Australian Government
Fair Work Building
& Construction

13 November 2014

Ms Julia Agostino
Committee Secretary
Senate Education & Employment Legislation Committee
Parliament House
Canberra, ACT 2600

Dear Committee

Victorian Desalination Plant and other matters

During my appearance before the Committee on 27 February 2014, I was asked by Senator Bridget McKenzie to provide an update to the Committee about the Victorian Desalination Plant Project. Oral interim accounts were provided during my appearances before the Committee on 2 June and 23 October 2014. The attached report represents a full account of my review of this matter and other cases.

Yours sincerely

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EXECUTIVE SUMMARY

Chronology of Key Events

Industrial activity took place at the Desalination Plant at Wonthaggi, Victoria (the **Desalination Plant**) on five relevant occasions between July 2010 and June 2011.

17 & 20 June 2011 Thiess Degremont Joint Venture (**TDJV**) obtains orders against the Construction, Forestry, Mining, Energy and Union (**CFMEU**) and others to stop industrial action at the Desalination Plant.

21 June 2011 TDJV commences proceedings the Victorian Supreme Court against the CFMEU for alleged unlawful industrial action.

22 June 2011 The Australian Building and Construction Commission (**ABCC**) intervenes in the Supreme Court proceedings.

19 July 2011 ABCC receives advice from external lawyers that there are reasonable prospects for success against the CFMEU and others regarding the June 2011 industrial action.

October 2011 Settlement discussions begin between TDJV and the CFMEU.

9 November 2011 Meeting between ABC Commissioner Leigh Johns and CFMEU National Secretary Dave Noonan.

December 2011 Representation by Commissioner Johns to National Secretary Noonan that the ABCC would not take its own legal action if TDJV settled their proceedings against the CFMEU.

16 December 2011 The Supreme Court proceedings are adjourned after agreement reached between TDJV and CFMEU that if no further industrial action takes place the proceedings will be discontinued.

8 April 2012 TDJV request that ABCC sign consent orders discontinuing the Supreme Court proceedings.

18 April 2012 ABCC withdraws its intervention in the Supreme Court proceedings.

23 April 2012 The Supreme court proceedings are discontinued by consent of the parties, TDJV and the CFMEU.

11 May 2012 The ABCC advises TDJV that their investigations into the relevant industrial action at the Desalination Plant have been finalised due to insufficient evidence.

31 May 2012 The ABCC closes its legal file on the matter *"in the public interest"*.

Summary of Desalination Plant events

In October 2011, Thiess Pty Ltd and Degremont Pty Ltd (together, **TDJV**) was engaged in talks with the CFMEU around settlement of proceedings including undertakings as to future conduct by the CFMEU whilst CFMEU members remained on site at the Desalination Plant at Wonthaggi, Victoria.

TDJV sought compensation or damages for loss of labour productivity, increased plant and equipment costs, extended financing, and interest costs and loss of profits. TDJV also claimed potential liquidated damages of approximately $1.5 million per day.

On 10 November 2011, ABC Commissioner Leigh Johns reported to certain members of the ABCC's Executive on a meeting he had with CFMEU National Secretary Dave Noonan that day and confirmed that, from his perspective:

- the "stay" of the Supreme Court action was the most appropriate course and, as the regulator, he would not oppose it; and
- it would be difficult for him to agree to any proposed discontinuance or dismissal of the substantive proceeding.

At the meeting with CFMEU National Secretary Noonan, Commissioner Johns said that if the proceedings were discontinued or dismissed then the ABCC would likely take over the proceeding and run the action itself.

Sometime later in 2011 (possibly in early or mid-December 2011) it appears Commissioner Johns' representation went further than his earlier stated position. Before terms of settlement were concluded between TDJV and the CFMEU, Commissioner Johns conveyed to National Secretary Noonan that if TDJV did not want to proceed with its action in the Victorian Supreme Court then he would not take over that proceeding. Nor would he commence his own proceedings against the CFMEU in relation to the events which were subject of the TDJV proceeding. It is evident that the making of the representation was a material factor in the CFMEU deciding to settle the TDJV proceedings on terms.

On 5 April 2012, TDJV's lawyers requested the ABC Commissioner to sign consent orders discontinuing the proceeding, noting that TDJV was making this request pursuant to the deed of settlement between TDJV and the CFMEU.

Rather than submitting to the request, on 18 April 2012, upon Mr Johns' instructions, the ABCC withdrew its intervention in the Supreme Court proceedings on the basis that it spared the ABCC being required to sign or otherwise object to the Consent Orders that were proposed by the parties. As a result, the Commissioner was not a party to any settlement and, at that juncture, there was no intention to progress this litigation in his own right.

By 27 April 2012, the ABCC investigator with carriage of the Desalination investigation expressed to his manager that he was closing the matter because Commissioner Johns had directed him to.

On 11 May 2012, the ABCC manager wrote to Thiess and stated that the ABCC had completed its investigations into these matters and found there was insufficient evidence to support a successful prosecution against any parties regarding alleged contraventions of the *Fair Work Act 2009* (**FW Act**) or the *Building and Construction Industry Improvement Act 2005* (**BCII Act**). The letter concluded that all relevant material would be retained for possible use should a stronger case for prosecution be identified. This action was taken despite the existence of external legal advice that there were good prospects for successful legal action.

In contrast to the reason provided to TDJV for finalising the matter; ABCC's legal file was closed on 31 May 2012 with the notation "*Not in the public interest*".

ABC Commissioner's decision not to proceed

There is Federal Court authority that where the ABCC had intervened in proceedings pursuant to s 71 of the BCII Act and the private applicant discontinued its claims, the ABC Commissioner could take over and prosecute those proceedings. In fact, the ABCC had a published policy, authored by Commissioner Johns, concerning the exercise of the discretion to commence proceedings for contravention of the provisions of the BCII Act and the provisions of the FW Act at the relevant times.

The key aim of the ABCC's and Fair Work Building & Construction's (**FWBC**) enforcement proceedings, as set out in the policy, is to achieve compliance with Building Industry Laws.

In the Desalination Plant matter there was sufficient evidence to prosecute the case in that the ABCC had received written legal advice from an external legal provider indicating there were reasonable grounds for starting the proceedings. Evident from the facts of the case,

and all the surrounding circumstances, commencing the proceeding would have been in the public interest.

However, the decision taken in December 2011 by way of an undertaking to Mr Noonan by Mr Johns not to continue or initiate proceedings had the effect of limiting the ability of FWBC to bring these matters to the courts.

Inherited ABCC matters and the Global Settlements

When the ABCC transitioned to become FWBC, any legal matters that had arisen under the previous entity or had been commenced by FWBC under the BCII Act were identified and categorised as 'Inherited ABCC'. After the establishment of FWBC, in June 2012, approximately 40 on-going legal matters from the ABCC were categorised by FWBC Legal Group in the case management system as 'Inherited ABCC' matters. Between June 2012 and June 2013 a number of these inherited matters were discontinued or finalised by way of agreed statements of facts and penalties.

Based on public statements, internal records and recollections of staff employed at the time, it appears that Mr Johns was seeking to:

- reposition and rebrand the agency as a 'full service regulator' leaving the legacy of the ABCC behind;
- build amicable relations with the CFMEU;
- hold regular meetings with National Secretary Dave Noonan with the intention of breaking deadlocks and resolving matters as they arose;
- clear the backlog of cases including 'Inherited ABCC' matters. Budget cuts were a factor in this ; and
- achieve improvements in CFMEU governance and behaviour.

The Global Settlements were a sub-set of these Inherited ABCC matters and part of an overall strategy to 'clear the decks' of active litigation linked to the ABCC.

Mr Johns took an active role in the Global Settlement meetings and made the final decision in all meetings. Prior to each meeting he was provided with detailed penalty risk assessments for each matter by FWBC Legal. The notes that Mr Johns made prior to, and during the meetings, indicate that he invariably adopted initial negotiating positions at the lower end of the recommended range.

FWBC's Legal Executive Directors have expressed the view that some of the agreed amounts were below the level they expected to achieve at the commencement of the mediation process.

With the exception of three cases in Victoria (RMIT, St Hilliers and Peninsula Link) the agreed penalty amounts negotiated during the Global Settlement meetings with the CFMEU were at or below the lower end of the range of assessed penalty risks.

There is no information to indicate that the negotiated outcomes resulted from anything other than the lack of a strong negotiating position with the desire to finalise as many of the 'Inherited ABCC' matters at the least possible legal expense.

One of the Global Settlement cases related to three Queensland State Government sites that are still the subject of proceedings. The Full Bench of the Federal Court during the course of a recent hearing questioned whether the basis for the agreed penalties may have been too low. The Court has reserved its decision and it is hoped that the ruling will provide future guidance to FWBC and regulators generally, on the appropriate manner in which to advise a court on the ranges of penalties.

The FWBC Litigation Policy states that in considering any proposal and putting its position to the CFMEU, the process is not one of "negotiation". FWBC should have been concerned with appropriately reflecting its assessment of the public interest in relation to the disposition of the matters generally.

The review also noted that the policy required that Field Operations officers should have been involved in decisions regarding the breach bargaining negotiations between the CFMEU and FWBC. While on occasions, the then Chief of Field Operations, Michael Campbell was involved, other relevant Field Operations personnel were not involved.

Further, there is no evidence to suggest that during the course of the breach bargaining negotiations, the persons who were injured or otherwise affected by the contraventions, were consulted before any breach bargaining decision was made.

The range of penalties agreed to by the FWBC in the Global Settlement negotiations should have been within acceptable limits having regard to FWBC's desire to balance its aims of general and specific deterrence with those circumstances that in individual cases, constituted relevant penalty considerations.

The Adoption of Model Litigant Guidelines

The ABCC and FWBC are both subject to the Legal Service Directions and the model litigant obligations. This includes an obligation to act fairly.

It is noted that while one of the model litigant obligations is to "*try to avoid, prevent and limit the scope of legal proceedings wherever possible*", the obligations in Note 4 of the Legal

Services Directions did not prevent either the ABCC or FWBC from "*acting firmly and properly to protect their interests*".

When considering "*acting firmly to protect their interests*" and deciding whether to litigate or to settle, it is perhaps worth considering the recommendations of the Cole Royal Commission which led to the creation of the ABCC. Broadly speaking, the Royal Commission recommendations outlined the reason for creating the ABCC - being to achieve cultural change in the building industry (*Reform – Cultural Change Volume 11*) by upholding the rule of law and holding those who break the law to account for their actions.

The transition from the ABCC to the FWBC, with the resulting 'clear the decks' strategy, and the desire to move forward with the 'full service regulator' model, may well have been factors in the results of the Global Settlement meetings being consistently at, or below, the lower end of the assessed range of likely penalties. These factors appear to have outweighed a proper assessment of the relative bargaining strengths of the FWBC and the CFMEU and mitigated against a stronger negotiating strategy.

Some of the settlements permitted the union body corporate to absorb the penalties for individual union officials and allow them to escape liability. This would appear to be contrary to the purpose and objectives of the agency. The individuals concerned were simply not held to account for their alleged unlawful actions.

It is noted that the 'Grocon Blockade' occurred in August and September 2012, after the commencement of the Global Settlements meetings and prior to the meetings that decided on the agreed penalty amounts for the Queensland and Victorian matters. Despite the Grocon dispute, it did not cause negotiations to stop or FWBC to take a harder line in those negotiations.

Therefore, considered in context, there was no apparent deterrent effect obtained by the FWBC in undertaking the Global Settlements. The benefits the Global Settlements achieved were to clean the slate of inherited matters and possible savings of legal expenditure.

Rather than a process to streamline lengthy legal proceedings, it appears to have become a negotiated outcome where the significant facts of the matter are bargained away in order to achieve a settlement.

Concluding comments

As a result of the Review of the manner in which the ABCC handled the Wonthaggi Desalination Plant investigations and FWBC's involvement in the so-called 'Global Settlement' of outstanding litigated matters, a number of conclusions can be reached.

The decisions made in these matters appear to be part of a broader strategy by Mr Johns to 'regularise' relations with the CFMEU.

In return, Mr Johns expressed to his senior legal executives that he believed the union would improve its governance and on-site behaviour. The basis upon which that belief was formed is not available, but it is apparent it involved on-going discussions with CFMEU National Secretary Dave Noonan at the time the matters were concluded.

This strategy of Mr Johns did not preclude the agency continuing to deal with coercion and right of entry complaints. The ABCC and FWBC continued to commence legal action against the CFMEU and other unions during this period. However, there was an expectation that an improvement in governance and behaviour by the union would allow a re-focusing of FWBC resources towards matters that would be of mutual interest to both parties - the enforcement of wages and entitlements and sham contracting matters.

In pursuing that objective it is apparent that the agency accepted a number of settlements that did not reflect the seriousness of the conduct being pursued. In all but three of the cases, they were settled at below the range estimated by the agency's Legal Group. It was a 'bulk discount' that meant the agency did not properly bring to account unlawful behaviour.

Of course, this may well have been an acceptable approach if the strategy had succeeded. However, as the 'Grocon' dispute made clear, the strategy did not result in any noticeable improvements in CFMEU governance or behaviour.

The attitude of the CFMEU to future compliance has proven to be damning with a failure to date by the CFMEU to have taken any relevant proactive measures to comply with Building Industry Laws.

The CFMEU has never shown a willingness to co-operate in any ABCC or FWBC investigation, including the investigation and litigation action against others.

The lack of records outlining the actions taken, and the reasons for them being taken, is a troubling aspect of the Desalination Plant and Global Settlement matters. It indicates a failure to properly record the deliberations and decisions. Some records were found that shed light on some of what happened, however these did not form part of formal case records.

This evidence of poor record keeping practices by officers of the agency demonstrates a clear need to improve transparency. The 'disconnect' between the sparse formal record and the actual events and decisions (including the reasons for them being taken) has created

considerable confusion as to what happened and why, even though those events took place a relatively short time ago.

This Review also raises questions about the validity of mediated settlements with the CFMEU that do not fully reflect the seriousness of the conduct, particularly given the recidivist nature of the CFMEU and others associated with that organisation.

The Courts have expressed concerns a number of times that having penalties imposed is regarded by the CFMEU as 'the cost of doing business' rather than an opportunity to make amends for the damage caused by wrongdoing and to identify ways to improve future behaviour.

The Desalination Plant matter and the Global Settlement process meant that the FWBC achieved a series of reduced regulatory outcomes, wrongly focussing on reaching bargains rather than on achieving results that properly reflected the conduct involved and achieved an appropriate level of deterrence.

While the decision has not yet been handed down at the time of tabling this report, in the Queensland Government sites matter, two of the judges expressed concern in regard to settlement procedures adopted by FWBC.

VICTORIAN DESALINATION PLANT

Background

Thiess Pty Ltd and Degremont Pty Ltd (TDJV) were joint venturers who contracted with Aquasure Pty Ltd for the design and construction of the Desalination Plant at Wonthaggi, Victoria.

Industrial activity took place at the site on five relevant occasions:

- 21 July 2010;
- 21 February 2011;
- 4, 5 and 7 March 2011;
- 31 May 2011; and
- 16 to 21 June 2011.

The industrial activities were arguably in breach of s 37 and s 38 of the BCII Act (since repealed) and, in relation to activity in the period 17 to 21 June 2011, in breach of the FW Act, because at that time interim orders of Fair Work Australia (**FWA**) were in place.

Litigation - Thiess & Degremont v CFMEU and others

On 17 June 2011, Fergus O'Hea, a CFMEU employee delegate, had a conversation with the TDJV Employee Relations Officer at the CFMEU office on site (TDJV had provided the CFMEU with a site shed on the Project). At the end of the conversation, Fergus O'Hea said to the TDJV officer, "*the site will be off for a couple of weeks I reckon*".

That same day, pursuant to s 420 of the FW Act, TDJV as plaintiffs, and being partners in the Victorian Desalination Plant, obtained an interim industrial action stop order against the CFMEU from Senior Deputy President Watson in FWA. This application followed a walk off by CFMEU members at the Desalination Plant construction site. The walk off was said to have been provoked by the alleged selection of a CFMEU member for redundancy because he was a CFMEU representative on site, in a demobilisation process commenced by TDJV.

On 20 June 2011, pursuant to s 418 of the FW Act, a final stop order was made because of a continuation of industrial action.

On 21 June 2011, TDJV commenced Victorian Supreme Court action by a generally endorsed writ against the CFMEU because of the continuation of industrial action. An application by summons for interlocutory injunctions was made, being supported by affidavit. The endorsement only alleged unlawful industrial action between 16 and 20 June 2011.

The endorsement on the writ sought remedies including injunctions, penalties and compensation exclusively by reference to the BCII Act.

The application for interlocutory relief came on for hearing before Justice Kyrou later in the afternoon on 21 June 2011. It seems that the application was effectively ex-parte, ie the CFMEU had not been given, or been given very little, notice. The application was adjourned to 22 June 2011 to enable notice to be provided to the CFMEU.

On becoming aware of the proceeding in the Supreme Court, the ABC Commissioner decided to exercise the right of intervention conferred under s 71 of the BCII Act. The court was notified of that decision pursuant to a letter sent to the Prothonotary and the Associate to Justice Kyrou.

On 22 June 2011, the interlocutory application was dismissed by consent without adjudication because an agreement was reached between TDJV and the CFMEU. The agreement included a dispute resolution mechanism to address the asserted grievance behind the industrial action, ie the selection for redundancy of the CFMEU delegate health and safety representative.

The proceedings were otherwise maintained.

Reasonable Prospects Advice obtained by ABCC

On 19 July 2011, the ABC Commissioner's instructing solicitors provided advice, endorsed by Senior Counsel, in respect of the industrial action taken by CFMEU classification employees on the Desalination Plant between 17 and 21 June 2011. The advice was that there were reasonable prospects of successful litigation by the Commissioner against the CFMEU and seven CFMEU officials for contravention of s 421 of the FW Act, ie contravention of a term of an order made by FWA.

The ABC Commissioner's solicitors noted that they had not been asked to express an opinion on the prospects of successful litigation against the CFMEU or any other person for contravention of s 417 of the FW Act (industrial action must not be organised or engaged in before nominal expiry date of enterprise agreement, etc). However, having regard to the solicitors' conclusion regarding the prospects of a section 421 FW Act contravention, and in particular the reasons for that opinion, it was suggested that the ABCC may also wish to have considered that matter.

The maximum penalties for contraventions of ss 417 and 421 were, at that time, $33,000 for an organisation and $6,600 for an individual.

Summary of ABCC instructing solicitors' opinion

The ABCC's instructing solicitors' opinion, on the prospects of s 421 contravention proceedings in summary, was as follows:

> *In respect of the interim order, there were reasonable prospects of successful litigation against the CFMEU for contravention of s 421 of the FW Act based on the allegations that:*
>
> - *it contravened the terms contained in that order in that it failed to take reasonable steps to stop its members employed by TDJV taking industrial action;*
> - *further and in the alternative, it contravened the terms contained in that order in that it did not stop organising industrial action by CFMEU classification employees and it organised industrial action by CFMEU classification employees; and*
> - *it contravened the terms contained in the interim order in that it failed to forthwith notify all its members employed by TDJV who were covered by the TDJV agreement that industrial action was not authorised by the CFMEU or any person acting on behalf of the CFMEU.*
>
> *Also in respect of the interim order, there were reasonable prospects of successful litigation against Noel Washington and Fergus O'Hea for contravention of s 421 of the FW Act based on the allegation that they were each, within the meaning of s 550 of the FW Act, 'involved in' the contraventions of s 421 that the instructing solicitors stated could be successfully alleged against the CFMEU.*
>
> *In respect of the final order, there were reasonable prospects of successful litigation against the CFMEU for contravention of s 421 of the FW Act based on the allegations that:*
>
> - *it contravened the terms contained in that order in that it did not stop organising industrial action by CFMEU classification employees and it organised industrial action by CFMEU classification employees;*
> - *it contravened the term contained in that order in that it aided and abetted, counselled, procured, induced, authorised and/or directed CFMEU classification employees to engage in industrial action that would be contrary to the final order; and*
> - *it contravened the term contained in that order in that it failed to forthwith notify all its members employed by TDJV who were covered by the TDJV agreement that industrial action was not authorised by the CFMEU or any person acting on behalf of the CFMEU.*

Also in respect of the final order, there were reasonable prospects of successful litigation against at least Noel Washington, Ilya Crnac, Dave Corrica and Peter Simpson for contravention of s 421 of the FW Act based on the allegation that they were each, within the meaning of s 550 of the FW Act, 'involved in' the contraventions of s 421 that the ABCC's instructing solicitors said could be successfully alleged against the CFMEU.

Thiess & Degremont v CFMEU - litigation continues

On 15 August 2011, TDJV filed and served an amended statement of claim in which TDJV alleged five occasions of industrial action in:

- July 2010;
- February 2011;
- March 2011;
- May 2011; and
- June 2011.

In those proceedings TDJV relevantly sought:

- injunctions under s 39 of the BCII Act to restrain unlawful industrial action under s 38;
- compensation under s 49(1)(b), alternatively damages under the Supreme Court Act; and
- penalties under s 49(1)(a) for contraventions of s 38.

The maximum penalty for a contravention of s 38 was, at that time, $110,000 for an organisation.

TDJV sought compensation or damages for loss of labour productivity, increased plant and equipment costs, extended financing, and interest costs and loss of profits. TDJV also claimed potential liquidated damages of approximately $1.5 million per day.

Adjournment and settlement of litigation

In October 2011, TDJV was engaged in talks with the CFMEU around settlement of proceedings including undertakings as to future conduct by the CFMEU whilst CFMEU members remained on site.

On 18 October 2011, the ABCC's instructing solicitors conveyed by email the ABC Commissioner's position to TDJV regarding a possible settlement of proceedings being reached between TDJV and the CFMEU. It included a possible settlement of proceedings which would involve an adjournment of the proceeding to a date when the CFMEU worker involvement on the site ceased, subject to the relevant terms in the deed being observed

and there being an absence of unlawful industrial action or behaviour on the Project by the CFMEU and its members.

The author of the email, ABCC's instructing solicitor's Special Counsel, included the following paragraph in his message:

> *As I mentioned, the ABCC's position in these respects ought not be seen as the ABCC endorsing the terms that have been reached or will be shortly concluded between TDJV and the CFMEU (or, to put it another way, that the ABCC was in any sense a defacto party to those terms), or that the ABCC was making a commitment to take a particular course of action or to exercise his powers in a particular way at the point that discontinuance by TDJV arrived. My instructions are that the ABCC would be monitoring industrial conduct on the Project as it normally would, and would respond to any unlawful industrial behaviour as the ABCC saw fit.*

Per email dated 31 October 2011, ABC Commissioner Leigh Johns advised relevant senior executives as follows:

> *From my perspective the "stay" of the Supreme Court action is the only worthwhile guarantee. As the regulator I would not oppose that. Anything less and it would be difficult for me to agree to any proposed discontinuance or dismissal of the substantive CFMEU proceeding. I'm content for Julian* (Thiess) *to know this is my position.*

On 4 November 2011, ABC Deputy Commissioner Michael Campbell emailed Commissioner Leigh Johns and relevant senior executives as follows:

> *Just clarifying our position regarding the offer of a meeting with the CFMEU regarding this matter. We have advised Thiess that the Commissioner would be happy to consider meeting with the CFMEU, if that is what they want, if an invitation is extended to the Commissioner by the CFMEU. Thiess was asking us to consider a meeting request from the CFMEU.*

The CFMEU, through TDJV, subsequently secured meetings with Commissioner Johns. The CFMEU was concerned, and wished to ascertain, the ABC Commissioner's position in relation to taking proceedings against the CFMEU about the matters which were the subject of the TDJV proceeding. Consideration also had to be given as to whether the ABC Commissioner would take over or commence proceedings if TDJV and the CFMEU reached settlement.

On 9 November 2011, National Secretary of the CFMEU, Dave Noonan, contacted Mr Johns and a meeting was arranged. Next day, on 10 November 2011, an internal email report was sent by Commissioner Johns to relevant senior executives reporting on the meeting he had with National Secretary Noonan that day. He wrote as follows:

> *I met with Dave Noonan today.*
>
> *I confirmed that, from my perspective the "stay" of the Supreme Court action is the most appropriate course. As the regulator I would not oppose that. I also confirmed that it would be difficult for me to agree to any proposed discontinuance or dismissal of the substantive proceeding. I said that if that occurred the ABCC would like* (sic) *take over the proceeding and run it itself (likely in an expanded way).*
>
> *I get a sense that Mr Noonan wanted to hear this from me personally as opposed to hearing it through the company.*

Following the entry of the TDJV proceeding in the Technology Engineering and Construction List of the Supreme Court, application was made by the CFMEU to strike out parts of the claim and obtain discovery of certain documents. In turn, application was made by TDJV to split the trial between liability and relief. This was heard to conclusion by Justice Vickery on 17 and 20 November 2011, and judgement was reserved. The ABCC participated in that application supporting a split trial.

In late November/early December, a representation was made by Commissioner Johns to Secretary Noonan about the ABCC's position in relation to continuing or taking proceedings against the CFMEU about the matters subject of the TDJV proceedings. Commissioner Johns recently informed FWBC that he advised Mr Noonan the ABCC would not take over the TDJV proceeding nor commence their own proceedings in relation to the events which were the subject of the TDJV proceeding.

By 2 December 2011, some form of in-principle agreement had been reached between TDJV and the CFMEU, which the parties contemplated formalising by deed to be executed by 16 December 2011. By email dated 2 December 2011, Mr Julian Rzesnioweieki from Thiess advised the ABCC of the features of the agreement, which included:

> *Proceedings currently in Supreme Court will be adjourned – if CFMEU undertake no unlawful action up until 14 April 2012 then Thiess will withdraw proceedings.*

A deed of settlement was made between TDJV and the CFMEU shortly before 16 December 2011. It provided that, subject to satisfaction of various industrial conditions by the CFMEU

over ensuing months, there would be discontinuance of the proceedings by TDJV on Tuesday 16 April 2012 (being a date by which it was anticipated that CFMEU members would no longer be engaged at the site).

The ABCC did not sight the deed containing those conditions.

On 16 December 2011, the parties notified Justice Vickery of the applications. Upon that notification, TDJV and the CFMEU requested the Court to defer handing down judgement. The ABCC was requested to join in. The ABCC's solicitors, upon instructions, wrote to the Judge's Associate indicating that while the ABC Commissioner considered that it would be more appropriate for the judgement to be handed down, in all the circumstances the Commissioner did not oppose the course requested by the parties.

Justice Vickery acceded to the TDJV and CFMEU application, stating that he did so in the interests of fostering the resolution of the broader issues between the parties. His Honour asked the parties to advise the Court should it be necessary to have the judgement published and orders pronounced.

Consent orders were signed by the parties on or around 16 December 2011 including the ABCC, upon Mr John's instructions, providing for adjournment of the proceedings to 25 May 2012.

On 8 March 2012 a private meeting took place between Commissioner Johns and Mr Noonan at the office of the ABC Commissioner's instructing solicitors, but with no lawyers present. The contents of the conversation at that particular meeting are unknown.

On 5 April 2012, TDJV's lawyers requested the ABC Commissioner to sign consent orders discontinuing the proceeding, noting that TDJV was making this request pursuant to the deed of settlement between TDJV and the CFMEU.

Rather than submitting to the request, on 18 April 2012, upon Mr Johns' instructions, the ABCC withdrew its intervention in the Supreme Court proceedings. The agency's instructing solicitors wrote to Justice Vickery's Associate, with a copy to the parties' lawyers. Referring to the letter in question, on the same day, Commissioner Johns emailed his Deputy Commissioners Corney and Campbell as follows:

> *It spared us being required to sign or otherwise object to the Consent Orders that were proposed by the parties*

On 19 April 2012, the ABC Deputy Commissioner Michael Campbell advised two of his senior officers that Thiess and the CFMEU had agreed to settle. His email went on to state:

> *we are discontinuing our intervention so as not to be party to any settlement. We will not be progressing this litigation in our own right (at this stage).*

On 23 April 2012 Justice Vickery made orders by consent of TDJV and the CFMEU that the proceedings be "*discontinued without adjudication on the merits*".

On 24 April 2012, the ABCC investigator with carriage of this matter emailed his manager as follows:

> *I am seeking direction in regards to the closure of the CFMEU VDP matters. There are currently 5 investigations that are with legal so I am assuming that they will be returned to us and closed by us.*

On 27 April 2012, the investigator again emailed his manager, stating:

> *At this stage I am planning on doing one closure letter to cover all the dates. At this stage I am not 100% what to put in it as the reason we are closing it is because Leigh has directed me to.*

It is assumed that in late April 2012 orders were made by consent of the parties that the proceedings be discontinued without adjudication on the merits and with no orders as to costs.

On 11 May 2012, the ABCC manager wrote to Thiess as follows:

> *The ABCC has completed its investigations into these matters and has found there is insufficient evidence to support a successful prosecution against any parties regarding alleged contraventions of the Fair Work Act 2009 or Building and Construction Industry Improvement Act 2005.*
>
> ...
>
> *Although these matters have been finalised, all relevant material will be retained for possible use should a stronger case for prosecution be identified.*

The legal file was closed on 31 May 2012. The reason for the closure was stated as "*Not in the public interest*". The ABCC Executive Director Legal who instructed the legal case be closed, advised the Review that he had done so after an administrative officer had prompted him to do so; he presumes because it was the last day of the ABCC. The FWBC commenced on 1 June 2012.

Whilst the Executive Director stated he was unaware at the time that an undertaking had been given to the CFMEU not to pursue the matter, he was clear in his recollection that Mr Johns had, by this time, made a decision not to proceed. In relation to the reasons used for the closure, he stated:

> *In looking back, the public interest issue that I likely had in mind was that the parties had reached a resolution and this reduced the public interest in pursuing the matter and led to the decision not to pursue this and this is what is recorded.*

FWBC's legal advice on recommencing litigation

FWBC recently sought and received legal advice which was to the effect that the current Director would not be able to proceed against the CFMEU.

Discussion

Summary of events

TDJV commenced proceedings against the CFMEU in the Supreme Court of Victoria on 21 June 2011 seeking civil remedies in the nature of injunctions, compensation and penalties against the CFMEU under sections 39 and 49 of the BCII Act in relation to a range of industrial activities at the Desalination Plant. TDJV's claims were expanded by an amended statement of claim dated 15 August 2011.

On 22 June 2011 the ABC Commissioner gave notice of intervention in the TDJV proceeding pursuant to its statutory entitlement to do so under s 71 of the BCII Act and participated in the proceedings until the Commissioner withdrew his intervention on 18 April 2012.

From at least October 2011, settlement discussions occurred between TDJV and the CFMEU. During the period of those discussions, the ABC Commissioner, Mr Leigh Johns, spoke to Mr Dave Noonan, the National Secretary of the CFMEU, on at least three occasions.

Commissioner Johns met National Secretary Noonan on 10 November 2011. By email that day the ABC Commissioner reported to other ABCC officers.

There were further conversations between the ABC Commissioner and Secretary Noonan in late November/early December 2011. During that time, a representation was made by the Commissioner to the CFMEU about the Commissioner's position in relation to continuing or subsequently taking proceedings against the CFMEU in relation to the matters which were the subject of the TDJV proceeding.

On 16 December 2011 judgement was due to be delivered by Vickery J in the Supreme Court in relation to interlocutory applications that had been argued. In light of the progress towards settlement, TDJV and the CFMEU requested the Court not to deliver judgement, to which request the Court acceded. The ABC Commissioner informed the Supreme Court by letter dated 16 December 2011 that he did not oppose the course that had been requested by TDJV and the CFMEU.

On 18 April 2012 the ABC Commissioner withdrew his intervention in the proceeding by letter from ABCC's instructing solicitors to the Associate to Justice Vickery.

The proceedings were discontinued by consent of the parties on or about 18 April 2012 pursuant to the terms of settlement made between TDJV and the CFMEU in December 2011.

The relevant circumstances occurred during a period of time when:

- the Act was entitled the BCII Act and when the relevant functions were reposed in the Australian Building and Construction Commissioner: see BCII Act ss 9 and 10;
- the Commissioner was Mr Leigh Johns. He ceased being Commissioner in June 2012 when he was appointed Director of FWBC. In April 2013 he was appointed as a Commissioner of Fair Work Commission and currently holds that position;
- there was Federal Court authority that where the ABCC had intervened in proceedings pursuant to s 71 of the BCII Act and the private applicant discontinued its claims, the ABC Commissioner could take over and prosecute those proceedings; and
- the ABCC had a published policy concerning the exercise of the discretion to commence proceedings for contravention of the provisions of the BCCI Act and the provisions of the FW Act which were engaged (see ABCC and FWBC Litigation Policies later).

<u>ABC Commissioner Leigh Johns' explanation</u>

In recent times, Commissioner Johns has informed FWBC that before terms of settlement were concluded between TDJV and the CFMEU in December 2011, he conveyed to the National Secretary of the CFMEU, Mr Noonan, that if TDJV did not want to proceed with its action in the Victorian Supreme Court he would not take over that proceeding nor commence his own proceedings against the CFMEU in relation to the events which were subject of the TDJV proceeding.

It was apparent from the course of the exchanges with Mr Johns about the matter in recent times, and also from the course of events concerning the negotiation of the settlement as far as they are known to FWBC and its instructing solicitors, that:

(a) with respect to a settlement between the CFMEU and TDJV, the CFMEU were urging Mr Johns to agree that he would not continue the proceedings or commence his own. This agreement was regarded by the CFMEU as a critical and necessary condition in the conclusion of the settlement with TDJV;

(b) Mr Johns was initially reluctant to make any promise about the course which the ABCC would take which would involve promising to refrain from taking proceedings (note ABCC's instructing solicitor's email to TDJV's solicitors on 18 October 2011 and Mr John's internal email dated 10 November 2011 reporting on a meeting he had with Mr Noonan on that day);

(c) having regard to (b) above and that the fact that the representation went further than what Mr Johns reported in his internal email of 10 November 2011, the representation was made sometime after 10 November 2011, possibly in early or mid-December 2011 (given that the terms of settlement were concluded between TDJV and the CFMEU not long before 16 December 2011);

(d) a matter that Commissioner Johns says weighed on his mind in deciding to make the representation was that his assessment of TDJV's commitment to prosecute the proceedings appeared to be waivering and he did not wish to take over the TDJV proceedings in those circumstances; and

(e) if he were asked, Mr Johns has indicated to FWBC that by making the representation he was intending that it would operate as a bar to the ABCC subsequently taking proceedings against the CFMEU in relation to the relevant events (provided that the terms of settlement were observed).

It may be noted that, save for the email exchange between the ABCC's instructing solicitors and TDJV on 18 October 2011, the matter of communicating the ABCC's position to the CFMEU in relation to the question of the ABCC taking over of the TDJV proceeding, or the ABCC commencing other proceedings against the CFMEU in relation to the events which were subject of the TDJV proceedings, was handled by Mr Johns personally.

On 26 February 2014, Mr Brian Corney, Chief Counsel of FWBC, spoke to Mr Johns on three occasions for the purposes of obtaining instructions in relation to his conversations with Mr Noonan. Materially, in the second telephone conversation Mr Johns instructed that:

CFMEU wouldn't settle with Thiess if a prosecution would be taken (by ABCC).

If Thiess didn't want to proceed Mr Johns said he didn't want to continue.

If a settlement was made with Thiess the ABCC would not "take over or commence our own proceedings".

On that basis the CFMEU did a deal with Thiess.

In the third telephone conversation with Mr Corney, Mr Johns confirmed his use of the word "commence", and expressed the opinion that in his assessment there was a bar to re-litigating.

INHERITED ABCC MATTERS and GLOBAL SETTLEMENTS

Background

When the ABCC transitioned to become FWBC, any legal matters that had arisen under the previous entity or had been commenced by FWBC under the BCII Act were identified and categorised as 'Inherited ABCC'. After the establishment of FWBC, in June 2012, approximately 40 on-going legal matters from the ABCC were categorised by FWBC Legal Group in the case management system as 'Inherited ABCC' matters. Between June 2012 and June 2013 a number of these inherited matters were discontinued or finalised by way of agreed statements of facts and penalties.

40 'Inherited ABCC' matters

In the wake of the internal review of the Desalination Plant settlement, I directed that a further review examine the circumstances of how these 40 inherited matters were finalised.

In particular, enquiries were conducted into the conduct of settlement negotiation meetings ('Global Settlements') and the material that was considered prior to the decisions taken during those negotiations. These enquiries involved, where possible, an assessment of the progress of these legal matters from the time when legal action was approved by FWBC's Litigation Advisory Committee, through formal or private mediation, through to the time when the agreed penalty amounts were negotiated.

The Review provided analysis of the events, taking into account FWBC documentation such as mediation minutes, penalty risk assessments and entries on files. FWBC has taken care to avoid breaching the without prejudice and confidential nature of the meetings and correspondence between the parties.

The Review indicated inconsistencies in the approach to settling or discontinuing legal actions during the period. For instance, some matters were settled with agreed declarations and penalties against both the unions and the union officials involved in the contraventions. In other matters, declarations and penalties were only sought against the union. In three matters, legal action against the unions and officials was discontinued. However, available case records fail to provide the reasons for these differences in approaches and outcomes.

FWBC's relevant Legal Group Executives advised the Review that Director Leigh Johns commenced a strategy of seeking a 'Global Settlement' with union-related respondents. This 'Global Settlement' approach involved going beyond court-ordered mediation to conduct

private negotiations in each relevant state (Queensland and Victoria) to seek to resolve matters either before the Courts or which were planned to be filed.

The 'Global Settlement' approach was conducted as part of a strategy by the Director to settle matters linked to the ABCC, rebrand the FWBC as a 'full service regulator' and to improve the relationship with the CFMEU. It was also adopted during a period of significant financial uncertainty for the Agency.

A number of matters were also settled with employer respondents during the same period.

Of the 40 Inherited matters, 28 matters involved union respondents, 11 involved employers as respondents and one matter had both an employer and union respondents.

The main allegations within the 'Inherited ABCC' matters were:

- 21 x Unlawful Industrial Action
- 6 x Sham Contracting
- 4 x Coercion
- 3 x Freedom of Association
- 3 x Non-compliance with Notice to Produce
- 1 x Discrimination
- 1 x Right of Entry
- 1 x Pay & Entitlements

Six of these matters are ongoing before the courts including the "Queensland State Government sites" matter (which is before the Full Bench of the Federal Court - see below).

One of the matters was unsuccessful in court, three were discontinued after legal action commenced and in four matters no legal action was commenced due to insufficient evidence or public interest considerations.

In the remaining 26 matters, declarations and penalties were obtained against the respondents.

Twenty of these matters were settled by way of Admission of Contraventions and/or Agreements to Penalties.

Ten of the 40 inherited matters were the subject of negotiation meetings between Mr Johns, FWBC's senior executive and legal officers, and senior officials of the CFMEU and their legal representatives. These matters were the subject of greater detailed analysis set out below under the heading 'Global Settlement Meetings'.

Of these ten, seven of the matters were settled, two were discontinued and one matter was fully contested in court proceedings.

Global Settlement Meetings

Between July 2012 and March 2013 a series of settlement meetings were held in Brisbane, Sydney and Melbourne to discuss the settlement of ten inherited matters. However, the details of these meetings and the outcomes were not recorded in the FWBC case management system, although there were references to a 'Global Settlement' of legal matters in a number of documents.

Of note is the fact that in all of the settled matters, the Statements of Agreed Facts (SOAF) contained admissions by the union regarding the involvement of named union officials in the contraventions.

Prior to these meetings, Mr Dave Noonan, National Secretary of the CFMEU, was provided by Mr Johns with details of the cases under consideration, and other relevant legal matters, along with FWBC calculations of the maximum penalty risks faced by his union and its officials.

The document provided by Mr Johns to Mr Noonan detailing the 'Inherited ABCC' matters included calculations based on all alleged contraventions by all of the parties.

Prior to the meetings, FWBC Legal prepared penalty risk assessments for each of the matters. These assessments were used by Mr Johns to prepare for the negotiations. The initial penalty assessments were used to assist the 'negotiation' process during the settlement meetings. Subsequent to the settlement meetings, SAOF were negotiated and updated calculations of penalty risk were prepared to reflect any changes to the alleged contraventions.

The Review inspected relevant 'daily files' arranged by the Director for, and during, those meetings. These daily files mainly comprised documents prepared by members of the FWBC's Legal Group and contained hand written notations by Mr Johns concerning the penalty assessments and the conduct of the settlement meetings.

One senior legal executive recalled that Mr Johns had carried out an analysis of ABCC court cases and compared the penalties the agency was obtaining against union respondents from the courts with the maximum penalty available. According to the executive, the Director's calculations showed the average penalty obtained against the CFMEU and its officials was approximately 12% of the maximum. Neither the executive nor the Review has been able to establish how this figure was calculated, other than it took place prior to the

commencement of a series of Global Settlement meetings. This figure appears to be incorrect and cannot be reconciled.

At the meetings, agreed amounts of global penalties were negotiated for some of the legal matters under consideration. FWBC Legal officers, who attended those meetings, have stated that on several occasions the Director would hold private conversations with National Secretary Noonan to discuss sticking points in the matters at hand. These conversations were conducted outside the earshot of the other attendees.

Details of each of the Global Settlement meetings are provided below.

Queensland Global Settlement matters

In relation to the settlements in Queensland, there were four matters where a settlement was reached after four meetings that were held between the FWBC and union respondents, including their legal representatives. They took place in July, September and October 2012, and March 2013.

On Saturday, 23 June 2012, Mr Leigh Johns, in his capacity as Director, FWBC emailed National Secretary Dave Noonan as follows:

> *Dear Dave,*
>
> *Further to our meeting yesterday:*
>
> 1. *I attach a list of the matters pending or in court in Queensland. Brian Corney (Chief Counsel) and I would welcome an opportunity to meet with you and your Queensland officials to explore the possibility of a global settlement of all these matters; and*
>
> 2. *Pulled the present print run of the RoE* (right of entry) *poster. I have asked that we re-run them by:*
>   - *replacing "Contact the police to remove the union official from your site" with "Your local state police may also be able to provide assistance if a trespass has occurred."*
>   - *including a statement on the poster about instances were* (sic) *enterprise agreements approved by FWA provide for site entry (other than right of entry).*

If it assists I am prepared to establish a mechanism for consultation with the CFMEU (and other stakeholders) about the content of published materials. Please let me know if you think this would be valuable.

Kind regards,

Leigh Johns

On 24 July 2012, FWBC Director Leigh Johns emailed Mr Noonan as follows:

Dear Dave

In preparing for tomorrow I have updated the table of matters that I provided to you on 23 June 2012.

It is attached for your information.

Kind regards,

Leigh

Brisbane 25 July 2012

An initial meeting was held with Director Johns, Chief Counsel Brian Corney and Chief of Field Operations Michael Campbell representing FWBC. National Secretary Noonan and others represented the CFMEU. The meeting took place at the offices of the CFMEU's legal representatives, Hall Payne Lawyers.

Four matters were discussed at this meeting and another proposed legal matter was noted for further consideration. The alleged contraventions and other issues were talked about in general terms. Penalty amounts were not discussed or negotiated at this meeting.

It was agreed that FWBC would provide Hall Payne Lawyers with a letter including greater details of alleged contraventions involving four Queensland State Government sites. That letter was sent by Mr Corney to Charles Massy, Partner at Hall Payne on 31 July 2012. These alleged contraventions involved an interrelated set of actions at the following Queensland Government projects:

- Queensland Institute of Medical Research;
- Queensland Childrens Hospital;
- Brisbane Convention and Exhibition Centre; and
- Translational Research Centre.

Brisbane 20 September 2012

At this meeting FWBC was represented by Executive Director Legal Tim Honey and a senior FWBC lawyer. They met with Charles Massy at Hall Payne Lawyers. They discussed each of the four matters in detail, including the number of contraventions to be alleged, arguments of totality and proposed ranges for penalty.

This meeting was followed by further telephone discussions between Mr Honey and CFMEU lawyer Charles Massy.

Sydney 31 October 2012

This meeting was held at the office of the Fair Work Ombudsman and was between Leigh Johns, Brian Corney, Michael Campbell and Tim Honey (FWBC) and Dave Noonan, State Secretary Queensland Michael Ravbar, State Secretary Queensland BLF Branch David Hanna, CFMEU Senior National Legal Officer Tom Roberts and Hall Payne lawyers Charles Massy and Marcus Clayton.

It was agreed that one matter would be discontinued due to evidentiary issues and concerns regarding the main witness. Global penalty amounts were agreed for three other matters, as follows:

> *Brookfield Multiplex – Gold Coast Hilton & Wintergarden* FWBC's assessment of the appropriate penalty range was between $74,800-$145,200 against the CFMEU and $27,940-$50,820 against the four organisers. Mr Johns' notes for the meeting indicate that he circled the lowest figure for the CFMEU alone ($74,800) and this was the figure initially offered by the FWBC. A final amount of $50,000 was agreed for all contraventions.
>
> *Watpac – Queensland Institute of Medical Research, Translational Research Centre, and the Carrara Stadium* FWBC's assessment of the appropriate penalty range was between $112,200-$217,800 after deciding to drop s 38 contraventions (they were said to be the same conduct as the s 43 and s 44 contraventions). The initial offer from FWBC was the lower figure from the range, ie $112,200. A global amount of $99,000 was agreed upon.
>
> *Laing O'Rourke – Brisbane Exhibition and Convention Centre and Brisbane Airport Carpark* FWBC's assessment of the appropriate penalty range was between $115,500-$152,460 for the alleged contraventions against the union and three

organisers. The initial offer from FWBC was $55,000. The final amount was $55,000 against the union only.

FWBC agreed to make similar offers to the CEPU to settle the following matters in line with the amounts agreed to with the CFMEU:

- Brookfield Multiplex - Wintergarden and Hilton projects;
- Watpac - Translational Research Institute, Queensland Institute of Medical Research, and Carrara Stadium projects.

FWBC also agreed to make available to the CFMEU the evidence it intended to rely upon in the four Queensland Government sites matter.

Mr Johns offered that the CFMEU could nominate how the agreed penalties should be allocated between the union and its organisers.

Sydney 5 March 2013

FWBC was represented at this meeting by Leigh Johns, Tim Honey and a FWBC senior lawyer. From the CFMEU were Messrs Dave Noonan, Peter Ong, Michael Ravbar, and Charles Massy. It was decided to discontinue legal action against the organisers in the three previously settled Queensland matters with penalty orders only to be sought against the union.

Queensland Government Sites matter

At the meeting in Sydney on 5 March 2013, the following matter was settled:

> *Laing O'Rourke, Abigroup and Watpac – the four Queensland Government sites*
> FWBC's assessment of the appropriate penalty range was between $210,210 - $368,082 after dropping the alleged contraventions for the Translational Research Centre because of evidentiary issues. The initial offer from the FWBC was $250,000. The final agreed amount was $105,000 against the CFMEU and $45,000 against the CEPU, with no declarations or penalties to be sought against the individual organisers.

A Statement of Agreed Facts (SOAF) and agreed penalty submissions were put to the Federal Court in respect of the three remaining sites ("Queensland Government sites").

The case related to unlawful industrial action that took place at the Queensland Children's Hospital, Brisbane Convention and Exhibition Centre, and Queensland Institute of Medical Research construction projects on 24, 25 and 26 May 2011. The FWBC alleged that the

CFMEU and CEPU breached s 38 of the BCII Act. As referred to above, this matter was categorised as one of the 'Inherited ABCC' matters. FWBC had filed an agreed SOAF and sought agreed penalties of $105,000 from the CFMEU and $45,000 from the CEPU.

This matter was referred to the Full Bench of the Federal Court to consider the applicability of *Barbaro v The Queen* [2014] HCA 2; (2014) 88 ALJR 372 (*Barbaro*) and the formal status of agreements reached between applicants and respondents in civil penalty proceedings.

FWBC's Counsel made submissions and was subjected to significant questioning trying to explain how the figures of $105,000 and $45,000 were arrived at.

As this case was one of the 'Inherited ABCC' matters and was settled by the former Director and the CFMEU, there were no details as to how the agreed penalty amounts were arrived at.

At the conclusion of the hearing, the Court asked whether the parties accepted that the Court might impose a higher penalty. FWBC's Counsel indicated in the positive, which was consistent with Counsel's submission that the penalty is ultimately at the Court's discretion.

The Respondents did not accept this proposition, which was inconsistent with their submission that penalty is ultimately at the Court's discretion. Interestingly, the Originating Application filed sought the penalty amounts of $105,000 and $45,000 (not just 'pecuniary penalties') and yet the Statement of Claim was filed sometime after. This sequence of events suggested to the Court that a 'deal' was struck before the proceedings actually commenced; which is an accurate depiction in that the Statement of Claim was drafted with the agreement of the respondents.

Comments included:

> WIGNEY J: *I have to say, one gets the distinct impression from the submissions that what has happened here is that there's a global amount being agreed at, and you're trying to work backwards from there, and that's not in accordance with principle… Now you can try and persuade me that that's not what has been done, but it certainly looks that way from the written submissions (p.77)*
>
> *That is, has your client taken – really taken into account what on my view is a pretty poor record of compliance with the Act by the CFMEU…. And yet I don't see anything in the written submissions beyond paying, with respect, lip service to the notions of deterrence that has actually been taken into account in arriving at the agreed s 35 penalty. (p. 80)*

DOWSETT J: *But are we entitled to infer that the penalty had, in fact, been negotiated before proceedings commenced… it does tend to undermine any suggestion that this had been – the result negotiated in the heat of battle having regard to all of the considerations that might be hammered out of a trial, but rather suggests something a little cosier than that (pp. 90-91)*

Victorian Global Settlement Matters

In relation to the four matters in Victoria that were subject to the 'Global Settlement', the following events occurred.

On 28 September 2012 a meeting was held in Melbourne to attempt a settlement of some outstanding Victorian legal matters. FWBC was represented by Leigh Johns, Michael Campbell and Tim Honey. Dave Noonan and Victorian State Secretary Bill Oliver represented the CFMEU and were accompanied by lawyer Kate Marshall. The following matters were dealt with during the meeting:

Abigroup – Nagambie Bypass This matter was discontinued. FWBC Legal advised the Review that this was considered to be a minor right of entry matter with some evidentiary issues. During the meeting Mr Johns decided to discontinue the matter in order to secure settlement in the other matters discussed during the meeting.

Hooker Cockram – RMIT Building 13 FWBC's assessment of the appropriate penalty range was between $10,000-$15,000 for the CFMEU and $5,000 for a union official. The final agreed penalty was $10,000 for the CFMEU with no declarations or penalties sought against the union official.

Glenn Industries – Parkville Hospital FWBC's assessment of the appropriate penalty range was calculated as $40,000 for the CFMEU and $5,500 for an organiser. The final agreed amount was $15,000 for the CFMEU and $2,500 for the organiser.

Abigroup – Peninsula Link and six other sites FWBC's assessment of the appropriate penalty range for three contraventions was between $225,000-$260,000 for the CFMEU and individual organisers. The final agreed amount was a total of $235,000, consisting of $155,000 for the CFMEU and $75,000 for six organisers.

St Hilliers – several sites FWBC's assessment of the appropriate penalty range was between $170,000-$250,000. Following agreement that the two incidents constituted a single course of conduct, the penalty assessment was reduced to $125,000. The final agreed amount was a total of $115,000, consisting of $84,000 for the CFMEU and $31,000 for five organisers.

Mirvac/Grocon – Yarra Edge site Agreement could not be reached on a penalty amount at the meeting. As a result, the matter went to trial on 14-16 July 2014. The CFMEU contested all allegations. The FWBC awaits a decision on liability.

Further meetings to settle the statements of agreed facts for the settled matters were held between FWBC lawyers and the union's lawyers.

Observations on the agency approach to the Global Settlements

The Review was unable to locate any documented information on the case files on the reasons for, or the conduct of, the Global Settlements. The Review relied on the 'daily files' prepared by Mr Johns for details of the settlement meetings.

As a result, the Review conducted interviews with FWBC's Legal Executive Directors, who were involved in the conduct of the settlements. The purpose of the discussions was to obtain their recollection of the reasons for the Global Settlements in 2012/2013 and to obtain an insight into relevant matters occurring during the settlements.

One executive recalled that when Mr Johns took over as Commissioner of the ABCC, it was his idea and intention to explore the concept of co-existing amicably with the CFMEU. Discussions held with National Secretary Dave Noonan were intended to clean the slate of old matters and to reduce the amount of litigation. The incoming Commissioner believed that this was the right direction to take the agency in, and he wanted to expand on the stakeholder engagement and education functions of the agency.

The executive went on to state that at the time there was regular communication between the Commissioner and National Secretary Noonan, with attempts being made to break deadlocks and resolve matters. There was an expected change of governance and education within the CFMEU. However there was no broader agreement. The executive's understanding was that Secretary Noonan did not have the sort of power to facilitate such change nationwide in that he lacked the power over the behaviour of each state and their organisers. The executive felt as though the CFMEU gained the benefit of the deal as nothing was given in return. It appears that the behaviour of CFMEU organisers did not change as a result, nor was the expected cultural change achieved.

The executive confirmed that there were no agency Board briefing papers or formal discussions with the remainder of the executive regarding the Global Settlements.

Another executive thought that Mr Johns' motivation for the global settlements came from his desire to reposition and rebrand the agency – that he wanted to draw a line in the sand and "leave the ABCC behind". Evidently, Mr Johns had a list of changes he wanted to make

within the agency, including branding, education and being a full service regulator. It appears he wanted to clear the legacy of 'Inherited ABCC' matters.

The second executive agreed that he thought some of the deals were too generous. However, it was explained that Mr Johns had examined previous decisions and penalty calculations, and conducted analysis to ensure the penalties he proposed were relevant. The executive recalled that Mr Johns had arrived at a certain average percentage of penalties received from the courts, but he was not sure of the number, nor aware of how the analysis was conducted.

Following his meeting with the Review, the executive advised that the 'old matters' that Mr Johns was looking to clean up were broader than just the 'Inherited ABCC' matters. Rather, he wanted to deal with most, if not all, pending issues before the courts.

The two senior executives made reference to the factors that needed to be considered when deciding whether to litigate or settle a matter, including the requirement to act as a model litigant (Legal Services Direction Appendix B) and directions from the Commonwealth Attorney-General to government lawyers to participate fully in alternative dispute resolution processes.

One of the model litigant obligations is to "*try to avoid, prevent and limit the scope of legal proceedings wherever possible*". Note 4 of the Legal Services Directions makes specific reference that the obligation does not:

- prevent the agency from acting firmly and properly to protect their interests;
- preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them; or
- preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute.

The Executive Directors stated that there was no formal strategy for the settlements articulated by Mr Johns and they expressed concern that the 'Global Settlements' did not achieve the expected change in union behaviour.

One FWBC legal officer who attended those Global Settlement negotiations has advised that when critical parts of the discussions took place, Mr Johns would be invited by Mr Noonan to retire to another area away from everybody else in order that a "compromise" for settlement could be achieved.

The Director explained his actions to FWBC's Legal Group executive officers as being part of an overall strategy to 'clear the decks' of current legal matters at the time the ABCC transitioned to the FWBC. These activities were said to be justified in order to change the hostile relationship between the union and the agency and provide a more civil relationship.

The Review has been unable to locate any record or comment by the CFMEU that would indicate they accepted that an improvement in governance arrangements and behaviour would occur.

Loss of Right of Entry Permits

After the courts imposed penalties against the unions, there were no actions taken to revoke or suspend the permits of the union officials involved in contraventions on these sites:

- Watpac's Translational Research Institute, Queensland Institute of Medical Research, and Carrara Stadium projects;
- Laing O'Rourke's Brisbane Conference and Exhibition Centre, and the Airport Car Park projects; and
- Brookfield Multiplex's Wintergarden and Hilton projects.

Fortunately, there was no agreement that the conduct admitted to in the Statement of Agreed Facts could not be provided to FWC in relation to any submission FWBC might seek to make regarding those union officials not being fit and proper persons to hold entry permits.

The contraventions have since been included in recent submissions to FWC in relation to various union officials' applications for permits. They have included applications by: Kane Pearson, Joe Myles, Tony Kong, Andrew Temoho and Tim Jarvis.

In the Lend Lease Gold Coast University Hospital and Law Courts projects there was an agreement that no action would be taken by the ABCC under Part 3-4 of the FW Act against Kane Pearson solely in relation to the facts of this particular case. However, the ABCC reserved the right to rely upon those facts and that breach in respect of any other application under part 3-4 of the FW Act. The terms of the agreement included that: "*The ABCC will not make any application to Fair Work Australia in respect of any right of entry permit held by any of the individuals (except Pearson) solely on the basis of the admitted contraventions. This does not for example prevent the ABCC making submissions about the contraventions in relation to any applications to renew entry permits.*"

Recently, when Mr Pearson applied for a new permit, FWBC made submissions to FWC, including these matters, which resulted in the refusal by Delegate Chris Enright to grant Mr Pearson a permit.

Budget cuts

As noted above, the Global Settlement approach was adopted during a period of budget uncertainty for the Agency. The Agency's budget in 2011-12 was $34.992m. This was reduced to $30.251m in 2012-13 with a further significant reduction in 2013-14. These budget reductions had particular significance for the Legal Group.

The issue of prevailing budget cuts affecting decisions on commencing legal proceedings was raised by the FWBC's senior legal executives in notes relating to two individual Victorian matters, with the following comments:

> *FWBC's budget had been heavily reduced by the time of the mediation and it had far less capacity to run trials of this magnitude. As the costs of the first trial depended upon the result of the second trial, the costs' consequences of losing the trial were very significant* (Shepherd v CFMEU and Bell).
>
> *In addition, FWBC's budget had been heavily reduced by the time of mediation and it had far less capacity to run a trial in this matter* (Western Water Treatment Plant).

ABCC Litigation Policy

Prior to November 2010, the ABCC did not have an established litigation policy, other than the Legal Services Directions and the Prosecution Policy of the Commonwealth, to use as a framework for a range of significant legal processes including:

- the decision to commence legal action;
- mediation and settlement/discontinuance; and
- the making of penalty submissions.

Concern at the apparent lack of a structured approach to mediated settlements was first raised by ABC Commissioner John Lloyd in March 2010. Subsequently a Mediation Minute template was developed to formally record mediation strategies and penalty risk calculations.

In November 2010, when Mr Leigh Johns became ABC Commissioner, one of his early actions was to introduce *Guidance Note 1 – ABCC Litigation Policy*. This policy was directly derived from the litigation policy of the Fair Work Ombudsman (FWO) that had been

authored by him when Chief Counsel of that agency and which, in turn, largely replicated the Prosecution policy of the Commonwealth.

On 1 July 2011, Mr Johns published the third edition of the *ABCC Litigation Policy*. This Guidance Note, signed and dated by Mr Johns on that date, was the relevant policy instrument at the time of the Desalination Plant events. At section 2.1, it "*sets out guidelines to be followed by the ABCC in deciding whether to commence proceedings in relation to a contravention or threatened contravention of Building Industry Laws*".

The purpose of the Guidance Note is set out at sections 2.3 and 2.4. The latter states as follows:

> *Secondly it aims to provide the community, and building industry participants in particular, with a better understanding of the manner in which the Director exercises those functions and powers.*

Section 2.5 states as follows:

> *This Guidance Note sets out the general guidelines under which decisions about the commencement of litigation by the ABCC will be made, …*

Section 4 of the Guidance Note is entitled **Litigation as a compliance tool.** Section 4.1 states as follows:

> *The enforcement of Building Industry Laws is a means by which the BCII Act aims to achieve its main object, namely to provide a balanced framework for building work to ensure that work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.*

Section 4.3 states as follows:

> *Litigation by the ABC Commissioner is part of a regulatory system to bring about compliance with Building Industry Laws. …*

Section 4.5 states as follows:

> *Proceedings might be commenced if the ABC Commissioner considers such proceedings to be the appropriate means of dealing with the alleged contravention or deterring others from contravening Building Industry Laws. This may occur even if there has been subsequent voluntary compliance.*

Section 6.4 states as follows:

> *The ABCC takes seriously the need to enforce Building Industry Laws. Accordingly, holding individuals and building associations accountable for acts that they are involved in or responsible for is an appropriate compliance tool.*

Section 10 is entitled "**The decision to commence proceedings – the two-step process**". It states as follows:

> *10.1 Effective law enforcement is a key means by which the ABCC aims to achieve the main object of the BCII Act. The key aim of the ABCC's enforcement proceedings is to achieve compliance with Building Industry Laws.*
>
> *10.2 A decision by the ABC Commissioner to commence (or not commence) a proceeding is an important one. Great care is taken in making the decision to commence proceedings. A wrong decision about whether or not to commence a proceeding may undermine the confidence of the building industry participants in the Australian Government's workplace relations system and in the ABCC as the national regulator of Building Industry Laws.*
>
> *10.3 All ABCC litigation should be lawful, accountable, constructive and effective. In addition, all ABCC litigation should be targeted, proportionate, consistent and fair, and commenced and conducted in accordance with the requirements of the Legal Service Directions, and, if appropriate, the Civil Dispute Resolution Act 2011.*
>
> *10.4 Decisions to commence a proceeding should satisfy a two-step test:*
>
> *(a) first, there must be sufficient evidence to prosecute the case; and*
>
> *(b) secondly, it must be evident from the facts of the case, and all the surrounding circumstances, that commencing the proceeding would be in the public interest.*

Section 11 is entitled "**Sufficient evidence**" and sub-section 11.2 states as follows:

> *Having regard to the evidentiary considerations the ABCC will consider whether there:*
>
> - *is a prima facie case against the alleged wrongdoer; and*
> - *are reasonable prospects of an order being made that the alleged wrongdoer contravened Building Industry Laws.*

Sub-section 11.3 states as follows:

Under the Legal Services Directions, the ABCC must not (...) commence a proceeding unless it has received written legal advice from an external legal provider indicating that there are reasonable grounds for starting the proceedings. ...

Section 12 is entitled "**Public Interest".** The following sub-sections are relevant:

> *12.1 Once satisfied that the evidence justifies the commencement of a proceeding, the ABC Commissioner will usually proceed to litigation unless, having regard to the whole of the circumstances, the public interest dictates that litigation should not be commenced.*
>
> *12.3 Generally speaking, the more serious the civil penalty provision alleged to have been contravened:*
>
> *(a) the more likely it will be that the public interest will require that a proceeding be commenced; and*
>
> *(b) the more compelling the reasons would have to be for a proceeding not to be pursued if the evidence is strong and the prospects good.*
>
> *12.6 However, a decision whether or not to commence a proceeding should not be influenced by:*
>
> *(f) possible advantage or disadvantage to any individual, employer, employer group, industrial or other association or union, or an office holder or member of such a group or any other building industry participant.*

Section 13 is entitled "**Relevant public interest factors**" and states as follows:

> *Factors which may arise in considering whether the public interest dictates that a proceeding not be commenced include the following:*
>
> *13.1* ***Nature and circumstances of the alleged contravention***
>
> *(a) the seriousness of the alleged contravention or, conversely, the triviality of the alleged contravention, including whether it is of a "technical nature" only.*
>
> *It would only be in the most unusual circumstances that allegations of ... industrial action prior to the nominal expiry date of an enterprise agreement, ... would be trivial or technical allegations.*

For example, it can be expected that, in most circumstances, there will likely be a determination that there is public interest in commencing a proceeding seeking a civil penalty in respect of:

… ; and

2. any allegation of unlawful industrial action under section 38 of the BCII Act or a breach of orders made by Fair Work Australia or a court in respect of industrial action.

(b) the actual or potential consequence of the alleged contravention;

(c) the prevalence within the industry of the alleged contravention;

13.2 ***Characteristics of the alleged wrongdoer***

(a) the degree of culpability of the alleged wrongdoer in connection with the alleged contravention;

For example:

- *the relevant compliance history of the alleged wrongdoer; and*
- *the attitude of the alleged wrongdoer to future compliance (including any relevant proactive measures taken to comply with Building Industry Laws).*

(c) whether the alleged wrongdoer is willing to co-operate in the investigation or litigation, including the investigation and prosecution of others, or the extent to which the alleged wrongdoer has done so;

(d) the level of contrition demonstrated by the alleged wrongdoer; and

(e) the degree of involvement of senior management in the alleged contravention, or the degree of involvement by office holders or members of a registered organisation or other association.

13.3 ***Level of industry or public concern***

whether the nature of the alleged contravention is of considerable industry or public concern. The ABCC assumes that, in all cases, the public and the industry is concerned about compliance with Building Industry Laws. However, there will be circumstances in which the level of concern is of heightened importance.

13.4 ***Impact of the alleged contravention***

(a) the attitude to the commencement of a proceeding which is held by the person who was injured or otherwise adversely affected by the alleged contravention;

(b) the impact of the alleged contravention on such persons;

(c) the impact of the alleged contravention on any other relevant persons; and

(d) any other relevant impact of the alleged contravention.

13.5 ***Deterrence***

(a) the likely impact of proceedings on:

(i) general deterrence (ie reducing the likelihood that other building industry participants will commit similar contraventions or otherwise contravene Building Industry Laws); and

(ii) specific deterrence (ie reducing the likelihood that the alleged wrongdoer will commit a further contravention of such laws).

13.6 ***Effect of litigation***

(a) the likely outcome in the event of a finding of a contravention, having regard to the penalty options available to the court;

(b) the availability and efficacy of any alternative to litigation;

13.7 ***Public Administration considerations***

(a) the necessity to maintain public confidence in the administration of Building Industry Laws;

Sub-section 14.2 is entitled "**Commencement of litigation**" and states as follows:

Where sufficient admissible evidence exists of a contravention, and the commencement of a proceeding is in the public interest, the ABCC will commence a proceeding.

Section 17 is entitled "**Discontinuance of proceedings**" and sub-section 17.1 states as follows:

Consistent with the objective of ensuring that only appropriate cases are brought before the courts, the ABC Commissioner will discontinue a proceeding if appropriate.

FWBC Litigation Policy

On 12 June 2012, Mr Johns published FWBC Guidance Note 1 - Litigation Policy. It was almost identical to the ABCC policy and became the relevant instrument at the time of the Global Settlement and other agreements referred to above.

Section 16 is entitled "**Breach bargaining**" and states as follows:

16.1 Breach bargaining involves negotiations between the respondent and FWBC (namely the Fair Work Building Industry Inspector and their State Director in consultation with relevant Field Operations Executive Directors and the Chief of Field Operations) in relation to the contraventions to be proceeded against. A breach bargaining decision may only be made with the consent of the Director or an authorised SES officer.

16.2 While FWBC must demonstrate care and consideration in identifying the contraventions that will be alleged, circumstances may change or new facts come to light which make it appropriate to proceed on fewer contraventions or to accept an admission to only some of the contraventions. It may be in the interests of justice or it might be in the public interest that the FWBC accepts an offer by a person to admit some of the alleged contraventions and discontinue others.

16.3 Before such an agreement is reached, FWBC needs to be satisfied that:

- *the contraventions to be proceeded against bear a reasonable relationship to the nature of the offending conduct of the wrongdoer;*
- *the contraventions provide an adequate basis for an appropriate penalty in all the circumstances of the case; and*
- *there is evidence to support the contraventions alleged.*

16.4 In many cases, the interests of justice will be served if a respondent admits to contraventions in the circumstances described above and the community is not put to the burden of funding a long and expensive hearing.

16.5 Accordingly, in appropriate circumstances, FWBC will promptly consider any proposal and put its position to the defendant/respondent. However, the process is

not one of "negotiation". FWBC is concerned with appropriately reflecting its perception of the public interest in relation to disposition of the matter generally.

16.6 A proposal by a respondent that it will agree to particular contraventions or accept a lesser number of contraventions may include a request that the Director not oppose a submission made by the respondent to the court that the penalty falls within a nominated range. FWBC will consider such a request provided the range of penalty nominated is considered to be within acceptable limits having regard to FWBC's desire to balance its aims of general and specific deterrence with those circumstances which, in individual cases, constitute relevant penalty considerations.

16.8 If the breach bargaining might affect the substantive interests of the person who was injured or otherwise affected by the contravention, then, where practicable, they will be consulted before any breach bargaining decision is made.

Section 18 is entitled "**Submissions on penalty**" and sub-section 18.2 states as follows:

Where appropriate, FWBC will seek penalties that balance its aims of general and specific deterrence with those circumstances which, in individual cases, constitute relevant penalty considerations. …

In relation to the making of penalty submissions and taking into account the intent of the legislature, the policy includes the following extract of comments of Justice Merkel in *Finance Sector Union v Commonwealth Bank of Australia (2005) FCA 1847*:

The legislature has, over time, also moved to increase the penalties that may be imposed in respect of unlawful industrial conduct. In my view, any light handed approach that might have been taken in the past to serious, wilful and ongoing breaches of industrial laws should no longer be applicable.

RECOMMENDATIONS

The Review raises concerns that the approach which had been adopted generally by the FWBC to all mediated settlements was not only contrary to the best interests of the agency but also the Australian building and construction industry. In future, consideration must be given to adopting a firmer approach to such arrangements, whilst still acting in accordance with the requirements of the Legal Services Directions.

Changes will be made to the litigation practices and procedures to ensure that decisions made by the agency head (as the final decision maker) are recorded. In addition, measures will be taken to ensure that the record keeping practices of other officers who take part in these activities and deliberations will be in accordance with government best practice.

Measures will also be put in place to ensure that appropriate legal records are maintained, and able to be accessed, at the corporate rather than individual level.