



**Master  
Builders**



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Finance and  
Administration Committee

Master Builders Submission to the  
Finance and Administration  
Committee' Inquiry into the  
Operation of Queensland's  
Workers' Compensation  
Scheme.





3 September 2012

The Research Director  
Finance and Administration Committee  
Parliament House  
George Street  
Brisbane Qld 4000

By email to : [fac@parliament.qld.gov.au](mailto:fac@parliament.qld.gov.au)

Dear Committee Members

I write in relation to your review and inquiry into the operation of the Queensland Workers' Compensation Scheme.

Master Builders is the peak industry association representing building and construction in Queensland since 1882. With approximately 8,000 members, Master Builders is the voice of the industry. Our services support members to operate professional and profitable businesses that deliver superior quality outcomes to their customers. With nine offices throughout Queensland, Master Builders regional footprint is unmatched by any other industry organisation in Queensland.

Master Builders is a vocal advocate of WorkCover Queensland and the Queensland workers compensation scheme. Master Builders commits significant resources each year to ensure the health and safety of all stakeholders in our industry. The industry supports a strong and financially sound workers compensation scheme that protects workers entitlements in a cost effective environment.

The attached recommendations are aimed to provide a stable and balanced workers compensation scheme for Queensland.

Regards

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### **A transparent and efficient worker definition is needed.**

The current unworkable system is in need of a clear and simple identifier of 'who is a worker'. Master Builders has struggled with this issue for over ten years and acknowledge the 'results test' has failed. Master Builders recommends a definition that can be applied and understood, that if you are 'in business' you must have your own insurance placing the obligation where it should be on the person 'in business' and not their clients. For this reason we support a further statutory exemption be extended to exclude all persons who charge GST for their services.

*Master Builders submits: 'A person 'in business' providing a service of any kind and charging GST are exempt from WorkCover'.*

Supporters of the 'majority labour test' will argue many labour only subcontractors in our industry are 'workers' and should be entitled to workers compensation. We agree the industry is presently undergoing a significant move away from the 'ABN Worker' due to increased ATO reporting in the construction industry from 1 July 2012. Further Master Builders experience is that any remaining ABN Workers who are supplying labour only are not charging GST. ABN Workers who are under \$75,000.00 turnover or have entered into a tax withholding arrangement through a voluntary agreement do not charge GST and are therefore still included in the scheme.

Examples:

Examples for PC or Builder	Included in the builders worker declaration subject to the seven steps	Excluded from the builders worker declaration & must have own policy.
Bricklayer on \$32.00 an hour ABN doesn't charging GST	Included	
Bricklayer Gang of three workers organised by a person in business on a rate per thousand blocks does charge GST		Excluded
A Carpenter working directly for a builder may charge \$38 per hour and doesn't charge GST	Included	Excluded
A Carpenter in business with an Apprentice does charge GST.		Excluded
Excavator or Concrete Pump Operators are in business supplying labour and machinery charge GST		Excluded.
Two Tilers in partnership working for a builder are in business and does charge GST		Excluded
A Cleaner working for a builders under an ABN earning less than \$75,000.00 doesn't charge GST	Included	
An IT consultant providing IT services to a builder are in business and charge GST		Excluded
A sediment control barrier Installer supplying labour and materials are in business and charge GST		Excluded
A Plaster or Painter working under an ABN for a Plastering or Painting Contractor doesn't charge GST		Excluded
A Concreter or Steelfixer working under an ABN for a subcontractor doesn't charge GST		Excluded

A self-evident truth is that contractors who are 'in business' and engage others or have significant plant charge GST. Workers that are not 'in business' don't charge GST.

**The Results Test has failed.**

Master Builders was a strong supporter for the introduction of the Results Test into the Workers Compensation Scheme. However the Industrial Court's interpretation of the legislative drafting over the past ten years has seen the unanticipated application of the 'majority labour only test' applied first. The current sequencing of the tests consists of seven steps.

- Step 1 Contract for performance of work (written or verbal)
- Step 2 Specific exclusions
- Step 3 Specific inclusions
- Step 4 Contract of service versus contract for service
- Step 5 Contract for labour only or substantially for labour only
- Step 6 Personal services business determinations
- Step 7 Results test

This sequencing of the tests has completely eroded the intended benefit to industry of the Results Test.

*Master Builders recommends removing the Results Test as an unnecessary burden and a failure to industry and should be abandoned.*

**Extending common law coverage to Principal Contractors**

Master Builders recommends extending common law coverage to host employers/principal contractors in cases of injuries to workers employed by labour hire firms and contractors where the host employer/contractor has a policy with WorkCover.

The problem is very real for Principal Contractors on construction workplaces. A typical example of the problem is where an employee of a subcontractor is injured on site. The common law settlement often occurs years after the incident with the Principal Contractor left to pay tens of thousands of dollars. This payment usually results in a claim against its public liability insurance. The impact of this issue has seen huge increases in the excess payments under the public liability policies of the Principal



Contractors. Some companies are finding it hard to even secure this form of cover. The cost shifting causes a great deal of uncertainty without adding any benefit to the scheme or the injured worker.

The settlement amounts can be very significant where WorkCover seeks to split the compensation payment between itself and the PC who in turn tries to process the claim through their Public Liability insurer.

Master Builders has always contended that the PC should be covered under their own WorkCover policy and provided both parties have a WorkCover policy then WorkCover should manage the entire claim. The building and construction industry has a complex series of relationships, responsibilities, and contractual obligations. This in turn means that there is a high level of co-dependency by Principal Contractors and subcontractors. The recommendation will reduce a substantial risk burden for Principal Contractors and allocate risk and responsibility with the party best able to manage that risk. While acknowledging that this recommendation does come at a cost to the scheme resolving this anomaly will dramatically improve the risk sharing arrangements between PC's and subcontractors and their employees. The current burden on the PCs and the insurance industry has left some PCs unable to secure insurance or carry an unworkable \$100,000 excesses.

Master Builders recommends apportioning liability between the two WorkCover policies. While this recommendation is strongly supported, both policy holders should be involved in that process to ensure a fair and just allocation of responsibility based on the differing contributions to the incident.

*Master Builders strongly recommends extending common law coverage to host employers and principal contractors who have a WorkCover policy with some additional processes to ensure the allocation of apportionment of claims are conducted fairly.*

### **Strengthen the nexus between employer, worker and injury.**

Master Builders seeks to restore a strong nexus between the employer, workers and the injury. The continual bracket creeping of 'who is a worker' through common law has broken this nexus. The Act was introduced to provide insurance with the best possible benefits and rehabilitation programs for workers at the lowest possible premiums for employers. This goal has lost its significant meaning in our industry where builders are required to pay premiums for an ever widening array of subcontractors, consultants and operators. We need to restore and strengthen the nexus between the employer and the worker and the injury. Master Builders supports an 'injury' definition limited to where work is 'a major contributing factor' of greater than 50%.

*Master Builders recommends amending the definition of an injury to a 'major contributing factor, of greater than 50%.'*

**Exclude workers from common law who have a low impairment.**

Master Builders acknowledges a combination of impairment and WPI have the strong potential of unsatisfactory or harsh outcomes for injured workers in the building and construction industry. For example a carpenter who suffers a finger (3% WPI) or minor back injury that prevents him from operating a nail gun, operate an electric saw or lifting timber but may not impair him from performing many other day to day duties at work. His inability to do these functions, would massively restrict his ability to obtain work in our industry and his personal attributes may not lend themselves to retraining as a supervisor or sales representative. For these reasons Master Builders would strongly support, as recommended above, WPI exclusion to common law for workers with a low WPI percentage. A low WPI percentage threshold would deliver a 25% reduction in common law claims by workers who have recorded a 0% WPI.

**Low cost Workers Compensation premiums for self-employed individuals.**

WorkCover's Workplace Personal Insurance premiums for a self-insured 'Manual' worker currently commence at \$2,032.00 for an income of \$75,000.00. This premium appears to be high considering the workers would only have access to statutory entitlements. Master Builders aim is for all 'in business' workers to have a WorkCover policy to minimise litigation and the costs to the industry. A full marketing and publicity campaign should be introduced to capture self employed, own account, in business workers to ensure maximum coverage under this policy. WorkCover should be the insurer of choice for this category of in business worker.

*Master Builders recommends WorkCover review and reduce the cost of Workplace Personal Insurance to market rates for persons 'in business' to attract self-insured workers.*



### **Zero WorkCover Premium for Apprentices**

The building and construction industry continues to fail in providing an adequate workforce for the future needs of Queensland. The current financial hardship across our industry again reflected in the low apprenticeship numbers and training across our industry. All efforts are needed to encourage employers to keep training apprentices and trainees throughout the industry. Exempting apprentices and trainees from WorkCover premiums will provide a significant level of support.

To maintain an incentive for a safe workplace the WorkCover premium loadings for poor performance should continue to be applied with only the base premium exempt.

*Master Builders recommends apprentice wages are exempt from the calculation of workers compensation premiums.*

### **Stop Compensation if injuries were caused by misconduct under section 130**

The Act prevents an injured worker, with some exceptions including death, from claiming compensation when the injury is caused by the worker's serious and wilful misconduct. The construction industry had experienced several of these situations recently when a worker wilfully disobeys instructions and there is sufficient supporting evidence or witnesses. However due to the complexity and delays of such a claim WorkCover has normally accepted the claim.

*Master Builders recommends section 130 be amended to allow WorkCover to stop compensation to a worker claim within 30 day of their application if reasonable evidence is provided of wilful misconduct by the worker.*

### **WorkCover to have low investment risk for 100% solvency**

Master Builders continues to advocate for low risk restrictions on the investment portfolio of WorkCover after the significant investment losses in 2008 and 2009. The fund needs to maintain a favourable solvency of 100% providing surety and confidence for injured workers and employers alike through premiums and low risk returns from guaranteed securities/deposits. Reserves that exceed the 100% solvency, currently 119% at 30 June 2012 may be invested with QIC for a commercial return.

The Committee is reminded of 'the problem' as detailed on page 8 of the 2012 discussion paper.

*"WorkCover Queensland (WorkCover), like other insurers was adversely affected by the global financial crisis over the last two financial years. This global financial crisis impacted WorkCover's investment returns detrimentally by approximately \$800 million. Notwithstanding the effects of the global financial crisis, WorkCover also incurred an underwriting shortfall over the same period of approximately \$500 million. These two factors contributed to the accumulated operating deficit of approximately \$1.3 billion before tax, which was absorbed by the established investment fluctuation reserve. It would appear in 2009-10, investment markets are moving to 'normal' positive returns; however any surplus above the targeted investment return of 7.5% should ideally be directed towards rebuilding the investment fluctuation reserve so WorkCover is able to absorb the inevitable, future negative investment returns"*

Master Builders rejects any return to the previous artificial reliance on commercial investment income.

*Master Builders recommends that investments be restricted to low risk for funds up to 100% of the scheme with higher commercial risk for reserves over the 100% solvency level.*

#### **Solar Claims and Journey claims affect all employers.**

Recent increases in the number of solar claims in the manufacturing and construction industry reflect the increased litigation of claims generally. Master Builders are of the view that the recent increases in solar claim number reflect plaintiff lawyer behaviour and an aging workforce in general. Solar claims are akin to journey claims in that all industries are exposed to solar claims with some industries having a higher inherent risk than others. There is increasing concern that the majority of solar damage is caused prior to working age with calls to introduce a percentage reduction, as with industrial deafness, for non-work related diminution.

The building and construction industry has inherent requirements that building workers travel as part of their employment. This necessitates a modest response for calls to abandon this cover. Building workers are currently travelling long distances to work and Master Builders cannot see any reason to water down or remove this cover.

*Master Builders recommends a 30% reduction in compensation for non-work related diminution of solar claims.*



## **Queensland Industrial Court**

The Act at section 531 'Appeal to Industrial Court' provides a party aggrieved by a decision of the Industrial Magistrate's Court or the Industrial Commission, an opportunity to appeal to the Industrial Court. However the Industrial Court since 2000 has been a single judge court and the absence of competing judicial views in this narrow jurisdiction is hindering the development of the common law.

The process of adjudication of cases benefits from dissenting opinions that give stimulus to debate and increases clarity of judgements. The capacity to have a dissenting view enables the law to admit new ideas and adapt old doctrines, by exposing them to scrutiny and consideration of both inside and outside the court.

*Master Builders recommends increasing judicial resources to allow for multiple judges of the Industrial Court.*

## **Staged penalties for contravention of section 48**

The Act provides at section 57 recovery of compensation and unpaid premium from employers who have contravened section 48 of the Act. Master Builders acknowledges that such penalties are important for the operation of the scheme however the current extreme ambiguity in the definition of a worker has caused some concern with the administration of this section.

We reject any view that WorkCover should impose a penalty of 100% as this shows no regard for the complexity of complying with the statutory requirements which is inherently difficult in the construction industry.

In considering what penalty should apply it is important to have some regard for the persons operating small businesses in Queensland. A person in the construction industry may have below average literacy skills and as such can only be expected to have a limited understanding of the complex issues surrounding subcontracting, workers, labour only, partnership law, contracts of service, contracts for service, working directors, and much more.

*Master Builders recommends section 57(2)(a) be amended to provide staged penalties for first, second, and third breaches of section 48. Master Builders recommends penalty staging of 10% at first instance, 30% at second instance, and 90% at third and subsequent breaches subject to normal defences and natural justice principles.*

### **Construction Industry Workers' Compensation Levy**

The Building and Construction Industry continues to lobby for an industry levy to provide workers' compensation benefits via two components:

1. a levy applied to building and construction work performed in Queensland with a GST inclusive cost on work of \$80,000 or more as defined in the *Building and Construction Industry (Portable Long Service Leave Levy) 1991*; and
2. each employer of workers as defined by the *Workers' Compensation and Rehabilitation Act 2003*, with a construction WIC will be required to hold a WorkCover policy. The policy will continue take account of each employer's claims experience.

The quantum of the levy to be collected as a percentage of the cost of building and construction work and the quantum to be collected through employer premiums will be determined following financial modelling by WorkCover and supported by actuarial analysis. Master Builders has indicated that they would like to see around 75% collected through the levy and 25% individual employer premiums.

Construction employers who do not have a policy of insurance will be subject to the same penalties as uninsured employers in the scheme more generally. However, the proposed requirement for a contractor to sight a sub-contractor's policy and record the policy number will minimise the potential for uninsured contractors to work on construction projects.

*Master Builders recommends the Government continues to consider such a levy as the most efficient system of providing worker compensation to the industry.*