



Master Builders Association of Victoria

Submission Occupational Health and Safety National Model Laws

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STRIVING FOR A BEST PRACTICE WORKPLACE SAFETY REGIME

Master Builders welcomes the opportunity to comment on the implications of the findings of the assessment prepared by PricewaterhouseCoopers (PwC) on the cost benefits and impacts of adoption of the harmonised Work Health and Safety (WHS) laws in Victoria.

Master Builders recognises the benefits that a nationally harmonised WHS regime would have for businesses, particularly those who operate across borders, but has significant concerns regarding the proposed laws and how it would impact Victorian building businesses.

The PwC report (“the report”) highlights the negative consequences that would arise from Victoria adopting the proposed harmonised WHS laws and in particular, the impacts this would have on small to medium-sized Victorian businesses. Small businesses represent a significant proportion of both our state’s building and construction industry as well as our own membership.

Master Builders also has serious reservations about the harm that adoption of these laws will do to business confidence. The report suggests that construction would be the second highest industry impacted, behind power generators, in terms of the cost implications of adopting the harmonised WHS laws, with some \$212 million in transition costs and annualised ongoing costs of \$154 million per year. This would total \$6,430 per business in transition costs and \$4,670 in annual ongoing costs.

Victoria is already achieving the lowest incidence of workplace injury and the lowest workers compensation premiums amongst Australian jurisdictions. These achievements are being attained under the existing Victorian Occupation Health and Safety (OHS) Act and regulations and efforts from employers, across industries such as building and construction, to protect the safety of their own workforces.

Furthermore, many elements of the proposed WHS regulations have already been managed adequately in Victorian workplaces without the need for additional regulation. Victorian employers have long taken a realistic risk-based approach to determining the need for first aid facilities, personnel and emergency procedures as part of their ‘general duty of care’ without the need for prescriptive regulation.

The fostering of this sensible risk-based approach is also attributable to the actions of WorkSafe Victoria and its inspectors in terms of being realistic and pragmatic in enforcing the law. Not only does Victoria have the best OHS laws and the best safety outcomes, but we also have the most sensible OHS regulator.

In addition to adopting the harmonised WHS laws, which were largely modelled on Victoria’s OHS Act and regulations, OHS regulators around the country have agreed to a uniform set of compliance and enforcement guidelines that were also modelled significantly on guidelines developed by WorkSafe Victoria.

The report concluded that only three of the 20 significant areas of change under the WHS laws are likely to have a positive impact on Victorian business.

Given these factors, combined with the estimated \$3.44 billion in costs for Victoria over the next five years outlined in the report, Master Builders does not support the adoption of the harmonised WHS laws in the current economic environment.

Brian Welch
Executive Director
July 2012

OVERVIEW OF MASTER BUILDERS ASSOCIATION OF VICTORIA

The Master Builders Association of Victoria (“Master Builders”) is the peak body representing employers in Victoria’s building and construction industry. Our membership consists of more than 9500 builders, subcontractors, manufacturers/suppliers and students. More than 50 per cent of our members are small businesses with an annual turnover of \$2 million or less.

Master Builders provides a range of services to members. Many of these would be cost prohibitive if not offered by a not-for-profit group that supports builders, particularly those in small businesses, including:

- Legal advice on matters such as preparing domestic building contracts and resolving building disputes;
- OHS advice, including delivering the Small Business OHS Consultancy Program in partnership with WorkSafe Victoria;
- Advice on the interpretation of building legislation and the technical provisions of the National Construction Code;
- Training services including Diploma, Certificate level and short courses designed to meet the needs of the various sectors within the industry;
- ALink, our go to support and advisory centre offering a range of services including placements, Industrial Relations and OHS advice for apprentices, apprenticeship service providers and those seeking a career in the building and construction industry to help reduce the attrition rate of apprentices and to raise the profile of the industry as a provider of rewarding career pathways;
- Our award-winning Virtual Office cloud-based system providing members access to services including e-contracts, e-permits and monitoring of CPD points; and
- Assisting members in preparing applications to become registered builders.

Given our close contact with building businesses, from large to small, on day-to-day regulatory and business concerns, Master Builders is uniquely placed to comment on the issues raised in the proposed WHS National Model Laws.

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SUMMARY OF RECOMMENDATIONS

- Recommendation 1: Master Builders does not support the adoption of the national model laws based on the estimated costs of \$3.44 billion over five years to the Victorian economy in the current economic environment, combined with only three of the 20 significant areas of change likely to have a positive impact on Victorian business.
- Recommendation 2: Master Builders recommends that work must be completed on the preparation of the Codes of Practice by SafeWork Australia prior to any national harmonisation of OHS laws being considered.
- Recommendation 3: Master Builders recommends that an adequate amount of time be provided to allow WorkSafe Victoria, industry associations and unions to engage in an extensive education campaign prior to any laws becoming operational in Victoria.
- Recommendation 4: Master Builders does not support the inclusion of the positive duty for officers to exercise due diligence in the model laws.
- Recommendation 5: Master Builders does not support the extended definition of the worker in the model laws, but endorses the concept set out in section 21(3) of the *Occupational Health and Safety Act 2004 (Vic)*.
- Recommendation 6: Master Builders does not support the broad definition of persons conducting a business or undertaking in the model laws.
- Recommendation 7: Master Builders does not support an extended definition of confined spaces in the model laws.
- Recommendation 8: Master Builders recommends SafeWork Fall Codes of Practice remain best practice for the industry in the model laws.
- Recommendation 9: Master Builders does not support a broader definition of 'plant' in the model laws.
- Recommendation 10: Master Builders does not support absolute duty to have and test emergency procedures in the model laws.
- Recommendation 11: Master Builders does not support the regulation requiring retrofitting of residual current devices in the model laws.
- Recommendation 12: Master Builders does not support compliance with the electrical chapter of the regulations in the model laws.

ESTIMATED COSTS TO VICTORIA

Master Builders notes that the findings in the report were based on stakeholder estimates of the clearly prescribed costs associated with the new laws and that in the report, PwC has included a disclaimer in which they have stated that none of the costs have been verified or assured.

However, based on the costs envisaged Master Builders could not support the adoption of the harmonised WHS laws in the current economic environment. The report suggested that adoption of the laws would cost Victoria \$3.44 billion over the next five years, inclusive of \$812 million in transition costs for Victorian business and annualised costs of \$587 million per year for business over the first five years.

Master Builders believes that to adopt the laws at this time would do serious harm to business confidence, particularly in the face of ever-increasing business costs and would create enormous cynicism amongst Victorian employers given that the report not only details the cost implications but also questions the benefit of the new laws with only three of the 20 significant areas of change under the WHS laws are likely to have a positive impact on Victorian business.

Recommendation 1:	Master Builders does not support the adoption of the national model laws based on the estimated costs of \$3.44 billion over five years to the Victorian economy in the current economic environment, combined with only three of the twenty significant areas of change likely to have a positive impact on Victorian business.
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CODES OF PRACTICE

Master Builders has previously stated publicly that it considers any adoption of the nationally harmonised WHS laws into Victoria should be delayed beyond the originally intended introduction date of 1 January 2012, until work has been completed on the preparation of the Codes of Practice which are currently being developed by Safe Work Australia in consultation with industry representatives and Occupational Health and Safety (OHS) regulators.

Recommendation 2:	Master Builders recommends that work must be completed on the preparation of the Codes of Practice by SafeWork Australia prior to any national harmonisation of OHS laws.
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EDUCATION CAMPAIGN

Master Builders considers it important that an adequate amount of time is set aside to enable WorkSafe, industry associations and unions to engage in an extensive information and education campaign before these laws were to commence operating in Victoria.

Recommendation 3:	Master Builders recommends that an adequate amount of time be to allow WorkSafe, industry associations and unions to engage in an extensive education campaign prior to the laws becoming operational in Victoria.
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OFFICER DUE DILIGENCE

The report suggests that inclusion of the positive duty for officers of organisations to exercise due diligence would require officers to undertake extensive training in order to understand their legal responsibilities at a cost of \$402 million over five years.

Master Builders notes that the current *Victorian Occupational Health and Safety Act 2004* (section 21(2)(b)) already provides a positive duty for employers to employ or engage persons that are suitably qualified to advise on OHS and that this duty is placed on the employer rather than on individuals.

In the lead up to 1 January 2012, in anticipation of the model WHS laws coming into effect in Victoria, Master Builders conducted a number of briefings for its members around the subject of 'Officer Due Diligence'. There is absolutely no doubt that adoption of the laws would create a need for Officers to undertake extensive OHS training to understand the duty and the breadth of their responsibilities.

Recommendation 4:	Master Builders does not support the inclusion of the positive duty for officers to exercise due diligence in the model laws.
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EXTENDED DEFINITION OF WORKER

The very broad definition of worker proposed in the model legislation will complicate the obligations of a person conducting a business or undertaking, in particular in relation to consultation and is not supported. Building sites are complex and dynamic environments where the hazards and risks change as the nature of the work changes. There is also a changeable workforce as following trades each conduct their component of the work. The consultation requirements, particular on principal contractors, will be onerous.

The broader definition of worker combined with a lack of a control test will lead to anomalies. There will be circumstances where the principal contractor has no control over the supervision, training and instruction of workers such as labour hire workers engaged by subcontractors through an independent labour hire agency. Whilst it is clear that the subcontractor and the labour hire company currently bear responsibility under occupational health and safety law, the extension of similar duties to principal contractors is a bridge too far.

Master Builders instead endorses the concept set out in section 21(3) of the *Occupational Health and Safety Act 2004 (Vic)*. That provision extends duties to independent contractors to the extent that the employer exercises control of the work performed by those contractors. This extends to employees of the relevant contractor.

The report suggests that the change to the term worker would create \$276 million in costs. The fact that the model Work Health and Safety Act creates a situation in which duty holders share duties and must discharge their duties to the extent required under the Act will lead to situations where duties have to be picked up by secondary duty holders (e.g. principal contractors) because primary duty holders fail to meet their OHS duties. The report cites the provision of hearing tests for workers exposed to noise in excess of 85 decibels as an example of such a situation where a new regulatory burden could be created.

Recommendation 5:	Master Builders does not support the extended definition of the worker in the model laws, but endorses the concept set out in section 21(3) of the <i>Occupational Health and Safety Act 2004 (Vic)</i>.
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PERSONS CONDUCTING A BUSINESS OR UNDERTAKING

Master Builders considers that using this broad definition of business or undertaking to frame all of the obligations under the model laws is likely to result in confusion about who actually holds that obligation. For example, under clause 37, a person who conducts a business or undertaking must notify the regulator immediately after becoming aware that a notifiable incident arising out of the conduct of the business or undertaking has occurred.

On a building site, a literal interpretation of this obligation could be that the principal contractor, a contractor and a subcontractor all have an obligation to report the same incident where the injured person was a worker of the subcontractor. This would create an administrative burden that is unnecessary and potentially costly and not deliver any significant safety outcomes.

Recommendation 6:	Master Builders does not support the broad definition of persons conducting a business or undertaking in the model laws.
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EXTENDED DEFINITION OF CONFINED SPACES

The changed definition of confined spaces in the model WHS regulations is identified in the report as having the most significant cost implications of the entire WHS regulatory package. The report suggests that adoption of this element of the laws will create \$738 million in costs.

Master Builders considers that entry to confined spaces is unlikely to operate any differently in practice than it does under Victoria's current OHS regulations. Master Builders considers that the current requirements for confined space entry under Victoria's regulations are adequate and that increased costs associated with permits for entry, signage and monitoring of the confined space will create an additional unnecessary cost burden for Victoria.

Recommendation 7:	Master Builders does not support an extended definition of confined spaces in the model laws.
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REMOVING THE TWO-METRE THRESHOLD FOR FALLS

In our submission on the model Work Health and Safety regulations, Master Builders supported the decision not to include a mandatory height threshold in the model falls regulations. The model fall regulations are consistent with Master Builders' policy that fall protection should be based on an assessment of the risk, not a specific height threshold. The regulations recognise that fall protection can be required in circumstances where a fall is lower than a specified height threshold (for example, where a fall could be on to a sharp object such as a paling fence which would potentially cause significant injury).

Master Builders notes that the absence of a height threshold in the regulations means that clear, practical and workable guidance needs to be included in supporting Codes of Practice.

There is absolutely no question that this issue in particular has potentially serious cost implications for Master Builders' members given the significant portion of work that is performed at heights on construction sites. This area of regulation serves as the best example of why Master Builders believes that Victoria should not adopt the harmonised laws as they are currently proposed. Master Builders suggests that as a minimum, Victoria needs to review the relevant Codes of Practice that support the Act and the regulations. This is particularly important as the detail around expectations (i.e. 'the state of knowledge') of how specific falls risks are intended to be managed is not found in the Act or the regulations but more so in the Codes. Victoria currently has two Codes of Practice for the construction industry (one for housing and the other for general construction), which Master Builders strongly recommends to its members as being the best practice for managing falls risks. The measures outlined in these Codes to manage falls risks were developed by WorkSafe and involved extensive consultation with industry stakeholders. The costs of implementing the various control measures detailed in the existing Victorian Codes of Practice are well known.

Safe Work Australia has produced a Code of Practice for [Managing the Risk of Falls at Workplaces](#) which covers all workplaces, not just construction workplaces. Safe Work Australia has also produced a Code of Practice for [Preventing Falls in Housing Construction](#) which is awaiting endorsement by the Select Council on Workplace Relations. These Codes are largely consistent with the existing Victorian construction falls codes and therefore represent the 'state of knowledge' for the construction industry going forward.

The report suggests that the absence of a height threshold in the model WHS regulations will add \$328 million in costs over five years. Master Builders considers that as the Falls Codes of Practice developed by Safe Work Australia are largely consistent with the Victorian Codes of Practice, the current state of knowledge for the construction industry and therefore the costs, remain essentially the same.

Recommendation 8:	Master Builders recommends Safe Work Fall Codes of Practice remain best practice for the industry in the model laws.
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PLANT – BROADER SCOPE

Consistent with the report, Master Builders considers in capturing a broader range of equipment found in workplaces that the broader definition of plant will almost certainly create unjustifiable cost imposts for Victorian business of \$304 million over five years.

Additional duties not referred to in the report include the duties of persons conducting business or undertakings that install, construct or commission structures. The very broad definition of structure in the model laws means that this regulation will apply to builders. This regulation has the potential to cause significant confusion. It uses terminology that has a different meaning elsewhere in the regulations. In the building and construction industry, the person who commissions the building project is the client. There are specific obligations on the person who commissions construction work (regulations 6.2.1 and 6.2.3).

Commissioning of plant, on the other hand, is the start up process to ensure that plant is safe to operate. The relationship between this regulation and the obligations on builders in Chapter 6 (Construction work) is unclear.

Master Builders also questions whether this regulation is necessary. Clause 26 of the model Act includes a broad duty of care on persons conducting businesses or undertakings that install, construct or commission plant or structures. This clause is sufficient to cover the matters in the regulation.

Recommendation 9:	Master Builders does not support a broader definition of 'plant' in the model laws.
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ABSOLUTE DUTY TO HAVE AND TEST EMERGENCY PROCEDURES

The report suggests that this duty would add \$280 million in costs over five years. Master Builders considers, similar to the absolute duty to ensure first aid facilities and have trained first aid personnel, that Victorian employers in the building and construction industry are already achieving the appropriate levels of emergency preparedness and first aid without the need for prescriptive regulation. There are many workplaces where there are multiple duty holders, shopping centres for example, where there appears to be little sense in having every employer within the facility having their own detailed emergency evacuation plan and a requirement for each and every one of these duty holders to practice and rehearse their procedures.

Master Builders also considers that the achievement of adequate emergency procedures requires implementation of administrative controls which can be achieved with little cost impact and that it is incumbent on industry associations and WorkSafe to provide practical guidance on what constitutes adequate emergency procedures in workplaces, without the need for additional regulation.

Recommendation 10:	Master Builders does not support absolute duty to have and test emergency procedures in the model laws.
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RESIDUAL CURRENT DEVICES

Master Builders opposes the proposed regulation that would require retrofitting of residual current devices (RCDs) into workplaces, which the report states would add \$44 million in costs over five years. The regulation would not only have implications for workplaces, particularly constructed before 2000, but also to occupiers of domestic premises as these premises would become a workplace when work is performed. The regulations fail to have regard for the use and adequacy of temporary RCD protection.

Recommendation 11:	Master Builders does not support the regulation requiring retrofitting of residual current devices in the model laws.
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THE ELECTRICAL CHAPTER

Master Builders notes that the electrical chapter was not referred to in the report in terms of potential cost implications, except for reference to the mandating of electrical testing and tagging in workplaces.

The Victorian construction industry relies on the *Industry Standard for Electrical Installations on Construction Sites* developed by WorkSafe Victoria in consultation with industry stakeholders for the management of electrical hazards. In the model Work Health and Safety regulations, Australian Standard AS3012 has been mandated for the construction industry.

Compliance with this part of the regulations would necessitate that construction industry participants would be required to purchase the Australian Standard. This Standard in turn references more than 40 other Australian Standards.

Master Builders as a matter of principle is opposed to the mandating of Australian Standards and considers it totally unreasonable for a duty holder to be expected to purchase Australian Standards in order to recognise their OHS duties.

Recommendation 12:	Master Builders does not support compliance with the electrical chapter of the regulations in the model laws.
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