Ai Group Personnel and Industrial Relations (PIR) National Conference

Hyatt Hotel, Canberra

5 May 2014

Fair Work Building & Construction – Plans and Priorities

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INTRODUCTION

Good afternoon, ladies and gentlemen. Thank you for giving me the opportunity to speak here today. Let me say at the outset, I appreciate that not all of you would consider yourselves to have a connection with the building and construction industry.

I believe though, that when we are talking about this industry, which, by the way, is the third largest contributor to GDP in this country – we must not lose sight of the fact it is undoubtedly a vital industry to all of us, whether we realise it or not.

Among other issues, my agency, Fair Work Building & Construction (FWBC) regularly deals with unlawful industrial action on construction sites. Regrettably, such work stoppages happen often, and without the wider community knowing what exactly is going on. On the face of it, these stoppages may not appear to affect the average Australian, but they do.

Project delays cost money. And, in the case of government projects such as hospitals, they cost the taxpayer money, and of course, delay much needed health facilities, or, as in a recent case, housing for the long term homeless.

In turn, I believe the hitherto lack of rule of law on Australian construction sites is discouraging foreign investment in Australian projects. I know this from first-hand experience, of sitting down with potential investors, particularly from Western Europe and, of course, Asia.

So, I would encourage those of you who do not already, to tune in carefully to what is happening in our country's construction industry, because at the end of the day, it affects us all.

It is fair to say, the agency I now head has had a range of plans and priorities in recent years. In particular, the agency went through an especially challenging time last year, when it had no less than four directors, in a mere seven months.

I was the fourth. Since I started at the end of last year, there has been a significant shift in FWBC's plans and priorities. Today, I want to talk to you about these plans and priorities. And, most importantly, why I believe they are so important.

A CLEAR DIRECTION

Following consultation with my executive, a new vision and mission has emerged for the agency.

As Director, my vision is ambitious: "*That all Australian building and construction workplaces are productive and harmonious*."

In highly charged environments, side issues can distract us from the big picture. It is my job to keep the agency's eye on the ball, and on the end goal: that there are productive and harmonious worksites for all.

I emphasise the '*all*'. To my mind, that includes unions, workers and employers, because they all have a critical role to play in the industry. And, I note, they all have a role to play in achieving that end goal of productive and harmonious worksites.

FWBC's Executive also agreed on a new mission. Our mission is simple, and to my mind, unequivocally simple to implement: "*To ensure that the Rule of Law prevails in the Australian building and construction industry*."

This mission means FWBC must investigate matters of alleged unlawful activity without fear of favour. And where the evidence exists, and it is in the public interest, we must bring wrongdoers before the courts.

Ladies and gentlemen, I have said before, and I will say it again, I do not believe the rule of law has ever really existed in Australia's construction industry. Over many years, I have witnessed employers, workers, and unions flout the law.

My agency cannot be selective about who it investigates, or brings before the courts. I plan to uphold the law on construction sites, regardless of who breaks it; be they employer, worker or union.

A new agency

In the lead up to the 2013 Federal Election, the Coalition committed to restoring the Australian Building & Construction Commission (ABCC). This commitment comes after the FWBC replaced the ABCC, in 2012.

In my experience, the industry requires a powerful regulatory framework, strong powers and a determination to apply those powers against any person, or organisation, that breaks the law.

In addition, employees, subcontractors and head contractors, require the support of a strong regulator, to resist unlawful demands and behaviour. As many of you would know, there is a Bill currently before the Parliament to re-establish the ABCC.

The Government has stated it is steadfast in its commitment to re-establishing the ABCC and introducing a new Building Industry Code.

Meanwhile, it is not my intention to wait around. My job is to do the best I can for the industry with the legislation available.

A new vision and mission are not the only things, which have changed at FWBC, in recent months.

Changed priorities

When I arrived at the agency in October last year, wages and entitlements was a large component of our work. In fact, more than 40 per cent of investigations related to wages and entitlements.

I am pleased to report that this important work is still being professionally conducted but it is now in the safe hands of the Fair Work Ombudsman. There is no doubt that this work is vital.

I believe that all workers should be paid correctly for the work they perform, and I do not for a moment pretend this is a problem that does not exist. It is a scourge on society, particularly as it is often the most vulnerable workers who are ripped off.

I am also firm in my belief that the Fair Work Ombudsman is the right agency to deal with these problems. It has specialist expertise and deals with these issues for all other industries in Australia.

In many other ways, however, the building and construction industry stands apart from other industries.

To my mind, this is why a specialist agency – the FWBC – is required to install the rule of law.

In the Cole Royal Commission into misconduct in the building and construction industry, over a decade ago, His Honour Justice Cole, concluded that Australia's construction industry was one which:

> *"departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. These standards marked the industry as singular".*

This is why successive governments have recognised the need for a specialist regulator for the building and construction industry, currently the FWBC.

And this is why I have moved the agency away from the investigation of wages and entitlements.

It has allowed us to prioritise what is now our core business: the investigation of unlawful industrial action, coercion, right of entry, freedom of association and adverse action – the kinds of conduct synonymous with the oft quoted term "thuggery".

CORE BUSINESS

Unlawful industrial action

Unlawful industrial action is, regrettably, commonplace in the industry. Obviously, such conduct has a serious impact on productivity. It is therefore a key component of our core business.

You may have heard in the news in recent weeks that sheriffs have been sent in to ensure that 33 West Australian workers, who were penalised by the Federal Court, pay their outstanding penalties.

In some cases, this may mean laying claim to their cars and houses. I took this step after allowing all parties an extension of time to pay their penalties.

Further to that, the option is open to the respondents to apply to the court for special arrangements, such as payment plans.

The CFMEU's WA Branch Secretary, Mick Buchan, criticised me for taking this approach.

Mr Buchan said about FWBC, and me in particular, "*They're simply acting with malice. They are callously pursuing these workers.*"

Well, I would remind Mr Buchan, and other critics, that it was not me or my agency who penalised the workers. It was a Federal Court Judge who determined that 117 workers should be penalised more than $1 million for some eight days of unlawful industrial action, on a huge Woodside project in the Pilbara.

So, is Mr Buchan expecting me to pick and choose who must respect court orders and who may choose to ignore them? If an employer had done wrong, and been penalised by the court, I imagine Mr Buchan would rightly expect those penalties to be paid.

Unlawful industrial action is certainly not confined to our country's west.

Across Australia, we currently have 29 investigations into alleged unlawful industrial action. This compares to 16 investigations when I started at FWBC some six months ago.

In Queensland, there were work stoppages on the Gallipoli Barracks and QUT projects, at the end of last year. Industrial activity continued for a shocking seven weeks. The magnitude of the stoppage was huge, and our investigation continues in earnest.

Very recently, 300 workers walked off a $2 billion hospital project on the Sunshine Coast. The Fair Work Commission has issued return to work orders, and again, FWBC's investigation into this matter is ongoing.

And of course, it is hard to forget the images – which were broadcast around the world – of the blockade in Melbourne at Grocon's Myer Emporium site.

Our case against the CFMEU in this matter is set to go to trial later this year.

Right of entry

Right of entry is also a huge part of our core business. Union officials who hold a Federal Right of Entry permit are entitled to enter building sites, to talk with workers, or investigate issues, including safety, provided they comply with Right of Entry laws. This includes showing their valid Right of Entry permit, when they go on site.

When I started in October, we had four investigations into right of entry matters.

Today, there are 47 – an almost 12-fold increase.

Several weeks ago, we published a list on our website of union officials who do not hold a current right of entry permit.

I believe the list is a critical tool for site managers, across Australia, in preventing potential trespassers, and right of entry breaches.

Some of the people on the list have a history of attempting to enter building sites without a valid permit.

We are regularly updating the list. And we actively monitor who holds a Federal permit, who is applying to be a permit holder, and whether we consider them to be fit and proper to hold a permit.

When we have concerns about a permit holder, we make a submission to the Fair Work Commission, which is responsible for issuing permits. We have made submissions regarding seven individuals, since 24 December last year.

A recurring and alarming theme emerging is that of union officials using alleged safety concerns to get on site, but as soon as they get past the site office, they seem to forget all about the safety issues they are purportedly there to investigate.

To say safety is a serious issue in this industry, would be an understatement. No words I can speak here today, can give the due weight to the importance of safety.

I am acutely aware that people die on building sites. Indeed, three lives have already been lost, on Australian sites this year. Nobody would disagree, that when there are genuine imminent risks to people's safety, then work in the area should cease immediately.

And, ladies and gentlemen, I absolutely agree that responsible union officials can play a vital role in keeping workers safe at work, particularly in the building and construction industry.

Sadly though, every time a union official uses a bogus safety claim, to get on site only to push an industrial agenda, it undermines the very system established to protect workers when a legitimate safety issue occurs.

Simply put, I do not want this malpractice to become a case of "*The boy who cried wolf*".

The impact on productivity is one thing. But what concerns me most, is how this could affect workers.

Let me put a hypothetical scenario to you.

Imagine you are a worker on a building site. You have turned up to earn a fair day's wage, for a fair day's work. Then, a union official, comes on site, and tells you to down tools. You ask why, and the only response you get is "safety". "Well," you think "fair enough". "If there's a safety issue, then I shouldn't be working". So, you sit in a shed.

After some time, it becomes apparent that there may not be an imminent risk to safety, but another issue brewing – perhaps an industrial dispute of some kind between the union and the head contractor. You return to work, but your pay has already been docked.

The next day, back at work, another union official comes on site and tells you to down tools because there is a serious safety issue. "Stuff that", you think. "That's what the bloke said yesterday, and there was no safety issue, and I'm now out of pocket four hours pay". So, you keep on working.

Ladies and gentlemen, what if, on that second occasion, there really was a serious safety issue, that put that worker and others in danger?

Fortunately, this situation is a hypothetical. However, I have grave concerns it could become a reality one day.

Allegations of union officials, using safety risks, to get on site, and then dealing with anything but, are not isolated.

Earlier this year, in one of our court cases, His Honour Judge Burnett penalised the CFMEU and three union officials almost $40,000, for hindering, obstructing and acting in an improper manner on a Queensland building site.

Joe Myles, Kane Pearson and Shane Treadaway entered the site to investigate alleged safety concerns.

I am yet to understand why Mr Treadaway needed to carry an EFTPOS machine with him to address safety issues.

In delivering his penalty judgment, Judge Burnett said words to the effect, "*The right of entry is a position of trust and those who seek to abuse the right should be dealt with.*"

Union officials are, and should be, entitled to enter construction sites to speak with workers and address potential problems, especially safety.

But when they do so, they must obey the law. For instance, none of us would allow a police officer to enter our home and search it without a warrant. And if they did, there would be community uproar. Likewise, people must respect the right of entry laws on construction sites.

Investigation powers

Unlawful industrial action and Right of Entry are not the only issues we investigate. Coercion, freedom of association and adverse action are equally important parts of our core business.

With a bill to restore the ABCC currently before the Federal Parliament, there has been much debate about my agency's investigatory powers, specifically compulsory powers.

These powers allow the FWBC, and previously the ABCC, to compel a person to give evidence to the agency. The ACCC, ASIC, and Australian Crime Commision (ACC) have all had similar powers, but for much longer. Even Medicare and Centrelink have similar powers.

For the FWBC, under current law, an Administrative Appeals Tribunal (AAT) Presidential Member is required to approve the examination. This adds a layer of procedural complexity, not experienced by other Commonwealth bodies. Further, there is now an Independent Assessor, with the power to "switch off" the powers in advance on particular projects.

Before the ABCC existed, during my time as Director of the Building Industry Taskforce, more than 50 per cent of our investigations into unlawful conduct failed because witnesses would not provide statements. Witnesses who attended examinations received protections, including immunity from prosecution, for evidence they provided and a right to legal representation.

In my day, the ABCC exercised its compulsory examination powers on about 200 occasions to help establish where the truth lay. In the last financial year, the FWBC did not conduct any examinations. The Cole Royal Commission in 2003 found that there was an overwhelming requirement for compulsory powers. Justification for the powers was also canvassed in the report of former Justice Murray Wilcox, in 2009.

In November last year, the CFMEU's National Secretary Dave Noonan, said that the compulsory powers "*discriminate against construction workers*".

I would remind Mr Noonan that in many cases, the powers actually protected construction workers from threats, coercion, discrimination, and other unlawful conduct.

The ABCC only used the powers as a last resort, and they were invariably invoked at the request of the witness, or victim, of unlawful conduct. As a consequence, workers were able to shelter behind the powers.

Mr Noonan also claimed, that if the ABCC is re-established, people will be "*forced to think twice about taking action about bad safety, they remember Ark Tribe, who faced prosecution and possible imprisonment under the ABCC laws*".

I agree with Mr Noonan that "*people remember Ark Tribe*" but I strongly disagree with the rest of his statement about safety. The Ark Tribe case began on an Adelaide building site some 6 years ago. In 2008, Mr Tribe refused to be interviewed by the ABCC, or attend an ABCC hearing in respect of an unlawful strike at a Flinders University site.

The Commonwealth DPP subsequently launched proceedings against Mr Tribe. I emphasise the DPP, as it is invariably misreported, it was the ABCC that prosecuted the matter. The DPP lost on a technicality. The suggestion made is that Mr Tribe was a hero, caught up in some innocent episode. There was nothing innocent about the episode in question.

Several other witnesses came into hearings, with the result that the CFMEU admitted to unlawful industrial action, and the union, and its organiser, were penalised a total of $45,000 by the court.

And the CFMEU's so-called safety concerns, were deemed by the SA government authority to be:

> "*not of a sufficient magnitude to pose an immediate threat to the health and safety of the building employees*".

Since then, it has repeatedly been implied, that Mr Tribe was 'prosecuted' because he spoke up about 'bad safety'. This is simply not true. People are quick to forget that by giving evidence in a compulsory hearing, Mr Tribe would have been immune, from the ABCC launching proceedings against him. The reason Mr Tribe was taken to court by the DPP had nothing to do with him speaking out about bad safety, and everything to do with him refusing to obey the law.

Building Code

On 17 April, Minister for Employment Eric Abetz released the Federal Government's proposed new Building Code. Minister Abetz said the new Code is "designed to restore the rule of law and fairness to Australia's construction sector". The new Code will come into effect when the Bill to restore the ABCC, becomes an Act.

Contractors who want to apply for Federal Government funded work will need to be code-compliant.

Once in effect, the Code will apply to all enterprise agreements reached after 24 April this year.

It is therefore important that industry participants currently involved in enterprise negotiations give careful consideration to the Code.

My previous experience with building codes, both as Deputy Commissioner, ABCC and more recently as Director of the Construction Code Compliance Unit with the Victorian Government, is that they make a significant, positive, difference to the building industry.

The Victorian Guidelines, monitored by the Code Compliance Unit, are already playing an important role in the industry. By relying on their obligations under the Victorian Guidelines, contractors can reject unlawful conduct on their sites by placing the importance of tendering for Victorian Government work ahead of any short term incentive.

While unions have categorised the Guidelines, as being 'anti-union', it should be remembered that all of the compliance obligations under the Guidelines are imposed on building companies, rather than on unions.

Conclusion

Ladies and gentlemen, my plans and priorities are simple: To ensure the rule of law prevails on Australian building and construction sites, and that all of those sites are productive and harmonious.

I realise that achieving both of these goals will be challenging, to say the least.

But I will not falter in my determination; because Australia's building and construction industry, those who work in it, and all Australians, not only deserve it, but badly need it.

Thank you very much, ladies and gentlemen.