

CFMEU COMMISSION OF INQUIRY

Will the inquiry impact your business?

An independent inquiry is underway into alleged misconduct by members of the CFMEU. The Commission has a broad scope to investigate the alleged misconduct and the impact on stakeholders, infrastructure projects, financial irregularities and uncommercial labour practices.

The Commissioner's mandate is to make a full and careful inquiry in an open and independent manner with respect to (inter alia):

- Misconduct by the CFMEU against Stakeholders;
- The impact of any Misconduct on any Stakeholder's physical, mental or financial wellbeing;
- Irregularities in financial dealings by the CFMEU, including cash transfers and contracts;
- The use of Labour Hire EBAs or State laws or policy that cause construction to become uncommercial;
- The impact of Misconduct on public and private infrastructure;
- Reviewing whether any other organisation or person assisted the CFMEU in engaging in the Misconduct.

Definitions

The definitions set out in the Terms of Reference are broad, which will allow significant scope for the Commission to investigate wide ranging allegations. The relevant definitions are as follows:

Misconduct – means any act (or threat of) or omission that amounts to abusive, blackmailing, bribing, bullying,

corrupt, criminal, harassing, inflammatory, intimidatory, menacing, misogynistic, offensive, threatening, uncooperative, unlawful, violent or otherwise morally reprehensible behaviour, and without limitation to the above, also includes any scheme or arrangement designed to circumvent any law.

Stakeholder – means any person employed in or otherwise involved in the Construction Industry in Queensland which will include but is not limited to a union member, public servants including Work Health and Safety Inspectors, a member of the public, a member of the Queensland Police Service, journalist or member of the media, employer or industry representative, the Australian Workers Union, or any individual or entity engaged in Allied Industries.

Allied Industries – refers to businesses that support the construction industry and include, for example, architects, draftspersons, engineers, civil contractors, plumbers and electricians or their associated business entities.

Do you, your business or your employees fit within the broad scope of the inquiry?

Questions to consider include:

- Did you or your business have dealings with the CFMEU either directly or indirectly?
- Did those dealings impact you personally or your business and/or employees?
- Do you have information that may be relevant to third parties who could be called before the Inquiry?

- Could third party disclosure to the Commission open a line of inquiry into you, your business or your employees?

Preparing for an investigation

Bearing in mind that the Commission is already underway, there is only a short window before notices to produce documents and/or to give evidence are issued. Many businesses are already engaging legal teams to ensure their availability to respond to notices on short notice. Acting early is the best way to protect your interests and respond effectively.

To mitigate the risks associated with responding to a notice issued by the Commission, it is critical that appropriate steps are taken as soon as possible if any of the Terms of Reference are applicable to you or your business. Again, individuals may be required to attend compulsory examinations or interviews by the investigating body **on very short notice**.

Recommended next steps

At this stage, the following actions should be taken, or at least be carefully considered:

1. Establish a core team

- Again, Commissions often proceed very rapidly, with notices to produce documents and to give evidence having sharp turnaround times.
- The notices often require wide-ranging searches to be conducted throughout an organisation's records.
- It is important to identify a core team of individuals who will be responsible for managing resources, timeframes and generally preparing for and responding to any notice issued by the Commission.
- This should include your legal representatives to review the disclosure material.

2. Anticipate risk areas

- Careful thought should be given to the key drivers of the Commission and your risks if your affairs are examined by the Commission. I.e., EBA negotiations or non-union subcontractor dealings.
- These risk areas should be anticipated and identified at the earliest opportunity so that appropriate preparatory steps can be taken to understand the key facts, relevant documents and individuals within your business that may be involved.
- Your business will be at a significant disadvantage if it only commences its own investigations when responding in the strict timeframes imposed by the Commission.
- Seek legal advice early on the identified risk areas.

3. Consider your people

- Consider the welfare of your impacted employees (and others), such as any psychosocial hazards.
- Planning for the eventuality that some of your employees may be called to give evidence is essential.

4. Claims for legal professional privilege

- Take steps at an early stage to ensure that confidential and legally privileged materials are properly protected.
- In particular, while legal professional privilege may exist over some legal advice (primarily in relation to you responding to the Commission), Commissions often have express powers to override privilege.

5. Implement a communications protocol, including for stakeholder relations

- A communications protocol should be prepared with your lawyers at an early stage.
- This can serve to reduce the risk of potentially adverse communications being made public, particularly embarrassing internal communications or sensitive information not relevant to a notice to produce.
- It also serves to clearly identify communications that should be the subject of claims for legal privilege, if applicable.

6. Identify potential witnesses and document repositories

- Identify the potential witnesses who may be summoned to appear and give evidence.
- Consider who is best placed to provide evidence on behalf of your organisation.
- Consider whether your lawyers can, or should, represent all present and former employees or whether they may require independent representation.
- Document management and preservation protocols should be implemented immediately.
- Again, timelines for production are tight so you should be speaking with your legal advisors now to review relevant documents.

7. Early engagement with the commission/authority – seek advice whether it would be beneficial in your circumstances.

8. Allegations of criminal conduct – any misconduct can be referred to the DPP.



Confidentiality

The Commission recognises that people giving evidence or providing information may wish to remain anonymous for a variety of reasons, including:

- nervousness about giving evidence in public;
- a fear of publicity;
- a fear of harassment by workplace colleagues;
- a fear of being sacked;
- a fear of harming your career prospects;
- a fear of being sued or prosecuted;
- a fear of prejudicing a possible legal claim;
- a fear of harassment, intimidation or retribution.

The Commission may wish to protect the confidentiality of information which it receives for its own operational reasons. For instance, so that potential witnesses do not have the opportunity to destroy evidence.

Procedures exist to protect the anonymity of people who do not wish to be identified, and the confidentiality of information and documents supplied to the Commission.

The Terms of Reference further provide that the Commission may receive submissions from relevant persons and entities and hold public and private hearings in such manner and in such locations as determined by the Commissioner, as appropriate and convenient, in a way that protects persons who are or have been subject of, or who have knowledge of Misconduct.

Closed sittings

Under the *Commissions of Inquiry Act 1950*, the Commissioner can hear evidence in a closed session, with the public, press and media excluded if 'it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given'.

The Commissioner will consider applications to give evidence in a closed session on any of the grounds outlined previously. In particular, if the application is based on a witness's fears, a fear of harassment, being sacked, or harming career prospects, it is sufficient if the fear is a genuine one. It is not necessary to prove the extent of the risk.

Evidence by written statement

Under the *Commissions of Inquiry Act 1950*, the Commissioner can also receive evidence in the form of sworn statements. In many instances, witnesses may be asked to give evidence in this form, either because the evidence is not contentious (that is, because there is no real dispute about the truth of what the witness is saying), or simply to save time and expense. But witnesses can also be given the option of providing evidence in this form on any of the grounds outlined above.

Providing intelligence without giving evidence

A person who has knowledge of relevant matters can, without becoming a witness by giving evidence either at a public sitting, or in the form of a sworn statement, provide information to the Inquiry team confidentially.

For example, a person may be able to help the Inquiry by providing names of people whom the Inquiry should be interviewing, or documents which the Inquiry should be looking for.

Confidential documents

Any document supplied to the Inquiry, such as a witness statement or a submission, can be marked 'confidential'. Such a document will not be released to anyone outside the Inquiry, unless the Commissioner decides that it is essential to do so.

If you have supplied a document marked 'confidential', you will, wherever possible, be given an opportunity to explain why it should be kept confidential before the Commissioner decides that it can be released to anyone outside the Commission.

The Commission will do everything possible to address your legitimate concerns.

Non-publication orders

The Commission also has the power, under the *Commissions of Inquiry Act 1950*, to make an 'order that any evidence given before it, or the contents of any book, document, writing or record produced at the inquiry, shall not be published'.

The Commissioner will consider applications for such orders on any of the grounds previously outlined. Once again, if the application is based on a witness's fears, a fear of harassment, being sacked, or harming career prospects, it is sufficient if the fear is a genuine one.


It is not necessary to prove the extent of the risk.

Statutory protection

Persons giving evidence or providing documents or information to the Commission should also be aware of other protections which exist under the *Commissions of Inquiry Act 1950* and other legislation.

These include:

- a witness at the Inquiry has the same protection as a witness in the Supreme Court.
- it is a serious criminal offence, punishable by up to one year's imprisonment, to dismiss or prejudice any employee because of evidence given to the Inquiry.
- evidence which you give to the Inquiry cannot be used against you in any criminal or civil proceedings (apart from perjury, judicial corruption, fabricating evidence, corruption of



witnesses, deceiving witnesses, destroying evidence or preventing witnesses from attending).

- under the Criminal Code, it is also a serious criminal offence to interfere with a witness or to prevent a witness from attending to give evidence.

If you think you or your business may be impacted by this commission, the Mullins team is here to assist you. Contact our team today.



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