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Restoring order in the construction sector

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Introduction

Good morning, ladies and gentlemen. Thank you for giving me the opportunity to speak here today.

Let me say at the outset, that as Director of Fair Work Building & Construction, I see my agency's role, not only to enforce workplace laws in the building industry, but to support the industry to improve its culture, and achieve more harmonious, productive worksites.

A productive, harmonious building industry is not going to happen by accident. It is a collective effort and we are all responsible for making it happen.

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 before.

Since my return, I have frequently been asked, "*Has any progress been made whilst I have been away*?" The feedback which I was receiving at the time of my departure was that progress was being made. Indeed, in recent times, the Prime Minister went so far as to state that the ABCC's activity had "*drastically and dramatically*" reduced the culture of corruption in the industry.

Upon returning to the scene in March 2012, as head of the Victorian Construction Code Compliance Unit (CCCU), I was disappointed to learn that unlawful conduct on Victorian building sites, and those throughout the country, had regressed.

I therefore find myself in a challenging position. I have inherited an agency with weakened powers and an industry with appalling lawlessness.

Bribery and corruption

One does not have to think too hard to recall unlawful activity in the building and construction industry. For many people, I imagine that the Grocon dispute, which shut down Melbourne's CBD, may come to mind.

To me, disputes like the Grocon blockade represent the tip of an iceberg with respect to unlawful conduct in the building industry. Far from being an isolated incident, the Grocon dispute was merely symptomatic of an industry within which unlawful activity extends beyond unlawful conduct to serious criminal activity.

The presence and actions of an industrial relations regulator are insufficient to confront serious criminal issues. 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 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. In a subsequent interview on the ABC's *7.30 Report*, Mr Sutton, when asked how the union expected to deal with organised crime in its ranks, advised he had taken an "*uncompromising stand on elements of organised crime*" and that he had attracted some enemies inside his union for doing so.

I referred to Mr Sutton'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.

I stated, in 2004:

> *Too many Australians attempting to earn an honest living have become victims of the industry's blatant disregard for the law.*
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> *Coercion, intimidation, violence and threatening behaviour are the most prevalent complaints received by the Taskforce. Many of the matters dealing with freedom of association, loss of work or otherwise, include an element of coercion to the extent that indicates these types of behaviours, unacceptable by general community standards, are the norm in the industry.*
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> *Such an overwhelming indictment of the industry's behaviour means the challenge before the Taskforce is not to simply restore the rule of law to the industry, it is to introduce the rule of law for the first time.*
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> *Approaches for reform which may be appropriate for other industries would simply fail in the building and construction industry because of the poor state of workplace relations and the pervading culture of lawlessness. Most concerning to the Taskforce are reports received about threats and intimidation being used as a means of advancing industrial agendas. Such coercion is indicative of how countless industrial disputes are currently resolved in the industry.*
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> *The Taskforce continues to receive reports that union officials extort money and services in return for industrial peace on building sites. The Taskforce is particularly alarmed about elements of organised crime operating within the industry.*

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 2002 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 whistleblowers in the union movement of unlawful activity, corruption, organised crime, standover tactics and kickbacks, which was "*very widespread in elements of the union movement*".

Mr Abbott also said that one of the problems was that:

> *The police traditionally have tended to stand back from industrial matters.*
>
> *We know that in many industrial disputes the police have seen their job as more to keep the peace than to enforce the law and certainly this will be one of the areas that we'll be asking the Royal Commission to look into.*

Where FWBC, and the ABCC if it is re-established, can truly make a difference, is to the prevailing culture in the industry. A national regulatory framework, with strong enforcement, will undoubtedly help reduce unlawful activity in the industry.

Restoring the ABCC

In the lead up to the 2013 federal election, the Coalition committed to restoring the ABCC and introducing a new Building Industry Code.

This commitment comes after the FWBC replaced the ABCC in 2012. As a consequence, the legislation in question significantly reduced the maximum civil penalties that can now 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.

In addition, 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-establish the ABCC.

While it is not my role to create or comment on government policy, the Government has stated it is absolutely resolute in its commitment to re-establishing the ABCC and introducing a new Building Industry Code.

Meanwhile, it is not my intention to simply wait around. Changes have been made within my agency and plenty is unfolding.

Return to core business
Since starting in October, I have restored the focus of the agency to what I have coined “core business”.

This change has seen the referral of wages and entitlements matters return to a more appropriate agency, the Fair Work Ombudsman. Important though these issues are, FWO has the resources and the expertise to deal with them.

This alteration in FWBC’s efforts is allowing our Inspectors to focus on coercion, unlawful industrial action, right of entry, freedom of association, discrimination and other conduct more commonly described these days as “thuggery”. It will look wherever the evidence leads it, whether such conduct is engaged in by unions, head contractors, sub-contractors or anyone else.

At the same time, I feel it is imperative that my agency understands the changing environment, the culture, and react accordingly.

One dominant aspect of the ABCC’s success, I was told at the time of my departure in 2008, was the agency’s responsiveness to incidents when they occur, and its visibility on sites. I am therefore committed to having the agency being responsive, visible and, at the same time, providing important education and advice.

Where breaches of the law have occurred, I am mindful that there has often been criticism of this agency and its predecessors about the amount of time taken to place matters before the courts. I am conscious of that dissatisfaction and I give you an assurance that efforts are underway to reduce that time. I must emphasise though, that once cases are placed before the courts, it is out of our hands.

Right of Entry
Right of entry is a recurring theme which looms large on the FWBC’s radar of complaints received. Right of entry will almost invariably be a component of any complaints coming our way. As a result, it is a major component of our core business.

At this juncture, I wish to commend the MBA Victoria for the initiative it took in circulating the photographs of union officials who do not possess Right of Entry Permits.

Coincidentally, for some time, I have been considering putting a similar list on the FWBC’s website – a move that would provide site management with the information required, and prevent the potential for unnecessary trespass and unlawful industrial conduct.

This brings me to the somewhat controversial topic of union organisers, who with, or without, permits enter sites, purportedly for safety, but instead enter for an industrial agenda.

In my 2004 Taskforce Report, which I referred to earlier, I stated:

> *Given the existence of significant real safety risks in the industry, the Taskforce is most concerned when it received information about Occupational Health and Safety (OH&S) being used as leverage in industrial matters.*

It is unacceptable for officials to obstruct work on Australia's building sites on spurious grounds. A decade later, it is still particularly concerning that union officials are entering sites, ostensibly to investigate safety problems, but then focus their attention, and actions, on anything but safety.

Building and construction is a dangerous industry. Nobody would disagree that safety is paramount. However, on every occasion that union officials use bogus safety claims to enter building sites, it undermines the very system put in place to deal with legitimate safety concerns.

Three weeks ago, his Honour Judge Burnett penalised the CFMEU and three union officials almost $40,000, in another FWBC case, for hindering, obstructing and acting in an improper manner on a construction site.

Joseph 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 concerns.

In delivering his penalty judgement, 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 Joseph Myles, who the week before the penalty hearing was twice arrested on a Regional Rail Link building site for trespassing.

I therefore worry that Joe McDonald, CFMEU WA Assistant Secretary, is not alone in his attitude towards right of entry. In a recent FWBC case, in which Mr McDonald and the CFMEU were penalised almost $200,000, Mr McDonald had been asked to leave the site, because he did not have a permit or permission to be there. McDonald responded, "*I haven't had one for 7 years and that hasn't f***ing stopped me.*"

Surely, enough is enough. And it seems that I am not the only one who thinks so. Just last week, Mr McDonald was banned by a judge from entering Brookfield Multiplex sites until December 2016. The CFMEU was ordered to pay the company $500,000 in compensation for strikes that McDonald incited at 2 major projects last year, and threatening conduct including grabbing a worker by the throat.

It is often said that information is the greatest form of power.

Therefore, I must emphasise to MBAV members know your rights and responsibilities. Know the right of entry laws. If you are ever in doubt, call our Hotline. If you believe someone is trespassing on a site, do not be afraid to call the police.

In recent times, it is pleasing to report that Victoria Police has proved itself ready and willing to deal with trespassers. So much so, I am currently writing to Chief Commissioner Ken Lay commending members of the Force for their decisive action recently on Melbourne's Regional Rail Link.

If we decide enough is enough together, and resolve to address these Right of Entry problems, we will create more productive building sites, which is in the economic interest of all Australians.

Building Codes

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 days, 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 new Victorian 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.

In my experience, it is fair to say that government agencies have not been the most sophisticated clients when it comes to the procurement of public sector building and construction.

The Victorian Guidelines were introduced when it became apparent that the ABCC was to be abolished. By ensuring that all contractors who choose to seek Government funded work are accountable for the set of standards contained in the Guidelines, the risks of delays and cost blowouts to the taxpayer are reduced. 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 last year. The tri-State compliance units are responsible for monitoring compliance with the Guidelines.

The Queensland Government estimated that their reforms would save taxpayers between 5 and 15 per cent of the cost of major public infrastructure projects. Meanwhile, in NSW, it was estimated that its guidelines would result in savings of around $790 million to the public purse. The CCCU has now identified 84 projects in Victoria at a value of more than $15 billion that may be subject to the Guidelines. 367 contractors in Victoria are now required to comply with the new Guidelines.

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. I saw the sanctions as a last resort. I would much prefer to see cultural change being brought about.

Pattern Agreements

At the heart of the issues I have raised with you today, is the achievement of improved productivity in the building industry.

With numerous agreements coming up for renegotiation shortly, it is timely to address what I consider is a substantial impediment to productivity in the industry, the prevalence of pattern bargaining.

A key object of this country's workplace relations system is to emphasise bargaining at the enterprise level, rather than a "one size fits all" approach.[1] Our laws prohibit anyone from applying pressure that negates free choice or threatening adverse consequences if they refuse to sign an agreement. This behaviour has no place in a system of co-operative workplace relations and I will not tolerate it. Employees, employers and their representatives should feel confident they can negotiate agreements that are fair, flexible and suit their individual circumstances and needs without the fear of reprisal.

The fact pattern bargaining hurts and inhibits productivity is nothing new. One needs only to read Commissioner Cole's Report, tabled 11 years ago, where the Commissioner observed:

> *"Genuine enterprise bargaining has eluded the building and construction industry. Instead, pattern bargaining has substantially replaced a process of genuine discussions and agreement between contractors and their employees. Pattern agreements grant increase in wages and conditions without corresponding productivity increases".*[2]

In my experience, pattern bargaining has seen:

- the effective circumvention of enterprise level bargaining;
- major contractors and particular unions entering into pattern agreements; and
- those same parties then applying pressure to smaller contractors and subcontractors to enter into agreements which contain the same terms and conditions as the pattern agreements.

The pressure applied has taken various forms:

- unions taking both lawful and unlawful industrial action until pattern agreements are made; and
- head contractors demanding subcontractors having pattern agreements in place before they will be engaged to work on building sites.

While bargaining representatives are now prohibited from engaging in pattern bargaining when seeking to take protected industrial action,[3] we would be kidding ourselves to imagine that pattern bargaining does not continue to be widespread in the building industry today.

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[1] Section 3(f) and section 171(a) of the FW Act
[2] Cole Report, Chapter 11, p 133.
[3] Section 409(4) of FW Act

Pattern bargaining has resulted in agreements containing things such as:

- common wages and conditions;
- inflexibly fixed hours of work;
- inflexibly fixed rostered days off (RDOs);
- restrictions on the use of alternative labour;
- clauses that require subcontractor and labour hire employees to be paid at the same rates as the head contractor;
- redundancy payments where employees resigned voluntarily; and
- payments of "productivity allowances" with no corresponding increase in productivity.

Pattern bargaining prevents discussions taking place between employees and employers about the things that most affect and matter to them at their workplace. No consideration is given to their respective unique interests or needs. As a consequence, productivity improvements which could flow from such discussions are prevented and denied to all involved.

At its core, pattern bargaining fails to acknowledge that not all workplaces are the same. It acts as a constraint on workplaces from innovating and delivering efficiencies that make those workplaces more productive and profitable.

In a recent address to the Brisbane club workplace relations special interest group, AI Group Chief Executive Innes Willox said "Industry-wide pattern agreements need to be outlawed. While the Fair Work Act contains important provisions outlawing industrial action in pursuit of pattern bargaining, the time has come to outlaw industry-wide pattern bargaining completely."

I agree with my predecessor, former ABCC Commissioner Mr Leigh Johns, who remarked that, "*Agreeing to pattern agreements, which contain no clauses to advance productivity, is not the type of leadership that many head contractors should be demonstrating*."

While critics will say this is an attack on rates of pay, as I mentioned earlier, there are plenty of ways in which these agreements restrict efficiency and flexibility – for example, industry-wide RDOs, shutdown weekends and restrictions on using subcontractors and labour hire.

These clauses reduce productivity and stifle competition and need to be consigned to the past where they belong. I would not want to be the last builder on the block who has these sort of clauses in their enterprise agreements.

Conclusion

I am committed to creating a more productive building and construction industry. To make this happen, we need an active regulator who ensures that laws are enforced.

I look forward to working with you, to making a concerted effort to turnaround Australia's building and construction industry and make it more productive, for the economic benefit of all.

Thank you very much, ladies and gentlemen.