

**AiG PIR National Conference  
Canberra  
26 October 2009**

**Australian Building and Construction Commissioner**

1. I will cover workplace relations in the building and construction industry from three perspectives.
2. First, the ABCC perspective of on site workplace relations in October 2009.
3. Second, the current and future on site role of the National Code and Implementation Guidelines.
4. Third, general issues that may influence building and construction industry workplace relations in the future. The Conference is very timely, the Bill to amend the BCII Act is expected to be debated and voted on later this week.
5. Most who work or do business in the industry want to conduct their affairs in a lawful manner. A minority are prepared to show contempt for the law, yield to unlawful pressure or tolerate unlawful conduct.
6. The conduct of the industry's participants has improved. However, it is not ideal. Victoria and Western Australia continue with too many examples of unlawful conduct. We still find instances of unlawful conduct in other states but they are more isolated.
7. On site adherence to right of entry and freedom of association laws is crucial. Where these rights are poorly protected other problems are likely to be encountered during the life of the project. It is not unusual to find coercion and intimidation associated with the disregard for these rights.
8. Just last week the Federal Magistrates Court in Sydney fined the CFMEU and an organiser \$28,600. The organiser threatened a contractor that he would have the contractor audited, send him bankrupt, screw him and make his life a misery.
9. This type of unlawful conduct is evident on major sites in Victoria and Perth. We have commenced proceedings against this type of conduct at sites such as the Royal Children's Hospital, Maryvale pulp mill, Doncaster shopping town, and Westgate Bridge.
10. These are major projects with tier 1 contractors involved. What I am concerned about is the reports we receive from small contractors working in suburban or regional centres on smaller projects. We hear of show card days, standover tactics and contractors taking accommodating action over union membership and agreement coverage to avoid trouble.
11. We are always looking for ways to more effectively reach this segment of the industry. Any assistance you can provide would be greatly appreciated.

12. Second, a recent development with the potential to influence on site conduct is changes to the application of the National Code's Implementation Guidelines. The 2006 Guidelines stipulated that agreements that contained certain provisions could not be code compliant. The types of provisions I refer to include:
  - the number of employees and the mix between permanent, casual and temporary employees;
  - one-in-all-in arrangements for overtime;
  - restrictions on engagement of labour, the terms and source of labour;
  - the prohibition of all in payments; and
  - clauses attempting to render ineffective the application of the Guidelines.
13. I fully appreciate that the Guidelines have assisted contractors to resist unreasonable claims that reduced flexibility. The risk of jeopardising code compliance was a strong argument against unreasonable claims.
14. The recent changes remove that prop. In addition the on site application of agreements will involve added complexity.
15. It will now be possible for there to be a variety of agreements with different versions of the Guidelines applying. For example, a head contractor has an agreement reached under the Workplace Relations Act and won a tender for a Code project covered by the 2006 Guidelines. The head contractor may employ a subcontractor who has an agreement approved under the Fair Work Act. That agreement may include clauses relating to union encouragement not permitted under the 2006 Guidelines. It could be for example a requirement for a union notice board.
16. Code compliance will now be easier. What we have to guard against is that on site practices do not deteriorate.
17. The ABCC is of the view that the agreement of the head contractor, who has ultimate control of the site, would prevail over any other agreement where there is a conflict. At the same time the head contractor would always have to be mindful of not infringing freedom of association laws.
18. The ABCC is devoting considerable attention to the impact of these changes on its on site compliance role. Our audits and inspections will be more complex to carry out. A closer scrutiny of agreements will be necessary. If you encounter Guideline complexities on your project and are unsure of the way ahead please call us.
19. I turn now to my third and final topic, the issues that may influence the industry's workplace relations in the future.
20. The building and construction industry's workplace relations is the most scrutinised of all industries. The Wilcox review and report is the last of a long line of reviews, royal commissions, special taskforces and industry focused agencies and arrangements.
21. Why has there been such scrutiny? The answer is simple and compelling. The industry's workplace relations conduct has significantly departed from the standards accepted elsewhere. Also, the industry plays a crucial role in the Australian economy. If it

operates below optimum efficiency and fairness the broader economy suffers.

22. During the five years 1996 to 2000 working days lost to industrial disputes in the industry accounted for between 23 and 40% of total working days lost nationwide. The industry only accounted for 7-8% of total employment during that period.
23. Changes to the National Code Implementation Guidelines, the Fair Work Act and the Bill will together alter the regulation of the building and construction industry workplace relations.
24. The implications of these changes for the industry are not readily discerned.
25. The business of the regulator would be reengineered to accommodate numerous new procedures, processes and supervisory requirements. On my count a total of 28 new requirements are included in the Bill.
26. It has been argued that it is unfair to have rules, powers and penalties applying to construction that do not apply to employers and employees in other industries. Once again the reason for special treatment is readily apparent. In the past the poor conduct halted for a short time as some new agency or law was introduced. But those who gained from disregarding the law were resilient and quickly reimposed past inappropriate and unlawful practices.
27. The ABCC and associated reforms have been the most successful of the various responses to the industry's workplace relations record.
28. This is in part due to the professional work of the ABCC staff in a challenging environment. Also, the regulatory scheme of the BCII Act and the National Code and Guidelines were crucial. They have established an excellent, clear and mutually reinforcing platform on which to build the reform task.
29. Those of you engaged in the industry and your associations have a vital role to play. You have to stand up to defend the law and to oppose unlawful conduct. The AiG and ACA have been very effective in supporting the reforms.
30. We at the ABCC will continue to stand up for the law. We are committed to support contractors, small and large, and their staff who encounter unlawful conduct. We will protect contractors who are prepared to give information about unlawful conduct.
31. The thorough and persistent approach of the ABCC is having results. Penalties awarded by the courts are increasing. Also, the courts are placing greater emphasis on the past record of the unions and the pattern of unlawful conduct.
32. This decision addresses abuse of OHS.
33. This decision concerned the organiser's threats to audit, bankrupt and screw the contractor. The threats were made in support of demand that the contractor's employees join the CFMEU.

34. In this decision the Federal Court imposed penalties totalling \$85,500 on the CFMEU and an organiser. The contravention involved coercion of a contractor to employ certain persons.
35. This decision concerned pressure and coercion applied by the union and three officials in a successful attempt to have a company cease to use the services of a subcontractor that employed workers on AWAs. The Full Bench decision on an appeal by the ABCC increased penalties by \$58,000 to \$82,750.
36. A strong regulator is needed for the building and construction industry. The industry plays such a crucial role in the Australian economy. The risk of not having a strong regulator is potentially serious. The impact of widespread unlawful conduct will not be readily apparent. It will work through the industry and affect other parts of the economy like a slow moving cancer. Those who embrace lawful conduct may find themselves facing the choices of leaving the industry, avoiding fraught situations or accommodating unlawful conduct with the rationale that that is the way you do business.
37. I hope that this is not the future of the building and construction industry.

John Lloyd  
Australian Building and Construction Commissioner