

DIRECTOR'S FOREWORD



Australia's construction industry has arguably never been more important to the national economy than it is today, in terms of generating employment and wealth. While the mining industry has cooled, construction continues to be the third largest contributor to Australia's

gross domestic product and employs nearly one in ten working Australians. Unfortunately, these workers continue to be exposed to alarming rates of unlawfulness in the workplace.

The previous financial year of 2014–15 saw a 44% increase in the number of legal proceedings commenced by FWBC, with a total of 36 new matters initiated in the courts. This high rate of litigation has continued with 34 new matters initiated in 2015–16. Of the 22 proceedings finalised in 2015–16, FWBC was successful in all but one of them (95%). The penalties awarded in cases brought by FWBC exceeded \$1.8 million; more than \$1.7 million of which was awarded against the CFMEU and its officials.

To achieve these results in the courts, FWBC continues to rely heavily upon its compulsory examination powers throughout the course of its investigations. The agency's investigations have become increasingly protracted and complex in both the type and the nature of the contraventions being investigated. Compulsory examinations are used as a last resort and have proven to be an invaluable tool in terms of gathering the evidence required to determine whether to initiate a legal proceeding or discontinue an investigation and redeploy resources elsewhere. Since I commenced as FWBC Director in October 2013, 75% of the matters in which compulsory examinations that have been conducted have demonstrated grounds for ongoing investigation or are currently before the courts.

Contrary to much public commentary, FWBC is far more likely to require the attendance of managers of construction companies at an examination than it is to require the attendance of an employee or a union official. In fact, 14 of the 17 attendees at FWBC's compulsory examinations during the reporting period were members of management. Two examinees were employees and one was a union official. Also contrary to public commentary, all examinees may choose to have a legal representative. This year, the majority of examinees chose to have a legal representative and all those who that lawyer would be. FWBC was also able to reimburse costs incurred for attendance, including legal costs.

All alleged breaches of the *Fair Work Act 2009* (FW Act) are treated seriously and investigated accordingly. Legal proceedings are only instituted when external lawyers provide independent advice that the requisite evidence exists and when it is deemed to be in the public interest to proceed.

Disappointingly, as in previous years, the majority of FWBC's proceedings were against the CFMEU and its officials (27 of the 34 cases initiated in 2015–16). Moreover, throughout the reporting period, FWBC consistently had more than 100 individual CFMEU officials before the courts, with the CFMEU and its officials consistently facing in excess of 1,800 alleged contraventions of the FW Act.

Causing frustration by breaches of the law is not an act confined to the CFMEU. In 2015–16, FWBC initiated six new matters involving employers. At the end of the reporting period, a total of eight cases, involving seven different contractors, were before the courts as a result of FWBC actions. These latest figures are almost double those of last year, when at 30 June 2015, there were four employers facing four cases. Of grave concern is that most of these eight matters relate to either discrimination against subcontractors for failing to have CFMEU enterprise agreements, or for discrimination against workers who were not members of the CFMEU.

Despite FWBC continuing to achieve overwhelmingly successful outcomes before the courts, with penalties exceeding \$1 million for the second year in a row, the agency is having little effect on changing the unlawful culture that clearly prevails within the building and construction industry. When it comes to the culture of the CFMEU and the conduct of its officials, FWBC finds itself regularly placing the same officials before the courts, for contraventions equivalent or similar to those which have previously been proven. This demonstrates that the repercussions for breaches of the law are falling far short of those required to bring about change in the industry and to restore the rule of law on the nation's construction sites.

This concern is repeatedly reflected in the increasing numbers of statements made by numerous judges who preside over FWBC's cases. For instance:

"The Third Respondent (CFMEU) does have an unenviable history of breaching the FW Act. It seems to treat being caught conducting such breaches as the present one simply as occupational hazards in the way in which they conduct their business." — **Judge Vasta, March 2016**

"It is difficult to resist the conclusion that the CFMEU views the penalties imposed upon it for breaches of industrial legislation as just that —the cost of doing business." — **Judge Jarrett, April 2016**

"The conduct occurs so regularly, in situations with the same kinds of features, that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action." — **Justice Mortimer, May 2016**

In addition to regulating construction industry adherence to the FW Act, FWBC is responsible for monitoring contractor compliance with the Commonwealth's Building Code 2013 (Building

Code). In recent times, the Building Code has been a central element of FWBC's core business as the agency endeavours, in the spirit of the Building Code, to encourage productive workplace relations on building sites.

During the reporting period, the Minister announced two changes to the Building Code. Firstly, in October 2015, new requirements for the management of drugs and alcohol were introduced. Secondly, in May 2016, the Government announced that the responsibility for assessing enterprise agreements against the Building Code 2013 would transfer from the Department of Employment to the Director, FWBC. FWBC is pleased to report that the transition to new arrangements has progressed well with independent stakeholder survey results indicating that over the reporting period, 83% of stakeholders reported being either satisfied or highly satisfied with the quality and timeliness of the advice provided by the agency.

A total of 74 Building Code audits were finalised in 2015–16. Regrettably, 59 of those audits uncovered issues of concern. While rectification was promised by all contractors, a small number of contractors failed to adequately rectify issues raised during the audits. At the end of the reporting period, consideration was being given to the making of recommendations to the Minister that a sanction be imposed.

The results delivered by FWBC in the 2015–16 financial year demonstrate that while the agency is winning many battles, it is still failing to gain adequate traction to win the war and achieve productive and harmonious building and construction workplaces. All building industry participants, including employers, unions and their officials, have an important role to play in this. FWBC merely expects that all industry participants respect the rule of law.

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