

Master Builders South Australia Breakfast Forum

Adelaide Oval

10 April 2014

A stronger building watchdog: establishing the rule of law

[check against delivery]

Nigel Hadgkiss

Director, Fair Work Building & Construction

Introduction

Good morning, ladies and gentlemen. Thank you for inviting me to speak here today. I am here to talk about the building industry, obviously, but more importantly what you can expect from my agency in terms of improving this extremely significant industry.

Firstly, I have to say that my eyes are firmly fixed on creating a more productive and more harmonious industry. My vision, ladies and gentlemen, is to create a building industry where people can actually go to work each day, free from unlawful industrial action, free from coercion, and free from downright thuggery.

Returning to the national building industry

It is fair to say that I have now returned to a completely different agency to the one I left five years ago. Since my return, I have frequently been asked, "*Has any progress been made while I have been away?*" Well, the feedback which I was receiving, at the time of my departure in 2008, was that some progress was being made. Indeed, in recent times, the Prime Minister went so far as to state that the ABCC's work had "*drastically and dramatically*" reduced the culture of corruption in the industry.

Unfortunately, in my opinion, unlawful conduct on building sites across the country, had regressed markedly. I therefore find myself in a challenging position. I have inherited an agency with weakened powers; and one which is confronting an industry with appalling lawlessness on a daily basis.

Bribery and corruption

One does not have to think too hard, to bring to mind unlawful activity in the building industry. It is widely accepted that this unlawful behaviour goes way beyond the types of matters the FWBC is empowered to investigate, to that of serious criminal activity. Let me emphasise, FWBC simply does not have criminal jurisdiction.

In January, I spoke to the ABC's *7.30 Report* about my insights into criminal activity in the industry. I was not interviewed by the ABC because FWBC is responsible for dealing with this serious issue. I spoke to the *7.30 Report* because of my background, which has been law enforcement, particularly the investigation of organised crime. Of course, since 2002, I have been exposed to all that goes on in the world of the nation's building industry.

Allegations of organised crime infiltrating the industry are not new. In a 2001 interview with the ABC TV program *Four Corners*, the then CFMEU National Secretary, John Sutton, expressed concerns about the presence of threats, intimidation, and underworld figures, operating within the industry, particularly in his union, the CFMEU. In a subsequent interview on the ABC's *7.30 Report*, Mr Sutton, when asked how the CFMEU expected to deal with organised crime in its ranks, advised he had taken an "*uncompromising stand on elements of organised crime*". He went on to say that he had attracted some enemies inside his union for doing so.

I referred to the CFMEU National Secretary's remarks in a report which I prepared for the Federal Government in 2004. Tabled in the Parliament, and entitled, "*Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce*" it provided an overview of the environment in which the Taskforce operated, highlighting in particular, the continuation of unlawful and inappropriate behaviour in the industry. In that 2004 report, I detailed serious concerns about coercion, intimidation, violence and threatening behaviour in the industry. The Taskforce received many accounts of threats and intimidation being used as a means of advancing industrial agendas. And, the Taskforce received reports that union officials extorted money and services in return for industrial peace on building sites. I also raised concerns about elements of organised crime operating within the industry.

That was 10 years ago. I think these concerns will be very familiar to many of you even now, and leads me to suggest, that the only thing that has changed since 2004, is the year.

Royal Commission

The Royal Commission announced by the Government will look into certain conduct relating to the financial dealings of unions. The Prime Minister has stated that in recent times there have been "*widespread and credible claims*" by senior people and whistle blowers in the union movement of unlawful activity, corruption, organised crime, standover tactics, and kickbacks, which was "*very widespread in elements of the union movement*".

It is true, this will not be the first Royal Commission into the building industry. Indeed, there has been much criticism from the union movement that the Cole Royal Commission did not result in any convictions. People must remember, however, that Royal Commissions are not set up for the purpose of putting people before the court; and nor is their success measured by the number of scalps.

Rather, Royal Commissions are established to shine light onto issues of significant public importance. They are about revealing the truth. That is what we must hope for, with the Heydon Royal Commission. We must hope that it uncovers the truth, no matter how ugly.

Around the country

My agency may not be able to act on criminal matters, but there is much the FWBC can do to improve the industry. While my goal, and I imagine yours too, is for productive and harmonious building sites, free from unlawful industrial action, coercion and other types of thuggery, I regret that we are a long way from this scenario. So, what is FWBC doing to address this deplorable state of affairs? Well, allow me to take you on a journey around the country.

South Australia

Let us start with South Australia. I am all too aware of the state of the industry in South Australia; though doubtless you know far more about matters than I do. According to the most recent Australian Bureau of Statistics data, construction work carried out in South Australia has risen for seven quarters. This increase has no doubt been helped by the redevelopment of this magnificent oval, and by the new Royal Adelaide Hospital. These two projects have been a boon for the State. But, I realise, more large projects are needed to keep the industry strong. The statistics might say construction is up, but what I am hearing is concern about the future of the industry.

This uncertainty makes it even more critical that the jobs which do exist in this state, are free from unlawful industrial action, coercion and thuggery. I regret to say, ladies and gentlemen, that lawlessness on South Australian building sites has increased to alarming levels in recent weeks.

In the last 10 days alone, FWBC's Adelaide Office has opened 17 new investigations into Right of Entry breaches. These matters no doubt greatly affect productivity on sites, along with the potential to delay projects meeting deadlines. Then there is the added dimension of union officials being flown into Adelaide from interstate. Therefore, recognising that your industry requires support in this regard, I have, in turn, flown FWBC staff in from around the country to assist the team in Adelaide.

Two weeks ago, FWBC launched proceedings against the CFMEU and five of its officials in the Federal Court here in Adelaide. It was reported in *The Advertiser*. CFMEU officials tried to enter the \$75 million CBus project on Flinders Street. We are alleging a physical confrontation occurred, and that the unionists forced their way onto the site. FWBC investigators, who were present at the time, considered the matter serious enough to request police assistance.

Our application to the Federal Court sought both penalties against the CFMEU and the individual organisers. In addition, FWBC sought an urgent hearing to ensure similar conduct did not reoccur at the site. In response to this application, Justice Mansfield issued an injunction requiring the five named union officials and all other SA CFMEU Construction and General Division officials to strictly comply with the Right of Entry requirements imposed by the Fair Work Act. The officials concerned were State Secretary Adam Cartledge, Jim O'Connor, David Bolton, Luke Stephenson, Brendan Pitt (Victoria) and all other CFMEU SA officials and organisers. This injunction also applies to the \$1.8 billion new Royal Adelaide Hospital site.

Pausing on our journey for a moment, it is important to note that not all of our proceedings are against unions and their officials. Minister for Employment Eric Abetz has said the Royal Commission will "cut both ways". Likewise, my aim to establish the rule of law in the building industry cuts both ways.

My agency will not be selective about who it enforces the rule of law against – be they workers, employers or unions. If you breach workplace laws, we will investigate you. And where appropriate, we will put you before the courts.

Western Australia

That is exactly what is happening in Western Australia. You may have heard in the news, just last week, that I have sent sheriffs in to ensure that 33 West Australian workers, who were penalised by the Federal Court, pay their penalties. In some cases this means seizing cars and houses. The CFMEU's West Australian 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."

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 8 days of unlawful industrial action on a huge Woodside project in the Pilbara. So, is Mr Buchan expecting me to pick and choose who has to respect court orders and who can choose to ignore them? If an employer had done wrong, and been penalised by the court, I imagine Mr Buchan would expect those penalties to be paid, and not be criticising me.

Northern Territory

In recent times, FWBC launched coercion proceedings against the CFMEU in the Federal Court, Darwin. We are alleging that the CFMEU and 2 Queensland BLF officials acted improperly by disrupting the site and requesting the Darwin company pay union membership fees on behalf of its employees to the CFMEU, and threatened to continue disruptive action if the firm did not comply.

FWBC is alleging that one of the officials threatened the project manager with words to the effect, "If you had 6 or 8 or 10 members on site that were part of the union, if you had that number of memberships, then the next time we come up, and we will be coming up more often, we will overlook, we will not just come here once, we know it's a union site, that's when we will focus on other jobs around town."

Queensland

Meanwhile, in Queensland we have placed the CFMEU and five of its officials before the court for allegedly trying to coerce head contractor Grocon to sign an enterprise agreement. We are alleging a range of problems were caused at the building site – which was a project to accommodate the long-term homeless. FWBC is alleging action included padlocks on entrance gates being super-glued shut and cars being parked nose to tail, blocking the entrance. When a sub-contractor asked: "What are the consequences to my business if I bring my boys on site?" We are alleging a union official responded, "You want to know what the consequences are? You would be committing industrial suicide."

New South Wales

Over in New South Wales, I have launched proceedings against a CFMEU official who allegedly entered a Sydney work site and claimed he was Steve Irwin. This official, together with another CFMEU organiser, are facing a combined 11 breaches of the Fair Work Act after they entered the \$17.4 million project and allegedly told workers to stop work. We are also alleging they did not show their Federal Right of Entry permits, and did not have the appropriate NSW State Work Health and Safety permits.

This is just one of many Right of Entry cases we are currently dealing with around the country. On that note, four weeks ago, His Honour Judge Burnett penalised the CFMEU and 3 of its officials almost \$40,000, for hindering, obstructing and acting in an improper manner on a building site. The trio entered the site to investigate alleged safety concerns. I am yet to understand why one of the CFMEU 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.*" One of the officials penalised was Joe Myles, who the week before the penalty hearing was twice arrested on a Melbourne Regional Rail Link construction site for trespassing.

As of two days ago, we published a list on our website of union officials who do not have a valid right of entry permit. Some of them have a history of trying to enter building sites without valid permits. I have heard stories about permit holders shrinking their official A4 sized permit to the size of a business card, making it very difficult to read. Now, would a South Australian traffic cop accept a photocopy of a driving licence, or one in a different format?

Likewise, site management should be equally demanding. I strongly suggest that you know your rights. Knowledge is power, and it is crucial that site management know about Right of Entry. It is within your right to request to see and inspect the original permit. It is not enough for the official to flash their document, or call out that they have left it in the car, at home, or interstate. Site managers, like police constables, should examine the permit.

ACT

Even our Nation's capital has its fair share of troubles. One current matter being investigated concerns an allegation that the CFMEU attempted to coerce a firm building a retirement village in Canberra, into signing an enterprise agreement (EA) with the union. As a result, it is alleged there were 17 visits for WH&S reasons over a 5 month period. The conduct is alleged to have included not just abuse, but threats to remove licences, threats to stop the builder working in the industry, and threats to impose fines. The conduct is said to have escalated as the contractor resisted the threats.

On the first visit to the site, the official concerned, a former professional footballer, when told the company was not interested in a CFMEU agreement, is alleged to have said, "There are bigger and crankier men than me". On one particular visit, the organisers are alleged to have told the concrete pumper that his safety procedures were not good enough. The organiser said "We are going to stop this f**king pour today and when we do I reckon there is going to be a punch-on today".

He then went on to say "If you proceed, I will take your ticket. You won't work in this industry again... I took a scaffolder's ticket off him a week ago. You've got a wife and kids. You need to look after your job. This is illegal...if you do not cease immediately, I will make sure that you lose your licence and you will be fined \$30,000....you will lose your licence I will see to that."

Victoria

Our journey finishes in Victoria, where investigators are also busy. Just last week, FWBC sought an urgent Federal Court hearing to prevent further disruptive conduct by the CFMEU at a \$400 million wind farm site. FWBC is alleging blockades have occurred at the site on numerous days. Workers have been prevented from entering the site to perform work, and truck deliveries of materials to the site were stopped because of the blockade. As you can see from these cases I have just spoken of, we have a challenge ahead of us to install the rule of law on building sites around South Australia and the Nation.

Compulsory powers

So, what powers do I have available to me to assist in my goal to create more productive, harmonious building sites? The former *Building and Construction Industry Improvement Act*, which was the relevant piece of legislation during my time at the ABCC, provided me with the power to investigate matters more thoroughly, in appropriate circumstances.

The ACCC, ASIC, and Australian Crime Commission (ACC) have all had similar powers, but for much longer. Even Medicare and Centrelink have similar powers. 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 give information. Witnesses who attended examinations, received protections, including immunity from prosecution, for evidence they provided, and a right to legal representation. Nobody suspected of breaching the law was ever called to attend. They were simply witnesses to unlawful conduct, reluctant to provide statements for fear of retribution.

In 2012, the compulsory examination powers were radically changed. The current legislation retains examination powers, but they are subject to elaborate safeguards. 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, including Medicare, Centrelink, the ACCC, ASIC, and the Australian Crime Commission (ACC). Further, there is now an Independent Assessor, with the power to “switch off” the powers in advance on particular projects. I have to say that there is now so much red tape surrounding the compulsory powers, their effectiveness is pretty much lost.

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 canvassed in both the reports of Royal Commissioner Cole, in 2003, and former Justice Murray Wilcox, in 2009. Justice Cole noted a number of reasons for conferring powers on the ABCC. These included him seeing it likely that the ABCC would have difficulties receiving co-operation. Also, evidence suggested that those who are victims of unlawful industrial action do not volunteer relevant information due to a fear of adverse consequences.

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.

Those inclined to assist an investigation would often receive threats, that they would be banned from working and, as a result, many examinations during this period were conducted in response to a request from the innocent witness. As a result, workers were able to shelter behind the powers. The ABCC only used the powers as a last resort, and, as I say, they were invariably invoked at the request of the witness, or victim, of unlawful conduct.

Mr Noonan also claimed that if the ABCC is re-established, people will be “*forced to think twice about taking action about bad safety*”. And that “*people 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.

Many of you would remember the Ark Tribe case, which began on an Adelaide building site. 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 that it was the ABCC. 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”.

Building workers have a hard job to do. They are entitled to carry out that job in a safe, working environment. I would never want any person, in any industry, to go to work and be unsafe. But to my mind, using unfounded safety concerns for an industrial agenda is appalling.

Building Codes

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 Federal Government has indicated that it will release a revised Building Code to replace the one introduced in early 2013. It will aim to use the Government’s purchasing power to promote workplace arrangements that drive productivity, flexibility and compliance with the law. I also note that the Government has indicated that the new Code will apply to the upcoming round of EBA negotiations in the building industry. I have no doubt that the previous Code and Guidelines helped to reduce unlawful conduct when the Code was at its most robust from 2006 to 2009. However, the Code’s effectiveness diminished when the Implementation Guidelines were successively watered down in 2009, 2012, and then with the 2013 Building Code.

I note that, in recent weeks, the Productivity Commission has released a draft report that includes recommendations for the Commonwealth to adopt the Victorian Construction Code, and for higher penalties to apply to contraventions of workplace relations laws within the building industry.

The Federal Government has indicated that the new National Code will be modelled on the Victorian Guidelines, with which I am extremely familiar. Those Guidelines, monitored by the Construction Code Compliance Unit (CCCU), 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 unions. Proven breaches of the Guidelines are to be reported to the responsible Minister, who is empowered to sanction contractors, government agencies and public servants. There is no ability to sanction unions. The sanctions, which are set out in the Guidelines, include being excluded from future government tenders. Sanctions also include being reported to an appropriate statutory body, such as the ASX in the case of publicly listed companies. Personally, I saw the sanctions as a last resort. I would much prefer to see cultural change.

Conclusion

Let me finish with a quote from an unlikely source at a building industry event, such as this. Andy Warhol, the late American artist, once said: "They always say time changes things, but actually you have to change them yourself."

To my mind, the last 10 years have proved that time will not change anything in the building industry. The fact is that unlawful, thuggish, behaviour will continue to undermine productivity on building sites if time is left to heal things.

Ladies and gentlemen, I am not waiting for time to change this industry. My agency will do everything in its power to change things, so that, as in other industries, people can go to work each day, free from unlawful industrial action, free from coercion, and free from downright thuggery.

Thank you.