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Back to the future: Introducing the rule of law

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Good morning, ladies and gentlemen. Firstly, thank you to the IR Society of WA, for inviting me to speak, and to the sponsors, for supporting such a first class event. It is a particularly important occasion for me, as it is the first time that I have spoken publically, since my appointment almost 5 weeks ago; other than, of course, my appearance before Senate Estimates on Thursday afternoon. However, I would like to think that this morning's experience will be a little more enjoyable than Senate Estimates.

The Rule of Law

I will start with a quote from Dwight Eisenhower, America's 34th President, who stated:

> "*The clearest way to show what the rule of the law means to us in everyday life is to recall what has happened when there is no rule of the law."*

Regrettably, ladies and gentlemen, when it comes to Australia's building and construction industry, we do not have to go back very far, to a time when the rule of law, in the sense that most of us would understand it, did not apply.

When the announcement of my appointment was made, many people publicly offered their support, although it is also fair to say several others voiced their disdain. That said, the underlying message, from those who did back me, was unanimous - *Nigel, you've got to reintroduce the rule of law*. The problem is, ladies and gentlemen, I do not believe that the rule of law, as normally understood, has ever existed in Australia's building and construction industry. Of course, there are today, and always have been, many building sites across the continent, which are harmonious, and are productive. However, for just as long, there have been sites filled with intimidation, thuggery and unlawful industrial action.

In a recent episode of the *ABC's 7.30 Report*, the CFMEU's National Secretary, Dave Noonan, stated, "*construction workers have been militant since Christ was a carpenter*". Well, if my memories of Sunday School classes serve me correctly, Jesus was not a carpenter. It was His Dad who was the chippie. Moreover, I believe Biblical scholars have yet to unearth any evidence that Joseph was in the least bit militant, although I suspect he got a trifle cranky when informed there was no room in the inn. The one point I do agree with is that there has been militancy on construction sites for many, many years.

Cole Royal Commission

In the early 2000s, you may recall that there was a Royal Commission into unlawful behavior in the Building and Construction Industry. His Honour Terence Cole, a Judge of the Supreme Court of NSW, delivered his report in 2003. It was then that I was appointed to establish the Building Industry Taskforce – the interim agency to regulate the building and construction industry.

Coincidentally, it may be noted that, the priority set, from the powers to be, was for me "*to reintroduce the rule of law on building and construction sites*". Very soon, however, having spoken to numerous workers, some of whom had ancestors, practicing the family trade way back in Colonial times, I found that nobody could actually

recall when the rule of law had prevailed in the industry. I therefore had to return to my hierarchy, and recommend that, rather than the Number One Objective being "to *reintroduce* the rule of law", it was more appropriate that it should be to actually "*introduce* the rule of law". Here we are then, 11 years later, and little has changed. And so, ladies and gentlemen, I find myself heading back to the future, to introduce the rule of law.

Why do we need a specialist regulator for the building and construction industry? I believe that you would be hard pressed, to find an industry with such a contemptible culture of intimidation, as the building and construction industry in Australia.

The findings of His Honour Justice Cole, over a decade ago, concluded that Australia's building 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*."

These standards indicated an urgent need for structural, and cultural, reform in 2003 and, in my humble opinion, even more so now. At the heart of His Honour's findings, was a culture of lawlessness in many parts of the industry in Australia.

Justice Cole stated:

> "*mechanisms must be in place to ensure that where disputes occur within the industry, such disputes are resolved in accordance with legislated or agreed dispute resolution mechanisms rather than by the application of industrial and commercial pressure. The rule of the law must replace industrial might*."[1]

It was not the only reference His Honour made to the rule of law. For instance, he stated:

> "*Culturally, first, there needs to be recognition by all participants that the rule of law applies within the industry*."[2]

This recognition is yet to occur. More recently, His Honour Justice Wilcox, in his 2009 Report, was satisfied that there was:

> *"still industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia."*

This is why the need has been recognised by successive governments for a specialist regulator for the building and construction industry, currently the Fair Work Building and Construction (FWBC). As a result of the Royal Commission's recommendation, the ABCC was finally established in 2005. The Hon John Lloyd PSM was appointed its Commissioner, and I served as a Deputy Commissioner until October 2008. And so it was, that the ABCC continued the work of the Building Industry Taskforce, in attempting to create the rule of law in Australia's building and construction industry.

Industrial Disputation

Before the ABCC was established, the construction industry faced regular and persistent industrial action. I am informed that the construction industry lost more working days to industrial disputes than all industries combined, for many years before the ABCC was introduced. The formation of the ABCC saw the number of working days lost to industrial disputes in the construction industry per 1,000 employees fall from 40.1 [December 2005] to 5.7 [March 2006]; that is in a matter of just four months.

The first major spike we saw after that time coincided with the introduction of the legislation that would see the rule of law weakened - legislation that would abolish the ABCC and have it replaced with the FWBC. There was another major spike about the time of last year's Melbourne Grocon dispute, which lasted more than two weeks and closed down parts of Melbourne's CBD. I am sure that you can recall the scenes of people viciously attacking police horses. The images were broadcast around the world. In this dispute, serious allegations of

contempt of court have recently been held to be proved beyond reasonable doubt against the CFMEU in the Victorian Supreme Court, and are to be penalised in due course.

A culture with high levels of unlawful industrial action is not just bad for workers, projects and the economy, it discourages foreign investment. The lack of the rule of law therefore costs Australian workers and businesses countless dollars every year. As the incoming Director of the FWBC, I see the introduction of the rule of law as a fundamental, contributing factor in reducing unlawful, industrial activity.

Working with unions

I know there has been talk I have been appointed to come down hard on unions. I see my role to install and uphold the rule of law across the board. Ladies and gentlemen, I give you an absolute assurance that the FWBC will investigate all relevant complaints. We will investigate when unions complain about employers, and when workers complain about unions.

For your information, I was a union member for more than 30 years. And my wife was still a member of the Nursing Federation until recent times. To me, responsible unions play an important part in creating safe, harmonious and fair workplaces. Unfortunately, this good and important work is tarnished when unions fail to obey the rule of law.

Very recently, Joe McDonald, National President of the CFMEU, said that:

> "*any law that stops an official getting to a member should be broken*".

Unfortunately, for Mr McDonald, and others, when citizens pick and choose which laws they respect and which they ignore, they must expect that there will be consequences if they breach the law. As a result of actions taken by the Building Industry Taskforce, the ABCC and the FWBC, the CFMEU has been the subject of numerous penalties, by various courts, amounting to almost $4.5 million. Obviously, this amount does not include penalties imposed by courts in proceedings brought by other parties, such as contempt, and claims for damages. On my watch, there will be little tolerance for those who do not respect the rule of law on Australia's construction sites.

On that basis, I wholeheartedly endorse the comment MBA CEO Wilhelm Harnisch made in *The Australian* 10 days ago:

> *"Master Builders Australia accepts the right of the union to represent its members, all we ask is they conform to community standards of behaviour".*

Another US President, Theodore Roosevelt, was on point when he stated:

> "*No man is above the law and no man is below it: nor do we ask any man's permission when we ask him to obey it*."

Who knows? Perhaps Mr McDonald, and others, can sense that the rule of law is coming. My appointment certainly did not impress him. While one union referred to me as "John Howard's Old Poodle", Mr McDonald was far more graphic. He referred to me as a "recycled reject", which is indeed a fabulous alliteration. Mr McDonald can call me whatever names he likes. My agency's door will always remain open to him and his colleagues to work together to create safe, harmonious and fair construction sites, where the law is upheld.

Compulsory examination powers

Another topic, which I have been asked a lot about since my appointment, is the use of compulsory powers. The former *Building and Construction Industry Improvement Act*, which was used 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 Commision (ACC) have all had similar powers, but for much longer. Even Medicare and Centrelink have similar powers.

Before the ABCC existed, more than 50 per cent of investigations into unlawful conduct failed because witnesses would not give information. Witnesses who attended examinations after receiving a notice from the ABCC received protections, including immunity from prosecution, for evidence they provided, and a right to legal representation.

In 2012, the compulsory examination powers were changed. The current legislation retains the examination powers, but they are subject to elaborate safeguards. Under current laws a nominated Administrative Appeals Tribunal (AAT) Presidential Member is required to approve the examination. This adds a layer of procedural complexity to securing such examinations not experienced by other Commonwealth bodies, including the ACCC, ASIC, and the Australian Crime Commission (ACC). Further, there is now an 'Independent Assessor, with the rather novel power to "switch off" the powers in advance on particular projects. As far as I know this power has not been exercised. An existing, safeguard that would remain in place under new legislation currently before Parliament, would be post-examination supervision by the Commonwealth Ombudsman.

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 is an overwhelming requirement for compulsory powers. Justification for the powers was canvassed in both the reports of Royal Commissioner Cole and The Hon Murray Wilcox QC in 2003 and 2009 respectively. 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. The Hon Murray Wilcox QC concluded in his 2009 report that, given the current state of the industry, any 'tough new regulator' would need compulsory powers. The Wilcox Report recommended the retention of compulsory powers, but with additional safeguards.

Mr Noonan said just last week 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 use of the compulsory powers was an effective tool in establishing the facts in relation to incidents within the building industry, and determining which cases did or did not warrant prosecution. 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. As for allegations of "interrogation", never were the suspects of unlawful conduct ever called to a hearing. The proceedings were also tape recorded.

I know only too well that the powers have civil liberty consequences. But Mr Noonan's claim that if the ABCC is re-established, people will be "*forced to think twice about taking action about bad safety*" is unfounded. Mr Noonan says "*people remember Ark Tribe, who faced prosecution and possible imprisonment under the ABCC laws*". In 2008, Mr Tribe refused to be interviewed by the ABCC or attend an ABCC hearing in respect of an unlawful strike at Flinders University, Adelaide. As a result of his refusal to comply with the notice and be interviewed, the Commonwealth DPP 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 government authority:

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

Construction workers have a hard job to do. They are entitled to do 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. In late 2011, attempts by ABC Commissioner Leigh Johns to persuade head contractors into entering an MOU with the ABCC, pledging cooperation of witnesses, were rejected by the industry and abandoned.

From ABCC to FWBC

In 2012 the FWBC replaced the ABCC. Amongst other matters, the Act in question significantly reduced the maximum civil penalties that can be imposed for unlawful industrial action. In my experience, the industry requires a powerful regulatory framework, strong powers and a determination to apply them against any person or organisation that contravenes the law. Head contractors, subcontractors and employees require the support of a strong regulator to resist unlawful demands and behaviour. To my mind, the ABCC proved to be a strong and resolute regulator. As many of you would know, there is a Bill currently before the Parliament to re-instate the ABCC. Obviously, it is not my role to create or comment on government policy. My role is to use the legislation currently at my disposal to try to uphold the law.

Reform on the East Coast

A strong and vibrant economy requires an affordable and innovative construction industry that is guided by policy settings that reduce costs and increase productivity. In recent years, the levels of cost blowouts and delays on large construction projects has increased to an extent that is unsustainable if governments are to have any hope of being able to deliver future infrastructure projects on time and on budget. In my experience, it is fair to say that government agencies have not been sophisticated clients when it comes to the procurement of public sector building and construction.

An important step taken by the Victorian Government to improve productivity in public construction was the introduction, in 2012, of the *Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry*. The Guidelines were introduced when it became apparent that the ABCC was to be abolished. By ensuring that all contractors are accountable for the set of standards contained in the Guidelines, the risks of delays and cost blowouts to the taxpayer will be reduced significantly. To date, major industrial disputes have not occurred on any projects covered by the Guidelines.

Both NSW and Queensland introduced almost identical Guidelines to Victoria on 1 July this year. The tri-State compliance units are responsible for monitoring compliance with the Guidelines. Under the National Building Code 2013, the *Fair Work Act 2009* became the primary vehicle for assessing appropriate workplace practices. As a result, the National Code no longer sets a higher standard than the legislation itself.

The role of the State compliance units includes the ability to obtain a detailed due diligence of tenderers' claims in tender documents. As a result, there is a requirement for tenderers to submit Workplace Relations Management Plans, along with their compliance history. The State compliance units are visiting worksites to ascertain whether those obligations, set out in a tenderer's plans, are in fact being adhered to on their current sites. This approach distinguishes the State compliance units from their Commonwealth counterpart, the FWBC, which is confined to the conduct of audits, only after the Commonwealth project has commenced. The issues to be addressed in each plan include a requirement that the tenderer explain the systems and processes it already has in place, or will implement, to achieve the objectives of the Guidelines, and deliver the project on time and on budget. Its purpose is to identify and address the key IR risks and issues associated with the project, rather than an assessment comprising mere generic provisions or material 'cut and pasted' from previous, unrelated projects.

Where a party tenders for public work in those three States, the party is required to comply with the Guidelines on the public projects and on any subsequent privately funded work, even if the contractor fails to win the initial tender. This includes ensuring that all expressions of interest, tender and contractual documents which they instigate, comply with the new Guidelines. The new regime requires all head contractors and sub-contractors they engage on Government projects to be compliant.

The Queensland Government estimates that their reforms will save taxpayers between 5 and 15 per cent of the cost of major public infrastructure projects. Meanwhile, in NSW, it has been estimated that its guidelines will result in savings of around $790 million to the public purse. At the time of my departure from the Victorian government last month, 124 projects had been identified at a value of more than $10 million. One hundred and one of these projects were between tender and construction stage and amounted to nearly $12 billion. Seventy-one of those 101 projects are now subject to the new Code and Guidelines, amounting to $7.7 billion. In total, 311 contractors in Victoria are now required to comply with the new Code and Guidelines.

While unions have categorised the Guidelines as being 'anti-union', it should be noted that all of the compliance obligations under the Guidelines are imposed on building companies rather than unions. One of the roles of the compliance units is to promote a culture within the industry in which compliance with all legal obligations becomes a primary concern for all industry participants. Proven breaches of the Guidelines will 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. I saw the sanctions as a last resort. I would much prefer to see cultural change.

NSW Treasurer and Minister for Industrial Relations, Mike Baird, said the alignment of building codes across the eastern states sends "a united message" that cost blow-outs and time delays will not be tolerated on construction sites. In addition to the State focus, the new Federal Government has flagged plans for a re-instated ABCC to administer a toughened code and guidelines, consistent with codes overseen by the governments of Victoria, NSW and Queensland. I do believe that in creating an effective National Building Code, we can learn much from the Queensland, New South Wales and Victorian Guidelines' experience. Meanwhile, I will ensure that the FWBC fully supports each of the tri-state compliance units.

Conclusion

Both State and Commonwealth governments have the ability to implement effective regulatory schemes to address the industry's problems. What such a scheme or schemes should look like is a question for the political parties to answer. Recent history suggests that lasting reform is only possible when political parties of all persuasions accept and agree that unlawful behaviour on Australian building and construction sites is a serious issue which continues to threaten the economy and welfare of the industry's workforce.

Meanwhile, I want to make it clear that nobody is above the law. I also wish to emphasise that unions have an important role to play in creating safe, harmonious and productive building sites. However, there are lawful ways for them to stand up for their members. For too long we have been stuck in the past. It is now time to get back to the future, and introduce and uphold the rule of the law. Thank you very much, ladies and gentlemen.

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[1] Royal Commisisoner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry*, Australia, 2003, Paragraph 9.

[2] Ibid, Paragraph 11