

# In Review

Your monthly **Industrial Relations** update

June 2017



## June Update

One of the key reasons for being a member of Master Builders SA is our ability to stand in your corner when it comes to delivering real results at a Federal, State and local level. We achieve that by drawing on experience from around the country – so your interests are supported by more than an office in Adelaide.

Industrial relations is a key battleground and demands national action to carry your voice. Our national office has helped restore the Australian Building and Construction Commission, and made unions more transparent and accountable. Master Builders SA is lucky to be able to work with the National Director of Safety, Contracts & Workplace Relations, Shaun Schmitke. Shaun has almost 15 years' experience as a workplace relations specialist in numerous industry associations, was Head of

Domestic Policy in the Office of the Prime Minister and is the Secretary of three National Policy Committees. Senior Adviser Rebecca Sostarko, a lawyer who was previously Director of a Canberra building company herself, has an excellent understanding of the issues that affect members "on the ground", allowing her to take a practical approach to policy development. It is a tremendous resource to have their vast experience and expertise only a phone call away.

At a State level, Master Builders SA has played a key role in defeating proposed industrial manslaughter laws that could have seen our members face up to twenty years in jail. We secured key amendments to Work Health and Safety laws that restricted union entry rights, introduced a right against self-incrimination and ensured members could only be held responsible for what they were able to influence and control. We are forever vigilant and have established close relationships across all sides of the Parliament.

At an individual level, the focus of Master Builders SA's Industrial Relations team is to be a true business partner for our members. We can talk you through your obligations under the WHS Act and other complex industry laws, or advise the best way to recover debts so you are paid for the work

you have performed. From hiring to termination, we can help you meet your employee obligations. We are available to draft your Enterprise Agreements and Employment Contracts, and our Building Code 2016 Assessment Service help subcontractors comply with the Code, while our dedicated Return to Work and Injury Management service helps support and manage injured workers while protecting your business. We are also available to represent your business for Return to Work, unfair dismissal and underpayment matters. This is just a small sample of the services we provide. Call us on **8122 4990** to find out more!

From the highest levels of Government to the most basic of day-to-day workplace requests, Master Builders SA has you covered. We have listened to feedback from members on the difficulties of debt recovery. Small Business Commissioner John Chapman will be the keynote speaker at a free presentation to assist members on this issue at **6:00pm on Wednesday 5 July at Master Builders House**. Keep an eye out for more details in your inbox soon and I hope to see you there.

**Will Frogley**  
Industrial Relations and Policy  
Manager



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## More industrial death laws

Safework SA is yet to release its draft review of the *Work Health and Safety Act 2012*.

Master Builders SA understands the process has been delayed by the February resignation of SafeWork SA Executive Director Marie Boland.

There appears to be increasing momentum around Australia to tighten up WHS laws. For example, the Queensland Government is introducing a new offence of "negligence causing death", designed to fall between the category 2 and category 1 penalties. The offence could also be introduced into the Queensland Criminal Code, similar to the crime of dangerous driving causing death.

The penalty is effectively an alternative to industrial manslaughter. Master Builders SA last year helped defeat an Australian Greens proposal for such an offence with a 20-year maximum jail sentence for guilty employers.

Master Builders Queensland has described the lack of consultation on the offence an "ambush".

## Judge dismisses union claim for automatic right of entry

A full Federal Court has upheld penalties of more than \$500,000 against the CFMEU for right of entry breaches in Adelaide in 2013.

The CFMEU argued there could be no contravention of section 500 of the Fair Work Act because no "right" was being exercised but rather the exercise of industrial "power".

Justice Geoffrey Flick said it was "astounding... the CFMEU was asserting that it could enter building sites simply because – given its position as a prominent union – it could."

Justice Flick also said the CFMEU's disregard of any need to comply with the legislation may result in further action by the Australian Building and Construction Commission (ABCC).

## Crackdown on "phoenix activity"

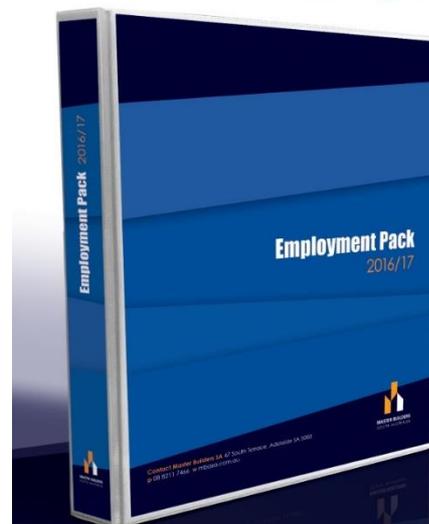
Federal Labor has launched a policy crackdown on phoenix activity by calling for the introduction of Direct Identification Numbers (DINs) for company directors.

The party argues the allocation of a unique identifier for each company director would prevent the transfer of assets of a collapsed business to a new business run by the same director.

The implementation of DINs was recommended by the Cole Royal Commission into the Building and Construction Industry and has long been advocated by Master Builders Australia. Labor has also called for higher penalties and a new legal test for transactions depriving employees of entitlements.

A 2012 PwC report estimated phoenix activity cost Australian businesses \$1.9 billion a year.

## MASTER BUILDERS SA Employment Pack



Manage your employees the right way with a Master Builders SA Employment Pack.

Includes current policies and procedures covering every step of the employment process from recruitment to termination.

**To order your pack or for further information, contact our Industrial Relations team on 08 8211 7466 or at [IR@mbasa.com.au](mailto:IR@mbasa.com.au)**

[www.mbasa.com.au](http://www.mbasa.com.au)

  
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## ABCC takes tough stance on Building Code

Australian Building and Construction Commissioner Nigel Hadgkiss has told a Senate Estimates committee that three builders face temporary bans on bidding for Commonwealth-funded work. Mr Hadgkiss said he had written “show cause” letters asking the companies – including two tier-one builders – why they shouldn’t face sanctions for code breaches.

In April, Employment Minister Michaelia Cash imposed the first sanctions under the Code, banning J Hutchinson Pty Ltd from securing federal contracts for three months.

Mr Hadgkiss also said the ABCC had five more employers before the courts for breaches of workplace laws.

Master Builders SA now offers a Code Audit service to help subcontractors demonstrate to head contractors they are Code-Compliant when tendering for Commonwealth-funded building work.

For more information contact the Industrial Relations Team on **8122 4990** or email [IR@mbasa.com.au](mailto:IR@mbasa.com.au).



## Case note: Dismissing unhealthy employees

A company that dismissed a sick employee by email has been found to have unfairly dismissed them for no valid reason in a way that was “harsh, just and unreasonable”.

Komatsu Forklift Australia dismissed the employee due to his alleged refusal to work and perform a full range of duties. However, the Fair Work Commission found the employee’s absence was based on a certified medical incapacity, which could not be construed as a refusal of duty – unless it could be proven it was falsified.

In his decision, Commissioner Ian Cambridge criticised the company’s human resource practices for not providing the employee with an opportunity to attend a meeting and respond to issues surrounding his capacity for work.

The email dismissal was also criticized as being “extraordinarily insensitive and highly inappropriate in circumstances which involved recognised mental health issues”.

## Industrial Relations Committee

The next Master Builders SA Industrial Relations Committee will be held at 4:00pm on Wednesday 5 July at Master Builders House.

Phone **08 8122 4990** to find out more.

## Tips for Employers

- Ensure you have a valid reason for dismissal and carefully document that reason and supporting evidence.
- Provide the employee a proper opportunity to respond.
- Communicate the dismissal through an appropriate means – considering all the circumstances.
- Don’t ignore the human element. As per Commissioner Cambridge: “When faulty, (employees) should be handled with more care than machines. Remember every case is unique, and how it is managed will depend on the circumstances”.
- Contact Master Builders SA for advice **before** taking action.



### State OHS laws still need Federal right of entry permit

The Full Court of the Federal Court has confirmed that union officials require a valid federal right of entry permit to enter a site – even when relying on a power under a State or Territory occupational health and safety law.

The Full Court's decision overturns a Federal Court ruling in November last year where Justice Mordy Bromberg said that section 70 of Victoria's Occupational Health and Safety Act – the equivalent of South Australia's section 68 – permitted CFMEU official Mick Powell to enter the site without an entry permit to assist a health and safety representative.

Section 494 of the Fair Work Act clearly states:

**“An official of an organisation must not exercise a State or Territory OHS right unless the official is a permit holder.”**

The Full Court found that the “plain words” of this section and the construction of Victoria's

Occupational Health and Safety Act requires union officials to have a valid right of entry permit, regardless of OHS concerns. It said the purpose of both the State and Commonwealth legislation is to regulate the lawful entry of union officials onto worksites via the permit system.

Master Builders SA welcomes the Full Court decision, especially considering the Greens currently have a Bill before State Parliament that appears to offer a “backdoor” around right of entry requirements for union officials who have had their credentials revoked.

Section 71 (4) of the *Work Health and Safety Act 2012* states that:

**“The person conducting a business or undertaking is not required to allow a person assisting a health and safety representative for a work group to have access to the workplace — (a) if the assistant has had his or her WHS entry permit revoked; or (b) during any period that the assistant's WHS entry permit is suspended or the assistant is disqualified from holding a WHS entry permit.”**

### Current Right of Entry Permits

According to the Fair Work Commission website, as at June 9 2017 the following South Australian CFMEU officials have valid Fair Work entry permits:

Andrew Penny  
Derek Stapleton  
Gregory Warner  
Matthew Blowes

Current details are available at <https://www.fwc.gov.au/registered-organisations/entry-permits/check-entry-permit>

**When you've finished work worth tens of thousands of dollars and there is a problem with payment, you'll wish you had spent half an hour filling out a Master Builders SA Contract.**

Learn more from our Industrial Relations team on **08 8122 4990** or at **IR@mbasa.com.au**.

