WHSQ Best Practice Review Discussion Paper

MASTER BUILDERS QUEENSLAND SUBMISSION

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EXECUTIVE SUMMARY

Master Builders Queensland ('Master Builders') welcomes the opportunity to make submissions on the Best Practice Review of Workplace Health and Safety Queensland Discussion Paper ('the Review').

Master Builders generally supports a review that examines the compliance and enforcement of policy, the effectiveness of the compliance regime, enforcement and compliance activities of the Department of Workplace Health and Safety Queensland ('the Department') and the effectiveness of the promotion of safer and healthier workplaces. Such topics require regular review and monitoring so that improvements can be made to ensure health and safety laws stay relevant and so that workplaces achieve better safety outcomes.

Whilst we have consulted with our members and boarder industry constituents on the matters contained in the discussion paper, due to the short timeframe of this review we have been unable to provide detailed feedback on all questions, and as such we have limited our response to major and key issues. We reserve our right to provide further and better particulars, comments and feedback on any issues not covered in this submission.

The intent of this Review is to examine those elements of the safety laws and the functions of the Department that will lead to better safety outcomes in workplaces and deter non-compliance that will result in injuries, illnesses and deaths. Whilst Master Builders supports this intent, we believe that some of the matters addressed in this discussion paper and the questions asked are not those that are likely to achieve better outcomes, but rather increase punitive actions and create further industrial and workplace unrest.

This Review considers four matters that Master Builders has great concern with, and believes will impact not only the Construction Industry, but also the Department and other major industries (particularly those that are heavily unionized). We have provided detailed commentary and recommendations on the following major issues:

1. Using the QIRC as a mechanism for issue resolution;
2. The introduction of a prosecutions board;
3. Introducing the penalty of "Gross negligence causing death"; and
4. Increasing penalties for category offences.

Additionally, the examination of the expertise, training, resourcing and effectiveness of the inspectorate is a necessary part of this Review. Whilst we recognize that the inspectorate has improved its ability to balance its punitive and advisory role over the last 10 years, there are still ongoing improvements that can be made which will most certainly lead to a more effective unit. We have provided some feedback and recommendations in relation to this issue, and encourage the Queensland Government to invest in making the inspectorate and Department as a whole, more effective and efficient.

We have also provided feedback on those areas that would have made a difference to safety outcomes in workplaces and which should have been part of this review, and additionally outlined recommendations on matters relating to statistics, lead indicator development and the overall performance of the Department.

MAJOR ISSUES

Using the QIRC as a mechanism for issue resolution (Section 2.9 page 23-28, Question 35-41)

The Review includes a proposal to move appeals on WHS actions – such as inspectors issuing or not issuing a prohibition notice - from the jurisdiction of Queensland Civil and Administrative Tribunal (QCAT), to the QIRC.

Master Builders strongly opposes this proposal on the following grounds:

1. The proposition in the review for QIRC referral is inconsistent with the Queensland government's *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* ('the Referral Act').

2. The expansion of the QIRC's jurisdiction will cause a jurisdictional conflict with the *Fair Work Act 2009 ('*the FW Act'*)*.

3. There is no evidence provided that the current appeals process and jurisdiction is lacking in any manner.

The expansion of QIRC jurisdiction is inconsistent with the Referral Act

The FW Act is the principal legislation for the regulation of industrial relations for constitutional corporations and unincorporated entities, collectively defined as national system employers. This jurisdiction is recognized in Queensland when, on 11 November 2009, the Queensland Parliament passed legislation to refer industrial relations matters for the unincorporated private sector to the Commonwealth - the Referral Act.

NSW, SA, Tasmania and Victoria also referred their industrial relations jurisdictions. The key aim of the State referrals was to provide a uniform single system for all employees in the private sector thereby providing certainty, clarity and efficiency for businesses and workers.

It its referral, the Queensland government endorsed and intended the new framework to be exclusive.

> ***4 Fundamental workplace relations***
> *The following are the fundamental workplace relations principles under this Act—*
>
> *(a) that the Commonwealth Fair Work Act should provide for, and continue to provide for ……*
>
> *(b) that there should be, and continue to be, in connection with the operation of the Commonwealth Fair Work Act, the following—*
>
> > *(i) an independent tribunal system;*
> >
> > *(ii) an independent authority able to assist employers and employees within a national workplace relations system.*

The referrals by the States have a rock solid purpose, which is to overcome the federal limitations contained in the Commonwealth Constitution. In particular, the referrals enable the Commonwealth to regulate corporations in lieu of the original, but problematic, constitutional power in respect to "*conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State* (section51(xxxv)).

In moving to a national regulation of industrial relations, the States and Commonwealth deliberately limited the scope of the FW Act so it did not extend to areas that had been traditionally beyond the scope of the section 51. The Act provides carefully drafted exclusions and exemptions, to accommodate the transition from State jurisdictions of the industrial relations powers.

Relevant to this Review, the FW Act sets aside for the States, discrete, pre-existing State laws dealing with 'occupational health and safety'. Section 30 A (1) lists occupational health and safety as one of the "excluded subject matters".

However, section 30(1)K defines 'referred subject matters' as follows:

> ***"referred subject matters "*** means any of the following:
>
> (a) …
>
> (c) rights and responsibilities of persons, including employees, employers, independent contractors, outworkers, outworker entities, associations of employees or associations of employers, being rights and responsibilities relating to any of the following:
>
> …
>
> (iv) industrial action;

The referral means the QIRC cannot hear and determine an industrial dispute concerning a national system party, including one, which stems from alleged protected action as a result of imminent risk. The employer or other party can apply to the Fair Work Commission (FWC) for Orders if the circumstance are disputed. In the building and construction industry, the latter type of dispute is routinely heard in the FWC. In practice, therefore, the proposal to clothe the QIRC with the jurisdiction to hear appeals arising from safety disputes will result in the QIRC becoming involved in disputes that are now reserved for the federal jurisdiction.

Creating conflicting jurisdiction between QIRC and the FW Act

The expansion of the jurisdiction of the QIRC to new matters was first raised in the review of the Industrial Relations Bill 2016. In our response to that review, Master Builders indicated why the expansion of the QIRC jurisdiction would result in a diminishment or interference with the rights of national system parties under the FW Act.

This latest proposal in the Review fails on the same grounds as it lacks acknowledgement of the jurisdiction of the FW Act and the FWC in the regulation of industrial disputes, including determination of what is, or is not, industrial action.

The commentary in the Review discussion paper, in fact, does not even acknowledge the obvious conflict the transferal of jurisdiction from QCAT to the QIRC will create with the FW Act. *Master Builders strongly recommends that the Reviewer turn his mind to conflicting jurisdictional issues when advising the government on this proposal.*

QIRC has no capacity under the FW Act to review or interfere with the performance and payment of national system employees. Further, it should not be misrepresented, by extension of workplace health and safety (WHS) issues, that it does have the capacity. If the government was to adopt the proposals, unchecked, it is very likely the QIRC will engage in settling a dispute that is, at its heart, an industrial issue for national system employers and employees.

The FW Act provides the following definition of industrial action;

> ***SECTION 19 Meaning of industrial action***
>
> *(1)* ***Industrial action*** *means action of any of the following kinds:*
>
> *(a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;*
>
> *(b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;*
>
> *(c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;*

(d) the lockout of employees from their employment by the employer of the employees.

*(2) However, **industrial action** does not include the following:*

(a) action by employees that is authorised or agreed to by the employer of the employees;

(b) action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer;

(c) action by an employee if:

(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and

(ii) 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 and appropriate for the employee to perform.

….

It is uncontroversial to submit that the industrialisation of WHS matters is a normal feature of many industry sectors. Master Builders is on the record that the overlap of WHS and industrial relations is notorious and prone to abuse. As we demonstrate below, in a case before the FWC in March 2014, it is not out of the question for industrial action to be claimed as legitimate safety action, i.e. as an 'imminent risk'.

Under current WHS legislation, any employee, at any time, has a right to cease work if they feel the work area is unsafe and they are at imminent risk of injury or worse. If work ceases when there is no imminent risk or other right, it will usually mean the stoppage is industrial action, as defined in the FW Act. The distinction is necessary as it means either a right to payment of wages, or otherwise a claim for strike pay. These types of determinations are currently made by the FWC under the FW Act.

The proposed appeal mechanism will mean the QIRC will be requested to assess the merits of a claim that a WHS inspector has failed to exercise their powers in a reasonable and objective manner. The QIRC will require evidence of the dispute and the consequences of the Inspector's alleged error, directly overlapping the type of evidence now routinely heard in the FWC. To illustrate that our concern is not merely of a theoretical nature, we provide the following recent case study as an example.

Lend Lease Building Pty Ltd v CFMEU (C2014/3436)

This matter was determined under the FW Act, section 418 - Application for an order that industrial action by employees or employers stop. It concerned alleged industrial action at a Lend Lease construction site, the Sunshine Coast University Hospital on 14 March 2014.

Commissioner Spencer granted Lend Lease their application for a return to work order. Her decision is attached for reference. Evidence was given by Lend Lease managers, a CFMEU officer and a WHS Inspector.

The relevant aspects of the Commissioner's decision are as follows:

- A CFMEU official arrived on site with a section 117 notice of suspected contravention, which related to water on the site after rain. The alleged contravention could not be made out with any definition.
- There was no evidence the official took particular steps to resolve that alleged contravention, or to detail it to the employer.
- There was evidence that the official moved to a mass meeting, and on the basis of this vague and generic section 117 the employees left the site.

- The Commissioner was critical of the union official's conduct in moving to the mass meeting without the relevant discussions with the employer, or escalating any particular issue that he held through the relevant dispute settlement procedure.
- The Commissioner was also critical of the fact the official did not advise employees that the action may be considered to be unprotected.
- The Commissioner noted Lend Lease had followed the procedure, or endeavoured to follow the relevant procedure in terms of the safety committee walk and the dewatering procedure.
- All other employees on the site, relevantly members of the other unions, had their relevant site areas dewatered and work continued. This was exactly the procedure the employer was in the process of discharging to deal with water on the site.
- The official's evidence was that he observed the alleged unsafe areas from a position at least 50m from him. This was in direct conflict with the WHS inspector's evidence who inspected the relevant area of the site.
- The WHS Inspector found that there was not an imminent or immediate risk to workers in the area at the time of his inspection.
- The official could not give any particular evidence to a relevant or imminent risk to his members at that particular area.
- The official could not give any evidence as to how he endeavoured to properly raise this issue, or the alleged issue, through the safety committee with the employer or the disputes procedure.
- The Commissioner found this to be of significant concern.
- The Commissioner found that that there was potential for further industrial action at that site.
- The Commissioner considered and relied upon the evidence regarding the "safety dispute" to reach the conclusion that the statutory tests have been made out that industrial action is probable.

The above case is particularly relevant because it involved a WHS Inspector giving evidence and tendering the Inspection Report. The union official did not accept the Inspector's report at the time, and continued to deny its reliability throughout the FWC hearing.

Using this case as an example, if:

- a union was able to apply to the QIRC to challenge the WHS report; and/or
- pressed FWC to adjourn the matter while the safety dispute was pending in the QIRC; and/or
- claimed procedural fairness under both the FW Act and WHS Act;
- then the FWC or the applicant may be seriously compromised during any proceedings under the FW Act or after an Order is granted.

If the QIRC's jurisdiction is expanded via the WHS Act, this must not undermine applications, hearings or other proceedings of the FWC. The government must guarantee any proposed changes to the QIRC role will have no effect whatsoever on proceedings under the FW Act.

What is the reason for transferring jurisdiction from QCAT to the QIRC?

The Review discussion paper does not provide any evidence as to why the change in jurisdiction is necessary, save to state that *no* appeals to QCAT have been made in the last three years. No evidence is presented that the current process is lacking in any regard, or failing at a policy level, yet the Discussion Paper proposes that the change in appeals tribunal is 'best practice'.

Master Builders strongly opposes the proposal to have WHS disputes or WHS matters of any kind heard in the QIRC. The current process is sufficient in dealing with these matters and based on the evidence provided there is no gap or need to move these matters to the QIRC.

The introduction of a prosecutions board (Section 2.6, Page 20, Question 26)

The Review contemplates whether a prosecutions board consisting of key stakeholders be established to ensure greater transparency and defensibility in decision-making.

When it comes to prosecutorial decision-making Master Builders believes there is ample guidance provided already to the Department's Legal and Prosecutions Services Unit through the Director of Public Prosecutions Guidelines (DPP guidelines) and the National Compliance and Enforcement Policy (National Policy).

We understand from the Review discussion paper that Price Waterhouse Coopers (PwC) have undertaken an assessment of the key functions of the Prosecutions Services unit and have made recommendations in a report provided to the Office of Industrial Relations dated 28 March 2017.

Master Builders' have requested a copy of the PwC report but at time of writing this submission, we had not yet received a response to our request. As such, we are not able to comment on any recommendations made within the PwC report. As the Discussion paper provides no evidence base for this proposal, our response will be limited to general principles, as follows:

A prosecutions board is likely to have an adverse impact on the integrity and independence of the Regulator's prosecutorial decision making

Central to the integrity of the prosecutorial decision making power is the ability of the Regulator to make an independent decision, free from undue influence. We are assuming, in the absence of any information provided in the Discussion paper, that the parties or stakeholders in a prosecutions board will be made up of persons outside the Regulator, and as such represent diverse interest groups.

If members of the prosecutions board are chosen by the government of the day, there is a real risk of perceived political bias, which of course will undermine the integrity and independence of the Regulator.

We could find no precedent for such a stakeholder body within other jurisdictions, nor any evidence of how it will improve the transparency and defensibility of the regulator's prosecutorial decisions; quite the contrary.

We also believe that introducing diverse interests into the decision making process will result in an imbalance between the dual considerations of prospect of success and public interest. When considering prospects of success, the Regulator has to assess the quality and persuasive strength of the evidence as it is likely to be at trial. This includes complex issues such as the availability, competence and compellability of witnesses and their likely impression on the Court; any conflicting statements by a material witness; the admissibility of evidence, including any alleged confession; any lines of defence that are plainly open etc. A layperson prosecutions board will not be able to contribute to these types of considerations in any meaningful way. Expecting the Regulator to involve a prosecutions board in such deliberations will be unproductive and further delay an already slow process.

We strongly encourage government to ensure that the Department's organisational structure supports and protects the independence of the Legal and Prosecutions Services Unit.

The *Work Health and Safety Act* 2011 (WHS Act) already provides sufficient recourse to the public to challenge a decision by the Regulator not to prosecute

Section 230(4) provides an unfettered right to the DPP to bring proceedings for an offence against the Act.

Furthermore, section 231(1) provides that any person may make a written request that a prosecution be brought for an alleged category 1 or 2 offense, if the Regulator has failed to do so within6 months, but no later than 12 months, after the alleged breach of the WHS Act.

Section 231(2) requires the Regulator to provide written advise to the person on the status of the investigation, whether a prosecution will be brought and reasons for the Regulator's decision to prosecute or not. The Regulator must also inform the person that they may request the matter be referred to the DPP.

Should a referral be made, the DPP must consider the matter and advise the Regulator within 1 month as to whether the DPP considers that a prosecution should be brought. The DPP's advice is to be provided to the person making the requests as well as the person believed to have committed the offence.

If the Regulator declines to follow the advice of the DPP to bring proceedings, the regulator must also give written reasons for the decision to these persons.

We believe the above provisions of the WHS Act provides an adequate pathway should any member of the public wish to challenge the Regulator's decision to not prosecute a specific matter. In the absence of any further evidence as to the utilisation or efficacy of sections 230 and 231 of the WHS Act, we believe there is no case to be made for additional oversight of the Regulator's prosecutorial decision-making power.

Master Builders recommends that the Government not pursue the establishment of a prosecutions board or stakeholder group of any type that would have some baring or impact on the decision to prosecute under the Work Health and Safety legislation. Rather we recommend that the reviewer consider options that will result in a true separation of powers and responsibilities, be independent from the policy makers and have little, or no powers of veto/ influence from other external parties.

Introducing an offence of "Gross negligence causing death" (Section 5.1, Page 41, Question 52)

The Review questions whether there is merit in introducing an offence of "Gross Negligence Causing Death" as a means of expanding the current categories of offences under the WHS legislation.

Such an offence is a closely aligned alternative to the highly debated criminal offence of "Industrial Manslaughter".

Master Builders has historically been opposed to the introduction of the offence of Industrial Manslaughter, and is similarly opposed to the introduction of the offence of Gross Negligence Causing Death.

There are three main reasons for our opposition to this offence:

1. The current compliance and enforcement framework is sufficient;
2. The current offences are largely untested; and
3. There is no evidence that there is a gap in the current framework that necessitates the need to introduce an additional offence.

In 2012, the Queensland Government adopted the "tall" work health and safety enforcement pyramid, with many levels, which provides scope for proper escalation of enforcement responses by regulators. It provides a framework to facilitate an agency's efforts to promote prevention. It also creates incentives, including through enforcement action, to address systematic failures before they result in injury.

The current legislation takes a graduated enforcement approach to breaches of the legislation. There is a range of enforcement options, which provides the regulator with the flexibility to match their responses to the facts of the case. These enforcement options include provisional improvement notices, prohibition notices, non-disturbance notices, enforceable undertakings as well as the three categories of penalties. In addition to these enforcement options held by the regulators, the DPP also have the ability to charge a person/s with the criminal penalty of "Manslaughter" in accordance with the elements of that offence outlined in the Queensland Criminal Code.

The current categories (1,2 and 3) have been in the legislation since the 2012 harmonisation amendments. Since 2012, there have been a number of category 2 and 3 prosecutions, some largely due to the evidence and facts of the case, and others due to public policy decisions. The majority of these decisions have resulted in monetary retribution on the lower end of the penalty scale for that offence. To date there has been no completed category 1 prosecutions, with the first in Queensland launched in February this year. In addition, there are two criminal Manslaughter charges on foot for industrial fatalities, however these are yet to be prosecuted.

Until such time as the current enforcement framework has been tested in a court of law, there is no evidence to suggest that the current system is flawed, that it has any consequential gaps or loop holes, or that it is insufficient in being a deterrent to compliance, and therefore necessitates an additional layer of offence of Gross Negligence Causing Death.

Master Builders considers the Category 1 offence along with the potential for a criminal manslaughter charge, sufficient for prosecuting all fatalities that have resulted in a negligence, recklessness or blatant disregard for health or safety in the workplace. We do not believe that industrial manslaughter provisions are an effective way to improve safety outcomes. Industrial Manslaughter type offences do not strike the right balance between prevention and cure, rather they are linked solely to the outcome of non-compliance. The principal motivations for industrial manslaughter prosecutions are moral, symbolic and retributive.

For the first time in Australia, in 2012 officers of a company were allocated a duty in their own right and must exercise due diligence to ensure that the person conducting the business or undertaking complies with their duties and obligations.

Master Builders' view is that a positive duty which makes company officers culpable for failing to meet their corporate governance responsibilities by preventing corporate misconduct has the potential to be more effective approach to work health and safety regulation than industrial manslaughter, or the additional provision of "Gross Negligence Causing Death".

The liability of company officers shifts the emphasis to ensuring that those people in the best position to demonstrate safety leadership do so, rather than focusing solely on punishing the corporate failure. Ex post facto punishment is less likely to lead to better safety outcomes than a duty to take positive action based on operational feedback.

Similarly there have been very few cases where the due diligence criteria has been tested in a court of law, again raising the question of whether there are in fact any issues with the current system which necessitate imposing an additional layer of legal consequence.

In Master Builders' view any introduction of a new offence of "Gross Negligence Causing Death" or Industrial Manslaughter type provisions fails to take proper account of the proactive officer duty, the graduated enforcement provisions or the necessity to properly test the current laws and identify the real gaps in enforcement.

Master Builders recommends that the additional offence of "Gross Negligence Causing Death" not be introduced. No further consideration should be given to expanding the penalties until such time as the current categories are properly tested in the court of law and a clear legislative gap can be identified.

Increase in Penalties for Category offences

The Review suggests a move to increase the current penalties under all categories of offences, in particular category 1 offences where there have been multiple deaths or serious injuries as result of a single event. Master Builders does not support the suggestion to increase penalties as a means for deterring non-compliance.

Punitive action is not a deterrent

In accordance with our response to the suggestion to an additional offence of "Gross Negligence Causing Death", there is a long history of reviews that have confirmed that increasing the punitive approaches to achieve better compliance is not an effective deterrent. Better education, accurately focused compliance campaigns, keeping codes of practice and guidance material up to date, having an active and experienced inspectorate and providing a balance of advice and punitive options are a far more effective deterrent, and is more likely to result in improved safety outcomes.

National consistency as a means for increasing penalties

Historically, based on the published Court Summaries from the Regulator between 2015 to present, there is a clear upwards trend in the penalties which are being imposed by the Court for WHS statutory breaches. This trend will ultimately see an organic increase over time to the penalties being imposed in Queensland courts, without the need to make legislative changes.

With regard to the trending increase, the following should be noted:-

- In 2015 the average penalty imposed by the Courts, against a corporate defendant for a breach of obligations imposed sections 19 and 32 of the *Work Health and Safety Act 2011* (Qld) was between $20,000 and $40,000. This does not include the $700,000 penalty imposed on a corporate defendant in circumstances where the repealed *Workplace Health and Safety Act 1995* (Qld) applied.

- In 2016 of the 19 Court Summaries published by the Regulator, regarding breaches of obligations imposed sections 19 and 32 of the *Work Health and Safety Act 2011* (Qld) by corporate defendants, seven (7) matters involved penalties of $100,000 to $200,000. The remaining matters averaged a penalty of $40,000. Court Ordered Undertakings were also imposed in two (2) of those instances.

- To date in 2017, eight (8) Court Summaries have been published where corporate defendants have been convicted of breaches of sections 19 and 32 of the *Work Health and Safety Act 2011* (Qld). So far two (2) of those matters have resulted in penalties exceeding $100,000 being imposed. One (1) matter resulting in a penalty of $80,000 and five (5) matters resulting in penalties of between $25,000 and $40,000.

- On 5 May 2017 NSW District Court Judge Andrew Scotting fined WGA Pty Ltd $1 million from a maximum $1.5 million, plus $50,460 in costs, after finding it guilty of breaching NSW WHS Act last month.

Between approximately February 2014 and 5 May 2016 the Regulator was somewhat hamstrung in making submissions to the Court as to an appropriate penalty as a result of the High Court decision in *Barbaro v R* (2014) 253 CLR 58. With the amendment of section 15 of the *Penalties and Sentences Act 1992* (Qld), which took effect on 5 May 2016, removing that hurdle, the Regulator has sought to establish that consistency with harmonised jurisdictions, as evidence in *Williamson v VH & MG Imports Pty Ltd* [2017] QDC 56.

The District Court of Queensland in that decision noted the harmonised legislation provides consistency in the nationally agreed quantum of penalties and accordingly the sentencing courts ought to "have regard to decisions in harmonised jurisdictions, which will result in "like cases [being] treated in a like manner"[1]. When increasing the penalty imposed on the Defendant by the Magistrate in the first instance, His Honour Dearden DCJ had regard to comparative cases from both Queensland and New South Wales.

[1] *Williamson v VH & MG Imports Pty Ltd* [2017] QDC 56

This emphasis on obtaining a consistent awareness of the consequences of failing to comply with the harmonised health and safety legislation is further reinforced by the National Compliance and Enforcement Policy, published by Safe Work Australia, which is applicable to Regulators nationwide.

It is appropriate to allow the legislative changes which took effect on 5 May 2016 and the recent District Court of Queensland decision (handed down on 17 March 2017) time to instigate further change before taking action which would undermine the objectives of harmonised health and safety legislation.

Master Builders recommends that the current penalty structure remain unchanged.

OTHER KEY CONCERNS AND FEEDBACK

Other matters that should have been considered for review

Whilst we understand that the purpose of this review is to examine the investigative and inspectorate functions of the department and the enforcement framework, and given that the key reason for this is to make workplaces safer and to provide a greater deterrent for non-compliance, Master Builders believes that the following items should have been included in the Review.

Risk management – Paperwork obligations

Proper risk management is the most important and fundamental aspect of making workplaces safer. The better a worker or employer's understanding of the risk management process, the less likely that an incident will occur. The process of risk management should be a simple and flexible process that allows the worker to identify risks and adapt his processes and controls as required to perform the work in a safe way.

However, the way in which risk management is expected to be carried out in construction workplaces does not always result in a better understanding of the activity and the risks involved. The current laws, particularly those relating to the mandating of Safe Work Method Statements (SWMS) and Safety Management Plans have created a shift in focus from basic risk management techniques, to ensuring that paperwork has been completed to satisfy legislative obligations.

After 15 years, the most common area of misunderstanding, under skilling and confusion relates to the SWMS and Safety Management Plans provisions. Master Builder's members often stress their frustration that these documents are not only difficult to write, but also have difficulty getting their workers and subcontractors to write them for their activities, and more importantly difficult to ensure compliance with them once they are completed. Often more time is spent writing these documents than actually taking time to properly understand the risks on site and control them in the most effective way.

Over the years there have been many changes to the SWMS provisions and many templates created to "make it easier to comply" however there still seems to be a frustration within industry. It has come time to reassess the validity, effectiveness and efficiency of these provisions and whether they are actually achieving better safety outcomes or whether there are more contemporary, flexible and relevant ways to manage risk.

Master Builders recommends that the risk management elements of the legislation including SWMS and Safety Management Plan provisions be considered as part of the review as a more effective means of making workplaces safer and more productive.

Legislative standing of Codes of Practice

Over the last five years there has been a substantial amount of concern from unions about the legislative standing of Codes of Practice since the changes to the Workplace Health and Safety Act in 2012. The unions' view is that Codes of Practice are no longer "enforceable" as the individual codes of practice are no longer specifically referenced in the Regulations.

As a result of this "complaint" by unions the department has set about reviewing the Codes of Practice in the building and construction industry for identification of those elements of the Codes that are appropriate for inclusion in regulation, with the intent to amend the Regulations accordingly.

This review was carried out without consultation with industry and Master Builders' objection to the process followed by the department has been placed on record with the government. To date, we have not been advised of the outcome of this "review".

Section 275 of the WHS Act allows Codes of Practice to be used in proceedings and as evidence of what is known about a risk and in determining what is reasonably practicable for controlling that risk. It also highlights that Codes of Practice provide a standard of work that should be followed for that particular risk or where an alternate control is used, that it must be to the same or better standard than that control specified in the Code.

On this basis, it is our view that the Codes of Practice still hold relevant legal standing for employers and workers to rely on a Code of Practice, both from a practical and a legal perspective. Additionally, it is not evident that there is an overwhelming gap in the law that would suggest that the provisions at section 275 of the WHS Act should be amended or that the Codes themselves need to be referred in the Regulations or called up in their entirety.

In addition to this, the Department recently made a direction to the inspectorate to encourage inspectors to make reference in compliance notices to relevant Codes of Practice. Master Builders' welcomes this development as it assist industry with identifying and implementing better risk mitigation and management strategies.

Our view is that the current requirements and legal standing are sufficient and effective if interpreted and exercised correctly by the industry, inspectors, employers and unions.

Master Builders recommends that this matter be the subject of review so that it can be resolved with some finality, without having to go through a laborious task of mutilating and watering down Codes of Practice for the purpose of making unnecessary additional regulations.

Compliance and enforcement policy framework

Master Builders supports the current compliance and enforcement policy adopted by the Department as outlined in the Review discussion paper on pages 7 and 8. In particular, we support the reliance upon the National Compliance and Enforcement Policy Pyramid as a tool for establishing the appropriate regulatory response to compliance.

Whilst it is understood that the department have a policy to use the pyramid and take certain steps when deciding on enforcement tools and educating/ advice, we believe that the method referred to in the discussion paper is not how this process has been working out in the field.

Although there is an effort by most inspectors to follow the policy, provide education where necessary and use punitive options as required, it is our understanding from our members feedback that there is a large amount of inconsistency in the approach taken across the board.

Anecdotal information has been provided that some inspectors provide a balanced mix of punitive and educative responses based on the situations at hand and assess the situation in line with the policy. Whereas other inspectors have a tendency for either a completely punitive or completely educative approach with all cases, which may not be appropriate in achieving good safety outcomes in the relevant circumstances.

The inconsistencies are more often noticed where an inspector is involved in a workplace safety issue that is outside their area of technical expertise, where they are confronted with a particularly difficult worker, employer or union or where they are not sure of the appropriate regulatory response, either due to lack of training or lack of internal guidance.

Master Builders recommends that the government review their current internal monitoring processes to ensure that the inspectorate is consistently and appropriate applying the enforcement framework policy to all situations and where this is not happening, provide appropriate training or counsel to improve consistency.

Compliance programs, industry partnerships and education campaigns

Master Builders supports the government's use of compliance programs, industry partnerships and education campaigns as a means of trying to improve health and safety in workplaces and reduce the prevalence of specific risks.

These programs are generally well received by industry and are seen as a positive way to educate the industry, encourage compliance and bring businesses onto a level playing field. It also gives the employers access to Department personnel in circumstances where they otherwise would not have been available and allows other risks on site to be addressed as well as those that are subject of the campaign. This all leads to better overall health and safety outcomes in workplaces.

Whilst the programs are generally run effectively and achieve the desired outcomes, we believe that there is still opportunity to expand these campaigns further and increase involvement from industry.

When choosing and designing its campaigns, the department appears to rely heavily on lag indicating statistics such as workers compensation data and injury rates. Whilst useful, the approach of using lag indicators or 'post incident statistics' is reactive in nature, and there is still a very real opportunity for the government to take a more proactive approach to improving safety.

This can be achieved by engaging with industry on a consultative basis to establish emerging risks and necessary education as well as accessing and assessing their lead indicating data, or alternatively creating a platform for the Department to collect and analyse their own lead indicators.

For example, last year Master Builders launched its first health and safety campaign with the aim of taking a proactive approach to improving safety within the construction industry. For many years we felt that our approach along with the Government's has been focused on reactive policy, where we only respond where issues occur. The shift towards a proactive approach has seen us establish a member working group that has identified several key risk areas to address with education and improvement activities over the next two years. Whilst the issues that have been chosen are not causing significant numbers of injuries at present (according to WorkCover statistics), they are either difficult to interpret or achieve compliance in the workplace or have the real potential to be high risk factors in the future.

Master Builders commends the government on their commitment to developing new campaigns, making new partnerships and delivering more education programs however sees great value in addressing those issues that are identified through lead indicators as well as other lag statistics.

Lead v Lag indicators

As outlined above Master Builders supports the efforts of the Department to promote better management and control of risks that cause high frequency injuries and illnesses. However, we believe that when only focusing on these risk areas there is a tendency and real potential to lose focus on the risks that cause high-consequence, low frequency illnesses and injuries or even fatalities.

Often this conflict is caused by only relying on lag indicators in order to establish those "high need" areas, which in the case of the Department is garnered from the Workers Compensation statistics both regionally and nationally. There are several known key reasons that lag indicators aren't the most effective way to measure WHS issues:

- They lack predictive power by waiting for incidents to occur before implementing safety measures.
- Measurement of these can be expensive due to the cost of first having the incident occur, rather than having the ability to predict and stop the incident.

- They do not support continuous learning opportunities. As a company experiences less injuries then the use of lagging data becomes less efficient, and lesser opportunities for improvement can be realised.

The use of lead indicators as a measure of health and safety performance helps to prioritise where the effort is needed in order to reduce catastrophic injuries to people, and this will often lead to inadvertently reducing other lower consequence, higher frequency injuries. Leading indicators are used to drive or measure activities that will aid in preventing or controlling an incident or injury before it occurs.

It is well known that if a business is too focused on managing and preventing risks associated with lag indicators there is a much higher chance that a risk that could result in serious injury or death could be overlooked. Injury patterns are simply not commensurate with claims patterns and often while we are "looking at a sprained ankle, a person could be falling from an exposed edge that went unnoticed" due to the focus being in the high frequency incidents.

Many of the larger business within the construction industry have moved to sophisticated models of record keeping to become proactive in their businesses. They have implemented systems that are in line with the sophistication of their business, targeting issues that are relevant to the workers and the workplace and ensuring that their systems cannot be manipulated to improve the outcomes.

Like any business, the Department can establish a system that can measure lead indicators. The key to this is to look to the industry for support, so that existing data can be sought from influential businesses in an impartial way, as well as through the proper analysis (or improvement of) data and information collected by inspectors and education providers about the emerging risks in workplaces in general.

Whilst no system of measuring the industry's performance is perfect it is important that the department use a method that takes into account both lead and lag indicators. In this way both current and future risks can be addressed through the various compliance and education campaigns.

Master Builders recommends that the Department look further into the creation of a leading indicators platform. We would recommend that this is done in consultation and co-operation with the industry in a way that encourages both the Department and the industry to share information that will lead to identifying the emerging issues on an ongoing basis.

A useful document to refer to about developing a lead indicator platform is "*Definitive Guide to Leading Indicators*" by Ecompliance Management Solutions Inc.

Capability of the inspectorate/ investigations/ department

Master Builders has identified three key areas of improvement that could be made in relation to the performance of the inspectorate, investigations and the department generally.

Allocation of inspectorate resources

The discussion paper at page 12 provides information about the number of inspectors allocated as advisers or inspectors, as well as those specifically allocated as construction inspectors.

Whilst we can appreciate that the construction industry is a high risk industry and unfortunately contributes to a large portion of the overall injury, illness and fatality statistics each year, the construction industry, based on more recent statistics, is not the worst performing industry with agriculture and transport comparatively experiencing much larger failings in performance.

Based on these statistics, it could be said that these other industries could benefit from a greater inspectorate presence, therefore giving justification for additional inspectorate resources or reallocation of current resources.

Adequacy of training of inspectors

The Review discussion paper highlights the training and education that the inspectorate undertake to ensure they are fit to undertake their duties as an inspector under the legislation. The broader industry stakeholders are largely unaware of the training, education and recruitment processes that is undertaken by inspectors. Greater transparency in this space would assist in being able to provide more detailed recommendations about not only the accredited or approved training they are provided but other vocational or soft skills training that may be necessary for inspectors to be more effective in their role.

Historically inspectors have been employed to play a punitive role, for example to play the "police officer" and implement punitive actions. Following the enforcement review of 2008 and the changes with harmonization, the Government has expected the inspectorate to shift their approach from one of punitive action to a balanced approach of punitive and educative/advisory action. This shift in approach has been very positive in improving the safety outcomes in workplace as it allows the inspector to not only play the role of police offer but also one of educator.

Whilst this changes over the last 10 years has been gradual, the inspectorate has had very little turnover in their staff base, so those that were employed in the early years (years of punitive action) are still in the inspectorate and are expected to be performing the dual punitive/educative role. Although this sounds simple, those two roles are very different and require inherently different skillsets, some of which the longer standing inspectors were not employed for or inherently do not have.

In our experience and based on anecdotal feedback, inspectors are inclined to approach matters in a either wholly punitive style or wholly educative style and there are only a few who have really been able to strike a good balance. We believe there may be several reasons for this, in particular:

- The focus on training to read legislation and exercise inspector powers rather than "soft skills" such as communication and interpersonal skills.
- Lack of exposure to how to go about educating someone, i.e training in basic educative skills.
- Not being provided consistent and ongoing training or guidance in how to interpret certain legislation on site and provide examples to workers and employers.
- Inconsistency in messaging from internal stakeholders (i.e. directors and managers) about new legislation, new interpretations, changes to internal and external policy, and what is expected of their role.

Master Builders members have experienced firsthand the inconsistency between the individual inspectors and regions about expectations in relation to new on-the-spot fine legislation and the interpretations of these expectations. Whilst the changes had been publically gazetted by the Government and widely advised by industry associations, reports from members of the industry have come back suggesting that inspectors either were not aware of the changes, were not able to provide clear interpretations of the relevant legislation to which they relate, or gave the impression that the changes were not important.

For example, one report suggested that the inspector said that "there was nothing to really worry about, because he never gave out fines", where as other feedback has suggested that some inspectors are very serious about giving out fines. This is a clear example of how an internal message has either not properly been sent out to the inspectors, or there has been little action taken to properly communicate the overall intentions of the Government by introducing the new legislation.

With examples like this a regular occurrence over the last 10 years, and with a largely unchanged inspectorate workforce, it brings into question the effectiveness and validity of the monitoring and disciplinary systems the department use to ensure their inspectorate are providing correct advice. It must be noted that when we have raised these inconsistencies with the Department they have taken swift action to resolve the immediate issue, however the internal process by which this happens may need to be more transparent or further examined for its ongoing effectiveness.

It is good governance to ensure that the decisions and actions/ or inaction of the inspectors is properly recorded, and monitored to ensure that the right decisions are being made, the internal enforcement and interpretive policies are being followed and that the inspector is receiving ongoing and regular upskilling in all areas of law and all workplace types.

Master Builders recommends that the inspectors receive additional training in "soft" skills as well as receiving more regular and consistent messages about the expectations and interpretations of the current rules and policies. Additionally, we recommend that where an inspector is failing to meet the balance of enforcement, that this person be appropriately managed to ensure they are given further training or alternatively, disciplinary action.

Timeliness of prosecutions

Unfortunately, it has become the expectation within industry that if legislation is breached (through injury or incident) and a prosecution may result, the decision to prosecute is likely to be notified to the defendant only within the last couple of months before the two-year statute of limitations timeframe has lapsed. This goes against the stated objective of the legislation and DPP guidelines and National Policy that prosecutions be brought in a timely fashion.

Whilst it is understood that in complex cases it may take a long time to make a case for prosecution and the delay may therefore be justified, even some of the seemingly simplest cases are being notified within (sometimes) several weeks before the cut off. This raises several key concerns:

- what are the deficiencies within the investigative mechanisms that are delaying the ability to make swift and accurate decisions?
- closure and retribution for those involved is being unnecessarily delayed.
- opportunities to rectify issues and achieve better safety outcomes for the industry and the workplace in a timely manner are lost due to the delay in holding persons to account or being able to negotiate an enforceable undertaking.

There needs to be greater accountability for the Regulator internally for ensuring that the decision to prosecute is done in the shortest possible timeframe so that the best safety outcomes can be achieved.

It is for this reason as well that the introduction of a prosecutions stakeholder board should not be introduced as it is likely to further slow down what is obviously already a long decision making process.

Event/fatality industry notification policy

When a serious event (i.e. near miss or serious incident) or a fatality occurs, there is a desire by industry to learn from these incidents and ensure that they do not make the same mistakes.

Currently, when these occur the majority of information about the incident is garnished from media reports and social media information that may or may not be accurate on fact. Whilst the Department will release a notice (sometimes several days after the event) that an event or fatality has occurred, they do not release any detailed facts or advice that will assist employers in immediately reviewing their own safety practices to ensure that the risk is managed adequately.

For example, a recent fatality occurred on a greenfield site where a person died as a result of an incident with moving plant. There was no communication from the department about this, the media was surprisingly quiet, and the only information about the incident could be found on the CFMEU facebook page.

Employers and safety professionals rely on the Department (and their associations) to keep them up to date on emerging issues, and incidents that might result in a need to change existing processes to prevent similar serious injuries or deaths. The current

process that is used by the Department is inconsistent, lacks basic facts and advice, and does not provide the necessary information that may lead to better safety outcomes.

Master Builders recommends that the Department develop a consistent approach to how they manage information and public notification post a serious event or fatality and publish that process so that employers, workers, associations and unions are aware of what to expect and look out for in these circumstances.