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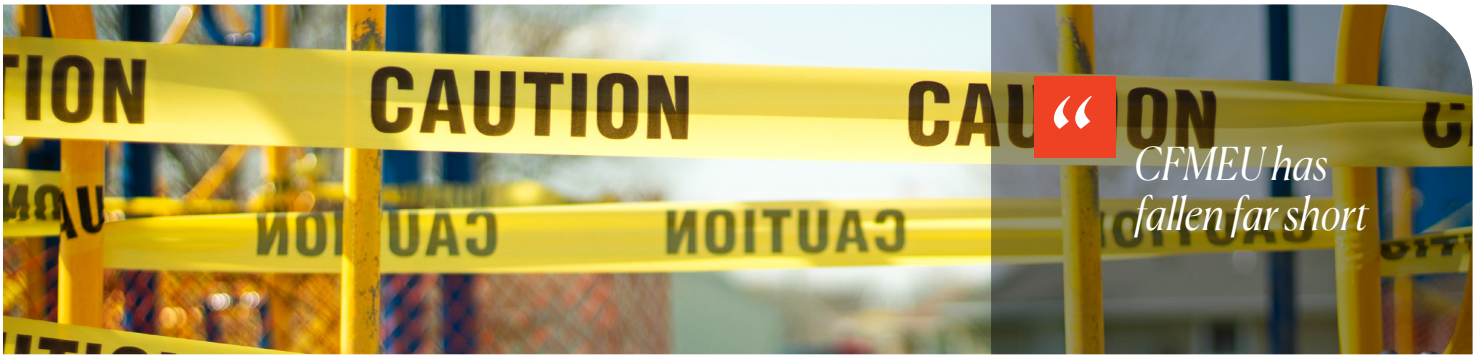

Prepare for court: Practical lessons for contractors on managing right of entry

The Federal Court in *B.M.D. Constructions Pty Ltd v Construction, Forestry and Maritime Employees Union (No 3) [2026] FCA 169* has clarified expectations for parties to proceedings where union officials have refused to comply with lawful site entry requirements, providing practical guidance for employers on managing right of entry visits and non-compliance on site.

Background

BMD Constructions Pty Ltd (**BMD**) was appointed principal contractor for the Centenary Bridge Upgrade Project in Brisbane. To meet its work health and safety obligations, BMD implemented visitor entry requirements, including mandatory inductions and signing of visitor registers.

Between 23 April and 14 May 2024, multiple CFMEU officials allegedly attended BMD worksites and:

- refused to complete site inductions or sign visitor registers
- rushed past BMD representatives into restricted areas
- entered exclusion zones, resulting in work stoppage
- participated in a blockade preventing site entry

BMD alleged this conduct breached the *Fair Work Act 2009* (Cth) right of entry provisions and constituted unlawful interference with contractual relations and nuisance.

In response, the CFMEU sought to rely on a lack of first-hand knowledge of various facts alleged by BMD to avoid substantively engaging in the proceedings.

The court's decision

The court rejected the CFMEU's claim of a lack of first-hand knowledge, observing that there was evidence in the CFMEU's possession which it could use to inform itself of the appropriate response to BMD's allegations.

Practical takeaways for contractors

While the judgment arose from an interlocutory application focused on procedural matters, the court's findings highlight the importance of preparation and compliance when dealing with union right of entry. The case demonstrates that contractors who implement clear, WHS-based site controls and properly document non-compliance are well positioned to take enforcement action if required.

A union responding to right of entry breach proceedings is expected to engage substantively with the allegations. The more compelling evidence a contractor has, the stronger its position in those proceedings.

These takeaways include:

1. ***Have clear, enforceable entry requirements in place***

BMD's visitor entry requirements were treated as legitimate WHS measures. Contractors should ensure site entry processes (inductions, registers, access controls) are clearly documented, consistently applied and defensible.

2. ***Treat non-compliance as a WHS issue, not an industrial irritant***

Union right of entry does not override WHS obligations. Where officials refuse to comply with lawful safety requirements, contractors are entitled to intervene to maintain site safety.

3. ***Record all site entry interactions***

Body worn cameras, CCTV footage and contemporaneous written records were critical to BMD's position. Contractors should train site personnel to document refusals, confrontations and access issues as they occur.

4. ***Train site managers to manage right of entry confidently***

Site supervisors and safety personnel should understand the limits of right of entry powers and how to respond calmly and lawfully where officials seek to bypass safety processes.

5. ***Be prepared to act quickly where conduct escalates***

Here, interlocutory orders were obtained restraining certain conduct at the site. Where non-compliance threatens safety or operations, contractors should consider urgent legal relief to maintain control of their worksites.

6. ***Expect disputes to be contested***

Proceedings can be protracted. Contractors should be prepared for union resistance and ensure their WHS systems and documentation withstand close scrutiny.

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AI alert: Increased duties imposed on employers utilising a "digital work system"

On 12 February 2026, the *Work Health and Safety Amendment (Digital Work Systems) Bill 2025* (**Bill**) was passed by NSW parliament, introducing amendments to the *Work Health and Safety Act 2011 (NSW)* (**WHS Act**).

The Bill's stated object is to make it a primary duty of care for a person conducting a business or undertaking (**PCBU**) to ensure that the health and safety of workers is not put at risk from the use of digital work systems.

The most significant practical change introduced by the Bill is the expansion of right of entry powers.

Under the amendments, entry permit holders may require a PCBU to provide reasonable assistance to enable access to and inspection of a digital work system that is relevant to a suspected contravention of the WHS Act.

This power may only be exercised where the permit holder has provided at least 48 hours' notice, and no more than 14 days' notice, during business hours. The exercise of these powers will also be subject to guidelines to be published by SafeWork NSW, which are yet to be released.

For the purposes of the Bill "digital work system" is defined as "*an algorithm, artificial intelligence, automation or online platform*". It also amends the primary duty of care under the WHS Act to require PCBUs, so far as is reasonably practicable, to ensure that the health and safety of workers is not put at risk by the business' use of such systems.

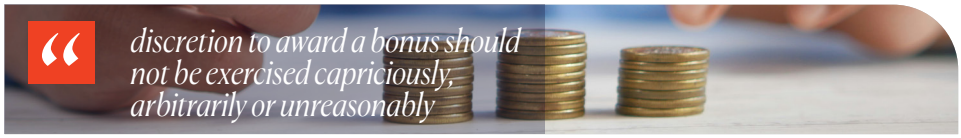
Additionally, the Bill inserts a new s.21A, which imposes a specific duty on PCBUs in relation to the allocation of work by digital work systems. Under s.21A, a PCBU must ensure, so far as is reasonably practicable, that a worker's health and safety is not put at risk by the allocation of work by a digital work system used by the business. The provision expressly requires PCBUs to consider certain risks when allocating work, including excessive or unreasonable workloads.

While some provisions of the Bill have already commenced (including the requirement to provide reasonable assistance), the new duty under s.21A is not yet in force. It remains to be seen how these reforms will operate in practice, and whether they will be relied upon primarily in the context of gig economy arrangements (such as delivery platforms), or whether they will have broader ramifications across more traditional workforces in New South Wales.

Reminder before your employees hop off (or on) for Easter

As the Easter Bunny gears up for extra shifts delivering eggs, employers are reminded that any "extra carrots" (over-award payments) can only be set off against award obligations that arise within the same pay period. When employees like the Easter Bunny work multiple public holidays, their award entitlements are likely to increase in that pay period. Those additional entitlements, including public holiday penalty rates, cannot be set off against over-award payments made in different pay periods. Employers should review their set off arrangements carefully before hopping into this holiday weekend.

Discretionary bonuses and an employer's ability to refuse to pay



It is common for employment contracts to provide that bonuses are payable at the employer's discretion. However, the mere fact that a bonus is described as "discretionary" does not mean that an employer is free to refuse payment unreasonably.

In *Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357*, Allsop J made clear that an employer's discretion to award a bonus should not be exercised capriciously, arbitrarily or unreasonably. His Honour observed that such a discretion should not be construed as giving the employer a "free choice" as to whether to perform or not perform a contractual obligation.

Rather, the discretion must be understood in light of the proper scope and content of the contract as a whole, and must be exercised honestly. While there may be legitimate circumstances in which it is appropriate not to pay a bonus (for example, where there has been employee misconduct or failure to meet required objectives), what is not permitted is an unreasoned or arbitrary refusal to pay a bonus "come what may".

Importantly, the court noted that if parties wish for a bonus to be entirely gratuitous or voluntary (such that it may be withheld capriciously, even where an employee has met agreed objectives) the contract must say so clearly.

Accordingly, when determining whether to pay a discretionary bonus, employers should ensure that any decision to withhold payment is reasonable and supported by a sound basis. Failure to do so may expose an employer to claims for breach of contract, depending on the drafting of the bonus clause, and potentially to claims under the Australian Consumer Law where representations about bonus eligibility or incentives are found to be misleading.

Did You Know? April Fools Edition

In 2001, Hooters franchisee Gulf Coast Wings Inc found itself in hot sauce after employee Jodee Berry sued. Berry had won a beer selling contest at the Hooters Panama City franchise in Florida, US, earning what she thought was a new Toyota car as promised by the franchise's manager. Instead, she received a Toy Yoda (yes, a Star Wars figurine), as an April Fool's joke. Berry sued for fraud and misrepresentation, and we expect reached a tidy settlement. Best not to be an April fool in the workplace.