

Master Builders Australia
Submission to
2018 Review of the Model WHS Laws



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INTRODUCTION

1. This submission is made on behalf of Master Builders Australia Ltd.
2. Master Builders Australia (Master Builders) is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders' members are the Master Builder State and Territory Associations. Over 127 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
3. The building and construction industry (BCI) is an extremely important part of, and contributor to, the Australian economy and community. It is the second largest industry in Australia, accounting for 8.1 per cent of gross domestic product, and around 9 per cent of employment in Australia. The cumulative building and construction task over the next decade will require work done to the value of \$2.6 trillion and for the number of people employed in the industry to rise by 300,000 to 1.3 million.
4. The building and construction industry:
 - Consists of over 340,000 business entities, of which approximately 97% are considered small businesses (fewer than 20 employees);
 - Employs over 1 million people (around 1 in every 10 workers) representing the third largest employing industry behind retail and health services;
 - Represents over 8% of GDP, the second largest sector within the economy;
 - Trains more than half of the total number of trades-based apprentices every year, being well over 50,000 apprentices; and
 - Performs building work each year to a value that exceeds \$200 billion.

SUMMARY OF THIS SUBMISSION

Master Builders supports a WHS framework that delivers real, practical improvements to industry safety outcomes.

The laws should always prioritise safety outcomes over paperwork and process; be flexible to accommodate changes in technology and work practices; be expressed clearly and simply; be enforced consistently and pragmatically; be immune to mis-use; and be capable of being observed by small businesses and ordinary workers.

Overall, Master Builders believes that the content, obligations and duties of the model WHS framework are sound and do not require substantive or fundamental change. For participants in the BCI, concerns centre around a number of key elements as detailed throughout this submission, being:

- Determining the source of WHS duty or obligation and the status of materials that either outline a duty or obligation or purport to outline a duty or obligation;
- Uncertainty about regulator enforcement and compliance processes;
- An increase in the extent to which WHS law and obligations differ between jurisdictions;
- The use of WHS for unrelated purposes; and
- Ensuring a practicable and common-sense approach is taken to the nature, application and enforcement of WHS duties and obligations.

5. Ensuring workplaces are safe and productive is the number one policy priority for Master Builders and our 33,000 members. The BCI is a significant part of the economy and community and is forecast to grow larger over the coming decade. Safe workplaces are a key element for our future success as an industry.
6. Safety outcomes in the BCI have consistently improved in recent years, with fatality and serious incident data trending downwards. However, there is more work to do and the BCI retains the definition of 'priority industry' by Safe Work Australia (SWA).

7. The BCI has a number of attributes and nuances that make it unique. While these are both current and historical, they are important to understand in the context of this submission and its content.
8. In broad terms, Master Builders considers that the existing model WHS framework is sound and does not need significant or fundamental alteration. Rather, the concerns of Master Builders' members and participants in the BCI relate more to matters such as how the law is applied and enforced and the status/source of WHS obligations and duties.
9. These concerns are discussed throughout and include key issues such as:
 - Determining what is required to ensure WHS compliance, including where to look, what to do, and the standing/status of various information/guidance sources.
 - Understanding the approach regulators take to enforcement and compliance processes, and their role;
 - The increasing differences between jurisdictions in terms WHS obligations and duties;
 - Increasing confusion about what is and is not a WHS matter and the use of WHS for unrelated ends; and
 - The need to ensure all WHS requirements, obligations and enforcement processes are realistic, clear, expressed simply and practicable.

STRUCTURE OF THIS SUBMISSION

10. This submission is structured into three distinct parts:
 - Current BCI employment and WHS profile – to provide an overview of current WHS issues;
 - Relevant BCI background and culture – to provide context for this submission; and
 - Review response and general observations – response to specific review questions and general observations about the WHS framework.
11. Key recommendations contained in this submission include, but are not limited to, the following:

RECOMMENDATION:

To achieve improved WHS performance amongst SMEs in the BCI, it is necessary to develop initiatives that provide:

- meaningful guidance materials;
- a reduced level of regulation, with national consistency;
- improved quality of regulation with provisions that can be properly understood;
- targeted workplace assistance; and
- face-to-face advice.

RECOMMENDATION:

The Review should examine and identify the extent to which jurisdictions are diverging from the model WHS framework and recommend strategies for the Commonwealth Government to pursue in arresting such divergence.

RECOMMENDATION:

The Review should focus on regulatory quality and not quantity. In doing so, the Review should ensure that regulation:

- is not repeated or duplicated;
- is clearly expressed and accessible;
- does not become the focus in terms of WHS compliance; and
- drives meaningful improvements in safety outcomes.

RECOMMENDATION:

Master Builders urges the Review to ensure that, so far as possible, avenues for exploitation of the WHS framework are closed and any recommendations for change do not create further avenues for such conduct.

RECOMMENDATION:

Given the history and ongoing occurrence of abuse of right of entry for WHS purposes in the building and construction industry, any right of entry for union officials should be subject to their being accompanied by an authorised inspector from the relevant regulatory body.

Only union officials who are 'fit and proper persons' should be entitled to exercise the right of entry under a permit issued by an independent government authority or judicial officer.

12. We ask the Review to note that this submission:
- should be read in conjunction with that of the Australian Chamber of Commerce and Industry ('ACCI');
 - emphasis in quotations throughout is that of Master Builders; and
 - includes throughout quotations/feedback from a range of Master Builders' members.

MBA APPROACH TO WHS POLICY AND FRAMEWORK

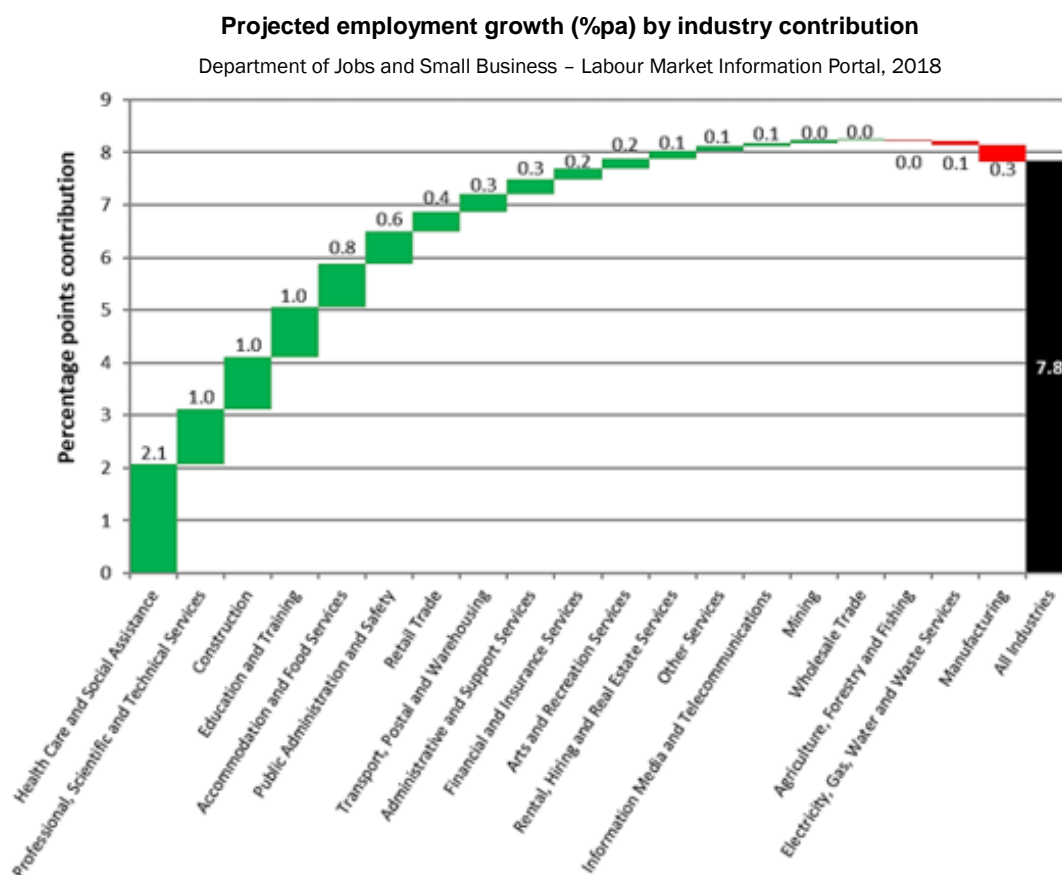
13. While recognising the significant WHS improvements achieved in the BCI in recent years, Master Builders' key focus is to continue to address areas of underperformance in WHS by striving for improvements through quality education and facilitating strong relationships between workers and employers. Regulatory settings should be balanced, sensible and practical and, wherever appropriate, limit the burden of red-tape. Nationally consistent WHS regulation is essential in improving safety outcomes and assisting businesses operating across multiple jurisdictions.
14. Improvements in WHS can only occur within a policy framework that focuses on practical safety outcomes where a safety-oriented workplace culture is prioritised. WHS is a shared responsibility and WHS laws should reflect the nature of the multitude of relationships that co-exist on a construction site.
15. In addition, the overlap between WHS and industrial relations laws creates unnecessary confusion and complexity, with the concept of workplace safety being increasingly sullied by organisations who use safety as a tactic to achieve industrial outcomes. Modification of the current framework is necessary to prohibit those organisations using unsubstantiated safety concerns to gain unlawful entry to and disrupt construction sites. These abuses undermine WHS laws, lead to costly disputes and detract resources from initiatives that attain genuine safety improvements.

EMPLOYMENT PROFILE OF THE BUILDING AND CONSTRUCTION INDUSTRY

Summary of the industry in 2018

16. To the extent that national statistics can adequately describe the state of WHS performance in the construction industry, the following points are clear.
17. In nearly all respects the construction industry has continued to improve performance:
 - The incidence rate for serious claims per 1000 employees is down 42 per cent since 2003, consistently holding a steady downtrend.
 - The incidence rate for fatalities within the construction sector is down by 43 per cent since 2003.
 - The incidence rate for compensated fatalities per million hours of work completed is down 35 per cent since 2003 consistently holding a steady downtrend. This indicates that periods of high demand have no discernible effect on fatalities.
 - The incidence rate of fatalities by industry of employer in key industries indicates a gradual downtrend overall, though highlights volatility in the agricultural industry.
 - Disease related fatalities such as asbestosis and mesothelioma from exposures to asbestos many years ago continue to influence WHS statistics in the BCI, however less so than they have in previous years.
 - The BCI is outperforming in key indicators and is on track to meet the National OHS strategy targets.
18. However, construction is still well behind the all industry rate:
 - Claims incidence rates in construction are still much higher than the national average.
 - Compensated fatality incidence rates are still twice the rate of the national average.
 - Construction tradespersons have higher incidence rates than tradespersons working in all other industries.
19. Some other features are also evident:
 - The level of injury does not seem related to the level of construction activity, suggesting that risks are generated mainly by the operating practices of companies not the pressure of economic activity.
 - The injury profile of the industry is dominated by manual handling and falls; there has been no evidence to suggest a change in this profile over the period.
 - The non-building construction sector (ie infrastructure projects) has the highest incidence rates compared with other categories in the construction industry.
 - Survey data indicates both young and older workers are exposed to greater risk of injury.
 - Survey data indicates that while contract work and non-employees represent a higher proportion in the construction workforce their experience of injury is similar to that of employees.
20. Construction is the third largest employing industry in Australia, employing 1,159,000 people (or 10.7 per cent of the total workforce) as at February 2018. The construction industry is strongly influenced by economic cycles and can be susceptible to skill shortages as well as oversupply for some skills. Consistently for at least the last 10 years, the construction industry, in line with Australia's strengthening economy, has experienced sustained and robust employment growth.

21. The Department of Jobs and Small Business has projected employment growth for the construction industry for the next five years, although it should be noted that some risk is attached to this outlook, particularly in light of the changing economic environment. Over a five-year period, employment in the construction industry is expected to grow at an average rate of 2.18 per cent per annum, which equates to around 64,800 new jobs (see figure). This compares with an average annual growth rate of 1.56 per cent across all industries over the same period. The projected job growth 'locks in' the much higher employment level reached in recent years, and anticipates further employment gains, albeit at a lower growth rate into the future.



22. The Australian workforce is becoming skewed to older age groups as a result of an ageing population. However, the construction industry has a higher share of prime aged workers between the ages of 20 years and 44 years in comparison with all other industries¹. Broadly, the Construction industry has a relatively young workforce, with 43.3 per cent of workers aged 15 to 34 years, compared with 38.8 per cent across all industries. By contrast, older workers are underrepresented in the Construction industry, likely due to the manual labour roles dominant in the industry, with 35.4 per cent aged 45 years or over, compared with 39.3 per cent across all industries. The median age of workers in the industry was 38 years in 2014, slightly below the median age of 40 years recorded across all industries.
23. In recent years, the construction industry has, unlike many other industries, experienced an influx of workers in all age groups and may be better placed to adapt to workforce ageing. Strong infrastructure investment and non-residential building activity, along with continuing high levels of residential construction (albeit more in line with population growth) are expected to support strong projected employment growth in the Construction industry (up by 120,700 or 10.9 per cent). The reality of this data is that 1 in 12 new jobs in Australia will be created within the construction industry.
24. Notwithstanding, the construction industry faces a real issue; census data indicates that attrition and retirement will account for the loss of over 120,000 workers over the next 5 years, which, along

¹ <https://cica.org.au/wp-content/uploads/2015-Construction-Industry-Outlook.pdf>, fig. 5.

with the forecast growth, indicates that training of over 220,000 new workers will need to occur. The challenge will be to boost current levels of new skilled entrants over the same period, or the industry will suffer an increasing skills gap and ageing worker effect.

25. This changing dynamic means that training for WHS and engendering a culture that integrates WHS in all aspects of work is a priority, especially for young people entering the industry. WHS must be a vital component of education for all industry participants. This stance on education is the best way of changing the culture of the industry so that WHS becomes integral to all workplace tasks.

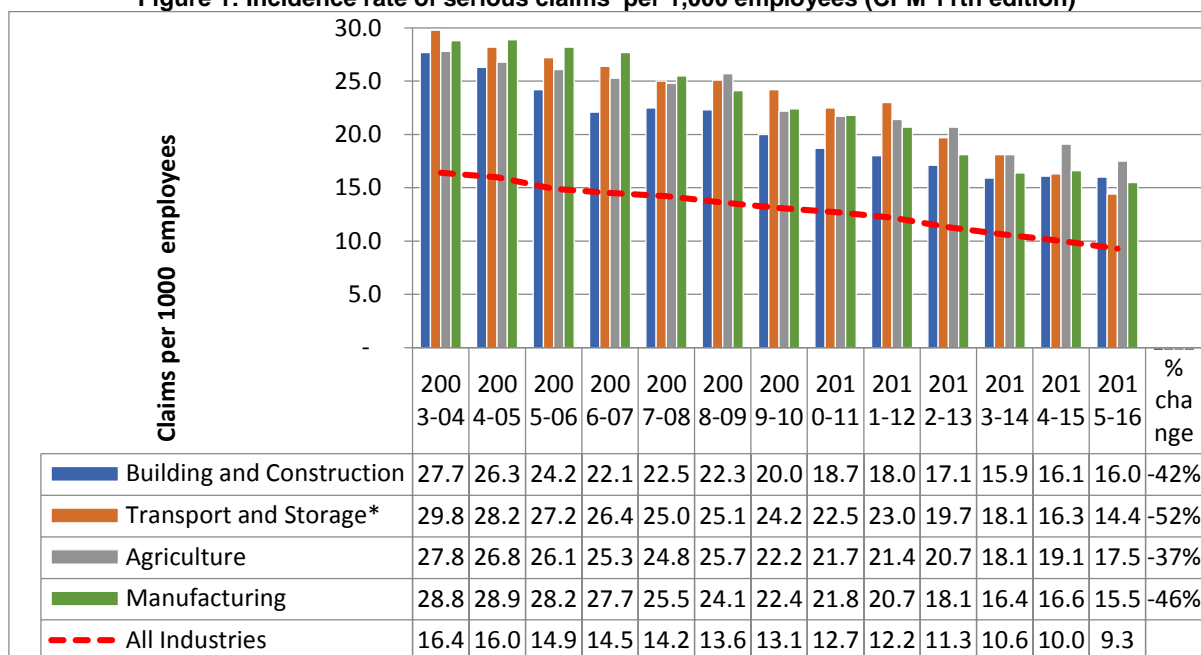
WHS Performance in the Industry is Improving

26. The BCI's WHS performance remains a matter of concern to all industry participants. However, the industry has responded to the various pressures for improved work health and safety management. According to the data analysed here, WHS performance is improving and has maintained a steady trend of improvement for the past 15 years.
27. The data is drawn primarily from the National Data Set for Compensation based statistics (NDS), census information, labour market information from the Department of Jobs and Small Business Labour Market Information Portal, and public reports produced by Safe Work Australia. Some elements of the data have been tracked by Master Builders Australia and updated over the preceding 15-year period.

Incidence and Frequency Rates Reducing but Slowing

28. **Figure 1** below shows that:
- The industry's incidence rate has fallen by 22 per cent in the period 2003-04 to 2007-08, a much higher rate of decrease than in the manufacturing, transport and storage and agriculture industries
 - From 2008 onwards, the industries incidence rate followed this downward trend until reaching an all-time low in 2014 and plateauing in 2015 and 2016.
29. Agriculture, manufacturing, and transport and storage have been adopted as high-risk benchmark industries for use in comparison to the industry throughout the below discussion.

Figure 1: Incidence rate of serious claims² per 1,000 employees (CPM 11th edition)



30. The BCI maintained a reduction in its incidence rate (27.7 to 16.0, being a 42% reduction from 2003-16), but it is still much higher than that for all industries (9.3 in 2016).
31. In **Figure 2** (using data drawn from Safe Work Australia reports) the frequency rate shows a similar trend, with building and construction outperforming the three high risk benchmark industries for the period 2003 – 2015, noting that Transport and Storage outperformed the BCI in 2016. It is pertinent that the BCI maintains a significantly higher rate of frequency than the ‘all-industries’ rate (being 8.0 in 2016, compared with 5.6 for all industries).

Figure 2: Frequency rate of serious claims per 1 million hours



Fatalities Still a Major Concern

32. Understanding fatality data in the construction industry is a complex matter. It is accepted that compensated fatality data is likely to understate disease-related deaths, and that the construction industry, having a significant percentage of self-employed workers, is also likely to underestimate fatality numbers and rates. Further, it should be noted that in the past a broad-brush assessment of statistics has led to development of policy that has failed to consider industrial nuances, leading

²Serious claims include all fatalities, all permanent incapacity claims (as defined by the jurisdictions) and temporary claims for which one or more weeks of time lost from work has been recorded.

to incorrectly tailored policy that can prove to have little effect on industrial safety outcomes especially in with respect to disease management and control.

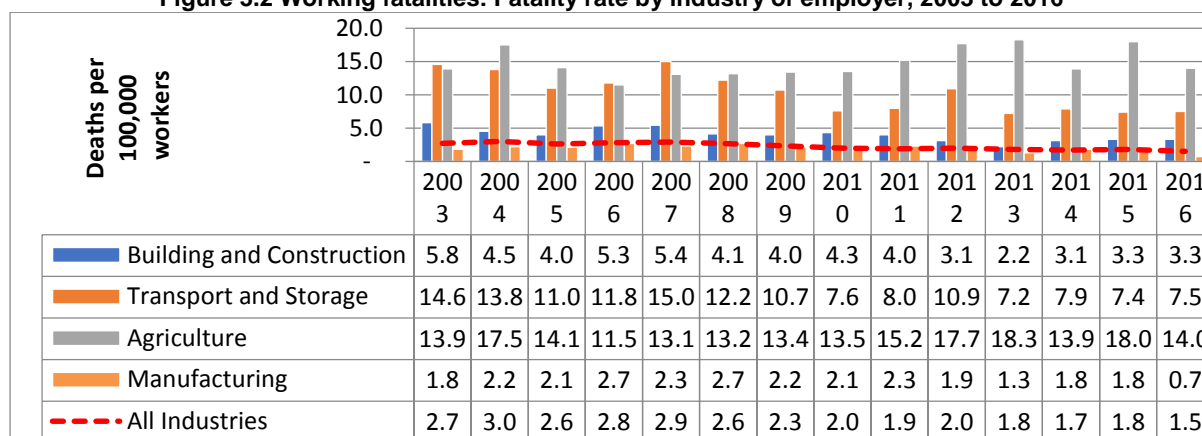
33. According to the most recent publicly available data from SWA (**Fig. 3.1**), working fatalities in key industries have steadily decreased between 2003 and 2016. Of note, Transport and Storage has reduced fatalities by 49% when compared to 2003 and Building and Construction has reduced fatalities by 43%³, in line with the all industry rate of 44%. Notwithstanding the significant improvement in outcomes, both industries are significantly underperforming when compared to the ‘all industry average’, where BCI remains over 200% higher, and Transport and Storage remains 500% higher.

Figure 3.1 Working Fatalities: Changes in rates of fatalities by industry of employer, 2003 to 2016

Industry	% change
Construction	-43%
Transport	-49%
Agriculture	-12%
Manufacturing	-62%
All industries	-44%

34. These figures highlight two points. First, the number of fatalities in construction remains high – even where consistent reduction is evident. While the long-term reduction is encouraging, the significant human and economic cost associated with fatalities means that this area needs to be given the highest order of priority.
35. Second, from a statistical standpoint, the numbers do not allow much confidence in predicting sustainable trends into the future.

Figure 3.2 Working fatalities: Fatality rate by industry of employer, 2003 to 2016

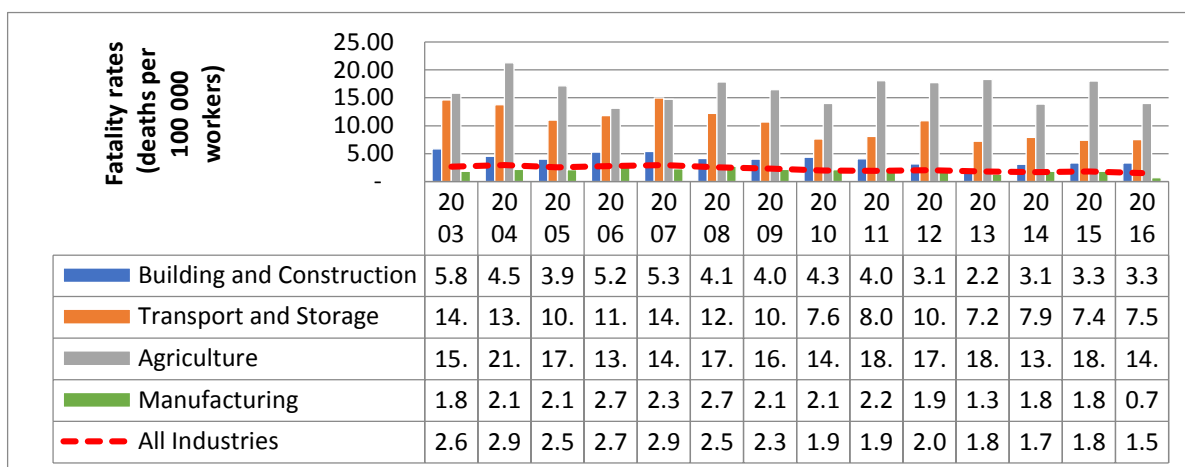


36. In terms of the fatality rate (deaths per 100,000 workers) agriculture (14.0) and transport and storage (7.5) had the highest fatality rate. The BCI rate was lower, at 3.3, however remains more than double the all industries rate of 1.5.
37. In this period the fatality rate has reduced consistently in all selected industries with the exception of Agriculture, which remains both high and volatile.
38. Data for the period 2017-18 is not yet available from SWA, however compensated fatality data also allows an examination of the difference between traumatic and gradual onset fatalities which may be useful in directing effort to achieve a reduction in fatality rates. The traumatic fatality cases directly reflect conditions in the period shown, whereas gradual onset fatalities may indicate the results of exposure to substances, materials and practices used in previous time periods. A disease

³Although the data reflects a 62% reduction across the manufacturing sector, this is not as statistically significant as the reductions in these two key industries as manufacturing maintained a significantly lower rate of fatalities (approximately 300% lower than the BCI, and 650% than Manufacturing) over the entire period, as well as maintaining a rate within 0.1 of the ‘all industry’ average over the period.

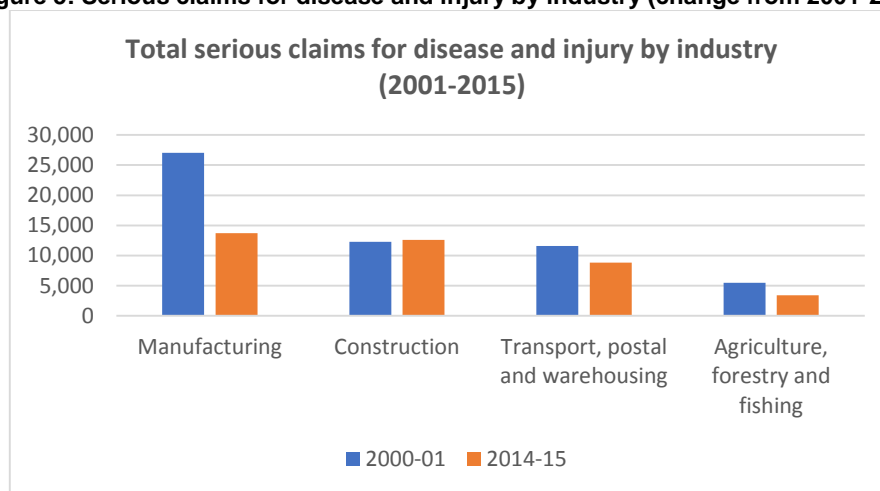
such as asbestosis is an example. This data has been drawn from SWA and is noted in Figure 4 below.

Figure 4: Compensated Fatalities Incidence Rate (compensated fatalities per 100,000 employees) by industry of employer, 2003 to 2016



39. **Figure 5** shows fatalities related to immediate causes (injury and poisoning) and excludes disease-related fatalities. The BCI has reduced its rate by 14 per cent in the period, compared with 5 per cent for all industries. There has been improvement in all sectors but transport, but the rate of improvement is skewed by the underdeveloped numbers in 2007-08.

Figure 5: Serious claims for disease and injury by industry (change from 2001-2015)



40. The equivalent series for disease related fatalities shows significant reductions in all the selected industries with the exception of building and construction. Manufacturing maintains the highest rate (13,725 in 2015) of all industries, representing 12.8% of all claims across all industries (where the total amount of claims in 2015 was 107,355, from 133,115 in 2000-01⁴). The BCI representing the second highest number of claims, totalling 12,575 and representing 11.7% of all claims.

41. Body stressing accounted for at least a third of all construction industry compensated injuries in the since 2014 (37%)⁵, where falls, trips and slips, and hits by moving objects account for a total of a further 42% of (28% and 14% respectively). Main causes of fatalities were falls from height (28%), vehicle incidents (16%), and contact with electricity (15%).

42. Within the disease related fatalities category, asbestosis and mesothelioma cases were represented significantly less than in previous years, where the most recent Construction-industry specific data

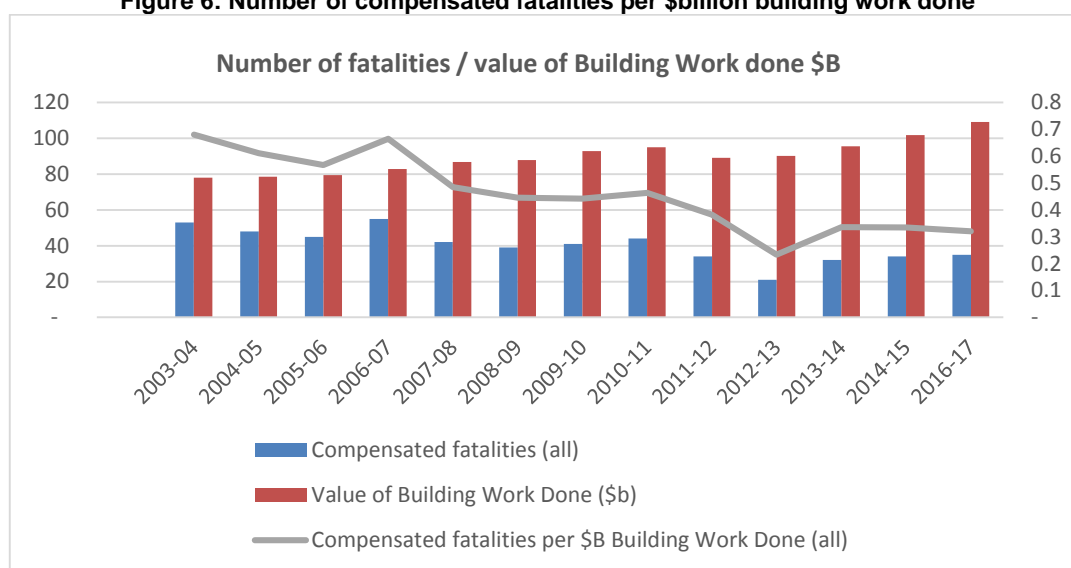
⁴ <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics>

⁵ <https://www.safeworkaustralia.gov.au/system/files/documents/1702/construction-industry-profile.pdf>

recorded that ‘less than five claims for asbestosis and no claims for mesothelioma [were] recorded for diseases over [the period of 2008-2013]’⁶.

43. Between 2014 and 2016 (the most recent data held by SWA) the most common causes of fatality in across all industries were:
 - vehicle collisions, accounting for 42% of fatalities,
 - falls from a height, accounting for 14% of fatalities and
 - being hit by moving objects (9%) and being hit by falling objects (9%)⁷.
44. Another perspective on fatality data is to compare numbers and trends with an exposure denominator such as the level of building activity (**Figure 6**). One of the intuitive responses to fatalities is that they are more likely to occur when time pressures and labour supply shortages lead to poor practices; data shows however that this is not the case.

Figure 6: Number of compensated fatalities per \$billion building work done



45. **Figure 6** shows the relationship between the level of building activity and the number and rate of fatalities⁸. The raw numbers suggest there is no relationship between the level of building activity and fatality numbers and rates: as activity has increased the number of fatalities has decreased. Further highlighting improvements in fatality rates in the BCI.
46. This suggests there is no relationship between the two variables and indicates that the reasons for fatalities may be more to do with practices unaffected by activity peaks.

Performance Varies Across Jurisdictions

47. The variation in performance across jurisdictions can be a basis for trying to identify success factors or barriers to improvement. The most recent jurisdiction-based comparison can be found in the latest SWA Information Sheet for Construction.⁹ SWA data from previous reports is reproduced below in **Figure 7.1**; the most recent data is reproduced below in **Figure 7.2**.

⁶ Noting from 2012 the Australian Government agency Asbestos Safety and Eradication Agency was established and took over the collection of key data in this field, construction industry specific data is difficult to obtain.
⁷ <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics>
⁸ The data are drawn from the Statistical Compendium and the Australian Bureau of Statistics report number 8752 (Building Activity Australia, September quarter 2009 released January 2010).
⁹ 2012-2016 Source: Indicator 1 - https://www.safeworkaustralia.gov.au/system/files/documents/1710/comparative-performance-monitoring-report-19th-edition-part-1_1.pdf

Figure 7.1: Serious claims: Incidence rates by jurisdiction (2003-2011)

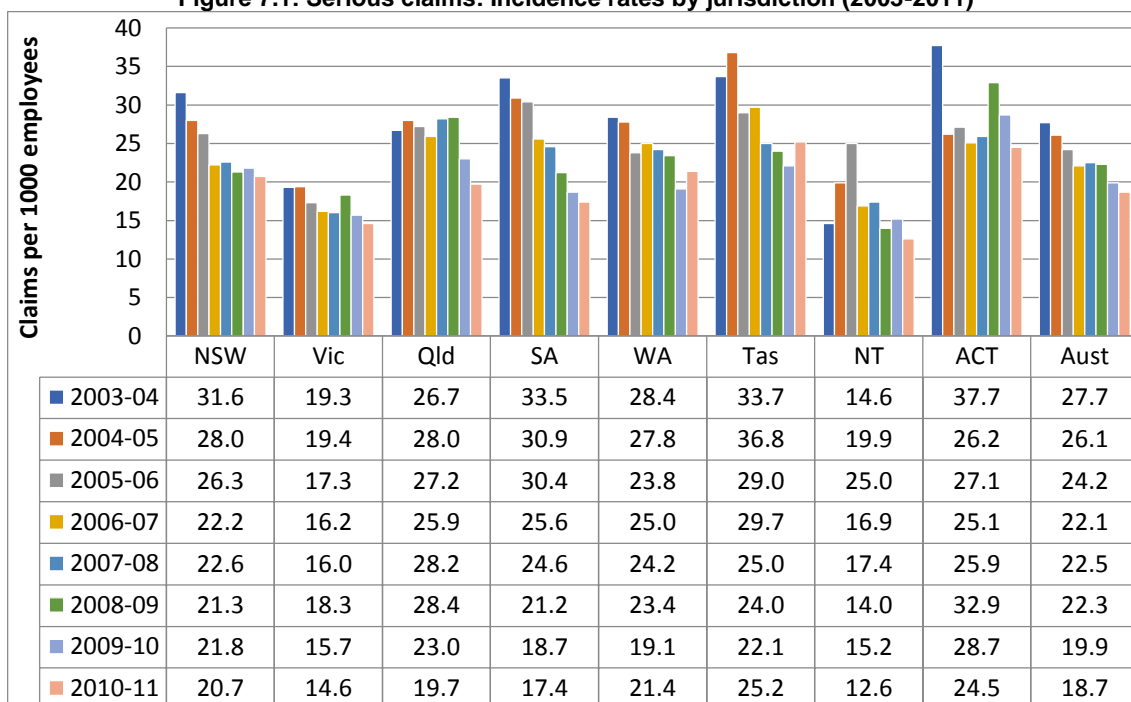
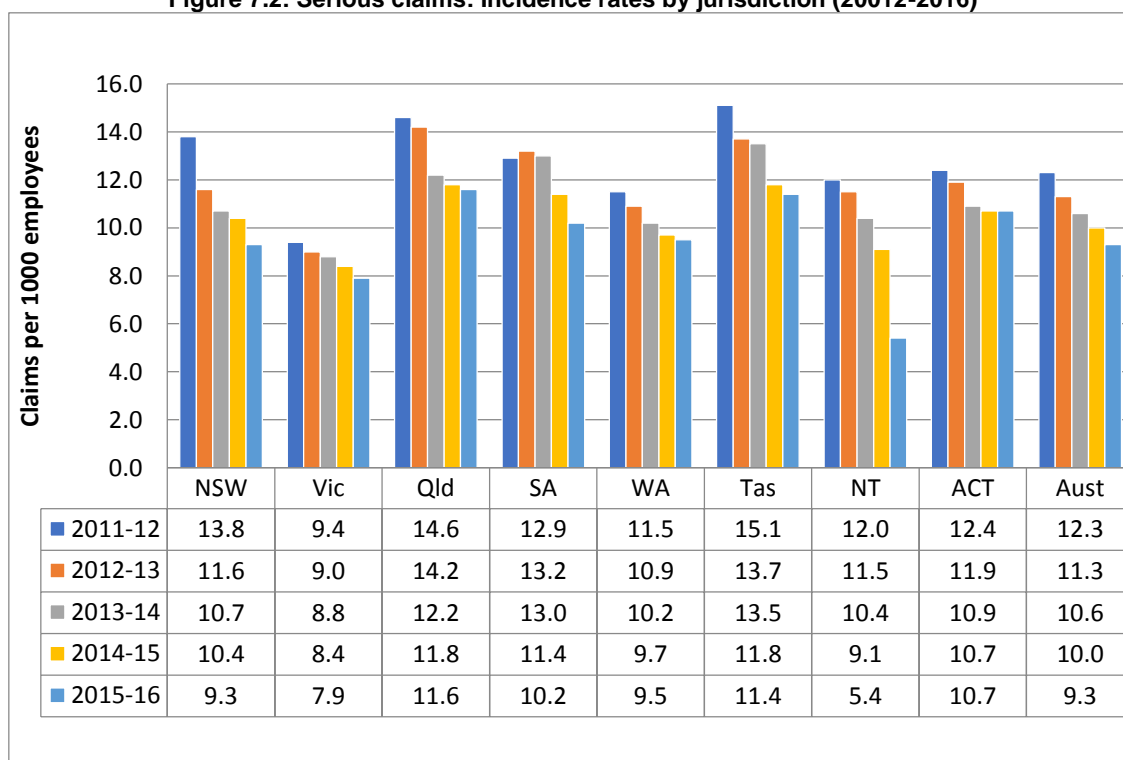


Figure 7.2: Serious claims: Incidence rates by jurisdiction (2011-2016)



48. Victoria has been consistently below the national incidence rate for the 13-year period. Queensland’s rate has significantly reduced, after maintaining a steady performance from 2003-2010, and reduced significantly for the first time since in 2011. New South Wales, ACT, Tasmania and South Australia have all achieved reductions in the incidence rate of at least 65% over the total period, although three of those jurisdictions (SA, Tasmania and ACT) are still performing worse than the Australian average rate.

Performance Varies Within Different Building and Construction Sectors

49. The BCI is diverse and represents many different types of construction activities and their attendant hazards. For statistical purposes the industry is classified into two groups, each with a number of sub-divisions as described below:

41 General Construction

411: *Building Construction*: covers the construction, alteration and repair of housing and other residential buildings; and non-residential buildings such as hotels, hospitals and prisons.

412: *Non-Building Construction*: covers the construction and repair of structures such as roads and bridges, railways, harbours, dams and pipelines.

42 Construction Trade Services

421: *Site Preparation Services*: covers activities such as earthmoving, excavating and trench-digging, and the hire of excavation equipment with operators.

422: *Building Structure Services*: covers activities such as concreting, bricklaying, roofing services and structural steel erection services.

423: *Installation Trade Services*: covers activities such as plumbing, electrical, air conditioning and heating services and fire and security system services.

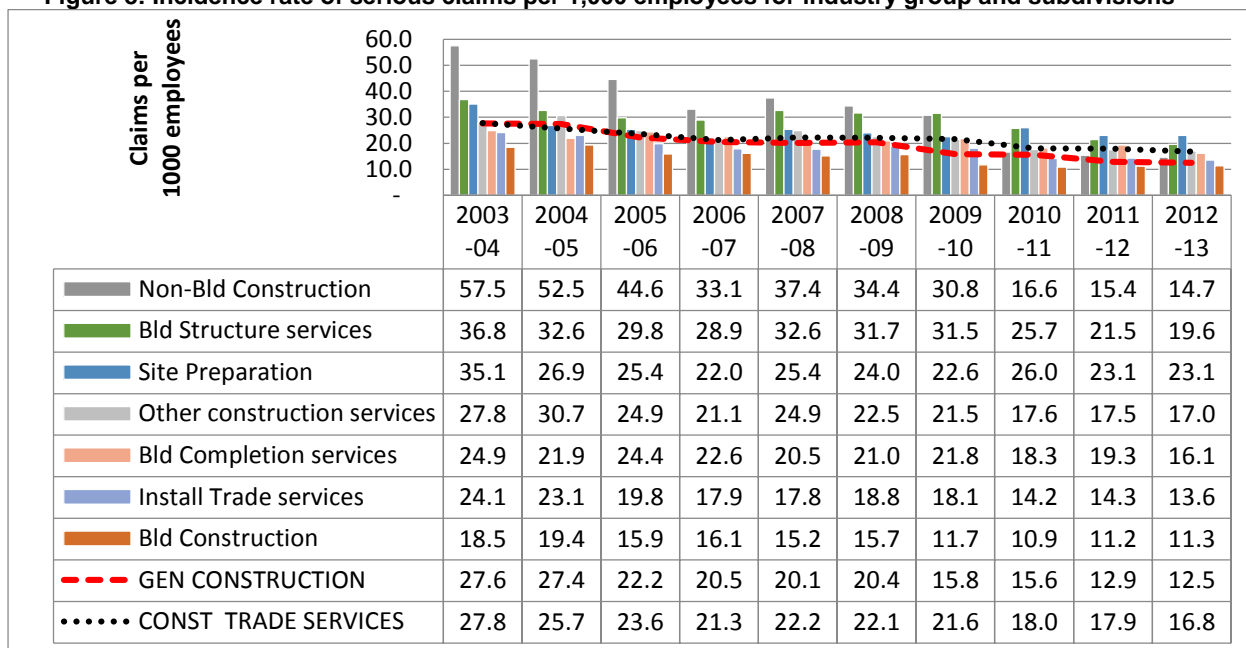
424: *Building Completion Services*: covers activities such as plastering and ceiling services, carpentry, tiling, painting and decorating and glazing services.

425: *Other Construction Services*: covers activities such as landscaping and other special services such as sand blasting and scaffold construction.

50. Differences in risk exposure are found in these industry sub-groups, and these may influence claims performance.

51. **Figure 8** shows that these two groups had similar incident rates over the period. The real differences are in the sub-divisions, with non-building construction having the highest rate and building construction the lowest rate. Nearly all subdivisions have reduced their rate by 25%-33% up to 2006-07.

Figure 8: Incidence rate of serious claims per 1,000 employees for industry group and subdivisions



Injury Profile Has Not Changed Significantly

52. Although there is evidence of reductions in the number and rate of claims, the profile of injury has not changed significantly. The most recent data shown in **Figure 9.1** illustrates the profile as represented between the period of 2003-2008; **Figure 9.2** represents the most current data from SWA, being the average figures from 2010- 2015. The figures illustrate how rigid the profile is, with little change in the relative importance of the major mechanisms of injury revealed.

Figure 9.1: Percentage serious claims by mechanism of injury or disease – 2003-08

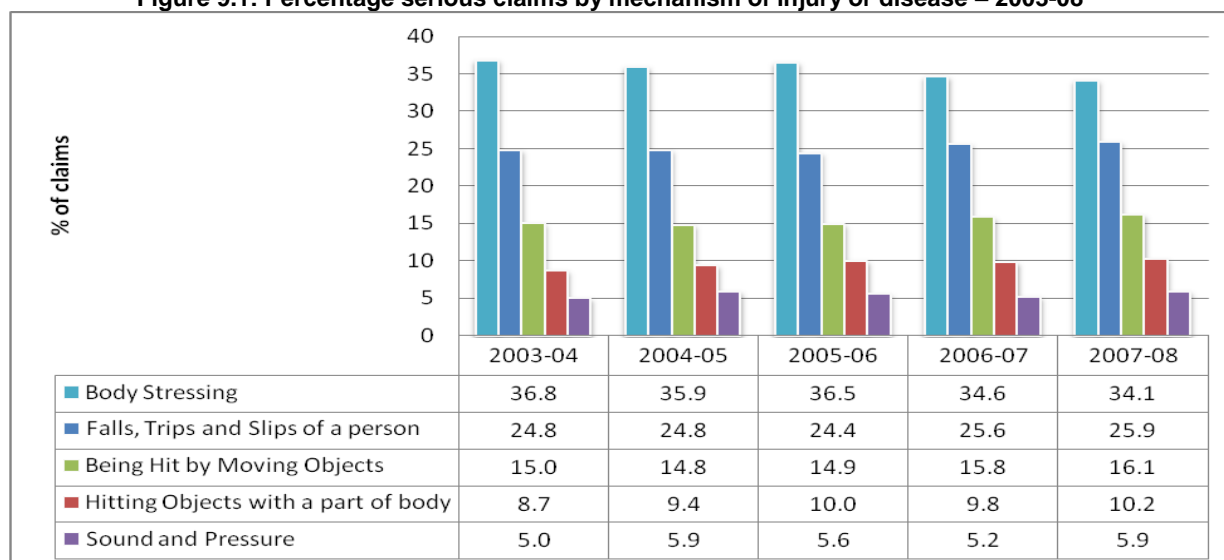
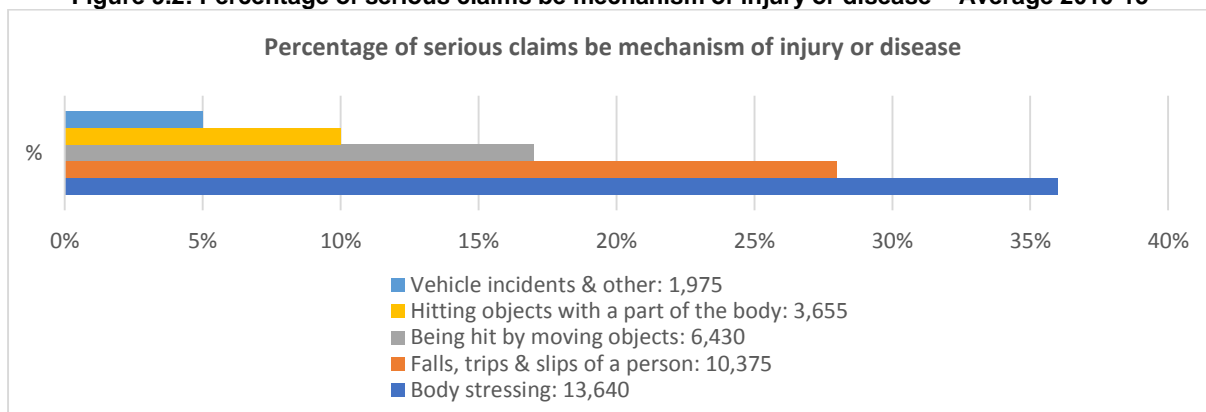


Figure 9.2: Percentage of serious claims by mechanism of injury or disease – Average 2010-15



53. Body stressing remains the major source of serious claims (at 36%), where falls, trips and slips of a person were responsible for 28% of serious claims. Unfortunately, crucial data highlighting correlations between occupations and injury classifications is no longer publicly available (for example, historical data has been able to establish correlations between height injuries such as falls occurring in higher proportions in painting and decorating services, body stressing claims were double the overall rate in Concreting services and well above average in Glazing services, Bricklaying services and Tiling & carpeting services¹⁰).

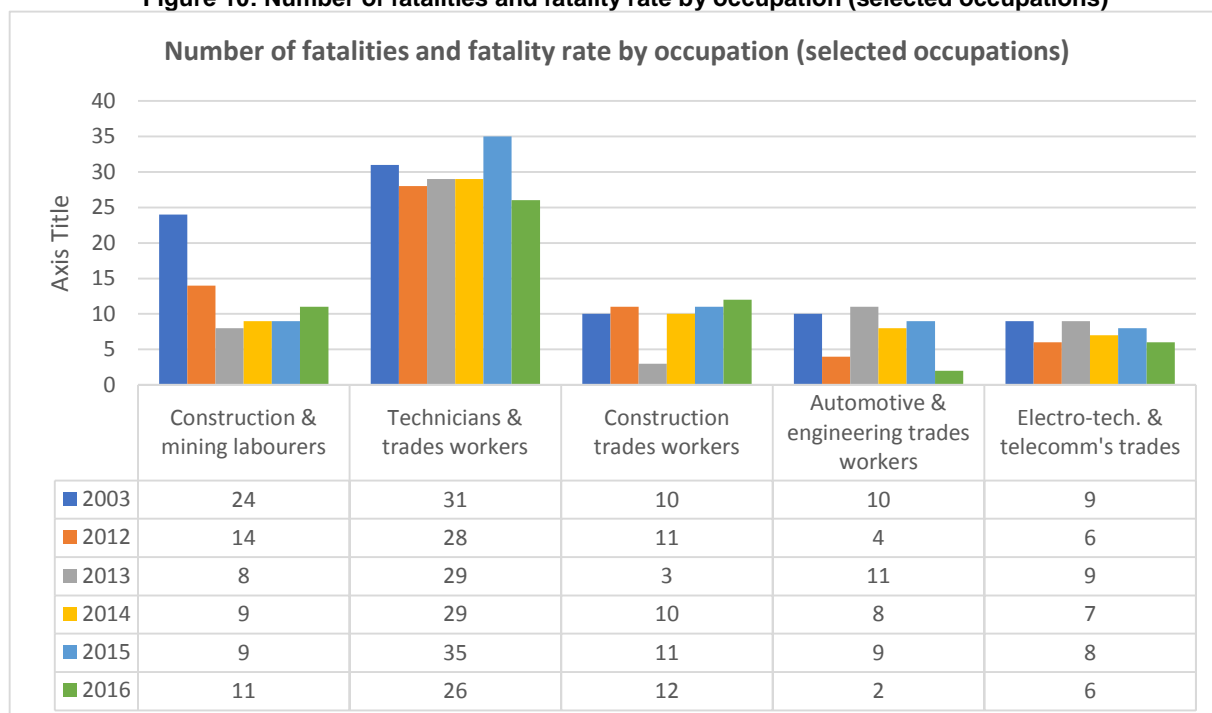
Other Factors: Size, Occupation, Age and Employment Status

54. Not all jurisdictions collect data about the size of company, but in those that do, the pattern is that very small organisations have higher incidence rates than larger firms.¹¹. This factor influences Master Builders’ focus on the need for small business and owner/builders to be an important target group in efforts to promote better WHS performance.
55. Reliable data about occupational experience in the BCI are difficult to find, as statistical collections do not disaggregate the data into meaningful classifications.

¹⁰ Ibid, p.52.

¹¹ See, for example, Bahn, S, Size does matter: the influence of business size on incident rates, *Journal of Occupational Health and Safety*, Volume 24(4), August 2008, p.343.

Figure 10: Number of fatalities and fatality rate by occupation (selected occupations)



56. Using the limited data available from SWA, **Figure 10** shows incidence rates for selected tradespersons across the BCI (noting that not all work by these tradespersons will have been carried out within the BCI). This data is not benchmarked against a weighting factor (such as per 1000 employees or compared to output of hours within the sector).
57. Technicians and trades workers have the highest incident rate and have remained steady between 2012 and 2016 compared to 2003. Construction and mining labourers have the second highest incident rate; however, the average rate has halved since 2003.
58. Previously, Tradespersons in the construction industry had higher incidence rates than that for all tradespersons working in all industries (28.6 compared to 25.0 in 2007-08¹²). This has reduced and is overtaken by technicians and general trades workers (16% of the 10-year average), however remains high (5% of the 10-year average; 7% of fatalities in 2016).
59. The influence of age on injury in the construction industry varies depending on the source of data used. SWA data shows older workers (55-64) have the highest incidence rates, and younger workers (under 25) have the lowest rates¹³.
60. NDS data also shows older workers (55-64) have the highest incidence rates and younger workers (15-24) have the lowest incidence rates.¹⁴ By contrast the survey-based data from the latest ABS Work-Related Injuries Survey (WRIS) (from 2014) shows that younger workers have the highest injury rates¹⁵. This difference may be due to the number of low severity cases captured in the survey data and therefore a lower propensity to lodge compensation claims. In the case of older workers SWA data picks up longer term diseases more comprehensively than survey data.
61. The survey data shows that while the age distribution of the construction workforce is similar to the workforce average, incidence rates were consistently higher, particularly amongst young workers and the middle aged (45-54).

¹² Safe Work Australia, *Compendium of Workers Compensation Statistics*, op. cit, p.51.

¹³ https://www.safeworkaustralia.gov.au/system/files/documents/1709/em17-0212_swa_key_statistics_overview_0.pdf

¹⁴ *Ibid*, p.51.

¹⁵ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6324.0>

62. The structure of the construction workforce has attracted comment in relation to contract workers and the self-employed. According to the WRIS data, about 90% of injuries were incurred by employees and 10% employers or owner managers.

A note about statistics

63. Master Builders has for some time held and raised concerns with respect to the collection, classification, collation and publication of WHS related statistics.
64. These concerns centre around what might be described as a desire to include incidents that are tangentially related to the workplace, classify incidents incorrectly, or double count incidents.
65. Master Builders does not oppose the publication of WHS related statistics – in fact we emphatically support it as one further method by which workplaces and industries can improve safety outcomes. However, statistics of this type must be presented in a clear and consistent way that is accurate and representative; and not used to increase or reduce emphasis on particular issues, instances or industries.
66. While our concerns would be the basis for stand-alone submission in and of itself, an example for background is set out hereunder.
67. This example is based on a 2016 publication of construction industry fatalities published by a state regulator. The publication stated that there were 7 fatalities in the building and construction industry for that state.
68. Upon closer examination, of the 7 fatalities:
- One was represented to be an electrocution while working on external lighting.
 - We are aware it involved a suburban retail premises and was not a construction site or involved construction work.
 - One was represented to be a concrete truck driver crushed by a pumping truck.
 - We are aware the incident occurred on a public road en-route to a construction site and involved a driver failing to apply a handbrake before exiting the vehicle.
 - Police classified this as a motor vehicle accident but it was categorised as a construction fatality.
 - One was represented to be an electrocution of an apprentice electrician installing an alarm.
 - We are aware the individual was undertaking the work out of hours installing the alarm on a friend's premises at the request of the friend.
 - It was classified as a construction fatality.
 - Another instance was represented to be a worker struck on the head by an excavator bucket causing fatal injury.
 - We are aware the incident took place at a council works depot and not a construction site, the major injuries occurred when falling after being struck, and the fatality was not immediate occurring several days later.
 - It was classified as a construction fatality when the only link to construction was the type of equipment involved.
69. While we in no way wish to detract or undermine the tragic circumstances the report referenced, we are concerned when they are categorised incorrectly and attributed to the BCI. The general public will read the report and conclude that 7 people died when undertaking construction work on a

construction site – whereas more than half of these involved circumstances unrelated to construction work or construction sites, or even the construction industry as a general concept.

WHS AND THE BUILDING AND CONSTRUCTION INDUSTRY ('BCI')

70. The BCI is considered to be a 'priority industry' by SWA and has a number of unique attributes that are relevant to safety and this Review. These unique attributes involve both the physical, regulatory and cultural environment.

Regulatory background

71. There are a number of WHS relevant regulatory obligations that exist with unique application to the BCI. Broadly speaking, these include:

- The *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act) which applies to all persons designated as 'building industry participants' engaged in 'building work' as defined;
- The *Code for the Tendering and Performance of Building Work 2016* (the 2016 Building Code), compliance with same is mandatory to achieve and retain eligibility to tender for Commonwealth funded building work; and
- The *Australian Government Work Health and Safety Accreditation Scheme* (the Scheme), compliance with same is a precondition for undertaking building work that is funded directly or indirectly by the Commonwealth.

72. The functions and requirements of the above items are overseen by several BCI specific agencies:

- The *Australian Building and Construction Commission* (ABCC) that aims to promote an improved workplace relations framework to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants, without distinction, and for the benefit of the Australian economy as a whole;
- The *Office of the Federal Safety Commissioner* (OFSC) is part of the Department of Jobs and Small Business. The OFSC aims to promote and improve WHS in the Australian building and construction industry, by providing administrative support to the functions of the Federal Safety Commissioner.

73. There are also a number of WHS regulations that have specific application to the BCI in addition to the general obligations provided under the *Work Health and Safety Act* (the WHS Act) and *Work Health and Safety Regulations* (the WHS Regulations). These include:

- The *Code of Practice for Construction Work* (Construction Code) being an approved code of practice under section 274 of the Model WHS Act aiming to provide a practical guide to achieving the standards of health, safety and welfare required under the Model Act and Regulations;
- Other BCI related Model Codes of Practice including:
 - *Abrasive blasting*
 - *Confined spaces*
 - *Construction work*
 - *Demolition work*
 - *Excavation work*
 - *First aid in the workplace*

- *Hazardous manual tasks*
 - *How to manage and control asbestos in the workplace*
 - *How to manage work health and safety risks*
 - *How to safely remove asbestos*
 - *Labelling of workplace hazardous chemicals*
 - *Managing electrical risks in the workplace*
 - *Managing noise and preventing hearing loss at work*
 - *Managing risks of hazardous chemicals in the workplace*
 - *Managing the risk of falls at workplace*
 - *Managing the risks of plant in the workplace*
 - *Managing the work environment and facilities*
 - *Preparation of safety data sheets for hazardous chemicals*
 - *Preventing falls in housing construction*
 - *Safe design of structures*
 - *Spray painting and powder coating*
 - *Welding processes, and*
 - *Work health and safety consultation, coordination and cooperation.*
74. In addition, each State and Territory maintains its own system of relevant Codes that are developed by that jurisdiction in relation to a specific obligation that exists therein. For example, in the ACT there are Codes that deal with:
- *Cooling Towers, Evaporative Condensers and Warm Water Storage Specialised Systems;*
 - *Preventing and Responding to Bullying;*
 - *Formwork; and*
 - *How to Safely Remove Asbestos (which contains reference to the mandatory asbestos training requirements required pursuant to r.445 of the ACT Work Health and Safety Regulation 2011).*
75. Further, each State and Territory has legislative and regulatory requirements that are relevant to building work and the built environment. For example, the ACT maintains the following Acts and Regulations containing provisions directly relevant to WHS:
- *Architects Act 2004*
 - *Architects Regulation 2004*
 - *Boilers and Pressure Vessels Regulation 1954*
 - *Building (General) Regulation 2008*
 - *Building Act 2004*
 - *Construction Occupations (Licensing) Act 2004*
 - *Construction Occupations (Licensing) Regulation 2004*
 - *Dangerous Goods (Road Transport) Act 2009*
 - *Dangerous Goods (Road Transport) Regulation 2010*

- *Dangerous Substances (Explosives) Regulation 2004*
- *Dangerous Substances (General) Regulation 2004*
- *Dangerous Substances Act 2004*
- *Electricity Safety Act 1971*
- *Electricity Safety Regulation 2004*
- *Environment Protection Act 1997*
- *Environment Protection Regulation 2005*
- *Fuels Control Act 1979*
- *Gas Safety Act 2000*
- *Gas Safety Regulation 2001*
- *Machinery Act 1949*
- *Machinery Regulation 1950*
- *Road Transport (Safety and Traffic Management) Act 1999*
- *Road Transport (Safety and Traffic Management) Regulation 2000*
- *Scaffolding and Lifts Act 1912, and*
- *Scaffolding and Lifts Regulation 1950*

76. There are also several other general regulatory sources that contain WHS related obligations. These include:

- *The Fair Work Act 2009; and*
- *Fair Work Regulations 2009.*

77. Specifically, we refer to the Bullying and Adverse Action provisions contained within the above legislative framework, discussed later herein.

78. The Fair Work laws further provide for the creation of additional sources of WHS obligation, in the form of Modern Awards and Enterprise Agreements. Despite a common and conventional view to the contrary, the extent to which these types of instruments provide a further source of WHS obligation is significant.

79. For example, the most commonly applied Modern Award in the BCI is the *Building and Construction Industry (On-Site) Award 2010* (On-Site Award). The On-Site Award contains approximately 175 separate and distinct provisions that are relevant to, or affect, WHS obligations including climactic conditions, hazardous work types and the provision of PPE. One current clause even sets obligations for employers in respect of employees undertaking building work in tuberculosis hospitals, a type of institution that has not existed in Australia for over 35 years.

80. Another example involves WHS obligations that exist in Enterprise Agreements. Master Builders has examined a range of agreements that receive common use in the sector, and these can include up to 45 separate *additional* WHS obligations and responsibilities. These include matters such as election of WHS representatives, entry for unions on WHS matters, WHS dispute resolution, PPE, inclement weather, hot work, etc.

81. In addition, Industry Enterprise Agreements commonly incorporate further sources of WHS obligations, commonly listed by way of appendix. As they form part of the Agreement, these obligations are legally enforceable by virtue of their incorporation by reference, irrespective of whether or not they have standing otherwise. The appendix attached to one such Enterprise

Agreement promoted by building unions in Victoria lists a series of WHS related Acts, Regulations, Codes, Guidelines and Standards replicated below:

- *Accident Compensation Act 1985*
- *Accident Compensation (Occupational Health and Safety) Act 1996, Electricity Safety Act 1998*
- *Workers Compensation Act 1958, Occupational Health and Safety Act 2004, Dangerous Goods Act 1985*
- *Equipment (Public Safety) Act 1994*
- *Road Transport (Dangerous Goods) Act 1995*
- *Road Transport Reform (Dangerous Goods) Act 1995, Mines Act 1958*
- *Workplace Injury Rehabilitation and Compensation Act 2013*
- *Accident Compensation Regulations 2001, Dangerous Goods (Explosives) Regulations 2000, Dangerous Goods (HCDG) Regulations 2005*
- *Dangerous Goods (Storage and Handling) Regulations 2000, Dangerous Goods (Transport by Rail) Regulations 1998, Electricity Safety (Installations) Regulations 1999, Equipment (Public Safety) Regulations 2007*
- *Magistrates Court (Occupational Health and Safety) Rules 2005, Occupational Health and Safety Regulations 2007*
- *Road Transport (Dangerous Goods) (License Fees) Regulations 1998, Road Transport Reform (Dangerous Goods) Regulations 1997, Workers Compensation Regulations 1995*
- *Workplace Injury Rehabilitation and Compensation Regulations 2014*
- *Workplace Injury Rehabilitation and Compensation (Savings and Transitional) Regulations 2014*
- *Communicating occupational health and safety across languages Workplace amenities and work environment*
- *Confined spaces*
- *First aid in the workplace*
- *Prevention of falls in general construction Foundries*
- *Managing asbestos in workplaces*
- *Removing asbestos in workplaces*
- *Electrical Installations on Construction Sites Concrete Cutting and Drilling*
- *Precast and Tilt-up Concrete for Buildings Concrete Pumping*
- *Construction and Erection of Bridge Beams*
- *VARICC Standard Specification for Asbestos Removal from Buildings, Structures, Ships, Plant & Workplaces*
- *AS/NZS 4576 - Guidelines for Scaffolding AS/NZS 1576 Parts 1-4 - Scaffolding*
- *AS 1577 - Solid timber scaffold planks*
- *AS 1578 - Laminated timber scaffold planks*
- *AS/NZS 1891.4 - Industrial Fall Arrest Devices - Selection, Use and Maintenance AS 3828 - Guidelines for the erection of building steelwork*

- *AS/NZS 3012 - Electrical Installations - Construction and Demolition sites*
- *AS 3000 - Electrical Installations*
- *AS 2294 - Protective structures for operators of earthmoving machines*
- *AS 2550 - Parts 1-16 - Cranes - safe use of*
- *AS 1418.1 - Cranes, Hoists and Winches*
- *AS 1418.4 - Cranes - Tower Cranes*
- *AS 1768 - Lightning Protection*
- *AS2601 -The Demolition of Structures*
- *AS1873.I - Power Actuated (PA) Hand Held Fastening Tools, Part 1 Selection, Operation, and Maintenance.*
- *AS2436 - Guide to noise control on construction, maintenance and demolition sites*
- *AS 3745 - Emergency control organisation and procedures for buildings*
- *AS 3850 - Tilt up concrete construction*
- *AS 3610 - Formwork for concrete*
- *AS 1270 - Acoustics - Hearing protectors*
- *AS/NZS 1800 - Occupational Protective Helmets - selection, care and use*
- *AS/NZS 1336 - Recommended practices for occupational eye protection*
- *AS /NZS 1337 - Eye Protection*
- *AS/NZS 4501.2 - Occupational protective clothing - General requirements*
- *AS 1715 - Selection, use and maintenance of respiratory protective devices*
- *AS 1716 - Respiratory Protective Devices*
- *AS/NZS 2210 - Occupational protective footwear - guide to selection, care and use*
- *AS 1674.1 - Safety in Welding and allied processes*
- *AS 1674.2 - Safety in Welding and allied processes - Electrical*
- *AS 4603 - Flashback Arrestors - safety devices for use with fuel gases and oxygen or compressed air*
- *AS 4839 - safe use of portable and mobile oxy fuel gas systems for welding, cutting, heating and allied processes.*
- *AS 2727 Chainsaws - Guide to safe working practices*
- *AS 2772.1 Radiofrequency radiation*
- *AS 2397 - Safe use of lasers in the construction industry*
- *AS/NZS - Risk management*
- *AS 1892 - Portable ladders*
- *AS/NZS ISO/IEC 1702 - General criteria for the operation of various types of bodies performing inspection*
- *AS 1657 - Fixed platforms, walkways, stairways and ladders - Design, construction and installation.*

- AS 1216.1 - Classification, hazard identification and information systems for dangerous goods Part 1 - Classification and class labels for dangerous goods
- AS 1216 .2-4 Classification, hazard identification and information systems for dangerous goods Part 2 - HAZCHEM emergency action code, Part 3 - NFPA hazard identification system Part 4 - UN substance identification numbers
- AS 1319 - Safety signs for the occupational environment
- AS 1318 - SAA Industrial safety Colour Code
- AS 2986 - Workplace atmospheres - Organic vapours sampling by solid adsorption techniques
AS 1473 - Guarding and safe use of woodworking machinery
- AS 1735 - Lifts, Escalators and moving walks.
- AS 1755 – Conveyors
- AS 1788 (Parts 1 & 2) - Abrasive wheels
- AS 2359 - Industrial Trucks
- AS 3509 - LP (Liquefied Petroleum) Gas fuel vessels for automotive use
- AS 3533 Amusement Rides and Devices
- AS 3788 - Boiler and Pressure Vessels - in service inspection
- AS 3837 - Boiler and Pressure Vessels - Operation and maintenance
- AS 3920 - Pressure equipment Manufacture Assurance of Quality
- AS/NZ 4360:2004 - Risk Management

82. In terms of these regulatory obligations and their application, the following approach extrapolated from the BCIP Act provide guidance.

83. A 'building industry participant' is someone involved with 'building work'. 'Building industry participant' and 'building work' are terms defined by the BCIP Act. The BCIP Act defines a 'building industry participant' to be any of the following:

- a 'building employee';
- a 'building employer';
- a 'building contractor';
- a person who enters into a contract with a building contractor where building work is carried out or arranged;
- a 'building association' (e.g. union or employer association); or
- an officer, delegate, or other representative of a building association.

84. The BCIP Act contains a relatively broad definition of 'building work', which encompasses a number of things:

- Any of the following activities, in so far as they relate to buildings, structures or works that form, or will form, part of land (including land beneath water), whether permanently or temporarily, being:
 - construction;
 - alteration;
 - extension;

- restoration;
 - repair;
 - demolition; or
 - dismantling.
 - The same activities listed above, in so far as they relate to railways (not including rolling stock) and docks.
 - The installation of fittings, such as:
 - heating;
 - lighting;
 - air-conditioning;
 - ventilation;
 - power supply;
 - drainage;
 - sanitation;
 - water supply;
 - fire protection;
 - security; and
 - communications systems.
 - Any operation that is part of, in preparation for, or in completion of, any of the work described above, including:
 - site clearance, earth-moving, excavation, tunnelling or boring;
 - the laying of foundations;
 - the erection, maintenance or dismantling of scaffolding;
 - the on-site or off-site prefabrication of made-to-order components; and
 - site restoration, landscaping or the provision of roadways and other access works.
 - The transportation or supply of goods to be used for any of the work mentioned above, directly to building sites (including any resources platform) where that work is being, or may be, performed.
85. In contrast to the Model WHS laws, however, the BCIP Act does not have general application to the following types of construction work, which usefully also assists in defining residential building work, and other non-civil or general building work:
- activities associated with drilling and excavation, namely the drilling for, or extraction of, oil or natural gas;
 - the extraction of minerals, including tunnelling and boring, or construction of underground works for, the extraction of minerals;
 - activities associated with domestic housing, namely:
 - the construction, repair, or restoration of a single-dwelling home;
 - the construction, repair, or restoration of a building, structure, or work associated with a single-dwelling home (e.g. a shed, or a pool);

- the alteration and extension of a single-dwelling home, which remains so after the activity is completed; or
 - a multi-dwelling development involving the construction of four single-dwelling homes or fewer.
86. The conclusion to be drawn from the above overview of WHS related regulatory background is that participants in the BCI experience what could be described as a 'smothering' of WHS related obligations that arise from a wide array of sources – more often than not, sources that are ostensibly non-WHS focussed.
87. In broad terms, a BCI participant is likely to be covered at any one time by WHS obligations that exist in:
- 29 separate Acts of Parliament; and
 - over 35 distinct Codes.
88. A participant who is covered by an Enterprise Agreement to which the union is a party will (by virtue of that agreement and irrespective of whether they would ordinarily otherwise apply) have WHS obligations incorporated by reference to:
- 13 Acts of Parliament;
 - 8 Codes; and
 - 53 distinct and referenced Australian Standards.
- *in addition* to the obligations existing in the conventional WHS framework.
89. The Review should be conscious of these circumstances when undertaking its work. While the central focus will be the model WHS framework, the existence of other sources of WHS obligation should also be considered.

Cultural background

90. It is also relevant to note the cultural attributes that are unique features of the BCI and its workplaces in terms of WHS. These include, but are not limited to:
- A high level of industry disputation;
 - A high level of lawlessness and disregard for laws by building unions;
 - The (ab)use of WHS for unrelated industrial purposes; and
 - The (ab)use of WHS right of entry for unrelated industrial purposes.
91. It is important for the Review to acknowledge and understand the background and circumstances of the BCI and its culture.
92. There are a large number of sources that describe the conduct and history of registered employee organisations in, and the culture of, the BCI.
93. One of the most recent was the Final Report of the Heydon Royal Commission¹⁶ which devoted some 1160 pages to the building and construction sector alone. Of the five volumes in the Final Report, almost one and a half volumes were specific to the building and construction sector and the conduct of the CFMEU.

¹⁶ Royal Commission into Trade Union Governance and Corruption Final Report, December 2015,

94. In respect of this conduct, the Royal Commissioner summarised:

*"The conduct that has emerged discloses systemic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats, intimidation, abuse of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court."*¹⁷

Then further observed:

*"The issues identified are not new. The same issues have been identified in reports of three separate Royal Commissions conducted over the past 40 years: the Winneke Royal Commission in 1982, the Gyles Royal Commission in 1992 and the Cole Royal Commission in 2003."*¹⁸

And later:

*"The continuing corruption and lawlessness that has been revealed during the Commission suggests a need to revisit, once again, the regulation of the building and construction industry."*¹⁹

95. The above findings were made following broader commentary about the building industry, and particularly the CFMEU. They complimented observations from earlier commentary in the Interim Report²⁰ which made the following observations about the CFMEU:

"The evidence in relation to the CFMEU case studies indicates that a number of CFMEU officials seek to conduct their affairs with a deliberate disregard for the rule of law. That evidence is suggestive of the existence of a pervasive and unhealthy culture within the CFMEU, under which:

- (a) *the law is to be deliberately evaded, or crashed through as an irrelevance, where it stands in the way of achieving the objectives of particular officials;*
- (b) *officials prefer to lie rather than reveal the truth and betray the union;*
- (c) *the reputations of those who speak out about union wrongdoing become the subjects of baseless slurs and vilification."*

96. Noting that additional case studies were undertaken by the Commission subsequent to the Interim Report, it was found that:

*"The case studies considered in this Report only reinforce those conclusions"*²¹

Further:

*"The conduct identified in the Commission is not an isolated occurrence. As the list in the previous paragraph reveals, it involves potential criminal offences against numerous laws. It involves senior officials of different branches across Australia."*²²

97. Of the seventy-nine recommendations made for law reform in the Final Report, seven were specific to the building and construction sector. These recommendations largely went to addressing the conduct displayed by building unions.

¹⁷ Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8, para 1

¹⁸ *Ibid* at para 2

¹⁹ *Ibid* at para 3

²⁰ Royal Commission into Trade Union Governance and Corruption, Interim Report (2014), Vol 2, ch 8.1, p 1008.

²¹ Heydon Report, Chapter 5, page 396

²² *Ibid*.

98. With respect to the CFMEU, the Heydon Royal Commission found that it is home to *“longstanding malignancy or disease”*²³ within the CFMEU and that lawlessness within the union was commonplace, with over 100 adverse court finding against the union since 2000.

99. Similarly, the Cole Royal Commission found²⁴:

“In the building and construction industry throughout Australia, there is:

(a) widespread disregard of, or breach of, the enterprise bargaining provisions of the Workplace Relations Act 1996 (C’wth);

(b) widespread disregard of, or breach of, the freedom of association provisions of the Workplace Relations Act 1996 (C’wth);

(c) widespread departure from proper standards of occupational health and safety;

(d) widespread requirement by head contractors for subcontractors to have union-endorsed enterprise bargaining agreements (EBAs) before being permitted to commence work on major projects in State capital central business districts and major regional centres;

(e) widespread requirement for employees of subcontractors to become members of unions in association with their employer obtaining a union-endorsed enterprise bargaining agreement;

(f) widespread requirement to employ union-nominated persons in critical positions on building projects;

(g) widespread disregard of the terms of enterprise bargaining agreements once entered into;

(h) widespread application of, and surrender to, inappropriate industrial pressure;

(i) widespread use of occupational health and safety as an industrial tool;

(j) widespread making of, and receipt of, inappropriate payments;

(k) unlawful strikes and threats of unlawful strikes;

(l) threatening and intimidatory conduct;

(m) underpayment of employees’ entitlements;

(n) disregard of contractual obligations;

(o) disregard of National and State codes of practice in the building and construction industry;

(p) disregard of, or breach of, the strike pay provisions of the Workplace Relations Act 1996 (C’wth);

(q) disregard of, or breach of, the right of entry provisions of the Workplace Relations Act 1996 (C’wth);

(r) disregard of Australian Industrial Relations Commission (AIRC) and court orders;

(s) disregard by senior union officials of unlawful or inappropriate acts by inferior union officials;

²³ Heydon Royal Commission, Volume 5, p401

²⁴ Final Report of the Royal Commission into the Building and Construction Industry, Vol 1 – Summary – p 5-6

(t) reluctance of employers to use legal remedies available to them;

(u) absence of adequate security of payment for subcontractors;

(v) avoidance and evasion of taxation obligations;

(w) inflexibility in workplace arrangements;

(x) endeavours by unions, particularly the Construction, Forestry, Mining and Energy Union (CFMEU), to regulate the industry; and

(y) disregard of the rule of law."

100. It is Master Builders' experience that the types of conduct identified above remain common place in the BCI. Feedback from members regularly describe instances of contemporary conduct, culture and practices that could easily be mistaken as instances set in the late 1970s. This feedback is supported by reference to contemporary evidence sources outlined below.

101. In the 2015–16 financial year for example, the courts issued \$1.826 million in penalties in ABCC related cases. The vast majority were fines against the CFMEU (\$1.732 million). The CFMEU have been penalised over \$10 million in cases brought by the ABCC²⁵, the FWBC and their predecessors and building unions generally have been penalised over \$12 million in total.

102. Despite this, the conduct continues. In its first full year of operation, the courts imposed more than \$2.9 million in penalties in matters brought by the ABCC²⁶ and it has approximately 39²⁷ current proceedings against building unions and industry participants for breaches of the law involving Adverse Action, Unlawful Industrial Action, Coercive Behaviour, and Right of Entry breaches.

103. The abuse of WHS for unrelated industrial purposes by building unions, while well documented, remains an extremely unfortunate feature of the BCI. The Cole Royal Commission²⁸ examined this issue in detail and found the following types of conduct to be frequent and common:

- the use by a union of occupational, health and safety (WHS) issues as an industrial tool, intermingled with legitimate WHS issues;
- the raising of alleged WHS issues by a union in pursuit of industrial ends;
- unions making unqualified and incorrect assertions about WHS processes;
- unions refusing to accept the results of repeated independent and expert safety inspections of a site;
- union officials failing to refer asserted WHS breaches to the relevant authorities; and
- union officials preventing persons from working on site to rectify asserted safety hazards

104. The Cole Royal Commission reached these conclusions after forensic examination of a series of actual cases and a special conference on WHS attended by building industry participants. One participant provided the following evidence²⁹:

"In my experience, unions in the building industry readily, and all too often, pick up the safety football during an industrial dispute and kick it around for purposes that have nothing to do with safety. In fact, I have formed the view over many years of working on safety in the building industry that

²⁵ "Latest penalty takes CFMEU fines past \$10m mark" Courier Mail, August 4, 2017

²⁶ <https://www.abcc.gov.au/news-and-media/industry-update/latest-industry-update/industry-update-november-december-2017/abcc-marks-first-anniversary>

²⁷ <https://www.abcc.gov.au/compliance-and-enforcement/outcomes-investigations/legal-cases>

²⁸ Final Report of the Royal Commission into the Building and Construction Industry, Vol 1 – Summary – p 5-6

²⁹ Ibid – Vol 6 – p.102

building industry unions throughout Australia habitually treat safety as an expedient device to assist in the pursuit of industrial objectives.

Safety can be a highly effective device in this respect – even the most obviously superficial claim requires investigation, and that takes time; workers can be paid for stoppages on safety grounds; safety is a compelling rallying cry; and claims that a Site is unsafe readily engages the support of governments and the public. Hence, in my experience, it is common for building industry unions to raise safety questions in industrial disputes. When they do, they are unfortunately more often than not – as in the case of the Nambour Hospital dispute – trivial and unwarranted. I have observed the ease with which trivial or unwarranted safety issues can be (and, as I have said, often are) exploited as a device in the pursuit of industrial objectives.

This means that the building industry unions have often been distracted or deflected from detecting or effectively addressing real risks to the health and safety of their members. The dispute at the Nambour Hospital provides an illustration of this – as I have said, so far as I can see, the unions had done nothing about what I consider to have been the real safety issues on the site (and, in the case of [the] formwork, seemed to actively resist any attempt to raise those concerns in the Commission), but instead devoted themselves to trivial issues that manifestly raised no real serious safety risks."

105. The Commission then summarised³⁰ the problems for WHS flowing from this misuse:

"Misuse of safety for industrial purposes compromises safety in important respects:

(a) it trivialises safety, and deflects attention away from the real resolution of safety problems on sites;

(b) the view that unions manipulate safety concerns inhibits the unions' capacity to effect constructive change;

(c) the widespread anticipation that safety issues may be misused may distort the approach that is taken to safety;

(d) time taken by health and safety regulators to attend and deal with less important issues detracts from their capacity to deal with more substantial issues elsewhere; and

(e) at an industry level, there is a tendency for issues to be dealt with at the lowest common denominator

Each of these is, in itself, of importance. The cumulative effect on the safety culture of the building and construction industry is significant.

It was a common point of frustration among both head contractors and subcontractors who met with me that safety disputes arising on major building projects usually result in the whole site being closed down notwithstanding that only the immediate area within which the safety issue is identified can be isolated. I was told, and I accept, that a 'one out, all out' mentality is prevalent throughout the industry. Site closures, especially on large projects, are very costly for head contractors and subcontractors.

The following evidence was given in Victoria, but it describes a problem that I found on many occasions throughout Australia:

³⁰ *Ibid* p103

‘..it is not uncommon for a builder or subcontractor who is in dispute with a union over an unrelated industrial issue to receive visits from union officials investigating and finding alleged safety breaches. The union official asserts that an immediate risk exists, work ceases while employees sit in the sheds or worse, leave site.’

106. To be clear, Master Builders does not oppose the capacity for officials of registered organisations to enter worksites, or for BCI participants to join such organisations. We recognise the role and importance these organisations play in Australian workplaces.
107. However, the experience of the BCI is, and has been for almost five continuous decades, one that is not reflective of the otherwise ordinary conduct of such organisations and their officials in other sectors and industries.
108. Such experience has been recorded in four separate Royal Commissions, dozens of reviews, inquiries and reports, and hundreds of court judgments and decisions.

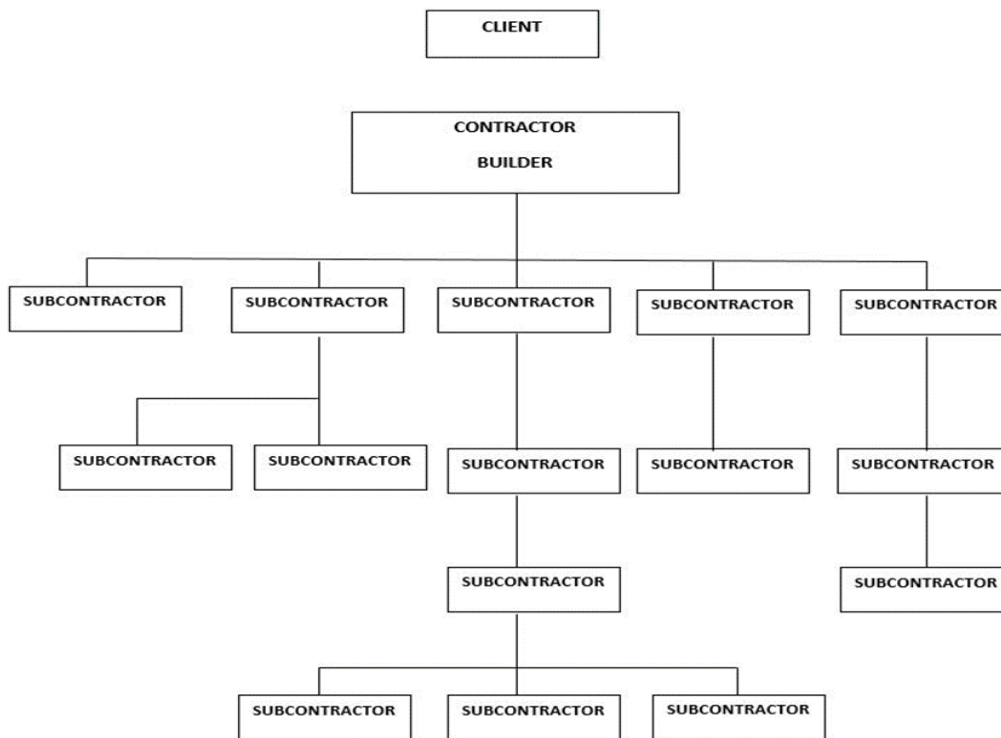
GENERAL OBSERVATIONS – WHS FRAMEWORK

109. There are a number of observations to be made regarding the model WHS framework that do not directly or necessarily arise in the context of responses to the list of questions in the Review Paper.
110. These are outlined below for consideration of the Review.

Small business must be the focus

111. Master Builders recommends that the Review consider the task at hand through a small business lens at all times. The Review findings and associated recommendations must be aimed at assisting small business workplaces to comply with the law, provide safe workplaces, and improve safety outcomes.
112. As noted in the introduction, the BCI is overwhelmingly dominated by small business entities. This point cannot be emphasised enough given common community perceptions of the BCI being made up of ‘big builders’ and ‘multinational construction giants’.
113. The factual reality is that approximately 98% of the almost 340,000 businesses that are directly and primarily engaged in BCI are defined as small, employing less than 15 employees. By total number, more small business entities exist within the BCI than any other sector of the Australian economy. Master Builders itself has in excess of 32,000 small business members; these are mainly small subcontractors and specialist contractors.
114. The dominance of small business within the BCI arises from the way in which work is performed. In general terms, building and construction work conventionally involves a client engaging a building contractor that will act as a ‘project manager’. The building contractor uses sub-contractor companies to perform particular tasks at different stages of construction. Sub-contractors often specialise in particular phases of construction work and it is common for them to also engage sub-contractors who are specialists in particular types of work.
115. For example, a contractor may engage a sub-contractor to undertake the internal fit-out stage of a construction project. That sub-contractor may require the services of further sub-contractors who undertake specific aspects of the fit-out, such as joinery or air-conditioning.
116. The impression commonly gleaned from passing a large commercial construction site is that the work is performed by one building company, such as Lend Lease or Hansen Yuncken. That impression, while reasonable, is entirely contrary to reality. At any point in time, a large commercial construction site may involve work being performed by dozens of separate small business sub-contractors.

117. A graphical explanation follows:



118. The ramifications and complexity of these circumstances are obvious, particularly insofar as it relates to WHS. Key points for the Review to note are:
- A builder or head contractor may utilise dozens of different sub-contractors or sub-sub-contractors over the life of a project;
 - Those sub-contractors can be all operating on the same site at the same time;
 - Sub-contractors may be working on numerous sites at any one time, often for different head contractors;
 - The work performed by sub-contractors is often technical and specialised, involving practices, activities and equipment that are unique and distinct from other forms of construction work;
 - The use of sub-contractors at a particular time is dependent upon the particular phase of construction and is therefore dependent upon factors that are fluid and beyond the control of a builder/head contractor; and
 - The work performed by specialised sub-contractors is often of a type that requires specialised safety considerations that are not necessarily known to the sector more broadly.
119. These points emphasise the complexities of construction work and create an impetus for the WHS framework to be simple and clear with defined and practicable duties and obligations.
120. To be clear, Master Builders does not wish to reduce or weaken obligations on the existing regime; the desire is to see a WHS framework that better suits small business; any regime must be such that small business can comply with the duties it creates.
121. It is Master Builders' experience that the source of WHS frustration for BCI small businesses is not the need for compliance per se, but the complexities and resources that compliance involves, particularly when working across multiple sites.
122. Actively engaging with small to medium sized business about WHS issues has been and continues to be a major challenge for governments and regulators, who rely heavily on employer and industry associations (like Master Builders) for this purpose.
123. Meeting that challenge is a priority for Master Builders. Small business must be recognised as having a different range of needs from that of other WHS stakeholders.
124. While businesses with significant WHS skills and resources need to be allowed to apply appropriate common systems across the nation, the WHS system must also be sympathetically crafted to the special needs of businesses with lower level skills or resources. Simply, it is a fact that small business is the growth sector of the Australian economy - yet is the sector with the fewest capacities and resources to manage WHS regulatory obligations, or to invest heavily in new plant or equipment.
125. Regulation must adequately recognise differing capacities of employers. Given the growth of small business in Australia, examination should be made of WHS regulatory frameworks that are more responsive to business realities in this sector.

RECOMMENDATION:

To achieve improved WHS performance amongst SMEs in the BCI, it is necessary to develop initiatives that provide:

- meaningful guidance materials;
- a reduced level of regulation, with national consistency;
- improved quality of regulation with provisions that can be properly understood;
- targeted workplace assistance; and
- face-to-face advice.

The concept of 'reasonably practicable' must be preserved

126. Master Builders strongly supports the principle of 'reasonably practicable' and this must be preserved within the WHS framework.
127. This concept is particularly relevant the BCI given the nature of the work undertaken generally, the use of specialist subcontractors, and the very high extent of work performed in an environment with multiple parties and entities.
128. While Master Builders appreciates the rationale behind any suggestion of improvement to the corresponding regulatory provision, we urge the Review to ensure that the concept of 'reasonably practicable' be retained.

RECOMMENDATION:

The model WHS framework must retain the concept of 'reasonably practicable'.

Jurisdictional consistency is essential

129. Master Builders strongly supported the creation of model national WHS laws and the related framework now established.
130. Amongst the many reasons for this support, key items were:
- The high likelihood of working across borders;
 - Increased understanding by, and compliance of, BCI participants;
 - Increased capacity to examine and adopt best-practice approaches from other jurisdictions; and
 - A reduction in compliance burden while maintaining appropriate protections for workers.
131. While there were minor nuanced differences, Master Builders was pleased to note the consistent adoption of model laws by all jurisdictions save for WA and VIC. Since that time, Master Builders Australia has maintained the view the WA and VIC ought to adopt the model framework to deliver better outcomes in terms of safety and productivity.
132. More recently, Master Builders has expressed concern at the growing tendency for jurisdictions to deviate from the model WHS framework as initially adopted. Examples of this include the introduction of industrial manslaughter and building product laws in Queensland, creating a range of WHS considerations that do not exist elsewhere³¹.
133. The existence of widely varying obligations for BCI participants dependent upon geography is undesirable and inconsistent with the underpinning basis for the current WHS framework. It serves only to erode the positives giving rise to Master Builders support for such a framework.
134. Inconsistency is significant in the construction industry because of the number of companies that operate across state borders. While estimates have varied, the number of businesses operating across jurisdictions represents around 1 per cent of all businesses and about 30 per cent of all employees. Businesses employing more than 200 employees accounted for 99 per cent of all businesses operating across jurisdictions.
135. Previous studies undertaken by Master Builders found that while medium to large companies dominate the employment share, smaller employers are still affected. Those studies indicated that,

³¹ For example, manslaughter offences carry \$10 million fines and 20-year jail terms, safety measures in Codes of Practice are mandated, and the role of workplace health and safety officer (WHSO) is re-introduced.

for example, only 31 per cent of Victorian companies operating in NSW and Queensland are larger companies. Consequently, national inconsistency is a price paid by all, but disproportionately by smaller construction companies.

136. Another example of where inconsistencies diminish safety outcomes is in relation to Safe Work Method Statements (SWMS). The format and quality of content included in SWMS, as required under the model laws, is vastly divergent in terms of formatting and quality of content.
137. Increasingly, SWMS are being drafted in a legalistic manner and include a substantial amount of information that is often difficult to digest and not relevant to the risks it seeks to address.
138. SWA's Construction CoP includes both a template for and an example of a SWMS³². This document is very useful to PCBUs and their workers to ensure that their own SWMS are compliant with the WHS law and regulations where the harmonised system has been introduced and in Victoria.
139. Master Builders urges the Review to consider the adoption, under the model WHS Regulations in some form, of the SWMS template referenced within SWA's CoP. Such an approach would not only ensure that hazards and risks on site have been addressed clearly and appropriately but would eliminate the broad inconsistencies that currently exist in relation to SWMS.
140. SWMS need to be presented in accessible format to ensure that those responsibilities are clear and do not confuse or alienate the workers SWMS are drafted to protect.
141. Master Builders contends that the degree of consistency amongst obligations in each jurisdiction has decreased and that this will likely deliver adverse safety outcomes unless addressed.

RECOMMENDATION:

The Review should examine and identify the extent to which jurisdictions are diverging from the model WHS framework and recommend strategies for the Commonwealth Government to pursue in arresting such divergence.

More regulation does not equal improved safety outcomes

142. Just as workplace safety matters, so does the quality of workplace regulation and its framework. Poor regulation or bureaucratic frameworks set by governments, parliaments or regulators can hinder, not help, the delivery of safe workplace outcomes.
143. Industry is seeking to improve the quality and structure of WHS regulation, not the removal of sensible regulation in areas where it is needed. The capacity of industry to deliver on its commitment to safety relies in part on the practicality of installing and maintaining all the elements of safe systems of work. Merely prescribing regulation without bearing this issue in mind will have adverse consequences for building industry participants, and may also raise construction costs, particularly the cost of housing.
144. To attempt to change a workplace culture by simply introducing more legislation, or to see regulation as a first or ideal response, is inconsistent with modern workplace management and good human resource practices. It may also have adverse consequences for housing affordability. With the extent and range of often inconsistent regulation currently in force, this is a major issue for the industry. This proposition does not mean that builders should be free of regulation or that small business should have the capacity to opt out of the WHS regulatory environment.

³² <https://www.safeworkaustralia.gov.au/system/files/documents/1705/mcop-construction-work-v2.pdf> - Appendix D

"I spend more time these days in the office than walking around the site. Checking forms, doing audits....it's like ticking boxes is more important than making sure the blokes are working safely."

145. However, the role of governments and regulators is to focus on what is reasonable, practical and achievable and to make the right interventions if and when they are needed. This means a framework that facilitates high level WHS awareness and culture in workplaces, not the micro-management of WHS in workplaces.
146. For the framework to be effective, it must be consistent with the realities of operating businesses in the modern economy and the mobile labour force characteristic of the BCI. Poorly established frameworks detract from the achievement of safer workplaces.
147. Regulators also have an important role as information providers in conjunction with business and employer organisations. Regulators should not merely introduce and enforce the law but should actively pursue educational aims that guide industry participants, particularly small business operators and owner/builders, in how to comply with the law. Promotion of practical means to comply with the law should be a function required of all WHS regulators.
148. The UK government undertook a major review of all regulatory bodies in 2005, and the resulting report recommended the adoption of certain principles. These were enshrined in law in 2006 and require regulators to incorporate them in their processes. The principles are as follows:
- Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most.
 - Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take.
 - No inspection should take place without a reason.
 - Businesses should not have to give unnecessary information, nor give the same piece of information twice.
 - The few businesses that persistently break regulations should be identified quickly.
 - Regulators should provide authoritative, accessible advice easily and cheaply.
 - Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.
149. Master Builders believes these are sound principles on which to base the role of WHS regulators.

RECOMMENDATION:

The Review should embrace the above principles and apply them to any findings and associated recommendations.

Better regulation, not more regulation

150. Some current regulation and the way it is interpreted and implemented, although well intended, is counterproductive rather than being a formula for improved WHS performance.
151. WHS systems have generated a plethora of regulation across Australia over the past generation. The major problems identified by employers are:

The quantity of regulation

- There are multiple sources of regulation on the same topics, including by each Australian government, each Australian parliament and multiple government departments, WorkCover authorities, WHS regulators and in some cases, industrial tribunals.
- Alternatives to regulation or black letter law are not properly considered or assessed.

The quality of regulation

- The ‘duty of care’ is interpreted to impose extreme, absolute and, in some cases, impossible duties on employers and designers in meeting performance-based obligations – to foresee the unforeseeable, to know the unknowable and to control the uncontrollable.
- Regulation is expressed in complex and legalistic terms.
- Inadequate defences where conduct has been reasonable.
- Regulation fails to account for particular circumstances of small and medium businesses.
- Regulation is developed without proper cost or economic impact assessments.
- Once made, regulation is not accompanied by effective communication to industry, especially about the new duties created.

The frequency of change to regulation

- Regulation, once introduced, is not properly reviewed.
- Additions and amendments to regulation are ad hoc and based on inadequate industry consultation.
- Employers cannot keep up with the volume of new regulation.
- It is in practice impossible for many businesses to keep pace with often obscure changes in scientific, technical, medical or attitudinal data affecting what they do and the way they work.

The compliance and red tape burden of regulation

- Regulation creates excessive compliance and red tape burdens, especially form filling, written reporting and data collection.
- Red tape focuses on compliance, not outcomes.
- This is increasingly a high order issue in business surveys, research and census data.
- Businesses carry an excessive burden of compliance with ever changing laws and keeping abreast of those changes.

RECOMMENDATION:

The Review should focus on regulatory quality and not quantity. In doing so, the Review should ensure that regulation:

- is not repeated or duplicated;
- is clearly expressed and accessible;
- does not become the focus in terms of WHS compliance; and
- drives meaningful improvements in safety outcomes.

Assistance must be available and flexible

152. Master Builders is concerned to ensure that the WHS framework remains one that adopts the Robens approach. It is our view that BCI workplaces must be able to choose the most effective and practicable course to address WHS matters given the nature of the BCI and work performed.
153. Master Builders did not support earlier iterations of WHS laws that were overly prescriptive and rigid. Such frameworks assume a ‘one size fits all’ approach and shift the focus from risk and hazard elimination to compliance and process – at the expense of practical safety outcomes.
154. The existing framework, on the whole, represents a reasonable balance between prescription and flexibility. The adoption of industry and task specific Codes, for example, provide BCI workplaces with the capacity to adopt practical and tailored WHS practices while retaining consistency in approach to particular risks and hazards.
155. As noted earlier, members of Master Builders (particularly SMEs) are not concerned about the need to ensure workplaces are safe, but do express frustration in terms of ensuring the obligations and duties to achieve this outcome are clear, known and accessible.
156. It is Master Builders’ view that where it is practicable to do so, guidance material should be available to assist BCI participants deal with particular risks and hazards. However, where an alternative approach would deliver improved safety outcomes, participants should be free to deviate from such guidance.
157. In other words, a small BCI subcontractor should have a clear and readily accessible source of information to achieve WHS compliance in the event this is required. Such an information source could be reasonably prescriptive but should retain underlying flexibility and not necessarily mandate particular processes except in special circumstances.

RECOMMENDATION:

Guidance material should exist and be easily accessible for those who seek it. Unless necessary to achieve a duty arising under the Act or Regulations, compliance with such material should not be mandatory.

WHS is WHS

158. Master Builders believes that WHS is WHS – a seemingly trite but crucially important proposition.
159. This proposition is founded on a notion that safety law should deal with safety – and other matters/issues that are only tangentially or indirectly linked to safety should be contained in the most relevant place or law for that matter/issue. Likewise, other laws that are not conventional ‘safety’ law should not contain WHS matters.
160. Master Builders would observe that it is common for BCI workplaces to have legal obligations:
- arising from separate and distinct sources that, by and large, mimic each other; or
 - that are found properly in one source but are re-stated in separate laws or regulatory frameworks.
161. For example, obligations regarding workplace consultation, dispute resolution and right of entry are found in both WHS and industrial relations laws – the requirements of which are largely the same. The aim of ensuring workplaces are safe and without risk appears as a stated object in over a dozen separate legislative Acts – many of which underpin regimes that exist to achieve a purpose or policy outcomes that is not primarily safety.
162. More frequently, obligations in one law are repeated or re-stated in another. As already noted, BCI participants experience frustration in determining the source of a particular WHS obligation and the duplication of these throughout various laws execrates this frustration.

163. There is also a very high risk that the problem above vastly increases the chance that various obligations can become conflicting in nature. For example, a mandated process to consult about workplace change in safety law could conflict with related obligations in industrial relations laws, creating a situation where compliance with one causes a breach of the other.
164. Worse, mandated practices arising from a particular non-WHS law could create a WHS risk. Master Builders is aware, for example, that the process and obligations conventionally enforced in BCI workplaces when altering workforce size increase the risk of psychological stress or injury amongst particular cohorts of workers.
165. A further obvious issue is the existence of provisions within the FW Act that deal with bullying and adverse action – areas that commonly have associated WHS implications or ramifications. The complexities this creates are obvious – for example, how can an employer determine if a worker’s representative seeks right of entry on the grounds of an imminent risk to safety (arising from bullying) or to hold discussions with a worker about rights, legal options and future representation?
166. It should be noted that the problem we describe usually arises from nothing more than the good intentions of policy and law makers who are keen to ensure workplaces are safe; but not exclusively.

RECOMMENDATION:

Master Builders strongly encourages the Review to ensure that, wherever possible, matters that are ostensibly WHS are homed within the WHS framework and that it is clear that this is the primary and overriding source of obligation wherever a conflict arises.

WHS Framework must free from abuse or misuse

167. The most crucial concern for Master Builders and the BCI generally is the need to ensure that WHS laws contain no capacity for exploitation, abuse or misuse.
168. Master Builders cannot overstate the importance of this requirement to the Review. As noted elsewhere, the extent to which WHS is abused, exploited or mis-used for purposes that are unrelated to safety is significant and a common (yet entirely unfortunate) feature of the BCI.
169. This feature is of serious and grave concern to Master Builders and our members, as it:
- Creates a barrier to improving BCI safety outcomes;
 - Undermines genuine WHS matters when they arise;
 - Reduces productivity and increases construction costs for consumers and taxpayers; and
 - Blurs the line between safety law and non-safety related laws, reducing compliance levels and increasing confusion amongst BCI participants.
170. Just as the duplication matter noted above, avenues to exploit and abuse WHS laws for unrelated purposes exist as a result of well-intentioned policy makers whom assume employee representatives always hold genuine motivations. This is not always the case.

RECOMMENDATION:

Master Builders urges the Review to ensure that, so far as possible, avenues for exploitation of the WHS framework are closed and any recommendations for change do not create further avenues for such conduct.

Additional offence types are not necessary

171. The current penalty regime under the model WHS laws is appropriate and there is no need for new offence types.

172. Recent amendments to the Queensland WHS Act have resulted in the introduction of a new offence of industrial manslaughter. Unions have argued that such a penalty should be included in all State/Territory legislation when a workplace death arises as a result of reckless breach of duty.
173. Contrary to those who argue that a change to the laws, akin to those recently enacted in Queensland, is necessary, existing offences under the model laws for reckless conduct remain appropriate.
174. The offence of reckless conduct under the Model WHS Act provides that a person who has a health and safety duty (i.e. not just an employer) that, without reasonable excuse, engages in conduct that exposes a person to whom that duty is owed, to a risk of danger of death or serious injury or illness; and is reckless as to the risk, is guilty of an indictable offence. The offence carries a maximum five years imprisonment or substantial financial penalties applicable under the Act.
175. In the alternative, under the QLD legislation, the offence of industrial manslaughter requires that the person's conduct (be that the PCBU or its officers) must cause the death of the worker and they must also be negligent in causing the death of the worker by their conduct. This is a much tougher offence to prove than reckless conduct, currently provided for under the model legislation.
176. The marked difference between the QLD industrial manslaughter provisions and the existing penalties under the model WHS Act, is that the QLD provisions are aimed solely at the employer.
177. The offence of industrial manslaughter in QLD provides for 10 years imprisonment and a \$20m maximum penalty. We are unaware of any evidence that suggests such a penalty will actually lead to improved safety outcomes.
178. It is important to note that a WHS offence differs from a breach of the general criminal law.
179. Firstly, a breach of a WHS duty occurs whether or not harm is caused. It is the failure to provide a safe working environment which constitutes the breach. Secondly, proof of a breach of duty does not depend upon proof of a relevant state of knowledge or intent, as opposed to the offence of manslaughter.
180. The introduction of the offence of industrial manslaughter is also unwarranted as the enactment of the Model WHS Act brought with it new duties for officers who now have a legal responsibility to exercise due diligence. Due diligence requires them to take a proactive role in ensuring that their business complies with its duties. Failure to ensure due diligence attracts significant personal liability.
181. In announcing the QLD industrial manslaughter laws, the Government stated "*companies won't be able to hide behind elaborate corporate structures to evade their responsibilities.*" Officer due diligence provisions exist for that exact reason – to ensure that officers can be held accountable for the failings of their organisations, reinforcing the point that there is no legislative gap in the model WHS laws.
182. Master Builders considers that the existing model WHS laws provide an appropriate framework for dealing with workplace deaths. A breach by a duty holder where the person, without reasonable excuse, engages in conduct that exposes an individual to a risk of death or serious injury or illness and the person is reckless as to the risk to an individual of death or serious injury or illness could result in substantial penalties of up to \$3 million for a body corporate and fines and/or 5 years imprisonment for individuals. There can be no doubt about the deterrent effect of such significant penalties. This notion is reinforced in the light of the scope for courts to deal appropriately with the most serious breaches of model WHS laws.
183. The existing legislation also achieves a balance between prevention and punishment. As mentioned above, of particular importance is the duty of officers. This additional duty was seen by WHS experts as one of the most important reforms made during OH&S harmonisation as officers are now required to take positive and proactive steps to ensure that their business or undertaking has the systems and procedures in place to meet its WHS obligations.

184. The focus should be on prevention of workplace injuries and deaths rather than taking punitive action after the event. A punitive approach is counterproductive and less effective than encouraging employers and workers to work together.
185. It is Master Builders' view that the introduction of the offence of industrial manslaughter is out of step with the intent of WHS harmonisation and therefore unwarranted.

RECOMMENDATION:

Master Builders does not believe the introduction of industrial manslaughter provisions into the Model WHS Act is warranted.

SPECIFIC QUESTIONS IN THE DISCUSSION PAPER

QUESTION 1:

WHAT ARE YOUR VIEWS ON THE EFFECTIVENESS OF THE THREE-TIERED APPROACH - MODEL WHS ACT SUPPORTED BY MODEL WHS REGULATIONS AND MODEL WHS CODES - TO ACHIEVE THE OBJECT OF THE MODEL WHS LAWS?

186. The three-tiered approach is effective in achieving the object of the model WHS laws. It is a regime that appears capable of encapsulating obligations that are general, specific, and industry specific.
187. In many respects, the BCI is a case-study example of how these tiers operate in such a way as to allow building industry participants to understand their obligations and responsibilities. The Construction specific CoPs are well understood and known within the BCI as the 'starting point' to achieve WHS compliance. Sub-sectors of the BCI (for example, asbestos removal) are also directed to more specialised Codes that, on the whole, provide practical guidance for building industry participants. The same can be said for specialised phases of the construction process (for example, crane operation). Notwithstanding, CoPs should be clear, concise and not deviate from obligations expressed under WHS laws.
188. This is also due, we submit, to the nature of the risk associated with building work and the history of associated culture in the sector. While that culture has arguably undermined the importance of safety, it has also ensured that employers and BCI PCBUs are extremely cognisant of their obligations and duties to ensure workplaces are safe.

QUESTION 2:

HAVE YOU ANY COMMENTS ON WHETHER THE MODEL WHS REGULATIONS ADEQUATELY SUPPORT THE OBJECT OF THE MODEL WHS ACT?

189. The Regulations adequately support the objects of the Act, albeit they are lengthy and too complex to comprehend easily.

QUESTION 3:

HAVE YOU ANY COMMENTS ON WHETHER THE MODEL WHS CODES ADEQUATELY SUPPORT THE OBJECT OF THE MODEL WHS ACT?

QUESTION 4:

HAVE YOU ANY COMMENTS ON WHETHER THE CURRENT FRAMEWORK STRIKES THE RIGHT BALANCE BETWEEN THE MODEL WHS ACT, MODEL WHS REGULATIONS AND MODEL CODES TO ENSURE THAT THEY WORK TOGETHER EFFECTIVELY TO DELIVER WHS OUTCOMES?

190. Master Builders believe the model WHS codes, on the whole, adequately supports the objects of the model Act.
191. There are many benefits associated with the use of Codes, including flexibility, industry specificity and capacity to deal with new issues and practices as they emerge. Notwithstanding this, Master Builders holds a number of concerns with respect to Codes relating broadly to status, length, cost of compliance and development/review process.
192. Given the existence of a large amount of WHS information and material, it is important for users to know what status certain material holds and that it be presented in a simple, clear and practical manner that is capable of implementation. We submit this is not always the case.
193. BCI participants often express frustration in terms of being able to clearly determine the legal status of certain WHS materials. There exists a vast array of such materials that are variously described as Codes, Guides, Practical Guides, Best Practice Guides, Information Guides, Guidance Materials, Implementation Guides, Codes of Practice and the like.

Code Status

194. Master Builders believes that the use of Codes should be limited to circumstances where specific duties exist under the Act and Regulations that provide an appropriate head of power for it to exist.
195. Codes should only contain obligations that are necessary to give effect to the relevant duties and obligations under the Act and Regulations, and not become a vehicle that extends duties beyond those required by the law.
196. Any material that outlines a practice or process that is not clearly linked to an appropriate head of power, should be excluded from a Code or identified clearly as being guidance rather than legislative duty.

Communication of status

197. Master Builders recommends that the status of a Code must be abundantly clear to users.
198. If a particular Code and its requirements are mandatory, this should be stated simply and explicitly so that users know compliance is necessary. If something is considered to be other than a Code (such as general information or guidance material) then this too should be explicit and clear to users.
199. It is crucial that users know the status of WHS materials given the potential ramification that may relatedly arise. As noted herein, a source of frustration amongst BCI participants is the inability to determine standing of particular materials – a relevant consideration in determining steps to ensure compliance with WHS duties and obligations.
200. Materials from government agencies frequently contributes to confusion in this regard. For example, a SWA information sheet³³ on the status of Codes initially adopts what appears to be a clear explanation being:

"Codes of practice have a special status because an approved code is automatically admissible as evidence in court proceedings under the WHS Act and Regulations. Courts may have regard to a code as evidence of what is known about a hazard, risk or control and may rely on the code in determining what is reasonably practicable in the circumstances to which the code relates."

201. However, much of this clarity is then lost when the sheet then states:

"Other types of guidance documents also help duty holders comply with the law but differ from the authoritative advice of a code of practice by allowing duty holders wider discretion to choose the options that best suit their circumstances. Guidance material contributes to the overall state of knowledge regarding hazards, risks and controls and may be tendered as evidence in court proceedings."

202. SafeWork NSW similarly seeks to clarify the status of Codes in its publications. However, when doing so, SafeWork NSW go on to note³⁴:

"As well as codes of practice, Safe Work Australia has guidance material that can also help you achieve the standards under WHS laws."

203. Later, the same source goes on to link what are titled "Pre-WHS Legislation Codes of Practice" that are described as:

³³ SWA Codes of Practice and Guidance Material INFORMATION SHEET

³⁴ <http://www.safework.nsw.gov.au/law-and-policy/legislation-and-codes/codes-of-practice>

"These codes of practice were developed based on older laws which were replaced with the Work Health and Safety Act and Regulation. However they are still current and can still be used to help you meet your WHS requirements."

204. This is followed by a reference to another type of source, relevant to synthetic mineral fibres that is described as:

"We have also published an information guide on the safe management of synthetic mineral fibres (SMF) – glasswool and rockwool which is intended to complement SafeWork Australia's guide to handling refractory ceramic fibres."

205. We also note that many Codes seek to incorporate by reference other external materials, the most common of which are Australian Standards. While we deal with the issue of standards separately hereunder, the status and standing of Australian Standards also pose practical difficulties to users in workplaces.

For example, Standards Australia³⁵ indicate that:

Australian Standards are published documents setting out specifications and procedures designed to ensure products, services and systems are safe, reliable and consistently perform the way they are intended to. They establish a minimum set of requirements which define quality and safety criteria. Australian Standards are voluntary documents that are developed by consensus. Many Australian Standards, because of their rigour, are adopted into legislation to become mandatory or referenced in contracts.

And later:

Standards are voluntary documents which are developed by consensus. While Australian Standards are not legal documents, many are adopted into Commonwealth, state or territory legislation and become mandatory. Standards are also often incorporated into legal contracts.

And then:

Other options include self-regulation by means of a voluntary industry code or standard; quasi-regulation such as a standard endorsed by government; or co-regulation such as a standard referenced in regulation or legislation.

206. There are a myriad of diverse messages and inferences that could be drawn from the above extracts in terms of what status they hold and the extent to which compliance is necessary, particularly when considered from the perspective of a small business person seeking to understand their duties and obligations.

Code development and review processes

207. Master Builders recommends that the Code development and review process be examined to determine where improvements can be made.
208. While consultation regarding Code reviews takes place on a semi-regular basis, the timeframes for such consultation is entirely insufficient and more rigorous processes need to be adopted.
209. It is also noted that certain requirements to create or initiate a Code do not appear to apply to the review or updating of an existing Code. This includes, for example, the obligation to undertake a RIS on a change or update to an existing Code.

³⁵ *Developing Australian Standards – Standards Australia*

Code complexity and cost

210. Master Builders has noted a tendency for Codes to become increasingly lengthy and complex. We have examined 3 such Codes that have been reviewed at least once and note that they are all longer than their original form.
211. Master Builders also notes the increasing extent to which various other source materials are referenced within particular Codes. The most common example of this is reference to Australian Standards which are generally unavailable unless purchased at significant cost.
212. Master Builders has examined two Codes that reference Standards and calculated the cost of purchasing those referenced therein by way of examples.
- The first examined was "Managing the risk of falls in housing construction" which references in excess of 15 separate standards. The total cost to purchase the referenced Standards therein is **\$2,202.62**.
 - The second examined was "Managing the risk of falls at workplaces" which also references a large number of separate additional standards. The total cost to purchase the referenced Standards therein is **\$3,881.83**.
213. Master Builders takes the view that it is entirely unacceptable for a Code dealing with a generic risk such as general falls in workplaces should need to spend almost \$4000.00 to ensure compliance with the Code.
214. Master Builders is also engaged in examining the cost to purchase those Australian standards referenced within the National Construction Code (NCC). Our analysis indicates that there are a staggering 3347 separate primary and secondary Australian Standards referenced throughout the NCC. Based on an average cost of \$120 per standard, and our preliminary estimate to purchase those required to interpret the NCC would be **\$401,600.00**.
215. Master Builders raises no contention with the interaction between the Act and Regulations in terms of WHS outcomes.
216. However, as noted above, Master Builders believes that there is room to improve the operational effectiveness of Codes.

RECOMMENDATIONS

Model Codes and Guidance Material should only detail obligations and duties that are required by the Act and Regulations.

The standing or status of Model Codes and Guidance Material should be clearly identified for users to avoid confusion. For example:

- a Code should feature the words “the obligations set in this Code must be followed in relation to [the relevant type of work or practice] in order to comply with your duties under WHS laws. A court or regulator will assess what you have done to meet the requirements of this Code in order to assess compliance with WHS laws.”
- Guidance Material should feature the words “unless you have implemented an alternative way to ensure [the relevant type of work or practice] is undertaken safely, the obligations set in this Guidance Material must be followed in relation to [the relevant type of work or practice] in order to comply with your duties under WHS laws. A court or regulator may assess what you have done to either meet the requirements set in this Code, or an alternative way to ensure [the relevant type of work or practice] is undertaken safely, in order to assess compliance with WHS laws.”

Stakeholders should be educated about the status and standing of Codes and Guidance Material, so as to enable easy and simple identification of their obligations to improve safety outcomes and distinguish material that is ‘best practice’ or non-mandatory.

Model Codes of Practice subject to a review process should be assessed against the same criteria and using the same processes within which they were originally drafted.

Where there is duplication, the Commonwealth Model Code of Practice should be adopted in lieu of the relevant State/Territory Code, or in the alternative, users should be able to clearly determine which Codes of Practice are have taken effect in the relevant State or Territory.

There should be a central repository for all Codes of Practice in each State or Territory that is easily accessible and widely publicised.

It should always be clear as to which regulatory agency is responsible for enforcement of a particular statutory obligation.

217. In terms of the use of and reference to Australian Standards (AS), we recommend a suite of actions to improve their role in terms of improved safety outcomes.

RECOMMENDATIONS – STANDARDS

The development of technical standards should continue but AS should not be developed for policy, managerial, performance or commercial issues.

Where information is contained in an AS, the use of which is mandated by regulation or law, such detail be removed from the regulation that mandates its use.

Master Builders supports the need to repeat specific text in a Code or guide, but only when deemed necessary. In a guide it would however become an expectation and could be used as an indication of compliance

AS are too costly and numerous. SA should undertake a 2 yearly review and stock take of AS to ensure relevance and efficiency.

Business cannot be expected to purchase the range of AS, especially given the high volume of cross-referencing between standards. Where use of an AS is mandated by regulation or law, there should be no cost to persons seeking to obtain the AS.

AS should not feature cross referencing, unless otherwise avoidable or necessary. The cascade requirements for further standards are an issue for businesses, especially when AS are noted in Codes or Guides

That information should be in as simple a format and reading age as possible. AS should be accessible, free and in plain language

AS can be used as an industry benchmark so long as such designation:

- has the unanimous support of the industry to which it will apply;
- does not exclude or rule out the use of other systems or approaches, especially if these alternatives are more appropriate or provide a higher standard; and
- the non-exclusionary nature noted above be outlined clearly on any AS that is designated as a benchmark.

The use and implications of AS in Guides or Codes and Regulations needs to be clear so that users know the status and applicability of every AS.

There is a concerning crossover on issues, where SWA have Regulations and Codes and AS that are also developed on same topic. These should be eliminated.

QUESTION 5:

HAVE YOU ANY COMMENTS ON THE EFFECTIVENESS OF THE MODEL WHS LAWS IN SUPPORTING THE MANAGEMENT OF RISKS TO PSYCHOLOGICAL HEALTH IN THE WORKPLACE?

218. Master Builders is concerned to ensure that the WHS framework remains focussed on genuine risks and safety in the workplace. Master Builders acknowledges that the term 'Health' is defined in the WHS Act as both physical and psychological health, and this is supported. It is accepted that the workplace can affect the psychological health of a person and that PCBUs, consistent with their general duties, should ensure that steps to reduce any related risks. This is entirely appropriate.

219. There is, however, a noticeable tendency for various WHS stakeholders (including commentators, academics, and consultants) to increasingly draw links between the workplace and matters that would ostensibly and historically be considered not work related. Psychological health is one area where this is commonly perceived to be the case.

220. Master Builders regularly receives reports from members expressing concern about the linkage described above. In many cases, these reports involve circumstances in which it is more common for employees to link to the workplace matters that are ostensibly unrelated to either the workplace or the employer.

“Everything that happens to our guys seems to be our responsibility. They might be having marriage or financial problems – whatever – but when these become a problem, somehow it’s related back to their job.”

221. Master Builders also notes that some of the key factors identified by SWA ³⁶ as organisational risks to psychosocial health include the following items:

“Organisational change management—how change in the organisation, structure or job is communicated and the extent of worker involvement during these changes.

Recognition and reward—the nature of feedback on task performance, performance reviews, opportunities for skills development, formal and informal rewards.

Organisational justice—perceptions of unfairness, consistency, bias and respect for workers.”

222. We would observe that in many workplaces these items are matters that are beyond the control of the employer or PCBU. For example, organisational structural change is regulated by provisions within Modern Awards or Enterprise Agreements; employment conditions (such as hours of work and shift patterns) are set by Modern Awards and the Fair Work Commission; rates of pay are linked to skill level, ability and hours worked underpinned by the Fair Work Act and Modern Awards; disciplinary processes are set by Modern Awards or Enterprise Agreements; and obligations exist with respect to bias, unfairness etc. in other laws such as discrimination or equal opportunity legislation.

223. While it is accepted that an employer can take steps to ensure these obligations are discharged in a manner that reduces psychosocial risk, this is not always possible where a preferable, less hazardous path would result in a breach of obligation noted elsewhere.

224. It is the view of Master Builders that WHS duties and obligations should be centralised as far as is practicable so as to ensure employers and PCBUs are able to reduce relevant risk and discharge their WHS obligation appropriately. To the extent that this is not the case, or where other sources create a conflict with WHS practice, it should be made clear as to what source prevails in terms of employer and PCBU obligation. For example, there should be no liability for an employer if an employee alleges a psychological injury due to a redundancy process mandated by a Modern Award.

RECOMMENDATION:

Where there is a conflict between two statutory instruments, or where compliance with one source leads to a breach of another, there should be no penalty for employers who breach the law.

225. Further, Master Builders believes that employers should be free to decide what steps they take to accommodate matters affecting employees that would ordinarily be considered non-work related. Indeed, employers should be encouraged to do this – but it should not be mandatory.

226. The issue of psychological health is also one that we would observe to be vocationally or occupationally specific. This observation is supported by SWA data showing that particular occupations have a higher mental disorder frequency, being:

³⁶ <https://www.safeworkaustralia.gov.au/topic/mental-health>

- defence force members, fire fighters and police (6 claims per million hours), specifically police (7.2)
 - automobile, bus and rail drivers (6 claims per million hours), specifically train and tram drivers (21.5)
 - health and welfare support workers (3.3 claims per million hours), specifically indigenous health workers (6.1)
 - prison and security officers (2.5 claims per million hours), specifically prison officers (5.7)
 - social and welfare professionals (1.8 claims per million hours).
227. It can be said that these occupations as an industry have, on the whole, taken significant steps to put in place specific processes to reduce the frequency of these incidents. This is appropriate as the specific industry itself recognises the consequences of work or situations faced by particular occupations in the workplace and can put in place industry lead and developed measures to address them. This is supported by Master Builders.
228. Within the BCI, there is much data to suggest it is home to a concentration of incidence associated with mental health concerns, such as depression and suicide. There are many factors as to why this may be the case (including drug use, gender concentration, perceptions of being considered ‘weak’ etc) but the cause is overwhelmingly not related to the workplace or type of work undertaken. In other words, while the BCI is home to this concentration, it is not necessarily the cause.
229. Again, the BCI itself has recognised this concentration and through various mechanisms taken steps to address the issue and assist those affected. There are significant benefits to the industry as a whole in adopting such an approach, including the development and implementation of programmes that are tailored and overwhelmingly known by building industry participants. These include programmes such as OzHelp.
230. Overall, Master Builders believes that the Act, Regulations and Codes are entirely adequate to address psychological workplace risk. They provide a reasonable degree of certainty for duty holders in terms of occupational risk management and appropriate protections for workers, linked back to general duties required by the Act. Further, the existing framework provides enough flexibility for individual employers and industry itself (including the BCI) to adopt strategies that are appropriate to them or their industry. There is no evidence of which Master Builders is aware that demonstrates a need for further reform, save for a need to clarify which obligational source prevails.

RECOMMENDATION:

Industries and workplaces that adopt policies or processes dealing with matters or public health or non-workplace specific health issues should be encouraged and supported in doing so, but this should not become mandatory and remain acknowledged as voluntary.

QUESTION 6:

HAVE YOU ANY COMMENTS ON THE RELATIONSHIP BETWEEN THE MODEL WHS LAWS AND INDUSTRY SPECIFIC AND HAZARD SPECIFIC SAFETY LEGISLATION (PARTICULARLY WHERE SAFETY PROVISIONS ARE INCLUDED IN LEGISLATION WHICH HAS OTHER PURPOSES)?

231. As noted earlier, the degree to which building industry participants are obliged to consider WHS duties and obligations within other legislation or sources is extensive.
232. A common source of frustration and consternation expressed by Master Builders’ members arises due to confusion and complexity flowing from the increasingly wide and expansive sources of WHS obligations, duties or reporting requirements. The concern is not the duty to ensure workplaces are safe but instead the ability to identify the source of that duty and its obligations.

233. For example, a builder in Queensland who undertakes building work is required to comply with:
- WHS Act
 - WHS Regulations
 - WHS Construction Code
 - Other WHS related Codes relevant to particular construction work.
234. In addition, they would need to have regard to obligations within:
- WHS provisions within the On-Site Award;
 - WHS related provisions in the Fair Work Act (e.g. Bullying and domestic violence); and
 - WHS provisions in any Enterprise Agreement that exists or applies to the workplace.
235. They would also need to adhere to WHS requirements within:
- The National Construction Code (Building Products);
 - The Queensland Building and Construction Commission Act 1991;
 - The Labour Hire Licensing Act 2017; and
 - Environmental Protection Act 1994.
236. If the work performed involves projects funded by the Commonwealth, they also must comply with:
- Code of Practice for the Tendering and Performance of Building Work 2016; and
 - Australian Government Building and Construction WHS Accreditation Scheme
237. If the work performed involves projects funded entirely or partly by the State of Queensland, they must also comply with various frameworks and codes that are mandated by that jurisdiction and include WHS elements. These include:
- Capital Works Management Framework
 - Quality Assurance Policy
 - Queensland Government building and construction training policy
 - Queensland Government Procurement Strategy (that references WHS obligations and other policies that also include WHS aspects, such as)
 - Queensland Charter for Local Content
 - Ending Domestic and Family Violence
 - Managing and monitoring suppliers' performance
 - Prequalifying suppliers
238. The problems that a SME participant in the BCI are likely to face from the above list are many. They include difficulties in determining:
- the sources of WHS duties and obligations;
 - the status of those sources in terms of the Act and Regulations;
 - the status of those sources in relation to other similar sources;
 - the 'hierarchy' of the various statuses;

- the enforceability of items arising from various sources;
- who is responsible for enforcement; and
- which of the various sources should be adopted and implemented.

239. It is also common for BCI participants to report that they commonly find inconsistencies between various sources once determined – compliance with one source of duty or obligation may create an inconsistency with another source.

"A Code says we can't do something that is specifically allowed under the Regulations – which do we follow?"

"The Award says that I have to pay an allowance for someone exposed to lime powder dust, but only if they are exposed for more than one hour. I'd prefer they weren't exposed in the first place, but I have to weigh up which might be the biggest problem – Worksafe or the Union?"

RECOMMENDATIONS

Where there is a law, regulation, code or another source which exists for a primary purpose other than WHS and which concurrently purports to generate a WHS obligation, it should be made clear that those duties do not override those prescribed under the WHS Act or Regulations.

Where there is an inconsistency between a statutory instrument and the WHS Act and Regulations, it should be made clear that the latter has greater authority than the source instrument that is unrelated to WHS.

A comprehensive review should be undertaken, on an industry by industry basis, of all regulation that creates or purports to create a safety obligation, with a view to removing overlap and increasing understanding of statutory obligations and duties.

QUESTION 7:

HAVE YOU ANY COMMENTS ON THE EXTRATERRITORIAL OPERATION OF THE WHS LAWS?

240. Master Builders has not identified any concern with respect to extraterritorial operation of the model WHS framework.

QUESTION 8:

HAVE YOU ANY COMMENTS ON THE EFFECTIVENESS OF THE MODEL WHS LAWS IN PROVIDING AN APPROPRIATE AND CLEAR BOUNDARY BETWEEN GENERAL PUBLIC HEALTH AND SAFETY PROTECTIONS AND SPECIFIC HEALTH AND SAFETY PROTECTIONS THAT ARE CONNECTED TO WORK?

241. Master Builders does not believe the model WHS laws create a boundary that is adequately clear to distinguish workplace health and safety and general public health and safety.

242. In addition to the comments provided above at Question 5, Master Builders remains concerned that there is a marked increase in expectations that workplaces (generally the employer or business entity) hold responsibility for matters that are not clearly workplace related.

243. These expectations are held not only by workers, but also by other stakeholders including the community, government and (in some instances) existing safety regulators/educators.

244. For example:

- A Victorian publication entitled *"Integrated approaches to worker health, safety and well-being"* is referenced as a *"Guide"* dealing with integrated approaches to worker health combine occupational safety and injury prevention with health promotion to advance worker health,

safety and well-being. While a small reference can be found that notes "*The opinions, findings and conclusions expressed in this publication are those of the authors and not necessarily those of WorkSafe or ISCRR*" the report moves from being a "Guide" to then outlining what are stated to be "Guidelines for implementing integrated approaches in Victoria".

245. It is Master Builders view that publications and information such as that above contributes to the uncertainty that workplaces experience in terms of the distinction between general public health and safety and that which is workplace related. This does not assist in terms of improving safety outcomes for workplaces.

RECOMMENDATION:

Industries and workplaces that adopt policies or processes dealing with matters or public health or non-workplace specific health issues should be encouraged and supported in doing so, but this should not become mandatory and remain acknowledged as voluntary.

QUESTION 9:

ARE THERE ANY REMAINING, EMERGING OR RE-EMERGING WORK HEALTH AND SAFETY HAZARDS OR RISKS THAT ARE NOT EFFECTIVELY COVERED BY THE MODEL WHS LEGISLATION?

246. Master Builders cannot envisage any remaining, emerging or re-emerging WHS hazards or risks that would not be capable of being accommodated appropriately within the existing model framework.

QUESTION 10:

HAVE YOU ANY COMMENTS ON THE SUFFICIENCY OF THE DEFINITION OF PCBU TO ENSURE THAT THE PRIMARY DUTY OF CARE CONTINUES TO BE RESPONSIVE TO CHANGES IN THE NATURE OF WORK AND WORK RELATIONSHIPS?

QUESTION 11:

HAVE YOU ANY COMMENTS RELATING TO A PCBU'S PRIMARY DUTY OF CARE UNDER THE MODEL WHS ACT?

QUESTION 18:

HAVE YOU ANY COMMENTS ON THE PRACTICAL APPLICATION OF THE WHS CONSULTATION DUTIES WHERE THERE ARE MULTIPLE DUTY HOLDERS OPERATING AS PART OF A SUPPLY CHAIN OR NETWORK?

247. Master Builders believes that obligations and duties of PCBUs are effective and do not warrant alteration or change. Instead, Master Builders' primary concern is the approach taken to these concepts in terms of the technical and operational nuances that exist in the BCI.
248. An operational difficulty is one that we submit arises from the complex and inter-dependent nature of the way building and construction work is performed. As noted earlier herein, a typical commercial construction site can have dozens of separate subcontractor entities operating at any one point in time.
249. A technical difficulty is one that involves construction practices that are nuanced or unique. While advances in general construction technology and methods mean that new and emerging practices are common place in the sector, some are simply rare or unique.
250. We refer to the following example to allow the Review to understand our concern.

EXAMPLE:

A head contractor secures a construction site ("Site X") at the completion of a working week ahead of a two day weekend. Site X is securely locked with signage and site project contact information visibly displayed. While subcontractors have keys and proximity cards such that they are able to access site X after hours, there are no subcontractors programmed to work over the weekend. All steps have been taken to secure the site. Subcontractors have been trained in applicable protocols to obtain permission to enter site X after hours, and the processes to be followed when this occurs.

On Saturday of the weekend, a subcontractor engaged to perform work on site X is programmed to work on a separate site ("Site Y") that is entirely unrelated and distinct from site X. A disruption on unrelated site Y means the subcontractor cannot commence work as expected and finds themselves unable to engage the three workers who they employ and who have presented themselves for work.

To ensure the three workers can be usefully engaged, the subcontractor determines that other work will eventually be required at site X and decides to access that site on the weekend even though this is not programmed and the site is secured.

The subcontractor and his workers access site X and do not adhere to required protocols necessary to obtain after hours site access. A worker subsequently sustains an injury while on site X over the weekend.

The head contractor has taken all reasonable steps to ensure this duty is discharged including steps to secure the site to prevent access and, by default, have foreseen the risks that may arise if not secured and access is obtained. The criteria established by s.18 have been met.

251. The above example is based on an actual circumstance involving a Master Builders member.
252. As would be expected, the injury was reported to a regulator who conducted an investigation. The approach adopted by the regulator is the source of our concern. Primarily, the approach was to immediately focus on the head contractor and its obligations rather than those held by the subcontractor whose employee suffered the injury.
253. The regulator investigation lasted almost two years before reaching finalisation. We understand that no prosecution or related proceedings arose from the investigation and that this was possibly due to statutory time limitations.
254. Nevertheless, the focus on the head contractor and the resulting cost and time involved as a result was arguably disproportionate and unnecessary.
255. The reasons and rationale behind this approach are unclear, but are likely to include some founded on assumptions of duty associated with a conventional workplace and not the complexities of the BCI. We add that this approach is not limited to the circumstances of the Master Builders' member in question nor the circumstances and example described above.
256. The approach was aptly described to Master Builders by a member as being one where regulators "target who they think should be responsible, rather than who is responsible." Master Builders is concerned that this creates and contributes to future uncertainty in terms of WHS duties and obligations and sends confusing messages to workplaces generally.

QUESTION 12:

HAVE YOU ANY COMMENTS ON THE APPROACH TO THE MEANING OF 'REASONABLY PRACTICABLE'?

257. Master Builders reiterates the comments made earlier herein with respect to this concept and the imperative for its retention. The concept is emphatically supported and must be retained.
258. Master Builders notes that certain provisions within the Act are now expressed as "strict liability offences". These are to be distinguished from, for example, the absolute liability approach adopted in predecessor NSW legislation (for example, s 8(1) of the 2000 OHS Act NSW) which has also been regarded as an absolute liability offence ever since the decision of Watson J in *Carrington Slipways Pty Ltd v Callaghan (1985) 11 IR 467*, a decision the correctness of which has been repeatedly affirmed by other Full Benches.

259. A strict liability offence is arguably a different type of offence from an offence described as “*an absolute liability*”. It is likely to be the case that a deliberate shift from an absolute liability offence to one of strict liability exposes the potential for a submission that a strict liability offence may be defeated, if the defendant can successfully raise a defence of honest and reasonable mistake of fact.
260. In acknowledging this shift, Master Builders reiterates the importance of the current concept and the necessity for its retention.
261. We also note that in some circumstances participants in the BCI experience uncertainty in terms of the 'reasonably practicable' concept. However, this uncertainty does not arise from the concept in and of itself – but rather the approach adopted to its application, particularly insofar as it relates to BCI specific considerations of duty holder influence and control.
262. We contend that this is due to:
- A failure of regulators and third parties to understand the technical and operational challenges that BCI participants face regularly; and
 - A tendency for the concept of 'reasonably practicable' to only be considered from perspective founded in a more conventional consideration of a workplace and the relationships therein.
263. We note the above uncertainty but do not believe these are grounds for alteration to its core concept.
264. Arguments to alter the concept so as to include more specificity around the issues of influence and control are appreciated and understandable. However, the circumstances where this becomes problematic for BCI participants is where there are multiple duty holders operating concurrently. In this respect (as noted above) we believe the law provides necessary certainty in terms of obligation.
265. This notwithstanding, the concern we hold is more relevant to the application of this aspect of the WHS law by regulators. We deal with this concern later herein.

QUESTION 13:

HAVE YOU ANY COMMENTS RELATING TO AN OFFICER'S DUTY OF CARE UNDER THE MODEL WHS ACT?

266. Master Builders would refer the Review to our comments earlier herein regarding the existing penalty regime.

QUESTION 14:

HAVE YOU ANY COMMENTS ON WHETHER THE DEFINITION OF 'WORKER' IS BROAD ENOUGH TO ENSURE THAT THE DUTIES OF CARE CONTINUE TO BE RESPONSIVE TO CHANGES IN THE NATURE OF WORK AND WORK RELATIONSHIPS?

267. Master Builders believes that the existing definition of worker remains appropriate and would not support any alteration to its current form.
268. Further, Master Builders believes that changes in the nature of work being performed does not, and would not, necessarily give rise to circumstances in which the definition of worker would require additional consideration. It is also difficult to envisage circumstances that would represent a change in what is termed a 'work relationship' that would not be entirely and readily capable of being accommodated by existing definitions.
269. Employers and businesses typically engage in two conventional types of relationship insofar as the provision of labour is concerned. Persons are either workers in a conventional sense, employed under a contract of employment on terms underpinned by minimum standards and conditions set within industrial law, or persons are independent contractors, engaged pursuant to a commercial contract that is underpinned by the *Independent Contractors Act 2006* (IC Act) and relevant existing law (such as taxation, superannuation etc.).

270. The IC Act and the FW Act protect the rights and entitlements of independent contractors. The difference between an employee and independent contractor is based on many different factors. No single factor determines whether a person is an employee or contractor. Instead, courts will look at each case and make a decision based on the totality of the relationship between the parties when determining the status of a person's employment.
271. The FW Act also prescribes significant penalties for what is termed 'sham contracting'. A sham contracting arrangement is when attempts are made to disguise an employment relationship as an independent contracting arrangement. This is sometimes done to avoid responsibility for entitlements triggered in an employment relationship. Under the sham contracting provisions of the FW Act, prohibitions exist that prevent someone:
- misrepresenting an employment relationship or a proposed employment arrangement as an independent contracting arrangement
 - dismissing or threatening to dismiss an employee for the purpose of engaging them as an independent contractor
 - making a knowingly false statement to persuade or influence an employee to become an independent contractor.
272. Master Builders is unaware of any alteration to the nature of work relationships that would not already be comprehended by the legislation noted above. This notwithstanding, were circumstances such that an alteration of the type contemplated came to pass, it is Master Builders' view that this ought to be reflected in legislation of the type noted above and not WHS legislation.
273. As mentioned earlier, it is Master Builders' strong view that WHS is WHS – it should be free from matters of an industrial nature.

QUESTION 15:

HAVE YOU ANY COMMENTS RELATING TO A WORKER'S DUTY OF CARE UNDER THE MODEL WHS ACT?

QUESTION 16:

HAVE YOU ANY COMMENTS RELATING TO THE 'OTHER PERSON AT A WORKPLACE' DUTY OF CARE UNDER THE MODEL WHS ACT?

QUESTION 17:

HAVE YOU ANY COMMENTS RELATING TO THE PRINCIPLES THAT APPLY TO HEALTH AND SAFETY DUTIES?

274. Master Builders makes no specific recommendations or comment regarding these questions and refers to our related views expressed elsewhere in this submission.

QUESTION 19:

HAVE YOU ANY COMMENTS ON THE ROLE OF THE CONSULTATION, REPRESENTATION AND PARTICIPATION PROVISIONS IN SUPPORTING THE OBJECTIVE OF THE MODEL WHS LAWS TO ENSURE FAIR AND EFFECTIVE CONSULTATION WITH WORKERS IN RELATION TO WORK HEALTH AND SAFETY?

275. Master Builders refers the Review to our comments earlier herein with respect to the culture and history of the BCI and its participants.

QUESTION 20:

ARE THERE CLASSES OF WORKERS FOR WHOM CURRENT CONSULTATION REQUIREMENTS ARE NOT EFFECTIVE AND IF SO HOW COULD CONSULTATION REQUIREMENTS FOR THESE WORKERS BE MADE MORE EFFECTIVE?

276. Master Builders has not identified any class of worker for whom current consultation requirements are not effective.

277. Within the BCI, all persons require a General Construction Induction Card (White Card) when working on a construction site. Industry practice is that entry to a construction site is restricted only to those who hold, at least, a white card.
278. *The WHS Regulations* require that a person conducting a business or undertaking must ensure workers have successfully completed general construction induction training before starting construction work.
279. General Construction Induction Training is a nationally accredited competency unit known as “Work safely in the construction industry”. The competency unit is a formal face to face training program that provides workers in the construction industry with an awareness and understanding of:
- their rights and responsibilities under Work Health and Safety law;
 - common hazards and risks in the construction industry;
 - basic risk management principles; and
 - the standard of behaviour expected of workers on construction sites.
280. The competency unit "Work safely in the construction industry" is approximately six hours in duration and can only be delivered by a registered training organisation registered with the Australian Skills Quality Authority having the scope to train the specified competency unit, "Work safely in the construction industry".
281. In addition, Master Builders would refer the Review to our comments earlier above regarding the varying range of sources in which WHS obligations exist, or purport to exist, including Enterprise Agreements. It is common for clauses to exist in these agreements that deal with WHS at tool box meetings, changes to work practices, changes to hours, safety training, and dispute resolution. Extracts from commonly adopted BCI agreements contain clauses such as those below:
- ...
- A tool box meeting will be held per site each month to facilitate and foster communication and consultation. All parties to this Agreement shall be invited. Items to be discussed at each meeting may include: programming of site work, site issues, Workplace Health and Safety, job design, productivity issues, management policies, agreement compliance, wages and conditions, compliance with statutory obligations and any other relevant issue raised. Notice of the meeting will be given at least one (1) week prior to the scheduled date including to the authorised representative of the Union.*
- ...
- In certain circumstances and by agreement between the parties, hours may be extended to perform works which are critical to the ongoing productivity or safety of other Employees on the project or where a critical work task is delayed due to unforeseen circumstances.*
- ...
- Any Employees elected as a workplace health and safety representative will undertake a training course approved by the State or Territory Government and provided by the Employer within six weeks of being elected, at no cost to the Employee.*
- ...
- The Employer recognises the high-risk nature of work on construction sites and the absolute need to ensure worker safety. Accordingly, all temporary foreign workers will be required to have*

minimum English language proficiency at the minimum level prescribed for the 457 visa standard business sponsorship, i.e.: English language proficiency that is equivalent to an International English Language Testing System (IELTS) test score of at least 5 in each of the four test components of speaking, reading, writing and listening.

...

The Employer provides a standing invitation for authorised representatives of the Union covered by this Agreement to enter the workplace for the purposes of dealing with safety issues or incidents in accordance with clause 8 of this Agreement. Application of this process is in no way intended to breach Right of Entry provisions under Part 3-4 of the FW Act or the WHS Act.

...

QUESTION 21:

HAVE YOU ANY COMMENTS ON THE CONTINUING EFFECTIVENESS OF THE FUNCTIONS AND POWERS OF HSRs IN THE CONTEXT OF THE CHANGING NATURE OF WORK?

282. Master Builders refers the Review to our comments earlier herein with respect to the culture and history of the BCI and its participants.
283. The specific role of HSRs is one that is particularly important to the BCI in context of this culture and history. There are a number of HSR specific matters to which the attention of the Review is drawn in an effort to contextualise our comments.
284. First, the BCI is renowned for the common practice where HSRs are determined by persons and entities that are not parties in the workplace, such as workers. To the contrary, it is common for building unions to 'nominate' a particular individual to be a site HSR and this is frequently a person not familiar with a particular worksite nor actually employed by the company.
285. There has been a myriad of instances where BCI participants have been involved in lengthy and protracted industrial action caused by disagreement related to a HSR nomination. The highly publicised Myer Emporium dispute in Melbourne CBD in which police horses were punched by union protesters (and which lead to a protracted dispute and secondary boycott action involving Boral) had its genesis in a dispute involving a HSR. In simple terms, the workers at the worksite had sought to nominate their HSR whereas the union wanted persons nominated by them to fulfil these roles. The employer's failure to concede to the union's demands lead to unlawful action that closed not only the building site in question, but the entire vicinity of the Melbourne CBD.
286. Second, the role and functions given to HSRs under WHS law is often the reason why a building union considers it crucial to determine who fills such a role. One such role is the capacity for a HSR to invite a building union official into the worksite to deal with an issue related to WHS.
287. The capacity for a HSR to extend such an invitation is seen to be crucial by building unions as this is seen to provide a mechanism that subverts usual right of entry processes and procedures.

"It's common for the union to rock up unannounced and try to wander onto the site. Asking them to follow the usual rules almost always results in a barrage of abuse and threats. If you survive the abuse and hold them to the rules, they'll go away but be back an hour or two later. This time, they'll say they've been invited by the HSR or there is some other serious safety risk that means they have to enter straight away. It doesn't matter what the rules say, they'll use any trick they can to get entry and if they don't, the whole site is shut down."

288. The frequency by which tactics noted above are deployed in the BCI is astounding – it is considered by BCI participants to be the 'norm' and instances where the rules are observed are disappointingly rare.
289. Master Builders was therefore disappointed by the decision in *Director of the Fair Work Building Industry Inspectorate v Powell [2016] FCA 1287*. The case involved an application by (ABCC predecessor agency) FWBC seeking orders that a CFMEU official had breached right of entry laws.
290. The official had entered a workplace at the request of, and to provide assistance to, a workplace health and safety representative (HSR) and would normally be required to have a right of entry permit. The court found that this was not the case, and that officials have a right to be in a workplace without a permit or following entry rules, if they are there at the invitation of a workplace HSR.
291. At the time of this decision, Master Builders warned of the danger the decision would pose to rules governing how, when and why a union official can enter a workplace were not applicable if they've been invited to attend the site. We considered it to be nonsensical to have a situation where the rules only apply to a union official if they request entry, but if a HSR invited them in, no rules apply and the official could be free to engage in whatever conduct they desired.
292. Master Builders was concerned that union organisers who have had entry permits taken away, never applied for a permit, or have failed a 'fit and proper person' test can get into any workplace at any time if they are invited to do so by a HSR. In the case referenced above, the official was known to associate with outlaw motorcycle gangs, protested against the deportation of people with links to organised crime, wore Rebels Outlaw Motorcycle Gang badges, and had a track record of ignoring entry laws. In 2007, the same official was reported to have abused a site manager calling him a "f..king maggot", a "piece of sh*t", a "c.ckhead" and a "f..king idiot" and had previously had entry permits suspended and received counselling for 'renegade' behaviour.
293. Master Builders does not believe union officials should be banned to assist workplace representatives, however giving someone associated with bikies and a history of abusive and illegal behaviour the green light to be anywhere they want if invited, was not appropriate.
294. The above decision was subsequently appealed to the Federal Court of Australia who overturned the first instance decision. The CFMEU subsequently appealed to the High Court of Australia who refused leave and dismissed the application.
295. This outcome was welcomed by Master Builders. The Court outcome means the decision of a Federal Court Full Bench³⁷ to overturn an earlier decision³⁸ remains, meaning union officials cannot bypass normal rules upon entering a workplace if invited by a health and safety representative.
296. The Federal Court Full Bench previously determined that:
297. *"There is no reason of policy or commonsense why one would distinguish between differently worded conditions that by their operation provided a right to enter premises for occupational health and safety reasons, to require a permit if the official has a reasonable suspicion of a contravention of a State or Territory or Commonwealth law about occupational health and safety, but not to require a permit if the official is asked to assist an HS representative deal with an issue about occupational health and safety, which may or may not have a connection with such a contravention."*³⁹
298. Master Builders agrees with the above observation and was pleased that the High Court outcome enables the previous 'common sense' position of the Full Bench to remain. The Courts decision to not hear the case meant the loophole remains closed and is a welcome outcome that will assist in improving safety on worksites and ensure that building unions, already renowned for unlawful

³⁷ (*Australian Building and Construction Commissioner v Powell [2017] FCAFC 89*)

³⁸ (*Director of the Fair Work Building Industry Inspectorate v Powell [2016] FCA 1287*)

³⁹ (*Australian Building and Construction Commissioner v Powell [2017] FCAFC 89*)

behaviour only following the law when it suits, play by the rules so that building sites can be just like every other workplace.

299. The ABCC subsequently issued the following E-Alert and media release:

HIGH COURT UPDATE: UNION OFFICIALS MUST HOLD A VALID FEDERAL RIGHT OF ENTRY PERMIT WHEN ENTERING UNDER STATE OR TERRITORY OHS LAWS

17 NOVEMBER 2017

The High Court today refused special leave to CFMEU official Michael Powell and the Victorian WorkCover Authority to appeal against a Full Federal Court ruling that officials of federally registered unions must hold valid right of entry permits under the Fair Work Act when entering sites under State or Territory OHS laws.

The Fair Work Act states (section 494): “An official of an organisation [i.e. a union official] must not exercise a State or Territory OHS right unless the official is a permit holder [under the Fair Work Act]”.

Today’s High Court ruling means that under Australian law, union officials are required to hold a valid federal right of entry permit even when invited onto site to assist a health and safety representative (HSR) under a State or Territory OHS law.

While the case before the High Court concerned an invitation under sections 58 and 70 of the Victorian Occupational Health and Safety Act 2004, the case has broader application to the equivalent provisions of the uniform Work Health and Safety laws (sections 68 and 70). The uniform laws apply in all other States and Territories (except Western Australia).

Mr Powell and the Victorian WorkCover Authority were ordered to pay the ABCC’s costs of defending the special leave applications.

Further information:

Building industry participants can view further information on the rights and responsibilities of [union officials exercising right of entry for OHS purposes](#) on the ABCC website.

The 2 June 2017 decision of the Full Court of the Federal Court can be accessed here: [ABCC v Powell \[2017\] FCAFC 89](#).

View the [ABCC E-Alert](#) released at the time of the Full Court’s decision.

300. Master Builders would seek the Review note the regulators view emphasised above regarding applicability of the decision across jurisdictions.

301. In light of the above, Master Builders believes that the functions and role of HSRs requires no alteration or change.

QUESTION 22:

HAVE YOU ANY COMMENTS ON THE EFFECTIVENESS OF THE ISSUE RESOLUTION PROCEDURES IN THE MODEL WHS LAWS?

302. Master Builders refers the Review to our comments earlier herein with respect to the culture and history of the BCI and its participants.

303. Master Builders contends that the WHS Issue Resolution procedures contained in the model WHS act and Regulations are sound but that they are not properly adhered to by WHS Regulators.

304. The provisions provide for the involvement of an inspector in instances where the procedure is being followed. BCI participants report that WHS Regulators frequently fail to attend workplaces to assist in the resolution of issues. Consequentially the provisions are not operating as intended.

QUESTION 23:

HAVE YOU ANY COMMENTS ON THE EFFECTIVENESS OF THE PROVISIONS RELATING TO DISCRIMINATORY, COERCIVE AND MISLEADING CONDUCT IN PROTECTING THOSE WORKERS WHO TAKE ON A REPRESENTATIVE ROLE UNDER THE MODEL WHS ACT, FOR EXAMPLE AS A HSR OR MEMBER OF A HSC, OR WHO RAISE WHS ISSUES IN THEIR WORKPLACE?

305. Master Builders refers the Review to our comments earlier herein with respect to the culture and history of the BCI and its participants, and specifically our comments in answer to question 21.
306. It is the case that for all of the situations involving abuse and misuse of relevant HSR provisions of which Master Builders is either aware to which our attention has been drawn, none have involved the issuance of a penalty or similar consequence for any employee, whether they be representative or otherwise.
307. In the overwhelming majority of cases dealing with circumstances involving a building union, there is usually no consequence, penalty or ramification for their involvement. Where there has been, it is usually in the form of penalty or fine for breach of the BCIP Act or FW Act. We are unaware where proceedings have been commenced for a breach of, or misrepresentations relevant to, a WHS law.
308. There are a number of related concerns that Master Builders would also note including:
309. Renewal/reaccreditation: Master Builders is concerned that little or no attention is given to WHS training entities who provide information that is misleading or incorrect with respect to the need for renewal or reaccreditation of particular training (for example, high risk work licenses). We are aware of many occasions where advertising by these entities infers or suggests that retraining is required in circumstances where it is not, or in circumstances not consistent with the regulations. This has the capacity to confuse BCI participants and does not improve safety outcomes.
310. Reports to regulators: Master Builders is aware of numerous occasions where regulators have been advised and provided evidence of unsafe conduct involving to employees or their representatives, and in which no action or steps were taken to act upon that information. In some cases, this involved deliberate and blatant misrepresentation of WHS duties and roles.

QUESTION 24:

HAVE YOU ANY COMMENTS ON THE EFFECTIVENESS OF THE PROVISIONS FOR WHS ENTRY BY WHS ENTRY PERMIT HOLDERS TO SUPPORT THE OBJECT OF THE MODEL WHS LAWS?

311. Master Builders refers the Review to our comments earlier herein with respect to the culture and history of the BCI and its participants.
312. The Cole Royal Commission into the building and construction industry was the first national review of conduct and practices in the building and construction industry in Australia.⁴⁰ The principal reasons given by the then Minister for Employment and Workplace Relations for commissioning the inquiry included high levels of complaint about freedom of association ('no ticket no start'), a strike rate that was five times the national average, massive variations in commercial construction costs from state to state as a result (sometimes as much as 25 per cent), and concerns about violence and intimidation on building sites,⁴¹ which is clearly an WHS issue.
313. The Cole Royal Commission reported that "*WHS is often misused by unions as an industrial tool. This trivialises safety, and deflects attention away from real problems. The scope for misuse of safety must be reduced and if possible eliminated.*"⁴²
314. The Royal Commission found that misuse of safety for industrial purposes compromises safety in important respects:

⁴⁰ *Final Report of the Royal Commission into the Building and Construction Industry, Summary of Findings and Recommendations, volume 1, February 2003, p 3.*

⁴¹ *Current Issues Brief no. 30 2002-03, Building Industry Royal Commission: Background, Findings and Recommendations, at <http://www.aph.gov.au/library/pubs/cib/2002-03/03cib30.htm>*

⁴² *Supra note 6, volume 6, p 108.*

- it trivialises safety, and deflects attention away from the real resolution of safety problems on sites;
 - the view that unions manipulate safety concerns inhibits the unions' capacity to effect constructive change;
 - the widespread anticipation that safety issues may be misused may distort the approach that is taken to safety; and
 - time taken by health and safety regulators to attend and deal with less important issues detracts from their capacity to deal with more substantial issues elsewhere.⁴³
315. One of the responses to the Cole Royal Commission was the passage of the BCIIIP Act. The 2005 version of this legislation is a predecessor to the current BCIIIP Act and is no longer in force. Section 36(1)(g) of that Act provided that employees and others are not taking building industrial action where:
- the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and
 - the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe for the employee to perform.
316. The provision proscribed the taking of industrial action on the basis of spurious WHS grounds.
317. Despite this provision, employers in the construction industry continued to report that abuse of WHS continues to be a problem that is confronted regularly and, on some sites, on a regular basis over protracted periods. The ABC Commissioner brought a number of cases of abuse of WHS for industrial purposes to the courts during that period.⁴⁴
318. The subsequent iterations of legislation leading up to the current BCIIIP Act did not contain equivalent provisions dealing with industrial action for questionable WHS purposes. The original Bill introduced to create the existing iteration of the BCIIIP Act did in fact initially contain an equivalent provision. However, amendments moved in the Senate during debate on the Bill saw an amendment moved successfully that stripped the Bill of the proposed provision.
319. As a result, BCI participants continue to suffer the consequences of those who abuse WHS and remain gravely concerned about the frequency with which this occurs.
320. In a contemporary example of such conduct⁴⁵, the Federal Court recently found that a CFMEU official blatantly misused safety as a means to gain entry to a construction site. Worse, once entry was gained, the official then deliberately and wilfully damaged property including handrails necessary to ensure workers were safe. During proceedings, the following evidence was taken under cross examination:
- "And what happened next? –From the bottom of where the pump had been set up, where the map on 501 shows, I noticed another – what appeared to me – another union official come up the back way and had some handrails that he was wobbling around and kicking and throwing and eventually dropped to the ground, and so there was more safety concerns then because the handrail was missing.*

⁴³ Cited in the Final Report of the Royal Commission into the Building and Construction Industry, Summary of Findings and Recommendations, volume 1, February 2003, p 102.

⁴⁴ See for example *Cruse v CFMEU and Stewart*; *Alfred v Wakelin, Abela, Batzloff, Jones, O'Connor, CFMEU, CFMEU QLD branch, FEDFA QLD, AWU and AWU (NSW)*; *Draffin v CFMEU, Allen, Benstead, Oliver and Walton Constructions and A & L Silvestri Pty Ltd & Hadgkiss v CFMEU, CFMEU (NSW), Primmer, Lane & Kelly*

⁴⁵ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] FCA 42 (7 February 2018)

So let me just try and break that up. You saw another union official come up through another path up to the concrete deck? –Yes.

And you saw him – I think you saw him shaking and, I think you said, kicking the handrails? –*Shaking and kicking, yes.*

Now, after the shaking and kicking, what did Mr Garvey do? –*I think he put the hand rails – just thrown onto the – where the concrete pour was to take place and he disappeared from there.*

All right. Did he say anything to the workers before he disappeared? –*Well, it's – it's unsafe. You can't be here.*

And that's what he said? –Yes."

321. The court also noted that:

- neither official had any genuinely held belief that there were any safety issues which warranted their entry upon Site, let alone an entry upon the Site immediately rather than a few hours later when they were offered to be taken on a safety walk by the company; and
- the concerns as to safety, whether justified or not, were but a convenient reason seized upon by those CFMEU persons in attendance as the means whereby they could tell the workers to get off the deck and to cease work.

322. In terms of evidentiary matters, the Court concluded (at paras 273 and 274):

"A number of facts when drawn together expose the campaign being pursued for what it was and expose the fact that any concern as to safety was not driving the conduct being engaged in by the CFMEU and its members. Pulling but some of these facts together, the campaign it is respectfully concluded was evidenced by:

- *the meeting on 5 June 2014 during which it has been found that Mr Taylor threatened to "smash" those who opposed the will of the CFMEU;*
- *the "[e]enie meenie miney mo!" text sent by Mr Kera later in the day;*
- *the fact that when Messrs Razaghi and Manna were invited to come back later on the morning of 11 March 2015, rather than being granted immediate access to the Rhodes Site, Mr Collier was called in;*
- *the conduct pursued by those CFMEU persons in attendance on 11 March 2015, including the parking of the cars in a manner to deliberately preclude concrete trucks gaining access to the Rhodes Site for the concrete pour, the directing of workers off the formwork and the deliberate conduct in kicking down the safety rail;*
- *the fact that the professed concerns as to safety voiced on 11 March 2015 were never followed up;*
- *the text sent on 16 March 2015 requesting "[f]urther support" at the Wollie Creek Site;*
- *the fact that so many CFMEU persons, and persons of seniority within the CFMEU, attended at the Rhodes Site and the Wollie Creek Site;*
- *the fact that there was no satisfactory explanation for why so many CFMEU persons attended at both the Rhodes Site and the Wollie Creek Sites, being geographical locations outside the normal geographical area of responsibility for many of the CFMEU persons who did attend; and*

- the fact that the industrial action ceased immediately once agreement was reached with Mr Parker on 17 March 2015 as to the payment of a site allowance."

323. Justice Flick even stated:

'...It is accepted that Mr Garvey deliberately kicked the handrail until it fell.... In respect to this expressed concern as to safety, it is concluded that there was no reasonable basis upon which any opinion could be formed that the handrail was unsafe. Any safety issue that did arise was caused by the conduct of Mr Garvey [the CFMEU Safety Inspector].'⁴⁶

324. In another case from December last year⁴⁷, proceedings were filed against the CFMEU and union officials for disrupting a concrete pour and flouting safety laws on the Regional Rail Link project in Footscray, Victoria. Justice Tracey found that the union delegates had acted improperly by failing to comply with WHS requirements in multiple ways, caused delays through disrupting workers, and hindered and obstructed the pouring of concrete from multiple trucks.

325. At paragraph 60 and 62, the Court observed:

[60]: Their contravening conduct on 27 February 2014 was arrogant and dismissive of warnings given to them that they were acting unlawfully. They abused their rights as permit holders and they impeded the concrete pouring which was planned for that afternoon. While espousing an interest in ensuring safety on the site, they deliberately placed themselves in dangerous positions in order to obstruct the movement of trucks carrying concrete to the site.

[62]: The CFMEU did not express any contrition for the offending conduct of its officials. Nor did it seek to assure the Court that it would put in place remedial measures to ensure that there would be no repetition of such misconduct.

326. The above examples are but a small selection of recent cases that are disappointingly common and representative of the way building unions use WHS. This ongoing abuse of WHS jeopardises the objective of achieving a significant and sustained reduction in building and construction workplace fatalities and injuries because it does nothing to foster the constructive approach required to achieve this outcome.

"Everyone knows safety is important, but it's hard when the CFMEU are involved. It's like they've only heard the first of the boy who cried wolf story. If we say no, they'll post something on facebook or blacklist us – we can't win and the law is on their side."

327. The practice of using WHS as a smokescreen for other issues denigrates its importance on building sites and shows gross disrespect to those who are genuinely seeking to improve WHS performance. Safety should not be relegated to a device to obtain workplace relations outcomes.

RECOMMENDATION:

Given the history and ongoing occurrence of abuse of right of entry for WHS purposes in the building and construction industry, any right of entry for union officials should be subject to their being accompanied by an authorised inspector from the relevant regulatory body.

Only union officials who are 'fit and proper persons' should be entitled to exercise the right of entry under a permit issued by an independent government authority or judicial officer.

⁴⁶ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] FCA 42 (7 February 2018)

⁴⁷ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Footscray Station Case)* [2017] FCA 1555 (21 December 2017)

328. The provisions of the FW Act provide a sound model as a guide as to who should be eligible to exercise the right of entry. The model WHS laws should specify that individuals with criminal records or a history of breaches of right of entry and related provisions under Commonwealth and State and Territory law should not be eligible to obtain a permit.

RECOMMENDATION:

The model WHS laws should specify that individuals with criminal records or a history of breaches of right of entry and related provisions under Commonwealth and State and Territory law should not be eligible to obtain a permit.

QUESTION 25:

HAVE YOU ANY COMMENTS ON THE EFFECTIVENESS, SUFFICIENCY AND APPROPRIATENESS OF THE FUNCTIONS AND POWERS OF THE REGULATOR (SS 152 AND 153) TO ENSURE COMPLIANCE WITH THE MODEL WHS LAWS?

329. The functions prescribed under the WHS Act provide an even balance of enforcement and education.
330. This said, the concerns held by Master Builders in terms of power and functions of regulators are as follows:
- Inconsistencies between jurisdictions with respect to how these roles are performed and the emphasis placed on each;
 - The interactions between certain regulators and third parties in particular jurisdictions; and
 - Confusion amongst BCI participants as to which regulator is responsible for enforcing compliance and with what.

Inconsistencies between jurisdictions

331. Master Builders regularly hears concerns via members and BCI participants about the willingness of regulators to assist in terms providing advice and assistance.
332. In some jurisdictions, BCI participants are uncertain as to their capacity to reach out to regulators to seek assistance or advice about particular situations. This uncertainty could arise for various reasons including concern as to whether a regulator presence is merely educative or investigative.
333. In other jurisdictions, it is not uncommon for BCI participants to have a regulator determine that a particular process or situation is unsafe, yet that regulator is unable to offer any advice or education as to what is necessary to address the concern they hold.
334. Master Builders accepts that it is the responsibility of each jurisdiction to determine the emphasis a regulator places on their education and enforcement roles. We contend that once determined, it is necessary for that regulator to make this clear to workplaces.

Regulators and third parties

335. One of the most common concerns relayed to Master Builders by members is the way in which regulators interact with third parties (e.g. parties that are not participants in a workplace or site.)
336. This concern involves what is perceived to be a disposition towards regulators adopting assertions or views that a particular situation or process is unsafe with little or no qualification of whether those views or assertions are correct, the motivation/qualifications of those making them, or consideration of views from those in control of a workplace.
337. An example of this concern relayed from a member is as follows:

Example:

An inspector issued an improvement notice regarding worksite access for a multi-storey commercial project. The building under construction had several levels and a temporary stairway was in use to enable workers access to and between various levels. During a visit to the site, a worker asserted that the use of one stairway was inadequate and that two stairways should be utilised. The basis for that view said to be that two stairways would enable the removal of a worker by stretcher in the event of a workplace injury, and that one stairway was not adequate for such purpose.

The site manager disagreed and presented the inspector with information with a contrary view. This included materials regarding obligations for safe site access, a list of additional hazards that would arise should a second stairway be erected (such as workers injuring themselves trying to remove a worker via stretcher) and how this would be inconsistent with broader obligations regarding the administration of first aid (for example, leave worker in-situ).

The inspector nonetheless stood by the improvement notice as issued.

338. The above example is of concern as:
- The notice issued obligated the site to adopt practices that would increase the likelihood of other safety hazards;
 - The site had discharged its WHS obligations and the installation of a second stairway was not reasonable or practicable in context;
 - Workers who were previously satisfied that the workplace was safe had this view undermined;
 - The workplace experienced significant cost to comply with a notice that was not necessary; and
 - The notice set an expectation amongst those on site that two stairways were now the required standard for such work.
339. A further concern is the relationship between regulators and third parties, particularly unions. Two examples of this concern relayed to Master Builders by the same member are:
- A regulator performed a site inspection. When completed, it was found that there were no problems or hazards identified, causing the inspector to leave the site. Later the same day a union official on-site alleged they had identified a safety concern involving an issue examined the same morning by the regulator. The union official left after being advised of the regulator inspection earlier in the day. Shortly thereafter, the inspector returned for the second time and subsequently issued an improvement notice for the same issue raised by the union official.
 - Inspectors threatening to charge site managers with hindering or obstructing union WHS right of entry without examining the relevant notices provided or seeking reasons from management as to why entry was refused.

Confusion about regulator role

340. One area about which Master Builders increasingly hears concerns involves confusion about the role of particular regulators. This arises as in some jurisdictions it is now the case that multiple regulators can hold WHS related powers and functions.
341. For example, in Queensland, regulators with WHS related duties include officers from:
- Workplace Health and Safety Queensland (WHSQ);
 - The Queensland Building and Construction Commission;
 - The Electrical Safety Office (ESO);
 - Labour Hire Licensing Compliance Unit;
 - Office of Industrial Relations, and

- Workers Compensation Regulator.
342. These regulators are in addition to others that also deal with matters relating to safety, such as the Environmental Protection Authority.
343. The difficulty such circumstances present to BCI participants are obvious. While not insurmountable, Master Builders is concerned that an increasingly wide and complicated regime of WHS related regulators has the potential to hinder the desire of a BCI participant to see improved industry safety outcomes.
344. We also note that although health and safety representatives have designated duties under the Act, those duties should be exercised strictly in accordance with the law and under no circumstances be a substitute for the work undertaken by the regulator.
345. Master Builders is becoming increasingly aware of circumstances where non-regulators appear to conduct themselves as regulators, or do not take steps to alleviate views or representations to that end. For example, it is not uncommon for media to report workplace accidents that feature terms such as “*CFMEU safety inspectors are on way to the incident*” or “*the site is shut down until the union gives the green light to recommence*” or similar terminology – creating an incorrect impression.
346. We are concerned that the apparent failure to clarify this type of information jeopardises the ability for the sector to improve safety outcomes by increasing confusion at the workplace level.

QUESTION 26:

HAVE YOU ANY COMMENTS ON THE EFFECTIVENESS, SUFFICIENCY AND APPROPRIATENESS OF THE FUNCTIONS AND POWERS PROVIDED TO INSPECTORS IN THE MODEL WHS ACT TO ENSURE COMPLIANCE WITH THE MODEL WHS LEGISLATION?

347. The existing powers and functions of inspectors are largely appropriate. We refer to our related comments elsewhere herein.

QUESTION 27:

HAVE YOU EXPERIENCE OF AN INTERNAL OR EXTERNAL REVIEW PROCESS UNDER THE MODEL WHS LAWS? DO YOU CONSIDER THAT THE PROVISIONS FOR REVIEW ARE APPROPRIATE AND WORKING EFFECTIVELY?

348. Master Builders makes no comment on this question.

QUESTION 28:

HAVE YOU EXPERIENCE OF AN EXEMPTION APPLICATION UNDER THE MODEL WHS REGULATIONS? DO YOU CONSIDER THAT THE PROVISIONS FOR EXEMPTIONS ARE APPROPRIATE AND WORKING EFFECTIVELY?

349. Master Builders makes no comment on this question.

QUESTION 29:

HAVE YOU ANY COMMENTS ON THE PROVISIONS THAT SUPPORT CO-OPERATION AND USE OF REGULATOR AND INSPECTOR POWERS AND FUNCTIONS ACROSS JURISDICTIONS AND THEIR EFFECTIVENESS IN ASSISTING WITH THE COMPLIANCE AND ENFORCEMENT OBJECTIVE OF THE MODEL WHS LEGISLATION?

350. WHS regulators, while administering what is considered to be a reasonably consistent legislative framework, take differing approaches in terms of the operation of the law and efforts to enforce compliance as noted elsewhere herein. It remains the case that a construction employer operating in several jurisdictions would experience quite different approaches to enforcement in each one.
351. An analysis of enforcement patterns shows that all jurisdictions place resources and enforcement activity into the construction industry that are disproportionately high in relation to its share of injury claims. If that effort was based on the higher risk profile of the industry the lack of consistency in regulation and enforcement becomes even more problematic for the industry.

352. Master Builders recognises that steps have been taken to achieve greater national consistency. However, while steps are being taken to close the legislative inconsistency gap, equal effort must go into achieving a national perspective on compliance and enforcement.
353. One area in which there needs to be a national perspective on compliance and enforcement is the application of WHS laws to owner builders. Master Builders' experience is that even where it is clear that owner builders are duty holders under State and Territory WHS legislation, regulators are reluctant to conduct compliance activities, regardless of the fact that there are significant numbers of owner builders around Australia.
354. Inconsistent compliance and enforcement activity in respect of owner builders is of concern as contractors may see operating in an owner/builder capacity as a mechanism to avoid WHS obligations or reduce WHS compliance costs. It also fails to encourage owner/builders to proactively address risks to the health and safety of workers.
355. Master Builders supports the consistent application of WHS duties to all BCI enterprises, including owner/builders and that the model WHS laws provide the opportunity for this consistency to be better realised.

QUESTION 30:

HAVE YOU ANY COMMENTS ON THE INCIDENT NOTIFICATION PROVISIONS?

356. Master Builders believes that the existing model WHS framework is appropriate, but that better education and awareness of incident notification obligations is required.
357. WHS Incident notification is not top of mind for employers in terms of 'things that they ought to know'. Duty holders in the BCI, including small business owners, have a strong appreciation for the importance of managing falls, plant and manual handling risks but they would do not have a parallel level of knowledge of incident notification.
358. Regulators must Act in a manner that is consistent with the compliance and enforcement policy to be constructive and educative.
359. Master Builders supports a much greater level of education and awareness around the provisions related to incident notification and scene preservation.

QUESTION 31:

HAVE YOU ANY COMMENTS ON THE EFFECTIVENESS OF THE NATIONAL COMPLIANCE AND ENFORCEMENT POLICY IN SUPPORTING THE OBJECT OF THE MODEL WHS ACT?

360. Master Builders supports the key principles outlined in SWA's *National Compliance and Enforcement Policy* ⁴⁸ which underpin all WHS regulatory compliance and enforcement activities as follows:

⁴⁸ <https://www.safeworkaustralia.gov.au/doc/national-compliance-and-enforcement-policy>

Consistency	Regulators endeavour to ensure that similar circumstances at workplaces lead to similar approaches being taken, providing greater protection and certainty in workplace and industry.
Constructiveness	Regulators provide support, advice and guidance to assist compliance with work health and safety laws and build capability.
Transparency	Regulators demonstrate impartiality, balance and integrity.
Accountability	Regulators are willing to explain their decisions and make available avenues of complaint or appeal.
Proportionality	Compliance and enforcement responses are proportionate to the seriousness of the conduct.
Responsiveness	Compliance and enforcement measures are responsive to the particular circumstances of the duty holder or workplace.
Targeted	Activities are focussed on the areas of assessed highest risk or the work health and safety regulators' strategic enforcement priorities.

361. It has been demonstrated, however, that regulatory regimes developed to foster partnerships with employers and workers alike, have the capacity to make significant headway in improving WHS culture and outcomes on building sites.

QUESTION 32:

HAVE YOU ANY COMMENTS IN RELATION TO YOUR EXPERIENCE OF THE EXERCISE OF INSPECTOR'S POWERS SINCE THE INTRODUCTION OF THE MODEL WHS LAWS WITHIN THE CONTEXT OF APPLYING THE GRADUATED COMPLIANCE AND ENFORCEMENT PRINCIPLE?

362. Master Builders makes no comment on this question.

QUESTION 33:

HAVE YOU ANY COMMENTS ON THE EFFECTIVENESS OF THE PENALTIES IN THE MODEL WHS ACT AS A DETERRENT TO POOR HEALTH AND SAFETY PRACTICES?

363. Master Builders believes in the principle that prevention before the event is more effective than penalty imposed ex-post facto.

364. This said, we accept that penalties do act in such a way as to hold significant deterrent value. To this end, we take the view that the existing penalty levels are appropriate to deter poor health and safety practices. There is no evidence of which we are aware that suggests the imposition of a penalty is not effective in ensuring circumstances that gave rise to it are not repeated.

365. As noted earlier herein, the BCI is overwhelmingly dominated by business entities that are defined as small businesses. In the majority of cases, these businesses are subcontractors and have the characteristics of what many would consider to be a 'mum and dad' family operation, employing few (if any) persons. As with such businesses in other industry sectors, the business is often financed by reference to personal assets (such as a family home) which creates the added pressure to ensure ongoing financial viability and stability.

366. In those circumstances, a penalty of \$3,000,000 for a body corporate, \$600,000 or 5 years imprisonment for an officer or PCBU, and \$300,000 for an individual worker or other person at the workplace would, in realistic terms, spell the end for most businesses and participants in the BCI. It follows that a loss of livelihood and/or a family home would, and does, represent a significant deterrent against poor health and safety practices in the BCI.

367. It should also be acknowledged by the Review that the existence of poor safety practices have consequences and penalty that do not simply involve financial penalty or potential imprisonment, but have the potential for equal significant effect.

368. For example, recent alterations to the *Queensland Building and Construction Commission Act 1991* have involved significant WHS related changes.

369. The additional obligations also place greater responsibility on all QBCC licensees to report unsafe situations on building sites. Licensees must notify the QBCC of a notifiable incident where the death

or serious injury or illness of a person occurs, or where an incident exposes a person to a risk of serious injury or illness.

370. In serious incidences where a licensee is convicted of a work health and safety offence the QBCC now has the power to suspend or cancel the licensee's QBCC licence. This has the practical effect of meaning that a tradesperson would be unable to lawfully continue their business or undertaking.
371. Similarly, the obligations in the *Labour Hire Licensing Act 2017 (Qld)* mean that if labour hire is used, that company must be licensed. The licensee must comply with extensive reporting requirements, including reporting on the arrangements between the licensee and workers, the locations and accommodation of workers, and any disciplinary action or enforcement action taken against the licensee by the regulatory body.
372. Inspectors have broad powers to enter a labour hire provider's workplace and will have a wide array of powers once at the premises, including searching the premises, taking equipment to the premises and removing things or documents from the premises. Reports are published online – and include details of any health and safety incidents workers are involved in, or applications for workers' compensation made by workers.
373. Again, if particular requirements are not met or breached, the labour hire company will lose its license, effectively removing the capacity to operate as an ongoing business concern.
374. In addition to comments elsewhere in this submission, Master Builders believes that the existing penalty regime, particularly when considered alongside potential ramifications from a non-monetary perspective (e.g. licence loss) is such that it does not warrant change.

QUESTION 34:

HAVE YOU ANY COMMENTS ON THE PROCESSES AND PROCEDURES RELATING TO LEGAL PROCEEDINGS FOR OFFENCES UNDER THE MODEL WHS LAWS?

375. Master Builders refers to related comments elsewhere herein and notes the courts' increasing propensity to test whether a PCBU has breached its duties under the Act with reference to obligations outlined in Model CoPs.
376. As noted elsewhere in this submission, if a determination is to be made as to whether or not a PCBU has breached its duty of care under the Act, with reference to those provisions outlined in the relevant CoP, it is crucial that those instruments clearly:
- Only provide guidance that mirrors obligations and duties are prescribed under the WHS Act and Regulations
 - Are drafted in plain English and are formatted in a way to clearly express a duty holders obligations
 - Are practical and only contain information that will assist users in executing their duties in a way that enhances safety outcomes.

QUESTION 35:

HAVE YOU ANY COMMENTS ON THE VALUE OF IMPLEMENTING SENTENCING GUIDELINES FOR WORK HEALTH AND SAFETY OFFENDERS?

377. Master Builders makes no comment on this question.

QUESTION 36:

HAVE YOU ANY COMMENTS ON THE EFFECTIVENESS OF THE PROVISIONS RELATING TO ENFORCEABLE UNDERTAKINGS IN SUPPORTING THE OBJECTIVES OF THE MODEL WHS LAWS?

378. Master Builders supports provisions regarding enforceable undertakings as an effective mechanism to support the objectives of the model WHS framework as prescribed in section 216 of the Act.

379. The concept of such an enforceable undertaking, if committed to by a defendant, is entered into in lieu of a prosecution proceeding and is an alternative to a defendant being convicted of an offence under the Act. Enforceable Undertakings are used sparingly as an alternative to a prosecution.
380. Such undertakings have been entered into by substantial corporations, with no earlier history of conviction for offences under workplace health and safety legislation. Undertakings are enforceable under the Act (section 219), where non-compliance attracts a penalty for breaching the undertaking, as well as then the penalties available for a successful prosecution for the original offence.
381. Indeed, the availability of a work health and safety undertaking is a sentencing alternative available to a court in lieu of recording a conviction. The imposition of such an undertaking by the court can be likened to an individual being placed on a bond to be of good behaviour.
382. One concern that Master Builders would ask the Review to note is the approach of regulators and courts to enforceable undertakings. There is a general view that the approach adopted appears to be inconsistent and greater uniformity would be preferable.

QUESTION 37:

HAVE YOU ANY COMMENTS ON THE AVAILABILITY OF INSURANCE PRODUCTS WHICH COVER THE COST OF WORK HEALTH AND SAFETY PENALTIES?

383. Master Builders makes no comment on this question.