Australian Government
Australian Building and Construction Commission

ABCC

10 July 2020

Mr Mark Fitt
Committee Secretary
Senate Economics References Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Mr Fitt

Unlawful Underpayments of Employees' Remuneration – ABCC response to CFMMEU submission

This letter is the ABCC's response to adverse comments made in the submission to the Committee by the Construction & General Division of the Construction, Forestry, Maritime, Mining and Energy Union ("the CFMMEU submission"). Our comments in this letter should be read alongside the ABCC's substantive submission to the Committee of 5 March 2020.

Since our submission was filed with the Committee, the ABCC has published a Labour Hire Campaign Report - June 2020. This report is included as Attachment A to this response.

ABCC's general approach to wages

The first recommendation contained in the CFMMEU submission is that:

Issue 2: Recommendation 1 - The ABCC is failing to address wage theft and its failure is emboldening wage thieves. It is an ideological regulator and should be abolished

Paragraphs 13 to 24 of the CFMMEU submission relate to this recommendation.

In response, the ABCC reinforces to the Committee that it is the full service regulator for the building and construction industry and takes this role seriously. The ABCC conducts its activities as an independent statutory agency.

The ABCC is committed to acting impartially and apolitically. On 6 December 2018, the formal report on the independent review of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act) was tabled in Federal Parliament. The review concluded that the ABCC is meeting its role as an impartial regulator, ensuring employers' compliance with wages and entitlements obligations as well as regulating industry participants' compliance with freedom of association, right of entry and other workplace laws.

Since 2 December 2016, the ABCC's role has included assisting employees and their employers to understand their rights and obligations in relation to wages and entitlements.

As noted in our initial submission, since its commencement on 2 December 2016 to 31 December

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2019, the ABCC recovered $1,443,085 for 2582 employees. As at 30 June 2020, wages recovered by the ABCC totals $2,224,175 for 3,300 employees.

The ABCC has recently finalised its first series of wage audits of labour hire employers in the building and construction industry. The results showed a disappointing 79 per cent of these employers did not fully comply with Australia's workplace laws.

ABC Inspectors assessed time and wage records for compliance against the *Fair Work Act 2009* (FW Act), the Fair Work Regulations 2009 and the relevant modern award or enterprise agreement.

Where contraventions were identified, ABC Inspectors worked with the labour hire employers to achieve voluntary rectification. Forms of rectification included:

- an audit of time and wage records
- evidence of back payments made to workers
- a compliance commitment to rectify record keeping
- evidence of ongoing record keeping compliance

The ABCC recovered $563,850 for 1,337 workers across Australia. The report is attached (see Attachment A - Labour Hire Campaign Report - June 2020).

Bungala Solar Farm investigation

The CFMMEU submission also asserts (at page 10) that the ABCC '*has taken no interest at all*' in circumstances at the Bungala Solar Farm in late 2018. This assertion is incorrect. The ABCC investigated allegations at this location of sham contracting, adverse action, misrepresentation and unpaid wages. The ABCC did not identify any actionable contraventions as a result of the investigation.

ABCC's wage related litigation outcomes

The CFMMEU submission at paragraph 17 states that the ABCC refuses to prosecute employers who engage in wage theft. This assertion is incorrect. Two of the 22 proceedings finalised by the ABCC during the 2019/20 financial year arose from wage related investigations. The CFMMEU submission does acknowledge the first of these matters - *ABCC v SWAT Building Pty Ltd (in Liq) & Anor* [2020] FCCA 1360 , where an employee was underpaid and had his employment terminated by his employer when he requested his back pay.

As a result of the ABCC's successful court action to recover the employee's minimum entitlements, the company director for SWAT Building Pty Ltd was penalised $54,000 and was ordered to pay the victim $13,673 in unpaid wages and entitlements and $906.55 in interest.

In addition, the ABCC has recently been successful in the matter of *ABCC v Big Li Ceiling Pty Ltd & Anor*, which resulted in penalties being imposed where an employer failed to provide documents to the ABCC to enable it to undertake a wage-related investigation.

Following ABCC court action, the Federal Circuit Court penalised Big Li Ceiling Pty Ltd $18,900 and its director $3,780. Both respondents were also ordered to pay the ABCC's legal costs in the sum of $24,284.72.

ABCC's budget

On page 12, paragraph 21, the CFMMEU submission states that the ABCC had $75 million available to it in the most recent budget appropriation papers. This figure is not the annual appropriation provided to the ABCC to conduct its activities. The annual appropriation for the ABCC as per the Portfolio Budget Statements is $34 million.

Royal Hobart Hospital investigation

Page 13 of the CFMMEU submission makes a number of assertions regarding the ABCC's investigation of allegations relating to the Royal Hobart Hospital. The ABCC conducted two investigations related to allegations that a plastering sub-contractor on the project, Accuracy Interiors Pty Ltd (Accuracy Interiors) had:

- not correctly paid its employees (the Wages investigation) and
- required its employees to pay fees for induction training prior to commencing work on the project (the Induction Fee investigation).

The ABCC did not, as asserted by the CFMMEU submission, commence an investigation into unprotected industrial action on the project.

Set out below is a chronology of the Wages investigation:

- On 6 September 2018, the ABCC received information that Accuracy Interiors was allegedly not paying its employees. The ABCC commenced an investigation on this date.
- On 11 September 2018, ABC Inspectors attended the Project to further its investigation.
- On 2 October 2018, Accuracy was placed under external administration.
- On 12 October 2018, a formal request was made to the CFMMEU to assist the ABCC with our investigation. However, no response was received to this request.
- On 8 February 2019, the CFMMEU provided information to the ABCC in response to a statutory notice.
- On 10 May 2019, the ABCC closed the investigation due to:
    - insufficient admissible evidence to substantiate any contravention of the FW Act, resulting from the paucity of written records and the lack of cooperation from potential witnesses.
    - the inability to directly pursue Accuracy (as a result of it entering into external administration), Accuracy's Director having left Australia and a lack of other identifiable accessories to the potential contraventions.

In relation to the Induction Fee investigation, this was commenced as a result of posts made on Twitter by CFMMEU Construction & General Division Victorian State Secretary John Setka that contained allegations that Accuracy Interiors employees had been required to pay fees for induction training prior to commencing work on the project. These posts were made on 11 and 14 September 2018.

These allegations were investigated by the ABCC. There were two aspects to this investigation:

- whether Accuracy Interiors employees had been forced to pay MBA for induction training (in potential contravention of section 325 of the FW Act).
- whether the Principal Contractor Joint Venture had unlawfully imposed an obligation on Accuracy Interiors to make payments to Master Builders Tasmania for induction training (in potential contravention of sections 346, 348 and 349 of the FW Act).

The evidence obtained by the ABCC did not identify any employee being required to pay the induction training fees that were not reimbursed by their employer. Accordingly, in relation to the first aspect of the investigation, there was insufficient evidence to establish a contravention of the FW Act.

In relation to the investigation into the arrangements between the parties – it was identified that the payments were required to be made in accordance with a lawful contractual term – which did not contravene the *Building Code 2013*.

On the question raised in the CFMMEU submission concerning the provision of an interpreter or translation service during induction, the ABCC referred this matter to Worksafe Tasmania. The referral was made on the basis of allegations that some employees attending the inductions had limited English language proficiency.

Right of entry

On page 19 of the CFMMEU submission, it is stated that the ABCC routinely interpose themselves in right of entry matters, essentially as an advocate for employers. The ABCC undertakes its role in an impartial, apolitical and professional manner. I have a statutory function to intervene in proceedings under under section 109 of the BCIIP Act.

Where the CFMMEU itself or its officials have commenced proceedings alleging contraventions of right of entries provisions contained in the FW Act, I have intervened in four such right of entry cases. I have not done so as an advocate for employers. My intervention in these case has been undertaken strictly in accordance with my statutory duty. A pertinent example of this is set out below.

***Ramsay v Menso* [2019] FCA 1273 (appeal judgment, 15 August 2019); *Ramsay v Menso (No 2)* [2018] FCCA 1808 (penalty judgment, 28 June 2018).**

On 12 April 2016, the CFMMEU commenced proceedings in the Federal Circuit Court against Susan Menso (Menso) and Z Group Pty Ltd in relation to an incident at a construction site in South Brisbane on 11 December 2015. Menso was the sole director and shareholder of Z Group which occupied the site.

I intervened in this proceeding under section 109 of the BCIIP Act on 28 May 2018. I made submissions on the application of relevant penalty principles, following findings of contravention of right of entry provisions by a site occupier.

In written submissions filed with the Court, I submitted the right of entry provisions in the FW Act provide very important rights and protections for all building industry participants and the laws must be respected by them, whether they are a permit holder or an employer/occupier.

On 28 June 2018, the Federal Circuit Court ordered the respondents to pay $111,000 in penalties for contravening section 501 of the FW Act for hindering and obstructing the CFMMEU officials who were attempting to exercise their right of entry. The Court ordered these penalties to be paid to the Commonwealth.

On 15 August 2019, the Federal Court upheld an appeal by the CFMMEU officials and ordered the penalties be paid to the officials, rather than the Commonwealth. I submitted to the Court that the outcome sought by the CFMMEU officials should be accepted by the Court.

CFMMEU's history of non-compliance with right of entry laws

On page 19 of the CFMMEU submission, it is stated that the ABCC actively seek to prosecute union officials for even minor infractions of the right of entry regime. The ABCC has responsibility as the building industry regulator to investigate and litigate contraventions of the Act. The FW Act establishes a statutory right for Union officials who hold entry permits to enter premises for purposes related to their representative role under the FW Act and under State or Territory OHS laws. Their entry is not dependent upon the consent of the owner or occupier of the premises. However, with those rights comes an obligation to comply with various statutory requirements, including the obligation not to act in an improper manner. In a number of judgments, the Federal Court has made commentary on the serious nature of the CFMMEU's right of entry contraventions.

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In the last two financial year's, the ABCC has been successful in 31 of 33 cases brought against the CFMMEU. The CFMMEU submission cites one of only two unsuccessful ABCC cases from the preceding two years.

For the period 2 December 2016 to 30 June 2020, the CFMMEU and its representatives have had $2,014,690 in penalties imposed by the courts for contraventions of the right of entry regime in ABCC cases.

An analysis of the judgments of the Federal Court and Federal Circuit Court demonstrate that these are not minor infractions of the right of entry regime.

For the same period, the CFMMEU and its representatives have had penalties of $9,995,295 imposed by the courts for contraventions of designated building laws in matters brought before the courts by the ABCC.

Building Code

On page 19 of the CFMMEU submission, a number of assertions are made that the *Code for the Tendering and Performance of Building Work 2016* (the Code) is being used to prevent union officials meeting with employers in site offices. The FW Act and State and Territory occupational health and safety Acts provide permit holders with legislative rights of entry. The Code does not diminish those rights.

The effect of the Code is that code covered entities must, in relation to premises where building work is performed, comply with applicable right of entry laws and allow entry to building sites by officials of a building association only pursuant to a properly exercised right of entry.

Relevantly, the Code requires that a code covered entity must, so far as is reasonably practicable, ensure that:

(a) entry by an officer of a building association to premises where building work is performed must be for a purpose for which a right of entry could be exercised under Part 3-4 of the FW Act or a relevant work health and safety law; and

(b) when an officer of a building association seeks to enter premises, the officer must strictly comply with all applicable legislative requirements in Part 3-4 of the FW Act or a work health and safety law, including permit and notice requirements.

The ABCC regulates code covered entities' right of entry obligations in accordance with these provisions of the Code.

It is unclear whether the CFMMEU's submission takes issue with the provision of the Code itself or the manner in which it is being interpreted by the ABCC. In any event, the ABCC is available to advise and assist any building industry participant on their obligations under designated building laws, including the CFMMEU. Further, the ABCC would welcome the opportunity to provide education and training to the CFMMEU on the operation of the Code as it affects right of entry for its Federal permit holders on sites covered by the Code.

Reverse factoring

On page 26 of the CFMMEU submission, it is claimed that the ABCC is turning a blind eye to reverse factoring. Reverse factoring (also known as 'supply chain financing') is a payment model being offered to subcontractors or suppliers as an alternative to traditional or extended payment terms.

Through reverse factoring, subcontractors and suppliers can obtain early payment of invoices in exchange for a settlement discount.

The ABCC has investigated industry practice with respect to reverse factoring, and to date has found that it is being offered to subcontractors voluntarily and in compliance with State and Territory

security of payment laws, and with the Code.

The Code prohibits code covered entities from coercing or applying undue influence or undue pressure on a subcontractor, to exercise their statutory security of payments right in a particular way (or refrain from exercising them at all).

The Code also requires that code covered entities must ensure that progress payments are made in accordance with State and Territory security of payment requirements (including maximum statutory payment times).

The issue of reverse factoring has been raised and discussed in the Security of Payments Working Group. The ABCC is grateful for the feedback provided by the Working Group and will continue to fulfil its monitoring role on this issue.

Yours sincerely

Stephen McBurney
Commissioner
Australian Building and Construction Commission

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LABOUR HIRE

CAMPAIGN REPORT · JUNE 2020

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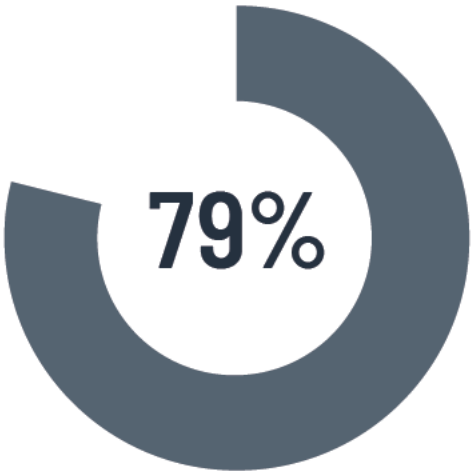
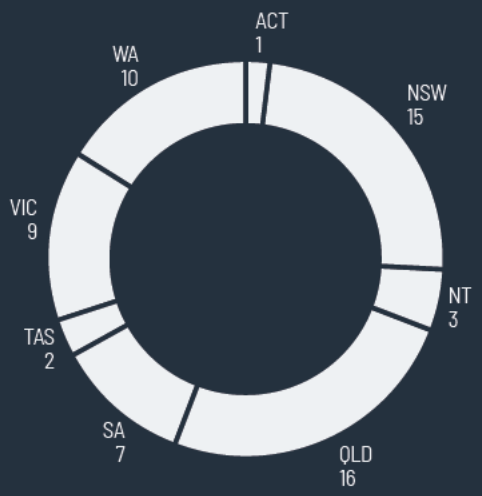
AT A GLANCE

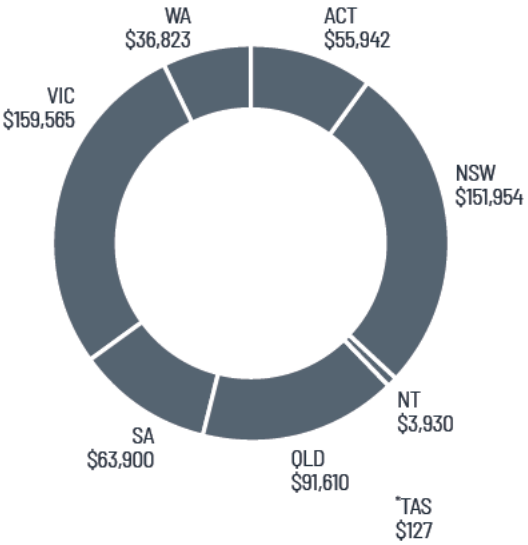


OF COMPANIES AUDITED ARE NOT COMPLYING WITH AUSTRALIAN WORKPLACE LAWS

63
LABOUR HIRE COMPANIES AUDITED



$563,850
RECOVERED FOR 1337 WORKERS



12
COMPLIANT

30
NON-COMPLIANT, BREACH RECTIFIED

20
NON-COMPLIANT, EDUCATION

1
UPGRADED, INVESTIGATION

BACKGROUND

The labour hire industry is a significant employer of building workers.

Labour hire arrangements involve a triangular relationship in which a labour hire business supplies a worker to a host employer for an agreed fee. This arrangement enables a flexible approach to the engagement of labour, without some of the constraints associated with engaging ongoing employees.

Numerous inquiries undertaken by all levels of government in the past few years have highlighted the vulnerability of labour hire employees. Several jurisdictions have introduced labour hire licensing schemes.

The precarious nature of labour hire employment means that workers are less likely to speak up about their working conditions.

During 2019, the Australian Building and Construction Commission (ABCC) engaged in an audit program targeting labour hire employers.

METHODOLOGY

ABC Inspectors carried out compliance audits on 63 labour hire employers in the building and construction industry. The focus of these audits was to ensure that employees were being correctly paid, including their base rate of pay, penalty rates, overtime rates and allowances. The audits also checked the employers' record keeping and pay slips.

The compliance audits only covered workers engaged in building work within the meaning of section 6 of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act).

Labour hire employers selected were located across Australia and employed a range of classification and employment types. Information received from industry led to an inclusion of a small number of specific employers.

ABC Inspectors assessed time and wages records for compliance with the *Fair Work Act 2009* (Fair Work Act), the Fair Work Regulations 2009 and the modern award or enterprise agreement.

An enterprise agreement predominantly covered 41 per cent of workers. A modern award covered the remaining 59 per cent. The most common award was the Building and Construction General On-Site Award 2010.

ABC Inspectors provided education to labour hire employers to help them understand their obligations. Where potential underpayments were identified the ABC Inspector worked with each employer to rectify any issues identified and ensured evidence was obtained of all back payments.

Where there were deficiencies in record keeping or pay slips the ABC Inspector assisted the company to improve their practices and sought evidence of ongoing compliance.

KEY FINDINGS

Fifty of the sixty-three employers audited were non-compliant with Australian workplace laws.

The rate of non-compliance between employers that were covered by a modern award compared to those using an enterprise agreement was statistically insignificant.

Record keeping within the labour hire sector was poor.

Record Keeping

Forty eight per cent of non-compliant employers (24) contravened the record keeping and/or pay slip provisions of the Fair Work Act.

The ABCC identified non-compliance issues including:

- failure to keep a record of overtime hours worked by an employee
- incorrect ABN/employer name on the pay slip
- pay slip not recording the pay period for which the payment related
- pay slip not recording the date the payment was made.

Monetary Entitlements

Sixty four per cent of non-compliant employers (32) had failed to pay the correct:

- base rate for ordinary hours
- allowances
- overtime or
- penalties.

Errors occurred where an employer used an industrial instrument that did not apply to the workers or when they were operating with limited knowledge of their obligations.

CASE STUDIES

TRAVEL ALLOWANCE

A labour hire employer in regional New South Wales did not pay the fares and travel pattern allowance as required in clause 25.2 of the Building and Construction General On-site Award 2010 (the Award).

The labour hire employer argued that because workers do not use vehicles to travel to the construction site (workers used public transport), they were not required to pay the allowance. This is inconsistent with the Award provision.

The audit further identified that the employer did not pay the meal allowance provided for in clause 20 of the Award to employees who had worked more than one and a half hours of overtime.

This resulted in back payments totalling $7,164 to 12 employees. The process also provided the ABCC with the opportunity to educate the labour hire employer on their workplace obligations.

MINIMUM ENGAGEMENT FOR CASUALS

The WA branch of a national labour hire employer was not complying with the minimum engagement time for casual employees as provided under the applicable industrial instrument.

According to clause 14.4 of the Building and Construction General On-site Award 2010, casual employees are entitled to be paid for a minimum of four hours work per engagement. Where casual employees are required to attend work, they are to be paid for at least four hours of work. This entitlement exists even if they are not required or do not work for all four hours.

The ABCC educated the WA labour hire employer and requested it rectify the above for all affected casual employees. As a result, the WA labour hire employer back paid $4,913 to 53 employees.

MINIMUM RATE OF PAY FOR APPRENTICES

A labour hire employer in Queensland specialising in the placement of apprentices in the commercial construction industry was found to be underpaying the minimum rate of pay, overtime and allowances for its apprentices.

The issues related to the employer not updating its rates from the previous minimum wage increase, therefore the flow on effect meant their penalty and overtime rates were incorrect as well. The employer had also failed to increase the travel allowance owed to employees from their progression in years of their apprenticeships.

The employer paid back a total of $21,601 to their seven apprentices, including one payment of more than $5,000. The ABCC also educated the labour hire employer on their rights and obligations.

MORE DETAIL ABOUT THE LABOUR HIRE INDUSTRY

Labour hire arrangements involve a triangular relationship in which a labour hire business supplies a worker to a host employer for an agreed fee. This arrangement enables a flexible approach to the engagement of labour, without some of the constraints associated with engaging ongoing employees.

The labour hire employer is responsible for ensuring the employee is correctly paid. The industrial instrument that applies to the worker is the award or enterprise agreement that applies to the labour hire business.

The labour hire industry is a significant employer of workers. However, there is a lack of disaggregated information to ascertain how many labour hire workers are engaged in the building and construction industry or fall within the jurisdiction of the ABCC.

In 2015, the Productivity Commission estimated that labour hire accounts for around 1.8 per cent of the labour market or 212,400 employed persons.[1]

A 2018 APH research paper[2] stated that:

- Labour hire employees are much more likely to be employed on a casual basis and have a greater expectation of leaving their employment in 12 months.
- Almost four in five (78.8 per cent) labour hire employees in August 2018 were employed on a casual basis compared with the average for all employees of 24.6 per cent.
- Just under a quarter (24.4 per cent) of labour hire employees did not expect to be working for the same employer in 12 months—more than double the estimate for all employees (at 9.9 per cent).

Numerous inquiries undertaken by all levels of government in the past few years have highlighted the vulnerability of labour hire employees. These reports include:

- South Australia Parliament House of Assembly Economic and Finance Committee, *Inquiry into the labour hire industry: final report*, October 2016
- Victorian Inquiry into Labour Hire Industry and Insecure Work, *Victorian Inquiry into the Labour Hire Industry and Insecure Work: final report*, August 2016
- Australia Parliament Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016
- Queensland Legislative Assembly Finance and Administration Committee, *Inquiry into the practices of the labour hire industry in Queensland*, June 2016

Several jurisdictions have introduced labour hire licensing schemes, including:

- *Labour Hire Licensing Act 2017 (Qld)*
- *Labour Hire Licensing Act 2018 (Vic)*
- *Labour Hire Licensing Act 2017 (SA)*

1 Productivity Commission, Workplace Relations Framework: Productivity Commission Inquiry Report, vol. 2, PC, Melbourne, 2015, p. 1092.

2 Trends in use of non-standard forms of employment (10 December 2018) APH Research Paper, Geoff Gilfillan, Statistics and Mapping Section (Sources: 2001, 2008 and 2001—ABS, Forms of Employment, cat. no. 6359.0; 2014, 2016 and 2018—ABS, Characteristics of Employment, cat. no. 6333.0, Table 13 3)

ABOUT THE ABCC

The ABCC is an independent statutory agency established under the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act). The ABCC commenced operations on 2 December 2016 and replaced its predecessor agency, Fair Work Building & Construction (FWBC).

Section 16 of the BCIIP Act provides that the ABCC's statutory functions include:

- promoting the main object of the BCIIP Act;
- monitoring and promoting appropriate standards of conduct by building industry participants, including by:
    - monitoring and promoting compliance with this Act, designated building laws (including the Fair Work Act and fair work instruments) and the Building Code (Building Laws) by building industry participants; and
    - referring matters to other relevant agencies and bodies;
- investigating suspected contraventions by building industry participants of Building Laws;
- ensuring building employers and building contractors comply with their obligations under Building Laws;
- instituting, or intervening in, proceedings in accordance with the BCIIP Act;
- providing assistance and advice to building industry participants regarding their rights and obligations under Building Laws;
- providing representation to a building industry participant who is, or might become, a party to a proceeding under Building Laws, if the ABC Commissioner considers that providing the representation would promote the enforcement of the relevant Building Law; and
- disseminating information about Building Laws, and about other matters affecting building industry participants, including disseminating information by facilitating ongoing discussions with building industry participants.

THE ABCC'S JURISDICTION

The ABCC's jurisdiction covers building industry participants as defined in the BCIIP Act.

Building industry participants include:

- A building employee
- A building employer
- A building contractor
- A person who enters into a contract with a building contractor where building work is carried out or arranged
- A building association (for example, union or employer association)
- An officer, delegate or other representative of a building association.

For the ABCC to have jurisdiction there must also be a connection to building work. That is the particular activity in which the workplace parties are engaged constitutes building work as defined by the BCIIP Act.

DEFINITION OF BUILDING WORK

Section 6 of the BCIIP Act defines 'Building Work'.

Broadly the definition captures civil, commercial and multi-dwelling residential building and construction activities but does not include: the drilling for oil or natural gas; the extraction of minerals; or, the construction of less than five single dwelling-houses.

CONCLUSION

The ABCC was disappointed to discover such a high level of non-compliance in a sector established to provide labour to the construction industry.

Employers that profit from a business model designed to relieve others of their lawful obligations should be beyond reproach.

All labour hire employers found not complying with their lawful obligations rectified the alleged contraventions to the satisfaction of the ABCC, including by repaying workers in full.

Host employers need to be aware that in contracting out labour obligations without significant oversight they may expose themselves to risks of liability.

Ensuring the correct wages and entitlements are paid to vulnerable labour hire workers is essential given the precarious nature of their employment.

The findings of this compliance activity will inform the ABCC's future proactive programs.

The ABCC encourages individuals with concerns about labour hire engagement within the commercial building sector to report it to us. People can anonymously report using this form: https://www.abcc.gov.au/contact/anonymous-reporting-form

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