

9 June 2015



The Research Director  
Finance and Administration Committee  
Parliament House  
George Street  
Brisbane Qld 4000  
By email to: [fac@parliament.qld.gov.au](mailto:fac@parliament.qld.gov.au)

**RE: Inquiry into the Work Health and Safety and Other Legislation Amendment Bill 2015**

Dear Chair

Master Builders is the peak industry association representing building and construction employers in Queensland since 1882. With over 8,500 members, Master Builders is the voice of the industry with a membership consisting of builders, trade contractors, suppliers and consultants in the housing and commercial sector of the Industry. While Master Builders and its membership acknowledges that Workplace Health and Safety is the most important part of every business, it cannot support all of the proposed amendments as highlighted in the Work Health and Safety and Other Legislation Amendment Bill 2015.

Master Builders and its members routinely face unlawful right of entry to building sites by permit holders who simply refuse to follow the rule of law in Queensland. Health and safety has become a bargaining tool by some unions and Master Builders believe that the issue of Workplace health and safety is too important to be used in this fashion. The repeal of the current WHS Right of Entry requirements for permit holders will see a return to a blatant and complete disregard for any rights of the PCBU/Occupier and an abuse of union power without any consequences for those breaches.

Master Builders contends that some middle ground can be found that protects the interests of employers and employees without having to repeal the current legislation. The submission provides for two practical solutions that if adopted will properly balance the interests between the PCBU's and permit holders. Master Builders strongly encourages the committee to review these options.

The Government should ensure that the rule of law is respected by all parties and the system needs to encourage consultation and cooperation without safety issues being used as an industrial weapon. Master Builders appreciates the opportunity to make our submissions and wants to work closely with the Government to deliver a health and safety environment that protects and balances the interests of employers and employees.

Regards



**John Crittall**

Director Construction and Policy

## **Master Builders Submission to the Finance and Administration Committee on the WHS Union Right of Entry 9 June 2015**

### **RIGHTS AND RESPONSIBILITIES**

#### **Introduction**

Master Builders is the peak employer industry association representing over 8000 employers in the building and construction industry in Queensland since 1882. Master Builders and its members believe health and safety to be the primary goal for everyone working in the industry. Master Builders is a strong advocate for improving health and safety and has had a long and active history in contributing to making the industry a healthier and safer place in which to work.

Master Builders strongly opposes the current proposal to “restore the right of entry powers allowing union representatives holding Workplace Health and Safety (WHS) entry permits to gain immediate access to a workplace to inquire into a suspected contravention of the WHS Act”. A return to the old failed laws and allowing unfettered access for militant unions to act unlawfully is a seriously retrograde step that will do nothing for improving safety and will further damage the industry’s reputation.

The submission is broken into three parts. The first part seeks to highlight the failure of the right of entry laws (ROE) which the Government wishes to re-instate. The previous legislation was seriously flawed and abused without any restrictions or consequences on the parties which routinely breached their obligations. The second part of the submission illustrates how the change to the WHS entry laws in 2014 has worked to curtail the most grievous actions of unlawful conduct by permit holders. While the change did not stop all unlawful conduct by permit holders it did provide an effective remedy to have the unlawful conduct addressed. The changes were beginning to hold permit holders accountable for their actions while providing a significant deterrence to others contemplating breaching their obligations. The third part of the submission provides a number of options that would provide immediate access for permit holders (in limited circumstances) while preserving the integrity of the health and safety system. Providing a regime of appropriate sanctions for unlawful conduct should also form part of managing the rights and responsibilities with respect to this important issue.

#### **Owners and Occupiers have rights as well**

The laws of ‘Right of Entry’ are firmly established on the basis that there are times when the rights of an “occupier” can be qualified or overridden for the public benefit. Statutory powers which override common trespass laws by allowing other parties to enter private property are serious provisions and should be respected by the parties being given the benefit of those provisions. Governments have usually been very careful in ensuring the rights of the occupier are protected before usurping those rights in statute.

Master Builders believe the current requirement that WHS permit holders provide 24 hours’ notice before lawful entry gives an occupier adequate protection and allows for the better management of any health and safety concerns provided by the permit holder. The Government needs to examine the effect of the changes brought in by the 2014 laws in

managing unlawful entry before simply restoring rights to WHS permit holders without any consideration of the impact of those changes on the occupiers.

Master Builders contends that the existing ROE provisions provide the right balance between the competing rights of the occupiers and the WHS permit holders.

### **Master Builder opposes repealing of the 24 hour notice requirement for WHS permit holders**

The ROE laws that the government want to re-instate are failed laws. They seek to provide immediate entry for permit holders to workplaces under the “condition” of a suspected contravention of the *Work Health and Safety Act 2011* (the Act). The requirements for entry under this section were so broad and so loose that it became the easiest way for permit holders from the Construction, Forestry, Mining and Energy Union (CFMEU) to enter sites unlawfully. The section was abused so often that the mantra of the CFMEU permit holders merely declared “we are entering under section 117 of the Act and there is nothing you can do to stop us”.

Master Builders *Submission to the Finance and Administration Committee on the WHS Union Right of Entry February 2014* provided numerous examples of industrial action taken after permit holders had entered sites under section 117. Oral submissions were also made to the Committee of the endemic refusal of WHS permit holders to follow safety requirements for the project (as per Section 128 of the Act and section 499 of the *Fair Work Act 2009*), to sign in the visitors book, to show their permits, to be escorted through the site, to undertake site inductions and on some occasions refused to wear the protective equipment that applied to all workers on the site. In essence section 117 was relied upon by the permit holders to enter sites without even attempting to acknowledge a contravention or breach of the Act. The tactics became so brazen that they even dared the occupier to “try and stop” us.

Occupiers were helpless and any efforts to assert their rights were met with threats and intimidation. The permit holders having breached their right of entry proceeded to hold discussions, inspect all aspects of the site and cause as much disruption as possible. The permit holders having gained unlawful entry then merely went about their business. Regular and unwarranted stoppages of work and a complete disregard for the rights of the Principal Contractor (PCBU) and subcontractors were standard practice. The CFMEU wilfully abused this section of the legislation to follow their industrial agenda without any consideration for genuine safety matters. The system had completely failed obligation holders who were trying to manage health and safety on the project.

When the LNP Government were examining the best way to reform the Right of Entry provisions for permit holders under the WHS Act, the WHS regulator was commissioned to investigate any alleged complaints or breaches of the ROE requirements under the Act. Between 2011-12 and 2012-13 WHS Inspectors responded to 57 right of entry disputes at construction workplaces.<sup>1</sup> The explanatory notes to the Bill noted:

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<sup>1</sup> Explanatory notes 2014 WHS Amendment Bill

*“Most disputes related to entry without prior notice to inquire into a suspected contravention of the Work Health and Safety Act 2011. Inspectors reported that notices were issued on occasion, but that overall none of the issues identified were considered to be an immediate or imminent risk to workers or others at the workplace”.*

The explanatory note and the results of the investigations merely confirmed what everyone in the industry already knew. The law had failed the fairness test and the CFMEU was taking advantage of poor legislation that allowed them to operate unlawfully and with impunity. The permit holders rarely provided written evidence of the “suspected” contravention, were not required to limit their inquiries to the matters raised at the point of entry and went on to “delay, hinder and obstruct” (Section 146 WHS Act) whenever they had their own industrial agenda to pursue.

The current Bill also seeks to go beyond merely re-instating the previous legislation. The Bill includes a new section 119(2) that seeks to further undermine the rights of the PCBU/ Occupier. The newly proposed section provides an excuse for failing to give the PCBU any reasons for entry if it doesn’t suit the permit holder. Section 119 notes that the permit holder should provide a notice “of entry” to the PCBU “as soon as reasonably practicable” after entering the workplace, specifying the alleged suspected contravention in accordance with the regulation. The proposed new section 119(2) completely negates the notice requirements under section 119 by allowing for the notice requirement to be ignored if the notice would “defeat the purpose of the entry” or cause unreasonable delay in their inquiry i.e. an emergency situation.

The inclusion of these additional excuses for failing to give the PCBU adequate and sufficient notice with respect to the alleged suspected contravention are completely opposed by Master Builders. The permit holders who routinely breach the notice requirements are now being given further ammunition to ignore the notice requirements under 119. Master Builders supports more detail and further clarification on what constitutes “suspected contravention” with details to be provided in writing to the relevant PCBU within 24 hours of entering the site. Failure to strictly follow the notice requirements should be deemed a breach and permit holders must be held accountable for those breaches.

### **CFMEU wilful contempt for the rule of law**

The CFMEU continues to disregard the Queensland and Federal laws of ‘right of entry’. Whilst the union’s officials have shown a special disregard for the 24 hour notice requirements and the provision regarding a “suspected contravention” the union has not veered from its apparent strategy that all the right of entry laws are optional for its officers. This behaviour has been demonstrated over the past 12 months with ongoing disruption of construction projects, obstruction of site personnel and employers trying to run a business, intimidation, and contempt for the basic safety requirements of the site. The CFMEU has demonstrated a complete disregard for the rule of law.

## **Applications to revoke WHS entry permit under *Work Health and Safety Act 2011*, section 138**

Master Builders is aware of six applications made by the regulator, Office of Fair and Safe Work, (OFSWQ) filed with the Queensland Industrial Relations Commission in 2014 concerning alleged contraventions of the WHS entry requirements under the Act. The Applications made by the OFSWQ were to revoke WHS entry permits under section 138 of the Act. The Applications are against the CFMEUQ and six of its officials. These Applications are supported by sworn evidence of Investigators within OFSWQ.

Five of the Applications are identified;

|  |                      |
|--|----------------------|
| Kevin Stewart Griffin (Matter No: WHS/2014/80) | filed 17 July 2014   |
| Anthony Robert Kong (Matter No: WHS/2014/78)   | filed 17 July 2014   |
| Edward Molloy Bland (Matter No: WHS/2014/79)   | filed 24 July 2014   |
| Adam Leon Olsen (Matter No: WHS/2014/83)       | filed 1 August 2014  |
| Michael Matthew Myles (Matter No: WHS/2014/88) | filed 14 August 2014 |

Each Application includes grounds that the named official has acted or purported to act in an improper way in the exercise of his rights as a WHS permit holder under the Act by;

- Not providing 24 hour written notice;
- Not reporting to site office;
- Not signing the visitor' register;
- Not complying with PPE and site WHS requirements;
- Intentionally hindered or obstructed a person conducting the business
- Disrupting work
- Refusing to leave the workplace when requested to do so

Master Builders would encourage the Committee to monitor these cases. If there were serious sanctions applied to permit holders who deliberately and flagrantly breached the ROE notice requirements then it would act as a deterrence for future permit holders contemplating similar breaches.

### **CFMEU Policy to breach 24 hour notice requirements**

There is no doubt that the CFMEU leadership hide behind alleged safety issues to pursue its industrial interests. If the CFMEU have an industrial problem with a contractor the first port of call is to breach the ROE requirements and demand to enter site for the purposes of inquiring into a suspected health and safety breach. A recent example highlights the rationale and strategy behind the CFMEU's standard operating model. The allegations in the case involves a serial offender (permit holder) who decided to make an example of a company that sought to follow the rule of law. The permit holder took offence to having to provide 24 hours' notice and when confronted with this reality, threatened the company and held meetings off-site to disrupt the project as much as possible. The quotes from the Fair Work Building & Construction press release highlight the allegations. (See appendix A)

Fair Work Building & Construction has launched Federal Circuit Court proceedings against the CFMEU and one of its officials after he allegedly disrupted two major concrete pours, causing significant financial loss to the head contractor.

FWBC is alleging that CFMEU official Michael Myles disrupted work on the \$60 million project at the Queensland University of Technology, on four separate occasions, before returning to the site a fifth time to direct workers to down tools after his demands to stand down the site manager were not met. He also wanted site management to disregard right of entry laws, for an extra labourer to be employed and for CFMEU flags to be flown from the site's cranes. FWBC has also filed proceedings against 40 workers as a result of the alleged strike. Two of the workers are CFMEU delegates.

FWBC is alleging that Mr Myles held eight separate meetings with the workers over five days, with the meetings lasting for up to two-and-a-half hours. As a result of these meetings, two major concrete pours which were scheduled to take place could not proceed.

When asked whether he held any imminent safety risks or safety concerns and why he was on site, Mr Myles allegedly told the site manager *"No, I'm just here to meet with the workers"*. The project manager told Mr Myles he was trespassing. When police arrived, Mr Myles had moved to an area off site near the boundary fence. Police issued him with a move on order.

After disrupting the site for a third day, Mr Myles allegedly informed the site manager that *"Things could return back to normal if my access to site is not restricted, that is, no 24 hour notice and no sign in so I can carry on discussions with the workers. You've also got a need for an extra labourer to clean sheds and you've got to have flags on the cranes"*.

Unsatisfied with the response of *"No way"* he received from the project manager, Mr Myles allegedly organised a meeting in the carpark of the site and advised the site manager that *"The meeting has decided that as a result of your actions in causing safety issues on site, you need to be stood down from the site for one day and that you need to be re-inducted. The men are going to sit out and not do any work until you comply with this requirement"*.

The site manager advised that he was happy to compromise, offering to complete some audits. FWBC alleges that Mr Myles replied *"No we have decided, we want you stood aside and re-inducted,"* before the 40 workers downed their tools and walked off site.

The allegations in the case outlined above provide an insight into the internal operations of the CFMEU. The permit holder was allegedly threatening the company with ongoing unprotected industrial action if the company continued to insist on the ROE notice requirements.

This constant threat and intimidation by permit holders continues across multiple contractors on many sites. A number of companies have been so threatened and intimidated by the constant unlawful behaviour of the CFMEU that they capitulated to the union threats and failed to take any action when the WHS notice requirements were abused.

### **Using Safety as a deliberate industrial strategy**

The CFMEU has also identified other weaknesses in the Act and regularly use safety as the mechanism to pursue other industrial interests. If a project can be stopped for alleged safety reasons the workers may still be paid and the site suffers the most disruption and the most costs without any detriment to the workers. It is a cynical response to safety issues which are so important to the industry.

In the pursuit of this industrial agenda, the CFMEU have produced a standard short list of potential safety issues (see Appendix B) that can be raised to stop the project if they don't receive the appropriate response to whatever claim they have generated. The CFMEU identified long ago that you needed to identify specific safety issues that potentially impacted on the whole site so that everyone could be 'put in the sheds' or sent home for maximum impact on the project.

Using elements from this list also prevented some workers from continuing to work in demonstrably safe areas while others ceased work. If a permit holder stopped the whole project it would create the most inconvenience and highest cost of disruption for the PCBU while neutralising any conflict over who had to work and those who got paid for sitting in the sheds. Stopping the whole project in complete defiance of Section 87 (that allows the PCBU to find suitable alternative work when safety issues arise) has become a standard strategy for CFMEU officials.

Master Builders Queensland provided this list to a national submission to Safe Work Australia by Master Builders Australia (MBA)<sup>2</sup> who was seeking to expand the 24 hour notice requirement for WHS purposes to other jurisdictions. MBA advises Master Builders Queensland that other states are currently considering adopting the 24 notice requirement for WHS entry purposes at the same time that the new Queensland Government is seeking to repeal it. Using safety as an industrial weapon, undermines the importance of genuine safety issues and provides a cynical response from the CFMEU.

The industry needs improved compliance from permit holders under the Act rather than watering down the current provisions as intended by the proposed Bill. Union officials routinely breach ROE provisions and regularly disrupt work in breach of their permit obligations. The Government should not assist this cynicism by allowing unfettered entry for health and safety reasons that have no substance.

There is overwhelming evidence that construction sites are systematically targeted for unlawful entry by the CFMEU whenever it suits their industrial purposes. Companies report

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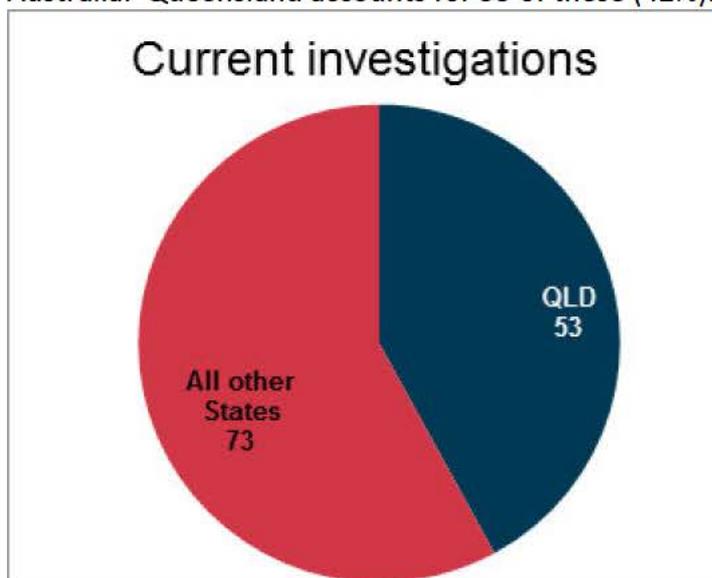
<sup>2</sup> National Work Health and Safety Right of Entry Policy – July 2014 – Master Builders Australia

on a daily basis breaches of entry by organisers of the CFMEU. If the union wants the Builders to hire a “union delegate” or suspects the Builder had engaged a trade contractor without the appropriate union agreement or wants to make any number of typical union demands then making up bogus safety issues and creating unlawful stoppages becomes the standard *modus operandi* for the CFMEU.

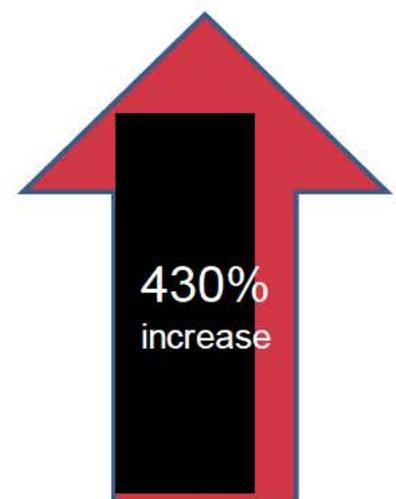
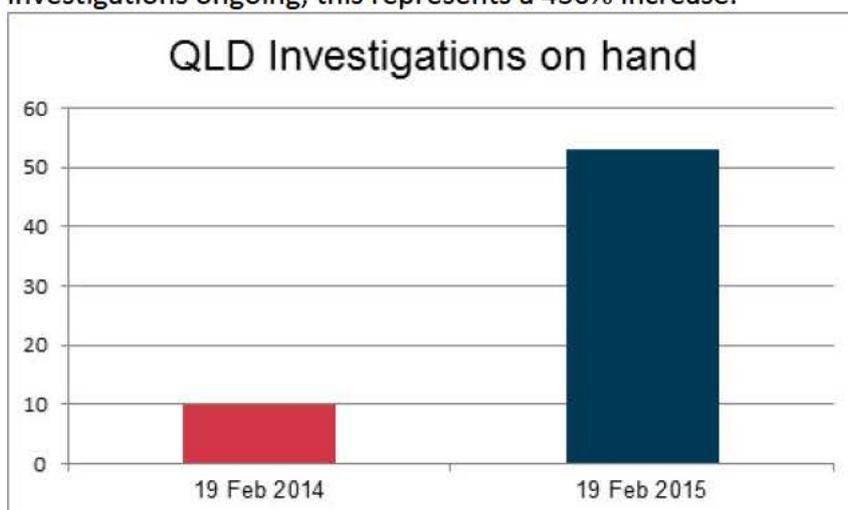
The Queensland building industry has become the most unlawful state in Australia and any watering down of the ROE requirements will merely exacerbate the current situation.

### FWBC Statistics regarding alleged unlawful industrial conduct

As of Friday, 19 February 2015, FWBC had 126 ongoing investigations around Australia. Queensland accounts for 53 of these (42%).

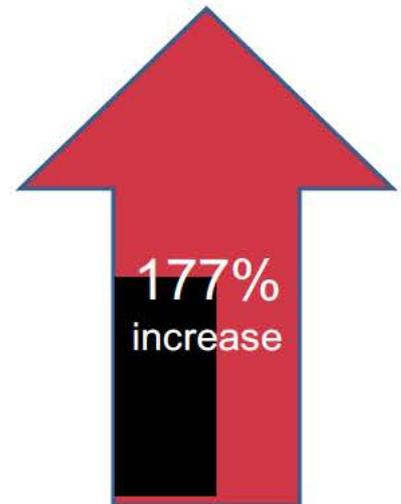
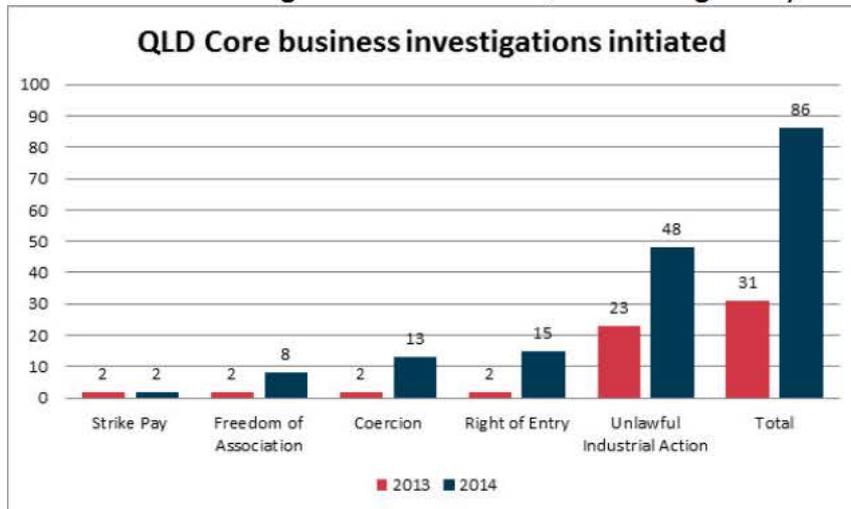


On the same day last year, Queensland’s workload was significantly less with only 10 investigations ongoing, this represents a 430% increase.

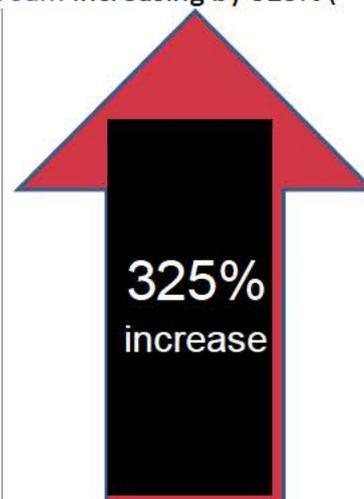
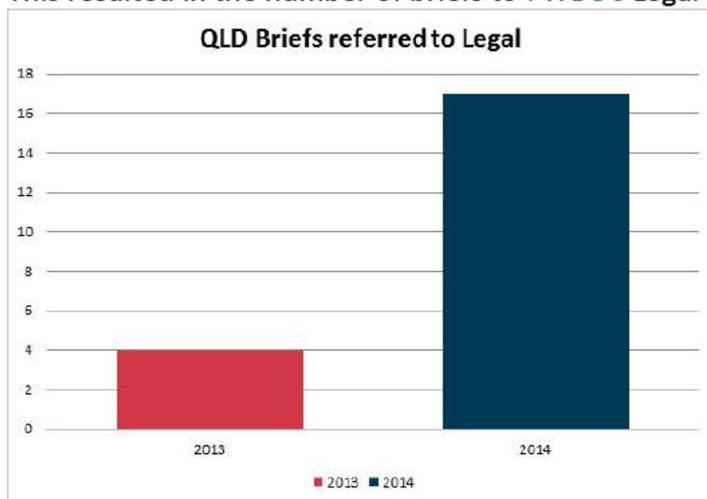


FWBC's core business includes allegations of Strike Pay, Unlawful Industrial Action, Right of Entry, Coercion and Freedom of Association breaches.

Core business investigations initiated in Queensland grew by 177% from 2013 to 2014.

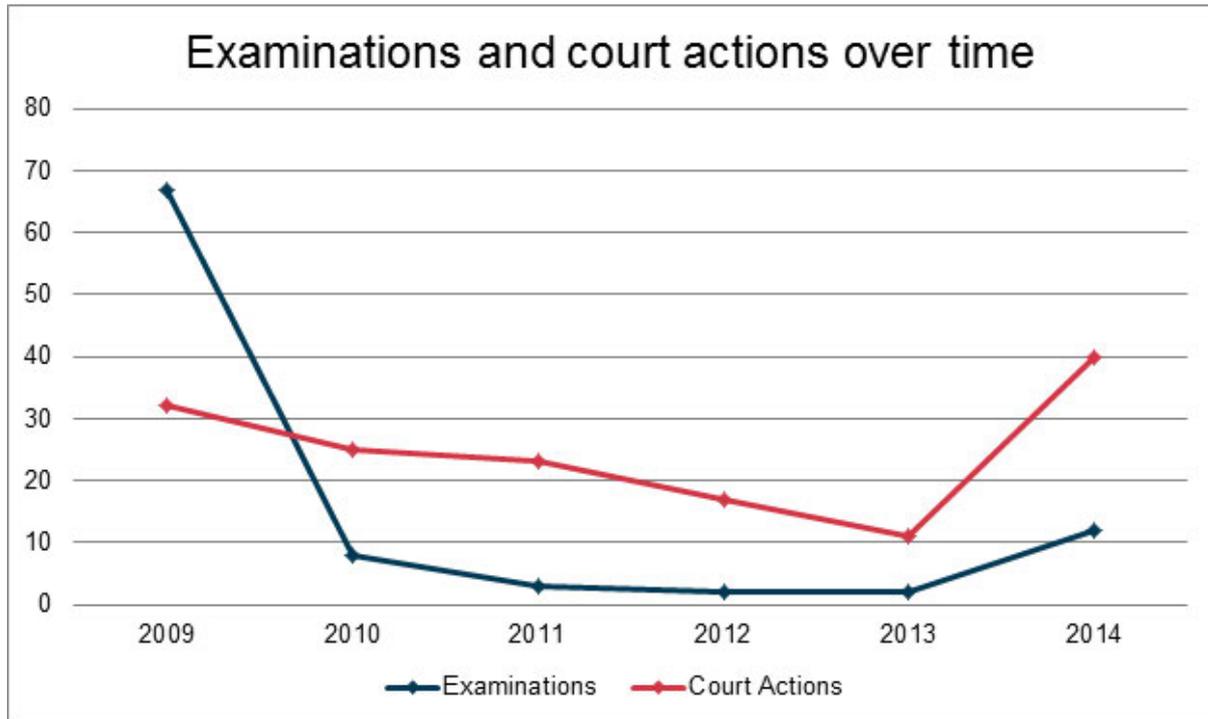


This resulted in the number of briefs to FWBC's Legal Team increasing by 325%



67 examinations were conducted in 2009. This number decreased to 8 in 2010, followed by 3, 2 and 2 respectively from 2011 to 2013. The number increased to 12 in 2014.

Court actions increased from 11 in 2013 to 40 in 2014.



#### **ABS September 2014 release regarding industrial disputes**

- In September quarter 2014, there were 55 disputes.
- There were 24,600 working days lost due to industrial disputation in September quarter 2014, an increase from 20,200 in June quarter 2014.
- The construction industry (13,700) accounted for 56% of total working days lost in the September quarter 2014.
- Queensland (12,300) had the highest number of working days lost of any state or territory in September quarter 2014, accounting for 50% of total working days lost. Queensland also had the highest number of working days lost per 1,000 employees (5.9) for the quarter.

#### **The FWBC also published further information with respect to allegations of unlawful conduct by the CFMEU in Australia and Queensland.**

1. 13 February 2015 – Media Release - CFMEU official allegedly locks non-union workers out of smoko shed and throws out their lunch
2. 11 February 2015 – E-Alert - Urgent message for Brisbane building & construction workforce
3. 6 February 2015 – Media Release - CFMEU its officials & site delegates broke law 78 times on one site, FWBC says
4. 23 October 2014 – Media Release - FWBC takes action against employer, union and workers
5. 6 August 2014 – Media Release - Urgent message for Brisbane builders taking part in rally
6. 11 July 2014 – Media Release - Urgent message for Brisbane builders on Lend Lease site

7. 10 July 2014 – Media Release - Judge finds CFMEU’s actions represent “gross failure of corporate governance”
8. 5 May 2014 – Media Release - Urgent message for Brisbane building and construction workers
9. 13 April 2014 – Media Release - Court extends injunction to 31 workers
10. 11 April 2014 – Media Release - CFMEU in court after allegedly warning of another "Ark Tribe"
11. 3 April 2014 – Media Release - CFMEU facing court for alleged action at Brisbane project for long-term homeless
12. 28 March 2014 – Speech - Address to MB QLD Industry Leaders Lunch – Nigel Hadgkiss
13. 3 March 2014 – Media Release - Union officials penalised for hindering work on Brisbane construction site
14. 4 December 2013 – Media Release - FWBC urges workers to return to Queensland building sites

This is typical CFMEU behaviour and the costs of the disruption and the loss of productivity continues to damage the reputation of the building industry. The Queensland Government should not encourage this unlawful behaviour by making it easier for the union to behave in this manner.

### **Impact of the 24 Hour Notice Requirements**

The introduction of the 24 hours’ notice requirements for entry to building sites by WHS permit holders for the purposes of WHS entry began to see an orderly and respectful process for managing genuine health and safety issues. The requirements went a long way in restoring the balance between the PCBU needs and the needs of the permit holders. The 24 hour notice provisions were not designed to “keep anybody out”. They were designed to match the entry requirements under the *Fair Work Act 2009* and provide a fair and sensible process for handling any matters the unions wanted to raise.

The 24 hours’ notice requirement was an easy issue to prove. One of the strengths of the provision was in relation to proving whether an offence had been committed. Occupiers could simply ask for evidence of the notice requirements having been given. If the permit holders had failed to give the requisite notice, then entry could be refused. A number of builders set up a special ROE email address to assist permit holders centralise their request for entry by nominating the sites they wished to enter. In the event that a permit holder was seeking unlawful entry, the PCBU had a number of options to enforce the rule of law.

In the first instance the permit holder was denied entry. If this failed the PCBU informed the permit holder that they are trespassing and that the OFSWQ would be contacted. The OFSWQ has established a single contact point for suspected ROE breaches. The OFSQ provided immediate advice to the PCBU on how to manage the ROE request and often provided personnel to come to site and assist in the resolution of the matter. The Queensland Police Service had also been consulted and trained with respect to managing requests from a PCBU if confronted with an alleged unlawful request for entry. The failure

to provide written notification requesting entry by the permit holder assisted the Police in managing their obligations and ensuring the rule of law was being applied. The OFSWQ provided information on how to manage a request for entry with guidelines produced for all of the parties on how to process a request. Builders working on Government projects were also required to comply with the Queensland Code of Practice for the Building and Construction Industry that created additional obligations with respect to properly managing ROE requests and possible breaches by permit holders. A number of unions sought information from the Regulator on how to make their requests and PCBU's /Occupiers were encouraged to support those permit holders and unions that were complying with the requirements. PCBUs began to receive 24 hour notices requesting entry and those requests were honoured and respected.

While the industry started to see some compliance by other industry unions with the new ROE laws, the CFMEU continued to defy the law. If it had an industrial agenda to pursue they would simply enter sites unlawfully and challenge builders to ring the police. This behaviour is in stark contrast to other unions who simply followed the 24 hour notice requirements, gaining access and using all of their powers of entry appropriately.

The fact that a number of building related unions abided by the 24 notice requirements and came on to site legally, confirms the ease and balancing of the rights of the permit holders with the PCBU/Occupier. Master Builders contends in option 2 later in this submission that only parties that wilfully seek to act unlawfully in defiance of the legislation are those parties who should be penalised. Breaching ROE laws are not minor offences and should have adequate penalties that discourage this form of unlawful conduct.

It is interesting to note that when the CFMEU wanted to hold numerous site meetings during Safety Week, they complied with the notice requirements and were allowed access to address the site. The 24 hours' notice requirement was not too onerous and the Builders were happy to cooperate as the lawful notices had been issued. The law could work if the parties wanted to follow it.

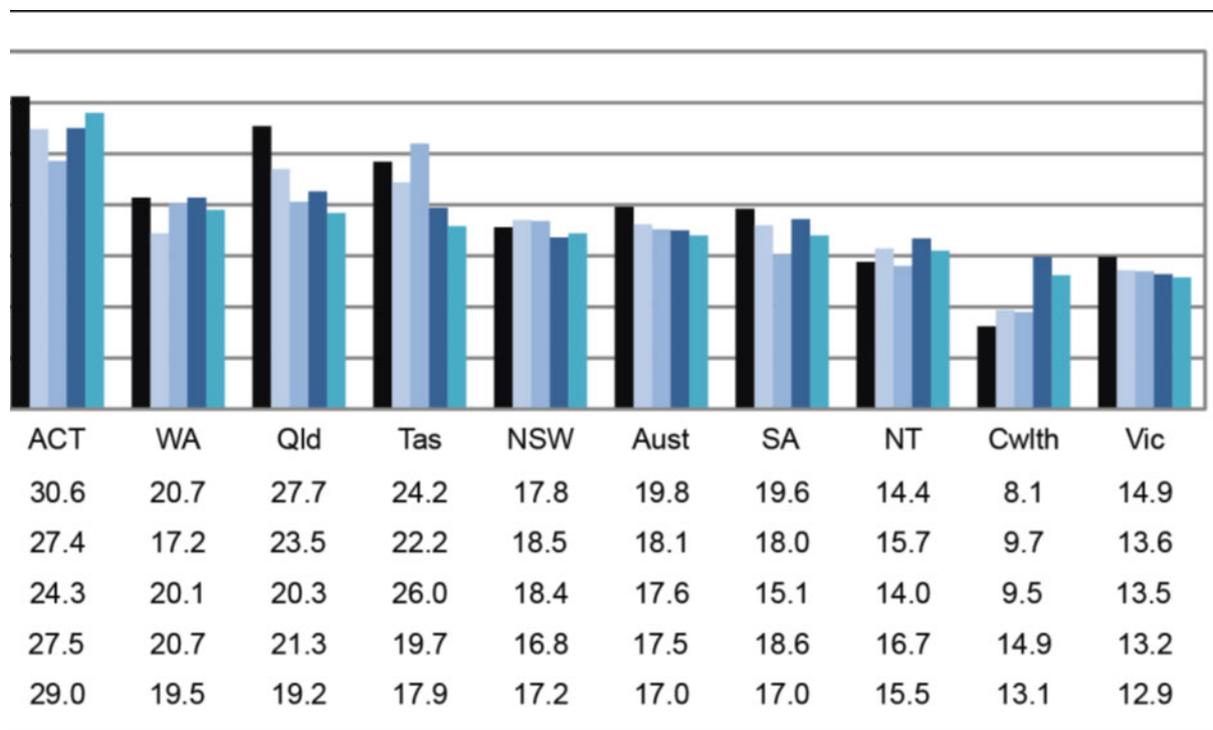
### **The provisions are not onerous**

The unions made a lot of noise with respect to how unfair the 24 hour notice requirement was to workers and the unions. Master Builders does not accept this argument at all. First it must be understood that the unions do not have any health and safety obligations to the workers under the Act. The PCBU is the primary obligation holders and workers engaged by the PCBU have a number of avenues in which to raise genuine safety concerns. The workers have a common law right to cease work if they believe there is imminent risk to their health and safety. They can raise any concerns with their elected health and safety representatives or any member of the site health and safety committee. They can obviously raise any matter with their own management representative and finally if they are still unsatisfied can contact a trained health and safety Inspector from the OFSWQ. The union's argument that the 24 hours' notice requirement is an attempt to keep them out is unfounded and hollow. The provisions were never designed to keep the unions out but simply allow for the orderly management of genuine safety issues by the parties best able to manage those issues in the first instance.

Master Builders supports the reasonable management of safety and applauds the excellent work of the OFSWQ and its Inspectors. Inspectors are often in the front line dealing with and responding to unreasonable union demands. The Inspectors have years of experience in knowing the legislative requirements and ensuring workplaces are healthy and safe. Most union officials do not have the same experience or skill or training in WHS matters and cannot provide the same information or service that the Regulator is required to provide.

### Safety Performance continues to improve

The CFMEU in a media statement released on the 4<sup>th</sup> April 2014 said that the “new workplace health and safety laws ... are putting lives at risk”. How an orderly management of ROE for permit could actually put lives at risk is certainly open for debate but the reality shows that injury rates in the building and construction injury are improving. The trend in the key data for Queensland construction sector is extremely promising. It shows a steady reduction in the rate of injury and fatalities in the sector over the last few years. A recent publication by Safe Work Australia (SWA) Construction Fact Sheet, released on 26 November 2013, noted that serious injury claims per 1000 workers for the Queensland construction sector had fallen from 28.2 workers per thousand in 2007-8 to 23.1 in 2009-10; 20.1 in 2010-11 and 21.1 for 2011-12. Queensland has experienced a notable decrease in the serious injury claims per 1000 workers. The reduction is nearly 7% in the period 2011-12 to 2012-13.



The same fact sheet information series is not yet updated for 2013-14. There is available and reliable reports in the Workplace Health and Safety Queensland claims projections. The following Figure 2 project the serious claims rates (per 1000 employees) for priority industries, including construction, for the period 2013 -2014. The construction industry is predicted to decrease at a rate more than any other industry.

The increase in Agriculture, forestry and fishing should be treated with some caution as it is driven by a 25 percent decrease in the ABS labour force for the sector over the five year period.

Figure 2 – Projected trends for the serious claim rate for priority industries

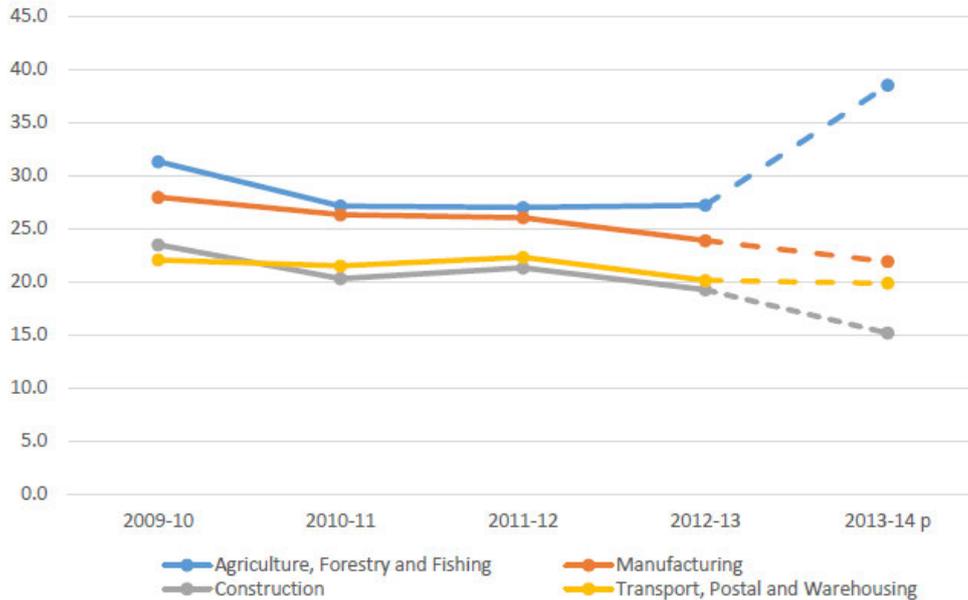


Table : Serious claims: incidence rates by jurisdiction in the construction industry, 2008–09 to 2012–13p. Construction Industry Profile. Published by Safe Work Australia May 2015.

### What Should The Government Do?

#### **Option 1. Maintain 24 hours’ notice requirement for WHS entry but allow immediate entry under limited circumstances**

Master Builders contends that the 24 hours’ notice requirement for WHS entry assisted in the orderly management of balancing the interests of the Occupier (PCBU) with the needs of union permit holders. Without conceding anything, Master Builders notes that a great deal of misinformation and noise was made out of the fact that union permit holders could not come onto site and hold immediate discussions with their members if they wanted too.

Master Builders believes there is a compromise solution that better balances and manages the competing interests with respect to WHS entry requirements. The Government should maintain the 24 hours’ notice requirement for WHS entry purposes but can provide one exception for immediate entry for WHS permit holders in the event of a “Notifiable Incident” as defined under section 35 of the WHS Act.

A “Notifiable incident” is clearly defined in the legislation. A notifiable incident includes “a death of a person, a serious injury or illness of a person or a dangerous incident. A “serious incident” is clearly defined and includes such things as: immediate treatment as an in-patient, an amputation, serious head injury, serious eye injury etc. A “dangerous incident”

includes such things as: an uncontrolled escape, spillage, or leakage, an uncontrolled implosion, explosion or fire, an electric shock, a fall or release from a height of any plant, substance or thing, the collapse or partial collapse of a structure etc.

PCBU's are currently obligated to notify the regulator immediately after becoming aware that a notifiable incident has occurred. Master Builders contends that all the Government has to do is to amend the current legislation with an exception to the ROE requirement that allows immediate entry for permit holders if a "Notifiable incident" has occurred. If somebody has been seriously injured or a potential exposure has occurred the WHS permit holders can have immediate access to represent their members and ensure everything is being managed effectively. WHS permit holders would have clear boundaries upon which they could access a workplace immediately mirroring the notification requirements applicable to PCBU's. The OFSWQ who receive the initial notification from the PCBU could contact the relevant union as part of managing the notification process.

Allowing an exemption that allows for immediate entry of WHS permit holders in the event of a notifiable incident removes any perception that the PCBU's are somehow trying to keep the unions away from becoming involved in genuine health and safety issues. The unions could not use this section for immediate entry unless there has been an incident that requires them to assist immediately. All other issues regarding safety can be managed by giving the appropriate and current 24 hours' notice.

### **Option 2 – Stronger penalties for breaching ROE laws and hindering and obstruction**

Master Builders believes the building industry has experienced the most unlawful conduct and challenges to the 24 hours' notice requirement than has other industries and other sectors of Queensland workplaces. The militant union model to threaten and intimidate many contractors caused a great deal of disruption and loss of productivity and cost. If the Government removes the 24 hours' notice for permit holders and allows immediate access then the focus should shift from the entry issues to the behaviour issues.

If the companies lose all control over the entry of permit holders then further consideration should be given to ensuring the behaviour of permit holders minimises disputation and manages "genuine" safety issues in a positive and consultative manner. Master Builders strongly supports an enhanced penalties regime with severe consequences for permit holders that breach their duties and obligations and act unlawfully in the pursuit of other industrial agendas. The "rights" of entry must be accompanied by the "responsibilities" that go with those rights. Master Builder supports amending the current WHS Act by increasing accountability and inserting effective penalties and consequences for breaches of the powers of permit holders. A number of ways of improving the behaviour of permit holders and providing adequate deterrence against unlawful conduct include:

- Written confirmation and details of alleged "suspected contravention" provided by the permit holder to the occupier within 24 hours after accessing the site.
- Inclusion in WHS Act the positive requirement on all parties to identify and find safe and appropriate consistent with the *Fair Work Act 2009*.

- Inclusion in the WHS Act terms consistent with Section 499 of the *Fair Work Act 2009* Permit that permit holders must be accompanied by a nominee of the PCBU and strictly comply with all site safety requirements.
- Revamped fit and proper person test for all permit holders (individuals with records of breaches should be denied access to permits).
- Single complaints section within the OFSWQ to monitor and investigate alleged breaches of the permit holders actions and powers.
- Implementation of a penalty regime that includes, fines, suspensions and revocation of permits with additional penalties for “hindering and obstruction” offences.
- Introduction of a streamlined and clear process for parties to make application to have the WHS permit revoked for breaches of any condition of the WHS permit. PCBU’s should be able to use agents to make those applications on their behalf.

### **New powers to HSR’s**

Master Builders notes the re-instatement of the powers of trained HSR’s to “direct a worker to cease unsafe work”. This additional power also extends to the deputy HSR and while the section is designed to be restricted to the HSR’s work group, the Act allows for a broader jurisdiction and interpretation for other work groups if there was “imminent exposure of a hazard to another work group (Section 69 of WHS Act). While this additional powers to the HSR’s are not unreasonable, the conditions upon which these powers may be exercised are of considerable concern to Master Builders.

On the one hand Section 85(2) acknowledges the importance of “not giving a worker a direction to cease work” unless there has been with consultation with the PCBU and on the other hand under section 85 (3) the HSR is under no such obligation to consult with the PCBU “if the risk is so serious and immediate that it is not reasonable to consult before giving the direction”. Master Builders does not believe the obligation to consult with the PCBU can be so easily dismissed. The PCBU is the primary obligation holder and should be consulted immediately any issue arises that causes concern to the HSR. In cases of imminent risk the HSR and every worker has the ability and lawful right to cease work. The Bill only muddies the waters and gives further power to people without any duties or obligations.

## **Conclusion**

Master Builders contends the current conditions in relation to ROE for WHS purposes are fair and reasonable and should remain. We make an exception for entry without notice for a “notifiable incident” because such incidents are strictly defined and would negate any perception that the PCBU’s are trying to keep the unions out of genuine safety matters affecting their members.

If the Government is intent on allowing unfettered access to sites for immediate access by permit holders, then we contend that tidying up the evidentiary issues in relation to a suspected contravention, installing a proper reporting regime and significantly increasing penalties and sanctions for wilful breaches by the permit holders should be introduced. If the building industry is the only sector where such issues arise then none of the other sector unions would be affected. The penalty regime would only apply to party’s intent on breaching their obligations. Master Builders is prepared to cooperate with the work of the Committee and look forward to making further submissions if required.

John Crittall

Director – Construction Policy



13 May 2015

## CFMEU official allegedly causes chaos on site after his demands not met

Fair Work Building & Construction has launched Federal Circuit Court proceedings against the CFMEU and one of its officials after he allegedly disrupted two major concrete pours, causing significant financial loss to the head contractor.

FWBC is alleging that CFMEU official Michael Myles disrupted work on the \$60 million project at the Queensland University of Technology, on four separate occasions, before returning to the site a fifth time to direct workers to down tools after his demands to stand down the site manager were not met. He also wanted site management to disregard right of entry laws, for an extra labourer to be employed and for CFMEU flags to be flown from the site's cranes. FWBC has also filed proceedings against 40 workers as a result of the alleged strike. Two of the workers are CFMEU delegates.

FWBC is alleging that Mr Myles held eight separate meetings with the workers over five days, with the meetings lasting for up to two-and-a-half hours. As a result of these meetings, two major concrete pours which were scheduled to take place could not proceed.

When asked whether he held any imminent safety risks or safety concerns and why he was on site, Mr Myles allegedly told the site manager "No, I'm just here to meet with the workers". The project manager told Mr Myles he was trespassing. When police arrived, Mr Myles had moved to an area off site near the boundary fence. Police issued him with a move on order.

After disrupting the site for a third day, Mr Myles allegedly informed the site manager that "Things could return back to normal if my access to site is not restricted, that is, no 24 hour notice and no sign in so I can carry on discussions with the workers. You've also got a need for an extra labourer to clean sheds and you've got to have flags on the cranes".

Unsatisfied with the response of "No way" he received from the project manager, Mr Myles allegedly organised a meeting in the carpark of the site and advised the site manager that "The meeting has decided that as a result of your actions in causing safety issues on site, you need to be stood down from the site for one day and that you need to be re-inducted. The men are going to sit out and not do any work until you comply with this requirement".

The site manager advised that he was happy to compromise, offering to complete some audits. FWBC alleges that Mr Myles replied "No we have decided, we want you stood aside and re-inducted," before the 40 workers downed their tools and walked off site.

FWBC Director Nigel Hadgkiss said that all people, regardless of whether they are an employer, worker or union official, are expected to comply with the law on construction sites.

FWBC is alleging the CFMEU and Mr Myles each contravened the Fair Work Act nine times, and that each of the workers contravened it once.

The maximum penalties available to the Court in this case are \$10,200 for an individual, and \$51,000 for a union per breach.

More information is available in the [media backgrounder](#).

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## Appendix B

- 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 drill 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.
- 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.