



## Compliance With “Reasonable Suspicion” and Other “Reasonable” WHS Legal Terms

An officer or employee of a union who is a WHS entry permit holder has the right to enter your workplace if they have a **“reasonable suspicion”** that WHS laws are not being complied with. (Section 117 WHS Act)

But what does “reasonable suspicion mean”. One person’s reasonable suspicion could be a PCBU’s “reasonable disbelief”.

Now, thanks to a judgement by Commissioner Murphy at the NSW Industrial Relations Commission on the 17/1/17 we have improved clarity on the matter and it should reduce the possibility of disagreements in the future.

The judgement was given in a case between the CFMEU (NSW Branch) and Pacifico (the full name of the PCBU is shown at the bottom of this article in Ref 1). This article explains the facts of the case and the judgement made on the meaning of “reasonable suspicion” and it also indicates other “reasonable” WHS terms that must be mastered.

### **The Basic Facts of the Case**

Two WHS Entry Permit Holders (EPH) from the CFMEU gave the PCBU a notice that they intended to enter the PCBU’s workplace. They believed that their right of entry under the WHS Act was triggered because they had a “reasonable suspicion” that bullying was occurring and section 19 of the WHS Act was being breached.

The PCBU believed that there were insufficient facts to justify the “reasonable suspicion” required by the WHS Act. So they denied entry to the EPHs. So the CFMEU commenced a legal action against the PCBU in the NSW Industrial Relations Commission Court

### **What is a “Reasonable Suspicion”?**

The Commissioner decided that the EPHs were not entitled to enter the workplace and said:

- Genuine beliefs that the WHS Act has been breached are not relevant to the objective assessment of evidence that is needed to form a “reasonable suspicion” (para 64 of Commissioner’s judgement)
  
- The facts relied upon to arrive at a “reasonable suspicion” have to be facts that would be acceptable in Court to prove or support proof that there had been a breach of the WHS Act.

*“There needs to be some factual basis, some material or materials with probative value which would create in the mind of a reasonable person a suspicion that Pacifico had contravened, or was contravening, section 19 of the WHS Act by failing to ensure, so far as is reasonably practicable, the psychological health of the workers engaged on the Site”* (paras 66-67 of Commissioner’s judgement)

Note: The legal term *probative value* refers to any evidence that serves the purpose of proving something during a Court case.

- Hearsay evidence and direct observation of workers who appeared stressed, anxious and uncomfortable did not have the probative value required for a “reasonable suspicion” (paras 68-70 Commissioner’s judgement)

WorkCover NSW’s November 2014 publication, *Guide to Workplace Right of Entry by WHS Entry Permit Holders*, contains examples of situations that might give rise to “reasonable suspicion” but bear in mind what the Commissioner said in the case above regarding the probative value of the evidence of a breach of the WHS Act.

Also click this link: [\*R v Rondo – Reasonable Suspicion Explained\*](#) A member of the police force who has a “reasonable suspicion” can stop, search, and detain a person or vehicle. This article from Sydney Lawyers has excellent examples and may be of interest to you in improving understanding of WHS “reasonable suspicion”

### **Other “Reasonable” Words in the WHS Act**

The word “reasonable” also occurs in the WHS Act in the key area of Duty of Care. The PCBU’s duty of care is “*reasonably practicable*”, Officers must take “*reasonable steps*”, and Workers and Others must exercise “*reasonable care*”.

Employees and others who do not fully understand key terms are liable to not carry out or misapply their duty or obligation. PCBUs needs to be sure that each duty holder understands the meaning of these “reasonable” terms and knows what **specific actions** they must carry out in their area of responsibility to comply with their duty of care.

**Ref: 1.** *CFMEU (NSW Branch) v Acciona Infrastructure Australia Pty Ltd and Ferrovial Agroman (Australia) Pty Ltd t/as the Pacifico Acciona Ferrovial Joint Venture* [2017] NSWIRComm 1000 (17 January 2017)