



Submission to

Review Panel for Occupational Health and Safety

on the

The National Standard for Construction Work –

Definitions of Construction in State and Territory Legislation

June 2008
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building australia



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1.0 INTRODUCTION

- 1.1 This submission is made by Master Builders Australia Inc (Master Builders).
- 1.2 Master Builders represents the interest of all sectors of the building and construction industry. The association consists of nine State and Territory builders' associations with over 31,000 members.
- 1.3 The construction workforce currently represents over 9 per cent of the total Australian workforce with the number of jobs expected to increase by more than 200,000 to around 1.2 million employees over the next decade.
- 1.4 This is the second submission Master Builders has submitted to the Review Panel. It will also be sent to the Deputy Prime Minister and to the Australian Safety and Compensation Council.
- 1.5 On 29 April 2008 Master Builders submitted its first submission to the Review Panel. On that date representatives of Master Builders met with the Review Panel and noted that Master Builders is very concerned about the inconsistencies in the method of implementation of the National Standard for Construction Work ('the Standard'), in the OHS laws and regulations of the States and Territories. This submission is written to highlight a concern with the Standard that focuses upon the differing manner in which the basic industry definition has been taken up in the jurisdictions.

2.0 PURPOSE OF THIS SUBMISSION

- 2.1 This submission is made in the context of the proposed national model occupational health and safety (OHS) laws, and any proposed regulations. It is also made in the context of the review of existing OHS State and Territory laws by the Review Panel to determine the content of the model laws and subsidiary regulations.
- 2.2 Master Builders highlights in this submission that the Standard at the most fundamental level has not been implemented consistently. It should not form the basis of further OHS law and governments should act as soon as possible to regularize the essential coverage of the Standard which is currently a mishmash.

3.0 OVERVIEW OF MASTER BUILDERS' POSITION

- 3.1 Master Builders is critical of the way in which the Standard is currently being implemented and does not believe that it now represents an appropriate vehicle for reform. Indeed, Master Builders withdraws its support for the Standard based on its current method of implementation across the States and Territories. Master Builders does support *nationally consistent* hazard based standards which are a better reform mechanism than has been shown in the development of the Standard. We reject industry OHS standards on the basis of our unsatisfactory experience with the Standard.
- 3.2 This submission does not encompass all the issues raised by the current method of implementation of the Standard. It simply focuses on inconsistencies in the way that 'Construction Work' and related definitions are defined in legislative instruments across the States and Territories, particularly in those jurisdictions that have purported to implement the Standard. The analysis is used to illustrate the current flaws in the implementation process of the Standard generally. It is ridiculously complex.
- 3.3 Appendix "A" is a schedule prepared by Master Builders. It sets out in detail all statutory and other definitions analyzed in this submission. In this regard, it is produced to assist in understanding the forensic analysis set out in this submission.
- 3.4 Master Builders advocates that regulations underpinning the new model OHS Act being developed by the Review Panel should be, wherever possible, based upon the control of hazards. Regulations that have this basis for their content are, in Master Builders experience, more appropriate for regulating building sites OHS than broad based industry related regulations.
- 3.5 Hazard based regulations follow an established practice. First, a hazard is identified. Secondly, the relevant regulation determines that the hazard should be controlled. Finally, where applicable, a level of exposure that cannot be exceeded or a level to which the hazard is to be controlled is established. The successful asbestos codes fall into this category, as does regulation regarding noise. So, too, do manual tasks, but this subject area needs further urgent review work. For the present, Master Builders records its policy of rejecting the industry specific standard and also emphasises that its poor implementation has added to rather than slowed the problem of fragmented OHS regulation.

3.5 The Codes of Practice that have been developed under the Standard have proved not to be optimal. In fact, the recently declared *Code of Practice for Precast Tilt-Up and Concrete Elements in Building Construction* is extremely poor. Master Builders submits that the other Codes of Practice developed under the Standard are insufficiently well administered to form the basis for regulation. Part of this problem derives from the inadequate manner in which they were developed: see Appendix B to this submission which is Master Builders' submission on the successor organisation to the ASCC where these problems are outlined.

4.0 BACKGROUND TO THE DEVELOPMENT OF THE STANDARD

4.1 The Standard was declared on 27 April 2005 by the National Occupational Health and Safety Commission (NOHSC)¹ (the predecessor of the current Australian Safety and Compensation Council (ASCC)). It was declared under section 38 of the *National Occupational Health and Safety Commission Act 1985* (Cth). The Standard is not legally enforceable unless State and Territory governments adopt it under State or Territory law,² for example, as part of their regulations under their principal OHS Acts.

4.2 The ASCC webpage notes that the Standard "...is expected to be adopted in State and Territory OHS laws, with a two-year implementation period for civil and commercial, and a three-year implementation period for the residential construction sectors."³

4.3 One of the aims of the ASCC is to "promote...national consistency in the OHS...regulatory framework".⁴ The aim of the Standard in an OHS context, which the ASCC endorses, is "...to protect persons from the hazards associated with construction work".⁵ The genesis for the Standard was the NOHSC's recognition in October 2002 that the construction industry warranted a high priority in Australia's efforts to reduce workplace death and injury.⁶

¹ Preface to the *National Standard for Construction Work*, p1.

² Confirmed on the website of the ASCC at <http://www.ascc.gov.au/ascc/HealthSafety/OHSstandards> accessed on 30/5/08.

³ Citing the website of the ASCC at <http://www.ascc.gov.au/ascc/priorityindustries/construction/nationalstandard> accessed on 30/5/08.

⁴ Citing the website of the ASCC at <http://www.ascc.gov.au/ascc/AboutUs/WhatWeDo> accessed on 30/5/08.

⁵ Preface to the *National Standard for Construction Work*, p1.

⁶ Ibid, p1.

- 4.4 This was followed in March 2003 by the Final Report of the Cole Royal Commission into the Building and Construction Industry, which recommended that *uniform* national occupational health and safety (OHS) construction standards be developed.⁷ In 2003, the Workplace Relations Ministers' Council agreed that NOHSC should undertake the recommended work to develop national material for the construction industry.⁸
- 4.5 The Standard was developed in a consultative manner. NOHSC established a Construction Reference Group (CRG), with representatives from State, Territory and Commonwealth governments, and from other relevant organizations including Master Builders. The CRG provided technical expertise and guidance for the development of the Standard.⁹
- 4.6 A draft of the Standard was released for public comment.¹⁰ As stated in paragraph 4.1 of this submission, the Standard was then declared by NOHSC, in accordance with section 38 of the *National Occupational Health and Safety Commission Act 1985* (Cth), on 27 April 2005.

5.0 OVERVIEW OF THE STANDARD'S IMPLEMENTATION IN STATE AND TERRITORY LAWS AT PRESENT

- 5.1 Despite the importance of reducing workplace death and injury in the construction industry, and the consultative manner in which the Standard was developed, to date it has been adopted by only some of the States and Territories. Queensland, Victoria, Western Australia, the Northern Territory and the ACT have adopted the Standard in full or in part. It has not yet been explicitly adopted in South Australia, NSW or Tasmania.
- 5.2 Of those jurisdictions which have not yet explicitly adopted the Standard, the South Australian regulations are currently the subject of a review. It is unclear at this stage whether South Australia plans to adopt any part of the Standard.
- 5.3 The NSW Cabinet is currently considering a proposed Bill which amends the *NSW Occupational Health & Safety Act* and, until this process is finalized, NSW will not be re-examining its OHS regulations. Tasmania does not, at this stage, appear to have any plans to review its regulations. In other words, it appears highly unlikely that the Standard will be adopted across all jurisdictions by the end of 2008.

⁷ Ibid, p1.

⁸ Preface to the *National Standard for Construction Work*, p1.

⁹ Ibid, p1.

¹⁰ Ibid, p1.

- 5.4 Furthermore, of the jurisdictions that have adopted all, or aspects of the Standard, their definitions of “Construction Work”, “Structure”, and where applicable “Construction Site”, are inconsistent. This inconsistency at such a fundamental level makes a mockery of the purported goal of achieving consistency across jurisdictions.
- 5.5 Furthermore, this type of inconsistency dramatically increases the likelihood of non compliance by businesses operating across jurisdictions, due to the confusion and complexity created by inconsistent requirements in each jurisdiction. Master Builders submits that State and Territory governments should reconsider their approach. The aim of the Standard in introducing greater consistency, is to protect persons from the hazards associated with construction work, a worthy goal but one that can be better focused by adopting hazard based standards and related uniform laws.

6.0 THE DEFINITION OF ‘CONSTRUCTION WORK’ IN THE NATIONAL STANDARD

- 6.1 The Standard defines ‘Construction Work’ in Clause 4.1 as follows:

‘Construction Work’ means any work on or in the vicinity of a Construction Site carried out in connection with the construction, alteration, conversion, fitting out, commissioning, renovation, repair, maintenance, de-commissioning, demolition or dismantling of any Structure, and includes:

- (a) the demolition or dismantling of a Structure, or part of a Structure, and the removal from the Construction Site of any product or waste resulting from the demolition or dismantling;*
- (b) the assembly of prefabricated elements to form a Structure or the disassembly of prefabricated elements, which, immediately before such disassembly, formed a Structure;*
- (c) any work in connection with any excavation, landscaping, preparatory work, or site preparation carried out for the purpose of any work referred to in this definition; and*
- (d) any work referred to in this definition carried out under water, including work on buoys, obstructions to navigation, rafts, ships, and wrecks; but does not include the exploration for or extraction of mineral resources or preparatory work relating to the extraction carried out at a place where such exploration or extraction is carried out.*

6.2 This definition links in to the definitions of 'Structure' and 'Construction Site' in the Standard, which must also be considered to determine whether or not work is 'Construction Work'. So, in this sense, a three step process is involved to determine what Construction Work comprises, considering each of the definitions mentioned. Almost all jurisdictions which have adopted the Standard define 'Construction Work' differently to the definition in the Standard.

7.0 QUEENSLAND: THE WORKPLACE HEALTH AND SAFETY ACT 1995 (QLD) AND THE WORKPLACE HEALTH AND SAFETY REGULATION 1997 (QLD)

7.1 Queensland has adopted aspects of the Standard. The definition of 'Construction Work' has been expanded from prior legislation¹¹. The definition now incorporates new types of work such as fit outs, renovations, repairs, and refurbishments. 'Construction Work' is defined in s14 of the *Workplace Health & Safety Act 1995 (Qld)* (the Queensland Act). A new definition of a 'Structure' has also been introduced; meaning that work on additional items such as fixed plant, ships and submarines is now classed as 'Construction Work'. Structure is defined in Schedule 3 of the Queensland Act.

7.2 Broad comparison with the Standard

7.2.1 In determining what 'Construction Work' is under the Queensland Act, a two-step process is involved rather than the three-step process under the Standard. In Queensland, 'Construction Work' is an activity on a 'Structure'. Therefore any interpretation of 'Construction Work' also involves consideration of the definition of 'Structure'. There is no reference to the defined term 'Construction Site' in this definition, which is the third step in the process under the Standard. The proximity of the Queensland's legislation introduction to the finalisation of the Standard indicates that this fundamental change was not a matter that was adequately canvassed by the prior consultations on the Standard. The removal of the Construction Site definition boundaries has increased the reach of the relevant law inconsistently with the intent of the Standard.

¹¹ Queensland Department of Industrial Relations website at <http://www.deir.qld.gov.au/workplace/business/construction/whatis/index.htm>

- 7.2.2 The Standard sets out that 'Construction Work' means "...any work *on or in the vicinity of* a Construction Site carried out *in connection with* the construction, alteration, conversion, fitting out, commissioning, renovation, repair, maintenance, de-commissioning, demolition or dismantling of any Structure, and includes [a specified list of types of work]." However, the words "on or in the vicinity of a Construction Site" are words of limitation in the Standard.
- 7.2.3 The Queensland Act states that work is Construction Work if it falls under a specified list of work in subclauses (a) to (e). The list in subclauses (b) to (d) expands on and refers back to the work listed in (a). The work listed in (a) is: "work to erect, construct, extend, alter, convert, fit out, commission, renovate, repair, refurbish, disassemble or decommission a Structure or part of a Structure". The reference point is work in relation to a Structure, without words of limitation referring to 'on or in the vicinity of a Construction Site', as in the Standard.
- 7.2.4 Deletion of references to "maintenance" in the Queensland definition of construction work, while retaining "repair" has created problems with interpretation, application and enforcement, given the overlap in meaning between the two. The Queensland regulator and industry in general, are still struggling with lack of clarity around these terms
- 7.2.5 The Queensland definition states that Construction Work is also: "(e) an activity that is a prescribed activity". Schedule 1 of the Act contains a definition of 'prescribed activity'. This sets out certain types of demolition work, and asbestos removal work. There is no reference to prescribed activities in the Standard, and the explicit reference to asbestos removal work in the definition is also different from the definition of Construction Work in the Standard.
- 7.2.6 The Queensland Act does not incorporate the wording in paragraph (d) of Construction Work in the Standard. Construction Work in the Standard includes "...any work referred to in this definition carried out under water, including work on buoys, obstructions to navigation, rafts, ships and wrecks; but does not include the exploration for or extraction of mineral resources or preparatory work relating to the extraction carried out at a

place where such exploration or extraction is carried out.” It may be that given that the Queensland Act simply incorporates, as a reference point, “Structure”, rather than to “any work on or in the vicinity of a Construction Site”, the reference to work carried out under water was considered unnecessary. It is unclear why the Queensland Act chose not to exclude exploration for mineral resources, or preparatory work leading to that extraction as described in the Standard. Again this exclusion causes confusion in application.

- 7.2.7 The Standard refers to ‘Construction Work’ including “...the removal from the Construction Site of any product or waste resulting from the demolition or dismantling.” This does not appear to be included in the Queensland definition, which in this sense is narrower.
- 7.2.8 In the Queensland Act the definition of work in s1(b) is only work in connection with that listed in paragraph (a) of the definition of Construction Work, rather than that listed in the whole of the definition of Construction Work as in the Standard. This point illustrates the unnecessary complexity of the Queensland Act.
- 7.2.9 The Queensland Act excludes from the definition of ‘Construction Work’, “work... to the extent it is carried out at a workplace, as part of a business, or undertaking if the work is to erect or construct a Structure that, when erected or constructed, is intended to be transported to another place”. The Standard contains a similar exclusion relating to where elements are manufactured ‘offsite’ (and related matters) but instead the relevant exclusion is located in the definition of ‘Construction Site’. Again, these differences introduce unnecessary complexity.
- 7.3 The definition of a ‘Structure’ in the Queensland Act is quite broad. When the two definitions are considered together, the definition of ‘Construction Work’ in the Queensland Act is broader than that in the Standard. As noted above, the Standard refers in its definition of Construction Work to the words of limitation “any work *on or in the vicinity of* a Construction Site”. As indicated previously, ‘Construction Site’ is a defined term under the Standard. By contrast the Queensland Act simply refers to Construction Work with reference to a ‘Structure’. In that Act, a ‘Structure’ means:

- (a) *a building, construction, wall, mast, tower, pylon, structural cable or telecommunications structure; or*
- (b) *an underground works (including shafts and tunnels), pipe, pipeline, sea defence works, river works, earthworks or earth retaining construction or other construction designed to preserve or alter a natural feature; or*
- (c) *a road or highway, footpath or driveway, railway line or siding, tramway line, airfield, dock or harbour, water storage or supply system (including a constructed lagoon), sewerage or drainage system, electricity or gas generation facility, transmission or distribution facility, gasholder, park or recreation ground (including, for example, a golf course, playing field, racecourse or swimming pool); or*
- (d) *production, storage or distribution facilities for heavy industries; or*
- (e) *fixed plant; or*
- (f) *a ship or submarine; or*
- (g) *formwork, falsework, scaffold or other construction designed or used to provide support, access or containment during Construction Work.*

7.3.1 By contrast in the Standard:

Structure means:

- (a) *any building, steel or reinforced concrete construction, railway line or siding, tramway line, dock, ship, submarine, harbour, inland navigation channel, tunnel, shaft, bridge, viaduct, waterworks, reservoir, pipe or pipeline (whatever it contains or is intended to contain), structural cable, aqueduct, sewer, sewerage works, gasholder, road, airfield, sea defence works, river works, drainage works, earthworks, constructed lagoon, dam, wall, mast, tower, pylon, underground tank, earth retaining construction, fixed plant, construction designed to preserve or alter any natural feature, and any other similar construction, and*
- (b) *any formwork, falsework, scaffold or other construction designed or used to provide support or access during Construction Work.*

7.3.2 The Queensland definition removed the broad catch all wording from paragraph (a) of the Standard definition "... and any other similar construction". In this sense, though both definitions of Structure are essentially exhaustive, the Queensland definition of Structure may be narrower, unless an alternative catch all phrase from the definition can be found (for instance 'construction' etc). The Queensland definition in paragraphs (a) to (f), in replacing and restating elements of the Standard's subclause (a), does however include some new terms discussed below.

7.3.4 The definition of 'Structure' in the Queensland Act explicitly refers to "production, storage and distribution facilities for heavy industries". These facilities may be included in the more general wording of the Standard,

but they are not explicitly referred to as in the Queensland Act. The Standard refers for instance to “any building, steel or reinforced concrete construction....reservoir, pipe or pipeline, ...underground tank...fixed plant...and any other similar construction”. The wording “and any other similar construction” in the Standard is likely to catch all manner of ‘Structures’ not otherwise listed in the definition.

7.4 The Queensland definition of Structure, by contrast to the definition in the Standard, also refers to “electricity or gas generation facility, transmission or distribution facility”. In so doing, the Queensland government appears to have ‘roped in’ new industries so that entities in the electrical industry for instance are now subject to provisions that would have applied only to the building and construction industry. The rationale for this extension, not dealt with in consultations on the preparation of the Standard, is unclear.

7.4.1 The Queensland Act also refers to a Structure including a footpath or drive way. In the Standard, these may or may not be included in the reference to “road...construction designed to preserve or alter any natural feature”, or through the wording “and any other similar construction”.

7.4.2 The Queensland definition of Structure also refers to a “park or recreation ground (including for example a golf course, playing field, racecourse or swimming pool)”. In the Standard elements of these terms may be captured through the wording “any building, steel or reinforced concrete construction, waterworks, reservoir, aqueduct, riverworks, earthworks, constructed lagoon, wall, earth retaining construction, construction designed to preserve or alter any natural feature” combined with the catch all “and any other similar construction” but this proposition is not beyond doubt.

7.4.3 The Queensland definition of Structure does not explicitly refer to a bridge, unlike the Standard, although the wording “construction” for instance (which becomes circular when combined with the definition of ‘Construction Works’), given the absence of the catch all phrase from the Standard, may capture it and most other works.

7.5 The expansion of the definition of construction work to include new industries which were previously not captured by what has in the past been understood as construction work, has created a situation where these industries are now being forced to comply with a regulatory framework which was never intended for these sectors. Specific construction regulations were developed over time with traditional construction in mind, whereas the expanded definition of construction work now, for example, requires persons installing fixed plant to complete general induction training, despite the fact that the training itself covers general OHS elements of typical construction work and has almost no relevance to the task of installing fixed plant. Again the ramifications of the altered definition were not explained to or explored with industry, a major issue when the notion of required and desired consistency is considered.

8.0 VICTORIA: THE OCCUPATIONAL HEALTH AND SAFETY ACT 2004 (VIC) AND OCCUPATIONAL HEALTH AND SAFETY REGULATIONS 2007 (VIC)

8.1 In 2007, Victoria reviewed its 13 occupational health and safety (OHS) regulations with a view to consolidating them into a single, streamlined document¹², now called the *Occupational Health and Safety Regulations 2007 (Vic)* under the *Occupational Health and Safety Act 2004 (Vic)*. The new regulations have now been promulgated, and the provisions in Part 5.1 will apply from 1 July 2008.¹³

8.2 Worksafe Victoria notes that the requirements are consistent with the Standard.¹⁴ Worksafe Victoria notes that these requirements build upon industry's existing safety practices by setting out specific OHS responsibilities for principal contractors, employers, workers and self-employed people.¹⁵ It is correct that the new laws build upon the commercial sector's current regulatory framework. However, for housing there is a very large volume of new law to be assimilated. This process has been poorly managed with the housing sector, particularly subcontractors, receiving very limited communication about the elevated obligations that will apply from 1 July 2008. There was a 12 month period where Part 3.1 was expanded but that period is insufficient for proper communication to the very large number of Victorian housing sector employers.

¹² Worksafe Victoria "Working Safely in the Construction Industry", Information Sheet, January 2007.

¹³ Worksafe Victoria "Is Construction Work Part of Your Business?" February 2008, Edition No 1, p 1.

¹⁴ Worksafe Victoria "Working Safety in the General Construction Industry: A Handbook for the Construction Regulations", February 2008, Edition No 1, p 1.

¹⁵ Ibid, p 1.

8.3 Regulation 5.1.2 of the *Occupational Health and Safety Regulations 2007 (Vic)* provides a definition of 'Construction Work'. Regulation 5.1.4 provides a definition of a Structure.

8.4 Broad Comparison with the Standard

8.4.1 The Victorian definition of 'Construction Work' is very similar to that in the Standard in some respects, but quite different in other respects.

8.4.2 The Victorian definition, like the Queensland definition, does not contain the words of limitation "...on or in the vicinity of a Construction Site" set out in the Standard; the reference point is simply to a 'Structure'. In this sense, the analysis of 'Construction Work' is a two step analysis, as in Queensland, rather than a three step analysis as in the Standard. The general wording of the initial part of the definition of Construction Work is otherwise very similar to the Standard, except that the catch all words "...or any similar activity" have been added at the end. This wording, combined with the removal of the words of limitation "on or in the vicinity of a Construction Site", appear to broaden the definition.

8.4.3 Like the Standard, and the Queensland definition, the Victorian definition then lists a number of types of work that are included in the general definition of Construction Work. It includes "installation and testing work performed in connection with the work" which is not referred to in the Standard. Unlike the Queensland definition, the Victorian definition includes "(b) the removal from the workplace of any product or waste resulting from the demolition", similar to the Standard.

8.4.4 Unlike the Queensland definition, there is no reference in the Victorian definition to "(e) an activity that is a prescribed activity", which is a unique Queensland addition. (Schedule 1 of the Queensland Act contains a definition of a 'prescribed activity'.) Like the Standard, the Victorian definition explicitly includes "any work....performed under water..." in contrast with the Queensland definition.

8.4.5 However, the Victorian definition contains broader exclusions than those in the Standard. The Victorian definition does not include:

- (a) *the assembly, disassembly, prefabrication or manufacture of fixed plant; or*

- (b) the prefabrication of elements as standard stock for sale; or*
- (c) routine or minor testing, maintenance or repair work performed in connection with a building or Structure; or*
- (d) the exploration for, or extraction of, minerals or stone.*

8.4.6 The exclusion in subclause (d) only is also an exclusion in the definition of “Construction Work” in the Standard. By contrast, subclauses (a) and (c) in the Victorian definition are not excluded in this way from the Standard. Subclause (b) is in a sense excluded from the Standard due to the definition of ‘Construction Site’ combined with the words of limitation ‘work on or in the vicinity of a Construction Site’. This definition of Construction Site specifically states that “...it does not include a place where elements are manufactured ‘off site’ or where construction material is stored as stock for sale or for hire”. These differences in the structure of the definitions from the Standard add unnecessary complexity.

8.4.7 An equivalent exclusion to subclause (d) does not appear to be contained in the Queensland definition. Subclause (b) is similar to an equivalent exclusion in the Queensland definition, which is Queensland’s only exclusion. In this sense then, comparing the Standard, the Queensland provisions, and the Victorian provisions, the exclusions in subclauses (a) and (c) would appear to be unique to Victoria.

8.4.8 The Victorian definition of ‘Structure’ is broader than that in the Standard. ‘Structure’ in the Standard is defined to “mean” a stipulated list of terms and is accordingly exhaustive. The Victorian definition of ‘Structure’ is defined to “include” a list of terms so is expansive. This is a significant difference, and expands the scope of the Victorian provisions by the lack of certainty associated with the expression of the Victorian list.

8.4.9 The definition in the Standard refers to the generic “any building, steel or reinforced concrete construction” whereas the definition in the Victorian Regulation does not include these general terms, perhaps because the definition of Structure is expansive rather than exhaustive. The Victorian definition does, however, include “electricity generation facility, electricity transmission facility, electricity distribution facility, gas generation facility.... gas transmission facility, gas distribution facility or park or recreation ground facility”, which are not specifically listed in the definition in the Standard. In this sense, like the Queensland definition, the Victorian

definition 'ropes in' new industries which are then subject to the provisions. The Victorian definition also refers to "...any part of any thing set out in [their definition]".

9.0 WESTERN AUSTRALIA - OCCUPATIONAL HEALTH AND SAFETY ACT 1984 (WA) AND OCCUPATIONAL SAFETY AND HEALTH REGULATIONS 1996 (WA).

9.1 New regulations relating to the Standard came into operation in WA for the civil/commercial construction sector on 3 January 2008 and will commence for the residential construction sector on 1 October 2008. These regulations are contained in Division 12 of Part 3 of the *Occupational Safety and Health Regulations 1996 (WA)*. As with Victoria, the main difficulty in practice is communicating the new obligations to the numerous housing sector employers.

9.2 The definition of 'Construction Work' in the WA regulations has however not changed since the incorporation of the Standard. The WA regulations do not define the term 'Structure'. We do not know the reason the definitions of 'Construction Work' and 'Structure' from the Standard were not incorporated into the regulations. This is again a measure that marks inconsistency that is unexplained.

9.3 The existing regulations, in 1.3 the definition section, specify that 'Construction Work' means:

- (a) the construction, erection, installation, alteration, repair, maintenance, cleaning, painting, renewal, removal, excavation, dismantling or demolition of, or addition to, any building or structure, or any work in connection with any of those things, that is done at or adjacent to the place where the building or structure is located;*
- (b) work on which a hoisting appliance or any scaffold or shoring is used or intended to be used;*
- (c) work in driving or extracting piles, sheet piles or trench sheet;*
- (d) work in laying any pipe or work in lining pipe that is done at or adjacent to the place where the pipe is laid or to be laid;*
- (e) work in sinking or lining or altering, repairing, maintaining, renewing, removing, or dismantling a well or borehole;*
- (f) road works, earthworks or reclamation; or*
- (g) work in laying an underground cable or work related to laying an underground cable that is done at or adjacent to the place where the cable is laid or to be laid.*

9.4 'Construction Work' is an exhaustive definition. It is quite different to that in the Standard in structure, and in some of its terminology. Subclauses (b) and (c) for instance use terminology that is quite different to the Standard. Subclause (b) deals with hoisting appliances, scaffolds and shoring. Subclause (c) relates to piles or trench sheet. Subclause (e) which deals with wells or boreholes is also quite different.

10.0 NORTHERN TERRITORY - WORKPLACE HEALTH AND SAFETY ACT (NT) AND THE WORK HEALTH (OCCUPATIONAL HEALTH AND SAFETY) REGULATIONS (NT).

10.1 In the Northern Territory, in December 2007 the Legislative Assembly passed legislation creating the *Workplace Health and Safety Act (NT)*. This legislation commenced in early 2008. Occupational health and safety and workers' compensation and rehabilitation functions, which previously existed together under the former *Work Health Act*, were separated into two Acts.

10.2 In the Northern Territory, the Standard has been given effect by calling it up as the law, even though the document was never intended to have legal force, a matter made plain by NOHSC when convening the Construction Reference Group meetings. It is called up in Regulation 133A of the *Work Health (Occupational Health and Safety) Regulations (NT)*. That Regulation states that the Standard "is incorporated into and forms part of these Regulations".

10.3 Master Builders submits that the Northern Territory government should reconsider its approach to the method of implementation of the Standard. The Standard should instead apply either as a Code of Practice as in the ACT, or alternatively the NT regulations should be redrafted, so that the language through which the Standard is put into effect is appropriate for the regulations.

10.4 There is also a separate and different definition of Construction Work in Regulation 2. This provides that "Construction Work means construction, digging, filling, erection, installation, addition to, alteration, forming up, repair, maintenance, cleaning, painting, renewal, removal, dismantling or demolition of a building, Structure or excavation".

10.5 This appears to contradict the definition in the Standard which has been deemed to have legislative force. The definition in Regulation 2 is far shorter than that in the Standard, and contains different language. The Standard, for example, does not refer explicitly to digging, cleaning or painting.

10.6 Instead, the Standard contains broader terms that are likely to cover these concepts and others not listed in the exhaustive definition in Regulation 2. The Standard refers to work “carried out in connection with ...construction”, which would probably include cleaning or painting. It also refers to work “in connection with any excavation”. Master Builders submits that the inconsistency in the definitions should be resolved in favour of the definition in the Standard.

11.0 AUSTRALIAN CAPITAL TERRITORY – THE OCCUPATIONAL HEALTH AND SAFETY ACT 1989 AND THE OCCUPATIONAL HEALTH AND SAFETY (NATIONAL STANDARD FOR CONSTRUCTION WORK) CODE OF PRACTICE 2008

11.1 In the ACT, the Standard applies as a Code of Practice.¹⁶ In 2008, the *Occupational Health and Safety (National Standard for Construction Work) Code of Practice 2008*, was approved under s 206 of the *Occupational Health and Safety Act 1989*. The Code took effect from 29 February 2008.¹⁷

11.2 The Code of Practice sets a minimum standard for management of health and safety issues for specific topics.¹⁸ Under s45 of the *Occupational Health and Safety Act 1989 (ACT)* whether a person owing a duty under the Act has complied with an approved Code of Practice is relevant in determining whether they have satisfied reasonable practicability and complied with that duty. The Code of Practice incorporates the Standard word for word, including the definition of Construction Work in Clause 4.1 of the Standard.

11.3 The Explanatory Memorandum provides that:

‘Construction Work’ means any work on or in the vicinity of a Construction Site carried out in connection with the construction, alteration, conversion, fitting out, commissioning, renovation, repair, maintenance, de-commissioning, demolition or dismantling of any Structure.

¹⁶ *Occupational Health and Safety (National Standard for Construction Work) Code of Practice 2008*, in the “Notification Statement” Clause 2 entitled ‘Approval as a Code of Practice’.

¹⁷ ACT legislation register at <http://www.legislation.act.gov.au/di/2008-30/default.asp> accessed on 2/6/08.

¹⁸ ACT Workcover website at <http://www.workcover.act.gov.au/docs/codesohs.htm> accessed on 2/6/08.

11.4 This appears to be an abbreviated definition of that in clause 4.1 of the Standard, incorporated in the ACT Code. Clause 4.1 of the Standard (and the ACT Code) provides more detail by noting that the above definition includes the work described in subclauses (a), (b), (c) and (d). The *Occupational Health and Safety Act 1989* (ACT) does not contain a definition of Construction Work. Nor do the *Occupational Health and Safety (General) Regulation 2007*(ACT)¹⁹, or its predecessor, the *Occupational Health and Safety Regulation 1991* (ACT)).

11.5 The Exposure Draft of the *Work Safety Bill 2008* has recently been published. Master Builders is bemused by the publication of this Bill. It is a very perplexing step in light of the ACT Government's commitment to nationally harmonised legislation. Whilst the Exposure Draft refers to that agreement, it seems poor timing to commit the ACT to a new legislative model in advance of the publication of the Review Panel's work. This is a point that we will be emphasising to the Deputy Prime Minister. MBAACT will also be making representations on this issue to the ACT Government seeking for any review of the local legislation to await the outcome of the Review Panel's report.

12.0 SOUTH AUSTRALIA – THE OCCUPATIONAL HEALTH, SAFETY AND WELFARE ACT 1986 (SA) AND OCCUPATIONAL HEALTH, SAFETY AND WELFARE REGULATIONS 1995 (SA)

12.1 The *Occupational Health, Safety and Welfare Regulations 1995* (SA), under the *Occupational Health, Safety and Welfare Act 1986* (SA) are currently subject to a review of their content.²⁰ It would appear that the adoption of the Standard is still under consideration.

12.2 Division 5.10 of the South Australian Regulations deal with 'Construction Work', which is not set out in the definition section. This definition is quite different from that in the Standard. Clause 5.10.1 (2) simply states that:

In this Division—

'Construction Site' means a site where one or more of the following activities are carried on:

- (a) the construction, erection, alteration, repair, equipping, finishing, painting, cleaning, marking or demolition of a building, Structure or ship;*
- (b) excavating, shaft sinking or tunnelling;*
- (c) the construction or maintenance of—*

¹⁹ Effective as of 26 May 2008 according to ACT Legislation Register at <http://www.legislation.act.gov.au/sl/2007-36/>

²⁰ SafeWork SA webpage at http://www.safework.sa.gov.au/show_page.jsp?id=6685 accessed on 2/6/08.

- (i) roadworks;
- (ii) the permanent way of a railway, busway or tramway;
- (d) dredging;
- (e) the placing, laying or maintenance of pipes or cables (whether the pipes or cables are placed or laid above or below ground level);
- (f) earth moving by power driven equipment

13.0 NEW SOUTH WALES - OCCUPATIONAL HEALTH AND SAFETY ACT 2000 (NSW) AND THE OCCUPATIONAL HEALTH AND SAFETY REGULATION 2001 (NSW)

13.1 There is currently no reference to the Standard in the Act or Regulations. However, the Standard is referred to briefly in general guidance material on NSW Workcover's website.²¹ A draft Bill amending the *Occupational Health and Safety Act 2000 (NSW)* is currently before Cabinet, and has been for some time.

13.2 Parts 8.3 and 8.4 of the *Occupational Health and Safety Regulation 2001 (NSW)*, under the *Occupational Health and Safety Act 2000 (NSW)* deal specifically with construction work. Regulation 3 contains a definition of Construction Work.

13.3 Regulation 3 provides that:

'Construction Work' means any of the following:

- (a) excavation, including the excavation or filling of trenches, ditches, shafts, wells, tunnels and pier holes, and the use of caissons and cofferdams,
- (b) building, including the construction (including the manufacturing of prefabricated elements of a building at the place of work concerned), alteration, renovation, repair, maintenance and demolition of all types of buildings,
- (c) civil engineering, including the construction, structural alteration, repair, maintenance and demolition of, for example, airports, docks, harbours, inland waterways, dams, river and avalanche and sea defence works, roads and highways, railways, bridges and tunnels, viaducts, and works related to the provision of services such as communications, drainage, sewerage, water and energy supplies.

13.4 This definition is initially exhaustive, using the term "means". The terms excavation, building and civil engineering are then subject to expansive sub-definitions. The structure of the definition, which is centred around those three concepts, is quite different to the Standard.

²¹ Workcover NSW, "OHS Guidance for Housebuilders" factsheets, December 2007.

14.0 TASMANIA - WORKPLACE HEALTH AND SAFETY ACT 1995 (TAS) AND THE WORKPLACE HEALTH AND SAFETY REGULATIONS 1998 (TAS)

- 14.1 In Tasmania, OHS is governed by the *Workplace Health and Safety Act 1995 (Tas)* and the *Workplace Health and Safety Regulations 1998 (Tas)*. Division 11 of the Regulations deals with ‘Construction Notification’, and sets out a number of requirements specific to construction work. The Standard is not specifically referred to in the Act or Regulations.
- 14.2 However Regulation 17(2)(b), which relates to ‘hazards and risks in the workplace’ is relevant. Regulation 17(1) notes that an accountable person, as far as is reasonably practicable, must identify all hazards arising or which may arise, in a workplace, assess the risk, and implement appropriate measures to control the risk. In doing so, under Regulation 17(2)(b), that person... “must consider ...any standard, rule, code or specification relating to the hazard of which the person ought to have been aware.”
- 14.3 The Standard is not gazetted as a Code of Practice. However, it is a Standard under s17(2)(b) of which, in the view of Workcover Tasmania as communicated to Master Builders, a person in the construction industry should be aware.

15.0 CONCLUSION

- 15.1 Master Builders no longer supports the Standard in part based upon the method by which the Standard has been implemented. The combined result of the analysis in this submission raises the question: why did the States and Territories which have implemented the Standard deliberately choose not to adopt the definitions from the Standard?
- 15.2 Queensland and Victoria have modified the definitions from the Standard apparently in an attempt to broaden the application of the provisions; while Western Australia chose not to modify its existing definitions at all, and the Northern Territory deemed the Standard to have legislative force (despite the inconsistency with existing definitions). In the ACT, unlike the other jurisdictions, the Standard simply applies as a Code of Practice for the Standard itself but without the underpinning Codes of Practice the method of implementation is opaque.

- 15.3 The practical consequence is that the Standard is applied differently across all States and Territories. This appears to defeat the purpose of the Standard, which is to promote consistency in the application of the law across jurisdictions.
- 15.3 Master Builders withdraws its support for the Standard based on its current method of implementation across the States and Territories. Master Builders supports nationally consistent hazard based regulations referred to in Section 3 of this submission.
- 15.4 Master Builders submits that State and Territory Governments should reconsider their approach to the implementation of the Standard to ensure true national consistency. The Commonwealth government should take this into consideration in considering the content of any regulations enacted pursuant to the model national OHS laws and should only recognize hazard based regulations as having the capacity to inform the basis of substantive law.

* * *

**The National Standard for Construction Work –
Definitions of Construction in State and Territory Legislation**

Jurisdiction	Instrument and General Comments relating to Extent of Incorporation of the National Standard for Construction Work (the 'Standard')	Definitions of "Construction Work", "Structure" and where applicable "Construction Site"
Commonwealth	<p>'National Standard for Construction Work'</p> <p>The Standard was declared in 2005 by the NOHSC and "...is expected to be adopted in State and Territory OHS laws, with a two year implementation period for civil and commercial and a three year implementation period for the residential construction sectors." (ASCC webpage).</p> <p>The ASCC (like its predecessor the NOHSC) has the power to declare National OHS Standards and Codes of Practice. This power is derived from the <i>Australian Workplace Standards Act 2005 (Cth)</i>. These Standards and Codes are not legally enforceable unless State and Territory governments adopt them as regulations under their principal OHS Acts.</p>	<p>The Standard defines '<i>Construction Work</i>' in Clause 4.1 as follows:</p> <p><i>"Construction Work</i>' means any work on or in the vicinity of a Construction Site carried out in connection with the construction, alteration, conversion, fitting out, commissioning, renovation, repair, maintenance, de-commissioning, demolition or dismantling of any structure, and includes:</p> <p>(a) the demolition or dismantling of a Structure, or part of a Structure, and the removal from the Construction Site of any product or waste resulting from the demolition or dismantling;</p> <p>(b) the assembly of prefabricated elements to form a Structure or the disassembly of prefabricated elements, which, immediately before such disassembly, formed a Structure;</p> <p>(c) any work in connection with any excavation, landscaping, preparatory work, or site preparation carried out for the purpose of any work referred to in this definition; and</p> <p>(d) any work referred to in this definition carried out under water, including work on buoys, obstructions to navigation, rafts, ships, and wrecks; but does not include the exploration for or extraction of mineral resources or preparatory work relating to the extraction carried out at a place where such exploration or extraction is carried out."</p> <p><i>"Construction Site</i>' means a place at which Construction Work is undertaken, and any other area in the vicinity where plant or other material used or to be used in connection with the Construction Work is located or kept during the construction work. It does not include a place where elements are manufactured 'off site' or where construction material is stored as stock for sale or for hire."</p> <p><i>"Structure</i>' means:</p> <p>(a) any building, steel or reinforced concrete construction, railway line or siding, tramway line, dock, ship, submarine, harbour, inland navigation channel, tunnel, shaft, bridge, viaduct, waterworks, reservoir, pipe or pipeline (whatever it contains or is intended to contain), structural cable, aqueduct, sewer, sewerage works, gasholder, road, airfield, sea defence works, river works, drainage works,</p>

Jurisdiction	Instrument and General Comments relating to Extent of Incorporation of the National Standard for Construction Work (the 'Standard')	Definitions of "Construction Work", "Structure" and where applicable "Construction Site"
		<p>earthworks, constructed lagoon, dam, wall, mast, tower, pylon, underground tank, earth retaining construction, fixed plant, construction designed to preserve or alter any natural feature, and any other similar construction, and</p> <p>(b) any formwork, falsework, scaffold or other construction designed or used to provide support or access during Construction Work.</p>
<p>Queensland</p>	<p><i>Workplace Health and Safety Act 1995 (Qld)</i> and the <i>Workplace Health and Safety Regulation 1997 (Qld)</i></p> <p><i>Construction Work</i> is defined in s14 of the Act.</p> <p>Queensland has now adopted aspects of the Standard.</p> <p>The definition of '<i>Construction Work</i>' has been expanded, incorporating new types of work such as fit outs, renovations, repairs, and refurbishments.</p> <p>A new definition of a '<i>Structure</i>' has also been introduced, meaning that work on additional items such as fixed plant, ships and submarines is now classed as construction work.</p> <p>Part 6 and Part 17 of the Regulations also deal with <i>Construction Work</i>. Part 17 of the Regulations distinguishes between different types of <i>Construction Work</i>, and contains some definitions for that Part (Civil, Housing, High risk etc.)</p> <p>The Qld Department of Industrial Relations website contains extensive guidance material relating to the definition of '<i>Construction Work</i>' with examples.</p>	<p>Under s14 of the <i>Workplace Health and Safety Act 1995 (Qld)</i> :</p> <p>"(1) Work is <i>Construction Work</i> if it is—</p> <p>(a) work to erect, construct, extend, alter, convert, fit-out, commission, renovate, repair, refurbish, disassemble or decommission a structure, or part of a structure; or</p> <p>(b) work connected with site preparation, excavation and landscaping for work mentioned in paragraph (a); or</p> <p>(c) the assembly or installation of prefabricated components to form a Structure, or part of a Structure, for work mentioned in paragraph (a); or</p> <p>(d) the disassembly of prefabricated components for work mentioned in paragraph (a) that, immediately before the disassembly, formed a Structure or part of a Structure; or</p> <p>(e) an activity that is a prescribed activity.</p> <p>(2) Work is not <i>Construction Work</i> to the extent it is carried out at a workplace, as part of a business or undertaking, if the work is to erect or construct a Structure that, when erected or constructed, is intended to be transported to another place.</p> <p>Example of what is not <i>Construction Work</i>— construction of a manufactured home or prefabricated building</p> <p>(3) <i>Construction Work</i> is taken to stop—</p> <p>(a) when the <i>Construction Work</i> at the workplace where the <i>Construction Work</i> is being performed ends and possession of the workplace is returned to the client; or</p> <p>(b) if the client remains in possession of the workplace where the <i>Construction Work</i> is being performed while the work is performed—when the <i>Construction Work</i> at the workplace ends."</p> <p>Schedule 1 of the Act defines a "prescribed activity" referred to in (1)(e) as follows:</p>

Jurisdiction	Instrument and General Comments relating to Extent of Incorporation of the National Standard for Construction Work (the 'Standard')	Definitions of "Construction Work", "Structure" and where applicable "Construction Site"
		<p>“(1) Demolition work is a prescribed activity if the Structure the subject of the demolition or dismantling contains pre-tensioned or post-tensioned structural components.</p> <p>(2) Demolition work is a prescribed activity if the demolition or dismantling of the Structure involves the use of—</p> <p>(a) load shifting equipment; or</p> <p>(b) explosives or another induced collapse method.</p> <p>(3) All other demolition work is a prescribed activity unless the Structure the subject of the demolition or dismantling is —</p> <p>(a) a domestic house; or</p> <p>(b) a Structure built as, and still having generally the characteristics of, a domestic house; or</p> <p>(c) a Structure that is ancillary to—</p> <p>(i) a domestic house; or</p> <p>(ii) a structure mentioned in paragraph (b).”</p> <p>and:</p> <p>“Asbestos removal work is a prescribed activity.”</p> <p>“<i>Structure</i>’ means —</p> <p>(a) a building, construction, wall, mast, tower, pylon, structural cable or telecommunications structure; or</p> <p>(b) an underground works (including shafts and tunnels), pipe, pipeline, sea defence works, river works, earthworks or earth retaining construction or other construction designed to preserve or alter a natural feature; or</p> <p>(c) a road or highway, footpath or driveway, railway line or siding, tramway line, airfield, dock or harbour, water storage or supply system (including a constructed lagoon), sewerage or drainage system, electricity or gas generation facility, transmission or distribution facility, gasholder, park or recreation ground (including, for example, a golf course, playing field, racecourse or swimming pool); or</p> <p>(d) production, storage or distribution facilities for heavy industries; or</p> <p>(e) fixed plant; or</p> <p>(f) a ship or submarine; or</p> <p>(g) formwork, falsework, scaffold or other</p>

Jurisdiction	Instrument and General Comments relating to Extent of Incorporation of the National Standard for Construction Work (the 'Standard')	Definitions of "Construction Work", "Structure" and where applicable "Construction Site"
		<p>construction designed or used to provide support, access or containment during Construction Work."</p>
<p>Victoria</p>	<p>Regulation 5.1.2 of the <i>Occupational Health and Safety Regulations 2007 (Vic)</i></p> <p>In 2007, Victoria reviewed its 13 occupational health and safety (OHS) regulations with a view to consolidating them into a single, streamlined document, now called the <i>Occupational Health and Safety Regulations 2007 (Vic)</i> under the <i>Occupational Health and Safety Act 2004 (Vic)</i>. The regulations have now been enacted, and will apply from 1 July 2008.</p> <p>Worksafe Victoria notes that its requirements are consistent with the Standard. They build upon industry's existing safety practices by setting out specific OHS responsibilities for principal contractors, employers, workers and self-employed people.</p> <p>Worksafe Victoria have a handbook 'Working Safely in the General Construction Industry' on their webpage, which provides guidance on the application of the regulations, including the definition of 'Construction Work'.</p>	<p>Section 5.1.2 of the <i>Occupational Health and Safety Regulations 2007 (Vic)</i> provide a definition of <i>Construction Work</i>.</p> <p>"In these Regulations '<i>Construction Work</i>' means any work performed in connection with the construction, alteration, conversion, fitting out, commissioning, renovation, refurbishment, decommissioning, or demolition of any building or Structure, or any similar activity.</p> <p>(2) Without limiting subregulation (1), work referred to in that subregulation includes—</p> <p>(a) installation, testing, maintenance and repair work performed in connection with the Construction Work; and</p> <p>(b) the removal from the workplace of any product or waste resulting from the demolition; and</p> <p>(c) the prefabrication or testing of elements at a place specifically established for the construction project; and</p> <p>Example</p> <p>An example of a prefabricated element of a structure is a concrete panel."</p> <p>(d) the assembly of prefabricated elements to form a building or Structure or the disassembly of prefabricated elements, that, immediately before the disassembly, formed a building or Structure; and</p> <p>(e) the installation, testing and maintenance of gas, water, sewerage, electricity or telecommunications services in or of any building or Structure; and</p> <p>(f) any work in connection with any excavation, landscaping, preparatory work, or site preparation performed for the purpose of any work referred to in subregulation (1) or this subregulation; and</p> <p>(g) any work referred to in subregulation (1) performed under water, including work on buoys, obstructions to navigation, rafts, ships and wrecks.</p> <p>(3) In these Regulations <i>Construction Work</i> does not include—</p> <p>(a) the assembly, disassembly, prefabrication or manufacture of fixed plant; or</p> <p>(b) the prefabrication of elements as standard stock for sale; or</p> <p>(c) routine or minor testing, maintenance or repair work performed in connection with a building or</p>

Jurisdiction	Instrument and General Comments relating to Extent of Incorporation of the National Standard for Construction Work (the 'Standard')	Definitions of "Construction Work", "Structure" and where applicable "Construction Site"
		<p>Structure; or</p> <p>(d) the exploration for, or extraction of, minerals or stone."</p> <p>Regulation 5.1.4 provides a definition of a 'Structure':</p> <p>Structure includes—</p> <p>(a) any construction wall, mast, tower, pylon or structural cable; and</p> <p>(b) any tunnel, shaft, underground tank, pipe or pipeline, sea defence works, river works, earthworks, earth retaining construction, or construction designed to preserve or alter any natural feature; and</p> <p>(c) any road, railway line or siding, tramway line, airfield, dock, harbour, inland navigation channel, bridge, viaduct, waterworks, reservoir, aqueduct, constructed lagoon, dam, sewer, sewerage or drainage works, electricity generation facility, electricity transmission facility, electricity distribution facility, gas generation facility, gasholder, gas transmission facility, gas distribution facility, or park or recreation ground facility; and</p> <p>(d) any ship or submarine; and</p> <p>(e) any fixed plant; and</p> <p>(f) any formwork, falsework, scaffold or other construction designed or used to provide support or access or containment during construction; and</p> <p>(g) any part of a thing set out in paragraphs (a) to (f).</p>
<p>Western Australia</p>	<p>Division 12 of Part 3 of the <i>Occupational Safety and Health Regulations 1996 (WA)</i> under the <i>Occupational Health and Safety Act 1984 (WA)</i>.</p> <p>New regulations relating to the Standard came into operation in WA for the civil/commercial construction sector on 3 January 2008 and will commence for the residential construction sector on 1 October 2008. These regulations are contained in Division 12 of Part 3 of the <i>Occupational Safety and Health Regulations 1996 (WA)</i>.</p> <p>The definition of 'Construction Work' has not changed however, and there is no definition of Structure in the WA regulations. There is however a definition of 'high risk Construction</p>	<p>Regulation 1.3, the definition section provides that 'Construction Work' means:</p> <p>"(a) the construction, erection, installation, alteration, repair, maintenance, cleaning, painting, renewal, removal, excavation, dismantling or demolition of, or addition to, any building or Structure, or any work in connection with any of those things, that is done at or adjacent to the place where the building or Structure is located;</p> <p>(b) work on which a hoisting appliance or any scaffold or shoring is used or intended to be used;</p> <p>(c) work in driving or extracting piles, sheet piles or trench sheet;</p> <p>(d) work in laying any pipe or work in lining pipe that is done at or adjacent to the place where the pipe is laid or to be laid;</p> <p>(e) work in sinking or lining or altering, repairing,</p>

Jurisdiction	Instrument and General Comments relating to Extent of Incorporation of the National Standard for Construction Work (the 'Standard')	Definitions of "Construction Work", "Structure" and where applicable "Construction Site"
	<p>Work'.</p> <p>Worksafe WA has guidance material on their website 'National Standard for Construction Work – Guidance for main contractors and people with control of construction work' which discusses the new regulations.</p>	<p>maintaining, renewing, removing, or dismantling a well or borehole;</p> <p>(f) road works, earthworks or reclamation; or</p> <p>(g) work in laying an underground cable or work related to laying an underground cable that is done at or adjacent to the place where the cable is laid or to be laid;"</p>
<p>Northern Territory</p>	<p>Regulation 133A of the <i>Work Health (Occupational Health and Safety) Regulations (NT)</i> under the <i>Work Health Act (NT)</i>.</p> <p>In the Northern Territory the Standard has been given effect by calling it up as the law, even though the document was never intended to have legal force. Regulation 133A provides that the National Standard for Construction Work is incorporated into and forms part of the Regulations.</p>	<p>Regulation 2, relating to interpretation provides that 'Construction Work' means construction, digging, filling, erection, installation, addition to, alteration, forming up, repair, maintenance, cleaning, painting, renewal, removal, dismantling or demolition of a building, Structure or excavation;"</p> <p>This appears to contradict the definition in the deemed National Standard for Construction Work.</p>
<p>ACT</p>	<p><i>Occupational Health and Safety (National Standard for Construction Work) Code of Practice 2008</i></p> <p>In the ACT, the Standard applies as a Code of Practice.</p> <p>In 2008, the <i>Occupational Health and Safety (National Standard for Construction Work) Code of Practice 2008</i>, was approved under s 206 of the <i>Occupational Health and Safety Act 1989</i>. The Code took effect from 29 February 2008.</p> <p>The Code of Practice sets a minimum standard for management of health and safety issues for specific topics. Under s45 of the <i>Occupational Health and Safety Act 1989 (ACT)</i> whether a person owing a duty under the Act has complied with an approved Code of Practice is relevant in determining whether they have satisfied reasonable practicability and complied with that duty.</p>	<p>The Code of Practice incorporates the Standard word for word, including the definition of 'Construction Work' in Clause 4.1 of the National Standard. (See above).</p> <p>Strangely, the Explanatory Memorandum provides that:</p> <p>“'Construction Work' means any work on or in the vicinity of a construction site carried out in connection with the construction, alteration, conversion, fitting out, commissioning, renovation, repair, maintenance, de-commissioning, demolition or dismantling of any structure.”</p> <p>This appears to be an abbreviated definition of that in clause 4.1 of the National Standard for Construction Work, incorporated in the ACT Code.</p> <p>The <i>Occupational Health and Safety Act 1989 (ACT)</i> does not contain a definition of 'Construction Work'. Nor do the <i>Occupational Health and Safety (General) Regulation 2007(ACT)</i>, or the <i>Occupational Health and Safety Regulation 1991 (ACT)</i>.</p>
<p>South Australia</p>	<p><i>Occupational Health, Safety and Welfare Regulations 1995 (SA)</i> under the <i>Occupational Health, Safety and Welfare Act 1986 (SA)</i>.</p> <p>The regulations are currently subject to</p>	<p>Division 5.10 of the Regulations deal with 'Construction Work', which is not defined in the definition section.</p>

Jurisdiction	Instrument and General Comments relating to Extent of Incorporation of the National Standard for Construction Work (the 'Standard')	Definitions of "Construction Work", "Structure" and where applicable "Construction Site"
	<p>a review of their content. The Standard does not yet appear to have been incorporated into the regulations.</p>	
<p>NSW</p>	<p>Parts 8.3 and 8.4 of the <i>Occupational Health and Safety Regulation 2001 (NSW)</i>, under the <i>Occupational Health and Safety Act 2000 (NSW)</i> deal specifically with construction work.</p> <p>Regulation 3 contains a definition of 'Construction Work'.</p> <p>The Standard is referred to briefly in general guidance material on NSW Workcover's website.</p> <p>There is no reference to the Standard in the Act or Regulations.</p> <p>The Regulations will shortly be the subject of a review into their content. This review has been delayed as a draft bill amending the <i>Occupational Health and Safety Act 2000 (NSW)</i> is currently before Cabinet, and has been for some time.</p>	<p>Regulation 3 contains a definition of '<i>Construction Work</i>'.</p> <p>"<i>Construction Work</i>' means any of the following:</p> <ul style="list-style-type: none"> (a) excavation, including the excavation or filling of trenches, ditches, shafts, wells, tunnels and pier holes, and the use of caissons and cofferdams, (b) building, including the construction (including the manufacturing of prefabricated elements of a building at the place of work concerned), alteration, renovation, repair, maintenance and demolition of all types of buildings, (c) civil engineering, including the construction, structural alteration, repair, maintenance and demolition of, for example, airports, docks, harbours, inland waterways, dams, river and avalanche and sea defence works, roads and highways, railways, bridges and tunnels, viaducts, and works related to the provision of services such as communications, drainage, sewerage, water and energy supplies."
<p>Tasmania</p>	<p>In Tasmania, OHS is governed by the <i>Workplace Health and Safety Act 1995 (Tas)</i> and the <i>Workplace Health and Safety Regulations 1998 (Tas)</i>.</p> <p>Division 11 of the Regulations deals with 'Construction Notification', and sets out a number of requirements specific to 'Construction Work'.</p> <p>The Standard is not specifically referred to in the Act or Regulations.</p> <p>However Regulation 17 (2)(b), which relates to 'hazards and risks in the workplace' is relevant. Regulation 17(1) notes that an accountable person, as far as is reasonably practicable, must identify all hazards arising or which may arise, in a workplace, assess the risk, and implement appropriate measures to control the risk. In doing so, under Regulation 17(2) (b), that person... "must considerany standard, rule, code or specification relating to the hazard of which the person ought to have been aware."</p> <p>The Standard is not gazetted as a code</p>	<p>"<i>Construction Work</i>' means any work carried out on a construction site:</p> <p>'<i>Construction Site</i>' means a workplace or other place at which –</p> <ul style="list-style-type: none"> (a) the construction, erection, equipping, alteration, repair, maintenance, cleaning, painting or demolition of, or addition to, a building or structure is carried on; or (b) any of the following activities is carried on, except if the activity is directly related to mining: <ul style="list-style-type: none"> (i) excavating, shaft-sinking or tunnelling; (ii) driving or extracting piles, sheet piles or trench sheet; (iii) the construction or maintenance of roadworks, the permanent way of a railway, busway or tramway, an airfield or airstrip or a cycle path; (iv) dredging or salvaging; (v) earthmoving by power-driven equipment; (vi) the placing, laying, lining or maintenance of pipes or cables, either above or below ground level; (vii) land clearing in preparation for an activity

Jurisdiction	Instrument and General Comments relating to Extent of Incorporation of the National Standard for Construction Work (the 'Standard')	Definitions of "Construction Work", "Structure" and where applicable "Construction Site"
	<p>of practice. However, it is a standard under s17(2) (b) of which, according to Workcover Tasmania, a person in the construction industry should be aware.</p> <p>Workcover Tasmania refer to the Standard as an additional source of information, in their publication 'Construction Industry: a guide to OHS'.</p>	<p>referred to in <u>paragraph (a)</u> or paragraph (b)(i), (ii), <u>(iii)</u>, <u>(v)</u> or <u>(vi)</u>;"</p>



Submission to

**Deputy Prime Minister and the Minister for Education, Employment
and Workplace Relations**

on the

**Structure for the Successor Organisation
to the Australian Safety and Compensation Council**

April 2008

Master Builders Australia Inc ABN 701 134 221 001

building australia



1.0 INTRODUCTION

- 1.1 This submission has been prepared by Master Builders Australia Inc (Master Builders).
- 1.2 Master Builders represents the interest of all sectors of the building and construction industry. The association consists of nine State and Territory builders' associations with over 31,000 members.
- 1.3 At the Workplace Relations Ministers Council (WRMC) held on 1 February 2008, the Ministers agreed to replace the Australian Safety and Compensation Council (ASCC) with a new body. It was also agreed that further work would be undertaken on the membership and funding model for the new body. Accordingly, this submission addresses the structure of the successor body to the ASCC recommended by Master Builders.
- 1.4 Further at its meeting on 26 March 2008, the Council of Australian Governments (COAG) made OH&S a priority issue. COAG endorsed a national OHS review with reporting and recommendations of the content of model legislation to the Workplace Relations Ministers' Council (WRMC) by September 2008. Master Builders will make separate submissions relating to that review.
- 1.5 Master Builders has a keen interest in occupational health and safety and has a commitment to improving the industry's safety record. Construction is one of the five sectors targeted by the National OHS Strategy (which has been formally endorsed by the Master Builders' Board) to improve its OHS. The sector was chosen by the Government because it was identified, through data analysis, as having one of the highest incidence rates and/or high number of workers' compensation claims compared with other industries. Accordingly, OH&S policy is of vital concern to Master Builders.

2.0 ASCC STRUCTURE

- 2.1 The ASCC was established in October 2005. It succeeded the National Occupational Health and Safety Commission (NOHSC). The ASCC is a council of 18 members comprising representatives from:
 - Chair (1)
 - the Commonwealth (1)
 - ComCare (1)

- DEEWR (1)
- State and Territory Governments (8)
- Employer representatives (3)
- Union Representatives (3).²²

2.2 Obviously, State and Territory jurisdictional representatives are the largest component of the ASCC. Theoretically, this should enhance the uniform roll out of the national standards and codes of practice for OH&S that are declared by the ASCC. These are intended to form the basis of a nationally consistent system of OH&S but, as will be demonstrated in this submission, this is not the case. This is doubly important in the context of the fact that the standards and codes have little legal authority unless adopted by State and Territory governments. Further, despite the preponderance of State and Territory representatives on the ASCC there is no obligation placed upon the jurisdictions to adopt the form or, more importantly, the substance of the standard and code voted for at the ASCC.

3.0 ASCC STRUCTURE AND BUILDING AND CONSTRUCTION OH&S

3.1 For a considerable period, Master Builders has sought for structural change within the ASCC. We submit that any new body should be structured to take into account these concerns. Essentially, the body should be responsible for the nascent law that it develops. Instead, the effectiveness of the body has been questionable, given that the manner of introduction of the standards and codes that are developed is diverse. The States and Territories have acted inconsistently in the way that standards and codes have become law. In the building and construction industry this failure has been manifest in the implementation of the *National Standard for Construction Work*, where in the enabling legislation there remains a disparity in something as basic as the definition of what is or is not building work. In the Northern Territory the manner in which the National Standard has been given effect is for it to be called up as the law, further creating confusion as the document per se was never intended to have legal force.²³

²² A list of the representatives by name appears at <http://www.ascc.gov.au/ascc/AboutUs/WhoWeAre/> accessed 4 April 2008

²³ Regulation 133A of the *Work Health (Occupational Health and Safety) Regulations* (NT)

3.2 This position contrasts markedly with the general progress of building and construction industry OH&S, fuelled by the formation of the Office of the Federal Safety Commissioner. In that regard, the Royal Commissioner's recommendations relating to OH&S led to an infusion of resources by the Commonwealth and attention to the formulation of proposed national OH&S rules for the building and construction industry. These changes included the establishment of the Federal Safety Commissioner via the statutory recognition of that role in the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII), although the appointment is a Departmental rather than a statutory office.²⁴

4.0 DETAILED PROBLEMS

4.1 Master Builders has identified a number of systemic problems in the method of operation of the ASCC.

4.2 These concerns are:

4.2.1 Insufficient scoping of required Codes and Standards and how new regulation fits with current regulation: in this regard Master Builders supports regulatory mapping and benchmarking which, in the past, has been applied sporadically, if at all. Without this work as a precursor to or in concert with the development of codes and standards, new rules do not lead to harmonisation but become an overlay on the existing law.

4.2.2 The ASCC processes for developing codes is misaligned. The appointed technical reference groups are presented with a draft of the relevant code at the inaugural meeting. The draft is often prepared by a junior researcher with little knowledge of the industry to which the code applies. Hence, the reference group has diminished input in determining the structure of the code and must work with a document which is substandard to begin with. A more robust process would be for reference group members to consult with their stakeholders prior to the initial meeting and obtain feedback on priority issues which should then form the fundamental structure of the code including establishing its scope. In other words, the codes should be developed from the ground up by the reference group, not ASCC staff, and then fine-tuned through a rigorous process of ongoing stakeholder consultation.

²⁴ Section 29 *Building and Construction Industry Improvement Act, 2005* (Cth)

- 4.2.3 Insufficient application of, or poorly structured, Regulatory Impact Statements (RIS): the fact that the *Code of Practice for Precast Tilt-Up and Concrete Elements in Building Construction* which has recently been declared by the ASCC,²⁵ could have been declared without an RIS is extraordinary given the weight of new rules that it introduces.
- 4.2.4 Dominance at all levels by the representatives of the jurisdictions, especially in voting.
- 4.2.5 The purported separation of “technical” matters from “policy” matters: this is an artificial divide and the two are not bright line differences.
- 4.2.6 The sidelining of industry comment and a lack of feedback about why some changes have been accepted and others rejected in the development of critical codes.
- 4.2.7 Lack of version control in documents that are changed and re-circulated.
- 4.2.8 Lack of industry reference groups to ‘test’ the proposed regulations with practitioners.
- 4.2.9 Lack of a database to chart the manner in which the jurisdictions implement the Codes and Standards with an articulation of differences and their causes.
- 4.2.10 Not properly explaining linkages to the training system or adequately planning for OH&S training to be transferred to the VET system.

5.0 FORM TO FOLLOW FUNCTION

- 5.1 In implementing a nationally consistent OH&S system, the model adopted will be the guide to how the successor body will operate. The extent to which a national model will or will not be based upon co-operative elements for implementation will ultimately assist to shape the structure of the successor body eg if there is a single Commonwealth OH&S statute that is agreed to by the jurisdictions with devolution of its operating functions such as Inspectors to the States and Territories then the successor body will be differently structured to an organisation that only has advisory status regarding the terms of the laws which are to govern OH&S.
- 5.2 With the recent CoAG commitment to model legislation, we assume that the ASCC’s successor body will have the carriage and maintenance of that statute and accordingly base our recommendations on that foundational assumption.

²⁵ Code of Practice for Precast Tilt-Up and Concrete Elements in Building Construction declared 27 February 2008

6.0 ASCC SUCCESSOR

- 6.1 The ASCC's successor must:
- 6.1.1 Be independent, with no Ministerial over-ride.
 - 6.1.2 Give priority to harmonisation of OH&S laws and standards in application.
 - 6.1.3 Only deal with risk based hazards – not the model adopted in the National Standard for Construction Work.
 - 6.1.4 Offer specialist panels to deal with specific industries especially in so called high risk industries such as the building and construction industry.
 - 6.1.5 Be required to take into account the advice of the Federal Safety Commissioner when dealing with building and construction industry regulation.
- 6.2 For effective implementation of policy programmes, the confidence of industry and the workforce is a necessity. It is employer organisations and trade unions that lead changes to regulations and develop cultures that make workplaces safer. A tripartite framework should therefore underpin the activities of governments in this vital field.

7.0 INDUSTRY SPECIFIC REPRESENTATION

- 7.1 Whilst peak body representation from employers and unions may be appropriate to form the basis for a supervisory or governing body, more specialist representation needs to be part of the structure of the new body, especially for high risk industries such as building and construction. The peak body should not make decisions until regulatory benchmarking is initiated and sign-off from industry practitioners is obtained.
- 7.2 Within any tripartite structure there should be a small, dedicated team that is responsible for building and construction.
- 7.3 We support the work of the Federal Safety Commissioner. We have been liaising closely with the Commissioner regarding the Australian Government Building and Construction OH&S Accreditation Scheme²⁶ (the Scheme). The Scheme uses the Commonwealth's purchasing power to regulate OH&S with a view to increasing the industry safety performance. The BCII also provides for the establishment of the Scheme, which requires all contractors to be accredited

²⁶ <http://www.fsc.gov.au/ofsc/Theaccreditationscheme/>

before tendering for construction work funded by the Commonwealth Government.

- 7.4 Master Builders has a strong commitment to safety. Master Builders advocates sensible, uniform national regulation of building and construction OH&S. We are therefore displeased about the way that regulators have acted to implement OH&S law as there is a lack of consistency, especially in the manner in which the fundamental, new form of regulation established by the *National Standard for Construction Work* has been introduced. The Federal Safety Commissioner's work stands in stark contrast to what is happening elsewhere and the Scheme is supported. Accordingly, Master Builders proposes that all of the building and construction industry review and developmental work under the successor organisation be co-ordinated by the Office of the Federal Safety Commissioner (OFSC). This would reinforce the work of the Federal Safety Commissioner at the same time as recognising that which is explicit in the formation of this role: that the building and construction industry should receive dedicated and specialist attention in respect of its OH&S. Further, the OFSC has developed substantial expertise in this field and also operates excellent consultative forums that stand as a model for the general consultation required of the ASCC's successor body.
- 7.5 Master Builders suggests ensuring that the work of the specialist unit within the successor to the ASCC has a legislated duty to consult with and take direction from the Federal Safety Commissioner. A review of all State and Territory OH&S regulation should be undertaken with a view to moving it toward the most successful model: the Victorian legislation and underpinning Codes and Standards. The review should also consider replacing the *National Standard for Construction Work* and its underpinning Codes with regulation related only to hazards. The model legislation being proposed by the review panel should contemplate a separate unique set of provisions for the building and construction industry which will build upon the OFSC's role and which will consolidate its work, at the same time as recognising the need for the reviews proposed in this submission. The Review should reject the idea that OH&S will benefit from adoption of the "highest common denominator", ie the most stringent, form of regulation. In a nutshell, this is generally the New South Wales regulatory model. This model is rigid and is not optimal when outcomes such as reduction in work-related injury, disease and death are measured.

8.0 CONCLUSION

Master Builders advocates that the successor organisation to the ASCC should have a small dedicated team devoted to the building and construction industry and that this part of the successor organisation should have a statutory duty to consult with and be guided by the Federal Safety Commissioner.

