



Findings & Forecasts: Major Developments in Industrial Relations in the Building and Construction Industry in 2018 & 2019

Authors // Murray Procter & Ben Keenan

December 2018

Following the upheaval experienced by employers in the construction industry in 2017 as a result of the commencement of the *Building and Construction Industry (Improving Productivity) Act 2016 (BCIIP Act)* and the *Code for the Tendering and Performance of Building Work 2016 (Code 2016)*, change is the new norm for industrial relations in the building and construction industry.

That may be set to continue with a Federal election looming in the first half of 2019. Some key policy initiatives of the major parties could have a significant impact upon the industrial landscape in the industry over the next 12 months.

FINDINGS: THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION IN 2018

2018 started with a change of leadership at the Australian Building and Construction Commission (ABCC), with Stephen McBurney formally succeeding Nigel Hadgkiss as Australian Building and Construction Commissioner in February.

Under Mr McBurney's leadership, a major focus of the ABCC has been on monitoring and enforcing compliance by Code 2016-covered entities with security of payment obligations. Between 1 July and 31 August 2018, the ABCC embarked on a wide-ranging campaign to educate Code 2016-covered entities on these obligations, which range from mandatory reporting requirements for disputed or delayed payments to the need for each Code

2016-covered entity to have written procedures in place for resolving payment disputes with subcontractors. From 1 September 2018, the ABCC has pivoted to a focus on enforcing compliance with the security of payment obligations in the same way as any other issue regulated by Code 2016 or the BCIIP Act.

Notably, in the period spanning 1 July 2017 to 30 June 2018, the ABCC only commenced 10 new legal proceedings¹. This is significantly fewer than the 34 cases commenced in 2015/2016, suggesting that the regulator is now far more cautious in its approach to enforcing compliance through the Court system.

FINDINGS: ANOTHER RIGHT OF ENTRY LOOPHOLE CLOSED FOR UNIONS

In one of its more notable compliance outcomes for 2018, the ABCC successfully defeated a novel argument from the Construction, Forestry, Mining, Maritime and Energy Union (CFMMEU) seeking to shield two of its officials from penalties for right of entry breaches under the *Fair Work Act 2009 (Cth) (FW Act)*.

In June 2018, a Full Federal Court decision² allowed an appeal by the ABCC from an earlier decision of Justice

¹ See Table A10 in Appendix 1 to the *Australian Building and Construction Commission Report 2017 – 2018*, 1 October 2018.

² *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Laverton North and Cheltenham Premises Case)* [2018] FCAFC 88.

ClarkeKann is a commercial law firm with offices in Brisbane and Sydney. Our expertise covers commercial & corporate transactions, employment & IR, financial services, litigation, risk management and insolvency, property transactions and resources projects, across a range of industries. For a full list of our legal services, please visit our website at www.clarkekann.com.au. To update your contact details or unsubscribe to any of our publications, email us at publications@clarkekann.com.au.

This bulletin is produced as general information in summary for clients and subscribers and should not be relied upon as a substitute for detailed legal advice or as a basis for formulating business or other decisions. ClarkeKann asserts copyright over the contents of this document. This bulletin is produced by ClarkeKann. It is intended to provide general information in summary form on legal topics, current at the time of publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters. Liability limited by a scheme approved under professional standards legislation. [Privacy Policy](#)

Bromberg that the two officials who had refused repeated requests to display their entry permits during five visits to a Geelong Grammar construction site in 2014 to hold discussions with workers had not contravened the FW Act, because they were not seeking to exercise their right of entry powers in accordance with the FW Act.

The Full Court overturned Justice Bromberg's decision, concluding that if the ruling was allowed to stand, all a permit holder would have to do to shield themselves from a prosecution for hindering or obstructing an employer at the workplace under section 500 of the FW Act would be to fail to give the required notice of entry under section 487 of the FW Act.

The Full Court decision means that union officials cannot rely upon a failure to comply with the restrictions imposed on the exercise of right of entry powers under the FW Act as evidence that they were not attempting to exercise those powers in the first place.

FORECASTS: CONSEQUENCES FOR THE INDUSTRY FROM THE RE-ELECTION OF A COALITION GOVERNMENT IN 2019

The outcome of the 2019 Federal election is likely to have a significant impact upon industrial relations in the construction industry regardless of which of the major parties forms government.

A re-elected Coalition government could be expected to press ahead with its *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (Integrity Bill)*, which is currently languishing before the Senate lacking the necessary support of cross-bench MPs. If passed by the parliament in its present form, the Integrity Bill would provide for the deregistration of unions for repeated breaches of industrial and other civil laws, as well as banning individual union officials from holding office in certain circumstances.

With the CFMMEU accounting for \$5.6 million of the almost \$6³ million in penalties imposed by the Courts as a result of proceedings commenced by the ABCC in the 2017/2018 financial year alone, it's safe to say that the CFMMEU's registration status will be under threat. Prime Minister Scott Morrison indicated he was open to the idea of deregistering the CFMMEU in an interview with 2UE's Alan Jones on 3 September 2018.

Amendments to the BCIIIP Act and Code 2016 may also be pursued by a returned Coalition government in 2019, drawing upon the recommendations of a review into the operation of the BCIIIP Act commissioned by the Department of Jobs and Small Business in December 2017.

The terms of reference for the review include the performance of the ABCC as a "full service regulator" for the construction industry, how the ABCC's compulsory examination powers have been used to date, whether the increased penalties under the BCIIIP Act have led to a decrease in contraventions of workplace law and whether amendments are required to the terms of the BCIIIP Act to streamline its interaction with other Federal laws, such as the *Migration Act 1958* (Cth).

A final report is due for delivery to the Department before the end of 2018⁴.

FORECASTS: CONSEQUENCES FOR THE INDUSTRY FROM THE ELECTION OF A LABOR GOVERNMENT IN 2019

Labor has pledged to abolish the ABCC in the event it should form government in 2019. This policy reflects Labor's long-standing opposition to the construction industry watchdog, having shut down an earlier incarnation of the ABCC after coming to power in 2007. The abolition of the ABCC will flow from the repeal of the BCIIIP Act, which will in turn result in the discontinuance of Code 2016.

Perhaps most controversially, Labor has also flagged potential amendments to the FW Act to facilitate industry-wide bargaining. Whilst Shadow Minister for Workplace Relations and Employment, the Hon Brendan O'Connor MP, has publically discussed the possibility for a return to industry-wide bargaining for low paid workers, the impact of such an approach in heavily unionised industries like construction could result in a massive increase in already inflated labour costs.

Principal contractors will also need to ensure that they have measures in place to monitor compliance with workplace laws by contractors and all levels of subcontractors, as Labor proposes to hold entities at the head of a supply chain liable for instances of non-compliance by smaller subcontractors.

³ See table 18 in the *Australian Building and Construction Commission Report 2017 – 2018*, 1 October 2018.

⁴ See *Department of Jobs and Small Business Annual Report 2017-18*, page 60.

FOR MORE INFORMATION, PLEASE CONTACT:



MURRAY PROCTER //
Partner

T 61 7 3001 9225

E M.Procter@clarkekann.com.au



BEN KEENAN //
Senior Associate

T 61 7 3001 9268

E B.Keenan@clarkekann.com.au