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Finance and Administration Committee

The Research Director
Finance and Administration Committee
Parliament House
George Street
Brisbane Qld 4000

By email to: fac@parliament.qld.gov.au

Dear Chair

On behalf of the Queensland construction industry, Master Builders supports the *Work Health and Safety and Other Legislation Amendment Bill 2014.*

Master Builders is the peak industry association representing building and construction in Queensland since 1882. With approximately 8,700 members, Master Builders is the voice of the industry. Master Builders is a vocal advocate of workplace health and safety in Queensland.

The purpose of this submission is to highlight the almost daily misuse of right of entry provisions under current Work Health and Safety legislation and to restore balance to Queensland construction workplaces while promoting safe workplaces for all industry participants. The introduction of a 24 hour notice period prior to union entry should minimise unlawful entry and prevent unions disrupting workplaces under the guise of Work Health and Safety.

Regards

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Addressing the misuse of WHS Right of Entry powers by Unions

Master Builders' submission to the Queensland Parliament's Finance and Administration Committee enquiry into the *Work Health and Safety and Other Legislation Amendment Bill 2015*

Master Builders

Introduction

The safety and health of all participants in the building and construction industry is of the upmost importance to Master Builders. Master Builders is a strong supporter and active participant in promoting a healthy and safe construction industry in Queensland.

Master Builders Queensland is a member of Master Builders Australia with over 33,000 member companies across every state and territory in Australia. The attached Master Builders Australia ***'National Work Health and Safety Right of Entry Policy 2014'*** gives an overview of the abuse of WHS right of entry powers and the current legal framework that sets out the powers and procedures for entering a workplace under a WHS right of entry permit. The national policy then sets out Master Builders' proposal for reform and sets out national recommendations for all jurisdictions to ensure that WHS right of entry powers are only used for legitimate purposes.

Master Builder Supports Queensland's Amendment Bill

Master Builders regards the amendment bill as a significant step towards addressing the problem of union officials abusing WHS right of entry. Union entry to construction sites under the current WHS right of entry laws without notice through section 117 *'Entry to inquire into suspected contraventions'* of the *Work Health and Safety Act 2011*[1] has caused a profound impact upon the productivity of our industry and the abuse of safety as an industrial weapon.

The industry needs improved compliance from permit holders under the Act. Unions officials routinely breach current Right of entry provisions and regularly disrupt work in breach of their permit obligations. Sites are regularly stopped with union interference and little effort is made by the permit holders to find suitable duties for those affected by the alleged safety concerns.[2]

Restoring the balance

Master Builders seeks to restore the balance between union right of entry and the reasonable management of health and safety. The continual harassment on construction sites by unions with unreasonable requests causes disruption to the workplace and productivity losses cannot continue. Unions are provided with significant wide-ranging powers to enter workplaces to represent their members and monitor reasonable safety standards. This goal has lost its significant meaning in our industry where builders are required to submit to unreasonable requests and abuse of these powers.

[1] *Work Health and Safety Act 2011*
[2] Ibid, at sections 146, 86 and 84

We need to restore the balance between the employer, workers and their safety without unnecessary union interference.

Master Builders supports the reasonable management of safety and applauds the excellent work of WHS Queensland and its Inspectors. Inspectors are often in the front line dealing with and responding to unreasonable union demands. In general the construction unions have no regard for what constitutes 'a reasonable response', 'alternative work' or 'unaffected areas'.

Anecdotal Examples Provided by Members:

The following are examples of moderate to minor safety issues that illustrate the abuse of union power in relation to WHS issues. They do not justify the stoppage of all works on site but the union practice is that all the workers sit down for any safety issue with the concept of alternative work completely alien to the unions. The union permit holders completely disregard section 146 'WHS entry permit holder must not delay, hinder or obstruct any person or disrupt work at workplace'[3] with stoppages occurring on a weekly if not daily basis in Queensland. A number of issues demonstrating where sites have been disrupted include:

Emergency Lighting:	Union officials stop all employees working on a major construction project as there was no battery backup for lights in the amenities. Union officials stop all employees working on a major construction project as there was no battery backup for emergency stairwell lights.
Evacuation Plan:	Union officials stop all employees on site to conduct a fire dill without notice, without consultation and without regard for the productivity of workers.
Fire extinguishers:	Union officials stop all employees working on one level of a construction project as there was not three separate fire extinguishers despite the two extinguishers complying with all fire requirements.
Site Access & Egress:	Union officials stop all employees working on site as one of the two emergency stairwells was partly wet from rain or if rubbish bins are blocking an exit.
Amenities:	Union officials stop all employees working on a major construction site due to any of the following: insufficient toilets, insufficient water coolers, dirty toilets, no covered walkways to amenities, insufficient seating for all site workers, a minor urine spill, no plumbed in toilets and insufficient tables.

[3] *Work Health and Safety Act 2011*

Dewatering	Following rain the union enter site and sit the workforce in the lunch rooms until the full site is inspected and dewatering is conducted. The union prevent workers returning to work in dry unaffected areas.
Housekeeping:	The union stop all workers on site while three of four workers clean the site.
Two Stair Access:	The union stop all workers on site when there is no second set of stair access to a work area despite there being no such legislative requirement.
Emergency access:	The union stop workers on site whilst they conduct a review of emergency access and rescue from Jump-forms or tower cranes regardless of any prior liaison with and drills with Queensland Fire and Rescue by the builder.

We must have the 'rule of law'

Work Health and Safety Queensland has failed to take any prosecutions under section 138 '*Application to revoke WHS entry permit*'[4] despite knowing a problem existed.

Master Builders is aware of the industry practice of some union officials who enter a workplace to inquire about the suspected contravention of WHS laws, find a dubious WHS hazard, warns workers that they are exposed to a serious risk to their health or safety, and then directs that the workers cease work. The entire project then shuts down and all workers walk off the job under the guise of WHS concerns.

Master Builders submits that this behaviour needs to be investigated by WHS Queensland as the regulator. In line with our national policy, if a WHS permit holder has pressured a worker or group of workers into ceasing work where that cessation is not in response to a reasonable concern of that individual worker being exposed to a serious risk.,the WHS permit holder should be prosecuted by WHS Queensland for contravening the permit conditions. WHS Queensland know the problem is not a small or minor one. *"WHS inspectors have responded to 57 right of entry disputes since July 2011 and found the majority of the safety issues raised were not immediate or imminent risks to workers.*[5]"

[4] *Work Health and Safety Act 2011*
[5] The Hon Jarrod Bleijie, 'Reforms ensure safer and more productive worksite' (Press Release, 13 February 2014).

Master Builders is committed to working with WHS Queensland to implement a right of entry complaints system whereby persons conducting a business or undertaking are able to report suspected abuses of WHS right of entry. Contact with WHSQ should ensure Inspectors are available to provide advice and visit sites upon request and investigate permit breaches by union officials.

Master Builders urges WHS Queensland to work harder on enforcing the permit conditions. We must have the 'rule of law' and stop safety being used as in industrial weapon in Queensland.

National consultation is an unnecessary delay

Master Builders supports allowing for codes of practice adopted in Queensland to be approved, varied or revoked without requiring national consultation, as is currently required by the *WHS Act*.

The Industry supports Safe Workplaces.

Safety committee meetings are conducted on projects in Queensland for approximately two to three hours per week. They consist of up to twenty members, including both employees of the builder, safety representatives, workers and subcontractors. Members also consist of dedicated work health and safety staff engaged by the builder. Safety committee meetings are an important investment in communication due to the dynamic changing environment on sites. Committee meetings are further supported by weekly 'safety walks involving up to 20 committee members which consist of a four to six hour inspection. This weekly safety walk allows for prompt identification and rectification of hazards and risks on the project.

Building projects must also prepare detailed WHS Management Plans which outlines the risks present and safety processes in place for the project The safety plan is communicated to subcontractors and their employees. This document is used as the basis for a site safety induction of every worker that comes onto the project. Workers are also required to participate in tool box meetings which ensure that relevant safety issues are communication to all workers.

The building industry is also well represented by independent construction specific inspectors from Workplace Health and Safety Queensland (WHSQ). Currently 40% of WHS Queensland inspectorate allocation is to the construction industry which allows most builders to receive a visit from a WHS Queensland inspector on average once every two weeks. The process also allows inspectors to engage with builders and identify any safety issues, and if required issue a relevant notice.

With these processes in place, the additional burden of union work health and safety inspections and demands without notice completely frustrates the operation of sites, lowers productivity and distracts site based WHS staff from managing the site as opposed to reacting to unreasonable union demands.

Incident Response

In the event of a critical incident, projects follow a detailed incident management process which has been put in place to ensure the incidents are handled promptly and safely. A documented critical incident plan exists which clearly outlines the processes that are to be followed in the case of an incident including:

- Immediately contacting emergency services
- Contacting Workplace Health and Safety Queensland and working with industry specific inspectors through the investigation process
- Clearing workers from any affected areas to ensure their safety or evacuating the site if required
- Prompt lodgement of an incident report to Workplace Health and Safety Queensland
- A thorough investigation of the incident by internal health and safety staff with key actions and recommendations outlined and reviewed
- Providing support through employee assistance programs to workers

The building unions completely oppose the proposed laws on the basis that they will not be allowed to attend sites after a critical incident. The policy steps outlined above clearly demonstrate the ways in which the PCBU will respond to an incident without the need for any third party interference. In some circumstances the PCBU also has an obligation to notify WHSQ.

Further amendments to strengthen proposals

As detailed in this submission and our attached national policy there have been many examples of unions using spurious health and safety issues as justification for the disruption of work on construction sites. A Queensland example can be found in the recent case of *Laing O'Rourke Australia Pty Ltd v CFMEU*,[6] the allegations by the CFMEU, the CEPU and the BLF of serious workplace health and safety issues were contradicted by an independent inspection conducted by Work Health and Safety Queensland.[7] Justice Collier stated that:

[6] [2013] FCA 133.
[7] Ibid, at [33].

> *The contrary views upon which the union officials appeared to insist during the inspection, in the face of the views adopted at the site by WHS Qld, suggest an agenda by the relevant union officials other than a pure interest in workplace health and safety issues.*[8]

The *Building and Construction Industry (Improving Productivity) Bill 2013* introduced by the Abbott Government contains a clause which stipulates that '*whenever a person seeks to rely on [the health and safety exception for industrial action], the person has the burden of proving the paragraph applies*'.[9]

Master Builders contends that the reverse onus of proof provision should also be inserted into the *Work Health and Safety Act 2011* amending section 84 '*Right of worker to cease unsafe work*'.

Master Builders submits that the reverse onus of proof provision will essentially forestall the misuse of safety but protect the rights of employees to refuse to perform duties which are genuinely unsafe.

Case studies for restoring the balance from the Federal Court or Fair Work Commission

Master Builders acknowledges the importance of health and safety in the workplace and that unions have a role in representing the interests of their members. However the behaviour of union officials must be conducted in a reasonable way, and safety is too important to be used as an industrial weapon when they don't get their own way.. The below Queensland case studies are examples of the complete disregard by the construction unions to the productivity of workers and utilising the current safety laws as an industrial weapon to achieve industrial outcomes.

The following four case studies represent a small number of the stoppages and disruptions caused by unreasonable and often unlawful behaviour on Queensland construction sites in the name of safety. Builders are extremely reluctant to enforce the WHS right of entry laws due to the well documented culture of fear, intimidation, coercion, and reprisals that exists in our industry.

The case studies highlight the disregard for section 146 'WHS entry permit holder must not delay, hinder or obstruct any person or disrupt work at workplace'[10] and obligations under the Act to carry out suitable alternative work under sections 86 ' Worker to notify if ceases work' and section 87 'Alternative work'[11].

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[8] Ibid, at [33].
[9] *Building and Construction Industry (Improving Productivity) Bill 2013*, clause 7(4).
[10] *Work Health and Safety Act 2011*
[11] Iblb, at section 86 and section 84

Case Study One:

The CFMEU and BLF utilising the current safety laws to unreasonably disrupt construction projects without notice over safety concerns. The Fair Work Commission (FWC) in matter C2013/5072 *Lend Lease Project Management & Construction Australia Pty Ltd and Construction, Forestry, Mining and Energy Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*[12] determined the unions actions were unlawful industrial action and not a genuine safety stoppage.

The 7 level project experienced a sewage leak of between five to ten square meters from a temporary toilet facility at level three on Thursday 4 July 2013. The project continued to work on the Friday and Saturday, however on Tuesday, 9 July (five days later), approximately 185 workers left the project for a meeting with a union organiser from the CFMEU who later attended the site along with an organiser from the CEPU, and two Lend Lease union delegates.

The builder was advised that the work force had voted not to return to work for the remainder of the day due to a lack of consultation in relation to the cleaning process undertaken after the temporary toilet leak on level three some five days earlier that remained barricaded off.

Site management confirmed that there was no imminent risk and instructed the workers to return to work. The builder had organised a company to inspect and report on the area that would remain barricaded.

On Wednesday, 10 July 2013, at 6 am the CFMEU union officials again entered the site through the gate without following right of entry requirements or attending the site office but taking a direct line to the basement.

The union conducted a meeting of approximately 185 workers in the basement advising they weren't happy with the WHS consultation on the previous Friday.

The Organiser was provided with a copy of the inspection report and the Organiser then demanded the area be cleaned by a third party, not just inspected by a third party.

During the Fair Work Commission hearing the CFMEU referred to the work health and safety legislation in some detail. Arguing that there is no industrial action if the workers had taken action under section 85 of the *Work Health and Safety Act 2011*.

[12] [2013] FWC 5072

The Union referred to the three elements required to establish this provision.

These are in summary of the relevant parts:

- a reasonable concern.
- a serious risk to the work health and safety of an employee and
- an immediate and imminent exposure to a hazard.

The FWC found that these three elements simply could not be made out on the facts of the matter[13].

The facts are there was a hazardous spill. It gave rise to employees' reasonable concern. But the evidence was that it was cleaned up almost a week prior to the union taking action[14].

Despite this the union continued to argue that there remained a serious risk to work health and safety and that there is immediate and imminent exposure to a hazard[15].

There was uncontested evidence by the builder that this small area had been barricaded off from the beginning and that the safety procedures was appropriate but not agreed.[16]

Master Builders notes the affected area that had been cleaned, represented less than one percent of the available work area that exceeded 30,000 square members. This was a clear case of the permit holders disrupting the work of 185 workers in breach of section 146 'WHS entry permit holder must not delay, hinder or obstruct any person or disrupt work at workplace'.[17] The lack of investigative action by WHSQ and the reluctance to hold permit holders accountable under their permits is of concern to Master Builders. Compliance with the new obligations on permit holders must form part of a new compliance and accountability strategy of WHSQ.

[13] Ibid, at [836]
[14] Ibid, at [836]
[15] Ibid, at [836]
[16] Ibid, at [838]
[17] *Work Health and Safety Act 2011*

Case Study Two:

The CFMEU and BLF utilising the current safety laws to unreasonable disrupt construction projects without notice or consultation to advance industrial agendas. The Fair Work Commission (FWC) in matter C2013/6426 *Lend Lease Engineering Pty Limited and Construction, Forestry, Mining and Energy Union; Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees* [18]determined the unions actions were unlawful industrial action.

The Fair Work Commission (FWC) found that on 14 October 2013 about 400 employees at the Queensland Children's hospital project site did not return to work after an evacuation drill. The day started around 6 am on Monday, 14 October when a number of organisers from the CFMEU and the BLF sought entry to the site without notice under section 117 *'Entry to inquire into suspected contraventions'* of the *Work Health and Safety Act 2011.*[19]

The organisers came on site because they had safety concerns about emergency evacuation procedures. The organisers insisted on a drill that day being without notice and at 8.45 am a drill was conducted on the site despite the massive disruption this caused and lost productivity for over 700 workers on site.

The Fair Work Commission on the evidence of the applicant found the drill was successful.[20] However, there was a need for some additional sirens and hand-held gas horns.

FWC found that at the conclusion of the drill the employer directed all workers to return to work. Evidence that was not disputed was that 400 workers who were identified by the employer as the CFMEU members did not return to work. The principal contractor stated that this was unlawful industrial action; the unions submits it is lawful and allowable under various safety laws. The Project Manager's evidence was that at the end of the meeting the organisers and the Health and Safety Representatives (HSR) had said words to the effect, "We're good." The Project Manager submitted that this meant there were no further issues on site[21].

Further, the Project Manager's evidence was that CFMEU members who had been working on that day had been working in the same areas as other trades who returned to work. The implication had been that the area was safe for 300 other employees. FWC accepted this view. The unions seek to rely on

[18] [2013] FWC 6426
[19] Ibid, at [802]
[20] Ibid, at [803]
[21] Ibid, at [804]

work health and safety provisions to explain the reason why 400 CFMEU employees did not return to work after the drill on 14 October.. FWC responded to the submissions in the following manner.[22].

Reliance firstly on section 118(1)(b) that regulates '*Rights that may be exercised while at workplace*' of the *Work Health and Safety Act 2011* provides a work health and safety entry permit holder the right to consult with relevant workers in relation to a suspected contravention. One of the suspected contraventions was the concerns about the evacuation drill. Some four months prior there had been some issues and an evacuation drill had not gone particularly well. The CFMEU and other organisers sought to redo the drill without notice and the employer agreed to do so. The drill was held on 14 October. On the evidence of the project builder it was successful but the employees did not return to work after that drill.[23]

The FWC considered having completed the drill, could the employees continue to rely on the work health and safety provisions or was it unlawful industrial action?

FWC found and the evidence, which was not disputed, was as follows: the drill was successful; the employees were successfully evacuated in 10 minutes; there were some extra enhancements that could, in a timely way, be implemented, but these were not so urgent that employees could not return to work; and finally the organisers said, as FWC indicated, "We're good." That is, there were no longer suspected contraventions. [24]

FWC concluded there was no basis under section 118(1)(b) to lawfully allow employees not to return to work on work health and safety grounds. However, the respondent unions relied on other grounds, these are the health and safety representative ground under section 85 '*Health and safety representative may direct that unsafe work cease*' of the *Work Health and Safety Act 2011*. This section allows representatives to direct unsafe work to cease.[25]

While it appears that the consultation between employers, HSRs, organisers and employees did occur around various emergency evacuation procedures, again these are important but it does not seem that at any time that the requirement of section 85(1) of the Work Health and Safety Act 2011 is satisfied in that there is no basis on which to cease work as a representative could not have a reasonable concern about an exposure of a worker to a serious risk to the workers' health or safety emanating from an immediate or imminent exposure to hazard.

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[22] Ibid, at [805]
[23] Ibid, at [806]
[24] Ibid, at [807]
[25] Ibid, at [808]

FWC concluded that the employees' refusal to attend work or perform work on 14 October 2013 was industrial action in that it was not action that was authorised or agreed by the employer and it was not based on a reasonable concern about an imminent risk to an employee's health or safety under either section 19 of the *Fair Work Act 2009* or the various work health and safety acts to which the FWC referred. It is therefore unlawful industrial action[26].

Another clear case of the permit holders disrupting the work of 400 workers in breach of section 146 'WHS entry permit holder must not delay, hinder or obstruct any person or disrupt work at workplace'[27] This case also demonstrates why the removal of the powers of representatives to cease work is supported by Master Builders.

Case Study Three:

A further example of an inappropriate WHS stoppage can be seen in a recent matter before the Federal Circuit Court of Australia being *Grocon Constructions (Queensland) Pty Ltd v Mason & ORS [2013] FCCA 2350.*[28] The matter was in regards to an alleged unlawful withdrawal of labour by site workers following CFMEU and BLF wrongly asserting safety issues.

Grocon Constructors (Queensland) Pty Ltd (builder), was engaged in the construction of a project at 480 Queen Street, Brisbane which experienced a stoppage whilst in its very early stages of construction.

On 18 July 2013, at approximately 6:46 am, a representative from the CFMEU and two representatives from the BLF, sought and were permitted entry subject to a notice they produced pursuant to s.117 of the *Work Health & Safety Act 2011* (Qld). It is to be noted that at that time light rain had just finished falling and as a result the workers were in the lunch sheds of the project. It was not in contest that the project policy is for workers to stop work if there is rain.

A meeting was held in the shed between site workers and representatives of the CFMEU and BLF. After the meeting, the CFMEU and BLF informed the project's General Foreman that the site workers would be leaving for the day because of a lack of "*covered access/walkways to the amenities.*" It was also alleged that those representatives advised the General Foreman that the builder ought to install covered walkways. Further, the representatives informed the General Foreman that they would return

[26] Ibid, at [812]
[27] *Work Health and Safety Act 2011*
[28] [2013] FCCA 2350

to the project on 19 July 2013 and report back to the workers to inform them whether they could work that day.

On 19 July 2013 at about 7:00am, the Project Manager for the builder, attended the site. Initially, it started to rain lightly at that time and at about 7:55am representatives arrived from the BLF

The Project Manager said that shortly after the BLF representative arrived, excavators, which until that time had been working notwithstanding the rain, ceased work and the operators of those machines made their way to the lunch room.

The Project Manager advised the court that he asked the BLF representative why he had returned and what the problem was with the project. He says that the BLF representative said to him that he had a problem with the uncovered walkways. By that time, approximately 7:55am, the weather had improved and it was no longer raining.

The Project Manager says that the BLF representative then spoke to workers in the lunch room, although this was not in his presence and that about 15 minutes later the BLF representative and the workers left the lunch room, collected their belongings and left the site.

He advised the court that he spoke to the BLF representative as the workers left the site and the representative informed him that it was the "... *workers' decision to leave as they do not believe the Project walkways are safe as they may slip and fall.*"

The court heard material evidence in the form of an affidavit by an experienced occupational health and safety professional, that, notwithstanding the concerns of the workers, the presence of water on the concrete in the vicinity of the work site does not present a hazard. The professional's risk assessment was that the uncovered walkways presented a negligible impact on the risk of slipping in wet conditions. He further noted that the likelihood of slipping on the rough concrete of the walkways was low, irrespective of whether the walkways were wet or dry.

The union argued that the BLF representative told the Project Manager that the workers did not feel safe and that it was their choice to walk off site. That is, that the workers were not induced by anything that was stated to them by representatives of the CFMEU and BLF, but it was a matter of their own choice and there was no involvement by them in any material way at all.

The builder contends that the statements ought not be viewed in isolation, but rather in a broader context, having regard to the history of the matter. That is, regard must be had not only for the events of today, but also the events of yesterday and the previous presence of representatives of the CFMEU and BLF on the site. The statements made yesterday, the representatives' presence today and the action which seemed to follow a meeting that ran for 10 to 15 minutes, are all set against the background of the agreements, which provide a mechanism for resolution of disputes that arise in the workplace.

The court, without making any findings of fact, concluded there was sufficient evidence before the court to demonstrate that the builder has a sufficient likelihood of success to justify that the CFMEU and BLF have been involved in a material way in the alleged unlawful action of the site workers, and to that end a prima facie case was established.[29]

Case Study Four:

Yet another example of an inappropriate WHS stoppage can be seen in a recent matter before the Federal Court of Australia being *Laing O'Rourke Australia Pty Ltd v Construction, Forestry, Mining and Energy Union [2013] FCA 133.*[30] The matter was in regards to an alleged unlawful withdrawal of labour by site workers for 48 hours following CFMEU, BLF, and CEPU wrongly asserting safety issues.

On 15 February 2013 the builders sought and obtained urgent *ex parte* interim injunctions in the Federal Court against nine respondents – namely three unions (the Construction, Forestry, Mining and Energy Union (" CFMEU "), the Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees ("BLF") and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ("CEPU")) and six union officials. [31]

The project is located at the corner of McLachlan and Ann Streets, Fortitude Valley, and is known as the "M&A Project". Employees at the site are employed by the second builder, Laing O'Rourke Australia Construction Pty Ltd ("LORAC") which is the head contractor and project manager of the M&A Project, and subcontractors engaged to supply labour and services to the site ("subcontractors").

[29] Ibid, at [20]
[30] [2013] FCA 133
[31] Ibid, at [2]

The background to the interlocutory application as alleged by the builders was that the project was plagued by high levels of unlawful industrial action. The builder alleged that the current industrial action has been instigated by the respondents to coerce LORAC to settle (favourably to the unions) issues concerning the right of entry of officials and organisers of the union respondents in respect of the work site, and payment for workers for 19 November 2012.[32]

There was a 48 hour withdrawal of labour from this site as a number of safety issues were identified in the commercial building including out of date electrical leads and electrical equipment, inadequate lighting, housekeeping problems and trip hazards, and incorrectly built temporary scaffolding[33].

The builder and the unions disagreed as to if safety issues at the M&A Project site created an imminent risk to the health and safety of any worker at the site.

An inspection report was produced by Workplace Health & Safety Queensland ("WHS Qld") relating to the attendance of inspectors from WHS Qld and the Building Services Authority's Electrical Safety Office ("ESO") at the M&A Project site on 19 February 2013. The court reviewed the observations in the report that was at the direction of the regional WHS Qld Director to address issues of safety that had been identified by union personnel. [34]

The court evidence was that the ESO Inspector advised that there was no imminent or immediate risk to personnel. However the unions did not accept this independent inspection.[35]

The court found in awarding the relief there was serious questions to be tried including an element of abuse in the exercise of rights of entry by officials of the three unions purportedly pursuant to the WHS Act. Then went further to note that allegations of serious workplace health and safety issues at the site are contradicted by the safety review conducted by LORAC. More particularly those allegations were not supported by the independent inspection conducted by WHS Qld and the ESO on 19 February 2013.[36]

[32] Ibid, at [10]
[33] Ibid, at [15,17,18]
[34] Ibid, at [20,33]
[35] Ibid, at [20]
[36] Ibid, at [33]

Yet another clear case of the permit holders disrupting the work of 185 workers in breach of section 146 'WHS entry permit holder must not delay, hinder or obstruct any person or disrupt work at workplace'[37]

Master Builders will continue to seek the intervention by WHSQ Inspectors to assist in the resolution of genuine safety matters.

Conclusion

Master Builders strongly supports any efforts to curtail any abuses of power by permit holders. Compliance with the new laws will be essential in order to achieve the outcomes ought from the proposed amendments. Master Builder will require assistance from WHSQ Inspectors to ensure permit holders comply with their obligations and are prosecuted for any breaches. Master Builders intends to work closely with WHSQ to ensure these new laws are effective. The PCBU needs protection from unlawful conduct and these amendments will go along way to assisting all of the parties.

The safety of Queensland construction workplaces is of utmost importance to Master Builders and we acknowledge that unions and their representatives share the same goals of ensuring the health and safety of all industry participants.

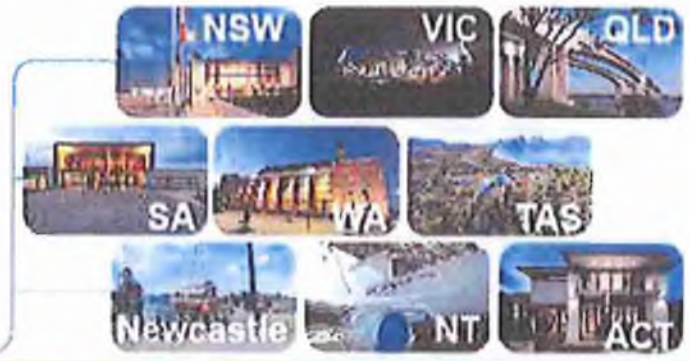
[37] *Work Health and Safety Act 2011*

Master Builders Australia

NATIONAL WORK HEALTH AND SAFETY RIGHT OF ENTRY POLICY

2014

MASTER BUILDERS AUSTRALIA



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LIST OF RECOMMENDATIONS FOR NATIONAL WORK HEALTH AND SAFETY RIGHT OF ENTRY POLICY 2013

Recommendation	1.	The person that seeks to rely on a reasonable concern about an imminent risk to his or her health and safety, as a defence to taking industrial action, has the burden of proving that the imminent risk exists.
Recommendation	2.	WHS permit holders that are found to have contravened their permit conditions should be prosecuted and the WHS permit holder's permit should be suspended or revoked.
Recommendation	3.	WHS right of entry permit holders should be required to have completed site specific induction before being able to enter a site.
Recommendation	4.	Given the history and on-going occurrence of abuse of right of entry for WHS purposes in the building and construction industry, any right of entry for union officials should be subject to them being accompanied by an authorised inspector from the relevant regulatory body if requested by a PCBU who has management or control of the workplace.
Recommendation	5.	Only union officials who are 'fit and proper persons' should be entitled to exercise the right of entry under a permit issued by an independent government authority or judicial officer.
Recommendation	6.	The model WHS laws should specify that individuals with criminal records or a history of breaches of right of entry and related provisions under Commonwealth and/or State and Territory law should not be eligible to obtain a permit.
Recommendation	7.	Union officials exercising right of entry powers for WHS purposes should be required to hold approved nationally recognised WHS qualifications under the Australian Qualifications Framework system.
Recommendation	8.	Each jurisdiction should amend its model Work Health and Safety Act to require any WHS permit entry holder wishing to enter a workplace to give at least 24 hours' written notice during usual working hours in all circumstances. If a WHS permit holder fails to adhere to these notification requirements that WHS permit holder would be subject to a penalty for breaching a condition of the WHS entry permit and WHS regulators must rigorously apply the law.

Recommendation	**9.**	Each jurisdiction amend its model Work Health and Safety Act to require a WHS permit entry holder to provide a written report as soon as practicable but at least within 14 days from the date of entering a workplace. The report should be lodged with the regulator and served on the PCBU. It should, contain the following information: • The WHS entry permit holder's full name and signature; • The permit number; • The name and address of the workplace that was entered; • Details of conversations and actions taken by the WHS entry permit holder when attending the workplace; • Details of any alleged contravention of the Act that, in the opinion of the WHS entry permit holder, has occurred; and • Whether there was considered to be a serious risk to the health and safety of a person emanating from an immediate or imminent risk and, if so, any details about the situation known to the WHS entry permit holder. Where multiple WHS entry permit holders attend a workplace on the same occasion, each WHS entry permit holder is required to submit an individual report. Failure by a WHS entry permit holder to provide a report in accordance with this provision should be grounds for a suspension or revocation of the WHS entry permit holder's permit.
Recommendation	**10.**	Each jurisdiction's work health and safety regulator should implement a right of entry complaints system whereby persons conducting a business or undertaking are able to report suspected abuses of WHS right of entry. The regulator would then be required to investigate the complaint and report back to the complainant within a reasonable period of time. It should be grounds for the suspension or revocation of the WHS permit holder's permit if the WHS permit holder has been found to have intentionally breached WHS right of entry laws or has breached WHS right of entry laws on multiple occasions.

1 INTRODUCTION

1.1 The safety and health of all participants in the building and construction industry is of the upmost importance to Master Builders Australia. Master Builders has a range of policies that promote a healthy and safe construction industry. Master Builders also acknowledges that trade unions also share these goals.

1.2 Union officials have broad rights to enter a workplace for work health and safety reasons under the model *Work Health and Safety Act* (WHS Act) and other OHS legislation.[1] Throughout this document when reference is made to work health and safety (WHS) law it includes the laws of all jurisdictions dealing with occupational health and safety however described. These rights are often the subject of dispute between employers and unions.

1.3 This policy gives an overview of the abuse of WHS right of entry powers and the current legal framework that sets out the powers and procedures for entering a workplace under a WHS right of entry permit. The policy then sets out Master Builders' proposal for reform and sets out recommendations to ensure that WHS right of entry powers are only used for legitimate purposes.

2 ABUSE OF WHS RIGHT OF ENTRY

2.1 The Cole Royal Commission into the building and construction industry was the first national review of conduct and practices in the building and construction industry in Australia.[2] The principal reasons given by the then Minister for Employment and Workplace Relations for commissioning the inquiry included high levels of complaint about freedom of association ('no ticket no start'), a strike rate that was five times the national average, massive variations in commercial construction costs from state to state as a result (sometimes as much as 25 per cent), and concerns about violence and intimidation on building sites,[3] which is clearly a WHS issue.

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[1] For example: *Occupational Health and Safety Act 2004* (Vic) and *Occupational Safety and Health Act 1984* (WA).

[2] *Final Report of the Royal Commission into the Building and Construction Industry*, Summary of Findings and Recommendations, volume 1, February 2003, 3.

[3] *Current Issues Brief* no. 30 2002-03, Building Industry Royal Commission: Background, Findings and Recommendations.

2.2 The Cole Royal Commission reported that:

> *OH&S is often misused by unions as an industrial tool. This trivialises safety, and deflects attention away from real problems. The scope for misuse of safety must be reduced and if possible eliminated.*[4]

2.3 The Royal Commission found that misuse of safety for industrial purposes compromises safety in important respects:

- it trivialises safety, and deflects attention away from the real resolution of safety problems on sites;
- the view that unions manipulate safety concerns inhibits the unions' capacity to effect constructive change;
- the widespread anticipation that safety issues may be misused may distort the approach that is taken to safety; and
- time taken by health and safety regulators to attend and deal with less important issues detracts from their capacity to deal with more substantial issues elsewhere.[5]

2.4 One of the responses to the Cole Royal Commission was the passage of the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act). Section 36(1)(g) of the BCII Act, which is now repealed, provided that employees and others were not taking building industrial action where:

> *the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and*
>
> *the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe for the employee to perform.*

2.5 This provision proscribed the taking of industrial action on the basis of spurious WHS grounds. Despite this provision, employers in the construction industry reported that abuse of WHS continued to be a problem and is confronted regularly and, on some sites, on a regular basis over protracted periods. The former Australian Building and Construction Commissioner brought a number of cases of abuse of WHS for industrial purposes to the courts.[6]

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[4] Above n1, 57.
[5] Above n1, 102.
[6] See for example: *Cruse v Construction, Forestry, Mining & Energy Union* (2009) 187 IR 335; *Alfred v Wakelin (No 4)* (2009) 180 IR 335; *Draffin v Construction, Forestry, Mining & Energy Union* [2009] FCAFC 120; *Hadgkiss v Construction, Forestry, Mining & Energy Union* (2008) 178 IR 123.

2.6 The introduction of the *Fair Work Act 2009* (Cth) (FW Act) changed this law. Section 19(2) of the FW Act excludes from the notion of industrial action, action taken by an employee based on his or her concern about an imminent risk to their health or safety and where they have not unreasonably failed to comply with an employers' direction to perform other available work. The onus of proof appears not to be the same as was under the BCII Act per *CFMEU v Hooker Cockram Projects NSW Pty Ltd*[7] where Master Builders intervened. The Full Bench of the then Fair Work Australia was of the opinion that the decision to not include a similar provision into the FW Act was intentional.

2.7 There have been many examples of unions using spurious health and safety issues as justification for the disruption of work on construction sites. For example, in the recent case of *Laing O'Rourke Australia Pty Ltd v CFMEU*,[8] the allegations by the Construction, Forestry, Mining and Energy Union (CFMEU), the Communications, Electrical, Plumbing Union (CEPU) and Builders Labourers Federation Queensland (BLF) of serious workplace health and safety issues were contradicted by an independent inspection conducted by Work Health and Safety Queensland.[9] Justice Collier stated that:

> *The contrary views upon which the union officials appeared to insist during the inspection, in the face of the views adopted at the site by WHS Qld, suggest an agenda by the relevant union officials other than a pure interest in workplace health and safety issues.*[10]

2.8 The Building and Construction Industry (Improving Productivity) Bill 2013 introduced by the Abbott Government contains a clause which stipulates that 'whenever a person seeks to rely on [the health and safety exception for industrial action], the person has the burden of proving the paragraph applies'.[11] Master Builders supports the re-establishment of this provision, i.e. the reverse onus of proof criterion. Master Builders contends that the reverse onus of proof provision should also be inserted into the FW Act.

2.9 Master Builders submits that the reverse onus of proof provision contained in the repealed BCII Act is essential if disruption of work on dubious WHS grounds is to be eliminated. The reintroduction of the repealed reverse onus of proof provision will

[7] [2013] FWAFB 3658 at [4].
[8] [2013] FCA 133.
[9] Ibid, at [33].
[10] Ibid, at [33].
[11] Building and Construction Industry (Improving Productivity) Bill 2013, clause 7(4).

essentially forestall the misuse of safety but protect the rights of employees to refuse to perform duties which are genuinely unsafe.

Recommendation 1

The person that seeks to rely on a reasonable concern about an imminent risk to his or her health and safety, as a defence to taking industrial action, has the burden of proving that the imminent risk exists.

2.10 Master Builders is aware of the industry practice of some union officials who enter a workplace to inquire about the suspected contravention of WHS laws, find a dubious WHS hazard, warns workers that they are exposed to a serious risk to their health or safety, and then directs that the workers cease work. The entire project then shuts down and all workers walk off the job under the guise of WHS concerns. Master Builders submits that this behaviour needs to be investigated by WHS regulators and breaches of the cessation of unsafe work provisions of the WHS Act, including the requirement to undertake alternative work, need to be enforced. If it is found that a WHS permit holder has pressured a worker or group of workers into ceasing work where that cessation is not in response to a reasonable concern that the worker would be exposed to a serious risk emanating from an immediate or imminent exposure to a hazard, the WHS permit holder should be prosecuted for contravening the permit conditions.

Recommendation 2

WHS permit holders that are found to have contravened their permit conditions should be prosecuted and the WHS permit holder's permit should be suspended or revoked.

2.11 Master Builders is also aware of a number of abuses of right of entry in the construction industry where builders are faced with flagrant breaches of the right of entry laws with some industry participants wearing trespass prosecutions as a badge of honour.[12] This abuse is especially evident in relation to WHS where urgent Government action to resolve the potential conflict between s121 and s146 of the harmonised WHS Act is required. In particular, the drafting of section 146 of the WHS Act makes it unclear whether or not the phrase 'or disrupt any work at a workplace' is intended to be read as being conjunctive or subjunctive. If the phrase is conjunctive, then the qualifier 'intentionally and unreasonably' would apply to a

[12] 'Union Boss Arrested in Perth' (*WA Today!*, 4 February 2011), http://www.watoday.com.au/wa-news/union-boss-arrested-in-perth-20110204-1aqlv.html accessed 20 November 2013.

disruption to work. If the phrase is subjunctive, then any disruption to work would appear to be prohibited which, prima facie, appears to be at odds with the very broad right of entry granted by s121 of the WHS Act. Master Builders has received reports that the WHS Act is being used to gain entry where disruption follows, as we now illustrate.

2.12 On 8 October 2010, CFMEU organiser, Derek Christopher, entered a building site in Bourke Street, Melbourne. While on the site, the organiser verbally abused and assaulted a project manager. The organiser was fined by the Melbourne Magistrates Court.[13] The CFMEU was also fined $10,000 by the Federal Magistrates Court after it admitted that the same organiser, Derek Christopher, repeatedly abused a site manager and threatened him with assault at a building site in La Trobe Street, Melbourne in October 2009.[14]

2.13 In *Darlaston v Parker*,[15] the Federal Court of Australia found that three CFMEU officials had breached the then *Workplace Relations Act 1996* (Cth) while on a building site under a right of entry permit on 3-4 December 2008. The three union officials failed to follow a reasonable safety instruction, namely to undergo a brief safety induction before entering the site.[16] The Court also found that CFMEU official, Thomas Mitchell, was also in breach of the Act by not following a reasonable request to come down from scaffolding,[17] CFMEU official, Brian Parker, was in breach for hindering and obstructing workers,[18] and Thomas Mitchell was found to be acting in an improper manner when he intentionally drove his car into a cyclone fence, endangering a bystander.[19]

Recommendation 3

WHS right of entry permit holders should be required to have completed site specific induction before being able to enter a site.

[13] Steve Butcher, 'CFMEU official Derek Christopher fined for assaulting manager' (*The Age*, 28 August 2013), http://www.theage.com.au/victoria/cfmeu-official-derek-christopher-fined-for-assaulting-manager-20130828-2spop.html, accessed 8 November 2013.
[14] Fair Work Building and Construction, 'Vic CFMEU penalised $10,000 for abuse and assault threats' (media release, 21 February 2012), http://www.fwbc.gov.au/vic-cfmeu-penalised-10000-abuse-and-assault-threats, accessed 8 November 2013.
[15] [2010] FCA 771.
[16] Ibid, at [125].
[17] Ibid, at [144].
[18] Ibid at [165].
[19] Ibid at [193].

2.14 The Federal Magistrates Court fined the CFMEU and two of its organisers, Michael Powell and Alex Tadic, for encouraging workers to stop work on a Victorian project on 31 January 2008.[20] While on the site it was alleged that Mr Tadic refused to comply with requests made by Victoria Police for him to leave the site and repeatedly swore at the police officers and encouraged them to "f*****g well shoot".[21]

2.15 Other historical, albeit well documented, examples below show blatant examples of abuse of WHS rights by the CFMEU or its officials; these cases comprise the tip of the iceberg.

2.16 In *Cruse v CFMEU and Stewart*[22] a bus which was travelling to a site was involved in a 'near miss' with a train at a level crossing. A stop-work meeting was called while the OHS committee discussed the issue. The site OHS representatives agreed that it was safe for the workers to return to work. By the end of the day, the head contractor had repainted the lines on the road, installed electronic signs and erected a stop-sign. Despite this, the workers voted to go on strike for 10 days. Penalty of $35,000 imposed on the CFMEU and a penalty of $7,000 imposed on the CFMEU official ($3,500 suspended for 12 months).

2.17 In *Alfred v Wakelin, Abela, Batzloff, Jones, O'Connor, CFMEU, CFMEU QLD branch, FEDFA QLD, AWU and AWU (NSW)*,[23] a maggot was found inside an employee's lunch box. The unions claimed this constituted "...major hygiene concerns with the camp". The workers went on strike twice for a total of 4 days. Two NSW Health Inspectors conducted an inspection and neither found serious breaches of hygiene standards. The CFMEU notified the AIRC of a dispute relating to the hygiene standard. The AIRC accepted that while the performance of the caterer had been less than exemplary the claim of safety problems was not convincing.

2.18 In *A & L Silvestri Pty Ltd & Hadgkiss v CFMEU, CFMEU (NSW), Primmer, Lane & Kelly*,[24] the CFMEU took action with intent to coerce a head-contractor to terminate its contract with Silvestri because Silvestri didn't have a union EBA. With intent to

[20] 'Trade union and two officials fined' (*The Australian*, 7 April 2011), http://www.theaustralian.com.au/news/latest-news/trade-union-and-two-officials-fined/story-fn3dxity-1226035600885, accessed 12 November 2013.
[21] Office of the Australian Building and Construction Commissioner, 'ABCC v Powell and Tadic' (Backgrounder, 15 July 2011), http://www.fwbc.gov.au/sites/default/files/20110715ABCCvPowellAndTadic_BG.pdf accessed 8 November 2013.
[22] [2007] FMCA 1873.
[23] [2009] FCA 2677.
[24] [2007] FCA 1047.

coerce the head contractor, the union threatened to call the NSW OHS Authority and have the job shut down.

2.19 Other common examples of routine breach of union right of entry by the CFMEU noted by Master Builders in 2013 include the following examples, none of which are before the courts:

2.19.1 CFMEU organiser who holds a federal permit enters a construction site without permission from the occupier or exercising a formal right of entry. The organiser initially alleges that there is an immediate risk to health and safety and directs workers to stop work and vacate the site. When challenged by management on the immediate risk, the organiser advises that no further work will occur until a CFMEU–appointed health and safety representative is employed on site. Despite best efforts of site management, employees of a number of subcontractors engaged on-site leave site at the direction of the organiser.

2.19.2 CFMEU official who holds a federal permit enters a construction site without permission of the occupier or exercising a formal right of entry. When told by site management to leave as he has no right to be there, he refuses to follow the formal right of entry process and threatens to close down the site (and other projects of the company) if they seek to have him removed. The organiser advises site management that he will stop all of its jobs around Melbourne unless they sign the union pattern agreement. This unlawful demand is refused. The following day, access to five of their sites is blocked by workers from other sites, allegedly at the direction of the CFMEU. This results in the prevention of concrete truck deliveries to the site.

2.19.3 CFMEU organiser who holds a federal permit enters construction site asserting that it is in accordance with right of entry. The organiser presents inter alia a Notice of Suspected Contravention (as required under the Victorian OHS Act) to a subcontractor alleging that the workers had not been provided with manual handling training and that an immediate risk to health and safety exists. Prior to issuing the notice, the organiser had directed work to cease (something that the organiser has no power to do). Whilst on site, the organiser advises the subcontractor not to work on the upcoming long weekend and also seeks to have them appoint a CFMEU

nominated health and safety representative/shop steward. WorkSafe is called in and confirms that there was no immediate risk to workers such that work should have ceased, but does not follow up on the alleged clear breach of the OHS Act by the CFMEU.

2.20 The reality reported to Master Builders by members is that in addition to union reprisals, there is simply no appetite by the relevant authorities to actively follow up on right of entry/trespass abuses, which are regularly mischaracterised as safety disputes.

2.21 To ensure that WHS right of entry powers are not abused and only legitimate WHS issues are being investigated, right of entry permit holders should be accompanied by an authorised inspector from the relevant regulatory body if requested by a person conducting a business or undertaking (PCBU) who has management or control of the workplace.

Recommendation 4

Given the history and on-going occurrence of abuse of right of entry for WHS purposes in the building and construction industry, any right of entry for union officials should be subject to them being accompanied by an authorised inspector from the relevant regulatory body if requested by a PCBU who has management or control of the workplace.

2.22 This ongoing abuse of WHS jeopardises the objective of achieving a significant and sustained reduction in building and construction workplace fatalities and injuries because it does nothing to foster the constructive approach required to achieve this outcome. The practice of using WHS as a smokescreen for other issues denigrates its importance on building sites and shows gross disrespect to those who are genuinely seeking to improve WHS performance. Safety should not be relegated to a device to obtain workplace relations outcomes.

3 WHS RIGHT OF ENTRY LAWS

3.1 Right of entry for WHS purposes is authorised under State and Territory WHS laws, although the FW Act imposes the following additional requirements on union officials seeking to exercise those rights:

- A union official who wishes to enter a site for WHS purposes must have an entry permit under the FW Act as well as a WHS permit. A permit

holder must produce his or her permit for inspection when requested to do so by the occupier of the site or an affected employer.

- A permit holder may only exercise right of entry under WHS laws during work hours.
- A permit holder must not exercise a WHS right unless he or she complies with any reasonable request by the occupier of the site to comply with any WHS requirements that apply to the site. For example, a permit holder may be asked to wear personal protective equipment or follow a particular route to gain access to part of the site.
- A permit holder must not exercise a WHS right to inspect or otherwise gain access to an employee record unless the permit holder gives at least 24 hours' notice.

3.2 An application for a WHS entry permit can only be made by an employee of a union. Applications to be issued with a WHS right of entry permit are made to the Fair Work Commission. The process of obtaining a WHS right of entry permit should be subject to strict guidelines. Only 'fit and proper' persons as defined under an enhanced test advocated by Master Builders[25] should be able to hold a WHS right of entry permit. A WHS entry permit gives the holder broad powers to enter workplaces and investigate WHS issues. Ensuring only 'fit and proper' persons are able to obtain a permit would be a useful vetting tool in this regard. Any person who has a criminal record or a history of breaches of right of entry provisions should also not be able to hold a WHS right of entry permit.

Recommendation 5

Only union officials who are 'fit and proper persons' should be entitled to exercise the right of entry under a permit issued by an independent government authority or judicial officer.

[25] Master Builders Australia, 'Submission on Strengthening Corporate Governance of Industrially Registered Organisations – Introducing a New Fit and Proper Person Test', Submission made to the Minister for Workplace Relations, 26 August 2013.

Recommendation 6

The model WHS laws should specify that individuals with criminal records or a history of breaches of right of entry and related provisions under Commonwealth and/or State and Territory law should not be eligible to obtain a permit.

3.3 WHS is a complex area in which regulations, codes of practice and guidelines change frequently, and nowhere is this truer than in the building and construction industry. This is sufficient reason in itself to require officials who wish to enter a site for WHS purposes to have specialised WHS knowledge and relevant industry experience. Right of entry powers are more likely to be inappropriately exercised by union representatives who do not have relevant WHS training and expertise, thereby causing disruption to the workplace where there may not be a genuine WHS issue.

Recommendation 7

Union representatives exercising right of entry powers for WHS purposes should be required to hold approved nationally recognised WHS qualifications under the Australian Qualifications Framework system.

3.4 The WHS Act contains two grounds which allow a permit holder to enter a workplace for WHS purposes. The first ground allows entry to inquire about a suspected breach of the WHS Act that relates to or affects a relevant worker. If the permit holder enters under this ground, he or she may examine employee records for the purposes of investigating the suspected breach, provided that they give advance notice. The second ground allows entry into the workplace in order to advise or consult on WHS matters. In order to understand how these grounds should be applied and interpreted, an interpretative guideline has recently been published by Safe Work Australia. Although the guideline gives the regulator's current view about how the grounds should apply, these matters have not yet been tested in the courts.

3.5 Union officials entering a site for WHS purposes possess broad but limited powers on site. They may only:

- consult with relevant workers in relation to the suspected breach;
- consult with the relevant person conducting a business or undertaking (PCBU) about the suspected breach;

- require any PCBU to allow the permit holder to inspect and make copies of relevant documents that are kept at the workplace or are accessible from a computer that is kept at the workplace; and
- warn any person who the permit holder believes is at risk from exposure to a hazard.

3.6 Advance notice of entry is required when the permit holder is entering to inspect employee records related to a suspected breach or to consult with workers on health and safety matters. Such notice must be given during usual working hours at a particular workplace at least 24 hours, but not more than 14 days, before the entry. If a permit holder enters a workplace to investigate a suspected breach, he or she must give notice of entry and notice of the suspected breach as soon as is reasonably practicable after entry. However, the permit holder does not have to give notice if it would defeat the purpose of entry; for example, result in the destruction of evidence, or unreasonably delay the permit holder in an urgent case. Another example is, workers being exposed to a hazard that posed a serious and immediate threat to their health and safety.

3.7 The Queensland Attorney-General has announced that the Queensland Government will be introducing amendments to the model *Work Health and Safety Act 2011* (Qld) which will require WHS right of entry permit holders to give at least 24 hours' written notice before they can enter a worksite to inquire into a suspected breach of the *WHS Act*.[26] Master Builders submits that requiring a permit holder to give at least 24 hours' written notice during usual working hours in all circumstances before they enter a worksite would help to curb the misuse of WHS right of entry laws where work health and safety is used as a guise for industrial relations ends. WHS permit holders that breach the conditions of their right of entry permit should be subject to the civil penalties contained in the model WHS Act.

[26] The Hon Jarrod Bleijie, 'Government to stamp out right of entry abuses' (Press Release, 5 October 2013).

Recommendation 8

Each jurisdiction should amend its model *Work Health and Safety Act* to require any WHS permit entry holder wishing to enter a workplace to give at least 24 hours' written notice during usual working hours in all circumstances.

If a WHS permit holder fails to adhere to these notification requirements, that WHS permit holder must be penalised for breaching a condition of the WHS entry permit.

3.8 A WHS safety permit holder is not currently required to give prior notice when entering a workplace to inquire into a suspected breach of the WHS Act. However, as soon as reasonably practicable after entering the workplace the WHS permit holder must give notice of entry and the suspected breach to the PCBU, and the person with management or control of the workplace. When providing this notice the WHS entry permit holder is not required to identify specific safety concerns, but may only enter if they have a reasonable suspicion that a breach is occurring or has occurred. The interpretative guideline states that to have a reasonable suspicion, the entry permit holder must have some information about the events that have caused, or are causing the breach; for example, a complaint from a worker which details the events that constitute a breach. However, as permit holders do not need to reveal their reasonable suspicion to the employer upon entry, it will be difficult for employers to assert that a permit holder has entered unlawfully.

3.9 In addition to the general entry notice requirements, the notice of entry to inquire about a WHS breach must include, as far as reasonably practicable, the particulars of the suspected breach. The requirement makes entry permit holders accountable for the proper exercise of right of entry. An inability to provide particulars may call into question the reasonableness of the belief that a breach occurred. Alternatively, knowledge of the particulars of the suspected breach better isolates safety concerns.

3.10 Master Builders recommends that those who enter a worksite for safety reasons should be required to supply a report to the PCBU detailing any conversations and actions taken while at the workplace, the details of any alleged contravention of the WHS Act, and whether any serious risk to the health and safety of a person emanating from an immediate or imminent risk and, if so, any details about the situation that are known by the WHS entry permit holder. This information will not only support the legitimacy of the entry but will also add to the state of knowledge of safety hazards.

Recommendation 9

Each jurisdiction amend its model Work Health and Safety Act to require a WHS permit entry holder to provide a written report as **soon as practicable** but at least within 14 days from the date of entering a workplace. The report should be lodged with the regulator and served on the PCBU. it should contain the following information:

- The WHS entry permit holder's full name and signature;
- The permit number;
- The name and address of the workplace that was entered;
- Details of conversations and actions taken by the WHS entry permit holder when attending the workplace;
- Details of any alleged contravention of the Act that, in the opinion of the WHS entry permit holder, has occurred; and
- Whether there was considered to be a serious risk to the health and safety of a person emanating from an immediate or imminent risk and, if so, any details about the situation known to the WHS entry permit holder.

Where multiple WHS entry permit holders attend a workplace on the same occasion, each WHS entry permit holder is required to submit an individual report. Failure by a WHS entry permit holder to provide a report in accordance with this provision should be grounds for a suspension or revocation of the WHS entry permit holder's permit.

3.11 Master Builders also recommends that each jurisdiction's work health and safety regulator implement a right of entry complaints system whereby persons conducting a business or undertaking are able to report suspected abuses of WHS right of entry. The regulator would then be required to investigate the complaint and report back to the complainant within a reasonable period of time. This complaints system may go some way to deterring unlawful or inappropriate behaviour by WHS right of entry permit holders.

Recommendation 10

Each jurisdiction's work health and safety regulator should implement a right of entry complaints system whereby persons conducting a business or undertaking are able to report suspected abuses of WHS right of entry. The regulator would then be required to investigate the complaint and report back to the complainant within a reasonable period of time.

It should be grounds for the suspension or revocation of the WHS permit holder's permit, if the WHS permit holder has been found to have intentionally breached WHS right of entry laws or has breached WHS right of entry laws on multiple occasions.

4 CONCLUSION

The abuse by unions of WHS right of entry laws is widespread within the building and construction industry. When unions use 'safety issues' as a means of entry into construction sites to push industrial relations agendas, they devalue the importance of safety in the workplace. Master Builders acknowledges that unions play an important role in ensuring that workers are protected at work. However, unions are not work health and safety regulators and need to play a constructive role in promoting safety at work instead of using it as an industrial relations weapon. Master Builders contends that there would be a reduction of WHS abuses and malpractice by adopting the 10 recommendations of this policy, creating an environment of WHS best practice by eliminating the devaluing of 'safety' by permit holders under the guise of industrial relations purposes.

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