

**Senate Standing Committee on Education and Employment**

**QUESTIONS ON NOTICE  
Additional Estimates 2013-2014**

**Agency - Fair Work Building & Construction**

**Department of Employment Question No. EM0162\_14**

**Senator Cameron asked on 27 February 2014 , Hansard page 53**

**Question**

**FWBC - Letter to Attorney-General**

Senator CAMERON: This is not about the CFMEU. I know you have got an issue with the CFMEU. This is about the Fair Work Building Inspectorate. I want to go back to this letter that the Attorney-General wrote. Who approached the Attorney-General to write a letter? Mr Hadgkiss: As I understand, it was the Deputy Commissioner Legal who wrote to the Attorney-General, who in turn wrote to the chief judge. Senator CAMERON: Do you have a copy of both those pieces of correspondence? Mr Hadgkiss: Not here. Senator CAMERON: No, can you, on notice, provide that correspondence? Mr Hadgkiss: I will endeavour to do that.

**Answer**

All correspondence is attached.



Australian Government  
Office of the Australian Building and  
Construction Commissioner

GPO BOX 9927  
Sydney NSW 2001  
t. 02 8255 6014  
f. 02 6204 2049

14 November 2008

The Hon Robert McClelland MP  
Attorney-General's Department  
Central Office  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600.

Dear Attorney General

**Subject: Comments by Spender ACJ in *Lovewell v O'Carroll***

I write to express concern about some remarks made in Brisbane by His Honour Mr Justice Spender, then Acting Chief Justice of the Federal Court. The remarks were made after the Office of the Australian Building and Construction Commissioner ('the ABCC') discontinued civil penalty proceedings brought against a Queensland union organiser, the PGEU (Qld) and the federal CEPU.

#### **The Proceedings**

In *Lovewell v O'Carroll and Others* (QUD 427 of 2007), the ABCC alleged under s 43 of the Building and Construction Industry Improvement Act 2005 that the organiser had on 21 February 2007 acted with intent to coerce the head contractor on a building project on the Gold Coast to terminate the contract of a plumbing subcontractor, Underground Group Pty Ltd ('Underground'). It was also alleged that the respondents intended to coerce the head contractor into not engaging Underground on any future stage of the project.

The hearing commenced on 7 October 2008 before His Honour. The applicant called 5 witnesses who were cross-examined on their affidavits. The respondent O'Carroll then gave evidence and was cross-examined and the evidence of another PGEU organiser was part-heard overnight. After the conclusion of the first day's evidence, the ABCC determined that, in the light of His Honour's

observations and the cross-examination of some of the witnesses called by the ABCC, there was no real prospect of success. Accordingly, leave was sought to discontinue the proceedings the next morning and the ABCC agreed to pay \$16 000 to the respondents in respect of their costs. His Honour granted leave to discontinue and the discontinuance was then filed in court.

It was then that His Honour made his comments. It is unusual for a judge to make comments after a case has concluded and his judicial function in the case had ceased. The comments included various allegations. However, I confine this letter to the allegations made by the judge against the plumbing subcontractor, Underground.

#### **The Comments**

His Honour said (T 89, lines 12-27, 8 October 2008):

*The set-up by Underground of its workers as independent contractors is and was a matter requiring thorough investigation ...*

*The present arrangement in the present proceedings, on the material presently available to me, strongly suggests that the arrangement of the works as "independent subcontractors" was a sham, a bogus arrangement. It was an example of dishonest or fraudulent financial engineering by Underground, whose intended purpose was to avoid the payments made under the certified agreement which bound Underground at the time.*

*In addition, the arrangement which Underground pursued was, in my view, a dishonest attempt to evade payment by the employer to the ATO of the income tax which the employer was obliged under the law of the Commonwealth to pay to the office in respect of the income tax obligations of its employees. It was also an attempt to evade the obligation on the employer to pay into the superannuation funds of the employees the 9 per cent that is mandated by Commonwealth legislation.*

*The whole arrangement is redolent of the many separate acts that, in truth, have the potential to constitute frauds on the revenue.*

His Honour made these allegations of serious criminal conduct by the subcontractor, arising out of its workplace arrangements. He described it as both "dishonest" and "fraudulent". None of these matters was the subject of the proceedings.

#### **Breach of Natural Justice**

Underground:

- (a) was not present in court, not being a party to the proceedings;
- (b) was not legally represented;

- (c) did not have any notice that such serious allegations were to be made; and
- (d) did not have any opportunity to be heard.

This amounted to, in my view, a serious denial of natural justice. The need to hear from the other side is particularly important where the allegations are serious.

His Honour drew on a different case heard in 2005 involving a different contractor to support an inference against Underground.

His Honour described Underground's contracts as 'a sham, a bogus arrangement'. The *Independent Contractors Act* and Part 22 of the *Workplace Relations Act* (which deals with sham arrangements) did not commence to operate until after the events which were the subject of proceedings. His Honour did not afford Underground (or anyone else) the opportunity to point this out. It was a matter irrelevant to the case being heard.

#### **Lack of a Proper Basis for Allegations of Fraud**

There was no proper basis for the allegations of fraud, made in a courtroom on an occasion of absolute privilege. This problem is compounded when the allegations are made by a judge, where a member of the public might think they amounted to concluded findings.

His Honour alleged that Underground deliberately evaded the terms of its certified agreement in a "dishonest or fraudulent way". The evidence was that both Underground and the union acted in the mistaken belief that the pre-Workchoices certified agreement had ceased to operate in October 2005, its nominal expiry date.

Fraud or dishonesty should only be alleged by a legal practitioner where there is material available that forms a "proper basis" for the allegation: eg. Rule 37 of the NSW Bar Rules. There are special ethical requirements to be satisfied before fraud can properly be alleged in a court. It must be precisely pleaded and strictly proved. Mahoney JA in the NSW Court of Appeal in *Rajski v Bainton* (1990) 22 NSWLR 125 at 135-6 sets out the requirements :

"If a person is to be charged with doing or writing something which will involve him in serious consequences, he is not to be condemned casually or by "inexact proofs, indefinite testimony or indirect inference": *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362... And charges of this kind are not to be made unless the person who makes them, in a pleading or otherwise, has satisfied himself that there is expected to be available the evidence to prove them... In *Law & Other Things* (1937) Lord Macmillan (at 191 – 192) said :

*... The consequence of lodging such pleadings in Court may be to cause irreparable injury to the person publicly accused. For an advocate to allow such charges to be launched with his name attached to them without the fullest investigation would be to abuse the absolute protection against actions for slander which the law affords to counsel. Counsel is not worthy of that protection unless he justifies it by the most scrupulous care in his written or oral attacks on character. He must insist upon being supplied with all the information which is thought by his client to justify the attack, and then he must decide for himself whether the charges made are such as can be justifiably made. In exercising his judgment in such a matter the advocate is fulfilling one of the most delicate duties to society which his profession casts upon him. It is no small responsibility which the State throws upon the lawyer in thus confiding to his discretion the reputation of the citizen... It will not do to say lightly that it is for the Court to decide the matter. It is for counsel to see that no good man's name is wantonly attacked. "*

It is submitted that the above ethical principles applicable to counsel should apply *a fortiori* to the judiciary, if allegations are to be made in court.

The lack of a proper basis for the allegations is evident in the opening remarks of His Honour

*The set - up by Underground of its workers as independent subcontractors is and was a matter requiring thorough investigation.*

Such an investigation is under way by the ABCC. However, that is not the point. To allege fraud and dishonesty before there has been any investigation is to pre- judge the outcome, not only of the investigation, but of any criminal trial which would be required to find the allegations proved.

**Conclusion**

His Honour used an occasion of absolute privilege to make allegations in respect of matters which were not the subject of the proceedings. The making of those allegations was and is likely to inflict irreparable damage to the reputation of a plumbing subcontractor in circumstances where:

- (a) His Honour was *functus officio*
- (b) His Honour's remarks could not be the subject of appeal;

- (c) the subcontractor had no opportunity to be heard;
- (d) there was no proper evidentiary basis for such serious allegations and the recommended investigation of the allegations had not yet commenced.

I am forwarding a copy of this letter to the Deputy Prime Minister.

Yours sincerely,



Ross Dagleish  
Acting ABC Commissioner  
Office of the Australian Building and Construction Commissioner



ATTORNEY-GENERAL  
THE HON ROBERT McCLELLAND MP

07 JAN 2009

08/23807, MC08/16825

Mr Ross Dagleish  
Acting ABC Commissioner  
Office of the Australian Building and Construction Commission  
GPO Box 9927  
SYDNEY NSW 2001

Dear Mr Dagleish

Thank you for your letter of 14 November 2008 expressing concern about remarks made by Justice Spender at the conclusion of a Federal Court matter in October 2008.

I have referred your letter to Chief Justice Black for consideration of the issues you have raised.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Robert McClelland', written over a light blue horizontal line.

Robert McClelland