



Australian Government
**Australian Building and
Construction Commission**



25 July 2018

Mr Stephen Palethorpe
Committee Secretary
Senate Education and Employment Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Palethorpe

Senate Education and Employment References Committee: ABCC Response to Submission by the CFMMEU

I refer to your correspondence dated 11 July 2018 concerning a submission made by the Construction, Forestry, Maritime, Mining and Energy Union to the Senate Education and Employment References Committee's inquiry into the prevention, investigation and prosecution of industrial deaths in Australia (CFMMEU Submission). Your letter advises that the Committee has offered me the right of reply on the basis that the Australian Building and Construction Commission (ABCC) is subject to adverse comment in the CFMMEU Submission.

I am grateful for the opportunity to respond. The CFMMEU Submission is inaccurate in a number of key respects. These are addressed in this response. I do not propose to make submissions on many of the broader issues raised in the CFMMEU Submission. I have confined this submission to factual matters and matters bearing directly on the work of my Agency.

The Australian Building and Construction Commission

The ABCC promotes understanding of and compliance with Australia's workplace laws in the building and construction industry. The ABCC does this by:

- providing information and resources
- advising and assisting everyone to understand their rights and obligations
- impartially monitoring and assessing compliance
- using the full range of enforcement options to address non-compliance.

Response to CFMMEU Submission

Page 12: 'The ABCC works to undermine the role of unions, which has had an adverse impact on work health and safety outcomes'

This statement is not accurate and is contrary to the statutory mandate under which the Agency operates.



One of the functions of the ABC Commissioner is to promote the main object of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act), see section 16. The main object of the BCIIP Act includes ensuring that “building work is carried out fairly, efficiently and productively without distinction between interests of building industry participants, and for the benefit of all building industry participants...”, see section 3(1).

The BCIIP Act further states that this object is to be achieved by ensuring respect for the rights of building industry participants, see section 3(2)(c).

The ABCC undertakes both proactive and reactive enforcement activities. The ABCC responds to notifications and enquiries regardless of whether the complainant is an employer, employee or union. In the 2017/18 financial year, the ABCC responded to 6,900 calls and enquiries. The suggestion that the ABCC works to undermine the role, responsibilities or rights, of any of these groups is incorrect.

Finally, whilst the ABCC was re-established in 2016, the examination powers currently held by the ABCC are the same compulsory examination powers that were held by the predecessor Agency, Fair Work Building Industry Inspectorate (commonly known as Fair Work Building and Construction). The powers of compulsory examination have existed with the ABCC and its predecessor agencies since October 2005.

“Case Study 4: ‘the ABCC’s political priorities’

The position outlined in the case study at page 13 of the CFMMEU Submission is inaccurate. The CFMMEU Submission incorrectly asserts that the ABCC was “blasted” for “wasting time and taxpayers’ money by reference to a number of statements attributed to a Judge of the Federal Court of Australia.”

The comments cited in the CFMMEU decision do not come from the decision of the Court. The judgment of the Court made no such findings. The transcript comments quoted in the CFMMEU submission do not appear in the reasons for decision of the Court.¹ The decision should be considered and understood in its proper context.

The ABCC commenced the proceeding having obtained signed statements from witnesses independent of the ABCC. The Court noted in its written judgment that whilst it accepted a central witness for the ABCC ‘gave evidence to the best of his recollection’, the Court found both the ABCC witness and a respondent in the case were ‘impressive and truthful witnesses’. In those circumstances, the Court did not prefer one witness’ version of events over the other and determined the benefit of this doubt ought be determined in favour of the respondent. The ABCC’s application in this matter was dismissed on this basis.

The CFMMEU Submission also incorrectly asserts that the ABCC brought an appeal that was unsuccessful. This statement is wrong. The ABCC has not filed an appeal against the judgment. There has been no appeal filed by either party. The matter remains before the Court on a discrete costs issue.

Page 13: Code for the Tendering and Performance of Building Work

An important part of the work of the ABCC is monitoring compliance with the *Code for the Tendering and Performance of Building Work 2016* (the Code). The Code regulates certain industrial conduct of entities that seek to be eligible to perform Commonwealth funded building work.

Several of the assertions in the CFMMEU Submission about the practical operation and application of the Code are incorrect.

¹ See *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Cup of Tea Case)* [2018] FCA 402 (26 March 2018)

To provide context, the Code applies to at least 1475 contractors, known as 'code covered entities', who have expressed interest in or tendered for Commonwealth funded building work since 2 December 2016. The Code applies to Commonwealth funded building work and new projects awarded since the contractors became code covered entities. The Code applies to 492 projects which are currently in construction.

Section 11 of the Code relates to the content of enterprise agreements that cover code covered entities. Neither section 11, nor any other aspect of the Code, prevents an employee from raising safety issues, either directly or through their union, nor does the Code prevent union officials from exercising lawful rights of entry to assist workers who have sought their assistance (on any matter, whether related to safety or otherwise).

Further, clauses that deal with safety or supervision of apprentices, qualifications to undertake tasks, or requirements relating to the supervision of tasks are not prohibited by the Code.

The Code imposes an additional sanction and consequence for code covered entities that do not comply with WHS laws, and in this way seeks to promote greater compliance with safety laws. Section 9(3) of the Code states that a code covered entity must comply with work health and safety laws. The ABCC monitors court decisions from all States and Territories to determine whether any contraventions of WHS laws have occurred. Where the ABCC becomes aware of a breach of a WHS law, it can be referred to the Minister as a recommendation for the imposition of a sanction on the basis that it is a breach of the Code.

Drug and alcohol testing

The Code also imposes drug and alcohol testing obligations on certain construction sites, the implementation of which is enforced by the ABCC. Section 32(2) of the Code requires that any *"proposed WRMP (Workplace Relations Management Plan) must include: (a) a fitness for work policy to manage alcohol and other drugs in the workplace that applies to all persons engaged to perform building work on a project and addresses the matters set out in Schedule 4."*

Schedule 4 requires a fitness for work policy to include drug and alcohol testing that meets particular requirements.

The ABCC approves all proposed WRMPs, and in doing so ensures that a fitness for work policy is included. The ABCC monitors compliance with the drug and alcohol testing requirements in the fitness for work policies on those projects.

Page 19: Case Study 6: 'Head Contractors are not being held accountable'

The CFMMEU Submission refers to the deaths of two Irish workers and refers to attendances by inspectors of the predecessor to the ABCC to the site concerned.

The involvement of the FWBC was addressed in detail on 19 October 2016 by the Agency head at the time at a Senate Estimates hearing. The Hansard (page 160-161) is relevantly extracted as an Attachment to this submission.

Page 26: Case Study 8: 'Right of entry and the 'obstructionist' ABCC'

The CFMMEU submission states that the capacity of union officials to enter workplaces to assist in protecting members from unsafe work practices is critical, but the union is consistently obstructed from performing its safety role by aggressive and uncooperative employers, and the obstructionist ABCC.

The right of entry laws in the Fair Work Act have played a significant role in the work of the

ABCC and litigation commenced by the agency. I consider it essential that right of entry laws are strictly complied with, whether that is by occupiers and employers in respect of lawful entry by permit holders, or by the permit holders themselves in the exercise of those rights.

Regrettably, the vast majority of cases presented to the Court by the ABCC have involved contraventions of right of entry provisions by CFMMEU permit holders. This, however, is not always the case.

I recently exercised my right of intervention under section 109 of the Act in an application commenced by two CFMMEU permit holders against an employer. On 27 April 2018 I intervened in a case in Queensland: *Ramsay & Anor v Menso & Anor* (BRG327/2016) (4151824). I confirmed my approach and position on ensuring compliance with right of entry laws in my written submission to the Court, where I stated:

“The Commissioner submits that rights of permit holders are as important and significant as the obligations on them under Part 3-4, and equally, the rights of occupiers and employers under Part 3-4 are as significant and important as the obligations which apply to them.

Appropriate penalties for contraventions of the right of entry provisions should be imposed to ensure these rights are respected by all building industry participants and to deter others from contravening the law in the future.”

The Federal Circuit Court imposed total penalties in this case of \$111,000 on the employer, Z Group Pty Ltd, and its Director.²

This case example demonstrates that the ABCC stands ready to assist any building industry participant, including the CFMMEU, who is a victim of unlawful conduct, and that the ABCC will uphold the law to both protect and enforce right of entry laws in the building and construction industry.

While this case serves as a timely example where the ABCC supported the arguments advanced by the CFMMEU, regrettably, it is a rare exception. All too often, the CFMMEU is the respondent to litigation pursued by the ABCC. As at 23 July 2018, the CFMMEU or its representatives are a respondent to 39 cases commenced by the ABCC and its predecessor Agency, the FWBC. In the last financial year, the CFMMEU or its representatives had penalties imposed on it of \$5.6m in cases litigated by my Agency. The CFMMEU's submission make no mention of this but it provides important context to the adverse comments made by the CFMMEU submission with only one case cited.

Conclusion

I am grateful for the opportunity afforded by the Committee to provide a submission in reply. I note your advice that my response should not be shown to other people. I have consulted with officers within my Agency and there has been no further dissemination or publication of this submission beyond the Agency.

I do not object to this its submission being made public.

Yours sincerely

Stephen McBurney
Commissioner

² An appeal has been filed in this matter by the applicants. The appeal relates to the issue of which entity the penalty is to be paid to, rather than liability.

Attachment A

Hansard transcript – 19 October 2016

I would particularly like to address false and disturbing claims which have been raised about my agency and my staff in relation to a horrific accident that resulted in the deaths of two young Irishmen at a construction site in Perth on 25 November 2015. As I have always maintained, any accident and any death at any Australian workplace is tragic. It is therefore entirely appropriate that, when such dreadful incidences occur, they are fully and properly investigated and prosecuted by the appropriate authorities. As I have said on previous occasions, the responsibility for monitoring workplace health and safety rests with the various state and territory safety bodies. When FWBC becomes aware of potential safety issues, we then refer them appropriately and promptly. In fact, in 2015-16, the agency made 48 referrals on matters relating to workplace health and safety.

The site where this tragedy took place was a JAXON construction site in Perth. Specifically, it was the Bennett Street lodge project. In response to question on notice No. SQ000175, I outlined that during the course of 2015 FWBC investigators made a total of 15 visits across a total of nine JAXON sites, one of which was the Bennett Street lodge project. I also provided, as an attachment to that answer, copies of file notes made by FWBC investigators arising from the visits to these various sites. It was following the tabling of these documents that statements were made and recorded in Hansard which sought to falsely attribute to my staff accounts made by others and thereby imply that my agency and my staff were somehow responsible for contributing to injuries and deaths on worksites. This is a baseless and hurtful allegation to be made about the dedicated public servants working at FWBC.

I also categorically reject the unjustified and uninformed claims that FWBC stops union officials from carrying out safety work on building sites. That is utterly false. In respect of the JAXON tragedy, let me set the record straight: at no point was FWBC investigating the CFMEU in relation to its conduct on any JAXON building sites, whether in respect of right of entry or otherwise. I will repeat that statement for clarity: at no stage did my agency or my staff launch any type of inquiry into the conduct of the CFMEU or its representatives on any JAXON construction site. Furthermore, at no point did FWBC receive any complaints or concerns from the CFMEU alleging that its representatives were being prevented from exercising their lawful rights in accessing these sites. Had they done so, the agency would have investigated.

In October 2015, FWBC became aware that the CFMEU had filed civil claims against the company for hindering union officials from accessing sites. We later learned that these claims had been filed back in August. The litigation was later subject to a confidential settlement between the CFMEU and the construction company—that is, JAXON. As many of those in this room would know, section 73 of the Fair Work (Building Industry) Act 2012 prevents my agency from enforcing the law after a matter has been settled by the parties concerned. What this means in the JAXON case is that not only is this tragedy being used by some to unfairly and falsely suggest that my staff have somehow contributed to this horrific accident, but the reality is that my staff are now restricted in our ability to investigate and act on the CFMEU's claims that JAXON unlawfully prevented the union from accessing JAXON's sites.

To be clear, I raise this issue not to enter the debate over matters of legislative policy but rather to clarify the record and respond to the hurtful and unjustified political attacks against my staff. My staff and I take the role of ensuring compliance with workplace laws and of ensuring workplace safety very seriously. There is absolutely no truth to the unfair claims that FWBC stops workers or unions from raising safety concerns or carrying out safety compliance on building sites.