



**Attachment B**

**Significant Issue Settlement Request Template**

<b>Matter name:</b> (As listed on court record) Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner & Ors
<b>Entity:</b> Australian Building and Construction Commission (ABCC) (Respondent)
<b>Court and matter number:</b> Federal Court of Australia – Full Court (Victorian Registry) – VID172/2022
<b>Parties:</b> <ul style="list-style-type: none"> <li>• Construction, Forestry, Maritime, Mining and Energy Union (Appellant)</li> <li>• Australian Building and Construction Commissioner (First Respondent)</li> <li>• Australian Building and Construction Inspector Robert Dalton (Second Respondent)</li> <li>• Lendlease Building Contractors Pty Ltd (Third Respondent)</li> </ul>
<b>Other Relevant Commonwealth Stakeholders:</b> None applicable

**Agreement Required by:**

As soon as possible but preferably by no later than 15 August 2022.

**Background**

- The ABCC wishes to agree to discontinue appeal proceedings VID172/2022 (commenced by the CFMMEU).
- The appeal has previously been reported as a significant matter in accordance with clause 3.1 of the *Legal Services Directions 2017*.
- On 11 March 2022, his Honour Justice Snaden of the Federal Court of Australia issued his decision in *Lendlease Building Contractors Pty Ltd v Australian Building and Construction Commissioner (No 2)* [2022] FCA 192 (the first instance decision), in favour of the ABCC.
- On 31 March 2022, Justice Snaden made orders that the CFMMEU pay the ABCC's costs for the first instance decision on a party-party basis as agreed or assessed (see Annexure 2).
- On 6 April 2022, the CFMMEU filed a notice of appeal challenging Justice Snaden's findings regarding the construction of section 13(2)(j) of the *Code for the Tendering and Performance of Building Work 2016* (Cth) (the Code) and its constitutional validity, and Justice Snaden's costs order dated 31 March 2022. The matter has been listed for hearing before a Full Court of the Federal Court on 18-19 August 2022.
- As a result of amendments to the Code which took effect on 26 July 2022, section 13(2)(j) of the Code is no longer operative.

**Outline of Potential Risk to the Commonwealth**

- Defending the appeal proceedings will involve an unnecessary investment of the Commonwealth's and Federal Court's resources given the repeal of section 13(2)(j).
- Should the appeal proceed and the CFMMEU be successful, the ABCC may face an adverse costs order against it.

**Reasons advanced for settlement of this claim**

We confirm we have obtained advice from Counsel [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- The CFMMEU offer is predicated on the previous costs order being vacated. The ABC Commissioner defers to the Attorney-General on this question and whether it would be appropriate to compromise the Commonwealth's entitlement to costs. The counter offer is structured to apply a discount of at least 50% as explained below.

**Effects on other agencies within the Commonwealth**

None applicable.

**Consultation/ministerial approval**

- The ABCC has consulted AGS (its solicitors for the matter) and Counsel. No other external consultation has occurred.
- The ABCC has provided a copy of this submission to the Minister for Employment and Workplace Relations for noting.
- The ABC Commissioner is the relevant party to the proceeding and is not required to obtain approval on any settlement from his responsible Minister. Section 17(2) of the *Building and Construction Industry (Improving Productivity) Act 2016* provides that the Minister must not give a direction to the ABC Commissioner about a particular case.

**Outline of any prior settlement offers/counter offers**

- On 5 July 2022, the ABCC wrote to all parties proposing that the appeal hearing dates be vacated in light of the ABCC's uncertain future as a statutory authority. Both the CFMMEU and Lendlease did not consent to this.
- On 25 July 2022, the CFMMEU wrote to all parties proposing that the appeal be discontinued by consent, on the basis that each party bears their own costs in the appeal; and Justice Snaden's costs order (dated 31 March 2022) as a result of the first instance decision be set aside. This offer remained open until COB Wednesday, 27 July 2022.

**Settlement terms**

- The ABCC proposes to make a counteroffer to the parties agreeing to the CFMMEU discontinuing the appeal (with no order as to costs of the appeal); and in consideration of the CFMMEU discontinuing the appeal the ABCC Respondents will agree that their costs for the first instance decision, which are the subject of a costs order by Justice Snaden dated 31 March 2022, be paid (by the CFMMEU only) at an amount of at least \$100,000 (noting that the ABCC will initially seek to have payment of costs at, or close to the amount of \$150,000).
- The basis for proposing that costs of, or close to \$150,000 (with \$100,000 as a minimum amount) be paid is that this amount represents a discount of more than 50% on actual costs expended that would be the subject of taxation in default of agreement. The ABC Commissioner believes this is an appropriate compromise in circumstances which justify discontinuing the appeal, but which also call for some acknowledgment (via costs) that the ABCC expended significant resources in successfully defending the first instance Federal Court proceedings. Acceptance of such an offer by the CFMMEU would also avoid significant taxation costs s 47C [REDACTED]
- The ABCC notes the following information for context:
  - On 7 June 2022, the ABCC (via AGS) notified the CFMMEU that its assessment of its recoverable costs under Snaden J's costs order dated 31 March 2022 is \$410,570.27 (Recoverable Costs). The ABCC then made an offer to the CFMMEU that it would agree to costs at 75% of the Recoverable Costs amount, being a figure of \$307,927.70 (Costs Offer) s 47C [REDACTED]. The CFMMEU did not accept this offer and proposed to defer consideration of the costs quantum until after the conclusion of the appeal. The ABCC agreed to this. The figure of, or close to \$150,000 (with \$100,000 as a minimum amount) in costs proposed by the ABCC represents approximately 50% of the ABCC's initial Costs Offer it proposed to the CFMMEU for agreement. It is a discount of more than 50% of the ABCC's Recoverable Costs.
  - In respect of the first instance decision and the appeal proceedings, Lendlease and the ABCC agreed that they would each bear their own costs. The proposed settlement terms outlined in this request form concern only payment of the ABCC's costs for the first instance decision by the CFMMEU.

**In accordance with Legal Practice and Principle**

- Yes – we confirm we have received advice from Counsel s 47C [REDACTED] that our proposed counteroffer is in accordance with proper legal principle and practice and the ABCC's obligations more broadly under the *Legal Services Directions 2017*.

**Has the Solicitor-General been briefed to advise in this matter: No**