

Modernising Work Health and Safety Laws in Western Australia

Submission by Master Builders Association of Western Australia

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Submission

Model Work Health and Safety Bill 2016

<p>Section 4 Definitions Representative (b)</p>	<p>Structure</p> <p>The definition of structure is too broad. It captures anything constructed whether fixed, moveable, temporary or permanent and includes <i>any component of a structure and part of a structure</i>.</p> <p>For example, the installation of a power point in an existing structure is arguably <i>a component of a structure and part of a structure</i> under the proposed definition.</p> <p>Master Builders contends the installation of a power point alone cannot be treated as being a component of, or part of a structure, but that is what the definition broadly proposes.</p> <p>This definition needs to be tightened to relate to what forms part of a structure’s integral structural support not inclusive of ancillary components.</p>
<p>Section 5 - Meaning of person conducting a business or undertaking</p>	<p>Master Builders supports this definition.</p>
<p>Section 7 - Meaning of worker</p>	<p>Master Builders does not raise an issue with this definition.</p>
<p>Section 8 - Meaning of workplace</p>	<p>Master Builders does not raise an issue with this definition.</p>
<p>Section 16 - More than 1 person can have a duty</p>	<p>Master Builders accepts the thrust of this definition, especially having regard for definition of a PCBU in section 5.</p>
<p>Section 17 - Management of risks</p>	<p>Master Builders accepts the basis of this section but recommends it be linked back to s16 given one has to infer the shared duty of care set out in s16 carries over to s17.</p>
<p>Section 18 - What is reasonably practicable</p>	<p>Master Builders supports the proposed definition.</p> <p>Master Builders note Safe Work Australia has issued an Interpretative Guideline on the meaning of what reasonably practicable is. Master Builders sees sense in WorkSafe WA issuing a similar document. Such a guide will be helpful to duty holders.</p>
<p>Section 22 - Duties of PCBU that design plant, substances</p>	<p>Master Builders refers to clause 4 Definition which defines “structure”. This definition includes the term “buildings.”</p> <p>Commercial and construction builders will by the proposed definition be</p>

<p>or structures</p>	<p>captured by sections 22,23,24,25 and 26.</p> <p>The scope of sub-section 22(2)(e)(iii) captures a builder having a duty of care, so far as is reasonably practicable, in the demolition or disposal of a structure built by the builder.</p> <p>Sub-section 3 then imposes a duty of the designer, which includes a builder, to conduct an analysis of the duties imposed under section 22. This means a builder must analyse the future disposal or demolition of a structure.</p> <p>Master Builders points out buildings generally have a very long life and a builder will have little control over what the owner of a building, once completed by the builder and handed over to the owner, intends to use it or modify it at some future date. Owners of buildings change over time meaning a new future owner may have very different views about what purpose the building is used for. Such modification can include refurbishment of old buildings. Equally, a builder will have no control over how a building might be deconstructed in say 20 or 30 or 40 or more years time after the building was built. New technologies can dramatically change the deconstruction process.</p> <p>Master Builders does not support the imposition of a duty of care on a builder in circumstances a builder will have no control over.</p> <p>In the alternate, Master Builders suggests consideration might be given to section 30B(3) of the previous Workplace Health and Safety Act 1995 (Qld). This section required consideration of standards at the time a structure was designed. That is, a builder’s duty is limited in a known point in time. Otherwise the adage of a builder having to be aware of unknown unknowns applies in connection with some unknown future use of a structure or its future deconstruction at some unknown future time. Such a notion has little merit and does not represent best practice in legislation.</p>
<p>Section 23 - Duties of PCBU that manufacture plant, substances or structures</p>	<p>See above comments for section 22.</p>
<p>Section 25 - Duties of PCBU that supply plant, substances or structures</p>	<p>See above comments for section 22.</p>
<p>Section 26 - Duty of PCBU that install, construct, or commission plant or structures</p>	<p>See above comments for section 22.</p>
<p>Section 27 - Duty of</p>	<p>Section 27(5) sets out a definition of “due diligence” which impose a</p>

<p>officers</p>	<p>positive duty on an officer of a PCBU to do certain things. The converse is, a failure to meet that positive duty renders a PCBU officer liable for a breach of the duty and potentially exposed to prosecution and penalties under the Bill.</p> <p>Master Builders contends the circumstances set out in sub-section 27(5)(a) through (e) are unclear in their practicability. For example, sub-section 27(5)(b) imposes a positive duty on a PCBU officer to “gain an understanding of the nature of the operations of the business and generally of the hazards and risks associated with those operations”.</p> <p>Sub-section 27(5) provides no guidance on how a PCBU officer can meet the due diligence test about how they can obtain an understanding of the operations of the business and make themselves generally aware of the workplace hazards and risks. The obligation imposed on PCBU officers of large corporations can be significant given such officers must appraise themselves of the hazards/risks of each separate business workplace.</p> <p>For larger tier one commercial builders, office bearers will have sophisticated reporting mechanisms which includes reporting on workplace safety. However, the residential sector is a very different subset of the building industry. It follows, the extension of s27(5) is these office bearers must be aware of the hazards and risks of each of a residential builder’s individual housing construction sites. As some WA residential builders build up to 2,000 houses per year this is an enormous, cumbersome and expensive exercise.</p> <p>Master Builders contends section 27 must have greater clarity on what due diligence is meant to be, especially given the significant penalties proposed under the Bill for PCBU office bearers. Master Builders does so on the basis s27(5) appear more suited to a fixed place of work or fixed places of work, with a stable workforce. That is, say a metal fabrication factory, retail shop, whereas, building sites have a changing workforce depending on the work being undertaken at any given time of the construction programme, and the worksite itself changes daily as the construction process unfolds. Put another way, the safety hazards presented at the start of site construction vary differently to what safety hazards may exist in the middle of the construction programme and differ, again greatly, at the end of the construction programme for fit out of a building.</p>
<p>Section 31 - Reckless conduct category - 1</p>	<p>Master Builders notes the WA Government has tabled a Bill in the WA Parliament to increase penalties over what is set out in the 2016 federal Model WHS Bill. Master Builders does not support the move to impose penalties above what is set out in the WHS model 2016 Bill.</p> <p>Master Builders also raises concern about the level of penalties set out in the 2016 federal model WHS Bill when weighed against the 97% of all WA employers being SMEs, as rightly pointed out by Premier Mark McGowan, which represent the majority of employers in WA. Master Builders does not call for there being no penalties for reckless conduct by employers resulting in serious injury or death of an employee at a workplace and never has.</p>

	<p>However, given the import of the introduction of the notion of the PCBU and duty of care attached to this entity Master Builders says there must be greater flexibility in any sentencing provisions for SMEs.</p> <p>Master Builders submits the focus of the Category 1 penalties is directed to large corporations or the 3% of large employers in WA. However, the lack of sentencing options including an extension of legally enforceable undertakings does not provide sentencing equity for a SME involved in this type of prosecution. It also acts as a disincentive for SMEs, and for individuals who want to start up a SME. That is, Master Builders says the WA Government must bear in mind the long term consequences of imposing draconian penalty laws on small employers which simply causes small employers to close their doors as the risk is too great to continue trading or to be a start up business.</p> <p>Add this against the current tough economic circumstances faced by the WA economy and any adverse influence on SMEs and employment levels cannot be ignored by the WA Government. That is why, Master Builders contends there must be more flexibility in sentencing provisions under Category 1 prosecutions.</p> <p>Master Builders points to industry statistics which show a drop in new single home starts in WA by as much as 41% since 2015. The construction Training Fund in its Snapshot July 2018 indicated a reduction in commercial construction activity by 20%. Economic modelling for the next 3-4 years in the WA building industry is pessimistic about any major uptick in building industry activity. Master Builders raises this economic data as a backdrop to the onerous financial penalties proposed in the Bill which impact predominantly on small employers. Such penalties only act as a disincentive for small business.</p> <p>Master Builders also looks to NSW for support on this matter. The NSW Regulator agreed to a legally enforceable undertaking with Willian John Seery as an employer (PCBU) following the death of a worker on 20 March 2014. The circumstances were seen as “exceptional” and undertakings considered appropriate given the circumstances notwithstanding the workplace fatality being a Category 1 incident.</p> <p>Master Builders says the above example of Seery provides clear demonstration of the need for flexibility in Category 1 and Category 2 penalty provisions. Having rigid penalty provision does not offer the equitable outcome as Seery.</p>
<p>Section 32 - Failure to comply with health and safety duty category - 2</p>	<p>See comments for section 31 above.</p>
<p>Section 33 - Failure to comply with health and safety duty –</p>	<p>See comments for section 31 above.</p>

category 3	
Section 38 - Duty to notify of notifiable incidents	<p>Sub-section 38(1) imposes penalties of up to \$10,000 for an individual and up to \$50,000 for a corporation for failure to notify the regulator of a notifiable incident.</p> <p>Master Builders opposes the level of penalties imposed by the Bill and contends the status quo penalty regime under the OSH Act 1984 be retained for general penalties in matters of this type. Master Builders does so in line with its submission in s31.</p> <p>In the alternate, should Master Builders position not be accepted, Master Builders then points to s74 of the 2016 draft Bill for guidance on this matter. The penalties in s74 offer a suitable benchmark and as they are contained in the Bill, cannot be dismissed as having no substance.</p>
Section 39 - Duty to preserve incident sites	<p>See comments regarding s31,s32,s33,s38 and s74 in connection with the proposed penalties.</p> <p>Master Builders contends the limited scope to allow disturbance of a work site where a notifiable incident has occurred is too narrow. Whilst sub-section 39(1) conditions non-disturbance so far as it is reasonably practicable, circumstances can mean an entire worksite is shut down until the regulator provides authorisation that work can re-commence in areas not related to the notifiable incident.</p> <p>Master Builders propose sub-section 39(3) be clarified to allow a PCBU to determine what part of a work site can be described as associated with a notifiable incident and what part of the workplace is not, allowing work to continue in areas not directly connected with the notifiable incident.</p>
Part 4 – Authorisations - Requirements for authorisations of workplaces	See comments regarding s31, s32, s33, s38 and s74.
Part 5 – Consultation, representation and participation	See comments regarding s31, s32, s33, s38 and s74.
Section 70 - General obligations of PCBU	<p>Master Builders notes a PCBU must allow a person assisting a HSR for a work group to have access to a workplace via sub-section 70(1)(g) but this is conditioned by sub-section 68(3B). Master Builders strongly endorse this. Master Builders says to avoid conflict at the workplace a note be included in sub-section 70(1)(g) linking to the requirements of sub-section 68(3B).</p> <p>See comments regarding s31, s32, s33, s38 and s74 on penalties.</p>
Section 71 - Exemption from obligations under	See comments regarding penalties under s31, s32, s33, s38 and s74.

section 70(1)	
Section 72 - Obligation to train health and safety representatives	See comments regarding penalties under s31, s32, s33, s38 and s74.
Section 74 - List of health and safety representatives	<p>Master Builders opposes the need for s74 on the basis of imposing unnecessary red tape on employers and particularly a PCBU.</p> <p>Master Builders notes the reduced penalties of \$2,000 and \$10,000 in this section and suggests such penalties might offer a reasonable benchmark for general penalties under the Act in the absence of picking up Master Builders recommendation in s38.</p>
Section 75 – Health and safety committees	See comments regarding penalties in s38 and s74.
Section 79 - Duties of PCBU	<p>Master Builders objects to s79. As drafted the section fails to recognise the practicality of the requirements of the workplace and, at times, inability of a PCBU to allow a member of a safety committee time off work to attend a committee meeting.</p> <p>Master Builders points out this section appears to be more centred on a fixed place of work and fixed workforce where there is a known and established work process. It has little appreciation of the nature of construction where the work site dynamics change from the time the first shovel is turned on site to hand over of the project to a client. A construction site is an evolving workplace every day that changes from day to day, week to week and month to month. The nature of work and workers performing that work on site also changes from earth works to fit out. Construction projects are constructed on a critical path which needs to be kept as a time table to complete the project on time and on budget. Failure by a builder to meet those KPIs can and will result in a client imposing liquidated damages to recover commercial loss to the client. A HSR safety committee member having an absolute right to determine when they will attend a safety committee meeting irrespective of the impact of their absence at their worksite does not assist a co-operative environment at a workplace on safety.</p> <p>Sub-section 79(1) must be recast to take into account that a safety committee member’s absence from work to attend a safety committee meeting must also require the employer’s approval which would not unreasonably withheld.</p> <p>The penalties imposed on a PCBU for not allowing a safety committee member to attend a safety committee meeting is draconian, especially given the absence of consideration about work obligations.</p> <p>See comments regarding s31, s32, s33, s38 and s74 on penalties.</p>
Division 6 - Right to	Master Builders says Division 6 is deficient in that it fails to reflect <u>sub-</u>

<p>cease unsafe work</p>	<p><u>section 28A of the OSH At 1984.</u></p> <p>Master Builders says the above sub-section must be included in the Bill when it progresses to legislation.</p> <p>The Bill, as drafted, only imposes an obligation on a worker to make themselves available to perform alternate work if directed by a PCBU due to the worker being unable to carry out their normal work due to a serious risk to the workers’ health or safety arising from an imminent risk or exposure to a hazard.</p> <p>S88 requires payment by a PCBU to a worker under Division 6 but there is no contra obligation on a worker when refusing to perform safe alternate work when directed to by the PCBU. Whilst an employer may invoke the principle of “No Work as Directed/No Pay” under such circumstances, Master Builders says the Bill must reflect in equity the outcome that a worker who fails to undertake safe alternate work forfeits payment.</p> <p>Master Builders says the same offence provisions under sub-section 28A of the OSH Act 1984 be retained as well to provide a real disincentive to abuse of safety as an industrial relations agenda item.</p> <p>Whilst some may argue sub-section 28A of the OSH Act 1984 has been little used since introduced in 1995, Master Builders says the presence of the sub-section has been beneficial in that its lack of use is a demonstration of its validity and usefulness. There is no legitimate reason for it not to be retained.</p>
<p>Section 97 - Display of provisional notice</p>	<p>Master Builders opposes the penalties prescribed by this sub-section and they ought be scrapped.</p> <p>The proposed penalties are self defeating as all they will do is encourage a PCBU when issued a PIN by a HSR is invoke section 100 and request a review by the regulator. This will take up time and resources of WorkSafe given inspectors will be required to review a PIN. In the event a PIN is cancelled or amended, a PCBU being exposed to a penalty of not displaying a defective PIN is a nonsense.</p> <p>A real consideration is the draw on the limited Worksafe resources as inspectors are required to attend a workplace where a PIN has been issued. Inspectors will be unable to perform core duties with a consequent reduction in safety levels in WA. Such an outcome is not best practice and leads to inefficiencies in Worksafe inspectors doing their core work.</p> <p>Master Builders is aware of the limited resources of Worksafe given its membership of CISAC with the issue a constant point of discussion as the union members of CISAC consistently press for greater Worksafe action which Worksafe is unable to consider given its limited resource capacity. This provision only exacerbates an already difficult resource issue for Worksafe and is unhelpful at best.</p>
<p>Section 99 - Offence to</p>	<p>See comments regarding s31 and s97.</p>

<p>contravene a PIN</p>	<p>Master Builders say employer groups and lawyers providing advice to PCBUs must be that in the event a PIN is issued by a HSR the PCBU must immediately challenge the PIN under s100 given the excessive penalty of \$250,000.</p> <p>This only exacerbates the draw on Worksafe inspectors resources and their inability to undertake core duties. Such an outcome is not in the best public interest.</p>
<p>Section 104 – Prohibition of discriminatory, coercive or misleading conduct.</p>	<p>Master Builders accepts the need for some form of protection for persons which raise safety issues at the workplace. Master Builders opposes the penalties proposed for the reasons set out in s31 and 97.</p> <p>Master Builders also raises the issue of jurisdiction shopping in that the Fair Work Act 2009 in Chapter 3 provides for General Protections as a guard against employees being denied a workplace right. Case law in the Fair Work Commission has determined workplace safety is a workplace right, therefore, attracting the jurisdiction of the FWAct. The General Protection provisions provide for uncapped damages and reverse the onus of proof to the employer to demonstrate the alleged workplace right breach was not unlawful. Master Builders says protection against discrimination against employees who raise a safety issue at the workplace already exists. The need for the excessive penalties proposed by the Bill on this point is really a duplication of existing workplace laws. Master Builders sees no merit or benefit in duplicating penalty provisions in differing laws for what is essentially the same alleged offence.</p>
<p>Section 107 - Prohibition of requesting, instructing, inducing, encouraging, authorising or assisting discriminatory conduct</p>	<p>Master Builders does not condone discrimination against a HSR.</p> <p>Master Builders does not support the proposed penalties under section 97. See comments regarding s31.</p>
<p>Section 108 - Prohibition of coercion or inducement</p>	<p>See comments regarding s31 and 107.</p>
<p>Section 109 - Misrepresentation</p>	<p>See comments regarding s31 and 107.</p>
<p>Division 2 - Criminal proceedings in relation to discriminatory conduct</p>	<p>See comments regarding s31 and 107.</p>
<p>Division 3 - Civil proceedings in relation to discriminatory or</p>	<p>See comments regarding s31 and 107.</p>

<p>coercive conduct</p>	
<p>Section 117 – Entry to inquire into suspected contraventions</p>	<p>At the outset of this part of this submission Master Builders raises the need for complementary amendments be made to the Industrial Relations Act 1979 to repeal certain parts of s49I of the IR Act which deal with union right of entry on safety. Master Builders submits the current provision under s49I on union right of entry to investigate safety cannot be allowed to continue in parallel with s117 proposed under the Bill.</p> <p>Master Builders submits given the WHS Bill is intended to be the primary legislation dealing with workplace safety and includes right of entry to investigate safety by accredited persons other than Worksafe Inspectors, there can be no dual powers of entry. Such a situation only causes confusion for all stakeholders and is to be avoided.</p> <p>A further point of tension is Master Builders says a union official seeking to exercise right of entry to investigate an alleged safety breach under sub-section 117(1) must as part of the entry provisions advise the PCBU in control of the workplace what the alleged safety breach is, or are. This follows as Master Builders says the union official seeking entry to site will likely have some foundation to investigate an alleged safety breach but absent an obligation to advise the PCBU there exists a real possibility the union official fails in an implied duty of care to set out to the PCBU what the allege safety risk is.</p> <p>Master Builders raises this issue given the very poor track record of the CFMMEU and its antecedents abusing workplace safety as a cloak to disguise industrial relations purposes. This conclusion has been drawn in two Royal Commissions into the building industry and court cases since 2002 including the Federal Court of Australia in recent years. Master Builders says, and has done so for many years, safety in the construction sector is too important to be devalued by the CFMMEU as some form of bargaining chip.</p> <p>In support of Master Builders contentions on this point is sub-section 120(2) of the Bill in that a union official when seeking access to records to an alleged breach can only access records “directly relevant” to the alleged breach. This is a common sense position and supported by Master Builders. It follows then, a union official exercising entry under s117 can only make investigations directly relevant to the alleged breach. It is just plain simple courtesy the union official seeking entry under s117 advise the PCBU what the alleged breach(es) are as part of seeking entry. Further, a union official not advising the PCBU of what the suspected breach is can lead to an unsafe situation continuing on site. Master Builders says this goes against the fundamental intent workplace safety in that a union official chooses to allow an unsafe work situation to prevail as they do not have to identify what it is to the PCBU. Such an outcome is unsustainable and totally inconsistent with the union movements call for improving workplace safety.</p> <p>Sub-section 117(6)(b)(ii) is frankly redundant and provides grounds for a union official seeking entry to site under s117 to conduct a fishing</p>

	<p>expedition and then seek to correct, at a later date, some valid reason for entry. That is, provide no reason for entry on safety, conduct a site inspection, and then create an entry reason based on what was found NOT suspected as required under s117(1). Master Builders says union officials must first identify what the suspected safety breach is on site when seeking entry for the benefit of allowing the PCBU to deal with the suspicion. Master Builders points out a suspicion does not mean fact.</p>
<p>Section 123 – Contravening WHS entry permit conditions</p>	<p>Master Builders notes s124 provides for a \$20,000 penalty for union officials which breach the entry obligations but the Discussion Paper discounts that penalty by 50% to \$10,000. Master Builders sees no justification in such a discount. Master Builders also says should the discount remain, this only reinforces Master Builders submissions about the financial penalties proposed for PCBUs are overly harsh and therefore should also be reduced by 50% based on what’s good enough for unions is also good enough for employers(PCBUs).</p> <p>This is a live matter for Master Builders now given Master Builders is aware the CFMMEU has been demanding access to records under sub-section 49(1)(6) of the OSHAct but failing to give the necessary 24 hours notice to have access to those records. That is, the union officials demand immediate access ignoring sub-section 49(1)(6). Master Builders says such contempt for the current law by the union cannot be rewarded with a 50% reduction in the penalty regime.</p>
<p>Section 133 – Eligibility criteria</p>	<p>Master Builders support the threshold test a WHS entry permit holder be an official of a union.</p> <p>Master Builders opposes the absence of approval criteria in the Bill that a union official making application for a WHS entry permit be a “fit and proper person” to hold such a permit. Master Builders says this is a major oversight in the Bill and must be corrected.</p> <p>Master Builders says this contention is not without support with s512 and s513 of the FWAct requiring such an approval test for union officials making application for a federal union right of entry permit.</p> <p>Mark Ritter SC in his Interim Report to the Ministerial Review of the State Industrial Relations System of March 2018 at Recommendation 67(a) expressly sets out a person issued with a state right of entry permit must be a fit and proper person.</p> <p>Master Builders contends given the power exercised by a WHS entry permit holder are so similar to those of entry permit holders under the FWAct and IRAct the WHS entry permit holder must in all fairness meet the same fit and proper person test. There can be no reasonable nor justifiable position put to argue in the alternate and say a WHS entry permit holder is required to meet a lesser standard of behaviour.</p>
<p>Section 143 – person must not refuse or</p>	<p>See comments in s33 and 74</p>

delay entry of WHS entry permit holder	
Section 144	See comments in s33 and 74.
Section 145	See comments in s33 and 74.
Section 146	See comments in s33 and 74
Section 148 – Unauthorised use or disclosure of information or documents	<p>Master Builders strongly supports this provision in principle but says the proposed penalty is too light. Master Builders is aware the CFMMEU regularly posts photos on its face book page and in its Construction Worker Journal of alleged unsafe site practices which can only have been taken when a union official is on site. Such behaviour is in direct contravention of the import of s148 and erodes the sanctity of responsible union conduct when undertaking alleged safety investigations on site. Master Builders says unions cannot have power to enter a workplace and abuse the power to pursue its own agenda in a manner not directly related to an alleged safety issue at the workplace. An example of the union’s abuse of safety in this context is a matter filed in the WA Supreme Court on 13 March 2018, CIV 426 of 2018, in which a sub-contractor alleged being defamed by the CFMMEU on its face book page which included making false accusations about the sub-contractor’s poor safety on a major construction project in Perth’s southern suburbs. Master Builders contends such information and exposure of allegations like this by the union is common. Master Builders says such a breach must also attract the same penalty as proposed by the failure of a PCBU to post a PIN or \$250,000. In the event this suggestion is rejected Master Builder’s cannot support the proposal given the bias in the penalty regime. That is, the legation cannot offer a light touch for union contravention but impose sledgehammer blows to SME employers. The huge gulf proposed by the law is obvious.</p>
Section 193 - Compliance with improvement notice	<p>Master Builders does not condone non-compliance with an improvement notice issued by the regulator.</p> <p>Master Builders is aware of builders issued with such notices challenging the notices and often being successful in either having the notice amended or revoked.</p> <p>A PCBU will automatically seek a review of every improvement notice given the proposed significant uplift in penalties. This will require the regulator to deploy its limited resources to sustain its issuing such notices. This is not the best use of the regulator’s limited resources.</p> <p>There is no case presented for the uplift in financial penalties proposed.</p> <p>See comments regarding s31, 32, 33 and 97.</p>
Section 197 - Compliance with	See comments regarding 193.

prohibition notice	
Section 200 - Contents of non-disturbance notice	See comments regarding 31, 32, 33.
Section 210 - Display of notice	See comments regarding 97, 193.
Part – 11 - Enforceable undertakings	<p>Master Builders strongly supports the introduction of enforceable undertakings subject to the necessary checks and balances being introduced to prevent an abuse of process. Master Builders puts this submission on the basis of the 97% of all WA employers being SMEs as acknowledged by Premier Mark McGowan, and the need to ensure there is not excessive application of undertakings against small unsophisticated employers (PCBUs.).</p> <p>Master Builders also reinforces its submission on extending undertakings to Category 1 and 2 penalties to provide greater flexibility in sentencing options.</p>
Section 275 - Use of codes of practice in proceedings	<p>Master Builders strongly opposes this section and says it must be scrapped.</p> <p>The import of section 275 is to bestow upon Code of Practice approved by the Minister under section 274 the same evidentiary status as regulations of the Bill.</p> <p>Master Builders sets out its position in section 6 of its wider submission.</p>

Submission template (including all recommendations)

Enter your comments on specific recommendations in the table below. You may add new rows at the end of the table if you wish to include comments on other aspects of the WHS Act other than those covered by the recommendations of the MAP.

#	Recommendation	Clauses	Comments
1	Amend the Objects of the WHS Act (WA) to foster cooperation and consultation in the development of health and safety standards.	3(1)(c).	Master Builders endorse the recommendation.
2	Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.	3(1)(h).	Master Builders endorse the recommendation
3	Include the formulation of policies and the coordination of the administration of laws relating to work health and safety in the Objects of the WHS Act.	3(1).	Master Builders endorse the recommendation
4	Establish roles of 'Chief Inspector of Mines' and 'Chief Inspector of Critical Risks' to enable duties under the Act and Regulations.	4.	Master Builders does not oppose the recommendation
5	Amend the definition of import to include importation from another state or territory into Western Australia.	4.	Master Builders does not oppose the recommendation
6	Amend the meaning of supply to include the loan of an item.	6(1).	Master Builders does not oppose the recommendation
7	Amend the meaning of person conducting business or undertaking to ensure only workers and officers who are 'natural persons' are excluded.	5(4).	Master Builders endorse the recommendation

#	Recommendation	Clauses	Comments
8	Include a new duty of care on the providers of workplace health and safety advice, services or products.	New clause to be added to Division 3, Part 2 and new definitions to be added to section 4.	<p>Master Builders opposes this recommendation on the basis it is a duplication of existing duty of care obligations. Master Builders accepts the implied thrust of the recommendation in requiring a greater professionalism of such service/advice providers but the recommendation as proposed is so vague in its broad sweep it can apply to any person providing such advice/guidance. For example, lawyers providing safety advice may be captured by the recommendation even though lawyers have to comply with significant professional standards now.</p> <p>The reach of the recommendation to safety training providers is problematic also. What a student does at a workplace after having attended a safety training course cannot be directly related back to the training undertaken in the event a student has failed in their duty of care at the workplace. The issue of proximity and relevance arises.</p>
9	Amend the meaning of <i>serious injury or illness</i> to include immediate treatment as an in-patient without reference to a hospital.	36(a).	Master Builders does not oppose this recommendation.
10	Include incapacity to work for 10 or more days as a category of <i>serious injury or illness</i> .	36.	Master Builders does not oppose this recommendation.

#	Recommendation	Clauses	Comments
11	Amend the heading 'Negotiations for agreement for work group' to Negotiations for determination for work group'.	52 (heading only).	Master Builders does not oppose this recommendation.
12	Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.	69(3).	Master Builders oppose this recommendation on the basis a HSR will not have knowledge of other work groups work meaning the HSR is not qualified in a practical sense to know the inherent risks of another workplace. Should this recommendation go forward Master Builders urges the need for a HSR have the necessary knowledge to perform such a role in another work group. For example, a HSR on a construction site in electrical work has little understanding of plumbing work. The recommendation is vague and dangerous as proposed.
13	Change the approving authority for courses to be attended by a health and safety representative (HSR) from the regulator to the Work Health and Safety Commission.	72(1)(a).	Master Builders endorse the recommendation
14	Ensure the PCBU's obligation to ensure a health and safety representative (HSR) attends approved training is a 'requirement' rather than an 'entitlement'.	72(1)(b).	Master Builders does not oppose the recommendation

#	Recommendation	Clauses	Comments
15	Require that a health and safety committee must include a representative from management with sufficient seniority to authorise the decisions and recommendations of the committee.	New clause to be added to section 76.	<p>Master Builders opposes this recommendation on the grounds the recommendation significantly moves away from the original intent of site safety committees being an advisory body to assist the PCBU to maintain and improve workplace safety. Master Builders feedback has been the existing safety committee framework has worked well and plays an important role in workplace safety.</p> <p>A further concern Master Builders has with the recommendation is the implication of the last paragraph at page 34 of the Discussion Paper that “a senior management representative who is able to authorise decisions (or the converse of not authorise decisions)” be a member of the safety committee. Whilst Master Builders accepts the underlying principle of what is reasonably practicable underpins the business of the safety committee, Master Builders holds deep reservations about the consequences which may flow to a senior management representative who does not authorise a safety recommendation of a safety committee based on what is reasonably practicable and a worksite incident arises connected to the refused safety matter under s27 of the Duty of officers under the 2016 model WHS Bill. Master Builders does not identify any merit in the recommendation if the intent is either overtly, covertly or unintendedly to capture a duty holder under s27 whilst being a member of a safety committee. If that is either the direct or indirect intent of the</p>

#	Recommendation	Clauses	Comments
16	Include the common law right for a worker to cease unsafe work where there is a risk posed to another person by the work.	84	Master Builders does not oppose the recommendation

#	Recommendation	Clauses	Comments
17	Include the right to seek review of an issue arising out of the cessation of unsafe work by the Work Health and Safety Tribunal (WHST).	89, 229.	<p>Master Builders opposes this recommendation on 2 grounds, being:-</p> <ul style="list-style-type: none"> • HSR power to issue stop work orders <p>Master Builders opposes a HSR having such power. A HSR will have limited accredited training to hold such authority compared to the extensive training of a Worksafe inspector. The contrast between both positions and training is stark.</p> <p>Master Builders notes employees have a common law right to cease work where the work presents exposure to risk of serious injury or imminent and serious harm. This power is enshrined in s26 of the OSHAct 1984.</p> <p>Master Builders says the recommendation is no more than a duplication of the power individual employees already have under s26 and the common law raising questions about the recommendation's value in real terms. That is, why will a HSR have greater knowledge about the unsafe work than the worker actually involved.</p> <p>Master Builders has serious reservations about the intent of the recommendation seeking to elevate the status of a HSR to a position in which the HSR was never intended to</p>

#	Recommendation	Clauses	Comments
18	Add a requirement that a HSR is notified where a request to review a provisional improvement notice by an inspector is sought by a PCBU or person.	New clause to be added to section 100.	Master Builders does not oppose this recommendation.
19	Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.	117, 119, 120, 123.	Master Builders has provided a separate submission on right of entry under the model 2016 Bill and 2011 WHS Act.

#	Recommendation	Clauses	Comments
20	Adopt the intent of South Australian provisions for right of entry, permitting a workplace entry permit holder (EPH) to inform the Regulator of the intended entry, and associated changes.	New clauses inserted in section 117.	<p>Master Builders questions the value of this recommendation on the basis of what is the purpose, and intent of the notice. Further, what penalties, if any, will apply for failure to provide subsequent notice to the regulator.</p> <p>Master Builders says if the requirement is to be introduced into the Bill it must be mandatory not framed as the union being “permitted” to provide such subsequent notice as permitted implies discretion. Master Builders contends discretion means a union may, or may not, choose to provide such notice and the recommendation as framed has little value and meaningless.</p> <p>Given such retrospective notice is required to be filed by a union, failure to do so must carry some form of penalty. Master Builders says such penalties must be consistent with those proposed in the Bill for a PCBU not displaying a PIN. Absence such a penalty provision Master Builders says the onus to punish employers only under the Bill is egregious and not balanced.</p>

#	Recommendation	Clauses	Comments
21	Insert the Registrar of the Western Australian Industrial Relations Commission as the <i>authorising authority</i> for the WHS entry permit system.	4, 116, 131, 132, 134, 135, 149, 150 and 151.	Master Builders does not oppose the recommendation

#	Recommendation	Clauses	Comments
22	Insert the <i>WHS Tribunal</i> as the authorising authority for revocation of WHS entry permits and resolution of disputes about right of entry.	138, 139, 140 and 142.	<p>Master Builders does not oppose the recommendation.</p> <p>Master Builders in its separate submission on the 2016 Model WHS laws in s133 refers to the FWAct and requirement for union officials making application for a federal right of entry permit having to meet a “fit and proper test” under s512 and s513 of the FWAct. Further, Mark Ritter SC, in recommendation 67(a) in his Interim Report to the Minister for Commerce and Industrial Relations, of March 2018 on the Review of the State industrial relations system set out a state union official seeking a state right of entry permit under the IR Act 1979 be a fit and proper person to hold such a permit.</p> <p>Master Builders says given a union official making application for a WHS entry permit will exercise similar powers as a union official under the FWAct and IR Act, Master Builders can see no legitimate reason why the same test ought not be required of a WHS entry permit holder. To argue otherwise implies such permit holders do not have to meet the same standards of conduct as union officials holding state and federal right of entry permits. Such a proposition is unsustainable.</p>

#	Recommendation	Clauses	Comments
23	Replace references to the defined phrase relevant state or territory industrial law with the <i>Industrial Relations Act 1979</i>	4, 116, 124, 131(2)(c)(ii), 133(c)(ii), 137(1)(b)(ii), 137(1)(d)(ii), 138(2), 150(b), 150(c)(ii)	Master Builders do not oppose this recommendation
24	The Registrar to be included as an eligible party to apply to the WHS Tribunal to revoke a WHS permit, or deal with a dispute about a WHS entry permit.	138(1), 142(4).	Master Builders endorse this recommendation
25	Modify the power of inspectors to require production of documents and answers to questions without the prerequisite of physical entry to the workplace.	171, Division 3 of Part 9 (heading) and Subdivision 4 of Division 3 of Part 9 (heading).	Master Builders does not oppose this recommendation
26	Clarify that the power of inspectors to conduct interviews includes the power to record the interview.	171.	Master Builders does not oppose this recommendation
27	Include a requirement for the person issued an improvement notice to notify the Regulator of their compliance.	193.	Master Builders does not oppose this recommendation
28	Include the power for the Regulator to request an independent evaluation consistent with current practice.	New clause to be added to Division 2, Part 8.	Given this recommendation impacts on the mines sector Master Builders provides no comment
29	For consistency with the <i>Coroner's Act 1996</i> , remove the power of an inspector to attend any inquest into the cause of death of a worker and examine witnesses.	160(f) and 187.	Master Builders endorse this recommendation

#	Recommendation	Clauses	Comments
30	Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality.	New sub-clause to be added to section 216.	<p>Master Builders in its submission on the federal model 2016 model WHS contends legally enforceable undertakings be extended to category 1 and category 2 penalties to offer a wider, and more flexible, penalty range. Master Builders intentionally puts this proposal forward given the Premier, Mark McGowan, rightly extolls the virtue of 97% of all employers in WA being SMEs. These employers do not have the ability to buy in legal expertise in any prosecution which might be brought by Worksafe and will plead guilty as they see this the lesser cost to them. This sharply contrasts with the 3% of larger employers which have the financial capability to buy in top shelf legal counsel to defend against any breach of the safety laws.</p> <p>Master Builders says the concept of heavy penalties under the safety laws is arguably based on retribution rather than improving workplace safety and seeks to punish small PCBUs which do not have the economic, emotional or mental capacity to process matters of this type.</p> <p>Master Builders refers to the written submission of Naomi Lemmon from Mobi Crane WA Pty Ltd dated 9 October 2017, to the Legislative Council Standing Committee on Public Administration Inquiry into Worksafe. That written submission appears on the Committee website and is a public document.</p>

#	Recommendation	Clauses	Comments
31	Include a worker's union as an <i>eligible person</i> who is able to apply for certain decisions to be reviewed.	223.	<p>Master Builders oppose this recommendation.</p> <p>Union membership in WA has crashed to be about 10% of the WA workforce. Unions therefore have little presence in most workplaces, and even if they do have a presence it will be in the very great minority.</p> <p>What say a union has only one member at a workplace not involved with the matter, why should the union have a right to challenge a Worksafe decision given it has so little representation at the workplace. This recommendation implies unions have greater presence than they do which fails to accept reality.</p> <p>Master Builders also says there is sufficient avenues for review of a decision by Worksafe in s223 of the 2016 model WHS Bill. Including unions as a party seeking review is unnecessary duplication and portrays unions as second guessing Worksafe in matters of this type which require Worksafe to follow exhaustive legal procedures and accept legal advice about what it ought, or ought not pursue, based on legal advice. This recommendation implies the legal advice is incompetent.</p> <p>Master Builders is fortified in its submission on this point given the comments connected with recommendation 32 at page 65 of the Discussion Paper which acknowledges the</p>

#	Recommendation	Clauses	Comments
32	Permit the Regulator to appoint any person to initiate a prosecution.	230(b) and 260(b).	Master Builders does not oppose this recommendation
33	Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision.	New paragraph to be added to 260.	<p>Master Builders strongly oppose this recommendation and points out it is a duplication of existing powers already available to the union under the FWAct and IRAct under union right of entry.</p> <p>There is no legitimate reason for this recommendation to be put up.</p> <p>Conversely, a PCBU must have equal right to bring prosecution against union officials which hold a WHS entry permit and breach the entry arrangements. Absence such equal rights/access to prosecution by a PCBU the obvious discrimination in favour of unions against employers is clear and has no place in legislation.</p>
34	Remove the requirement that codes of practice cannot be approved, varied or revoked by the Minister without prior consultation with the Governments of the Commonwealth and each state and territory.	274(2)(b).	Master Builders endorse this recommendation but in its submission on the model 2016 WHS Bill strongly oppose Codes of Practice having evidentiary weight applied by the Act.

#	Recommendation	Clauses	Comments
35	Streamline and modernise dangerous goods safety laws, and adopt Schedule 1 of the model WHS Bill.	Section 3 references to 'dangerous goods' and Schedule 1.	Master Builders makes no comment about this matter.
36	Establish the Work Health and Safety Commission (WHSC) as the tripartite consultative body for Western Australia.	Schedule 2 to include clauses establishing the WHSC.	Master Builders endorse this recommendation.
37	Replace the Mining Industry Advisory Committee with the Mining and Critical Risk Advisory Committee (MACRAC)	Include a section establishing the MACRAC in Schedule 2.	Master Builders makes no comment about this recommendation.
38	Review approach to remuneration for appointed members of the WHSC in consultation with Parliamentary Counsel.	Remuneration clause for inclusion in Schedule 2.	Master Builders makes no comment about this recommendation.
39	Establish the Work Health and Safety Tribunal as the external review body for work health and safety matters.	Include new Part/Schedule.	Master Builders provides qualified support for this recommendation on the basis the WHST does not have power to deal with industrial matters. This is clearly set out in recommendation 42 of the Discussion Paper.
40	Add clauses specifying administrative and procedural matters for reviews conducted by the Work Health and Safety Tribunal	New clauses to be added to section 229.	Master Builders does not oppose this recommendation

#	Recommendation	Clauses	Comments
41	Provide the Work Health and Safety Tribunal (WHST) with power to direct the Registrar to investigate and report on matters.	51G(1) of the OSH Act to be incorporated into the WHS Bill.	Master Builders does not oppose this recommendation
42	Include a clause that mirrors the exclusion of work health and safety matters from the definition of industrial matters in the <i>Industrial Relations Act 1979</i> .	Equivalent of 51G(3) of the OSH Act.	Master Builders does not oppose this recommendation

#	Recommendation	Clauses	Comments
43	Extend the current conciliation powers of the Work Health and Safety Tribunal (WHST) to include all matters that may be referred, other than Regulator enforcement activities.	51J of the OSH Act to be incorporated into the WHS Bill.	<p>Master Builders only provides qualified support for this recommendation. Refer to the response in recommendation 17 of this table for one ground of opposition to the WHST having a wide jurisdiction as proposed.</p> <p>Master Builders does not support or agree in any way to the WHST having jurisdiction to deal with strike pay claims under the guise of safety issues.</p> <p>Master Builders does not support or agree to the WHST having jurisdiction to deal with any matter not directly related to safety at a workplace. This proposition reflects the intent s120(2) of the 2016 draft WHS Bill in that union right of entry seeking access to records is conditioned on the records being “directly relevant” to the alleged breach. That is, as the Bill narrows access to records to directly relevant safety matters so must the WHST be limited in its jurisdiction to matters directly related to workplace safety. This also builds the case against the WHST having jurisdiction to deal with strike pay claims under the alleged pretext of safety.</p>

#	Recommendation	Clauses	Comments
44	Insert the WHS Tribunal as the designated court or tribunal for specific matters.	65, 112, 114, 215, and 229.	Master Builders does not oppose this recommendation
	<i>Add your comments by creating new rows</i>		