



MASTER BUILDERS
AUSTRALIA

**Submission to
Productivity Commission
on
Benchmarking Business Regulation:
Occupational Health and Safety**

February 2010

Master Builders Australia Ltd

ABN 68 137 130 182

building australia



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1 INTRODUCTION

- 1.1 This submission is made by Master Builders Australia Ltd (Master Builders).
- 1.2 Master Builders represents the interest of all sectors of the building and construction industry. The association consists of nine State and Territory builders' associations with over 31,000 members.

2 PURPOSE OF SUBMISSION

- 2.1 This submission provides comments on the Productivity Commission's Draft Research Report Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety released in January 2010. Master Builders also made an initial submission to the Productivity Commission review.

3 OVERALL COMMENTS

- 3.1 Master Builders supports the harmonisation of occupational health and safety (OHS) laws. Master Builders has taken and continues to take an active interest in the OHS harmonisation process including making four formal submissions to the Review Panel. The submissions covered offences relating to workplace death; inconsistencies in the implementation of the National Standard for Construction Work in State and Territory legislation and regulations; right of entry and the questions and matters included in the Issues Paper for the National Review into Model OHS Laws. Following the release of the Panel's reports, in May 2009 and July 2009 Master Builders made two further submissions to the Government on aspects of the Panel's reports of concern to the building and construction industry, including how the proposed model legislation proposes to deal with safe design and right of entry.
- 3.2 Master Builders is also actively engaged in the process for the development of the model OHS regulations. Harmonisation of OHS regulations is a complex process and is the area with the greatest potential to achieve efficiencies for industry given the focus of regulation tends to be on prescribed processes and procedures that duty holders must implement in order to fulfil the broadly expressed duties of care in the model OHS Act. The work of the Productivity Commission in summarising the differences in the current regulatory framework across jurisdictions is therefore useful for the harmonisation process.
- 3.3 While Master Builders believes that the summary of current regulatory differences is a useful exercise, the draft report would benefit from consideration of a broader range of material in order to reach conclusions about aspects of the existing regulatory

environment. For example, the veracity of the statement on page 182 that

it would be expected that the interpretation of reasonably practicable would address the issue of control

should be tested through analysis of the application of reasonably practicable by the courts and substantiated by reference to objective criteria. Additional comments on key aspects of the draft report are provided in the following sections of this submission.

- 3.4 Master Builders notes that on page 109 of the draft report a number of jurisdictions have indicated that budget and staffing limitations constrain their enforcement activities. Greater levels of regulation and stricter OHS duties do not of themselves improve OHS performance. To be effective, OHS regulation must also focus on education and awareness, injury prevention and the practical and achievable management of foreseeable risks.
- 3.5 Master Builders is committed to improving OHS performance in the building and construction industry, and harmonisation of OHS has the potential to be an important catalyst for further improvements in performance both in the building and construction industry and more broadly, provided that sufficient emphasis is given to these aspects of OHS regulation. As part of its pre-Budget submission, Master Builders has therefore called for a comprehensive education program on the harmonised laws. There must also be a commitment by all jurisdictions to provide sufficient resources to regulators in order for them to provide ongoing education and awareness activities; this is a crucial role for regulators in the view of the Review Panel on whose report the harmonised laws are based. The fact that regulators in some jurisdictions report that they have current budget and staffing limitations makes such a commitment all the more important.
- 3.6 Master Builders notes that the draft report contains information on compensated fatalities and incidence rates for injury/disease by industry for 2007-08 for each State and Territory.¹ Master Builders has long sought the provision of relevant and timely data and evidence about trends in the industry and this is one of the recommendations in Master Builders' OHS Policy Blueprint.² Information of the sort included in the report should be made available in a timely way on an ongoing basis to assist industry to achieve the targets contained in the National Occupational Health

¹ Page 52

² Master Builders has previously provided the Commission with a copy of the Blueprint.

and Safety Strategy.³ Currently, the most recently available data for the construction industry by State and Territory is for the 2006-07 financial year.⁴ Master Builders also notes that the compensated fatality incidence rate for the construction industry in the Commonwealth (69.1 per 100,000 employees) appears to be one of a number of outlier figures contained in the table. An explanation for these figures should be provided.

4 FEDERAL SAFETY COMMISSIONER

- 4.1 Master Builders notes that the draft report does not include mention of the Australian Government Building and Construction OH&S Accreditation Scheme (the Scheme) and believes it to be a major omission. The Scheme is established under section 35 of the *Building Industry Improvement Act 2005* (Cth) (BCII Act) and the Building and Construction Industry Improvement Regulations. The Scheme is overseen by the Federal Safety Commissioner.
- 4.2 The Scheme operates such that, subject to certain thresholds, only head contractors who have been accredited under the Scheme can enter into contracts for construction work that is funded directly or indirectly by the Commonwealth.
- 4.3 In order to be accredited, head contractors must meet a number of criteria. The initial assessment is undertaken through a desktop assessment, followed up with a site visit. Once accredited, companies are subject to an ongoing audit process against a detailed set of audit criteria. These audit criteria are available on the Federal Safety Commissioner's web site (www.fsc.gov.au). The audit process is undertaken on behalf of the Federal Safety Commissioner by Federal Safety Officers. Federal Safety Officer positions are established under section 60 of the BCII Act. Section 63 of the BCII Act outlines the powers of Federal Safety Officers. These powers are extensive and are similar to the powers of inspectors under State and Territory occupational health and safety legislation.
- 4.4 The reach of the Scheme is extensive. At the end of 2008–09, there were 147 accredited companies. At 30 June 2009, 191 projects were covered by the Scheme, with a total value of \$8.1 billion. These numbers have increased further in the 2009–2010 financial year.

³ *The National OH&S Strategy 2002-2012*, National Occupational Health and Safety Commission, Commonwealth of Australia, 2002.

⁴ *Construction Information Sheet*, Safe Work Australia, available on the Safe Work Australia web site www.safeworkaustralia.gov.au

- 4.5 As noted above, accredited companies are required to undergo an initial accreditation audit and an ongoing audit program. In 2008-09 there were 406 audits under the Scheme, comprising 164 accreditation audits, 122 project safety audits and 120 special and maintenance audits, including of projects which are operated by accredited companies by are not government funded. Audits conducted as part of the Scheme are in addition to any investigation and compliance activity of State and Territory OHS authorities.
- 4.6 Master Builders considers that the Scheme falls within the scope of the study as outlined on page 4 of the draft report, which states that the purpose of the study is to benchmark indicators of the regulatory burden associated with OHS regulatory regimes across the jurisdictions. Regulatory regime is defined to include both 'government rules' that influence and control behaviour as well as the activities of regulators responsible for implementing strategies to increase compliance, including education and enforcement. Master Builders urges the Commission to include the operation of the Scheme as part of the study.
- 4.7 Master Builders considers that the Scheme should be included to ensure that the full extent of the compliance burden on businesses in the building and construction industry can be determined. Table 5.11 on page 116 of the draft report demonstrates that there is a significant compliance burden on the building and construction industry, in particular in some jurisdictions (New South Wales, Western Australia and the Northern Territory). As noted on page 114 of the draft report, the frequency of inspections would increase the compliance burden on business in terms of the production time lost during visits and the impost of having an inspector access the worksite.

5 CONSTRUCTION INDUCTION TRAINING

- 5.1 Master Builders supports consistency in the content and delivery of general induction training, as envisaged in the National Code of Practice for Construction Induction Training, which Master Builders endorsed. Master Builders notes that the report states that "it is envisaged" that all jurisdictions will recognise each others construction induction training certificates. Master Builders believes that this would be better expressed as this development is expected, then followed by the evidence upon which that expectation is based.

6 ASBESTOS REGULATION

- 6.1 The draft report states that Western Australia only requires a license for removal of

thermal and acoustic asbestos products. A separate demolition license is required for removal of 200 square metres of asbestos cement roofing.⁵ WorkSafe Western Australia has recently announced that the licensing requirements for asbestos removal have been changed and that there will be two forms of license – an unrestricted licence and a licence to remove amounts exceeding 10 square metres of bonded (non-friable) asbestos (this restricted licence will be required from June 2010).⁶

- 6.2 Master Builders is committed to reducing the incidence rate for serious claims and fatalities in the building and construction industry, including by more effectively preventing occupational diseases. Recent workers compensation statistics show that for the period 2004-05 to 2006-07, 40 per cent of all compensated fatalities in the building and construction industry were related to exposure to asbestos.⁷ Master Builders therefore supports the introduction of best practice in health and safety measures into the Australian workplace for asbestos management, control and removal. In July 2009 Master Builders released its National Policy for Asbestos Management, Control and Removal. A copy of the policy is at Attachment A. The policy makes a number of recommendations that Master Builders believes will assist in achieving the objective of reducing the rate of serious claims and fatalities in the industry.
- 6.3 One of the recommendations in the policy is for the uniform regulation of asbestos management, control and removal across jurisdictions, including consistent training and licensing requirements. Master Builders therefore welcomes the revised licensing requirements in Western Australia and encourages the Productivity Commission to reflect this development in the final version of their paper.
- 6.4 Master Builders notes that while the proposed change to the Western Australian licensing arrangements will bring the jurisdictional requirements for asbestos regulation closer together, significant differences will remain in the costs of licensing

⁵ Page 262

⁶ Refer to the article on the WorkSafe Western Australia web site:
http://www.docep.wa.gov.au/WorkSafe/Content/Services/Certification_registration_and/Asbestos_removal_licence_No_3.html

⁷ Australian Safety and Compensation Council, *Compendium of Workers' Compensation Statistics Australia 2006-07, March 2009*, page 49. There were 133 fatalities in this period, 53 of which were related to asbestos exposure. Of the 53 fatalities, 40 were as a result of Mesothelioma and 13 from Asbestosis.

and information requirements.⁸ This factor points to the need for the administrative arrangements that support OHS regulation to form part of the harmonisation process.

7 RIGHT OF ENTRY

7.1 Page 246 of the draft report states that “Notice needs to be given at least 24 hours before inspecting premises or accessing an employee record of an employer...” Master Builders believes that this is a misinterpretation of section 495 of the *Fair Work Act 2009* (Cth). That section relates only to the inspection or access to employee records and is replicated below. In all other circumstances the notice requirements, if any, for entry for OHS purposes are determined by individual State and Territory OHS law.

- (1) *A permit holder must not exercise a State or Territory OHS right to inspect or otherwise access an employee record of an employee, unless:*
 - (a) *he or she has given the occupier of the premises, and any affected employer, a written notice setting out his or her intention to exercise the right, and reasons for doing so; and*
 - (b) *the notice is given at least 24 hours before exercising the right.*

7.2 Page 247 of the draft report includes the following statement regarding misuse of entry provisions:

The misuse of entry provisions to discuss industrial matters, instead of OHS matters, highlighted by some industry and employer groups, should only have the potential to occur for businesses operating under Queensland, Western Australian and the Northern Territory regimes, as these are the only jurisdictions to provide the power to authorised union representatives to consult with workers on OHS matters.

7.3 This is a gross oversimplification of the issues associated with misuse of OHS for industrial purposes and is not supported by the available evidence. The extent of the misuse of OHS was detailed in the report of the Cole Royal Commission into the Building and Construction Commission. That misuse is not isolated to using rights of entry to hold consultations regarding OHS for industrial purposes and nor is that misuse limited to the States and Territories listed above. The following four cases brought to the courts by the Australian Building and Construction Commission (ABCC) are examples of the ongoing abuse of OHS for industrial purposes. The

⁸ Report, page xviii

ABCC web site⁹ contains additional material that reinforces Master Builders' position.¹⁰

Cruse v CFMEU and Stewart

A bus travelling to a site was involved in a 'near miss' with a train at a level crossing. A stop-work meeting was called while the OHS committee discussed the issue. The site OHS representatives agreed that it was safe for the workers to return to work. By the end of the day, the head contractor had repainted the lines on the road, installed electronic signs and erected a stop-sign. Despite this, the workers voted to go on strike for 10 days. Penalty of \$35,000 imposed on the CFMEU and a penalty of \$7,000 imposed on the CFMEU official (\$3,500 suspended for 12 months).

Alfred v Wakelin, Abela, Batzloff, Jones, O'Connor, CFMEU, CFMEU QLD branch, FEDFA QLD, AWU and AWU (NSW)

A maggot was found inside an employee's lunch box. The unions claimed this constituted "...major hygiene concerns with the camp". The workers went on strike twice for a total of 4 days. Two NSW Health Inspectors conducted an inspection and neither found serious breaches of hygiene standards. The CFMEU notified the AIRC of a dispute relating to the hygiene standard. The AIRC accepted that while the performance of the caterer had been less than exemplary the claim of safety problems was not convincing.

Draffin v CFMEU, Allen, Benstead, Oliver and Walton Constructions

The ABCC alleges that Walton terminated its contract with a subcontractor at instruction of the CFMEU, due to the subcontractor's use of AWAs. The CFMEU claims that the decision to terminate the contract was based on the subcontractor's inadequate qualifications in traffic management.

A & L Silvestri Pty Ltd & Hadgkiss v CFMEU, CFMEU (NSW), Primmer, Lane & Kelly

The CFMEU took action with intent to coerce a head-contractor to terminate its contract with Silvestri because Silvestri didn't have a union EBA. With intent to coerce the head-contractor, the union threatened to call the NSW OHS Authority and have the job shut down.

⁹ <http://www.abcc.gov.au>

¹⁰ See especially the speech by ABC Commissioner, Mr John Lloyd, made on 26 October 2009 <http://www.abcc.gov.au/abcc/Mediacentre/MediaArchive-2009.htm>

8 PSYCHOSOCIAL HAZARDS

- 8.1 The section of the report dealing with psychosocial hazards does not distinguish between the causes of such hazards. Stress, for example, is induced not only by conditions at work. There must be a clear causal connection present between the suffering of this condition and the employee's work if an employer is to be accountable. Where the causal connection is unclear, OHS regulation should not impose a duty upon employers. In fact the question assumes that these matters are part of identifiable hazards and risks when they are more clearly manifestations of reactions to life variables. One person might be extremely affected by an event and suffer stress with another person being unaffected by the same incident.
- 8.2 Bullying is a form of harassment, including pranks and "initiations" (especially for apprentices) as well as verbal abuse. These practices are unacceptable. Where there are direct links between employer conduct and bullying then this conduct should be punishable by a criminal fine. However, as was the case involving a Ballarat Radio Station¹¹ there must be an unquestionable causal link between the activities or knowing omission by the employer before an offence is triggered. It would be rare that there would be OHS prosecutions related to these matters except where a direct link could be made to incidents at the workplace.
- 8.3 Master Builders notes that the draft report asserts that the existence of a Code of Practice regarding bullying in some jurisdictions means that businesses in those jurisdictions are likely to have the greatest incentive to manage bullying and harassment. Codes of Practice provide guidance to duty holders about how to meet their obligations under OHS Acts or regulations. Of themselves they do not create obligations on employers. Codes of Practice provide one possible way in which employers can meet their OHS obligations. There are many other sources of information available which assist employers to put in place policies and procedures to address bullying. For example, Master Builders Human Resources Manual, which has been developed to assist small and medium sized builders to develop policies and procedures on key aspects of human resources management, contains guidance and a sample policy dealing with discrimination, bullying and harassment.¹²

¹¹ WorkSafe Victoria v Ballarat Radio Pty Ltd (Victorian Magistrates Court, August 2004)

¹² Human Resources Manuals are available from State and Territory Master Builders Associations in New South Wales, Victoria, Western Australian, Northern Territory and the ACT. A manual for Queensland is currently under development.

9 MANUAL TASKS

- 9.1 The draft report (page 311) concludes that jurisdictions that have not adopted the National Standard for Manual Tasks (New South Wales, Victoria, Queensland, South Australia, Western Australia) may not be gaining the potential benefits derived from the national standard's best practice measures for manual handling management and control in the workplace. This claim is based on the potential savings identified in the Regulation Impact Statement (RIS) developed for the Standard and Code.
- 9.2 The Manual Tasks Standard and Code of Practice include duties that exceeded the requirements then in place in most jurisdictions. To ensure that the full costs of adopting the Standard and Code were properly identified Master Builders sought the inclusion of qualitative benchmarks of the duties introduced in the Standard against those which were then in place in the States and Territories. This benchmarking work was not completed. In Master Builders' view, the RIS therefore did not properly take into consideration the full costs of implementing the Standard and Code. Reliance on the RIS in order to reach conclusions about the implications of the failure to adopt the standard is therefore, in Master Builders' view, problematic.
- 9.3 During the development of the Manual Tasks Standard and Code of Practice industry raised a number of serious concerns about their practical application. Chief among these concerns are the onerous training and consultation requirements, in particular the requirement in the Standard for training to be provided *when any aspect of the work changes*. Work in the building and construction industry is by its very nature constantly changing: it is neither feasible nor practical to meet this aspect of the Standard. Industry also had concerns about the perceived cost increases for individual small contractors, in particular, as a result of those businesses needing to undertake their own manual handling appraisals/risk assessments at the micro-level of each task. The Code of Practice, at over 120 pages in length, is not the sort of practical guidance needed to assist employers, in particular small to medium sized enterprises, to meet their obligations.
- 9.4 For the reasons outlined above, the Standard and Code of Practice have not been universally adopted. Master Builders believes that a more thorough analysis of the reasons why the Standard and Code have not been implemented should be undertaken to ensure that the conclusion reached on page 311 of the report is sound.

10 FALLS FROM HEIGHT

- 10.1 Page 298 of the draft report states "Victoria, which had a fall threshold of 2 metres,

had a greater incidence of falls than Queensland over the same period (1999-2000 to 2003-04, except for 2002-2003).” Master Builders notes that the 2 metre height threshold was introduced by the *OHS (Prevention of Falls) Regulations 2003* which came into effect on 31 March 2004. This error should be corrected. Given the timing of the introduction of the 2 metre height threshold in Victoria, the conclusion reached in regard to figure 12.1 on page 299 should be reviewed. A significant proportion of the improvement in the Victorian incidence rate for falls from height occurred prior to the introduction of the 2 metre height threshold. Any broad conclusions about the link between height thresholds and falls incidence therefore appears to be at best tenuous. As correctly noted on page 299 of the draft report, jurisdictions with lower thresholds do not necessarily outperform those with higher thresholds, or, in the case of South Australia, with no mandated threshold. Indeed the improvement in incidence rates in South Australia appears to outstrip that of Victoria.

- 10.2 Master Builders has consistently argued that the proposed National Code of Practice for the Prevention of Falls from Height in Housing Construction should not mandate a height threshold, except in its application to work around stairwell voids, internal landings, suspended slabs and steeply-pitched roofs. Rather, mandatory fall protection, as is usual in occupational health and safety, should be based on the level of risk. This is the approach taken in the South Australian regulations. The information provided in the draft report, which shows that there is no clear link between thresholds and incidence of falls supports Master Builders’ position.

11 CONCLUSION

- 11.1 Master Builders supports the harmonisation of occupational health and safety laws. The different approaches to regulation of OHS across the jurisdictions highlighted by the draft report demonstrate why this task is important for those businesses that operate across jurisdictions. The report also highlights the need for harmonisation to consider costs (for example of licensing) and administrative requirements (in particular record keeping and provision information to regulators)