

## Submission to Safe Work Australia

# Best Practice Review of the model Work Health and Safety laws

3 November 2025



## Contents

|                                                                |    |
|----------------------------------------------------------------|----|
| Introduction .....                                             | 3  |
| Key recommendations: .....                                     | 5  |
| General observations of the WHS Framework and the Review ..... | 6  |
| Scope of the Review .....                                      | 6  |
| Harmonisation must be maintained .....                         | 7  |
| The need for regulatory impact assessment .....                | 7  |
| Focus of the WHS Framework .....                               | 8  |
| WHS Framework must free from abuse or misuse .....             | 9  |
| Unique nature of the Building and Construction Industry .....  | 9  |
| The BCI workforce .....                                        | 10 |
| Regulatory arrangements .....                                  | 11 |
| The cultural of the BCI .....                                  | 15 |
| Consultation and an industry-based approach .....              | 22 |
| Specific Questions in the Discussion Paper .....               | 23 |
| Summary of relevant reviews .....                              | 23 |
| Question 1 .....                                               | 23 |
| Question 2 .....                                               | 23 |
| The harmonisation objective .....                              | 25 |
| Question 3 .....                                               | 26 |
| Question 4 .....                                               | 28 |
| Question 5 .....                                               | 28 |
| Variations to the model WHS Act .....                          | 29 |
| Question 6 .....                                               | 29 |
| Question 7 .....                                               | 29 |
| Question 8 .....                                               | 31 |
| Question 9 .....                                               | 32 |
| Question 10 .....                                              | 33 |
| Question 11 .....                                              | 33 |
| Question 12 .....                                              | 33 |
| Variations of the model WHS Regulations .....                  | 34 |
| Question 13 .....                                              | 34 |
| Broader consideration of the model WHS Regulations .....       | 34 |
| Question 14 .....                                              | 34 |
| Question 15 .....                                              | 34 |
| Question 16 .....                                              | 34 |
| Question 15 .....                                              | 34 |
| Question 16 .....                                              | 34 |
| Question 17 .....                                              | 35 |
| Question 18 .....                                              | 36 |
| Environmental scan .....                                       | 36 |
| Question 19 .....                                              | 36 |

## Introduction

In September Safe Work Australia (SWA) released a discussion paper to commence the Best Practice Review of the model Work, Health and Safety Laws (Discussion Paper).

Master Builders Australia (Master Builders) takes this opportunity to respond to the Discussion Paper. Master Builders acknowledges that the model Work, Health and Safety laws apply across all industries but advises that the views provided in this submission are specific to the building and construction industry (BCI).

It is also important to note that while the scope of the review is broadly focused on the Model WHS Act and Regulations, in practice considerations are much broader and go to the adoption (in various forms) of the model laws in each jurisdiction.

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 130 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.

The BCI is an extremely important part of, and contributor to, the Australian economy and community. It is the third largest industry in Australia, accounting for 11.7 per cent of gross domestic product, and around 9.3 per cent of the total work force in Australia. Over the next five years, we project that at least \$1.60 trillion worth of construction work needs to be delivered across Australia. This includes the creation of 1.2 million new homes required under the National Housing Accord.

The building and construction industry:

- ▶ Consists of over 460,000 business entities, of which approximately 98.6 percent are small businesses with fewer than 20 employees;
- ▶ Employs over 1.3 million people (around 1 in every 10 workers) representing the third largest employing industry behind retail and health services;
- ▶ Represents over 11.7 percent of GDP, the second largest sector within the economy;
- ▶ Trains almost half of the total number of trades-based apprentices every year; at the end of March 2025, over 115,000 construction apprentices were in training; and
- ▶ Performs building work each year to a value that exceeds \$320 billion.

Ensuring workplaces are safe and productive is the number one policy priority for Master Builders and our 32,000 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 and it is notable that safety outcomes in the BCI have consistently improved, with fatality and serious incident data trending downwards.

However, the recent revelations regarding conduct in the industry have brought the areas in need of improvement into sharp focus and the Blueprint for the future of the construction industry developed through the National Construction Industry Forum places emphasis on improving and enhancing safety outcomes.

Master Builders agrees there is more work to do; the BCI retains the definition of a 'priority industry' by SWA and most state and territory regulators.

To continue to address areas of underperformance WHS improvements should be secured through quality education and facilitating strong relationships between workers and employers coupled with 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.

Regulatory settings must 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.

## Key recommendations:

- ▶ **Harmonisation must be maintained**

Review the Intergovernmental Agreement for Occupational Health and Safety (IGA). Harmonisation must be maintained and supported. A recommitment from jurisdictions is strongly recommended.

- ▶ **Review Regulations and Codes of Practice**

Review the Regulations and Codes of Practice to ensure consistency across all regulatory tiers by determining a clear purpose for these regulatory arrangements. These documents are also the source of most of the operational issues experienced by Master Builders members.

- ▶ **Industry based approach is essential**

The work health and safety regulatory framework should be industry based. This means the regulatory framework is based on the work, health and safety obligations applicable to a particular industry.

- ▶ **Consultation is key**

Industry and small business consultation is critical.

Expanding the SWA Strategic Issues Group to include COSBOA and use industry specific subgroups more regularly to support an industry-based approach to regulation would enhance the regulatory framework.

- ▶ **Remove references to Australian Standards across the WHS regulatory framework**

Removing referencing to Australia Standards and where relevant extracting appropriate information into the one source document will support compliance and reduce red tape.

- ▶ **Regulatory impact assessment needed**

Regulatory impact assessments are critical to ensuring appropriate regulatory arrangements are in place.

- ▶ **Ensure WHS laws are focused solely on ensuring the health and safety of all**

Using safety as a trojan horse to pursue other industrial matters is at odds with the objects of the WHS laws and must be stamped out. WHS laws must not be exploited, abused or misused.

## General observations of the WHS Framework and the Review

In broad terms, Master Builders considers that the existing model WHS framework is sound and does not need significant or fundamental alteration.

Overall, the regulatory framework 'fits' together, however not every element operates hand in glove creating problems with implementation. This works against the delivery of better safety outcomes on construction sites.

To that end there are elements which Master Builders sees that are at odds with 'Best Practice' and the objectives of the Work, Health and Safety Act. In summary these include:

- ▶ The move away from a harmonised approach.
- ▶ The politicisation of WHS to the extent that policy decisions advance ideological positions and respond to specific issues and incidents rather than taking a wholistic approach to the work, health and safety regulatory environment.
- ▶ The expansion of work, health and safety duties to capture circumstances outside of 'work' that do not require a direct causal link to work. This expansion has also caused confusion about how requirements apply in industry specific settings.
- ▶ The expansion of the role of Health and Safety Representative's (HSRs).
- ▶ The proliferation of regulation including a vast array of issue-based Codes of Practice that relate to non-physical risks and hazards. The challenge is determining how these Codes apply to industry specific settings.
- ▶ In some instances, unhelpful model Codes of Practices that default to a 'one size fits all' approach rather than providing practical guidance, that creates problems for PCBUs.
- ▶ How the law is applied and enforced.
- ▶ The status/source of WHS obligations and duties.

### Scope of the Review

As outlined in the Terms of Reference to this Review and the Discussion Paper, SWA has been directed to carry out a 'Best Practice' review of the model WHS laws. To add further clarity to its directive, SWA have described the scope of this review as a thematic one that is to examine and make recommendation on whether the model WHS Act and WHS regulations incorporate a 'best practice' approach that achieves the object of the model WHS Act.

SWA also indicates it will consider the outcomes of other 'best practice' reviews.

While a review against the objects of the Model WHS Act is easy to understand and affords an appropriate scope, the adoption of the terms 'best practice' is unhelpful and vague, and its use is a cause of concern.

Firstly, the notion of 'best practice' implies something more than minimum compliance or the setting of a minimum standard. While ensuring all workplaces are safe and healthy the regulatory framework must set a bar that supports compliance by all, it is conceivable that imposing best practice may put compliance out of reach for some.

Secondly, reference to other WHS reviews provides little insight into the scope or meaning of 'best practice'.

The scope of the 2018 review of the Model Work, Health and Safety laws (Boland Review) was to examine and report on the content and operation of the model WHS laws. Of note, this review was to have regard to the objects of the model WHS Act. There was no mention of 'best practice'.

The independent review of the Queensland *Work Health and Safety Act 2011* (WHS Act) considered the overall effectiveness of the key components of the WHS Act in achieving its objectives. These objects mirror the objectives in the model WHS Act. Again, there was no mention of 'best practice'.

Finally, the [2022 Independent Review of SafeWork SA](#) made no mention of 'best practice' instead its Terms of Reference set out four matters for consideration.

All in all, it is inaccurate to describe these (and other) reviews as best practice – to do so implies each has set a 'bar' for best practice or characterises 'best practice'.

Further context as to the scope of the review may be provided from the meeting of the WHS Ministers on 18 September and the following paragraphs from the meetings [communiqué](#):

*"There are still too many deaths, injuries and illnesses arising from work. Ministers reflected on WHS statistics published by Safe Work Australia today which show in 2023, 200 workers died from a workplace injury, and in 2022-23, 139,000 workers made a workers' compensation claim for a serious injury.*

*Ministers discussed the importance of ensuring the model WHS laws provide the highest level of protection for workers. Ministers asked Safe Work Australia to prepare a proposal on how it would undertake a best practice review of the model WHS laws in the context of seeking to maintain a harmonised approach. This would involve examining alternative approaches used across jurisdictions that could be considered for adoption nationally."*

The Ministers make no mention of the objects of the WHS Act, highlighting, the need for WHS laws to provide the 'highest protection for workers', and the maintenance of a harmonised approach. While Master Builders agrees that the latter should be a focus of the review, the former must be constrained by the usual 'reasonably practicable' qualifier, to do otherwise would put employers, business and industry in an unenviable position of attempting to comply with an impractical regulatory framework.

Master Builders submission proceeds on the basis that the scope for this Review is to ensure the Model WHS laws continue to meet the Acts objectives, Master Builders strongly encourages SWA to move away from attempting to determine or recommend 'best practice'.

### **Harmonisation must be maintained**

Nationally consistent WHS laws should continue to be pursued to reduce complexity, red tape and assist businesses operating across all jurisdictions.

Jurisdictions should be encouraged to continue the process of harmonisation to ensure a nationally consistent set of laws that encourages trade across borders and increases levels of understanding and compliance. Inconsistencies in WHS laws cause additional red tape and costs to business which have the effect of higher construction costs to the consumer.

The extent to which jurisdictions are diverging from the model WHS laws should be resisted. The Commonwealth Government should investigate strategies in arresting such divergence, such as reviewing and recommitting to the IGA for Regulatory and Operational Reform in Occupational Health and Safety, imposing a process for review of any proposal for state or territory variation including a rigorous process through SWA to ensure national scrutiny over jurisdictional changes.

### **The need for regulatory impact assessment**

For completeness, Master Builders highlights the need for appropriate regulatory impact assessments of any changes to the model WHS laws. Of note, a number of jurisdictional variations have not been fully scrutinised in this manner, and should any moves be made for adoption more broadly these must be fully assessed. All decisions that give rise to a significant regulatory change, including to the law, regulations and Codes of Practice must be subject to a regulatory impact statement process.

Regulatory review should take into account the impact of regulation on organisations that operate across adjacent jurisdictions and there should be a cross border “no disadvantage test” that the initiating jurisdiction should satisfy.

Such a process should also consider:

- ▶ costs and benefits;
- ▶ evidence about the impact of the proposed regulation in achieving reductions in risk (whether new or being remade); and
- ▶ evidence about how the most effective outcomes can be achieved.

### **Focus of the WHS Framework**

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 pursue and 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.

What will be demonstrated throughout this submission is the misuse and abuse of WHS rights and obligations to further other, industrial interests, these pursuits are not about improving safety onsite, they are about pursuing an industrial agenda.

A fundamental consideration when carrying out this Review should be that safety laws 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.

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.

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 somewhat similar with the multitude of obligations on similar themes causing complexity and confusion.

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.

More frequently, obligations in one law are repeated or re-stated in another. BCI participants experience frustration in determining the source of a particular WHS obligation and the duplication of these throughout various laws exacerbates this frustration.

There is also a very high risk that the problems 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.

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.

A further obvious issue is the existence of provisions within the *Fair Work Act 2009* (Cth) (FW Act) that deal with bullying, sexual harassment 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?

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.

Master Builders strongly encourages SWA to focus on matters that are ostensibly WHS and these are outlined within the WHS framework. Further, it should be made clear that this is the primary and overriding source of obligation wherever a conflict arises.

### **WHS Framework must free from abuse or misuse**

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.

Master Builders cannot overstate the importance of this requirement when considering what 'best practice' may be. As noted elsewhere, the extent to which WHS is abused, exploited or misused for purposes that are unrelated to safety is significant and a common (yet entirely unfortunate) feature of the BCI.

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.

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 who assume employee representatives always hold genuine motivations. This is not always the case.

Master Builders urges that, so far as possible, avenues for exploitation of the WHS framework are closed and any consideration of State/Territory-based variations do not create further avenues for such conduct.

## **Unique nature of the Building and Construction Industry**

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 these include:

- ▶ The unique composition of the **workforce** which spans employment, independent contracting and small business leads to unique and complex safety challenges, often making the practical implementation of work, health and safety laws challenging.
- ▶ The **complex regulatory environment** the most difficult of which is the overlap between WHS and industrial relations laws.

- Significant **cultural challenges** that act as a barrier to the adoption of genuine work, health and safety improvements.

In practice, the implications of these arrangements is that there is a need for a formal structure to collect industry-based feedback.

These matters are elaborated on below.

## The BCI workforce

The BCI is the third largest industry and currently employs 1,323,382 people, making up 9.1 percent of the total workforce.

Employment in this sector increased by 2.1 percent on the employment figures from 12 months earlier. There are various occupations captured in these figures which include labourers, skilled trades, professionals and apprentices, which are likely to be engaged on a full-time, part-time or casual basis, depending on the role to be undertaken. The industry is however made up of independent contractors and predominantly small businesses.

While the industry is activity seeing more active female participation, the BCI remains a male-dominated industry.

Labour shortages persist especially when it comes to skilled construction trades workers – a problem that the industry has faced for a number of years. This is of particular concern because 16.9 percent of construction workers are aged 55 or older. As a result of the unique nature of the industry, there will continue to be a decline in the number of workers, particularly skilled trades, as these older workers retire, but because there are also difficulties with attracting and retaining new entrants to industry, for a variety of reasons.

Further, the BCI has had to adapt to providing a safe working environment for all industry participants despite being a high-risk industry.

These risks are not contingent to one particular engagement type and the rates of incidents, accidents and fatalities depends on a number of factors including but not limited to age, experience and qualification. There is a distinct link, however, to the vulnerability of certain demographics within the industry – such as older workers (above 45 years old) and younger workers (under 25 years) due to age-related physical decline and recovery times, through to lack of experience and/or safety awareness in their respective parts. To date, the data relating to injuries and fatalities has body stressing, slips trips and falls, and being hit by a moving object as the top three causes for fatalities and claims for the period FY2008-09 to FY2023-24.

Supply chains in the BCI are longer, and often more complex, than many other industries. The heavy reliance on the use of independent contractors, many of which are small businesses, in conjunction with the inordinate number of participants involved in a construction project makes WHS compliance extremely challenging.

Specifically, the concurrent and overlapping duties on a construction site is a constant source of frustration for the industry. While guidance has been development and education efforts focused on implementing practical ways to comply with these obligations, challenges remain. For example, when incidents are investigated and prosecutions brought, notwithstanding the application of WHS duties throughout the contractual chain the head contractor will often bear the brunt of any compliance and enforcement activity. While this may be appropriate in some cases, in others, this approach ignores the obligations under the legislative framework.

Master Builders strongly urges that SWA consider the complex and layered nature of the employment and contracting arrangements that are unique to the BCI as a part of this review process.

This is why Master Builders has called out the need for a PCBU's primary duty of care to be limited by the extent that the person is in actual control of a certain activity such that the subsequent liability is apportioned based on the level of control.

These unique workforce characteristics warrant the need for the BCI to be considered separately and require that any 'blanket reforms' do not impose any unintended consequences for industry.

Master Builders maintains its position that the WHS law should always aim to improve safety outcomes while balancing the need to limit administrative and costs burdens upon business.

Any policy and regulatory setting must be balanced, sensible and practical but consistent with a view to reduce complexity, red tape and to apply consistently, where possible, across all jurisdictions.

## Regulatory arrangements

Alongside the relevant WHS regulatory obligations there are others with unique obligations that apply to the BCI.

Broadly speaking, this includes the Australian Government Work Health and Safety Accreditation Scheme (the Scheme), compliance with which is a precondition for undertaking building work that is funded directly or indirectly by the Commonwealth.

The Office of the Federal Safety Commissioner (OFSC) is part of the Department of Employment and Workplace Relations. 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.

It is relevant to observe that the OFSC auditing criteria often imposes requirements that are over and above the WHS requirements and in some instances do not directly relate to work, health and safety requirements and do not have a clear benefit to positive measurable safety outcomes. For example, OFSC Auditors requesting third party independent assessment of verification of competencies.

There are also a number of WHS regulations that have specific application to the BCI in addition to the general obligations provided under the model WHS Act and 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.

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 *Work Health and Safety Regulation 2011* (ACT)).

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*

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

- ▶ FW Act; and
- ▶ *Fair Work Regulations 2009* (Cth) (collectively 'the Fair Work laws').

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

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.

For example, the most commonly applied Modern Award in the BCI is the *Building and Construction Industry (On-Site) Award 2020* (On-Site Award). The On-Site Award contains more than 150 clauses that are relevant to, or affect, WHS obligations including climactic conditions, hazardous work types and the provision of PPE.

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, consultation requirements, PPE, inclement weather, hot work, etc.

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, irrespective of whether or not they have standing otherwise. The appendix attached to one such Enterprise Agreement promoted by building unions 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
- ▶ AS1873.1 - 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

The conclusion to be drawn from the above overview of the 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.

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.

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.

## The cultural of the BCI

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.

When considering the objects of the model WHS Act and variations made by jurisdictions to WHS laws it is important to acknowledge and understand the background and circumstances of the BCI and its culture.

There are a large number of sources that describe the conduct and history of registered employee organisations in, and the culture of, the BCI.

Most recently of course is the 60 Minutes Building Bad expose and the domino effect these reports have had most notable of which was the appointment of an administrator to take control of the Construction division of the CFMEU in August 2024.

In response, Master Builders produced the [Breaking Building Bad](#) document which outlines a range of measures targeted at removing the behaviours widely reported over the last 2 years.

Measures outlined in that document go to the heart of the cultural issues in the industry, key recommendations include:

- ▶ making it an offence for officials or delegates to exploit or abuse workplace safety rights for non-safety purposes;
- ▶ repealing and replace right of entry provisions in the Work Health and Safety Act 2011 and the equivalent provisions of the equivalent State Acts with new provisions which provide that prior written notice of entry is to be provided except where the permit holder has a reasonable concern that
  - ▷ (a) there has been or is contravention of the Act and
  - ▷ (b) that contravention gives rise to a 'serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard';
- ▶ making it clear that the burden of proving that a permit holder has a suspicion that is reasonable for the purposes of s 117(2) or a concern that is reasonable for the purposes of s 119A lies with the person asserting that fact;
- ▶ requiring that permit holders exercising rights under safety laws must leave a site within a reasonable time if requested to do so by a SafeWork inspector who is on the site;
- ▶ requiring that right of entry to worksites on safety grounds can only be exercised by persons holding a valid ROE permit; and
- ▶ ensuring persons seeking entry on safety grounds are also subject to a 'three strikes' rule.

Since 2024, Master Builders has been working with the Administrator and the National Construction Industry Forum to look for ways to rid the industry of these systemic and long-term cultural issues.

The industry was not, however, surprised by these revelations. Multiple inquiries and reviews have highlighted these illegal and unsavoury behaviour over many decades.

One of the most recent was the Final Report of the Heydon Royal Commission<sup>1</sup> 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.

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."*<sup>2</sup>

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."*<sup>3</sup>

---

<sup>1</sup> Royal Commission into Trade Union Governance and Corruption Final Report, December 2015,

<sup>2</sup> Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8, para 1

<sup>3</sup> Ibid at para 2

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."*<sup>4</sup>

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 Report<sup>5</sup> 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."*

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"*<sup>6</sup>

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."*<sup>7</sup>

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.

With respect to the CFMEU, the Heydon Royal Commission found that it is home to *"longstanding malignancy or disease"*<sup>8</sup> within the CFMEU and that lawlessness within the union was commonplace, with over 100 adverse court finding against the union since 2000.

Similarly, the Cole Royal Commission found<sup>9</sup>:

*"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;*

---

<sup>4</sup> Ibid at para 3

<sup>5</sup> Royal Commission into Trade Union Governance and Corruption, Interim Report (2014), Vol 2, ch 8.1, p 1008.

<sup>6</sup> Heydon Report, Chapter 5, page 396

<sup>7</sup> Ibid.

<sup>8</sup> Heydon Royal Commission, Volume 5, p401

<sup>9</sup> Final Report of the Royal Commission into the Building and Construction Industry, Vol 1 – Summary – p 5-6

- 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;*
- 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."*

As has more recently been widely reported, union misconduct has remained common place in the BCI. Unfortunately, despite the work of the Administration, bad actors continue to be able to operate in the industry. It is clear more needs to be done with the Administration only the first step in a series of reforms needed to redress the systemic illegal and behavioural issues in the industry.

Over many years, feedback from members has 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.

In 2024, documents filed by the Fair Work Commission in Federal Court proceedings seeking to put the CFMEU into administration claimed the CFMEU has breached workplace law 2,600 times in more than 20 years, accumulating \$24 million in fines. The Fair Work Commission said the union had "ceased to function effectively" as it looked to secure the appointment of administrators.<sup>10</sup>

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 Commission<sup>11</sup> examined this issue in detail and found the following types of conduct to be frequent and common:

<sup>10</sup> 7 August 2024 Report by ABC -CFMEU broke the law 2,600 times, Fair Work claims in court documents <https://www.abc.net.au/news/2024-08-07/cfmeu-broke-law-fair-work-commission-claims/104196488> accessed 24/10/25

<sup>11</sup> Final Report of the Royal Commission into the Building and Construction Industry, Vol 1 – Summary – p 5-6

- ▶ 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.

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 evidence<sup>12</sup>:

*"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 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."*

The Commission then summarised<sup>13</sup> 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.*

<sup>12</sup> Ibid – Vol 6 – p.102

<sup>13</sup> Ibid p103

*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:*

*'...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.'*

More recent cases continue to echo these experiences.

In 2024, the Federal Court fined the CFMEU the near maximum penalty of \$60,000 for breaking right of entry laws after finding that its organiser Dean Rielly acted in "open defiance" of safety requirements at Queensland's biggest infrastructure project, the Cross River Rail<sup>14</sup>.

The conduct occurred in July 2021 at a worksite in Brisbane that was part of the Queensland Cross River Rail project.

The conduct involved Mr Rielly failing to comply with occupational health and safety requirements and acting in an improper manner, when he:

- ▶ failed to sign the visitor register and to complete a visitor induction;
- ▶ entered areas of the worksite to which access was restricted and refused to leave when requested to do so; and
- ▶ failed to read and obey all safety signs at the worksite.

Justices John Halley, Scott Goodman and Shaun McElwaine found that:

*"Objectively, Mr Rielly's behaviour leads us to conclude that he did not consider that he was bound to comply with those requirements for undisclosed reasons at best or, at worst, was fully cognisant of the requirement to comply and chose to ignore them in an act of open defiance."*

The Justices found that there was a need to impose penalties to deter the CFMEU, Mr Rielly and others from similar contraventions in future.

*"For permit holders generally, it is obvious that an appropriate pecuniary penalty must be imposed to deter others from engaging in conduct in defiance of reasonable Occupational Health & Safety requirements that apply to worksites," the Justices said.*

In a 2023 matter the Federal Court also ruled against the CFMEU and two of its officials, finding that they organised employees to take industrial action on a building site and coerced the principal contractor not to allocate particular duties or responsibilities to one of their employees.<sup>15</sup>

During July and August 2020, a number of subcontractor employees ceased working on the project. The first stoppages on 21 and 22 July were linked to concerns about the operation of a fire hydrant, and

---

<sup>14</sup> [Construction, Forestry and Maritime Employees Union v Fair Work Ombudsman \(Cross River Rail Appeal\) \(No 2\) \[2024\] FCAFC 55](#)

<sup>15</sup> [Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union \(No 2\) \[2023\] FCA 1302 \(fedcourt.gov.au\)](#)

the subsequent stoppages commencing on 27 July for seven days were linked to concerns the project manager 'PM', might bully or intimidate workers.

The initial stoppage arose after claims the available fire equipment was insufficient to deal with any fire on-site. In evidence before Justice Darryl Rangiah, various reasons were suggested as to why there were concerns with the fire hydrant, including access being blocked, low water pressure, and the absence of hose reels.

Nevertheless, it was accepted that Mr Mattas, as site delegate, and the Health and Safety Representatives (HSRs) directed the workers to cease work. Several of the subcontractors had EBAs with identical clauses that allow HSRs to direct that employees cease work without consultation in some circumstances where there was an immediate threat to the health and safety of workers, with similar provisions contained within s85 of the Queensland Work, Health and Safety Act (WHSQ Act).

They also informed Broad Construction over the ensuing days that PM was a bully and needed to be removed from the site as he posed a 'psycho-social hazard' to the workers, the majority of whom refused to work on days he attended the site.

Justice Rangiah determined that there was a low probability of a fire occurring, that restrictions on access did not make the situation any worse, and therefore concluded that exposure to the hazard did not create a 'serious risk' to workers' health or safety.

He also determined that while PM's conduct was "*aggressive, abusive and intimidating*", he did not believe that it posed a 'serious risk' of injury to the psychological health of the employees on-site, particularly as the bullying behaviour was very substantially directed towards the HSRs and not the employees themselves.

With regard to Mr Mattas, Justice Rangiah determined that he was not validly appointed to represent a number of the contractors and, therefore, was not qualified to issue directions to cease work pursuant to s 85(1) of the WHSQ Act.

In determining the employees engaged in 'industrial action', Judge Rangiah noted that the supposed risks to health did not meet the EBA requirements of being 'immediate', nor was there sufficient consultation, as required, with relevant employers before directions to cease work were given.

Finally, Master Builders must highlight the findings of the Watson report *Violence in the Queensland CFMEU* which detailed allegations of disturbing and violent incidents including towards women and children, Watson reporting that:

*"There is a plain and consistent theme running through the operations of the CFMEU in Queensland – that theme is the CFMEU's utter contempt for the law, its disregard for laws and rules, its refusal to be bound by ordinary norms of behaviour, and its attempt to take advantage of its acting outside the law"*

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.

However, the experience of the BCI is, and has been for almost six continuous decades, one that is not reflective of the otherwise ordinary conduct of such organisations and their officials in other sectors and industries.

Such experience has been recorded in four separate Royal Commissions, dozens of reviews, inquiries and reports, hundreds of court judgments and decisions and drawn significant government and media attention over the last 12 months.

## Consultation and an industry-based approach

Master Builders sees that taking an industry-based approach to the WHS regulatory framework is the most appropriate and the most meaningful way to improve safety outcomes on site. This would also cement genuine consultation and consideration of industry-based issues and concerns, which must be a priority for SWA. While this engagement has improved, more can be done to facilitate this.

Consultation on the regulations with respect to Respirable Crystalline Silica (RCS) is an example of an issue where industry-based consultation could have added value.

While we acknowledge that this did occur in the lead up to the making of the regulation, issues with implementation remain yet SWA has not engaged directly with industry on this.

Specifically, and for example, there is a lot of consternation around determining whether a process is a high-risk silica process (triggering additional WHS obligations) and how to measure the workplace exposure to RCS for that purpose. There are a variety of 'tools' available directed at responding to this challenge and a co-ordinated industry-based approach would seem appropriate, yet Master Builders is unaware of such moves. This is a very live issue with the real prospect of a halving of the WEL for RCS likely.

An equally challenging but related issue is how small business are to implement complex safety rules and requirements. Along with an industry-based approach to consultation and regulations, small business should be given a voice at the table, perhaps through the inclusion of COSBOA as a SWA member.

## Specific Questions in the Discussion Paper

### Summary of relevant reviews

#### Question 1

**Do you have any comments on the review or inquiry recommendations outlined in this chapter, or other reviews or inquiries that may be relevant to the model WHS laws?**

#### Question 2

**Are there any recommendations from these reviews or inquiries that you believe should or should not be adopted in the model WHS laws? Please explain why.?**

Master Builders acknowledges the plethora of reviews and inquiries carried out across the country since the 2018 Review of the model Work Health and Safety laws (2018 Review).

#### 2018 Review

There are 4 key recommendations outstanding from the 2018 Review that Master Builders sees value in progressing. These include:

- ▶ Recommendation 1: Review the model WHS Regulations and model Codes against agreed criteria on the purpose and content of the second and third tiers of the model WHS laws as they relate to the seven Australian Strategy priority industries, noting Construction remains a priority industry.
- ▶ Recommendation 21: Review the National Compliance and Enforcement Policy (NCEP) to include supporting decision-making frameworks relevant to the key functions and powers of the regulator to promote a nationally consistent approach to compliance and enforcement.
- ▶ Recommendation 25: SWA to work with relevant experts to develop sentencing guidelines to achieve the policy intention of Recommendation 68 of the 2008 National Review. As part of this process, any unintended consequences due to the interaction of local jurisdictional criminal procedure and sentencing legislation should also be considered.
- ▶ Recommendation 31a: Review the references to Australian Standards in the model WHS laws with a view to their removal and replacement with the relevant obligations prescribed within the model WHS Regulations.

These recommendations touch on a number of areas of concerns and are elaborated on throughout this submission.

#### Seyfarth Shaw Review

A 2018 review of Work, Health and Safety in the BCI was carried out by Seyfarth Shaw Australia (Seyfarth Shaw Review). The goal of the review was to:

- ▶ Test whether aspects of the WHS regulatory framework itself are acting as a barrier to building industry participants managing the risks associated with the top three mechanisms of injury in the BCI.
- ▶ Seek to understand if the significant amount of information (including in Codes of Practice and guidance materials) available to duty holders assists them to eliminate or minimise these risks to health and safety.

While it was understood that the observations from the Seyfarth Shaw Review were to inform the 2018 Review many observations made remain live issues, for example, assessing the representation of SME's in the work related traumatic injury fatalities database, further the concerns with the operation of Part 3.1 of the WHS Regulations as well as specific regulations containing risk controls remain difficult to understand in respect of the duty to eliminate or minimise the risk of falling objects and the risk of falls.

Master Builders recommends the consideration of the Seyfarth Shaw Review to SWA.

### **State/territory inquiries and reviews**

In respect of the various jurisdictional reviews, a very high-level assessment indicates that their recommendations and observations focus on:

- ▶ The role and powers of HSRs and requirements regarding consultation,
- ▶ The effectiveness of the relevant safety agencies, and
- ▶ Compliance and enforcement including the role and performance of inspectors.

Each of these subject areas has been highly politicised and often used as a tool to respond to a specific work, health and safety incident, for example Queensland made amendments to their work, health and safety laws in early 2024. In Master Builders view these amendments:

- ▶ Allowed the CFMEU to use safety as an industrial weapon by amongst other things, expanding the right of entry.
- ▶ Did not add to positive safety outcomes.
- ▶ Added more red tape for construction site staff and business owners to comply with.
- ▶ Moved Queensland's Work Health and Safety laws further away from national consistency with the FW Act and national model Work Health and Safety laws.

In November 2024 after a change in Government the Queensland WHS legislation was further amended to:

- ▶ Remove an automatic right of entry for permit holders except for immediate or imminent risks to the health and safety of a worker. WHS entry permit holders must now give notice of the proposed entry and suspected contravention during usual working hours at that workplace at least 24 hours, but not more than 14 days, before the entry. This advance notice requirement had been removed by the former Queensland Government.
- ▶ Require Health and Safety Representatives (HSRs) to issue 'cease work' notices directly to workers, and not to a Person Conducting a Business or Undertaking (PCBU). The previous government amended the cease work notice power enabling health and safety representatives (HSRs) to issue written cease work notices to persons conducting a business or undertaking (PCBUs) (rather than workers) directing them to direct workers to cease work.
- ▶ Repeal recent changes which would have permitted HSRs and WHS entry permit holders to take photos, videos, measurements and conduct tests at the workplace when undertaking their roles.

While Master Builders supported the latest changes, there are clearly ideological motivators behind the changes in legislation in March 2024. Therefore, we are of the view that all the changes relating to HSRs should be reverted to the model laws.

On that basis, Master Builders would recommend taking a cautious approach to any recommendation from a state/territory work, health and safety inquiry. The same can be said for reviews that have led to the implementation of reforms that diverge from the model laws.

### **Reviews in relation to digital technologies**

One of the key outcomes of the Economic Reform Roundtable (Roundtables) held in August this year was for the Minister for Industry and Innovation and Minister for Science Tim Ayres to accelerate his work on a broader National AI Capability Plan.

The Roundtable discussions also considered the regulations of AI and considered whether one AI Act or using existing regulation was appropriate. At that time the Treasurer committed to doing a gap analysis to see whether existing legislative framework are appropriate, or whether it requires one overarching bill.

Regulation of AI was a major dividing line between employers and unions heading into the Roundtable, with the ACTU calling for the government to force employers to consult with staff before introducing AI tools to the workplace.

The Minister followed this announcement with a speech at the National Tech Summit which elaborated on this commitment.

Most recently the Productivity Commission released their interim response to Pillar 3: Harnessing data and digital technology as part of their five pillars of productivity inquiry making three key draft recommendations:

- ▶ A gap analyses of current rules need to be expanded and completed.
- ▶ AI specific regulation should be a last resort.
- ▶ Pause steps to implement mandatory guardrails for high risk AI.

Master Builders would echo these recommendations and strongly encourage SWA to await the broader work being undertaken by Government in response to AI prior to progressing the consideration of any response solely from a work, health and safety perspective.

### The harmonisation objective

Master Builders agrees that *“ongoing harmonisation is essential to achieving the object of nationally consistent, fair and effective WHS regulatory Framework”*<sup>16</sup>

It remains problematic that Victoria has yet to fully embrace harmonisation and it is clear that the objective of harmonisation has been significantly diluted, for example:

- ▶ Many jurisdictional variations exist in relation to consultation, representation and participation provisions, including differing union right of entry regimes between each jurisdiction.
- ▶ Queensland, South Australia, Western Australia and New South Wales have distinct dispute resolution processes and rights to refer different types of matters to tribunals for resolution.
- ▶ Many jurisdictional differences exist between the structure and powers of regulators, including independent regulators and prosecutors in some jurisdictions.
- ▶ Legal proceedings are approached differently, including differing limitation periods, an intent to enable unions to initiate prosecutions in New South Wales<sup>17</sup> and differing rights for individuals to request prosecutions if they are not brought.<sup>18</sup>
- ▶ Infringement notice schemes are applied differently between each jurisdiction, with the model laws not having been included in Western Australia, ACT, Queensland and the Northern Territory.
- ▶ Significant jurisdictional differences exist in the applicable penalties for offences generally, with only the Commonwealth and ACT having adopted the latest updated model laws.
- ▶ Material variations in industrial manslaughter offences exist between jurisdictions, including in relation to the elements of the offence, the duty holders covered and the maximum penalties that apply.
- ▶ Western Australia having a different regime for high-risk work licences, and variations in the regulation of psychosocial risk.
- ▶ Many jurisdictional differences exist for construction work and high-risk construction work, including South Australia regulating falls over 3 metres rather than 2 metres, as in other jurisdictions, differences in the value of construction projects regulated under the regimes, and variation between requirements and licensing for demolition work.
- ▶ Codes of practice vary significantly between the jurisdictions as does the legal status of Codes of Practice.

---

<sup>16</sup> Discussion Paper pg. 19

<sup>17</sup> *Industrial Relations and Other Legislation Amendment (Workplace Protections) Act 2025* (NSW).

<sup>18</sup> As recommended in the amendments to the model WHS Act made in 2022.

### Question 3

#### **Do you have any comments on compliance and enforcement provisions under the model WHS Act, including variations made by the jurisdictions?**

Master Builders agreed that how WHS laws are administered and enforced is an essential part of maintaining a harmonised approach.

In principle, Master Builders cannot see why compliance and enforcement provisions should vary across the country. The legislative arrangements with respect to penalties and offences should be harmonised as a priority. This would include, for example the offence of industrial manslaughter, which, as has been highlighted, is different in every single jurisdiction.

Penalty amounts and should also be consistent – there would appear to be no real reason for differences on this issue.

Further what has become evident is that even if the legislative arrangements are similar, how they are enforced differs leading to different outcomes in respect of the same legislative provision, however, we accept that in practice this is a complex issue and various factors need to be weighed when considering a compliance and enforcement approach, for example:

- ▶ The size of a jurisdiction.
- ▶ WHS inspector training and expertise.
- ▶ Resourcing of the WHS regulator, including the number of inspectors.
- ▶ Local priorities.
- ▶ Local precedent in respect of penalty and sentencing decisions.

Inconsistencies in implementation cause additional red tape and costs to business which have the effect of higher construction costs to the consumer. This lack of clarity also adversely impacts a business desire to 'do the right thing' which is the predominate objective of most in the industry.

As a start, Master Builders recommends, that a compliance and enforcement approach, implemented by local WHS regulators:

- ▶ Ensures that workplaces are safe.
- ▶ Looks for ways to improve safety outcomes.
- ▶ Upholds the law, including that where necessary, take unbiased action recognising that all participants have a responsibility to maintain safe workplaces.
- ▶ Be bi-partisan, act faithfully, responsibly and reasonably in accordance with the authority provided to them by law.
- ▶ Where relevant generate materials and research that is practical, relevant and useful to industry participants.
- ▶ Implement strategic plans to ensure transparency and accountability with respect to their work and role.
- ▶ Develop common strategies for dealing with construction risks, including consistent enforcement protocols.
- ▶ Cooperate and collaborate across State/Territory Regulators. To that end, all WHS decisions of various courts and tribunals across the country should be published and made publicly available. Work should be done to review these decisions to identify areas of inconsistency and improvement.
- ▶ Require all internal protocols and processes be subject to regular review to ensure they remain suitable, including ensuring appropriate industry consultation.
- ▶ Be appropriately resourced and funded to effectively carry out their roles and responsibilities.
- ▶ Focus on what is reasonable, practical and achievable and to intervene if and when needed.

- ▶ Facilitate improved WHS awareness and culture in workplaces, rather than strictly enforcement.
- ▶ WHS inspectors should have industry specific and appropriate work, health and safety experience.

### Regulators and third parties

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).

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.

An example of this concern relayed from a member is as follows:

*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.*

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.

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.

#### Question 4

##### **Do you have any views on how the model WHS laws interact with other work health and safety schemes?**

As discussed above the WHS regulatory framework that applies to the BCI is not just limited to the WHS Act and Regulations. Additional obligations arise not only through industry specific Codes of Practice but the workplace relations framework, including through Modern Awards and Enterprise Agreements impose further obligations on building industry participants.

This often makes the ability to comply incredibly challenging.

See above discussion for further details.

#### Question 5

##### **What can be done to strengthen and sustain harmonisation of WHS laws across Australia? Is there a better way to achieve this?**

The commitment to harmonisation across the country was brought to life by the IGA signed in July 2008.

The Agreement committed the Commonwealth, States, and Territories to work together to improve workplace safety by implementing a national system of model WHS laws and related codes of practice.

Despite its fundamental importance to the commitment to harmonisation, the IGA does not appear to have been reviewed or updated since 2008. Further, the commitments made would appear to carry little weight given the disregard jurisdictions appear to have for them, for example:

- ▶ the commitment to maintain uniformity over time,
- ▶ that any proposals for change that materially affects the operation of the model laws be submitted to WHS ministers for decision which will only progress if Ministers endorse the proposal, and
- ▶ that where endorsed all will undertake to introduce changes to ensure the legislation remains national consistent.

Master Builders is not aware of this approach being followed in any case where changes have occurred.

As a matter of priority, the IGA should be reviewed and re-endorsed. Further, consideration could be given to funding jurisdictions to maintain a harmonised approach, to support, for example the recommendations set out above with respect to compliance and enforcement.

#### **Consistency across Codes of Practice**

Consistent Codes of Practice would strengthen harmonisation and support a more uniform approach to compliance and enforcement. Some key concerns with Code of Practice include:

- ▶ Duplication in some jurisdictions with Codes of Practice across jurisdictions touching on the same/similar issues causing a lack of clarity about which one should be applied.
- ▶ These documents have been complex and lengthy, yet industry is expected to understand and implement the arrangements set out within them. This is unrealistic.
- ▶ There should be a simple document which highlights the subtle changes that the states have made to the model Codes of Practice.
- ▶ There is a lack of harmonisation in the provision and titles used for Codes of Practice across the states.
- ▶ There are also now discrepancies across the country with regard to the enforceability of Codes of Practice. This divergence is unwelcomed and should be remedied.

As indicated earlier, Master Builders support Recommendation 1 of the 2018 Review to respond to these issues.

## Variations to the model WHS Act

### Question 6

**Do you have any comments on the general WHS duties under the model WHS Act, including variations made by jurisdictions? Are the variations best practice?**

The operation of concurrent duties has always been a point of contention in the BCI. The complex contractual chains and the attendance at site of multiple trades means that the practical operation of WHS duties is a constant moving feast of WHS roles, responsibilities and obligations.

This is why a PCBU's primary duty of care should be limited by the extent that the person is in actual control of a certain activity such that the subsequent liability is apportioned based on the level of control.

Actual control is an integral element that must be included in the consideration of what is 'reasonably practicable'. The term 'control' should be taken to mean 'exercising actual and direct control' over the relevant 'worker' and 'workplace'.

In practical terms for the construction industry a PCBU builder or principal contractor (PC) is often held responsible for all the risks created by subcontractors, even in circumstances where a PC has no particular expertise in the work undertaken by the subcontractors.

The current approach also has the potential to lead to poorer safety outcomes as subcontractors and safety inspectors hold the view that the Principal Contractor is wholly responsible for managing all risks to health and safety.

For example, Section 19(3)(g) of the model WHS Act requires that a PCBU *ensure that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking*. The requirement for monitoring the health of workers is confusing and impractical particularly where multiple PCBUs are involved.

### Question 7

**Do you have any comments on the consultation, representation and participation provisions under the model WHS Act, including variations made by jurisdictions? Are the variations best practice?**

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

The specific role of HSRs is one that is particularly important to the BCI in context of this culture and history.

Firstly, 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.

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.

Secondly, 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. Recent amendments to the model WHS Act now mean that such assistance can be provided by union officials without the need for a right of entry permit<sup>19</sup>.

Such amendments inappropriately leave the door open to union officials that have lost their entry permit for bad behaviour to access the workplace to potentially exert inappropriate industrial pressure which undermines the intended purpose of this provision and compromises the broader principles of maintaining a safe and respectful work environment

The implicit admission in the adoption of these provisions is that union officials with right of entry permits do not have the appropriate WHS experience or expertise being able to assess hazards or risks. This raises concern regarding the general role of union officials in raising WHS matters.

This amendment overturned a decision of the Federal Court Full Bench that had previously determined that:

*"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."*<sup>20</sup>

We consider 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 any conduct.

Master Builders remains 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, 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.

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.

Master Builders does not believe union officials should be banned to assist workplace representatives in all cases, however giving someone associated with bikies and a history of abusive and illegal behaviour the green light to be anywhere they want if invited, is not appropriate.

On this basis Master Builders recommends that any further consideration of this issue, including any state/territory variations consider that:

- ▶ 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.

<sup>19</sup> [Fair Work Legislation Amendment \(Closing Loopholes\) Act 2023](#)

<sup>20</sup> Australian Building and Construction Commissioner v Powell [2017] FCAFC 89

- ▶ 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.

## Question 8

### **Do you have any comments on the right of entry provisions under the model WHS Act, including variations made by jurisdictions? Are the variations best practice?**

Master Builders refers to our earlier comments and answer to question 7 above.

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.<sup>21</sup>

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,<sup>22</sup> which is clearly an WHS issue.

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."*<sup>23</sup>

The Royal Commission found that misuse of safety for industrial purposes compromises safety in important respects:

- ▶ 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.<sup>24</sup>

One of the responses to the Cole Royal Commission was the passage of the BCIIIP Act. The 2005 version of this legislation included section 36(1)(g) that 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.

The provision proscribed the taking of industrial action on the basis of spurious WHS grounds.

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

<sup>21</sup> Final Report of the Royal Commission into the Building and Construction Industry, Summary of Findings and Recommendations, volume 1, February 2003, p 3.

<sup>22</sup> Current Issues Brief [no. 30 2002-03](#), Building Industry Royal Commission: Background, Findings and Recommendations.

<sup>23</sup> Supra note 6, volume 6, p 108.

<sup>24</sup> 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.

protracted periods. The ABC Commissioner brought a number of cases of abuse of WHS for industrial purposes to the courts during that period.<sup>25</sup>

With the repealing of this legislation in 2022 BCI participants continue to suffer the consequences of those who abuse WHS and we remain gravely concerned about the frequency with which this occurs.

The examples set out in this submission are but a small selection of 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.

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.

Master Builders recommends that

- ▶ 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 9

**Do you have any comments on the provisions relating to compliance, enforcement, or inspector powers and procedures in the model WHS Act, including variations made by jurisdictions? Are the variations best practice?**

The National Compliance and Enforcement Policy (NCEP) contains principles that are relevant to how WHS regulators should perform their monitoring and enforcement activities.

The purpose of the NCEP is to support the model WHS laws by ensuring a nationally consistent approach to compliance and enforcement.

As indicated elsewhere consistent implementation of the policy by the jurisdictions, particularly in relation to the use of enforceable undertakings is an important matter that the review should address.

A key element missing from the NCEP, but that is crucial to achieving better health and safety outcomes, is how the regulators should engage with key stakeholders. The NCEP would benefit from a clear articulation of the important role that key stakeholders can play at improving health and safety outcomes, and what the regulators should do to consult with and support workplace parties and stakeholder bodies to achieve sustainable health and safety improvements. The NCEP should explicitly emphasise engaging directly with key stakeholders.

#### *Role of HSR's in compliance and enforcement activity*

Master Builders has serious concerns regarding any expansion of the role of HSRs in bring compliance and/or enforcement action, including the ability to issue provisional improvements notices. Such matters fall squarely within the remit of a regulator and moves beyond that should be strongly resisted.

For example, any attempts to bring recent NSW reforms into the model WHS laws must be opposed.

---

<sup>25</sup> 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*

In June this year, NSW passed the *Industrial Relations and Other Legislation Amendment (Workplace Protections) Bill 2025* (Bill). This Bill, amongst other things has introduced:

- ▶ A requirement for PCBU's to promptly notify SafeWork NSW when provisional improvement notices are issued by health and safety representatives (HSRs). The failure to do so can result in a maximum penalty of 50 penalty units.
- ▶ Enhanced powers for union officials exercising entry powers to collect evidence relating to suspected contraventions of the WHS Act, including conducting tests, measurements and taking photos or videos at a workplace.
- ▶ Expansion of the right to review decisions made under the WHS Act to unions representing a worker affected by a decision.
- ▶ Granting unions the power to initiate prosecutions under the WHS Act in circumstances where the union has consulted with SafeWork about its intention to bring proceedings and the regulator has declined to act or does not bring proceedings within 12 months of being consulted.
- ▶ Clarification that WHS entry permit holders can investigate any additional WHS breaches that they come to "reasonably suspect while at the workplace".
- ▶ Authorisation for registered organisations, in addition to regulators, to initiate WHS civil penalty proceedings on behalf of affected individuals and to claim any resulting monetary penalties.

#### Question 10

**Do you have any comments on the provisions relating to legal proceedings in the model WHS Act, including variations made by jurisdictions? Are the variations best practice?**

Master Builders has no comment.

#### Question 11

**Do you have any comments on the offences, penalties and enforceable undertaking provisions in the model WHS Act, including variations made by jurisdictions? Are the variations best practice?**

See comments elsewhere within this submission.

#### Question 12

**Do you have any comments on Codes of Practice, including variations made by jurisdictions? Are the variations best practice?**

The divergence from the model WHS laws by Queensland and NSW is of concern.

In those jurisdictions businesses must comply with an approved code of practice under the relevant work, health and safety. Businesses can use another method, such as a technical or an industry standard, to manage hazards and risks—as long as it provides an equivalent or higher standard of work health and safety to the standard required in the code.

This restored the status of Codes of Practice to their pre-harmonisation level, requiring that safety measures in a code must be followed unless an equivalent or higher standard of safety is demonstrated.

This change made breaches of Codes of Practice an offence and allowed for enforcement action, such as a health and safety representative issuing a Penalty Improvement Notice (PIN).

This moves codes out of the category of 'guidance' to mandatory compliance setting an unappealing precedent.

## Variations of the model WHS Regulations

### Question 13

**Do you have any comments on the model WHS Regulations, including variations made by jurisdictions? Are the variations best practice?**

As outlined elsewhere Master Builders support recommendation 1 of the 2018 Review.

While Master Builders supports harmonisation, the construction industry environment can differ across the country, for example, socio economic conditions, building methods, different levels of building activity, combined with trades availability has impacts on construction costs.

To that end, there may be justification for different definitions of construction work and different approaches to, for example, falls from heights. In those cases, it would be appropriate for jurisdictions to make their case for a different approach and have that endorsed by SWA and SWA members.

However, differences not linked to local economic circumstances should be avoided, for example a different approach to managing psychosocial risks should be remedied and the amendments made to the Queensland WHS law through the *Work Health and Safety (Sexual Harassment) Amendment Regulation 2024* not pursued.

## Broader consideration of the model WHS Regulations

### Question 14

**Do you have any comments on the role of the model WHS Regulations? Should there be criteria guiding their content and structure? If so, what should this be?**

### Question 15

**Do you have any comments on the industries or work areas covered by the model WHS Regulations? Are these sufficient or are there gaps and if so, what are they?**

### Question 16

**Do you have any comments on the model WHS Regulations? Do they continue to reflect best practice?**

Yes, as indicated earlier, Master Builders support recommendation 1 of the 2018 Review.

In principle Master Builders see that WHS regulations should:

- ▶ Avoid duplication with obligations under the Model WHS Act.
- ▶ Provide additional prescription for high-risk industries and activities.
- ▶ Be consistent with the model Act remain principles based for non-high risk industries and activities.

While a thorough review of the WHS regulations is recommended, we highlight below some key areas where issues are identified.

### Question 15

**Do you have any comments on the industries or work areas covered by the model WHS Regulations? Are these sufficient or are there gaps and if so, what are they?**

### Question 16

**Do you have any comments on the model WHS Regulations? Do they continue to reflect best practice?**

*Safe Work Method Statements (SWMS)*

In the building and construction industry, a SWMS is required for High Risk Construction Work (HRCW). While template SWMS are available Master Builders understands that there is a proliferation of these documents across industry. The consequences of this are that it:

- ▶ Provides an opportunity for Subcontractors or Principal Contractors to impose their own requirements above and beyond the WHS legislative requirements. This imposes additional 'white tape' i.e. businesses imposing or requiring additional measures that are either over and above the regulatory framework or are designed to reduce the regulatory burden higher up the contractual chain.
- ▶ Conflates internal policies and procedures with WHS legislative requirements which may result in separate safety disciplines becoming combined, for example a project risk assessment (which uses a risk matrix) and a SWMS for HRCW. Resulting in confusing non-compliant documentation, that hinders positive measurable safety outcomes.

One response may be for WHS regulators to provide better education and advice on the minimum requirements for SWMS, a further step may be to include the template in the regulations to provide clarity and certainty regarding what must be included.

#### WHS Licenses

WHS licenses should include photo identification. While this appears to be the case for High Risk Work Licenses (HRWL) the same cannot be said for the General Construction Industry white card. Mandating photo identification would reduce red tape and alleviate the need for a second piece of documentation to verify one is bona fide i.e. copies of a driver's license or passport.

Copies of these documents are then kept introducing a risk to an individual's privacy that could easily be avoided.

#### Silica Regulations

A continual source of confusion relates to the determination of whether or not the processing of a crystalline silica substance is high risk.

At page 25 of the Code of Practice Managing risks of respirable crystalline silica in the workplace (August 2025) it states that

*"Under the WHS Regulations, if you have identified that processing of a CSS is carried out at your workplace, you must determine whether the processing is high risk or not. This assessment occurs after you have identified the process and determined all reasonably practicable control measures that will be implemented, but before work commences."*

However, it is arguable that section 529CA of the WHS Regulations does not reflect this approach.

Master Builders recommends that the approach outlined in the Code of Practice is preferred and appropriate and should be adequately reflected in the WHS Regulations

We also understand that this discord is causing difficulties for regulators trying to educate and enforce the provisions.

#### Question 17

##### **Do you have any comments on the use of Australian Standards in the model WHS Regulations?**

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.

- ▶ 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.
- ▶ 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:

- ▶ does not conflict with any other regulatory arrangements;
- ▶ 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 are also developed on same topic. These should be eliminated.

### Question 18

**Which aspects of the model WHS Regulations are working well, and which are not? What changes could improve them?**

See above answer to question 16

## Environmental scan

### Question 19

**Do you have any comments on the issues raised in this section as they relate to best practice WHS laws and harmonisation going forward?**

While parties should not be ignorant of the external environment, it is relevant to note that the current definition of PCBU is appropriate to respond to changes in the nature of work and work relationships.

New and evolving styles of workplace organisation have been a feature of the Australian economy for decades with celebrated court cases establishing the status of encyclopaedia salespeople, bicycle riding couriers and labour hire workers, in fact, the shift in terminology was aimed at being broad enough and flexible enough to incorporate changes in the way we work and the way work is carried out.

### Concerning developments

#### *Digital Work System Duty*

A concerning development is the NSW reforms that proposes to implement an excessively broad Digital Work System Duty, unrestricted union access through WHS entry permit holders gaining unprecedented

access to proprietary business systems without adequate protections, automatic liability provisions placing small businesses at risk by default if unable to meet tight information provision timeframes, new employer excess payments without evidence of effectiveness, and insufficient transition support with no dedicated resources for small businesses to implement changes.

The *Workers Compensation Legislation Amendment (Reform and Modernisation) Bill 2025* would dramatically shift the obligations of duties holders - small businesses would be particularly adversely impacted.

To that end Master Builders strongly opposes any amendments to the WHS legislation that seeks to introduce similar obligations. Such arrangements impose onerous obligations and expand the powers given to permit holders in a way that would undermine workplace safety, productivity and/or regulatory balance.

Master Builders urges jurisdictions and SWA to follow the Federal Government's lead in relation to its investigation of these matters and take a harmonised approach to any regulatory or other response.