CONSTRUCTION UPDATE - LAST DITCH ATTEMPT TO KILL OFF BUILDING CODE FAILS, THE ABCC CALLS THE CFMEU'S BLUFF ON 'SAFETY' ISSUES AND FEDERAL COURT ORDERS MASSIVE INCREASE IN FINES AGAINST CFMEU

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In this construction update, we look at some recent developments in relation to the Code for Tendering and Performance of Building Work 2016 (**Code**) and the race to achieve Code compliance before 1 September 2017.

We also look at a recent decision where the CFMEU's pressuring of a building contractor to change one of its safety policies was found to be in breach of the Fair Work Act, exposing it and its organiser to another order to pay penalties, and another where the Court tripled the penalties against the CFMEU and the CEPU for organising illegal industrial action.

SUMMARY: NEED TO KNOW, NEED TO DO

- The clock is ticking for construction industry participants to achieve Code compliance before 1 September 2017. Employers should consider all options, including 'going it alone' (ie without CFMEU agreement) to ensure they are able to tender for Government funded contracts.
- Employers implementing safe workplace policies have protection under the Fair Work Act where those efforts are undermined by unlawful union retaliation.
- The ABCC will continue to pursue unlawful union behaviour on building sites. However, employers should not feel they are immune from the ABCC's attention, and ensure that they maintain strict compliance with The Code, the *Building and Construction Industry (Improving Productivity) Act 2016 and the Fair Work Act.*
- The ability of the ABCC to hold unions accountable for unlawful activity is reliant upon the employers who are the recipient of that conduct. It is critical that employers maintain records and have in place sound processes in respect of their union interactions.

A LAST DITCH EFFORT TO DISALLOW THE CODE AND THE RACE TO ACHIEVE CODE COMPLIANCE

With the date for Code compliance just around the corner, construction industry participants should already be well advanced in their progress towards Code compliance. This is particularly the case, given that the last ditch

effort by Labor, seeking that the Senate disallow the Code was defeated on 9 August 2017. To the extent that the CFMEU (and other parties) were delaying facing up to the need to vary non-compliant enterprise agreements pending the disallowance motion in the Senate, that ship has now sailed.

Employers need to consider all the options open to them to achieve Code compliance, particularly where agreement cannot be reached with the CFMEU to vary non-compliant enterprise agreements.

A recent decision of the Fair Work Commission demonstrates that achieving Code compliance is possible for some employers, even without Union agreement. This is particularly important given that the CFMEU has have publicly stated that it will not agree to variations of in-term enterprise agreements to make them Code compliant.

Grandstand Scaffold Services Pty Ltd (an organisation that provides scaffolding services to the building industry) took matters into its own hands, when agreement with the Union could not be reached.

Grandstand argued that the Enterprise Agreement was having an adverse effect on its business. It was struggling to win work as its competitors had substantially lower rates of pay. The Enterprise Agreement was also not compliant with the Code, which meant that it was failing to win work from contractors. It had tried to renegotiate a Code compliant enterprise agreement with the CFMEU, but agreement was not reached.

It made an application to the Fair Work Commission to terminate its 2016 Enterprise Agreement, following a ballot of its employees in which a majority of them supported the termination of the agreement.

The CFMEU objected to the termination of the Enterprise Agreement. It argued that:

- the termination was not agreed by the employees and a majority of employees covered by the enterprise agreement did not approve its termination
- some of the employees who participated in the ballot run by Grandstand were not covered by the enterprise agreement
- Grandstand had made false representations to employees to entice them to agree to the termination of the enterprise agreement, particularly concerning Code compliance
- the enterprise agreement had only recently been approved by the employees, and its termination would result in a massive reduction in remuneration. The CFMEU estimated that he would lose approximately AUD150 per week in wages
- Grandstand should have sought to renegotiate the terms of the agreement rather than seek to terminate it.

Notwithstanding the CFMEU's objections, the Commission agreed to the termination of the Enterprise Agreement. The Commission found that there had been genuine agreement by the employees to terminate the agreement. The Commission delayed its termination by one month, to provide an opportunity to the parties to negotiate a new enterprise agreement.

The experience of Grandstand tells us that failure to reach agreement with the CFMEU need not be the end of the road in achieving Code compliance. Employers should be considering all options that may be available to preserve their ability to bid for government funded work.

INDUSTRIAL ACTION AND THE SAFETY ISSUE - ABCC CALLS THE CFMEU'S BLUFF, AND GETS MUCH MORE THAN IT ASKED FOR

Employers often see safety issues morph into industrial issues, or the use of safety as a basis for action which is really just illegal industrial action and/or unions flexing their muscles. In a recent Federal Circuit Court decision, we saw the ABCC call the CFMEU's bluff on challenging a safety issue and win.

In 2014, John Holland found itself in a stand off with the CFMEU over its "two longs" policy – a policy that required workers on site to wear long sleeves and long pants. The policy, in place for some time, was aimed at reducing the risk of cuts and abrasions, as well as the risks associated with the exposure to ultraviolet light. The CFMEU wanted employees to have the option to wear short sleeves and shorts (although the union was apparently prepared to draw the line at football shorts).

The Union had been able to get this policy implemented at other sites, and wanted John Holland to follow suit. The CFMEU positioned its objection to the two longs policy around concerns about heat stroke.

John Holland tried to address the Union's stated concerns by meeting with representatives, convening a Health and Safety Committee meeting and having Comcare attend the site and assess the policy – which it determined was reasonable and appropriate.

Unable to extract agreement from John Holland, the Union, through its organiser, encouraged workers to come to work in short sleeves and shorts. It told the company that if anyone was sent off site for not complying with the two longs policy, all workers would walk off. The message from the union organiser to the company was "touch one, touch all." The CFMEU and employees carried through with this threat, and when an employee was told to change clothes or leave the sites, all workers on site stopped working.

The ABCC prosecuted the CFMEU and its organiser, arguing that it had engaged in adverse action against John Holland in its exercise of a workplace right. The CFMEU did not deny it had engaged in the conduct, but that it was not a breach of the adverse action provisions of the Fair Work Act. The Court found in favour of the ABCC.

The Court's finding was important, because the Judge found that:

- the enforcement of reasonable policies in discharge of the duty under the Workplace Health and Safety Act was an exercise by the employer of a workplace right. This means that any adverse action taken by the Union in relation to it would be in breach of the General Protections Provisions of the Fair Work Act; and
- any argument that the refusal to comply with thee two longs policy and refusal to work as based on safety concerns on the part of employees was not accepted on the basis that there was no imminent risk to health and safety.

This decision should give building industry employers some degree of comfort that their reasonable efforts to put in place policies aimed at complying with their legal obligations to ensure the safety of their workers are protected in circumstances where the union may be seeking to drive an alternative agenda.

Businesses can also learn from the actions of the employer in this case - which ensured that its processes, communications and evidence were robust. These actions included:

- having a documented, well communicated policy that was known by all workers on site (and formed part of the induction processes)
- attempting to engage with workers and the union regarding their stated concerns about the policy
- having the third party regulator attend the site, review the policy and confirm its appropriateness
- taking notes of relevant discussions with the CFMEU, and producing statements shortly after the incidents.

MORE BIG FINES AWARDED AGAINST UNIONS

Finally, in another decision, the Full Court of the Federal Court issued penalties against the CFMEU and CEPU of $AUD300,000 and $AUD130,000 respectively, arising from industrial action taken by workers at three major public infrastructure projects in Brisbane –– the Queensland Children's Hospital, the Brisbane Convention and Exhibition Centre and the construction of the Queensland Institute of Medical Research at the Royal Brisbane Hospital. Remarkable, these penalties were around triple the amount initially sought by the ABCC.

The Court was somewhat critical of the ABCC in suggesting penalties that were so apparently modest, saying that "one wonders how it was that the Commissioner was originally prepared to agree to and actively advocate penalties that were clearly well below the very bottom of the ranges that, following remittal, were said to be appropriate."

Of the Unions, particularly the CFMEU, the Court was scathing. The Court noted that the CFMEU chose to encourage workers to take unlawful industrial action and deliberately flout the law. It described the record of the CFMEU's past transgressions as a lamentable, if not disgraceful record of deliberately flouting industrial laws, and that it continued to deliberately thumb its nose at industrial laws. The Court also said that the Union's record of past transgressions meant that there was no reason to afford it any leniency.

This decision continues a clear trend that displays the Court's exasperation with the CFMEU's attitude towards compliance with building laws. We expect that we will continue to see large fines coupled with highly critical commentary, until the CFMEU gets the message.

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