

11 July 2019

Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

Re: Criminal Code (Trespass Offences) Amendment Bill 2019.

Introduction

Master Builders is the peak employer association representing 8700 employers in the building and construction industry in Queensland.

Master Builders strongly supports the rule of law, enforcement and suitable deterrence, in particular, measures to protect the right of business owners to operate without unlawful interference and disruption to their legitimate business interests. The narrative for the Bill is a response to ‘farm invasions’ and similar sabotage of business interests by community activists, although it does not appear to be limited to this form of trespass.

Master Builders strongly supports the *Criminal Code (Trespass Offences) Amendment Bill 2019* (the Bill) for its prescribed purposes. Additionally, we believe the Bill has merit in relation to the construction industry in terms of deterring unlawful entry and interference on construction sites. This is especially desirable where the interference is not related to genuine safety issues and is intended to cause economic and financial losses by stopping or slowing construction.

Trespass versus Right of Entry

The building and construction industry, especially the top tier commercial construction sector, is renowned for its exposure to the militant and often unlawful industrial activities of the principal union, the Construction, Forestry, Mining, Maritime and Energy Union (CFMMEU). In particular, our members regularly face challenges at the site gate, with union officers deliberately ignoring the laws of entry.

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The *Fair Work Act 2009* authorises a union official to enter a site or premises:

- to investigate a suspected breach of the FW Act or a fair work instrument (which includes a modern award or enterprise agreement)
- to hold discussions with eligible employees
- to exercise a right to enter that is conferred on them under a state or territory OHS law.

These 'Right of Entry' powers override the rights of an occupier to refuse a union officer access to their property. The powers are not unlike statutory powers invested in authorised government agencies, for example, Australian Tax Office, Fair Work Ombudsman, Workplace Health and Safety Inspectors, and the Queensland Police Service (QPS).

These are very serious powers and authorities. The parties given the benefit of those provisions must respect them.

Where a union officer has entered a property without a right of entry, or does not have permission from the occupier to enter the property, the occupier is entitled to call the QPS for assistance to remove the official from the property. The Australian Building and Construction Division (ABCC) may also investigate the matter and bring actions against the union for hindering and obstructing the occupier/contractor.

Invasion of construction sites

Evidently, the CFMMEU is a serial offender in hindering and obstructing occupiers going about their lawful business. Judge Vasta of the Federal Court has described the union as "*the most recidivist corporate offender in Australian history*".¹

Most recently, Federal Court Judge Bromberg fined the CFMMEU and two of its officials who had entered a Melbourne construction site on four separate occasions without providing the required 24 hours' notice and who refused to show their right of entry permits when requested to do so.²

In commenting on this decision, the head of the ABCC stated: "*The decision of the Court today to impose personal payment orders reinforces the earlier guidance provided by the High Court. Ultimately, if a penalty is devoid of sting or burden, it will not have any deterrent effect. The greater the sting or burden of the penalty, the more likely it will be that the union officials will be deterred from future contraventions.*"³

¹ Australian Building and Construction Commissioner v Hanna & Anor (No.3) [2017] FCCA 2519

² Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Laverton North and Cheltenham Premises Case) (No 2) [2019] FCA 973

³ <https://www.abcc.gov.au/news-and-media/cfmmeu-penalised-119300-unlawful-entries-melbourne-building-sites-%E2%80%93-officials-hit-personal-payment-orders>

Where past contraventions manifest an ongoing attitude of disobedience to the law, the heightened need for deterrence may indicate that a more severe penalty is warranted for the instant contravention.⁴

The Queensland experience.

In our submission to the *Finance and Administration Committee on the Work Health and Safety and Other Legislation Amendment Bill 2015*, Master Builders provided numerous examples of union officers failing to comply with entry requirements.⁵

The submission described at length that occupiers were often helpless in the face of these unauthorised intrusions and efforts to challenge the entry met with threats and intimidation from the officers. The permit holders, having breached their right of entry, would proceed to hold discussions with site workers inspect all aspects of the site and cause as much disruption as possible.

That submission highlighted the regular and unwarranted stoppages of work caused by the union and its complete disregard for the rights of the Principal Contractor (PCBU) and subcontractors. It is widely accepted in the industry, that the union tactics are often, intended to cause economic and financial losses by stopping or slowing construction in order to meet an industrial outcome.

Fast forward to 2019 and very little has changed. The CFMMEU repeatedly fails to comply with the standards for 'right of entry'. It often results in unlawful disruption of construction projects, obstruction and intimidation of site personnel/contractors trying to do their job, and contempt for the basic safety requirements of the site. The CFMEU has demonstrated a complete disregard for the rule of law.

The value of the Bill and the QPS

Our members frequently call on the QPS to remove unauthorised union officials from the site. Indeed, if the project has federal funding, the federal Code dictates that the employer / contractor enforce right of entry and take corrective action if there is a breach.⁶


Our experience in the enforcement of trespass laws in building industry is one of caution.

The overlapping state and federal laws on right of entry are unique and complex. There will be many occasions where the right of entry is unclear. It is often an unforgiving task for QPS officers, after having attended a reported trespass, to be confronted by union officials who vigorously deny

⁴ Parker v Australian Building and Construction Commissioner [2019] FCAFC 56 at [339] [348]

⁵ <https://www.parliament.qld.gov.au/documents/committees/FAC/2015/B4-WorkHealthSafetyOLAB/submissions/023.pdf>

⁶ Code for the Tendering and Performance of Building Work 2016



a breach of entry laws has occurred, attempting to muddy the waters in an attempt to delay a swift decision to remove the official from a site.

There have been occasions of the QPS wrongly arresting or removing union officers from sites.

The risk of 'getting it wrong' may be a cause for concern in the QPS and could discourage a prompt and decisive response to occupier's requests to attend to right of entry disputes. Consequently, occupiers may be less likely to report unlawful union entry, for fear of unfavourably escalating the dispute with the union. The union entry may go unchallenged.

These cases of less enthusiastic QPS response are discussed more generally by property owners or contractors, who also become more reticent to engage the QPS.

This disorder is unacceptable. It is vital that the government ensure a robust deterrence with the combination of strong trespass laws and competent enforcement. The QPS must perform its job with confidence and certainty; otherwise, the deterrence value of enhanced trespass laws will be undermined. In our industry, this means the QPS must be proficient in the right of entry laws.

The Bill defines aggravated trespass as a person who unlawfully enters or is in premises, private land or transport infrastructure with intent to cause economic loss to another person or the State.⁷ In cases of alleged aggravated trespass, the prosecution must prove the trespass has happened and there was intent to cause loss and economic harm to the business occupier. This requires careful investigation and specific evidence.

Conclusion

Breaches of right of entry laws in the building and construction industry are clearly documented, evident and widespread. The right of entry laws are a jurisdictional nightmare for the QPS. The number of repeat offences the courts have to deal with, particularly in the construction industry show a lack of any form of a deterrent for unlawful behaviour.

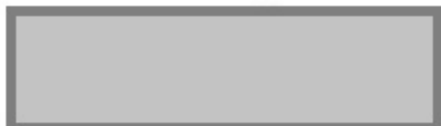
Master Builders strongly supports the Bill. Increasing the categories and penalties for trespass should serve as a deterrent to union officials who regard the laws on right of entry as optional. We acknowledge that unions have valid representational rights. However, this right, and the union's registration, is a privilege with attending obligations. The Bill should discourage unlawful entry by making it more precarious for union officials to do so.

The usefulness of trespass laws will also be improved by providing relevant QPS officers with expert training on the operation of union right of entry laws.

⁷ Clause 5. Section 422 .Criminal Code (Trespass Offences) Amendment Bill 2019.

Overall, the property owners, authorities and judiciary need balanced and practical initiatives from the government to oversee the right of entry in the construction industry.

Yours sincerely,



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