



Australian Government

**Fair Work Building
& Construction**

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THE RULE OF LAW – ONE YEAR ON

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Introduction

Good morning, everybody. Thank you to the IR society of WA for inviting me to speak again at your conference.

I was particularly delighted to speak at last year's conference. You had not only this spectacular location and fabulous company, but it marked my first public presentation since being appointed the Director of Fair Work Building & Construction (FWBC), other than that delightful experience of an appearance before a Senate Estimates hearing.

For those of you who weren't here last year (and those of you who nodded off during my presentation), I spoke about introducing the rule of law on Australian construction sites.

What I thought I would do today is to re-visit that concept, and talk about what has happened in the year that has passed.

So, where exactly are we, one year on?

An industry in need of regulation

Ladies and gentlemen, it pains me to say that unlawful conduct in Australia's construction industry is still in a deplorable state of affairs.

I thought things were bad when I stood before you a year ago, but now I regret to say, they are far worse.

To give you some context, when I started at FWBC, there were 79 active investigations. We currently have 155 active investigations – almost double!
And those 155 investigations are not just into unions and union officials, as a popular misconception may have you believe.

Our current investigations include looking into activities including 24 head contractors, 20 employees, 9 sub contractors and 5 employers.

It is not appropriate for me or my agency to pick and choose who we investigate and who we put before the courts. We are responsible for investigating wherever a possible breach of the law occurs, and we take that responsibility very seriously.

Only a month ago we launched a case in the Federal Circuit Court against an employer, the CFMEU, CFMEU officials and workers. Our court action came after allegations that workers on a construction site downed tools in response to government officials visiting the project.

We are alleging 51 employees took unlawful industrial action and that two CFMEU officials organised the industrial action. We are also alleging that the employer paid strike pay.

That is one of 44 matters we currently have before the courts around Australia. This compares to 15 matters when I started – almost triple.

Thanks to Cliff Pettit and his legal team responsible for WA, SA and NT.

I also note that of the 44 matters before the court, the majority (16), relate to coercion.

On a local note, we have 11 matters before the courts in WA.

I am not the only person who believes that there is a problem in the industry.

It has long been established that Australia's construction industry is unique in its problems, which is exactly why the FWBC, its predecessor the Australian Building & Construction Commission (ABCC), Building Industry Taskforces, and more recently on the East Coast, Construction Code Compliance Units have existed.

More than 10 years ago, the Cole Royal Commission into the Building and Construction Industry investigated misconduct in the sector.

It found the industry was so different to any other, and so riddled with lawlessness, that it needed a specialist agency to regulate it.

Given the construction industry is Australia's third largest contributor to GDP, and employs more than one million people, there is no doubt it is worth protecting.

It would greatly please me to be able to tell you that things have changed for the better since Justice Cole made his findings. Unfortunately, this is not the case.

The current Heydon Royal Commission has uncovered evidence of serious problems in the industry which to my mind support Justice Cole's position that the construction sector is an industry plagued by problems like no other.

When there is unlawful conduct on construction sites, which my agency confronts far too often, it costs big bucks. This doesn't just affect the big companies who may be targeted, but it affects the entire economy, and through a ripple effect, all Australians, including all of you here today.

We heard from Stedman yesterday, about the huge investments which go into the construction phase of oil and gas projects. The value of these projects cannot be underestimated. Of course my agency regulates workplace laws on all construction sites, not only oil and gas projects.

Let me provide you with some context. We have identified 545 construction projects across the country which the Federal Government directly or indirectly funds. These projects have a total reported value of more than \$50 billion. That's 50 billion tax payer dollars.

Losing a day here or a day there to an unlawful industrial dispute, or having a project slowed down because site managers have to deal with Right of Entry breaches may not

seem like a big deal. But it costs all of us. Not only do construction projects fail to come in on budget, but there are immeasurable social costs when projects like hospitals, schools and safer roads are delayed.

There are other indicators too, that all is not well in the construction sector.

Days lost to industrial disputes in the construction industry are far greater than in other industries. Data from the Australian Bureau of Statistics paints a grim picture.

For the six-and-a-half years before the ABCC was installed, average working days lost per 1,000 employees was almost five times as high in the construction sector compared to all other industries.

This figure dropped dramatically during the six-and-a-half years the ABCC was in operation to one-and-a-half times all other industries.

Interestingly, since the ABCC was abolished and the FWBC started in June 2012, average working days lost in the construction sector has increased again. In fact, since June 2012, it has been almost four times worse than all other industries.

What action have we taken?

The problem is clear for all to see. Law breaking in the industry is rife. So, a reasonable question to ask – which I hope you are all wondering – is what is FWBC doing about it?

Well, wherever it is in the public interest, then I am committed to bringing anyone who breaks the laws that we regulate, to be put before the courts - be they employer, union or worker.

I believe that our agency is being proactive and reactive where necessary.

We are also having to be far more nimble an agency in that we regularly have to fly investigators interstate to support those capitals being hit by unlawful activity.

We currently have 14 active investigations in WA. Compared to Queensland, which currently has four times that number – 57, this is not many. However I caution the industry not to become complacent, as I have seen this year, that things can go awry overnight.

For instance, in October last year and in March and April this year, the CFMEU flew 18 officials in to Adelaide from all over the country.

In a few days they entered 47 sites, with all of those visits winding up as Right of Entry breach investigations with us. As a result, we have filed 17 matters in the courts so far.

One of the visits, which included a physical altercation between a CFMEU official and a site manager, saw the Federal Court penalise the CFMEU and its officials more than \$150,000.

We have subsequently applied to the Fair Work Commission for five of those officials to have their Right of Entry permits either revoked or suspended and that they be banned from being issued new permits for up to two years.

This includes the CFMEU State Secretary.

More recently, in WA we started court proceedings against the CFMEU and six union officials over allegations they took coercive action on the \$80 million Perth International Airport site.

We are alleging that the CFMEU and its six officials organised approximately 100 people to block the entrance to the site in a way which prevented some 160 workers from attending work.

During the blockade, CFMEU Assistant State Secretary Joe McDonald allegedly verbally abused a female supervisor, and her workers, when they attempted to cross the picket line, saying words to the effect: "f***ing bitch", "p**s hole", and told her workers words to the effect that they were "all being pussy whipped".

Part of being vigilant in investigating unlawful behaviour on building sites is using the compulsory powers available to us.

There is legislation currently before the Senate which seeks to reintroduce the ABCC. There has been a lot of scaremongering that this would see the return of compulsory powers.

I want to make it clear – FWBC already has these powers and I have used them on 11 occasions in recent times.

I also want to make it clear about what we use the compulsory powers for and what it looks like when we use them.

Of the 11 compulsory examinations I have conducted in recent times, not one has been to interview a union official. In fact the majority were managers or mum and dad business owners who risk going broke due to coercion and other unlawful activity.

Despite popular propaganda, we do not examine people who we suspect may have broken the law. Even if we did, and they said something to incriminate themselves, we cannot use that information against them.

I also stress that the people being examined can have a lawyer present, we also pay their legal expenses and any other costs they may incur.

We use the examinations to establish where the truth lies. And there are elaborate safeguards in place which ensure we can only compel someone to give evidence with good reason.

No less than 50 other Commonwealth bodies have similar compulsory information gathering powers but not necessarily with the same safeguards (for example 14 days notice).

For instance, on Thursday of this week, the ACCC announced it had started court proceedings against the CFMEU for allegedly secondary boycott activities in relation to Grocon and Boral.

ACCC Chairman Rod Sims said on Thursday, and I quote, that "the ACCC has only been able to progress the investigation by compelling people to give evidence".

Likewise, without these powers, our ability to investigate and establish the truth would be greatly inhibited.

What does the future look like?

I'm a believer in the maxim "if nothing changes, nothing changes". That is why I have implemented so many changes since I took over at FWBC a year ago,

FWBC cannot, however, do it alone.

To see real change in the industry, we need to see change from all angles. From the regulator, the employers, the workers, the unions and industry groups. Many people in a range of these groups are unaware of the simple changes they could make to improving the industry – and I see it as my agency's job to help educate them.

We are trying to educate all people in the industry about their rights and responsibilities. I believe the best way is face to face, but where this isn't possible we are working to improve our external communications through e-bulletins and in particular a new app. Of course, a starting point would be for all parties to respect the rule of law on Australian construction sites. And difficult though it would be with the prevailing culture, we need all parties to stand up and speak loudly when others look like breaching the law.

I realise that this takes courage. If all of your work mates are walking off site to attend a rally and not in accordance with the law, it is not easy to be the one who stands up and says it might be unlawful.

By the way, attending and participating in rallies is an Australian democratic right. All I urge people in the construction industry to do is comply with the law when doing so.

And by the way, for an employer it is not easy to say no to demands (even if they are unreasonable) if it guarantees your project a smooth run to the finish line. The path of least resistance often offers short term benefits. But what about the long term benefits for the construction industry?

I am pleased Unions WA Secretary Meredith Hammat recently commented that unions are opposed to bullying of any kind in the workplace.

I agree wholeheartedly with Meredith that such behaviour is "just not on".

Since becoming Director in October 2013, I have expressed publicly on a number of occasions my abhorrence of the treatment received by FWBC investigators on building sites.

There appears to be an increase in the bullying, thuggish and intimidating behaviour shown towards FWBC's investigators in the past year.

Conduct includes being spat upon and being subjected to disgusting verbal abuse, particularly towards female staff. In the course of their job, senior CFMEU officials have called a FWBC female investigator, over a loudhailer a "f***ing sl*t".

What the industry really needs is a cultural shift towards obeying the rule of law. Who knows? One day, we may even have respect for the law?

The Federal Government is trying to bring back the ABCC, which Minister Mischin touched on yesterday, and I thank him for his kind words about FWBC's activities.

Policy matters are for the politicians, however FWBC will continue with more of the same regardless.

We are extremely busy. For instance, we received 286 requests for help in the last month. While I am pleased that people feel confident in coming to us for help, I am worried that this number will continue to grow because of increased unlawful in the industry.

Based on the number of contraventions FWBC is placing before the courts, the current penalties do not seem to be deterring union officials from breaking the law.

In a recent judgment, Justice Mansfield said in determining an appropriate penalty for a CFMEU official who breached Right of Entry laws on an Adelaide construction site:

“The behaviour demonstrates that he did not care that he was breaking the entry laws, but that he was so indifferent to complying with them as to force entry”.

I have grave concerns that this attitude is commonplace.

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

The trio entered the site to investigate alleged safety concerns.

Ladies and gentlemen, I am yet to understand why one official needed to carry an EFTPOS machine with him to address safety issues.

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

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

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

Conclusion

Rest assured, regardless of the legislation currently before the Parliament, our agency will continue to do all it can to confront unlawful conduct in order that all Australians can benefit from productive construction sites.

Thank you very much, ladies and gentlemen.