



Australian Government
**Australian Building and
Construction Commissioner**

**Findings in relation to events at a Defence Science and Technology
Organisation construction project, Fishermans Bend, Victoria**

1. The events the subject of this investigation occurred on 7 April 2006 at a Defence Science and Technology Organisation construction site (the DSTO site), at Fishermans Bend, Victoria.

Introduction

2. As a result of media reports, the Office of the Australian Building and Construction Commissioner (the ABCC) became aware of a work stoppage on 7 April 2006 at the DSTO site. The ABCC commenced an investigation into the matter to determine whether any building industry participants had contravened the *Building and Construction Industry Improvement Act 2005* (BCII Act) and the *Workplace Relations Act 1996* (WR Act).
3. A dispute arose between Hooker Cockram Projects Limited (Hooker Cockram) the head contractor at the DSTO site and representatives of the Construction Forestry Mining and Energy Union (CFMEU). In the course of the ABCC investigation, Hooker Cockram requested advice from the ABCC on its obligations under the BCII Act and the WR Act concerning the dispute. Specifically, Hooker Cockram requested advice on whether it was obliged by section 507 of the WR Act to deduct four hours pay from its employees who engaged in the work stoppage associated with the dispute.
4. In conducting its investigation, the ABCC interviewed a number of building industry participants and obtained documentation relevant to the dispute.
5. This document addresses:
 - my findings in relation to the ABCC investigation;
 - my recommendations as to what action those building industry participants should take in relation to the work stoppage; and
 - the action I propose to take in relation to the work stoppage.
6. The investigation, the findings and recommendations are undertaken and made pursuant to my statutory functions under the BCII Act, namely:
 - subsection 10(b), to investigate suspected contraventions by building industry participants of the BCII Act and the WR Act;

- subsection 10(d), to advise building industry participants of their rights and obligations under the BCII Act and the WR Act;
- section 67, to publicise non-compliance by a building industry participant with the BCII Act and/or the WR Act where it is in the public interest to do so.

Factual Findings

7. Having regard to the evidence obtained in the ABCC investigation, I make the following findings of fact.

- (a) At some time during the morning of 7 April 2006, Steve Barun, an employee of Hooker Cockram, and the CFMEU OH&S representative distributed at the DSTO site a CFMEU flyer entitled “Worker killed at Pakenham” (the CFMEU flyer). It is possible other personnel assisted in distributing the flyer. The flyer advised of the tragic death of a construction worker on 8 March 2006 in Pakenham and asked all construction workers “to donate to a collect (sic) to assist his family through this difficult time.”
- (b) The morning tea break for workers on the DSTO site was held each day between 9.30am and 9.45am.
- (c) At 9.20am, Elias Spernovasilis, an organiser for the CFMEU entered the DSTO site. Mr Spernovasilis failed to provide an entry notice to the occupier of the premises before his entry to the site. Such a notice is required to be provided to the occupier of the premises at least 24 hours prior to entry. On entering the DSTO site Mr Spernovasilis failed to sign the site register as required by Hooker Cockram policy. After his entry to the site, Mr Spernovasilis did not inform Hooker Cockram site management of his presence on the site.
- (d) Between 9.30am and 9.45am the morning tea break was held. During the morning tea break Mr Barun informed workers on site that a meeting would occur **after** the morning tea break to discuss the contents of the CFMEU flyer. Mr Barun stated that it was a “must attend” meeting and he would be chasing anybody who failed to attend.
- (e) At no stage did Mr Barun, Mr Spernovasilis or the CMFEU request written authorisation from Hooker Cockram site management, or any other employer on site, to conduct a stop work meeting.
- (f) The meeting of workers commenced immediately after the morning tea break. On the commencement of the meeting, Mr Barun introduced Mr Spernovasilis to the workers. Mr Spernovasilis then addressed the workers and discussed the contents of the CFMEU flyer. It was decided that a collection would take place and it was agreed that everyone would make a donation to the family of the deceased worker.
- (g) Following the decision to take up a collection, Mr Barun addressed the meeting for a further 5-10 minutes. Mr Barun advised the meeting that:
 - there could be consequences as a result of the meeting;

- there could be a media presence at the site; and
- the workers could have their pay docked for attending the meeting.

Mr Barun also discussed recent changes to workplace relations laws and referred to a large protest march planned in the city in the near future.

- (h) The meeting concluded at about 10.05 am and all workers, save for Mr Barun, returned to productive work.
- (i) Immediately following the workers' meeting, Mr Barun and Mr Spernovasilis requested a meeting with Hooker Cockram management on the DSTO site. At that meeting:
- Mr Spernovasilis handed Hooker Cockram management a copy of the CFMEU flyer and advised that they had just conducted a meeting with the workers on site about the flyer.
 - Mr Spernovasilis made it clear to Hooker Cockram management that the workers' meeting occurred after the morning tea break.
 - Mr Spernovasilis asked Hooker Cockram management whether it was going to deduct four hours pay from its employees for their attendance at the meeting.
 - Hooker Cockram management advised Mr Spernovasilis and Mr Barun that they did not propose to deduct their employees' wages for attending the meeting. Hooker Cockram management advised that they did not have an issue with the meeting. In reaching this view they had regard to the reason for the meeting, that it followed immediately after the morning tea break and was of short duration.
 - Mr Spernovasilis then asked Hooker Cockram management whether they needed to consult with head office. Mr Spernovasilis advised that, owing to the way the law read now, Hooker Cockram could be prosecuted if they didn't take a particular course of action.
 - Mr Spernovasilis suggested that Hooker Cockram management consult the Construction Manager for Hooker Cockram. The Construction Manager for Hooker Cockram was informed of the situation and advised Mr Spernovasilis by telephone that no deduction of wages would be made. Mr Spernovasilis replied to the Construction Manager: "Are you sure about that? Are you sure of the implications?". The meeting then concluded.
- (j) As a result of these discussions, Hooker Cockram management felt they were being "set-up" by Mr Barun and Mr Spernovasilis. Hooker Cockram management sought legal advice on the issue of whether to deduct four hours pay from its two employees who attended the meeting. Hooker Cockram after considering the legal advice decided to deduct four hours pay from its two employees who attended the meeting that morning. Hooker Cockram advised Mr Barun of this decision at around 6pm on 7 April 2006 and Mr Spernovasilis at around 7.15am on 10 April 2006.
- (k) On 10 April 2006, Hooker Cockram sent a letter to all subcontractors on site advising of the stop work meeting occurring on 7 April 2006. The letter

stated: “In accordance with the Workplace Relations Amendment (Workchoices) Act 2005 in the Building & Construction Industry any action taken that is not authorised in advance and in writing must be considered industrial action. This meeting was not authorised by Hooker Cockram Projects Ltd and is therefore deemed to be industrial action. We remind all contractors that under Workplace Relations Amendment (Workchoices) Act 2005 a minimum non-payment of 4 hours applies on any day where industrial action occurs.”

- (l) The matter received broad media attention. Mr Barun was interviewed by media outlets on 11 April 2006.
8. The ABCC requested the CFMEU’s co-operation in conducting its investigation. To that end, the ABCC made requests to both Mr Barun and Mr Spervasilis to interview them about this matter. Both Mr Barun and Mr Spervasilis declined to be interviewed. I find this regrettable but I am satisfied that sufficient evidence exists to make the above findings and to arrive at my conclusions below.

Decision of the Victorian Building Industry Disputes Panel

9. The dispute between Hooker Cockram and the CFMEU in this matter was referred by the CFMEU to the Victorian Building Industry Disputes Panel (the Disputes Panel). A hearing proceeded on 2 May 2006 and the Disputes Panel published its decision on 5 May 2006. A representative of the ABCC appeared before the Disputes Panel to seek an adjournment until the completion of the ABCC investigation. The Disputes Panel rejected this request. The rejection ultimately led the Disputes Panel into what I consider were errors in its reasons for decision.
10. The Disputes Panel determined “that only 20 minutes should have been deducted for the period of the delay.” The determination did not have regard to the full circumstances of the matter. In respect of Mr Barun, the Disputes Panel determined that Hooker Cockram should make a deduction of 20 minutes pay for the period during which work was delayed. However, as I have concluded below, section 507 of the WR Act requires Hooker Cockram to make a deduction from Mr Barun’s pay of four hours for the work stoppage.
11. If Hooker Cockram were to act in conformity with the finding of the Disputes Panel this would constitute a contravention of section 507 of the WR Act in respect of Mr Barun. The circumstances pertaining to Mr Barun are addressed later in this document.

Relevant law

12. **Strike pay.** Section 507 of the WR Act, when read with section 42 of the BCII Act, provides that where an employee has engaged in building industrial action that is industrially-motivated and constitutionally connected the employer must not make a payment to the employee in relation to:

- 4 hours of that day, if the relevant action is for a period of less than 4 hours; or

- otherwise, the total duration of the action on that day.
13. ***Unlawful industrial action.*** 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:
- industrially-motivated;
 - constitutionally-connected action; and
 - not excluded action.
14. The terms building industrial action, constitutionally-connected action, industrially-motivated and excluded action are defined in section 36 of the BCII Act.
15. Section 38 of the BCII Act is a civil penalty provision. 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. A person is involved in a contravention of a civil penalty provision if, and only if, the person:
- has aided, abetted, counselled or procured the contravention; or
 - has induced the contravention, whether by threats or promises or otherwise; or
 - has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
 - has conspired with others to effect the contravention.

My conclusions and recommendations

16. The conclusions and recommendations I make below are based on my findings of fact referred to in paragraph [7] above.
17. It is commendable that workers show compassion towards the families of deceased workers. However, activity to support families such as collections of donations should not be conducted in a manner that infringes the relevant laws governing building and construction projects. Such activity can be entertained so long as it is appropriately organised and authorised.

The workers, other than Mr Barun

18. The question arises as to whether the actions of the workers in attending the stop work meeting on 7 April 2006 was industrially-motivated. Industrially-motivated means “motivated by one or more of the following purposes, or by purposes that include one or more of the following purposes:
- supporting or advancing claims against an employer in respect of the employment of employees of that employer;
 - supporting or advancing claims by an employer in respect of the employment of employees of that employer;
 - advancing industrial objectives of an industrial association;
 - disrupting the performance of work.”

19. No evidence was gathered to suggest that prior to the meeting the workers were aware that the meeting was for a purpose other than to discuss a death in the industry and to take a collection for the family of the deceased. In these circumstances, I conclude that the workers' attendance at the stop work meeting was not industrially-motivated.
20. On the basis of these conclusions, I advise that:
 - (a) section 507 of the WR Act does not oblige Hooker Cockram or any other employer on the DSTO site to withhold four hours payment from their employees who attended the meeting on 7 April 2006; and
 - (b) the workers have not engaged in unlawful industrial action, contrary to section 38 of the BCII Act.
21. The question remains as to whether an employer on site should deduct any amount from their employees' pay for their attendance at the stop work meeting. It would be open for an employer on the DSTO site to make a deduction of 20 minutes pay in respect of any employee who attended the stop work meeting. This would be subject to the specific circumstance of the case and the terms of any workplace agreement, contract of employment or award applying to the employee.

Mr Barun

22. I conclude that Mr Barun engaged in building industrial action by attending and organising the meeting on the morning of 7 April 2006. I further conclude that that action was industrially-motivated, constitutionally-connected and not excluded action.
23. I conclude that one of Mr Barun's purposes in organising and conducting the meeting was to advance the industrial objectives of the CFMEU in regard to the workplace relations reforms of the Australian Government. A particular target appears to have been changes to strike pay provisions. I conclude that Mr Barun organised the meeting after the morning tea break to manoeuvre Hooker Cockram and other contractors on site into a position where they were obliged to deduct four hours pay from their employees. One of the purposes for taking the action appears to have been to gain publicity for the CFMEU's views about the new workplace relations laws.
24. On the basis of these conclusions, I recommend that Hooker Cockram withhold four hours payment from Mr Barun for the time taken in organising and attending the meeting.
25. I am of the view that Mr Barun has contravened section 38 of the BCII Act by engaging in unlawful industrial action in relation to his attendance at the meeting on 7 April 2006.

Mr Spervovasilis

26. I am of the view that, pursuant to section 48 of the BCII Act, Mr Spervovasilis also contravened section 38 of the Act in that he aided, abetted, counselled or procured the unlawful industrial action engaged in by Mr Barun.

Public interest

27. The ABCC considers each case on its merits. In relation to its discretion to institute proceedings, two major factors are considered: the sufficiency of the evidence and whether the institution of proceedings would be in the public interest. A number of factors are taken into account when evaluating the public interest, including:

- the seriousness or otherwise of the alleged contravention;
- the extent to which the alleged contravention is of public concern;
- the likely penalty order;
- the proposed defendant's degree of culpability; and
- the previous history of the proposed defendant.

28. 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 will not be instituted against either Mr Barun or Mr Spervovasilis in this instance. I have made this decision taking into account the following factors:

- the length of the stoppage;
- the minimal disruption to work;
- the fact that Hooker Cockram would have authorised in writing the collection had that request been made;
- the financial penalty suffered by Mr Barun in respect of the deduction of four hours pay; and
- the desire for early clarification, resolution and closure of this dispute.

29. While I have decided not to institute proceedings against Mr Spervovasilis in relation to his conduct on 7 April 2006, the ABCC may rely on his conduct in any application made to have his right of entry permit revoked.

30. Section 67 of the BCII Act permits me to publish details of non-compliance by a building industry participant with the BCII Act or the WR Act, where I consider it to be in the public interest to do so.

31. I have decided that it is in the public interest to publish details of the contraventions for the following reasons:

- this matter has attracted media attention;
- in such circumstances, it is important to place on the public record an account of the background facts and my findings;

- my statutory functions include a role of assisting all building industry participants to understand their rights and obligations;
- the collection of donations for the widow of a deceased worker is commendable but the use of such an occasion to advance the CFMEU's industrial objectives is regrettable;
- providing full details of the outcome of this investigation will enable the individual workers to understand why they are not being penalised for the actions of two CFMEU officials; and
- given the large number of subcontractors on site, it is important they are advised of the strike pay obligations in this instance.

Publication of Non-Compliance

32. On 7 April 2006 at the DSTO site, Steve Barun engaged in unlawful industrial action contrary to section 38 of the BCII Act for a period of approximately 20 minutes from 9.45am to 10.05am.
33. On 7 April 2006 at the DSTO site, Elias Spervovasilis was involved in the contravention set out in paragraph [32] above by reason of the fact that Mr Spervovasilis aided, abetted, counselled or procured the contravention. Accordingly, pursuant to subsection 48(2) of the BCII Act, Mr Spervovasilis is treated as having contravened section 38 of the BCII Act.

John Lloyd
Australian Building and Construction Commissioner
23 May 2006