

## Comments on the *Work Health and Safety Bill 2014*

Clause (section) of the Model WHS bill	Comment
<p><b>Section 4 Definitions</b></p>	<p><b>Representative (b)</b></p> <p>Master Builders notes the definition of representative includes a person who is an authorised representative under section 49G of the state Industrial Relations Act 1979 as well as an official of an organisation who holds a current entry permit issued under the Fair Work Act 2009.</p> <p>Master Builders notes this definition is then picked up in section 70 (g) of the Bill.</p> <p>Section 80(1)(b)(c)(d) also refers to a person’s representative that must pick up the definition in section 4.</p> <p>Whilst Master Builders does not take issue with the inclusion of this definition in section 4, it does oppose inclusion of the definition in sections 70 and 80. Comment will be provided in those sections.</p> <p><b>Structure</b></p> <p>The definition of structure is too broad. It captures anything that is 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 <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 proposes.</p> <p>This definition needs to be tightened to relate to what forms part of a structure’s integral structural support not ancillary components.</p>
<p><b>Section 5</b></p> <p><b>Meaning of person conducting a business or undertaking</b></p>	<p>Master Builders supports this definition.</p>
<p><b>Section 7</b></p> <p><b>Meaning of worker</b></p>	<p>Master Builders does not raise an issue with this definition.</p>
<p><b>Section 8</b></p> <p><b>Meaning of workplace</b></p>	<p>Master Builders does not raise an issue with this definition.</p>
<p><b>Section 16</b></p>	<p>Master Builders accepts the thrust of this definition, especially</p>

<p><b>More than 1 person can have a duty</b></p>	<p>having regard for definition of a PCBU in section 5.</p> <p>However, it proposed to expand the definition to include the duty where a person has a capacity to direct and compel others at a workplace to provide greater clarity.</p> <p>This suggested expansion of the definition provides clearer lines of duty between multiple duty holders at a workplace. This is a major consideration for the building and construction industry given the nature of the industry of having multiple businesses, and multiple duty holders, on site at any given time.</p>
<p><b>Section 17 Management of risks</b></p>	<p>See above in connection with the comments regarding a person having the capacity to direct and compel.</p>
<p><b>Section 18 What is reasonably practicable</b></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 should the Bill progress to legislation, in full or part, that contains this definition. Such a guide will be helpful to duty holders.</p>
<p><b>Section 22 Duties of PCBU that design plant, substances or structures</b></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 captured by sections 22,23,24,25 and 26.</p> <p>The scope of section 22 captures in sub-section 22(2)(e)(iii) that a builder is required to have a duty of care, so far as is reasonably practicable, in the demolition or disposal of the structure.</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. 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.</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</p>

	<p>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><b>Section 23</b> <b>Duties of PCBU that manufacture plant, substances or <u>structures</u></b></p>	<p>See above comments for section 22.</p>
<p><b>Section 25</b> <b>Duties of PCBU that supply plant, substances or <u>structures</u></b></p>	<p>See above comments for section 22.</p>
<p><b>Section 26</b> <b>Duty of PCBU that install, construct, or commission plant or <u>structures</u></b></p>	<p>See above comments for section 22.</p>
<p><b>Section 27</b> <b>Duty of officers</b></p>	<p>Section 27(5) sets out a definition of “due diligence” that imposes a positive duty on an officer of a PCBU to do certain things. The converse is, a failure to meet that positive duty renders an officer of a PCBU liable to be in 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 an officer of a PCBU to “gain an understanding of the nature of the operations of the business .... and generally of the hazards and risks associated with those operations: and”</p> <p>Sub-section 27(5) provides no guidance on how an officer of a PCBU can meet the due diligence test about how an officer of a PCBU 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. An extreme example is in the residential sector in which company directors and officers must be aware of the hazards and risks of each of the 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 officers of a PCBU.</p>

<p><b>Section 31</b> <b>Reckless conduct category - 1</b></p>	<p>Master Builders oppose this penalty regime on the basis it directly conflicts with the WA Government Policy of 2008 and 2009 of NOT reflecting the federal Model safety law penalty framework. Section 31 is a direct take from the federal model OSH laws.</p> <p>Master Builders propose the current penalty regime under the Occupational Safety and Health Act 1984 be retained in lieu of sections 31, 32 and 33 of the Bill, if the Bill is enacted in part or full.</p>
<p><b>Section 32</b> <b>Failure to comply with health and safety duty category - 2</b></p>	<p>See comments for section 31 above.</p>
<p><b>Section 33</b> <b>Failure to comply with health and safety duty – category 3</b></p>	<p>See comments for section 31 above.</p>
<p><b>Section 38</b> <b>Duty to notify of notifiable incidents</b></p>	<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. See comments regarding section 31, 32 and 33.</p>
<p><b>Section 39</b> <b>Duty to preserve incident sites</b></p>	<p>See comments regarding section 31, 32 and 33 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>
<p><b>Part 4 – Authorisations</b> <b>Requirements for authorisations of workplaces</b></p>	<p>See comments regarding sections 31, 32 and 33.</p>
<p><b>Part 5 – Consultation, representation and participation</b></p>	<p>See comments regarding section 31, 32 and 33.</p>
<p><b>Section 70</b> <b>General obligations of PCBU</b></p>	<p>Master Builders notes a PCBU must allow a person assisting a HSR for a work group to have access to a workplace. The person assisting includes an authorised representative as defined by the Industrial Relations Act 1979 or FWAct 2009 in sub-section</p>

	<p>70(1)(g).</p> <p>Master Builders says sub-section 70(1)(g) is flawed, as drafted, as a person assisting includes union officials who are recognised by the Industrial Relations Act 1979 or FWAct 2009. The sub-section does not require they comply with union right of entry procedures under either act.</p> <p>Master Builders says union officials acting as a person assisting a HSR must comply with the relevant requirements of the state and federal industrial relations laws in connection with union right of entry, namely;</p> <ul style="list-style-type: none"> <li>• A union official MUST have a current right of entry permit issue by the WAIRC and FWC.</li> <li>• A union official must comply with the relevant union right of entry procedures set out in the state Industrial Relations Act 1979 and FWAct 2009.</li> </ul> <p>Construction unions have a long and chequered history of abusing safety for industrial relations purposes which undermines and devalues the importance of safety in the construction industry. Master Builders foreshadows that sub-section 70(1)(g), as proposed, allow union officials entry to site under the guise of safety for other than genuine safety reasons and not related to any matter concerning safety on a work site.</p> <p>Master Builders contends sub-section 70(1)(g) must contain the requirement union officials when acting as a person assisting a HSR must comply with the relevant union right of procedures.</p> <p>See comments regarding section 31, 32, 33 on penalties.</p>
<p><b>Section 71</b> <b>Exemption from obligations under section 70(1)</b></p>	<p>See comments regarding penalties under 31, 32, 33.</p>
<p><b>Section 72</b> <b>Obligation to train health and safety representatives</b></p>	<p>See comments regarding penalties under 31, 32, 33.</p>
<p><b>Section 74</b> <b>List of health and safety representatives</b></p>	<p>Master Builders opposes the need for section 74 on the basis of imposing unnecessary red tape on a PCBU.</p>
<p><b>Section 79</b> <b>Duties of PCBU</b></p>	<p>Master Builders objects to section 79. 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</p>

	<p>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>Section 79(1) must be recast to take into account that an 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 section 31, 32, 33 on penalties.</p>
<p><b>Section 80</b> <b>Parties to a dispute</b></p>	<p>Master Builders notes sub-section 80(1)(d) recognises a worker representative which includes a union official. See comments regarding section 70(1)(g). Master Builders contends the same obligations apply on union officials under this section as we call for under sub-section 70(1)(g).</p>
<p><b>Division 6</b> <b>Right to cease unsafe work</b></p>	<p>Master Builders says Division 6 is deficient in that it fails to reflect <u>sub-section 28A of the OSH At 1984.</u></p> <p>Master Builders says the above sub-section must be included in the Bill, if 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>Section 88 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</p>

	<p>agenda item.</p> <p>Whilst some may argue sub-section 28A of the OSH Act 1984 has been little used since its introduction 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.</p>
<p><b>Section 97</b> <b>Display of provisional notice</b></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 WA as they 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><b>Section 99</b> <b>Offence to contravene a PIN</b></p>	<p>See comments regarding section 31, 32, 33 and 97.</p>
<p><b>Section 107</b> <b>Prohibition of requesting, instructing, inducing, encouraging, authorising or assisting discriminatory conduct.</b></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 section 31, 32, 33.</p> <p>Master Builders is unaware of a case being raised under the OSH Act 1984 since the anti-discrimination provisions were introduced in 2004. Master Builders therefore advances to proposition the current anti-discrimination provisions under the OSH Act are effective and ought be retained. There is no arguable case to sustain the uplift in penalties proposed.</p>
<p><b>Section 108</b> <b>Prohibition of coercion or inducement</b></p>	<p>See comments regarding 31, 32, 33, 107.</p>
<p><b>Section 109</b> <b>Misrepresentation</b></p>	<p>See comments regarding 31, 32, 33, 107.</p>
<p><b>Division 2</b> <b>Criminal proceedings in relation to discriminatory conduct</b></p>	<p>See comments regarding 31, 32, 33, 107.</p>
<p><b>Division 3</b> <b>Civil proceedings in relation to discriminatory or coercive conduct</b></p>	<p>See comments regarding 31, 32, 33, 107.</p>
<p><b>Section 193</b> <b>Compliance with</b></p>	<p>Master Builders does not condone non-compliance with an improvement notice issued by the regulator.</p>

<p><b>improvement notice</b></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 significant uplift in penalties. This will require the regulator to deploy 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 penalties proposed.</p> <p>See comments regarding 31, 32, 33, 97.</p>
<p><b>Section 197</b> <b>Compliance with prohibition notice</b></p>	<p>See comments regarding 193.</p>
<p><b>Section 200</b> <b>Contents of non-disturbance notice</b></p>	<p>See comments regarding 31, 32, 33.</p>
<p><b>Section 210</b> <b>Display of notice</b></p>	<p>See comments regarding 97, 193.</p>
<p><b>Part - 11</b> <b>Enforceable undertakings</b></p>	<p>Master Builders notes the Bill does not pick up enforceable undertakings of the WHS Act 2012.</p>
<p><b>Section 239</b> <b>Release on the giving of a court-ordered WHS undertaking</b></p>	<p>Section 239 in effect reflects the intent of Division 3 – Undertaking by offender in lieu of payment of a fine under the OSH Act 1984 in that a court may (with or without conviction) adjourn proceedings for up to 2 years following an offender giving an undertaking with specific conditions.</p> <p>Master Builders supports this position but notes the Bill provides no mechanism about how such an alternate remedy will be put before a court for consideration. For example, section 55I of the OSH Act 1984 allows an offender to make an election to a court to either pay a fine imposed by a court upon conviction or enter in to an enforceable undertaking with the Commissioner.</p> <p>Master Builders propose section 239 be expanded to set out how such an alternate remedy will be put before a court for consideration and clarity. For example, a PCBU can propose such an undertaking as an alternate remedy.</p>
<p><b>Section 275</b> <b>Use of codes of practice in proceedings</b></p>	<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</p>



	<p>status as regulations of the Bill.</p> <p>Master Builders sets out its position in section 6 of its wider submission.</p>
<p><b>Schedule 4</b> <b>Safety Tribunal</b></p>	<p>Master Builders has opposed the treatment of safety issues by the Safety Tribunal under the jurisdiction of the WAIRC, and continue to oppose this position. This opposition is not based on there being no Tribunal to deal with such matters, rather, Master Builders does support the need for a review mechanism the Tribunal presents. Master Builders does not, and never has, supported the tainting of safety with industrial relations, which in its view having the WAIRC oversight the Safety Tribunal does. This is no criticism of the WAIRC nor Tribunal, rather, the symbolism portrayed by the WAIRC overlooking the Safety Tribunal.</p> <p>Whilst safety may have been treated as an adjunct to industrial relations in the formative years leading up to the creation of the OSH Act 1984 and for some years after that, occupational workplace health and safety has developed into a specialist discipline in its own right in the 21<sup>st</sup> century. This is very evident with WA Universities offering a Graduate Diploma and a Masters Degree in occupational health and safety. No party can these days attempt to portray the discipline of occupational workplace health and safety as merely a subset of industrial relations.</p> <p>Master Builders has previously called for the Tribunal to be replaced by a Safety Magistrate, which was the case in the mid 1990s. Whilst Master Builders accepts our submission on this point has not been picked by the Minister previously, or his predecessors, Master Builders reaffirms its position on this matter.</p>
<p><b>Schedule 5</b> <b>Health and Safety Magistrate</b></p>	<p>Master Builders notes the creation of the Health and Safety Magistrate but this jurisdiction has a very limited jurisdiction as set under section 4 of Schedule 5 which restricts the HSM to make decisions in connection with only sections 179 and 180 of the Bill. The respective sections deal with the forfeiture of seized things and return of seized things.</p> <p>Master Builders calls on the HSM jurisdiction to be expanded to absorb the functions of the Safety Tribunal for the reasons set out in the comments regarding Schedule 4.</p>