

FOI information shows Federal Government Fair Work Building and Construction (FWBC) changed evidence to mislead Court

Linkhill will continue with criminal prosecution against the Director of the FWBC

Linkhill to proceed with criminal charges against former Federal Workplace Relations Ministers Shorten and Abetz who were both responsible for FWBC conduct

CFMEU and ETU escape scrutiny following High Court Special Leave application refusal for *'lack of sufficient public interest'*

In the High Court on Friday, December 11, 2015, Linkhill Pty Ltd ("Linkhill") **was denied** special leave to appeal payment orders and a penalty totalling **\$466,365** imposed on it by the Federal Circuit Court, for allegedly underpaying workers. **The extraordinary fact of the case though, is that the workers were actually paid more than \$100,000 above their *'Award entitlements'*!**

A conflict in case law about off-setting overpayments means that employers who **pay workers as contractors above an Award on an hourly basis** can be prosecuted for underpaying them, and be ordered to pay further amounts to workers, as well as having to pay penalties.

Had the High Court granted Linkhill Special Leave to appeal, the High Court would have uncovered behaviour both unethical and unlawful at many levels of Government, the union movement, and the Judiciary, involving abuse of power, misfeasance in public office, and attempting to pervert the course of justice.

The High Court's decision to refuse Linkhill's special leave application will have a devastating impact on thousands of Australian businesses. It also means millions of Australians can and will continue paying trades people and in-home helpers with 'cash'. The 'brown paper bag' economy has been saved!

In the High Court, Linkhill failed to convince Justice Michelle Gordon and Justice Geoffrey Nettle that being **fined and penalised for overpaying workers** was of *'sufficient public interest'* for the High Court to hear its application, despite **Fair Work Building and Construction (FWBC) (the former Australian Building and Construction Commission)** knowingly and deliberately alleging workers were underpaid when they knew they were **not**.

It is interesting to note that Justices Gordon and Nettle were both appointed to the High Court by Attorney General George Brandis within the last 12 months. This is a concern because Attorney General Brandis and (then) Minister responsible for the FWBC, Eric Abetz, were well aware of the **criminal allegations** made by Linkhill in this case. (See notes: [9](#), [18](#), [20](#), [29](#), [37](#), [45](#)).

Based on the comments made by their Honours during Linkhill's Special Leave application, it is reasonable to conclude that **Justices Gordon and Nettle accepted that the judgment of the Full Federal Court was wrong**, but declined to grant special leave to Linkhill on the basis that the error raised by Linkhill was not of '*sufficient public interest*'. As a result, workers covered by an Award who are paid a flat hourly rate in excess of the '*Award rate*', stand to be paid twice, and their employer fined for what is, in reality, '*overpaying workers*'.

The Implications of the High Court Decision

Many Australian employers and business entities, including media companies, mining companies, farmers, and many in the hospitality and retail industries who engage any workers as contractors on an hourly basis, will be 'sent to the wall' – **because the High Court refused Linkhill's special leave application because in its opinion, there was '*not sufficient public interest*' in this important test case.**

The Federal Government must now change the law. If it does not, there will be industrial chaos as unions make claims for millions of dollars for alleged underpayments, for contactors who have been paid an hourly all up rate which included all entitlements. High Court Judges, Politicians and Public Servants and their families may find themselves owing many thousands of dollars to their nannies, house cleaners, gardeners and baby sitters who have been paid a flat hourly rate (today, mostly paid by cash)!

Insufficient Public Interest...Really?

In July 2014, Linkhill commenced a **criminal prosecution** under Federal law against the Director of the FWBC for commencing and proceeding with its prosecution of Linkhill for allegedly underpaying workers when the Director of FWBC knew that no worker had actually been underpaid (See note: [31](#)). As it is entitled to do, the Commonwealth Director of Public Prosecutions took over the conduct of Linkhill's prosecution but then, inexplicably, discontinued it without explanation (See notes: [55](#) & [56](#)).

Linkhill subsequently sought to commence a similar **criminal prosecution** against the Director of FWBC under Victorian law. The Deputy Magistrate of the Magistrates Court of Victoria refused to accept Linkhill's complaint and summons for filing, asserting (without reasons) that it was '*an abuse of process*' (See note [57](#)). Linkhill is challenging the Deputy Magistrate's decision in the Supreme Court of Victoria.

In view of the nature and extent of unlawful conduct Linkhill alleges occurred within the FWBC, it also **proposes to proceed with criminal charges against former Federal Workplace Relations Ministers Shorten and Abetz** (both of whom were responsible for the

conduct of the FWBC at the relevant time), and were, or ought to have been, aware of the unlawful conduct engaged in by the FWBC at the relevant times.

Former Ministers Shorten and Abetz allowed the Linkhill prosecution to proceed when the affected workers had suffered no financial detriment, and were paid more than the amount to which they were legally entitled under the relevant Awards.

Insofar as the Director of the FWBC is concerned, he does not appear to have, at any time, instructed his legal team (Clayton Utz and Steven Moore QC) to clearly inform the Judge hearing the claim against Linkhill of the actual amounts Linkhill had paid to the workers in excess of their entitlements under the relevant ‘*industrial Awards*’, and did not raise the legal issue of ‘*off-setting*’ amounts overpaid against amounts allegedly underpaid at any time.

Linkhill says that as a Federal Government agency, the FWBC has a duty to act as a model litigant, and inform the Courts of all relevant matters such as these in cases of the type prosecuted by the FWBC. Significantly, the Director of the FWBC even directed his legal team to object to Linkhill raising both of these issues (overpayments and off-set) later in the proceeding. Clearly, the Director had something to hide.

Linkhill asserts that through his actions, the Director of FWBC sought to mislead and deceive the Courts as to the true position of payments made to the workers by Linkhill, and present a case to the Court based on underpayment, when no such underpayment existed. In doing so, the Director of FWBC and potentially the Ministers for Workplace Relations at the relevant times (depending on evidence on what they knew at various times), committed serious offences contrary to the *Criminal Code Act 1995* (Cth).

The facts of this case also raise questions about the conduct of the Director’s legal team, in presenting evidence to the Court which it knew was misleading or deceptive, and the Judge in the Federal Circuit Court (where the case against Linkhill was heard), Judge John O’Sullivan. **Gary Morgan gave evidence at the hearing that, at the relevant time “the rate of \$25 per hour or whatever they were paid on an hourly basis was way above the Award”. This evidence was not challenged or contradicted, yet was disregarded by Judge O’Sullivan.**

History

In early 2010, representatives of two unions (Derek Christopher from the CFMEU and Troy (?) from the ETU) entered a small workplace at 384-386 Flinders Lane (a building owned personally by Michele Levine), in which refurbishment work was being done. The union officials did not have Right of Entry Permits and gave no notice of their intended visit (See note: [58](#)). The purpose of the visit was to recruit members. The workers, then engaged as independent contractors by Linkhill, refused the unions’ invitations.

As a result of the refusal of the workers to join the unions, the unions went to the (then) Australian Building and Industrial Commission (“ABCC”), and asked the ABCC to investigate Linkhill.

What followed was Linkhill being notified of an investigation by the ABCC, and being asked to provide records in relation to its business and its workers (with which request Linkhill fully complied).

Investigators from the ABCC also visited the Flinders Lane workplace, and invited Linkhill's workers to attend interviews and provide statements. Most of the workers declined. One aggrieved worker agreed to work with the ABCC investigators, and secretly provided confidential Linkhill information and documents to the investigators, as requested by them.

Following this, the workers' foreman, Ryan Lowery, received a vague and unsigned letter from an ABCC investigator, Renae Mortimer, requiring him to produce documents. When Mr Lowery telephoned the investigator to query the letter, **he was informed that if he did not attend at the ABCC's offices and make a statement he could be sent to jail** (See note [59](#)). This is not what the letter purported to say, and was incorrect and untrue in fact. In intimidating Mr Lowery to give evidence in this way, Ms Mortimer potentially committed a serious criminal offence.

In response to this deliberately misleading threat, Mr Lowery, against his will, attended at the offices of the ABCC and made a statement to the investigator. Mr Lowery also communicated the ABCC investigator's threat to the other workers, who also felt obliged to attend interviews and give statements to the ABCC.

During meetings with the ABCC investigators, the workers were told that the ABCC would '*get them some money*' by way of '*unpaid wages*' if they co-operated with the ABCC.

In October 2011 the Director of the ABCC, (now the FWBC) began Federal Magistrate Court proceedings against Linkhill for allegedly entering into sham contracts, and allegedly underpaying workers.

The amount of the total '*alleged*' underpayment to ten workers at the time the litigation was commenced was \$131,477.71. However, the reality was that the workers, when their income from Linkhill was compared to the applicable '*industrial Awards*' (and this comparison was done by FWBC in preparation for the proceedings against Linkhill), were paid **\$253,281.00** above the prescribed '*Award rates*'.

To date, the Director of FWBC has spent more than \$2 million of taxpayers' money on the litigation against Linkhill. The litigation brought against Linkhill by FWBC is in a jurisdiction in which legal costs are not recoverable.

The Director of FWBC justified the litigation against Linkhill on the basis of the technical legal argument that the **\$253,281.00** payments by Linkhill in excess of '*Award entitlements*' **should not be off-set against the alleged '*underpayments*' of \$131,000.00**. In other words, although the workers were not actually underpaid, because of an ambiguous and technical legal point from 1967, the Director wanted the workers paid a further amount of \$131,000 by Linkhill to compensate them for this '*technical*' underpayment. Commencing or continuing litigation on the basis of a '*technical legal point*', breaches FWBC's own litigation policy.

In these circumstances, the cost of the litigation, when compared to the outcome sought by the FWBC, makes no sense at all. How does the Director justify spending over \$2 million of taxpayer's money to recover \$131,000.00 that has already been paid to them? Where is the public interest in that?

This disgraceful waste of taxpayer money has occurred at a time when research suggests that less than 50% of employers in the restaurant and café industry are paying their staff even the 'minimum Award entitlements' (and this figure excludes those restaurant and café employers who pay cash). Clearly, the prosecution of Linkhill by the FWBC had nothing at all to do with protecting workers.

So what was it all about?

At the time of instigating Court proceedings, the Labor Party was in Government in Canberra, and in accordance with Labor Party policy, the Federal Government was proceeding to emasculate FWBC. Bill Shorten became the Minister for Employment and Workplace Relations (December 2011 – September 2013) with the office of the Director of FWBC, reporting directly to him. The Director of FWBC at the time was Labor appointee, Leigh Johns (now a Commissioner in the Fair Work Commission). Mr Johns was appointed to both FWBC and the FWC by the Gillard Government.

Overpayment or underpayment?

Before commencing litigation against Linkhill in 2012, FWBC conducted a thorough, detailed and extensive analysis of Linkhill's pay records for each of the workers. FWBC knew, even before commencing the litigation, that the amounts Linkhill had paid the ten workers in question, was more than the amount the workers would have been entitled under the applicable 'industrial Awards'.

Documents obtained from FWBC under Freedom of Information in June 2014 (after Judge O'Sullivan had made his decision about Linkhill's liability for underpayment) show that, as early as 2010, FWBC **knew** that calculations indicated that the workers were not, in fact, all 'underpaid' (when the simple comparison of the amount to which they were entitled under an Award and the amount they had actually been paid by Linkhill, was conducted). In another document obtained by Linkhill from its Freedom of Information request to FWBC, it was discovered that FWBC Inspector Linda Helal, in a written advice to FWBC's legal team, noted:

“On the basis of the above research, the evidence suggests that Mr Hunter was not under paid according [to] the award. Moreover, the difference between the \$35 per hour and the minimum requirement of \$18.36 per hour could be argued as payment in lieu of Standard entitlements. Whether trading Standard entitlements for monies is legal may be explored further into the investigation”. (See note: [60](#)).

Nevertheless FWBC maintained throughout the litigation and for the next five years that all of the workers were 'underpaid' (ignoring the actual facts, and relying on a disputed, 50 year old legal precedent.

FWBC's misleading and deceptive conduct

Although knowing that the workers had been paid by Linkhill amounts far in excess of their entitlements under applicable '*industrial Awards*', the Director of FWBC prosecuted the litigation against Linkhill alleging '*underpayments*'.

When the Statement of Claim was initially served on Linkhill in October 2011, it contained a Schedule, comprising a one page table allegedly showing amounts of underpayments to each of the workers. In this table, a column showed the actual amount paid to each worker by Linkhill. In another column of the table for each worker titled Underpayment of Wages, the table showed "N/A" for all but one of the workers (See note: [61](#)).

In October 2013, the Director of FWBC filed and served an amended statement of claim. In this statement of claim, the original one page Schedule was deleted (See note: [63](#)), and replaced with a 162 page Schedule which purported to present in more detail the alleged underpayments for each worker. The alleged amount of underpayments increased to approximately \$173,000.00, **and the references in the FWBC's pleadings to amounts paid by Linkhill to the workers was removed.**

Why did the Director FWBC spend more than \$2 million of taxpayer's money to prosecute Linkhill for paying its workers more than their entitlements under the industrial Awards?

It is Linkhill's view (observed by others) that under Federal Labor Governments, FWBC has been the industrial unions' intimidator and enforcer. It has, with the responsible Minister's knowledge, acted upon the unions' demands to punish specific employers.

In October 2011, Leigh Johns replaced John Lloyd (Howard Government appointee) as Commissioner of the ABCC. At the time, the Federal Labor Government was pushing ahead with its bid to abolish the ABCC, and replace it with its own inspectorate. This is because the ABCC was set up by the Howard Government to prosecute unions for unlawful conduct in the building industry.

The focus of the ABCC, under Leigh Johns' tenure as Commissioner, moved from investigating unlawful union activity in the construction industry, to investigating employers in a '*much more broadly defined construction industry*'. One of the first things Commissioner Johns did as Director of the ABCC was take on the investigation of underpayments of wages and entitlements. This was part of Commissioner Johns' campaign against sham contracting. Sham contracting is the practice of encouraging a person to enter into a contract which is not what they thought it was (for example, engaging an employee as a contractor).

The fact is that in virtually all cases of sham contracting, where an employee is engaged as a contractor, the employee is often disadvantaged, and loses out on wages and entitlements to which he or she would receive if engaged as an employee. This is the '*wrong*' engaged in by unscrupulous employers that is associated with sham contracts. This was **not** the case at Linkhill. Linkhill's contractors were paid well in excess of '*industrial Award wages*' and

entitlements. Linkhill covered workers compensation and many additional benefits with flexible working conditions.

This is where FWBC made a major error. Whilst it could be (and was) asserted by FWBC that Linkhill's workers – engaged as contractors – should more properly be engaged as employees, the workers were not disadvantaged as a result of the alleged '*sham*'. They were not underpaid or disadvantaged. The case against Linkhill, presented to FWBC by the CFMEU and/or the ETU, **was based solely on '*payback*' for being a non-union site**. How else could this outrageous waste of taxpayer money be contemplated or justified?

By any normal and sensible standards, this was not an issue on which over \$2 million of taxpayer's money should have been wasted on a vexatious prosecution. However, this was a chance for the unions to get a high profile '*scalp*': the scalp of Gary Morgan. Freedom of Information documents obtained by Linkhill from FWBC reveal that FWBC Inspector Renae Mortimer wrote "*I'd love to see Gary's face when he gets it*" in an internal email to an FWBC solicitor, when FWBC prepared a letter requiring Gary Morgan to attend an interview (See note: [62](#)).

Linkhill's claim sounds unbelievable, but is frighteningly true

In circumstances where workers are paid well above '*Award rates*', the conflicts in Australian case law concerning an employer's right to off-set overpayments against alleged underpayments mean that employers of contractors will not be entitled to claim the benefit of the overpaid amounts in cases where '*Award based benefits*' (such as overtime and leave loading) are sought by disgruntled workers or unions.

Linkhill paid 10 workers a total of **\$253,281** above '*Award hourly rates*', but did not reference the overpayments as being for overtime, crib breaks, travel allowance and the like. The workers simply received a flat hourly rate, set well above the corresponding '*Award hourly rate*'.

FWBC alleged that the workers, engaged as independent contractors, were employees, and had been underpaid by a combined total amount of **\$152,865**. In calculating the amount of overpayment, FWBC completely disregarded the amounts paid by Linkhill in excess of '*Award hourly rates*', and calculated the alleged underpayment of workers based on amounts specified in the Award (other than base hourly rate) that was not specified in the generous hourly rate payments made by Linkhill. These underpayments comprised the workers' alleged additional '*Award entitlements*' to penalty rates, crib time, meal allowance, travel allowance, annual leave and annual leave loading.

FWBC, who by law must be a model litigant, then resisted all attempts by Linkhill to offset the **\$253,281** it had overpaid the workers against the **\$152,865** FWBC alleged the workers had been underpaid. **There was no dispute that the workers were all much better off financially under Linkhill than under the Award, but Linkhill was still 'hit' with a \$313,500 penalty fine for sham contracting and allegedly '*underpaying*' its workers.** Obviously NOT fair!

Judge Anderson of the Western Australian Industrial Appeal Court, in 2003, expressed unambiguous support for the view being argued by Linkhill.

*“If the proposition is correct it would seem to be a warrant to claim double payment of wages, that is, to accept and retain all payments made pursuant to an employment contract in which there is no reference to the Award as well as claim all payments prescribed in the Award. **Justice and the law would have parted company.**” Anderson J – Western Australian Industrial Appeal Court – James Turner Roofing Pty Ltd v Christopher Peters; [2003] WASCA 28 at par 29.*

In view of the decision of the High Court, ‘*justice and the law*’ HAVE parted ways. Linkhill’s quest for justice is lost, and its money gone in duplicate payments and severe penalties imposed for imaginary disadvantage to ten of its workers.

In an effort to right this wrong, Linkhill proposes to pursue **criminal charges** against the **Director of FWBC** and the relevant Ministers for Workplace Relations (**Shorten and Abetz**) for allowing the abusive prosecution to proceed, knowing the workers had suffered no actual financial detriment, whilst making representations to the contrary in Court.

What to do about this abuse of power by the FWBC?

Following the Federal Coalition Government’s election win in 2013, Nigel Hadgkiss was appointed as Director of the FWBC, and the focus of that organisation again turned towards unions behaving badly. But since the litigation against Linkhill was commenced and well progressed, no one (neither Coalition Minister Eric Abetz, nor Commissioner Hadgkiss) has been prepared to admit the FWBC’s mistake, and end the outrageous abuse of Federal Government power and taxpayer dollars (See notes: [17](#), [19](#), [21](#), [22](#), [24](#), [25](#), [26](#), [27](#), [28](#), [31](#), [32](#), [33](#), [34](#), [35](#), [36](#), [40](#), [41](#), [42](#), [44](#), [46](#), [47](#), [48](#), [49](#)).

Linkhill has made formal complaints about the conduct of the ABCC investigator involved in coercing witnesses, and the FWBC’s misleading and deceptive representations to the Federal Circuit Court, to:

- The Victorian Police (See notes: [1](#), [2](#), [3](#), [4](#), [5](#), [6](#), [10](#), [12](#), [15](#), [16](#)).
- The Federal Police (See note: [43](#)).
- The Commonwealth Ombudsman (See notes: [7](#), [13](#), [30](#), [38](#), [39](#)).
- The Victorian Independent Broad-based Anti-corruption Commission (See notes: [11](#), [14](#)).
- The Federal Minister for Workplace Relations (See note: [8](#)).
- The Attorney General. (See notes: [9](#), [18](#), [20](#), [29](#), [37](#), [45](#)).

All of these entities informed Linkhill that they are unable to investigate these allegations.

Linkhill commenced a private criminal prosecution, under the *Criminal Code Act 1995* (Cth) against the ABCC. This prosecution was promptly taken over by the Commonwealth Department of Public Prosecution, and immediately discontinued. (See notes: [50](#), [51](#), [52](#), [53](#), [54](#), [55](#), [56](#)).

Linkhill commenced a private criminal prosecution, under Victorian State law against the ABCC. The filing of this prosecution was refused by the Victoria's Deputy Chief Magistrate, on the basis that it was '*an abuse of process*'. (See note: [57](#)).

Linkhill requested in writing that it be able to appear at the Royal Commission into Union Corruption. The request was refused. Why? (See note: [23](#)).

Linkhill says there must be a comprehensive investigation into the conduct of FWBC in relation to its conduct in prosecuting Linkhill. The reasons for the decisions to proceed with the prosecution, and the justification for the extraordinary waste of taxpayers' money must be identified, and misconduct, incompetence and unlawful conduct of all relevant FWBC officers and employees, and any other public servants, or agents, involved (including former Ministers and/or Ministerial staff), must be exposed and dealt with.

It is unfathomable that a Federal Government agency with the coercive powers of FWBC can engage in such obviously improper conduct, without being answerable to, overseen, or held to account by either:

- The responsible Minister;
- The Attorney General;
- The Commonwealth Ombudsman;
- The Federal Police;
- The Victorian Police; or
- The Victorian Independent Broad-based Anti-corruption Commission.

It is also unbelievable that when a complaint of improper conduct or unlawful behaviour is made to the Director of FWBC by an external organisation, the Director has no obligation whatsoever to:

- (a) conduct any kind of independent investigation into the complaint; or
- (b) respond to the complainant in relation to the investigation and handling of the complaint; or
- (c) report the fact of the complaint to the responsible Minister or Federal Attorney General.

FWBC is unquestionably an entity without sufficient integrity processes or accountability, and is an organisation within which unlawful and improper conduct has been allowed to occur.



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