be elected[51].

Although there is no requirement for an HSR to complete specific training, an employer must allow an HSR to attend WorkSafe approved training on request, and on paid time.

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[51] See Part 7, Division 4 of the *Occupational Health and Safety Act 2004.*

Powers

The *Occupational Health and Safety Act* grants HSRs comprehensive powers, including to:

- Conduct workplace inspections of any part of the workplace, with reasonable notice or immediately in case of an incident or immediate risk.
- Document any part of the workplace by taking photographs, measurements, sketches, or recordings at the workplace, except during certain interviews.
- Accompany an inspector during workplace inspections.
- Seek assistance from a suitable person when necessary (including a union official).
- Issue Provisional Improvement Notice (PIN) to address OHS issues.
- Issue directions to cease work after consultation with the employer

The Review notes that the power to seek assistance from a suitable person allows an HSR to bring a union official on site with them, regardless of whether that official holds a Fair Work Entry Permit or an OHS entry permit. Before December 2023 a union official assisting an HSR was required to hold a Fair Work Permit, but this requirement was removed as part of the Commonwealth government's 'Closing Loopholes' reforms[52].

Disqualification

An HSR will remain in that role until they cease to be a member of the DWG or if, after 12 months, the members of the DWG determine that the HSR should no longer hold the role.

For a worker to otherwise be removed from their role as an HSR, an employer must apply to the Magistrates' Court and demonstrate that the HSR used their powers under the Act (such as their power to issue a direction to cease work) intending to cause harm to the employer. If the Magistrates' Court is satisfied of this, it may disqualify the HSR for a specified period, or permanently.

Entry rights in practice

This system applies across all Victorian workplaces, and HSRs in all industries play an important role in representing the health and safety interests of their co-workers. Similarly, union representatives and union delegates protect the rights of employees and ensure that workers are treated fairly and consistently with the terms of their employment.

However, the Review has heard that on Victorian government construction sites, these powers have been misused and have enabled criminal and unlawful conduct, contributing to the many problems that have led to this review.

As the Review notes in Chapter 3, media reports have alleged that labour hire provides a pathway for OMCG members to find roles on worksites[53] and that members of the CFMEU

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[52] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (Cth).*

[53] Drill S and Downsley A, 27 October 2024, Push to outlaw labour hire to flush out bikies, *Herald Sun*.

who had been removed from positions in CFMEU were returning to worksites as labourers[54]. The Watson interim report found that, on the available information, the Victorian branch of the CFMEU had been infiltrated by OMCGs and organised crime figures and noted that OMCG members 'mainly inserted themselves at the delegate level, employed by third parties.'[55].

The Fair Work Act permits operate to ensure that people who are not 'fit and proper' do not hold entry permits, and misuse of the permits can result in their cancellation, however, these permits are irrelevant if a person is on a worksite as an employee. In addition, a Fair Work Act permit is not necessary for any person who is entering a site to assist an HSR. This provides another avenue for inappropriate people to enter worksites.

Although the *Occupational Health and Safety Act* establishes a system for the election of HSRs from among their fellow workers, the ability to use labour hire to bring a specific worker onto a site allows disingenuous actors to get around that system. It has been reported that these workers have been elected unopposed as HSRs, despite not working within a DWG before their election. It is not clear to the Review if the workers in a DWG generally agree to that arrangement, or if it imposed upon them. In either case, the result is that once on worksites, these workers are appointed as HSRs, often full-time. It has been reported that this enables them to collect a salary without performing the duties[56], or to misuse the powers of an HSR to intimidate others by, for example, threatening to call a stop work on safety grounds if a sub-contractor who is not favoured by the CFMEU is allowed on site.

The Review has been told that contractors often accept these behaviours without reporting them to relevant authorities to avoid retribution, disruption to operations, and associated cost implications. It has been reported that the easiest and most cost-effective pathway for contractors is often to accede to demands.

This reported misuse of the position has led some stakeholders to propose that the bar needs to be raised for people to be appointed to these positions. The Review has heard suggestions that there be tighter controls on the selection of HSRs, stricter enforcement of the *Occupational Health and Safety Act* election provisions for HSRs, formal training requirements and that HSRs should be subject to a fit and proper person test of the type that applies to a Fair Work entry permit.

While there are reports of misuse of the powers provided to HSRs, the Review considers that any action to limit workers' ability to raise health and safety concerns may introduce unacceptable risk in what can be dangerous places of work. As WorkSafe notes, employees can make a significant contribution to identifying and controlling hazards and risks and

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[54] Drill S, 27 October 2024, Secret battle in building union, *Herald Sun*.

[55] Watson G, 2024, *Watson Interim Report Investigation into allegations against the CFMEU* https://cg.cfmeu.org/cfmeu-administrator/watson-interim-report.

[56] See for example McKenzie N, Marin-Guzman D and Schnieders B, 13 July 2024, 'A Cancer that Spreads', *Australian Financial Review*.

developing preventative measures to address health and safety issues that arise at the workplace.[57]

Protecting health and safety while preventing criminal conduct.

As we noted at the start of this chapter, Victoria's occupational health and safety laws apply across the state. The WorkSafe Annual Report for 2022/23 notes that it covers 343,568 workplaces, and that during the year it launched a new campaign to raise awareness of the importance of HSRs in the workplace. Any change to the *Occupational Health and Safety Act* would apply to all workers in Victorian workplaces.

If HSRs were required to pass a fit and proper person test, this would make it more difficult to attract and appoint HSRs, who are a valuable part of the State's occupational health and safety infrastructure. Employees who may be otherwise motivated to nominate themselves as HSRs may be discouraged if they are required to provide evidence of their character or feel that their record is being scrutinised. If this were combined with increased vigilance over HSRs who over-step their role, it may become significantly more difficult to attract employees who would be suitable HSRs.

Pre-conditions for appointment as an HSR would require an agency to administer them, and it would place a considerable burden on any court or agency that was required to assess a nominated HSR's suitability for the role – each worksite may have dozens of HSRs at any given time. Despite the problems that have arisen in the Victorian government construction sector, the Review does not think that imposing preconditions on the appointment of HSRs is justified.

Rather than imposing a blanket requirement on HSRs, the state could choose to define a particular class of workplace as (for instance) a 'high industrial risk' workplace and impose more stringent rules on the appointment of HSRs or entry rights for HSRs' assistants to those locations. This is similar to the approach that has been taken in the amendments to the *Criminal Organisations Control Act,* which will designate 'Victorian Government worksites' covered by the Act through regulations. It would be possible to adopt this definition and apply particular occupational health and safety rules to union representatives and HSRs on these sites only.

However, construction sites remain a high-risk environment for workers. WorkSafe runs a 'Construction Priority Harms Program' to address the leading causes of death and serious injury in the sector. Victoria's major infrastructure projects are within the program's scope of work, and the WorkSafe annual report notes that inspectors "...primarily focused on hazards that have historically resulted in serious harm, including work from height, plant-pedestrian interface, falling objects, contact with electricity and structural collapse.[58]". The Review does

[57] WorkSafe, 17 May 2006, Health & Safety Representatives – Policy Positions.
[58] WorkSafe Annual Report 2022-23.

not recommend imposing any controls on HSRs that may make it more difficult to continue to mitigate these real risks.

There are powers to address misconduct by union representatives or HSRs on a case-by-case basis. These interventions include:

- action under the *Fair Work Act* against a permit holder who hinders or obstructs a person, or who acts in an improper manner, when exercising their right of entry
- action under the *Fair Work Act* to suspend or revoke a union representative's Fair Work entry permit
- action under the *Occupational Health and Safety Act* to disqualify an HSR
- prosecutions under the *Occupational Health and Safety Act* of ARREOs who intimidate or threaten any employer or employee
- action by employers to terminate employees within the terms of their employment
- VIDA's powers to remove people from worksites.

While some of these actions can take time, the Review considers that, in combination with the other recommendations the Review makes, the introduction of amendments to the *Criminal Organisations Control Ac*t and actions at the Commonwealth level, these interventions are the best options.

External actions include the Administrator's disciplinary processes, leading to the termination of some CFMEU employees and the initiation of investigations[59]. The Fair Work Commission has established an on-line portal for complaints that, as we noted in Chapter 3, has received 700 submissions.

In addition to any action at the Fair Work Commission to suspend or revoke an entry permit, the State's amendments to the *Criminal Organisations Control Act* will, when they commence, provide a mechanism to remove members of prescribed organisations from relevant worksites, regardless of whether they hold an entry permit or have been appointed as an HSR. These interventions focus on the person rather than their role and are more likely to be effective in keeping inappropriate people off worksites, than blanket changes to the roles and powers of HSRs and ARREOs.

All these interventions will be supported by the Review's core recommendations to establish a complaints referral body and an Alliance involving state and federal agencies; supported by our recommendation to require, through construction policies and contracts, that principal contractors report any suspected criminal or other unlawful conduct to the new body. This should surface the evidence needed for legal interventions and ensure that bodies that have the power to act are aware of the issues.

[59] See testimony at the Senate Education and Employment Legislation Committee Estimates, Wednesday 6 November 2024, p103.

The Alliance can ensure, for example, that WorkSafe is aware of ARREOs who are misusing their OHS entry permit, so that WorkSafe can consider prosecution. And as the environment on Victorian government worksites becomes less fertile for those who would misuse the powers that are intended to support the safety of their colleagues, the Review expects that employers will become more willing to apply to the Magistrates' Court to disqualify HSRs who are using their powers to cause harm to an employer. This will be encouraged by new construction policies and contractual terms requiring principal contractors to act to respond to criminal and unlawful conduct on their worksites.

As noted in the Review's Interim Report, the Victorian Government has committed to a separate review to consider whether the powers, functions and support provided to ARREOs and HSRs in all sectors under the Occupational Health and Safety Act remain effective and fit-for-purpose to deliver improved health and safety outcomes for all workers.

The allegations that have led to this Review relate to the practices being employed amid the broader culture described in the Watson Report. The collective effort currently underway, together with the Review's recommendations to strengthen this effort, seek to create an environment where people can act to address the conduct. The Review prefers this approach to the creation of greater regulation that carries a risk of reducing occupational health and safety protections.

6. Future opportunities

Cultural and administrative changes will move more quickly than law reform, and Victoria needs to be well positioned to capitalise on any change. The Review's recommendations to create a complaints referral body and an Alliance are designed to be flexible enough to be implemented in the short term, to allow Victorian agencies to work with Commonwealth agencies and the CFMEU administration while their work is ongoing.

However, the issues that led to this review are entrenched problems, and the Review is aware that there is a risk that stronger interventions may still be needed.[60] The Review has also considered a range of more significant legislative reforms and, while they are not recommended now, government may want to consider them in the future.

The Review recommends that the implementation and impact of its recommendations be evaluated after two years. An evaluation of the Review's recommendations and their efficacy will provide government with the evidence to judge whether the reforms, in tandem with the actions taken by the Commonwealth and the administrator of the CFMEU, have changed behaviour on Victorian Government construction sites, and whether there is a need to consider more substantive changes.

Recommendation 8

That the implementation and impact of its recommendations be evaluated two years after delivery of this Review, and that government consider whether further reforms are needed to provide Victorian government bodies with the powers to investigate and respond to allegations of criminal or other unlawful conduct in the Victorian construction sector.

A legislated complaints body

The Review recommends that a complaints referral body be established by the state and act as a secretariat for the Alliance. An administrative office is the most efficient way to establish a body in the short term, however, there are some functions that a complaints referral body could only take on if it were created in legislation and given specific powers and functions.

Legislating a complaints body would be an opportunity to create a robust complaints management system, where all complaints come into the complaints body, and the body coordinates the sharing of complaints and oversights the results of complaints investigations. This would be founded on clear requirements for employers, Victoria Police and other

[60] See *Fair Work Ombudsman v Construction, Forestry and Maritime Employees Union* (The Beams Lift Case) (No 2) [2024] FCA 779 para 75.

agencies to notify the complaints body about complaints, share information, and notify the complaints body of the outcome of investigations into complaints.

A variety of complaints bodies exists across government. The Victorian Ombudsman has a broad remit to consider any complaint about an action taken by a public body and a range of bespoke complaints bodies exist covering specific areas. There are key features of successful complaint bodies that government could consider if it were to develop a legislated complaints body to cover the Victorian Government construction sector.

A legislated complaints body that included:

- a central point to receive complaints
- mandatory reporting by employers of complaints of criminal or unlawful conduct
- an information sharing regime to enable the sharing of evidence and outcomes of investigations

would contribute over time to a culture where complaints are encouraged, recorded and responded to. The more faith that workers and others have that a complaint will be taken seriously and addressed, the more likely it is that they will be confident in making a complaint.

A central coordinating body

One common feature of complaints schemes is a central body to receive complaints and coordinate the management of those complaints. For example, the Reportable Conduct Scheme, overseen by the Commission for Children and Young People (CCYP) ensures that all allegations of particular types of harmful conduct in relation to children (known as 'reportable conduct') are investigated by workplaces within the scope of the scheme[61]. The features of this scheme include:

- a power for Victoria Police to inform the CCYP of the outcome of its investigations
- an advice function enabling the CCYP to advise workplaces on how to investigate and address allegations
- an oversight function giving the CCYP the ability to oversee investigations conducted by employers
- information sharing between the CCYP and the Working with Children Check agency, so substantiated reportable conduct can be considered in relation to Working with Children checks
- annual public reporting on the numbers of allegations received and the areas in which they arise, giving government visibility of these issues.

The Review expects that its recommendations will contribute to a culture that supports people to make complaints about conduct on Victorian government construction sites. However, if, when these changes are evaluated, that has not occurred, then there may be aspects of the

[61] *Child Wellbeing and Safety Act 2005,* part 5A.

Reportable Conduct Scheme and the CCYP's co-ordination role and functions that could be helpful in driving the cultural change needed to encourage people to make complaints about conduct on Victorian government construction sites.

Mandatory reporting

It has been reported that there is a culture on building sites that does not support complaints and treats talking to police, as betrayal.[62] In this environment, *requiring* complaints to be made may help to shift this culture.

There are several regulatory schemes that include mandatory reporting. Mandatory reporting applies to employers in relation to incidents under the *Occupational Health and Safety Act*, which requires employers to inform WorkSafe of harmful 'incidents' that occur at a workplace under that employer's management and control[63].

This Review has noted above that an obligation to report complaints of criminal or unlawful conduct could be imposed through procurement policies and contractual terms. However, if there were to be a legislated complaints scheme for Victorian government construction sites, it could be bolstered by mandatory reporting of certain types of conduct. Rather than placing a burden on workers, employers could be required to inform the complaints agency of any complaint of criminal or unlawful conduct they are aware of, and to provide the agency with any available information in relation to that complaint.

Mandatory reporting of complaints from Victorian government construction sites would create a flow of information into the complaints body, increasing its ability to refer complaints to the appropriate agency, providing a wholistic view of complaints arising across the sector, and creating visibility of problematic conduct.

Information sharing

As the Review discussed above in relation to its recommendation for an Alliance, it may be challenging for government agencies to share information. The Review expects that there will be enough flexibility in individual agencies' legislation to allow information to be shared for a proper purpose, but if the experience of the Alliance is that this is a barrier, creating a legislated complaints body will provide an opportunity to address those barriers.

Legislating information-sharing requirements may be useful to establish the relationship between Victoria Police and other agencies on the Alliance[64]. Legislation could clarify that police investigations have priority, but if an investigation does not proceed, police could be

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[62] Watson G, 2024, *Watson Interim Report Investigation into allegations against the CFMEU* https://cg.cfmeu.org/cfmeu-administrator/watson-interim-report.

[63] *Occupational Health and Safety Act 2004* s38.

[64] See for example *Child Wellbeing and Safety Act, s16T & 16U.*

empowered to inform the complaints body and, where appropriate, share evidence with a regulatory body that may be able to tackle the issue in a different way.

It would also be helpful to require any state agency engaged with the Alliance to inform the complaints body of the outcome of an investigation conducted by that agency. This would allow the complaints body to keep records of the outcome of complaints, analyse the results and inform government of trends and emerging issues.

While many employers will have existing complaints policies that involve investigation of complaints[65], the outcome of those investigations is not generally visible outside that organisation. Information-sharing arrangements could be legislated to enable (or require) an employer to share with the complaints body their decision to either investigate or decline to investigate a compliant, and, if there is an investigation, the outcome of that investigation.

This would increase the visibility of complaints, allow the complaints body to refer some matters to regulators with formal powers to address issues, and increase the visibility of complaints on Victorian government constructions sites.

Whistleblower protection

While the Review does not recommend a comprehensive legislated whistleblower protection scheme in the short-term, in the future there may be a case for creating a legislated scheme in relation to Victorian government building sites.

The Review noted earlier that the strength of these schemes is that they create a deterrent to retaliatory action that is strong enough to reassure those wanting to complain that it will be safe for them to do so. As described in Chapter 2, there are several whistleblower schemes that will apply to complaints made to the complaints referral body, but this will be a patchwork of protections that depends on the Act that a complaint is made under, who the complainant is and the agency that the complaint is made to. For people to feel confident in complaining, they need assurance that they will be protected from retaliation, even if their complaint does not fit into one of the categories that currently attract whistleblower protections.

While the Review expects that the various steps being taken at the Commonwealth level and by the administrator of the CFMEU will reduce the reluctance to complain, it may be that at the time the recommendations made by this Review are evaluated, there is a need and an appetite to further embed an environment where people feel safe to complain. If this is the case, government may want to consider a whistleblower protection scheme modelled on the Public Interest Disclosure Scheme.

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[65] See, for example, John Holland Whistleblower Standard, Whistleblower Standard (jhg.com.au), Mirvac Whistleblower Policy, Corporate Governance | Mirvac.

Public interest disclosures

The *Public Interest Disclosures Act 2012* creates a system where any person who makes a disclosure of suspected improper conduct in relation to the public sector will have that disclosure treated confidentially and will be protected from reprisals. This scheme is overseen by IBAC, which receives all the complaints made under the scheme.

Within most government agencies, there is a Public Interest Disclosure Coordinator, who is responsible for receiving these disclosures. If a government agency receives a disclosure that they consider meets a certain threshold, it must be notified to IBAC. Additionally, any person can make a disclosure directly to IBAC.

IBAC assesses all disclosures and notifications made to it and determines whether they are public interest complaints. If IBAC determines that a disclosure is a public interest complaint, it is treated as a complaint under the IBAC Act. Regardless of whether the disclosure is found to be a public interest complaint, the person is covered by the whistleblower protections in the *Public Interest Disclosure Act*.

The actual protections that apply are broad. It is a criminal offence to take detrimental action against another person in reprisal for a public interest disclosure[66]. Detrimental action is broadly defined, and includes action causing injury, loss or damage; intimidation or harassment; and discrimination, disadvantage or adverse treatment in relation to a person's work. Protections also include protection from civil or criminal liability for making the disclosure, and from disciplinary action for making the disclosure.

There is of course an opportunity to misuse a scheme like this, and the *Public Interest Disclosure Act* notes that it does not prevent management action in relation to an employee who has made a disclosure, as long as that action is not *because* the person made that disclosure. (s44).

If the complaints body were created in legislation and became the coordinator of a complaints scheme, as outlined above, whistleblower protections could be included as part of that suite of reforms.

A Statutory Fair Jobs Code and Commissioner

The Review has recommended that the Fair Jobs Code include clauses covering criminal and unlawful conduct that require principal contractors of construction projects to act to report criminal and unlawful conduct, to address criminal and unlawful conduct on their sites, and to support and promote the new complaints referral body. The Review did also consider whether the Fair Jobs Code should be further strengthened to address criminal and unlawful conduct and whether it could be enforced by a body that has some regulatory powers.

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[66] *Public Interest Disclosures Act 2012, s45.*

If government wanted more options in relation to the enforcement of the Fair Jobs Code, and for the Fair Jobs Code Unit to be able to work more effectively with the complaints referral body and the Alliance to address conduct on building sites, the Code could be given a statutory basis and the Unit could exercise legislated powers and functions. The Review considers that there is also potential for the Local Jobs First Commissioner's role to be expanded, to enable the Commissioner to also regulate and enforce compliance with the Fair Jobs Code.

There is an existing link between the Fair Jobs Code and the Local Jobs First Commissioner. The *Local Jobs First Act 2003* creates a commissioner, with powers to promote the Local Jobs First policy, to monitor and report on compliance with the Policy, and to take enforcement action to address breaches of the Policy. The Commissioner has some regulatory and enforcement powers, which include the Commissioner's power to recommend that the Minister issue an 'adverse publicity notice', setting out the details of a failure to meet the Local Jobs First policy.

The Fair Jobs Code gives the Local Jobs First Commissioner the role of engaging with industry to advocate for and promote the Fair Jobs Code. The Code also states that the Commissioner will liaise with the minister and the Fair Jobs Code Unit to share information and insights on the application of the Code.

With a statutory basis, and a dedicated commissioner, compliance with the Fair Jobs Code could be supported by:

- information-gathering powers, to ensure the Commissioner could review the Fair Jobs Code Plans that are prepared, many of which are commercial-in-confidence
- the ability to request and require companies to provide information that would support the functions of the Commissioner, such as information providing details of the implementation of a Fair Jobs Code plan
- the ability to recommend to the Minister that the Minister issue an 'adverse publicity notice', setting out the details of a failure to meet the Fair Jobs Code
- a legal requirement for companies subject to the Fair Jobs Code to inform the Commissioner of any adverse decisions made against them
- powers to collect information about adverse decisions directly from decision-makers, so that the scheme did not rely on companies notifying the Department themselves of any adverse decisions.

While the Review does not recommend additional legislative change in the short-term, there is a potential opportunity to strengthen the Fair Jobs Code in the future. If, when the impact of this Review is evaluated in two years, the objectives of exposing and responding to criminal and unlawful conduct on Victorian government construction sites have not been achieved, government may want to consider strengthening the Code.

Giving the Code a statutory basis, creating a regulatory capacity in the Fair Jobs Code Unit and expanding the role of the current Local Jobs First Commissioner to enable them to enforce the Fair Jobs Code would create one more tool in the State's armoury.

Appendices

Appendix A - Acronyms and abbreviations

Acronym	Explanation
ACCC	Australian Competition and Consumer Commission
AFP	Australian Federal Police
ARREO	Authorised Representatives of Registered Employee Organisations
ASIC	The Australian Securities and Investment Commission
CCYP	Commission for Children and Young People
CFMEU	Construction, Forestry and Maritime Employees Union
CSR	Construction Supplier Register
Cth	Commonwealth
DJSIR	Department of Jobs, Skills, Industry and Regions
DTF	Department of Treasury and Finance
DWG	Designated working group
EA	Enterprise agreement
FJC	Fair Jobs Code
FW	Fair Work
FW Act	Fair Work Act
FWC	Fair Work Commission
HSR	Health and Safety Representative
IBAC	Independent Broad-based Anti-corruption Commission (Vic)
ICAC	Independent Commissioner Against Corruption (NSW)
IR	Industrial relations
KPIs	Key performance indicators
LHA	Labour Hire Authority
MOU	Memorandum of understanding
MPSG	Major Projects Skills Guarantee
OHS	Occupational Health and Safety
OMCG	Outlaw motorcycle gangs
PC	Principal Contractor
The Review	Formal Review into Victorian Government Bodies' Engagement with Construction Companies and Construction Unions

Acronym	Explanation
ROSB	Registered Organisations Services Branch (of the Fair Work Commission)
SMEs	Small to medium enterprises
SRLA	Suburban Rail Loop Authority
VAGO	Victorian Auditor-General's Office
VIDA	Victorian Infrastructure Delivery Authority
VIPP	Victorian Industry Participation Policy
WHS entry permits	Work Health and Safety entry permits

Inquiries Act 2014

APPOINTMENT OF A FORMAL REVIEW INTO VICTORIAN GOVERNMENT BODIES' ENGAGEMENT WITH CONSTRUCTION COMPANIES AND CONSTRUCTION UNIONS

Establishing Instrument

I, Jacinta Allan, the Premier of Victoria, appoint Gregory Wilson to constitute a Formal Review to inquire into and report on the terms of reference specified in this instrument under section 93(1) of the *Inquiries Act 2014*.

This instrument comes into effect on the date it is executed.

1. Background

On 15 July 2024, I announced that the Victorian Government would establish an independent review to strengthen the power of Victorian Government bodies who are engaged with construction companies and construction unions to respond to allegations of criminal or other unlawful conduct in the Victorian construction sector. The announcement followed allegations in the media of criminal activity involving the Construction Forestry and Maritime Employees Union ("Union") and allegations of criminal associations within the Union.

In response to these allegations, and in addition to the announcement of an independent review, I wrote to the:

- Chief Commissioner of Victoria Police referring the allegations for investigation;
- Commissioner of the Independent Broad-based Anti-corruption Commission (IBAC) referring the allegations for investigation;
- National Executive of the Australian Labor Party to immediately suspend the Union's construction division from the Victorian Labor Party. The National Executive has now taken this action; and
- Commonwealth Minister for Employment and Workplace Relations, the Honourable Tony Burke MP, requesting the Commonwealth Government exercise its powers under the Fair Work Act 2009 to review – and if necessary, terminate – Union enterprise bargaining agreements on Victorian construction sites to prevent criminal activity. Minister Burke has confirmed the Fair Work Ombudsman will review all enterprise

agreements made by the Victorian branch of the Union's construction division that apply to Victorian "Big Build" projects.

2. Terms of Reference

Having regard to the background set out above, you are required to inquire into, report on and make any recommendations you consider appropriate in relation to the following terms of reference:

(a) The current roles, responsibilities and powers of the Commonwealth and the Victorian Government to investigate or respond to allegations of criminal or other unlawful conduct in the Victorian construction sector, including but not limited to:
    i. any coercive, bullying or intimidatory practices or conduct;
    ii. the power of the Victorian Infrastructure Delivery Authority to direct the removal of individuals engaging in criminal or other unlawful conduct from Victorian worksites; and
    iii. protections for whistleblowers and complainants;

(b) The effectiveness of the matters in (a) and any legal or procedural deficiencies in the Victorian regulatory regime, having regard to the roles, responsibilities and powers of any relevant Commonwealth bodies, including as they may relate to criminal or other unlawful conduct or practices of a systemic nature in the Victorian construction sector;

(c) The role of Victorian Government bodies managing construction projects ("Project bodies") in relation to:
    (i) workplace relations, operations and practices, and health and safety matters applying under both Victorian and Commonwealth law and practices; and
    (ii) the apportionment of responsibility and oversight for these matters between parties to contracts delivering construction projects; and

(d) Law and practices applicable to the selection of health and safety representatives, right-of-entry permit holders and union delegates in or on Victorian worksites.

3. Conduct of the Review

Without limiting the scope of your review or the scope of any recommendations arising out of your review that you may consider appropriate, you are directed in the conduct of the inquiry of your review to:

(a) Conduct your inquiry in accordance with this instrument, the *Inquiries Act 2014,* and all other relevant laws.
(b) Otherwise conduct your inquiry as you consider appropriate, subject to the matters set out in section 99 of the *Inquiries Act 2014.* This may include but is not limited to obtaining information, documents, evidence and written submissions, conducting consultations and adopting any informal and flexible procedures and practices;
(c) Provide an accessible and supportive forum for participants to participate in your inquiry, including accommodating their choices as to how they wish to participate in your inquiry to the extent it is practicable to do so and without limitation on the powers of the Formal Review set out in the *Inquiries Act 2014*; and
(d) Have regard to the desirability of conducting your inquiry and producing your report without unnecessary cost or delay.

4. Reporting

You are required to deliver a report of your inquiry to me in accordance with the following timetable:

(a) an Interim Report by 29 August 2024 in respect of any interim findings and recommendations; and
(b) a Final Report by 29 November 2024 in respect of your final findings and recommendations.

5. Recommendations

Your report may contain any recommendations, consistent with the terms of reference, that you consider appropriate arising out of your inquiry, including, but not limited to, recommendations about:

(a) Existing limitations in Victoria's legislative powers over certain workplace relations and related matters, and their interaction with Commonwealth law — for example the operation of matters subject to the *Occupational Health and Safety Act 2004* or the *Victorian Crimes Act 1958*, and those matters regulated by the *Fair Work Act 2009* (Cth) or the *Crimes Act 1914* (Cth);

(b) The establishment of clear processes and protections for whistleblowers and complainants who notify any Victorian Government bodies of any allegations of criminal or other unlawful conduct in the Victorian construction sector; and

(c) The operation of Commonwealth law as applying to registered organisations.

6. Exercise of powers

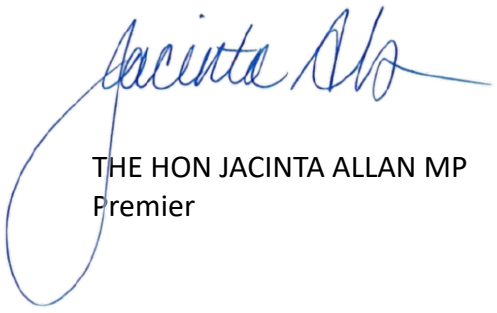
You may exercise the powers of a Formal Review in accordance with the *Inquiries Act 2014.* You may enter into agreements or arrangements for the provision of services to support your inquiry, including, without limitation, any agreements or arrangements with one or more Australian legal practitioners for the provision of legal services.

7. Expenses and Financial Obligations

You are authorised to incur expenses and financial obligations to be met from the Consolidated Fund up to a maximum amount to be approved by the Premier (in consultation with the Treasurer) in conducting your review.

Dated: 20 / 7 / 2024

Responsible Minister:



THE HON JACINTA ALLAN MP
Premier