Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE
Supplementary Budget Estimates 2013-2014

Agency - Fair Work Building & Construction

Department of Employment Question No. EM0029_14

Senator Cameron provided in writing.

Question

FWBC - Judicial critisicm

1. Please advise what steps you will take to ensure that the issues raised in judicial criticism of the former ABCC are analysed and dealt with, including what management systems, training and accountability measures will be implemented to deal with the problems identified by the judiciary including the following matters: • Steven Lovewell v. Bradley O'Carroll & others (unreported Matter No. QUD 427 of 2007) in which the ABCC commenced proceedings on 24 December 2007 in the Federal Court against Bradley O'Carroll and the Qld Branch of the CEPU alleging that O'Carroll had attempted to coerce a head contractor not to engage a subcontractor on the Southport Central project on the Gold Coast. Justice Spender did not feel constrained to make comments about the merits of the case brought by the ABCC. He observed, in his ex tempore dismissal of the case brought by the ABCC: ""The case, as brought and as evidenced by the evidence yesterday, was misconceived, was completely without merit and should not have been brought. ""There is room for the view that if the Commission was even-handed in discharging its task of ensuring industrial harmony and lawfulness in the building or construction industry, proceedings, not necessarily in this court and not necessarily confined to civil industrial law, should have been brought against a company, Underground, and its managing director and possibly another director."" His Honour was referring here to Underground setting up its employees as independent subcontractors. His honour went on to say: ""The promotion of industrial harmony and the ensuring of lawfulness of conduct of those engaged in the industry of building and construction is extremely important, but as one which requires an even-handed investigation and an even-handed view as to resort to civil or criminal proceedings, and that seems very much to be missing in this case."" In concluding his remarks, Justice Spender said: ""The commercial arrangements that Underground entered into with its workers is a species of black economy, which, unfortunately, seems to exist in the building industry, and equally, that it is to be stamped out if at all possible in the payment to workers in such ac way as to avoid the obligations of the income tax legislation and the superannuation legislation. It is not to be ignored or a blind eye cast when it is engaged in by employers."" • Duffy v Construction, Forestry, Mining & Energy Union [2008] FCA 1804 (28 November 2008) in which the ABCC alleged that the Union breached s 38 of the BCII Act, on 20 October 2005, by engaging in unlawful industrial action at a construction site in Plenty Road, Bundoora, known as the University Hill site. The matter was heard by Justice Marshall. An ABCC inspector watchdog was ""avidly anti-union"" and biased against the construction union and evidence produced from an interview was ""inherently unreliable"", Justice Marshall said. ""I consider the interviewer's approach to be biased against the respondent and her tone to be avidly anti-union,"" he said. Justice Marshall described the interview as producing ""unsatisfactory evidence and (was) inherently unreliable"". • ABCC v

Stephenson & Ors [FMCA 1026] (December 22, 2011). CFMEU Victorian officials did not order that work be stopped on a road building project in an effort to increase union membership but because of a genuine health and safety issue, the Federal Magistrates Court has found. The Federal Magistrates Court dismissed an application by the ABCC to prosecute the Victorian CFMEU branch. The ABCC conceded at the close of its case that a health and safety issue raised by the CFMEU had been genuine rather than a "ruse" to justify ordering work to stop and workers on site to join the union. This followed evidence by the contractor's project manager that he had agreed with the union official's assessment that using a forklift to unload a truck at the site was unsafe. The project manager gave evidence that he told the sub-contractor delivering material for the bridge railings that there would either need to be an alternative method used or a Work Safe inspection prior to the work proceeding. Federal Magistrate Dominica Whelan criticised the ABCC for presenting its case on the assumption that the health and safety issue was a ruse, rather than a potentially genuine issue. "While the [ABCC] abandoned the contention that the raising of the safety issue was without substance, the evidence… was clearly presented in that light. It was also clearly presented, in the drafting of the affidavits, that the raising of the health and safety issue was a ruse to justify the ordering of the…employees to cease work and to support the making of the membership demand,"" Magistrate Whelan said. • Cozadinos v CFMEU [FCA 46] (6 February, 2012). Justice Peter Gray dismissed a case brought by the ABCC against the CFMEU Victorian branch and a union organiser, saying that the investigator had "failed to prove her claim in any respect", and ordered that the ABCC pay the union's and official's costs in defending the action. The case centred on allegations that the union organiser in 2008 breached the BCII Act's s44(1) provision on coercion and s45(1) on freedom of association. It alleged the union official threatened to ensure that Bendigo Scaffolding was not able to work on a Safeway construction site unless there was an EBA reached with the CFMEU and all of the sub-contractor's employees were members of the union. Bendigo Scaffolding subsequently withdrew its contract to provide bricklaying and scaffolding services to the project and the work was carried out by another sub-contractor. The ABCC argued that the withdrawal was due to the union pressure and the company should be compensated for lost profits. However, after hearing evidence which he described as containing "numerous inconsistencies, some of them significant", Justice Gray ruled there was no proof that the union official had made any such threats or caused the sub-contractor to withdraw. He said he accepted the evidence of the union official that he had been trained by the CFMEU in dealing with the practical application of the BCII Act and had not done more than he would have normally on such a building project, namely ensuring that sub-contractors were compliant with existing regulations. The official also agreed that he had raised concerns that the manager of the sub-contractor had previously run companies which had gone into liquidation without having paid their employees their wage and superannuation entitlements, which Judge Gray said he was entitled to do as an employee representative. Judge Gray said that the manager's evidence to the court on questions about these previous insolvencies and possible underpayment was "evasive".

Answer

FWBC will only initiate legal proceedings on the basis of legal advice and will take into account previous court decisions when assessing prospects of success.