

In Review

Your monthly **Industrial Relations** update

Feb 2018



Feb Update

High Court ruling paves the way for personal fines for union officials

In an important ruling, the High Court has determined that the Federal Court can require individual union officials to pay fines personally, rather than the union paying them on their behalf.

The decision related to a fine that was imposed by the Federal Court on a CFMEU official, Mr Myles, as a consequence of Mr Myles involvement in a breach of the *Fair Work Act 2009*. The Judge made an order preventing the CFMEU from indemnifying Mr Myles in relation to the fine. The CFMEU appealed to the Full Federal Court, which overturned the decision. The Australian Building and Construction Commission appealed that decision to the High Court. The High Court agreed that the non-indemnification order went beyond the Court's powers, however the

Court found that a "personal payment order" could be made by the Federal Court under section 546(1) of the Act (which allows for pecuniary penalties to be imposed). The matter has been referred back to the Full Federal Court to determine whether it was appropriate for a personal payment order to be imposed against Mr Myles.

The decision means that union officials will be required to pay fines personally, when directed to do so by the Court. Although there may be practical difficulties with monitoring how individual fines are paid, the decision should act as a deterrent for union officials who engage in behaviour that may breach the Act.

Meanwhile, the Australian Building and Construction Commission has announced that 'building unions', including the CFMEU, were fined \$3 million over the past year.

Right of entry - Federal Court finds CFMEU entry for "safety issues" unlawful

The Federal Court has found that the CFMEU breached various provisions of the *Fair Work Act 2009* when a number of senior CFMEU officials entered two sites in Sydney over alleged "safety issues". The Court was satisfied that the entry was in fact motivated by a campaign to have an employer on site agree to sign up to a union enterprise agreement.

In *ABCC v CFMEU [2018] FCA 42*, the Court heard that the CFMEU had blockaded worksites and disrupted concrete pours. When challenged, the union alleged it had shut the site down due to safety concerns.

The Court heard evidence that union officials had in fact kicked down safety railings themselves, before demanding work stop because the site was unsafe.

The Court determined that the entry on site and the disruption to work by the union was not motivated out of concern for worker safety. This was in part because the alleged safety concerns were not followed up by the union, and the industrial action ceased immediately once the employer agreed to the union's demands.

Under the *Fair Work Act 2009*, union officials can only enter a work site for one of the prescribed reasons in the Act. The entry must relate to the reason specified on the entry notice.

If you receive an entry notice, or the union arrives on your site unannounced, please call the Industrial Relations Team on **8122 4990**. We can provide assistance by phone or on-site.

Sam Condon
Lawyer & Manager, Workplace Relations



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High Court rules on Security Of Payment

The High Court of Australia has published two important decisions in relation to the application of security of payment laws.

In *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4*, the High Court confirmed that an error of law on the part of an adjudicator's decision will not provide a ground of review, unless the error goes to the adjudicator's jurisdiction. This means that decisions of adjudicators that incorrectly apply the facts, or misapply the law (provided that it does not relate to the adjudicator's jurisdiction), are incapable of being overturned.

In *Maxcon Constructions Pty Ltd v Vadasz & Ors [2018] HCA 5*, the High Court reached the same conclusion in respect of a party's ability to challenge an adjudicator's decision. The Court further found that the applicable clause in the contract was a "pay when paid" provision for the purpose of section 12 of the *Building and Construction Industry Security of Payment Act 2009 (SA)*, and accordingly had no effect. Pay when paid provisions are defined in the Act as a provision "that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract."

In this case, the contract between Maxcon and Mr Vadasz required Mr Vadasz to provide security in the form of cash retention. These amounts were to be released to Mr Vadasz after the certificate of occupancy was issued by the council.

The High Court determined that the issuing of the certificate of completion depended on completion of the whole project in accordance with the provisions of the head contract. Accordingly, the clause was a "pay when paid" provision for the purpose of the Act. The decision of the High Court means that it is important for head contractors to ensure that retention clauses in contracts are not inconsistent with the Security of Payment Act.

Displaying union logos and mottos may constitute a breach of the Building Code

Builders who allow union logos and mottos to be displayed on site risk breaching the 2016 Building Code, according to new guidelines issued by the ABCC.

The ABCC published the updated information sheet in response to requests from industry "participants" for clarification of the 2016 Building Code's freedom of association clauses.

Under previous guidelines that had been on its website since December 2016, the ABCC simply repeated the code's requirement [at s13(2)(j)] that "[the code covered entity must ensure that] building association logos, mottos or indicia are not applied to clothing, property or equipment supplied by...the employer". An accompanying explanatory note added: "They must also ensure that there are no requirements to apply building association logos, mottos or indicia to company supplied property or equipment".

In the revised information sheet, the ABCC sets out examples of words or phrases on posters or signage that breach the 2013 Code. These included "100% Union"; "union site"; "no ticket, no start"; "wanted – freeloaders on building sites"; "no freeloaders"; and "scab", "rat", "grub" or similar to refer to employees who choose not to participate in industrial activities, such as joining a union or being represented by a union".

Under the heading "Additional requirements under the 2016 Code", the information sheet states that "In addition to all of the requirements of the 2013 Code, code-covered entities have additional responsibilities under the 2016 Code which are more stringent than the 2013 Code in respect of building association logos, mottos or indicia".

"Logos, mottos and indicia" is defined to include images generally attributed to, or associated with an organisation, such as the iconic symbol of the five white stars and white cross on the Eureka Stockade flag; symbols or trademarks that identify an organisation; an organisation's name in its standard, recognisable font, size, style and colour; phrases that express an organisation's guiding principle; signs; markings, and indications.

The restrictions apply to any clothing, property or equipment supplied by the employer, as well as clothing or equipment where the employer reimburses employees for the cost of the clothing or equipment.



New obligations for labour hire companies

From 1 March 2018, new laws will require any business that supplies workers to another person or business, and pays those workers directly, to hold a labour hire licence. To allow for a transition period, labour hire providers will have until 1 September 2018 to become licensed.

Online licence applications must be lodged with Consumer and Business Services (CBS). To be granted a licence, applicants must satisfy various criteria, and identify all persons who will be responsible for the day-to-day management and operation of the business. To be granted the licence, individuals must satisfy a "fit and proper person" test. The new test is predominantly aimed at preventing "phoenixing" (the practice of deliberately liquidating companies for the sake of avoiding liability and then creating a new company to continue trading), as well as ensuring that operators have a history of compliance with workplace and other laws.

From 1 September 2018, there will be penalties for anyone who operates without a licence and penalties for employers that use unlicensed labour hire companies. The maximum penalty for either offence will be \$400,000 for a company, and \$140,000 or 3 years imprisonment for an individual.



Right of Entry Seminar

Right of entry is widely utilised by unions in the construction industry as a means of communicating with current and potential union members, and to investigate alleged safety and other contraventions. Master Builders SA expects an increase in right of entry activity on South Australian construction sites by CFMEU officials in 2018.

It is important for employers and site occupiers to know their rights before a right of entry occurs. The seminar will provide a comprehensive overview of the right of entry provisions under both the Fair Work Act 2009 (Cth) and the Work, Health and Safety Act 2012 (SA).

In addition to providing a summary of the law, the seminar will provide useful and practical tips for employers and site occupiers to manage rights of entry on site.

The seminar will also provide an insight from the industry regulator, the Australian Building and Construction Commission.

Don't miss this opportunity to attend an important and topical Industrial Relations seminar.

When Thursday 8 March 2018

Time 5:00pm to 6:00am

Where Master Builders House - 47 South Tce, Adelaide

Cost FREE for members & non-members \$20 (inc GST)

Book now at:

mbasa.com.au/membership/member-events

Bookings close Wednesday 7 March 2018

Industrial Relations Committee

The next Master Builders SA Industrial Relations Committee will be held at 4:00pm on Wednesday 4th April at Master Builders House. Phone **08 8122 4990** to find out more.

Industrial Manslaughter laws

The result of next month's State Election is likely to determine whether industrial manslaughter laws are passed in South Australia.

Labor, Nick Xenophon's SA Best and the Greens are all backing penalties of up to 20 years' jail and fines up to \$10 million for companies.

This would require amending the Work Health and Safety Act 2012 to create the new criminal offence of industrial manslaughter.

It was only last year that Master Builders SA successfully lobbied to have this exact proposal defeated in parliament.

If you have any questions about the proposal, please contact Policy and Communications Manager Will Frogley on 0422 052 728. If you would like any WHS advice and assistance, please contact the IR Team or Master Builders SA SQE Manager Chris Ginever on 0432 484 400.



RDO Calendar 2018-19

The RDO Calendar for 2018-19 is now available on the Master Builders SA website. Click [here](#) to view it.



Portable Long Service Leave

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Members are reminded of their obligations under the Construction Industry Long Service Leave Act 1987. Employers of eligible workers are required to register with Portable Long Service Leave, lodge Employer Returns every two months and pay a levy based on 2.15% of remuneration (apprentices are levy free). It is far better to be proactive now than be met with a Bill for many thousands of dollars that has accumulated over the years. For further information, contact the Master Builders SA Industrial Relations Team on **8122 4990**.



Labor promises lengthy imprisonment for "wage theft" recidivists

Labor has pledged to criminalise wage theft if re-elected on March 17.

The worst repeat offenders would face up to 15 years' jail.

The new offence will apply to employers who "knowingly, recklessly or repeatedly underpay their workers, including by failing to pay or underpaying their superannuation payments."

Labor has emphasised that the law will apply to "deliberate underpayment of staff and not to cases of genuine error by employers."

"There is growing evidence that many thousands of South Australian workers are being ripped off in this way, including workers who are already vulnerable, especially young people, migrant workers, and those in insecure work," said Premier Jay Weatherill.

Unions have welcomed Labor's announcement. SA Unions State Secretary Joe Szakacs said wage theft is endemic across Australia and has become a business model relied on by businesses to make profits.

