

# **MASTER BUILDERS AUSTRALIA INC**

**PRELIMINARY SUBMISSION TO THE**

**PRODUCTIVITY COMMISSION ON  
WORKERS COMPENSATION**

**AND**

**OCCUPATIONAL HEALTH AND  
SAFETY (OH&S) ARRANGEMENTS**

**June 2003**

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## EXECUTIVE SUMMARY

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This submission outlines MBA's broad policies regarding OH&S and workers compensation in response to the Productivity Commission Issues Paper on its Reference.

MBA's two main policy objectives for OH&S are:

- to achieve improved building and construction industry OH&S performance; and
- to achieve a nationally consistent OH&S regime, in the establishment of a framework and linked definitions.

MBA has the following principal policy objectives regarding workers compensation:

- establishment of core nationally consistent, cost effective compensation arrangements; and
- promotion of an incentive based premium system where improved or diminished performance equates to reduced or increased workers compensation premiums.

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## **1.0 Introduction**

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1.1 Master Builders Australia (MBA) represents the interests of all sectors of the building and construction industry. MBA consists of nine State and Territory builders' associations with over 24,000 members. These members operate in the following sectors:

- housing
- commercial/industrial
- civil engineering
- manufacturing and supply
- specialist contracting

The members range in size from large multinational and national contractors to small subcontracting businesses.

1.2 The building and construction industry in Australia contributes almost \$70 billion<sup>1</sup> of activity annually. It has approximately 210,000 businesses and 440,000 specialist trades businesses operating within it, employing some 771,000 persons<sup>2</sup>, a new industry record for employment.

1.3 There are three key sectors to the building and construction industry, namely:

1. housing construction;
2. commercial and industrial construction; and
3. civil and engineering construction.

1.4 Housing construction is the largest of the three sectors, undertaking work amounting to around \$30 billion, or 4.25% of GDP; followed by civil and engineering construction with a turnover of some \$22 billion, or 3% of GDP; and commercial and industrial construction at around \$15 billion, or 2% of GDP. The housing sector has a substantial proportion of multi-housing developments, work of approximately \$9 billion.

1.5 MBA is a member of the Australian Chamber of Commerce and Industry (ACCI) and endorses ACCI's submission to the Productivity Commission. We have had input into ACCI's submission.

## **2.0 Purpose of this Submission**

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2.1 The inquiry by the PC follows the release of the Final Report of the Royal Commission into the Building and Construction Industry (Cole Report). Prior to the publication of the Cole Report, the Royal Commission published a discussion paper on OH&S.<sup>3</sup> The Cole Report analyses building and construction industry OH&S issues in Volume 6, entitled "Reform –

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<sup>1</sup> ABS Cat No. 8755.0

<sup>2</sup> ABS Cat No. 6203.0

<sup>3</sup> Discussion Paper No. 6 – "Workplace Health & Safety in the Building and Construction Industry"

Occupational Health and Safety". There are 19 Recommendations in the Cole Report that deal with OH&S: Recommendations 17 to 35.<sup>4</sup>

- 2.2 The Cole Report was critical of the current OH&S system. It found that there is a fragmented, disjointed and uncoordinated system of occupational health and safety law and regulation in Australia. This system was labelled as inequitable, wasteful and inefficient. In view of these considerations, the Cole Report supported reform to OH&S law and regulation involving a single national scheme comprehensively regulating occupational health and safety throughout Australia. However, the long failure of attempts to achieve national uniformity in occupational health and safety regulation indicated to the Royal Commission that there was no realistic prospect that the Commonwealth, States and Territories would co-operate to bring about a single national system regulating occupational health and safety generally.
- 2.3 The Cole Report Recommendations hence proceed from the assumption that it is not possible to construct a national OH&S system. At paragraph 46 of Chapter 1 of Volume 6 of the Cole Report the Royal Commissioner said that "it is clear that the Commonwealth has not had, and still does not have, any intention of assuming any greater responsibility for occupational health and safety than it presently has in isolated areas, such as Commonwealth employment and the maritime industry." MBA has been supportive of the Cole Recommendations on OH&S because, in the main, they will prove beneficial.<sup>5</sup> Some commentators have been less kind.<sup>6</sup> Clearly the optimal solution is that which was rejected by Cole. In economic terms, the current Cole proposal is "second best" or less than the theoretically optimal solution. However, we agree that attempts should be made outside of this optimal position to advance OH&S in the building and construction industry.
- 2.4 We note that in the PC's Issues Paper<sup>7</sup> one of the proposed responses to the national frameworks discussion is for the Commonwealth to establish a national workers compensation scheme and national OH&S legislation via the exercise of existing constitutional powers (eg the corporations power and/or referred power from the States). MBA's view is that nationally consistent OH&S policies should be created and implemented. MBA policy is that the States should compete in respect of the issue of workers compensation arrangements but that consistent arrangements will assist the business community and workers.
- 2.5 A national OH&S and a national workers compensation system under the control of the Commonwealth would be less desirable than creating an appropriate framework and related definitions to be adopted by the States and the Commonwealth. In particular, a consistent framework and definitions for workers compensation would benefit employers which operate nationally.
- 2.6 This submission outlines the MBA's broad policies regarding OH&S and workers compensation. Not all of the issues raised in the PC's Issues

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<sup>4</sup> [www.royalcombcgi.gov.au](http://www.royalcombcgi.gov.au) contains a copy of the Final Report

<sup>5</sup> See MBA's website ([www.masterbuilders.com.au](http://www.masterbuilders.com.au)) for a copy of its submission on the Cole Royal Commission Final Report

<sup>6</sup> See for example M Hammond "Law" National Safety, Journal of the National Safety Council of Australia May 2003 p 20

<sup>7</sup> Productivity Commission *National Workers Compensation and Occupational Health and Safety Frameworks* Issues Paper April 2003, p8

Paper are dealt with. It is the intention of MBA to set out the broad policies adopted in this subject area and to outline the most important platforms for consistency. Subsequent submissions will address other questions raised by the PC Issues Paper in the context of the MBA response to the PC interim report foreshadowed by the PC. Details concerning the building industry OH&S have already been extensively canvassed in the Cole Report including a comprehensive statistical analysis which it is not intended to repeat here.

### **3.0 Nationally Consistent OH&S Rules**

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- 3.1 MBA's two main policy objectives for OH&S are:
- to achieve improved building and construction industry OH&S performance; and
  - to achieve nationally consistent OH&S arrangements in the establishment of an appropriate framework and linked definitions.
- 3.2 MBA supports the development of a nationally consistent regulatory framework to be adopted by the nine (9) jurisdictions through national standards supported by national codes of practice and underpinned by guidance materials. This will lead to improved OH&S performance. Guidance material should be accessible to small business employers for use on building sites.
- 3.3 In MBA's response to the Royal Commission discussion paper on OH&S the need for OH&S law to be simplified on a national basis was emphasised thus:
- "One set of laws to replace 11 would be an excellent start".*
- 3.4 From the outset, we reject the idea that the current form of "co-operative" Federalism will advance OH&S. A better model based on a new level of co-operation will advance OH&S. The necessary consistency and reduced complexity that would follow if the Commonwealth and the States determined to regulate via one set of consistent rules, far exceeds any progress that would occur under any current model. Whilst cooperative arrangements have accelerated of late with the establishment of the NOHSC national strategy<sup>8</sup>, the Cole Report clearly states that, after detailed analysis, the current system cannot develop the reforms needed to fully assist the building and construction industry. This does not mean that improvement cannot occur within the current framework – merely that improvements will be less than optimal.
- 3.5 We believe co-operative federalism will advance OH&S for the building and construction industry. We believe there is a need for prescriptive legislation where high risk construction activities are being undertaken and prescriptive standards can be set, for example work at height, working in the ground, working with hazardous substances, working in confined spaces, public protection, falling objects. These should be consistently applied and

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<sup>8</sup> [http://www.nohsc.gov.au/national\\_strategy/](http://www.nohsc.gov.au/national_strategy/)

enforced in all jurisdictions via the adoption of national standards dealing with these subjects.

#### **4.0 Workers Compensation – Uniform Core Principles**

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- 4.1 MBA does not support workers compensation and occupational health and safety being combined in one framework or one national scheme. Separate regulatory arrangements are more appropriate.
- 4.2 The States and Territories and the Commonwealth currently have in place a number of workers compensation schemes that differ in design, benefit levels and in financial success. It is particularly this latter issue that would complicate the integration of the current State systems into one national system defined by a single Commonwealth statute.
- 4.3 The 4<sup>th</sup> Comparative Performance Monitoring Report<sup>9</sup> contains material that compares the recognition of liabilities, represented by the ratio of net assets to outstanding claim liabilities (referred to as the funding ratio in some schemes), on a standardised basis for the four financial years 1997-98 to 2000-2001. Nationally the funding ratio of Australian workers' compensation schemes declined marginally in 2000–01 to an average of 87 per cent. At 30 June 2001, only three Australian schemes reported a ratio of assets to liabilities greater than 100 per cent. This is a particular concern, having regard to the upward pressure such a situation places on employer costs. A major difficulty confronting any Commonwealth Government that sought to take charge of workers compensation arrangements in Australia would be to examine how the problem of negative funding ratios can be reversed whilst maintaining the level of benefits offered by the current State systems. In addition, it would be difficult for any Commonwealth Government to assume the level of unfunded liabilities that most State Governments have accrued in their workers compensation schemes.
- 4.4 Whilst we do not recommend a Commonwealth controlled Australian workers compensation scheme, we advocate a number of improvements to current arrangements based on the notion of core principles that should underpin uniformity amongst States.
- 4.5 MBA is not optimistic about the States adopting uniform core principles. The issues of differing funding ratios between States and the competitive pressures between States to attract business are factors that support this view. In other words, the system of competition between States is at issue – new businesses will take into account the costs of establishing workers compensation in a particular State<sup>10</sup>. Despite that political view, the policy utility of adopting core principles should be recognised.
- 4.6 Accordingly, MBA has the following principal policy objectives regarding workers compensation:

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<http://www.workplace.gov.au/DEWRSB/WP/Content/Files/WP/WR/Publications/CPMReport0802FourthReport.pdf> p.72

<sup>10</sup> Governments openly promote lower workers compensation premiums as indicators of higher levels of cost effectiveness. See for example the Tasmanian website <http://www.development.tas.gov.au/InfoTech/labourforce.html>

- establishment of core nationally consistent, cost effective compensation arrangements; and
  - promotion of an incentive based premium system where improved or diminished performance equates to reduced or increased workers compensation premiums.
- 4.7 MBA recognises that the most important issue is to prevent workplace injury and illness from occurring. However, where such events do occur, minimising the human and financial costs must be the next priority. Mechanisms that assist a speedy recovery and a prompt return to work are of paramount importance in a workers compensation scheme. A system of workers compensation that operates efficiently for the injured, but with adequate compensation, must appropriately allocate the cost of workplace injury and illness between employer, employees and the taxpayer. The PC investigation should focus upon how the current systems for delivery of compensation for injured workers under various schemes may be better integrated, and how integration should be effected. We will return to some of these issues below.

## 5.0 Model Provisions to Carry Consistent OH&S Principles

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- 5.1 The Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002 (OHSCE Bill) amends the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (the Act) to provide improved protection of the health and safety of Commonwealth employees at work. It was introduced in the House of Representatives on 26 June 2002.
- 5.2 The OHSCE Bill, in a number of ways, provides a model for the structure consistent OH&S laws should follow. (Obviously, some aspects of the Bill's structure and operation could not be translated to the private sector). It revises the Act's provisions by ensuring that the employer's duty of care is outcomes focussed and by removing unnecessary prescription from the Act's terms. There is no change to the employer's primary duty to take all reasonably practicable steps to protect the health and safety at work of employees. However, prescriptive provisions requiring an employer to develop an occupational health and safety policy and agreement are replaced with a requirement for the employer to develop safety management arrangements in consultation with the employer's employees. When developing or varying safety management arrangements, employers will be required to have regard to any advice of the Safety, Rehabilitation and Compensation Commission (SRCC). In any model system, these management plans are important. They should be employer/employee specific, involving all employees, not merely union delegates, and should clearly define the roles and responsibilities of workplace parties. Management plans of this type are envisaged as part of the improved OH&S focus of the Commonwealth per Recommendation 24 of the Cole Report.
- 5.3 The role of the SRCC envisaged in the Bill could be taken for the private sector by a restructured National Occupational Health and Safety Commission (NOHSC). In its submission on the Royal Commission Discussion Paper on OH&S, MBA envisaged assistance being provided by



an external authority that would be able to provide technical advice about OH&S problems, an organisation with the ability to provide an extensive set of subordinate prescriptive manuals, where necessary. Thus, the model provided in the OHSCE Bill fits with this idea. We support the adoption of national standards and national codes of practice from which these materials could be derived. However, where the individual safety management plans were able to safely supplant a prescriptive method of independent work, then the management plans would prevail. As expressed in paragraph 3.5, for high risk construction activities, prescriptive standards should be set and consistently enforced and it would be rare that management plans altered these arrangements.

5.4 The OHSCE Bill also recognises the primacy of direct employer and employee relationships, by facilitating consultations between employers and employees through a more direct relationship, in part by removing mandatory third party intervention. This is an underlying theme in the Cole Report. Employers and employees will be free to develop suitable OH&S arrangements which take account of the circumstances of their own enterprise to accommodate their needs at the enterprise or site level. Where these arrangements were not within the competence of a small business, the template arrangements put in place by NOHSC in a revised role would be the underpinning OH&S arrangements. This strategy recognises that performance based legislation inherently creates uncertainty and this suggestion will help to manage that phenomenon without the need to legislate unnecessary prescriptive measures.

5.5 There is a great deal of debate about appropriate enforcement levels and penalties on OH&S arrangements.<sup>11</sup> MBA believes that there should be a balanced approach to enforcement and that in such a regime the necessity for harsh and alienating laws based on notions of industrial manslaughter<sup>12</sup> are not warranted. The OHSCE Bill provides flexibility to employers to develop appropriate arrangements at the workplace level, balanced by a responsive enforcement regime by:

- Encouraging voluntary compliance;
- Providing for civil penalties as far as possible; and
- Providing for a wider range of remedies under the Act namely:
  - Injunctions, both prohibitory and mandatory, to achieve compliance with the Act;
  - Remedial orders to enable effective action to be taken to remedy the effect of a breach of the Act; and
  - Enforceable undertakings. Comcare is given the power to accept a written undertaking relating to the fulfilment of an obligation under the Act from a person who is required to fulfil that obligation. This will be available as an alternative to prosecution and thereby encourage voluntary compliance with the requirements of the Act.

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<sup>11</sup> For one erudite perspective on this debate, see R Johnstone "Safety Costs and Crime" September 2002 [http://www.aic.gov.au/conferences/regulation/johnstone .pdf](http://www.aic.gov.au/conferences/regulation/johnstone.pdf)

<sup>12</sup> For an excellent critique of these laws, endorsed by MBA, see ACCI "Industrial Manslaughter and Workplace Safety." [www.acci.asn.au](http://www.acci.asn.au)

This approach to OH&S enforcement stands as an appropriate model for a new broader based system and the approach that should be taken by the Commonwealth and the States.

- 5.6 We propose the model established by the OHSCE Bill, modified as mentioned, in answer to the question in the PC's discussion paper as to what would be the features of a national OH&S framework that would generate the greatest benefit for the community. Consistency based on this model would reduce complexity and compliance costs.

## **6.0 Workers Compensation – the beginning of a model**

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- 6.1 An ideal workers compensation scheme should be fully self-funding. This ideal is far from reality, as discussed in paragraph 4.3 of this submission. However, standardisation of certain elements of workers compensation has the potential to bring benefits such as allocative efficiency and fairness. Access to workers compensation schemes and entitlements flowing from them must clearly distinguish between employees and independent contractors. MBA will make further submissions on this issue in the future. Our initial position is that a very important element of the PC's work will be in providing options for consistency in definitions used in all workers compensation legislation. MBA submits that it is from such a suite of options that feedback to the PC as to the definitions with greatest utility will flow.
- 6.2 As expressed earlier, there are a number of core principles that should govern a standardised system for workers compensation. The most efficacious definitions will flow from the manner in which and the extent to which these principles are adopted. Whilst MBA does not agree with all of the recommendations of the Heads of Workers Compensation Authority (HWCA) report<sup>13</sup> that had as part of its objective to promote greater national consistency, there is a very useful analysis relating to scheme design. The issue of appropriate cost allocation raised in paragraph 4.7 of this submission is dealt with by establishing what are termed "principles of good benefit design" which have as one of their purposes, an attempt to make allocation decisions more transparent. Underpinning the establishment of these principles are three characteristics that should guide any reform in workers compensation.
- 6.3 We agree with the HWCA view that any benefit structure for workers compensation should exhibit three principal characteristics:
- Balances equity between employees (having regard to benefit adequacy) and employers (having regard to scheme affordability);
  - Achieves administrative efficiency; and
  - Reinforces the primary goals of prevention and return to work.<sup>14</sup>

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<sup>13</sup> Heads of Workers Compensation Authorities "Promoting Excellence: National Consistency in Awarding Workers' Compensation".

<sup>14</sup> Ibid at p. 45

6.4 HWCA then sets out the principles to best practice design that flow from those three objectives. Those core principles are as follows:

PRINCIPLE	OBJECTIVE
1. That an employer's financial liability flowing from a work incapacity in a no-fault scheme be limited.	Scheme affordability
2. That workers' compensation design should provide for no (or strictly limited) access to common law action. <b>NB MBA suggests no access.</b>	Scheme affordability Benefit adequacy
3. That weekly benefits be earnings related during the entire period of incapacity.	Benefit adequacy
4. That step-downs should apply which recognise non-work savings and provide return to work incentives.	Return to work
5. That ceilings on weekly benefits should not apply for an initial period but ceilings should apply in the context of step-downs.	Benefit adequacy Return to work
6. That for an initial period, an injured worker's weekly benefits should be calculated in terms of his or her normal weekly earnings (NWE) for the previous 12 months.	Benefit adequacy
7. That weekly benefits constitute the system of income replacement for a worker's loss of employment income and the benefit system should not extend to additional payments for dependants.	Scheme affordability Benefit adequacy
8. That income replacement for a compensable work injury should be met through workers' compensation. There should be no access to other employer-financed income payments which relate to the same injury and incapacity. (Payment of other employer financed income/capital benefits should be restricted to non-compensable situations and injuries). Payments from other sources which may be made while liability is being determined should be recovered and/or recredited as appropriate.	Prevention Return to work
9. That redemptions of future benefits are not desirable and should be available only in limited circumstances.	Benefit adequacy Return to work

	Admin efficiency
10. That a comprehensive impairment/disability benefit be designed to accommodate all non-economic losses resulting from occupational injury and illness based on a common table, a common percentage attribution to the same impairment and a common assessment process.	Scheme affordability Benefit adequacy Comprehensiveness

- 6.5 MBA supports these principles as the basis of core, uniform standards that should underpin the relevant statute in each State. This is to ensure scheme affordability and to more appropriately allocate this cost to the community. It should be noted that the table has been altered to show MBA policy relating to access to the common law - even limited access to common law rights in no fault based schemes, is misconceived.
- 6.6 Workers compensation schemes should operate on a no fault basis. This is appropriate. Workers are paid benefits whether or not they have contributed by their own actions to an injury. Common law claims based upon proving a party or parties, particularly the employer, to be at fault are therefore inherently out of place in a no fault system. The scheme, not the employer, meets the costs associated with common law actions although in an ideal system, the premium of the employer should reflect the claims history (with suitable modifications for small business). Whilst common law costs can impact significantly upon an employer's workers compensation premium, the various State schemes generally absorb these costs and incur additional legal and medical costs than would otherwise be incurred. The argument put forward by proponents of common law is frequently based on the idea that these legal actions are "punishing" the employer. Penalties by their very nature are intended to have some deterrent effect in regard to so-called negligent behaviour that results in injury. However, this deterrent effect is removed by the no fault construct within which the damages action is taken.

## 7.0 Conclusion

- 7.1 MBA looks forward to providing comment on the PC Interim Report.
- 7.2 In summary, MBA advocates and supports the following core principles:
- Nationally consistent workers compensation schemes based upon a series of core principles.
  - A nationally consistent OH&S regulatory framework, based upon the adoption of national OH&S standards, underpinned by user friendly practical guidance materials and, where necessary, prescriptive standards governing high risk activities.
  - Regulatory frameworks and systems to be nationally consistently administered and interpreted along the lines of the OHSCE Bill.