



**MASTER BUILDERS
AUSTRALIA**

**SUBMISSION TO
SENATE EDUCATION, EMPLOYMENT AND WORKPLACE
RELATIONS COMMITTEE**

ON

WORK HEALTH AND SAFETY BILL 2011

27 July 2011

Master Builders Australia Limited ABN 68 137 130 182

building australia



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1. INTRODUCTION

- 1.1 This submission is made by Master Builders Australia Limited (Master Builders).
- 1.2 Master Builders is Australia's peak building and construction industry association, federated on a national basis in 1890. Master Builders' members are the nine Master Builder State and Territory associations.
- 1.3 Over the past 120 years the association has grown to represent over 30,000 businesses nationwide. Master Builders is the only industry body that represents all three building and construction sectors: residential, commercial and engineering.

2. PURPOSE OF SUBMISSION

- 2.1 Master Builders is responding to the inquiry into the *Work Health and Safety Bill 2011* (Cth) (the Bill). Master Builders first, by way of background, sets out its broad view of the harmonisation process.
- 2.2 Secondly, this submission outlines very strong concerns about proposals to amend the Bill to introduce union right of prosecution and industrial manslaughter provisions.

3. BACKGROUND

- 3.1 Master Builders has taken and continues to take an active interest in the work health and safety harmonisation process including the preparation of four formal submissions to the Review Panel charged by the Government with making recommendations about the shape of the model legislation. The four submissions covered offences relating to workplace death; inconsistencies in the implementation of the National Standard for Construction Work in State and Territory legislation and regulations; right of entry and the questions and matters included in the Issues Paper for the National Review into Model WHS Laws. Following the release of the Review Panel's reports, in May 2009 and July 2009, Master Builders made two further submissions to the Government on aspects of the Review Panel's reports of concern to the building and construction industry, including how the model legislation proposed to deal with safe design and right of entry.

- 3.2 Master Builders is also actively engaged in the process for the development of the model work health and safety regulations. This includes involvement through various temporary advisory groups (on prevention of falls in housing, licensing and asbestos) and provision of advice to the industry representatives on policy committees established by Safe Work Australia. Master Builders also made a comprehensive submission to Safe Work Australia on the draft model regulations and codes of practice.
- 3.3 Master Builders supports harmonisation of work health and safety laws provided that the process results in a regulatory framework which is fair and reasonable for the construction industry, and in particular for the vast majority of businesses in the construction industry which do not operate in more than one jurisdiction.
- 3.4 On balance, Master Builders considers that the *Work Health and Safety Bill 2011* (Cth) achieves the objective set out in the prior paragraph, in particular because it does not contain a number of features of existing work health and safety laws which are unnecessary and contrary to good public policy; these being union right of prosecution, reverse onus of proof and offences for industrial manslaughter.
- 3.5 While Master Builders broadly supports the *Work Health and Safety Bill* (and the mirror legislation in other jurisdictions), there are aspects of the Bill which are of concern to the industry. The three major issues are that the Bill will result in expanded duties for principal contractors¹; right of entry provisions are extensive and are potentially open to abuse; and there will be multiple and overlapping duty holders.
- 3.6 Master Builders, despite these concerns, recognises that harmonisation of work health and safety laws is an important regulatory reform and one that has benefits
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¹ This is as a result of using the terms “person conducting a business or undertaking” and “worker” rather than employer and employee. This will result in expanded duties in Victoria, South Australia and Western Australia, where independent contractors are currently deemed to be employees for the purposes of the primary duty of care, but only in relation to matters over which the employer has control or would have control if not for an agreement purporting to limit or remove that control. There is no control test in the primary duty of care in the *Work Health and Safety Bill*. In New South Wales, principals must ensure that contractors are not exposed to risks arising from the conduct of the employer’s undertaking (section 8(2) of the *Occupational Health and Safety Act 2000* (NSW)). In Tasmania the duty (section 9(5) of the *Workplace Health and Safety Act 1995* (Tas)) is similar to that in New South Wales - principals must not allow a contractor engaged by the employer or any person employed or engaged by that contractor to carry on work for the employer at the employer’s workplace in a manner which the employer reasonably believes would place at risk the health and safety of any person. This is very different to the primary duty of care in the *Work Health and Safety Act*, which as noted above requires the provision of such things as safe plant, safe systems of work and information, supervision and training.

for industry, in particular those companies which operate in more than one jurisdiction. Master Builders is prepared to support the *Work Health and Safety Bill* (and mirror legislation in other jurisdictions) provided that it is not amended to include provisions along the lines of those outlined in paragraph 3.4 above. Master Builders' reasons for opposing union right of prosecution and industrial manslaughter provisions are outlined below in sections 4 and 5 of this submission.

4. UNION RIGHT OF PROSECUTION

4.1 Two jurisdictions currently include union right of prosecution in their work health and safety legislation – New South Wales² and the Australian Capital Territory³. The NSW provisions have been in place for some 60 years, whereas the ACT provision is relatively new, having been introduced with the passage of the *Work Safety Act 2008* (ACT).

4.2 As part of the work health and safety harmonisation process, the NSW Government had sought to remove union right of prosecution with the introduction of the *Work Health and Safety Bill 2011* (NSW) (NSW Bill). However, the opposition and minor parties in the Legislative Council amended the NSW Bill to retain union right of prosecution and these amendments were subsequently agreed to by the NSW Legislative Assembly. Section 230 of the *Work Health and Safety Act 2001* (NSW) is therefore as follows:

(1) Subject to subsection (4), proceedings for an offence against this Act may only be brought by:

(a) the regulator, or

(b) an inspector with the written authorisation of the regulator (either generally or in a particular case), or

(c) the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the proceedings relate, but only as permitted by subsection (3) if the offence concerned is a Category 1 offence or a Category 2 offence.

....

² Section 106 of the *Occupational Health and Safety Act 2000* (NSW) provides that the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the proceedings relate is able to bring a prosecution

³ Section 218 of the *Work Safety Act 2008* (ACT) (ACT Act) provides that the secretary of a registered organisation established to represent the interests of workers can commence a prosecution for failure to comply with duties under the Act. The section also allows a prosecution to be brought by the chief executive officer of a registered organisation established to represent the interests of employers. The concerns relating to union prosecution discussed below are equally applicable to prosecutions brought by industry associations and Master Builders therefore does not support this provision of the ACT Act.

(3) The secretary of an industrial organisation of employees can bring proceedings for a Category 1 offence or a Category 2 offence only if the regulator has (after referral of the matter to the regulator and the Director of Public Prosecutions under section 231) declined to follow the advice of the Director of Public Prosecutions to bring the proceedings.

- 4.3 Master Builders understands that amendments may be similarly sought to the Commonwealth's *Work Health and Safety Bill* to introduce union right of prosecution along the lines of the provisions in the NSW Bill as enacted.
- 4.4 Master Builders strongly rejects union right of prosecution. Master Builders considers that the authority to prosecute and to commence criminal proceedings should rest solely with the State. A prosecutor represents all members of the community and cannot, therefore, act as if representing private or factional interests. Unions, by their very nature, represent the interests of employees and therefore cannot represent the entire community. To empower them with the ability to prosecute is akin to empowering employers with the ability to prosecute employees for a breach of health and safety, an issue that would be viewed as inappropriate by the community. Master Builders believes such an approach is bad law and is supported in this view by the Review Panel consideration and recommendation of this matter.
- 4.5 The expert Review Panel which made recommendations on the model laws gave extensive consideration as to whether the model laws should include the right of private prosecutions.
- 4.6 The Review Panel recommended against such a provision because of the legitimate concerns of many stakeholders that private prosecutions can be seen as compromising the objectivity, credibility and effectiveness of enforcement. The Review Panel identified three major concerns with private prosecutions⁴:
- 4.6.1 There are serious practical difficulties (such as lack of resources which may undermine the evidence base).
- 4.6.2 Private prosecutions are not subject to the same safeguards as prosecutions brought by the State, such as application of prosecution

⁴ National Review into Model OHS Laws: Second Report to WRMC – January 2009, pages 343-344.

policies, review of decisions and other public sector accountability measures.

- 4.6.3 Private prosecutions can disrupt other enforcement activities, such as enforceable undertakings or other measures that the regulator considers as more appropriate or proportionate in the circumstances of a particular case.
- 4.7 Master Builders considers that the Review Panel's consideration of this issue is sound and clearly establishes the reasons why union right of prosecution is inappropriate.
- 4.8 Instead of union right of prosecution, the Review Panel recommended that only the Crown should be able to prosecute but with accountability for inaction or a decision not to prosecute. The Review Panel considered that this option has the benefits of ensuring that the resources, expertise and accountability of the Crown are always applied to prosecution decisions and proceedings. The Review Panel also considered that this approach would facilitate the graduated enforcement of compliance with the model legislation.⁵ Master Builders supports this recommendation.
- 4.9 The Bill reflects the Panel's recommended approach. While it does not include union right of prosecution, it does contain safeguards to address inaction by regulators. Section 231 of the Bill includes detailed procedures to deal with cases where prosecutions are not brought by the regulator for the most serious offences under the model legislation (those involving reckless conduct or failure to comply with a duty which exposes an individual to a risk of death or serious injury or illness). The section is as follows:

(1) If:

- (a) a person reasonably considers that the occurrence of an act, matter or thing constitutes a Category 1 offence or a Category 2 offence; and*
- (b) no prosecution has been brought in relation to the occurrence of the act, matter or thing after 6 months but not later than 12 months after that occurrence;*

the person may make a written request to the regulator that a prosecution be brought.

(2) Within 3 months after the regulator receives a request the regulator must:

⁵ Ibid, page 345

- (a) *advise the person (in writing):*
 - (i) *whether the investigation is complete; and*
 - (ii) *if the investigation is complete, whether a prosecution has been or will be brought or give reasons why a prosecution will not be brought; and*
- (b) *advise the person who the applicant believes committed the offence of the application.*

(3) If the regulator advises the person that an investigation has been conducted and that a prosecution for a Category 1 or Category 2 offence will not be brought, the regulator must:

- (a) *advise the person that the person may ask the regulator to refer the matter to the Director of Public Prosecutions for consideration; and*
- (b) *if the person makes a written request to the regulator to do so, refer the matter to the Director of Public Prosecutions within 1 month of the request.*

(4) The Director of Public Prosecutions must consider the matter and advise (in writing) the regulator as soon as is practicable as to whether the Director considers that a prosecution should be brought.

(5) The regulator must:

- (a) *notify the following persons in writing whether the Director of Public Prosecutions considers that a prosecution should be brought:*
 - (i) *the person who made the request;*
 - (ii) *the person who the applicant believes committed the offence; and*
- (b) *must include in the notice given to the person who made the request a summary of the reasons given by the Director of Public Prosecutions for his or her decision.*

(6) If the regulator declines to follow the advice of the Director of Public Prosecutions to bring proceedings, the regulator must give written reasons for the decision to any person to whom information is given under subsection (5).

4.10 This is a very comprehensive procedure for dealing with the failure by the regulator to bring a prosecution. Master Builders considers that this process obviates the need for private prosecutions. It strikes the right balance between maintaining the integrity of the prosecution process (hence avoiding the difficulties identified by the Review Panel) and providing unions and other stakeholders with a rigorous and transparent process for seeking a comprehensive review of cases where prosecutions are not brought.

5. INDUSTRIAL MANSLAUGHTER

5.1 Master Builders would be strongly concerned if as part of harmonisation of laws governing workplace health and safety that amendments may be sought, either to the Bill or to the Criminal Code, which would introduce industrial manslaughter offences. Master Builders understands that the Green's Employment and Industrial

Relations policy⁶ includes a proposal to introduce national industrial manslaughter laws.

- 5.2 Master Builders is strongly opposed to such a policy.
- 5.3 In accordance with the recommendations of the Review Panel, the Bill takes a graduated enforcement approach to breaches of the legislation. There is a range of enforcement options which provides regulators with the flexibility to match their responses to the facts of the case. The enforcement options include provisional improvement notices, prohibition notices, non-disturbance notices, enforceable undertakings⁷ as well as three levels of penalties⁸. The highest level of penalty is reserved for a breach by a duty holder where the person, without reasonable excuse, engages in conduct that exposes an individual to a risk of death or serious injury or illness and the person is reckless as to the risk to an individual of death or serious injury or illness. There are substantial penalties for this offence - up to \$3 million for a body corporate and fines and/or 5 years imprisonment for individuals.⁹
- 5.4 Master Builders supports the compliance and enforcement approach adopted in the Bill although the construction industry is concerned about the impact of the highest level of penalty on businesses, particularly on small businesses. The “tall” work health and safety enforcement pyramid, with many levels, provides scope for a proper escalation of enforcement responses by regulators, and provides regulators with flexibility to tailor their response to the facts. It provides a framework to facilitate an agency’s efforts to promote prevention. It also creates incentives, including through enforcement action, to address systemic failures before they result in injury or death.
- 5.5 Master Builders has a demonstrated commitment to improving safety outcomes in the building and construction industry but does not support separate industrial manslaughter offences in the Criminal Code and believes that offences for reckless conduct should be at the top of the work health and safety enforcement pyramid.

⁶ See paragraph 41 of the policy which is available through the following link <http://greens.org.au/policies/sustainable-economy/employment-and-industrial-relations>

⁷ Clauses 191, 195, 198 and 216 of the *Work Health and Safety Bill* respectively

⁸ Clauses 31 to 33 of the *Work Health and Safety Bill*

⁹ Clause 31 of the *Work Health and Safety Bill*

- 5.6 Industrial manslaughter offences do not strike the right balance between prevention and cure. They are linked solely to the outcome of non-compliance. The principal motivations for industrial manslaughter prosecutions are moral, symbolic and retributive.
- 5.7 Master Builders therefore does not believe that industrial manslaughter provisions are an effective way to improve safety outcomes.
- 5.8 The issue of industrial manslaughter has been examined by a number of major reviews of work health and safety laws, including the review of the Victorian Occupational Health and Safety Act by Chris Maxwell in 2004¹⁰ and more recently the National Occupational Health and Safety Review which examined harmonised work health and safety legislation. Both of these reviews rejected outcome based offences such as industrial manslaughter.
- 5.9 The Maxwell Report distinguished between work health and safety offences and manslaughter, noting their different character. The Report commented that with work health and safety offences it is the breach of the duty not the causing of the death which gives rise to the offence. With manslaughter, on the other hand, it is the causing of a death, which constitutes the offence, which the report concluded properly remains within the province of the general criminal law¹¹.
- 5.10 The Review Panel which examined harmonised work health and safety legislation supported this view. The Review Panel concluded that it is consistent with the overall aims of work health and safety regulation to provide for the sanction to relate to the culpability of the offender, not to the seriousness of the consequences. They expressed concern that the natural abhorrence felt towards work-related deaths should not lead to an inappropriate response¹².
- 5.11 Master Builders considers that the Bill provides an appropriate framework for dealing with workplace deaths. There can be no doubt about the deterrence effect of the high maximum fines as provided for in clause 31 of the Bill. This notion is reinforced in the light of the scope for courts to deal appropriately with the most serious breaches of the work health and safety law.

¹⁰ Chris Maxwell, *Occupational Health and Safety Act Review*, March 2004

¹¹ *Ibid*, page 14

¹² National Review into Model OHS Laws: First Report to WRMC – October 2008, page 135

5.12 The Bill also seeks to achieve a balance between prevention and punishment. It is particularly important in this context to consider the implications of the duty for officers provided for in the Bill. For the first time in Australia, officers will be allocated a duty in their own right, rather than being merely attributed with liability for conduct that is committed by their company. Under clause 27 of the Bill, officers of a business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with their duties and obligations under the legislation. Work health and safety commentators have described this as the most important reform being made by harmonisation because it will require officers to take positive and proactive steps to ensure that their business or undertaking has the systems and procedures in place to meet its work health and safety obligations. In *Understanding the Model Work Health and Safety Act*, Sherriff and Tooma describe this as one of the most important reforms of the model Act and they conclude that the duty “is onerous and requires vigilance by officers to personally ensure that their organisation is complying with its obligations.”¹³

5.13 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 a more effective approach to work health and safety regulation than industrial manslaughter provisions or corporate manslaughter provisions such as those provided for in the *Corporate Manslaughter and Corporate Homicide Act 2007* (C.19) (UK)¹⁴. It shifts the emphasis to ensuring that those people in the best position to demonstrate safety leadership do so, rather than solely on punishing 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 level feedback.

5.14 In Master Builders’ view, any introduction of industrial manslaughter offences fails to take proper account of the terms of the Bill, and in particular the proactive officer duty and the graduated enforcement provisions. Industrial manslaughter offences are out of step with work health and safety harmonisation and are unwarranted. The motivation for their introduction seems awry.

¹³ Barry Sherriff and Michael Tooma, *Understanding the Model Work Health and Safety Act*, 2010, page 47

¹⁴ Under the UK Act, liability for an offence which causes the death of a person depends on a finding of gross negligence in the way in which the activities are managed or organised in the organisation as a whole, rather than being contingent on the guilt of one or more individuals.

6. CONCLUSION

- 6.1 Master Builders strongly recommends that the Bill be passed without amendment. The process for developing the model work health and safety laws has been long and rigorous, involving extensive consultation with all stakeholders. There have been many considerations taken into account along the way so that this important reform can proceed. Last minute changes to the agreed outcomes of this process, particularly to introduce changes that have been thoroughly considered and rejected for sound reasons, can only undermine work health and safety harmonisation.
- 6.2 Master Builders by this submission contends that not only are union right of prosecution and industrial manslaughter provisions inconsistent with harmonisation, they are also unnecessary given the approach adopted in the Bill. Master Builders therefore strongly recommends that the *Work Health and Safety Bill* not be amended to include either matter.

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