



**Australian Government**  

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**Australian Building and  
Construction Commissioner**

**CONCLUSIONS IN RELATION TO ALLEGED  
UNLAWFUL INDUSTRIAL ACTION AT THE CTA SITE, PERTH**

1. This investigation relates to the Country Travellers Association building site (CTA site) located at the corner of Sherwood Court and the Esplanade, in Perth. At the relevant time, a multi-storey building was being gutted and reconstructed. This constituted “building work” for the purposes of section 5 of the *Building and Construction Industry Improvement Act 2005* (BCII Act).
2. The events addressed by this statement became known as the “blue flu” incident.

**Introduction**

3. The ABCC has concluded an investigation into a work stoppage at the CTA site that occurred on 8 July 2005, following a stop work meeting held on the CTA site on 7 July 2005. The investigation was to determine whether any building industry participant had contravened the BCII Act or the *Workplace Relations Act 1996* (WR Act).
4. This statement addresses:
  - (a) my conclusions in relation to the ABCC investigation; and
  - (b) the action I propose to take in relation to the investigation.
5. The investigation, my conclusions and recommendations are undertaken and made pursuant to my statutory functions under the BCII Act, namely:
  - (a) subsection 10(b), to investigate suspected contraventions by building industry participants of the BCII Act, the *Independent Contractors Act 2006* (IC Act), the WR Act or a Commonwealth industrial instrument;
  - (b) subsection 10(d), to advise building industry participants of their rights and obligations under the BCII Act, IC Act and the WR Act; and
  - (c) section 67, to publish details of non-compliance by a building industry participant with the BCII Act, the WR Act or the IC Act where it is in the public interest to do so.

## **Factual Conclusions**

6. Having regard to the information obtained in the ABCC investigation, I reach the following factual conclusions:

- (a) prior to July 2005, there were a number of incidents of industrial action which affected the CTA site, including:
- a four day strike which commenced on 4 January 2005;
  - a strike on 5 April 2005 following a union meeting convened by Mr Joseph McDonald; and
  - a strike on 20 April 2005 following a union meeting convened by Mr McDonald.

Mr McDonald was Assistant State Secretary of the Construction Forestry Mining and Energy Union (CFMEU) and Assistant Secretary of the CFMEU of Workers (CFMEUW), a union registered in Western Australia;

- (b) on 1 July 2005, John Holland Pty Ltd obtained a Supreme Court interlocutory injunction preventing the CFMEU, the CFMEUW, Mr McDonald, and CFMEU organisers Michael Buchan and Mick Powell from taking any industrial action affecting the CTA site, and other John Holland sites in Western Australia. The decision to grant the interlocutory injunction is *John Holland Pty Ltd v CFMEU & Ors* [2005] WASC 146;
- (c) on 1 July 2005 John Holland Pty Ltd acceded to a request from Mr McDonald that he convene a union meeting at the CTA site to inform the union's members of the injunction. John Holland authorised a paid union meeting of CTA site workers to be held from 9.45am to 10.05am on 7 July 2005;
- (d) at 10:05am on 7 July 2005, a meeting was held on the grassed area adjacent to The Esplanade. The meeting was attended by approximately 60 John Holland employees and sub-contractors. Mr McDonald was involved in organising and conducting the meeting. He addressed the meeting. Mr Powell and Mr Rick Kavanagh, CFMEU Safety Adviser also addressed the meeting;
- (e) the meeting concluded at approximately 10:45am and the majority of those attending returned to work. Approximately eleven of the workers then held their own meeting which lasted about 15 minutes before returning to work;
- (f) at the meeting convened by the union, an instruction or recommendation was given, or a resolution was made, for all the workers to take a sick day on 8 July 2005. That instruction or recommendation was made by Mr McDonald;
- (g) on 8 July 2005, 71 workers failed to attend the CTA site for work on that day. Most of these workers notified their respective employers, or the person who had engaged them to work that day, that they would not be attending work on 8 July 2005 due to illness or because they were taking personal leave; and

- (h) only three workers who were absent subsequently provided documentary evidence of being sick on 8 July 2005.
7. The ABCC requested the CFMEU's co-operation in conducting an investigation into these events. I wrote to the CFMEU, the CFMEUW and Mr McDonald on 20 March 2007. I advised them of my intention to consider publishing details of non-compliance pursuant to section 67, in the public interest. I invited each of them to make submissions, submit to an interview, or provide an explanation concerning the allegations raised in the investigation.
  8. I have had regard to the correspondence received from the CFMEU prior to publishing my conclusions.
  9. I am satisfied that sufficient evidence exists to support the factual conclusions I have set out above, and to support my further conclusions below.

### **Relevant Law**

10. Section 38 of the BCII Act prohibits a person from engaging in unlawful industrial action. Section 37 of the BCII Act provides that building industrial action is "unlawful industrial action" if the action is:
  - (a) industrially-motivated;
  - (b) constitutionally-connected; and
  - (c) not excluded action.
11. The terms "building industrial action", "constitutionally-connected action", "excluded action" and "industrially-motivated" are defined in section 36 of the BCII Act.
12. Section 38 of the BCII Act is a civil penalty provision. Sections 36, 37 and 38 were given retrospective effect to 9 March 2005, and applied to the conduct under investigation.
13. Subsection 48(2) of the BCII Act provides that a person who is involved in a contravention of a civil penalty provision is treated as having contravened that provision. Subsection 48(2) is not applicable as it commenced operation on 12 September 2005 after the industrial action occurred.

### **My conclusions and recommendations**

14. The conclusions and recommendations I make below are based on the factual conclusions set out in paragraph 6 above.

#### **A. The workers**

15. I conclude that a substantial majority of the workers engaged in building industrial action. The relevant workers:

(a) failed to attend the CTA site for work on 8 July 2005; and

(b) cited illness for their absence from work on that day or otherwise said they were unable to work on that day.

16. I conclude that the action was industrially-motivated, constitutionally-connected, and was not excluded action. The primary purpose of the workers in not attending for work was to disrupt the performance of work.

17. Accordingly, I conclude that the workers engaged in unlawful industrial action in contravention of section 38 of the BCII Act.

18. I conclude that the workers who submitted a valid sick leave form did not engage in unlawful industrial action.

### **B. Mr McDonald**

19. I conclude that Mr McDonald engaged in unlawful industrial action by advising or encouraging that all workers call in sick on 8 July 2005. Mr McDonald held senior positions as an officer of both the federal and state unions. What he said to members would carry much weight. Mr McDonald advised and encouraged the taking of industrial action in the form of a failure to attend work the following day, and thereby advised and encouraged the abuse of sick leave entitlements by the workers.

20. In respect of the definition of “building industrial action” in s.36(1) of the BCII Act, Mr McDonald placed “a ban, limitation, or restriction on the performance of building work” at the site. This work was regulated by the Building Trades (Construction) Award 1987 (WA).

21. I conclude that Mr McDonald’s purposes in organising and conducting the meeting on 7 July 2005 were to disrupt the performance of work and advance the objectives of the CFMEU.

22. Mr McDonald’s action was industrially-motivated, constitutionally-connected, and was not excluded action. I conclude that Mr McDonald engaged in unlawful industrial action in contravention of section 38 of the BCII Act.

23. Mr McDonald acted at all relevant times in his capacity as a senior officer of both the CFMEU and the CFMEUW, apparently on their behalf. Accordingly, the unions also engaged in unlawful industrial action in contravention of section 38 of the BCII Act.

### **Public interest**

24. The ABCC considers each case on its merits. In relation to its discretion to institute proceedings, two major factors are considered:

(a) the sufficiency of the evidence; and

(b) whether the institution of proceedings would be in the public interest.

25. A number of factors are taken into account when evaluating the public interest, including:
- (a) the seriousness or otherwise of the alleged contravention;
  - (b) the extent to which the alleged contravention is of public concern;
  - (c) the likely penalty order;
  - (d) the proposed defendant's degree of culpability; and
  - (e) the previous history of the proposed defendant.
26. In having regard to the circumstances of this case and whether the public interest would be served by putting the matter before the courts it has been determined that penalty proceedings not be instituted against the workers, Mr McDonald, the CFMEU, or the CFMEUW. This decision was made taking into account the following factors:
- (a) the time elapsed since the matter was under investigation;
  - (b) the public interest would not be served by putting workers before the Court in this case. The workers were poorly advised by the CFMEU;
  - (c) the strong public reaction against the "blue flu" tactic and no evidence of it being repeated in the industry since July 2005; and
  - (d) the fact that the unlawful conduct pre-dated some, but not all, of the operative provisions of the BCII Act.
27. The ABCC reserves its position to adduce evidence of this incident, and Mr McDonald's involvement, in any relevant proceeding. This may include, but is not limited to, any future application by Mr McDonald for the issue of a right of entry permit.
28. Section 67 of the BCII Act permits me to publish details of non-compliance by a building industry participant with the BCII Act, the WR Act or the IC Act, where I consider it to be in the public interest to do so.
29. I have decided that it is in the public interest to publish details of the relevant non-compliance for the following reasons:
- (a) the abuse of personal or sick leave entitlements for industrial purposes is a significant cause for concern and is, of itself, the primary reason for my decision;
  - (b) this matter has attracted significant media attention and as a consequence is of significant public concern;

- (c) in such circumstances, it is important to place on the public record what took place and my conclusions;
- (d) my statutory functions include advising and assisting all building industry participants to understand their rights and obligations;
- (e) if similar circumstances arose after 12 September 2005, that is, following the commencement of all operative provisions of the BCII Act, a prosecution would be appropriate; and
- (f) the unlawful industrial action occurred in defiance of a Supreme Court interlocutory injunction granted on 1 July 2005.

### **Publication of non-compliance**

- 30. On 7 July 2005 at the CTA site, Mr Joseph McDonald engaged in unlawful industrial action contrary to section 38 of the BCII Act.
- 31. Mr McDonald organised and conducted the relevant meeting on 7 July 2005, and advised or encouraged the workers to be absent from work the following day on the basis that they were sick.
- 32. Mr McDonald acted at all relevant times in his capacity as a senior officer of both the CFMEU and the CFMEUW, apparently on their behalf. Accordingly, the unions also engaged in unlawful industrial action contrary to section 38 of the BCII Act.
- 33. On 8 July 2005, at the CTA site, a substantial majority of workers engaged in unlawful industrial action contrary to section 38 of the BCII Act. The relevant workers:
  - (a) failed to attend the CTA site for work on 8 July 2005; and
  - (b) cited illness for their absence from work on that day or otherwise said they were unable to work on that day.

### **Timing**

- 34. My publication of non-compliance arises more than two years after the conduct under investigation. I set out the reasons for this delay.
- 35. This was a long running investigation into conduct that occurred prior to the formation of the ABCC. As a result of lack of cooperation from a number of relevant witnesses, the ABCC had to resort to its compliance powers under section 52 of the BCII Act. In the course of the investigation, one witness challenged the exclusion of his preferred legal representative from an examination being conducted by a Deputy ABC Commissioner. It is an important protection in the BCII Act that a witness has the right to judicial review and I make no comment or judgement on the merits of that challenge.

36. The legal challenge by the witness was the subject of a Federal Court decision in *Bonan v Hadgkiss* [2006] FCA 1334 delivered on 17 November 2006 by Justice Besanko. The decision affirmed the power of the Deputy ABC Commissioner to exclude the legal practitioner, and ruled that it was reasonable in the circumstances to do so. A further appeal was filed from that decision, and on 27 July 2007, the Full Court of the Federal Court permanently stayed the appeal. That decision brought to an end the legal proceedings arising from this investigation.
37. While matters relevant to this investigation were being considered by the Federal Court, I considered it appropriate to postpone publication of my decision until those matters were determined.

### **Further matters**

38. The ABCC has, in the course of its investigation, obtained evidence of public comments by CFMEU State Secretary Kevin Reynolds defending the blue flu. Mr Reynolds defended the taking of sick leave for industrial purposes as a legitimate industrial tactic. Unions WA expressed similar sentiments.
39. As previously advised, I have a statutory function to advise building industry participants of their rights and obligations under the BCII Act. This is set out in section 10(d) of the Act.
40. An orchestrated abuse of sick leave entitlements is unacceptable, unjustifiable and unlawful. The defence of this practice by Mr McDonald, Mr Reynolds, the CFMEU, CFMEUW or Unions WA is unacceptable. The ABCC will not hesitate to prosecute any repetition of this conduct.
41. I note the comments made by the Australian Medical Association (AMA) regarding this and other potential "Blue Flu" outbreaks. I commend the AMA for the responsible position adopted in this regard and the strong advice given to its members to ensure that medical certificates are not issued to workers who are not genuinely sick. This is, in my view, a responsible and appropriate position to maintain.
42. Any building industry participant who is the victim of unlawful conduct should immediately notify the ABCC so that appropriate investigative and prosecutorial action can follow.

John Lloyd  
Australian Building and Construction Commissioner

2 August 2007