

SCHEDULE A – INDEX TO DOCUMENTS

The documents proposed to be put to Mr Hadgkiss and Mr Jenkinson during cross-examination or otherwise relied on in connection with cross-examination are as follows.

#	DOCUMENT	BUNDLE PAGE NUMBER
Witness statements and material before the Commission		
1.	Statement of Nigel Hadgkiss dated 8 April 2026 (exhibit NCH1), including all annexures	Not in bundle
2.	Statement of Wayne Jenkinson dated 8 April 2026 (exhibit WXJ-1), including all annexures	Not in bundle
3.	Counsel Assisting's written opening on the case for a Code of Practice and an independent regulator (exhibit JMC-1)	Not in bundle
Empirical data <i>Items 4 to 8 of the bundle are extracts of key data prepared from the sources cited in the index; the complete underlying data files are provided separately</i>		
4.	Australian Bureau of Statistics, <i>Industrial Disputes, Australia</i> (Catalogue No 6321.0.55.001): Table 2b 'Industrial disputes which occurred during the period, working days lost per thousand employees, industry', covering the period March 1985 to December 2008; series A2159549V (ANZSIC 1993)	4–6
5.	Australian Bureau of Statistics, <i>Industrial Disputes, Australia</i> (Catalogue No 6321.0.55.001): Table 2b 'Industrial disputes which occurred during the period, working days lost per thousand employees, industry', covering the period March 2008 to December 2025; series A2540869W (ANZSIC 2006)	7–9
6.	Australian Bureau of Statistics, <i>Estimates of Industry Multifactor Productivity, Australia</i> (Catalogue No 5260.0.55.002, 6 February 2026), 2024-25 release: Tables 1, 6 and 7, construction industry (ANZSIC E) series; underlying Time Series Workbook (Tables 1-19) to be provided separately	10
7.	Australian Bureau of Statistics, <i>Industrial Disputes, Australia</i> (Catalogue No 6321.0.55.001), Table 3b 'Industrial disputes which occurred during the period, working days lost per 1000 employees, States and Territories', covering the period March 1985 to December 2025; Queensland series A2540888C	11–15
8.	Safe Work Australia, <i>National Dataset for Compensation Based Statistics – detailed data file</i> , 2023-24, published 1 October 2025; particularly Tables 1.1 (Claims count by Industry), 1.2 (Claims frequency rate by Industry) and 1.3 (Claims incidence rate by Industry), construction industry (ANZSIC E) series, covering 2014-15 to 2023-24	16–17

Academic and policy material		
9.	Anthony Forsyth, ““Restoring the Rule of Law” through Commercial (Dis)incentives: The Code for the Tendering and Performance of Building Work 2016’ (2018) 40(1) <i>Sydney Law Review</i> 93	18–47
10.	Melissa Wilson and James Brooks, ‘Size Matters: Why Construction Productivity Is So Weak’ (Conference Paper, Opening Doors: Data and Analytics Shedding Light on Housing Challenges, Australian Bureau of Statistics and Reserve Bank of Australia Conference, Sydney, 23–24 June 2025)	48–66
11.	Independent Economics, <i>Economic Analysis of Building and Construction Industry Productivity: 2013 Update</i> (Report prepared for Master Builders Australia, 26 August 2013)	67–152
12.	Philip Toner, <i>An Assessment of the Methodology and Findings of the EY Report (2022) ‘The Costs of Abolishing the Australian Building and Construction Commission’</i> (Report, 2022)	153–164
13.	David Peetz, Submission No 8 to Senate Education and Employment References Committee, Parliament of Australia, <i>Inquiry into the Government’s Approach to Re-establishing the Australian Building and Construction Commission</i> (2014)	165–227
14.	Elsa Underhill et al, <i>Evaluating the Role of CFMEU OHS Representatives in Improving Occupational Health and Safety Outcomes in the Victorian Construction Industry</i> (Interim Report, Deakin University, May 2016)	228–267
15.	Australian Council of Trade Unions, Submission to Jaguar Consulting, <i>Review of the Building and Construction Industry (Improving Productivity) Act 2016</i> (10 April 2018)	268–287
16.	Australian Council of Trade Unions, Submission No 2 to Senate Education and Employment Legislation Committee, Parliament of Australia, <i>Inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 [No 2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No 2]</i> (19 February 2016)	288–307
17.	Queensland Productivity Commission, <i>Opportunities to Improve Productivity of the Construction Industry</i> (Final Report, October 2025) 325–40	308–324
Newspaper articles		
18.	David Marin-Guzman, ‘Labor “Failed to Learn” from CFMEU Scandal’, <i>Australian Financial Review</i> (Sydney, 4 June 2026)	325
Legislation and cases		
19.	<i>Fair Work Act 2009</i> (Cth) s 3	326–328

20.	<i>Building and Construction Industry (Improving Productivity) Act 2016</i> (Cth) s 3	329–330
21.	<i>Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Cup of Tea Case)</i> [2018] FCA 402	331–349
22.	<i>Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate</i> [2017] FCA 1166	350–376
Other		
23.	PowerPoint presentation titled ‘Construction Industry: Productivity and Safety’	Not in bundle

Industrial disputes – Construction industry, March 1985 to December 2008

ABS Catalogue 6321.0.55.001, Table 2b (national industry, ANZSIC 1993 classification)

Source: Australian Bureau of Statistics, Industrial Disputes, Australia (Catalogue 6321.0.55.001), Table 2b "Industrial disputes which occurred during the period, working days lost per 1000 employees, industry", release compiled on the Australian and New Zealand Standard Industrial Classification (ANZSIC) 1993.

Series ID: A2159549V

Quarter	Working days lost per 1,000 employees
Mar 1985	74.6
Jun 1985	172.5
Sep 1985	237.3
Dec 1985	77.4
Mar 1986	42.2
Jun 1986	203.1
Sep 1986	55.3
Dec 1986	67.9
Mar 1987	100.5
Jun 1987	125.6
Sep 1987	300.6
Dec 1987	78.5
Mar 1988	86.7
Jun 1988	294.8
Sep 1988	135.8
Dec 1988	85.8
Mar 1989	30.4
Jun 1989	89.0
Sep 1989	149.6
Dec 1989	39.1
Mar 1990	23.7
Jun 1990	55.4
Sep 1990	50.7
Dec 1990	32.4
Mar 1991	48.2
Jun 1991	74.9
Sep 1991	124.6
Dec 1991	116.5
Mar 1992	16.0
Jun 1992	2.3

Quarter	Working days lost per 1,000 employees
Sep 1992	3.4
Dec 1992	98.8
Mar 1993	2.3
Jun 1993	1.4
Sep 1993	23.8
Dec 1993	13.6
Mar 1994	5.5
Jun 1994	18.2
Sep 1994	7.5
Dec 1994	26.1
Mar 1995	42.4
Jun 1995	25.1
Sep 1995	12.5
Dec 1995	33.5
Mar 1996	42.9
Jun 1996	534.5
Sep 1996	263.9
Dec 1996	40.9
Mar 1997	58.9
Jun 1997	39.2
Sep 1997	79.6
Dec 1997	110.4
Mar 1998	68.9
Jun 1998	319.4
Sep 1998	85.1
Dec 1998	45.6
Mar 1999	74.8
Jun 1999	63.4
Sep 1999	132.9
Dec 1999	107.9
Mar 2000	109.1
Jun 2000	43.1
Sep 2000	45.3
Dec 2000	41.5
Mar 2001	48.5
Jun 2001	98.8
Sep 2001	69.2
Dec 2001	63.7

Quarter	Working days lost per 1,000 employees
Mar 2002	51.2
Jun 2002	52.9
Sep 2002	44.2
Dec 2002	76.3
Mar 2003	86.3
Jun 2003	30.4
Sep 2003	56.5
Dec 2003	75.4
Mar 2004	51.2
Jun 2004	48.6
Sep 2004	71.1
Dec 2004	52.8
Mar 2005	43.5
Jun 2005	32.8
Sep 2005	37.4
Dec 2005	40.1
Mar 2006	5.7
Jun 2006	7.6
Sep 2006	1.6
Dec 2006	9.1
Mar 2007	1.5
Jun 2007	1.7
Sep 2007	3.1
Dec 2007	3.8
Mar 2008	2.9
Jun 2008	2.0
Sep 2008	10.4
Dec 2008	4.6

Industrial disputes – Construction industry, March 2008 to December 2025

ABS Catalogue 6321.0.55.001, Table 2b (national industry, ANZSIC 2006 classification)

Source: Australian Bureau of Statistics, Industrial Disputes, Australia (Catalogue 6321.0.55.001), Table 2b "Industrial disputes which occurred during the period, working days lost per 1000 employees, industry", release compiled on the Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006.

Series ID: A2540869W

Quarter	Working days lost per 1,000 employees
Mar 2008	2.9
Jun 2008	2.0
Sep 2008	10.3
Dec 2008	4.6
Mar 2009	6.1
Jun 2009	10.6
Sep 2009	6.9
Dec 2009	10.3
Mar 2010	17.3
Jun 2010	8.9
Sep 2010	12.8
Dec 2010	4.2
Mar 2011	11.6
Jun 2011	45.7
Sep 2011	6.6
Dec 2011	5.3
Mar 2012	8.2
Jun 2012	12.3
Sep 2012	63.7
Dec 2012	2.3
Mar 2013	11.4
Jun 2013	8.5
Sep 2013	8.7
Dec 2013	10.1
Mar 2014	2.2
Jun 2014	6.2
Sep 2014	18.2
Dec 2014	4.0
Mar 2015	11.1
Jun 2015	5.3

Quarter	Working days lost per 1,000 employees
Sep 2015	14.2
Dec 2015	16.7
Mar 2016	13.8
Jun 2016	19.6
Sep 2016	18.4
Dec 2016	19.7
Mar 2017	12.1
Jun 2017	14.2
Sep 2017	8.7
Dec 2017	4.5
Mar 2018	1.2
Jun 2018	7.7
Sep 2018	7.4
Dec 2018	14.4
Mar 2019	5.3
Jun 2019	10.5
Sep 2019	1.9
Dec 2019	1.3
Mar 2020	0.2
Jun 2020	Not available
Sep 2020	0.8
Dec 2020	1.0
Mar 2021	1.4
Jun 2021	2.4
Sep 2021	3.7
Dec 2021	1.2
Mar 2022	1.7
Jun 2022	0.6
Sep 2022	3.0
Dec 2022	2.3
Mar 2023	1.6
Jun 2023	3.4
Sep 2023	3.6
Dec 2023	2.3
Mar 2024	3.0
Jun 2024	7.9
Sep 2024	25.6
Dec 2024	6.7

Quarter	Working days lost per 1,000 employees
Mar 2025	3.0
Jun 2025	12.3
Sep 2025	8.7
Dec 2025	3.4

ABS Estimates of Industry Multifactor Productivity – Construction industry

ABS Catalogue 5260.0.55.002, 2024-25 release (released 6 February 2026)

Source: Australian Bureau of Statistics, Estimates of Industry Multifactor Productivity, Australia, 2024-25 financial year (Catalogue 5260.0.55.002), released 6 February 2026. Time Series Workbook, Tables 1, 6 and 7.

Series: "E Construction" (ANZSIC code E). Tables 1 and 6 extracted on the quality adjusted hours worked basis.

Table 1: Gross Value Added based Multifactor Productivity Indexes – E Construction

Year	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07
Index	110.66	109.15	107.84	107.25	107.79	105.68	105.81	104.53	110.92	114.72	114.87	97.24	112.62	114.90	115.84	116.66	117.38	112.83
Year	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23	2023-24	2024-25
Index	111.19	111.97	111.38	108.29	117.65	121.30	125.78	116.74	111.86	108.62	110.61	105.88	103.75	103.48	102.49	100.24	100.00	97.18

Table 6: Gross Value Added Labour Productivity Indexes – E Construction

Year	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07
Index	91.73	93.30	95.25	94.29	95.52	93.56	95.97	94.18	100.42	103.66	102.82	87.72	104.01	103.21	103.34	105.65	106.74	100.90
Year	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23	2023-24	2024-25
Index	100.04	101.70	104.87	102.51	112.43	118.16	123.36	113.88	108.85	107.37	108.97	104.07	103.57	104.31	102.51	99.15	100.00	97.07

Table 7: Capital Productivity Indexes – E Construction

Year	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07
Index	179.90	162.42	144.60	146.08	142.85	140.52	131.36	132.09	138.20	143.80	147.57	122.45	131.91	145.40	148.87	144.94	144.57	143.41
Year	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23	2023-24	2024-25
Index	139.53	137.43	126.47	121.53	129.27	128.04	130.86	122.90	118.44	110.69	113.60	109.30	103.82	101.66	102.35	102.74	100.00	97.43

Industrial disputes – Queensland (all industries), March 1985 to December 2025

ABS Catalogue 6321.0.55.001, Table 3b (by State and Territory)

Source: Australian Bureau of Statistics, Industrial Disputes, Australia (Catalogue 6321.0.55.001), Table 3b "Industrial disputes which occurred during the period, working days lost per 1000 employees, States and Territories".

Series ID: A2540888C

Quarter	Working days lost per 1,000 employees
Mar 1985	191.9
Jun 1985	37.2
Sep 1985	124.9
Dec 1985	45.9
Mar 1986	28.1
Jun 1986	83.6
Sep 1986	51.6
Dec 1986	30.0
Mar 1987	7.2
Jun 1987	25.3
Sep 1987	23.5
Dec 1987	24.0
Mar 1988	45.6
Jun 1988	148.1
Sep 1988	71.6
Dec 1988	44.1
Mar 1989	26.1
Jun 1989	14.4
Sep 1989	24.6
Dec 1989	30.4
Mar 1990	14.1
Jun 1990	22.9
Sep 1990	29.3
Dec 1990	34.4
Mar 1991	8.9
Jun 1991	37.5
Sep 1991	44.5
Dec 1991	9.2
Mar 1992	11.3
Jun 1992	13.3

Quarter	Working days lost per 1,000 employees
Sep 1992	13.9
Dec 1992	22.1
Mar 1993	19.8
Jun 1993	18.1
Sep 1993	64.0
Dec 1993	14.8
Mar 1994	27.8
Jun 1994	24.7
Sep 1994	16.9
Dec 1994	43.7
Mar 1995	44.2
Jun 1995	52.1
Sep 1995	23.0
Dec 1995	29.0
Mar 1996	10.2
Jun 1996	72.6
Sep 1996	55.7
Dec 1996	25.2
Mar 1997	20.1
Jun 1997	33.9
Sep 1997	14.6
Dec 1997	4.1
Mar 1998	2.4
Jun 1998	17.6
Sep 1998	10.8
Dec 1998	8.2
Mar 1999	17.3
Jun 1999	4.0
Sep 1999	12.1
Dec 1999	5.6
Mar 2000	18.3
Jun 2000	26.3
Sep 2000	12.5
Dec 2000	8.4
Mar 2001	10.8
Jun 2001	11.9
Sep 2001	12.0
Dec 2001	4.5

Quarter	Working days lost per 1,000 employees
Mar 2002	6.0
Jun 2002	9.0
Sep 2002	8.6
Dec 2002	6.3
Mar 2003	16.7
Jun 2003	2.8
Sep 2003	4.9
Dec 2003	8.8
Mar 2004	3.9
Jun 2004	3.1
Sep 2004	5.2
Dec 2004	2.6
Mar 2005	7.2
Jun 2005	4.5
Sep 2005	1.4
Dec 2005	4.6
Mar 2006	3.5
Jun 2006	0.3
Sep 2006	0.2
Dec 2006	0.3
Mar 2007	0.2
Jun 2007	0.8
Sep 2007	0.2
Dec 2007	0.3
Mar 2008	0.1
Jun 2008	3.6
Sep 2008	3.1
Dec 2008	0.7
Mar 2009	1.3
Jun 2009	15.6
Sep 2009	2.9
Dec 2009	4.2
Mar 2010	1.1
Jun 2010	1.9
Sep 2010	4.6
Dec 2010	3.7
Mar 2011	3.7
Jun 2011	14.5

Quarter	Working days lost per 1,000 employees
Sep 2011	8.3
Dec 2011	11.0
Mar 2012	Not available
Jun 2012	12.9
Sep 2012	24.9
Dec 2012	0.9
Mar 2013	2.7
Jun 2013	2.9
Sep 2013	0.6
Dec 2013	3.3
Mar 2014	0.9
Jun 2014	0.8
Sep 2014	6.0
Dec 2014	1.6
Mar 2015	2.3
Jun 2015	2.9
Sep 2015	5.3
Dec 2015	5.5
Mar 2016	6.9
Jun 2016	6.1
Sep 2016	6.5
Dec 2016	10.0
Mar 2017	1.7
Jun 2017	4.2
Sep 2017	4.2
Dec 2017	4.6
Mar 2018	3.2
Jun 2018	1.1
Sep 2018	3.3
Dec 2018	3.8
Mar 2019	1.2
Jun 2019	2.3
Sep 2019	1.2
Dec 2019	0.9
Mar 2020	Not available
Jun 2020	Not available
Sep 2020	0.6
Dec 2020	0.3

Quarter	Working days lost per 1,000 employees
Mar 2021	0.2
Jun 2021	0.7
Sep 2021	1.7
Dec 2021	1.6
Mar 2022	1.2
Jun 2022	0.2
Sep 2022	1.0
Dec 2022	1.1
Mar 2023	0.6
Jun 2023	1.3
Sep 2023	3.2
Dec 2023	4.2
Mar 2024	3.6
Jun 2024	3.9
Sep 2024	4.9
Dec 2024	2.0
Mar 2025	1.5
Jun 2025	3.6
Sep 2025	Not available
Dec 2025	Not available

Workers' compensation claims – Construction industry

Safe Work Australia, National Dataset for Compensation Based Statistics, 2023-24 (published 1 October 2025)

Source: Safe Work Australia, National Dataset for Compensation Based Statistics – detailed data file, 2023-24, published 1 October 2025; Tables 1.1, 1.2 and 1.3 (industry breakdown by ANZSIC subdivision).

Table 1.1: Number of serious claims (count)

Year	Construction (E)
2014-15	12,397
2015-16	12,753
2016-17	12,958
2017-18	13,834
2018-19	14,429
2019-20	15,438
2020-21	16,077
2021-22	16,101
2022-23	17,156
2023-24p	17,609

Table 1.2: Claims frequency rate (per million hours worked)

Year	Construction (E)
2014-15	7.9
2015-16	8.0
2016-17	7.8
2017-18	7.5
2018-19	7.7
2019-20	8.4
2020-21	8.8
2021-22	10.5
2022-23	9.0
2023-24p	9.3

Table 1.3: Claims incidence rate (per 1,000 employees)

Year	Construction (E)
2014-15	15.6
2015-16	16.0
2016-17	15.5
2017-18	14.9

Year	Construction (E)
2018-19	15.4
2019-20	16.2
2020-21	16.8
2021-22	19.8
2022-23	17.7
2023-24p	17.7

“Restoring the Rule of Law” through Commercial (Dis)incentives: The Code for the Tendering and Performance of Building Work 2016

Anthony Forsyth*

Abstract

This article examines the Australian Coalition Government’s attempt to restore the rule of law in the building and construction industry, through the procurement requirements in the *Code for the Tendering and Performance of Building Work 2016* (Cth) (‘2016 Code’). It traces the evolution of the separate scheme of construction regulation adopted in 2005 following the Cole Royal Commission, the subsequent Labor Government changes to this scheme, and the initiatives of the Coalition Government since 2013. The article then considers the use of procurement guidelines to implement workplace reform in the construction industry since 1997, followed by a detailed explanation of the new procurement rules in the *2016 Code*. The concept of the rule of law is examined as a basis for analysis of arguments in support of its reinstatement in the Australian construction industry. The article concludes that the Government’s use of the procurement rules in the *2016 Code* is partly aimed at restoring the rule of law — narrowly conceived as ensuring compliance with the law — but is also a mechanism to reduce union power and enhance productivity in the Australian construction industry.

I Introduction

This article examines the Australian Coalition Government’s attempt to bring back the rule of law in the building and construction industry, through the procurement requirements in the *Code for the Tendering and Performance of Building Work 2016* (Cth) (‘2016 Code’). Since coming to office in September 2013, the Coalition has

* Professor, Graduate School of Business and Law, RMIT University, Melbourne, Australia; Consultant, Corrs Chambers Westgarth. Thanks to the *Sydney Law Review*’s anonymous referees for their comments on an earlier version of this article; to SLR Editorial Board member Dr Michael Sevel for his insights on the rule of law; and to Ruth Hart, Special Counsel, Corrs Chambers Westgarth for her feedback on the draft article.

repeatedly expressed its intention to ‘restore the rule of law’¹ in a sector where unlawful conduct is a significant problem (eg illegal industrial action, coercion and unlawful union entry onto sites).² The primary vehicle for achieving this objective is the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (‘BCIIP Act’), which was passed by Federal Parliament in late 2016. The *BCIIP Act* re-established the Howard-era regulator, the Australian Building and Construction Commission (‘ABCC’), and introduced stronger prohibitions on unlawful strikes, picketing and coercion in the construction sector along with higher penalties.

The *BCIIP Act* also includes a provision that facilitated the issuing of the *2016 Code*, which is another important instrument through which the Government is pursuing its ‘rule of law’ objective in the building industry. Construction companies and contractors must comply with the *2016 Code* in order to remain eligible to tender for, and be awarded, Commonwealth-funded building work. This includes ensuring that there are no provisions in a bidding company’s enterprise agreements that infringe a wide range of new prohibitions on agreement content under the *2016 Code*. The *Code* therefore holds considerable potential to influence the practices of construction companies and their relationships with unions (particularly the Construction, Forestry, Mining and Energy Union (‘CFMEU’)), and to achieve the kind of cultural change in the building industry sought by the Government. In 2003, the Cole Royal Commission into the Building and Construction Industry saw the opportunity for procurement guidelines to drive workplace reform, stating in its Final Report that:

Because governments provide significant funds for building and construction activity, including on the occasions when they are the clients directly commissioning the work, they have the capacity through their purchasing power to influence the behaviour of participants in this industry.³

The Productivity Commission put this a little more bluntly, describing the role of the 2013 iteration of the *Code* as being ‘purely to use government procurement as a carrot and stick for improved workplace relations and [health and safety]’.⁴ According to Howe, this approach is one of several forms of the dispensation of ‘money and favours’ by governments ‘to promote desired labour relations practices’, a regulatory technique that contrasts with traditional forms of direct regulation of the labour market.⁵ Creighton has observed that procurement instruments dating as far back as the *Fair Wages Resolution 1891* (UK) had traditionally been utilised to protect workers from exploitation and to promote collective bargaining. In contrast,

¹ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 2016, 84 (Malcolm Turnbull, Prime Minister), introducing the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) into Parliament.

² Productivity Commission (Cth), *Public Infrastructure: Inquiry Report* (Report No 71, Productivity Commission (Cth), 27 May 2014) vol 2, 530–1.

³ Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 7, 49 [3.2] (‘Cole Royal Commission’).

⁴ Productivity Commission (Cth), above n 2, vol 2, 503.

⁵ John Howe, “‘Money and Favours’: Government Deployment of Public Wealth as an Instrument of Labour Regulation” in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 167, 167; other government initiatives discussed by Howe include financial incentives, subsidies, administrative guidelines, and ‘quasi-contracts’/other devices to achieve contracting out of government functions: at 169–70.

the forerunner to the *2016 Code* adopted by the Howard Government was used mainly ‘to constrain the industrial behaviour of workers and unions in the construction industry’, and thus amounted to ‘a perversion of the logic of using public procurement as a vehicle for workplace relations reform’.⁶

This article seeks to assess the deployment of the *2016 Code* to achieve the Turnbull Government’s aim of returning to the rule of law in the Australian building industry. Respect for the rule of law became a subject of heated debate in March 2017, when the new Secretary of the Australian Council of Trade Unions (‘ACTU’), Sally McManus, stated (in response to a question about the CFMEU’s alleged flouting of legal restrictions on industrial action) that: ‘I believe in the rule of law where the law is fair, where the law is right. But when it’s unjust, I don’t think there’s a problem with breaking it.’⁷ Her comments were strongly criticised by Coalition politicians,⁸ and were even repudiated by Federal Labor leader Bill Shorten.⁹ McManus’s position also gave the Coalition Government another opportunity to mount its arguments as to the ‘lawlessness’ of the construction sector and the need for its reforms.¹⁰

Part II of the article outlines key elements of the concept of the rule of law, focusing, in particular, on the notions of compliance with legal rules and equal treatment before the law. Part III traces the evolution of the separate scheme of construction regulation adopted in 2005 following the recommendations of the Cole Royal Commission, the subsequent Labor Government changes to this scheme, and the initiatives of the Coalition Government since 2013. Part IV discusses the use of procurement guidelines to implement workplace reform in the construction industry since 1997, and is followed by a detailed explanation in Part V of the new procurement rules set out in the *2016 Code*. Part VI analyses the arguments in support of the need to reinstate the rule of law in the Australian construction industry. The analysis also considers whether the *2016 Code* is really intended to achieve

⁶ Breen Creighton, ‘Government Procurement as a Vehicle for Workplace Relations Reform: The Case of the National Code of Practice for the Construction Industry’ (2012) 40(3) *Federal Law Review* 349, 383–4. See also John Howe and Ingrid Landau, ‘Using Public Procurement to Promote Better Labour Standards in Australia: A Case Study of Responsive Regulatory Design’ (2009) 51(4) *Journal of Industrial Relations* 575; Catherine Barnard, ‘To Boldly Go: Social Clauses in Public Procurement’ (2017) 46(2) *Industrial Law Journal* 208 (exploring recent European Union public procurement directives and their implementation in the United Kingdom).

⁷ ABC, ‘New ACTU Boss Says It’s Ok for Workers to Break “Unjust Laws”’, 7.30, 15 March 2017 (Sally McManus).

⁸ David Marin-Guzman, ‘Malcolm Turnbull Says He Can’t Work With New ACTU Boss Sally McManus’, *Australian Financial Review* (online), 17 March 2017 <<http://www.afr.com/news/policy/industrial-relations/malcolm-turnbull-says-he-cant-work-with-new-actu-boss-sally-mcmanus-20170316-gv06gu>>.

⁹ Latika Bourke, ‘Bill Shorten Rejects ACTU Leader Sally McManus’ View on Breaking “Unjust” Laws’, *The Sydney Morning Herald* (online), 16 March 2017 <<http://www.smh.com.au/federal-politics/political-news/bill-shorten-rejects-actu-leader-sally-mcmanus-view-on-breaking-unjust-laws-20170315-guz1vp.html>>.

¹⁰ See, eg, Tom McLroy and Amy Remeikis, ‘Breaking the Law an Australian Worker Tradition: ACTU Boss Sally McManus’, *The Sydney Morning Herald* (online), 16 March 2017 <<http://www.smh.com.au/federal-politics/political-news/anarchomarxist-claptrap-liberals-slam-actu-boss-sally-mcmanus-over-law-breaking-comments-20170315-guz3sh.html>>; Australian Associated Press, ‘Turnbull Stands Up to Union Secretary’, *SBS News* (online), 17 March 2017 <<https://www.sbs.com.au/news/turnbull-stands-up-to-actu-secretary>>.

broader workplace reform objectives of the Coalition Government, and how it has been argued that the separate scheme of building industry regulation offends the rule of law. Some concluding observations are made in Part VII.

II The Concept of the Rule of Law

Bingham observed that the modern concept of ‘the rule of law’ is generally credited to the English constitutional law professor, A V Dicey,¹¹ who devoted a large part of his seminal 1885 work to defining and examining the application of the rule of law.¹² Dicey referred to ‘the supremacy or the rule of law’ as ‘a characteristic of the English constitution’, with three defining features: first, that no person should be punished ‘except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land’;¹³ second, not only that ‘no man is above the law’, but also that ‘every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals’ — ‘the idea of legal equality’;¹⁴ and third, that general constitutional principles such as the right to personal liberty are ‘the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts’.¹⁵

Bingham sought to encapsulate Dicey’s conception of the rule of law as follows:

The core of the existing principle is ... that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.¹⁶

Bingham then set out eight principles that are ‘ingredients of the rule of law’.¹⁷ These ingredients include: that the law must be accessible, clear and predictable; that laws should apply equally to all (except where objective differences justify differentiation); that government officials must exercise their powers in good faith, for proper purposes, within power and not unreasonably; and that adjudicative procedures provided by the State must be fair.¹⁸ The notion of equality before the law has been further expounded, for example by Gowder, as requiring *regularity* in the application of the law; *publicity* as to what the law is and what it requires of subjects; and *generality* (‘[n]either the rules under which officials exercise coercion nor officials’ use of discretion under those rules make irrelevant distinctions between subjects of

¹¹ Baron Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 3.

¹² A V Dicey, *Introduction to the Study of the Law of the Constitution* (LibertyClassics, 8th ed, 1982) 104–273. See further Mark D Walters, ‘Dicey on Writing the Law of the Constitution’ (2012) 32(1) *Oxford Journal of Legal Studies* 21. On the much earlier antecedents of the rule of law, see James Spigelman, ‘Magna Carta: The Rule of Law and Liberty’ (2015) 31(2) *Policy: A Journal of Public Policy and Ideas* 24; on the various philosophical foundations of the concept over time, see Judith Shklar, ‘Political Theory and the Rule of Law’ in Allan C Hutchinson and Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1, ch 1.

¹³ Dicey, above n 12, 110.

¹⁴ Ibid 114. See also 120.

¹⁵ Ibid 115.

¹⁶ Bingham, above n 11, 8.

¹⁷ Ibid 37. See chs 3–10.

¹⁸ Ibid 37, 55, 60, 90.

law’).¹⁹ Importantly for purposes of this article, Gowder goes on to mount the proposition that: ‘when a law or exercise of official discretion treats people differently from one another, there must be public reasons to justify the different treatment’.²⁰

Bottomley and Bronitt contend that: ‘For the liberal theorist, the rule of law is more to do with the duties on *governments* than on citizens. It obliges governments to rule only by way of laws.’²¹ On this view, the rule of law is valuable because it constrains the absolute power of government and protects the liberties of citizens. Allan has argued, though, that while the rule of law stands against the arbitrary or discriminatory exercise of power, it ‘does not itself afford a complete protection of liberty: it does not identify spheres of personal conduct which should be immune from legislative or governmental interference, or specify all the liberties essential to an effective democracy’.²² This is consistent with Hayek’s conception of the rule of law as a safeguard of individual freedom, but ‘[restricting] government only in its coercive activities’.²³ Hayek also addressed the issue recently raised by Sally McManus’s view that unjust laws can be broken,²⁴ as follows:

It is sometimes said that, in addition to being general and equal, the law of the rule of law must also be just. But though there can be no doubt that, in order to be effective, it must be accepted as just by most people, it is doubtful whether we possess any other formal criteria of justice than generality and equality — unless, that is, we can test the law for conformity with more general rules which, though perhaps unwritten, are generally accepted, once they have been formulated.²⁵

The centrality, to the rule of law’s purpose, of an expectation of compliance with the law is contested. Bottomley and Bronitt maintain that: ‘in everyday use “the rule of law” is often taken to mean simply “law and order”, that is, people should obey the law. While law and order might be an aspect of some versions of the rule of law, it is not really at the heart of it’.²⁶ For theorists like Fuller, however, the rule of law notion is more nuanced and reflects a kind of balance between government and

¹⁹ Paul Gowder, ‘The Rule of Law and Equality’ (2013) 32(5) *Law and Philosophy* 565, 566. See also Christopher Nathan, ‘What is Basic Equality?’ in Uwe Steinhoff (ed), *Do All Persons Have Equal Moral Worth?: On ‘Basic Equality’ and Equal Respect and Concern* (Oxford University Press, 2014) 1.

²⁰ Gowder, above n 19, 602 (citations omitted). See also 603–11; and below Part VID the discussion of how the specialist scheme of construction industry regulation may offend the equality objective of the rule of law.

²¹ Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) 42 (emphasis in original). See also, eg, Mortimer N S Sellers, ‘What is the Rule of Law and Why is it so Important?’ in James R Silkenat, James E Hickey Jr and Peter D Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer, 2014) 3; Allan C Hutchinson and Patrick J Monahan, ‘Democracy and the Rule of Law’ in Allan C Hutchinson and Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 97, 100–1.

²² T R S Allan, ‘The Rule of Law as the Rule of Reason: Consent and Constitutionalism’ (1999) 115 (April) *Law Quarterly Review* 221, 225.

²³ Friedrich A Hayek, *The Constitution of Liberty* (Routledge & Kegan Paul, 1960) 206 (citations omitted). See also *ibid* 225.

²⁴ See nn 7–10 above and accompanying text.

²⁵ Hayek, above n 23, 210.

²⁶ Bottomley and Bronitt, above n 21, 42. See further Alois Troller, *The Law and Order: An Introduction to Thinking about the Nature of Law* (A J Sijthoff, 1969) [trans of: *Rechtserlebnis und Rechtspflege; ein Fussweg zur Jurisprudenz für Ungeübte begehbar* (first published 1962)].

citizen, or as he put it: ‘a relatively stable reciprocity of expectations between law-giver and subject’.²⁷ Allan articulates this sort of approach in the following terms:

The idea that adherence to the rule of law is intended to enable the law’s subjects to obey it ... is too closely related to an underlying assumption that the law is primarily a means for achieving governmental objectives and overlooks the role of law as a set of constraints and limitations on the pursuit of such objectives. Properly understood, the rule of law is quite as much concerned with ensuring that state officials — both executive and judiciary — are able to obey the law, and required to do so, as with affording guidance to the private citizen.²⁸

However, it is the arguably narrower understanding of the rule of law as requiring that the law must be *observed*, which has generally informed the debate about building industry regulation in Australia over the last 30 years. In 1988, Walker wrote of ‘the construction industry as a no-law state’, where the report of the 1981–82 Royal Commission into Activities of the Australian Building Construction Employees’ and Builders’ Labourers’ Federation had exposed ‘an organized group that succeeded in placing itself above the law and indeed suppressing the rule of law throughout the construction industry’.²⁹ For Walker, these activities offended his conception of the rule of law, which included the need for ‘institutions and procedures that are capable of speedily enforcing’ substantive laws ‘which prohibit violence, coercion, general lawlessness and anarchy’.³⁰ The notion that the law must be complied with lies behind the development of the specialist scheme of building industry regulation in Australia since the early 2000s, and continues to be foundational to the case in support of that scheme due to the ‘lawlessness’ of the principal construction union, the CFMEU.³¹

III The Evolution of Construction Industry Regulation in Australia

A *The Cole Royal Commission and Howard Government Legislation*

Generally, workplace and employment relations in Australia are regulated by the *Fair Work Act 2009* (Cth) (‘FW Act’). This legislation applies to most Australian private sector employers and employees,³² setting minimum employment standards

²⁷ Lon L Fuller, *The Morality of Law* (Yale University Press, revised ed, 1969) 209.

²⁸ Allan, above n 22, 229. See also Krygier’s contrasting notions of the rule of law as ‘thin’ (‘formal, institution-focused’) and ‘thick’ (‘substantive, or material’): Martin Krygier, ‘The Rule of Law: Pasts, Presents, and Two Possible Futures’ (2016) 12(1) *Annual Review of Law and Social Science* 199, 213–14.

²⁹ Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988) 222. See further 222–8.

³⁰ Ibid 28 (although note that Walker did not wish this view to be equated with ‘mere “law and order”’: at 29). See also ch 7.

³¹ See, eg, Alan Colman, ‘The ABCC Bill is About Fairness and the Rule of Law’, *Australian Financial Review* (online), 18 April 2016 <<http://www.afr.com/opinion/the-abcc-bill-is-about-fairness-and-the-rule-of-law-20160418-go8orl>>.

³² On the coverage of the national workplace relations system, see further Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (Federation Press, 6th ed, 2016) ch 6.

and providing for the making of industry-level awards and enterprise agreements (including rules relating to enterprise bargaining and ‘protected’ industrial action in support of bargaining claims).³³ The *FW Act* also provides employees with protection from unfair dismissal and various forms of ‘adverse action’ by employers (related to an employee’s exercise of defined ‘workplace rights’ or engagement in ‘industrial activity’).³⁴ The national workplace relations system is overseen by the Fair Work Commission (‘FWC’), which makes awards, approves agreements and resolves a wide range of claims and disputes arising under the *FW Act*;³⁵ and the Fair Work Ombudsman, which has responsibility for enforcement and ensuring compliance with the legislation and instruments made under it.³⁶

However, since 2005 an additional regulatory framework has applied to industrial relations in the building and construction industry, along with various iterations of a specialist regulator for that sector. The origins of this separate system of regulation can be traced to the Howard Government’s establishment of a Royal Commission into the Building and Construction Industry in 2001, headed up by former New South Wales judge Terence Cole QC. In its 2003 Final Report, the Cole Royal Commission made extensive findings as to the ‘lawlessness’ of the construction sector, including breaches of relevant criminal laws, the *Workplace Relations Act 1996* (Cth) (the predecessor to the *FW Act*), state occupational health and safety (‘OHS’) laws and court/tribunal orders.³⁷ Commissioner Cole made observations that the rule of law had ceased to apply in the construction industry, particularly in Western Australia and Victoria, and had been supplanted by ‘commercial expediency’ in New South Wales.³⁸ In his view, the widespread lawless conduct in the industry arose from:

a clash between the short term project profitability focus of the providers of capital, clients, head contractors and subcontractors on the one hand, and the long term aspirations of the union movement, especially the CFMEU, to dominate, control and regulate the industry for its benefit, and what it perceives to be the benefit of its members, on the other hand.³⁹

The key recommendation of the Cole Royal Commission was for the establishment of a specialist agency to enforce applicable laws in the construction industry, and to effect a cultural shift towards respect for the rule of law.⁴⁰ In response, the Howard Government established the ABCC under the *Building and Construction Industry Improvement Act 2005* (Cth), which also gave this body

³³ *FW Act* pts 2-2, 2-3, 2-4, 3-3.

³⁴ *Ibid* pts 3-2, 3-1.

³⁵ *Ibid* pt 5-1.

³⁶ *Ibid* pt 5-2.

³⁷ Cole Royal Commission, above n 3, vol 1, 5–6 [1.15]–[1.17].

³⁸ *Ibid* vol 12, 37 [94], 89–94 [5–28], 279–82 [5–28]. See also ‘Cole’s State Findings Prepare Ground for Reform Push’, *Workplace Express* (online), 26 March 2003 <<https://www.workplaceexpress.com.au>>.

³⁹ Cole Royal Commission, above n 3, vol 1, 11 [1.20]. See also ‘Unions to Seek Senate Veto on Cole Changes’, *Workplace Express* (online), 27 March 2003 <<https://www.workplaceexpress.com.au>>.

⁴⁰ Cole Royal Commission, above n 3, vol 1, 4 [1.10], 13–14 [1.33]–[1.34]. See also vol 11, titled ‘Reform — Achieving Cultural Change’. Note also the critical accounts of the Cole Royal Commission (from the unions’ perspective) in Jim Marr, *First the Verdict: The Real Story of the Building Industry Royal Commission* (Pluto Press, 2003); Liz Ross, ‘Building Unions and Government “Reform”: The Challenge for Unions’ (2005) 56 *Journal of Australian Political Economy* 172.

compulsory evidence-gathering powers⁴¹ and imposed new restrictions on unlawful industrial action with significant penalties (among other reforms).⁴² The ABCC's role was to increase the level of compliance with laws applicable to workplace relations in the construction industry, predominantly through investigation of suspected breaches and bringing enforcement proceedings.⁴³

B *The Rudd/Gillard Governments' Changes to Construction Regulation*

The Labor Opposition went to the 2007 Federal Election promising to retain the ABCC (despite the union movement's concerns about the separate regulatory regime for the building industry), but to transfer its functions to a specialist division of the national industrial tribunal after a two-year transition period.⁴⁴ Ultimately, the Rudd Labor Government did not implement that proposal. It commissioned former Federal Court Justice the Honourable Murray Wilcox QC to engage in public consultation on options for construction industry regulation, but then ignored his recommendation to house the construction regulator within the FWO.⁴⁵ Instead, under the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (Cth), the ABCC was replaced by the Fair Work Building Industry Inspectorate, which operated under the name 'Fair Work Building and Construction' ('FWBC'). The 2012 building industry legislation replaced the *Building and Construction Industry Improvement Act 2005* (Cth) with the *Fair Work (Building Industry) Act 2012* (Cth),⁴⁶ under which some safeguards were imposed on the FWBC's exercise of its compulsory examination powers⁴⁷ and the strictures on unlawful industrial action in the construction sector were removed.

⁴¹ Since their introduction, these powers have been a particularly controversial aspect of construction industry regulation: see George Williams and Nicola McGarrrity, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21(3) *Australian Journal of Labour Law* 244; Stewart et al, above n 32, 1010–15.

⁴² See further Anthony Forsyth et al, *Workplace Relations in the Building and Construction Industry* (LexisNexis Butterworths, 2007), chs 1–2, 7, 9; John Howe, "'Deregulation" of Labour Relations in Australia: Towards a More "Centred" Command and Control Model', in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 147, 159–65.

⁴³ Howe, above n 42, 159–60.

⁴⁴ Kevin Rudd and Julia Gillard, 'Forward with Fairness — Policy Implementation Plan' (Statement, 28 August 2007) 4.

⁴⁵ Murray Wilcox, 'Transition to Fair Work Australia for the Building and Construction Industry' (Report, Australian Government, March 2009) ('Wilcox Review'). Wilcox noted that: 'The *BCII Act* provisions have always been, and remain, highly controversial': at 1 [1.5]. However, he concluded that: 'the ABCC's work is not yet done. Although I accept there has been a big improvement in building industry behaviour during recent years, some problems remain': at 14 [3.23]. See also 55–6 [5.77]–[5.83]. More generally, see Emma Goodwin, 'Constructing Fair Work for the Australian Building and Construction Industry: The Honourable Murray Wilcox QC's Report *Transition to Fair Work Australia for the Building and Construction Industry*' (2009) 22(2) *Australian Journal of Labour Law* 173.

⁴⁶ See further Emma Goodwin, 'Building on Shifting Sands: From the *Fair Work (Building Industry) Act 2012* (Cth) to the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)' (2014) 27(1) *Australian Journal of Labour Law* 97, 100–105.

⁴⁷ Wilcox Review, above n 45, chs 5–6. See also Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 868–9.

C *Winding Back Labor's Changes: The Coalition Government's Construction Reforms*

Continuing the pattern of incoming governments changing construction industry regulation, after the 2013 Election, the Abbott Coalition Government quickly sought to implement its policy commitment to bring back the ABCC and maintain the rule of law in the construction industry.⁴⁸ However, it took the Government (by then, led by Prime Minister Turnbull) three years to gain Parliament's support for the *BCIIP Act*.⁴⁹ In the meantime, the Government-initiated Royal Commission on Trade Union Governance and Corruption had made extensive findings (similar to those of the Cole Royal Commission) as to the extent of lawless conduct in the industry and the CFMEU's '[habitual] contempt for the rule of law'.⁵⁰ Commissioner the Honourable Dyson Heydon QC AC recommended 'that there continue to be a separate industry-specific regulator for the building and construction industry'.⁵¹

As indicated earlier, the *BCIIP Act* re-established the ABCC (with effect from 2 December 2016), although with a number of new constraints on its powers, which formed part of a series of amendments agreed to by the Government in order to secure passage of the legislation by crossbench senators.⁵² In addition, the *BCIIP Act* re-introduced prohibitions on unlawful industrial action and coercion (similar to those that operated under the *Building and Construction Industry Improvement Act 2005* (Cth)), and created a new prohibition on unlawful picketing.⁵³ The Turnbull Government had staked a great deal on getting this legislation enacted, first calling a special sitting of Federal Parliament in April 2016 to consider it (following repeated rejection of the Bill for the *BCIIP Act* by the Senate);⁵⁴ then (once it was rejected again at the special sitting) calling a double dissolution Election for 2 July 2016.⁵⁵ Prime Minister Turnbull invoked the need to 'restore the rule of law' in the construction industry through the ABCC as a vital economic reform, both when calling the Election⁵⁶ and when claiming victory on Election night⁵⁷ (albeit with a substantially reduced majority in the House of Representatives). The Election result

⁴⁸ Liberal Party of Australia and The Nationals, 'The Coalition's Policy to Improve the Fair Work Laws' (Policy Statement, May 2013).

⁴⁹ On the earliest of the several Bills ultimately enacted as the *BCIIP Act*, see Goodwin, above n 46, 105–10.

⁵⁰ Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015) vol 5, 401 [8.23].

⁵¹ *Ibid* vol 5, 435 [8.109].

⁵² For example, the Government abandoned plans to remove the framework of administrative law oversight applying to the ABCC's exercise of its powers to obtain evidence compulsorily (see *BCIIP Act* ss 61A–5). See further David Marin-Guzman, 'Michaelia Cash's Concessions on Australian Building and Construction Commission', *Australian Financial Review* (online), 30 November 2016 <<http://www.afr.com/news/explainer-what-is-left-of-the-australian-building-and-construction-commission-20161129-gt0ihe>>.

⁵³ See *BCIIP Act* chs 5–6 (ss 44–58).

⁵⁴ 'Turnbull Bringing on IR Bill Votes Next Month', *Workplace Express* (online), 21 March 2016 <<https://www.workplaceexpress.com.au>>.

⁵⁵ 'Turnbull Confirms ABCC Bills' Rejection to Trigger Election', *Workplace Express* (online), 19 April 2016 <<https://www.workplaceexpress.com.au>>.

⁵⁶ 'Turnbull Calls Double Dissolution Election', *Workplace Express* (online), 8 May 2016 <<https://www.workplaceexpress.com.au>>.

⁵⁷ 'PM Defends Double Dissolution as Doubts Raised about Joint Sitting', *Workplace Express* (online), 3 July 2016 <<https://www.workplaceexpress.com.au>>.

also produced a more workable Senate,⁵⁸ which led to the passage not only of the *BCIIP Act*, but also the other election trigger, legislation implementing the Government's enhanced framework for trade union regulation (in response to corruption and financial mismanagement within several unions).⁵⁹

IV Reform through Procurement Requirements: From the 1997 Code to the 2016 Code

A Increasing Use of Procurement as a Policy Lever 1997–2009

The use of procurement requirements to achieve workplace reform objectives commenced under the Howard Government, through its *National Code of Practice for the Construction Industry*, which was agreed to by the Federal, state and territory governments in 1997 ('1997 Code').⁶⁰ This instrument established a series of general principles to which companies seeking to work on government construction projects were required to adhere, including industrial relations principles dealing with freedom of association and the right not to associate (among other matters). Accompanying the 1997 Code were various versions of the *Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry* ('Code Guidelines'), which specified more detailed industrial relations requirements and made compliance with those requirements a condition of eligibility to bid for and be awarded federally-funded building work.⁶¹ In addition to bolstering freedom of association and limiting union right of entry,⁶² the *Code Guidelines* sought to preclude 'pattern bargaining' (a practice whereby unions obtain common outcomes across more than one enterprise agreement) and the imposition of construction industry awards on subcontractors.⁶³

The Cole Royal Commission recommended that the Federal Government make greater use of the 1997 Code and *Code Guidelines* 'as a vehicle for reform' in the building and construction industry.⁶⁴ Commissioner Cole found that the 1997 Code was not being applied consistently across all Commonwealth-funded projects, and there was neither adequate monitoring of compliance, nor imposition of

⁵⁸ See, eg, Phillip Coorey, 'One Nation Boosts Govt's Chances on IR Bills', *Australian Financial Review* (online), 10 October 2016 <<http://www.afr.com/news/politics/one-nation-boosts-govts-chances-on-ir-bills-20161009-gryhh5>>.

⁵⁹ *Fair Work (Registered Organisations) Amendment Act 2016* (Cth). See also Royal Commission into Trade Union Governance and Corruption, above n 50.

⁶⁰ Australian Procurement and Construction Council ('APCC'), 'National Code of Practice for the Construction Industry' (1997). See Forsyth et al, above n 42, 20–1. Note that at various times, some state governments have also adopted construction industry codes to further workplace reform objectives. These state codes are not examined in this article, for discussion see Creighton, above n 6, 361; Productivity Commission (Cth), above n 2, vol 2, 547, 550; Stewart et al, above n 32, 1026. See also *Victoria v CFMEU* (2013) 218 FCR 172.

⁶¹ Compliance with the 1997 Code and *Code Guidelines* was also made a condition of state governments obtaining federal funding for state infrastructure projects, such as the redevelopment of the Melbourne Cricket Ground in preparation for the 2006 Commonwealth Games: see Howe, above n 5, 176–7.

⁶² Forsyth et al, above n 42, 31, 33–4.

⁶³ Howe, above n 5, 177.

⁶⁴ Cole Royal Commission, above n 3, vol 11, 12–14 [48].

sanctions for breaches of the Code and *Code Guidelines*.⁶⁵ Highlighting the benefits of application of the 1997 Code on the Alice Springs to Darwin Railway Project,⁶⁶ Commissioner Cole recommended that the Code and Guidelines apply to all projects where the Commonwealth directly or indirectly provides funds for construction; and that parties contracting with the Commonwealth for government-funded work also be required to comply with the Code and Guidelines on their privately-funded projects.⁶⁷ In 2005, the *Code Guidelines* were changed to require tenderers for Commonwealth-funded building work to be Code-compliant on all their privately-funded work as well, and for all their related entities to be Code-compliant.⁶⁸

B The Labor Government and the Code 2009–13

The 2009 Wilcox Review essentially endorsed continued application of the 1997 Code and *Code Guidelines*, stating that:

There is widespread support for the idea behind the Guidelines. They are seen as ‘raising the stakes’ on employer misbehaviour; it is one thing to expose oneself to a relatively small monetary penalty, another thing to render oneself ineligible to tender for a project that is funded, even indirectly, by the Commonwealth.⁶⁹

The Wilcox Review recommended that the *Code Guidelines* be retained (with some changes), and that they be transformed from an administrative policy to a legislative instrument subject to scrutiny by Parliament (with the capacity for judicial and administrative review of any adverse decision made under that instrument).⁷⁰ The Labor Government made several changes to the *Code Guidelines*, in 2009 and again in 2012,⁷¹ before taking the more significant step of replacing the 1997 Code with the *Building Code 2013* (Cth) (‘2013 Code’). This placed into effect the Wilcox Review recommendation noted above: whereas previously the federal construction procurement rules operated as policy instruments, the 2013 Code was made as a legislative instrument under s 27 of the *Fair Work Building Industry Act 2012* (Cth). The Code thereby obtained greater legal force and certainty, making it less amenable to change at the discretion of government and subjecting it to possible disallowance in either House of Parliament.⁷² Further, decisions taken under the Code became subject to a range of potential review processes.⁷³ Accompanying the 2013 Code were the *Supporting Guidelines for Commonwealth-Funded Entities*.

⁶⁵ Ibid vol 7, 49 [3.4]. See further 65–71 [3.65]–[3.84].

⁶⁶ Ibid 69–71 [3.71]–[3.84], 73 [3.85], 81 [3.117].

⁶⁷ Ibid 79–81 [3.106]–[3.117]. See also ‘Cole Code Push to Drive Change in Private Sector’, *Workplace Express* (online), 15 April 2003 <<https://www.workplaceexpress.com.au>>.

⁶⁸ Forsyth et al, above n 42, 21–2.

⁶⁹ Wilcox Review, above n 45, 4 [1.29].

⁷⁰ Ibid 4–5 [1.27]–[1.33], 87–9 [7.32].

⁷¹ The 1997 Code, and *Code Guidelines* as in place following the 2012 changes, are examined in Creighton, above n 6, 364–77.

⁷² Stewart et al, above n 32, 1021. However, it should be noted that in terms of content, the 2013 Code was essentially the same as the 2012 *Code Guidelines*.

⁷³ See further below Part VC.

C *The Slow Road to Reform: From the 2014 Proposed Code to the 2016 Code*

Consistent with its commitment to restore the rule of the law in the construction industry through the legislation re-establishing the ABCC, in April 2014 the Coalition Government released a proposed new instrument to replace the *2013 Code*. The advance release of the Building and Construction Industry (Fair and Lawful Building Sites) Code ('2014 Proposed Code') sought to impose similar procurement requirements to those that had applied under the Howard Government, including support for freedom of association and restrictions on union entry rights.⁷⁴ When releasing the 2014 Proposed Code, then Minister for Employment Senator Eric Abetz indicated that it was 'designed to restore the rule of law and fairness to Australia's construction sector'.⁷⁵ The Minister further stated that:

Fair, productive and lawful building sites are critical to Australia's competitiveness, and job creation potential. ... For too long, the building and construction sector has provided the worst examples of industrial relations lawlessness. The new code emphasises the importance of compliance with the law and freedom of association on building sites. ... Our new code, together with a stronger ABCC, will help get the building and construction industry back on track.⁷⁶

Importantly, the 2014 Proposed Code also sought to re-introduce a wide range of restrictions on the content of enterprise agreements, primarily aimed at precluding agreement clauses that provide support for the role of unions or impinge on workplace flexibility or efficiency. While the 2014 Proposed Code could not take effect until the Bill for the *BCIIP Act* was passed by Parliament, the new Code's agreement prohibitions were stated to apply to enterprise agreements made after 24 April 2014.⁷⁷ According to the Minister, this meant

that from commencement of the [2014 Proposed Code], contractors covered by agreements that were made after 24 April 2014 that do not comply with the code's content requirements for enterprise agreements, will not be eligible to tender for and be awarded Commonwealth-funded building work.⁷⁸

This led to a lengthy period of confusion and uncertainty for all parties involved in the construction industry,⁷⁹ which continued through to the passage of the *BCIIP Act* in late 2016 and the issuing of the *2016 Code*. To secure support for the legislation

⁷⁴ Much of the content of the 2014 Proposed Code is reflected in the *2016 Code*, which is examined in detail below in Part V. For a critique, see The McKell Institute, 'Unfounded and Unfair: An Analysis of the Building and Construction Code (2014)' (Report, October 2016).

⁷⁵ Eric Abetz, 'Building and Construction Industry Code 2014 Released' (Media Release, 17 April 2014).
⁷⁶ *Ibid.*

⁷⁷ 2014 Proposed Code s 11(2).

⁷⁸ Abetz, above n 75.

⁷⁹ See, eg, "'Uncertain' Draft Building Code Fails BOOT: Bench', *Workplace Express* (online), 26 June 2015 <<https://www.workplaceexpress.com.au>>; relating to a decision by the FWC to refuse approval of an enterprise agreement that incorporated the terms of the 2014 Proposed Code (*CFMEU v CSR Ltd* (2015) 250 IR 16); 'Code Sparked Major Construction Dispute, Says ETU', *Workplace Express* (online), 11 May 2016 <<https://www.workplaceexpress.com.au>>; *Australian Building and Construction Commissioner v CFMEU* (2017) 267 IR 130 (where it was found that the union had breached ss 343 and 348 of the *FW Act* by organising a series of meetings with employees of contractors in a dispute over agreement negotiations, which involved the principal contractor's refusal to enter into an agreement that would not comply with the *2013 Code* or the 2014 Proposed Code).

from crossbench senators, the Government compromised on the retrospective application of the new Code prohibitions on agreement content, instead striking a deal for a two-year transition period (which was altered in early 2017 following a change of position by Senator Derryn Hinch).⁸⁰

V The Code for the Tendering and Performance of Building Work 2016

A Purposes and Scope of the 2016 Code

The *2016 Code* was issued by the Employment Minister, Senator Michaelia Cash, on 2 December 2016, under s 34(1) of the *BCIIP Act* (which provides for the Code to be issued as a legislative instrument).⁸¹ On that date, referring to the commencement of both the new legislation and the *2016 Code*, the Minister stated that: ‘A new era for Australia’s building and construction industry has started from today. An era in which law and order is restored and respected.’⁸² Among other aims, the new Code seeks to:⁸³

- ‘promote an improved workplace relations framework for building work and promote compliance’ with applicable laws;⁸⁴
- ‘encourage the development of safe, healthy, fair, lawful and productive building sites for the benefit of all building industry participants’;⁸⁵
- ‘increase the likelihood of timely, predictable, and cost-efficient delivery of Commonwealth funded building work’;⁸⁶ and
- ‘establish an enforcement framework under which building contractors and building industry participants may be excluded from tendering for, or being awarded, Commonwealth funded building work if they do not comply’ with the *2016 Code*.⁸⁷

These objectives clearly signal a desire to ensure that all relevant laws are complied with in the construction sector, and must be read in conjunction with the objects of the *BCIIP Act*, which now explicitly include ‘promoting respect for the rule of law’ (s 3(2)(b)) and ‘ensuring that building industry participants are accountable for their unlawful conduct’ (s 3(2)(e)).

⁸⁰ On the complex transitional arrangements for the *2016 Code*, see below Part VB.

⁸¹ Note that a motion for disallowance of certain provisions of the *2016 Code* was moved in the House of Representatives on 29 March 2017 by the Shadow Minister for Employment and Workplace Relations, Brendan O’Connor, but did not succeed. Another motion, for disallowance of the entire *2016 Code*, was moved in the Senate by Senator Doug Cameron on 9 August 2017, and was also voted down: see David Marin-Guzman, ‘Nick Xenophon Defies CFMEU Threats of “Armageddon” Over Building Code’, *Australian Financial Review* (online), 9 August 2017 <<http://www.afr.com/news/policy/industrial-relations/nick-xenophon-defies-cfmeu-threats-of-armageddon-over-building-code-20170809-gxss5h>>.

⁸² Michaelia Cash, Minister for Employment, ‘New Building Code to Improve Conduct and Boost Productivity on Building Sites’ (Media Release, 2 December 2016).

⁸³ *2016 Code* s 5.

⁸⁴ *Ibid* s 5(a).

⁸⁵ *Ibid*.

⁸⁶ *Ibid* s 5(d).

⁸⁷ *Ibid* s 5(g).

The potential application of the *2016 Code* is established by the *BCIIP Act*, which provides in s 34(3) that compliance with the Code can only be required of ‘building contractors’ that are constitutional corporations, ‘building industry participants’ carrying out work in a Territory or Commonwealth place, and Commonwealth bodies or authorities.⁸⁸ The *2016 Code* mostly adopts⁸⁹ the broad definition of ‘building work’ in s 6 of the *BCIIP Act*, which includes ‘the construction, alteration, extension, restoration, repair, demolition or dismantling of buildings, structures or works that form, or are to form, part of land’,⁹⁰ as well as ‘transporting or supplying goods to be used’ in that work ‘directly to building sites (including any resources platform)’.⁹¹

Generally, the *2016 Code* applies to a building contractor or building industry participant ‘from the first time they submit an expression of interest or tender (howsoever described) for Commonwealth funded building work’ on or after 2 December 2016.⁹² From that point on, the contractor or participant becomes a ‘code covered entity’, which also means that each of its related entities then become subject to the *2016 Code*;⁹³ and that the code covered entity must be compliant with the Code on all of its privately funded projects.⁹⁴ The ‘Commonwealth funded building work’ to which the Code applies is defined to include a range of projects with varying levels of direct or indirect Federal Government financial contribution or involvement.⁹⁵

B Principal Obligations Imposed by the *2016 Code*

The *2016 Code* imposes a wide range of restrictions and conditions on building contractors and building industry participants, which apply once they become code covered entities. The following discussion highlights the key obligations imposed by the Code, with particular attention given to new or different rules introduced by the Coalition Government in its replacement of the *2013 Code*,⁹⁶ and those aspects of the *2016 Code* that arose from crossbench amendments to the Bill for the *BCIIP Act*.

⁸⁸ In turn, *BCIIP Act* s 5 defines the terms ‘building contractor’ (a person who has entered into/offered to enter into a contract for services for carrying out building work or arranging for such work to be carried out); and ‘building industry participant’ (a building employer, building employee, building contractor, person who enters into a contract with a building contractor (for carrying out of building work), building association, and officers, delegates and other representatives of building associations). ‘Building associations’ are industrial associations of building employers, employees or contractors: *BCIIP Act* s 5.

⁸⁹ See *2016 Code* Notes to s 3(1) ‘code covered entity’; *2016 Code* s 3(4).

⁹⁰ *BCIIP Act* s 6(1)(a).

⁹¹ *Ibid* s 6(1)(e). On the addition of transport and supply to building sites to the definition of building work through the 2016 legislation, see Goodwin, above n 46, 105–6, 110.

⁹² *2016 Code* s 6(1). Note that the *2013 Code* and *Supporting Guidelines for Commonwealth-Funded Entities* continue to apply to Commonwealth funded projects that were the subject of expressions of interest or tenders prior to 2 December 2016.

⁹³ *2016 Code* ss 6(2), 8(8).

⁹⁴ *Ibid* sch 1 item 9. Note also the obligations of code covered entities in relation to compliance with the *2016 Code* by their subcontractors: ss 8(3)–(7).

⁹⁵ *Ibid* s 3 (definition of ‘publicly funded building work’), sch 1 items 1–8.

⁹⁶ This article does not examine the OHS or drug and alcohol management/testing provisions of the *2016 Code* (see, eg, s 16A, sch 4), other than to note that the *2013 Code* requirements relating to ‘work health safety and rehabilitation’ management systems/plans have been removed: *2013 Code* s 20.

First and foremost, code covered entities are required to comply with the Code,⁹⁷ and with the *BCIIP Act*, designated building laws (eg the *FW Act*, modern awards and enterprise agreements), the *Competition and Consumer Act 2010* (Cth) ('*Competition Act*'), OHS laws, the *Migration Act 1958* (Cth), and applicable court and tribunal decisions, orders, etc.⁹⁸ In addition, code covered entities are subject to more extensive reporting requirements than applied under the *2013 Code*. For example, they must report actual or threatened industrial action to the ABCC within 24 hours of becoming aware of the action (or threat); take reasonable steps to prevent or end any unprotected industrial action (such as seeking an order from the FWC or a court); and report any unlawful secondary boycott activity to the ABCC within 24 hours.⁹⁹

Second, a major concern of the Coalition Government in introducing the *2016 Code* has been to subject building contractors/participants to comprehensive limits on enterprise agreement clauses that impede managerial prerogative or improvements to productivity, are discriminatory, or are inconsistent with a broader set of freedom of association principles than applied under the *2013 Code*.¹⁰⁰ To that end, s 11(3) provides an extensive list of provisions that 'are not permitted to be included in enterprise agreements', such as: any restriction on the types of workers that may be engaged (eg casuals); a requirement to consult with a union over the number or types of workers or subcontractors to be engaged; any prescription of the terms and conditions of engagement of subcontractors or their employees (eg 'jump up' clauses); a requirement to apply union logos or mottos to company property/equipment (eg union flags on cranes); or any form of encouragement (or discouragement) of union membership.¹⁰¹ The prohibitions on agreement content are bolstered by a number of anti-avoidance provisions: s 11(4) precludes engagement in conduct or practices (outside the terms of an enterprise agreement) that would have the same effect as that prohibited by ss 11(1) and (3);¹⁰² s 11A prohibits agreement clauses which purport to remedy clauses otherwise in breach of s 11; while s 10 prohibits unregistered written agreements (eg 'side deals' that seek to circumvent the s 11 limits on agreement content).¹⁰³

It was noted earlier in the article that these agreement prohibitions were to apply, under the 2014 Proposed Code, to agreements made after 24 April 2014, but that the Government compromised on this proposal to ensure passage of the *BCIIP Act* through Parliament.¹⁰⁴ Under the arrangements for this compromise as originally

⁹⁷ Ibid s 7(a).

⁹⁸ Ibid s 9. This is a broader range of laws than was specified in the equivalent provision of the *2013 Code*: s 9.

⁹⁹ *2016 Code* s 16. On protected and unprotected industrial action under the *FW Act*, remedies for unprotected action, and secondary boycotts under the *Competition Act*, see Stewart et al, above n 32, chs 26, 27; Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) chs 5–7.

¹⁰⁰ *2016 Code* s 11(1); the freedom of association provisions in s 13 are discussed below.

¹⁰¹ For a full explanation of the types of agreement clauses prohibited by s 11(3), see Explanatory Statement, Code for the Tendering and Performance of Building Work 2016 (Cth) 9–13 [51]–[71] ('*2016 Code Explanatory Statement*').

¹⁰² See also *2016 Code* s 11(5).

¹⁰³ *2016 Code Explanatory Statement* 7 [41]. On s 10 of the *2016 Code*, see below nn 136–8 and accompanying text.

¹⁰⁴ See above Part IVC.

enacted in late 2016, companies that had entered into enterprise agreements with unions (before 2 December 2016) that would not comply with the new prohibitions on agreement content were to remain eligible to bid for and be awarded Commonwealth funded work until 29 November 2018.¹⁰⁵ In effect, this gave companies that had entered into non-compliant agreements two years to ‘get their house in order’ (this outcome benefited, for example, a group of companies that had made agreements earlier in 2016 against the advice of the Master Builders Association).¹⁰⁶

However Senator Hinch, who had been instrumental in securing this compromise,¹⁰⁷ reversed his position in early 2017¹⁰⁸ — paving the way for the Government to introduce an amendment implementing new transitional arrangements. The amendment was passed by Parliament on 16 February 2017,¹⁰⁹ essentially reducing the two-year ‘grace period’ for application of the 2016 Code agreement restrictions to nine months, and prohibiting tenderers for Commonwealth funded work from being awarded a contract during that nine-month period, unless they had a Code-compliant agreement.¹¹⁰ Minister Cash then issued a new legislative instrument amending the 2016 Code,¹¹¹ setting out further (complex) transitional rules dealing with the application of the Code agreement prohibitions and the eligibility of companies to bid for, and be awarded, Commonwealth funded work.¹¹²

¹⁰⁵ *BCIIP Act s 34(2E)*, later amended by *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (Cth) sch 1 ss 1–2. See also *2016 Code s 11(2)*, later amended by *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (Cth).

¹⁰⁶ Ewin Hannan, ‘Election 2016: Master Builders Slams Contractors over CFMEU Pay Deal’, *Australian Financial Review* (online), 18 May 2016 <<http://www.afr.com/news/politics/election/election-2016-master-builders-slams-contractors-over-cfmeu-pay-deal-20160518-goy8cc>>; ‘CFMEU Branch Secures “Unsustainable” Pay Rises’, *Workplace Express* (online), 13 July 2016 <<https://www.workplaceexpress.com.au>>. See also Paul Karp, ‘Turnbull Vows to Stop “Excessive” Pay Rises for Construction Workers’, *The Guardian* (online), 1 June 2016 <<https://www.theguardian.com/australia-news/2016/jun/01/election-2016-malcolm-turnbull-above-inflation-pay-rise-construction-workers-union>>; ‘Threat to Construction Deals if ABCC Legislation Passes’, *Workplace Express* (online), 26 April 2016 <<https://www.workplaceexpress.com.au>> (including discussion of Master Builders Association allegations that building unions were pressuring subcontractors to sign agreements that would not comply with the 2014 Proposed Code); David Marin-Guzman, ‘Major Contractors Revolt Against Master Builders Association’, *Australian Financial Review* (online), 26 January 2017 <<http://www.afr.com/news/policy/industrial-relations/major-contractors-revolt-against-master-builders-association-20170126-gtz1e3>>.

¹⁰⁷ Ewin Hannan, ‘Derryn Hinch Proposes ABCC Changes’, *The Australian* (online), 30 November 2016 <<http://www.theaustralian.com.au/national-affairs/industrial-relations/derryn-hinch-proposes-abcc-changes/news-story/6fc26ebf9efeed23bfecf9d4eba39486>>.

¹⁰⁸ ‘Construction Code Holiday to Be Cut, After Hinch Volte-Face’, *Workplace Express* (online), 8 February 2017 <<https://www.workplaceexpress.com.au>>.

¹⁰⁹ *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (Cth).

¹¹⁰ See now *BCIIP Act s 34(2E)*, as amended by *2017 Act*. The effect of the amendment was that companies with an agreement that did not comply with the 2016 Code could tender for Commonwealth work until 31 August 2017, but could not be awarded the work until they complied (see Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Amendment Bill 2017*). Since 1 September 2017, companies have been required to be fully compliant with the 2016 Code in order to tender for, and be awarded, Commonwealth funded work.

¹¹¹ *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (Cth).

¹¹² These rules vary depending on when the relevant enterprise agreement was made and when the company submitted its tender: see now *2016 Code s 11(2)*, sch 5; as amended by the *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (Cth). See also ABCC, *Transitional Arrangements — Interaction between Building Code 2013 and Building Code 2016*

These new arrangements were justified by the Employment Minister on the basis that small and medium construction businesses could not wait two years (the original transitional period for Code 2016 compliance) while having to compete with those companies that had struck non-compliant enterprise agreements:

They cannot stand up to the CFMEU, they cannot stand up to Lendlease; they cannot stand up to Probuild. That is why we are moving this amendment with the crossbench, because we are here today to say to the big end of town and to say to the CFMEU ... ‘The reason we are doing this is to stop your cartel-like behaviour’.¹¹³

However, it must be noted that the *2016 Code* transitional rules for enterprise agreement content, particularly the 1 September 2017 deadline for having fully Code-compliant agreements, led to ongoing confusion and uncertainty in the industry. The CFMEU adopted a general position that it would not renegotiate existing agreements to make them Code-compliant.¹¹⁴ Other unions, such as the Australian Manufacturing Workers’ Union, took a more cooperative approach to renegotiation. At least one employer, Boral subsidiary De Martin & Gasperini, raised the prospect of redundancies after employees voted down changes to their enterprise agreement to ensure Code compliance.¹¹⁵ Another employer, Lendlease Engineering Pty Ltd, obtained FWC approval of a Code-compliant agreement despite opposition from the CFMEU and the Australian Workers’ Union.¹¹⁶

Third, the *2016 Code* carries over similar obligations regarding freedom of association to those found in the *2013 Code*, while adding a number of further requirements. As before, code covered entities ‘must protect freedom of association in respect of building work’ through policies and practices that ensure people are free: to become, or not become, members of building unions; to be represented (or not) by unions; to participate (or not) in lawful industrial activities; and to not be discriminated against in terms of workplace benefits because they are, or are not,

<<https://www.abcc.gov.au/building-code/transitional-arrangements-%E2%80%93interaction-between-building-code-2013-and-building-code-2016>>. Reportedly, the new transitional rules arose following lobbying by the Australian Industry Group: ‘CFMEU Finalises Day for National Protest against ABCC’, *Workplace Express* (online), 28 February 2017 <<https://www.workplaceexpress.com.au>>.

¹¹³ Commonwealth, *Parliamentary Debates*, Senate, 15 February 2017, 1051 (Michaelia Cash, Minister for Employment). Note that the new arrangements presented many construction companies with the dilemma of having to renegotiate existing agreements, or make new ones, to ensure *2016 Code* compliance in the face of the CFMEU refusing to relinquish conditions in existing agreements: see Paul Karp, ‘“We’re Not Bluffing”: Construction Union on Collision Course Over Building Code’, *The Guardian* (online), 3 April 2017 <<https://www.theguardian.com/australia-news/2017/apr/03/were-not-bluffing-construction-union-on-collision-course-over-building-code>>. For a further illustration of the threat to widespread industry practices, see ‘Code Outlaws RDO Calendar: ABCC’, *Workplace Express* (online), 10 March 2017 <<https://www.workplaceexpress.com.au>>.

¹¹⁴ Nick Toscano, ‘Tensions Rise in Building Industry as Blacklist Looms’, *The Sydney Morning Herald* (online), 5 June 2017 <<http://www.smh.com.au/business/workplace-relations/tensions-rise-in-building-industry-as-blacklist-looms-20170602-gwjfi5.html>>.

¹¹⁵ Jenny Wiggins, ‘Construction Firms Do Deals with Unions over Building Code’, *Australian Financial Review* (online), 5 July 2017 <<http://www.afr.com/business/construction-firms-do-deals-with-unions-over-building-code-20170705-gx4wua>>.

¹¹⁶ *Re Lendlease Engineering Pty Ltd* [2017] FWC 3080 (6 June 2017), and *CFMEU v Lendlease Engineering Pty Ltd* [2017] FWCFB 4001 (15 August 2017). In another case, the FWC granted an employer’s application to terminate an existing enterprise agreement (under *FW Act* ss 222–3) for reasons including the employer’s view that the agreement did not comply with the *2016 Code*: see *Re Grandstand Scaffold Services Pty Ltd* [2017] FWCA 3980 (28 July 2017).

union members.¹¹⁷ Section 13(2) of the *2016 Code* sets out an expanded list of practices that must, or must not, be engaged in to ensure the observance of freedom of association on building sites. For example, personal information must be handled in accordance with the *Privacy Act 1988* (Cth);¹¹⁸ ‘no ticket, no start’ signs cannot be displayed, nor signs which seek to vilify employees who participate in industrial activities (or do not);¹¹⁹ ‘show card’ days must not occur;¹²⁰ forms that require employees or subcontractors to identify union membership cannot be used;¹²¹ employment cannot be refused or terminated based on union status;¹²² union logos or mottos must not be applied to company property etc;¹²³ non-working shop stewards must not be engaged, nor other individuals nominated by a union;¹²⁴ employees must be provided free choice about whether to be represented in dispute processes and by whom;¹²⁵ and union officials or delegates must not be involved in induction processes.¹²⁶

Many of these practices would be unlawful under pt 3-1 of the *FW Act*, which preserves the right of employees to join and be involved in unions or not to do so.¹²⁷ However, practices through which *encouragement* is provided to union membership or presence in the workplace (as opposed to pressure to join the union) would not necessarily offend pt 3-1.¹²⁸ In contrast, s 13(2) of the *2016 Code* exhibits a stronger determination to ensure that union membership (or non-membership) is a matter for individual choice. For example, the prohibition on display of union signs and mottos on building sites is considered necessary by the Government

because such practices can result in an implication that membership of a building association is a mandatory requirement of employment with the particular employer or at a particular site. These practices are inconsistent with the proposition that membership of a building association is a matter for individual choice.¹²⁹

¹¹⁷ *2016 Code* s 13(1).

¹¹⁸ *Ibid* s 13(2)(a).

¹¹⁹ *Ibid* s 13(2)(b)–(c).

¹²⁰ *Ibid* s 13(2)(d).

¹²¹ *Ibid* s 13(2)(f).

¹²² *Ibid* s 13(2)(h)–(i).

¹²³ *Ibid* s 13(2)(j).

¹²⁴ *Ibid* s 13(2)(l).

¹²⁵ *Ibid* s 13(2)(o).

¹²⁶ *Ibid* s 13(2)(p).

¹²⁷ See especially *FW Act* ss 50, 346–7. These general protections are reinforced by ss 12 (definition of ‘objectionable term’) and 194(b), which make enterprise agreement provisions that would breach pt 3-1 ‘unlawful terms’ that cannot be included in an agreement. On pt 3-1 generally, see Breen Creighton, ‘Individualization and the Protection of Worker Voice in Australia’, in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014) 232.

¹²⁸ See, eg, *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339, 369–70 [85]–[89] (the Court); *United Firefighters’ Union of Australia v Country Fire Authority* (2015) 228 FCR 497.

¹²⁹ *2016 Code Explanatory Statement* 18 [98]. See also 19 [99]. FWBC had taken the view that the application of union stickers on employees’ clothing breached the freedom of association provisions of the *2013 Code*, leading in one instance to the dismissal of three construction workers (and warnings being issued to 130 more) who refused a management directive to remove their stickers, see: ‘Workers Let Go After FWBC Declares Union Stickers Breach Building Code’, *Workforce* (Sydney), 8 June 2016; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia — Electrical, Energy and Services Division —*

In February 2018, the ABCC took this view even further, issuing a ‘fact sheet’, which states that the prohibited union logos, mottos and indicia under s 13(2)(j) of the *2016 Code* include: ‘images generally attributed to, or associated with a [building union], such as the iconic symbol of the five white stars and white cross on the Eureka Stockade flag’.¹³⁰

Fourth, related to the freedom of association provisions, s 14 of the *2016 Code* tightens the requirements relating to union right of entry. The intent of s 14 is to ‘[recognise] that legislative right of entry is a privilege that only a select class of persons can apply to access’;¹³¹ namely, building union officials with the appropriate permit who meet the applicable statutory requirements for entry. As before, code covered entities are required to comply with federal, state and territory laws (as applicable) that provide permit-holders with a right to enter premises where building work is performed, such as OHS statutes and pt 3-4 of the *FW Act*.¹³² In addition, however, a code covered entity must (as far as reasonably practicable) ensure that entry by a union official is for a purpose permitted by pt 3-4 or the applicable OHS legislation; and that the union official complies with all requirements of the relevant legislation (including permit and notice requirements).¹³³ This would preclude, for example, a union official from being invited onto a building site for purposes of involvement in a dispute resolution process under an award or enterprise agreement, because this is not a purpose contemplated by any right of entry legislation — although workplace delegates may represent employees in those processes under s 13(k) of the *2016 Code*.

Fifth, as was the case under the *2013 Code*, code covered entities must not enter into unregistered written agreements in relation to building work, such as an unregistered site agreement between a head contractor and the relevant union.¹³⁴ This prohibition covers any agreement that will not be registered or approved under the *FW Act* (or where the code covered entity reasonably believes this to be the case) and: deals with matters that would be prohibited by s 11 of the *2016 Code*¹³⁵; or provides for terms and conditions of employees or subcontractors; or restricts the type or form of engagement used to engage subcontractors.¹³⁶ However, the prohibition does not extend to ‘a common law agreement made between an employer

Queensland Divisional Branch v Laing O’Rourke Australia Construction Pty Ltd [2016] FWC 3699 (8 June 2016) (a failed attempt by the unions to address the issue through the dispute resolution clause of the applicable enterprise agreement). See also *Harrison v P & T Tube Mills Pty Ltd* (2009) 181 IR 162 (relating to dismissal of an employee following a ‘union sticker dispute’, although not in the construction industry).

¹³⁰ ABCC, *Freedom of Association – Logos, Mottos and Indicia: Differences between the 2013 and 2016 Codes* (30 January 2018) <<https://www.abcc.gov.au/resources/fact-sheets/building-code-2016/freedom-association-%E2%80%93-logos-mottos-and-indicia>>.

¹³¹ *2016 Code Explanatory Statement* 19 [101].

¹³² *2016 Code* s 14(1).

¹³³ *Ibid* s 14(2). On the need to meet the requirements of both pt 3-4 and the applicable OHS legislation (where entry is sought for OHS purposes), see *Australian Building and Construction Commissioner v Powell* (2017) 268 IR 113.

¹³⁴ *2016 Code* s 10.

¹³⁵ See above nn 100–103 and accompanying text.

¹³⁶ *2016 Code* s 10(1).

and an individual employee'.¹³⁷ In addition to circumvention of the s 11 prohibitions, a concern underlying the prohibition of unregistered agreements seems to be that, frequently, such agreements provide superior terms and conditions to those in the applicable award or enterprise agreement.¹³⁸ Linked to the unregistered agreements prohibition is the *BCIIP Act*'s revival of an earlier prohibition (recommended by the Cole Royal Commission and introduced by the *Building and Construction Industry Improvement Act 2005* (Cth)) upon project agreements. Typically, these are agreements negotiated with relevant unions by a head contractor for a specific site or project, which is then applied to all contractors/subcontractors engaged on the site (although they may not be in a position to apply the generous terms and conditions of the agreement).¹³⁹ Subsections 59(1)(a)–(b) of the *BCIIP Act* therefore makes unenforceable an agreement 'entered into with the intention of securing standard employment conditions for building employees in respect of building work that they carry out at a particular building site or sites', where 'not all the employees are employed in a single enterprise'.¹⁴⁰

Sixth, a number of new requirements were introduced under the *2016 Code* as part of the Government's agreement with crossbench senators to secure passage of the *BCIIP Act*. These include:

- provisions requiring code covered entities to comply with applicable laws relating to security of payments due to persons engaged to perform building work for the entity, and to ensure that disputed payments are resolved through reasonable, timely and cooperative processes;¹⁴¹
- a requirement that the preferred tenderer for Commonwealth funded building work provide a range of information about the proposed work, such as 'the extent to which domestically sourced and manufactured building materials will be used',¹⁴² compliance of building materials with Australian standards, and the project's impact on jobs and contribution to skills growth;¹⁴³

¹³⁷ Ibid s 10(2). The Government contends that for the exclusion of individual common law agreements from the s 10 prohibition to apply, the relevant common law agreement must be 'genuine'. According to the *2016 Code Explanatory Statement* 8 [45], this is intended to address the following kind of situation:

An agreement negotiated collectively between an employer and the employer's employees to, for example, give a general pay rise to employees through individual common law employment agreements while the employees are covered by an enterprise agreement would not be a genuine common law agreement.

However, this appears to be an attempt to read into the terms of the *2016 Code* language that is not there. This is unlikely to be effective in practice, as extrinsic materials cannot be used 'to place upon words [in a statute or delegated legislation] a meaning they cannot reasonably bear': Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles* (Lawbook, 2014) 207.

¹³⁸ See Stewart et al, above n 32, 1024. Note also the prohibition of coercion, undue influence etc to make 'an above-entitlements payment' in s 12 of the *2016 Code*; and the imposition of several prohibitions of various types of coercive activity under the *BCIIP Act* ss 51–5.

¹³⁹ Stewart et al, above n 32, 1019–20.

¹⁴⁰ Unless the agreement takes the form of a Commonwealth industrial instrument, such as an enterprise agreement made under the *FW Act*: *BCIIP Act* s 59(1)(d). Note also that *BCIIP Act* s 59(2) defines the term 'single enterprise'.

¹⁴¹ *2016 Code* ss 11D–11E. See also *BCIIP Act* ch 2 pt 4 (establishing a federal 'Security of Payments Working Group').

¹⁴² *2016 Code* s 25A(1)(a).

¹⁴³ Ibid; *BCIIP Act* s 34(2A)(a). See also *BCIIP Act* s 34(2A)–(2C).

- a prohibition on the engagement of non-Australian citizens/permanent residents to undertake building work, unless the position is first advertised in Australia (with specified requirements as to the terms of the advertisement) and ‘the employer demonstrates that no Australian citizen or Australian permanent resident is suitable for the job’;¹⁴⁴ and
- prohibitions on various collusive practices between tenderers for Commonwealth funded work.¹⁴⁵

C *Enforcement of the 2016 Code*

The ABCC has primary responsibility for monitoring compliance with, and enforcing, the *2016 Code*.¹⁴⁶ The ABCC has power under s 35 of the *BCIIP Act* to issue a written notice to a person required to comply with the Code, directing that person to provide information, within 14 days, about the extent of their compliance in respect of particular building work. ABCC Inspectors may use their compliance powers (such as powers of entry and investigation) for the purposes of ensuring compliance with the *2016 Code*,¹⁴⁷ and may also issue compliance notices under s 99 of the *BCIIP Act*. Further, code covered entities must notify the ABCC of a breach or suspected breach of the *2016 Code* within two working days (previously 21 days), and advise the ABCC of the steps that have been or will be taken to rectify the breach.¹⁴⁸

The process for dealing with non-compliance with the *2016 Code*, and possible sanctions, are as follows. The Australian Building and Construction Commissioner may refer to the Employment Minister any matter involving an entity’s failure to comply with the Code (or a s 99 compliance notice relating to the Code), with recommendations as to the proposed sanction.¹⁴⁹ The Minister may then issue a formal warning to the code covered entity,¹⁵⁰ or impose an ‘exclusion sanction’¹⁵¹ — namely, a period (no longer than one year) during which the entity cannot tender for or be awarded Commonwealth funded building work.¹⁵² An exclusion sanction must be imposed ‘unless the Minister is satisfied that it would not be appropriate in the circumstances because of the nature of, or factors contributing to, the failure to comply’.¹⁵³ An entity that may be subject to an exclusion sanction is entitled: to be provided with written notice, by the Minister, of the alleged Code breach; and to make a submission in relation to the proposed sanction by a specified date.¹⁵⁴ The entity must subsequently be provided with

¹⁴⁴ *2016 Code* s 11F(1)(a). See also *2016 Code* s 11C(1); *BCIIP Act* s 34(2D)(d).

¹⁴⁵ *2016 Code* s 11C.

¹⁴⁶ See further Stewart et al, above n 32, 1029–30. Until April 2016, these functions under the *2013 Code* were performed by the Code Monitoring Group, the Department of Employment and the FWBC.

¹⁴⁷ *BCIIP Act* s 70(1)(a)–(b). On the extent of ABCC Inspectors’ powers, see ss 71–9.

¹⁴⁸ *2016 Code* s 17.

¹⁴⁹ *Ibid* s 18(1).

¹⁵⁰ *Ibid* s 18(1A)(b).

¹⁵¹ *Ibid* s 18(1A)(a).

¹⁵² *Ibid* s 3(3) (definition of ‘exclusion sanction’).

¹⁵³ *Ibid* s 18(1B).

¹⁵⁴ *Ibid* s 19(1).

written notice of any decision to impose an exclusion sanction, and the reasons for it, within 14 days of the decision being made.¹⁵⁵

In March 2017, the Employment Minister imposed the first ever sanction for Code breaches upon J Hutchinson Pty Ltd, precluding the company from bidding for federally-funded building work from 1 April to 30 June 2017.¹⁵⁶ Across several projects, Hutchinson had breached the 2013 Code requirements (reflected in the 2016 Code) to ensure Code compliance by its subcontractors, by influencing subcontractors to have a particular workplace arrangement, and by failing to ensure its workers were free to join or not join a union (including through display of a ‘no ticket, no start’ sign at one site).¹⁵⁷ The ABCC indicated in late May 2017 that a further three building companies had been sent ‘show cause’ letters, seeking responses as to why sanctions should not be imposed for Code breaches.¹⁵⁸

While the 2016 Code itself is silent on whether there is any right of review or appeal against the imposition of an exclusion sanction, it is likely that a complaint could be made to the Commonwealth Ombudsman, review could be sought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and/or an application for judicial review could be made under s 39B of the *Judiciary Act 1903* (Cth).¹⁵⁹ The second and third of those avenues — *Administrative Decisions (Judicial Review) Act 1977* (Cth) review and judicial review — formed the basis for a legal challenge brought by the Communications, Electrical and Plumbing Union, against the ABCC’s decision under another part of the 2016 Code (not to exempt South Australian Power Networks from the operation of the Code as an ‘essential service’ under s 6A).¹⁶⁰

The ABCC also plays an important role in assessing enterprise agreements for compliance with the 2016 Code. Under s 22 of the 2016 Code, the ABCC may issue a determination that an agreement meets the requirements of s 11 (as discussed above in Part VB), and may provide preliminary advice on agreement compliance with the Code. The ABCC requires tenderers for Commonwealth funded building work to conduct a preliminary self-review of their agreement, using extensive guidance material provided by the ABCC (including sample agreement clauses); then to submit the agreement for an assessment of Code compliance.¹⁶¹ An

¹⁵⁵ Ibid s 19(3)(c).

¹⁵⁶ Australian Building and Construction Commission, *Notification of Sanction under Building Code* (31 March 2017) <<https://www.abcc.gov.au/notification-sanction-under-building-code>>.

¹⁵⁷ ‘Cash Imposes Sanction on Hutchinson, as CFMEU Refuses to Change Deals’, *Workplace Express* (online), 3 April 2017 <<https://www.workplaceexpress.com.au>>.

¹⁵⁸ ‘Code Bites as More Builders Face Commonwealth Project Bans’, *Workplace Express* (online), 31 May 2017 <<https://www.workplaceexpress.com.au>>.

¹⁵⁹ See further Stewart et al, above n 32, 1030–1.

¹⁶⁰ See ‘Power Supply Potential Pawn as Building Code Faces First Legal Challenge’, *Workplace Express* (online), 19 June 2017 <<https://www.workplaceexpress.com.au>>; ‘Roe Leaving FWC; Individual Workers Facing Strike Fines; and More’, *Workplace Express* (online), 30 June 2017 <<https://www.workplaceexpress.com.au>>. The union’s application was ultimately discontinued, following an amendment in August 2017 to relevant provisions of the 2016 Code: see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Building and Construction Commissioner* [2017] FCA 1062 (5 September 2017).

¹⁶¹ ABCC, *Preliminary Review* <<https://www.abcc.gov.au/building-code/eligibility-tender/preliminary-review>>. For further detail on the agreement assessment process within the overall framework of tendering for Commonwealth work, see Stewart et al, above n 32, 1029–30; ‘FWBC Expands its Role’ *Workplace Express* (online), 16 May 2016 <<https://www.workplaceexpress.com.au>>.

assessment of compliance with s 11 of the *2016 Code* is one of the key criteria for eligibility to be awarded Commonwealth funded work.¹⁶²

VI Analysis: The 2016 Code as an Instrument for Restoring the Rule of Law

A Introduction

This Part of the article examines the arguments mounted by proponents of restoring the rule of law in the Australian construction industry, and the ways in which it is said that the CFMEU's conduct has led to a breakdown of law and order. This is followed by an analysis of the extent to which the *2016 Code* is really a mechanism for addressing those issues, or whether it seeks to achieve other workplace reform objectives of the Coalition Government. Attention then turns to contentions that the specialist scheme of construction industry regulation offends rule of law principles, primarily the concern to ensure equal treatment before the law.

B The Case for Restoring the Rule of Law in the Construction Industry

When reintroducing the Bill for the *BCIIP Act* following the 2016 Election, Prime Minister Turnbull stated the Government's argument as to the need to restore the rule of law in the construction industry as follows:¹⁶³

The Coalition Government will always stand up for the rule of law. ...

[The Bill to re-establish the ABCC] will ensure the rule of law prevails on building sites across the country. ...

Two royal commissions have now identified systemic unlawful behaviour in the construction industry. ...

The industry is still marred by illegal strikes, constant bullying, intimidation and thuggery. ...

The Bill upholds and promotes respect for the rule of law and ensures respect for the rights of all building industry participants. ...

A re-established ABCC will also administer a building code that will govern industrial relations arrangements for government-funded projects. ...

No person in Australia ... should have to work in an industry where the rule of law is routinely defied. ...

This Bill will ensure our construction industry is safe, productive and free of intimidation and harassment. This will create the conditions for Australians to get the infrastructure they need at a price we can afford.

The Royal Commissions referred to by the Prime Minister were the Cole Royal Commission¹⁶⁴ and the more recent Heydon Royal Commission on Trade Union Governance and Corruption, which made similar findings about the continued

¹⁶² *2016 Code* s 23(1)(a).

¹⁶³ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 2016, 81–5 (Malcolm Turnbull, Prime Minister).

¹⁶⁴ Cole Royal Commission, above n 3. See also above nn 37–40, 64–7 and accompanying text for a discussion of the main findings.

lawlessness of the building industry.¹⁶⁵ Commissioner Heydon dealt extensively with the conduct of the CFMEU in his Final Report, pointing to its ‘repeated unlawful conduct’ including breaches of the law and court orders,¹⁶⁶ and to judicial criticism of the union and its officials due to their ‘disregard for the law’.¹⁶⁷ For example, the Commissioner stated that: ‘The concept of the rule of law has been described as an anathema to the CFMEU.’¹⁶⁸ He went so far as to suggest that

[t]here is a longstanding malignancy or disease within the CFMEU. One symptom is regular disregard for industrial laws by CFMEU officials. ... Another symptom of the disease is that CFMEU officials habitually show contempt for the rule of law.

What can be done to cut out the malignancy and cure the disease?¹⁶⁹

Commissioner Heydon’s solutions included the possibility of special legislation disqualifying CFMEU officials considered not to be fit and proper persons to hold union office.¹⁷⁰ He also recommended that the specialist building industry regulator continue to operate, with investigatory and enforcement functions relating to then-existing laws¹⁷¹ along with enhanced penalties for unlawful industrial action, coercion and a new prohibition of industrially motivated picketing¹⁷² (along the lines of the provisions eventually enacted in the *BCIIP Act*).

The principal concerns of Commissioner Heydon, the Coalition Government, the courts and the construction industry regulator have been about the CFMEU’s propensity for taking unlawful industrial action, then ignoring court orders and injunctions intended to address that action, as well as various types of coercive conduct. Perhaps the starkest illustration of the combination of these illegal activities is provided by the Grocon Emporium project dispute in 2012, in which the CFMEU maintained an unlawful blockade of the site in central Melbourne for more than two weeks. The dispute originated over union demands relating to the role of safety representatives on the site¹⁷³ and gave rise to various legal proceedings, including a criminal contempt action following the union’s refusal to comply with an injunction

¹⁶⁵ Royal Commission into Trade Union Governance and Corruption, above n 50. See also above nn 50–51 and accompanying text.

¹⁶⁶ Ibid vol 5, 397 [8.12]. See also 396–7 [8.7]–[8.12], appendix A 487–574 (a summary table of 147 construction industry cases involving successful proceedings against building industry participants for industrial law breaches and contempt over the period 2000–15).

¹⁶⁷ Ibid vol 5, 397 [8.13]. See also vol 5, 398–401 [8.14]–[8.22].

¹⁶⁸ Ibid vol 5, 398 [8.14], citing *Director, Fair Work Building Industry Inspectorate v CFMEU (No 2)* [2015] FCA 407 (1 May 2015), [103] (Tracey J). For another example, see the reference by Mortimer J to the ‘contumelious disregard for the restrictions the law imposes on industrial activities shown by those who control the CFMEU’: *Director, Fair Work Building Industry Inspectorate v CFMEU (No 2)* [2016] FCA 436 (13 May 2016) 49 [196].

¹⁶⁹ Royal Commission into Trade Union Governance and Corruption, above n 50, vol 5, 401 [8.23]–[8.24].

¹⁷⁰ Ibid vol 5, 408 [8.44]. The Government has indicated that it will not implement this recommendation because it is not the role of Parliament to ban union officials: ‘Coalition Confirms Adoption of 48 TURC Recommendations’, *Workforce* (Sydney), 24 June 2016. Instead, however, see the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (Cth); David Marin-Guzman, ‘New Laws Threaten CFMEU with Deregistration’, *Australian Financial Review* (online), 16 August 2017 <<http://www.afr.com/news/policy/industrial-relations/new-laws-threaten-cfmeu-with-deregistration-20170816-gxx6wp>>.

¹⁷¹ Royal Commission into Trade Union Governance and Corruption, above n 50, vol 5, 436 [8.112].

¹⁷² Ibid vol 5, 478 [8.192].

¹⁷³ ABC, ‘CFMEU Clashes with Grocon Over Safety Officials’, *Lateline*, 28 August 2012.

to lift the picket, and civil penalty proceedings for unlawful coercion in respect of the ‘safety rep’ demands. The CFMEU was fined \$1.25 million in the criminal contempt case,¹⁷⁴ while penalties of over \$150 000 were imposed on the union and eight of its officials in the coercion proceedings brought by FWBC.¹⁷⁵ The union also settled a common law claim for damages brought by Grocon in respect of the Emporium site blockade,¹⁷⁶ and had to defend a number of civil and criminal proceedings arising from an alleged secondary boycott of concrete supplier Boral on Melbourne building sites in the wake of the Grocon dispute.¹⁷⁷

There are many other reported cases in which the CFMEU, its officials and/or members have been found to have engaged in unlawful industrial action.¹⁷⁸ For its part, the CFMEU argues that it is sometimes necessary to engage in such action — for example, to protest against what it sees as unjust laws (like the *BCIIP Act* and the *2016 Code*) and problems with safety issues on building sites which have led to the deaths of construction workers.¹⁷⁹ This was also the basis for the incoming ACTU Secretary’s comments defending the right of unions to ignore the rule of law in March 2017,¹⁸⁰ although it has been pointed out that many instances of unlawful CFMEU industrial action do not involve safety concerns.¹⁸¹ Sally McManus also highlighted the unfairness of restrictions on union entry rights: ‘When union officials

¹⁷⁴ *Grocon v CFMEU (No 2)* (2014) 241 IR 288, and *CFMEU v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527.

¹⁷⁵ *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 225 (17 March 2015); *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 1213 (11 November 2015).

¹⁷⁶ ‘CFMEU to Pay \$3.6 Million to Settle Grocon Case’, *Workplace Express* (online), 22 June 2015 <<https://www.workplaceexpress.com.au>>.

¹⁷⁷ ‘CFMEU to Pay Up to \$9 Million to Settle Boral Action’, *Workplace Express* (online), 18 September 2016 <<https://www.workplaceexpress.com.au>>; ‘CFMEU Loses Appeal Over “Boral Bans”’, *Workplace Express* (online), 19 July 2016 <<https://www.workplaceexpress.com.au>>; ‘Boral Lost Customers From CFMEU Boycott, Court Hears’, *Workplace Express* (online), 3 October 2016 <<https://www.workplaceexpress.com.au>>; ‘CFMEU’s Setka Asks Supreme Court to Axe Blackmail Case’, *Workplace Express* (online), 2 December 2016 <<https://www.workplaceexpress.com.au>>; *Setka v Magistrates Court of Victoria* (2017) 323 FLR 108.

¹⁷⁸ See, eg, *Director, Fair Work Building Industry Inspectorate v Abbott (No 6)* [2013] FCA 942 (18 September 2013); *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 226 (17 March 2015); *Director, Fair Work Building Industry Inspectorate v Vink* [2016] FCCA 488 (9 March 2016); *Australian Building and Construction Commissioner v McCullough (No 2)* [2017] FCA 295 (22 March 2017); *Australian Building and Construction Commission v CFMEU* (2017) 268 IR 178 (‘*Kane Constructions Case*’).

¹⁷⁹ See, eg, ‘Building Industry Will Stop, Enough is Enough, CFMEU Warns’, *Workplace Express* (online), 15 February 2017 <<https://www.workplaceexpress.com.au>>; ‘Victorian CFMEU Leader Vows to Defy IR Construction Laws’, *Workplace Express* (online), 9 March 2017 <<https://www.workplaceexpress.com.au>>.

¹⁸⁰ See nn 7–10 above and accompanying text. Support can be found for McManus’s position on defying unjust laws: see, eg, Bottomley and Bronitt’s reference to Fuller, above n 27, ‘ch 2, suggesting that there is no obligation to obey legal rules that violate the rule of law as they are not laws at all: Bottomley and Bronitt, above n 21, 42; cf Hayek, above n 23, 210.

¹⁸¹ Matthew Dunkley, ‘New Union Chief Sally McManus has a Problem with Facts’, *The Sydney Morning Herald* (online), 23 March 2017 <<http://www.smh.com.au/business/workplace-relations/new-union-chief-sally-mcmanus-has-a-problem-with-facts-20170319-gv1rn6.html>>. See further cases such as *Director, Fair Work Building Industry Inspectorate v Merx* [2015] FCA 316 (2 April 2015); *Kane Constructions Case* (2017) 268 IR 178.

are prevented from going onto a worksite because they need to give 24 hours' notice and they know that someone's life is at risk, I think that is an unjust law.'¹⁸²

As well as the inaccuracy of that description of the legal position,¹⁸³ there have been many judicial findings of entry onto building sites by CFMEU officials in breach of applicable restrictions under the *FW Act* and/or OHS legislation.¹⁸⁴ Further, the Heydon Royal Commission considered evidence of the misuse of entry rights for OHS purposes to address industrial issues,¹⁸⁵ while alleged breaches of right of entry laws have become an increasing focus of compliance activity on the part of the construction industry regulator.¹⁸⁶ The CFMEU has also, on occasions, demonstrated a belligerent approach to interactions with ABCC inspectors. This was most clearly exemplified by Victorian CFMEU Secretary John Setka's warning (at a public rally held in Melbourne on 19 June 2017) that the union would expose ABCC inspectors in their communities so that they would 'not be able to show their faces anywhere'.¹⁸⁷ These comments were condemned by both the Government and Opposition.¹⁸⁸ Although Setka later apologised for his remarks,¹⁸⁹ they served to entrench a perception that the union regards itself as 'above the law'.

C *Is the 2016 Code about Restoring the Rule of Law or Something Else?*

The discussion in the preceding section illustrates that there is a persuasive basis for the notion of restoring the rule of law in the building industry, if one accepts the

¹⁸² 'I Will Not Keep My Head Down: ACTU's McManus', *Workplace Express* (online), 29 March 2017 <<https://www.workplaceexpress.com.au>>.

¹⁸³ The requirement to give 24 hours' notice of entry for OHS purposes only applies to entry for purposes of accessing employment records (*FW Act* s 495; *Work Health and Safety Act 2011* (Cth) s 120) and for consulting with employees on safety matters (*Work Health and Safety Act 2011* (Cth) ss 121–2); it does not apply for purposes of entry to investigate a suspected OHS contravention under *Work Health and Safety Act 2011* (Cth) ss 117–19. This is also the position in those states and territories that have adopted the model *Work Health and Safety Act* (ie all but Victoria and Western Australia).

¹⁸⁴ See, eg, *Director, Fair Work Building Industry Inspectorate v CFMEU* [2016] FCA 413 (22 April 2016); *Director, Fair Work Building Industry Inspectorate v CFMEU* [2016] FCA 414 (22 April 2016); *Director, Fair Work Building Industry Inspectorate v O'Connor* [2016] FCA 415 (22 April 2016); *Director, Fair Work Building Industry Inspectorate v Bolton (No 1)* [2016] FCA 816 (19 July 2016); *Director, Fair Work Building Industry Inspectorate v Bolton (No 2)* (2016) 261 IR 452. See also *Fair Work Commission v Roberts* [2016] FWC 4052 (29 June 2016), relating to the suspension of a CFMEU official's right of entry permit; *Australian Building and Construction Commissioner v Powell* (2017) 268 IR 113, dealing with the inability of an official (without a federal entry permit) to obtain entry onto a site to assist a safety representative under Victorian OHS legislation.

¹⁸⁵ Royal Commission into Trade Union Governance and Corruption, above n 50, vol 2, ch 3.2; vol 3, ch 6.3; vol 5, 578 [9.5].

¹⁸⁶ 'Entry Permit Breaches Dominating FWBC Actions', *Workplace Express* (online), 18 August 2015 <<https://www.workplaceexpress.com.au>>. See also Nigel Hadgkiss, 'The Rule of Law — One Year On' (Speech delivered at the IRSWA State Conference, Rottnest Island, Western Australia, 22 November 2014).

¹⁸⁷ 'CFMEU Official Threatens to Expose Inspectors' "Secret Lives", *Workplace Express* (online), 20 June 2017 <<https://www.workplaceexpress.com.au>>.

¹⁸⁸ David Marin-Guzman, 'Bill Shorten "Repudiates" CFMEU Boss John Setka's Threats to ABCC Officials', *Australian Financial Review* (online), 21 June 2017 <<http://www.afr.com/news/policy/industrial-relations/bill-shorten-repudiates-cfmeu-boss-john-setkas-threats-to-abcc-officials-20170621-gwvc4d>> (noting also that the Federal Employment Minister would be referring the matter to police).

¹⁸⁹ 'CFMEU Leader Apologises for "Heat of the Moment" Comments', *Workplace Express* (online), 23 June 2017 <<https://www.workplaceexpress.com.au>>.

narrow view of the rule of law as necessitating compliance with legal rules.¹⁹⁰ To what extent, then, is the *2016 Code* oriented towards achieving that objective? Clearly there are elements of the Code that aim to promote respect for the law by construction industry participants, such as the requirements to comply with the Code itself and other applicable laws, as well as the rulings of courts and tribunals. The goal of compliance can also be seen in the reporting requirements about industrial action — although notably, *any* industrial action must be reported to the ABCC, not just unlawful industrial action. Similarly, the *2016 Code* seeks to ensure observance of the *FW Act* provisions relating to freedom of association and union right of entry, and compliance with various laws dealing with security of payments.

However in many more respects, the *2016 Code* has nothing at all to do with the rule of law. Rather, it seeks to promote other aspects of the Government's workplace relations agenda, particularly its desire to dilute the power and influence of trade unions. This is no longer the explicitly articulated feature of Coalition policy that it was in the Howard era (particularly through the 2005 'Work Choices' legislation).¹⁹¹ However, it is evident, for example, in the Government's attempts to limit union entry rights under pt 3-4 of the *FW Act*,¹⁹² and in its robust posturing in agreement negotiations in the federal public sector.¹⁹³ Unions are also being subjected to higher standards of governance and accountability, particularly in relation to financial management, although this is largely a necessary response to the corruption issues identified by the Heydon Royal Commission.¹⁹⁴

Arguably, the *2016 Code* is the Coalition Government's most potent statement of anti-union intent — especially the extensive attempts to preclude union involvement in the workplace through the agreement content restrictions and freedom of association requirements. These provisions of the *2016 Code* go well beyond ensuring *neutrality* in the choice presented to employees as to whether they should join a union or become involved in union activities (or not).¹⁹⁵ Rather, the *2016 Code* restrictions seek to prevent employers from offering any support for, or tolerance of, union involvement in the workplace — right down to prohibiting the display of union flags or symbols and union involvement in employee inductions — under the pain of possible ineligibility for Commonwealth-funded building work.

¹⁹⁰ See above Part II.

¹⁹¹ Anthony Forsyth and Carolyn Sutherland, 'From "Uncharted Seas" to "Stormy Waters": How Will Trade Unions Fare under the Work Choices Legislation?' (2006) 16(2) *Economic and Labour Relations Review* 215.

¹⁹² See Fair Work Amendment (Remaining 2014 Measures) Bill 2015 (Cth), discussed in Stewart et al, above n 32, 870.

¹⁹³ 'Abbott Government Tightens Screws with New APS Bargaining Policy', *Workplace Express* (online), 2 April 2014 <<https://www.workplaceexpress.com.au>>; Sue Williamson, Michael O'Donnell and Cameron Roles, 'Bargaining over Australian Public Service Cuts: Do Forcing Strategies Work?' (2016) 27(1) *Economic and Labour Relations Review* 46.

¹⁹⁴ See n 59 above and accompanying text; *Fair Work Amendment (Corrupting Benefits) Act 2017* (Cth); Anthony Forsyth, 'Law, Politics and Ideology: The Regulatory Response to Trade Union Corruption in Australia' (2017) 40(4) *University of New South Wales Law Journal* 1336.

¹⁹⁵ The notion of state neutrality in the legal rules for union activity such as collective bargaining is explored in the United States and United Kingdom contexts in (respectively): Benjamin I Sachs, 'Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing' (2010) 123(3) *Harvard Law Review* 655; Ruth Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37(3) *Industrial Law Journal* 236.

As indicated earlier in the article, the reach of the Code's prohibitions extend to preclude certain forms of employer activity (that is, encouragement or facilitation of union involvement) that are more than likely permissible under the *FW Act*.¹⁹⁶ The *2016 Code* is therefore as much an instrument to drive an ideological view antipathetic to trade unions, as it is a vehicle to restore the rule of law.

The enterprise agreement restrictions in the *2016 Code* also point to another of the Coalition's policy objectives: enhancing productivity and competitiveness.¹⁹⁷ In its first term in office, the Government largely left it to the Productivity Commission to examine how the workplace relations system could be improved, and ensure that businesses can 'grow, prosper and employ'.¹⁹⁸ The Commission's reform recommendations were more moderate than many observers expected,¹⁹⁹ but have still not been acted upon by the Government.²⁰⁰ As indicated earlier, the *2016 Code* precludes agreement clauses that limit management decision-making or productivity gains. Of particular note in that context are the prohibitions on clauses restricting the utilisation of flexible forms of labour (for example, contractors or labour hire), and on 'jump up'-type provisions. Through the *2016 Code*, therefore, the Government has implemented (in the construction industry) a recommendation of the Productivity Commission to restrict the permissible content of agreements,²⁰¹ which it has not yet been prepared to pursue more broadly.

D Rule of Law Concerns about Construction Industry Regulation

While it has been shown that the *2016 Code* is only partly aimed at rule of law concerns, the *BCIIP Act* is certainly more squarely focused on ensuring compliance with prohibitions on unlawful industrial action, picketing and coercion through stiff penalties and a vigilant regulator (the ABCC). Yet this only addresses one element — enforcement of existing laws — of some (but not all) perspectives of what the rule of law means. At the same time, the specialist scheme of construction industry regulation that has operated in Australia since 2005 has raised a number of concerns, particularly regarding its incursion on a principle that (as discussed earlier in this article)²⁰² is another foundational component of the rule of law in Dicey's terms: equality before the law.²⁰³

¹⁹⁶ See above nn 117–129 and accompanying text.

¹⁹⁷ Liberal Party of Australia and The Nationals, *The Coalition's Policy to Create Jobs by Improving Productivity* (Policy Statement, 4 September 2013). See also Liberal Party of Australia and The Nationals, above n 48.

¹⁹⁸ Productivity Commission (Cth), 'Workplace Relations Framework' (Inquiry Report, Australian Government, 30 November 2015) vol 1, vi. See also v–vii.

¹⁹⁹ Ibid. See also Stewart et al, above n 32, 75–6. More generally, see David Peetz, 'The Productivity Commission and Industrial Relations Reform' (2016) 27(2) *Economic and Labour Relations Review* 164.

²⁰⁰ Ewin Hannan, 'Election 2016: Coalition Silent on Promised Productivity Commission Response', *Australian Financial Review* (online), 29 June 2016 <<http://www.afr.com/news/policy/industrial-relations/election-2016-coalition-silent-on-promised-productivity-commission-response-20160629-gpulge>>.

²⁰¹ Productivity Commission (Cth), above n 198, vol 2, 815–20.

²⁰² See above Part II.

²⁰³ Another significant rule of law issue raised about the system of construction industry regulation has been its abrogation of individual liberties through the coercive investigatory powers of the ABCC (see above nn 41, 47, 52 and accompanying text). Space does not permit further examination of those issues here; see further Williams and McGarrity, above n 41, 247, 276–7.

The ACTU has maintained that the imposition of special laws for workers in the construction industry is unnecessary and discriminatory, and that the ABCC (as it operated under the *Building and Construction Industry Improvement Act 2005* (Cth)) was ‘aggressive, coercive and biased’ in its overwhelming focus on the activities of workers and unions.²⁰⁴ For the CFMEU: ‘principles of equal treatment before the law demand that there be no separate regulator for the building industry and no accompanying laws directed at the participants of that industry’.²⁰⁵ It was noted earlier that according to Bingham and Gowder, laws should generally apply equally to everyone unless there are objective or public differences justifying different treatment.²⁰⁶ According to Gowder, reasons for such differential application of the law that ‘appeal to plausible conceptions of the public good will always count’, while reasons ‘based on patronizing or disdainful attitudes toward classes of individuals will never count’.²⁰⁷ Clearly, perceptions of ‘the public good’ will always be in the eye of the beholder. Nevertheless, it is strongly arguable that the ‘justification’ test for differential treatment is satisfied in respect of the Australian building industry, based on the lawlessness discussed in Part VIB above. Even the Labor Party, when last in government²⁰⁸ and leading up to the 2016 Election,²⁰⁹ has supported a (less restrictive) separate system of regulation for this industry.

However, in at least one case a court has criticised the construction regulator for bringing an unsuccessful enforcement proceeding against the CFMEU.²¹⁰ Commissioner Heydon found no evidence of anti-union bias on the part of the ABCC.²¹¹ Nevertheless, the concerns of the ACTU and CFMEU have, to some extent, been validated by the inclusion in the *BCIIP Act* of a provision requiring the ABCC to carry out its functions in a way that ensures

the policies and procedures adopted and resources allocated for protecting and enforcing rights and obligations arising under [applicable building industry laws] are, to the greatest extent practicable having regard to industry conditions based on complaints received by the [ABCC], applied in a reasonable and proportionate manner to each of the categories of building industry participants.²¹²

Union concerns about the ABCC’s lack of impartiality were further reinforced in September 2017, when Australian Building and Construction Commissioner Nigel Hadgkiss resigned following revelations that he had breached the *FW Act* by

²⁰⁴ See Royal Commission into Trade Union Governance and Corruption, above n 50, vol 5, 420 [8.75]. See also vol 5, 419–21 [8.72]–[8.77].

²⁰⁵ Ibid vol 5, 422 [8.78]. See also the Wilcox Review’s consideration of the justification for a special scheme of regulation in Wilcox Review, above n 45, ch 4.

²⁰⁶ See above nn 18, 20 and accompanying text.

²⁰⁷ Gowder, above n 19, 607–8 (citations omitted).

²⁰⁸ See nn 44–7 above and accompanying text.

²⁰⁹ Ewin Hannan, ‘Why Voters are Not Getting the Full Picture on the ABCC’, *Australian Financial Review* (online), 23 March 2016 <<http://www.afr.com/news/politics/why-voters-are-not-getting-the-full-picture-on-the-abcc-20160322-gnot1r>>.

²¹⁰ See, eg, *Director, Fair Work Building Industry Inspectorate v Ingham* [2016] FCA 328 (7 April 2016).

²¹¹ Royal Commission into Trade Union Governance and Corruption, above n 50, vol 5, 433–4 [8.103]–[8.107].

²¹² *BCIIP Act* s 16(2), which was inserted as part of the crossbench amendments to the legislation in the Senate.

publishing incorrect information about union entry rights.²¹³ Based on his admissions of wrongdoing, a civil penalty of \$8500 was subsequently imposed upon Hadgkiss by the Federal Court, for breaching the legislation he was required to police.²¹⁴

VII Conclusion

This article has concluded that the Coalition Government's use of the procurement rules in the *2016 Code* is partly aimed at restoring the rule of law in the Australian construction industry, with the rule of law narrowly conceived as ensuring compliance with the law. In addition, though, it has been shown that the *2016 Code* is intended to achieve certain other workplace reform objectives, including reducing union power and enhancing productivity and competitiveness. These conclusions were reached following a detailed examination of: the evolution of the specialist framework of building industry regulation since the Cole Royal Commission in 2003; the use of commercial (dis)incentives through procurement policy to drive workplace reform in this sector since 1997; and the obligations imposed under the *2016 Code*.

In the course of the above analysis, it was observed that the CFMEU's wilful defiance of legal restrictions on industrial action, coercion and right of entry — and court orders and injunctions enforcing those limitations — means that there is a need to reimpose 'law and order' in the building industry. However, this is only one aspect of the rule of law, and the separate scheme of construction regulation has raised significant concerns over the years in relation to compliance with another central feature of the liberal conception of the rule of law: equal treatment before the law.

In the end, there must be some doubt as to the likely effect of the *2016 Code* (and the *BCIIP Act*) to effect the cultural change the Australian Government is seeking to bring about. Imposing commercial 'carrots and sticks' on construction companies has some capacity to influence behaviour, because most larger players will want to tender for Commonwealth funded projects — and many smaller companies will seek to be engaged on those projects.²¹⁵ On the other hand, similar obligations have applied previously (under the Howard Government) and the special scheme of construction regulation has been in place for almost 15 years without any real change in the nature of industrial relations practices on building sites.²¹⁶ It is, therefore, far from certain that the Government can turn the mantra of 'restoring the rule of law' in the Australian construction industry into reality.

²¹³ 'ABCC's Hadgkiss Admits Contravening Act', *Workplace Express* (online), 12 September 2017 <<https://www.workplaceexpress.com.au>>.

²¹⁴ *CFMEU v Director of the Fair Work Building Industry Inspectorate* [2017] FCA 1166 (29 September 2017).

²¹⁵ Stewart et al, above n 32, 1023.

²¹⁶ See, eg, Nigel Hadgkiss, 'Plans and Priorities of the Construction Industry Regulator' (Speech delivered at the Australian Industry Group National PIR Group Conference, Canberra, 2 May 2016); 'FWBC Needs Bigger Stick to Force Compliance: Hadgkiss', *Workplace Express* (online), 14 October 2016 <<https://www.workplaceexpress.com.au>>.



SIZE MATTERS: WHY CONSTRUCTION PRODUCTIVITY IS SO WEAK

2025

Size matters: Why construction productivity is so weak (2025)
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ABOUT THIS PUBLICATION

Size matters: Why construction productivity is so weak explores the factors driving the three-decade long decline in the productivity of Australia's construction sector and focuses on the lack of scale in construction as a key barrier to this multifaceted problem. By proposing measures to lift stagnant national productivity growth – in particular in construction – and address Australia's housing crisis, this report contributes to two focus areas of CEDA's Progress 2050 vision for a better future for the next generation of Australians: productivity, investment & innovation and wellbeing, security & participation.



Melissa Wilson
Senior Economist, CEDA

Melissa Wilson is a Senior Economist at CEDA based in South Australia. She leads CEDA's research on productivity, business dynamism and working from home. She was the lead author of the report 'Dynamic Capabilities: How Australian firms can survive and thrive in uncertain times'. Melissa has more than a decade of experience as an economist at the Reserve Bank of Australia (RBA), where she worked in a broad variety of areas including the RBA's business liaison program, overseas economies, international relations, labour markets, domestic markets, financial stability and public education.



James Brooks
Economist, CEDA

James Brooks is an Economist at CEDA. He has experience working on government policy from advocacy to implementation. Prior to joining CEDA, he worked at the Victorian Department of Transport and Planning in its policy reform team, which supported the State Government in responding to emerging challenges in Victoria's transport network. He also worked as a Senior Department Liaison Officer for Victoria's Public Transport Minister. He has also held roles at Infrastructure Victoria. James has a Bachelor of Commerce, Economics major, from the University of Melbourne.

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Size matters:

WHY CONSTRUCTION
PRODUCTIVITY IS SO WEAK



DWELLINGS BUILT PER
CONSTRUCTION WORKER

**DECLINED BY
ROUGHLY 50%**

SINCE THE 1970s

IN SYDNEY, APPLICATIONS TO BUILD AN
APARTMENT BLOCK HAVE BALLOONED IN SIZE



THEY NOW REQUIRE STRUCTURAL, ENVIRONMENTAL,
TRAFFIC AND OFTEN HERITAGE ASSESSMENT,
MAKING THEM HUNDREDS OF PAGES LONG

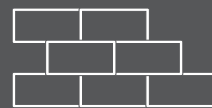
CONSTRUCTION FIRMS
WITH 200+ EMPLOYEES

**GENERATE 85%
MORE REVENUE
PER EMPLOYEE**

THAN CONSTRUCTION FIRMS
WITH 5-19 EMPLOYEES



If construction firms matched
the size distribution of
manufacturing firms



the construction
industry would
produce



12 per cent or
\$54 billion
more revenue

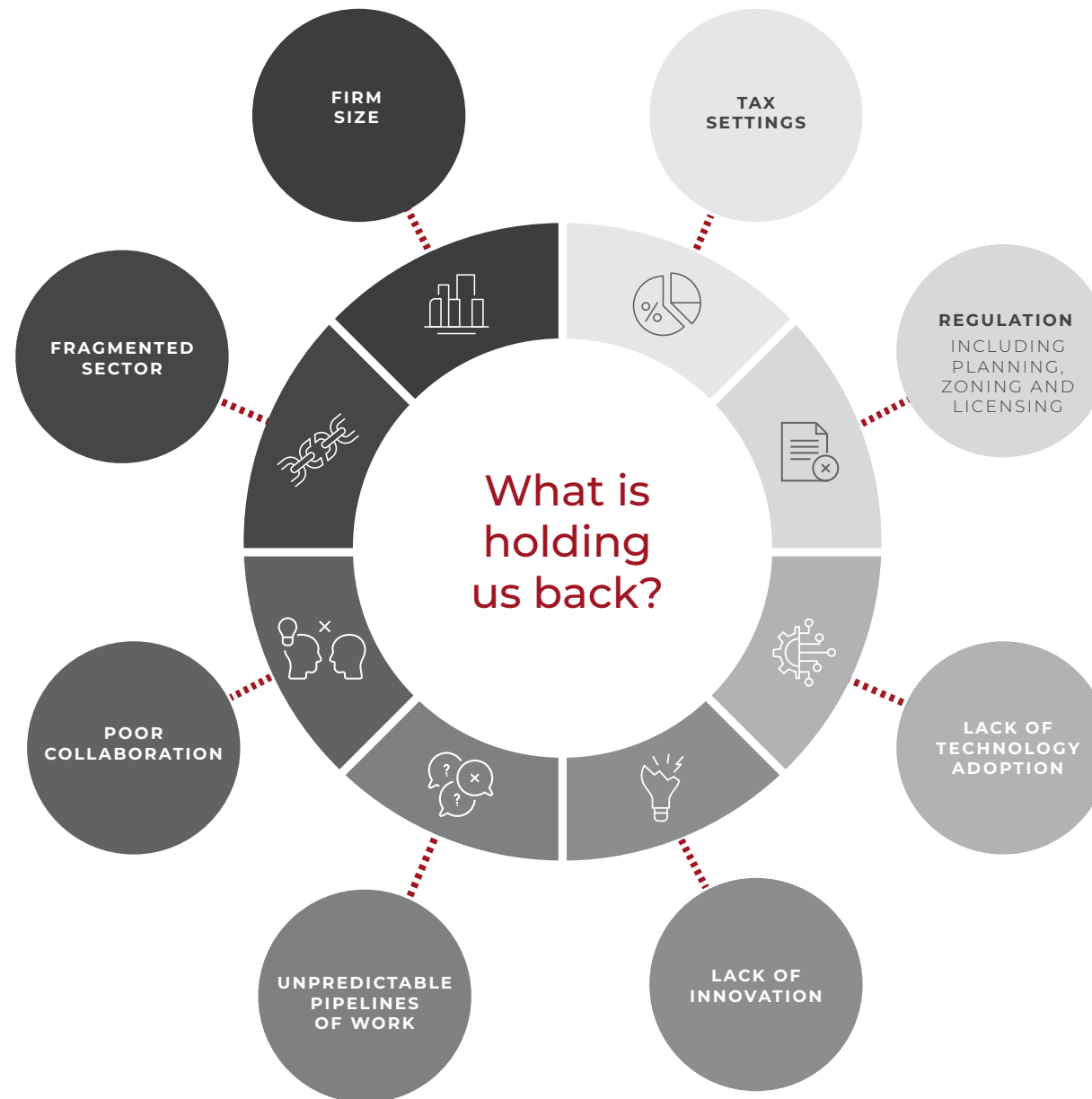


without any
additional
labour



**equivalent to gaining
an extra 150,000
construction workers**

Factors contributing to weak construction productivity



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INTRODUCTION: CONSTRUCTION IS CRITICAL TO ALL AUSTRALIANS BUT IS FAILING TO DELIVER

The construction sector is one of our largest industries and is vital to the functioning of our economy. It plays a critical role in meeting Australians' housing needs, delivering the nation's infrastructure pipeline and making the energy transition. These goals are important not only for Australians today, but also for generations to come. Our economic prosperity relies on our ability to get things built, but we are losing this ability. Without improvement in this sector we will not be able to deliver on a strong economy and a strong social compact.

Put simply, productivity means producing more of something (an output) with the same or fewer resources (inputs). It is about working smarter, not harder.

By all measures, construction has been underperforming in the productivity stakes. Construction's size and interconnectedness mean it has a significant impact on the national economy and is a key driver of Australia's broader productivity weakness.¹

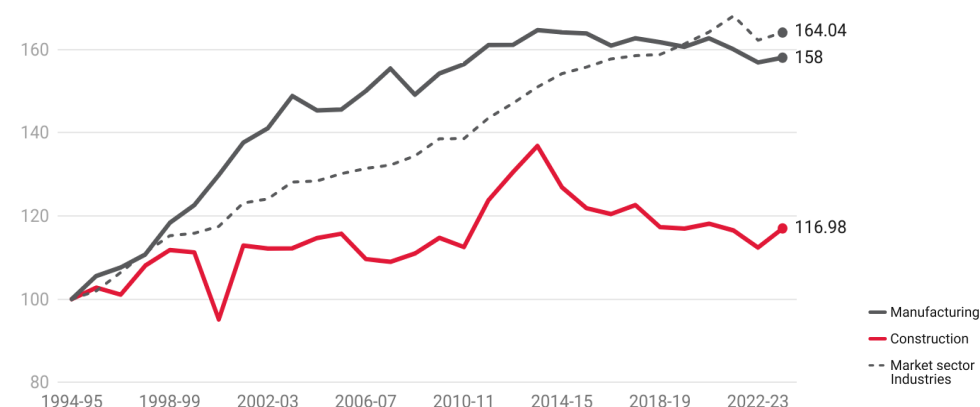
Labour productivity in construction (measured as output per hour worked) grew by just 17 per cent over the 29 years from 1994/95 to 2023/24 (Figure 1). In contrast, labour productivity grew by 64 per cent in the 'market-sector' industries, and 58 per cent in manufacturing over the same period.

Multifactor productivity in construction has been broadly unchanged from 1994/95 to 2023/24 (Figure 2). It grew by almost 20 per cent in market-sector industries and 23 per cent in manufacturing over the same period.²

Construction productivity underperforms

Figure 1 - Labour productivity

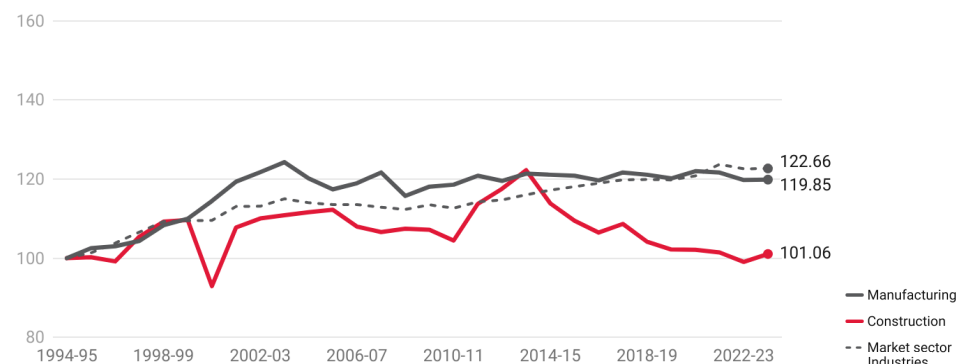
ABS estimates of labour productivity hours worked basis; 1994 =100.



Source: Australian Bureau of Statistics, 5260.0.55.002 Estimates of Industry Multifactor Productivity, Australia, table 6.

Figure 2 - Multifactor productivity

ABS estimates of multifactor productivity hours worked basis; 1994 =100.



Source: Australian Bureau of Statistics, 5260.0.55.002 Estimates of Industry Multifactor Productivity, Australia, table 1.

Productivity has been particularly weak in the building of houses and apartments. Our analysis shows that dwellings built per construction worker have declined by roughly 50 per cent since the 1970s (Figure 3).

These measures do not account for changes in the size and quality of buildings, which have both improved over time. The Productivity Commission has found that, even when adjusting for size and quality improvements, construction labour productivity per hour worked has declined by around 12 per cent since 1994, and still significantly underperformed the wider economy, which experienced labour productivity growth of around 49 per cent over the same period.

Construction's productivity performance has been one of the weakest of all sectors in the economy – it is one of only three market-sector industries to have *subtracted* from overall multifactor productivity growth in recent decades.³ Boosting productivity in construction will be vital to solving Australia's housing crisis, rejuvenating weak business investment and supporting a strong economy.

We are not alone in this challenge - many other advanced economies have also experienced weak construction productivity over the past 30 years, including the United Kingdom, the United States and Canada.⁴

The construction productivity problem is complicated and there is no single driver of poor performance. Analysis by CEDA and others, as well as discussions with key stakeholders, suggest it has not been driven by some commonly cited culprits, including: a lack of new technologies;⁵ measurement issues; quality improvements; growth in the white-collar workforce;⁶ or industrial relations and conditions in enterprise-bargaining agreements.⁷

Instead, a range of other factors have contributed, including: complex, slow approvals; lack of innovation; lack of scale; workforce issues; and policy settings.⁸ Inefficiency (rather than a lack of technical progress) also appears to be part of the problem.^{9,10}

Figure 3 - We are building half as many homes per worker as in the 1970s

Residential dwelling units completed per construction worker

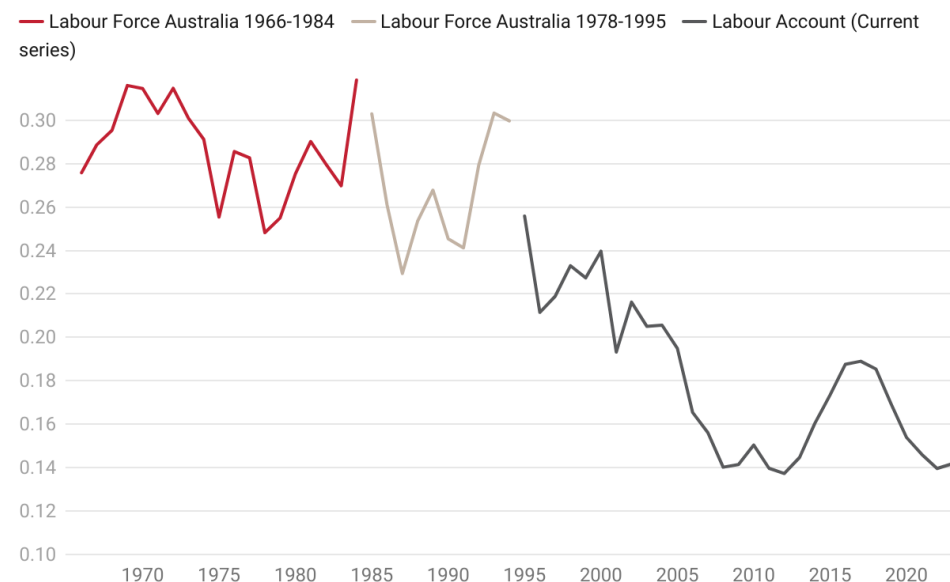


Chart: CEDA analysis of ABS data | Source: Labour Force Australia 1966-1984, Labour Force Australia 1978-1995, Labour Force Account (Current series)

Our analysis shows a key driver of this multifaceted challenge is that Australia's building industry is dominated by very small firms due to its structure, complex regulations and broader tax settings.

This report focuses on the lack of scale in the sector, an area that hasn't previously received much attention. The construction sector is currently suffering from labour shortages, which is holding back progress on critical infrastructure and housing. It is imperative that we address productivity in the sector to allow us to deliver the infrastructure Australia needs.

CONSTRUCTION IS NOW DOMINATED BY SMALL FIRMS

Construction is one of the least concentrated industries in Australia, made up mainly of small firms and individual subcontractors. Aside from the few very large or highly specialised firms, the number of firms in the industry is far greater than what is needed to deliver effective competition. Our analysis shows this is contributing to the productivity problem.

There are currently 410,602 construction firms in Australia, of which 98.5 per cent are small businesses with fewer than 20 employees.¹¹ Ninety-one per cent of construction firms are microbusinesses with fewer than five employees,¹² up significantly from 43 per cent in 1988/89.¹³ Construction has a much higher share of microbusinesses than comparable industries (Figure 4).

In Australia, firms with fewer than 20 employees account for 53 per cent of total construction sector revenue. Many of these small firms are “construction services” providers, which includes a diverse network of tradespeople and subcontractors. Their large share of construction revenue and employment, and high degree of interconnectedness with the rest of the sector, means that small construction firms are critical to the sector’s overall productivity.

Figure 4 - Most construction firms are microbusinesses

Percentage of employing firms by number of employees

1-4 5-19 20-199 200+

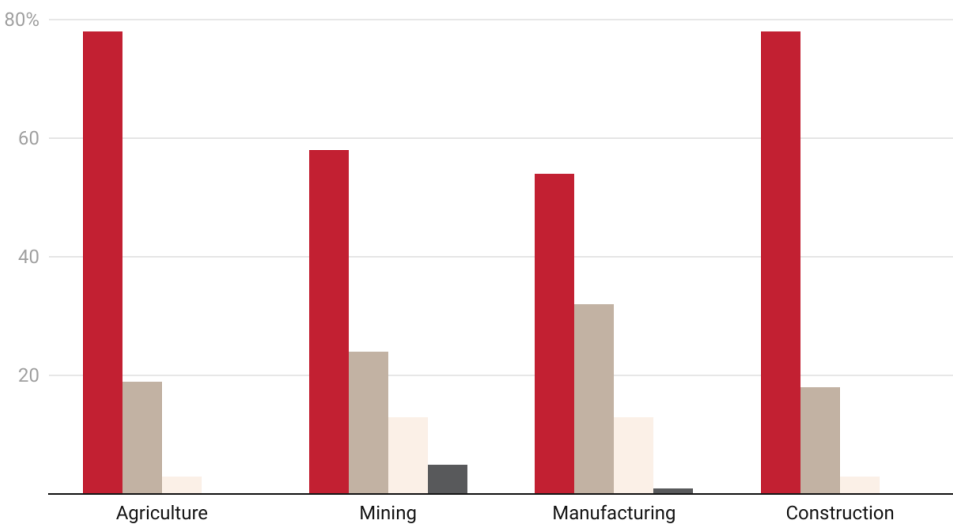


Chart: CEDA analysis of ABS data | Source: 8165.0 Counts of Australian Businesses, including Entries and Exits, June 2020 to June 2024

SMALLER CONSTRUCTION FIRMS ARE LESS PRODUCTIVE

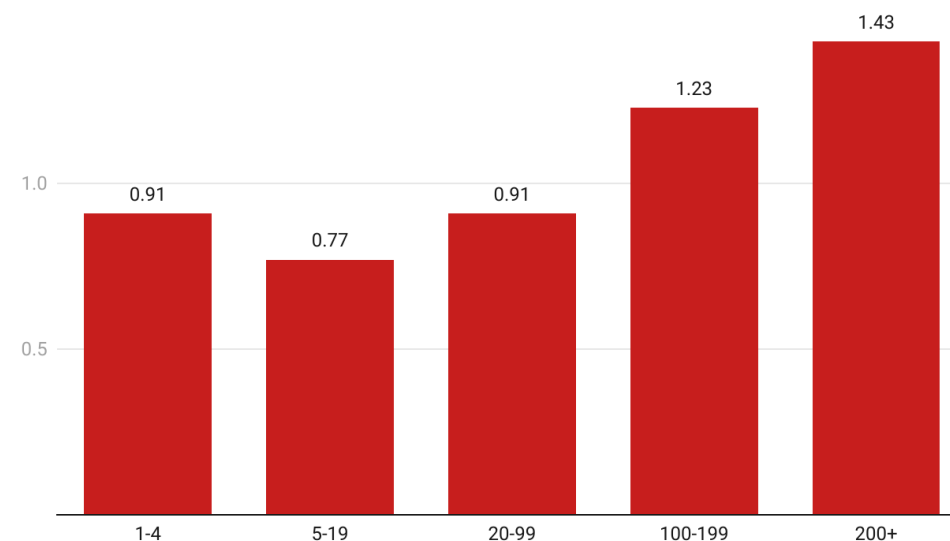
We analysed previously unreleased ABS data that looked at revenue per employee in construction firms ranging in size from zero to 200+ employees. While we are unable to measure firm-level productivity, revenue per employee acts as a reasonable proxy for labour productivity.¹⁴ Our analysis shows larger Australian construction firms produce more per employee than smaller ones.

We found that Australian construction firms with 200 or more employees generate 86 per cent more revenue per worker than Australian construction firms with 5 to 19 employees (Figure 5).

If firms in the Australian construction industry matched the size distribution of firms in the manufacturing industry, the construction industry would produce 12 per cent, or \$54 billion, more revenue per year without requiring any additional labour. This is equivalent to gaining an extra 150,000 construction workers. In a sector currently suffering from labour shortages that are holding back progress, this sort of increase would make substantial inroads in the ability to deliver on critical infrastructure and housing works.

Figure 5 - Construction workers generate more revenue in larger firms

Average revenue per employee, by number of employees



Sample of construction industry businesses, linked PAYG and business activity data

Chart: CEDA analysis of ABS data | Source: ABS data commissioned by CEDA

Smaller firms are less able to achieve economies of scale and scope. Consultation with CEDA members and other industry experts has confirmed that the construction industry tends to be fragmented, insular and lacking incentives to adopt new ways of doing things.

While there are some large, highly innovative firms in the sector, overall it is dominated by small businesses with more traditional ways of working. They have less capacity to innovate, to invest in equipment and technology, and to devote to training and capability building, which are all important drivers of productivity growth.

The link between firm size and productivity likely works in both directions – naturally more productive construction firms do more building, while firms that anticipate taking on more projects also invest more in technology.¹⁵ Differences in business models between large and small construction firms may account for part of this difference – for example, larger firms often function as project managers, outsourcing much of the physical work to subcontractors, and larger firms tend to dominate high density and civil engineering projects.

Our results align with overseas experience - researchers have found a strong connection between firm size and productivity in US residential

construction, where firms with 500 or more employees produce six times as many units per employee than firms with fewer than 20 employees, and firms with 100 to 499 employees are twice as productive. They estimate that US residential construction could be as much as 91 per cent more productive if its size distribution matched US manufacturing.

CEDA workshop participants identified poor management capabilities as the most important factor holding back technology and digital adoption in construction.

ABS data backs this up, showing that small construction firms have weaker management capabilities than equivalent-sized firms in other industries. In 2021/22 less than 7 per cent of construction firms had a written strategic plan, 8 per cent used key performance indicators, 21 per cent had reviewed their business model and just 12 per cent actively sought digital technologies to improve business processes. These scores were all 10 percentage points lower than the aggregate Australian business sector, and 2 to 5 percentage points lower than for all businesses with 0-4 people.

WHY ARE THERE SO MANY SMALL CONSTRUCTION FIRMS?

Construction firms have stayed small because the structure of the industry and regulations encourage them to remain so.

Construction is highly segmented and demand is highly cyclical. Downturns in demand can disadvantage businesses that invest in productivity-enhancing assets like machinery, equipment and new technologies. They are therefore more likely to maintain cost flexibility by relying on labour instead of capital inputs, and to favour subcontracting as a more flexible source of labour than direct employment.

While subcontracting may be the right approach for a given business or project, at an economy-wide level it means more work is done by smaller, less productive firms. And as subcontracting fragments the industry, this has likely increased the time and effort spent on procurement, contract negotiations, supervision and regulation, and dispute resolution. Our consultation has identified reworks and disputes as a major source of inefficiency in the sector.

Our analysis of ABS data found that in Australia, more residential construction output also comes from bigger firms in areas with faster dwelling growth – showing the strong demand pipeline allowing firms to invest and grow (Figure 6).

Certainty and repeatability can increase productivity. Innovation typically comes with up-front financial and learning-by-doing costs, which can make new approaches unviable on an individual project basis, where customers and upstream suppliers are more likely to focus on cost and time savings rather than experimenting with new methods or technologies.

The success of Victoria's Level Crossing Removal Program is a case in point. This infrastructure program in Melbourne elevated rail lines above roads. The goal in 2018 was to remove 85 crossings by 2025 with a budget of \$16.3 billion (average cost \$191.8 million per crossing).¹⁶ The goal was achieved earlier than anticipated and following efficiency improvements

Figure 6 - Areas with greater housing supply have bigger firms

Residential completions, census data industry employment

Dwelling completions between 2016 and 2019 at SA4. Percentage of construction firms within SA4 employing five or more people. Slope .0265, R Squared .029

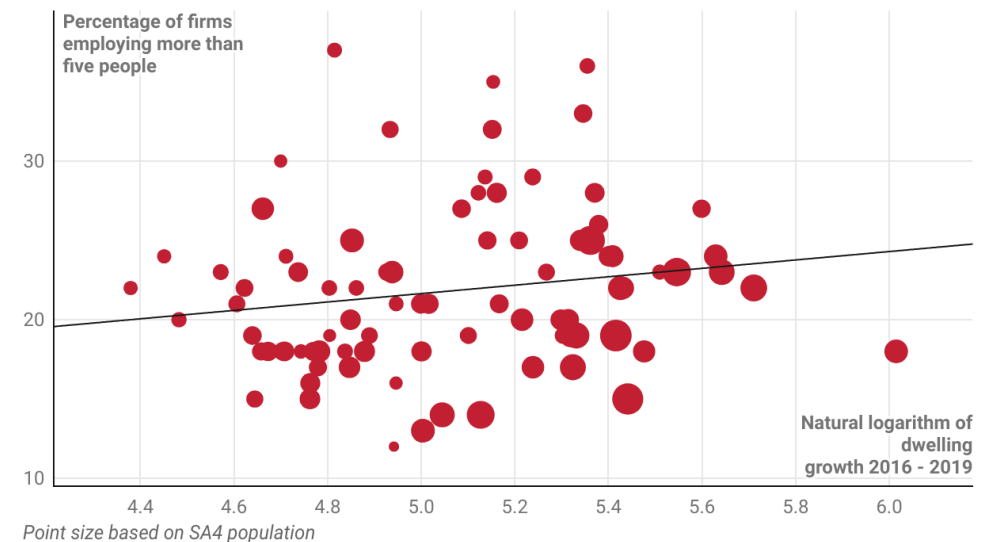


Chart: CEDA analysis of ABS data | Source: Small Area Dwelling Completions, Counts of Australian Businesses, including Entries and Exits

was expanded to remove 110 crossings by 2030 with a budget of \$19.8 billion (average cost \$180 million per crossing).¹⁷

The demand certainty created by this program enabled the firms delivering the infrastructure to invest in new building methods and process innovations.¹⁸ In addition, industry stakeholders say a key factor in the program's success was the tight integration between client and contractors, where the procurement and contracting framework forced innovation to occur.

TAX SETTINGS AND REGULATIONS KEEP FIRMS SMALL

The construction sector is governed by a complex set of regulations across all three levels of government. While regulations are important to ensure minimum safety and quality standards, excessive regulation hinders productivity, including by limiting firm size.

Tax incentives encourage construction firms to remain small

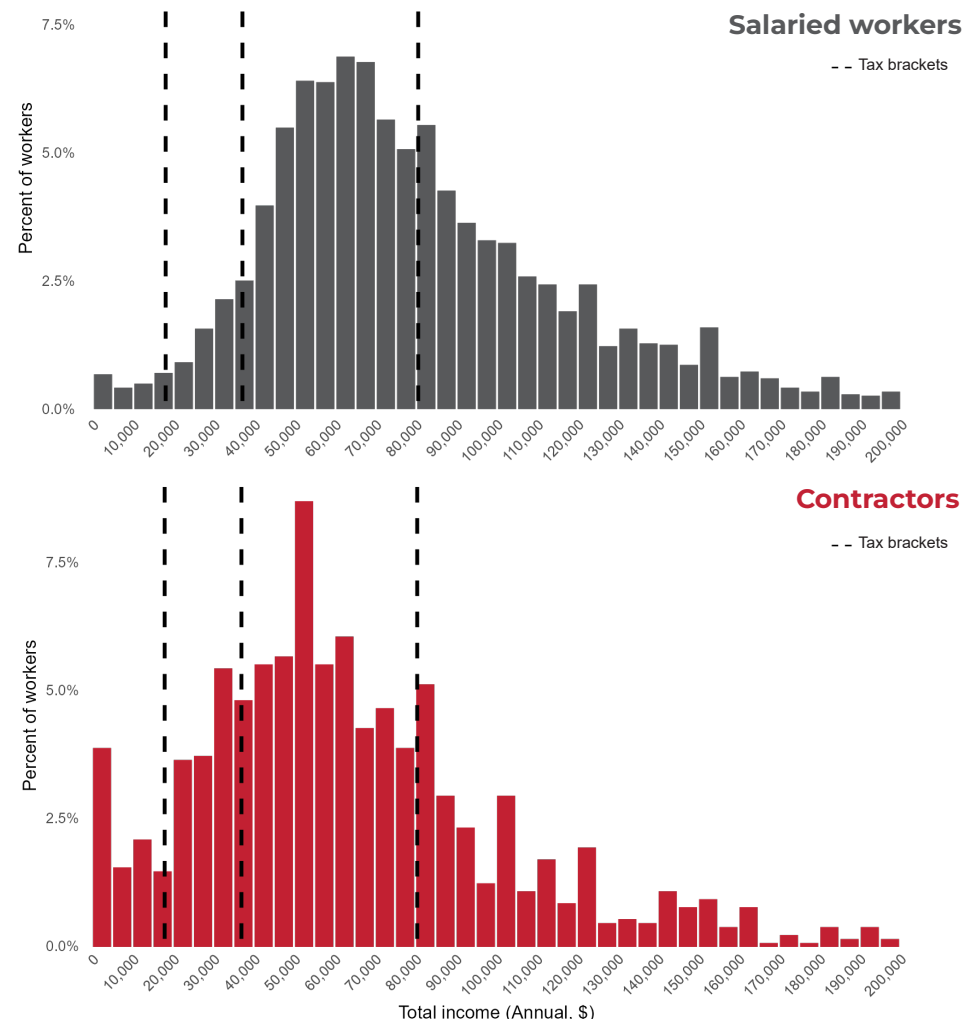
Being self-employed can result in paying less tax than a salaried employee earning the same pre-tax income. Self-employed businesses typically operate as a private company or sole trader.

Our analysis of HILDA income data for people working at least 30 hours per week shows around 8.5 per cent of independent contractors in the construction sector disclose income under the tax-free threshold of \$18,200, and therefore pay no tax, compared with just 2 per cent of salaried construction workers (Figure 7). 2.2 per cent of the contractors disclose no income at all, compared with 0.44 per cent of salaried workers.

Self-employed businesses operating as sole traders are taxed at the same marginal tax rates as employees. However, independent contractors must declare and assess their own tax obligations. Self-employed people are more responsive to changes in tax rates and are more likely to report their income just under thresholds where marginal tax rates increase, often called “bunching”.¹⁹

These results are not unexpected given the structure of our taxation system. Employees or salaried workers typically make ongoing personal income tax contributions deducted from each salary payment with rising thresholds based on income. In contrast, private companies are taxed at a flat rate of 25 per cent for small and medium businesses (with revenue of less than \$50 million) and 30 per cent for larger businesses.

Figure 7 - Contractors are more likely to report very low incomes



Source: CEDA analysis of HILDA Release 22.0 - Construction workers who work 30 or more hours per week.

A high-income construction worker earning \$148,000 per year would pay 26 per cent tax as a salaried worker. As a contractor, they could structure their income with a discretionary trust and a 'bucket' company and pay just 18 per cent tax – a difference of \$12,400 in annual-take home pay after tax.²⁰ Additionally, in trust structures, a high-income individual can distribute income across household members, who may pay even lower tax rates. Or, in rare cases, contractors can simply misrepresent their income and avoid tax altogether.

Other tax settings also favour smaller construction firms. For example, the instant asset write-off currently allows businesses with turnover of less than \$10 million to claim an immediate tax deduction on vehicles and other business assets.²¹ There are therefore significant incentives for construction workers to be self-employed under a private company arrangement to minimise their tax bill.

It's not just individual tax settings that are discouraging scale. Taxes charged at different rates based on firm size can also discourage productive firms from growing, particularly payroll tax. For example, in South Australia, where the tax-free threshold for payroll tax was raised from \$600,000 to \$1.5 million in 2019, firms that would otherwise generate revenue in excess of \$1.5 million adjusted their behaviour to remain just under the tax-free threshold.²² At the national level, around 60,000 companies in construction pay the lower federal company tax rate of 25 per cent rate for small and medium businesses rather than the large business rate of 30 per cent, which is the second most by industry.²³

Australia's land-use regulation is complex and decentralised

Australia has a complex combination of local, state and federal rules around land-use that often differ across local geographic areas. Australia has the most decentralised system of land-use planning in the OECD.²⁴

Over time, the work required to lodge development applications and comply with planning and construction rules has increased significantly. For example, the development application to build a three-storey block of apartments in Sydney in 1967 was 12 pages long.²⁵ Today an equivalent building would require extensive structural, environmental, traffic and often heritage assessment, meaning applications are many hundreds if not thousands of pages long.²⁶

This can prevent new firms from entering the local market and prevent productive firms from growing.²⁷ Where there is more regulation or it adds greater uncertainty to large housing projects, firms are more likely to prefer smaller projects that are better suited to smaller, less productive firms.²⁸ This exacerbates geographic segmentation, makes it harder for firms to grow and reduces the incentive to invest in technology.

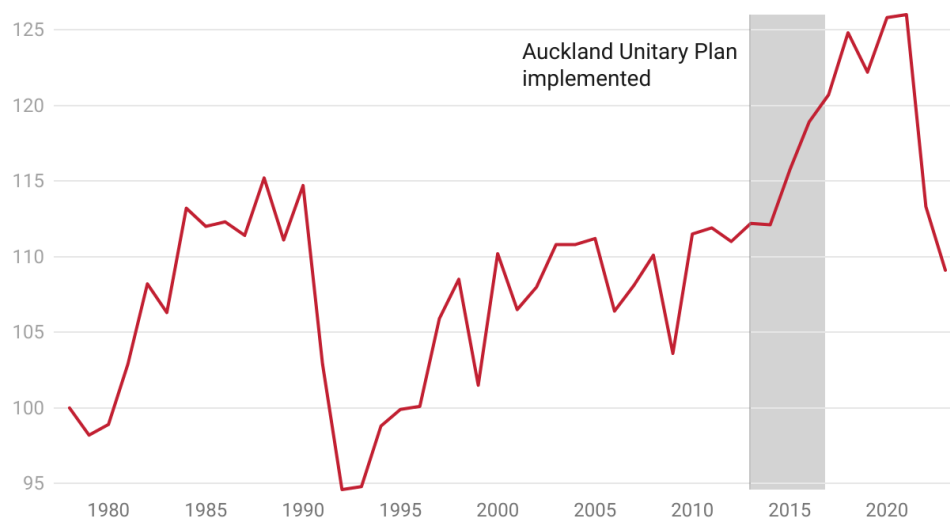
In the US, researchers found the decline in homes built per construction worker after 1970 occurred just as land-use regulations tightened.²⁹ They found that more regulated US cities had higher construction costs and smaller, less productive residential builders.³⁰

This area is ripe for reform. Our consultations revealed broad agreement that land-use regulation is a barrier to firm size in Australia.

Experience in New Zealand suggests reducing these regulations can help to boost productivity. The Auckland Unitary Plan removed many different zoning restrictions, allowing for higher-density development across the city. The “up-zoning” of Auckland started in 2013 with the introduction of “Special Housing Areas”.³¹ It was implemented across three-quarters of Auckland in 2016, and more than tripled approvals for dwellings within six years.³² It coincided with a significant increase in multifactor productivity in NZ construction (Figure 8).³³

Figure 8 - NZ construction productivity accelerated after zoning reform

New Zealand construction sector multifactor productivity; 1978 = 100



Source: Stats NZ

Other regulations

Other regulations may also be holding back firm size and productivity. This includes **state-based occupational licensing**, which sets legal requirements to practice an occupation such as being a plumber, painter or electrician. Construction licensing has become more stringent in recent years,³⁴ which can be detrimental to productivity growth because it makes businesses less dynamic, reduces business entries and exits, and makes it harder for the most productive businesses to grow.³⁵ The Federal Government's new plan to introduce national licensing for electricians is a much-needed first step in the right direction.³⁶

Two reasons commonly put forward for licensing are consumer and/or public safety and service quality. Despite widespread licensing in the sector, however, it has been plagued by problems with non-compliant cladding, water ingress, structurally unsound roofs and poor fire safety.³⁷

As CEDA has previously argued, while safety must be guarded, there are better ways to protect consumers, such as closer regulatory oversight, including on-site inspections of building works. Professional indemnity insurance is also important. Licensing of low-risk trades such as painting and decorating should be abandoned, and remaining licences should be nationally consistent.

Regulation can enhance productivity if targeted correctly. Governments at all levels must recognise that, despite good intentions, poorly designed and onerous regulations can have big opportunity costs and unintended consequences. More coordination is needed to improve this. Stronger directives from federal and state governments could also help.

CONCLUSION AND POLICY DIRECTIONS

Productivity in the construction industry has been stagnant for three decades. While many factors have contributed to this outcome, a critical driver is the dominance of small firms. Currently, 98.5 per cent of Australian construction firms have fewer than 20 employees. Smaller building companies are less productive than bigger firms because they can't achieve the same productivity gains from economies of scale and scope, innovation and investment.

Our analysis of previously unreleased ABS data shows Australian construction firms with 200 or more employees generate 86 per cent more revenue than those with 5 to 19 employees. If Australian construction firms matched the size distribution of firms in the manufacturing industry, construction would produce 12 per cent, or \$54 billion, more revenue per year without requiring any additional labour. This is equivalent to gaining an extra 150,000 construction workers.

The dominance of small firms is the result of the cyclical and segmented nature of the industry, combined with the shift to subcontracting that took place in the early 1980s and late 1990s.

Current regulatory settings are keeping builders small:

- Tax incentives favour independent contractors, who are four times more likely to disclose income under the tax-free threshold than salaried construction workers. Other tax settings, such as the instant asset write-off and payroll tax thresholds, also favour smaller construction firms.
- Australia has the most decentralised system of land-use regulation in the OECD, which exacerbates geographic segmentation and makes it harder for firms to expand into new areas.
- Complex, and in some cases increasingly stringent, state-based occupational licensing rules also make it harder for the most productive businesses to expand interstate.

Many drivers of productivity, such as technology adoption, require scale and certainty. As volatility and regulation in the sector grows, so too does the complexity and risk involved in delivering construction projects. This prevents productive firms from growing.

To encourage scale, governments should:

1. Make local and state government regulations more streamlined and consistent.
2. Help to smooth out variability in demand by creating a more consistent, predictable pipeline of construction work through their infrastructure and social housing programs.
3. Better align the relative tax rates for individuals and small and large businesses as part of broader reform of the entire tax system.

Australia has been slow to deliver on critical infrastructure projects and has not built enough homes to keep up with demand. Sydney is now the second most expensive housing market in the world, while Adelaide is sixth and Melbourne is ninth.³⁸

All levels of government must tackle this challenge. We must ensure that basic policy foundations such as regulations and tax don't stand in the way of targeted measures to build more homes.

To help us build smarter, not just harder, we must focus on policies to lift productivity in construction.

This work has benefited from insights gathered from two workshops (around 15 attendees in total), as well as broad consultation with around 15 other CEDA members and key stakeholders, including industry participants, academics, state and federal government agencies and industry bodies. We are sincerely grateful for all contributions and insights received.

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Level 3, 271 Spring Street,
Melbourne 3000 Australia

Telephone: +61 1800 161 236

Email: info@ceda.com.au

Web: ceda.com.au

Economic Analysis of Building and Construction Industry Productivity: 2013 Update

This report was prepared for Master Builders Australia

26 August 2013

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Postal Address:

Independent Economics
PO Box 4129
KINGSTON ACT 2604
AUSTRALIA

Street Address:

Independent Economics
Unit 4
4 Kennedy Street
KINGSTON ACT 2604
AUSTRALIA

Phone: +61 2 6295 8884

Email: office@independenteconomics.com.au

Web-site: www.independenteconomics.com.au

Entity: Econtech Pty Ltd (ACN 056 645 197) trading as Independent Economics

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Executive summary

Introduction

Econtech Pty Ltd (now trading as Independent Economics) has analysed trends in construction industry productivity since 2007. The original 2007 report, which was commissioned by the Office of the Australian Building and Construction Commissioner (ABCC), found that reforms tailored to the building and construction industry, including those recommended by the Cole Royal Commission, had improved work practices, lifting productivity. It also modelled the flow on effects to the wider economy from this productivity outperformance in the building and construction industry, showing significant benefits for consumers. The original report was updated for the ABCC in 2008. Since then, Master Builders Australia (MBA) has commissioned updates in 2009, 2010 and 2012, as well as this latest update. The data analysed for each update has consistently confirmed the original findings.

This 2013 report, like the previous reports, assesses the impact on productivity of the earlier industry reforms. These include the regulation of the industry by both the Building Industry Taskforce (Taskforce) and its successor the ABCC, as well as the industrial relations reforms in the years to 2006.

In addition, this report also considers, for the first time, the impact on productivity of recent developments in the industry reform process. Specifically, on 1 June 2012, the ABCC was abolished and a new agency, the Office of the Fair Work Building Industry Inspectorate (also known as Fair Work Building and Construction or FWBC), was established in its place to regulate the building and construction industry. The broad aim of establishing the FWBC was to bring the industry's regulation back much more closely into line with those of other industries.

This represents a reversal of the approach that was recommended by the Cole Royal Commission and implemented through the Taskforce/ABCC of tailoring regulation to the building and construction industry. This raises the question of whether the FWBC era will see a partial or complete reversal of the industry's productivity outperformance achieved in the Taskforce/ABCC era.

Thus, while our earlier reports focused on the industry's productivity performance across two regulatory regimes (pre and post Taskforce/ABCC), this report analyses industry productivity across three regimes:

- **the pre-Taskforce/ABCC era** – the period prior to the establishment of the Taskforce and ABCC (up to and including 2002);
- **the Taskforce/ABCC era** – the period of operation for the Taskforce and ABCC (between 2002 and mid-2012); and
- **the FWBC era** – from mid-2012 onwards, when the FWBC was established.

Methodology

First, this report compares the industry environment and workplace relations regulations during the three regimes. A particular focus is on determining the extent to which the industry environment and regulations associated with the FWBC represent a return to the circumstances that prevailed prior to the Taskforce and ABCC. This can be used to indicate the extent to which the productivity gains achieved during the Taskforce and ABCC era are likely to be preserved in the FWBC era.

Next, the latest data on construction industry productivity from a variety of sources is examined to provide an up-to-date analysis of trends in construction industry productivity and the factors driving these trends. In line with earlier reports, three types of productivity indicators are assessed to determine the extent of any shifts in industry productivity from changes in industry regulation between regulatory regimes.

- Year-to-year comparisons of construction industry productivity are made using data from the Australian Bureau of Statistics (ABS), the Productivity Commission (PC) and academic research. The timing of any shifts in productivity trends is compared with the timing of the three regulatory regimes.
- Industry reforms have focussed on the commercial construction sector, comprising non-residential building and multi-unit residential building, where construction costs have historically been higher than for the housing construction sector. Rawlinsons data is used to compare the timing of any changes in this cost gap (for undertaking the same building tasks in the same states) with the timing of the three regulatory regimes.
- Case studies of individual projects, undertaken for earlier reports by Econtech Pty Ltd and by other researchers, are used to provide comparative information on productivity performance between the three regulatory regimes.

Using both the analysis of the nature of the three regulatory regimes and the productivity data, conclusions are drawn on the impact on productivity in the building and construction industry from the regulatory changes.

- First, the boost to productivity from improved workplace practices associated with the Taskforce and ABCC is estimated.
- Second, the extent to which this productivity boost is expected to be preserved under the FWBC regime is also estimated.

These productivity effects are then introduced into an economy-wide model to estimate the impacts of the regulatory changes in the construction industry on the Australian economy as a whole.

The economy-wide modelling is undertaken using Independent Economics' Computable General Equilibrium model, the Independent CGE model. This modelling provides estimates of the permanent or long-term effects on activity in the construction industry and other industries from changes to the productivity of the construction industry. It also estimates the permanent, flow-on impacts on consumers from changes in costs in the construction industry: higher construction productivity leads to lower prices and taxes while lower construction productivity has the opposite effects.

This report continues the pattern of previous reports of further developing the sophistication of the economy-wide modelling. Hence, the estimates of the economy-wide impact of changes to workplace practices presented in this report are even more robust than those presented in earlier reports. The Independent CGE model has the following features that are important for this report.

- The model separately identifies four sectors within the building and construction industry: residential building; non-residential building; engineering construction; and construction trade services. This means that the model can better trace the economy-wide impact of improved workplace practices in different sectors of the building and construction industry. It also means that the jurisdiction of the ABCC and FWBC can be more closely identified.
- The modelling is contemporary, adopting 2012/13 as its reference year. This involves using Input-Output (IO) tables for 2007/08 released by the ABS in late 2011, and uprating this snapshot of the economy to a normalised 2012/13, by allowing for growth in wages, productivity, population and normalised commodity prices. Likewise, the model uses the latest ABS industry classification, ANZSIC 2006.
- The production process in each of the model's 120 industries distinguishes nine different types of capital, including dwellings and buildings and structures. This supports more robust estimates of the flow-on effects from reform in the building and construction industries, which produce the dwellings, buildings and structures used by the 120 industries.
- The model provides a robust measure of consumer welfare derived from the consumption of goods and services. Consumer welfare is the key measure used to assess the public policy merits of economic policies, such as the changes in workplace practices analysed here.

Workplace practices in the building and construction industry

Reporting in 2003, the Royal Commission into the Building and Construction Industry (Cole Royal Commission) found that the industry's productivity performance was poor and that this was linked to poor work practices. Unions had assumed control of managing construction projects, rather than head contractors and major subcontractors. The Cole Royal Commission identified that attitudinal change was required to solve this problem and that the "benefits to the industry and the Australian economy from improved productivity flowing from this cultural change are very significant"¹.

The Cole Royal Commission concluded that these problems occurred because the unique structure of the building and construction industry meant that head contractors had an "unwillingness and incapacity ... to respond to unlawful industrial conduct causing them loss"². Commercial pressures meant that contractors would concede to union demands rather than become involved in long disputes. Consequently, the Cole Royal Commission concluded that the conditions in the Australian building and construction industry were unlike those in other industries.

¹ Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003, p4.

² Ibid., p11.

*These findings demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular. They indicate an urgent need for structural and cultural reform.*³

In response to these special circumstances, the Cole Royal Commission recommended that mechanisms be put in place to restore the rule of law, with significant penalties for those breaching the law. The Cole Royal Commission recommended that an “Act of special application to the building and construction industry”⁴ be put in place, as well as codes of practice for the industry. It also recommended that an independent commission be established to monitor the conduct of the industry. These recommendations were enacted with the strengthening of the Taskforce, followed by the introduction of the ABCC. The data presented in the following section shows that this led to significant improvements in productivity in the building and construction industry.

Despite this, the changes in replacing the ABCC with the FWBC have meant that the regulatory environment has largely returned to that of the pre-Taskforce/ABCC era. The five main changes associated with the FWBC are as follows.

- The circumstances under which industrial action attracts penalties are narrowed, to be in line with other industries.
- The maximum penalties applicable for breaches of industrial law have been cut, to be in line with other industries.
- The use of the compulsory examination notice powers is now subject to a number of restrictions. Despite acknowledgements that these powers have been useful in assisting investigations, the use of these powers has been significantly reduced.
- The FWBC cannot continue to participate in proceedings or initiate fresh proceedings on matters which have been settled between building industry participants.
- The right of union officials to enter work sites has been expanded to allow them to visit for the purpose of “discussions with potential members”.

This means that the building and construction industry now largely lacks the regulations required to address the industry-specific issues identified by the Cole Royal Commission. The main remaining feature from the Taskforce/ABCC era is that the FWBC is still a specialist regulator for the industry. However, its most important powers used to obtain information are substantially weakened and used in only limited circumstances. Just as the Taskforce/ABCC era led to productivity gains, this regulatory reversal under the FWBC can be expected to lead to a partial or complete reversal of those productivity gains.

Productivity comparisons in the building and construction industry

The results of our analysis of the latest productivity indicators are outlined below.

³ Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003

⁴ Ibid., p13

Year-to-Year Comparisons

- ABS data shows that, from 2002 to 2012, construction industry labour productivity has outperformed by 21.1 per cent. This productivity outperformance is identified after controlling for factors driving productivity in the economy as a whole and trends in construction industry productivity prior to 2002 (the year improved workplace practices began). Data for 2013 is not yet available.
- The Productivity Commission's analysis of ABS data has found that multifactor productivity in the construction industry was no higher in 2000/01 than 20 years earlier⁵. In contrast, the latest ABS data on productivity shows that construction industry multifactor productivity accelerated to rise by 16.8 per cent in the ten years to 2011/12. Similar to the labour productivity data, multifactor productivity data for 2012/13 is not yet available.
- Published academic research on total factor productivity shows that productivity in the construction industry grew by 13.2 per cent, between 2003 and 2007, whereas productivity grew by only 1.4 per cent between 1998 and 2002. Data on total factor productivity is only available up to 2007.

Commercial versus domestic

- Rawlinsons data to January 2012 shows that the cost penalty for completing the same tasks in the same state for commercial construction compared to domestic construction has shrunk. The boost to productivity in the commercial construction sector, as estimated by the narrowing in the cost gap, is conservatively estimated at 11.8 per cent between 2004 and 2012. This narrowing in the cost gap developed over several years, as the industry gradually adjusted to the industry-specific regulatory regime of the Taskforce/ABCC era.
- Similarly, the cost gap can be expected to widen again over several years, as the industry gradually adjusts to the weaker regulatory environment in the FWBC era. However, the latest cost gap data refers to January 2013, when the FWBC had been in operation for only seven months. Over that time, from January 2012 to January 2013, the cost penalty for commercial construction widened by 0.9 percentage points. Based on past experience, this is likely to represent the start of a widening trend in the cost gap, driven by an erosion in the productivity outperformance of the Taskforce/ABCC era.

Individual Projects

- Case studies undertaken as part of the original 2007 Econtech report found that improved workplace practices in the Taskforce/ABCC era led to better management of resources in the building and construction industry. This, in turn, has boosted productivity in the building and construction industry compared to the pre-Taskforce/ABCC era.
- Other studies considered reached similar conclusions, including those assessing the impact of improved workplace practices on major engineering construction projects. The gain in productivity as a result of improved workplace practices in the Taskforce/ABCC era is estimated at around 10 per cent.

⁵ Productivity Commission, *Productivity Estimates to 2005-06*, December 2006.

Days lost to industrial action

- ABS data shows that the days lost to industrial action in the building and construction industry averaged 159,000 per year between 1995/96 and 2001/02. This gradually declined during the first five years of the Taskforce/ABCC era, and working days lost then remained at a low level from 2006/07 to 2011/12. However, with the replacement of the ABCC by the FWBC, working days lost jumped from 24,000 in 2011/12 to an estimated 89,000 in 2012/13. Hence, more than one half of the improvement in working days lost in the Taskforce/ABCC era has already been relinquished in the first year of the FWBC era.

The impact of changes in workplace practices on construction industry productivity

Productivity gains in the Taskforce/ABCC era

While the productivity indicators listed above are not directly comparable, they all indicate that the significant productivity outperformance in the construction industry began to appear around 2002/03 and continued to develop over several years. This supports the interpretation that it was the activities of the Taskforce (established in late 2002) and, more importantly, the ABCC (established in October 2005) that made a major difference. That is, while general industrial relations reforms provided a more productivity-friendly environment, it was the ABCC (with its enforcement powers) which made a significant impact on building and construction industry productivity.

As seen above, after considering the latest economic data, case studies and other research, the estimated magnitude of the productivity gain under the Taskforce/ABCC era ranges between 10 and 21.1 per cent, depending on the measure and the source of information that is used. However, after excluding the effects on industry productivity of recent compositional change in favour of engineering construction, the indicated productivity gain from the Taskforce/ABCC is towards the bottom of this range. In light of this, we conservatively use a productivity gain of 9.4 per cent, because this is the same scenario that has been modelled in previous updates of this report.

Productivity losses in the FWBC era

As detailed above, replacing the ABCC with the FWBC has meant that the regulatory environment has largely been returned to that of the pre-Taskforce/ABCC era, when regulation of the workplace in the building and construction industry was similar to that of other industries. This runs counter to the recommendations of the Cole Royal Commission. Likewise, it does not heed the evidence in our earlier reports that the industry-specific regulation by the Taskforce and the ABCC has led to a substantial boost to building and construction industry productivity.

Because the building industry-specific nature of regulation in the Taskforce/ABCC era has been almost completely removed, it is reasonable to expect that most or all of the productivity gains achieved during the Taskforce/ABCC era will also be lost. This would justify an assumption that 100 per cent of the productivity gains will be lost in the FWBC era.

However, just as the productivity gains of the Taskforce/ABCC era developed gradually over several years, those gains are likely to be lost over a similar timeframe in the FWBC era. The fact that more than one half of the improvement in working days lost in the Taskforce/ABCC era has already been

relinquished in the first year of operation of the FWBC era is not a good sign. However, several years more data will be needed before the full loss of the productivity gains can be confirmed. In the meantime, this report adopts the conservative assumption that only 75 per cent of the productivity gains will be lost. That is, it is assumed that replacing the ABCC with the FWBC will result in the productivity gains generated by the Taskforce and ABCC being wound back by 75 per cent.

The main remaining feature of the Taskforce/ABCC era is that there is still an industry-specific regulator in the form of the FWBC. However, this is likely to be of little benefit in preserving the productivity gains of Taskforce/ABCC era. This is because the FWBC largely lacks the support of the industry-specific approach to regulation that was recommended by the Cole Royal Commission and successfully exercised by the Taskforce/ABCC.

Modelling the impact of changes to workplace practices

The Independent CGE model of the Australian economy is used to estimate the long-term economy-wide impacts of changes to workplace practices. The following three scenarios were developed.

- A “Baseline Scenario” provides a snapshot of the Australian economy representing the workplace practices in place before the Taskforce and ABCC era.
- An “ABCC Scenario” provides a snapshot of the Australian economy with higher productivity in the construction industry due to improved workplace practices resulting from the ABCC, Taskforce and industrial relations reforms in the years to 2006. That is, productivity in the construction industry is 9.4 per cent higher than in the baseline scenario.
- An “FWBC Scenario” provides a snapshot of the Australian economy where 75 per cent of the productivity boost achieved in the Taskforce/ABCC era is unwound in the FWBC era. This deliberately-conservative estimate can be refined in future annual updates as more data on the FWBC era becomes available.

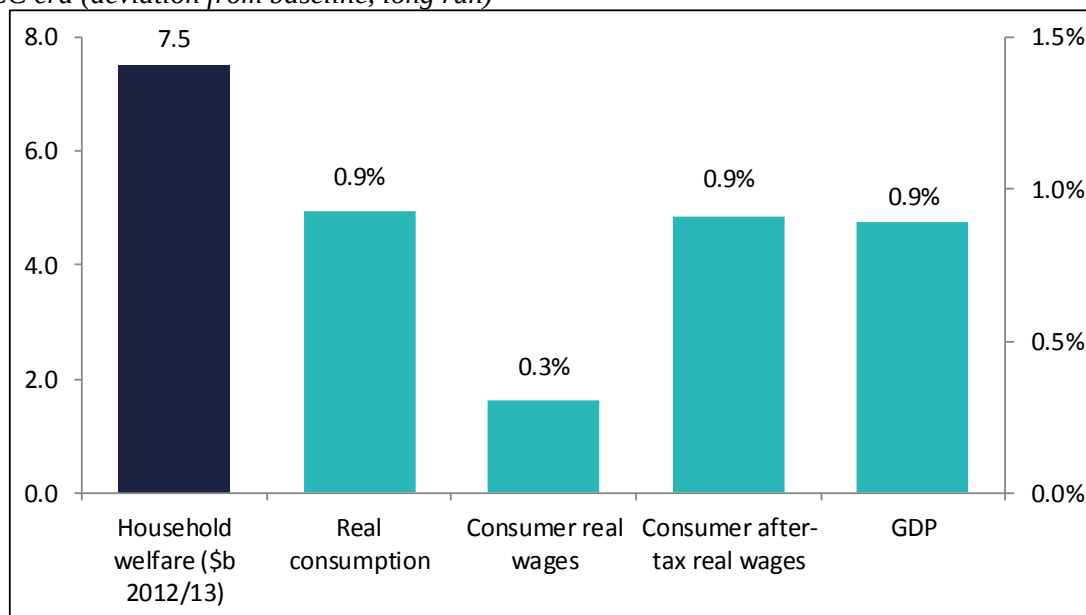
The economic benefits of improved workplace practices in the Taskforce/ABCC era are estimated as the difference between the ABCC scenario and the baseline scenario. The economic losses from the less productive workplace practices during the FWBC era are estimated as the difference between the FWBC scenario and the ABCC scenario.

Economic impact of improved workplace practices in the Taskforce/ABCC era

This section presents the economy-wide effects of improved workplace practices in the construction industry resulting from the ABCC, Taskforce and industrial relations reforms in the years to 2006. As discussed above, these have been estimated using the Independent CGE model. Chart A below summarises the key impacts of these improved workplace practices which, as explained above, are assumed to have boosted building and construction industry productivity by 9.4 per cent.

The improvements in labour productivity during the Taskforce and ABCC era have lowered construction costs, relative to what they would otherwise be. This in turn reduces costs across the economy, as both the private and government sectors are significant users of commercial building and engineering construction.

Chart A. National macro-economic effects of improved workplace practices during the Taskforce and ABCC era (deviation from baseline, long run)



Source: Independent CGE model simulations

Note: The results refer to permanent effects on the levels, not growth rates, of indicators relative to what they otherwise would be. For example, the ABCC Scenario shows a gain of 0.9% in the level of GDP relative to what it would otherwise be, and not its annual growth rate.

In the private sector, the cost savings to each industry from lower costs for buildings and engineering construction flow through to households in the form of lower consumer prices. This is reflected in the gain of 0.3 per cent in consumer real wages seen in Chart A.

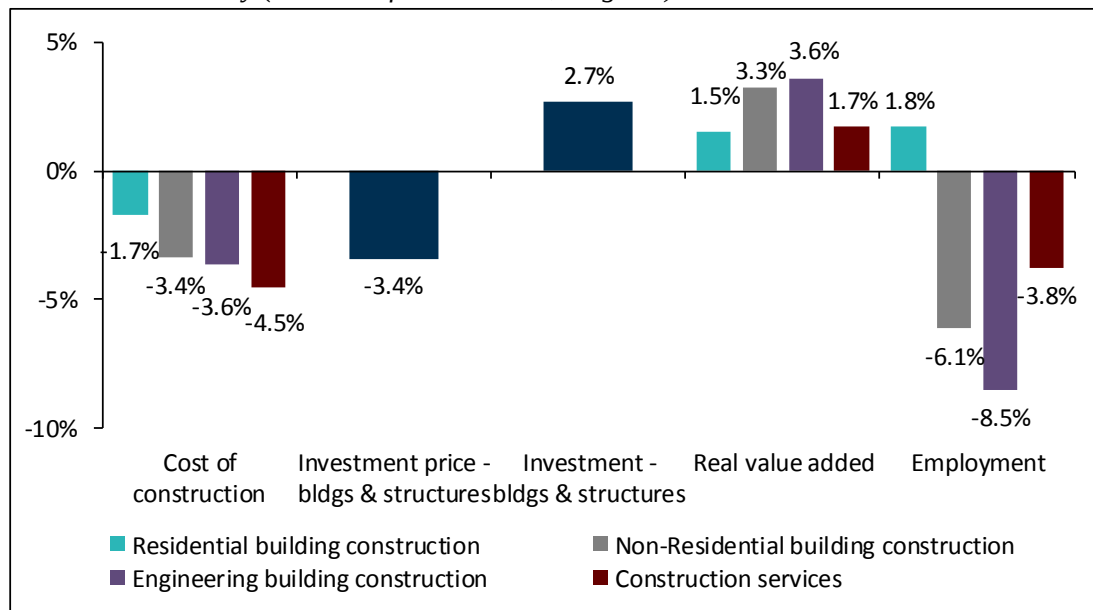
In the government sector, the budget saving from the lower cost of public investment in schools, hospitals, roads and other infrastructure is assumed to be passed on to households in the form of a cut in personal income tax. This boosts the gain in consumer real wages from 0.3 per cent on a pre-tax basis, to 0.9 per cent on a post-tax basis, as seen in Chart A. Consumers are better off by \$7.5 billion on an annual basis, in current (2012/13) dollars.

After allowing for economic growth over the last year, this is consistent with the consumer gain estimated in the 2012 report of \$6.3 billion in 2011/12 terms⁶. The estimate of consumer gains is similar across reports, since each report has consistently modelled a productivity gain of the same magnitude (9.4 per cent) and from the same source (improved workplace practices in the building and construction industry). Chart B summarises the effects on the building and construction industry.

The ABCC Scenario confirms that higher productivity in the construction industry lowers its costs, leading to lower prices for new construction. This stimulates demand for new construction, leading to a significant permanent gain in construction activity of 2.1 per cent.

⁶ An additional factor raising the estimated gain in living standards in this report compared to the 2012 report is the improved modelling approach, which now recognises the value that consumers place on their leisure time.

Chart B. Effect of improved workplace practices during the Taskforce and ABCC era on the building and construction industry (deviation from baseline, long run)



Source: Independent CGE model simulations

The industry subsectors more fully under the jurisdiction of the ABCC, non-residential building and engineering construction, experience larger labour productivity gains and hence have larger activity gains of 3.3 per cent and 3.6 per cent respectively. For residential building, multi-unit complexes were within the jurisdiction of the ABCC but houses were not, leading to a smaller labour productivity gain and a commensurately smaller activity gain of 1.5 per cent. Construction trade services, such as site preparation, electrical, plumbing and plastering services, are delivered across the entire construction industry, so they share in the gains in activity in the other three subsectors, with a gain of 1.7 per cent.

Labour saving from higher productivity leads to employment losses in non-residential building and engineering construction. However, some displaced construction workers migrate to residential building, which experiences an employment gain, while there are also employment gains in other industries, leading to no overall job loss in aggregate.

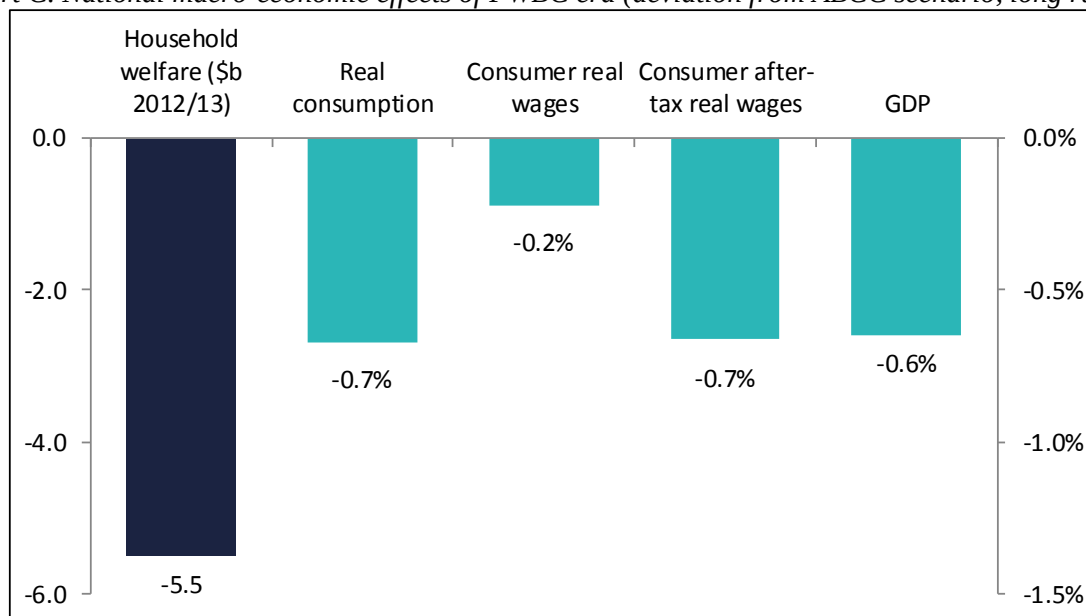
Economic impact of less productive workplace practices during the FWBC era

This section presents the economy-wide effects from less productive workplace practices in the construction industry resulting from replacing the ABCC with the FWBC. As explained above, it is conservatively assumed that 75 per cent of the productivity gains from the Taskforce/ABCC era are lost in the FWBC era. Thus, the results in this section show economic losses that are around 75 per cent of the magnitude of the economic gains shown in the previous section. Given the economic drivers are the same, the explanation here can be briefer, to avoid unnecessary repetition.

Chart C summarises the key impacts from this loss in productivity. A key result is that construction costs are higher. In the private sector, the additional construction costs flow through to households in the form of higher consumer prices, while in the government sector higher construction costs are paid for by raising personal income tax rates. These two effects combine to generate a loss in consumer

real wages of 0.7 per cent on a post-tax basis, as seen in Chart C. Lower real after-tax wages leave consumers worse off by \$5.5 billion on an annual basis.

Chart C. National macro-economic effects of FWBC era (deviation from ABCC scenario, long run)

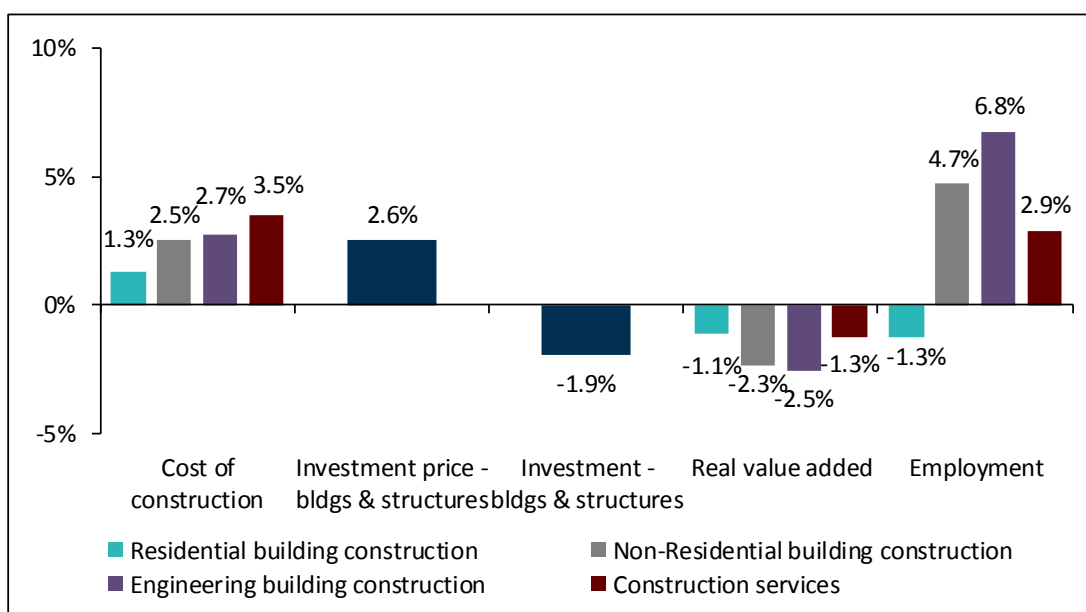


Source: Independent CGE model simulations

Note: The results refer to permanent effects on the levels, not growth rates, of indicators.

Higher construction costs also reduce demand for new construction, leading to a permanent loss in construction activity of 1.5 per cent. This includes losses of 2.3 per cent for non-residential building construction, 2.5 per cent for engineering construction, 1.1 per cent for residential construction and 1.3 per cent for construction trade services. Chart D summarises these effects.

Chart D. Building & construction industry effects of FWBC era (deviation from ABCC scenario, long run)



Source: Independent CGE model simulations

1 Introduction

Econtech Pty Ltd (now trading as Independent Economics) has analysed trends in construction industry productivity since 2007. The original 2007 report, which was commissioned by the Office of the Australian Building and Construction Commissioner (ABCC), found that reforms in the building and construction industry, including those recommended by the Cole Royal Commission, had improved work practices, lifting productivity. It also modelled the flow on effects to the wider economy from this productivity outperformance in the building and construction industry, showing significant benefits for consumers. The original report was updated for the ABCC in 2008. Since then, Master Builders Australia (MBA) has commissioned updates in 2009, 2010 and 2012, as well as this latest update. The data analysed for each update has consistently confirmed the original findings.

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- **the FWBC era** – from mid-2012 onwards, when the FWBC was established.

Section 2 of this report begins by comparing workplace relations regulations during the three regimes. A particular focus is on determining the extent to which the industry environment and regulations associated with the FWBC represent a return to the circumstances that prevailed prior to the Taskforce and ABCC. This can be used to indicate the extent to which the productivity gains achieved during the Taskforce and ABCC era are likely to be preserved in the FWBC era.

Next, the latest data on construction industry productivity from a variety of sources is examined to provide an up-to-date analysis of trends in construction industry productivity and the factors driving these trends. In line with earlier reports, three types of productivity indicators are assessed to determine the extent of any shifts in industry productivity from changes in industry regulation. It compares construction industry productivity between different years, between the commercial and domestic construction sides of the industry and between individual projects completed before and after changes to workplace practices. It then assesses the source of these productivity changes.

Using both the analysis of the nature of the three regulatory regimes and the productivity data, conclusions are drawn on the impact on productivity in the building and construction industry from the regulatory changes. First, the boost to productivity from improved workplace practices associated with the Taskforce and ABCC is estimated. Second, the extent to which this productivity boost is expected to be preserved under the FWBC regime is also estimated.

Section 3 of this report describes how these productivity effects are introduced into an economy-wide model to estimate the impacts of the regulatory changes in the construction industry on the Australian economy as a whole. This economy-wide modelling is undertaken using Independent Economics' Computable General Equilibrium model, the Independent CGE model.

This modelling provides estimates of the long-term effects on activity in the construction industry and other industries from changes to the productivity of the construction industry. Importantly, it also estimates the permanent, flow-on impacts to consumers from changes in construction industry productivity. Section 4 presents estimates of the economic impacts of the change in productivity from the Taskforce/ABCC era while section 5 presents analogous estimates for the FWBC era.

While all care, skill and consideration has been used in the preparation of this report, the findings refer to the terms of reference of Master Builders Australia Ltd and are designed to be used only for the specific purpose set out below. If you believe that your terms of reference are different from those set out below, or you wish to use this report or information contained within it for another purpose, please contact us.

The specific purpose of this 2013 report is to fully update the economic analysis performed in the 2007, 2008, 2009, 2010 and 2012 reports for new developments since February 2012.

The findings in this report are subject to unavoidable statistical variation. While all care has been taken to ensure that the statistical variation is kept to a minimum, care should be taken whenever using this information. This report only takes into account information available to Independent Economics up to the date of this report and so its findings may be affected by new information. The information in this report does not represent advice, whether express or inferred, as to the performance of any investment. Should you require clarification of any material, please contact us.

2 The impact of changes in workplace practices on building and construction industry productivity

This section provides an analysis of productivity trends in the building and construction industry, including the magnitude and sources of these trends. As mentioned in the introduction, this report analyses industry productivity across three time periods, which are:

- **the pre-Taskforce/ABCC era** – the period prior to the establishment of the Taskforce and ABCC (up to and including 2002);
- **the Taskforce/ABCC era** – the period of operation for the Taskforce and ABCC (between 2002 and mid-2012); and
- **the FWBC era** – from mid-2012 onwards, when the FWBC was established.

First, the workplace environment in each of the three eras is reviewed in section 2.1. Section 2.2 analyses historical productivity trends in the building and construction industry, and compares the performance of the industry to the economy as a whole. Finally, based on this evidence, section 2.3 draws conclusions about the effect of changes in work practices on productivity in the building and construction industry.

2.1 Workplace practices in the building and construction industry

This section discusses changes in the workplace environment in the building and construction industry in each of the three regulatory regimes. It assesses the expected effect of the regulatory arrangements on the industry's productivity. The industry environment and regulatory changes are analysed for each of the three regimes in turn.

2.1.1 Before the Taskforce and ABCC

In 2001, the Royal Commission into the Building and Construction Industry (Cole Royal Commission) was established to review the conduct and practices in the Australian building and construction industry. The final Cole Royal Commission Report⁷ was released in 2003 and concluded that there was widespread misconduct and poor work practices in the industry.

The Cole Royal Commission found that the industry's productivity performance was below that of the market sector average. For example, Tasman Economics⁸ found that, between 1988/89 and 1999/00, multifactor productivity grew by 15.3 per cent in the market sector. By comparison, multifactor productivity in the construction sector grew by only 4.3 per cent over the same period.

⁷ Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003

⁸ Tasman Economics, *Productivity and the Building and Construction Industry*, Discussion Paper 17, prepared for the Royal Commission into the Building and Construction Industry, 2002

The Cole Royal Commission linked this poor productivity performance to the poor work practices in the industry. For example, the Cole Royal Commission found that:

- industry participants engaged in unlawful and inappropriate behaviour;
- pattern bargaining resulted in rigid employment structures including “commonality of wages and conditions, fixed hours of work, fixed rostered days off and limited flexibility”⁹; and
- there was “widespread application of, and surrender to, inappropriate industrial pressure”¹⁰.

Importantly, the Cole Royal Commission found that unions had assumed control of managing construction projects, rather than head contractors and major subcontractors, and that this was detrimental to the industry and overall economy. That is, while in all other industries it is clear that employers are responsible for managing their businesses, the reverse was true in the construction industry. The Cole Royal Commission identified that attitudinal change was required to solve this problem and that the “benefits to the industry and the Australian economy from improved productivity flowing from this cultural change are very significant”¹¹.

Based on its investigations, the Cole Royal Commission concluded that these problems occurred because of the unique structure of the building and construction industry. Head contractors had an “unwillingness and incapacity ... to respond to unlawful industrial conduct causing them loss”¹². Short term profitability considerations together with the importance of building a reputation for on-time delivery meant that contractors preferred to quickly resolve issues rather than become involved in long conflicts¹³. As such, contractors tended to concede to union demands for reasons of commercial expediency.

In addition, limited international competition in the construction industry means that unions have more scope to impose work practices that impede productivity. Lower productivity leads to higher costs for construction projects, and these are passed on to the clients of the construction industry – government and businesses – who in turn pass them on to households in the form of higher consumer prices and taxes.

The Cole Royal Commission concluded that the conditions in the Australian building and construction industry were unlike those in other industries.

*These findings demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular. They indicate an urgent need for structural and cultural reform.*¹⁴

Despite these unique features, the laws and regulations used to govern workplace relations in the building and construction industry were the same as in all other industries. The Cole Royal Commission found that the legal processes “available to enforce industrial or civil rights, and to

⁹ Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003, p12

¹⁰ Ibid., p5.

¹¹ Ibid., p4.

¹² Ibid., p11.

¹³ Ibid., p11.

¹⁴ Ibid., p6

recover losses are slow, cumbersome and expensive”¹⁵, and that this had contributed to the atypical environment in the building and construction industry.

In response to these special circumstances in the building and construction industry, the Cole Royal Commission recommended that mechanisms be put in place to restore the rule of law, with significant penalties for those breaching the law. The Cole Royal Commission recommended that an “Act of special application to the building and construction industry”¹⁶ be put in place, as well as codes of practice for the industry. The Cole Royal Commission also recommended that an independent commission be established to monitor the conduct of the industry.

2.1.2 The Taskforce and ABCC era

In response to the recommendations of the Cole Royal Commission, laws and regulations governing the building and construction industry were introduced and strengthened. The Building Industry Taskforce (the Taskforce) was established in 2002¹⁷, and given increased responsibility and regulatory powers. In 2005, the *Building and Construction Industry Improvement Act 2005* (BCII Act) established the ABCC, among other things. The ABCC was provided with powers to monitor, investigate and enforce the laws and guidelines in the building and construction industry. These building industry-specific reforms built on the more general workplace relations reforms that were implemented across the economy in the years to 2006.

The main building industry-specific reforms associated with the Taskforce and ABCC are briefly listed below. These reforms are then discussed in more detail in the following section.

- The National Code of Practice for the Construction Industry (the National Code) and the associated Implementation Guidelines (Guidelines) were strengthened. The National Code and Guidelines seek to influence work practices in the building and construction industry by setting “employer and employee standards relating to the performance of building and construction work and to conditions for bidding for Commonwealth funded construction work”¹⁸.
- Broader forms of industrial action were made unlawful in the building and construction industry compared to other industries.
- The maximum penalties for unlawful conduct in the building and construction industry were trebled.
- The ABCC was given powers to compulsorily acquire information either through compelling a person to attend an examination and answer questions, or through obtaining documents relevant to an investigation.

¹⁵ Ibid., p13

¹⁶ Ibid., p13

¹⁷ The *Interim Building Industry Task Force* was set up in response to the first report of the Cole Royal Commission in November 2002. In April 2003, the operation of the Building Industry Task Force was extended, pending the establishment of the then proposed ABCC. In March 2004, it was announced that the taskforce would become a permanent body, and would operate until the ABCC was established. For more information, see the following link.
http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0405/05bd139

¹⁸ Parliamentary Library, *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, Bills Digest No. 80, 2011-12, November 2011, p4.

- The ABCC was able to initiate proceedings on matters which have already been settled between the parties.
- Greater restrictions were placed on the right of union representatives to enter construction sites.

The reforms respond to the issues identified in the Cole Royal Commission and address the problems that arise from the unique circumstances of the building and construction industry. Therefore, they are expected to have improved work practices and labour productivity in the construction industry. These gains have been quantified by analysing the data presented in section 2.2.

Despite the productivity gains associated with the Taskforce and the ABCC, the ABCC was abolished in mid-2012. The following section compares the building industry-specific policies associated with the Taskforce and ABCC with those related to their replacement, the FWBC. In doing so, it includes a more detailed discussion of the policies listed above. As discussed in the following section, the reforms associated with the FWBC are likely to result in an unwinding of the productivity gains achieved during the Taskforce and ABCC era.

2.1.3 The FWBC era

In mid-2012 the FWBC was established, replacing the ABCC. Compared to the Taskforce and ABCC era, the regulatory environment enforced by the FWBC is more lenient and penalties are lower. The jurisdiction of the FWBC has also been narrowed, and its powers of investigation weakened.

Despite the unique problems in the building and construction industry, as identified in section 2.1.1, these changes have been implemented with the aim of shifting the industry's regulations to much more closely resemble regulations in other industries. This represents a return to close to the situation in place in the pre-Taskforce and ABCC era. This return has occurred despite the following conclusion of the 2009 Wilcox report.

However, the ABCC's work is not yet done. Although I accept there has been a big improvement in building industry behaviour during recent years, some problems remain. It would be unfortunate if the inclusion of the ABCC in the OFWO¹⁹ led to a reversal of the progress that has been made.²⁰

Therefore, dismantling the reforms of the Taskforce and ABCC era is likely to allow the workplace environment to deteriorate towards the situation identified by the Cole Royal Commission, as discussed in section 2.1.1. This section seeks to identify the extent to which this deterioration is likely to occur, to assess the extent to which the productivity gains generated in the Taskforce and ABCC era are likely to be wound back.

This section first considers the extent to which the building industry code and guidelines have been returned to the pre-Taskforce/ABCC era. Following this, it examines the extent to which the functions and powers of the FWBC are weaker than those of the Taskforce/ABCC. It then considers whether there has been any change to the underlying circumstances necessitating building industry-

¹⁹ Office of the Fair Work Ombudsman

²⁰ Wilcox, M, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, p14.

specific regulations. Finally, an assessment is made of the extent to which these factors indicate a return to the pre-Taskforce/ABCC workplace relations environment.

Weaker building industry code and guidelines

As noted in the previous section, the National Code and Guidelines seek to influence work practices by setting standards for building and construction work. Most importantly, if a contractor does not abide by the National Code in all of its projects, then it is unable to bid for Commonwealth-funded work. Since the Commonwealth Government is a large procurer of construction services, the National Code and Guidelines can assert considerable influence over the industry.

The establishment and enforcement of such Guidelines was a key recommendation of the Cole Royal Commission. Therefore, during the Taskforce and ABCC eras, the Guidelines were progressively strengthened. The Taskforce and ABCC had responsibility for enforcing the Guidelines.

However, from August 2009, “less stringent”²¹ Guidelines have operated. More importantly, wide-ranging changes were implemented in May 2012. Following these changes, the Guidelines “no longer try to impose formal requirements upon the construction industry that do not apply to employers and employees elsewhere in the labour market”²². Since February 2013, a new Code has applied which involves some further weakening of restrictions on right of entry requirements and enterprise bargaining²³.

State governments have expressed concern that the weakened National Code and Guidelines are likely to increase the cost of state construction projects.^{24, 25, 26} Therefore, the Victorian, NSW and Queensland governments have strengthened their own State Guidelines in 2013²⁷. However, it is unclear whether these guidelines are able to be applied by State governments, and so their impact on productivity cannot yet be assessed.²⁸

More limited function and weaker powers of the FWBC

On 1 June 2012, the ABCC was abolished and replaced by the FWBC. This change was brought about by the *Fair Work (Building Industry) Act 2012*, which reversed or modified many of the provisions in the BCII Act. The changes aim to remove the building-industry specific industrial law that was designed to address the problems that were specific to the building industry. As such, there has been a reversal of the industry reform implemented throughout the Taskforce and ABCC era.

There are several main areas in which the functions and powers of the ABCC and FWBC can be compared. These are summarised in Table 2.1 and discussed below.

²¹ Parliamentary Library, *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, Bills Digest No. 80, 2011-12, November 2011, p4.

²² Creighton, B; ‘Government procurement as a vehicle for workplace relations reform: the case for the national code of practice for the construction industry’, *Federal Law Review*, Vol. 40 (3), 2012, p364

²³ Gadens Lawyers, ‘Don’t be ‘blindsided’ by the new Building Code 2013’, www.gadens.com.au; viewed 16/08/2013.

²⁴ The Hon Robert Clark MP, *CCU to target work site conduct under revised construction guidelines* [Press Release], 20 May 2013

²⁵ Mike Baird MP, *Delivering value on infrastructure – construction guidelines now in force* [Press Release], 1 July 2013

²⁶ Jarrod Bleijie, *Feedback sought on construction code guidelines*, [Press Release], 4 March 2013

²⁷ Workplace Express, *Eastern States line up on construction*, 22 March 2013, www.workplaceexpress.com.au, viewed 16 July 2013.

²⁸ Corrs Chambers Westgarth, *Federal Court Rules on the Interaction Between the Victorian Construction Code and Implementation Guidelines and the Adverse Action Provisions*, 28 May 2013 www.corrs.com.au viewed 1 August 2013.

Table 2.1: Comparison of ABCC and FWBC regulatory regimes

Aspect	Pre Taskforce / ABCC	Taskforce / ABCC	FWBC
Unlawful industrial action definition	Same as all other industries	Building industry faces stronger regulations than other industries	Same as all other industries
Penalties	Same as all other industries	Building industry faces penalties three times higher than other industries	Same as all other industries
Powers to obtain information	Same as all other industries	Strong powers to acquire information: • able to compulsorily require a person to attend an examination and answer questions • able to ensure confidentiality of examinations	Additional powers still exist but are restricted: • use of powers needs to be approved on a case-by-case basis • Independent Assessor can determine that the powers do not apply to particular projects • sunset clause means that powers lapse after three years and will be reviewed
Settled proceedings	Not Applicable	Able to initiate fresh proceedings on matters already settled between parties	Not able to initiate fresh proceedings on matters already settled between parties
Right of entry	Loose restrictions	Tighter restrictions	Loose restrictions
Jurisdiction (definition of building work)	Not Applicable	Broad coverage Includes pre-fabrication of made to order components, but excludes • mining and extractive activities • domestic building if fewer than four units	Narrower coverage, excluding • off-site prefabrication on permanent manufacturing site • mining and extractive activities • domestic building if fewer than four units
Minister's role	Not Applicable	Minister not able to give directions about the policies, programs and priorities	Minister able to give directions about the policies, programs and priorities
Reporting	Not Applicable	Required to report on: • number and type of matters investigated • assistance to employees • compliance with Building Code	Not required to report on: • number and type of matters investigated • assistance to employees • compliance with Building Code

Sources: Parliamentary Library, *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, Bills Digest No. 80, 2011-12, November 2011
Parliament of the Commonwealth of Australia, *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012*, Revised Explanatory Memorandum

The changes listed in Table 2.1 above all represent a dilution of the FWBCs powers and functions, shifting regulation in the building and construction industry back close to the pre-Taskforce and ABCC era. Of these changes, five stand out as key differences between the ABCC and the FWBC.

First, one of the most important differences is that the circumstances under which industrial action attracts penalties have been narrowed. Under the ABCC, the definition of unlawful industrial action applied to the building industry was more comprehensive than for other industries. This broader definition was removed with the introduction of the FWBC.²⁹

Second, under the ABCC, the building and construction industry faced higher penalties for breaching industrial law compared to other industries. This is no longer the case. When the FWBC was introduced, penalties were cut to 30 per cent of their previous levels. The maximum penalty for a body corporate was cut from \$110,000 to \$33,000 and for individuals it was cut from \$22,000 to \$6,600. (In December 2012 all penalties in Commonwealth statutes were increased,³⁰ but this does not mean that the building industry faces higher penalties than other industries.)

Third, the FWBC has a more limited ability to use its compulsory examination powers compared to the ABCC. The FWBC retains the ABCC's power to compulsorily obtain information. However, the use of these powers is more restricted under the FWBC.

In its 2009/10 annual report, the ABCC noted that "the use of the compliance powers has assisted investigations which otherwise would have stalled. Often witnesses are reluctant to assist the ABCC Inspectors voluntarily as they are fearful of retribution. In these circumstances, many witnesses prefer that they are subject to the compliance powers before they provide information".³¹ Based on this observation, restrictions on these powers would be expected to hinder the effectiveness of the FWBC.

Despite this, the use of these powers experienced a sharp decline the following year, 2010/11, and remained low in 2011/12. This is shown in Table 2.2. The 2010/11 ABCC annual report attributes the sudden decline to "a change of investigative technique, a shift in agency emphasis and [sic] consistent communication to the industry by the ABCC and increased voluntary compliance by parties"³².

²⁹ Parliament of the Commonwealth of Australia, *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012*, Revised Explanatory Memorandum

³⁰ FWBC, *Penalties for Breaches of Workplace Relations Law Rise by 54.5 per cent*, January 2013, www.fwbc.gov.au, viewed 1 August 2013.

³¹ ABCC Annual report 2009/10, pg 43

³² ABCC Annual report 2010/11, pg 49

Table 2.2 Number of examinations undertaken by the ABCC and FWBC by type of examinee

	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12*	2011/12*
						July '11 - May '12	Jun '12
Employee	15	36	39	23	2	2	0
Union	4	2	1	0	0	0	0
Management	1	15	20	14	4	1	1
Other	0	1	0	0	0	0	0
Total	20	54	60	37	6	3	1

Source: ABCC and FWBC Annual Reports

Note: * For the 2011/12 financial year, the ABCC published a report for the period from 1 July 2011 to 31 May 2012. The FWBC published an annual report for June 2012. In this annual report, the FWBC noted that it issued no new examination notices. The single examination it conducted in June 2012 was from an investigation that was continuing from the ABCC.

It is likely that the main factor driving the sharp reduction in the number of examinations is the “change of investigative technique” and “shift in agency emphasis”. This is because it is unlikely that such a large and sudden reduction in the number of examinations can be attributed entirely to “increased voluntary compliance”. If such cultural improvements were the primary driver, then similar reductions in examinations are also likely to have been observed in previous years, but this was not the case.

The sharp reduction in examinations observed from 2010/11 is likely to be carried through to the FWBC. As outlined above, the FWBC faces restrictions on the use of its powers to obtain information. This is likely to hinder its use of examination powers in its investigations. As a result, the effectiveness of the FWBC in enforcing the regulations is likely to be lower than for the ABCC.

Fourth, the FWBC cannot continue to participate in proceedings or initiate fresh proceedings on matters which have already been settled between the parties. In contrast, the ABCC was able to do so. This is an important change because, as discussed in section 2.1.1, the Cole Royal Commission concluded that head contractors in the building and construction industry tend to concede to union demands for reasons of short-term commercial expediency, even if there has been some unlawful conduct. Therefore, preventing the FWBC from continuing or initiating proceedings on matters which have been settled can allow unlawful practice and the associated losses to occur without penalty, which is detrimental to the productivity of the industry. Recognising this, the Law Council of Australia concluded that this change is likely to “significantly impact the ability of the independent regulator to enforce compliance with the relevant legislation in the building and construction industry.”³³

Fifth, the right for union representatives to enter work sites has been expanded. The Cole Royal Commission concluded that the ‘right of entry’ provisions were being abused and exploited by unions. Right of entry is intended to be exercised for the purpose of investigating a suspected breach of relevant awards or laws. However, unions were able to abuse this provision because there was no

³³ Law Council of Australia, Law Council raises concerns about dilution of building and construction industry regulator’s role [Press Release], 8 March 2012.

requirement that they specify the nature of the breach that they suspected. This resulted in “union officials acting with the apparent belief that their right of entry was effectively unlimited”³⁴, and meant that they could extend their influence over the work site.

During the Taskforce and ABCC era, the right of entry provisions were modified to prevent this abuse. Unions were required to establish the nature of their concern before gaining entry. In addition, the ABCC was notified when a union official intended to visit a work site, and was able to attend the inspection. As a result, the Wilcox report noted that the “quite remarkable transformation in the industry was most commonly attributed by respondents to those legislative changes which prevent union officials from accessing worksites unannounced and disrupting work and calling stoppages. Commonly, union officials justified such action by citing a spurious or marginal safety issue.”³⁵

Together with the introduction of the FWBC, these restrictions on right of entry have been wound back, first in 2012 and again in 2013. Importantly, union officials can now enter work sites for purposes as broad as “to hold discussions with potential members”³⁶. This open access to work sites is similar to the situation identified by the Cole Royal Commission, and therefore is likely to allow abuse of the right of entry to re-occur.

Therefore, the changes in these five main areas associated with the establishment of the FWBC represent virtually a full unwinding of the building industry regulations that were implemented during the Taskforce and ABCC era. The main remaining feature from the Taskforce and ABCC era is that the building and construction industry still has its own regulator. However, because it does not have the strong building industry-specific legislation and powers that were held by the Taskforce and ABCC, the simple existence of a building industry-specific regulator is unlikely to be able to contribute much to workplace practices in the industry.

Importantly, this unwinding of the building industry-specific regulations has occurred even though there has been no change to the unique underlying circumstances which necessitated the reforms. This is discussed below.

Unique circumstances in the building and construction industry unchanged

Together with change in the regulatory environment, developments in the underlying circumstances in the building and construction industry are central to understanding the effect of the FWBC on productivity. Given that the reforms implemented during the Taskforce and FWBC era have been largely wound back, if the circumstances necessitating these reforms remain, then it can be expected that the productivity gains generated during the Taskforce and ABCC era would be largely lost.

Two of the main factors contributing to poor work practices in the building and construction industry are still present. These factors were identified in section 2.1.1.

- Firstly, commercial pressures on head contractors are unlikely to have reduced since the Taskforce/ABCC era. They still require a focus on short-term project profitability and the need to maintain a reputation for on-time delivery. Therefore, in the current environment,

³⁴ Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003

³⁵ Wilcox, M, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, p51.

³⁶ Fair Work Ombudsman, Right of Entry Fact Sheet, www.fairwork.gov.au, viewed 7 August, 2013

contractors are still likely to concede to union demands rather than become involved in long disputes.

- Secondly, the construction industry faces limited international competition. Since unions have an industry-wide influence, this limited international competition still gives unions scope to exert pressure for work practices that inhibit productivity.

The question of whether permanent cultural change has been achieved by the ABCC is also important. In 2009, the Honourable Murray Wilcox QC reported on his consultations in the building and construction industry, commissioned by the Government. He found that, in 2009, unlawfulness and inappropriate conduct was still present in the industry.

I am satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the BCD³⁷ to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove.³⁸

Considering the above, the unique underlying circumstances in the building and construction industry leading to unlawful behaviour and productivity losses are unlikely to have significantly changed since the time of the Cole Royal Commission.

This suggests that regulations and enforcement activities specific to the building industry are still required to achieve efficient work practices. By the same token, the return to the pre-Taskforce/ABCC regulatory environment is likely to lead to the reversal of the productivity gains achieved during the Taskforce/ABCC era.

³⁷ BCD refers to the 'Building and Construction Division' which went on to become the FWBC.

³⁸ Wilcox, M, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, p3.

2.2 Productivity comparisons in the building and construction industry

The previous section reviewed the changes to the workplace relations environment and found that, while a significant improvement in building and construction industry productivity is expected to have occurred during the Taskforce and ABCC era, this is expected to be largely unwound during the FWBC era.

To test these expectations, this section provides an analysis of productivity trends in the building and construction industry over the three time periods considered in this report. The focus is on determining whether or not productivity in the industry has outperformed/underperformed productivity in the wider economy. Similar to our earlier reports, we perform several types of productivity comparisons.

- **Year-to-year** comparisons of building and construction industry productivity are made using data from the Australian Bureau of Statistics (ABS), the Productivity Commission and published academic research to determine whether there was any shift in construction industry productivity following the changes in workplace practices.
- The non-residential building sector and multi-unit residential sector (i.e. commercial construction) have been the focus of improved workplace practices because this is traditionally the higher cost side of the building and construction industry. Historically, the housing construction (domestic construction) sector of the industry can complete the same construction tasks at lower cost than the commercial construction sector. We use Rawlinsons data on construction costs to determine whether changes in workplace practices have affected the cost gap between **commercial construction and domestic construction**. For example, a narrowing of the cost gap may indicate that improved workplace practices have boosted productivity in commercial construction.
- Case studies of **individual projects**, completed in earlier reports by Econtech Pty Ltd and other sources, compare projects completed before and after changes in workplace practices to provide information on the impact of changed workplace practices on the productivity performance of individual projects.

For this 2013 update, we have fully updated our 2012 report for the latest data. This means that full information is now available for the first two eras analysed in this report: the era before the establishment of the Taskforce and ABCC and the era of the Taskforce and the ABCC. We also present the economic data that has been released since the introduction of the FWBC in mid-2012.

This section first provides an explanation of differences in productivity measures. Following this explanation, each of the different types of productivity comparisons listed above are discussed in turn. That is, subsection 2.2.1 examines year-to-year comparisons and subsection 2.2.2 compares commercial and domestic construction productivity. Subsection 2.2.3 reviews studies comparing the productivity of individual building and construction projects completed before and after changes to workplace practices. Subsection 2.2.4 analyses the impact of improved workplace practices on working days lost to industrial action.

Differences in productivity measures

There are a number of alternative approaches to measuring industry productivity. The most common measures are labour productivity, multifactor productivity and total factor productivity. For ease of exposition, the discussion on these three productivity measures is included below and follows the discussion outlined in the original 2007 Econtech Pty Ltd report.

- **Labour Productivity.** Labour productivity is the ratio of real output produced to the quantity of labour employed. Labour productivity is typically measured as output per person employed or per hour worked. Changes in labour productivity can be attributed to labour where they reflect improvements in education levels, labour efficiency, technology or work practices that makes labour more productive. Changes in labour productivity can also reflect changes in capital and intermediate inputs, in technical and organisational efficiency, as well as the influence of economies of scale and varying degrees of capacity utilisation.
- **Multifactor Productivity (MFP).** MFP is defined as the ratio of output to combined inputs of labour and capital. In principle, MFP is a more comprehensive productivity measure because it identifies the contribution of both capital and labour to output. In practice, labour input can be measured more accurately than capital input. Reflecting these competing considerations, both labour productivity and MFP continue to be used as measures of productivity.
- **Total Factor Productivity (TFP).** TFP is the ratio of output to the combined inputs of labour, capital and intermediate inputs (such as fuel, electricity and other material purchases). While this measure is the most comprehensive, often it cannot be calculated because there is insufficient data on intermediate inputs.

2.2.1 Year-to-year comparisons

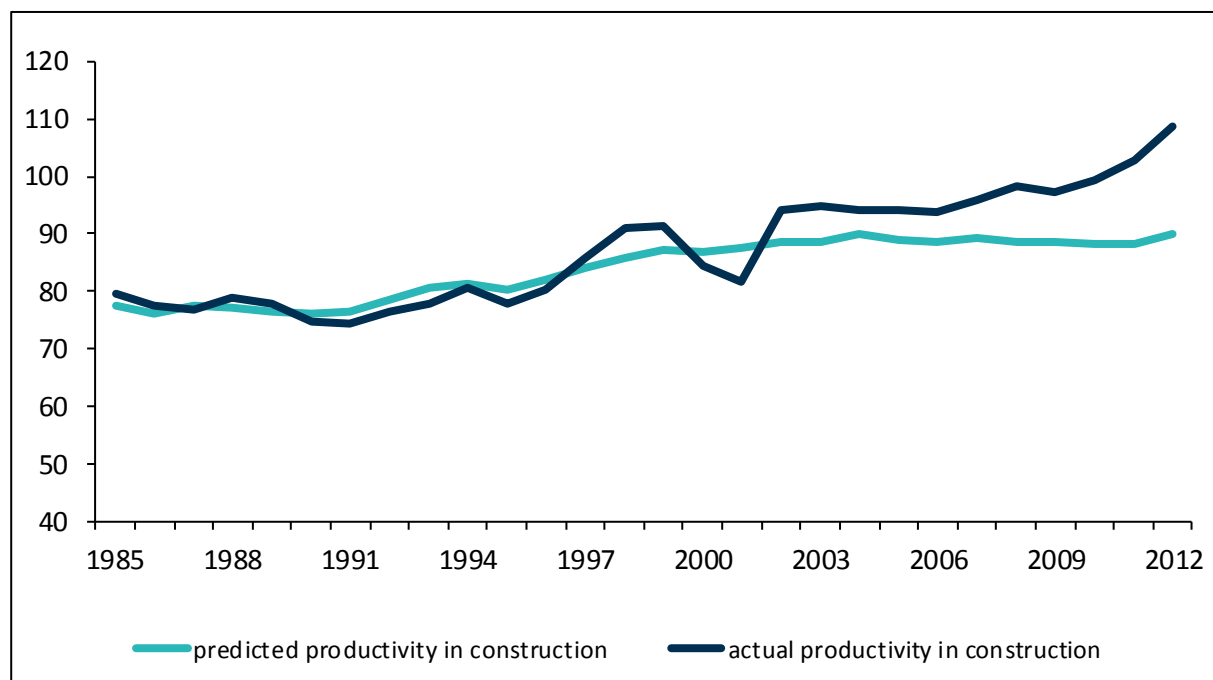
This section reviews trends in productivity in the construction industry over a number of years for each of the three productivity measures outlined above. It begins by analysing the aggregate construction industry labour productivity data from the ABS. This section then reviews and extends an analysis of multifactor productivity trends in the construction industry undertaken by the Productivity Commission. Finally, this section analyses total factor productivity in the construction industry, using published research. For each productivity indicator, the analysis is completed for:

- data up to and including 2002, the period prior to the establishment of the Taskforce/ABCC;
- data between 2002 and mid-2012, the period of operation for the Taskforce/ABCC; and
- data from mid-2012 onwards, when the FWBC was established.

Labour productivity

An analysis of the latest ABS data on building and construction industry labour productivity is presented below. Specifically, building and construction industry output and employment data are used to make year-to-year comparisons of industry labour productivity. Chart 2.1 shows actual productivity in the building and construction industry compared to predictions based on historical performance.

Chart 2.1: Actual construction industry labour productivity compared with a prediction based on an historical benchmark



Source: Independent Economics estimates based on ABS data

The historical productivity performance of the construction industry is assessed using data for the period prior to the establishment of the Taskforce/ABCC (from 1985 to 2002). For this period, regression analysis was used to establish the trend in productivity in the construction industry, relative to the trend in productivity for the economy as a whole. This analysis identifies whether there is a component of building and construction industry productivity that cannot be explained by factors driving productivity in the economy as a whole and trends in construction industry productivity prior to 2002 (i.e. in the pre Taskforce/ABCC era). This would assist in identifying whether or not improved workplace practices during the Taskforce/ABCC era have had a positive impact on productivity in the construction industry.

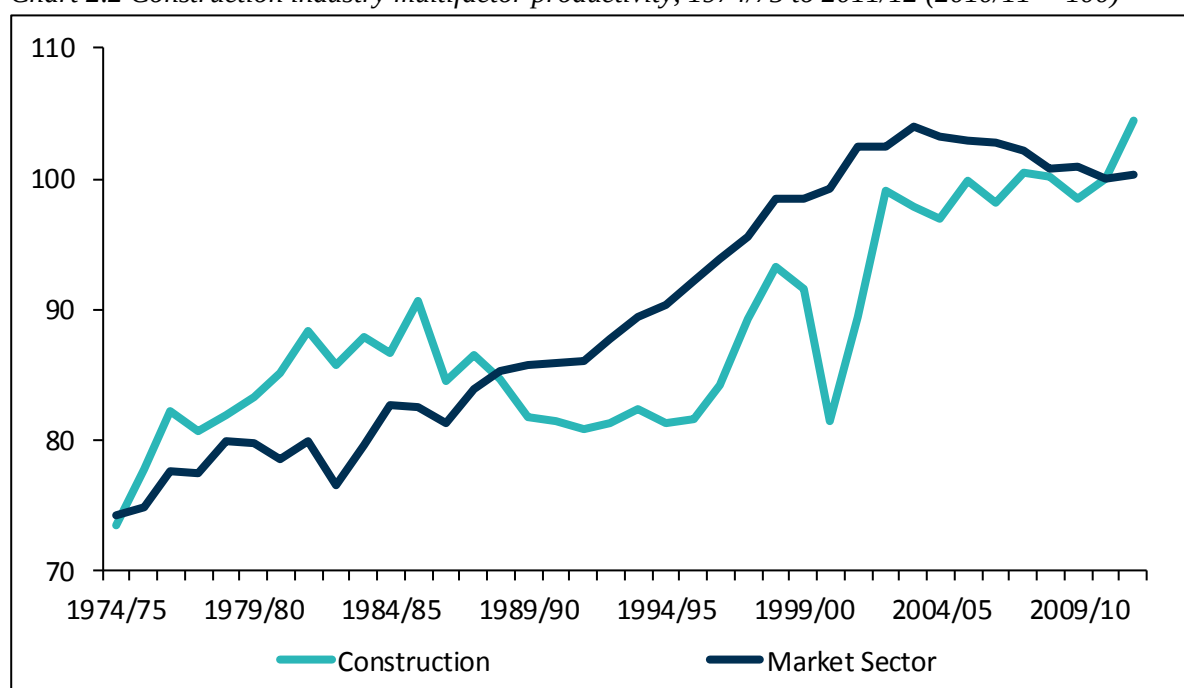
As can be seen in Chart 2.1, since 2002 actual construction industry labour productivity has consistently outperformed predictions based on past trends. In 2010, actual construction industry productivity was approximately 12.6 per cent higher than predictions based on its relative historical performance. This indicates that improved workplace practices have lifted labour productivity in the building and construction industry. Industry productivity outperformance was even higher in 2011 and 2012, at 16.4 per cent and 21.1 per cent, respectively. The additional labour productivity outperformance over the last two years is driven by a compositional shift within the building and construction industry towards engineering construction, which is less labour intensive. For example, several large LNG projects began construction during 2011 and 2012. Other measures of labour productivity that are not affected by these compositional effects, including the measures discussed in section 2.2.2 of this report, show that the productivity outperformance in the construction industry has stabilised, rather than expanded further, in recent years.

Unfortunately, labour productivity data for 2013, which would begin to reflect the operation of the FWBC, is not yet available. So an assessment of the FWBC's impact on this measure of labour productivity is not possible at this time.

Multifactor productivity

This section examines changes in multifactor productivity (MFP) in the construction industry using aggregate data from the Productivity Commission (PC) and the ABS. The PC calculates indices of productivity in 12 industry sectors based on data provided by the ABS. Specifically, the ABS provides estimates of multifactor productivity from 1985/86 onwards and the PC extends these estimates back to 1974/75 using published and unpublished ABS data. The data series were last updated by the PC in February 2009, with 2007/08 as the latest year of data. Since then, the ABS has released, annually, updated data on industry multifactor productivity. The latest multifactor productivity data available from the ABS is for 2011/12. Independent Economics has combined the PC and ABS data to develop estimates of multifactor productivity between 1974/75 and 2011/12 for the construction industry. Chart 2.2 compares this multifactor productivity in the construction industry with multifactor productivity in the market sector as a whole from 1974/75 to 2011/12.

Chart 2.2 Construction industry multifactor productivity, 1974/75 to 2011/12 (2010/11 = 100)



Source: Productivity Commission 2009, "Productivity Estimates and Trends", ABS Cat No. 5260.0.55.002, ABS Cat No. 5204.0 and Independent Economics estimates.

While productivity in the market sector has followed a fairly steady upward trend, productivity in the construction industry was fairly flat through the 1980s and 1990s. The PC found that multifactor productivity in the construction industry was no higher in 2000/01 than 20 years earlier³⁹. As shown in Chart 2.2, construction industry productivity is below the level seen in 1980/81 during several periods, including between 1988/89 and 1996/97.

However, construction industry productivity then strengthened considerably. The data shows construction industry productivity rising by 16.8 per cent in the ten years to 2011/12 (starting from a value of 89.4 in 2001/02 and escalating to 104.5 in 2011/12)⁴⁰. Over the same period, multifactor

³⁹ Productivity Commission, *Productivity Estimates to 2005-06*, December 2006

⁴⁰ The improvement in MFP in the final year of this data may reflect the higher share of engineering construction, in the same way that labour productivity was affected in the same year, as discussed above.

productivity in the market sector fell by 2.1 per cent. This confirms the strong construction industry productivity outperformance of the last decade already seen using labour productivity in Chart 2.1.

As noted in the 2012 report, a study by the Grattan Institute also found that the building and construction industry was one of only three industries that have enjoyed faster labour and multifactor productivity growth in the 2000s compared to the 1990s⁴¹. Administration and support services and arts and recreation services are the other two industries whose productivity performance has improved in the 2000s.

Similar to the case for labour productivity, data on multifactor productivity for 2012/13 is not yet available. Hence, an assessment of the impact of the FWBC on this multifactor productivity measure is not possible at this time.

Total factor productivity

The 2012 report discussed a study by Li and Liu which estimated total factor productivity for the Australian building and construction industry using ABS data⁴². The results of this research are summarised here for ease of reference; for further details please refer to the 2012 report.

Total factor productivity estimates from this research paper are available between 1990 and 2007. Similar to the analysis using labour productivity and multifactor productivity, growth in total factor productivity in the building and construction industry was faster in the five years to 2007, compared to growth in the five years to 2002. Between 2003 and 2007, total factor productivity in the Australian construction industry grew by 13.2 per cent, whereas the industry's productivity grew by only 1.4 per cent between 1998 and 2002.

2.2.2 Commercial versus domestic residential comparisons

Improved workplace practices (consisting of the establishment of the Taskforce, the ABCC and supporting industrial relations reforms) are expected to have their main impact on the non-house building side of the construction industry, rather than on the house building side. This is because the ABCC's jurisdiction does not cover housing construction of four dwellings or less (as well as the extraction of minerals, oil and gas). The jurisdiction of the FWBC is also focussed on the non-house building side of the construction industry.

The ABCC's and FWBC's mandate is on the non-house building side of this industry because this is where, traditionally, there have been more industrial disputes, poorer work practices and higher costs for specific tasks. The house building side, on the other hand, is considered to be more flexible – reflecting the involvement of many small, independent operators and the extensive use of piece rates for work performed.

So another way of testing the impact of the ABCC and FWBC is by examining whether it has led to any improvement in productivity on the non-house building side of the industry compared with the house building side. This can be assessed at a detailed level by comparing how the regulator has affected the relative performance of the two sides of the industry in undertaking the same tasks.

⁴¹ Eslake, Saul and Walsh, Marcus, *Australia's Productivity Challenge*, The Grattan Institute, Melbourne, February 2011

⁴² Yan Li and Chunlu Liu, *Malmquist indices of total factor productivity changes in the Australian construction industry*, Construction Management and Economics, 28:9, September 2010

Changes in the relative performance of the two sides of the industry can be assessed using quantity surveyors data. This data is used to investigate how the regulator has affected the cost comparison between the two sides of the industry for the same building tasks in the same locations. This report updates the analysis of the earlier reports by including the latest (January 2013) data available from Rawlinsons.

The cost comparison involves the following analysis. The Rawlinsons data is used to investigate movements in recent years in the cost comparison between commercial building and domestic residential building for the same building tasks in the same locations.

In making this comparison, the first point to clarify is the definitions of the two sides of the industry that are used in the Rawlinsons data. Commercial building includes larger-multi-unit dwellings, offices, retail, industrial and other buildings besides domestic residential buildings. It excludes engineering construction (roads, bridges, rail, telecommunications and other infrastructure). Domestic residential building includes all dwellings except larger multi-unit dwellings.

The building tasks used in this cost comparison of commercial building with domestic residential building are as follows:

- concrete to suspended slab;
- formwork to suspended slab;
- 10mm plasterboard wall;
- painting (sealer and two coats);
- hollow core door; and
- carpentry wall.

Table 2.3 shows the cost penalties for commercial building compared with domestic residential building for completing the same tasks, in the same states, for each year.

Table 2.3: Difference between the costs of tasks in commercial building and the same tasks in domestic residential building, in the same state, 2004 – 2013 (per cent)

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Change between 2004 and 2012	Change between 2012 and 2013
SA	9.2	7.3	6.6	6.6	6.1	6.1	5.2	5.1	5.0	5.0	-4.2	0.0
Qld	23.9	20.8	21.7	22.4	22.7	24.8	21.7	16.5	17.4	17.0	-6.4	-0.4
Vic.	22.7	24.0	21.8	15.1	15.7	15.7	15.2	14.2	14.2	14.1	-8.5	-0.1
WA	15.5	11.3	10.4	10.5	12.0	11.6	10.2	9.4	9.3	9.1	-6.2	-0.2
NSW	16.2	14.7	12.6	12.4	12.3	12.5	11.3	11.0	11.2	13.4	-4.9	2.2
Aust. Average	19.0	17.2	16.1	14.8	15.2	15.7	14.2	12.4	12.7	13.2	-6.3	0.5

Source: Rawlinsons Australian Construction Handbook, 2004 – 2013⁴³

Notes: (1) Australia Average is weighted according to turnover on a state-by-state basis.

(2) Dates indicate beginning of each calendar year, for example 2004 refers to January 2004.

Table 2.4: Average labour cost differences between commercial building and domestic residential building, 2004/2013 (per cent or percentage points)

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Change between 2004 and 2012	Change between 2012 and 2013
Total Cost Gap	19.0	17.2	16.1	14.8	15.2	15.7	14.2	12.4	12.7	13.2	-6.3	0.5
Labour Cost Gap	35.8	32.5	30.4	27.8	28.7	29.6	26.7	23.4	23.9	24.9	-11.8	0.9

Source: Independent Economics estimates.

⁴³ Rawlinsons is a construction cost consultancy in Australia and New Zealand. The Rawlinsons Australian Construction Handbook is the leading authority on construction costs in Australia.

As outlined in the introduction, this report follows the same methodology as was employed in the earlier reports since 2008. The analysis has simply been updated to incorporate the January 2013 Rawlinsons data. Specifically, Rawlinsons data is used to compare cost gaps between commercial and domestic construction in 2012 with the same cost gaps in 2004 to see whether the cost penalty in commercial construction has shrunk as a result of improved workplace practices⁴⁴. This base year was chosen because the Taskforce was established in October 2002 and the ABCC was established in 2005. The base year was also chosen to remove the effects of an apparent break in some of the data series. Hence, a narrowing of the cost gap over this period would suggest that improved workplace practices have had a positive effect on productivity.

In addition, the cost penalty in 2013 is compared with the cost penalty in 2012 to see whether the recent change in industry regulation has yet had an effect on cost penalties. As noted earlier, the ABCC was abolished on 31 May 2012 and the FWBC was established on 1 June 2012. The powers of the FWBC are weaker compared to the ABCC. These differences were discussed in section 2.1.

Table 2.3 confirms that, similar to the findings of the original 2007 Econtech report and other updates, the average costs of completing the same tasks in the same states have been generally higher in the commercial building sector than in the domestic residential building sector. However, as noted above, our interest is in whether this cost penalty for commercial building has shrunk since the introduction of improved workplace practices.

Between January 2004 and January 2012, Table 2.3 shows that the cost penalty for commercial building compared to domestic residential building fell in all mainland states, suggesting improved workplace practices. The biggest fall is in Victoria, where it is down from about 23 per cent to about 14 per cent. Victoria is the state where restrictive work practices in commercial building were generally acknowledged to be most pervasive⁴⁵.

January 2012 is the last data point which reflects the ABCC's operations, whilst January 2013 is the first data point which reflects the operations of the new industry regulator, the FWBC. Between January 2012 and January 2013, the cost gap in New South Wales widened by 2.2 percentage points, accounting for a smaller widening in the cost gap at the national level. In New South Wales, there was a large fall in the cost of concrete to suspended slab in domestic residential building.

The widening in the cost gap in New South Wales between 2012 and 2013, led to an increase in the cost penalty in Australia over the same time period. The cost penalty is estimated to be 13.2 per cent in 2013. This represents a small increase, of 0.5 percentage points, from the 2012 level. This increase is consistent with the expectation that the introduction of the FWBC is likely to gradually unwind the productivity gains generated in the FWBC era. Given that the full extent of the productivity gains under the Taskforce/ABCC developed gradually over several years, it can be expected that the full extent of the productivity losses under the FWBC are likely to develop over a similarly long timeframe. The FWBC began its operations on 1 June 2012. This means that, in January 2013, the FWBC had been in operation for only seven months.

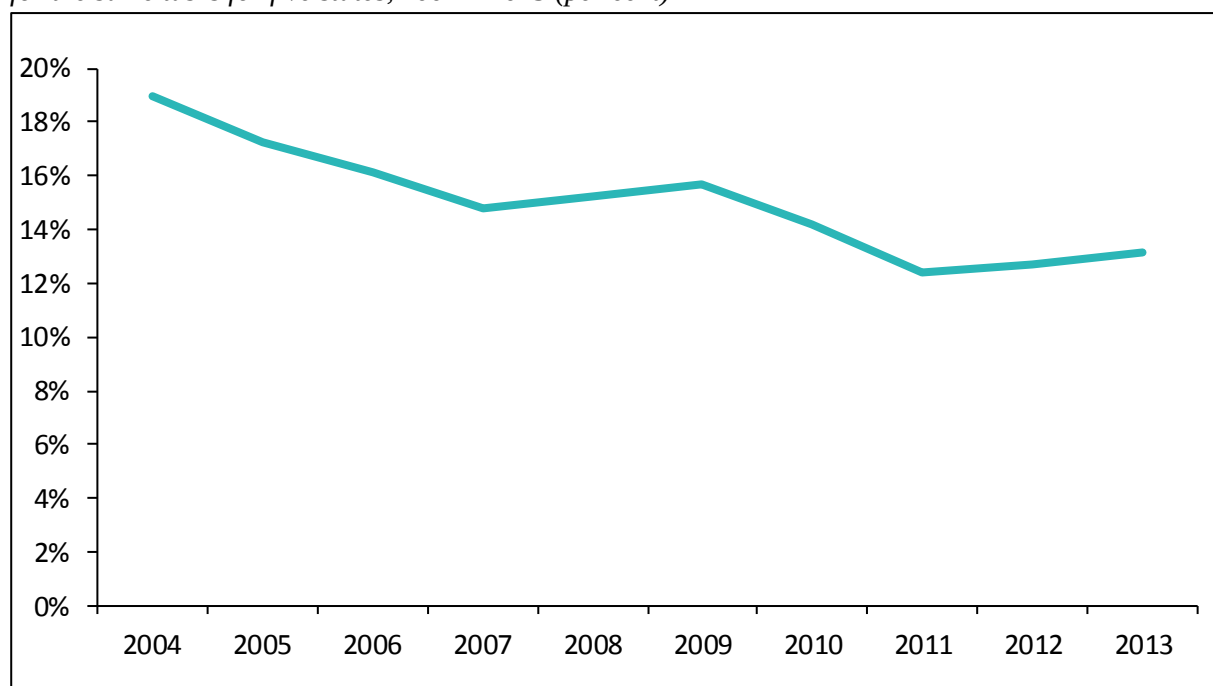
The gradual nature of the productivity gains in the Taskforce/ABCC era can be seen in Table 2.3 and Chart 2.3. Table 2.3 presented cost penalties for Australia as a whole, calculated as weighted

⁴⁴ Survey data refers to January of each year.

⁴⁵ Wilcox, *Transition to Fair Work Australia for the Building and Construction Industry*, April 2009

averages of the cost penalties for individual states,⁴⁶ while Chart 2.3 shows the Australian cost penalties alone. In January 2005, the ABCC had been in operation for approximately four months and the data showed only a small fall of 1.8 percentage points in the cost penalty. Over the period of operation of the Taskforce⁴⁷ and the ABCC, across Australia, the cost penalty for commercial building compared with domestic residential building continued to fall. The cost penalty was around 19 per cent in 2004, but fell gradually over the following years to be 12.7 per cent in 2012, or a fall of 6.3 percentage points.

Chart 2.3: Average cost differences between commercial building and domestic residential building for the same tasks for five states, 2004 – 2013 (per cent)



Source: Independent Economics estimates.

Many possible explanations for the fall in the cost penalty between 2004 and 2012 are ruled out by the close nature of the comparison used in estimating the penalty. In particular, the cost penalty is calculated for performing the same building tasks in the same locations. The only major aspect that is varied in the calculation is whether a task is undertaken as part of a commercial building project or as part of a domestic residential building project. Both types of building activity pay similar costs for materials for like-for-like projects.

This leaves a fall in the labour cost penalty (for commercial building) as the most plausible explanation for the fall in the total cost penalty. On this interpretation, Table 2.3 uses the fall in the total cost penalty for commercial building to estimate the fall in the labour cost penalty. It does this conversion using the average share of labour in total costs for the six building tasks. Labour cost shares for each type of building task listed earlier in this section are combined and come to

⁴⁶ Between this report and the 2012 reports the weights used to calculate this nationwide average have been updated to reflect more recent data.

⁴⁷ The Taskforce was established in October 2002 but it is reasonable to expect a lag before its activities started to make an impact. The data also relate to January of each year so that for 2004, the data relates to January 2004.

approximately 53 per cent⁴⁸. This results in an estimated fall from 2004 to 2012 in the labour cost gap for commercial building of 11.8 percentage points, as shown in Table 2.4. That is, using the Rawlinson's data, applying the labour share of 53 per cent to the estimated fall in the labour cost gap of 11.8 percentage points replicates the observed fall in the total cost gap of 6.3 percentage points.

In principle, this fall in the labour cost penalty for commercial building compared with domestic residential building could be due either to movements in relative productivity or wages between the two sectors. These two possible explanations are considered in turn.

Relative wages in commercial building compared with domestic residential building could have moved for two reasons. First, site allowances associated with non-residential construction have been restricted by the ABCC. However, site allowances are not included in the data for the costs of building tasks and so do not explain the fall in the cost penalty. Second, enterprise bargaining may have affected relative wages. However, enterprise bargaining easily predates our cost comparison, which begins in 2004.

This leaves post-2004 improvements in labour productivity in commercial building compared with domestic residential building as the most likely explanation for the fall in the commercial building labour cost penalty between 2004 and 2012. The timing of improvements is in line with activities of the Taskforce and the ABCC, prior to its abolition, in improving work practices and enforcing general industrial relations reforms in commercial building.

Therefore, this data suggests that there has been an improvement in labour productivity in commercial building compared with domestic residential building of at least 11.8 per cent as a result of improved workplace practices.

As Mitchell points out in his comment on the 2007 report⁴⁹, to the extent that the Rawlinsons classification blurs the desired distinction in categories, the cost gap and its movements will be understated. As noted earlier, the ABCC's jurisdiction includes housing construction of four dwellings or more. However, this type of small-scale commercial construction is included in the definition of domestic construction used by Rawlinsons. This means that a small sector of domestic construction would have also benefited from improved workplace practices and associated labour productivity boost. The inclusion of small-scale construction in the domestic construction category means that the cost gap would have narrowed further had this not been the case.

Thus, the simple estimate of the gain in productivity of 11.8 per cent is likely to be understated because a component of domestic construction (small scale construction) also benefits from a productivity boost.

Domestic residential building is less useful as a cost benchmark for engineering construction, which largely involves other, unrelated tasks. However, as noted in our earlier reports, a previous study has estimated that there is a similar cost advantage for engineering construction projects by comparing the construction of EastLink to CityLink. Specifically, a previous study showed a significant "advantage to EastLink by operating under the post-WorkChoices/ABCC environments" of 11.8 per cent. Thus it

⁴⁸ Information on labour cost shares are sourced from Rawlinsons.

⁴⁹ Mitchell, *An examination of the cost differentials methodology used in 'Economic Analysis of Building and Construction Industry Productivity' – the Econtech Report*, August 2007.

is reasonable to assume that the engineering cost improvement is likely to be at least equal to the estimate of the improvement in commercial building costs.

Hence, based on the evidence above, the relative labour productivity gain for the non-residential construction sector as a whole as a result of the Taskforce/ABCC and associated reforms is conservatively estimated at 11.8 per cent. If the estimate was adjusted to incorporate the cost of capital in determining the labour share of construction costs and if small-scale construction was excluded from the definition of domestic construction, then the estimated boost in productivity would be greater.

As discussed above, only early data is available following the introduction of the FWBC. This data is consistent with the expectation that the productivity loss from the FWBC is likely to occur gradually over several years.

2.2.3 Other supporting studies

Case studies and other research reports confirm the findings of the original 2007 report and earlier updates; that there has been a boost to building and construction productivity as a result of improved workplace practices during the era of the Taskforce and ABCC. This includes:

- case studies completed by Econtech as part of the 2007 report which estimated a 7 per cent (\$2.71 million) cost saving from a reduction in days lost to industrial disputes;
- research by the Allen Consulting group which estimated a 12.2 per cent gain in multifactor productivity in the five years to 2007⁵⁰;
- a study by Ken Phillips which estimated a 11.8 per cent saving in total construction costs for Eastlink because it was constructed under the ABCC and within the Workchoices environment⁵¹; and
- research by the John Holland Group which estimated that the construction industry has enjoyed a 10 per cent productivity dividend since the completion of the Cole Royal Commission⁵².

A more detailed discussion of the studies listed above, and other case studies, can be found in the 2008 and 2009 reports.

Recently, the Business Council of Australia commissioned the Allen Consulting Group to conduct an analysis of the potential impact of industrial relations developments in the New South Wales construction industry⁵³. The report examines a case study by Woodside Petroleum, which outlines the differences in the cost of constructing two similar LNG trains. One train (Train 4) was constructed between 2001 and 2005; thus the majority of construction was undertaken before the establishment of the ABCC. The other train (Train 5) was constructed between 2005 and 2008, and thus the majority

⁵⁰ The Allen Consulting Group, *The Economic Importance of the Construction Industry in Australia*, 2007, p18

⁵¹ Ken Phillips, *Industrial Relations and the struggle to build Victoria*, Institute of Public Affairs, Briefing Paper, November 2006

⁵² John Holland Group, *Preliminary Assessment of Economic benefits of industrial relations reform in the construction industry*, 2007

⁵³ The Allen Consulting Group, *Economic impact of construction industrial relations arrangements and investment in infrastructure – A New South Wales perspective*, 2013

of construction was undertaken under the ABCC. Train 5 lost 0.4 per cent of man hours to industrial action, while Train 4 lost 2.3 per cent. As noted in the Allens report, this case study suggests that the move to the ABCC-regime resulted in a two per cent reduction in labour costs.

However, as discussed in the following section, the number of days lost to industrial action is only one component of labour productivity. There are wider benefits from moving to the ABCC, including changes to work practices. For example, the 2007 Econtech case studies found that additional flexibility in rostering allowed for better management of resources in the building and construction industry. Hence, as noted by Allens, two per cent is the lowest estimate of the benefit from the ABCC regime.

The Allens report then estimates the economy-wide impact of a deterioration in industrial relations in the construction industry using a CGE model. Specifically, they use a CGE model to estimate the flow-on impacts on the New South Wales economy of two scenarios, a two per cent reduction in multifactor productivity and a two per cent increase in labour costs that are not funded by productivity gains. The report notes that increased industrial unrest may result in both a reduction in multifactor productivity and unfunded increase in labour costs. That is, it is possible that the effects modelled in the scenarios are additive rather than alternatives. Hence, to allow for the possibility that the effects are greater, scenarios for a ten per cent reduction in multifactor productivity and a ten per cent increase in wages that are unfunded were also modelled.

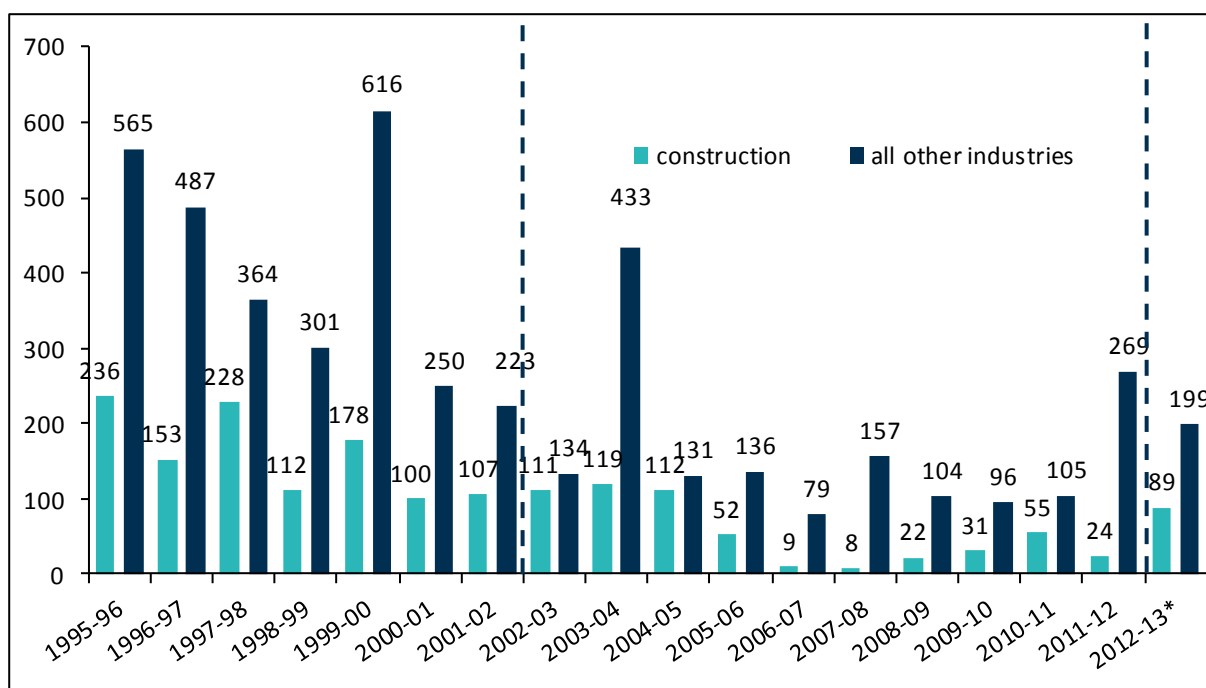
2.2.4 Days lost to industrial action

The previous sections outlined the impact of improved workplace practices on productivity indicators for the building and construction industry. This section analyses the impact of improved workplace practices on another general performance indicator, the number of work days lost to industrial action. Specifically, since improved workplace practices have been implemented, the building and construction industry has outperformed other sectors of the economy in reducing in the number of work days lost. This improvement can be shown at two different levels, using aggregate ABS data and using individual project data. This subsection focuses on aggregate ABS data. The analysis of individual project data can be found in the 2008 report.

To consider the effects of the recent change in industry regulation, it is useful to perform the analysis in financial year terms. This is because the ABCC was abolished at the end of May 2012 and the FWBC began operations on 1 June 2012. Thus, the 2012/13 financial year was the first full year of the FWBC's operations.

Chart 2.4 shows ABS data on the number of working days lost in the construction industry due to industrial disputes. The average number of working days lost each year for the period prior to the establishment of the Taskforce/ABCC (1995/96 to 2001/02) was 159,000. This gradually declined during the first five years of the Taskforce/ABCC era, and working days lost then remained at a low level from 2006/07 to 2011/12. By 2011/12, the number of working days was only 24,000, or 15 per cent of the annual average for 1995/96 to 2001/02.

Chart 2.4: Working days lost in construction due to industrial disputes ('000)



Source: ABS Cat No. 6321.0.55.001

Note: * Independent Economics' estimate for June 2013 is included in the data for 2012/13

As a comparison, the number of working days lost to industrial disputes in other sectors of the economy is also presented in Chart 2.4. The number of working days lost to industrial disputes in all other industries also fell, from an average of 401,000 days between 1995/96 and 2001/02, to 269,000 days in 2011/12. However, this also implies that the construction industry has outperformed other industries, because its working days lost have fallen to only 15 per cent of the earlier level (as noted above) whereas in other industries the fall is to 67 per cent of earlier levels. This outperformance of the construction industry during the Taskforce/ABCC era was also seen in the earlier analysis of labour productivity trends.

The FWBC took over from the ABCC in June 2012. Data for industrial disputes is available for the September and December quarters of 2012 and the March quarter of 2013. An estimate for the June quarter of 2013 has been made by assuming that the growth rate for the full financial year is the same as the growth rate in the first three quarters of the financial year. This assumption is applied for both the construction industry and the economy in aggregate.

With the replacement of the ABCC with the FWBC, working days lost to industrial disputes in the building and construction industry jumped from 24,000 in 2011/12 to an estimated 89,000 in 2012/13. Hence, more than one half of the improvement in lost working days achieved in the first five years of the Taskforce/ABCC era has already been relinquished in the first year of the FWBC era. In fact, in 2012/13, the working days lost in construction was the highest since 2004/05.

The increase in work days lost to industrial dispute is mainly due to industrial action at:

- Lend Lease sites in July 2012;
- Grocon sites (mainly in Melbourne) during late August and early September 2012;
- Queensland Children's Hospital between August and October 2012;

- Little Creatures Brewery in October and November 2012; and
- Werribee Water Treatment Plant in February 2013.

In contrast to the construction industry, following a high reading in 2011/12, the number of work days lost in all other industries fell in 2012/13. All other industries lost 199,000 work days to industrial disputes in 2012/13.

This sharp increase in work days lost to industrial disputes in only the first year of operation of the FWBC is consistent with the expected reversal of the productivity benefits achieved during the Taskforce/ABCC era that was discussed in section 2.1.

2.3 Conclusions – the impact of changes in workplace practices on building and construction industry productivity

This section considers the changes in the workplace relations environment examined in section 2.1 together with the data presented in section 2.2. First, it uses the information to evaluate the impact of the ABCC, Taskforce and industrial relations reforms in the years to 2006 on productivity in the building and construction industry. Following this, the expected impact of the FWBC on productivity in the building and construction industry is evaluated.

2.3.1 Productivity gains in the Taskforce and ABCC era

All of the evidence discussed in section 2.1 and 2.2 continues to support the conclusion of the original 2007 Econtech report and earlier updates, that there has been a significant gain in construction industry productivity during the Taskforce and ABCC era. The question then becomes to what extent has improved workplace practices contributed to this improvement.

As shown in section 2.2, each of the updated productivity indicators continue to provide strong evidence that during the period of operation of the Taskforce and ABCC (between 2002 and mid-2012) there were significant improvements in labour productivity. This is consistent with the findings of the original 2007 Econtech report and earlier updates. Specifically, the latest data on construction industry productivity shows the following.

- ABS data shows that, in 2012, construction industry labour productivity has outperformed predictions based on its historical performance relative to other industries by **21.1 per cent**. That is, a productivity outperformance is identified after allowing for factors driving productivity in the economy as a whole and trends in construction industry productivity prior to 2002 (the year improved workplace practices began).
- The Productivity Commission's analysis of ABS data has found that multifactor productivity in the construction industry was no higher in 2000/01 than 20 years earlier⁵⁴. In contrast, the latest ABS data on productivity shows that construction industry multifactor productivity accelerated to rise by **16.8 per cent** in the ten years to 2011/12.
- Academic research on total factor productivity shows that productivity in the construction industry grew by **13.2 per cent**, between 2003 and 2007, whereas productivity grew by only 1.4 per cent between 1998 and 2002.
- Rawlinsons data to January 2012 shows that the cost penalty for completing the same tasks in the same region for commercial construction compared to domestic construction shrunk. The boost to productivity in the commercial construction sector, as estimated by the narrowing in the cost gap, is conservatively estimated at **11.8 per cent** between 2004 and 2012. This estimate is considerably higher once other factors are taken into account.

⁵⁴ Productivity Commission, *Productivity Estimates to 2005-06*, December 2006.

- Case studies undertaken as part of the original 2007 Econtech report demonstrate that improved workplace practices have led to better management of resources in the building and construction industry. This, in turn, has boosted productivity in the building and construction industry. Case studies by industry participants have also found that improved workplace practices have contributed to cost savings for major projects.

While the productivity indicators listed above are not directly comparable, they all indicate that the significant productivity gains in construction industry productivity appear around 2002/03. This supports the interpretation that it was the activities of the Taskforce (established in late 2002) and, more importantly, the ABCC (established in October 2005) that made a major difference. That is, while general industrial relations reforms provided a more productivity-friendly environment, it was the ABCC (with its enforcement powers) which made a significant impact on building and construction industry productivity.

In summary, the productivity and cost difference data suggest that effective monitoring and enforcement of general industrial relations reforms, and those that related specifically to the building and construction sector, were necessary before the reforms could lead to labour productivity improvements. As such, it is considered that separate attribution of labour productivity improvements to the ABCC and industrial relations reforms is not possible, because they both need to operate together to be effective.

The latest data continues to point to this conclusion. It shows that, in the Taskforce/ABCC era, the construction industry's productivity has outperformed other sectors of the economy as a result of improved workplace practices. As reported above, the estimated gain ranges between 10 and 21.1 per cent, depending on the measure and the source of information that is used. However, in line with earlier reports, for modelling purposes we conservatively assume a smaller gain of 9.4 per cent. Besides providing consistency and comparability with our earlier reports, this conservative approach avoids any possible overestimation of the productivity outperformance of the construction industry as a result of improved workplace practices.

2.3.2 Productivity losses in the FWBC era

The changed workplace relations environment associated with the replacing the ABCC with the FWBC represent an almost complete reversal of the successful reforms implemented in the Taskforce/ABCC era. As discussed below, this has the potential to fully reverse the productivity gains made during the Taskforce/ABCC era.

As discussed in section 2.3.1, the Taskforce and ABCC have been successful in improving the productivity of the industry by effectively monitoring and enforcing general industrial relations reforms as well as those related specifically to the building and construction sector. These reforms were implemented to address specific problems that were seen in the building and construction industry, and not in other industries.

Compared to the ABCC, the FWBC is limited in its ability to achieve this same outcome. Firstly, the strong building-industry specific regulations and penalties have been removed. In addition, the ability of the FWBC to monitor and enforce the regulations is limited because its use of compulsory examination powers is restricted, and in practice its use of these powers has reduced to very low levels. The FWBC is also unable to participate in proceedings for disputes already settled between

the parties. Finally, union officials' right of entry has been expanded, allowing them significant access to work sites. Therefore, the regulatory changes associated with the FWBC, which were examined in detail in section 2.1.3, indicate that the workplace relations regulations applying to the building and construction industry have been weakened and returned to the pre-Taskforce and ABCC era.

Importantly, this unwinding of the building industry-specific regulations has occurred even though there has been no change to the unique underlying circumstances which necessitated the reforms. Commercial pressures still mean that contractors are likely to concede to union demands rather than become involved in long disputes. Limited international competition still means that unions have more scope than in some other industries to exert pressure for work practices that impede productivity.

Hence, replacing the ABCC with the FWBC has meant that the regulatory environment has largely been returned to that of the pre-Taskforce/ABCC era, when regulation of the workplace in the building and construction industry was similar to that of other industries. This runs counter to the recommendations of the Cole Royal Commission. Likewise, it does not heed the evidence in our earlier reports that the industry-specific regulation by the Taskforce and the ABCC has led to a substantial boost to building and construction industry productivity.

Because the building industry-specific nature of regulation in the Taskforce/ABCC era has been almost completely removed, it is reasonable to expect that most or all of the productivity gains achieved during the Taskforce/ABCC era will also be lost. This would justify an assumption that 100 per cent of the productivity gains will be lost in the FWBC era.

Because of the long-run nature of the modelling, it is based on the eventual impacts on productivity of the change from the Taskforce/ABCC era to the FWBC era. However, just as the productivity gains of the Taskforce/ABCC era developed gradually over several years, those gains are likely to be lost over a similar timeframe in the FWBC era. The fact that more than one half of the improvement in working days lost in the Taskforce/ABCC era has already been relinquished in the first year of operation of the FWBC era is not a good sign. However, several years more data will be needed before the full loss of the productivity gains can be confirmed. In the meantime, this report adopts the conservative assumption that only 75 per cent of the productivity gains will be lost eventually. That is, it is assumed that replacing the ABCC with the FWBC will result in the productivity gains generated by the Taskforce and ABCC being wound back by 75 per cent.

The main remaining feature of the Taskforce/ABCC era is that there is still an industry-specific regulator in the form of the FWBC. However, this is likely to be of little benefit in preserving the productivity gains of Taskforce/ABCC era. This is because the FWBC largely lacks the support of the industry-specific approach to regulation that was recommended by the Cole Royal Commission and successfully exercised by the Taskforce/ABCC.

3 Modelling the impact of changes to workplace practices

This section provides details of the modelling approach used to estimate the economy-wide impacts of:

- the improved workplace practices as a result of the ABCC, Taskforce and industrial relations reforms in the years to 2006; and
- the partial unwinding of these improved workplace practices due to the abolition of the ABCC and establishment of the FWBC.

The section is structured as follows. Section 3.1 summarises Independent Economics' previous studies in this area. Section 3.2 outlines the scenarios that were simulated using the Independent CGE model to quantify the economic effect of the changes in workplace practices in the building and construction industry. Section 3.3 outlines the main data inputs that are used to build these scenarios and describes how these inputs were derived. Section 3.4 discusses the main features of the economic model (the Independent CGE model) that was used to estimate the economic impact of changes in workplace practices.

3.1 Previous studies

In 2003, Econtech prepared a study for the then Department of Employment and Workplace Relations (DEWR) that analysed the cost differences for the same standard building tasks between commercial buildings and domestic residential buildings. This report and its conclusions (outlined below) on building and construction industry productivity were accepted by DEWR.

- The report, using Rawlinson's data, showed that building tasks – such as laying a concrete slab, building a brick wall, painting and carpentry work – cost more for commercial buildings than for domestic residential housing. The difference was mainly attributed to differences in work practices between the commercial and domestic residential building sector.
- The report found that the productivity performance of Australia's building and construction industry lagged behind international best practice. If the cost gap between commercial and domestic construction were removed, Australia's performance would still have been behind international benchmarks.

The 2003 Econtech Report went on to model the economy-wide benefits of reducing the cost gap through reform to work practices in the commercial building sector.

While the 2003 Report estimated the potential productivity gains from workplace reform in the construction industry, by 2007/08 the reform process was well established. Hence, in 2007 the ABCC commissioned Econtech to estimate the actual productivity gains that can be attributed to the activities of the ABCC and its predecessor the Taskforce. This 2007 report was then updated in 2008, 2009, 2010 and 2012.

Each report consistently showed that there had been a gain in construction industry productivity of about 10 per cent, due to the activities of the Taskforce and the ABCC in conjunction with related industrial relations reforms. Similar to the 2003 report, each subsequent report modelled the economy-wide benefits of this gain in construction industry productivity from improved workplace practices.

The 2008, 2009, 2010 and 2012 reports considered the impact of workplace reform on construction industry productivity from three different angles. It compared construction industry productivity between different years, between the non-residential and residential sides of the building industry, and between individual projects undertaken before and after the establishment of the ABCC.

This report updates the economic analysis in the earlier reports to incorporate the latest data and other studies completed in the intervening time on building and construction industry productivity. In addition, this report uses an enhanced version of the Independent Economics' Computable General Equilibrium (CGE) model that was first used in the 2012 report. While the enhanced model includes significant refinements, its estimates are comparable with those estimates presented in earlier reports; this is discussed further in section 4. Finally, in this report, an additional scenario has also been added that estimates the economic impacts of a loss in productivity in the FWBC era.

The following sections present the methodology and model used to estimate the economic impacts of changed workplace practices within the building and construction industry.

3.2 Scenarios

The Independent CGE model of the Australian economy is used to estimate the long-term, economy-wide impact of changes to workplace practices. To do this, the following three scenarios were developed.

- A “Baseline Scenario” provides a snapshot of the Australian economy representing the workplace practices in place before the Taskforce/ABCC era.
- An “ABCC Scenario” provides a snapshot of the Australian economy with higher productivity in the construction industry due to better workplace practices resulting from the ABCC, Taskforce and industrial relations reforms in the years to 2006. Specifically, productivity in the construction industry is 9.4 per cent higher than in the baseline scenario. This scenario is the same scenario that has been modelled in previous updates of this report. As explained in Section 2.3, it has been adopted for this report after considering the latest economic data, case studies and other research.
- An “FWBC Scenario” provides a snapshot of the Australian economy where 75 per cent of the productivity boost achieved in the Taskforce/ABCC era is unwound in the FWBC era. As explained in Section 2.3, this conservative assumption has been adopted following analysis of the workplace relations changes associated with abolishing the ABCC and establishing the FWBC, as well as the latest data.

The modelling results for these three scenarios are used as follows to estimate the economy-wide impacts of the various regulatory eras in the building and construction industry.

- The impact on the Australian economy of improved workplace practices during the Taskforce/ABCC era is determined by the differences in key economic outcomes between the ABCC scenario and the Baseline scenario. Results for the ABCC scenario are generally presented as percentage deviations from the Baseline scenario.
- The impact on the Australian economy of replacing the ABCC with the FWBC is determined by the differences in key economic outcomes between the FWBC scenario and the ABCC scenario. Results for the FWBC scenario are generally presented as percentage deviations from the ABCC scenario.

The main inputs for each of the scenarios are discussed in detail below.

3.3 Model inputs

As noted above, for the ABCC scenario it is assumed productivity in the construction industry as a whole is higher by 9.4 per cent relative to the baseline scenario. This matches the assumption used in the original 2007 Econtech report and previous updates in 2008, 2009, 2010 and 2012.

As in previous reports, this gain in productivity is concentrated in the various subsectors of the industry where the ABCC has jurisdiction, which are non-residential building construction, engineering construction and multi-unit residential building. Specifically, as shown in Table 3.1, it combines productivity gains of 12.3 per cent in non-residential construction and 4.5 per cent in residential building (to reflect the productivity gain in multi-unit residential building). This is consistent with the overall industry productivity gain of 9.4 per cent.

Table 3.1: Simulated gains in labour productivity (per cent) for the ABCC scenario compared to the baseline scenario

	ABCC Scenario		
	2 sectors	3 sectors	4 sectors
Non-residential construction	12.3%	17.9%	
Engineering construction			16.5%
Non-residential building			20.5%
Residential building	4.5%	0.0%	0.0%
Construction services		7.0%	7.0%
Total building and construction	9.4%	9.4%	9.4%

Source: Independent Economics estimates based on total estimated productivity improvements and current labour cost relativities between the construction sub-sectors.

The model used in the 2012 report and this report, the Independent CGE model, uses the ABS' latest industrial classification, ANZSIC 2006. This extends the construction industry detail to separately identify four sub sectors of the construction industry, rather than two. Hence, the productivity gains must be disaggregated, in a consistent manner, into these four sub sectors. This disaggregation of the productivity gains is also shown in Table 3.1. Specifically, the ABCC scenario models a 16.5 per cent productivity gain in engineering construction, a 20.5 per cent gain in non-residential building, no direct gain in residential building and a 7.0 per cent productivity gain in construction services. This is consistent with the overall productivity gain of 9.4 per cent, but this overall gain is distributed between the four sub sectors in a way that reflects the ABCC's jurisdiction.

The productivity gain in the construction services sector of 7.0 per cent is higher than for residential construction but lower than for non-residential construction. This reflects the pervasive nature of the construction services sector combined with the narrower jurisdiction of the ABCC. In principle, construction services covers services such as site preparation, electrical, plumbing and plastering services, irrespective of whether these services are provided by general construction firm employees or by independent contractors. Thus, the construction services industry covers a range of construction services delivered across the entire construction industry, including residential building, non-residential building and engineering construction. Thus, its modelled productivity gain of 7.0 per cent lies between the lower gain of 4.5 per cent for the residential side of the industry and the higher gain of 17.9 per cent for the non-residential side.

In addition, while there is no direct productivity gain in residential construction, the sector benefits indirectly because it uses construction services, which experience a productivity gain. This indirect benefit is equivalent to a 4.5 per cent gain in productivity for the residential construction industry as a whole. This gain is attributable to multi-unit residential building, which fell within the jurisdiction of the Taskforce/ABCC, rather than to house construction, which did not.

As explained in section 2.3, for the FWBC scenario we adopt the conservative assumption that 75 per cent of the productivity gain assumed in the ABCC scenario is unwound. As noted above, the ABCC scenario assumes a productivity gain of 9.4 per cent compared to the baseline scenario. A reversal of 75 per cent of this gain would therefore represent a productivity loss of 7.1 per cent, when expressed as a percentage of the productivity level of the baseline scenario. However, when re-expressed as a percentage of the higher level of productivity in the ABCC scenario, the loss in productivity is slightly lower at 6.5 per cent.

Table 3.2 shows how the overall productivity loss of 6.5 per cent in the FWBC scenario is distributed between the four construction sub sectors identified in the Independent CGE model.

Table 3.2. Simulated losses in labour productivity (per cent) for the FWBC scenario relative to the ABCC scenario

	FWBC Scenario 4 sectors
Non-residential construction	
Engineering construction	-10.6%
Non-residential building	-12.8%
Residential building	0.0%
Construction services	-4.9%
Total building and construction	-6.5%

Source: Independent Economics estimates based on total estimated productivity improvements and current labour cost relativities between the construction sub-sectors.

In the FWBC scenario, a 10.6 per cent productivity loss in engineering construction, a 12.8 per cent loss in non-residential building, no direct loss in residential construction and a 4.9 per cent productivity loss in construction services is consistent with the overall productivity loss of 6.5 per cent and this pattern is consistent with the FWBC's jurisdiction.

3.4 The Independent CGE model

The economy-wide effects of changes to workplace practices were estimated using the Independent CGE model. It is a long-term model of the Australian economy that models a long-run equilibrium (after approximately 5 to 10 years). In other words, it estimates the long-term impacts of changes to workplace practices after the economy has fully adjusted.

The Independent CGE model has the following features that are important for this report.

- The model uses the most up-to-date ABS industry classification, ANZSIC 2006, and distinguishes 120 industries.
- As noted above, the model separately identifies four sectors within the building and construction industry: residential building; non-residential building; engineering construction; and construction trade services. Importantly, modelling the residential construction industry separately from the other construction industries means that the jurisdiction of the ABCC and FWBC can be more closely identified. Improved workplace practices have been concentrated in non-residential construction and multi-unit residential building.
- The model uses recent Input-Output (IO) tables from the Australian Bureau of Statistics (ABS). Specifically, the 2007/08 IO tables released by the ABS in late 2011 are used. The IO tables provide the most detailed information that is available on the structure of the Australian economy.
- While the data underlying the model is based on the structure of the Australian economy in 2007/08, the model has been uprated to provide a snapshot of the economy in a normalised 2012/13. This includes allowing for growth in wages, productivity and population since 2007/08 as well as normalised commodity prices.
- Each industry in the model can use 43 types of labour, nine types of capital, land and natural resources, whereas in a basic CGE model only one type of labour and capital are used. Importantly, two types of structures are separately identified: building and structures; and dwellings. These are modelled separately from other types of capital (such as motor vehicles, machinery and computers). Each industry's mix of primary factors is separately chosen depending on relative prices and the industry's production technology. This is of particular importance in this project, as it allows for a more robust estimate of the impact of reform on the building and construction industry, which produces building and structures and dwellings. In addition, the model accounts for the use of fixed factors in production, such as residential land in the provision of housing services.
- Consumer welfare (household living standards) is estimated robustly, based on the equivalent variation measure used in welfare economics. A robust measure of household living standards is of particular importance as policies should be assessed based on their impact on households.

As noted above, the model estimates the long-term effects of changes to workplace practices, after the economy has fully responded. The merit of economic policies should be judged on their long-term, as

opposed to short-term, impacts. The long-term assumptions of the Independent CGE model are as follows.

- Profit maximisation: the representative business in each industry chooses how to produce (primary factors, intermediate inputs) and how much to produce to maximise profit subject to constraints such as prices and a production function.
- Utility maximisation: a representative household chooses a consumption bundle to maximise utility, which depends on the consumption of products and leisure time, subject to a budget constraint.
- Labour market equilibrium: in the long term the labour market is assumed to clear, so that an economic shock will have no lasting effects on unemployment.
- External balance: in the long term, external balance is assumed to be achieved by adjustment of the real exchange rate, so that trade shocks have no lasting effect on external balance.
- Budget balance: the budget is balanced because in the long run fiscal policy must be sustainable. The policy instrument which adjusts to ensure the budget is balanced, otherwise known as the swing policy instrument, is labour income tax.
- Private saving: in the long run the level of private sector saving and associated asset accumulation must be sustainable.

4 Economic impact of improved workplace practices during the Taskforce/ABCC era

The previous section described the approach to modelling the flow-on effects to the broader economy of changes to workplace practices in the building and construction industry. This section presents these economy-wide impacts flowing from the improvement in workplace practices under the Taskforce/ABCC. The next section presents the economy-wide impacts flowing from expected productivity-lowering workplace practices under the FWBC.

Section 3 set out the modelling inputs for the Taskforce/ABCC era and how these inputs were derived. In summary, there is an assumed 9.4 per cent gain in productivity in the building and construction industry, and this gain is distributed across the four subsectors of the industry in a way that reflects the jurisdiction of the ABCC. The economy-wide effects of this productivity gain are simulated using the Independent CGE model. This section presents the results of this modelling at three different levels, as follows.

- Section 4.1 describes the detailed economic impacts on the building and construction industry of improved workplace practices during Taskforce/ABCC era.
- Section 4.2 describes the wider industry impacts of improved workplace practices in the building and construction industry during Taskforce/ABCC era.
- Section 4.3 presents the macroeconomic impacts of improved workplace practices in the building and construction industry during Taskforce/ABCC era.

The ABCC Scenario provides a snapshot of the Australian economy with the improved workplace practices in place. This scenario is the same policy scenario that has been presented in previous versions of this report. As explained in Section 2, it has been developed by considering various economic data, case studies and other research.

Importantly, the results presented in this section refer to permanent effects on the levels, not growth rates, of indicators relative to what they would otherwise be. This means, for example, that a gain of 0.8 per cent in the level of GDP is interpreted as the gain in the level of GDP relative to what it would otherwise be in the same year, and not the annual growth rate. That is, it compares the level of GDP at a point in time under the (ABCC) scenario with the level of GDP at the same point in time under the baseline scenario.

4.1 Building and construction industry effects

This section presents the economic impacts on the building and construction industry of labour productivity gains in the industry stemming from improved workplace practices as a result of the ABCC, Taskforce and industrial relations reforms in the years to 2006.

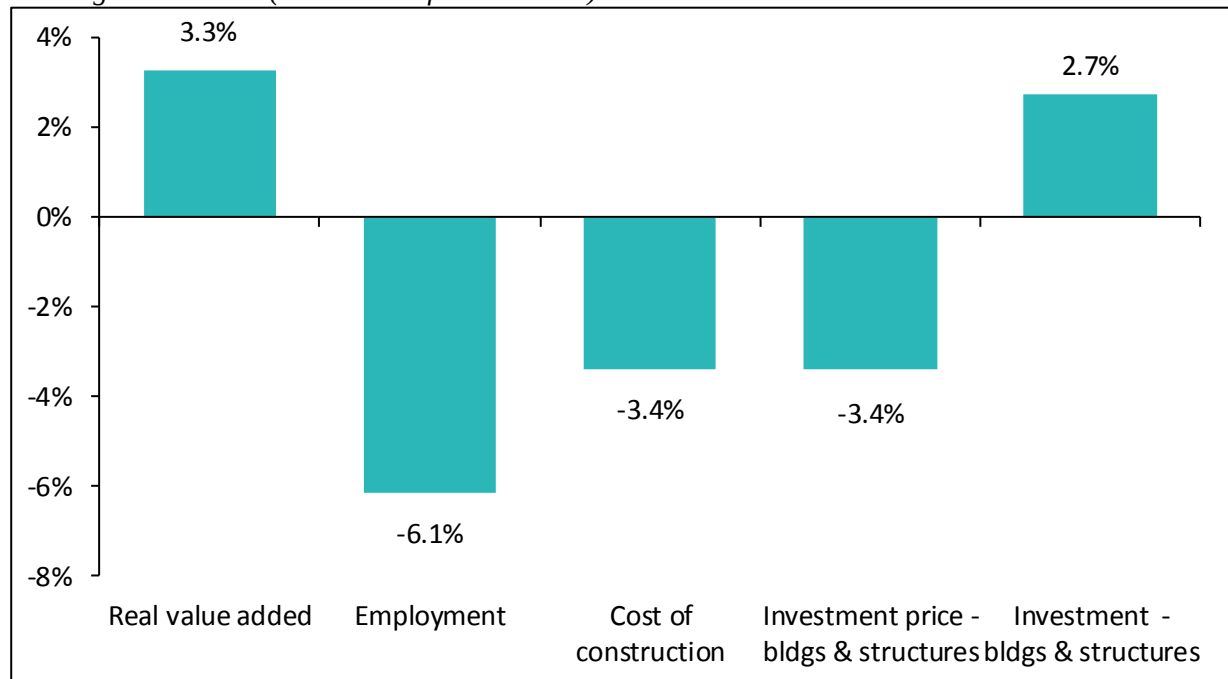
The analysis of productivity gains from improved workplace practices in section 3 indicated that the productivity gains are concentrated in the non-residential building, engineering and multi-unit side of the construction industry. Therefore, in considering the effects on the construction industry itself, it is

important to distinguish between non-residential building construction, engineering construction, residential construction and construction services. This section considers each of these in turn.

Non-residential building

The effects on non-residential building are shown in Chart 4.1. These effects are driven mainly by an assumed increase in labour efficiency of 20.5 per cent for non-residential building construction in the long-term, relative to the situation in the absence of the reforms, as shown in Table 3.1.

Chart 4.1. Effect of improved workplace practices during the Taskforce/ABCC era on non-residential building construction (% deviation from baseline)



Source: the Independent CGE model simulations

Lower non-residential building construction costs, together with lower engineering construction costs, combine to lower the overall cost of business investment in buildings and structures by 3.4 per cent (as seen in Chart 4.1). As discussed later in this subsection, the reduction in engineering construction costs, like the reduction in non-residential building costs, is a result of higher labour productivity from improved workplace practices.

Cheaper buildings and structures stimulate a lift in real investment by business in this type of capital of 2.7 per cent. Even assuming that there is no response by general government in its level of investment in building and structures, the business response results in a long-term gain in total non-residential building construction activity of 3.3 per cent, as seen in Chart 4.1.

Employment in non-residential building is affected by three separate factors.

- The assumed gain in labour efficiency of 20.5 per cent reduces employment by a similar percentage, for an unchanged level of activity (“labour saving effect”).
- The rise in activity of 3.3 per cent adds a similar percentage to employment (“output effect”).

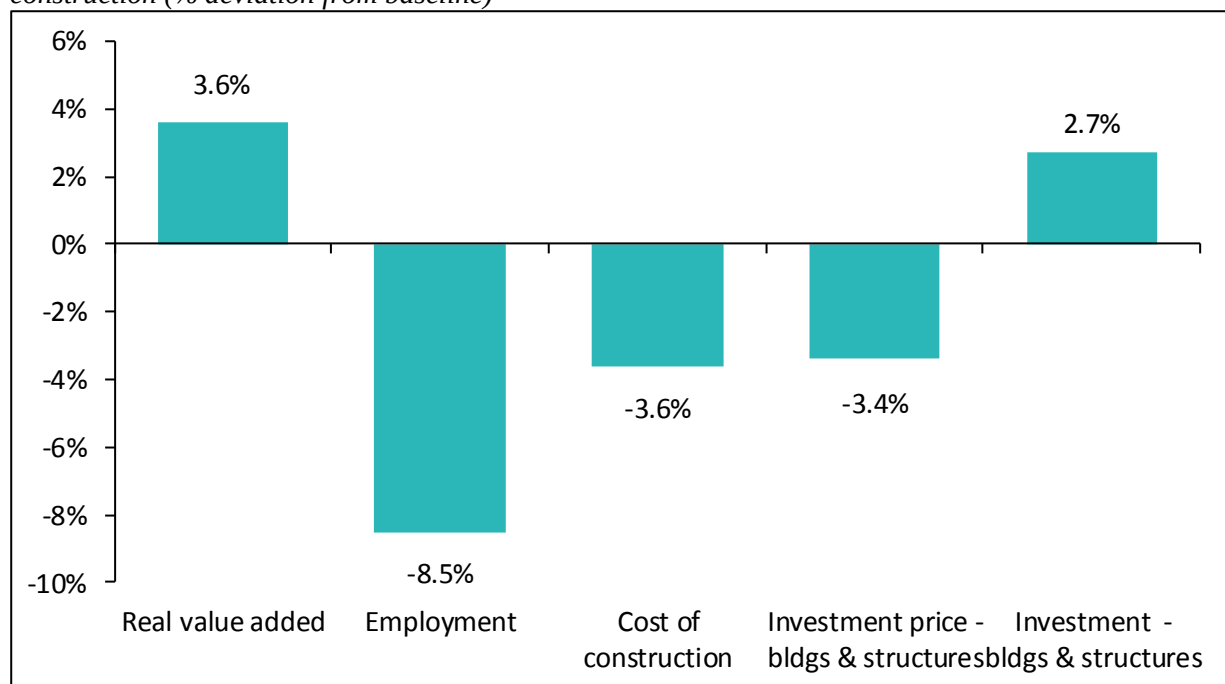
- The gain in labour efficiency makes labour cheaper, inducing some substitution towards labour and away from other inputs, such as capital and land (“substitution effect”).

The negative effect on employment from the labour saving effect dominates the positive effects of the output and substitution effects, leaving a net loss of 6.1 per cent in non-residential building employment in the long-term. Importantly, there are fully offsetting employment gains in other sectors of the economy. However, there would be short-term adjustment costs from job shifting from non-residential building to other industries, even though there is no long-term loss in national employment.

Engineering construction

Similar to the non-residential building construction industry, the engineering construction industry enjoys a direct labour productivity boost of 16.5 per cent. The flow-on impacts of this gain in efficiency are shown in Chart 4.2 below.

Chart 4.2. Effect of improved workplace practices during the Taskforce/ABCC era on engineering construction (% deviation from baseline)



Source: the Independent CGE model simulations

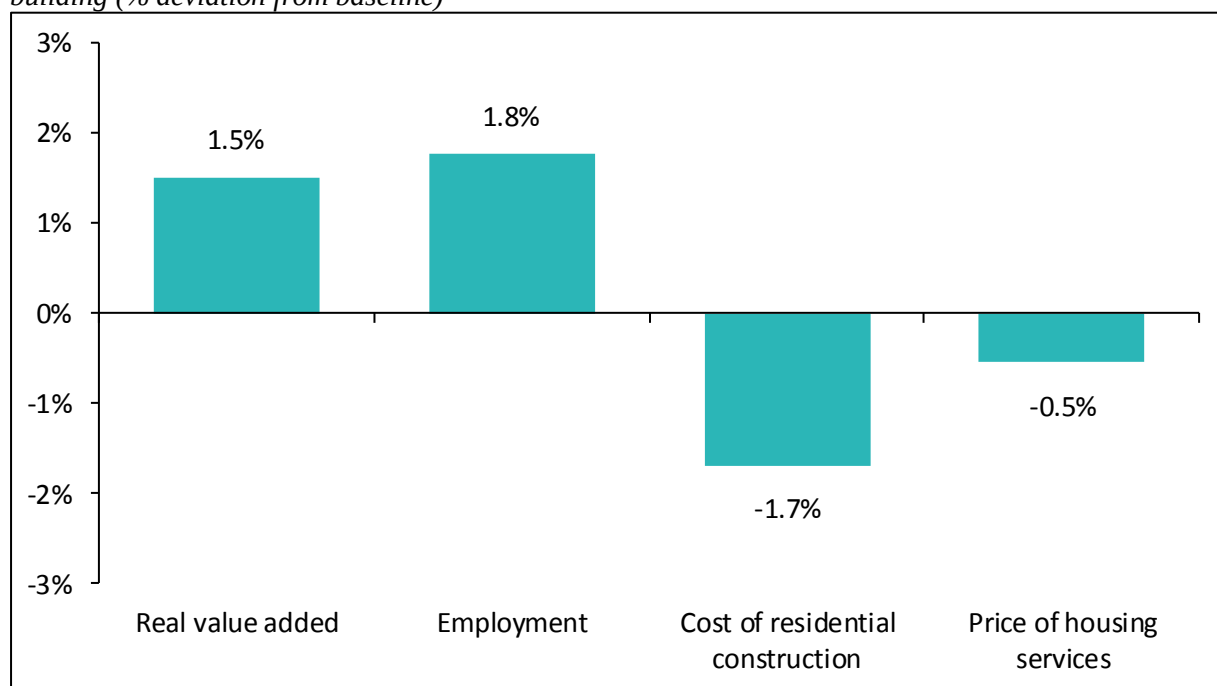
Similar to non-residential building construction, this gain in efficiency leads to a reduction in engineering construction costs of 3.6 per cent. As noted earlier, lower engineering construction costs, combined with lower non-residential building construction costs, lower the overall cost of business investment in buildings and structures by 3.4 per cent. As also noted earlier, cheaper building and structures, in turn, stimulates a lift in real investment by business in this type of capital of 2.7 per cent. It is assumed that there is no response by general government in its level of investment in engineering construction. Even so, the business response results in a long-term gain in engineering construction activity of 3.6 per cent, as seen in Chart 4.2. This is a permanent gain in engineering construction activity compared to the situation without improved workplace practices.

Similar to non-residential building, higher labour efficiency in engineering construction affects employment in three separate ways (labour saving, output and substitution effects) and the positive output and substitution effects offset only part of the negative labour saving effect. This leaves net employment losses of 8.5 per cent in engineering construction, which are fully offset in other sectors of the economy.

Residential building

Chart 4.3 shows the estimated long-term effects on residential construction. As discussed in section 3, productivity gains are expected to have been achieved for multi-unit residential complexes, but not for houses, during the Taskforce/ABCC era. Thus, the overall fall in costs for residential construction shown in Chart 4.3, of 1.7 per cent, is more muted than for non-residential building construction and engineering construction.

Chart 4.3 Effect of improved workplace practices during the Taskforce/ABCC era on residential building (% deviation from baseline)



Source: the Independent CGE model simulations

This flows through to a smaller percentage reduction in the price of housing services of 0.5 per cent, consistent with the fact that production of housing services relies not only on residential buildings, but also on residential land and intermediate inputs.

Lower prices for housing services leads to an increase in the demand for residential buildings, boosting residential construction activity. Indeed, Chart 4.3 shows a long-term increase in residential construction activity of 1.5 per cent relative to what it would otherwise be.

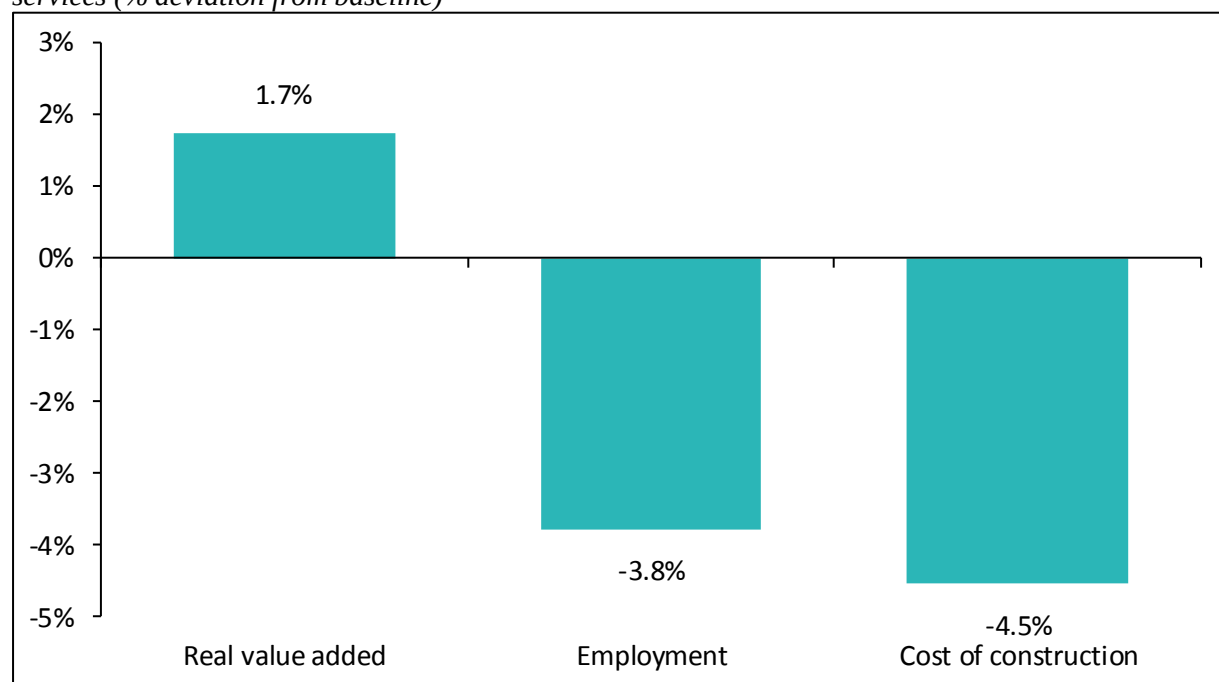
Interestingly, unlike for non-residential construction, where there are employment losses, for residential building there is an employment gain. As discussed above, large productivity gains in non-residential construction (including both non-residential building and engineering construction) reduce demand for construction workers on that side of the construction industry. This leads to wages for construction workers being lower than otherwise, which stimulates demand for construction workers

on the other side of the construction industry, in residential building. Thus, construction workers migrate from non-residential construction to residential building. Chart 4.3 shows the estimated employment gain in residential building of 1.8 per cent.

Construction services

As discussed in section 3, construction services covers services such as site preparation, electrical, plumbing and plastering services, irrespective of whether these services are provided by general construction firm employees or by independent contractors. Thus, the construction services industry covers a range of construction services delivered across the entire construction industry, including in residential building, non-residential building and engineering construction. Consequently, the effects of the ABCC scenario on the construction services industry are similar to the effects on the construction industry as a whole. These effects are presented in Chart 4.4

Chart 4.4. Effect of improved workplace practices during the Taskforce/ABCC era on construction services (% deviation from baseline)



Source: the Independent CGE model simulations

There is a gain in activity in the construction services industry of 1.7 per cent, as it shares in the gains in activity in the other three subsectors of the construction industry. Employment is lower by 3.8 per cent, reflecting the larger falls in employment in non-residential construction partly offset by the smaller gain in employment in residential building. As noted earlier, this employment loss is fully offset by employment gains in other sectors of the economy, but it is also accompanied by short term adjustment costs as workers move to the other industries.

Total construction industry

Overall, the productivity boost in the building and construction industry as a result of improved workplace practices boosts activity. The lift in activity varies across the four subsectors of the construction industry in the following way:

- 3.3 per cent gain for non-residential building;
- 3.6 per cent gain for engineering construction;
- 1.5 per cent gain for residential building; and
- 1.7 per cent for construction services.

At the same time, these permanent long-term gains in construction activity will have been accompanied by short-term adjustment costs, due to job shifting from construction to other industries.

Note that the losses in construction industry employment are relative to the employment level that would have occurred if there were no reforms (as in the Baseline Scenario). This does not mean that there has been a fall in construction employment during the reform process. Indeed, because of other factors, construction employment has grown strongly in most years during the reform process, and was much higher at the end of the Taskforce/ABCC era than it was at the beginning.

4.2 Wider industry effects

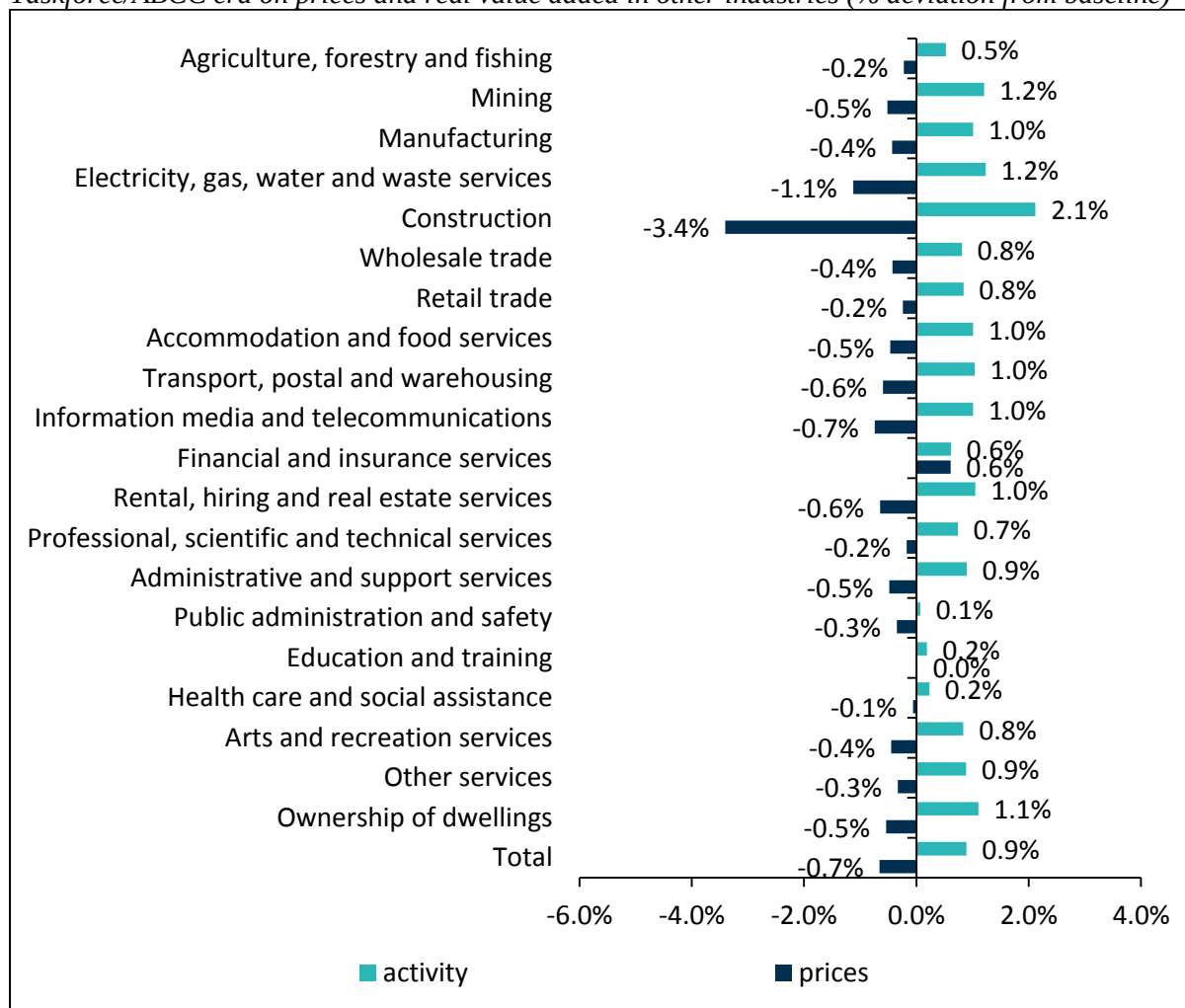
The change in activity in the building and construction industry is expected to affect activity in other industries. This section outlines the simulated production impacts on other industries of improved workplace practices in the building and construction industry as a result of the ABCC, Taskforce and industrial relations reforms in the years to 2006. The impacts on activity refer to the impact on real value added and are presented in Chart 4.5.

As discussed in Section 4.1, higher labour productivity flows through to reduce the price of dwellings by around 0.5 per cent (also shown in Chart 4.5). This stimulates a long-term rise in demand for housing services (“ownership of dwellings”) of 1.1 per cent, relative to what it otherwise would be, as also shown in Chart 4.5.

The detailed effects within the construction industry itself were discussed in Section 4.1. These effects add up to an average fall in construction costs of 3.4 per cent and a rise in activity of 2.1 per cent, as shown in Chart 4.5. These are average effects only. As explained above, the percentage gains in production are lower for residential building and higher for non-residential building.

As discussed in the previous section, the lower prices for construction flowing from productivity gains reduce the overall cost of investment in buildings and structures by 3.4 per cent. This is of particular benefit to sectors that are large users of buildings and structures. Chart 4.5 shows that, outside of the construction industry, the electricity, gas, water & waste industry and the information, media & telecommunication services industry receive the largest cost savings, and they reduce their prices by 1.1 and 0.7 per cent respectively. These price reductions lead to significant gains in activity.

Chart 4.5. Effect of improved workplace practices in the construction industry during the Taskforce/ABCC era on prices and real value added in other industries (% deviation from baseline)



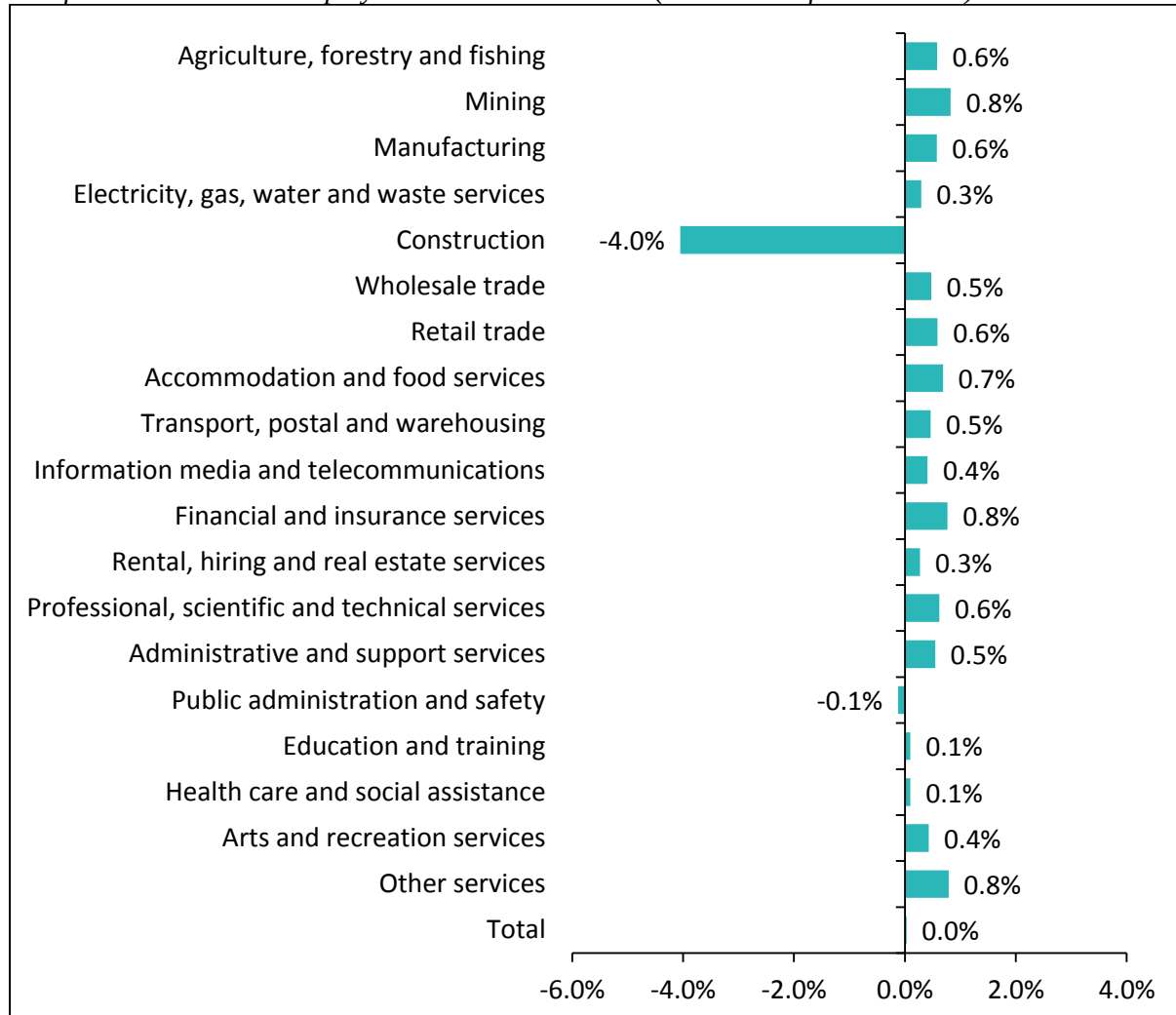
Source: the Independent CGE simulations

For the economy as a whole, production costs and output prices are down by 0.7 per cent, while production volumes are up by 0.9 per cent, relative to what they would otherwise be. The long-term production gains are widespread but are largest in the mining industry and the electricity, gas, water & waste services industry.

Chart 4.6 shows the pattern of industry job shifting induced by higher productivity in the construction sector. While employment in construction is down, the effect of this on national employment is offset by employment gains in other industries. The biggest employment gains are in the industries of mining, other services and finance and insurance services (where employment in each industry increases by 0.8 per cent). This is a direct effect of the gains in production in these industries.

As discussed in Section 4.1, employment in the construction industry itself is expected to be 4.0 per cent lower than would otherwise be the case, with the negative labour saving effect only partly offset by the positive output and substitution effects in this industry. Minor reductions are also expected in employment in the public administration and safety industry as government substitutes away from labour towards relatively cheaper capital.

Chart 4.6. Effect of improved workplace practices in the construction industry during the Taskforce/ABCC era on employment in other industries (% deviation from baseline)



Source: the Independent CGE simulations

Chart 4.6 also shows that, overall, there is no change in the level of employment in the economy. As explained in Section 3.4, in the long-term the labour market clears and unemployment converges to its natural rate.

4.3 National Macroeconomic effects

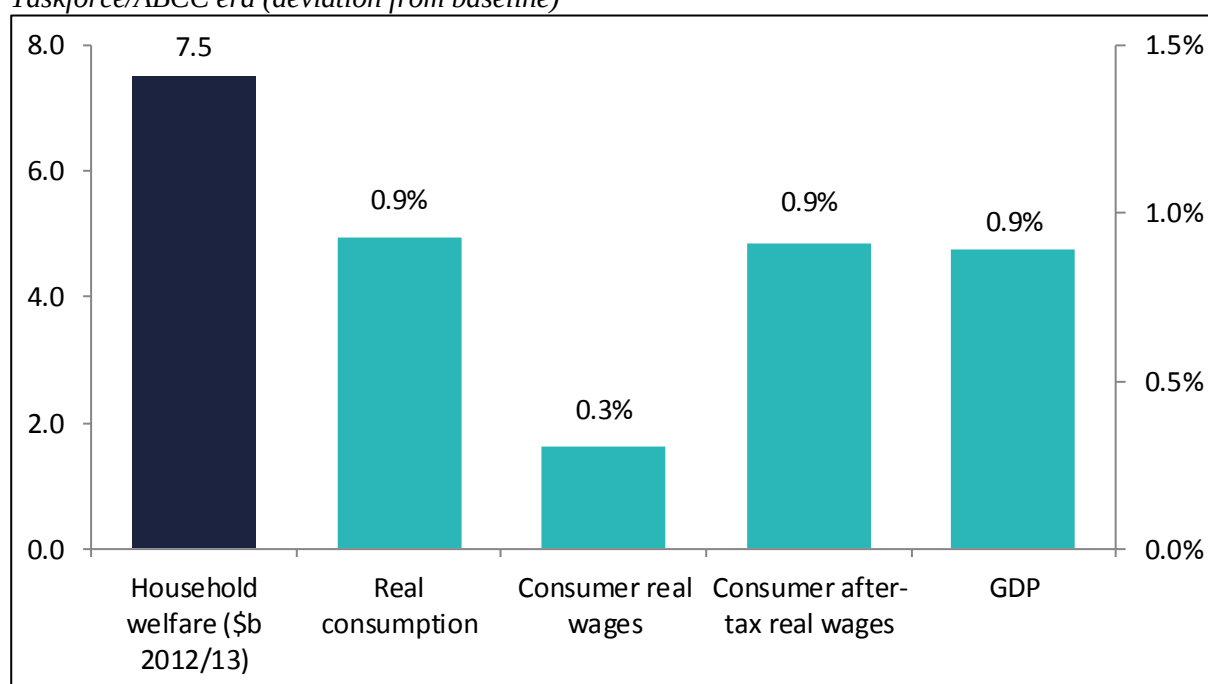
As explained in the previous sections, higher construction productivity leads to lower construction prices. This flows through to savings in production costs across the economy, because all industries are reliant on construction to some extent as part of their business investment. As shown in Chart 4.5, the average saving in production costs is reflected in a reduction in economy-wide production prices of 0.7 per cent.

This cost saving is shared across the economy, as both the private and government sectors are significant users of commercial building and engineering construction. Importantly, consumers reap the benefits of this through a gain in their real after-tax wage. This gain is distributed through two channels, a lift in the real wage and cut to personal income tax rates.

In the private sector, the cost savings to each industry from lower costs for buildings and engineering construction flows through to households in the form of lower consumer prices. This is reflected in the gain of 0.3 per cent in consumer real wages seen in Chart 4.7.

In the government sector, lower construction costs mean that the same level of public investment in schools, hospitals, roads and other infrastructure can be provided at a lower cost. This budget saving is assumed to be passed on to households in the form of a cut in personal income tax, which is the model's swing fiscal policy instrument, as discussed in section 3.4. This tax cut boosts the gain in consumer real wages from 0.3 per cent on a pre-tax basis, to 0.9 per cent on a post-tax basis, as seen in Chart 4.7.

Chart 4.7. National macro-economic effects of improved workplace practices during the Taskforce/ABCC era (deviation from baseline)



Source: Independent CGE model simulations

In short, there is a lift in the real consumer after-tax wage, because labour in the construction industry has become more productive as a result of improved workplace practices during the Taskforce and ABCC era, and this productivity boost flows through to the wider economy and ultimately to consumers.

Chart 4.7 also shows the effects of higher construction productivity on other economy-wide indicators. The gain of 0.9 per cent in consumer real after-tax wages leads to a gain in real private consumption of 0.9 per cent. That is, a higher real wage leads to higher living standards.

This gain in living standards is more rigorously measured as an annual gain in consumer welfare. The Independent CGE model provides estimates of the effect of higher productivity on annual economic welfare by using the equivalent variation measure from welfare economics. This is a rigorous measure of the gain in real consumption. Chart 4.7 shows that the higher construction productivity leads to an increase in consumer living standards (the annual economic welfare gain) of \$7.5 billion in current (2012/13) dollars.

After allowing for economic growth over the last year, this is similar to the consumer gain estimated in the 2012 report of \$6.3 billion in 2011/12 terms⁵⁵. The estimate of consumer gains is similar across reports, since each report has consistently modelled a productivity gain of the same magnitude (9.4 per cent) and from the same source (improved workplace practices in the building and construction industry).

Policies should be assessed on the basis of their impact on households. Consumer welfare, as opposed to GDP, is the most robust way of measuring how households are affected by various policies. The findings of this report for the impact on households are consistent with the original 2007 Econtech report and earlier updates and continue to support the argument that improved workplace practices in the building and construction industry are in the public interest.

Chart 4.7 also shows a 0.9 per cent increase in the level of GDP in the long-term, relative to what it otherwise would have been in the absence of the reforms. This gain was reported earlier in Chart 4.5 as the gain in real value added for all industries added together. Activity gains for individual industries can be seen in the same Chart.

⁵⁵ An additional factor raising the estimated gain in living standards in this report compared to the 2012 report is the improved modelling approach which now includes the value that consumers place on their leisure time.

5 Economic impact of less productive workplace practices during the FWBC era

The previous section described the industry and economy wide impacts of the productivity benefits in the construction industry from improved workplace practices during the Taskforce/ABCC era. This section discusses the industry and economy wide impacts of a partial unwinding of these productivity benefits, due to the changes associated with replacing the ABCC with the FWBC. This section is presented in the same format as Section 4.

- Section 5.1 describes the detailed economic impacts on the building and construction industry of replacing the ABCC with the FWBC.
- Section 5.2 describes the wider industry impacts of replacing the ABCC with the FWBC.
- Section 5.3 presents the macroeconomic impacts of replacing the ABCC with the FWBC.

The FWBC scenario has been designed based on the analysis in section 2 of changes to workplace relations regulations and the available data. This resulted in the conservative assumption in section 3 that 75 per cent of the productivity gains achieved in the Taskforce/ABCC era are unwound in the FWBC era.

Importantly, the results presented in this section refer to the permanent effects on levels, not growth rates, of indicators as a result replacing the ABCC with the FWBC. This means, for example, that a reduction of 0.8 per cent in the level of GDP is interpreted as the reduction in GDP relative to what it would otherwise be, and not the annual growth rate. That is, it compares the level of GDP at a point in time under the FWBC scenario with the level of GDP at the equivalent point in time under the ABCC scenario.

The effect of the less productive workplace practices presented in this section can be compared to the effect of the more productive workplace practices presented in the previous section. The FWBC scenario models a 75 per cent loss of the productivity gains generated during the Taskforce/ABCC era. Thus, it turns out that the magnitude of the economic losses in the FWBC scenario is around 75 per cent of the economic gains estimated in the previous section for the Taskforce/ABCC era.

5.1 Building and construction industry effects

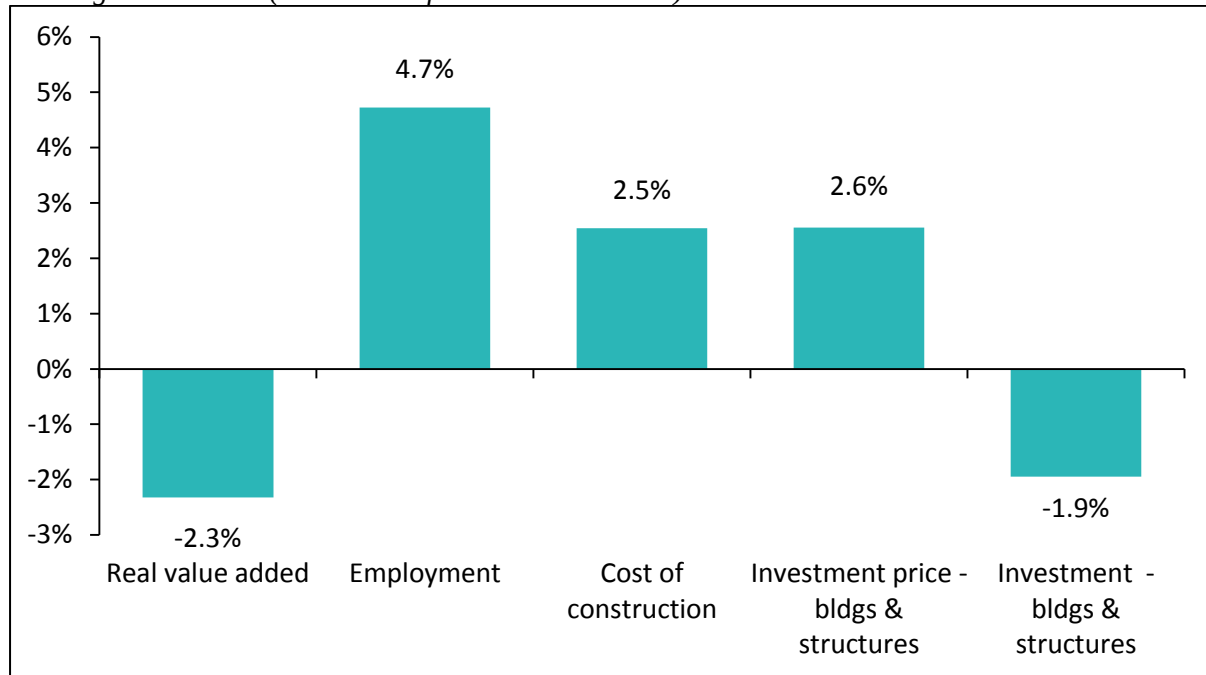
This section presents the economic impacts on the building and construction industry of the labour productivity loss in the industry stemming from abolishing the ABCC and replacing it with the FWBC.

Similar to section 4, we consider, in turn, the economic impacts on the four subsectors of non-residential building construction, engineering construction, residential building construction and construction services.

Non-residential building

The effects on non-residential building construction are shown in Chart 5.1. As shown in Table 3.2, these effects are driven mainly by an assumed decrease in labour efficiency of 12.8 per cent for non-residential building construction in the long-term, relative to the scenario where the ABCC remains in place.

Chart 5.1. Effects of less productive workplace practices during the FWBC era on non-residential building construction (% deviation from ABCC scenario)



Source: the Independent CGE model simulations

Higher non-residential building construction costs, together with higher engineering construction costs, combine to increase the overall cost of business investment in buildings and structures by 2.6 per cent (as seen in Chart 5.1). As discussed later in this subsection, the increase in engineering construction costs, like the increase in non-residential building costs, is a result of lower labour productivity due to replacing the ABCC with the FWBC.

More expensive buildings and structures result in a reduction in real investment by business in this type of capital of 1.9 per cent. Even assuming that there is no response by general government in its level of investment in building and structures, the business response results in a long-term reduction in total non-residential building construction activity of 2.3 per cent, as seen in Chart 5.1.

Employment in non-residential building is affected by three separate factors.

- The assumed loss in labour productivity of 12.8 per cent means that the number of employees required for an unchanged level of activity is higher (“labour *dis*-saving effect”).
- The reduction in activity of 2.3 per cent subtracts a similar percentage from employment (“output effect”).

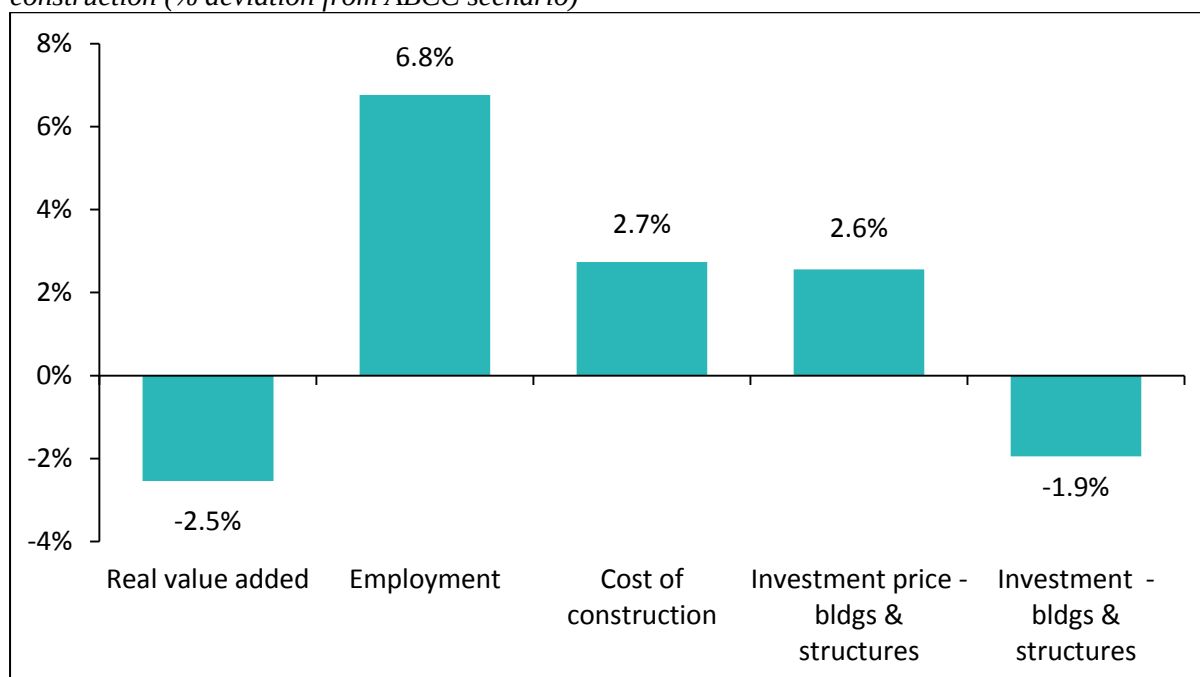
- The reduction in labour efficiency makes labour more expensive, inducing some substitution away from labour towards capital and land (“substitution effect”).

The positive effect on non-residential building employment from the labour *dis*-saving effect dominates the negative effects of the output and substitution effects, leaving a net gain of 4.7 per cent in non-residential building employment in the long-term. Importantly, in the long-term, this additional employment in the construction sector is fully offset by lower employment in other industries. However, there would be short-term adjustment costs from job shifting to non-residential building from other industries.

Engineering construction

The engineering construction industry is expected to see a direct labour productivity loss of 10.6 per cent in the FWBC era. The flow-on impacts of this reduction in productivity are shown in Chart 5.2 below.

Chart 5.2. Effects of less productive workplace practices during the FWBC era on engineering construction (% deviation from ABCC scenario)



Source: the Independent CGE model simulations

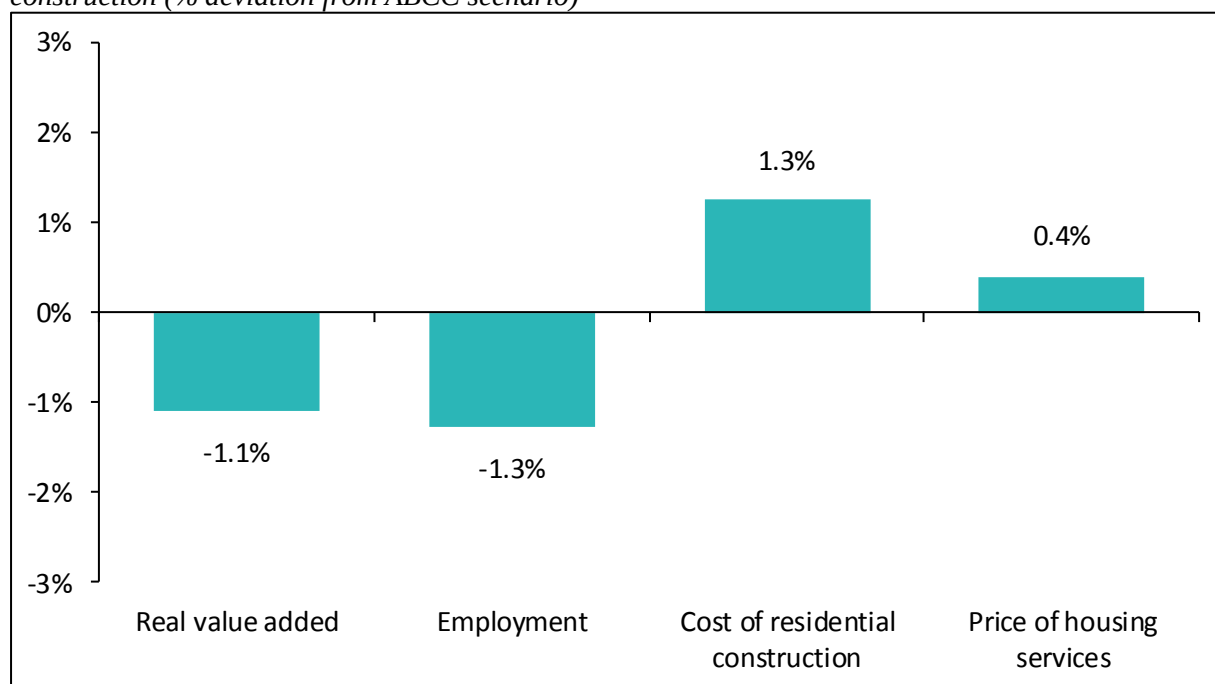
Similar to non-residential building construction, this reduction in labour efficiency leads to an increase in engineering construction costs of 2.7 per cent. As noted earlier, higher engineering construction costs, combined with higher non-residential building construction costs, increase the overall cost of business investment in buildings and structures by 2.6 per cent. As also noted earlier, more expensive building and structures, in turn, results in lower real investment by business in this type of capital by 1.9 per cent. It is assumed that there is no response by general government in its level of investment in engineering construction. Even so, the business response results in a long-term fall in engineering construction activity of 2.5 per cent, as seen in Chart 5.2. This is a permanent loss in engineering construction activity compared to the ABCC scenario.

Similar to non-residential building construction, higher labour efficiency in engineering construction affects employment in three separate ways (labour *dis*-saving, output and substitution effects) and the negative output and substitution effects offset only part of the positive labour *dis*-saving effect. This leaves a net employment gain of 6.8 per cent in engineering construction, which is fully offset in other sectors of the economy.

Residential building

Chart 5.3 shows the estimated long-term effects on residential construction. As discussed in section 3, productivity losses are expected for multi-unit residential complexes, but not for houses, as a result of replacing the ABCC with the FWBC. Thus, the overall increase in costs for residential construction shown in Chart 5.3, of 1.3 per cent, is more muted than for non-residential building construction and engineering construction.

Chart 5.3 Effects of less productive workplace practices during the FWBC era on residential construction (% deviation from ABCC scenario)



Source: the Independent CGE model simulations

This flows through to a smaller percentage increase in the price of housing services of 0.4 per cent, consistent with the fact that production of housing services relies not only on residential buildings, but also on residential land and intermediate inputs.

Higher prices for housing services leads to a decrease in the demand for residential buildings, reducing residential construction activity. Indeed, Chart 5.3 shows a long-term decrease in residential construction activity of 1.1 per cent relative to what it would have been under the ABCC.

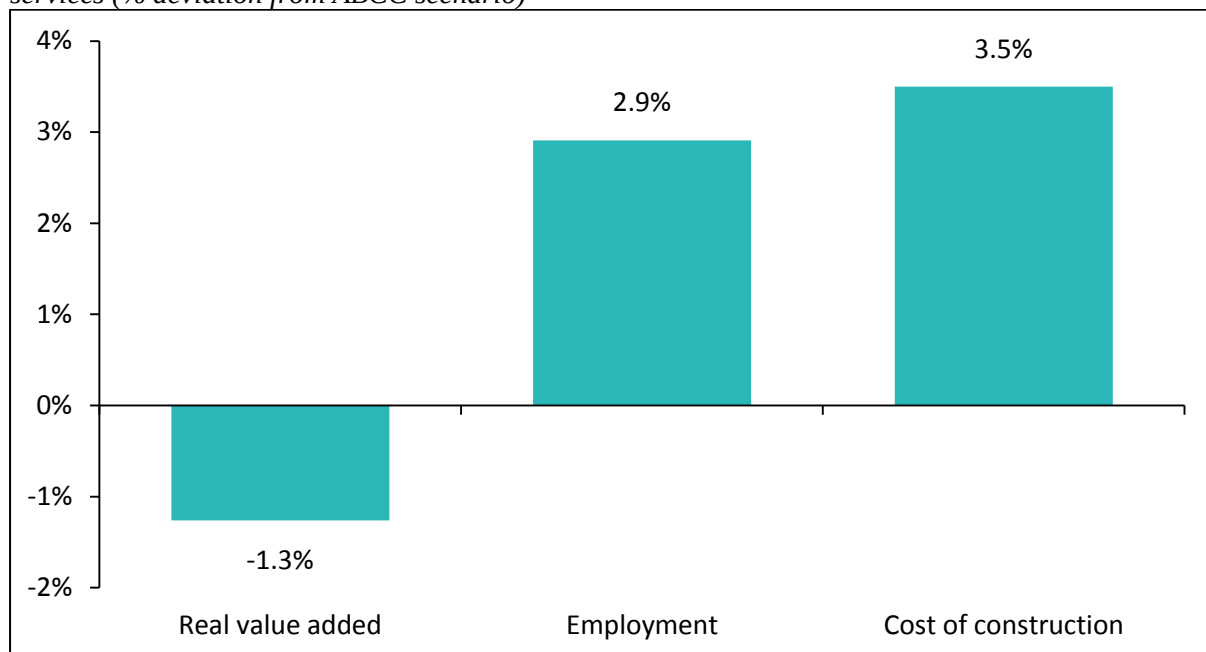
Interestingly, unlike for non-residential construction, where there are employment gains, for residential building there is an employment loss. As discussed above, large productivity losses in non-residential construction (including both non-residential building and engineering construction) increase demand for construction workers on that side of the construction industry. This leads to a strengthening of wages for construction workers, which reduces demand for construction workers on

the other side of the construction industry, in residential building. Thus, construction workers migrate from residential building to non-residential construction. Chart 5.3 shows the estimated employment loss in residential building of 1.3 per cent.

Construction services

As discussed in section 3, construction services covers services such as site preparation, electrical, plumbing and plastering services, irrespective of whether these services are provided by general construction firm employees or by independent contractors. Thus, the construction services industry covers a range of construction services delivered across the entire construction industry, including in residential building, non-residential building and engineering construction. Consequently, the effects of the FWBC scenario on the construction services industry are similar to the effects on the construction industry as a whole. These effects are presented in Chart 5.4

Chart 5.4. Effects of less productive workplace practices during the FWBC era on construction services (% deviation from ABCC scenario)



Source: the Independent CGE model simulations

There is a loss in activity in the construction services industry of 1.3 per cent, as it shares in the losses in activity in the other three subsectors of the construction industry. Employment is higher by 2.9 per cent, reflecting the larger gains in employment in non-residential construction partly offset by the smaller loss in employment in residential building. As noted earlier, this employment gain is fully offset by employment losses in other sectors of the economy. Further, there would be short-term adjustment costs from job shifting to non-residential building from other industries.

Total construction industry

Overall, the productivity loss in the building and construction industry as a result of replacing the ABCC with the FWBC reduces activity in the sector. However, the fall in activity varies across the four subsectors of the construction industry in the following way:

- 2.3 per cent loss for non-residential building;

- 2.5 per cent loss for engineering construction;
- 1.1 per cent loss for residential building and
- 1.3 per cent loss for construction services.

5.2 Wider industry effects

The change in activity in the building and construction industry is expected to affect activity in other industries. This section outlines the simulated production impacts on other industries of replacing the ABCC with the FWBC in the building and construction industry. The impacts on activity refer to the impacts on real value added and are presented in Chart 5.5.

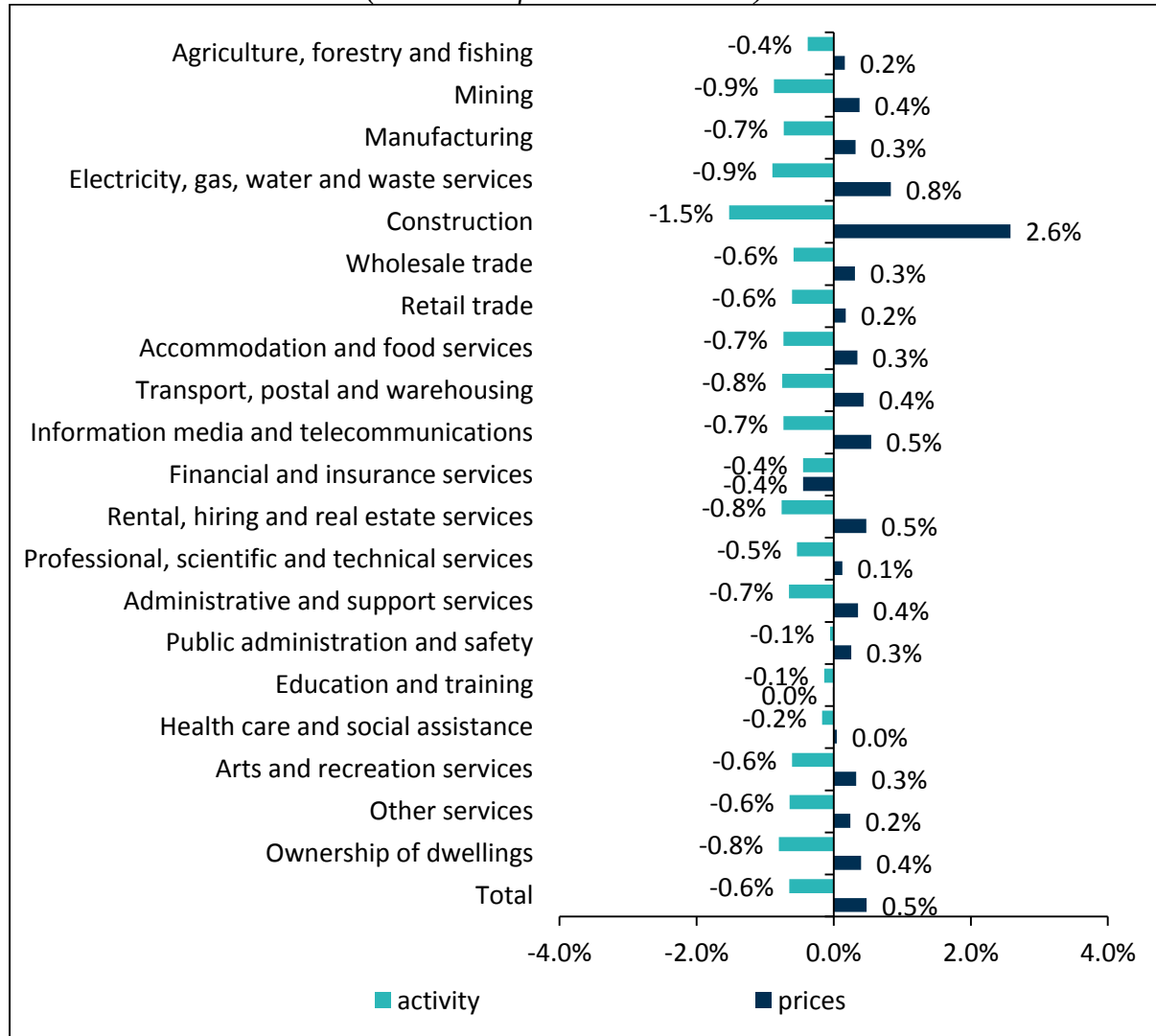
As discussed in Section 5.1, lower labour productivity flows through to raise the cost of dwellings by around 0.4 per cent (also shown in Chart 5.5). This leads to a long-term reduction in the level of demand for housing services (“ownership of dwellings”) of 0.8 per cent, relative to what it would be under the ABCC scenario, as also shown in Chart 5.5.

The detailed effects within the construction industry itself were discussed in Section 5.1. These effects lead to an average increase in construction costs of 2.6 per cent and a fall in construction activity of 1.5 per cent, as shown in Chart 5.5. These are average effects only. As explained above, the percentage losses in production are lower for residential building and higher for non-residential construction.

As discussed in the previous section, the higher prices for construction as a result of the lower productivity push up the overall cost of investment in buildings and structures by 2.6 per cent. This is particularly costly to sectors that are large users of buildings and structures. Chart 5.5 shows that the electricity, gas, water & waste industry and the information, media & telecommunication services industry see cost increases that cause price rises of 0.8 per cent and 0.5 per cent respectively. These higher prices lead to significant reductions in demand for production.

For the economy as a whole, production costs are up 0.5 per cent, while production volumes are down 0.6 per cent, relative to what they would be under the ABCC scenario. The long-term production losses are widespread but the largest reductions outside the construction industry are in the mining industry and the electricity, gas, water & waste services industry.

Chart 5.5. *Effects of less productive workplace practices during the FWBC era on prices and real value added in other industries (% deviation from ABCC scenario)*



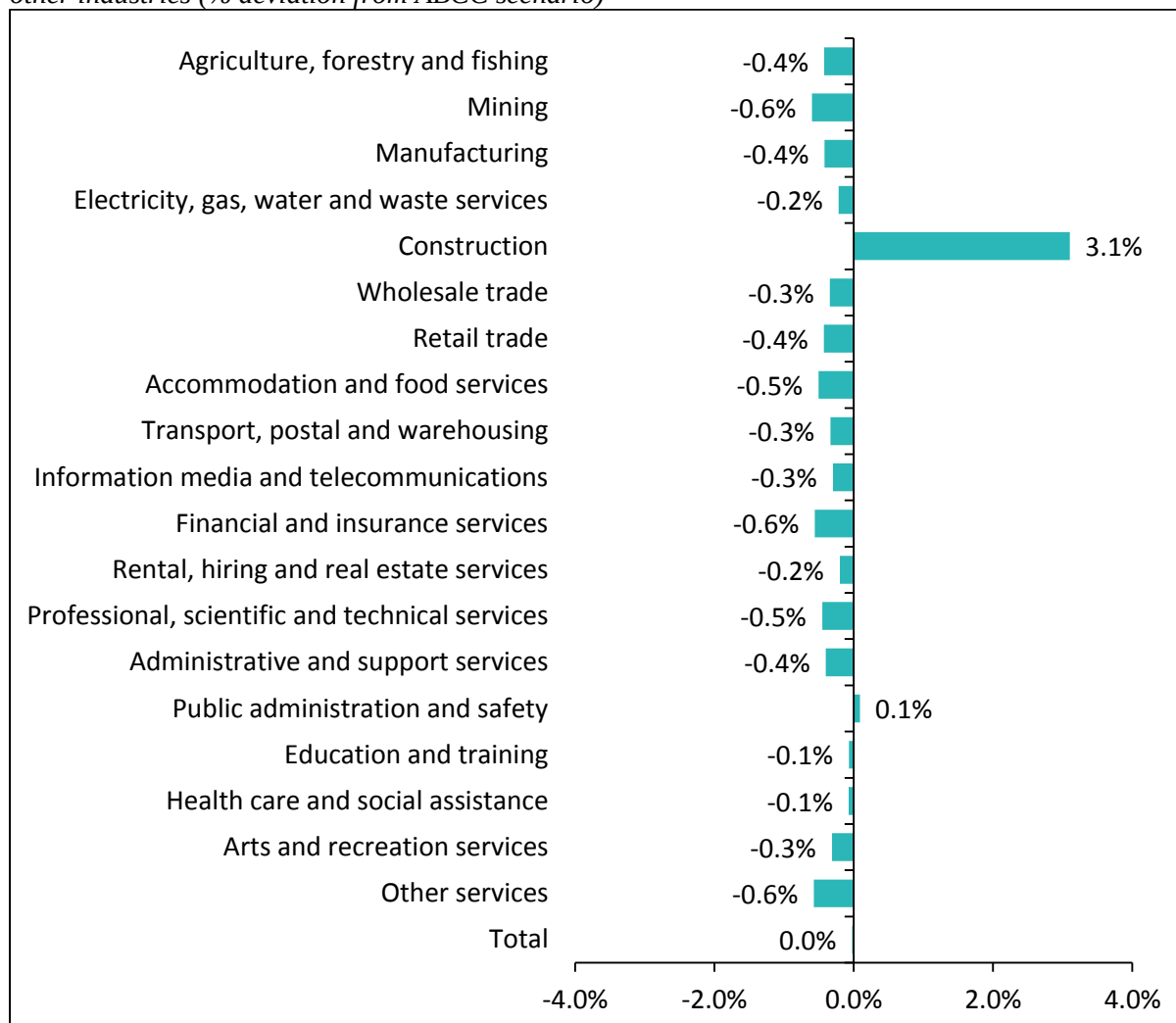
Source: the Independent CGE simulations

Chart 5.6 shows the pattern of industry job shifting induced by lower productivity in the construction sector. While employment in construction increases by 3.1 per cent, the effect of this on national employment is offset by employment losses in other industries. The biggest reductions in employment are in the industries of mining, other services and finance and insurance services (of 0.6 per cent in each case). This is a direct effect of the lower production levels in these industries.

As discussed in Section 5.1, employment in the construction industry itself is expected to be higher than otherwise, with the positive labour *dis*-saving effect only partly offset by the negative output and substitution effects in this industry. A minor increase is also expected in employment in the public administration and safety industry as government substitute towards labour as capital has become relatively more expensive.

Chart 5.6 also shows that, overall, there is no change in the level of employment in the economy. As explained in Section 3.4, national unemployment is not affected in the long-term because wage adjustments allow the labour market to clear.

Chart 5.6. *Effects of less productive workplace practices during the FWBC era on employment in other industries (% deviation from ABCC scenario)*



Source: the Independent CGE simulations

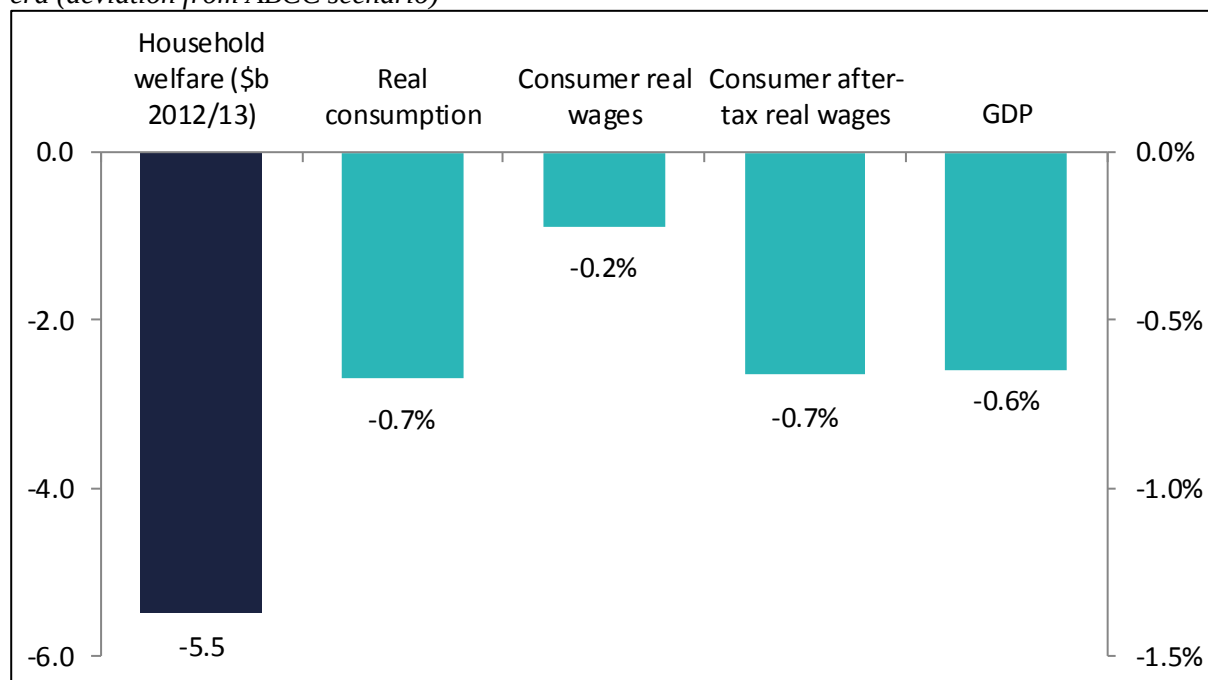
5.3 National Macroeconomic effects

As explained in the previous sections, lower productivity in the construction industry leads to higher construction costs and prices. This flows through to higher production costs across the economy, because all industries are reliant on construction to some extent as part of their business investment. As shown in Chart 5.5, the average increase in production costs is reflected in a rise in the economy-wide price of production by 0.5 per cent.

This cost increase is borne across the economy, as both the private and government sectors are significant users of commercial building or engineering construction. Importantly, consumers lose out through a fall in their real after-tax wage. This fall is distributed through two channels, a reduction in the real wage and increases to personal income tax rates.

In the private sector, the cost increases to each industry from higher costs for buildings and engineering construction flows through to households in the form of higher consumer prices. This is reflected in the 0.2 per cent lower consumer real wages seen in Chart 5.7.

Chart 5.7. National macro-economic effects of less productive workplace practices during the FWBC era (deviation from ABCC scenario)



Source: the Independent CGE model simulations

In the government sector, higher construction costs mean that the same level of public investment in schools, hospitals, roads and other infrastructure can now only be provided at a higher cost. This sees the government's budget position deteriorate, and it is assumed this is passed on to households in the form of higher personal income tax rates, which is the model's swing fiscal policy instrument, as discussed in section 3.4. This tax hike adds to the reduction in the consumer real wage from 0.2 per cent on a pre-tax basis, to 0.7 per cent on a post-tax basis, as seen in Chart 5.7.

In short, there is a fall in the real consumer after-tax wage, because labour in the construction industry has become less productive as a result of replacing the ABCC with the FWBC, and this productivity loss flows through to the wider economy and ultimately to consumers.

Chart 5.7 also shows the effects of lower construction productivity on other economy-wide indicators. The fall of 0.7 per cent in consumer real after-tax wages leads to a loss in real private consumption of 0.7 per cent. That is, a lower real wage leads to lower living standards.

This loss in living standards is more rigorously measured as an annual loss in consumer welfare. The Independent CGE model provides estimates of the change in annual economic welfare by using the equivalent variation measure from welfare economics. This rigorously measures the loss in real consumption. Chart 5.7 shows that lower construction productivity leads to a fall in consumer living standards (the annual economic welfare loss) of \$5.5 billion in current (2012/13) dollars.

Chart 5.7 also shows a 0.6 per cent reduction in the level of GDP in the long-term, relative to what it otherwise would have been if the ABCC had not been replaced by the FWBC. This loss was reported earlier in Chart 5.5 as the loss in real value added for all industries added together. Activity losses for individual industries can be seen in the same chart.

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Appendix A: Independent CGE Model

Computable General Equilibrium (CGE) models provide a powerful tool for simulating the economic impacts of changes in government economic policies, industry developments, and the world economy. They show impacts on economic activity, employment, trade and investment at the level of individual industries, impacts on households and impacts on the economy as a whole.

The Independent CGE Model is Independent Economics' CGE model of the Australian economy, first developed in early 2012. It includes a number of notable features that set it apart from other models of the Australian economy.

- The model uses recent data from the Australian Bureau of Statistics (ABS). The starting point was calibrating the model to the 2007/08 Input-Output (IO) tables from the ABS, which were released in late 2011. The model is then uprated in the baseline scenario to a normalised version of the Australian economy in 2012/13. This includes allowing for growth in wages, prices, productivity and employment from 2007/08 to 2012/13, as well as normalised commodity prices.
- The model is based on the most up-to-date ABS industry classification, ANZSIC 2006, which replaces ANZSIC 1993. The 111 industries originally in the ABS data have been extended so that the model distinguishes 120 industries.
- The model incorporates a sophisticated modelling of production in each industry. Production in a standard CGE involves at least three factors of production - labour, capital and intermediate inputs. The Independent CGE model extends this to distinguish 43 types of labour, nine types of capital, land and natural resources. The model also allows for different degrees of substitutability between these different inputs.
- The model provides a valid measure of changes in consumer welfare or living standards based on the equivalent variation, so that policy changes can be correctly evaluated in terms of the public interest.

This appendix explains the main features of the Independent CGE Model, starting with its general features, which are common to most long-run CGE models. Then, the overall structure of the model is described, including the different sources of supply and the end users in the model. Following this, the behaviour of each of the agents in the model is outlined – industries, households, government and then the foreign sector. The final section explains the baseline scenario and validation procedures undertaken in ensuring that the model meets high professional standards.

A.1 General features

The Independent CGE Model makes a number of general assumptions that are consistent with its long-term time horizon. Many of these features are shared with other long-run CGE models.

Long-term model

The Independent CGE Model is a long-term model, meaning that results refer to the ongoing effects on the economy after it has fully adjusted to economic shocks. In keeping with this, all markets are assumed to have reached equilibrium. This includes key markets such as the labour market, where the real wage adjusts so that labour demand from industries is equal to labour supply from households. In addition, the behaviour of households and government is consistent with the inter-temporal budget constraints that they face. This involves levels of household saving and foreign capital inflow that are consistent with stocks of assets growing at the same rate as real GDP.

The long-term time horizon is fitting because economic policies should be judged against their lasting effects on the economy, not just their effects in the first one or two years.

Optimising behaviour

Industries and households in the Independent CGE Model choose the best possible outcome, while still remaining within the constraints of their budgets.

- **Profit maximisation:** the representative business in each industry chooses how to produce (with a mix of primary factors and intermediate inputs) and how much to produce to maximise its profit subject to the prices of its inputs and outputs.
- **Utility maximisation:** A representative household chooses their consumption levels of leisure and each of the 120 goods and services in a way that maximises their well-being (or utility), subject to a budget constraint.

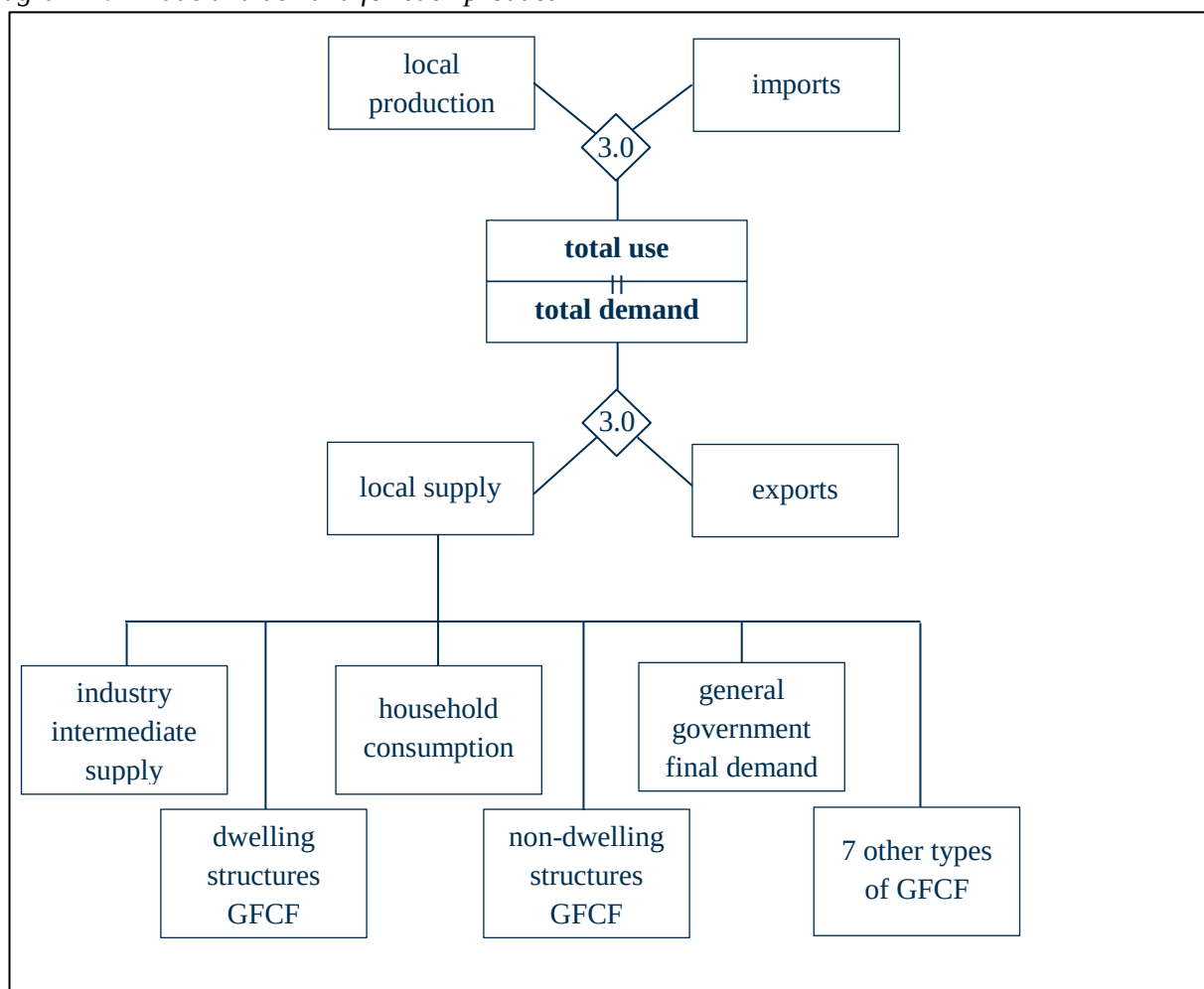
Budget constraints

In a sustainable equilibrium, governments and households must meet their budget constraints. For simplicity, we assume that the government budget is balanced in the long run. Given its expenditure requirement, the government chooses its level of taxation consistent with achieving this outcome. In the private sector, a sustainable outcome is one in which household saving is sufficient to generate growth in household assets in line with growth in real GDP.

A.2 Trade and demand

This section discusses the overall structure of the Independent CGE Model. The connection between total use and total demand is shown in Diagram A.1.

Diagram A.1 Trade and demand for each product



Note: GFCF is Gross Fixed Capital Formation, or investment.

As shown in Diagram A.1, total supply in the Independent CGE Model is made up of locally produced and imported varieties of each good. Local production competes with imports so that if imports become cheaper relative to the locally-produced equivalent, domestic users will purchase more imports and less locally produced goods and services. This substitution is modelled using a Constant Elasticity of Substitution (CES) function, where the elasticity of substitution has been set at 3.0. That is, if the price of imports relative to local production is 1 per cent lower, then the quantity used of imports relative to local production will be 3.0 per cent higher.

The value of 3.0 for the elasticity has been chosen after considering the economic literature for Australia. For example, Zhang and Verikios have estimated the elasticity of substitution between locally produced and imported goods for a number of countries, including Australia, using data from 1997, 1998 and 2002. Their estimates for this elasticity in industries for which Australia is a large importer suggest an overall substitutability of around 3.0.

In each industry, the representative firm chooses the amount to supply to the export market and the amount to supply to the domestic market. Some CGE models unrealistically assume that a firm can switch between supplying the domestic and export markets without incurring a cost. However, there are a number of inherent costs involved in export activities, such as the costs of establishing and maintaining a client base in foreign countries and/or of producing goods that satisfy foreign tastes. In line with this, the Independent CGE model takes into account that firms cannot costlessly switch between supplying the domestic and export markets. It does this using a constant elasticity of transformation (CET) function, with an elasticity of 3.0. That is, if the price received for exports relative to the price received in the domestic market is 1 per cent higher, then the quantity that firms supply to the export market relative to the quantity supplied to the domestic market will be 3.0 per cent higher. This represents a relatively high level of sensitivity to export prices, but is still less sensitive than models that assume that exports and domestic supply are perfect transformates.

Total supply must equal total demand in a long-run equilibrium. In the Independent CGE Model, local production and imports supply the 13 different categories of demand that are shown in Diagram A.1.

- Industries demand intermediate inputs.
- Industries also make decisions about their nine different types of capital– including stocks of dwellings structures, non-dwellings structures and seven other types of produced capital. In turn, these capital stocks determine the gross fixed capital formation (GFCF or investment) required to maintain sustainable growth in these assets.
- Households demand consumption goods and services.
- The general government sector demands final goods and services on behalf of households.
- The foreign sector demands exports from Australia.

The following sections describe the behaviour of each of these agents in the model – industries, households, the government and the foreign sector.

A.3 Industry production

Production in each of the 120 industries in the Independent CGE Model is modelled in a sophisticated way that identifies a large set of inputs used by industries.

It is a standard practice in a CGE model to at least distinguish between labour and capital as primary factors. Krusell et al. (1997) go further and distinguish between capital structures and capital equipment, as well as between skilled labour and unskilled labour. In the Independent CGE model, we adopt their idea of distinguishing between capital equipment and capital structures. The model also identifies industry use of labour by skill level and occupation.

Fraser and Waschik (2010) note that the GTAP7 Dataset distinguishes the primary factors of land, skilled labour, unskilled labour, capital and natural resources. Hertel et al. (2008) discuss land use in CGE models. Land and natural resources can be regarded as location-specific fixed factors which earn economic rents, setting them apart from mobile factors such as labour and capital. In each

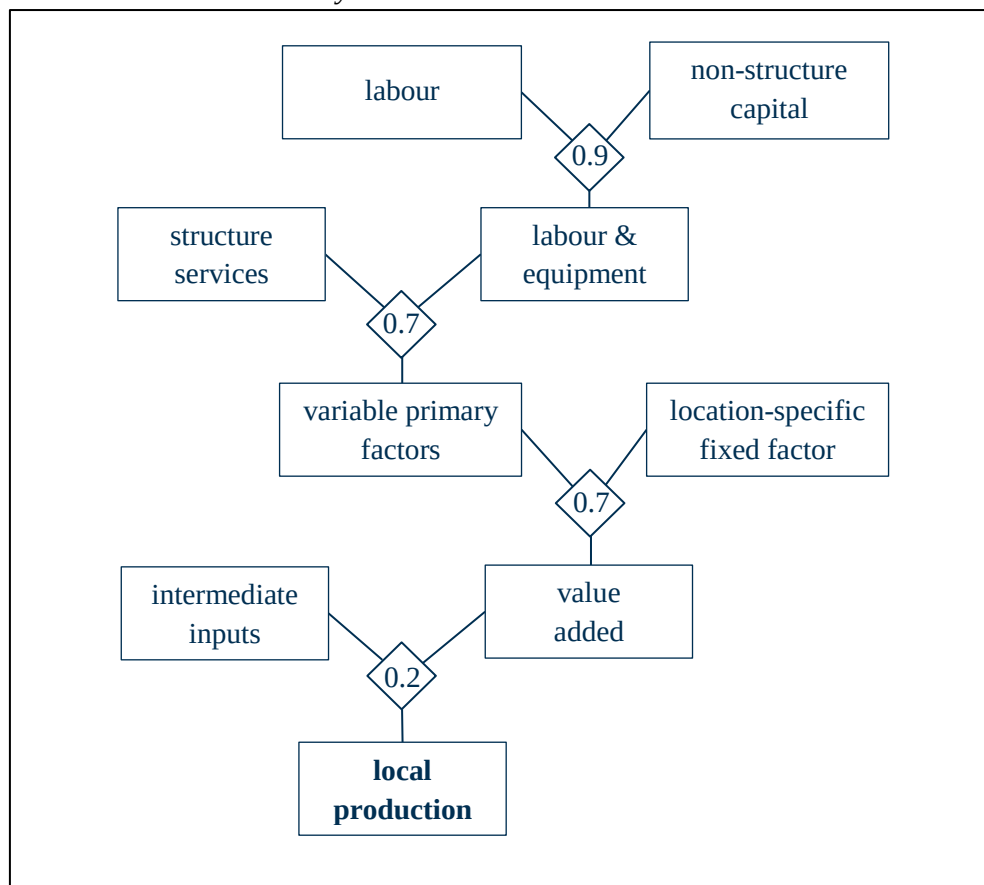
industry in the Independent CGE model, there are three fixed factors to capture economic rents. These fixed factors are land and two industry-specific fixed factors, one of which is fixed in supply in Australia (location specific) and the other which is fixed in supply globally (or firm-specific).

Each industry other than Dwelling Services in the Independent CGE model can use 43 different types of labour, nine types of produced capital and three fixed factors. It combines these primary factors with intermediate inputs purchased from other industries. The structure of the production decisions is shown in Diagram A.2.

Each industry can change the mix of primary factors that it uses as their relative prices change. Some types of primary factors are more substitutable with other factors, and other types of primary factors are less substitutable. To reflect this, the nesting structure of production decisions in the Independent CGE Model is set up in a way that allows for a high degree of flexibility.

Diagram A.2 below shows an overview of the production technology used by firms in each industry in the Independent CGE model. The full production technology is illustrated in the set of three diagrams including Diagram A.2 below, along with Diagrams A.3, A.4 and A.5 which are presented later.

Diagram A.2 Production in each industry



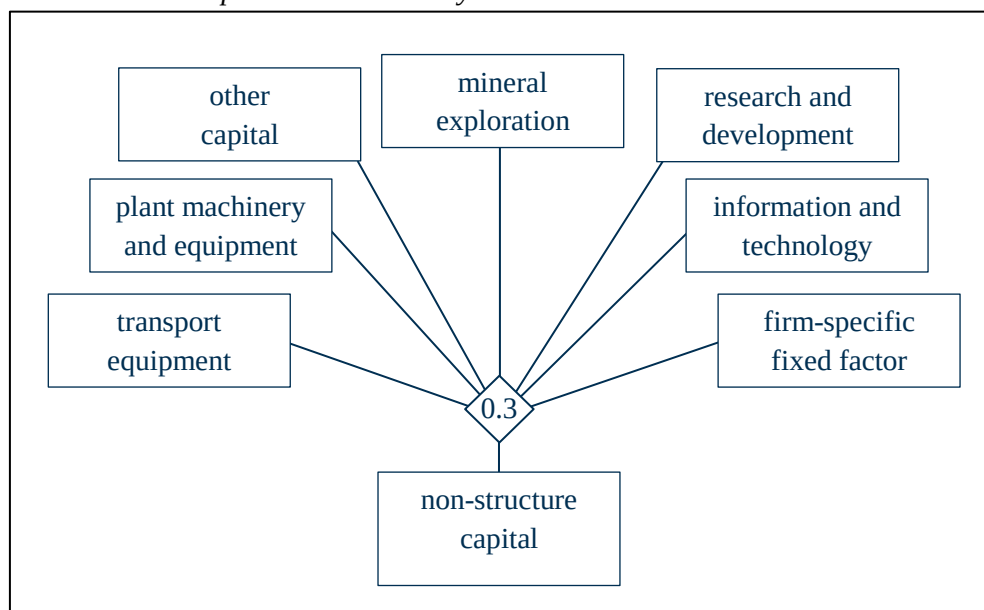
Labour and non-structure capital are modelled to be relatively substitutable with each other. As the non-structure capital bundle becomes more expensive, an industry may choose to use more labour instead. The elasticity of substitution for labour and non-structure capital measures the per cent increase in the ratio of labour to non-structure capital for a 1 per cent decrease in the ratio of their

prices. Gunning et al. (2007) review the CGE modelling literature, showing that the consensus for this elasticity appears to be between 0.7 and 1.0. Following this, we set the elasticity of substitution between labour and non-structure capital at 0.9.

A.3.1 Non-structure Capital

Non-structure capital is itself a combination of seven different types of capital, as shown in Diagram A.3. The representative firm in each industry chooses a different combination of the seven types of non-structure capital, and substitutes between each type as their relative prices change. The elasticity of substitution is set relatively low, at 0.3, reflecting the limited substitution possibilities between the different capital types. This implies that, when the cost of one capital type is higher by 1 per cent, relative to the overall cost of non-structure capital, firms will use 0.3 per cent less of this capital type, relative to their overall use of non-structure capital.

Diagram A.3 Non-structure capital in each industry



Of the seven different types of non-structure capital, six are produced (all types except the firm-specific fixed factor). Each of these types of capital is produced using different inputs. Firms can vary their use of each produced capital asset, through investment, as its return changes. Firms are able to attract funds to invest in the stock of each type capital as long as the return that can be earned is at least as high as the return that could be earned on the global market.

However, the other type of non-structure capital, the firm-specific fixed-factor, is not produced. Income from the firm-specific fixed factor reflects the rents generated by intangible assets such as brand names, patents and market power. This firm-specific fixed factor is assumed to be owned by multi-national firms, who can allocate the factor between its Australian and international operations. Although the amount of this factor globally available to multinational firms is fixed, firms can choose to change the amount that they use within Australia to generate rents. Firms will allocate their fixed factor to Australia as long as the after-tax rate of return earned in Australia is at least as high as the return that could be earned in the rest of the world.

A.3.2 Labour

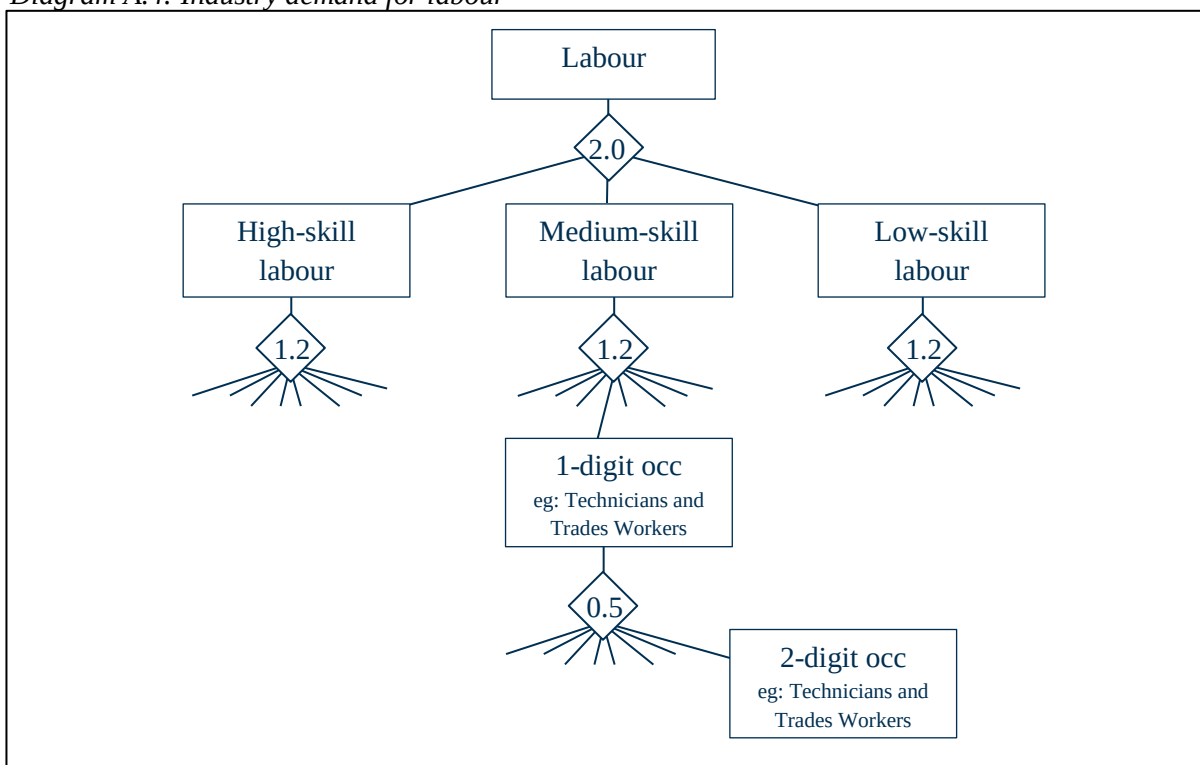
The Independent CGE model includes detailed modelling of the labour market. Specifically, it distinguishes industry use of labour according to 43 different occupations. The modelling approach in the Independent CGE model takes into account three main features of the labour market.

- Firstly, different industries demand different kinds of labour, depending on their skill level and occupation. For example, the Automotive and Engineering Trades Workers make up a relatively large share of employment in manufacturing industries, compared to their share of employment in the finance industry.
- Secondly, to a certain extent, industries are able to substitute between the types of labour that they use.
- Thirdly, through training and education (including formal and informal learning), individuals are able to adjust their skills and occupations in response to industry demand.

The initial pattern of employment in each industry is based on a number of ABS data sources showing employment by occupation by industry. Specifically, detailed data from the recent census is used to enhance data from the Labour Force Survey to estimate the pattern of employment in each of the 120 industries in the model.

The Independent CGE model uses a three-tiered system to model labour demand. This is represented in the following diagram, and then discussed below.

Diagram A.4: Industry demand for labour



Generally, the modelling of industry demand for each occupation takes into account that while industries can substitute relatively easily between broad skill levels, they are less able to substitute

between more detailed types of occupations. In addition, the parameters used in the model take into account that the occupational pattern of labour supply can respond to labour demand from industry. This is discussed below.

As shown in Diagram A.4 above, an industry first distinguishes between the different skill levels that it requires. These skill levels are defined as broad groupings of the 1-digit ANZSCO occupations.

- **High Skill Labour:** Managers and Professionals
- **Medium Skill Labour:** Technicians and Trades Workers, Community and Personal Service Workers, and Clerical and Administrative workers
- **Low Skill Labour:** Sales Workers, Machinery Operators and Drivers and Labourers

The econometric literature provides evidence that the elasticity of substitution between broad skill categories is relatively high. If it is cost-effective to do so, firms can substitute low, medium or high skilled labour relatively easily. This does not imply that the workers need to be substituted one for one. For example, the work of a team of Low Skill Workers might instead be undertaken by a smaller team of Medium Skill Workers. A firm's choice between lower and higher skilled workers will depend on the wages paid to each type of worker, and their relative productivities. However, industries will always need to use some combination of the three types of workers. The elasticity of substitution for the broad skill types is set at 2.0 – that is if the wage for high skill labour relative to the other types of labour is higher by 1 per cent, then demand for high skill labour is 2.0 per cent lower.

This level of substitutability is slightly higher than estimates from Katz and Murphy (1992) and Acemoglu and Autor (2010). This is to allow for flexibility in the supply side of the labour market. For example, if industries increase their demand for high-skilled labour, then households are likely to respond by undertaking more education or training so that they can supply this kind of labour.

After the amount of high, medium and low skilled labour is chosen, industries then choose the amount of labour from each broad (1-digit) occupation to employ. To recognise that industries are less able to substitute workers at this 1-digit occupational level, a lower elasticity of substitution is used, of 1.2. For example, if the wage for Clerical and Administrative workers relative to other medium skill occupations is higher by 1 per cent, then the demand for Clerical and Administrative workers relative to other medium skill occupations is lower by 1.2 per cent.

This elasticity is set relatively high to mimic the responsiveness of labour supply to changes in industry demand. Supply side responses are likely to have a relatively large effect at this level, because retraining from a Clerical and Administrative worker to a Community and Personal Service worker in response to industry demand is likely to be easier than retraining from a medium skill worker to a high skill worker.

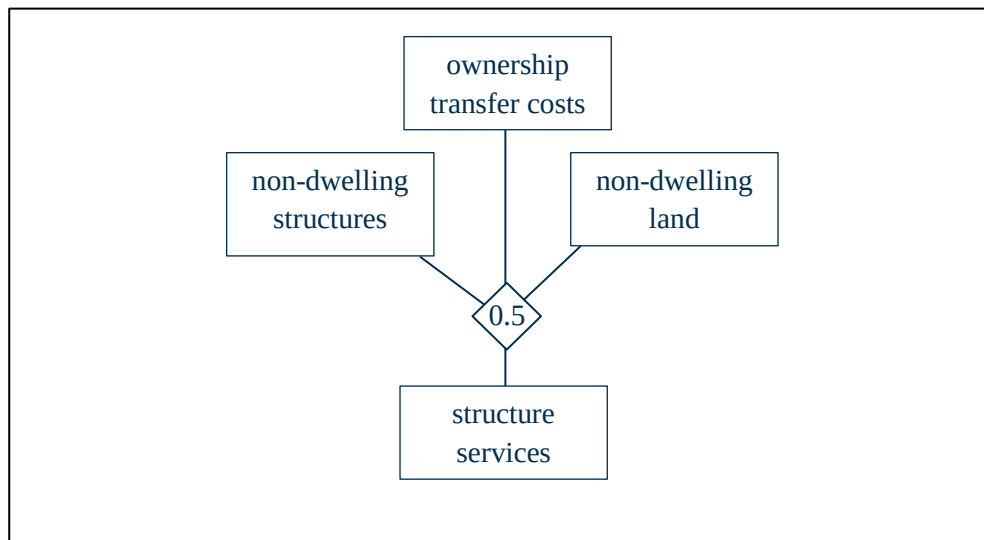
Finally, industries distinguish between more specialised fields of skills that it requires, as represented by the 2-digit ANZSCO occupations. These 43 different occupations represent skills which are closely associated with work in particular industries. The modelling takes into account that it is relatively difficult for firm's to substitute between different types of labour at this detailed occupational level. Therefore, the elasticity of substitution between these one digit occupations is set lower, at 0.5.

Both labour demand and labour supply have an influence on the wage paid to each occupation. The wage is determined in the labour markets in the Independent CGE model. If demand for a particular occupation is larger than supply, then the wage will be bid upwards. Likewise, if demand for a particular occupation is smaller than supply, then the wage will be bid downwards. The wage continues to adjust until demand for labour equals the supply of labour in the long run.

A.3.3 Structure services

Diagram A.5 shows that structure services is itself modelled as a bundle of different factors of production. Firms can substitute between using non-dwelling structures (which includes commercial buildings and engineering structures such as roads and bridges), non-dwelling land and ownership transfer costs. As shown in Diagram A.5, the elasticity of substitution between non-dwelling structures, non-dwelling land and ownership transfer costs is 0.5. This is based on the literature survey and assessment of Zhao (2010, p. 31-32, 51).

Diagram A.5 Structure Services in each industry (except Dwellings Services)



The amount of non-dwelling structures and ownership transfer costs used by an industry can be varied, through investment in the capital stock. Firms are able to attract funds to invest in the capital stock as long as the return that can be earned is at least as high as the return that could be earned on the global market. The amount of non-dwelling land used by any particular industry can also be varied. However, the overall quantity of land available to the whole economy is fixed. Non-dwelling land is allocated to its most productive use through a market, where the rental price of land adjusts to reflect its marginal product.

A.3.4 Location-specific fixed factors

The next tier in each industry's production decision models the choice between variable primary factors and location-specific fixed factors, as shown in Diagram A.2. Variable primary factors are inputs for which firms vary their level of use over the long-run – labour & equipment and structure services. On the other hand, location-specific fixed factors are inputs that are fixed in supply to any particular industry, such as natural resources. Each industry uses a different type of location-specific fixed factor. For example, each industry within the mining sector will use a different type of natural resource – the coal industry requires coal resources and the iron-ore industry requires iron-ore resources. In the banking sector, a location-specific fixed factor generates rents associated with the large networks required. These fixed factors generate location-specific economic rents, which are unable to be obtained unless they are exploited within Australia. Fixed factors are used in combination with variable primary factors, where the elasticity of substitution is set at 0.7, similar to the substitutability between structure services and labour & equipment.

A.3.5 Intermediate inputs

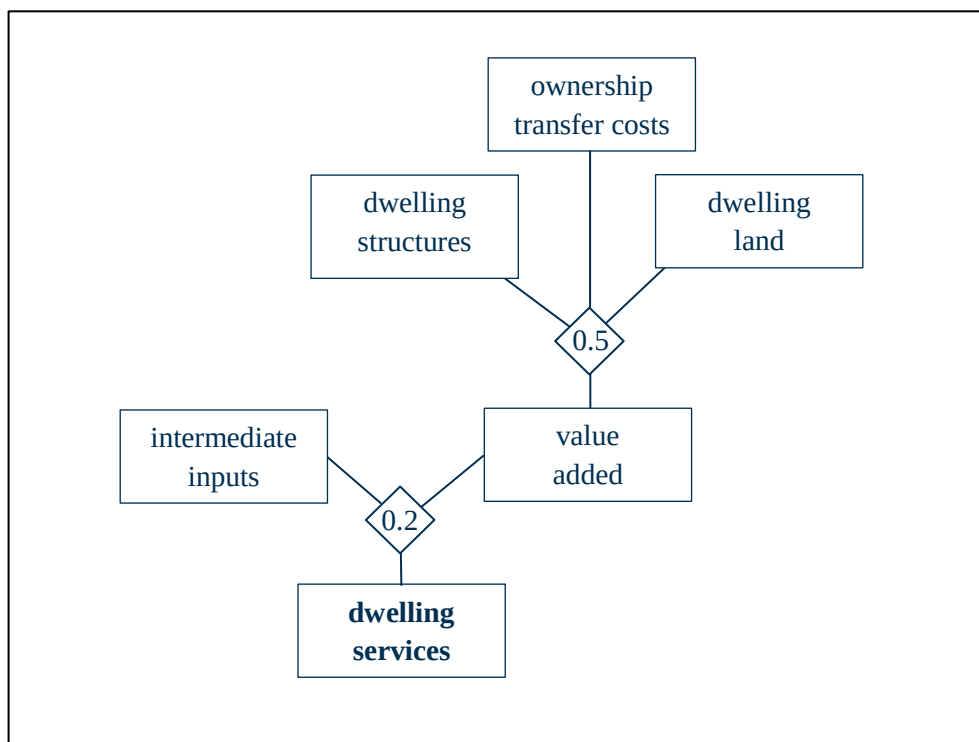
Finally, each industry combines the bundle of their primary factors, or value added, with intermediate inputs, which are the goods and services it purchases from other industries. Industries are assumed to use intermediate inputs and value added in variable proportions, but with a low elasticity of substitution of 0.2, as shown in Diagram A.2.

A.3.6 Dwellings Services

The Dwellings Services sector in the Independent CGE Model follows a similar structure as other industries, but uses primary factors specific to the industry – dwelling structures and dwelling land. The production technology for the Dwellings sector is shown in Diagram A.6 below, which reflects the more limited range of inputs that are used in this sector.

The Dwelling Services industry uses inputs which are similar to the factors of production used to create structure services in the other industries in the Independent CGE model. However, the structures and land used in the Dwelling services industry are different to those used in other industries. Specifically, dwelling structures are produced by the Residential Construction industry, whereas the non-dwelling structures used by other industries are produced by another two industries – the Non-residential Building Construction industry and the Heavy and Civil Engineering Construction industry. In addition, the land used by the Dwelling services industry can only be used within this industry, and is not available to other industries. This means that changes affecting inputs into dwelling services can be modelled separately to changes that affect the rest of the economy.

Diagram A.6 Production of Dwelling Services



As shown in Diagram A.6, the elasticity of substitution between dwelling structures, dwelling land and ownership transfer costs (from moving house) is 0.5. This is based on the literature survey and assessment of Zhao (2010, p. 31-32, 51).

A.4 Households

Households in the Independent CGE model derive well-being (or utility) from leisure and their consumption of the 120 different goods and services included in the model. However, as described in Section 2, households cannot spend more than their income. After taking into account tax and saving at a sustainable rate, households divide their full income between leisure and consumption, and then divide their consumption between the 120 goods and services. They do so in a way that maximises their utility. This behaviour is explained below, and illustrated in Diagram A.7.

Household full income is the amount of income that they would earn if they spent all of their available time working, and took no leisure. Full income is made up of the following components.

- Full labour income is the after-tax labour income that would be earned if households spent all of their time working. The wage is determined in the labour market, where it adjusts so that the demand for labour equals the amount supplied in the long run. Households value their time at the real after-tax wage that could be earned. The labour income tax rate is set by government policy, and all other taxes are built into the price of goods and services.
- Households generate income from owning a certain amount of the capital and fixed factor assets identified in the model. These include: the six types of capital that make up non-structure capital (not including firm-specific fixed factors), dwellings and non-dwellings

structures, ownership transfer costs, land and location-specific fixed factors. Households are able to earn the rates of return demanded by global capital markets on these assets.

- Households also receive income through government transfers, including cash benefits and transfers related to franking credits.

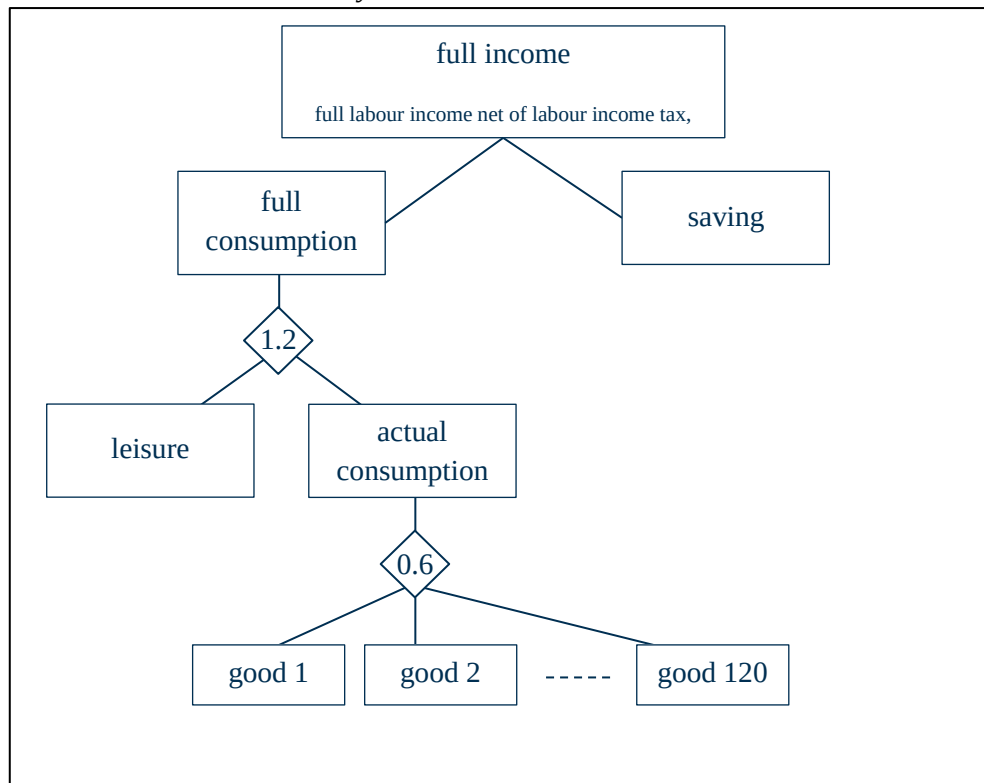
Household saving must be enough to maintain sustainable growth in the assets owned by households i.e. the domestically-owned capital stock. This sustainable rate of growth is the same as the long-run real GDP growth rate, which is consistent with the long-run time horizon of the Independent CGE model. After saving enough to cover this growth in their capital stock, the remainder of full income is spent on ‘full consumption’ – which includes the consumption of leisure and of goods and services.

The Independent CGE model uses a nested Constant Elasticity of Substitution (CES) utility function to describe the utility that households derive from leisure and their consumption bundle. This means that households make price-sensitive decisions in two tiers. The first tier describes their choice between leisure and consumption, and the second tier describes their choices about their mix of consumption goods and services. These two tiers are discussed below.

After meeting their savings target, households decide how much of their time to spend in leisure, and how much to spend working. The cost of taking leisure is the amount that would have been earned if the time were instead spent working – which is the real after-tax wage. If the real after-tax wage is higher, then the cost of taking leisure is higher, and households are expected to reduce their consumption of leisure and raise their labour supply. The parameters used in the Independent CGE model reflect an elasticity of labour supply similar to that used by de Mooij and Devereux (2011), of around 0.2. If the real after-tax wage increases by 1 per cent, then labour supply increases by 0.2 per cent. This outcome reflects the net impact of a higher wage on labour supply, through both the substitution effect (where a higher wage rate encourages households to take less leisure and supply more labour) and the income effect (where higher income levels encourage households to take more leisure and supply less labour). In the Independent CGE model, households substitute between leisure and consumption in the first tier of the nested CES utility function. An elasticity of substitution of 1.2 is used in this tier to implement the assumption that the uncompensated elasticity of labour supply is 0.2, as shown in Diagram A.7.

The amount that households spend on actual consumption is determined by the income generated from their chosen level of labour supply (net of labour income taxes), plus income from other sources and saving. As mentioned above, households make price-sensitive decisions about the goods and services they consume. If the price of one good becomes higher relative to the price of others, then households will substitute away from consuming that good. The elasticity of substitution governs how readily households would be willing to substitute between goods and services when their relative prices change. The elasticity of substitution in consumption in the Independent CGE Model is 0.6.

Diagram A.7 Household choices and utility



A.4.1 Measuring household living standards

Since household decisions are modelled using a consistent utility function, the Independent CGE model is able to provide valid measures of changes in consumer welfare, or living standards, from economic shocks or policy changes. The measure used is the equivalent variation, from welfare economics. This is the income transfer that would need to be given to households before the economic shock or policy change to enable the same level of utility as they would have after the change.

A.5 Government

Given the policy choices of the government, it will have certain expenditure requirements. Therefore, it is assumed that real government expenditure is not influenced by changes in the economy – that is real expenditure is exogenous. However, the model user can specify a change in government spending policies. For example, government spending on Defence-specific industries can be increased. In addition, since only real government expenditure is exogenous, if prices change, then nominal government expenditure changes accordingly.

Cash benefits paid to households are an additional government expenditure. These cash benefits are modelled as lump-sum transfers to households which are proportional to labour income. Franking credits are also modelled as transfers to households. These are the credits that households receive against personal income tax payments because their income from owning assets has already been taxed through business income tax.

The government collects tax revenue to finance its expenditure. In the Independent CGE model, it collects indirect taxes, business income tax, labour income tax, mining royalties and mining resource rent tax.

In the long-run, the government must have a sustainable budget position. For simplicity, in the Independent CGE model it is assumed that the government has a balanced budget.

When an economic shock is applied to the model, the government's budget position is affected, as changes in economic activity and prices affect government expenditure requirements and tax collections. Therefore, a swing fiscal policy instrument must be nominated, which adjusts so that the budget is always in balance. In the Independent CGE Model, either the tax rate on labour income or cash benefits can be used for this purpose.

A.6 Foreign sector

The modelling of Australia's relationship with the foreign sector recognises Australia's position as a small economy. This is the case for both trade and capital flows, which are now considered in turn.

Australia is a price taker for imports, meaning that changes in the Australian economy do not influence the foreign-currency price of imports. Likewise, Australia is also close to being a price taker for exports, with a standard value for the export price elasticity of demand of -12. For the following industries, where Australia has some market power or product differentiation (e.g. tourism services) a lower value of -6 is used:

- Sheep, grains, beef, dairy;
- Coal;
- Iron ore;
- Accommodation;
- Food and beverage service;
- Air and space transport; and
- Education.

Under the small country assumption, Australia can access the world market for funds, so long as the rate of return that is achieved matches the given rate required on the world capital market. That is, the after tax required rate of return on capital is determined overseas and is not influenced by changes in the domestic economy.

Australian ownership of the capital stocks is determined by their initial asset holdings. As discussed in Section A.4, the rate of growth in Australian-owned assets is assumed to be fixed, at a rate that implies sustainable growth in the initial locally-owned asset stock. Since foreign investors are willing to invest funds as long as the rate of return is at a given level, any change in the capital stock is met by a change in foreign-owned capital.

Foreign ownership of the capital stock must also be in a sustainable long-run equilibrium. The annual inflow of investment funds, recorded on the capital account in the balance of payments, is an amount that ensures that the foreign-owned capital stock grows at a sustainable rate – the long-run rate of real GDP growth. The payments to service this borrowing, an outflow on the current account, is equal to the required return on the foreign-owned assets.

Together, the inflow on the capital account and the outflow on the current account imply a certain trade balance if external balance is to be achieved. Exchange rate adjustments ensure that this balance occurs.

A.7 Baseline scenario and validation

This section first explains the construction of the baseline scenario and then outlines the validation procedures undertaken in ensuring that the model is robust.

The model uses a variety of recent data, but the main source is the detailed Input-Output (IO) tables from the ABS, giving the model a detailed picture of the Australian economy. Specifically, the 2007/08 IO tables released in late 2011 are used, which means that the model also uses the contemporary ABS industry classification, ANZSIC 2006. The model is calibrated so that it exactly reproduces this 2007/08 data.

The next step is to simulate a baseline scenario for use as a point of reference. This involves two aspects, uprating the economy from 2007/08 to 2012/13 and normalising the economy to a sustainable position. That is, the baseline scenario provides a normalised, or sustainable, version of the 2012/13 economy.

Uprating the economy from 2007/08 to 2012/13 involves simulating the model after adjusting the model's inputs for the effects of economic developments from 2007/08 to 2012/13. This includes allowing for growth in wages, import prices, productivity and employment from 2007/08 to 2012/13.

Normalising the economy involves taking into account the differences between the structure of the economy in 2007/08, compared to an economy in a long-run sustainable equilibrium.

- In 2007/08 capital inflow was well above a sustainable level, as the share of foreign liabilities in the capital stock was on the rise. In the normalised economy, capital inflow is set at the sustainable level, so that foreign liabilities grow at the same rate as the economy. This external balance is achieved through flexible adjustment of the exchange rate, as described in section A.6.
- In 2007/08 business investment was well above a sustainable level (reaching a peak as a share of GDP), as capital-output ratios were on the rise. In the normalised economy, business investment is set so that the stocks of capital grow at the same rate as real GDP.

The model has also been tested to ensure that it observes a number of widely-accepted balance and neutrality properties for CGE models.

- GDP by expenditure (the sum of household consumption, gross fixed capital formation, general government final demand and exports, less imports) always equals GDP by income (the sum of value added across all industries). This is true for both nominal and real GDP in all simulations, which is a useful check on the consistency of the model's coding.
- Walras' Law states that if all but one market is in equilibrium, then the last market must also be in equilibrium. This is the case in the Independent CGE Model. All markets other than the labour market are in equilibrium because the model equations are set up to achieve this. On

the other hand, equilibrium in the labour market is not explicitly modelled. Rather, the balance between labour demand and supply is monitored in simulation results. Exact balance is always achieved, meaning that Walras' Law holds precisely, which is an important test of the internal consistency of a CGE model.

- The Independent CGE Model observes price neutrality. In all CGE models, one price must be fixed exogenously as the numeraire, to provide an anchor for the price level. This is because the price level is usually considered to be determined by monetary policy, which is outside the scope of a CGE model. Just as it is argued that the real economy should be neutral to monetary policy in the long run, real outcomes from CGE models should be unaffected by a shock to the level of the numeraire. The numeraire in the Independent CGE model is the wage. When it is increased by one per cent, all prices in the model increase by exactly one per cent, and all real variables are unaffected, in accordance with the expected price neutrality property.
- The Independent CGE Model also observes real neutrality. This means that when all of the exogenous real variables are one per cent higher, all of the endogenous real variables are also one per cent higher. The exogenous real variables in the Independent CGE Model are: employment; real general government final demand; the fixed factors available to each industry; the real assets owned by the household sector; and the size of the economy in the rest of the world.

An Assessment of the Methodology and Findings of the
EY Report (2022) ‘The costs of abolishing the Australian Building and Construction
Commission’

Dr Philip Toner, Honorary Senior Research Fellow,
Department of Political Economy, University of Sydney

An Assessment of the Methodology and Findings of the
EY Report (2022) ‘The costs of abolishing the Australian Building and Construction
Commission’

Key Dot Points

- The 2022 EY report is one of a long chain of commissioned reports from employer and developer related groups to argue for a continuation of the ABCC or like entities. The Productivity Commission (2014: 543) inquiry into Public Infrastructure reviewed these studies and concluded ‘when scrutinised meticulously, the quantitative results provided by IE [Independent Economics, formerly Econtech] or others do not provide credible evidence that the BIT/ABCC regime created a resurgence in aggregate construction productivity or that the removal of the ABCC has had material aggregate effects. Indeed, the available data suggests that the regime did not have a large aggregate impact’. Further the Commission (2014: 773) makes the important point that ‘the use of unconvincing evidence of a large effect [of industrial relations changes] may undermine the credibility of proposals for IR policy change. It may also distract policymakers from other factors important for productivity in the construction industry — such as better procurement practices, innovation and diffusion of technologies’.
- The list of qualifications and exclusions regarding the analysis and use of the report stated at the beginning and throughout the report undermines its standing in attempting to influence public policy. There are two key disclaimers. First, the report represents solely the ‘interests’ of the MBA and so does not have regard to other evidence that contradicts these interests. Second, the modelled outcomes are contingent ‘on the collection of assumptions as agreed with the Client’. That is, the assumptions critical for modelling which, forms the core of the report, were determined by the MBA and not based on objective data or accepted economic theory.
- The report does not attempt to understand the role of unions; indeed, this role is explicitly excluded from the analysis (p.6). Nor does it seek to understand the current industrial relations system within the construction industry and the role of disputes. Disputes in the industry have been trending down consistently since the 1980s in line with the pattern in other industries. The EY report appears to regard all industrial action, both protected and unprotected, as illegitimate and simply a cost, and has no regard to the role of industrial disputes in raising safety standards, recovering unpaid wages, improving conditions and seeking a fair distribution of the surplus generated by both capital and labour. Nor does it discuss the critical role of wages in attracting labour into the industry which, as the report notes, is suffering current and prospective critical labour shortages.
- The fundamental claim of the report, that the ABCC had had a positive effect on productivity, is contradicted by the fact that according to the definitive source, the ABS National Accounts, output per hour worked in the construction industry over the 7 years immediately before and during the tenure of the ABCC (2015-2021) fell by 6.3%. Over the preceding 7 years 2008-2014) productivity increased by 25.6%.
- The study does not attempt to directly measure the effect of the ABCC on productivity or firm performance rather, it establishes a hypothetical case by first estimating how productivity could be affected by abolition of the ABCC and then applying these estimates in an economic model to determine the impact of this change on productivity and output in the macro-economy. To determine the effect of abolishing the ABCC EY surveyed 49 people engaged in the construction industry and asked them to estimate the effect of ‘industrial disputes’ on construction productivity and output. This methodology for data collection is utterly unacceptable – it is effectively anecdotal- empirically empty and

useless as a basis for analysis and modelling. It is not based on a large random stratified sample and the term ‘industrial dispute’ was never defined (duration, type, numbers of people involved etc). Further, an analysis of the ‘data’ in Table 1 *EY Respondents Assessment of the frequency of industrial activities at worksites*, reveals that nearly two-thirds of respondents reported they ‘never’ or ‘rarely’ experienced industrial action at their worksites implying they had no direct factual basis for making any assessment of the impact of industrial action.

- The results of all economic modelling depend critically on the underlying assumptions. The key parameters fed into the model were that that abolition of the ABCC would result in an increase in industrial disputation that would in turn increase total construction industry labour costs by 1.78% and decrease in labour productivity by 1.86%. Not only do these assumptions have no empirical basis they are also implausible and internally inconsistent. First, the EY report (p.30) argues that the increase in labour costs and fall in productivity would cause ‘a fall in demand for construction services which could cost the industry \$5 billion in economic output immediately’. (EY assumes the ABCC is abolished in 2021 and the effect on output occurs in 2022). However, elsewhere the report notes that in recent years the construction industry has been subject to very high levels of cost increase for non-labour inputs (materials, machinery etc) in the order of 90%-120%. These non-labour inputs comprise around 60% of total production costs in the construction industry. Yet, the report also notes that despite this phenomenal level of cost inflation the industry is projecting extremely robust growth in output into 2025. Second, the report argues that these cost increases have resulted in a ‘profits squeeze’ which will cause the industry to contract. This logic is then used to argue abolition of the ABCC by causing a labour cost increase and productivity decrease will cause both construction output and GDP to fall in the future. ABS data actually shows gross profits (EDBITA/income) in the construction industry have been robust for more than a decade and actually increased over the last 2 years. Third, because labour costs represent such a small part of total costs in the construction industry on average (16.1%) a 1.78% increase in labour costs equates to just a 0.287% increase in total construction costs. (To put this in perspective this tiny percentage change is well within the ABS sampling relative standard errors for estimates of construction output. In simple terms, the EY estimated labour cost increase is a ‘rounding error’ and can have no plausible economic effects). Fourthly, the EY model also assumes a close relationship between productivity change and construction output and GDP- a fall in construction productivity leads to a fall in construction output. Abolition of the ABCC will reduce construction productivity by 1.86% and therefore construction output and GDP will fall. This assumption is contradicted by the fact that despite the ABS National Accounts showing a substantial decline in actual construction productivity during the term of the ABCC (2016-2021) both construction output and GDP growth have been generally robust over the same period. (This, of course, is not to say productivity is unimportant; it simply reflects complex dynamics). This assumption was also statistically tested using a longer time series data and the claim that construction productivity ‘drives’ construction output is not supported. Finally, the EY report appears not to understand the basic economic concepts that underpin the model’s results. For example, the report (Table 1) finds that abolition of the ABCC will by 2025 reduce GDP by \$16.3bn and investment by \$24.7b. However, it is not possible for the fall in investment to exceed the reduction in GDP since investment (or more correctly Gross Fixed Capital Expenditure) is one of four National Accounts categories of expenditure that sum to GDP. (These categories are private and public investment and consumption plus net exports). In simple terms the data in ‘do not add up’ and the table does not make sense.

An Assessment of the Methodology and Findings of the EY Report (2022) ‘The costs of abolishing the Australian Building and Construction Commission’

Introduction

The Australian Building and Construction Commission (ABCC) is an Australian Government agency established by the Building and Construction Industry (Improving Productivity) Act 2016. It commenced operations in December 2016. Its purpose is ‘Upholding the law and changing behaviour to make the building and construction industry fair, efficient and productive’ (ABCC Annual Report 2020-21: 9).

In 2021 Master Builders Australia commissioned Ernst and Young (EY) ‘to perform economic analysis to assess the cost impacts from abolishing the Australian Building and Construction Commission (ABCC)’. The report took 9 months to compile, commencing July 2021 and completed April 2022.

The principal argument of the EY report relate to the claimed negative impact on productivity in the construction industry arising from closure of the ABCC and the wider adverse flow on effects to the rest of the economy. Accordingly, this Assessment focuses primarily on this claim.

This Assessment begins by summarising the key findings of the EY report and data collection methods. Observations regarding the status of the report and its utility as a guide to public policy follow. Next is a critical assessment of the data used in the modelling and the results.

Key Findings of the EY Report

The chain of reasoning in arguing for the adverse effect of abolition of the ABCC can be summarised as follows:

- the Australian construction industry is subject to high levels of industrial action and a challenging industrial relations environment’ (EY 2022: 6).
- ‘the disproportionate levels of industrial action in the construction industry can aggravate existing risks and have major implications for workers, businesses and the broader economy’ (EY 2022: vi).
- ‘the ABCC forms a critical safeguard for industry efficiency and performance...it was broadly accepted that if the body was abolished, this would lead to increased industrial action with attendant impacts on cost overruns and project delays (EY 2022: vi)
- abolition of the ABCC ‘in the current operating environment, labour costs could increase by around 8.8%, coupled with a potential decline in productivity of around 9.3%’ (EY 2022: vi)
- ‘any adverse impacts on the industry are likely to spill over into broader economic performance, damaging productivity and constraining future growth’ (EY 2022: vi).

The EY General Equilibrium Model (EYGEM) is used to quantify the scale of direct effects on the construction industry and indirect effects on the wider economy (Table 1). These direct and indirect effects are derived by comparing a ‘baseline’ scenario of retaining the ABCC against the ‘counterfactual’ of its abolition (EY 2022: 40). On all variables measured the impact of the ABCC’s abolition is negative.

Table 1: The potential short- and long-term impacts of abolishing the ABCC Indicator

	2025	2030
GDP (\$)	-16.3 billion	-47.5 billion
Construction output (\$)	-18.4 billion	-35.4 billion
Manufacturing output (\$)	-4.8 billion	-13.1 billion
Services output (\$)	-5.9 billion	-19.5 billion
Investment (\$)	-24.7 billion	-45.6 billion
Employment (FT jobs)	-3,839	-3,950

Source: EY 2022: 30

Status of the EY Report

As with other EY commissioned reports the document begins with a Notice outlining qualifications and disclaimers. The list of legal disclaimers is prodigious, and the general reader is left wondering about the status of the report and the reliance that may be placed upon its contents. Two disclaimers are particularly pertinent.

First, EY ‘prepared the Report for the benefit of the Client and has considered only the interests of the Client... Accordingly, Ernst & Young makes no representations as to the appropriateness, accuracy or completeness of the Report for any other party's purposes’ (EY 2002: i). Further, ‘the merits or justification behind unions in the building and construction industry, whether or not the building and construction industry benefits from unions or how they should function, has not been considered’ (EY 2022: 6). Although not stated in the report the MBA strongly opposes abolition of the ABCC (The Property Tribune 2021). This singular focus on the interests of the MBA is a concern since it explicitly excludes consideration of the interests of construction workers, non-MBA employers in the industry, developers, and private and public purchasers of construction industry products and services. It is illicit to assume the interests of the MBA necessarily align with these other groups. This explicit partiality is important to note given the report is presumably intended to influence government decision-making by making a case against abolition of the ABCC.

Second, an additional disclaimer records that the MBA determined, or at least influenced, the assumptions used in the economic modelling which produced the claimed adverse macro-economic effects from closure of the ABCC. ‘The modelled outcomes are contingent on the collection of assumptions as agreed with the Client’ (EY 2022: ii). Assumptions regarding the behaviour of economic agents are critical to determining the quantitative results of economic models and differing assumptions will generate widely differing quantitative results from these models (Brain 1986). There may be a case for a client with specialised knowledge of a particular industry or activity to assist a modeller with selecting appropriate assumptions, but it is desirable that these assumptions be detailed in any presentation of a model’s results.

The fact that the EY report explicitly serves solely the interests of the MBA and that it also exercised some unspecified control over the EY economic model’s assumptions call into question the standing of the report’s findings given its apparently intended role in influencing public policy.

ABS data refutes the EY Findings

The fundamental assertion and finding of the EY report is that the ABCC has had a positive effect on aggregate construction industry productivity and that, conversely, its abolition will lower productivity, increase costs and lower construction output and adversely affected GDP. This claim is not consistent with ABS National Accounts labour productivity statistics. Over the 7 years immediately before and during the tenure of the ABCC, 2015-2021, productivity fell by 6.3%. Over the preceding 7 years, 2008-2014, productivity increased by 25.6%.¹

Table 2: Construction. Gross Value Added per hour worked.
Index Numbers. Original. Gross Output Index. 2020 Base = 100

June	Productivity Index*	Construction Gross Output Index**
2008	93.0	77.26
2009	94.8	79.28
2010	97.8	82.14
2011	96.0	86.3
2012	105.8	93.37
2013	111.5	97.75
2014	116.8	99.79
2015	108.4	98.83
2016	104.0	98.48
2017	103.3	95.64
2018	104.9	104.47
2019	100.4	103.96
2020	100.0	100.0
2021	101.9	

Source: *ABS (2021) *Australian System of National Accounts 2020-21*: Table 15. Cat No. 5204.0

**ABS (2021) *Estimates of Industry Multifactor Productivity, Australia*: Table 16 Cat No. 5260.0

Table 2 also permits us to test a basic hypothesis underlying the EY analysis, that a change in productivity in the construction causes a change in construction output. Thus, the EYGEM model assumes that a fall in construction productivity of 1.86% (combined with a rise in labour costs) following abolition of the ABCC will result in an ‘immediate’ reduction in construction output. This assumption that output is driven, at least in part, by an exogenous change on productivity, was tested by calculating the R-squared statistic which represents the percentage of variation in the dependant variable (output) is explained by variation in the independent variable (productivity). The R-squared statistic is just 0.47 implying that over half of the percentage variation in construction output is explained by factors other than variation in productivity. The R-squared relationship is weak and therefore does not support the EY hypothesis underlying their analysis. A more plausible explanation of the trends in table 2 is that construction productivity rises with construction output, especially emerging from a period of low demand as capacity utilisation rises. However, as capacity utilisation is reached productivity is likely to slow or decline.

¹ Labour productivity is an intuitively obvious and robust measure of long-run productivity that requires few assumptions or data manipulation to derive. Alternative measures such as multi-factor productivity (MFP) growth show different results but are also highly controversial as they employ an economic theory which purports to measure the productivity of both capital and labour, or the contribution of each separate factor to total industry output. In reality, the results are simply an accounting identity or tautology derived directly from empirical measures of factor income shares and are not independently estimated (See Felipe and McCombie (2019) for a theoretical critique and Mark (1986) for some empirical problems with MFP).

The Data Sources for Modelling

The EY modelling was a two-stage process. The first stage was quantifying ‘the impacts of workplace relations matters and the ABCC on businesses, workforces and project sites, and the expected impact if there was a change to the functions of the ABCC’ (EY 2022: 6). The second stage was using these estimates of direct impacts on the construction industry of ABCC closure in the EYGEM model to quantify their impact on all other industries. These direct and indirect effects are derived by comparing a ‘baseline’ scenario of retaining the ABCC against the ‘counterfactual’ of its abolition (EY 2022: 40). (In such models typically the final results are the sum of direct effects and indirect effects where the latter are derived from a combination of input-output linkages and assumptions regarding parameters such as rates of capital-labour substitution and price elasticities of demand for intermediate and final commodities).

Data for the first stage was derived from an Industry Survey of ‘personnel that are involved in managing business operations, interactions between the business and the ABCC, and managers of workplace relations’ (EY 2022: 29). The survey was completed between November 2021 and March 2022. The key results of the survey were that abolishing the ABCC could increase construction labour costs by 8.8% and a decrease in productivity of 9.3% (EY 2022: 26). These direct impact estimates apply to the whole construction industry but as only ‘around 20% of the construction industry’s future pipeline is covered by the ABCC’s mandate. Direct impacts...were translated into an industry-wide impact of approximately an increase in labour costs of 1.78% [and] a decrease in labour productivity of 1.86%’ (EY 2022: 29). (In other words, to be able to model the effect on those parts of the construction industry covered by the ABCC the original survey estimates which applied to the whole construction industry, were discounted by a factor of .8).

The Industry Survey received 49 responses. The report correctly observes that for a number of reasons this data ‘is not intended to provide a statistically robust assessment of stakeholders’ views’ (EY 2022: 6). This is because the survey does not meet the minimum conditions for statistical robustness. First, the survey response size is small. Second, no indication is given of the size of the population from which the sample is drawn and how representative the sample is of this population. Third, no indication is given of the survey response rate, that is, what proportion of those surveyed actually responded to the survey and how the characteristics of those who responded differed from those who did not. Without meeting these minimum conditions no confidence can be placed on the validity or reliability of the data and no inferences can be drawn to the population from which it was drawn. In simple terms, data from Industry Survey cannot be taken to represent the views of industry and is equivalent to ‘anecdotal evidence’. It is also worth noting that survey respondents were not representative of the construction industry workforce as ‘respondents are likely in business management and operations roles or workplace and industrial relations management roles. Employees of construction companies were not covered by this survey’ (EY 2022: 20).

Given these limitations and the admitted absence of any statistical ‘power’ in the survey it is illicit to claim, as the report does, that the Industry Survey provides ‘a sound basis for this report’ in terms of the survey data informing the subsequent economic modelling exercise.

The report seeks to bolster the veracity of the Industry Survey by claiming it is ‘broadly consistent with previous studies and surveys undertaken on this issue and provide a sound

basis for this report’ (EY 2022: 6). Amongst others it cites earlier surveys by the Australian Constructors Association (2007) and MBA (2008). These surveys arguably suffer from similar deficiencies in terms of lacking statistical power. For example, ‘more than 40% of respondents’ to the 2008 MBA survey were ‘unfamiliar with the work of the ABCC’ and the degree of familiarity of the remaining respondents is not stated but apparently the attitudes of both groups were included in the results (EY 2022: 18).

It is important to note the report also relies on a 2014 Productivity Commission study into Public Infrastructure as apparently lending its authority to the veracity of its own and other surveys such as those cited above. This is simply not the case. ‘The Commission has carefully reviewed the studies and the empirical evidence on aggregate productivity... when scrutinised meticulously, the quantitative results provided by IE [Independent Economics] or others do not provide credible evidence that the BIT/ABCC regime created a resurgence in aggregate construction productivity or that the removal of the ABCC has had material aggregate effects. Indeed, the available data suggests that the regime did not have a large aggregate impact’ (Productivity Commission 2014: 543).

There are other reasons for questioning the validity of the Industry Survey. The survey covered the ‘experience of the respondent with IR over the last four years’ (from 2018-2021) (EY 2022: 19). One survey question required respondents to consider 12 types of industrial action and to nominate the frequency with which each type occurred on their sites over the previous four years. There were a total of 404 responses. (Not all questions were answered by all 49 respondents). The aggregate results are interesting (Table 3). Nearly one-third (32%) of respondents had ‘never’ experienced industrial action over the last 4 years, while for a similar proportion (31%) this happened ‘rarely’. Another 22% recorded their sites experienced industrial action ‘once or twice a project’. It should be noted that some projects, especially those larger infrastructure projects typically covered by the ABCC, can take years to complete. In all 88% of respondents had none or at best very limited experience of industrial action over the reference period. This data calls into question the actual level of experience and knowledge base the Industry Survey respondents have in quantifying the impact of industrial action on productivity and output.

Table 3 EY Respondents Assessment of the frequency of industrial activities at worksites

	Never	Rarely	Sometimes - once or twice a project	Often - multiple times on a project	Very often - frequent occurrence on a project
Total no. of responses	128	124	88	43	21
% of total responses	32%	31%	22%	11%	5%

Derived from EY 2022: Table 3

In sum, the Industry Survey and other information used to derive output and productivity effects of industrial disputes and the impact of the ABCC in the EY report are not statistically valid and therefore are not suitable as inputs for estimating either direct effects on the construction industry or the wider economy.

One can only agree with the Productivity Commission’s assessment that industrial disputes can impose costs and can have local productivity effects but equally the impact of any particular industrial relations arrangements governing an industry are in reality a second or

third order issue in the panoply of the more important factors impinging output and productivity within the construction industry. To cite the Commission again:

To place some perspective on the apparent economic implications of industrial disputes, in 2012-13, they reduced time worked by employees in the construction industry by around 0.032 per cent or about 40 minutes per employee per year. *This is a fraction of unscheduled absenteeism due to sickness each year.* (PC 2014: 535, *italics added*)

Finally, the Productivity Commission (2014: 773) makes the crucial point that:

‘the use of unconvincing evidence of a large effect [of Industrial relations changes] may undermine the credibility of proposals for IR policy change. It may also distract policymakers from other factors important for productivity in the construction industry — such as better procurement practices, innovation and diffusion of technologies’. [And, occupational health and safety].

Internal Inconsistencies in Evidence

Using the Industry Survey parameters of a construction wide increase in labour costs of 1.78% and a decrease in labour productivity of 1.86% following abolition of the ABCC the EYGEM model found that these ‘direct impacts cause a reduction in construction industry output as projects become more expensive and riskier, creating a fall in demand for construction services which could cost the industry \$5 billion in economic output immediately, and \$35.4 billion cumulatively by 2030. The immediate reduction in construction industry activity is likely to be sharp’ (EY 2022: 30). By ‘immediate’ the EYGEM model means within 12 months, as it is assumed the ABCC was abolished in 2021 and the largest reduction in construction output, investment and employment as well as GDP occurred in 2022, with a gradual recovery in all measures to 2030.

The claims that an increase in construction cost of production automatically leads first, to an ‘immediate’ reduction in construction output and second, that this will be a large reduction in output, are implausible and contradicted by other data in the EY report. The report devotes considerable space to a description of current conditions in the construction industry which, it observes, is characterised by both a very large rise in non-labour input costs *and* extremely vigorous growth. As to the first it notes that over the medium term ‘growth of demand for materials, equipment and plant could increase by over 120% each, increasing input prices. Prices for timber and steel have increased by 90%’. Further ‘demand for labour is predicted to be almost 50% higher than supply’ (EY 2022: 9). Despite this rapid rise in input costs Infrastructure Australia (2021) is cited as anticipating extremely vigorous expansion in construction output with ‘projections of 33% average annual growth’ (EY 2022: 11). This data is not consistent with the claim that a rise in input costs is associated with an ‘immediate’ and large decline in construction output.

The EY data on non-labour cost inflation also raises an obvious question; why is the MBA so exercised about the ABCC when apparently the principal ‘threat’ facing its membership is rising non-labour intermediate input costs? ABS data reveals that these non-labour inputs, such as equipment, steel, timber and concrete comprise around 60% of total costs in the industry (ABS 2020. Australian National Accounts: Input-Output Table 2019-20: Table 5 Cat. no. 5209.0). (Even accepting the argument that abolition of the ABCC increases wage

costs by 1.78%, as explained below this will only raise total construction costs by just 0.287%- the equivalent of a statistical ‘rounding error’).

The report explains the purported negative association between input costs and output through a variety of mechanisms but the main one appears to be the adverse effect of rising input costs on construction industry profitability. ‘Falling levels of profitability are being driven by increasing project timelines, risk allocation, cost of inputs and capability constraints’ (EY 2022: 14). Within a General Equilibrium framework such as that used in EYGEM model a reduction in profitability would constrain construction output since the construction industry would in effect be ‘out competed’ by other industries in attracting productive resources. However, ABS data over the 11 years to 2020-21 shows no trend decline in the construction industry rate of profit, despite non-labour input prices rising substantially over the period (Table 4). In other words, a fundamental premise of the EY report, that input costs lead to a reduction in construction output is not supported by the data. (The reasons for this can reflect risk management practices by builders in their negotiations with developers and pricing power by builders allowing them to pass price increases onto to customers).

Table 4 Construction industry earnings before interest tax depreciation and amortisation (EDBITA) as a percent of Total Income

	EDBITA as % of Total Income
2010-11	11.4%
2011-12	10.9%
2012-13	10.4%
2013-14	10.1%
2014-15	11.0%
2015-16	11.1%
2016-17	11.0%
2017-18	10.7%
2018-19	11.2%
2019-20	12.2%
2020-21	12.9%

Source: Derived from ABS Australian Industry, 2020-21: Table 1

The projected scale of labour price rises are vanishingly small

It is important to put the scale and impact of a projected 1.78% increase in wage costs in perspective. First, employee wage costs as a proportion of total costs vary considerably across the main segments of the industry but comprise only 16.1% of total construction costs (Table 5). It follows that a 1.78% increase in construction wage costs will increase total costs in the construction industry by just 0.287%.

Table 5 Employee wage cost as a percent of total construction costs 2019-20. Australia

Residential	Non-residential building construction	Heavy and civil engineering construction	Construction services	Total Construction
11%	21%	18%	32%	16.1

Source Derived from ABS 2020. Australian National Accounts: Input-Output Table 2019-20: Table 5 Cat. no. 5209.0

Table 6 Effect of a 1.78% increase in employee costs on total construction industry costs

Residential	Non-residential building construction	Heavy and civil engineering construction	Construction services	Total Construction
0.196%	0.374%	0.320%	0.570%	0.287%

Derived from ABS 2020. Australian National Accounts: Input-Output Table 2019-20: Table 5 Cat. no. 5209.0 from ABS 2020. Australian National Accounts: Input-Output Table 2019-20: Table 5 Cat. no. 5209.0ABS 2020: Table 5

To put this in perspective this tiny percentage change is well within the ABS sampling relative standard errors for estimates of construction output. (In simple terms total industry costs are equivalent to total industry output).² Expressed differently, the EY estimated labour cost increase is a ‘rounding error’ and can have no plausible economic effects.

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² Because the ABS estimates of construction output, employment and investment etc are all sample survey based they are subject to various types of sampling and non-sampling errors. The concept of standard error of estimate (SE) is used to quantify how much the estimate might have varied by chance. There are about two chances in three that a sample estimate differs by less than one standard error from the number that would have been obtained if all construction activity had been included and there was no random adjustment. There are about 19 chances in 20 that the difference is less than two standard errors. A related and generally more easily understandable measure of variation in the estimate caused by chance is the relative standard error (RSE), which is obtained by expressing the standard error as a percentage of the estimate. The RSE of construction output differs across sub-industries. For example, the March quarter 2022 RSE's for Non-Residential and Engineering output were 1.4% and 0.7% respectively (Building Activity, Australia, Mar 2022 Cat. No. 8752.0 and Engineering Construction Activity, Australia, March 2022 Cat. No. 8762.0). This means there is 68% chance the true Engineering output measure lies $\pm 0.7\%$ of the sample estimate.

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Submission by Professor David Peetz to Inquiry by Senate Standing References Committee on Education and Employment into the Government's approach to re-establishing the Australian Building and Construction Commission

The purpose of this submission is to discuss a particular aspect of the construction industry, that of productivity. In particular I focus on a source that is frequently relied upon by proponents of legislative change in this industry, a series of closely related reports undertaken by Econtech Pty Ltd (later known as 'KPMG Econtech' and then 'Independent Economics', a trading name used by Econtech Pty Ltd) and commissioned by the Australian Building and Construction Commission (ABCC) and subsequently Master Builders Australia (MBA). These reports purport to measure the productivity gains associated with building industry 'reforms' from 2002, and in particular the benefits from legislation enabling the exercise of coercive powers by the ABCC. The economic case for coercive legislation in this industry has centred around these reports and their claims of large productivity gains in the industry as a result of industry 'reforms', with consequent large welfare gains to consumers and the economy. Likewise the economic case for abolition of the Fair Work Building Commissioner (FWBC) and re-creation of the ABCC (with more extensive coercive powers than were originally possessed by the ABCC) hangs around estimates of the large welfare losses arising from productivity losses resulting from the existence of the FWBC.

Appended to this submission, as Attachment A and Attachment B, are two articles published in peer-reviewed journals that relate to this topic. Attachment A is an article published in the *Journal of Industrial Relations* on the earlier Econtech reports (Allan, Dungan and Peetz, 2010). Attachment B is an article in the *Australian Bulletin of Labour* on the general question of industrial relations policy and productivity (Peetz, 2012). Some of the material in this submission draws on the analysis in Attachment A, and more details can be found there. However, some of the analysis in the body of this submission has been especially prepared for this Committee. For simplicity and consistency I refer to the company responsible for the various reports as 'Econtech'.

The 2007 report 'found that "industry reforms", consisting of: the Australian Building and Construction Commissioner (ABCC); its predecessor, the Building Industry Taskforce; and industrial relations reforms in the years to 2006, had a positive impact on construction industry productivity' (KPMG Econtech, 2010:1). Its modelling purports to compare the effects of these reforms, a 'reform scenario', with a 'baseline scenario' where reforms are not implemented (ibid:3). Econtech divides time into three periods, the period prior to the Building Industry Taskforce (BIT) and the ABCC 'up to and including 2002' (a baseline or pre-'reform' period); the 'reform' era 'between mid 2002 and mid 2012'; and the FWBC era from mid 2012 onwards (Independent Economics, 2013:i). As discussed later, however, it does not do this consistently through its analysis.

The origins of Econtech's 9.4 per cent productivity gain assumption

In each of its six reports and updates since 2007, Econtech has claimed a 9.4 per cent increase in construction industry productivity arising from building industry 'reform' (the establishment of the BIT and then of the ABCC). The origins of this estimate are in the 'original' 2007 report. (The word 'original' is in quotation marks because the 2007 report built on an earlier, 2003 report commissioned by the then government.) In that 2007 report the only method by which a 9.4 per cent gain is shown is through Econtech's use of Rawlinson's data. Rawlinson's is a quantity surveyor that collects and publishes data annually on construction industry costs, by contacting firms and contractors and asking them the price of a specific task. The 2003 Econtech report compared average costs for selected items in the domestic and commercial construction sectors and claimed to show that 'building tasks such as laying a concrete slab, building a brick wall, painting and carpentry work cost an average of 10 per cent more for commercial buildings than domestic residential housing' (Econtech, 2007a, i; Econtech, 2003). The comparison was made between costs in the largely non-union domestic (housing) construction sector, and the more unionised commercial construction sector. The logic was that costs would be higher in the commercial sector because of its union presence, so the 10 per cent cost difference was said to reflect the union impact in creating inefficient work practices and reducing productivity. Econtech's 2007 report for the ABCC purported to provide an 'up to date assessment of the cost gap', using the same methodology as the 2003 report to DEWR and was said to reveal 'that the activities of the ABCC have dramatically improved the productivity of the building and construction industry' (Office of the Australian Building and Construction Commissioner, 2007). In construction, compared to the average over the 1994-2003 period (also shown in Figure 1), the labour productivity gap between what productivity could be and what it was, allegedly was down to an average of 1.8 percentage points from 11.2 percentage points, a drop of 9.4 percentage points or 84% (Econtech, 2007a, pi). The number of 9.4 per cent was derived solely from the estimated 'closing of the cost gap between commercial building and domestic housing' (Econtech 2007:iv,v,vi,27,28,33,37), which Econtech argued was 'due to improved work practices associated with the activities of the ABCC' (Econtech, 2007b).

As discussed in Attachment A (esp pp 66-67), several years ago some colleagues and I attempted to replicate the Econtech findings. We were unable to do so and discovered that this was because Econtech had made major errors in its calculations, apparently it transpired due to spreadsheet mistakes. Correcting these mistakes meant that the change in the gap identified by Econtech almost disappeared. For example, they meant that, in 2007, the average cost differential between housing and commercial construction was *no lower* that it had been in 2002, before the establishment of the BIT – in fact, it was 0.9 percentage points higher. In a subsequent report Econtech referred simply to 'anomalies' in the data and in a later report again to 'errors', but did not retreat from its estimate of a 9.4 per cent gain in productivity under the ABCC. Despite

the discrediting of the original calculation, Econtech has repeated the number in reports since then.

Econtech has, however, continued to use Rawlinson's data. A difficulty is that the cost differential by Econtech calculations ranged between 12.4 per cent and 19 per cent during the reform period; it has never fallen below the 10 per cent gap it established in 2003. (Although a smaller number of items were used for comparisons in later years, this does not explain the failure to fall below the pre-reform differential.) Possibly to avoid the embarrassment of having to show that the cost differential has been worse in the 'reform' period than in the period that preceded it, Econtech no longer publishes data for the period before 2004. Instead, it uses as the base year 2004 (over a year after the reform period began), which happens to be the year the cost differential peaked (see Figures 2 and 3 in Attachment A). Elsewhere in the Econtech report (for example in the discussion of ABS productivity data or industrial disputes data) 2004 is treated as part of the 'reform' period and compared with the benchmark pre-reform period. But in the analysis of the cost differential, 2004 becomes the benchmark year itself. This selective use of data periods and of data to produce favourable results to the cause one is advancing is referred to in statistics as 'cherry picking'.

The possibility of undertaking comparisons with any part of the pre-2004 period was dismissed by Econtech on the basis of an alleged 'break' in the series. We tested the validity of this excuse (see Attachment A, pp 68-71) and found there was no basis for it, except possibly (but not convincingly) for one of the six (originally eight) items used in the Econtech index, and that using alternative series which omitted this item produced similar results. That is, the cost differential before the 'reform' period was actually no lower than, and was typically *higher* than, the cost differential during the pre-'reform' period.

Econtech's problem with the change in use of coercive powers

Econtech has problems in dealing with the last two years of the ABCC, when there were administrative changes in the ABCC (including its leadership) and hence a change in its policy towards use of its coercive powers. Econtech pointed to 'a sharp decline' in 'the use of these powers' in 2010-11 which was sustained in 2011-12, due, it said, to a 'change of investigative technique' and 'shift in agency emphasis' (Econtech 2013:9-10) and linked, no doubt, to the departure of the preceding head of the ABCC. Indeed, Econtech showed a 90 per cent drop in compulsory 'examinations' of employees between 2009-10 and 2010-11. It used this to help explain that 'restrictions on [its compliance] power would be expected to hinder the effectiveness of the FWBC' (2013:9).

With regard to the Rawlinson's data, for most of the period of operation of both the Building Industry Task Force and the coercive powers of the ABCC, there was no evidence of a reduction in this cost differential below that which could be observed over the 1995-2002 period (which averaged 14 per cent). For example, the narrowest

this gap became, according to Econtech, was 14.2 per cent in 2010. Only in 2011, after the virtual cessation of compulsory examinations, did this gap fall below 14 per cent, and it remained in a range between 12.4 per cent and 13.2 per cent over the 2011 to 2013 period. Econtech argues that the small increase between 2012 and 2013 in the gap (from 12.7 per cent to 13.2 per cent) 'is consistent with the expectation that the introduction of the FWBC is likely to gradually unwind the productivity gains generated in the FWBC era'. Yet it fails to adequately explain why, in that case, the gap was lower after ABCC virtually stopped using its compliance powers; or why the gap in the first year of the FWBC was lower than at any time while coercive powers were extensively used by the ABCC. If changes in this gap can, as Econtech argues, be attributed to changes in construction industry regulation (a highly dubious proposition), then Econtech has failed to demonstrate that the use of coercive powers leads to any gains in relative costs between commercial and domestic residential building.

With regard to some of the other indicators used by Econtech (discussed in more detail below), there was a slight rise in the proportion of all working days lost that took place in the construction industry (from 14 per cent over 2006-07 to 2009-10, to 17 per cent over 2010-11 and 2011-12). But there was also a substantial rise in construction industry labour productivity in 2011-12, to levels much greater than those shown over the preceding years. It was the only time during the ABCC's operation when construction productivity showed a significant increase. While Econtech noted that 'labour productivity data for 2013, which would begin to reflect the operation of the FWBC, is not yet available. So an assessment of the FWBC's impact on this measure of labour productivity is not possible at this time' (p15) it also opined in its model that 'labour in the construction industry has become less productive as a result of replacing the ABCC with the FWBC, and this productivity loss flows through to the wider economy and ultimately to consumers' (p54). Yet contrary to the predictions or assumptions of Econtech, construction industry labour productivity rose again in 2012-13, exceeding the high levels achieved after the ABCC had virtually abandoned its use of compulsory powers.

Perhaps because this coincided with the near cessation of use of the ABCC's coercive powers, Econtech downplays this rise in productivity, saying the 'additional labour productivity outperformance over the last two years is driven by a compositional shift within the building and construction industry towards engineering construction, which is less labour intensive' (Econtech 2013:15). Yet the share of 'Heavy and Civil Engineering Construction' employment in total construction employment was remarkably stable, at 7.0 per cent in 2009-10, 6.8 per cent in 2010-11, 6.7 per cent in 2011-12 and 6.8 per cent in 2012-13 (ABS Cat 6291.0.55.003, Table 06). Thus compositional change in the labour force data is not sufficient to explain away the higher level of construction industry productivity in 2011-12 and 2012-13 after the virtual cessation of use of the coercive examination powers.

'Predicting' and comparing productivity

Econtech made much of the idea that productivity in the construction industry over the period since 2002 has been greater than that which would have been 'predicted' on the basis of changes in national productivity.

This, however, is a spurious argument. There is no particular reason to presume that one can accurately predict what productivity will be in the construction sector on the basis of what productivity is in the rest of the economy. Moreover, according to Econtech, construction industry productivity began to rise above its 'predicted' level back in 1997. By 1999, three years before even the Building Industry Task Force, construction industry productivity was exceeding Econtech's 'predictions' by almost as much as in 2007, making the claim of a 'reform' effect unwarranted. Productivity slumped in 2001 – only to resume its 1999 level in 2003. This has been attributed to a downturn arising from housing construction having been brought forward prior to the goods and services tax (PwC, 2013; Treasury, 2008:45) and the boom and bust cycle associated with the Sydney Olympics (Parham, 2005).

The technique used by Econtech is severely compromised by the fact that national productivity growth in recent years has been dragged down by the effects of productivity slumps, for different reasons, in mining and utilities (electricity, gas and water). These productivity falls are related to high commodity prices making it more economic to extract lower grade ores, hence lowering output per unit of labour input, despite profits increasing; and to heavy investment phases (possibly in some cases over-investment). That means that productivity growth in the 'rest of the economy' (other than mining and utilities) has been higher than growth in 'all industries'. Indeed, if Econtech's method of prediction was applied to other industries (that is, predicting industry productivity post-2002 based on pre-2002 regressions of industry productivity on national 'all industries' productivity) then, setting aside mining and electricity gas and water, 13 of the 17 remaining industry groups would average higher productivity growth over the period 2006-07 to 2012-23 than their predicted productivity growth (based on regression equations undertaken by the author). Eight of those industries had higher than predicted productivity in *every* year in that period. Yet productivity in most of these industries (such as agriculture, retail trade, accommodation cafes & restaurants, professional services, arts & recreation services) could not have been affected by the ABCC. So there is nothing unusual about productivity growth in an industry running above or below some 'predicted' average based on national productivity growth, and it certainly cannot be attributed to the ABCC or construction industry 'reform'.

There is another methodological weakness in the Econtech technique. Construction industry productivity is a component of national productivity, so it is inappropriate to regress construction against a variable of which it is a component itself. If there is to be any validity in this approach at all, it would be necessary to regress construction industry productivity against productivity in industries other than construction that

make up national productivity. With only 17 annual observations before 2002, it is impossible to regress construction against all industries in a single equation (as the resultant equation would have no 'degrees of freedom'). Parsimony is needed. But it is feasible to regress construction productivity against that in two or three industries without reducing the degrees of freedom critically. I have done this by regressing construction industry productivity against productivity in three industries: retail trade, information and communication services, and mining. These three industries are, between them, a very good proxy for national productivity: an equation regressing national productivity growth against these three industries is highly predictive over the 1985-2002 period ($r = .993$) and is even highly predictive over the 2003-2013 period ($r=.936$).¹

The table and charts below show the outcomes of regressing construction industry productivity (i) against 'all industries' productivity, along the lines of Econtech's approach; and (ii) against the three above industries. They also show the effects of using these regressions to predict post-2002 construction industry productivity (as can be seen, the figure in Chart 1 resembles that used by Econtech in their Chart 2.1). Two things stand out. First, the three-industry equation (number 2) more closely tracks construction industry productivity in the pre-2002 period (it has a higher r value), so it should be a better indicator (in Econtech terms) in the post-2002 period than the 'all industries' equation (number 1) of what construction industry productivity *should* be. Second, in the post-2002 period, construction industry productivity in the post-2002 period is mostly *below*, and often well below, the level predicted by the three-industry equations in chart 2. That is, if one accepts the logic of 'predicting' construction industry productivity, then these equations, which are more robust and theoretically valid than those used by Econtech, show that construction productivity in the 'reform' years has been well below what it should be.

Table 1: Regression equations predicting construction industry productivity

	Equation no (1)	Equation no (2)
Mining		-.146 (0.04)
Retail		.608 (0.03)
Informa		.275 (0.05)
ALL_INDS	.392 (0.00)	
(Constant)	41.995 (0.00)	40.347 (0.00)
R: YEAR <= 2002 (used for prediction)	.739	.837
Adjusted R ² (whole equation)	.517	.631
F Significance	.001	.001

p-values in brackets under coefficients. Source: Calculated from ABS Cat 5204.0 Australian System of National Accounts, Table 15.

¹ The equation is All industries productivity = .494 Retail productivity + .104 Info & Comm productivity - .053 mining productivity. p-values of coefficients = .000, .074 and .072 respectively. $F_{sig} = .000$; adjusted $r^2 = .982$.

Chart 1: Predicted and actual construction productivity using equation 1

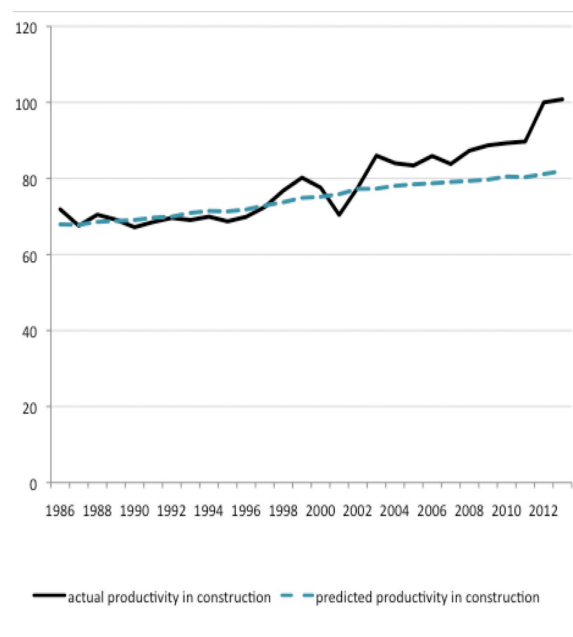
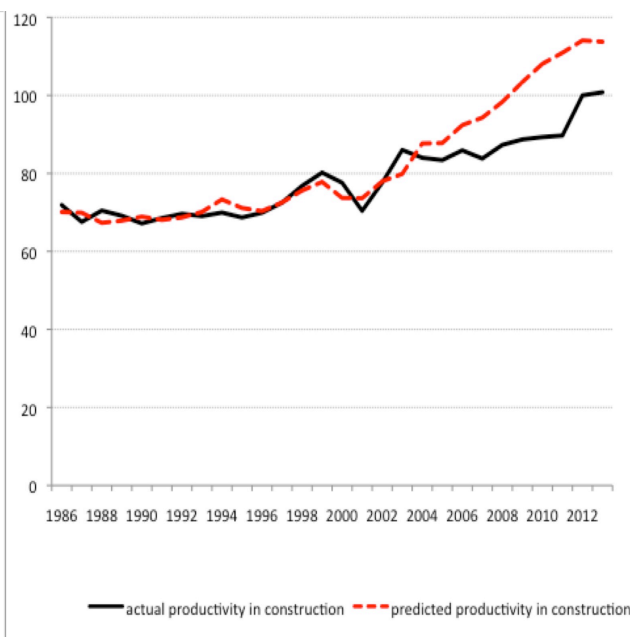


Chart 2: Predicted and actual construction productivity using equation 2

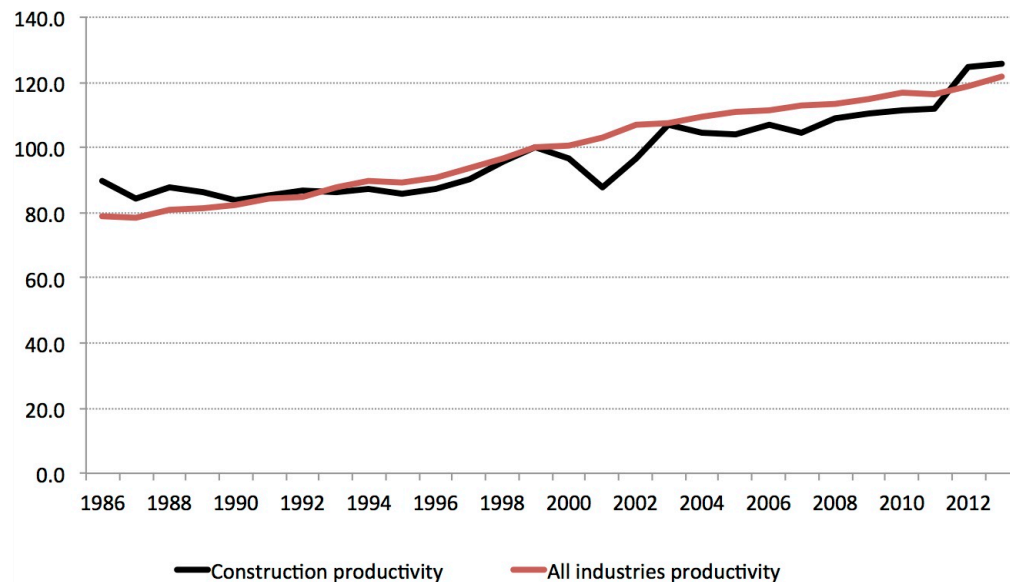


Of course, a much simpler and preferable approach to attempting to ‘predict’ productivity is to make direct comparisons. This is because a major problem with predicting productivity in any one industry based on regressing it against national productivity is that the coefficient in the equation may well be considerably less than 1 – in the case of equation 1, it is around 0.4 – meaning that a 1 percentage point increase in national productivity would be ‘predicted’ to be associated with only a 0.4 percentage point increase in construction industry productivity. Thus if national productivity increases by 1 per cent and construction productivity increases by, only say, 0.8 per cent, then this would be considered a huge success for construction in terms of such an equation. Yet this would be a counter-intuitive conclusion. It is more valid simply to compare growth rates in productivity in the construction industry and nationally. This is what chart 3 does.

We see in chart 3 that productivity growth in construction pretty much tracked national productivity growth through the 1990s. There was then a large dip associated with the aftermath of the Sydney Olympics, and a subsequent return to ‘normal’ by 2003. After that, and through most of the period of ‘reform’, productivity in construction fell behind national levels. It only reversed this in 2011-12, after the ABCC had virtually ceased using its coercive powers, and maintained this position in 2012-13 after the FWBC had been established. The chart sets 1999=100 for the two indices, ie 1999 is the base year, but, as can be seen from visual inspection of the chart, a similar pattern would be shown

from any base year in the 1990s. 'Predicting' productivity growth against a national trend, when in reality there is little medium- or long-term difference in their growth rates, is a brilliant way of torturing the data to get it to give the answer one wishes, but it does not illuminate public debate.

Chart 3 Comparison on construction industry labour productivity and national labour productivity indices



Source: ABS Cat 5204.0 Australian System of National Accounts, Table 15.

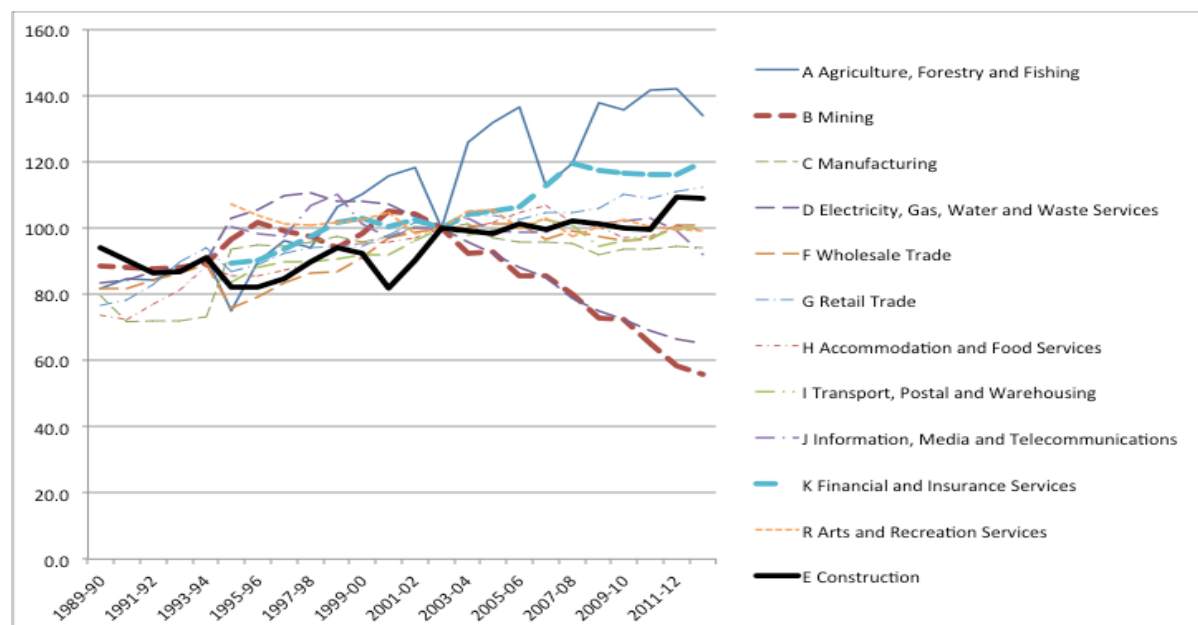
I am not so foolish as to assert that this 'surge' in productivity after the virtual end of the use of the ABCC's coercive powers was *due* to that event. Repeatedly the Econtech reports assume that if something happened at a time when something else happened, then the former must be due to the latter. It repeatedly seeks to find causality when none might be due – a common human failing (Kahneman, 2011). Rather my point is to demonstrate again that it is not feasible to assert that major changes in productivity in the industry are due to regulatory regimes and in particular to the use of coercive authority. As I indicate in the article attached in Attachment B, interest groups will regularly use often spurious claims about productivity to advance the case for a policy that will advance their own interests. In other words, rent-seeking often dresses up as productivity-seeking. In reality, public policy in industrial relations often makes little difference to national or industry productivity, but it makes a substantial difference as to the distribution of resources, income and wealth. This may also be seen in the construction industry (eg Attachment A, pp73-75).

On multifactor productivity, unlike labour productivity, Econtech in a chart compares actual growth rates in construction with the whole of the market sector, rather than using dubious 'predictions'. It observes that construction industry productivity 'strengthened considerably' arguing that

The data shows construction industry productivity rising by 16.8 per cent in the ten years to 2011/12 (starting from a value of 89.4 in 2001/02 and escalating to 104.5 in 2011/12). Over the same period, multifactor productivity in the market sector fell by 2.1 per cent. This confirms the strong construction industry productivity outperformance of the last decade already seen using labour productivity in Chart 2.1.

Again, however, the poor 'market sector' multifactor productivity figure is heavily influenced by the large decline in productivity in mining and utilities. Moreover, through most of the reform period, construction MFP growth was pretty much in the middle amongst industries. Chart 4 shows TFP in all 12 market sector industries for which there are continuous data from 1989-90. The base year is set to 2002-03 so that it is easier to see how industries compare in growth since then. By 2009-10, construction had the sixth highest growth rate from 2001-02 out of twelve industries, hardly a basis for claiming coercive reforms had led to a major boost in industry productivity. Indeed, TFP in construction was 0.2 per cent *lower* in 2009-10 than it had been in 2002-03. (Econtech's claim about 'escalating' productivity in the quote above is entirely attributable to TFP growth of 11 per cent in 2002-03, not replicated in any future year.) Only after the virtual abandonment of the ABCC's use of its coercive powers did MFP grow substantially in construction, with a 10 per cent increase recorded in 2011-12, almost sustained in 2012-13, so that, under the FWBC, MFP was 9 per cent higher than it had been in 2009-10, the last year of major use of coercive powers. Again, my point is not that the cessation of compulsory interviews led to this increase in MFP, but rather that the evidence refutes the possibility that the use of compulsory interviews led to a huge increase in MFP in construction industry.

Chart 4 Comparison of total factor productivity, all industries



Source: ABS Cat 5260.0.55.002 Estimates of Industry Multifactor Productivity, Table 1. Data are calculated by ABS on a quality-adjusted hours worked basis.

Overall, then, construction industry labour productivity followed a path broadly comparable to that of the rest of the economy. There was no magical 9.4 per cent increase in productivity as a result of the ABCC or other reforms, and no equally magical 7 per cent drop in productivity (75 per cent of 9.4 per cent) evident as a result of the FWBC coming into effect. Hence it is no surprise that, in its recent 'Productivity Scorecard' focused on the construction industry, PricewaterhouseCoopers (PwC) observed that

Growth in labour productivity in the construction industry has tracked closely with the market sector over the past fifteen years aside from a dip around the introduction of the GST, when housing construction was brought forward...

In relative terms, capital productivity outperformed the market sector between 1994-95 and 2004-05, due to the poor performance of the market sector generally... However, since 2005-06 it has declined at a similar rate as the market sector...

Multifactor productivity for the construction industry has tracked closely with the market sector since 2007-08 (PwC, 2013:3-4).

Econtech (2013:16-17) cited a Grattan Institute report as supportive evidence but a different interpretation was placed on the significance of this by PxC, who made the following observation on the construction industry and the relevance of external research:

The Grattan Institute notes that at the macro (i.e. economy-wide) level, 'there is no clear link between labour productivity growth and IR laws', and also 'at a firm level there is no obvious link between IR reform and productivity changes'.

Despite these observations, industrial relations (IR) is one of the key productivity battlegrounds in the construction industry.

Much of the focus in recent times has been on the potential reinstatement of the Australian Building and Construction Commission (ABCC).

There has been considerable debate about the degree to which the ABCC is a positive for productivity in the construction industry. A series of benchmarking studies commissioned by the ABCC and the Master Builders Association have sought to portray the ABCC as the driver of improved productivity in the construction industry. These studies have been critiqued and *the analysis found wanting on a number of methodological grounds*. (emphasis added) (PwC, 2013:7-8)

Industrial disputes

Econtech's 2013 update considered industrial disputes data from 1995-96 and claimed that

With the replacement of the ABCC with the FWBC, working days lost to industrial disputes in the building and construction industry jumped from 24,000 in 2011/12 to an estimated 89,000 in 2012/13. Hence, more than one half of the improvement in lost working days achieved in the first five years of the Taskforce/ABCC era has already been relinquished in the first year of the FWBC era.

This estimate is wildly erroneous. The number of working days lost (WDL) in 2012-13 in construction was only 61,600, so Econtech overestimated WDL in the industry by 44 per cent. Econtech conceded that, at the time, it only had access to data for three quarters instead of a full year, but felt able to estimate the full year 'by assuming that the growth rate for the full financial year is the same as the growth rate in the first three quarters of the financial year'. Like several assumptions, this one was false, Econtech failing to take account of the fact that September quarter 2012 had an unusually high number of WDL but that in subsequent quarters WDL had dropped by over four fifths. Hence Econtech applied applying a wrong extrapolation to the data. It would have got much closer to the mark if it had instead assumed that June quarter would have a similar number of WDL to March quarter.

Indeed, in the most recent 12-month period for which data are available, the number of WDL lost in construction fell to just 23,700, very slightly *below* the 23,800 in the last 12 months of the ABCC. The reality is that disputation data vary substantially from one quarter to the next, and Econtech conveniently overlooked this fact when attempting to justify a major deterioration of construction industrial relations under the FWBC.

Over the longer period covered by Econtech's disputes data, the results are presented as if there is a marked drop in construction disputation in the 'reform' period that goes well beyond that which occurred in other industries. In reality, the fall in WDL in construction is not all that different to the fall in disputes nationally, with construction's average share of disputes falling only a little, from 28 per cent in the 1995-96 to 2001-02 period, to 25 per cent in the 2002-03 to 2011-12 period. Indeed the first comparison is very favourable to the 'reform' period as, despite the ready availability of WDL data by industry back to 1985-86, Econtech chose not to use this when assessing the impact of 'reform' in disputes (unlike on productivity, where it preferred to go back through the 1980s). Had it done so, the data would have implied an increase in the share of disputes in construction, from 14 per cent in the 1985-86 to 2001-02 period, to 25 per cent in the 'reform' period. Dispute levels in the post ABCC period have been fairly stable overall, and construction's share of days lost depends on the period assessed. In the twelve months to June 2013 it was 30 per cent (an increase on the reform average), but in the

12 months to September quarter 2013 it was 23 per cent (a very slight decrease). Table 2 shows the average over the five quarters to date at 30 per cent. Yet for four of the five quarters of the FWBC, WDL in construction have been well below the average during the 'reform' period (between 1,800 and 8,700 days lost per quarter, compared to the previous average of 13,600). Even more than productivity figures, disputes data are highly erratic from one quarter to the next and a much longer period would be needed to assess the impact of any change in policy regime.

Table 2: Construction as a share of all working days lost through industrial disputes, per quarter, 1995-96 to date

	Construction	All industries	Proportion of all days lost, in construction
average 1995/96 - 2001/2	39.8	139.9	28%
average 2002/3 to 2011/12	13.6	54.7	25%
average 2012/13 to date ^(a)	13.7	46.1	30%

(a) Latest data are for September quarter 2013.

Source: ABS Cat 6321.0.55.001 Industrial Disputes, Australia, Table 2a.

Econtech also fails to understand the relationship of industrial action to both labour productivity and labour costs. Days lost through industrial disputes also do not automatically feed directly into labour productivity calculations. Labour productivity is output per unit of labour input. During a strike, for those workers involved labour there is zero labour input and zero output, so there is no change to total output per unit of labour input over the course of that year for those workers. Of course, there may be major impact on labour earnings and profits, but these are not the same as labour productivity. Econtech says in a comparison on the building of two trains cited in another consultant's report:

Train 5 lost 0.4 per cent of man hours to industrial action, while Train 4 lost 2.3 per cent. As noted in the Allens report, this case study suggests that the move to the ABCC-regime resulted in a two per cent reduction in labour costs.

This misrepresents the original consultancy report (Allens did not say that this showed a two per cent reduction in 'labour costs' – Allen Consulting Group, 2013:33), and suggests a misunderstanding of the practice and law on industrial action. Workers do not get paid for 'man hours' lost through industrial action and so it is not a direct labour cost.

Case studies and modelling

As shown, Econtech cherry-picks data periods and data. Econtech also refers to some case studies it and others undertook several years ago. Case studies lend themselves strongly to cherry-picking of data, as – unlike with analyses of, say, ABS data where

others can obtain access to the data and attempt to verify results – the full data in case studies collected are typically not revealed, rather only those selected by the writer are revealed. If cherry-picking is observed in the use of quantitative data, then there is little reason to believe it has not occurred in the use of qualitative data. Accordingly, I do not bother commenting on the unverifiable case studies Econtech cites.

The modelling that Econtech uses to base its claim of \$7.5 billion in consumer gains from 'reform' of the building and construction industry, and \$5.5 billion in consumer losses as a result of the introduction of the FWBC, has no solid basis. Rather, these claims are entirely a function of the assumptions fed into Econtech's CGE model, of a 9.4 per cent productivity gain arising from 'reform' and that 75 per cent of this gain is lost as a result of the FWBC (a formula justifying this 75 per cent ratio is never revealed, it is just another assumption). The former number is really just an inflated version of the \$3.1 billion gain estimated in its 2007 report, increased by the growth of nominal GDP and some tinkering to the model, which has been renamed as updates to it have been made. Change the assumptions and these outcomes also change proportionately. As discussed above, the 9.4 per cent productivity gain, originally claimed in the 2007 report and repeated in each successive report, despite the discrediting of its estimation, has no basis in fact. Therefore the claims of massive welfare gains and losses from building industry regulatory changes are nonsense.

Closing remarks

The exercise of coercive powers by the ABCC has been justified by reference to claimed gains in productivity and hence national welfare. These claims were erroneous, probably due to incorrect transcription, with the source data indicating no significant relative productivity gains.

The boost to GDP, savings to the CPI and national welfare gains in each of the Econtech reports, estimated as they were 'from the recent closing of the cost gap between commercial building and domestic housing', had no basis as there was no 'closing of the cost gap'. Despite being made aware of this, the ABCC and its consultant, Econtech, stuck to the original claims about the size of productivity and welfare gains from the use of coercive powers. Yet Justice Wilcox's inquiry (cited four times by Econtech in the 2013 report) found that 'The 2007 Econtech report is deeply flawed. It ought to be totally disregarded' (Wilcox, 2009:46). The errors ('anomalies') in the 2007 report might be dismissed as an 'honest mistake', but it is not clear that the later insistence on not revising findings can be so easily. Other critiques (eg Toner 2003; Mitchell 2007; Keane, 2010; Martin, 2013) also appear valid.

Claimed productivity gains from the use of coercive powers are also not discernible in official ABS or Productivity Commission data. If the ABS and Rawlinson's data show anything, it is that productivity improved after the ABCC virtually ceased using its compulsory examination powers. However, it would not be safe to conclude from this that the end of compulsory examinations *caused* the improvement in productivity. A

more appropriate conclusion would be that links between cause and effect are too easily drawn – especially, as in the Econtech reports, when cherry picking occurs. It is likely the public policy in industrial relations often has little impact on productivity in construction or many other industries, but it does have a major impact on the distribution of resources, income and wealth.

On industrial conflict, working days lost fell in construction in line with developments in the rest of the labour market, and that industry's share of disputes was slightly lower in the 'reform' period than beforehand. Since the FWBC came into being the average number of WDL in construction has not changed much from the 'reform' period average, the average share of WDL in the industry has increased but for four of the five quarters WDL are well below the average during the 'reform' period. As a result any conclusions one way or the other about the impact on disputation must be tentative – other than observing that Econtech severely overestimated the level of conflict in the industry under the FWBC.

In short, if 'economic case' refers to productivity gains, there is no economic case for the reinstatement of the ABCC. If, however, the aim is to increase the share of income going to profits, or reduce it going to wages, then that is an 'economic' objective that would be served by the reintroduction of an institution that may more effectively use coercive powers against workers. If this is the aim, however, it should be more clearly stated.

In the conclusion to Attachment A we also drew attention to the implications of our analysis for public debate over these issues, and pointed to the aphorism 'he who pays the piper, calls the tune.' On the basis of its 2003 report, the ABCC could have been confident that Econtech would be able to produce favourable reports. The MBA could have subsequently been equally confident. So it is no surprise that the ABCC and MBA commissioned successive Econtech reports and 'updates'. This does not mandate, however, that they should be given credence. A final remark is worth noting. Highly respected economic journalist, Ross Gittins, has expressed considerable disquiet on general issue of the use of consultants by interest groups in policy and legislative debates. In an article that also made specific reference to a commissioned report on a separate issue, also prepared by Econtech, he made the following remarks:

To my knowledge there's no statement of ethical principles to which modellers do or don't adhere. If so, on what is the claim of independence based?

My doubts about the credibility of commercially provided modelling exercises rest on the belief that they're essentially a propaganda tool.

They don't - and aren't intended to - inform the policy debate in any real sense. Rather, they're an exercise in dazzling the punters with pseudo-science.

Anyone can make claims about the economic benefits or costs of a particular policy, but those claims gain an air of authority and false precision when they come out of an econometrician's black box.

The punters are meant to be impressed by the notion that it's all terribly scientific, complex, mathematical, computerised and generally beyond their ken.

The commissioning of special reports, the use of words such as "independent" and "respected", and the quoting of "point estimates" rather than ranges are intended to create an air of certainty and God's truth revealed.

But everyone in the business knows econometric modelling exercises are as ropy as all get-out. In the jargon, they're subject to significant limitations that fellow economists could argue over until the cows come home.

The results from models are based on a mountain of assumptions - assumptions that are built into the model's equations and further assumptions that are fed into the model - and every assumption is open to debate...

The activities of the commercial modellers will eventually discredit the use of economic modelling in the public policy debate. But models are so potentially misleading that this may be no bad thing. (Gittins, 2007)

Griffith Business School
Griffith University
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ATTACHMENT A



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'Anomalies', Damned 'Anomalies' and Statistics: Construction Industry Productivity in Australia

Cameron Allan

Griffith University, Australia

Andrew Dungan

Department of Employment, Economic Development and Innovation,
Australia

David Peetz

Griffith University, Australia

Abstract: The exercise by an Australian state agency of coercive powers against construction industry workers has been justified by reference to claimed gains in productivity and hence national welfare. Yet the literature suggests that a more cooperative approach to union-management relations would offer better opportunities for productivity improvement. This article examines the data behind the productivity claims and finds that they were erroneous, probably due to incorrect transcription, and that the source data indicated no relative productivity gains against the identified benchmark. Despite being made aware of this, the state agency and its consultant maintained the original claims about the size of productivity and welfare gains from the use of coercive powers. Official cross-industry and time series data also showed no productivity gains arising from the use of coercive powers. However, there is some evidence that there has been a shift of income shares in the industry from labour to capital. The findings have

Contact address: David Peetz, Department of Employment Relations, Griffith Business School, Nathan Campus, Griffith University, Brisbane, QLD 4111, Australia. [email: d.peetz@griffith.edu.au]

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implications for understanding the role of commissioned studies in public debate, and for regulation of the construction industry.

Keywords: *building and construction industry; productivity; trade unions*

Introduction

The Australian Building and Construction Commission (ABCC) was established by the Howard government under special legislation enabling the use of coercive powers to regulate union activity. The *Building and Construction Industry Improvement Act* (2005) (BCII Act) provided for six months jail for people refusing to cooperate with ABCC inquiries (section 52). Only the Australian Security Intelligence Organisation (ASIO), responsible for ensuring national security, has similar coercive powers regarding the questioning of persons who assist in relation to a terrorism offence. The ABCC, by contrast, could apply these ASIO-style powers to investigate an employee's breach of an award. Unlike hearings by public tribunals, such as Fair Work Australia, the ABCC conducted its interrogations in secret. Detailing the nature and implications of the extraordinary coercive powers of the ABCC is beyond the scope of this article, but they have been extensively analysed elsewhere (Williams and McGarrity, 2008). At the time of writing, the legislation was still in place but with proposed amendments before the Senate, after an inquiry by Hon Murray Wilcox QC (Wilcox, 2008, 2009). The Labor government's Building and Construction Industry Improvement Amendment (Fair Work) Bill proposed to abolish the ABCC but transfer most of its coercive powers to a new Fair Work – Building Industry Inspectorate, albeit with some additional, limited safeguards (Gillard, 2009).

Arguments to retain the use of state coercive powers in the industry were based on data suggesting economic welfare benefits from maintaining a separate regulatory regime in the industry. In 2007, the ABCC released a report by private consultants, Econtech (2007a), which claimed that the BCII Act had resulted in major improvements in labour productivity. That report remained the basis on which claims about industry productivity gains were made (e.g. Australian Chamber of Commerce and Industry, 2009). This article aims to assess the merits of the data on which this debate was cast from 2007, and its implications for the interpretation of commissioned modelling and the future of regulation of the building and construction industry.

Productivity and Construction Unions

The 2007 report followed an earlier report by Econtech (2003) that had been undertaken for the then Department of Employment and Workplace Relations (DEWR). That earlier report compared average costs in the domestic and commercial construction sectors and claimed to show that 'building tasks such as laying a concrete slab, building a brick wall, painting and carpentry work cost

an average of 10% more for commercial buildings than domestic residential housing' (Econtech, 2003, 2007a: i). The claim was based on analysis of data from Rawlinson's, a quantity surveyor that collects and publishes data annually on such costs, by contacting firms and contractors and asking them the price of a specific task. The comparison was made between costs in the largely non-union domestic (housing) construction sector, and the more unionized commercial construction sector. The logic was that costs would be higher in the commercial sector because of its union presence, so the 10 percent cost difference reflected the union impact in creating inefficient work practices and reducing productivity.

This methodology was criticized by Toner (2003) as naively assuming unions were the only potential source of cost differences. Other structural factors could also explain them, including greater on-site complexity (it costs more to affix a plasterboard wall on the 10th floor of a high rise than on a ground floor cottage), higher capital intensity and higher profit margins in the commercial sector. Econtech countered that if the gap declined then it would reflect not structural explanations but changes in work practices associated with the activities of the ABCC (Econtech, 2007a: i), and claimed 'Toner's theory was disproved by Econtech's 2007 update of the cost gap analysis' (Econtech, 2007c). Toner argued that ABS data (Australian Bureau of Statistics, 2008a) showed that labour productivity was markedly *higher* in engineering and non-residential construction than in residential construction. Toner also pointed out that 'in three out of four studies of [construction industry] labour productivity, Australia is on par with the US and generally performing better than Japan, Singapore, Germany and France' (Toner, 2003).

The studies cited would seem contrary to the adversarial philosophy behind the ABCC approach of suppressing union activity. Neither does the existing economic literature offer strong support to that philosophy. The once accepted wisdom that unions necessarily harmed productivity has been overturned. Freeman and Medoff's (1984) seminal study, *What Do Unions Do?*, demonstrated that unions may enhance productivity through both 'monopoly response' (higher union wages force firms to introduce more productive technology) and 'voice' effects (unions reduce quits and increase tenure by enabling employees to seek workplace improvements). There was empirical support for Freeman and Medoff's claims in subsequent US data (Allen, 1985; Ben-Ner and Estrin, 1986; Phipps and Sheen, 1994), along with some critics (Addison and Barnett, 1982; Drago and Wooden, 1992). The British evidence was initially of a negative unions-productivity relationship (Edwards, 1987), but empirical evidence from the 1990s onwards suggested no systematic relationship (Addison and Belfield, 2004). The evidence that unions reduce quits and increase job tenure is more consistent (Addison and Belfield, 2004; Freeman, 2005). Twenty years on, the general consensus among those who reviewed the literature was of no consistent relationship evident between unions and productivity, with a wide variety of results but the average impact tending towards zero (Addison and Belfield, 2004; Freeman, 2005; Hirsch, 2004; Kaufman, 2005). Similarly,

studies that effectively contrasted union collective bargaining with non-union individual contracting showed no advantage for individual contracting (Fry et al., 2002; Gilson and Wagar, 1997; Hull and Read, 2003; Peetz, 2005).

There is one consistent positive relationship that comes through in the literature: 'what matters is not unionism *per se* but the interaction of unions with management' (Freeman, 2005: 657), as 'union plants with cooperative labor relations and high-performance HRM practices have above-average productivity, whereas union plants with adversarial relations and traditional "job control" HRM practices have below-average productivity' (Kaufman, 2005 citing Hirsch, 2004). Black and Lynch (2001) showed that among workplaces promoting joint decision-making and incentive-based pay, unionized workplaces had higher productivity than non-union workplaces, whereas among workplaces without any innovations, the reverse was the case. In Australia, the intensity of collaboration between management and workers (via unions) has a positive effect on workplace performance (Alexander and Green, 1992).

The Release of the 2007 Report

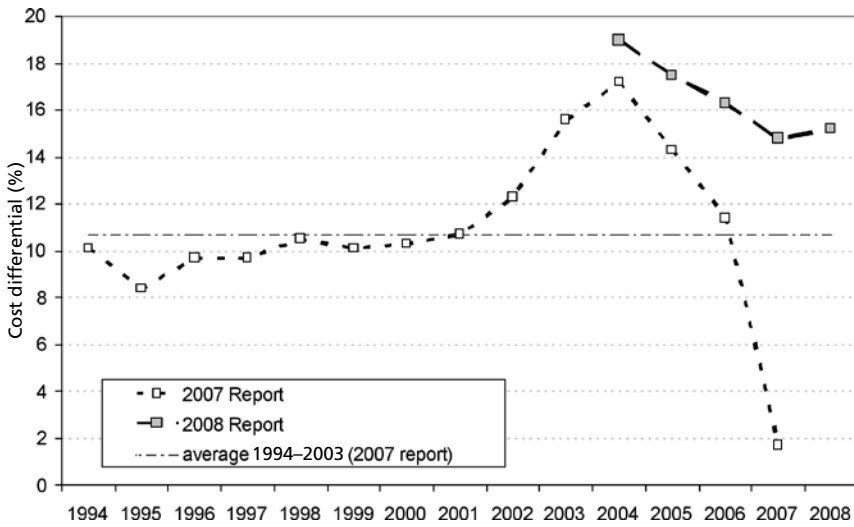
Econtech was an economic consultancy based in Canberra.¹ It most visibly entered the debate on industrial relations reform in July 2007 (Econtech, 2007b) when it produced a report for major employers, that was used in advertising even before it was released (*Workplace Express*, 2007), to support a campaign against abolition of the Work Choices legislation. That report received considerable positive media coverage, but there was also scepticism and criticism because of major problems with the report itself (e.g. Coorey, 2007a,b; Gittins, 2007; Peetz, 2007; Streketee, 2007).

Around the same time, Econtech produced a report for the ABCC, which purported to provide an 'up to date assessment of the cost gap', using the same methodology as the 2003 report to the DEWR. This was depicted as demonstrating economic gains resulting from the BCII Act (e.g. Lewis, 2007). An ABCC media release stated the report 'reveals that the activities of the ABCC have dramatically improved the productivity of the building and construction industry' (Office of the Australian Building and Construction Commissioner, 2007). As mentioned, the 2007 findings were primarily based on an analysis of cost data from Rawlinson's. The report claimed:

After averaging 10.7 per cent in the 10 years to the end of 2002, the cost gap has recently closed dramatically to be only 1.7 per cent at 1 January 2007. This is not consistent with claims that the cost gap was due to structural factors. Rather, closing of the cost gap has coincided with the operation of the ABCC and its predecessor the Taskforce. (Econtech, 2007a: ii)

Across construction as a whole, compared to the average over the 1994–2003 period (also shown in Figure 1), the labour productivity gap between what productivity could be and what it was, allegedly was down to an average of 1.8 percentage points from 11.2 percentage points, a drop of 9.4 percentage points or 84 percent (Econtech, 2007a: i). The number of 9.4 percent was derived

Figure 1 *Information in charts purporting to depict average cost differences between commercial building and domestic residential building for the same tasks for five states*



Source: Econtech Reports (2007, 2008).

solely from the estimated ‘closing of the cost gap between commercial building and domestic housing’,² which Econtech argued was ‘due to improved work practices associated with the activities of the ABCC’ (Econtech, 2007c). This was depicted in a chart, the features of which are shown by the dotted line in Figure 1. The numbers behind it were, said Econtech, ‘dramatic’.

Econtech then plugged its estimated productivity gains into its MM600+ economic model. This modelling led it to summarize the ‘economy wide effects of the impact of ABCC’ by unequivocally asserting that:

consumer prices are lower (by 1.2 per cent), and Australian GDP is higher (by 1.5 per cent) than would have been *if the ABCC had not existed*. (Econtech, 2007c: emphasis added; also Econtech, 2007a: i)

In addition, ‘the higher construction productivity leads to an increase in consumer living standards (the annual economic welfare gain) of about \$3.1 billion’ (Econtech, 2007a: 46).

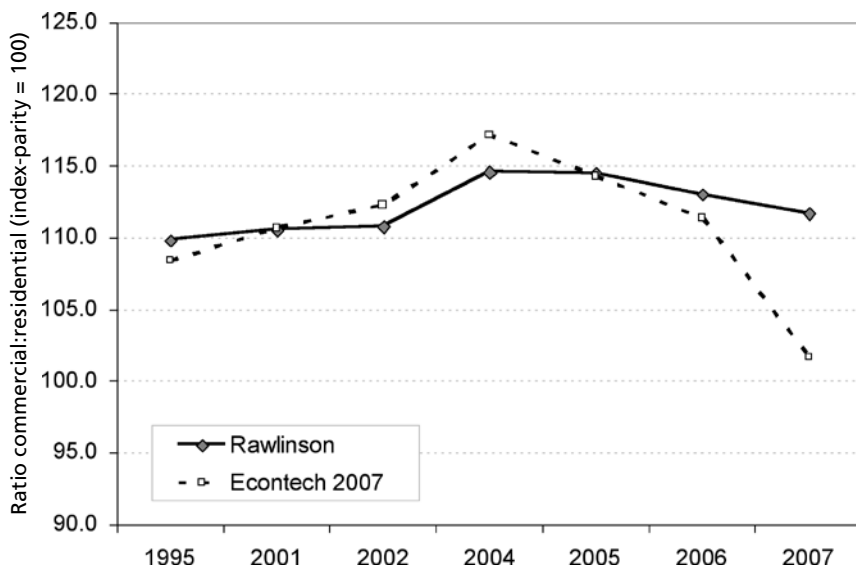
A month later, the methodology was critiqued by Mitchell (2007). He argued Econtech ‘provides no transparency in their published work and replication of their results is impossible’. Using ABS implicit price deflator data he found non-residential construction prices grew at a slightly slower rate than residential and non-residential building and ‘found no evidence to support the hypothesis that a sudden “event” . . . has altered the time series behaviour of the . . . data’ (Mitchell, 2007). Econtech (2007c) challenged this. However, another reason Mitchell was unable to replicate Econtech’s findings was that Econtech had not accurately used Rawlinson’s data.

Problems with the 2007 Report

In an attempt to verify the Econtech report, we went back to the original source data of Rawlinson's. We obtained data for January in the years 1993, 1995, 2001, 2002 and 2004 to 2008. We replicated the stated Econtech methodology, obtaining data on the following eight tasks in domestic residential and commercial construction: reinforced concrete 25 Mpa suspended slab NE 150mm thick; class 3 formwork sofit of suspended slab 100/200mm thick; clay brickwork wall or skin of hollow wall 110mm thick; carpentry wall framing plates 75 × 38mm; doors, timber, hollow core, std 2040 × 820 × 35 hardboard for painting; steel roofing corrugated, zinc coated 0.42mm; plasterboard flush finished, 10mm thick to timber wall framing; and painting, woodwork, acrylic, primer, one undercoat, two gloss coats.

We identified the ratio of commercial to domestic costs for each item for each year in each mainland capital city (Sydney, Melbourne, Brisbane, Perth, Adelaide). There are, it appears, what Econtech describe as 'slight differences in the precise definitions' of tasks used by us and Econtech, but Econtech advise that these differences 'are not material' and led to a discrepancy of merely 0.1 percent in estimates of movements in the cost differential in 2008 (email communication, 31 October 2008). So, for all practical purposes, we used the same data as Econtech. We calculated an average cost differential for each capital, and a national weighted average that used the weights Econtech provided, based on each state's 'average contribution to national contribution activity'.³

Figure 2 *Comparison of Econtech data and state-weighted original Rawlinson data, eight items, Australia, 1995–2007*



Source: Econtech Report (2007); Rawlinson's data.

Our results based on the original Rawlinson's data were vastly different to those of Econtech. National level comparisons are shown in Figure 2. For the eight tasks selected by Econtech, we found only a small drop of 1.3 percentage points in the cost differential between 2006 and 2007. (Between 1994 and 2005, the average absolute movement on Econtech's estimates was 1.3 percent, so a movement of that size was entirely unremarkable.) This fall was only one seventh the size of the movement claimed by Econtech.

For 2006, we detected a fall of just 1.5 points, barely half the 2.9 point fall claimed by Econtech and, again, within a fairly normal range. So, over the period January 2005–January 2007, the actual fall in the cost differential was not 12.6 percentage points, but 2.8 points.

Notably, the cost differential in 2007 was still 11.7 percent. This was actually slightly higher than the gap of 10.8 percent in January 2002, before even the establishment of the Building Industry Task Force. In fact, the cost differential was higher in 2007 than in each of the early years for which we had collected data.

Presenting the 2008 and 2009 Revisions

On 1 July 2008, the ABCC requested Econtech to 'update' its report (Lloyd, 2008). It was released one month later. By then, the ABCC had been made aware of the 2007 report's inaccuracies rendering invalid the key conclusions about major changes in the cost differential. Indeed, the data in Econtech's 2008 report were totally different to the data in the 2007 report. The extent of the difference can be seen by comparing the dotted and dashed lines in Figure 1. The huge drop in the cost differential in 2007, apparent in the 2007 report, no longer appeared in the 2008 report. Instead, the reported cost differential fell slightly by 2007 but then, without comment, rose by 0.4 points to 2008.

The ABCC issued a media release similar in tone to the previous year, claiming that the 2008 report 'reaffirms the ABCC's role in improving productivity in the construction industry' (Office of the Australian Building and Construction Commissioner, 2008). Commissioner John Lloyd said 'It is encouraging to find that *all* indicators are pointing to increased productivity across the construction industry' (*emphasis added*).

Despite the refutation of the cost comparisons data that formed the basis for the 2007 report, exactly the same conclusions were reached about the impact on GDP and consumer prices as in the 2007 report. Econtech estimated that the 'economy-wide impacts of the ABCC activities' were that: 'GDP is 1.5% higher than it otherwise would be; the CPI is 1.2% lower than it otherwise would be . . . and improved consumer living standards [are] reflected in an annual economic welfare gain of \$5.1 billion'⁴ (Office of the Australian Building and Construction Commissioner, 2008; see also Econtech, 2008: 27).

Econtech was able to produce the same macroeconomic outcomes from the 2008 analysis as in the 2007 analysis because 'this report also assumes an ABCC-related gain in construction industry labour productivity of 9.4 per cent

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for the purposes of the economy-wide modelling' (Econtech, 2008: 18), despite the new evidence. Recall that in 2007 the 9.4 percent productivity assumption was based on the now discredited 'closing of the cost gap between commercial building and domestic housing' (Econtech, 2007a: 37).

Econtech dealt with the major revisions in the 2008 report simply by describing them as 'anomalies':

Econtech has reviewed its previous use of the Rawlinson's data to remove anomalies.

For the original 2007 Econtech Report, some data was inadvertently juxtaposed in manually extracting it from Rawlinson's annual hard copy publications. The use of all Rawlinson's data has been carefully checked and is now correct. (Econtech, 2008: 8)

There was no mention anywhere of the magnitude of the impact of these 'anomalies'. Media reports were uncritical (e.g. Norington, 2008).

Justice Murray Wilcox was not so kind. Issuing his March 2009 report to the Labor government on implementation of its commitment to retain a 'strong cop on the beat' in the industry (Rudd and Gillard, 2007), Wilcox said Econtech's 2007 report was 'deeply flawed . . . It ought to be totally disregarded' (Wilcox, 2009: 46).

In May 2009, a third Econtech report was produced, commissioned this time by Master Builders Australia. The 2009 report bore striking resemblance to the 2008 version. A majority of the 2009 executive summary was identical to that from 2008, and many of the changes were simply differences in tense or rewriting 'the ABCC' as 'industrial relations reform'. For the first time, however, Econtech admitted that the 2007 report 'contained an error in compiling a single data series'. This was an advance from its 2008 concession of 'anomalies', although 'an error' actually comprised mistakes in data for all states, and in most years, with the exception of 2001 and, to a lesser extent, 2005.

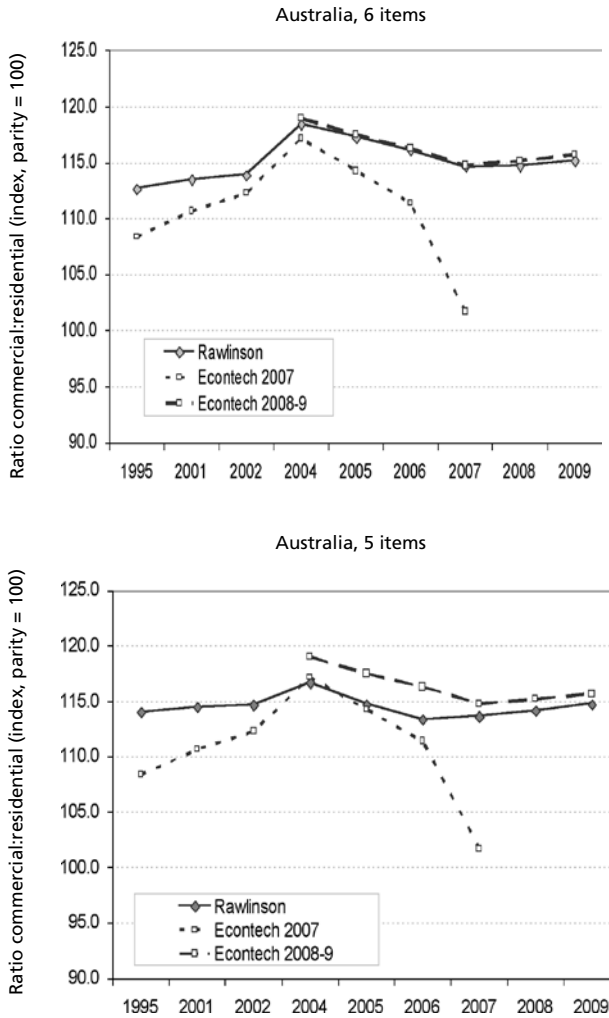
Again, the Rawlinson's data were less supportive of the Econtech claims than previously, showing a 0.5 percentage point deterioration in the cost differential between commercial and domestic residential building by January 2009, making a total 0.9 point deterioration over two years. Again, Econtech modelled the economic effects of 'industrial relations reform' as deriving from a 9.4 percent boost in productivity in the building and construction industry, though nowhere in the 2009 report was there any number, or mathematical combination of numbers, that produced a 9.4 percent productivity gain. The economic 'benefits' of industrial relations reform were again identical to those in 2007 when the erroneous data were used.

Narrowing the Tasks and Time Period

Econtech made other adjustments to methodology after 2007. One involved removing two of the eight tasks from the Rawlinson's dataset. In its only concession to a major critic, it said 'we agree with Mitchell (2007) that corrugated zinc roof and single skin face brick walls are best excluded from the estimation'.

In Panel 1 of Figure 3, we plot new estimates of the cost differential, based on just the six items chosen by Econtech for their 2008 and 2009 reports. The

Figure 3 Comparison of Econtech data and state-weighted original Rawlinson data, six items (excluding zinc roofs and brick walls) and five items (also excluding formwork), Australia, 1995–2009. Panel 1: six items. Panel 2: five items



Source: Econtech Reports 2007–9; Rawlinson's data.

Econtech estimates in these latter reports closely track our own figures based on Rawlinsons. This is also the case in state level data. The discrepancies are very small and likely explained by the slight differences in definitions. The six items used by Econtech indicated an average cost difference by 2009 that was 1.6 percent *worse* than the pre-2004 average benchmark, providing no evidence of any gains from the BCII Act.

More notably, Econtech data no longer went back to this earlier period. In the 2007 report, the crucial comparison was between the most recent cost differential and the average over the decade to 2002, yet data before 2004 were omitted from the later reports.

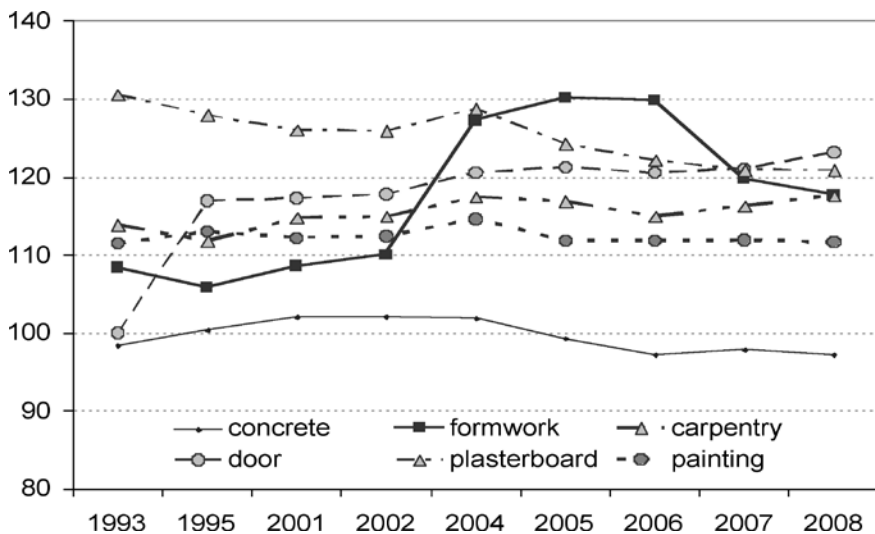
The exclusion of the pre-2004 data was explained as being to 'remove the effects of an apparent break in some of the data series from 2003 to 2004' (Econtech, 2008: 8). The term 'series break' by convention refers to situations where the way something was measured changes, so that an observation one year cannot be directly compared to an observation in the previous year. A 'spike' might signify a break in the series – or a genuine increase in the price. That said, let us accept at face value that a spike means a change in measurement. For how many series did this apply? Figure 4 shows the cost differentials for each task. There was only one series for which any spike is apparent in 2004, that for formwork. So we developed a five-task index using the same principles as previously. The result is in Panel 2 of Figure 3.

The data showed a slightly less adverse picture post-2002 than did the index with six tasks. Still, the national cost differential by January 2009 was some 0.3 percent worse than in the average pre-2004 period indicating, again, no gains from the BCII Act.

Despite this, Econtech claimed:

significant improvements in labour productivity since the introduction of the ABCC (in conjunction with the supporting regulatory framework) . . . Using Rawlinson's

Figure 4 *Testing for series breaks in cost differentials by task, 1993–2008*



Source: Rawlinson's data.

data to 2008 on the evolution of the cost gap between non-residential and residential building for the same building tasks, the relative productivity gain for non-residential construction is conservatively estimated at 7.3 per cent. (Econtech, 2008: 9)

Identical words were used in the 2009 report, except that '2008' was replaced by '2009' and '7.3' by '6.2' (KPMG Econtech, 2009: 23). The latter estimate was made by comparing the estimated cost differential in 2009 (15.7 percent) with that in the peak year, 2004 (19.0 percent). This change of 3.3 percent was then roughly doubled, on the intriguing assumption that the only possible source of these alleged gains is labour costs, which make up just 53 percent of total costs for the tasks. The base year selected produces the best result: the very poor performance during the period of the BCII Act is ignored, and data from prior to 2004 are suppressed, avoiding disclosure of the fact that the cost differential was not significantly less than it had been five or 10 years earlier.

Long-term Patterns and the Productivity Crystal Ball

With the discrediting of the earlier cost comparisons, the main basis for continued boasting of productivity improvements were some 'case studies', a comparison between actual and predicted productivity in the construction industry and a chart using Productivity Commission data on multi-factor productivity. The 'case studies' (which were identical in the 2007 and 2008 reports) comprised one undertaken by the Institute of Public Affairs, a conservative lobbyist and 'think tank' (Murray, 2004), and two by Econtech, which boiled down to the qualitative claims of two leading construction companies and data on reduced working days lost due to industrial action, supported in 2009 by extracts from three submissions by advocates of coercive powers. Here and elsewhere, Econtech appeared to confuse reduced industrial action with higher labour productivity. Labour productivity is the amount of real output per unit of labour input (such as the number of houses built per hour worked). Strikes normally mean no output is produced during a period in which no labour is used or paid for, and so have no direct relationship with output per unit of labour input. If reduced industrial action has led to increased productivity, this should be visible in the productivity data.

The second basis for the productivity claim was a comparison between actual and 'predicted' productivity in the construction industry (using national productivity growth as the sole predictor for construction productivity growth). Yet there is no particular reason to presume that one can accurately predict what productivity will be in the construction sector on the basis of what productivity is in the rest of the economy. In fact, over the period from 1986 to 2002 (the period covering the data that are used to generate the prediction), only 20 percent of the variance in annual construction industry productivity growth can be explained by variations in national productivity growth. For a time series this is a very low r^2 and would not normally be used by econometricians as the basis for making accurate predictions about future productivity growth.

Moreover, according to Econtech, construction industry productivity began to rise above its 'predicted' level back in 1997. By 1999, three years before even the Building Industry Task Force, construction industry productivity was exceeding Econtech's 'predictions' by almost as much as in 2007, making the claim of a 'reform' effect unwarranted. Productivity slumped in 2001 – only to resume its 1999 level in 2003 – because of a major downturn in the construction industry. It is no coincidence that labour productivity falls during such a downturn – it is almost an arithmetic inevitability, given the way that productivity is calculated, and the well known tendency towards labour hoarding during a downturn (Addison and Siebert, 1979; Norris, 2000). Likewise productivity rises during boom phases of the business cycle.⁵ But the close relationship between GDP growth and productivity highlights the dangers involved in using national accounts aggregates to draw conclusions about the magnitude of effects on labour productivity in particular industries.

Finally, in each report, Econtech referred to a Productivity Commission (PC) report containing data on multi-factor productivity (MFP) from 1974–5 to 2005–6. Econtech said:

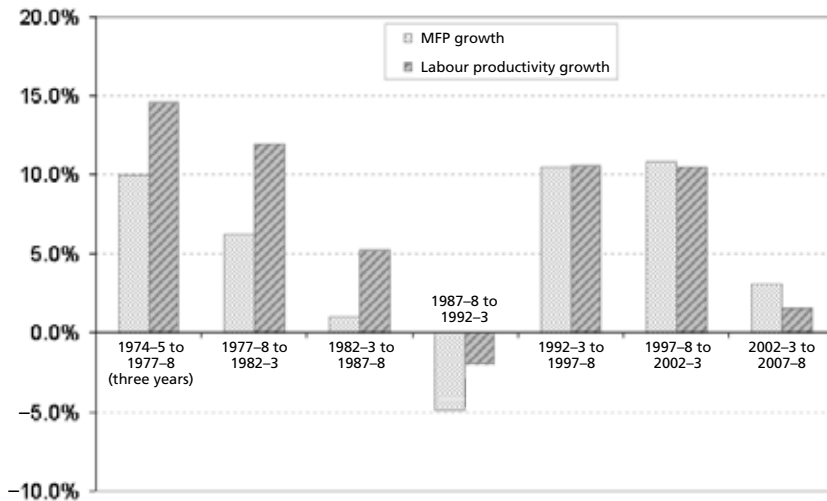
productivity in the construction industry was fairly flat through the 1980s and 1990s ... However, construction industry productivity then strengthened considerably to achieve a higher level for the four years from 2002–03 to 2005–06. The Productivity Commission data shows construction industry productivity rose by 13.6 per cent in the four years to 2005/06. This confirms the strong construction industry productivity performance of recent years. (Econtech, 2008: 5; KPMG Econtech, 2009: 12)

These data were never updated by Econtech despite being twice updated by the Productivity Commission (PC, 2009). If four years to 2005–6 was a suitable comparator in the first Econtech report, then by 2009 the relevant period was the six years to 2007–8, in which MFP growth was 14.8 percent. However, this was not uniquely strong, as MFP growth over the six-year period ending 2002–3 was higher – at 18.0 percent – and it was higher over other six-year periods, including to 1998–9 and 1980–1 (PC, 2009).

More importantly, including 2002–3 within the calculations is itself debatable, given that, as Econtech repeatedly said, 'the Taskforce was established in October 2002 but it is reasonable to expect a lag before its activities started to make an impact' (Econtech, 2007a: 23, 2008: 9; KPMG Econtech, 2009: 15). Over the more relevant five years to 2007–8, MFP growth totalled a mere 3.1 percent. This compared with 10.8 percent over the immediately preceding five years to 2002–3, and 10.5 percent in the period to 1997–8.

Similarly, over the five years to 2007–08, growth of *labour* productivity (the focus of Econtech's conclusions) in construction totalled 1.6 percent, compared to 10.5 percent over the preceding period to 2002–3, and 10.6 percent to 1997–8. These data are shown in Figure 5. Among the seven mostly five-year periods shown, the current 'reform' period had the second *lowest* labour productivity growth and the third lowest MFP growth. There is certainly no evidence here of a 9.4 percent boost to productivity arising from the BCII Act.

Figure 5 *Growth in labour productivity and multi-factor productivity (MFP), construction industry, five year periods, 1974–5 to 2007–8*



Source: Productivity Commission (2009).

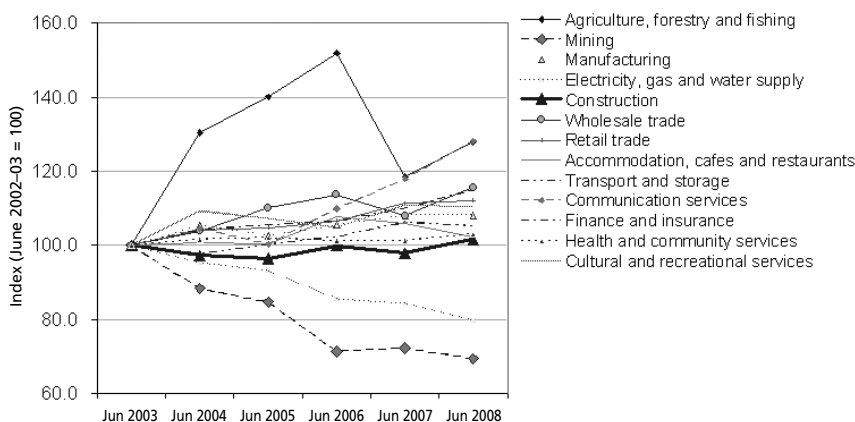
Cross-industry Productivity and Profit Comparisons

It is instructive to consider what ABS labour productivity data show for the building and construction industry, in comparison to other industries (Australian Bureau of Statistics, 2008a). If there has been a 9.4 percent increase in productivity attributable to the BCII Act, it should be clearly evident in the ABS data, which should show construction industry productivity growth well above that in other industries.

Figure 6 depicts annual national accounts data on developments in value added per hour worked by industry. In the period since 2003, labour productivity in construction has fluctuated (as is normally the case), but by June 2008 it was *only 1.7 percent higher* than in June 2003. Moreover, labour productivity growth per hour worked in construction was the third lowest of the 13 industries for which productivity data are published. This is not what one would expect if the BCII Act had led to a 9.4 percent boost in productivity above what would have happened in the industry anyway.

Although those arguing that the BCII Act has generated great productivity gains often referred to data over such a five year period, in fact the ABCC has only been in existence since October 2005. Unfortunately the national accounts productivity data are only published by reference to June. Bearing in mind, as Econtech (2007a: 23) acknowledges the delayed onset of any BCII effects, we note that since June 2006 labour productivity growth in construction has totalled 1.8 percent (an annual rate of 0.9 percent), ranking construction eighth

Figure 6 *Gross value added per hour worked, by industry, 2002–3 to 2007–8*



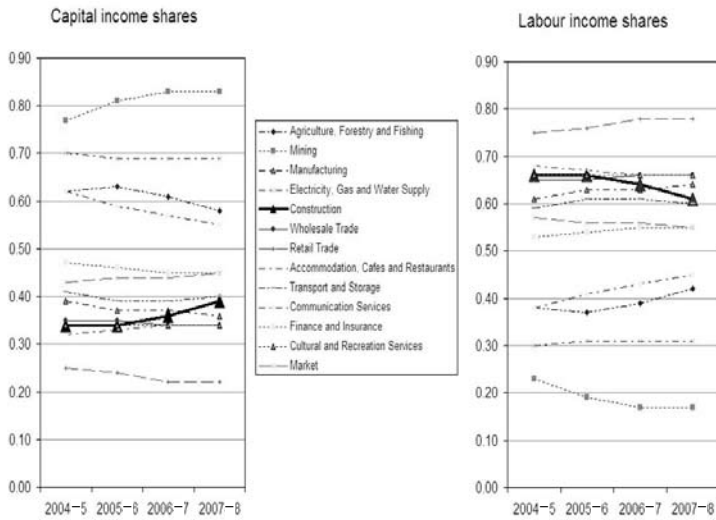
Source: ABS (2008a: Table 15).

out of 13 industries, just below the middle one. There are significant variations from year to year in industry labour productivity growth. If the BCII Act had created a 9.4 percent boost to labour productivity above what would otherwise have occurred, it would be large enough to be reflected in a major spike of that magnitude above and beyond normal year to year movements. There is no evidence of such a spike and hence of any 9.4 percent construction industry labour productivity boost attributable to the BCII Act.

Figure 7 looks at recently released experimental ABS data on capital and labour income shares by industry (Australian Bureau of Statistics, 2008b). It shows, from 2004–5 to 2007–8, a distinct increase in the share of industry income going to capital. The five percentage point increase in capital's share was the second highest growth of all industries (behind mining). Equally, labour's share of industry income in construction fell by five percentage points. The shift of income accelerated as the ABCC became more active. By 2007–8 labour's share of construction industry income was the lowest recorded.

This is not to attribute all the shift in factor shares to the BCII Act. The construction industry was going through a major boom, which would have added to the share of income going to capital, just as it added to productivity in the industry. However, the performance of the construction industry was exceptional. At least part of the boost to the profit share was likely due to a reduction in industrial disputes and a reduction in the bargaining power of labour associated with the use of coercive powers against workers. A shifting balance of power is also suggested by the doubling of construction industry notified fatalities between 2004–5 and 2007–8 (Australian Safety and Compensation Council, 2008), as observance with occupational safety requirements and injury rates tend to be lower where unions are weaker (Reilly et al., 1995; Weil, 1992).

Figure 7 *Labour and capital shares in construction and other industries, 2004–5 to 2007–8*



Source: ABS (2008b: Table 10).

Conclusion

The exercise by an Australian state agency of coercive powers against construction industry workers has been justified by reference to claimed gains in productivity and hence national welfare. We have examined the data behind the productivity claims and found that they were erroneous, probably due to incorrect transcription, and that the source data indicated no relative productivity gains. The boost to GDP, savings to the CPI and national welfare gains in each of the Econtech reports, estimated as they were ‘from the recent closing of the cost gap between commercial building and domestic housing’, had no basis as there was no ‘closing of the cost gap’. Despite being made aware of this, the ABCC and its consultant, Econtech, stuck to the original claims about the size of productivity and welfare gains from the use of coercive powers. The errors (‘anomalies’) in the 2007 report might be dismissed as an ‘honest mistake’, but can the later insistence on not revising findings be so easily dismissed? Claimed productivity gains from the use of coercive powers are also not discernible in official ABS or Productivity Commission data. The critiques of Toner (2003) and Mitchell (2007) stand. The literature suggests that the unionized building and construction industry would benefit from more cooperative union-management relations. The role of the ABCC has been to penalize cooperative relations, and so it might come as no surprise that previous policy makers’ productivity expectations have not been met. However, there is some evidence that there has been

a shift of income shares in the industry from labour to capital, with coercive powers reducing strikes and labour's bargaining power.

We also draw attention to weaknesses in public debate over these issues. Little critical thought was given in the media to the Econtech reports on the building and construction industry, even though its similarly timed report on industrial relations reform policies was received with considerable scepticism. While some union officials in the industry have clearly harmed their own cause, the responsibility also lies with the media, with commentators and with policy makers to examine the evidence put before them and assess it on its merits. Attaching numbers to something does not make it true. The Econtech experience should be illustrative of a wider lesson for the media and commentators: to treat with extreme scepticism commissioned 'modelling' or like reports prepared by commercial consultancy firms for interest groups, especially when the findings advance that group's political interests. There is good reason for the adage, 'he who pays the piper, calls the tune'.

This close analysis of the data relied upon by the ABCC also raises serious questions about the nature of regulation in the building and construction industry. The alleged economic benefits have been used to justify the denial of basic rights to employees in the industry, rights that everybody else is, at least at present, entitled to enjoy. In short, there do not appear to be any significant economic benefits that warrant the loss of rights involved in coercive arrangements. A more cooperative, less punitive approach by policy makers to the industry would not only be consistent with better human rights, it might even be consistent with better productivity.

Acknowledgement

The views in this article are those of the authors and do not necessarily reflect the views of their employers or the Queensland government. Our thanks to Paul Grieve for assistance with 2009 data and David Hurley for editorial assistance.

Notes

- 1 It has more recently been taken over by KPMG, and is now known as KPMG Econtech, but for consistency it is referred to here as Econtech throughout.
- 2 Noted in nine places in the 2007 Econtech Report: Table 1, iv, v, vi, Table 5.3, 27, 28, 33 para.1–2, 37.
- 3 The weights provided by Econtech were: NSW – 34 percent, VIC – 24 percent, QLD – 23 percent, WA – 13 percent, SA – 5 percent. As these only added to 99 percent we then made a pro-rata adjustment to each.
- 4 The reason the last figure was higher than previously claimed was because a later base year, with higher nominal GDP, was used.
- 5 In itself, the boom of recent years could have artificially added to productivity growth, just as the anticipated downturn in the industry would be expected to artificially reduce productivity growth: predicted movements in construction employment and output (Access Economics [2009] imply falls of 5.6 percent and 0.7 percent in construction industry productivity in 2009–10 and 2010–11 respectively).

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ATTACHMENT B

Does Industrial Relations Policy Affect Productivity?

David Peetz*

Abstract

This article considers the link between productivity, fairness, and industrial relations (IR) policy at workplace, national, and international levels using data from micro- and macro-level empirical studies as well as data from the Australian Bureau of Statistics (ABS), the OECD, and other sources. There is some evidence that policies that enhance fairness enhance economic performance. But the effects are conditional; they are neither consistent nor universal. Government policies to encourage or discourage unions, to restrict the extent or scope of collective bargaining or related action, or to encourage or discourage non-unionism or individual contracting, will not do a great deal in net terms to improve economic performance. However, in any specific workplace, industrial relations and the decisions management makes can have a notable effect on productivity. While welfare and industrial relations systems do not make a large inherent difference to economic efficiency, they make a very large difference to social outcomes.

1. Introduction

A thread through much economic policy discourse in the late 20th century was the alleged trade-off between equity and efficiency (Okun 1975). In the labour market, this is typically underpinned by the idea that the optimal allocation of resources will be achieved by the operation of a totally free labour market (Manning, 2004). Any divergence from that ideal in the interests of promoting 'equity' would be seen as harming efficiency. Yet the idea that efficiency and equity are opposed has been challenged by more recent developments in economics, which have led to the argument that more equal societies grow faster than less equal ones (Osberg 1995; Wilkinson and Pickett 2009).

*Department of Employment Relations and Human Resources, Griffith University. My thanks are offered to Heather Peetz for editing the manuscript.

In debate on industrial relations (IR), in Australia and elsewhere, this conflict is manifested as arguments that policies should, and can, focus on productivity improvement, rather than equity. In recent times, a campaign to make fundamental changes to the *Fair Work Act*, on the grounds of improving productivity, has been pursued (Hewett 2011; Ridout 2011; Business Council of Australia 2012). This article questions the extent to which industrial relations policy affects productivity. Productivity is the *quantity* of output per *unit* of input. *Labour* productivity is output per hour worked. It is *not* measured by the value of that output, or the cost of that input, or the amount of output not produced when there are no hours worked due to strikes. Debate is often complicated by confusion over the meaning of productivity.

Proponents of particular IR policies often *portray* their preferred systems as being designed to enhance economic performance. The reason for that is straightforward. Almost everyone agrees that, other things being equal, people are better off in an economy with high productivity, high employment, and low inflation than the opposite. It is not possible to obtain the same sort of consensus about the distribution of income and power. So arguments about the allocation of resources and power will tend to be couched in terms of its benefits for the economy.

IR policy often appears aimed at more objectives than it can meet. With few exceptions, it has much more of an impact in the long run on fairness, however defined, than on economic performance. If claims are made that a particular industrial relations policy is going to have very large (positive or negative) consequences for economic performance, such claims should be examined sceptically, as there is a reasonable probability that the effects may be small, even non-existent, or perhaps the opposite of what is claimed. The rest of this article considers the link between productivity, fairness, and IR policy at (in order) workplace, national, and international levels.

2. Micro-level evidence

The major policy questions in IR focus around the extent to which policies advantage or disadvantage unionism, individual contracting or collective bargaining, and the taking of industrial action by unionised workers as part of collective bargaining, or the protection of employment. These are what contemporary debate on the *Fair Work Act*, and much of the debate on WorkChoices, has been about.

There is a long history of studies in Australia and especially internationally that looked at the impact of unions on economic performance. There is a much smaller group of studies that look specifically at individual contracting.

First, we refer to the studies on union effects. The ways in which unions can impede economic performance of a firm are by imposing restrictive work practices or by impeding the introduction of innovations such as new technology. I set aside the question of defining just what a restrictive work practice is. (Is it something that tempers unfettered managerial prerogative or a practice that management was willing to accept in the past but which it is no longer willing to accept?) There is some international evidence from the 1970s showing that restrictive practices had harmful effects (Elbaum and Wilkinson 1979; Lazonick 1979; Pencavel 1977). Such practices were common in Australia in that period up until the mid and late 1980s, but were mostly removed by the two-tier wage system, and then award restructuring and nearly two decades of enterprise bargaining. Restrictive practices were typically associated with demarcations arising from multiple unionism, but union amalgamations, single bargaining units, and the processes mentioned above substantially diminished or ended the impact of demarcations. As to whether unions restrict the introduction of new technology, while there were some cases of this, the evidence even from the 1980s was that, in general, unions did not substantially restrict new technology (for example Batstone and Gourlay 1986; Daniel 1987 McLaughlin 1979; Nichols 1986, p. 232).

Still, it was generally thought amongst conventional economists that unions had a negative impact on economic variables until the emergence in the 1980s of a new literature, based principally around Richard Freeman and James Medoff's book *What Do Unions Do?* (Freeman and Medoff 1984). This showed that unions could have a *positive* effect on productivity through two mechanisms. One was through what they called the union 'monopoly' effect: unions raise wages and the higher wages lead employers to invest in labour-saving technology. This leads to higher labour productivity—though not necessarily higher multi-factor productivity. The second mechanism was the 'voice' effect: employees express their voice through unions and this leads to lower covert conflict at work and to improved techniques of production. In *non-union* workplaces, dissatisfied workers leave, causing turnover costs for employers; in *union* workplaces, they stay and seek to change the problems they identify. There is a body of evidence collected over the years that shows benefits from employee *voice* for economic performance. Direct and indirect participation by employees in decision making—preferably in combination—on average lead to lower absenteeism, lower labour turnover, higher morale and employee satisfaction, and higher productivity, though this may be conditional upon favourable workplace and institutional circumstances (Jones and Svejnar 1982; Strauss 1992; Zwick 2004; Grimsrud and Kvinge 2006).

Whether unionism increases productivity is really a question of how far these competing factors offset each other. It is an empirical question that is likely to produce different results at different times and in different places. After Freeman and Medoff's book came out, there was mixed evidence from the United States. Some were in support of their argument (Allen 1985; Ben-Ner and Estrin 1986; Phipps and Sheen 1994) some were counter to it (Addison, John, and Barnett 1982; Drago and Wooden 1992). Initial British evidence was adverse (Edwards 1987), but by the 1990s negative productivity effects from unionism appeared to have disappeared (Addison, John, and Belfield 2004). There *was* consistent evidence that unions reduced quits and increased job tenure (Freeman 1980; Addison, John, and Belfield 2004).

More recently, three studies in Australia published in the last decade provide some evidence to support Freeman and Medoff. A *positive* relationship was found between unionism and productivity at workplaces where unions are active (Wooden 2000, p. 173). Collective bargaining coverage was associated with *higher* levels of self-claimed productivity (Fry, Jarvis, and Loundes 2002). Firms with high rates of union membership were more productive than firms with no union members (Tseng and Wooden 2001). Another study from the 1990s showed that the intensity of *collaboration* between management and workers (through unions) had a positive effect on workplace performance (Alexander and Green 1992). More recently again, and in contrast, a consultant's report was commissioned to show that reform of the building industry achieved 10 per cent productivity gains through reducing union influence (Econtech 2007). Its core data have since been discredited, as either false or subject to selective or inappropriate interpretation (Allan, Dungan, and Peetz 2010).

Two decades after the publication of *What Do Unions Do?*, the general consensus amongst those who reviewed the literature was that there was *no consistent relationship* evident between unions and productivity, with a wide variety of results; but the direct impact of unions on productivity tended towards *zero*. The impact, it appears, depends on circumstances (Addison, John, and Belfield 2004; Hirsch 2004; Freeman 2005; Kaufman 2005). Overall, studies from Australia and internationally suggest that unionised workplaces with good union-management relations and high employee participation or involvement will probably have *higher* average productivity than non-union workplaces. However, for those with adversarial and non-participatory union-management relations, the *reverse* is probably the case. Probably the most influential study is that of Black and Lynch, which found that:

Unionized establishments that have adopted human resource practices that promote joint decision making, coupled with incentive-based compensation, have higher productivity than other similar non-union plants; whereas unionized businesses that maintain more traditional labor management relations have lower productivity. (Black and Lynch 2001)

With respect to the evidence specifically on individual contracting, several studies are relevant. New Zealand workplace researchers (Gilson and Wagar 1997, p. 230) reported that they could find no 'significant or reliable relationship between organisations pursuing individual contracts and [their] exhaustive measures of firm performance'. This helps to explain why the *Employment Contracts Act*, often perceived at the time as unlocking productivity gains, was associated with no higher growth in labour productivity than occurred in Australia over the same period (Dalziel 2002; Dalziel and Peetz 2008). A British study found that firms that derecognised unions and pursued individualisation 'did not gain any flexibility advantage over those that retained collective bargaining' (Brown et al. 1998, p. ii). A study of 'excellent workplaces' by researchers from the University of New South Wales found that whether employee representation was collective, or whether individual arrangements were in place, had no impact on whether workplaces could achieve excellent performance (Hull and Read 2003, p. 8).

One reason that non-unionism and individual contracting seldom work out as predicted is that they are often associated with problems of fairness. If workers perceive unfairness, they will sense relative deprivation and feel the wage-effort bargain has been breached; and they will then respond with absenteeism, exit, reduced effort, or direct conflict (Baldamus 1961; Walker and Pettigrew 1984). Six decades of research demonstrate a phenomenon called 'dual commitment' (Dean 1954; Purcell 1954; Gallagher 1984; Fukami and Larson 1984; Angle and Perry 1986; Magenau, Martin, and Peterson 1988; Bamberger, Kluger, and Suchard 1999; Snape and Chan 2000). It means that, on average, workers who are more committed to their union are also *more committed* to their *employer*. So effort that goes into breaking employees' commitment to their union is often counterproductive.

On the other hand, the evidence that individual contracting and non-unionism have an adverse effect on fairness is strong (for example Elton et al. 2007; Bertone, Marshall, and Zuhair 2008; Peetz and Preston 2009). The earnings distribution is more equal when union density is higher (Card 2001; Charlwood 2007; Gittleman and Pierce 2007). In most Australian

industries, union members receive higher wages than non-members, more so when membership density is higher or unions are more active (Wooden 2000; Baarth, Raaum, and Naylor 1998); and workers on union collective agreements received higher wages than workers on registered individual contracts under WorkChoices. The exceptions are where individual contracts are used as a union-avoidance device or are in those mostly professional and managerial occupations where workers have lots of individual bargaining power anyway (Peetz and Preston 2009). Especially, but not exclusively, when the no-disadvantage test was removed from registered individual contracts, they were used to remove penalty rates, overtime pay, shift premiums, redundancy benefits, and job security from employees, especially from those without strong labour market power. So even though only a small minority of workers were ever employed on registered individual contracts under WorkChoices, surveys indicated that 30 to 40 per cent of people personally knew someone who had been made worse off (Silmalis 2006; Farr 2007). Individual contracts had a substantial impact on fairness, but very little impact, and not necessarily positive, on productivity.

3. National Level

Claims have been made that the changes made by the *Fair Work Act*, compared to the industrial relations framework of WorkChoices, have damaged productivity growth. So a key question to examine is how bad the damage is, how consistent is it across industries, and can the country sustain it? The left-hand panel of Table 1 looks at which industries experienced productivity growth in the WorkChoices period from 2005–06 to 2007–08. It shows that during WorkChoices eight market-sector industries had growth in productivity, eight had productivity falls, the mean was 2.2 per cent growth, and the median was a decline of 0.1 per cent. (There followed a transition year, during which most provisions of WorkChoices remained but the core features of individual contracting had been removed). The right-hand panel of Table 1 shows which industries sustained productivity growth under the first two years of the *Fair Work Act*, from 2008–09 to 2010–11. In that period, nine industries had productivity growth, seven had falls, the mean growth rate was slightly higher at 2.4 per cent and the median was substantially higher than WorkChoices at 2.3 per cent. The most noteworthy drop was in the expanding mining sector, where high commodity prices have made it worthwhile to extract lower-grade ores with more waste rock to remove and therefore lower productivity (ore produced per worker hour).

Table 1: Labour Productivity Growth in 16 Market-sector Industries: WorkChoices (2005–06 to 2007–08) and Fair Work Act (2008–09 to 2010–11)

Industry	2005–06 to 2007–08 %	Industry	2008–09 to 2010–11 %
J Information, Media and Telecommunications	16.3	A Agriculture, Forestry and Fishing	13.6
N Administrative and Support Services	14.4	J Information, Media and Telecommunications	8.2
K Financial and Insurance Services	13.6	I Transport, Postal and Warehousing	7.9
G Retail Trade	4.2	M Professional, Scientific and Technical Services	6.4
C Manufacturing	2.8	C Manufacturing	4.8
I Transport, Postal and Warehousing	1.8	G Retail Trade	4.6
F Wholesale Trade	1.7	E Construction	3.7
E Construction	1.3	R Arts and Recreation Services	2.6
H Accommodation and Food Services	-1.6	K Financial and Insurance Services	2.0
B Mining	-2.1	F Wholesale Trade	-0.1
R Arts and Recreation Services	-2.3	S Other Services	-5.3
M Professional, Scientific and Technical Services	-3.4	L Rental, Hiring and Real Estate Services	-6.4
S Other Services	-5.4	H Accommodation and Food Services	-6.7
D Electricity, Gas, Water and Waste Services	-8.8	N Administrative and Support Services	-9.0
L Rental, Hiring and Real Estate Services	-11.4	D Electricity, Gas, Water and Waste Services	-9.6
A Agriculture, Forestry and Fishing	-14.7	B Mining	-13.8
median	-0.1	median	2.3
mean	2.2	mean	2.4

Source: ABS cat. 5204.0.

The productivity 'crisis' of the *Fair Work Act*, then, is no worse than the productivity crisis of WorkChoices. Yet the voices expressing concern over the alleged productivity costs of the *Fair Work Act* were not concerned about productivity under WorkChoices.

That said, the above is not the whole story. This is because productivity is very sensitive to the stage of the business cycle and needs to be placed in historical context. The ABS considers that the relevant comparisons are of productivity over whole growth cycles, each of which lasts for several years. Growth cycles are shown in Figure 1.¹ The current growth cycle (growth cycle 10), which started in 2008–09 and includes the *Fair Work Act*, is not complete. However, in the previous growth cycle (growth cycle 9) trend labour productivity growth was also low. Indeed, it was one of the two weakest cycles since records began — nearly half a century ago — in the mid-1960s. The gap between productivity growth in that cycle and previous ones started to widen at the time WorkChoices commenced.

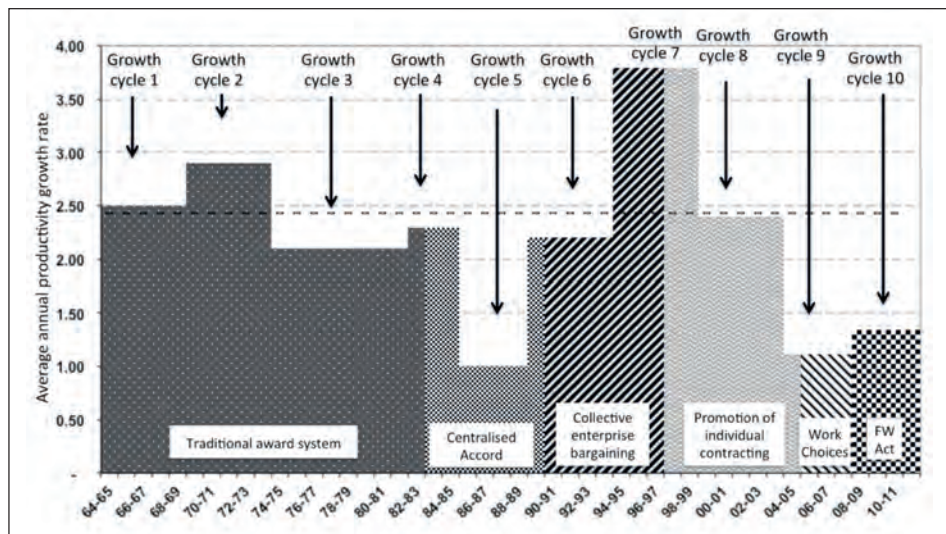
Some argued that poor productivity growth under WorkChoices was because 'the statute allowed marginal workers to contract into the labour market, which reduced the observed growth of labour productivity' (Sloan 2011; also Pearson 2007). However, the ABS also produces a measure of labour productivity that takes account of changes in the aggregate quality of labour due to changes in average educational attainment and experience. If labour productivity growth had been dragged down by the entry of low-skilled, low-productivity workers, this 'quality-adjusted' measure of labour productivity would have shown a greater increase than the conventional measure. In reality, this quality-adjusted measure of productivity grew even more slowly in growth cycle 9 than the conventional measure — at only 0.7 per cent over that cycle, compared to 1.1 per cent for the conventional measure, and down by more than half from the recorded 1.9 per cent in the previous growth cycle.

WorkChoices was not the only factor influencing productivity in this cycle, if it had any influence at all. But it is noteworthy that, in the first complete growth cycle under the *Workplace Relations Act* (growth cycle 8), labour productivity growth was merely 2.4 per cent per year, across the 12 market-sector industries for which data go back more than a few years. In the whole *Workplace Relations Act* period, which extends across two and a half growth cycles and encompasses the tail end of the strongest cycle, labour productivity growth averaged 2.5 per cent annually. Those numbers are in effect no tangible improvement on the 2.4 per cent a year averaged during

¹ Figure 1 refers to 12 industries, whereas Table 1 refers to 16 industries. This is because the data for the 16 industries are not available over the whole of the period from the mid-1960s.

the antiquated, 'inefficient', traditional *award* system of the 1960s and 1970s. The traditional award system was associated with restrictive work practices and demarcations, and it operated at a time when Australian industry was protected by high tariffs, with many important enterprises in the public sector, and many highly regulated industries. The award system was associated with productivity growth rates of similar magnitude to the years of the *Workplace Relations Act*, and considerably better than the WorkChoices era of the *Workplace Relations Act*.

Figure 1: Labour Productivity Growth over Productivity Cycles, 12 Market-sector Industries, 1964–65 to 2010–11



Source: ABS cat. 5204.0; 5206.0, various years

This is not to say that the *Fair Work Act* has necessarily delivered a markedly better outcome. So far, the current growth cycle has produced only slightly higher labour productivity growth than the growth cycle that preceded it—even though the IR policy regime is said to be vastly different. This suggests that industrial relations policy has made little difference to productivity growth.

Indeed overall, looking back at the growth cycles over nearly half a century, there are not many occasions on which it can be said that IR policy had a notable impact. One was probably the centralised period of the Accord, when real wages dropped significantly (growth cycle 5). That meant there was no longer much incentive for firms to invest in labour-saving technology, as labour was cheap, and so labour productivity growth appeared to stall. The other was one cycle in the mid-1990s (growth cycle 7) which showed accelerated growth, coinciding with the consolidation of enterprise bargaining over the latter part of the *Industrial Relations Reform Act* and the early part

of the *Workplace Relations Act*, before the shift to individual contracting gathered momentum. But the acceleration of productivity was only for one cycle, it did not have a lasting impact, and there were a number of other economic reforms going on at the time. If the move to enterprise bargaining had an effect, it was small, one-off, perhaps removing most of the remaining inefficiencies in the IR system, but that was all. This is probably about all that can be expected. Whatever 'surge' in productivity growth occurred in that one cycle was not sustainable and not sustained. Indeed Hancock (2012), analysing productivity growth across industries as well as nationally, found no evidence of any effect from enterprise bargaining. Earlier, Quiggin (2006) had argued that the higher productivity growth rate achieved in just that one cycle in the mid-1990s (cycle 7 in Figure 1) was a statistical illusion anyway—not a signal that reforms had delivered a 'new economy' that could deliver permanently higher productivity growth rates, but rather, a blip caused by overestimation and, most importantly, an unsustainable increase in work intensity that was subsequently wound back, at least partly. Evidence in support of this included the very ordinary productivity growth in the subsequent period, growth cycle 8. Six years later, with the hindsight benefit of observing the even weaker productivity growth rates of cycles 9 and 10 that followed the WorkChoices reforms, the weight of evidence supports Quiggin even more strongly.

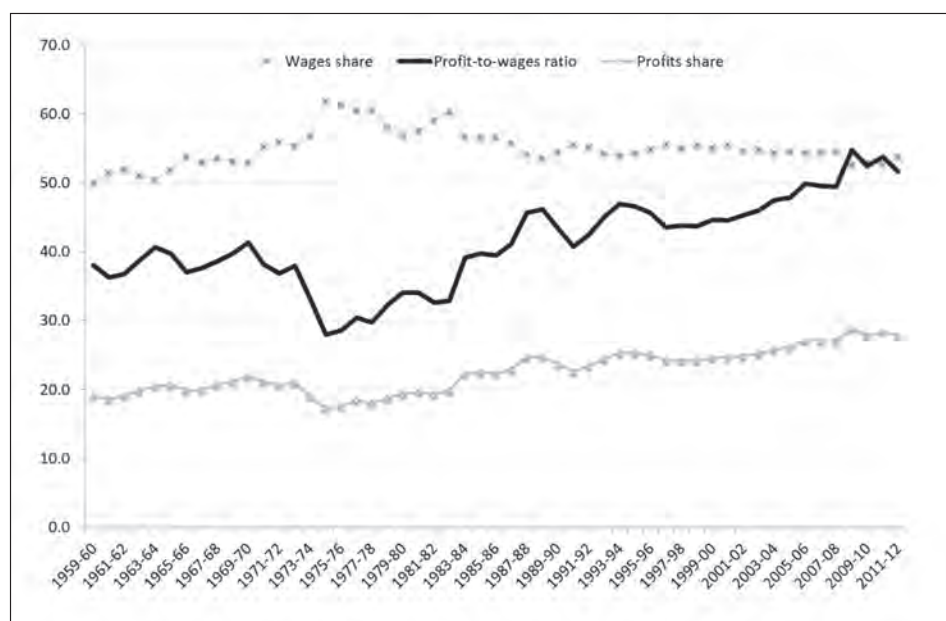
Indeed, the data do not suggest that the long period of 'liberal market' or 'neoliberal' economic reforms that Australia has experienced since the early 1980s has really done anything to boost productivity growth. Starting with the deregulation of financial markets in December 1983, these included the deregulating of product markets and the privatising of public assets. Rather, productivity growth has been slightly lower under 'neoliberalism'.

However, there have been some fairly significant changes in the distribution of income. In the early 1980s, there was a popular idea of a 'real wage overhang': the notion that the wages share of national income had risen above its long-term average after 1972, and the profits share had fallen below its long-term average. This was squeezing profits and a major cause of the economic problems of the time. One of the implicit ideas behind the Accord was to return those factor shares to their previous levels. Figure 2 shows the share of trend national income going to profits, and the share going to wages. They do not add to 100 per cent because some also goes to government, so the key line is that which shows the ratio of total profits to total wages. Until 1972, the long-term average profit-to-wages ratio

was 38 per cent. The centralised Accord brought it back up from its 1970s trough and then some more.

The move to collective enterprise bargaining led to a slight shift in favour of wages, but from 1997 onwards there was a relatively sustained increase in the profit share. It reached a record of slightly under 50 per cent in 2005–06 under WorkChoices, dropped back slightly, then reached another record through 2010—under the *Fair Work Act*—of just under 55 per cent, before dropping more recently to below 52 per cent in 2011–12. (To use the parlance of the late 1970s and early 1980s, it represented a ‘profit overhang’, though less so now than three years ago.)

Figure 2: Wages and Profit Shares in Factor Incomes and Profit-to-wages Ratio, Australia, 1959–60 to 2011–12



Source: ABS cat. 5206.0

Of course, industrial relations policies like the Accord were not the only thing going on over that long period. As mentioned, there was also a series of liberal market economic reforms from December 1983, and since then (and probably in consequence) there has been an underlying upwards movement in the ratio of profits to wages. This was also the time that the boom in salaries of chief executive officers (CEO's) commenced. Through the 1970s and into the early 1980s, the ratio between CEO pay and average earnings had been fairly stable. However, from the mid-1980s, CEO salaries started to grow much faster than average earnings. Indeed, the growth in

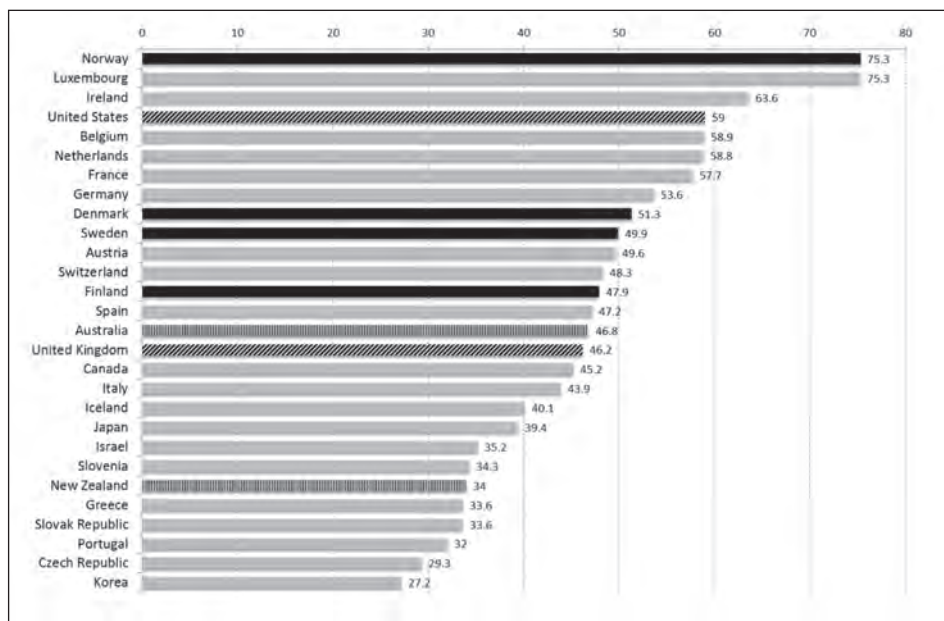
CEO earnings relative to wages was much greater than the growth in the ratio of profits to wages. It was also substantially greater than the increase in national productivity (Peetz 2009). This has been a major contributor to the widening gap between very high-income earners and the rest of the workforce from the mid-1980s. By contrast, the level of inequality between very high-income earners and the rest had actually declined across a period well over half a century before the 1980s (Atkinson and Leigh 2007). This suggests that there has been nothing natural or inevitable about widening inequality post-1980.

4. International Level

Some interesting and insightful patterns emerge through cross-national comparisons. In this respect, the 'varieties of capitalism' literature is quite useful in the contrasts it draws between different types of governance systems for developed capitalist economies (Hall and Soskice 2001). For our purposes it is not so important whether there are two 'varieties' of capitalism, as Hall and Soskice originally suggested, or several varieties, or a continuum with many nuances, as some critics have argued (for example Crouch 2005). My interest is in comparing the more extreme ends of the continuum, those with a high commitment to equality—a subset of what Hall and Soskice called the 'coordinated market economies'—and those with a high commitment to the market—a group of the 'liberal market economies'. The latter, liberal market economies, rely to a high degree on market forces, and have low protections for workers and a low welfare safety net. At the other end, to varying degrees the coordinated market countries are characterised by markets constrained through government intervention, a stronger welfare net, workers having higher protections, and the labour force being more unionised. The United States and to a lesser extent the United Kingdom epitomise the liberal market economies (while New Zealand has had several of their characteristics since the late 1980s). The Scandinavian countries of Norway, Sweden, Finland, and Denmark epitomise the egalitarian end of the coordinated market countries.

Figure 3 compares labour productivity *levels* across countries. It is apparent that there was no consistent, uniform pattern. The highest productivity (at 75.3 USD per hour) was achieved by Norway, a coordinated market country (solid black in Figure 3). There was quite a gap to the United States (59), a liberal market economy (diagonal stripes in Figure 3), then Denmark (51), Sweden (50), and Finland (48), all coordinated market countries, and then the liberal market United Kingdom (47). (Also shown, in vertical stripes, are: Australia (46) with similar productivity to the United Kingdom; and New Zealand (34), well below the others.)

Figure 3: Labour Productivity Levels (USD PPP), 28 OECD countries, 2010



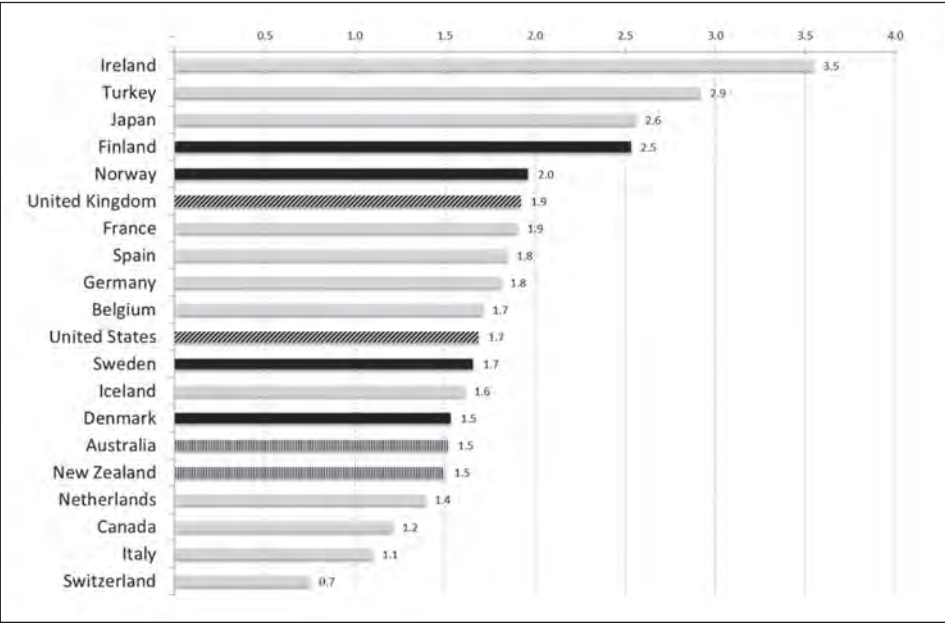
Source: Organisation for Economic Cooperation and Development (OECD) productivity database (data extracted on 17 February 2012 from OECD.Stat)

Another way to look at the question is to consider productivity *growth rates* over a 30-year period, 1980–2010, rather than levels (Figure 4).² By this criterion, the coordinated market countries Finland (2.5 per cent annual labour productivity growth) and Norway (2.0 per cent) did best, followed by the liberal market United Kingdom (1.9 per cent). Then the liberal market United States (1.7 per cent) is in a group with the coordinated markets Sweden (1.7 per cent) and Denmark (1.6 per cent). Australia and New Zealand are in a comparable cluster (with 1.5 per cent each), suggesting that the ‘gap’ between US and Australian productivity levels has not narrowed over that period. The latter is especially disappointing for advocates of industrial relations reform as the basis for productivity growth, since the Business Council of Australia (BCA) had claimed in the 1980s that the productivity of Australian workplaces ‘was between 20 and 50 per cent below their overseas competitors’ and a 25 per cent productivity improvement could be achieved through reform of the industrial relations system (Business Council of Australia 1989a, p. 25; Business Council of Australia 1989b). This reform has subsequently occurred without its promised impact. Over two decades later the BCA claimed that project productivity was 30 per cent or more lower in Australia than the United States, without any reference to the failure of its previously sponsored productivity reforms (Business Council of Australia 2012).

² For some countries, data this far back are not available. Figure 4 covers 20 countries compared to the 28 countries in Figure 3.

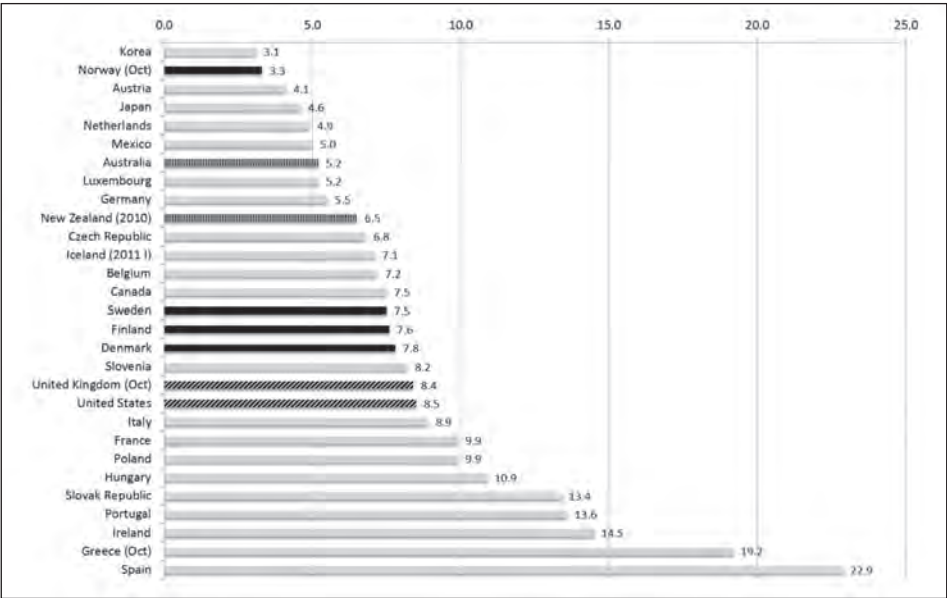
While unemployment is not necessarily reduced in the short term through higher productivity, it is nonetheless often used as an indicator of economic performance. Though outcomes here are heavily influenced by responses to the global financial crisis, it is worth referring to these data simply because the topic is often incorporated into debate about IR systems and economic performance. Unemployment rates at the end of 2011 are shown in Figure 5. Norway performed considerably better than the other countries that have been discussed, while Sweden, Denmark, and Finland were ahead of liberal market United Kingdom and United States. However, unemployment rates are influenced by labour force participation, so many consider the employment rate to be a better indicator of labour market performance. Employment rates (the ratio of employment to population in the 15-64 age group) are shown in Figure 6. Here the three major coordinated market countries, Norway (with an employment rate of 75 per cent), Denmark, and Sweden (both 73 per cent), all performed best, though Finland (68 per cent), while ahead of liberal market United States (67 per cent) was behind the United Kingdom (70 per cent).

Figure 4: Labour Productivity Growth Rates (USD PPP), 20 OECD Countries, 2010



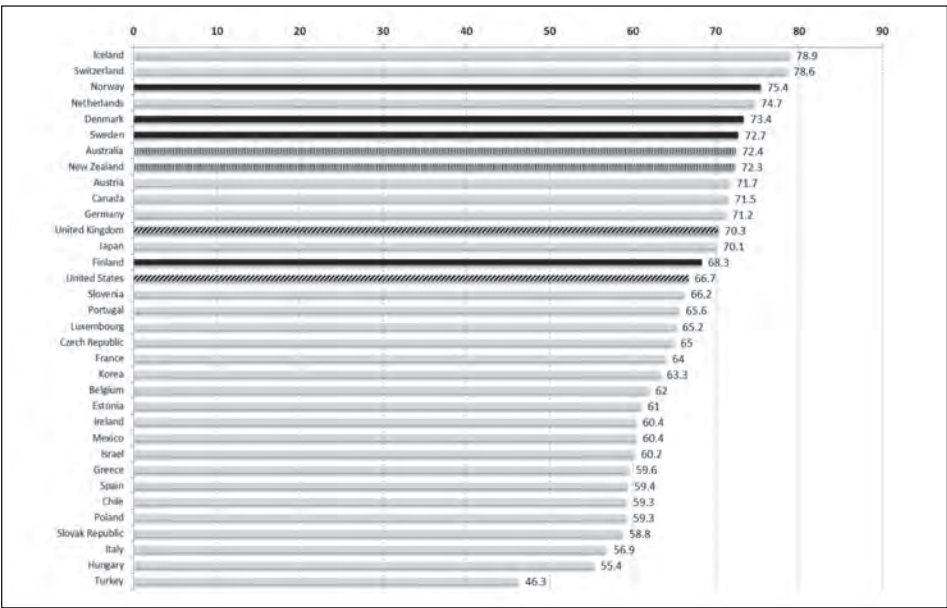
Source: OECD productivity database (data extracted on 17 February 2012 from OECD.Stat)

Figure 5: Unemployment Rates, OECD Countries, 2011



Source: OECD, Labour Force Statistics, Main Economic Indicators (database) accessed 23 Feb 2012

Figure 6: Employment Rates, OECD Countries, 2010

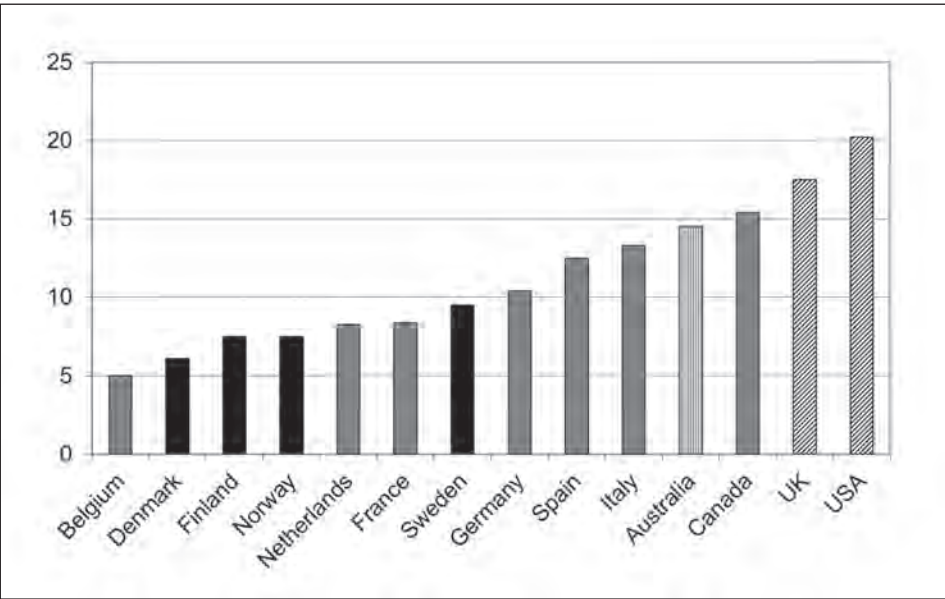


Source: OECD StatExtracts database, accessed 17 February 2012

Overall, what does it mean? It would be possible to make an argument that on average the *coordinated market countries* perform better. But on productivity there is not an overwhelming pattern—there is quite a lot of diversity between countries and indicators. It may be preferable to take the cautious conclusion that there is not a massive difference: that one cannot say categorically that coordinated market economies perform better or worse than liberal market ones in terms of productivity and employment. Productivity is driven more by technology, innovation, skills, and education (Engelbrecht 1997; Greenwood, Hercowitz, and Krusell 1997)—and in Australia’s case, even geographical isolation (Battersby 2006)—than by industrial relations or welfare policy arrangements.

However, a quite different pattern emerges when consideration is given to indicators of social cohesion. I focus here on just one: poverty rates. This is the proportion of people in poverty in each of 14 countries. The data are from a 1998 study. As can be seen in Figure 7, there is no ambiguity: the coordinated market countries had far lower poverty rates than the liberal market economies, particularly the United States where poverty is up to three times higher.

Figure 7: Poverty Rates, 14 OECD Countries, 1998



Source: Marx and Verbist (1998), cited in Rubery and Grimshaw (2003), p. 94.

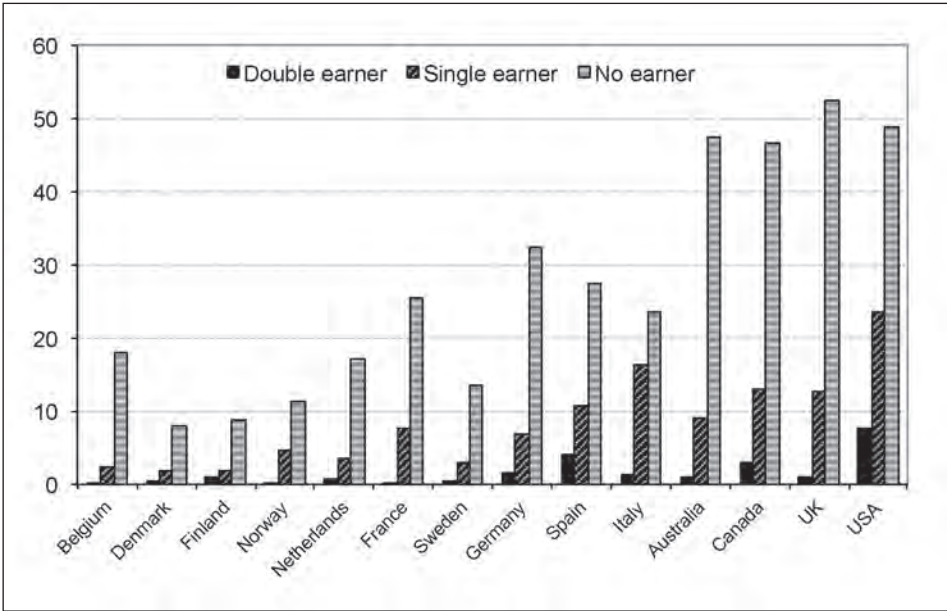
But the particularly notable feature is in Figure 8. This shows poverty rates in two-adult households, according to how many adults in the household are working. Poverty is in part a function of households’ access to employment, so,

in every country, poverty was lower among dual-earner households (shown in solid black in Figure 8), than in single-income households (in diagonal stripes), or in no-earner households (grey horizontal stripes). A single-income household in the United States was more likely to be in poverty than a single-income household in any of the other countries here.

But notice also how in the United States, a single-income household was more likely to be in poverty than a household with no employed income earners in Denmark, Finland, Norway, Sweden, or even the Netherlands or Belgium. And a two-income household in the United States was more likely to be in poverty than a single-income household in each of those countries plus Germany. And indeed, it was roughly as likely to be in poverty as an unemployed household in Denmark.

A more recent and more wide-ranging German study that assessed five dimensions of social justice (poverty, labour market inclusion, education, health, social cohesion, and non-discrimination, and inter-generational justice) across 31 countries ranked Iceland, Norway, Denmark, Sweden, and Finland in the top five positions, with the United Kingdom 15th and the United States 27th (ahead of only Mexico, Chile, Greece, and Turkey) (Schraad-Tischle 2011). In short, welfare and industrial relations systems do not make a large inherent difference to economic efficiency, but they make a very large difference to social outcomes.

Figure 8: Poverty Rates in Two-earner Households, 14 OECD Countries, 1998



Source: See Figure 7.

Moving to a global, temporal scale, in each industrialised country there has been a shift away from the policies of the 'post-war Keynesian compromise', that had seen incremental improvements in the conditions of workers, industrial protections, and the welfare state, towards 'liberal market' or 'neoliberal' policies. With that, across much of the OECD, the share of income going to profits has risen, although this is also something that varies between countries (Ellis and Smith 2007). However, productivity growth was higher before the neoliberal reform period gained momentum. Across the developed nations in Europe and elsewhere, growth in GDP per hour worked was lower in the period from 1973 to 1992 than it had been from 1950 to 1973 (Maddison 1995). Growth in GDP per hour in the G7 nations was much higher in the 1970s than in the decades from the 1980s onwards (OECD productivity database).

The period of neoliberal reforms has not brought about a period of unrivalled prosperity in terms of productivity advancement, but it has brought about a shift in income as the relative bargaining power of capital and labour has changed. Especially since the mid-1980s, the share of the top 1 per cent of income earners increased substantially in Australia, something that has been also seen in the other major English-speaking nations—the United Kingdom, Canada, and by most of all in the United States (Kapur, Macleod, and Singh 2006). Yet this share had been stable in the preceding period. Indeed, in the United States, as in many other countries, inequality between the top few and the rest had declined over much of the twentieth century (Kapur, Macleod, and Singh 2006).

Most recently, the global financial crisis has debunked the myth of efficient markets, the idea that markets 'self-correct' and find stable equilibrium, and the idea of 'trickle down' (or 'a rising tide lifts all boats') (Quiggin 2010). Also debunked was the myth of the superiority of numerical labour market flexibility. The United States experienced a worse deterioration in employment than Europe. The greater labour market flexibility in the United States that was meant to protect employment ended up more readily destroying it. Average employment in the United States fell by 3.8 per cent between 2008 and 2009, over double the fall in EU employment of 1.7 per cent. Yet GDP fell by considerably more in the European Union (4.2 per cent) than in the United States (2.4 per cent) (OECD 2010).

Thus the OECD in 2009 found no evidence that structural reform policies aimed at promoting flexibility had made labour markets 'less sensitive to severe economic downturns than was the case in the past'. It now recommended that governments improve income support and unemployment insurance benefit systems, though it had previously said these would decrease flexibility

(OECD 2009, p. 40). Instead, active intervention by unions and governments, negotiating and facilitating firm-level agreements for adjustment, helped moderate the effects of a crisis created elsewhere (Peetz, Le Queux, and Frost 2011).

Indeed, before the global financial crisis the OECD—once an enthusiastic supporter of labour market deregulation—had already begun hedging its position on employment-related policies. In 2004 it acknowledged that the evidence for a link between high wages or compressed wage structures and lower employment was ‘fragile’ (OECD 2004, p. 165.). In its 2006 *Employment Outlook*, the OECD analysed its own research and that of others and observed that: the effect of employment protection legislation on overall unemployment ‘was probably small’; there is little or no significant union impact on overall labour market performance; a high degree of centralisation in bargaining was associated with lower unemployment; and evidence on the link between minimum wages and employment was ‘ambiguous’. Several countries with highly regulated labour markets and active labour market programs had on average better employment rates than ‘market reliant’ countries. It conceded ‘there is no single combination of policies and institutions to achieve and maintain good labour market performance’ (OECD 2006, pp. 12, 13 & 18).

5. Implications

Overall, then, what can be said? There is some evidence that industrial relations *policies* that enhance fairness enhance economic performance. However, although this is a trend on average, the effects are conditional; they are not consistent or universal. What can be said with more certainty is that, *in any specific workplace, industrial relations can* make a difference to productivity. The decisions management makes, and the relationship it has with employees and unions, will shape what happens in the workplace and can have a noticeable effect on productivity.

That is not the same as saying, though, that if IR policy is altered at the national level, it is going to have a widespread or noticeable impact on productivity. It is what happens at the *workplace* that matters—and some managers will make decisions under a new framework that will make things better than they would have been, and some will make things worse. Some will consult with and involve their employees, and some will exclude or exploit them. Many seek a holy grail in employment or industrial relations policy that is going to give a magic boost to the economy. But there is none—certainly not to be found in policies that aim to shift the balance of power in industrial relations one way or the other.

That does not mean that *no* IR policies can influence productivity. The results of research suggests that government policies to encourage or discourage unions, to restrict the extent or scope of collective bargaining or related action, or to encourage or discourage non-unionism or individual contracting, will not do a great deal in net terms to change economic performance. Policies aimed at giving employees more say or more voice at work may well improve economic performance. This is an area where Australian policy still lags many other industrialised countries, but one largely beyond the scope of this article.

Interestingly in this context, the name of the present law is the *Fair Work Act*. As discussed above, advocates for various policy positions often argue that changes should be made to legislation because of the impacts on economic efficiency and productivity, when often what is being sought will have little impact on economic efficiency and productivity, but will have significant implications for the distribution of power and hence income—that is, for fairness. While there are problems of confusion arising from naming the associated *institution* Fair Work Australia (McCallum, Moore, and Edwards 2012, p. 249), it can be said that labelling the statute the ‘Fair Work’ was at least a tacit recognition that fairness is the principal issue with which industrial relations legislation can deal. Fairness is not the only consideration, but it is certainly an important one, and very probably the one that that legislation has the better chance of affecting.

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Evaluating the role of CFMEU OHS representatives in improving occupational health and safety outcomes in the Victorian construction industry: Interim Report

May 2016

Dr. Elsa Underhill, Deakin University

Prof. Michael Quinlan, UNSW

Prof. David Walters, Cardiff University

Dr. Emma Wadsworth Cardiff University

Deakin University CRICOS Provider Code: 00113B

Executive Summary

This Report examines the role of CFMEU OHS representatives in improving occupational health and safety outcomes in the Victorian construction industry. It draws upon a sample of 94 construction sites in the CBD and greater metropolitan region of Melbourne (commencing from 2009-2014), matched according to the status of OHS representation and the value and type of site. Entry Reports completed by Worksafe Victoria OHS inspectors were examined for each of these sites (446 reports in total), and the analysis based upon data from these reports. OHS inspector reports cannot include all of the hazards present throughout the building construction process, only those noted at the time of the inspection. Also, the sample is a relatively a small number of construction sites. Nonetheless, with these caveats in mind, a number of observations can be made. The findings in this Report suggest CFMEU OHS representatives play a valuable role in improving health and safety on Victorian construction sites.

- High hazard risks were less prevalent on sites with CFMEU OHS representatives than those with management nominated OHS representatives, and those with no OHS representation at all
- Injuries occurring on sites with CFMEU OHS representatives were less severe than those on sites with management nominated OHS representatives, and those with no worker representation at all. They were less likely to involve hospitalisation, or require transportation to hospital by ambulance
- Sites with CFMEU OHS representatives were more likely to have undertaken appropriate risk assessments, contributing to a lower level of high hazard tasks. They were also less likely to have a mismatch between documented safe work method statements and work practices
- Sites with CFMEU OHS representatives were more likely to demonstrate a learning approach to hazards; this contrasts with a 'repeat offender' approach identified on non-union sites
- Sites with CFMEU OHS representatives were better informed on industry standards, demonstrated by the lesser need for OHS inspectors to provide advice on these standards
- Improvement notices were less likely to be issued on sites without a CFMEU OHS representative, compared to sites with no OHS representative; and
- Sites with no OHS representation appear to be under-reporting injuries to WorkSafe Victoria.

This Report is part of a larger study of health and safety representatives in the construction industry in three States, and is the first significant study of representatives in the construction industry undertaken in Australia. Later stages of the project will extend the documentary analysis to New South

Wales and Queensland, and include qualitative material drawn from focus groups and interviews. This should help to flesh out the analysis, identify critical processes and viewpoints, and provide further insights into quantitative findings reported here.

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1. Introduction

Promoting worker involvement is widely accepted as a core principle for effectively managing occupational health and safety (OHS) and reducing harm to workers (and their families in the case of serious and fatal injuries or diseases). It is, for example, a critical component of the main OHS convention of the International Labour Organisation (Convention 155). A body of research globally has pointed to the benefits of worker involvement, especially more representative forms of involvement including health and safety representatives (HSRs), committees and via unions. Unions have strongly supported OHS legislative frameworks providing for representative structures and have provided logistical support for these structures (training, protection from victimisation and the like).

In Australia, David Biggins and colleagues undertook studies of the role and effectiveness of HSRs in Queensland and Western Australia in the 1980s and 1990s (Biggins & Phillips 1991; Biggins et al. 1991). However, there had been little follow up research until a study of safety representatives in the Queensland coal mining industry in 2013-2014 (Walters et al. 2014). Unlike many other studies, that project was able to use documentary records of these representatives' inspections at 19 mines over a 20 year period as well as interviews with representatives themselves. Inspections by safety representatives were also compared to the documented inspections of government mine inspectors relating to the same mines. The study found a close alignment between interview responses and documented inspections, that representatives targeted hazards known to lead to death and serious injury and were careful in using their powers under Queensland coalmine safety legislation. For example, representatives' activities maintained a focus on OHS, and sanctions like suspending all or part of an operation were used rarely and in circumstances clearly justifying their use.

The present study looks at the construction industry and also makes use of documentary records. Ninety-four construction sites, and 446 WorkSafe Victoria OHS Inspector's Entry Reports related to those sites were analysed in this study. The report presents the results of the first stage of the current study. It is an interim report, pending the completion of the full project which extends the analysis to qualitative data (primarily focus group interviews with OHS representatives) and includes data from New South Wales and Queensland. In this report, the impact of CFMEU Health and Safety Representatives (HSRs, OHS Representatives) on health and safety outcomes in the Victorian construction industry is analysed based upon WorkSafe Victoria OHS inspectors' reports. The final report will include a review of the relevant literature, and an analysis of both inspector reports and qualitative data, enabling a fuller understanding of the contribution of CFMEU HSRs representatives to construction site safety.

The report commences with a brief account of the sampling methodology used to match union and non-union sites, which enables a valid comparison of health and safety outcomes on sites with, and without CFMEU HSRs. For brevity the distinction is also referred to as union and non-union sites in this report. An overview of the nature of the sites follows, describing their size, the timing of the construction projects and the type of construction.

The report then turns to an analysis of key differences in OHS outcomes between construction sites with and without a CFMEU HSR. The aspects of site safety focused upon in the report are determined by the nature of information provided in OHS Inspectors' Entry Reports. The analysis commences with the number, type, severity and immediate cause of workplace injuries. The nature of hazards identified on sites are then analysed. This is an important and unique aspect of this project. Many of the hazards identified are not associated with a workplace injury, but are sufficiently important for inspectors to record them; they have the potential to produce an injury. The discussion of hazards also includes an analysis of why these hazards were believed to arise, based upon the OHS inspectors' interpretation of site practices. The extent of workforce consultation is noted, but ambiguities in OHS Inspectors' reports prevent a detailed analysis of this practice. The advice provided by OHS inspectors on how to remedy a workplace hazard informs, in part, on the level of knowledge of workplace hazards applied at a worksite and this is examined in section 7. The final section of the data analysis reviews the extent to which improvement notices, a clear indicator of an unsafe work situation, are issued to union and non-union sites. Section 9 of the report repeats the analysis, comparing sites with a CFMEU HSR to those with a management nominated OHS representative.

The data analysis shows more severe injuries, and a distinctly poorer attitude towards the management of workplace hazards on sites without a CFMEU HSR. It is clear that some employers in the industry are prepared to take a cavalier attitude towards workplace safety – these are 'repeat offenders' who allow similar high risk hazards to recur notwithstanding advice from OHS inspectors. They also demonstrate a low level of knowledge of industry standards in relation to safety, relying more upon the advice of OHS inspectors which is mostly received only once an incident or complaint has occurred. That these practices are less common on sites with CFMEU HSRs points to the critical role they appear to play in improving site safety.

There are, however, limitations on how to interpret the role played by CFMEU HSRs. Whilst the data show higher safety standards, the process by which this occurs cannot be explored through OHS inspector reports. There are also some ambiguities in the data, particularly in relation to worker communication and consultation, which can only be clarified through qualitative research. The report concludes with a summary of the main findings identified in the data.

2. Sample methodology

This study is based upon data sourced from WorkSafe Victoria's OHS inspectors' Entry Reports, for 94 construction sites in the CBD and greater metropolitan Melbourne. A total of 446 reports were analysed. Sites beyond the jurisdiction of the Occupational Health and Safety Act (Victoria) 2004 were therefore not included in the study.

The population from which the sample was drawn was Cordell's listing of successful tenderers in the Victorian building and construction industry. All projects which commenced between 1 July 2009 and 30 June 2014, with a minimum value of A\$10 million were included. The construction sites were then categorised, based on advice from the CFMEU, according to the type of OHS worker representation, namely:

- (1) A CFMEU HSR
- (2) A management nominated HSR; and
- (3) No OHS worker representative.

A sample of 100 sites was then selected for the project. Site selection was governed by matching the time period, the \$ value of the site, and similar type of construction for sites with a CFMEU recognised HSR, and those without. The \$ value is used as a proxy for the size of the construction project. This process enabled comparisons to be drawn between sites which were similar in size.

Freedom of Information requests were submitted for all sites in the sample. Of these, around 10% did not have any OHS inspector reports. A small number were replaced in the sample by construction sites of a similar size, and comparable commencement date.

The data from the OHS inspectors' reports were entered into a data base and analysed using Statistical package SPSS 22. For the purposes of Sections 3-8 of this report, groups 2 and 3 are combined and referred to as sites without a CFMEU HSR (or non-union sites). This categorisation provides a proxy for those sites with an active union presence, and those without a union presence. Sites coming with group 2 are analysed separately in Section 9.

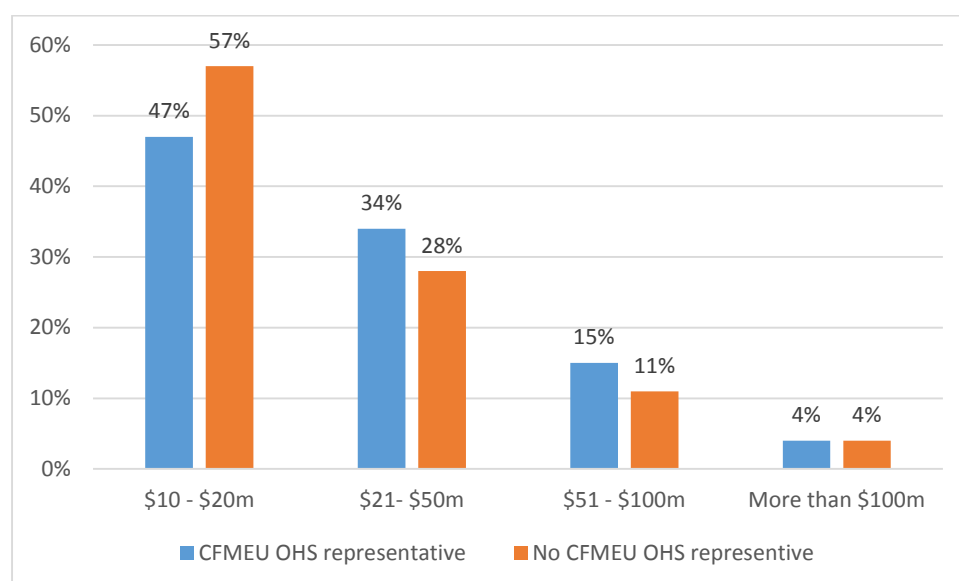
3. Characteristics of sample

This section provides an overview of the main characteristics of the construction sites in the sample. It describes the value of the construction projects, the timing, and the type of construction projects. These characteristics evidence the similarities between sample sites without and without a CFMEU HSR, enabling a valid comparison of the two.

3.1 Size of construction sites

Construction sites in the sample were matched by the estimated value of construction provided in the Cordell listing. The minimum site value included in the study is A\$10 million. Chart 1 gives the distribution of the sample by value of site and OHS representation. The difference in size distribution between the two categories of sites is not significant, and therefore does not impact on the comparisons of sites by size in this report.

Chart 1: Value of sample sites



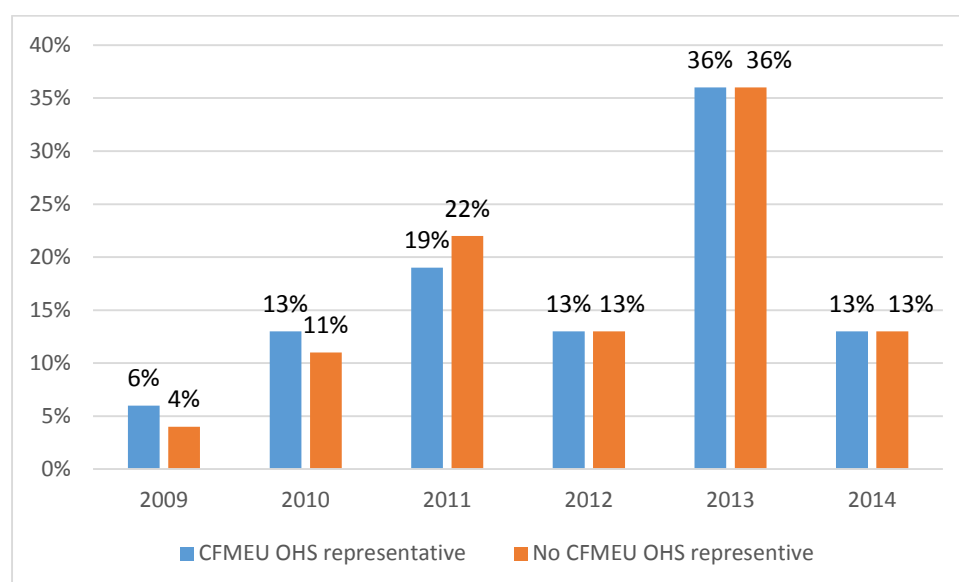
As small construction sites are less likely to be unionised than larger sites, the matching process has inevitably skewed the sample towards small- medium valued sites. In this report, we draw comparisons between sites valued up to \$20 million, and sites valued at more than \$20 million, when the findings differ significantly between the two groups. Of union sites, 47% (22 sites) were valued at \$20 million or less (median \$15 m.), compared to 57% (27 sites; median \$13 m) of sites without a

CFMEU HSR. For the larger sites, those with CFMEU HSR had a median value of \$40 million, compared to \$47 million for those without such representation.

3.2 Year construction commenced

The sample is taken from commencement date of sites over a five year period (July 2009 – June 2014). The distribution is shown in Chart 2 and is identical between both categories in most years. As the status of OHS worker representation was based on information provided by the CFMEU (subject to local knowledge and memory recall), almost 50% of the sample has been drawn from relatively recent construction sites, those that commenced in 2013 and 2014.

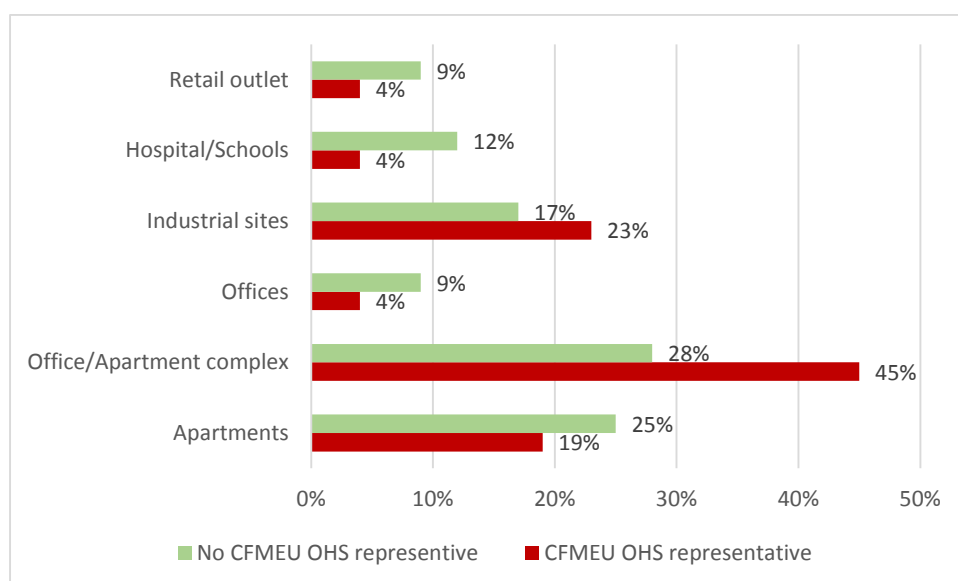
Chart 2: Year project commenced



3.3 Type of construction project

More than half the sample involved construction of either apartments, or office and apartment complexes (see chart 3). For sites with a CFMEU HSR, 64% of projects involved either an apartment block or a combined retail/apartment block (typically a multi-storey apartment block with a small number of ground floor shops), compared to 54% of sites without a CFMEU HSR. Given the similarities between these construction types, these differences are not significant. Overall, with the exception of school buildings, the types of construction sites are sufficiently similar between the two groups for valid comparisons to be drawn based upon OHS worker representation.

Chart 3: Type of construction project



3.4 Other variables: Complexity of design, height of construction, workforce size, number of subcontractors

A number of variables which might otherwise be considered important from a workplace health and safety perspective were not available. No information was available on the complexity of the construction design, or the height of the construction project, which might be regarded as inherently contributing to different site and health and safety risks. Likewise no information was available on the number of subcontractors on site, even though additional supervision requirements might suggest the presence of multiple subcontractors would impact upon workplace risks. Finally, no data were available on the number of workers involved in the construction project, a commonly used indicator of worksite size in other industries. Reliance on the value of the construction project, as an indicator of the size of the construction project, is expected to indirectly capture some of these variables.

3.5 Reasons for inspectors visiting sites

This analysis is based on Entry Reports completed by OHS Inspectors following a visit to a construction site. Inspectors visit sites under a number of different circumstances. The inspection may follow the notification of an injury to WorkSafe Victoria; in response to a complaint from a worker, OHS representative, union official or a member of the public; as part of a specific Worksafe Victoria construction industry improvement project or to follow up on an improvement notice previously issued at the site. As there can be overlap between these issues, we have not provided data on the

reasons for the OHS inspector visiting the sites included in this study (for a discussion of different reasons for inspections, see Walters et al 2011).

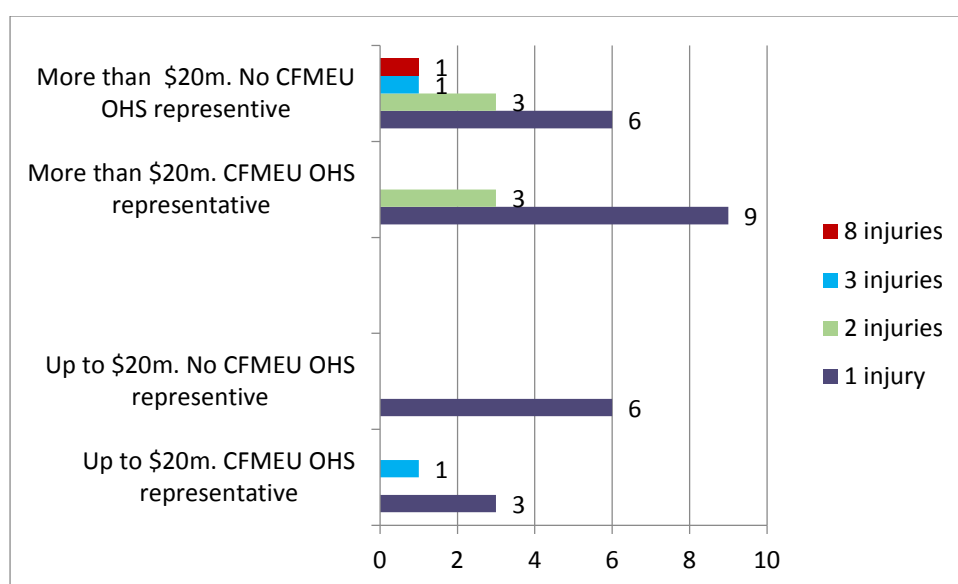
4. Workplace Injuries

Employers are obliged to report to WorkSafe Victoria deaths, and workplace injuries involving medical treatment, or immediate in-patient treatment in a hospital. The injuries recorded in this study only involve those reported to WorkSafe Victoria which were in turn followed up by a visit from an OHS inspector. Information on injuries which were not reported as an incident to WorkSafe Victoria, irrespective of whether a worker's compensation claim was lodged, could not be included in this study.

OHS inspectors' reports recorded workplace injuries on one third (35%) of the sites in this study. As the reporting of an incident to Workplace Victoria triggers a visit by an OHS inspector, this proportion is likely to be higher than for the industry as a whole. Fifty injuries were recorded. Of these, 42% (21 injuries) occurred on sites with a CFMEU HSR, and 58% (29 injuries) were on sites without such representation. This is not a statistically significant difference, however as noted in sections 4.4 and 9.1 below, sites without a CFMEU HSR appear to under-report injuries.

The distribution of injuries by size of site was comparable between the two groups, with 29% of injuries on sites with a CFMEU HSR being valued at A\$20 million or less, compared to 21% on similar sized sites without such representation (refer Chart 4). When analysed by number of injuries per site, the data show two larger sites without a CFMEU HSR which experienced multiple injuries (8, and 3 injuries respectively), and one smaller site (up to \$20m) which also experienced 3 injuries and also which had a CFMEU HSR.

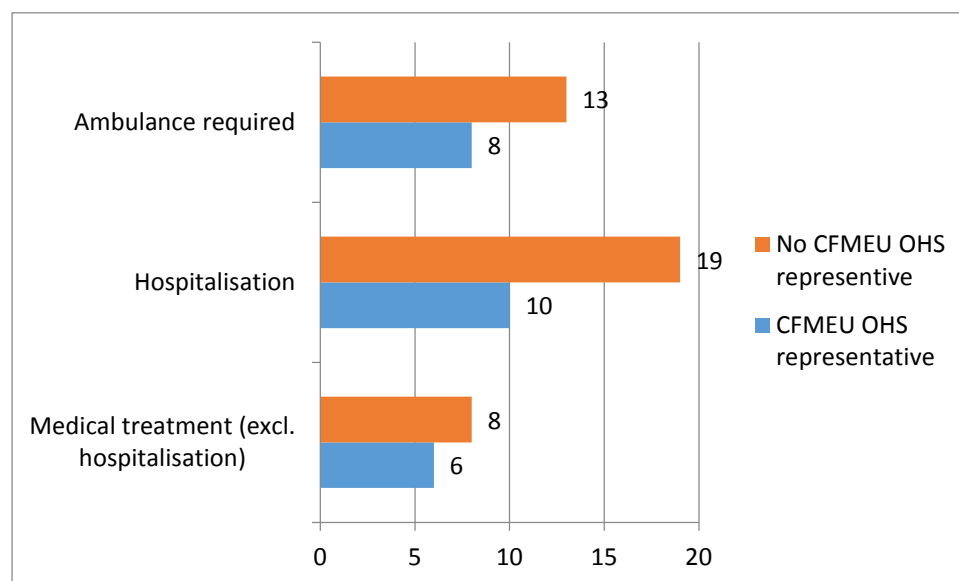
Chart 4 No. of injuries per site, by size of site



4.1 Severity of injury

OHS Inspector reports do not discuss the nature of a worker's injury in detail, but they do provide some indicators of severity, namely whether the worker received medical attention, was hospitalised, and whether the worker was transported by ambulance to hospital. Hospitalisation includes all injured workers admitted to hospital for observation through to those needing surgery. Those that were transported to hospital are considered the most severely injured because of the emergency implied by the need to call an ambulance. Injuries requiring medical attention but not hospitalisation are considered the least severe. Chart 5 shows the number of injuries requiring each of these different medical responses.

Chart 5 Number of injuries by severity indicators



Workers injured on sites without a CFMEU HSR were almost twice as likely to require hospitalisation, and more than 50% more likely to require transportation to hospital by ambulance. They were also slightly more likely to require medical treatment for injuries. The latter predominantly involved injuries such as heavy bruising and swellings from being hit by moving objects, and mild electric shocks. The greater prevalence of hospitalisation and transportation by ambulance points to more severe, acute injuries being experienced on construction sites without a CFMEU HSR.

The more severe injuries occurred on larger construction sites, with 75% -85% of severe injuries occurring on sites valued at more than A\$20 million, irrespective of worker representation and notwithstanding that these sites made up around half of the sample. Several factors are likely to contribute to this pattern. The construction design and management is likely to be more complex, it is more likely to involve multi-storeys and will involve a larger number of subcontractors and employees. The interplay of these factors cannot be evaluated based upon OHS inspector reports. They will be analysed in the qualitative research stage of the project, through focus groups and in-depth interviews.

4.2 Fatalities

Two fatalities occurred on sites in this study. One involved a site without a CFMEU HSR. The second occurred on a site with a CFMEU HSR, but did not involve a building worker. This fatality involved a member of the public who had entered the site overnight without permission.

4.3 Immediate Cause of injury

The immediate causes of injury are presented in Chart 6 for those injured on a site with a CFMEU HSR, and Chart 7 for those without (note: multiple sources were identified for a small number of injuries). The main differences between the two is that injuries caused by falling objects were twice as likely on CFMEU sites than those without a union HSR; and injuries from being struck by equipment or machinery were much less common on CFMEU sites. There are no other significant differences. It should be also recalled that the number of injuries for both groups of sites is relatively small; small differences in numbers translate into large percentages.

Chart 6 Immediate cause of injury on sites with a CFMEU HSR (n=26)

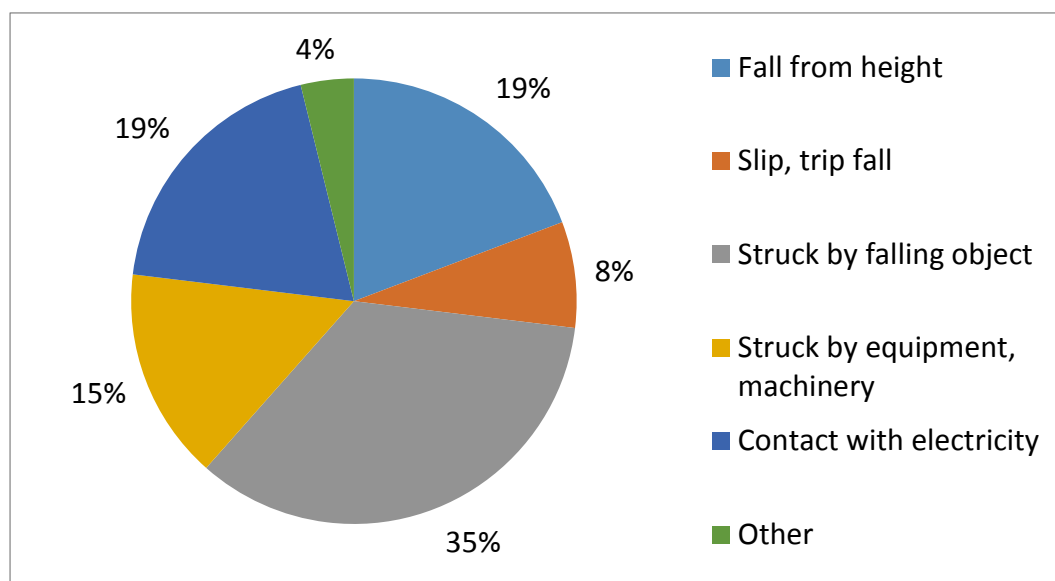
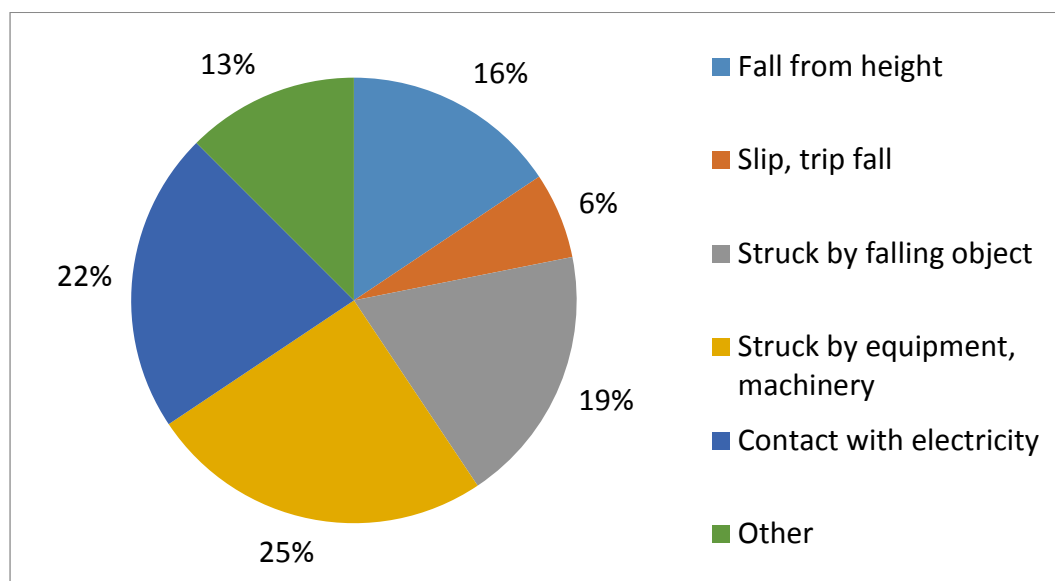


Chart 7 Immediate cause of injury on sites without a CFMEU HSR (n=32)



The OHS inspector reports cannot provide sufficient information to enable an explanation of why the causes of injury differ between the two types of sites. Further qualitative research is needed to understand how work practices, or other factors, potentially contribute to these different types of risks.

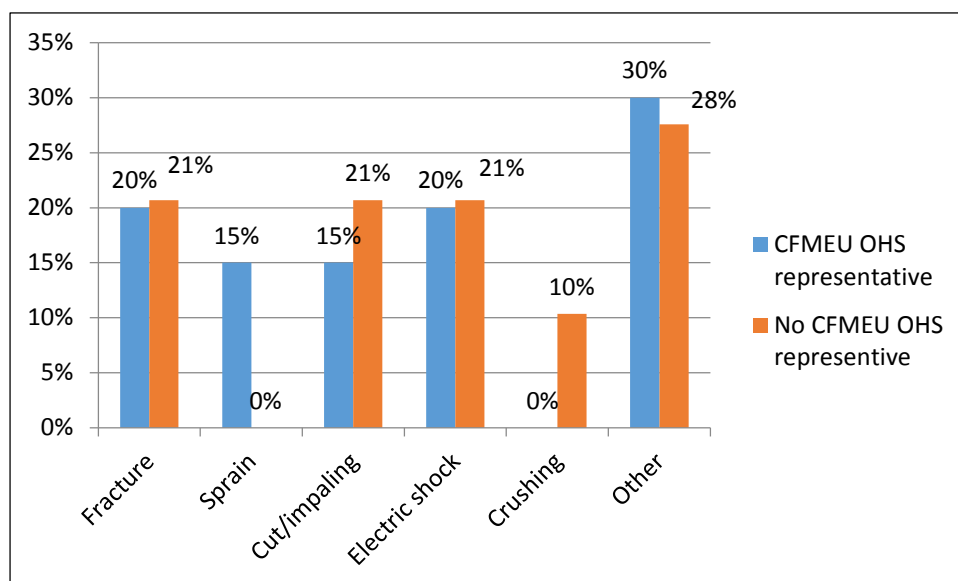
4.4 Type of injuries

OHS inspectors' reports typically provide a brief account of the circumstances contributing to a worker's injury. OHS inspectors are not, however, in a position nor qualified to describe the nature of all injuries. In some instances the type of injury will be obvious. In others, however, it may only be known that, for example, the worker was struck on the leg by machinery and was immediately taken to hospital. In such cases, the type of injury is categorised as 'other'. Chart 8 provides the distribution of injury type according to OHS worker representation. Note that because of the small number of injuries recorded, small numerical differences translate to large percentage differences.

The types of injuries were similar between sites with and without CFMEU HSRs, with the exception of two categories. Sprains were more common on sites with a CFMEU HSR, and crushing-related injuries were more common on sites without a CFMEU HSR. This is consistent with the finding that workers on sites without a CFMEU HSR experienced more severe injuries.

The contrasting level of sprains - 15% of injuries on union sites and zero on non-union sites - raises the question of whether less acute injuries, such as sprains, were not reported on sites without a CFMEU HSR. WorkSafe Victoria requires injuries to be notified when either medical attention or hospitalisation occurs. Workers receiving sprain injuries on CFMEU sites appear to be seeking medical attention, causing the incident to be reported. This does not appear to be the practice on non-union sites. Failure to report injuries as required under legislation has been identified as a problem in both Australia and other countries (see Walter et al. 2011, Quinlan et al. 2010). Further qualitative research may inform on how these practices differ.

Chart 8 Type of injury, and OHS representation



Note: n=21 for those with a CFMEU HSR; n=29 for those without a CFMEU HSR..

The data show a lower level of injuries on sites with a CFMEU HSR, and those injuries were less severe than those experienced on sites without a CFMEU HSR. Injured workers on sites without such representation were almost twice as likely to require hospitalisation, and 50% more likely to receive an acute injury requiring transportation by ambulance. This is reflected in the type of injuries that were evident on non-CFMEU sites, which were predominantly acute injuries. It also appears that some injuries are not reported on non-union sites, resulting in an understatement of the injury rate for non-union sites compared to union sites.

5. Identified Hazards

In this section, we focus upon hazards that OHS inspectors demanded be rectified. OHS inspector reports provide an insight into the hazards identified on construction sites, including those that have, and have not, resulted in an injury. The presence of a CFMEU HSR would be expected to reduce the likelihood of preventable hazards arising on sites.

5.1 Unsafe work practices

Our analysis focuses on when there is a statistically significant difference between sites with and without a CFMEU HSR. Our concern here is with hazards containing the potential for severe injury:

falls from heights, slips trips and falls, and contact with electricity. These hazards were more likely to occur on sites without a CFMEU HSR, irrespective of the size of the site.

A review of the data showed that for some sites, the OHS inspector identified a particular hazard following an incident or complaint, and required its rectification. However, although the hazard was corrected the first time, the same kind of hazard arose repeatedly throughout the construction process. Either the site management did not pro-actively prevent a similar hazard from occurring again, did not understand the nature of the hazard, or was willing to take a chance on either a worker not being injured or the builder not being caught a third or fourth time. Table 1 provides the data on the number of times a hazard was identified at the same site, and OHS worker representation.

Table 1: Frequency of hazard (unsafe work practice) identified on same site

Number of times hazard identified on same site	CFMEU HSR No of sites	CFMEU HSR % of sites	No CFMEU HSR No of sites	No CFMEU HSR % of sites
Fall from height				
Once	13	28%	16	34%
Twice	4	9%	2	4%
Three	1	2%	5	11%
Five times			1	2%
<i>Total sites where hazard found</i>	<i>17</i>	<i>38%</i>	<i>24</i>	<i>51%</i>
Slip, trips and falls				
Once	8	17%	13	28%
Twice	2	4%	2	4%
Three			1	2%
Four times			1	2%
<i>Total sites where hazard found</i>	<i>10</i>	<i>21%</i>	<i>17</i>	<i>36%</i>
Contact with electricity				
Once	5	11%	12	26%
Twice	1	2%	4	9%
Three times	1	2%		
<i>Total sites where hazard found</i>	<i>7</i>	<i>15%</i>	<i>16</i>	<i>34%</i>

Each of the hazards in Table 1 were identified more often on sites without a CFMEU HSR, and were identified repeatedly on those same sites.

- The risk of a fall from a height was identified on just over half of sites without a CFMEU HSR, compared with 38% of sites with such representation. Importantly, this hazard was identified

repeatedly – up to five times on five separate occasions – on these sites. Eleven percent of CFMEU sites had a risk of falls identified more than once, compared to 18% of sites without CFMEU representation. One site had such a risk identified five times. This is consistent with the higher proportion of injuries from falls from heights noted above. Small sites without a CFMEU worker representative, valued at under \$20 million, were far more likely to have a fall from height hazard identified. 52% of those sites had such a risk, compared to only 27% of those with a CFMEU HSR. Many of these sites were multi-storey, but not high-rise buildings. Builders on these lower valued sites are either less aware of the risks associated with falls from lower heights, or willing to take a risk with that hazard.

- Slip, trip and fall hazards were identified on one in five sites (21%) with a CFMEU HSR, and just over 1/3 of sites (36%) without such representation. These hazards are indicative of sites with poor housekeeping and a lack of conscientiousness about site safety. The presence of a large number of subcontractors at a particular time can also create over-crowding, whilst impeding management control over the site. Slips, trips and falls can result in severe injuries, such as inadvertently coming in contact with electrical cables. In one instance, for example, a worker tripped, knocking his head and subsequently requiring hospitalisation for a fracture, and stitches. Only a small proportion of injuries were identified as caused by slips, trips and falls in the preceding analysis. Two interpretations are possible. First, the immediate cause of an injury may be a consequence of poor housekeeping, such as contact with an electricity source brought about by careless positioning of cables. Second, OHS inspectors may identify slip, trip and fall hazards when inspecting sites for a range of reasons, not only in response to a specific complaint or incident.
- The risk of coming in contact with electricity was twice as likely on sites without a CFMEU HSR (34% of sites compared with 15% of CFMEU sites). Both types of sites had a similar proportion of injuries attributable to coming in contact with electricity (19% of injuries on union sites compared to 22% for non-union sites). An explanation for this disparity cannot be ascertained from this data source.

Other types of hazards identified by inspectors did not differ significantly based on OHS representation. These included the risk of being struck by a falling object (36% of union sites, 40% non-union sites); being struck by equipment or machinery (23% union sites, 11% non-union sites); danger to the public (21% and 23% respectively); and the risk of cut / impaling (15% on both types of sites).

5.2 Faulty, inappropriate or poorly maintained equipment & machinery

Hazards arising from faulty, inappropriate or poorly maintained equipment and machinery were also more common on sites without a CFMEU OHS representative. As with hazards linked to unsafe work practices, we identify the proportion of sites where the hazard was identified, and the extent of repeat offenders. We focus only on the hazards where a statistically significant difference was found between sites with and without CFMEU OHS representation. Table 2 provides the details.

Table 2: Frequency of hazard (equipment & machinery related) identified on same site

Number of times hazard identified on same site	CFMEU HSR No of sites	CFMEU HSR % of sites	No CFMEU HSR No of sites	No CFMEU HSR % of sites
Scaffolding				
Once	7	15%	8	17%
Twice			3	6%
Three times			1	6%
<i>Total sites where hazard found</i>	<i>7</i>	<i>15%</i>	<i>12</i>	<i>25%</i>
Guard rails / barriers				
Once	8	17%	9	19%
Twice			5	11%
Three	1	2%	1	2%
Five times			1	2%
<i>Total sites where hazard found</i>	<i>9</i>	<i>19%</i>	<i>16</i>	<i>34%</i>
Electrical supplies & tools				
Once	6	13%	12	26%
Twice			2	2%
Three times	1	2%	1	2%
<i>Total sites where hazard found</i>	<i>7</i>	<i>15%</i>	<i>15</i>	<i>32%</i>

The three main equipment and machinery hazards were scaffolding, guard rails/barriers and electrical supplies. These hazards arose more often on non-union sites, irrespective of size of site. For inappropriate or faulty electrical supplies/tools, non-union sites were twice as likely to experience this risk. Not surprisingly, the three main hazards in Table 2 were associated with those hazards identified above as unsafe work practices

Again, the data point to repeat offenders. OHS inspectors identify the hazard, seek rectification, yet find a hazard of a similar nature at the same site at a later time. In the case of scaffolding, for example, a hazard was identified on 15% of union sites on a one-off basis. For non-union sites, the hazard was identified on 17% of sites just once, but a further 12% of non-union sites allowed the same type of hazard to arise on two or three occasions. The processes which enable CFMEU sites to learn from first exposure to the hazard cannot be evaluated based on OHS inspector reports. This awaits further qualitative research.

Other equipment and machinery related hazards were identified by inspectors but are not analysed here as differences in their prevalence were not statistically significant between union and non-union sites. These included cranes and lifting equipment (13% union sites compared to 17% of non-union sites); and hand held tools (8% union sites, not identified on non-union sites).

6. Had a risk assessment been undertaken to identify the hazards?

When OHS inspectors identify hazards on site, they typically review the documentation, particularly the Safe Work Method Statements (SWMS), and evaluate whether the work methods observed match those specified in the documentation. When a discrepancy or mismatch arises between SWMS documentation and site practices, site management are required to ensure that the relevant workers are informed, and if necessary, provided with training to ensure the work practices match the SWMS. When the SWMS is found not to be appropriate to the specific context of the site, then site managers are required to amend the SWMS accordingly, and again ensure workers are informed of the changes. More commonly, however, a risk assessment does not appear to have been undertaken in relation to the specific hazard associated with a complaint or injury, and a SWMS is not available to guide safe work practices. The following two tables detail the frequency with which there was a mismatch between documentation and practice, and the absence of a risk assessment related to the hazard. As with Table 1 and Table 2 above, data on 'repeat offenders' is also included.

Table 3 Frequency of hazards originating from a mismatch of practice and documentation

Number of times mismatch was on same site	CFMEU HSR No of sites	CFMEU HSR % of sites	No CFMEU HSR No of sites	No CFMEU HSR % of sites
Once	9	19%	4	9%
Twice	2	4%		
Three			4	9%
Four			1	2%
Seven times			1	2%
<i>Total sites where mismatch found</i>	<i>11</i>	<i>23%</i>	<i>10</i>	<i>21%</i>

Both union and non-union sites were equally likely to have a hazard arising from a mismatch between practice and documentation (Table 3). However, there is a clear failure by a small proportion of non-union sites to learn from incidents, and change the way site management is approaching reduction in the level of risk. This reluctance to learn is not apparent on union sites where a pro-active approach to matching SWMS documentation and work methods appears more likely once the issue has been identified by an OHS inspector (a practice also identified by Biggins and Phillips 1991). The process by which this learning occurs cannot be ascertained without further qualitative research.

Table 4 Frequency of hazards originating from a failure to undertake a risk assessment

Number of times mismatch was on same site	CFMEU HSR No of sites	CFMEU HSR % of sites	No CFMEU HSR No of sites	No CFMEU HSR % of sites
Once	15	32%	15	32%
Twice	3	6%	9	19%
Three	2	4%	1	2%
Four	1	2%	1	2%
Five			1	2%
Six times	2		1	2%
<i>Total sites where risk assessment not undertaken</i>	<i>21</i>	<i>45%</i>	<i>28</i>	<i>60%</i>

Table 4 shows that on 45% of union sites, and 60% of those without a CFMEU HSR, the hazard identified by the OHS inspector originated in a failure to undertake a risk assessment in relation to the relevant task. This hazard may have been associated with an injury, with a complaint, or simply arose from a pro-active visit to the site by the inspector. The difference between the union and non-union sites was statistically significant, and unrelated to the size of the site. Once again, non-CFMEU sites were much more likely to be repeat offenders.

7. Workforce consultation

OHS inspectors typically include worker representation and consultation during site visits. Their reports on these issues, however, are ambiguous and difficult to interpret. For example, a common statement in reports is:

I enquired into employee representation and consultation arrangements.

*I was **informed** [our emphasis] that a Health and Safety Representative (HSR) has been elected and a Designated Work group (DWG) has been formed at the workplace.*

I was informed that consultative mechanisms are in place, which include:

Health and safety committee meetings

Tool box meetings

Regular scheduled meetings which include discussions relating to health and safety

Designated work group meetings

*I also **observed** [our emphasis] that an up-to-date list showing the DWG and HSR's name was displayed/accessible at the workplace.*

The OHS inspector reports showed two aspects of workforce consultation where a statistically significant difference occurred between sites with and without a CFMEU HSR. The first was the holding of tool box meetings, which was recorded as occurring on 66% of sites without a CFMEU HSR, but only 40% of sites with a CFMEU HSR. Second was advice provided by OHS inspectors on workforce consultation processes. Such advice was given on 32% of non-union sites compared to 17% of sites with a CFMEU HSR.

Several difficulties arise in interpreting the information on workforce consultation recorded by OHS inspectors.

- First, unlike other worksite issues, the prevalence of representation and consultation is not visually (or otherwise) confirmed, but informed by management. The displaying of the names of OHS representatives appears to be the only practice visually confirmed.
- Second, the existence of the processes does not inform of the quality and breadth of those processes.
- Third, it is possible (but not testable based on the data) that OHS inspectors do not ask about or record consultative processes to the same extent on sites with a CFMEU HSR. Instead, they may assume that the presence of CFMEU HSR is indicative of worker consultative practices being in place, and the inspector's attention is given to the more immediate site risks.

An earlier study of OHS inspectors in four Australian jurisdictions including Victoria (including construction) identified the level of communication between inspectors, and workers and their OHS

representatives as a weakness warranting attention (see Walters et al 2011). An understanding of the gaps revealed in the data analysis here can only be obtained through a different research method, such as discussions with OHS representatives.

8. Actions taken by OHS inspectors

8.1 Provision of advice

The nature of advice provided by OHS inspectors during a site visit varies according to the site specific problems. However, some advice was more common on non-union sites compared to those with a CFMEU HSR, notably advice on site house-keeping, which was provided at 25% of non-union sites compared to only 11% of union sites. This difference was significant and arose irrespective of site size. The second area where a significant difference arose between sites with and without CFMEU HSRs (also irrespective of site size) was the provision of advice on industry standards. This advice could be hazard specific, such as cross-bracing to ensure the stability of a stair case, or more general such as notification of incidents. Table 5 details the frequency of such advice by site.

Table 5 Frequency of advice on industry standards per site, and OHS representation

Number of advice provided on industry standards, same site	CFMEU HSR No of sites	CFMEU HSR % of sites	No CFMEU HSR No of sites	No CFMEU HSR % of sites
Once	10	21%	14	30%
Twice	1	2%	1	2%
Four			3	6%
Five			2	4%
Seven			1	2%
Fourteen times			1	2%
<i>Total sites where advice on industry standards given</i>	<i>11</i>	<i>23%</i>	<i>22</i>	<i>46%</i>

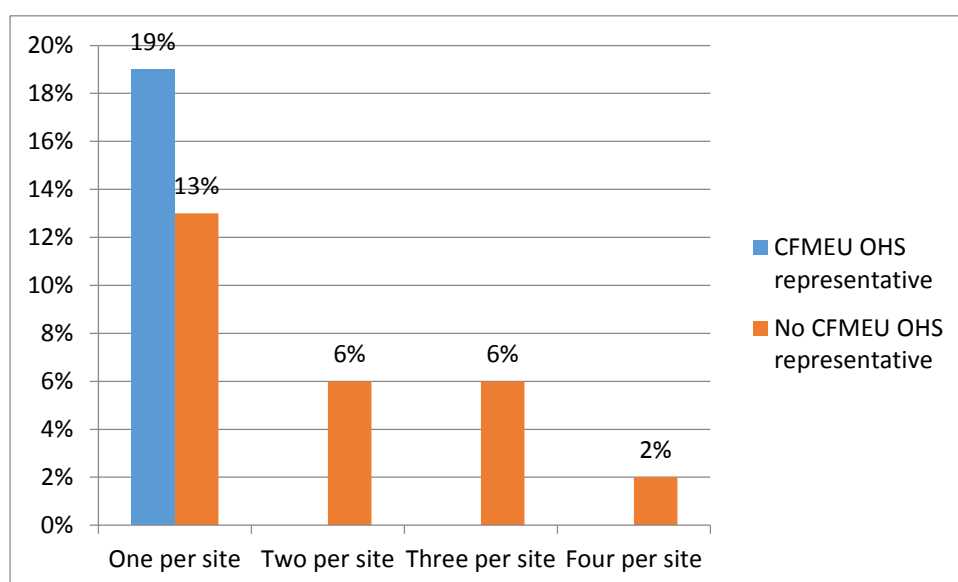
Sites without a CFMEU HSR were twice as likely to be advised by OHS inspectors on industry standards as those with a CFMEU HSR. The reason for this difference can only be speculated upon. It could, for example, be attributable to the greater breadth of knowledge available when a CFMEU HSR is consulted about safe construction processes. This will be explored further in the qualitative research.

8.2 Improvement Notices

Improvement notices are issued by OHS inspectors when they reasonably believe a person is contravening the Occupational Health and Safety Act 2004, or its regulations, or when they believe a contravention has occurred and is likely to continue (s. 111 OHS Act Victoria). OHS inspectors appear to prefer to issue advice on how to remove hazards, rather than issue improvement notices, except when the hazard has already resulted in an injury, or it is likely that it will do so in the near future. The issuing of improvement notices indicates the seriousness of a hazard, with a failure to comply with an improvement notice potentially resulting in penalties of up to \$380,000 for a body corporate (s. 112 OHS Act Victoria).

Nineteen percent of sites (9 sites) with a CFMEU HSR were issued with an improvement notice by an OHS inspector, compared to 29% of sites (13 sites) without such representation. A small proportion of the non-union sites were issued with more than one improvement notice, so that absolute numbers of notices issued was 9 for union sites compared to 25, or almost three times as many, for non-union sites. Chart 10 gives the percentage distribution of sites receiving improvement notices, according to the number issued.

Chart 9 Distribution of improvement notice, and OHS worker representation



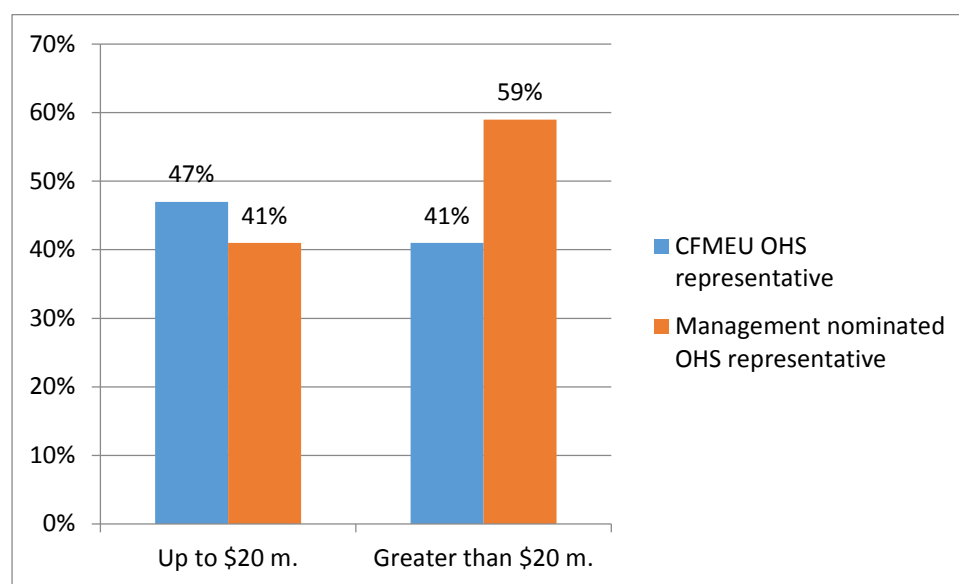
Sites without a CFMEU OHS representative were significantly more likely to be issued with an improvement notice than those without such representation, irrespective of site size. Some of these sites received more than one notice based on a single visit from an inspector, others received notices

throughout the construction process. The issuing of improvement notices reinforces the earlier findings that injuries experienced on non-union sites were more severe, and that highly hazardous practices were identified more often on non-union sites.

9. CFMEU HSRs compared to management nominated OHS representatives. Where do the differences lie?

The analysis so far has compared sites with a CFMEU OHS representative, to all sites without such representation. Sites without an OHS representative were combined with those that have a management nominated OHS representative. In this section, we narrow the comparison to include only CFMEU sites and those with a management nominated OHS representative (MOHSR). There are 27 of the latter sites included in the sample. This is a relatively small number of construction sites, notwithstanding that the majority were medium – large sites. Of these, 11 were valued at up to \$20 million with a median value of \$13 m. compared to \$15 m for CFMEU sites in the same value range. For the larger sites, the 16 management nominated OHS representative sites had a median value of \$76 million, compared to \$40 million for CFMEU sites. The comparison is not as closely matched on site value, with more small – medium sized CFMEU sites in the sample. The site size distribution is provided in chart 10.

Chart 10: Distribution of sample by value of site, CFMEU and MOHSR sites



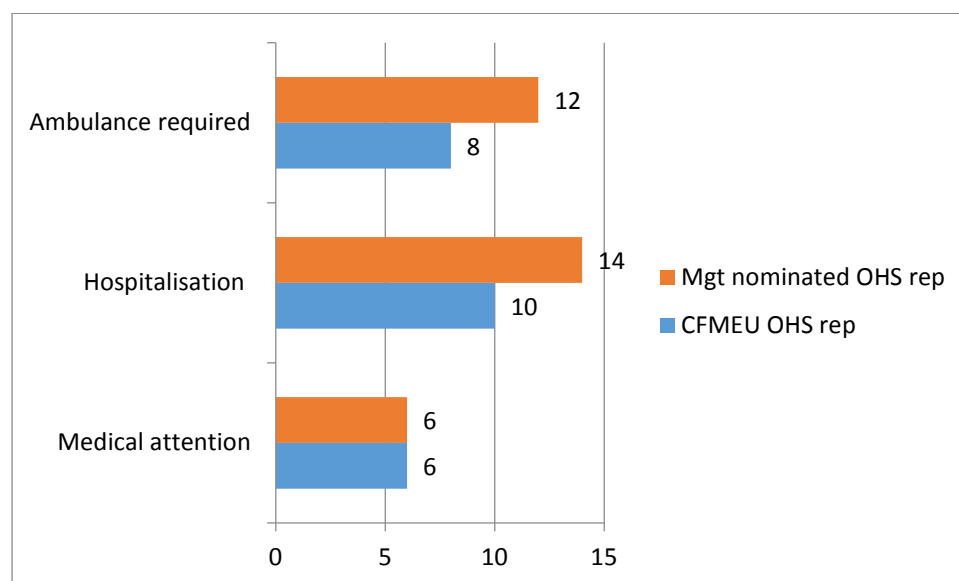
Similar differences were identified between CFMEU sites and those with a management nominated OHS representative, across a range of variable described in the preceding comparisons.

9.1 Workplace injuries

The same number of injuries (21 injuries) were recorded on the 27 MOHSR sites as were recorded on the 47 sites with a CFMEU OHS representative. It will be recalled from section 4 that 29 injuries were reported on all sites without a CFMEU OHS representative. The 20 sites with neither a CFMEU OHS representative nor a MOHSR therefore accounted for only 8 of the injuries reported to WorkSafe Victoria. On sites without a CFMEU representative, 72% of injuries occurred on sites with a MOHSR, and only 27% on sites without an OHS representative. This appears an unlikely distribution. It reinforces the earlier finding (section 4.4) that under-reporting of injuries on non-union sites may be common, especially on sites without any form of OHS representation.

Turning to severity of injury, as with the overall difference between union and non-union sites (section 4.1), the injuries on MOHSR sites appear more severe. Injuries requiring transportation by ambulance were 50% higher, and hospitalisation 40% more common (Chart 11). One of the fatalities noted earlier (refer 4.2) occurred on a MOHSR site.

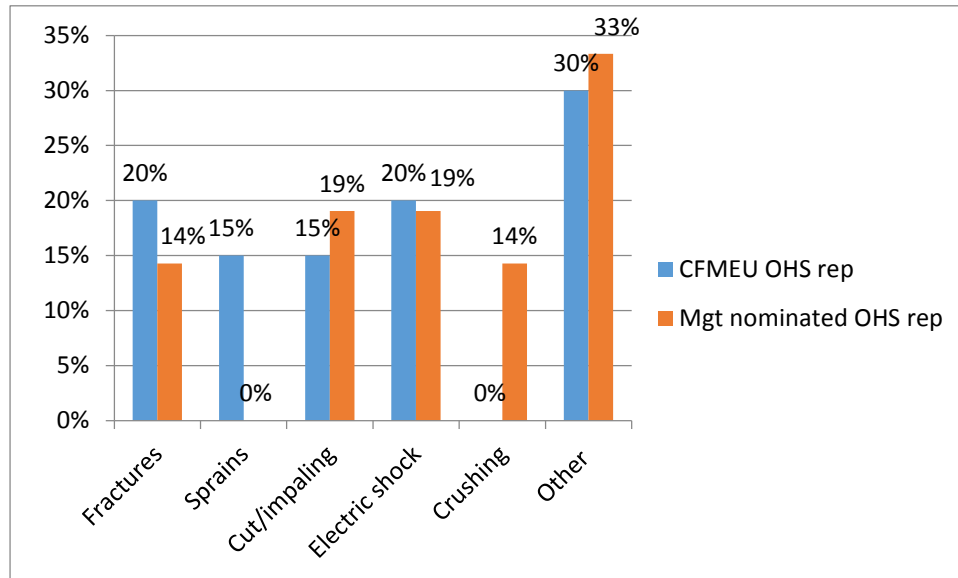
Chart 11: Severity of injury, CFMEU and MOHSR sites



The immediate cause of injury on CFMEU and MOHSR sites did not differ from the pattern identified earlier (refer section 4.3). Injuries from falling objects remained twice as likely on CFMEU sites than on MOHSR sites; other differences were insignificant. There was also no statistically significant difference between the type of injury experienced on CFMEU compared to MOHSR sites. The data is presented in Chart 12. Whilst not statistically significant, the absence of sprain injuries and presence

of crush-related injuries on MOHSR sites raises questions about injury reporting and work practices which can only be answered through further research.

Chart 12: Type of injury, CFMEU and MOHSR sites



Note: n= 21 for both categories of representation

9.2 Identified hazards

The analysis presented here of hazards identified by OHS inspectors focuses only on those with a statistically significant difference between sites with a CFMEU HSR and MOHSR sites. Our concern is with hazards containing the potential for severe injury: falls from heights, and contact with electricity. Slips, trips and falls, discussed at 5.1 above, did not show a statistically significant difference when the sample was reduced to MOHSR sites. Table 6 gives the frequency of these two hazards according to the type of representation. It should be noted that because of the small number of sites included in this part of the study, caution should be applied when interpreting percentage figures.

Table 6: Frequency of hazard (unsafe work practice) identified on same site, CFMEU and MOHSR sites

Number of times hazard identified on same site	CFMEU OHS Rep No of sites	CFMEU OHS Rep % of sites	Management nominated OHS Rep No of sites	Management nominated OHS Rep % of sites
Fall from height				
Once	13	28%	5	19%
Twice	4	9%	1	4%
Three	1	2%	4	15%
<i>Total sites where hazard found</i>	<i>17</i>	<i>38%</i>	<i>10</i>	<i>37%</i>
Contact with electricity				
Once	5	11%	5	18%
Twice	1	2%	1	4%
Three times	1	2%		
<i>Total sites where hazard found</i>	<i>7</i>	<i>15%</i>	<i>6</i>	<i>23%</i>

The risk of a fall from heights was more likely to occur repeatedly on MOHSR sites, and the difference was statistically significant for sites valued up to \$20 million (but not larger sites). The risk of contact with electricity was greater on MOHSR sites than union sites, irrespective of site size. As also shown in the earlier Table 1, the prevalence of repeat offences is much lower in relation to this hazard, suggesting a different approach to the management of hazards associated with electricity supply than other high risk hazards.

Hazards associated with equipment and machinery were also more likely to be found on sites with a management nominated OHS representative than CFMEU sites. The higher incidence of hazards was statistically significant for inadequate guard rails and barriers, and electrical supplies and tools, for MOHSR sites irrespective of size of site. The difference in the prevalence of scaffolding related hazards was only statistically significant on the smaller sites valued up to \$20 million. Table 7 provides the details.

Table 7: Frequency of hazard (equipment & machinery related) identified on same site, CFMEU and MOHSR sites

Number of times hazard identified on same site	CFMEU OHS Rep No of sites	CFMEU OHS Rep % of sites	Management nominated OHS Rep No of sites	Management nominated OHS Rep % of sites
Scaffolding				
Once	7	15%	4	15%
Twice			1	4%
Three times			1	4%
<i>Total sites where hazard found</i>	<i>7</i>	<i>15%</i>	<i>6</i>	<i>22%</i>
Guard rails / barriers				
Once	8	17%	3	11%
Twice			3	11%
Three	1	2%	1	4%
<i>Total sites where hazard found</i>	<i>9</i>	<i>19%</i>	<i>7</i>	<i>25%</i>
Electrical supplies & tools				
Once	6	13%	5	19%
Twice			1	4%
Three times	1	2%		
<i>Total sites where hazard found</i>	<i>7</i>	<i>15%</i>	<i>15</i>	<i>32%</i>

Notwithstanding the higher incidence of high risk hazards on MOHSR sites, it is clear that the extent of repeat offending evident in the earlier analysis is not as evident on these sites (guard rails appear to be the main exception). The differences appear to lie more in the first instance of a hazard being found, rather than repeatedly failing to learn from mistakes. Further qualitative research is necessary to throw further light on the complex ways in which risks are managed on these sites.

9.3 Were risk assessments undertaken on MOSHR sites?

The preceding analysis (section 6 above) identified both a mismatch of documentation with practice, and a failure to undertake risk assessments of specific hazardous tasks as contributing to the prevalence of hazards on non-union sites. Neither of these failures differed significantly between CFMEU and MOHSR sites. This finding appears inconsistent with the frequency of hazards identified above, and cannot be explained from the data available in the inspectors reports. The extent to which these practices are implemented on MOHSR sites can only be assessed through further research.

9.4 Actions taken by OHS inspectors - Provision of advice

Similar to the preceding analysis (section 8 above), some particular types of advice from OHS inspectors on hazard elimination were more likely to be given to MOHSR sites than union sites, and the differences were statistically significant. Advice on site house-keeping was provided at 26% of MOHSR sites compared to only 11% of union sites, although repeat offenders were less common (only one site received this advice on 3 separate occasions). Advice on supervision was also provided at 19% of MOHSR sites (5 sites), and less often on CFMEU sites (only 2 sites). Advice on industry standards was also more common on MOHSR sites, especially on the smaller sites valued at up to \$20 million. Table 8 details the frequency of such advice by site.

Table 8 Frequency of advice on industry standards per site, CFMEU and MOHSR sites

Number of advice provided on industry standards, same site	CFMEU OHS Rep No of sites	CFMEU OHS Rep % of sites	Management nominated OHS Rep No of sites	Management nominated OHS Rep % of sites
Once	10	21%	7	26%
Twice	1	2%		
Four			2	7%
Five			2	7%
Fourteen times			1	1%
<i>Total sites where advice on industry standards given</i>	<i>11</i>	<i>23%</i>	<i>12</i>	<i>44%</i>

Almost half of the MOHSR were given advice on industry standards by OHS inspectors, with one site receiving such advice on 14 occasions. As noted earlier, the reason for this difference can only be speculated upon. This will be explored further in the qualitative research.

The OHS inspector reports again showed two aspects of workforce consultation where a statistically significant difference occurred between sites with a CFMEU representative and those with a MOHSR. Tool box meetings were recorded on 75% of MOHSR sites, but only 40% of CFMEU sites. However advice was provided by OHS inspectors on workforce consultation processes at 37% of MOHSR sites compared to 17% of sites with a CFMEU OHS representative. Possible explanations for the discrepancy between processes were noted at Section 7 above. Further qualitative research is needed to understand the nature of OHS representatives involvement in communication and consultative processes.

9.5 Improvement Notices

The number of improvement notices issued did not differ significantly between sites with a CFMEU OHS representative and those with a management nominated OHS representative. Nineteen percent (19%) or nine of the 47 CFMEU sites were issued with an improvement notice compared to 22% or 5 of the 27 MOHSR sites.

10. Discussion and Conclusion

This report presents interim findings of the first stage of a larger study of health and safety representatives in the construction industry drawing on the reports of government inspectors. It is the first significant study of representatives in the construction industry undertaken in Australia. The research methodology enabled careful matching of union and non-union sites by value and construction type, but nevertheless, given the small sample size, the findings need to be treated with some caution. Later stages of the project will also include qualitative material drawn from interviews. This should help to flesh out the analysis, identify critical processes and viewpoints, and hopefully provide some insights into quantitative findings and why certain outcomes occur.

With these caveats in mind, a number of observations can be made. Consistent with previous research in Australia and internationally, the findings suggest HSRs play a valuable role in OHS.

- High hazard risks were less prevalent on sites with CFMEU HSRs than those with management nominated OHS representatives, and those with no OHS representation at all.
- Injuries occurring on sites with CFMEU HSRs were less severe than those on sites with management nominated OHS representatives, and those with no worker representation at all. They were less likely to require hospitalisation, as well as ambulance transportation to hospital.
- Sites with CFMEU HSRs were more likely to have undertaken appropriate risk assessments, contributing to a lower level of high hazard tasks. They were also less likely to have a mismatch between documented safe work method statements and work practices.
- Sites with CFMEU OHS representatives were more likely to demonstrate a learning approach to hazards, preventing the 'repeat offender' approach to hazards identified on non-union sites.
- Sites with CFMEU OHS representatives were better informed on industry standards, demonstrated through being less likely to receive advice from OHS inspectors on these standards.

- Improvement notices were less likely to be issued on sites without a CFMEU OHS representative, compared to sites with no OHS representative.
- Sites with no HSRs appear to be under-reporting injuries to WorkSafe Victoria.

Consistent with previous research, the findings indicate HSR activities and interventions are more effective where they are linked to union presence at the workplace. The majority of these findings applied to sites with a MOHSR and those without any OHS representation. The exceptions were the prevalence of improvement notices, repeat offending, and the mismatch of SWMS with work practices. These were more likely on sites without any HSR representation. Previous research has suggested reasons for such differences include the training unions provide and other forms of logistical support like protecting HSRs from victimisation and enabling workers to draw on someone with knowledge and authority and to raise potentially contentious OHS issues without fear of reprisal (Johnstone et al, 2005; Quinlan & Johnstone, 2009).

The findings in this report provide an outline of what is occurring on Victorian construction sites, and point to the role CFMEU HSRs in improving health and safety on those sites. Qualitative research should enable a more informed understanding of the processes that underpin these findings. In particular, the role and contribution of CFMEU HSRs to appropriate and effective hazard prevention; their role in preventing repeat offending by employers; the learning process, including knowledge of industry standards; and the various ways in which information about safety and risks is disseminated and implemented on CFMEU sites.

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Review of the Building and Construction Industry (Improving Productivity) Act 2016

Submission of the Australian Council of Trade Unions, 10 April 2018

About the ACTU

1. Since 1927 the Australian Council of Trade Unions (**ACTU**) has been the peak trade union body in Australia. There is no other national confederation representing unions. Governments have consulted with the ACTU in the development of almost every legislative measure concerning employment relations over the ACTU's 90 year history. The ACTU consists of 43 affiliated unions and state and regional trades and labour councils, who between them have approximately two million members engaged across a broad spectrum of industries and occupations in the public and private sector. All of the unions that represent the interests of workers in the building and construction industry are affiliated to the ACTU.

Introduction

2. The ACTU thanks Jaguar Consulting for the opportunity to make this submission to the review of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (**BCIIP Act**).
3. However the ACTU has several concerns about the review process which, in our view, give rise to an inference that the process is biased in favour of the Government's interests. First, the review claims to have sought input 'from a range of stakeholders', but none of the unions that represent the interests of workers in the building and construction industry were invited to make a submission. Not even the Construction, Forestry, Mining and Energy Union (**CFMEU**), which continues to be the main target of the Australian Building and Construction Commission (**ABCC**) and which is clearly a key stakeholder, was contacted by the review nor made aware that the review was occurring. Second, in terms of process, the ACTU notes with concern the short timeframe provided for the review, particularly given that the Minister was on notice of the requirement in s 119A of the BCIIP Act for the review to occur. Finally, s 119A requires 'a review into the operation of this Act', but the terms of reference are narrower than the general review contemplated by s 119A and do not include an assessment of the operation of the BCIIP Act against its object.
4. The ACTU submits that the operation of the BCIIP Act has not achieved its object as set out in s 3. In particular, the workplace relations framework established under the BCIIP Act is not operating 'without distinction between interests of building industry participants' or 'for the benefit of all building industry participants'. The words 'without distinction between interests of building industry participants' were introduced to make clear that the framework should no longer operate in a discriminatory manner against unions and workers, but the ABCC is continuing to target unions and to fail to protect workers (discussed further under heading 1 below). Further, the operation of the BCIIP Act is: preventing 'genuine bargaining', by imposing artificial restrictions on the matters that parties can agree to include in their bargains;¹ failing to improve work health and safety in building work, largely because of an undermining of the role of unions in work health and safety;² doing nothing discernible to encourage youth employment or the engagement of apprentices;³ and, in respect of wages and entitlements, utterly failing to promote respect for the rule of law or for the rights of unions and workers.⁴

¹ BCIIP Act, s 3(a) (discussed further under heading 4 below).

² BCIIP Act, s 3(f) (discussed further under headings 5 and 6 below).

³ BCIIP Act, s 3(g) (discussed further under heading 5 below).

⁴ BCIIP Act, s 3(b) and (c); see, also, BCIIP Act, s 16(1)(ba), (2) and (3)(a) (discussed further under heading 1 below).

The nature of the building and construction industry

5. In order to properly understand these failings of the BCIP Act and, in particular, of the ABCC as the regulator established under the BCIP Act, it is important to understand the nature of the building and construction industry. The building and construction industry is characterised by poor work health and safety and low rates of employer compliance with employee wages and entitlements obligations. High rates of insolvency and sham contracting compound these issues.
6. The most important issue facing workers in the building and construction industry is poor workplace safety. The construction industry had the third highest rate of fatalities on average of the last ten years (2007-2016)⁵ and had the fourth highest incident rate of serious workplace injury claims per 1000 workers in 2012/13.⁶ Seven construction industry workers have been killed at work this year already (to 29 March 2018).⁷
7. In 2014/15, the Fair Work Ombudsman (**FWO**) undertook a targeted campaign of the building and construction industry in response to the high rates of contraventions of the *Fair Work Act 2009* (Cth) (**Fair Work Act**) within the industry.⁸ As part of the campaign, the FWO audited the compliance of 700 businesses nationally.⁹ The campaign found that only 59 percent of employers were compliant with all requirements.¹⁰ Twenty-five percent of employers were not paying their employees correctly and 23 percent were not meeting their record keeping and pay slip obligations.¹¹
8. When the Fair Work Building Commission (**FWBC**) was pursuing underpayments for a short period prior to October 2013, many breaches of industrial laws by employers were uncovered. For example, in the 2012-2013 reporting period, the FWBC recovered wages and entitlements totalling \$1,622,853.89 for 1363 construction workers.¹² In that year, the greatest number of investigations of all categories of investigations undertaken by the FWBC (31 percent) was in the category of wages and employee entitlements.
9. In 2015, the Senate Economic References Committee undertook an inquiry into insolvency in the construction industry. The inquiry found that the industry's high rate of insolvencies is attributable in large part to 'harsh, oppressive and unconscionable commercial conduct ... combined with criminal conduct and a growing culture of sharp business practices'.¹³ The inquiry further found a culture in which 'contempt for the rule of law is becoming all too common' and company directors 'consider compliance with the corporations law to be optional, because the consequences of non-compliance are so mild and the likelihood that unlawful conduct will be detected is so low'.¹⁴ The inquiry identified that workers are one of the main groups of victims of this conduct. Workers are 'a particularly vulnerable category of creditor in the event of corporate failure' and risk losing considerable entitlements built up over many years, including superannuation, annual leave, long service leave and

⁵ Safe Work Australia, *Fatality Statistics by Industry* < <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics-industry>>.

⁶ Safe Work Australia, *Construction Industry Profile*, May 2015.

⁷ Safe Work Australia, *Fatality Statistics by Industry* < <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics-industry>>.

⁸ Fair Work Ombudsman, *National Building and Construction Industry Campaign 2014/15 Report*, July 2015, 4.

⁹ Ibid.

¹⁰ Fair Work Ombudsman, *National Building and Construction Industry Campaign 2014/15 Report*, July 2015, 3.

¹¹ Ibid.

¹² FWBC Annual Report 2012-2013, 31.

¹³ Senate Economic References Committee, *'I just want to be paid': Insolvency in the Australian Construction Industry*, December 2015, xvii.

¹⁴ Ibid, xix.

redundancy payments.¹⁵ In its submission to the inquiry, the Australian Securities and Investments Commission noted that, across all categories of unpaid employee entitlements and across all ranges of amounts owing, 'the construction industry consistently rates as either the highest or second highest as against all other industries'.¹⁶

10. In 2011, the CFMEU undertook a detailed study of sham contracting in the building and construction industry, and estimated that between nine and 16 percent of persons working in the industry were sham contractors and that the tax leakage attributable to sham contracting was in the order of \$2.457 billion per annum.¹⁷
11. The deliberate or negligent use of non-conforming building products, and the use of building products in a manner not in compliance with the National Construction Code, is widespread in the industry. Even employer organisations acknowledge the severity of the problem. For example, on the issue of fraudulent certification and other problems with certification reliability, the Senate Economic References Committee's current inquiry into non-conforming building products has heard evidence from Master Builders Australia, the Australian Industry Group, the Australian Window Association, the Building Products Innovation Council, the Australian Institute of Building Surveyors, the Housing Industry Association, the Australian Steel Institute, the Engineered Wood Products Association of Australasia, the National Electrical and Communications Association about the extent of the problem.¹⁸ In addition to employer organisations, the Australian Building Codes Board and the certifiers themselves such as SAI Global and CertMark International have acknowledged the problem of fraudulent certification.¹⁹
12. Yet in the face of these pressing issues, the ABCC continues to target unions and workers and does little to address misconduct and law breaking by employers in the industry. According to international legal standards, the primary purpose of a government industrial inspectorate is 'to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons'.²⁰ The ABCC fails to meet this brief.
13. The Australian union movement has for many years questioned the motivation and wisdom of having a separate inspectorate for the building and construction industry. We again call for the repeal of this politically-motivated law, which was designed to attack the construction unions and their members and to promote the economic interests of large construction companies and property developers at the expense of workers' rights.

¹⁵ Ibid, 32-33.

¹⁶ Ibid, 33.

¹⁷ CFMEU Construction & General Division, *Race to the bottom: Sham contracting in Australia's Construction Industry*, March 2011.

¹⁸ CFMEU Answers to questions taken on notice from a public hearing of the Senate Economic References Committee Inquiry into Non-Conforming Building Products on 14 July 2017, 13 October 2017,

<<https://www.apf.gov.au/DocumentStore.ashx?id=d1130cb0-3226-4190-bcfe-6deb7794847b>>.

¹⁹ Ibid.

²⁰ ILO Convention 81, Labour Inspection in Industry, Part 1, Article 3.

1 – The performance of the ABCC of its ‘full service regulator’ function

14. The types of matters that are investigated and prosecuted by the ABCC show a strong bias towards targeting alleged conduct by unions and workers, while widespread wage theft and the unlawful denial of employment entitlements continue to characterise the industry. The ABCC has for many years chosen to ignore its statutory functions in respect of enforcing employer compliance with wages and entitlements obligations²¹ and has instead focussed its resources on attacking unions, in particular the CFMEU, and workers.
15. In the face of its statutory mandate to enforce laws applying to *all* building industry participants, the ABCC adopted the view that enforcing wages and entitlements obligations and investigating sham contracting was not its ‘core business’, and that it would only investigate such matters if they arose in conjunction with freedom of association issues and the like.²² From October 2005 to June 2011, the ABCC brought a total of 86 prosecutions against unions and union officials, compared to a mere five prosecutions against employers in the same period.²³ In the period 1 July 2009 to 30 June 2010, there were 29 prosecutions brought against unions and union officials and *none* brought against employers.²⁴ From 1 July 2010 to 1 June 2011, the prosecution of unions still outnumbered the prosecution of employers by almost three to one.²⁵ This total failure to carry out its wages compliance functions occurred even before the then Minister for Workplace Relations, Senator Eric Abetz, made the extraordinary request on 12 November 2013 that the then FWBC transfer its wages compliance functions to the FWO – despite it being a clear statutory function of the FWBC.²⁶
16. With the reinstatement of the ABCC in 2016 came legislative amendments that were intended to address its partisan and politicised operation. These amendments can be broadly grouped into three categories, discussed below: first, a requirement that the ABCC apply a reasonable and proportionate balance to enforcing employer compliance with wages and entitlements obligations and regulating building industry participants’ industrial activities;²⁷ second, a requirement that the Commissioner perform his or her functions in an apolitical and impartial manner;²⁸ and third, additional reporting requirements to enable an assessment of the ABCC and the Commissioner’s performance against these requirements.²⁹ Despite these amendments, the ABCC continues to prioritise the interests of building employers ahead of unions and workers and is manifestly failing to perform its ‘full service regulator’ function.

²¹ BCIIIP Act, s 16(3)(a).

²² Hansard, Senate Education and Employment Legislation Committee, Estimates, 21 November 2013, 70-71.

²³ Senate Standing Committee on Education Employment and Workplace Relations, Questions on Notice Additional Estimates 2010-2011, Question No.EW0675_11.

²⁴ Ibid.

²⁵ Ibid.

²⁶ ABCC Answer to question on notice from Senator Doug Cameron in a Senate Standing Committee on Education and Employment Budget Estimates 2017-18 hearing, 20 May 2017

<https://www.apf.gov.au/~media/Committees/eet_ctte/estimates/bud_1718/Employment/Answers/SQ17-004185.pdf> and, for a copy of the request, see:

<https://www.apf.gov.au/~media/Committees/eet_ctte/estimates/bud_1718/Employment/Answers/SQ17-004185-Correspondence-Attachment.pdf>.

²⁷ See: the reference to ‘without distinction between building industry participants’ in s 3(1); the inclusion of ‘ensuring building employers and building contractors comply with their obligations under this Act, the designated building laws and the Building Code’ in the Commissioner’s functions in s 16(1)(ba); the requirements for the Commissioner’s allocation of resources etc in s 16(2); and the inclusion of ‘wages and entitlements’ in the list of Fair Work Act provisions that the Commissioner must perform his or her functions in relation to in s16(3).

²⁸ See: the requirement that the Minister only appoint as Commissioner a person who will perform his or her functions in an apolitical manner and act impartially and professionally in s 21(3)(c) and the power of the Minister to terminate the appointment of a Commissioner who fails to perform his or her functions with impartiality in s 28(1)(c).

²⁹ See: the requirement for greater disclosure of the types of matters pursued via the new reporting requirements in s 20.

(1) A reasonable and proportionate balance

17. In the most recent quarterly reporting period for which the report has been publicly released (1 July to 30 September 2017), 'wages and entitlements' and 'misclassification/sham contracting' constituted only 24.39 and 7.32 percent respectively of investigations open during the period.³⁰ The balance of investigations was into alleged 'coercion', 'unlawful industrial action', 'freedom of association' and 'right of entry'.³¹ The conduct of employers was the subject of investigation in 27 matters, but only 18 of those pertained to wages and entitlements or misclassification and sham contracting.³² Five examination notices were issued, none of which related to wages and entitlements or misclassification and sham contracting.³³ Two proceedings were commenced, both against the CFMEU or CFMEU officials.³⁴
18. This trend is consistent. In the 1 April to 30 June 2017 period, 'wages and entitlements' and 'misclassification/sham contracting' constituted only 15.85 and 6.1 percent respectively of investigations open during the period.³⁵ Only six of 34 matters in which the conduct of the employer was the subject of the investigation related to 'wages and entitlements' or 'misclassification and sham contracting'.³⁶ No proceedings were commenced, but the ABCC became involved in two proceedings in the Fair Work Commission, objecting to the grant of right of entry permits to two CFMEU officials.³⁷ In the 1 January to 31 March 2017 period, 'wages and entitlements' and 'misclassification/sham contracting' constituted only 12.35 and 4.93 percent respectively of investigations open during the period.³⁸
1. At a Senate Estimates hearing on 2 March 2017, then Commissioner Nigel Hadgkiss admitted that the CFMEU was the respondent in 57 of 62 proceedings brought by the ABCC that were currently before the courts.³⁹ The Communications, Electrical and Plumbing Union was the respondent in one matter. Employers were the respondent in only four matters. Mr Hadgkiss told the hearing that, as at 27 February 2017, the ABCC had six matters before the courts involving employers and there had recently been three matters whereby employers had been penalised by the courts following ABCC action. When asked to characterise what sort of contraventions by employers cause the ABCC to take action against them, Mr Hadgkiss said, 'The six cases are generally coercion and the taking of adverse action. On one occasion, it was a payment of strike pay.' None of the cases involved a failure to pay wages or entitlements or misclassification and sham contracting.
2. The ABCC commenced a total of 42 proceedings in the 2015-16 and 2016-17 reporting periods. *Not one* related to 'wages and entitlements' or 'misclassification and sham contracting'.⁴⁰ The ABCC secured \$4,219,200 of penalties awarded in those periods, of which only \$19,250 was for failure to pay correct wages and entitlements (0.45 percent).⁴¹ Of the \$1,802,675 m in penalties awarded in proceedings brought by the ABCC in 2015-16, 95 percent were against the CFMEU.⁴² This lack of prosecution of employers is remarkable given that the very high rate of non-compliance among employers in the industry, and given that the FWO recovered a total of

³⁰ ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017 inclusive*, 7.

³¹ ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017 inclusive*, 7.

³² ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017 inclusive*, 11.

³³ ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017 inclusive*, 15.

³⁴ ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017 inclusive*, 13.

³⁵ ABCC, *Quarterly Report – Fourth quarter of 2016-17: operations from 1 April to 30 June 2017 inclusive*, 7.

³⁶ ABCC, *Quarterly Report – Fourth quarter of 2016-17: operations from 1 April to 30 June 2017 inclusive*, 11.

³⁷ ABCC, *Quarterly Report – Fourth quarter of 2016-17: operations from 1 April to 30 June 2017 inclusive*, 13.

³⁸ ABCC, *Quarterly Report – Third quarter of 2016-17: operations from 1 January to 31 March 2017 inclusive*, 7.

³⁹ Hansard, Senate Education and Employment Legislation Committee, Estimates, 2 March 2017, 102.

⁴⁰ ABCC, *Annual Report 2016-17*, 24.

⁴¹ Ibid, 25.

⁴² Ibid.

\$6,076,325 in unpaid wages and entitlements between 1 July 2013 and 4 October 2016 – despite not being the industry regulator.⁴³

3. None of the eight 'significant' cases prosecuted by the ABCC that were finalised in the 2016-17 reporting period (as described in the ABCC 2016-17 Annual Report) related to wages and entitlements or misclassification and sham contracting.⁴⁴ The CFMEU was the respondent in every case, except one in which a CFMEU official was the respondent. The dearth of litigation in respect of wages and entitlements and misclassification and sham contracting occurred despite 'higher than planned external legal expenses as the ABCC had continued agency-wide focus on enhanced compliance and litigation activities which resulted in increased litigation in the Federal Court and the Fair Work Commission'.⁴⁵
4. Ms Cathy Cato, while Acting Commissioner of the ABCC, is on record as stating that 'to change any culture and change any type of behaviour ... you need a stick—a big stick. When that big stick doesn't hurt, then it's hard to change behaviour.'⁴⁶ It is curious then that the ABCC has been so reluctant to use its 'big stick' in order to change the culture of non-compliance with wages and entitlements obligations amongst employers in the industry. For example, the Commissioner of the ABCC has made only one recommendation to the Minister that a sanction be imposed on a building contractor or building industry participant for failure to comply with the *Code for the Tendering and Performance of Building Work 2016 (Building Code)*. The exclusion was recommended for breaches generally pertaining to alleged 'freedom of association' issues such as allowing a 'no ticket, no start' sign to be displayed on a worksite. The Commissioner has made no such recommendations in respect of companies that have failed to comply with the Fair Work Act in relation to the underpayment of an employee's wages or entitlements.⁴⁷

(2) An apolitical and impartial Commissioner

5. The Federal Court very recently handed its decision in 'The Cup of Tea Case',⁴⁸ in which the ABCC prosecuted two CFMEU officers for having a cup of tea with a union delegate. Justice North was scathing in his criticism of the ABCC and Mr Hadgkiss. He was reported in the *Financial Review* as saying, during the course of the hearing, that it was:

... "astounding" that commissioner Nigel Hadgkiss had briefed silk and conducted days of hearing with dozens of participants, including Australian Federal Police, over "such a miniscule, insignificant affair".

"This is all external forces that are beating up what's just a really ordinary situation that amounts to virtually nothing," he said.

"For goodness sake, I don't know what this inspectorate is doing."

He said when the ABCC "use[s] public resources to bring the bar down to this level, it really calls into question the exercise of the discretion to proceed".

⁴³ Department of Employment, 'Responses to questions taken on notice by the Department of Employment', Senate Education and Employment Committee, *Inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013, and the Fair Work (Registered Organisations) Amendment Bill 2013*, 4 October 2016.

⁴⁴ ABCC, *Annual Report 2016-17*, 25-29.

⁴⁵ Ibid, 55.

⁴⁶ Hansard, Senate Education and Employment Legislation Committee, Estimates, 27 October 2017, 90.

⁴⁷ The Commissioner is empowered to do so by clause 18(1)(a)(ii) of the Building Code.

⁴⁸ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Cup of Tea Case)* [2018] FCA 402.

...

Justice North said he was "surprised the matter has come back, frankly". "I must say it's a terrible waste of everybody's time."⁴⁹

6. In his Honour's reasons for dismissing the ABCC's application for declarations of contraventions and the imposition of pecuniary penalties, Justice North described the case as '*excitare fluctus in simpulo*' (a 'storm in a teacup').⁵⁰ On 30 May 2017, the ABCC gave evidence to a Senate Estimates hearing that the cost of the case to the ABCC was \$146,177.10 to date.⁵¹
7. Justice North's criticism of Mr Hadgkiss underscores the partisan and politicised way in which he performed his role as the Commissioner, which in turn reflects on the structure and operation of the ABCC as a whole. In evidence to a Senate Estimates hearing on 2 March 2017, Mr Hadgkiss stated explicitly that, in his view, the reason for 100 percent union membership on building and construction sites is coercion and cartel behaviour.⁵² Mr Hadgkiss did not have the ideological capacity to accept that workers may choose to join their union for the benefits the union provides.
8. It should have come as no surprise therefore when Mr Hadgkiss admitted in Federal Court proceedings against him to causing incorrect information to be provided, purportedly advising employers on 'what to do when a union official comes onto your site', in breach of s 503 of the Fair Work Act.⁵³ ABCC emails showed that Mr Hadgkiss had declined to amend the information in the belief that the incoming Coalition Government would follow through on its declared aim to reverse laws introduced by the previous Labor Government.⁵⁴ Describing his conduct as 'serious', Justice Collier ordered Mr Hadgkiss to pay a penalty set at approximately 87 percent of the maximum. Her Honour said:

The Director admitted to contravening a law he was required to police. The consequence of his conduct was the dissemination by the FWBC – at his direction – of false information to the industry of which the FWBC was not only the regulator, but supposedly a trustworthy source of reliable information for industry participants. Making matters worse, the wrongdoing was exacerbated by the fact that right of entry is commonly a source of industrial dispute in a frequently volatile industrial environment. Indeed the Director has not hesitated to commence legal proceedings against the CFMEU in circumstances where the FWBC alleges CFMEU officers or agents infringe rights of entry on to building sites.⁵⁵

9. The ABCC's then Deputy Commissioner, Anthony Southall QC, resigned shortly after Mr Hadgkiss' resignation, issuing a statement which said, 'In the circumstances Mr Southall desires to totally disassociate himself from the conduct of Mr Hadgkiss, and considers that he had no alternative but to resign his position as deputy commissioner.'⁵⁶ Representatives of the ABCC gave evidence to a Senate Estimates hearing that the total cost to the taxpayer of the litigation defending Mr Hadgkiss was more than \$436,000.⁵⁷

⁴⁹ David Marin-Guzman, 'Judge turns on ABCC for wasting time over 'cup of tea' CFMEU incident', *Financial Review*, 13 March 2017.

⁵⁰ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Cup of Tea Case)* [2018] FCA 402, [82].

⁵¹ Hansard, Senate Education and Employment Legislation Committee, Estimates, 30 May 2017, 171.

⁵² Hansard, Senate Education and Employment Legislation Committee, Estimates, 2 March 2017, 142.

⁵³ *Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* [2017] FCA 1166.

⁵⁴ *Workplace Express*, 'ABCC says Hadgkiss has already paid "high price" for breach', 15 September 2017.

⁵⁵ *Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* [2017] FCA 1166, [43].

⁵⁶ *Workplace Express*, 'ABCC in-house counsel quits over Hadgkiss conduct', 23 October 2017.

⁵⁷ Hansard, Senate Education and Employment Legislation Committee, Estimates, 1 December 2017, 70-71.

10. The ACTU is concerned about whether any real change in the biased operation of the ABCC will be realised with the appointment of the new Commissioner, Mr Stephen McBurney. At a recent Senate Estimates hearing on 28 February 2018, in response to a question about the ABCC's education and awareness programs, Mr McBurney said:

If the law is observed on building sites, if we can reintroduce and reinforce the rule of law on building sites, one of my main aims is that a worker can turn up at a building site and go about his work free from harassment, intimidation or bullying, be able to choose whether or not to join an association, and be able to carry out his work, much as most of us turn up to work each day without facing coercion or the threat of unlawful industrial action. So our education is really pitched at ensuring that all building industry participants understand their legal rights and obligations.⁵⁸

11. Mr McBurney's comments suggest that the ABCC will continue to maintain its disproportionate focus on unions. He says nothing about the right of a worker to attend for work knowing that they will receive their correct wages and entitlements – let alone whether their employment contract will be correctly classified, whether they will be safe at work, whether they will have a job to go to, or whether the subcontractor that employs them will be able to pay them on time or keep them in work (or will instead be waiting on the head contractor to pay them). Mr McBurney was previously Deputy Commissioner to Mr Hadgkiss.

(3) Transparent reporting

12. Amendments to the ABCC's reporting requirements in s 20 of the BCIP Act were moved by Senators Nick Xenophon and Derryn Hinch to enable an assessment of the ABCC and the Commissioner's performance against the requirements discussed above. However the operation of these reporting requirements has revealed that they are ineffective in enabling a proper assessment.
13. First, they do not capture the requisite level of detail. For example, a report that an investigation was open in which the main allegation being investigated was 'right of entry' does not indicate whether, for example, the allegation was that a union official contravened their right of entry obligations by failing to give the proper notice of their visit, or that an employer contravened the obligation by interfering with the exercise of a union official's entry.⁵⁹ Detail of the category of building industry participant (as defined in s 5 of the BCIP Act) that each investigation or compliance action is targeting, along with the nature of the allegations, should be provided.
14. For wages and entitlements contraventions, the quarterly reports provide the number of matters under investigation but do not provide detail of the total shortfall of the wages and entitlements alleged, or how many employers and workers the allegations involve. The ABCC officers came unprepared to provide this information at the Senate Estimates hearing on 28 February 2018 but took the question on notice. Answers to the questions on notice are due by 12 April 2018.
15. In addition, the quarterly reports do not provide sufficient detail to assess whether the ABCC is enforcing compliance with the Building Code in a fair and unbiased manner. For example, in the quarterly report for the period ending 30 September 2017, the ABCC reported that it had finalised eight Building Code audits (with six audits finding 'potential issues') and undertook 59 Building Code inspections (with 13 issues identified) in the period. Not only are the nature of the issues identified not reported on, but again the ABCC officers present at the Senate Estimates hearing on 28 February 2016 were unable to provide this information. Consequently the extent

⁵⁸ *Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* [2017] FCA 1166, [43].

⁵⁹ See, eg, Table a)(i) of ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017* inclusive, 7.

of the issues identified and acted upon in relation to issues such as work health and safety, labour market testing, security of payments, sham contracting and disputed payments or compliance with the *Migration Act 1958* (Cth) (**Migration Act**) cannot be assessed. The questions were taken on notice but answers are not due until 12 April 2018.

16. In respect of compliance with the migration-related Building Code requirements, we note that the ABCC has indicated that it is undertaking a 'desktop auditing' of code-covered entities' compliance with clause 11F by writing to them all to ask what they are doing.⁶⁰ This information should be published so that the effectiveness of s 34(2D) of the BCIIIP Act can be assessed. Similarly, the ABCC has indicated that it undertakes 'a lot of co-compliance activities around the migration issue'.⁶¹ Further information needs to be provided about these 'co-compliance activities', including the number of referrals between agencies, the number, nature and outcome of resulting prosecutions and the number, nature and outcome of any compliance actions taken by the ABCC.
17. Second, there have been significant delays in the production of the reports. For the quarter ending 31 December 2016, the report was provided to the minister on 8 February 2017. For the quarter ending 31 March 2017, the report was provided on 19 May 2017. For the quarter ending 30 June 2017, the report was provided on 16 August 2017. For the quarter ending 30 September 2017, the report was provided on 8 January 2018 – three months and eight days after the end of the quarter. On 28 February 2018, Ms Cato, Deputy Commissioner Operations and Code of the ABCC, gave evidence at a Senate Estimates hearing that the report for the quarter ended 31 December 2017 had not yet, to the best of her knowledge, been provided to the Minister.⁶² Certainly the report has not yet been publicly released. Given that it is now April 2018, it seems clear that the reporting delays cannot be attributed to staff leave or confusion about whom the responsible Minister was (as Ms Cato claimed).⁶³
18. Section 20 of the BCIIIP Act needs to be amended to ensure that the reporting requirements are sufficient to enable a proper assessment of the ABCC's performance in respect of the matters above and to ensure that the reporting occurs in a timely fashion. Commissioner Burney has indicated that he will not report on anything more than the minimum that he is required to report on under the BCIIIP Act.⁶⁴

Summary

19. The overwhelming majority of the ABCC's investigations and prosecutions concern the alleged conduct of unions and workers. This fact is not accidental; it is the result of a policy decision of the ABCC to direct its resources toward union-related matters. Yet the laws that the ABCC is enforcing against unions and workers are laws that the International Labour Organisation (ILO) has repeatedly found to be contrary to Australia's commitments to comply with international legal standards. This point was made by the ILO's Committee of Experts as early as February 2010:

The Committee considers that the prosecution of workers does not constitute part of the primary duties of inspectors and may not only seriously interfere with the effective discharge of their primary duties – which should be centred on the protection of workers under Article 3 of the Convention – but also prejudice the authority and impartiality necessary in the relations between inspectors and employers and workers. This is even more so when the laws on the basis of which the workers are prosecuted have been repeatedly found by this Committee to be

⁶⁰ Evidence of Ms Cathy Cato, Deputy Commissioner Operations and Code, ABCC to the Senate Education and Employment Legislation Committee (Estimates), 28 February 2018, Proof Committee Hansard, 119.

⁶¹ Ibid.

⁶² Ibid, 116.

⁶³ Ibid, 117.

⁶⁴ Ibid, 120.

contrary to other international labour standards, notably Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).⁶⁵

20. The focus on enforcing these broken laws is also concerning because it represents a diversion of resources away from tackling the widespread problems of wage theft and denial of employment entitlements that are endemic to the industry. In February 2011, the ILO's Committee of Experts said:

*Noting with concern that the manner in which the ABCC carries out its activities seems to have led to the exclusion of workers in the building and construction industry from the protection that the labour inspection system ought to secure for these workers under the applicable laws, the Committee urges the Government to ensure that the priorities of the ABCC (or the Fair Work Building Industry Inspectorate) are effectively reoriented so that labour inspectors in the building and construction industry may focus on their main functions in full conformity with Article 3(1) and (2) of the Convention.*⁶⁶

21. These comments echo the recommendations of the Royal Commission into the Building and Construction Industry in 2003. Commissioner Cole recommended that the ABCC adopt a greater role in the enforcement of employee entitlements,⁶⁷ provide representation for employees who had been underpaid⁶⁸ and monitor and report on mechanisms that would improve this process for employees.⁶⁹
22. It is disappointing to say the least that the Government continues to ignore this mandate some seven or eight years after the ILO's recommendations and some 15 years after the Cole Royal Commission. The limited legislative amendments that were directed toward encouraging the ABCC to be a 'full service regulator' have failed spectacularly. It is important to remember that the myopic focus of the regulator on conduct involving unions is occurring in the context of an industry in which the FWO, responding to high rates of complaints from workers about not being paid their correct wages and entitlements, conducted a national audit and found that only 59 percent of employers comply with their obligations to employees. It is not that employer wrongdoing does not occur; it's that the regulator chooses not to see it.

2 – Independent oversight of the compulsory examination powers

23. Under the BCIIIP Act, the Commissioner of the ABCC can inquire into and investigate any act or practice by a building industry participant that might be contrary to a designated building law, a safety net contractual entitlement or the Building Code. As part of such an investigation, the Commissioner can apply to a nominated presidential member of the Administrative Appeals Tribunal for an examination notice, which may require its recipient to: give information to the Commissioner; produce documents to the Commissioner; or attend before the Commissioner to answer questions relevant to an investigation. These are the 'compulsory examination powers'.
24. The Commissioner is required to notify the Commonwealth Ombudsman (**Ombudsman**) after an examination notice has been issued and provide copies of relevant documents. After the examination is completed, the Commissioner is required to give the Ombudsman a report about the examination, and a video recording and transcript of the examination. The Ombudsman is required to review the exercise of these powers by the Commissioner and any person assisting the Commissioner and to report quarterly to the Parliament about examinations conducted by the ABCC and the results of reviews conducted by the office of the Ombudsman.

⁶⁵ ILO Observation (CEACR) - adopted 2009, published 99th ILC session (2010) Labour Inspection Convention, 1947 (No. 81).

⁶⁶ ILO Observation (CEACR) - adopted 2010, published 100th ILC session (2011) Labour Inspection Convention, 1947 (No. 81).

⁶⁷ Recommendation 157, Final Report, vol 1.

⁶⁸ Recommendation 159, Final Report, vol 1.

⁶⁹ Recommendation 163, Final Report, vol 1.

25. The Ombudsman's independent oversight is intended to provide safeguards and public accountability in the application of these compulsory examination powers. Such mechanisms are particularly important given that the compulsory examination powers limit the right to privacy contained in Article 17 of the International Covenant on Civil and Political Rights,⁷⁰ and given also the misuse of these and other investigative powers by the ABCC in the past. For example, in March 2017, Justice North was critical of the then Commissioner Mr Hadgkiss for adopting, during a compulsory examination, 'a partisan approach rather than the neutral approach proper for the investigative process'.⁷¹ His Honour described Mr Hadgkiss' approach as 'really inexcusable, I have to say, for an investigator'.⁷²
26. Additional problems have become evident or underscored since the compulsory examination powers came into operation. First, the Ombudsman can only make recommendations retrospectively, on review of the exercise of the powers *after* 'the liberties of an individual may have already been negatively impacted'.⁷³ The Ombudsman has no power to oversee the application of the powers in real time so as to correct problems as they arise. In contrast, a subpoena process is subject to the immediate supervision of a court.
27. Second, the Ombudsman has no power to enforce its recommendations. For example, the Ombudsman has repeatedly recommended that the Commissioner should not express a preference to an examinee that the examinee not disclose information or answers given at the examination or matters relating to the examination with any other person.⁷⁴ This recommendation has been made in the context that the BCIIP Act specifically prohibits the Commissioner from requiring such confidentiality. The prohibition was included in the BCIIP Act in response to significant concerns about secret interrogations raised by the community and the legal profession. Notwithstanding, the Commissioner has repeatedly refused to adopt this recommendation.
28. Third, the Ombudsman's reports are not readily accessible or easy to find, which inhibits their effectiveness in ensuring public accountability in the application of the compulsory examination powers. The reports should be made available through the ABCC website (and not only the Ombudsman website) and should be displayed in a more prominent manner so that they are easier to find by interested persons.
29. Fourth, the BCIIP Act requires that the reports be presented to Parliament 'as soon as practicable after the end of each quarter of each financial year' and report on examinations conducted during that quarter. The reports for the periods 1 July 2016 to 31 March 2017 (which was a transitional period following the reinstatement of the

⁷⁰ Explanatory Memorandum to the *Building and Construction Industry (Improving Productivity) Bill 2013*, 2016, 60-62.

⁷¹ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 197, [148]. Although the Full Court later commented that it 'would have been better had his Honour not described the Director's conduct in these pejorative terms', they accepted that Justice North engaged in a 'careful examination of the evidence'. The Full Court did not express an opinion as to whether or not they agreed with Justice North's concerns. See, *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Castlemaine Police Station Case)* [2018] FCAFC 15, [82]-[84]. In 2007, Senior Deputy President Watson of the then Australian Industrial Relations Commission made similar criticism of ABCC Inspectors having conducted an investigation and interviews in a manner that 'cast Mr McLoughlin in the worst possible light, rather than to provide full evidence as to the manner in which Mr McLoughlin exercised his right of entry on to sites': *Australian Building and Construction Commission* [2007] AIRC 717, [79].

⁷² *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Castlemaine Police Station Case)* [2018] FCAFC 15, [65].

⁷³ Law Council of Australia, submission to the Senate Education and Economics Legislation Committee, *Re-establishment of the Australian Building and Construction Commission*, 19 February 2016, 8.

⁷⁴ See, eg, Commonwealth Ombudsman, *Quarterly report by the Commonwealth Ombudsman under s 65(6) of the Building and Construction Industry (Improving Productivity) Act 2016*, for the period 1 July 2016 to 31 March 2017, 1; Commonwealth Ombudsman, *Annual report by the Commonwealth Ombudsman: In accordance with Chapter 7, Part I, Division 3 of the Fair Work (Building Industry) Act 2012*, for the period 1 July 2015 to 30 June 2016, 1.

ABCC) and 1 April 2017 to 30 June 2017 were not released until March 2018. According to the ABCC's quarterly reports, five examination notices were issued in the period 1 July to 30 September 2017,⁷⁵ but some six months later the Ombudsman is still yet to release its report in respect of this period. These delays again inhibit the effectiveness of the reports in ensuring public accountability in the application of the powers. The reports should be required to be publicly released, including on the ABCC website, as soon as practicable after the end of each quarter of each financial year.

30. The ACTU has already made extensive submissions about the inadequacies of the safeguards and public accountability in the application of the compulsory examination powers in the BCIP Act.⁷⁶ We reiterate our earlier submissions on this issue, enclosed for ease of reference.

3 – Whether penalties are acting as a deterrent

31. The ACTU again refers the review to the disturbing rates of non-compliance with wages and entitlement obligations in the industry and, in particular, the industry's ongoing appalling safety record.

4 – Interaction with other Commonwealth legislation and application of the Building Code

Migration Act 1958 (Cth)

32. The application of the recruitment obligations regarding the employment of foreign workers in the BCIP Act and the Building Code need to be clarified where they overlap with obligations in the Migration Act.
33. There is an error in s 34(2D) of the BCIP Act. Section 34(2D) of the BCIP Act provides that 'the Building Code must include provisions ensuring that no *person* is employed to undertake building work' unless certain labour market testing requirements set out in s 34(2D)(a)-(d) are met.⁷⁷
34. The related provision of the Building Code attempts to correct this error. Clause 11F of the Building Code provides that 'A code covered entity must ensure that no person *that is not an Australian citizen or Australian permanent resident (within the meaning of the Migration Act 1958)* is employed to undertake building work for the code covered entity' unless the labour market testing requirements are met.⁷⁸ Section 34(2D) of the BCIP Act should be amended to reflect the clarifying wording in clause 11F of the Building Code.
35. There is a Note at the end of clause 11F of the Building Code which reads: 'Note: The *Migration Act 1958* and its subordinate legislation contain requirements relating to the engagement of persons that are not Australian citizens or Australian permanent residents.' The Explanatory Statement for the Building Code says, 'The note directs the reader to obligations under the *Migration Act 1958* in relation to the engagement of persons that are not Australian citizens or Australian permanent residents.'
36. The Note and the Explanatory Statement are causing confusion. They appear to have been misinterpreted as meaning that a person who is not an Australian citizen or Australian permanent resident (within the meaning of

⁷⁵ ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017 inclusive*, 15.

⁷⁶ See, eg, ACTU submission to the Senate Education and Employment Legislation Committee inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013*, 19 February 2016; ACTU submission to the Senate Standing Legislation Committee on Education and Employment inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, 22 November 2013, enclosing the ACTU submission to the Wilcox Consultations on the Proposed Building and Construction Division.

⁷⁷ Emphasis added.

⁷⁸ Emphasis added.

the Migration Act) can be employed to undertake building work without the labour market testing requirements in clause 11F of the Building Code being met if any exemptions from any labour market testing requirements apply under the Migration Act (for example, if the person is on a student or working holiday visa). The labour market testing requirements in clause 11F of the Building Code are arguably stronger than the equivalent requirements in the Migration Act. The Note should be amended to clarify that the labour market testing requirements in clause 11F of the Building Code must be complied with *in addition to* any requirements relating to the engagement of persons that are not Australian citizens or Australian permanent residents in the Migration Act.

Fair Work Act 2009 (Cth)

37. Clauses 11(1) and 11(3) of the Building Code have the effect of prohibiting code-covered entities from being covered by an enterprise agreement that includes clauses that would otherwise be permitted under the Fair Work Act. These include clauses that provide for union or worker participation in decision making about matters that affect them in the workplace, such as work health and safety or the introduction of major changes that are likely to have a significant effect on employees, or that seek to bolster employee job security, such as clauses requiring that labour hire and direct hire employees receive equivalent terms and conditions.
38. These sorts of clauses were expressly contemplated in the Explanatory Memorandum to the Fair Work Act⁷⁹ and their legitimacy under the Fair Work Act has been routinely upheld by the courts.⁸⁰ It is a nonsense that these clauses are permitted under the Fair Work Act but excluded for one part of the Australian workforce only under the Building Code.
39. Further, these clauses have attracted significant criticism as incompatible with Australia's commitments under international human rights law, from the Parliamentary Joint Committee on Human Rights, the UN Committee on Economic, Social and Cultural Rights and the ILO Committee of Experts on the Application of Conventions and Recommendations.⁸¹ It is unsurprising therefore that the operation of clauses 11(1) and 11(3) is resulting in comparatively reduced wages and entitlements for workers in the building and construction industry.⁸² These clauses should be repealed immediately.
40. In addition, we note that, when the bill to amend the BCIP Act to its current form was being debated in Parliament on 15 February 2017, the then Minister for Employment, Senator Cash, was asked whether the following enterprise agreement clause would comply with the Building Code if the bill were enacted:

In the event of redundancies required during the life of the agreement, in occupational classifications where both Australian workers and temporary foreign workers are employed temporary foreign workers will be made redundant first, given that temporary foreign workers are intended to supplement the Australian workforce.

41. The Minister's unequivocal answer was, 'Yes',⁸³ but the ABCC has released guidance on the Building Code which states that this enterprise agreement clause is not compliant with clauses 11(1)(a)-(b) and 11(3)(c) and (h) of the Building Code.⁸⁴ That the clauses are not operating in a manner consistent with the commitments made by

⁷⁹ See, eg, paragraph [672].

⁸⁰ See, eg, *AIG v Fair Work Australia* [2012] FCAFC 108; *R v Moore*; *Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470.

⁸¹ Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report*, Report 2 of 2018, 13 February 2018, 48-59.

⁸² See, eg, the submission of the Electrical Trades Union to this review.

⁸³ Senate Hansard, debate on the *Building and Construction Industry (Improving Productivity) Amendment Bill 2017*, In Committee, 15 February 2017.

⁸⁴ ABCC, 'ABCC Agreement Clauses', 2017 <https://www.abcc.gov.au/building-code/eligibility-tender/preliminary-review/abcc-agreement-clauses?combine=foreign&field_code_reference_tid=All&field_advice_category_tid=All&items_per_page=10>.

the Minister about the legislation at the time that it was being debated in Parliament is further reason for the clauses to be repealed.

Freedom of association under international law

42. Recently the ABCC's interpretation of clause 13 of the Building Code has attracted significant controversy.⁸⁵ The clause has already attracted criticism as incompatible with the right to freedom of association and the right to freedom of expression under international laws to which Australia has committed itself.⁸⁶ The clause should be repealed.

5 – The operation of new provisions in the BCIIP Act

Security of Payments Working Group

43. 'Security of payments' relates to the right of subcontractors to be paid promptly for the work they do in the building and construction industry. The 2015 Senate Economic References Committee inquiry into insolvency in the construction industry identified that the current approach to security of payment in the industry was fragmented and disparate. The inquiry repeated the recommendation of several earlier inquiries, dating back to 1995, that:

*...the completely unacceptable payment practices in the construction [industry] has to end. The continued viability of the industry in its current structure requires Commonwealth intervention to ensure that businesses, suppliers and employees that work in the industry's subcontracting chain get paid for the work they do.*⁸⁷

44. The Security of Payments Working Group (**Working Group**) was established under the BCIIP Act as a result of amendments proposed by Senators Xenophon and Hinch in order to secure their support for the BCIIP Act being passed. In support of these amendments, Senator Xenophon said:

*If we are to be serious about the issue of productivity and bad behaviour in the construction sector, the issue of security of payments is fundamental to that. We cannot simply talk about the behaviour of some in the union. We also need to talk about the behaviour of a number of principal contractors and the way that people have been left in the lurch, the way that many thousands of subcontractors have not been paid and have not been treated fairly and that many have been driven to either the brink of bankruptcy or actual bankruptcy.*⁸⁸

⁸⁵ See, eg, Peter Fitzsimmons, 'Ban on the most Australian symbol of them all an outrage, *The Sydney Morning Herald*, 6 February 2018.

⁸⁶ Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report*, Report 2 of 2018, 13 February 2018, 59-72.

⁸⁷ Senate Economic References Committee, *'I just want to be paid': Insolvency in the Australian Construction Industry*, December 2015, xviii.

⁸⁸ Senator Nick Xenophon, *Building and Construction Industry (Improving Productivity) Bill 2013*, Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, Second Reading Speech, 28 November 2016.

45. Senator Hinch made similar comments:

One major area is the protection of sub-contractors—the subbies. Too often, they are left holding the bag. Confected disputes over supposedly shoddy work or missed completion deadlines can see money—earned money—going from A to B but not getting to C. Sometimes it is a case of robbing Peter to pay Paul in a stalling tactic which might otherwise see a boss guilty of trading while insolvent. A fast-track tribunal hearing with the disputed money held in trust is good idea and a possible solution, I believe.⁸⁹

46. The Working Group is charged with monitoring the impact that the ABCC has on improving compliance with security of payments obligations and making recommendations about policies, procedures or programs that could improve compliance.⁹⁰ In May 2017, the then Minister for Employment, Senator Cash, appointed 11 members to the group. There is only one employee representative, who was appointed from the ACTU (compared to four employer and five employee representatives). To date, the Working Group has met three times, with the next meeting scheduled for May 2018. The ACTU representative and the Subcontractors Alliance have raised serious concerns that the ABCC is not doing nearly enough to address the widespread problem of security of payments.
47. One of the main problems with the ABCC's approach is the way that it defines a 'disputed or delayed progress payment'. Under clauses 11(D)(1)f) and 11E(1)(d) of the Building Code, a code-covered entity must report any disputed or delayed progress payment to the Commissioner and the relevant funding entity as soon as practicable after the date on which the payment falls due. The term 'disputed or delayed progress payment' is not defined in the Building Code. However, the ABCC has made an internal decision to define a 'disputed payment' as a payment that has been referred to adjudication, and a 'delayed payment' as a payment not paid in accordance with the timeline determined by the adjudicator.⁹¹ The ACTU and the Subcontractors Alliance have repeatedly raised concerns that this approach excludes the vast majority of problems that the ABCC should be looking at – that is, payments which are genuinely disputed or delayed, but which have not yet been formally referred to adjudication.
48. In a discussion paper provided to the Working Group, the ABCC argued that they cannot monitor whether payments are made in a reasonable and timely manner as they do not have the expertise to resolve contractual disputes about payments. They claim that a trigger for intervention prior to adjudication would 'open the floodgates' and swamp the ABCC with so many complaints that it would be unmanageable for them. We do not accept that this is a sufficient reason for the regulator to fail to perform its statutory function. On the advice of the Working Group, the ABCC is developing an education package intended to explain to subcontractors their rights under security of payments laws. However, no moves have been made to change the definition of disputed or delayed progress payments. Until this happens, the ABCC cannot be said to be taking the problem seriously.
49. On 21 December 2016, the Government announced a national review of security of payment laws by John Murray AM to consider the different approaches taken to security of payment laws across Australian jurisdictions. Mr Murray provided his report to the Department of Jobs and Small Business on 22 December 2017. As at 28 February 2018, the Department was yet to provide a copy of the report to the Minister.⁹² It has not yet been provided to the Working Group, nor has the Government confirmed whether it will be made public. We hope and expect that the report will recommend – and the Government will adopt – the long-overdue and wide-ranging reform necessary to harmonise national security of payments laws and improve compliance.

⁸⁹ Senator Derryn Hinch, *Building and Construction Industry (Improving Productivity) Bill 2013*, Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, Second Reading Speech, 22 November 2016.

⁹⁰ BCIIP Act, s 32A(2).

⁹¹ ABCC, 'Security of Payments', March 2017, < <https://www.abcc.gov.au/building-code/security-payments>>.

⁹² Hansard, Senate Education and Employment Legislation Committee, Estimates, 28 February 2018, 40, 88.

Youth employment and engaging apprentices

50. The BCIIIP Act aims to achieve its main object in partly by 'encouraging youth employment with an emphasis on engaging apprentices'.⁹³ This provision was introduced by way of a range of amendments to the 2013 bill introduced by the cross-bench that enabled the Government to have the bill passed. Yet there is not one mention of the word 'youth' or 'apprentice' in the ABCC's corporate plan for 2016-17 or 2017-18, its regulator performance framework, or any of the four quarterly reports that the ABCC has released to date. The ABCC's annual report for 2016-17 mentioned apprentices once, in a sentence which says that the ABCC gave targeted presentations at TAFEs. There is no transparent reporting by which to measure the BCIIIP's Act performance against this object.
51. Clause 11(3)(a) of the Building Code prohibits enterprise agreement terms that prescribe 'the number of employees or subcontractors that may be employed or engaged on a particular site, in a particular work area, or at a particular time'. Out of concern about the impact on apprentices, a note to the clause says, 'This does not prevent the inclusion of clauses in an enterprise agreement that encourage the employment of apprentices.'
52. Nonetheless, the ABCC has ruled that enterprise agreement terms which mandate a ratio of apprentices to tradespeople are not code compliant. For example, the ABCC has deemed the following term inconsistent with clauses 11(1)(a) and 11(3)(a) of the Building Code:

Apprentices are the future of our industry and the parties reaffirm their commitment to the training of apprentices. Further they shall make every endeavour to make full time apprenticeships available with the company. The employer will employ at least 1 apprentice for every 8 tradespeople employed.

53. In contrast, we have no knowledge of the extent to which the ABCC is enforcing clauses 24(2)(d) of the Building Code, which requires companies when tendering, '...to demonstrate a positive commitment to the provision of appropriate training and skill development for their workforce', or clause 24(2)(e), which requires companies when tendering to, '... include details of the number of current apprentice and trainee employees ... that are engaged by the respondent, and that are intended to be engaged by the respondent to undertake the Commonwealth funded building work'. In any event, even if the ABCC is enforcing these clauses, they are a poor substitute for the requirement of ratios in enterprise agreements (let alone a procurement policy that actively favours the use of apprentices).

The Federal Safety Commissioner

54. As outlined above, the most important issue facing workers in the building and construction industry is poor workplace safety.
55. The Federal Safety Commissioner has various statutory functions designed to promote work health and safety in the building and construction industry, including administering the voluntary Work Health and Safety Accreditation Scheme and auditing compliance with National Construction Code performance requirements in relation to building materials.
56. Our affiliates have reported to us that the presence of the Federal Safety Commissioner (and Federal Safety Officers) is invisible in the industry and that direct requests for assistance or intervention in particular safety issues of relevance to the Federal Safety Commissioner's remit have not been met.

⁹³ BCIIIP Act, s 3(2)(g).

57. It is entirely appropriate that a company's work health and safety record and compliance with the National Construction Code be taken into account when awarding public contracts. However, for several reasons the Federal Safety Commissioner is not able to perform his statutory functions in s 38 of the BCIIIP Act effectively or to bring about real change in the industry.
58. First, the Federal Safety Commissioner is not valued or resourced appropriately in order to be effective. The office of the Federal Safety Commissioner has only 28 staff, along with 27 consultants engaged as Federal Safety Officers.⁹⁴ This amount of personnel is insufficient to effect change, especially because the accreditation scheme is voluntary.
59. Second, an unaccredited company is only prevented from acting as a head contractor undertaking Commonwealth-funded projects, not as subcontractor (in contrast to an exclusion sanction under the Building Code). This limitation reduces the incentive to gain and maintain accreditation.
60. Third, the Federal Safety Commissioner will not publish the name of a company that loses accreditation (again, in contrast to an exclusion sanction under the Building Code). This protection reduces the incentive to maintain accreditation.
61. The recent Senate Standing Committee on Economics inquiry into non-conforming building products found that the Federal Safety Commissioner does not have adequate resources or expertise to carry out its new statutory function to audit compliance with the National Construction Code performance requirements into building materials.⁹⁵ The inquiry also found that loss of accreditation is not a strong enough penalty for non-compliance with the National Construction Code.⁹⁶
62. The inquiry recommended that, 'the Commonwealth government ensure the Federal Safety Commissioner is adequately resourced to ensure the office is able to carry out its duties in line with the new audit function and projected work flow'.⁹⁷ The inquiry also recommended that, 'the Commonwealth government consider imposing a penalties regime for non-compliance with the National Construction Code such as revocation of accreditation or a ban from tendering for Commonwealth funded construction work and substantial financial penalties'.⁹⁸ We repeat these recommendations.

6 – The ABCC and work health and safety

63. The ABCC does not directly regulate work health and safety in the building and construction industry, but it has significant capacity to impact on workplace health and safety outcomes in the industry.
64. Clause 9(3) of the Building Code requires that code-covered entities comply with work health and safety laws, including work health and safety training requirements and asbestos safety requirements and strict compliance with procedures for the election of health and safety representatives and right of entry requirements.⁹⁹ The Commissioner of the ABCC is empowered to refer any code-covered entity that has failed to comply with the Building Code, including because of a failure to comply with work health and safety laws, to the Minister with

⁹⁴ Office of the Federal Safety Commissioner, *Regulator Performance Framework 2016-17 Report*, 7.

⁹⁵ Senate Economics References Committee, inquiry into non-conforming building products, *Interim report: aluminium composite cladding*, September 2017, xii.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Clause 9(3) of the Building Code.

recommendations that a sanction be imposed.¹⁰⁰ As noted, the Commissioner has made one such recommendation, and that was in respect of a company that allowed a 'no ticket, no start' sign to be displayed on a worksite. The Commissioner has made no such recommendations in respect of companies that have failed to comply with work health and safety laws, despite there having been seven reported deaths in the industry this year alone.¹⁰¹

65. Part of the problem is that, rather than actively monitoring compliance with clause 9(3) as part of the inspection and audit regime, the ABCC will only act if there has been a court decision that a code-covered entity has contravened a work health and safety law. This approach contrasts the ABCC's approach in other areas where it will actively refer matters for enforcement. It significantly diminishes the potential for the Building Code to effect real change in improving work health and safety in the industry, as was recently explained by Ms Cato in a Senate Estimates hearing, '...As you can imagine, it takes some time for these matters to go through the courts, so, by the time there's a court outcome, it's usually two or three years after the event, so it will take a little while for the power of the code and the sanction that can also apply to the company to be able to be put in place for those OHS breaches.'¹⁰²
66. Finally, there is significant Australian and international evidence that a union presence in a workplace is positively associated with improved work health and safety.¹⁰³ The operation of the BCIIIP Act, and the ABCC, works to undermine the role of unions, which will have an adverse impact on work health and safety outcomes. This undermining happens in a range of ways, from the failure of the ABCC to act as a 'full service regulator',¹⁰⁴ to the application of the Building Code restricting the inclusion of clauses in enterprise agreements that facilitate union and worker participation in work health and safety matters.¹⁰⁵

¹⁰⁰ Clause 18(1)(a)(i) of the Building Code.

¹⁰¹ Safe Work Australia, *Fatality Statistics by Industry* < <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics-industry>>.

¹⁰² Hansard, Senate Education and Employment Legislation Committee, Estimates, 28 February 2018, 118.

¹⁰³ See, eg, Maureen F Dollard*, Daniel Y Naser, 'Worker Health is Good for the Economy: Union Density and Psychosocial Safety Climate as Determinants of Country Differences in Worker Health and Productivity In 31 European Countries' (2013) 92 *Social Science & Medicine*; Andrew Robinson and Clive Smallman, 'Workplace Injury and Voice: A Comparison of Management and Union Perceptions' (2013) 27 *Work, Employment & Society* 4; Theo Nichols, David Walters, Ali C. Tasiran, 'Trade Unions, Institutional Mediation and Industrial Safety: Evidence from the UK' (2007) 49 *Journal of Industrial Relations* 2; S Grazier *Compensating Wage Differentials for Risk of Death in Great Britain: An Examination of the Trade Union and Health and Safety Committee Impact* (2007) Working Paper 2007/02, Welsh Economy Labour Market Evaluation and Research Centre, Swansea University; Department of Trade and Industry, *Workplace Representatives: A Review of Their Facilities and Facility Time*, Consultation Document, January 2007; Theo Nichols, David Walters, Ali C Tasiran, *The Relationship between Arrangements for Health and Safety and Injury Rates – The Evidence-Based Case Revisited*, (2004) Working Paper Series Paper 48, School of Social Sciences, Cardiff University; Kwan Hyung Yi, Hm Hak Cho, Jiyun Kim, 'An Empirical Analysis on Labor Unions and Occupational Safety and Health Committees' Activity, Their Relation to the Changes on Occupational Injury and Illness Rate' (2001) 2 *Safety and Health at Work* 4; Andrew Robinson and Clive Smallman, *The Healthy Workplace?* (2000) Working paper 2000/05, Judge Institute of Management; Barry Reilly, Pierella Paci and Peter Holl, 'Unions, Safety Committees and Workplace Injuries' (1995) 33 *British Journal of Industrial Relations* 2.

¹⁰⁴ Discussed under heading 1 above.

¹⁰⁵ Discussed under heading 4 above.

67. There was a significant increase in the rate of workplace deaths in the industry during the first iteration of the ABCC (October 2005-June 2012) and a decrease after the ABCC was closed.¹⁰⁶

	Fatality rate (deaths per 100,000 workers)												
Industry of employer	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Construction	4.50	3.98	5.25	5.36	4.11	4.02	4.33	4.07	3.1	2.2	3.1	3.3	3.3
All industries	2.95	2.57	2.78	2.93	2.57	2.33	1.99	1.94	2.0	1.8	1.7	1.8	1.5

68. Professor David Peetz has explained:

*There were 36 fatalities in the construction industry in 2007-08, twice as many as in 2004-05, immediately before the ABCC commenced operations in late 2005. Under the ABCC, construction became the industry with the highest number of deaths. As observance with occupational safety tends to be lower where unions are weaker, this trend is not surprising.*¹⁰⁷

69. Laws which foster joint management of work health and safety have a positive effect on work health and safety outcomes. Laws which cause workers to fear raising safety issues or which compromise their ability to voice safety concerns – including via their union representatives – have a negative effect on work health and safety outcomes. The BCIIIP Act has done nothing to improve work health and safety in building work and will inevitably have the opposite effect.

Conclusion

70. The workplace relations framework for the building and construction industry established under the BCIIIP Act fails workers. The ABCC continues to target unions and union officials whilst critical issues such as poor work health and safety, poor compliance with wages and entitlements obligations, subcontractors not being paid for work performed, and misclassification and sham contracting continue to plague the industry. The ABCC is not performing its full service regulator function – yet another example of Australia's workplace laws failing to meet international labour law standards. Concerns remain around the role of the Commissioner being performed in a partial and political manner. The Building Code imposes special rules on bargaining that are damaging for workers, particularly in respect of issues such as job security, engagement of apprentices, work health and safety and worker participation in decision making about matters that affect their working lives. For all of these reasons and many more, the Australian union movement rejects the legitimacy of the BCIIIP Act in its entirety.

71. In terms of the specific issues raised by the terms of reference for this review, we note:

- 1) The ABCC is not performing its full service regulator function. The ABCC continued to target unions and union officials and to fail to adequately enforce wages and entitlements obligations or deal with misclassification and sham contracting. Concerns remain about the role of the Commissioner being performed in a partial and political manner. The legislative amendments designed to address these issues have not been effective. In addition, the quarterly reporting requirements need to be strengthened to require detailed, timely reporting that enables a proper assessment of the ABCC and the Commissioner's

¹⁰⁶ Safe Work Australia, *Work Related Traumatic Injury Fatalities, Australia, 2012*, 2013 Table 9, quoted in Anne Holmes and Jean Murphy, *Building and Construction Industry (Improving Productivity) Bill 2013 [and] Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, Parliamentary Library Bills Digest No 34, 2013-2014, 23 January 2014, 9, and Safe Work Australia, *Fatality Statistics by Industry* <<https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics-industry>>.

¹⁰⁷ David Peetz, 'Gillard's other ABCC dilemma: making it work', *Crikey*, 15 June 2009.

performance as a full service regulator and its performance in monitoring and enforcing compliance with the Building Code.

- 2) The oversight of the compulsory examination powers does not allow real time oversight with the ability to correct problems as they arise (rather than making unenforceable recommendations after the fact). It would be preferable if these powers were abolished and replaced with the usual discovery and subpoena powers supervised by the courts. In the interim, the Ombudsman reports should be more easily accessible via the ABCC's website and be required to be published in a timely fashion.
- 3) In terms of the effectiveness of the penalties regime, the ACTU again refers the review to the disturbing rates of non-compliance with wages and entitlement obligations in the industry and, in particular, the industry's ongoing appalling safety record.
- 4) There needs to be a wholesale review of the Building Code and its interaction with other laws. In the meantime, at the very least:
 - a) Clauses 11(1) and 11(3) of the Building Code ought to be repealed, to ensure consistency with the Fair Work Act and Australia's international obligations and to promote genuine bargaining.
 - b) The Note to clause 11F of the Building Code needs to be amended to clarify the relationship between the Building Code and the Migration Act; that is, to clarify that employers must comply with the requirements in clause 11F in addition to any requirements in the Migration Act.
 - c) The ABCC needs to adopt a proactive role in monitoring and enforcing compliance with clause 9(3) of the Building Code and its reporting obligations need to be strengthened to enable a proper assessment of its performance of this function.
 - d) Clause 13 of the Building Code ought to be repealed, to ensure consistency with Australia's international obligations.
- 5) In terms of the operation of new provisions, including the Federal Safety Commissioner's new audit functions:
 - a) The potential effectiveness of the security of payments provisions has been significantly limited by the ABCC's interpretation of the term 'disputed or delayed progress payment'.
 - b) Clauses 11(1) and 11(3) of the Building Code hinders the engagement of apprentices. The ABCC's reporting requirements need to be strengthened to enable a proper assessment of its performance in promoting the engagement of apprentices.
 - c) The office of the Federal Safety Commissioner needs to be adequately resourced to carry out its new functions. An effective penalties regime for non-compliance with the National Construction Code ought to be introduced, such as revocation of accreditation or a ban from tendering for Commonwealth funded construction work and substantial financial penalties.

ACTU D No. 80/2018

ACTU submission to the Senate Education and Employment Legislation Committee

*Building and Construction Industry (Improving
Productivity) Bill 2013*

19 February 2016



Overview

1. Recent public discussion of this Bill has gone hand in hand with discussion about the *Royal Commission into Trade Union Governance and Corruption*.
2. One thing that needs be understood very clearly is that this Bill is not a Bill about trade union governance, nor is it a Bill about corruption. This is a Bill about the regulation of industrial relations, and nothing more. In some material respects, it in fact does things that the Report of that Royal Commission clearly states ought not be done.
3. At the time of writing, the Government is engaging in series of roundtables concerning workplace relations policy. Notably absent from those discussions to date, at least those which our organization has been invited to participate in, has been any mention of the ABCC. Like the rest of the Workplace Relations Framework, the Building and Construction Industry has been the subject of an inquiry and report, yet a fulsome consultation on the recommendations of that inquiry has not followed. Rather, this Government seems inexorably wedded to the re-establishment of the ABCC in the form in which it was proposed in this Parliament nearly two years ago, and relevantly almost indistinguishable from the entity that bore that name during the Howard Government. The overt threat of a double dissolution on the basis of a failure to pass this Bill demonstrates an irrational attachment to what on any measure is and was bad policy.
4. No amount of paper shuffling and contortion has yielded any credible economic argument in favour of the ABCC. Nor has the passage of time provided any revelatory comparisons about a positive impact on the industry. Rather, the most significant change in environment has been Australia's recent adoption of the *Korea-Australia Free Trade Agreement* and the *Trans Pacific Partnership Agreement*. Through those instruments, Australia has re-stated its commitment to its trading partners to the very international labour rights that the International Labour Organization has found the ABCC laws to have violated. For the Government to knowingly and so enthusiastically renege on those commitments, particularly so soon after re-stating them, is enormously disappointing and potentially damaging to our trading relationships.
5. The ACTU supports a strong stance against corruption in all its forms. Corruption offends the values of the trade union movement and, beyond the immediate economic

impacts on its victims, can effect confidence in the economy and its institutions as well as a country's international reputation. We do not suggest that the construction industry is immune from corruption, and in fact official statistics from the Australian Securities and Investment Commission suggest that it is a poor performing sector on that front. However, if this government is serious about tackling corruption, a very different legislative response is indicated. To this end, the ACTU supports the establishment of a national anti-corruption body to investigate corruption in all its forms.

6. We oppose the Bill in its entirety.

Features of the Bill

7. The central features of this Bill are:
 - a. The re-establishment of the Australian Building and Construction Commission;
 - b. Enabling and enforcement of the Building Code;
 - c. The creation of industry specific industrial relations laws for the Building and Construction and other industries; and
 - d. Coercive powers with less independent oversight.
8. We address each of these central features in turn below.

Re-establishment of the ABCC

9. The ABCC, as it existed under the former BCII Act, distinguished itself by the aggressive, coercive and biased manner in which it carried out its activities. It focused overwhelmingly on the investigation and prosecution of workers and trade unions, thus failing in its primary obligation as a regulator to enforce the law impartially. It did very little to address the significant and widespread issues in the building industry such as the underpayment or non-payment of wages and entitlements, occupational health and safety issues or sham contracting.
10. Our affiliate, the CFMEU, undertook a detailed study of sham contracting in the Building and Construction industry in 2011¹, in which it estimated that between nine and sixteen percent of persons working in the construction industry were sham contracting and that the tax leakage attributable to sham contracting was in the in the order of \$2.457 billion per annum. Because the ABCC had a policy position for most of its period of operation that it did not even investigate let alone prosecute employers who had not paid the wages and entitlements legally owed to its workers, it did nothing to address this problem. In fact, the opposite was the case because it administered and enforced laws that were designed to ensure that the wages and conditions of persons on building sites that were described as “contractors” could not be scrutinized let alone improved by unions in negotiations with employers.

¹ CFMEU Construction and General Division, “Race to the bottom: Sham contracting in Australia’s Construction Industry”, March 2011.

11. Adding to the concerning reality that the construction industry consistently rates as either the highest or second highest as against all other industries when it comes to unpaid employee entitlements², data from the Australian Bureau of Statistics suggests that close to 10% of all workplace injuries occur in the construction industry, and that between 2013 and 2014 over 50,000 people in that industry suffered a work related injury³. In 2014, the construction industry accounted for 16% of workplace fatalities, our third worst performing industry.⁴ The construction industry is known to be a dangerous industry, and whilst we agree that State and Territory Health and Safety legislation is an appropriate vehicle to regulate this, we note that those laws assume or are dependent upon properly functioning workplace organisation to identify, address and monitor health and safety risks. Accordingly, unions play a critical role in those frameworks. The provisions of the Bill are directed to toward discouraging or hindering the participation of workers in unions and to that end might undermine the efficacy of those models. In circumstances where the third most common reason for not making a workers' compensation claim after reporting an injury is worry about a "Negative impact on current or future employment"⁵, it is clear that more needs to be done to empower and support workers in dangerous industries.

12. Further, the business to business relationships in the construction industry have been shown to be highly problematic. A recent Report from the Senate Economics Committee observed:

"Businesses now operate in an environment in which non-payment for work carried out is commonplace, cash flows are uncertain and businesses lower down in the subcontracting chain have little power relative to those at the top of the chain. In this environment, there is very little incentive to invest the necessary capital to adopt new and innovative construction methods, invest in new capital equipment or invest in workforce skills development."⁶

"The committee considers that the estimates of the incidence of illegal phoenix activity detailed in this report suggest that construction industry is being beset by a growing culture among some company directors of disregard for the corporations law. This view is reinforced by the anecdotal evidence received by the committee which indicates that phoenixing is considered by some in the industry as merely the way business is done in order to make a profit.

² Senate Economics References Committee, "I just want to be paid: Insolvency in the Australian Construction Industry", December 2015, p. xx.

³ ABS 6324.0, Table 4.1

⁴ Safe Work Australia, "Work Related Traumatic Injury Fatalities, Australia 2014", October 2015.

⁵ ABS 6324.01, Table 11.1. This explanation ranks behind only "Minor injury/not considered necessary" and "Not covered or not aware of workers' compensation".

⁶ Senate Economics References Committee, "I just want to be paid: Insolvency in the Australian Construction Industry", December 2015, p. xxxi.

The committee is particularly concerned at evidence that a culture has developed in sections of the industry in which some company directors consider compliance with the corporations law to be optional, because the consequences of non-compliance are so mild and the likelihood that unlawful conduct will be detected is so low.

This culture is reflected in the number of external administrator reports indicating possible breaches of civil and criminal misconduct by company directors in the construction industry. Over three thousand possible cases of civil misconduct and nearly 250 possible criminal offences under the Corporations Act 2001 were reported in a single year in the construction industry. This is a matter for serious concern. It suggests an industry in which company directors' contempt for the rule of law is becoming all too common.”⁷

13. The Committee’s comments were made in the context of a wide-ranging inquiry into insolvency in the construction sector. It made 44 recommendations directed to avoiding and remedying instances of non-payment and insolvency in the construction industry, including increased use of project bank accounts, amendment to Corporations Act provisions concerning the avoidance of employee entitlements, the establishment of an inquiry into statutory trusts, a legislative prohibition on intimidation, coercion or threats in relation accessing remedies under security of payments legislation and that a “fit and proper person” test apply across the breadth of the construction sector through requirements in state licensing regimes.

14. The Report of the Economics Committee was notable for its absence of a dissenting report. Rather, Coalition Senators included “Additional Comments” in which they:

a. Acknowledged the problems described:

“Clearly, the evidence presented during the course of the inquiry shows that the high rate of insolvencies in the building and construction industry is adversely impacting on the health and integrity of the Australian economy. The social impact and economic cost—not to mention the indirect effects on productivity—stemming from the high rates of insolvency in the sector, is worrying.”⁸

and;

b. Acknowledged the need to act:

“The Government will give a considered response to the full list of recommendations in due course”⁹

“..any regulatory responses need to address all instances of systemic illegal or improper behavior in the construction industry”¹⁰

⁷ Senate Economics References Committee, “I just want to be paid: Insolvency in the Australian Construction Industry”, December 2015, p. xxix-xx.

⁸ Senate Economics References Committee, “I just want to be paid: Insolvency in the Australian Construction Industry”, December 2015, p. 195.

⁹ *Ibid.*

15. Shockingly, notwithstanding the references in the title of the Bill to *Improving Productivity*, neither the ABCC nor the Bill are designed to have any positive impact on the matters of concern identified in the Committee's report. Rather, the Bill relates only to workplace relations matters and specifically union activity. And whilst much of the debate and rhetoric surrounding the Bill has contained references to the report of the Royal Commission into Trade Union Governance and Corruption, the reality is that the Bill pre-dates that Report and cannot by any stretch be considered to be responsive to it.
16. We do not consider it appropriate to comment specifically on any matters that the Royal Commission referred for investigation or prosecution, or on any insolvency related matters that are currently underway. We do however find it perplexing that number of instances of alleged wrongdoing described by the Royal Commission, which consumed tens of millions of dollars of resources, used investigative powers, was assisted by Police taskforces, was singularly focused on its task and had before it documents going back to 1992, is far less than that which a Parliamentary Committee comprised of busy Senators was able to ascertain about the level of non compliance by businesses in the sector in a single year largely through resort to statistics published by ASIC.
17. Unions are known to be effective advocates for quality training and career paths that build productivity and for safer workplaces. Unions are also adept at the early detection, investigation and remedying of underpayments. The reanimation of a statutory agency that sees its role as the frustration of those laudable objectives is precisely what the building and construction industry does not need.
18. Finally, we would urge the Committee not to be persuaded by the suggestion in the Report of the *Royal Commission into Trade Union Governance and Corruption* that the ABCC is neither biased nor discriminatory. We believe that its coercive powers as well as its enforcement actions make the case that it is both. The fact that legal proceedings might have be brought with a proper legal basis against in law against unions does not answer the issue of bias in circumstances where the prosecutor elects to look the other way when confronted with the misdeeds of employers, or where the laws themselves

¹⁰ Senate Economics References Committee, "I just want to be paid: Insolvency in the Australian Construction Industry", December 2015, p. 196.

are the type which the government has promised the international community it will not pass. Further, the Report dismissed allegations of discrimination on the basis that

“The short answer to this argument is that the essence of discrimination lies not only in ‘the unequal treatment of equals’ but also ‘in the equal treatment of those who are not equals’ where the different treatment or unequal outcome is not the product of relevant distinction”¹¹

We respectfully part company with the Report as we believe that construction workers **are** equals with other workers. Further, the report attributes the quotations in the above passage to *Austin v. Commonwealth* (2003) 215 CLR 185. The full quotation, not produced in the Report, is as follows:

“The essence of the notion of discrimination is said to lie in the unequal treatment of equals or the equal treatment of those who are not equals, where the differential treatment and unequal outcome is not the product of a distinction which is *appropriate and adapted to the attainment of a proper objective*” (emphasis added)

19. We regard the ABCC as serving a distinction which is neither appropriate nor adapted to the attainment of a proper objective. It is directed toward rendering industrial activity - that is legal and protected by federal and international law – illegal in the building industry.

Enabling and enforcement of the Building Code

20. The Bill contains provisions that authorise the making of a Building Code, and provide for its enforcement. The Building Code is an instrument that building companies and the Commonwealth can be required to comply with in relation to building work. It can also apply to other entities if they perform building work in a Territory or a Commonwealth place. The ABCC can direct persons to report on their compliance with the Building Code, and can seek civil penalties against them if they fail to provide that information, or if they provide that information later than is requested of them. Where the Building Code applies, ABCC inspectors can enter premises. They can also issue compliance notices, requiring persons to comply with the Building Code. Non-compliance with these notices is enforceable by civil penalties.

¹¹ Royal Commission into Trade Union Governance and Corruption, “Final Report: Volume 5”, Commonwealth of Australia 2015, at Chapter 8, [108].

21. An “Advanced Release” of the intended Building Code has already been published. It applies to builders (and also their related entities) if they tender for Government funded work. If they do tender for that work, it also applies to privately funded work.
22. The Code is highly objectionable, as it contains restrictions on legitimate industrial relations practices that are lawful in every other industry. For example:
- a. Individual employment contracts can be made, but collective employment contracts can't;
 - b. Enterprise agreements with building companies cannot prescribe safe staffing levels;
 - c. Enterprise agreements with building companies cannot contain terms to ensure that labour hire workers are not discriminated against in their rates of pay for doing the same work;
 - d. Enterprise agreements with builders cannot insist on only skilled, trained tradespeople doing dangerous work;
 - e. Building company managers and union representatives are not allowed to agree to meet at building sites;
 - f. The independent umpire, the Fair Work Commission, is not allowed to resolve disputes freely. For example, if workers complain about unfair rostering or unfair treatment of their leave requests, the Fair Work Commission cannot remedy the unfairness because it is not allowed to limit the employers right to determine who does what work when.
23. These substantive restrictions on industrial relations practices cannot be regarded as beneficial (mutually or otherwise). Even the Report of the *Royal Commission into Trade Union Governance and Corruption* dismissed the suggestion that the building industry needed industry specific industrial laws.¹²
24. In an unusual step, the Code requires that enterprise agreements made from April 24 2014 need to be compliant with its requirements. Accordingly, a number of businesses may be non-compliant if the Bill is passed and the Code is tabled as intended. The only manner in which many could become compliant would be to seek the variation or

¹² Royal Commission into Trade Union Governance and Corruption, “Final Report: Volume 5”, Commonwealth of Australia 2015, at Chapter 8, [186].

termination of their existing enterprise agreements, which could lead to legitimate disputation.

Industry Specific Industrial Laws

25. In addition to the industry specific industrial laws found in the Building Code, the Bill proposes to introduce the following provisions for the building and construction industry:

- a. Clause 8 of the Bill, which modifies the definition of ‘protected industrial action’ within the meaning of the *Fair Work Act* so as to exclude industrial action if it is engaged in concert with, or if the organisers include, persons other than an employee or an employee organisation, its members or an officer, that are bargaining representatives for the proposed enterprise agreement;
- b. Clauses 47 and 48, which introduce a new and wide prohibition on persons engaging in or organising ‘unlawful pickets’, defined to include action that is industrially motivated and restricts persons from accessing or leaving a building site (and ancillary sites as defined in clause 9), has the purpose of doing so, or ‘would reasonably be expected to intimidate’ such persons;
- c. Clause 48 of the Bill, which enables *any person* to apply to a court for an injunction against unlawful industrial action or an unlawful picket and expands the circumstances in which the general discretionary power to issue injunctions may be exercised;
- d. Clause 49 of the Bill, which modifies the rules concerning payment relating to periods of industrial action found in Division 9 of Part 3-3 of the *Fair Work Act* so that the rules only apply to the more narrow definition of ‘protected industrial action’ provided in the Bill;
- e. Clauses 52-55, which deal with coercion in a manner partly replicating and partly neutering the existing protections against coercion in the *Fair Work Act*. We are particularly concerned that clause 54 of the Bill is expressed to operate to the exclusion of provisions in the *Fair Work Act*. This could conceivably operate to allow conduct to occur which would otherwise be unlawful, and deprives disputants of access to the dispute resolution functions of the Fair Work Commission under Subdivision B of Division 8 of Part 3-1 of the *Fair Work Act*;

- f. Clause 59 of the Bill, which renders project agreements unenforceable. We note that this clause constitutes a breach of the principle of free and voluntary collective bargaining embodied in Article 4 of the *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*.¹³ This principle includes placing no restrictions on the freedom of parties to choose the level at which they bargain.¹⁴
26. Both the Wilcox inquiry in 2009 and the Report by the Royal Commission into Trade Union Governance and Corruption found no need for there to be different substantive industrial relations laws applying in the building industry.¹⁵
27. If the alleged “need” for specific industrial laws is said to be linked to productivity or the incidence of industrial action, the case for specific industrial laws is not at all compelling. The statistical arguments asserting a positive productivity impact range from the highly equivocal to the outright wrong. We refer in particular to our previous submission to the References Committee on the last occasion this Bill was presented and to the answers we gave to questions taken on notice during hearings of that Committee. In relation to the incidence of industrial action, we re-iterate that there is no evidence to suggest that industrial disputation in the building industry is at historically high levels or that the rate of disputation in the industry has materially increased in the period since the ABCC was abolished. Indeed, the rate of industrial disputation in the industry remains extremely low relative to its historic levels. The other important consideration regarding industrial action is that official statistics draw no distinction between industrial action that lawful and that which is not.

Coercive powers with less independent oversight

28. The ACTU strongly opposes the re-introduction in Chapter 7 of the Bill of coercive powers exercisable by the ABCC in a similar form to that existing under the former BCII Act. Under clause 61 of the Bill, the ABC Commissioner is empowered to require any person to provide information or documents in relation to an investigation of a

¹³ Section 64 of the BCII Act, upon which this clause was presumably modelled, was found by the Committee on Freedom of Association and the Committee of Experts to contravene Australia’s obligations under Convention No. 98.

¹⁴ ILO, General Survey on Freedom of Association and Collective Bargaining (1994), at [249]

¹⁵ Wilcox, M., “Transition to Fair Work Australia for the Building and Construction Industry”, Commonwealth of Australia 2009, at [1.19]; Royal Commission into Trade Union Governance and Corruption, “Final Report: Volume 5”, Commonwealth of Australia 2015, at Chapter 8, [186].

suspected contravention of the Bill or a designated building law, or to compulsorily interrogate any person who may have such information or documents. A person must comply with an examination notice, on pain of six month's imprisonment.¹⁶

29. A careful examination of these provisions, which is the Committee's task, will once and for all expose the fact that any assertion that the ABCC will use these powers to investigate corruption or other criminal activity is blatantly untrue. Whilst its powers are indeed expansive, they may only be exercised for limited purposes. Examination notices can only require the production of information or the answering of questions relevant to a suspected contravention of industrial relations laws: *The ABCC Act, the Fair Work Act, The Fair Work (Transitional Provisions and Consequential Amendments) Act* and the *Independent Contractors Act*. If the ABCC steps outside this limited remit, it is acting unlawfully. It has no power to use the information it obtains unlawfully, let alone share it with other authorities. Nor may it have resort to examination notices to investigate a suspected contempt of court. This is a matter that, with respect, we consider the report of the *Royal Commission into Trade Union Governance and Corruption* deals with in an entirely incorrect way.

30. That is not to say that the powers granted to ABCC are limited in manner which makes them acceptable. Coercive information gathering powers have no place in the enforcement of industrial laws. These powers impinge upon the rights of individuals, including the right to protection of property and privacy, the right to silence, and statutory rights to the protection of personal information. These types of coercive powers are similar to those available in connection with the examination of suspected terrorists, save that compulsory interrogation of suspected terrorists requires a warrant to be issued by a Federal Judge or Magistrate,¹⁷ whereas the ABCC under this Bill may issue its own.¹⁸

31. These extraordinary powers are not used to investigate allegations of criminal behaviour, but rather they are used to investigate whether workplace laws have been breached. The ABCC has a proven track record of abusing those rights – one needs only to look to the failed prosecution of *Ark Tribe* and the routine issuing of 203 defective compulsory examination notices to appreciate this. The recent revelations that legal

¹⁶ Clause 62.

¹⁷ *Australian Security Intelligence Organisation Act 1979*, Part 3, Division 3.

¹⁸ Clause 61.

proceedings for illegally striking were wrongly commenced against 28 workers who were not actually rostered to be working in any event¹⁹ also raises serious questions. How could a fair minded and diligent regulator commence proceedings about an alleged work stoppage without being more certain about something as fundamental as who it was that was required to be working? In the absence of a satisfactory explanation is it unreasonable to ask whether some broader objective of frightening workers about being involved in a union played some role?

32. The public interest favours keeping these types of powers out of the industrial arena to ensure that, insofar as the powers are directed towards workers (as they have been overwhelmingly in Australia), they do not impinge upon the exercise of industrial rights, like the right to associate, organise and take collective action.

33. While maintaining our strong objection to the retention of coercive information gathering powers in this context, the ACTU supported the introduction through the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* of safeguards surrounding the use of these powers. We strongly oppose the removal of some of these critical safeguards through the Bill. These include:

- a. the requirement for the inspectorate to make an application for an examination notice to a Presidential Member of the Administrative Appeals Tribunal;²⁰
- b. the requirement for the presidential member to be satisfied that a case has been made out for the use of the coercive powers, having regard to a number of factors;²¹
- c. the capacity under the FWBI Act for certain stakeholders to make an application to an Independent Assessor to have such compulsory powers ‘switched off’ on particular building projects. The Independent Assessor must not switch off compulsory powers at a particular building project unless the Independent Assessor is satisfied that it would be appropriate to do so having regard to the objects of the FWBI Act and the public interest;²²

¹⁹ <http://www.abc.net.au/news/2016-01-21/more-charges-against-nedlands-industrial-action-workers-dropped/7106042>

²⁰ FW (BI) Act, s.45.

²¹ FW (BI) Act, s.47.

²² FW (BI) Act, s. 39.

- d. the prohibition on the Director requiring a person attending an examination to enter into a confidentiality undertaking in relation to the examination;²³
- e. the sunsetting on the use of coercive powers, with a decision whether to extend those powers to be made after that time expires²⁴; and
- f. provisions for the payment of legal expenses incurred as a result of attending a compulsory examination²⁵.

34. There is no evidence to suggest that the existence of these safeguards impeded in the work of Fair Work Building Industry Inspectorate (FWBII) in any way.

²³ FW (BI) Act, s.51(6).

²⁴ FW (BI) Act, s. 46.

²⁵ FW (BI) Act, s.58(1)

International Labour Rights and Free Trade Agreements

35. Australia is subject to international obligations in the field of human rights under customary international law and as a result of ratification of international legal instruments. Failure of Australia to abide by its obligations to respect human rights (which include a number of basic workers' rights) has significant implications for the protection and promotion of human rights in Australia and Australia's reputation internationally.

36. The former BCII Act – upon which this Bill is explicitly based²⁶ - was found repeatedly and unequivocally by the UN's International Labour Organisation (ILO) to constitute a serious breach of Australia's obligations both as a member-state and as a signatory to specific conventions including the *Freedom of Association and Protection of the Right to Organise Convention, 1947 (No. 87)*, the *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)* and the *Labour Inspection Convention, 1947 (No. 81)*.

37. The following features of the BCII Act were found by the ILO supervisory bodies (the tripartite Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations) to contravene Australia's international obligations:

- a. Those provisions which rendered a wide range of industrial action 'unlawful';
- b. The imposition of penalties and sanctions upon workers and unions that engage in 'unlawful industrial action' that were significantly higher than those imposed by the *Workplace Relations Act 1996*;
- c. Provisions within the Act that rendered project agreements unenforceable;
- d. Provisions of the National Code of Practice for the Construction Industry and the associated Implementation Guidelines (as they then existed) which sought to promote, through the availability of Commonwealth funding, restrictions on freedom of association and collective bargaining;
- e. The 'expansive' monitoring, investigatory and enforcement powers of the ABCC which, according to the ILO's Committee on Freedom of Association, '... could give rise to serious interference in the internal affairs of trade unions';

²⁶ Second Reading Speech, *Building and Construction (Improving Productivity) Bill 2013*, 14 November 2013.

- f. the absence of any provision within the Act to ensure that any penalties imposed under its provisions were proportional to the offence committed;²⁷ and
- g. the ABCC's focus on investigating, examining and prosecuting workers and trade union officials.²⁸

38. The majority of the provisions in the BCII Act which were the subject of criticism by the ILO are reproduced in the current Bill. It is clear, therefore, that without significant amendment, passage of this Bill will take Australia significantly further from compliance with Australia's obligations under international law. The ACTU submits that this is a matter that the Government, and the Australian Parliament, should consider of significant import.

39. Finally, with respect to Australia's international obligations, the ACTU strongly objects to the proposition in the Statement of Compatibility with Human Rights (attached to the Explanatory Memorandum) to the effect that the Bill is compatible with the human rights and freedoms recognised or declared in international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

40. As the Statement of Compatibility recognises, the statute has far-ranging and serious implications on human rights. This includes, but is not limited to, implications for rights to freedom of association under article 22 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 8 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), as well as the right to peaceful assembly in article 21 of the ICCPR and rights to freedom of expression under article 19(2) of the ICCPR. Further,

²⁷ ILO: Committee on Freedom of Association, *Case No 2326 (Australia)*: Report No. 338, November 2005; Report No. 342, June 2006; Report No. 348, November 2007; and Report No 353, March 2009; i ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 95th Session, Geneva, 2006; p. 43; ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 96th Session, Geneva, 2007, p. 43 and p.47; ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 97th Session, Geneva, 2008, pp.47-48 and p.54; ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 98th Session, Geneva, 2009, pp. 54-55 and p. 58; ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 99th Session, Geneva, 2010, p.58 and p. 60; and ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 101st Session, Geneva, 2012, pp. 60-61 and p. 63.

²⁸ ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 100th Session, Geneva, 2011, p. 500; and ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 99th Session, Geneva, 2010, p. 490.

while omitted from the Statement of Compatibility's summary of the obligations in article 8(1) of the ICESCR,²⁹ it is also important to note that this sub-article of the ICESCR explicitly protects the right to strike.

41. We note the failure of the Compatibility statement, in the context of its discussion of the implications of the Bill for freedom of association as protected in article 22 of the ICCPR and article 8 of the ICESCR, to identify or engage with comments made by the Committee on Economic, Social and Cultural Rights (the UN Committee of experts tasked with reviewing UN member-states compliance with the ICESCR) specifically in relation to the BCII Act. In its Concluding Observations on Australia's Fourth Periodic Report under the ICESCR in 2009, the Committee stated:

'The Committee is concerned that provisions of the Building and Construction Industry Improvement Act 2005 seriously affect freedom of association of building and constructions workers, by imposing significant penalties for industrial actions, including six months of incarceration. The Committee is also concerned that before workers can lawfully take industrial action at least 50 per cent of employees must vote in a secret ballot and a majority must vote in favour of taking the industrial action which unduly restricts the right to strike, as laid down in article 8 of the Covenant and ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise.(art. 8).

The Committee recommends that the State party continue its efforts to improve the realization of workers' rights under the Covenant. It should remove, in law and in practice, obstacles and restrictions to the right to strike, which are inconsistent with the provisions of article 8 of the Covenant and ILO Convention No. 87. In particular, the Committee recommends that the State party abrogate the provisions of the Building and Construction Industry Improvement Act 2005 that imposes penalties, including six months of incarceration, for industrial action ³⁰ [emphasis in original].

42. In light of this Observation, as well as the consistent and unequivocal criticism of the former BCII Act by the ILO supervisory bodies (outlined above), we find the proposition in the Statement of Compatibility with Human Rights that 'the Bill will enhance workers' right to freedom of association' to be highly objectionable.³¹
43. Adding to the weight of international institutions criticisms of the ABCC regime is the prospect of an issue being raised by one of our trading partners under either the *Korea-*

²⁹ Statement of Compatibility with Human Rights, p. 51.

³⁰ Committee on Economic, Social and Cultural Rights, Forty-Second Session, Geneva, 4 – 22 May 2009 at [19].

³¹ Statement of Compatibility with Human Rights, p. 52.

Australia Free Trade Agreement or the *Trans Pacific Partnership Agreement*. Both agreements contain some commitment in relation to labour standards.

44. Under Chapter 17 of the *Korea-Australia Free Trade Agreement*, Australia:

- a. Affirms its obligations as a member of the International Labour Organization. This includes obligations to implement and comply with conventions that Australia has ratified³²;
- b. Affirms its commitments under the *Declaration on Fundamental Principles and Rights at Work and its Follow-up*. This includes a recognition that all ILO members (including Australia) have an obligation to respect, promote and realise, in good faith in accordance with the ILO constitution, the principles concerning fundamental rights which are the subject of ILO conventions; and
- c. Specifically commits to endeavour to adopt or maintain in its laws, regulations, policies and practices, the fundamental principles of freedom of association and the effective recognition of the right to collective bargaining.

45. We make no assertion that these provisions of the *Korea-Australia Free Trade Agreement* are enforceable under the Dispute Resolution provisions of the Agreement – it is clear the Agreement only requires consultation between the parties in various forms in an attempt to resolve their differences. However, in the event Australia's clear non-compliance with its commitments was raised by Korea, we suspect that a response that amounted to the private international law equivalent of a distinction between "core" and "non-core" promises would be considered neither diplomatic nor satisfactory.

46. The situation under the *Trans Pacific Partnership Agreement* is somewhat different. The substantive obligations under Chapter 19 of that agreement are similar to those above, in that, Australia:

- a. Affirms its obligations as a member of the ILO; and
- b. Specifically commits to adopt and maintain in its statutes and regulations and practices, the rights of freedom of association and the effective recognition of the right to collective bargaining as stated in the *Declaration on Fundamental Principles and Rights at Work and its Follow-up*.

³² ILO Constitution, Article 5(d)

However, unlike the case with the *Korea-Australia Free Trade Agreement* these commitments *are* enforceable through the dispute resolution provisions of the agreement³³.

47. Should the Bill be passed, we will once again raise the matter of Australia's non-compliance with its ILO obligations with the appropriate authorities.

³³ Chapter 19, Article 19.15(12), Chapter 28.

ADDRESS

ACTU
365 Queen Street
Melbourne VIC 3000

PHONE

1300 486 466

WEB

actu.org.au

D No: 22/2016

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October 2025

OPPORTUNITIES TO IMPROVE PRODUCTIVITY OF THE CONSTRUCTION INDUSTRY

Final Report



16.0 **Apprenticeships and training pathways**

16.1 Apprenticeships and training pathways

How do apprentice and training policies impact productivity?

Fit-for-purpose training is essential for productivity. If the training system fails to properly skill prospective workers, does not deliver the right skills, or is inefficient in some other way, there is a greater risk of construction delays, building defects and idle resources. Further, when training is commenced but not completed, there are significant costs in terms of forgone time as well as industry and government expenditure (PC 2020b, p. 26).

The training and apprenticeship system has been subject to many reviews in recent years, and the purpose of this section is not to summarise all these various contributions. Rather, the objective is to identify areas where there are challenges specific to the Queensland construction industry with implications for productivity.

Queensland's apprenticeship and training system

Apprenticeships are structured training arrangements that combine on-the-job work experience with off-the-job training at an approved training provider. Traineeships are typically shorter in duration (one to two years) but still involve a combination of on-the-job work experience and off-the-job training (Naidu & Frazer 2024, p. 55). Off-the-job training is offered by a range of providers, predominantly Technical and Further Education (TAFE) and registered training organisations (RTOs), which consist of private and industry not-for-profit operating models. The university sector also supports skills requirements in the construction industry, but it accounts for only a small share of overall VET delivery (PC 2020b, p. 5).

This section focuses on the trades-related skills development system rather than the university system given the apprenticeship and VET systems' greater contribution to construction-related training, the limited policy leverage of state governments over the university system, and the emphasis placed on the apprenticeship and VET system by stakeholders.

However, the role of the university sector in the functioning of the construction industry is significant. Universities train important sections of the construction workforce, such as engineers, surveyors and other professionals – shortages and deficiencies in these occupations can impede the operation of the broader construction industry.

Apprentices and trainees can be placed with a single employer or be employed by a group training organisation (GTO). GTOs place apprentices and trainees with one or more host employers, who are responsible for on-the-job training and work experience, while GTOs are responsible for organising off-the-job training, handling recruitment, arranging job rotations and managing payroll. Such arrangements are typically beneficial for small and medium-sized employers, who may not have the capacity to provide these support services.

Responsibility for training and apprenticeship policy in Queensland is shared between the Australian and Queensland governments. In Queensland, the *Further Education and Training Act 2014* regulates RTOs and GTOs, provides for training contracts between apprentices and employers, and determines which qualifications can be completed as apprenticeships and traineeships. RTOs are also regulated by the Australian Skills Quality Authority.

In its 2020 review of the National Agreement for Skills and Workforce Development, the Australian Productivity Commission did not find 'evidence of a VET system in crisis' (PC 2020b, p. 2). However, it did find there were opportunities to lift participation and improve training quality. Changes to the design of VET qualifications were subsequently agreed by Australian Skills Ministers (Box 16.1). The Australian Productivity Commission also recommended that reform efforts should be focused on improving completion rates through more screening and matching of prospective apprentices, and by aligning the timing of employer incentives with periods where the risk of cancellation is highest (PC 2020b, p. 28). Although the Australian Productivity Commission's commentary was at the national level and not confined to the building and construction industry, stakeholders have raised similar issues in their submissions to this inquiry.

Box 16.1 Recent training system reforms

In December 2024, Australian Skills Ministers endorsed a new approach to vocational education and training (VET) qualifications design aimed at improving quality and reducing complexity (DEWR 2024a). While made in the context of the entire training system, the reforms have potential implications for training and development in the construction industry:

- transitioning from the traditional 'unit-first' approach to a 'qualification-first' approach, whereby the emphasis is on designing a coherent portfolio of knowledge and skills, rather than packaging competency units that attempt to reflect all functions and tasks
- allowing qualification developers to better describe job functions and tasks or knowledge and skills outcomes to promote adaptability
- consistently embedding foundation skills (language, literacy, numeracy and digital literacy - LLND) as a holistic outcome of a qualification, rather than as a narrow component of every individual unit of competency
- strengthening principles to underpin VET qualifications development, including drawing on data and evidence, removing duplication and unnecessary specification to enable flexible and high-quality delivery, and drawing on broad industry and educator expertise when developing qualifications.

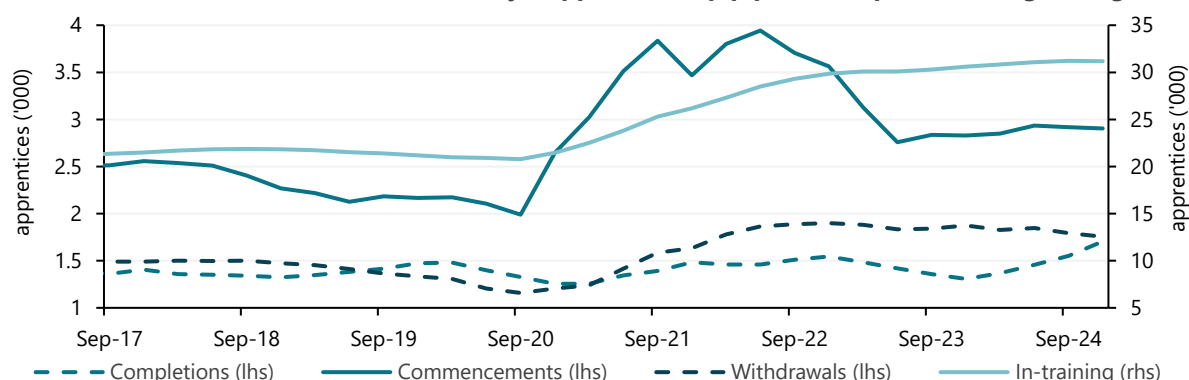
The Australian Productivity Commission (2020b, p. 218) found that employer satisfaction with the VET system is generally high, but has been trending downwards over the last decade. The leading causes of dissatisfaction arose from programs that did not teach relevant skills or were not sufficiently focused on practical skills. A recent national survey of 999 apprentices and trainees in construction trades found that:

- 96 per cent were employed after completing their training, with 93 per cent improving their employment status
- 94 per cent reported they were satisfied with skills learnt on-the-job
- 89 per cent were satisfied with off-the-job training (NCVER 2025a).

Recent trends in apprenticeships in Queensland

As of December 2024, there were approximately 50 per cent more construction apprentices in-training in Queensland compared to four years prior (Figure 16.1). This growth has been driven by Covid-era initiatives such as the Boosting Apprenticeship Commencements (BAC) and Completing Apprenticeship Commencements (CAC) schemes (DEWR 2023b),⁵⁹ which led to 80 per cent more commencements during their operation compared to the two-year period prior to their introduction. While commencements have fallen since the BAC and CAC schemes closed, commencements were still 40 per cent higher than in the two years prior to their introduction.

⁵⁹ The Boosting Apprenticeship Commencements and Completing Apprenticeship Commencements wage subsidy schemes opened on 5 October 2020 and closed on 30 June 2022.

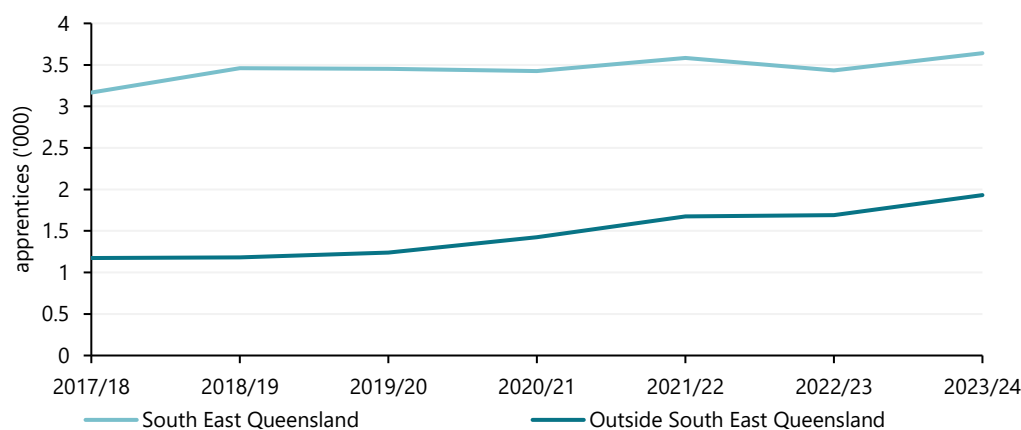
Figure 16.1 Queensland construction industry's apprenticeship pipeline, 4-quarter rolling average

Source: QPC based on CSQ 2025a.

Although the number of apprentices in-training has risen since the BAC and CAC schemes were introduced, withdrawals have outpaced completions since 2021. However, as apprenticeships typically take up to four years to complete, it is anticipated that the number of commencements throughout 2021 and 2022 should lead to higher completions throughout 2025 and 2026.

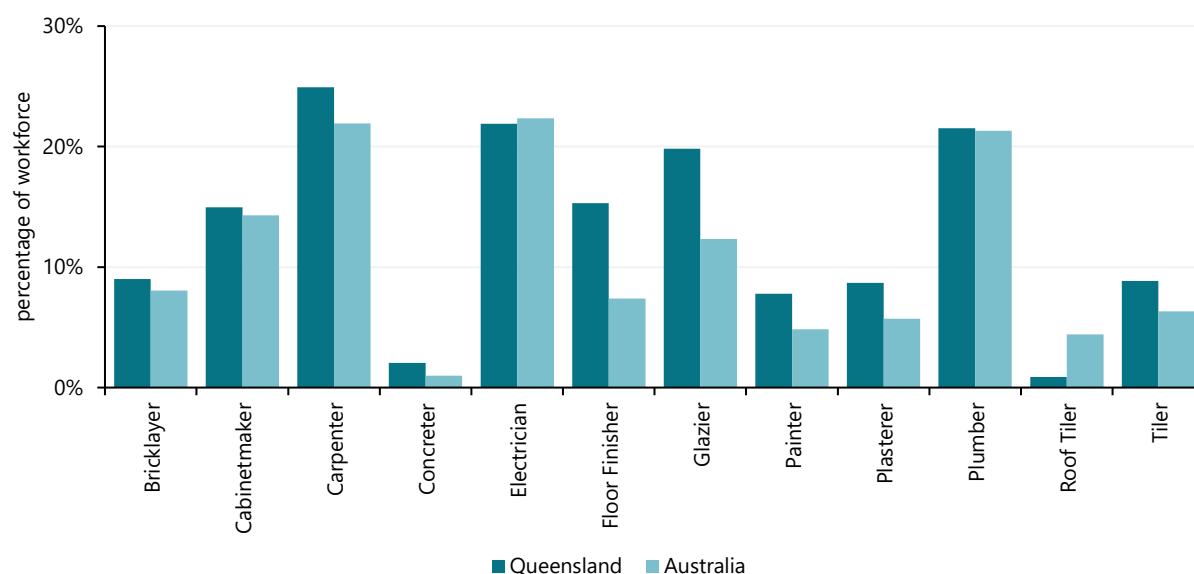
Apprenticeship numbers may also be influenced by the currently suspended Best Practice Industry Conditions (BPICs) and the Queensland Government Building and Construction Training Policy. However, as discussed in Part A, it is unclear how effective and efficient those policies have been in increasing net apprenticeship numbers.

Figure 16.2 compares completions for construction apprenticeships in and outside South East Queensland. Completions outside South East Queensland have almost doubled since 2017/18, with the split of completions similar to the population distribution.

Figure 16.2 Construction apprenticeship completions, in and outside South East Queensland

Source: QPC based on data provided by the Department of Trade, Employment and Training.

With the exception of roof tilers, the share of apprentices in Queensland as a proportion of the total workforce is either close to or above the national average for a range of construction trades (Figure 16.3).

Figure 16.3 Apprentices as a proportion of the total workforce by trade, Queensland and Australia, 2024

Source: QPC based on *Jobs and Skills Australia 2025*; *NCVER 2025b*.

Taken together, recent trends in apprenticeships appear broadly favourable, both in terms of the number of apprentices and as a proportion of the building and construction workforce. However, the escalating demand for construction work will place pressure on labour supply.

The Australian Productivity Commission (2025b, p. 38) has found that the age distribution of dwelling construction workers is currently more favourable than for the economy as a whole, but there is still the potential for pressures to emerge in specific occupations. The Housing Industry Association (2024a, p. 12) found that the occupations most susceptible to an ageing workforce were plasterers, bricklayers, and floor finishers, and to a lesser extent glaziers, tilers, cabinetmakers, and painters, due to the decline in the number of workers in these occupations aged under 25. In the white-collar professional occupations, the Australian Institute of Building Surveyors (sub. 49, p. 9) estimated that up to one third of building surveyors are also likely to reach retirement age within the next 10 years. On the other hand, carpenters, electricians, and plumbers were considered among the least susceptible to age-related exits, as growth had been observed in both the overall size of the workforce as well as the size of the workforce aged under 25.

Construction Skills Queensland (CSQ) (2025d) projects that Queensland will face an average aggregate shortfall of more than 18,000 construction workers per year over the next eight years, peaking at 50,000 in 2026-27. It is likely that shortages will not be spread evenly, with certain occupations likely to experience more intense shortages. CSQ forecasts demand for construction workers in the building industry over this period to be focused on carpenters and joiners, building and plumbing labourers, painting trades workers, plumbers, electricians, concreters, and plasterers.

Queensland faces a challenge to provide a coordinated response that can meet the immediate and growing demand for construction work. In particular, more will be required of the apprenticeship system if labour shortages, especially in high demand occupations, are not to become an increasing drag on construction output and productivity.

Issues with the apprenticeship and training system

The Australian Productivity Commission has presented a decision-making framework for apprentices and employers for deciding whether to undertake an apprenticeship or take on an apprentice (Table 16.1). A diverse range of considerations factor into these decisions.

Table 16.1 A decision-making framework for apprentices and employers

	Benefits	Costs
Apprentice	• Desire to work in occupation • Improved skills • Training wages • Future wages • Government incentives	• Training costs incurred by the apprentice • Opportunity cost of alternative employment • Lack of career information • Negative community and individual attitudes • Rigid structure or length of training and work • Risk of problems with employer
Employer	• Productive contribution of apprentice • Wage discount • Giving back to the community • Government incentives	• Training wages • Supervision costs • Training costs incurred by the employer • Group training fees • Administration costs • Extra maintenance due to apprentice errors • Risk of non-completion • Risk of poaching

Source: PC 2020b, p. 336.

During consultations and in submissions, stakeholders raised many issues with, and possible improvements to, the apprenticeship and training system as it operates in Queensland. These issues generally fit across several broad themes:

- information barriers faced by prospective apprentices and workers
- deficits in and underutilisation of the existing training system
- financial barriers facing businesses and workers.

These issues and proposals merit a deeper investigation and evaluation than this inquiry can provide. Many require a rigorous evaluation by those with expertise and experience in the field, while some issues strike at underlying problems with the VET system, and the constraints in which it operates. That is, it is a wide-ranging system, involving government agencies, many industries, individual businesses, prospective workers and public and private employees. It interacts with school education and labour market regulatory regimes and exists within a federal architecture with responsibilities shared across jurisdictions.

With the Commission's inquiry focusing on productivity in the construction industry, areas have been identified for improvement based on stakeholder feedback.

Prospective workers encounter information barriers

Incomplete or conflicting information for prospective trainees and apprentices can be an impediment to making sound decisions on their training and ultimately to construction productivity. Information barriers can stem from a general lack of awareness about what it is like to work in the construction industry, future industry prospects, and the precise training pathways that will best equip them to succeed in the industry. The Australian Productivity Commission noted the mismatch of skills training was in part driven by gaps in information and career advice, which is often fragmented or duplicated across multiple websites, leading to suboptimal decision making about training pathways (PC 2020b, p. 12).

Despite recent increases in apprenticeship commencements, stakeholders emphasised that attracting school leavers to apprenticeships continues to be an ongoing challenge (Plumbing Industry Climate Action Centre, sub. 56, p. 7; NECA, sub. 27, p. 7; MBQ, sub. 43, p. 26), with the low participation of women being an example (Box 16.2).

Box 16.2 Female participation in the construction apprenticeship system

In 2022, the Queensland Training Ombudsman (2022, p. 2) completed a review of support provided to Queensland apprentices and trainees, with a focus on female apprentices in male dominated occupations. While the review found the system was not in need of major systemic change, it did recommend reforms to better prepare and support employers, apprentices and trainees throughout training contracts in order to narrow the gap in completion rates between male and female apprentices.

The review found that females accounted for around 4 per cent of construction apprenticeship commencements and were less likely than males to complete their apprenticeship. On the other hand, females were more likely than males to complete a construction traineeship, despite representing only 11 per cent of total construction traineeships.

These trends in apprenticeships and traineeships are also reflected in longer-term career outcomes. There were 46,000 females working in the Queensland construction industry in 2024, a 16 per cent increase from 2023 (CSQ 2024a, p. 9). Despite this, females account for only 17 per cent of the total construction workforce, and only 5 per cent of construction trades.

The 2024 Strategic Review of the Australian Apprenticeship Incentive System found that females were more likely than males to drop out of their apprenticeship due to poor working conditions and were more likely to observe or experience bullying (DEWR 2024c, p. 83). Females may also be deterred from entering trades due to a lack of recognition of their prior experience.

Several stakeholders noted that low female participation remains a challenge for the construction industry (MBQ, sub. 43, p. 27; Queensland Unions, sub. 59, p. 4). Proposed solutions included:

- continuing to fund programs for women in construction to new entrants
- increasing awareness of pathways, occupations and careers
- providing training and support to female-led businesses
- addressing unfavourable working practices that may exclude women (for example, long or inflexible working hours and other conditions of employment)
- addressing cultural issues such as bullying and harassment through education and hotlines.

BuildSkills Australia's Housing Workforce Capacity Study (2025a) found that Queensland's residential construction workforce could add 10,462 workers by 2029 if female participation increased to levels observed in the manufacturing sector.

The Department of Trade, Employment and Training (sub. 17, p. 2) is currently delivering the \$4.6 million Women in Trades Mentoring Program, with \$1 million allocated to support female apprentices in the construction industry. Master Builders Queensland and the Housing Industry Association are delivering the construction portion of the program. Meanwhile, CSQ (2024a, p. 5) is continuing to advocate for the implementation of a Queensland Women in Construction Strategy.

Pre-apprenticeship programs

Pre-apprenticeship programs have been identified as an effective strategy for providing prospective candidates with some early insights into the industry before committing to a longer-term pathway, and especially so for underrepresented cohorts. In Queensland, initiatives such as CSQ's partnership with Year13 seek to counter these problems by providing tools for high school students to investigate their compatibility with the choice of careers in construction (CSQ 2024b, p. 19).

Strategies to reduce information barriers can be both formal and informal in their design. Stakeholders recommended the introduction of readiness assessments for prospective apprentices to ensure that candidates possess sufficient motivation, literacy and numeracy skills, practical dexterity, and understanding of the trade environment to commence and complete an apprenticeship (NECA, sub. 27, p. 10). This could help to counter high attrition rates and avoid wasted time and resources for both industry and candidates, increasing employer confidence when engaging new apprentices. This process could also interact with mentoring strategies by identifying individual learning or support needs at the outset, enabling targeted intervention and tailored support plans.

Measures to retain apprentices

Information barriers are not confined to the initial decision to enter training for the construction labour market. Apprentices and trainees also benefit from support and access to information during their placement to ensure they have a clear view of their progress and remain in touch with industry networks.

Stakeholders pointed to evidence showing that structured, industry-specific mentoring is among the most effective interventions to increase retention, completion, and overall apprentice wellbeing, especially for mature-age apprentices, women, First Nations people, and other priority cohorts (HIA, sub. 32, p. 23; NECA, sub. 27, p. 10). An effective mentoring system consists of regular scheduled check-ins, clear escalation pathways for workplace or personal issues, and access to trained mentors with direct experience in the given trade.

Several stakeholders emphasised the effectiveness of GTOs for improving recruitment, retention, and completion rates for apprentices in the trades. GTOs allow apprentices and trainees to spend their entire apprenticeship or traineeship with a single host employer or to rotate across several host employers. This can increase flexibility for employers who may not be in a position to support an apprentice or trainee for the full term of their apprenticeship or traineeship.

Small businesses may not have the resources to provide apprentices with comprehensive mentoring and support. GTOs can address this gap by ensuring that apprentices are matched with host employers based on their skills and potential for success (NECA, sub. 27, p. 8). GTOs can also bolster job security by helping to smooth boom-bust workforce cycles. If a business faces financial difficulties or ceases operations, GTOs can intervene to secure alternative placements for the business's apprentices (Plumbing Industry Climate Action Centre, sub. 56, p. 6).

Stakeholder submissions have highlighted the potential for significant productivity gains from engaging cohorts that are currently underrepresented in the construction industry. Although stakeholders have pointed to successful pilots and other localised projects, improving productivity at an industry level will require solutions to be deployed at scale across wide geographical areas while retaining the personalisation that makes mentoring and pre-apprenticeship support mechanisms effective. Policies designed to reduce information barriers for employees and employers may not require substantial financial resources but do need to be coordinated to avoid duplication and confusion about potential pathways and opportunities. High quality evaluations of the efficacy of these programs will be required to inform decisions on their adoption.

Queensland's training system may lack and underutilise capacity

The off-the-job training opportunities offered by RTOs and TAFEs are an important complement to on-the-job work experience for apprentices and trainees. However, their effectiveness in supporting construction productivity is dependent on attracting a pipeline of qualified educators and ensuring that capacity is matched to demand across the state. Jobs and Skills Australia reported shortages of VET teachers in every Australian jurisdiction, with shortages particularly acute for teachers, trainers and assessors in building and engineering trades (Jobs and Skills Australia 2024b, p. 110).

Several stakeholders have drawn attention to challenges with RTOs and TAFEs attracting and retaining qualified trainers and assessors in specialised fields (Plumbing Industry Climate Action Centre, sub. 56, p. 8; Australian Glass and Window Association, sub. IR19, p. 9; Master Electricians Australia, sub. IR48, p. 43). For example, the Fire Protection Association Australia (sub. 23, p. 1) noted that the Certificate IV in Fire Systems Compliance is only offered in full by two RTOs in Queensland, resulting in only 45 course completions across 2022 and 2023.

In order to remain fit-for-purpose, training pathways must stay up-to-date with the evolving requirements of employers and the building and construction industry generally. Stakeholders raised concerns that some qualifications are not sufficiently responsive and can lag behind current industry practices, technological advancements, and the evolving complexity of fire safety, electrical, and mechanical systems (AMCA, NECA and NFIA, sub. 47, p. 4). Not only does this necessitate additional training by employers to address these shortfalls, but up-to-date training in modern construction practices is essential to reduce the risk of building defects (Australian Sustainable Built Environment Council, sub. 58, p. 2).

Some stakeholders also suggested that existing capacity is not being used as effectively as it could be:

- It was reported that several public TAFE facilities and other government-owned buildings in Brisbane and regional centres are considerably underutilised, with the potential for Industry RTOs to use these facilities to deliver qualifications (NECA, sub. 27, p. 9).
- Some stakeholders also raised concerns that available RTO capacity was not always being utilised productively. For example, electricians could previously complete Authorised Person (AP) requirements for electrical work as part of onboarding, but must now complete a dedicated RTO course (MEA, sub. 37, pp. 7-8). Not only does this use up RTO capacity, but limited class intake leads to delays in electricians being able to complete electrical work.

Measures to increase training capacity

Stakeholders suggested measures to increase training capacity, including:

- NECA (sub. 27, p. 9) recommended the adoption of 'Trade to Trainer' programs, whereby Industry RTOs deliver training to assist experienced workers seeking less labour-intensive work, or career or lifestyle changes, to transition into technical training roles.
- NECA (sub. 27, p. 9) also noted its ongoing trial of a 'pop up' RTO campus model, utilising a community hall as a trade school facility on the NSW South Coast, where it delivers a Certificate III in Electrotechnology - Electrician two days a week. This has contributed to the employment of nearly 40 new electrical apprentices in fewer than 12 months. NECA also pointed to the success of a block release training model targeted at organisations with fly-in-fly-out models.
- Stockland (sub. 29, p. 3) is investigating opportunities to collaborate with the TAFE sector to create local Skills Exchanges to build a skilled workforce through its own large-scale construction sites.
- Master Electricians Australia (sub. 37, pp. 21-22 and sub. IR48, p. 44) suggested a greater role for technology in delivering training. MEA considered the continued requirement for face-to-face training is a constraint to the productive use of limited qualified trainers and limited physical training facilities. Virtual reality (VR) technology could be adopted (possibly starting with non-accredited training) to deliver training remotely, with the ability to validate progress and completion.
- The Australian Institute of Architects (sub. IR21, p. 15) noted that architecture students can only complete accredited training in Brisbane, which reduces the likelihood that graduates remain in regional centres.

Stakeholders also told us during the consultation phase that recognition of prior learning remains an obstacle for mature apprentices, especially those who have served in the defence force. This may suggest that some prospective construction workers are being forced to acquire additional qualifications with limited incremental benefits to their skill set, which is likely to place additional pressure on an already constrained training system.

The Australian Productivity Commission (2023c, 2025b) has supported consideration of microcredentials in its recent reports, arguing that microcredentials provide an opportunity for workers to quickly obtain specific new skills, and can therefore help address acute skill shortages. They are generally less costly than more formal education, and more likely to be undertaken by the existing workforce, with employers also being more likely to fund them. The Australian Glass and Window Association (sub. IR19, p. 9) noted that microcredentialing can facilitate knowledge transfer, lifelong learning, and cross-sector collaboration.

Stakeholder consultation has highlighted various training offerings, each with strengths and drawbacks as currently adopted in the construction industry. Establishing which models are likely to be most effective in addressing training constraints and how these should be funded is beyond the scope of this inquiry. Importantly, construction is not the only industry where training systems are under pressure. As such, it is relevant to bear in mind that resources deployed for the construction industry will need to be diverted from other productive uses.

Financial barriers may constrain uptake of apprenticeships and training

Training for an occupation should be considered an investment with all parties seeking to maximise the return on the resources they have invested under uncertain prospects.

From the perspective of labour market entrants, there are financial costs to efficiently acquire the necessary skills and subsequently make themselves available for work in the industry. Financial costs for prospective employees include not only the direct cost of training, but potentially also the cost of moving, the cost of obtaining relevant equipment and the loss of income from entering the training system for those in work.

For employers who invest in training by taking on an apprentice, there is a risk the apprentice fails to complete their placement, leading to wasted resources. Even if a placement is completed, employers may miss out on the benefits of the time and resources they invest in an apprentice if they move to a competing firm. For example, in the electrical sector, Master Electricians Australia (sub. 37, pp. 19-21) reported that small businesses are discouraged from taking on apprentices because they often invest substantial time and resources but then lose them to larger firms who are able to offer higher wages in the later years of an apprenticeship. There may be broader benefits to the worker and the industry from the small business's investment, but these do not fully accrue to the small business itself.

Construction employers face competing demands for the allocation of scarce resources. For instance, time and funds spent dedicated to apprentices and training offerings could be spent on other employees, or on other factors of production (for example, capital equipment). Employers and students in regional areas also face higher costs when students undertake studies at distant university and training campuses, such as accommodation costs and the unavailability of students for work.

Master Plumbers' Association Queensland (sub. 62, pp. 2-3) for example, estimates the 'true' cost of training a single apprentice as exceeding \$250,000, with only 2 per cent of this figure covered by government financial incentives.

Stakeholders also pointed to financial barriers to entry for mature apprentices (HIA, sub. 32, pp. 22-23; AMCA, NECA and NFIA, sub. 47, p. 6). NECA (sub. 27, p. 7) reported that people over the age of 21 can comprise up to 50 per cent of applicants, but constitute less than 5 per cent of NECA Apprenticeships' annual intake. Adult apprentices are more expensive to employ and, hence, more difficult to justify, particularly for small businesses. This wage barrier significantly disadvantages women, who are more likely to pursue a trade career later in life.

Use of financial incentives and subsidies

Incentive systems have been one of the strategies used to support training and apprenticeships. The purpose of these incentives is to assist employers when the resources involved with engaging, supervising and training apprentices are not commensurate with the productivity generated by these employees in the early stages of their career (MBQ, sub. 43, p. 27; DEWR 2024c, p. 53). In the absence of such initiatives, workplaces may not be sufficiently incentivised to engage trainees and apprentices if there is a risk that apprentices do not complete their apprenticeship or move to another workplace.

Common policy instruments to address financial barriers typically include a range of incentive payments to employees and employers, wage and other subsidies, and tax breaks. A range of incentive schemes already exist at the state and Australian government levels (Box 16.3).

Box 16.3 Government financial incentive schemes

As of 1 July 2024, the Australian Apprenticeships Incentive System payments are structured as follows:

- Employers of apprentices in priority occupations will be eligible to claim up to \$5,000 over 2 instalments (\$2,000 at 6 months and \$3,000 at 12 months) using the Priority Hiring Incentive.
- Apprentices in priority occupations can also receive up to \$5,000 in 4 instalments over 24 months using the Australian Apprentice Training Support Payment (DEWR 2024c, p. 53).

Queensland Government incentives and subsidies for apprenticeships and trainees include the following:

- Contributions to the cost of training for priority apprenticeships and traineeships paid directly to eligible Skills Assure Suppliers (Queensland Government 2025d).
- Travel and accommodation allowances paid directly to apprentices and trainees (DTET 2025).
- Discounted workers' compensation insurance premiums for apprentices (WorkCover Queensland 2023).
- 50 per cent rebate on payroll taxes for apprentice and trainee wages (QRO 2025a).

Construction Skills Queensland (CSQ) is an independent, not-for-profit, industry-funded body which supports workers, apprentices, trainees, employers, and career seekers in the building and construction industry. CSQ provides this support through:

- subsidising training for tradies, workers and small and large businesses to help them build their careers and capability
- promoting careers in construction and supporting pathways into the industry
- working with industry partners to help keep talented people in the industry (CSQ 2025c).

CSQ administers the Building and Construction Industry Training Fund, which is funded by a statutory training levy collected by the Queensland Government's QLeave. The training levy is charged on all building and construction work performed in Queensland with a cost of \$150,000 or more (excluding GST) at a rate of 0.1 per cent of the cost of the project. In 2024-25, CSQ received \$54.1 million in training levies and provided \$40.3 million in training support (CSQ 2025b).

Better targeting of financial incentives and subsidies

It is difficult to evaluate the adequacy of these payments and how they contribute to construction productivity based on the information available to the Commission. In its 2020 study, the Australian Productivity Commission's view was that employer incentives are unlikely to provide a strong return on investment, often paying businesses for training that would have occurred anyway, and being likely to change the behaviour of only a few. Instead, they could be better targeted or redirected to other mechanisms that provide a greater return on investment (PC 2020b, pp. 27-28).

The Strategic Review of the Australian Apprenticeship Incentive System made the following recommendations with implications for productivity (DEWR 2024c):

- direct employer incentives to small and medium employers engaging apprentices in priority occupations, by removing employer incentives for large employers. This recommendation was based on evidence that large businesses are more likely to hire apprentices based on business needs rather than available government incentives
- develop ways to recognise previous experience and fast-track apprenticeships to make them more appealing to those entering an apprenticeship later in life
- develop means for apprentices to demonstrate the transferability of the skills they develop in their training between different employers and occupations.

The review found that financial costs are not the only factors limiting uptake by small and medium-sized businesses (SMEs). SMEs, especially those who have not taken on an apprentice before, often need additional support around providing apprentices with training and navigating the apprenticeship system (DEWR 2024c, p. 67). Low training wages were also found to deter people from not only taking up an apprenticeship but also impacting on their ability to afford to follow it through to completion. Master Builders Australia (2024b, p. 34) has recommended adapting the Vocational Education and Training award to allow for more flexible patterns of work and part-time apprenticeships.

MEA (sub. 37, p. 19) recommended the Queensland Government provide targeted financial support to SMEs for training hours spent by a qualified electrical worker supervising an apprentice during the first and second years when greater direct supervision is required. This funding would help offset the cost of lost productivity from qualified electrical workers who dedicate time to apprentice supervision and could encourage more SMEs to take on first year apprentices despite the risk of losing them as they become more productive.

Similarly, in the building industry, Master Builders Queensland (sub. 43, p. 27) has proposed increased apprentice wage subsidies for businesses to incentivise commencements and offset high supervisory costs in the first year, along with financial incentives for apprentices upon completion of their first year (when apprentices are most likely to drop out), and upon completion of the full apprenticeship.

NECA (sub. 27, p. 7) noted the success of the Western Australia Construction Training Fund (CTF), which provided GTOs with 100 per cent of the wage gap allowing adult apprentices to be engaged at the same rate as junior apprentices. This resulted in a doubling of female apprentices, suggesting that subsidies may be effective for increasing mature entrants to apprenticeships.

Investment in training is more likely to be optimised if those receiving the benefits of that investment are also the ones making that investment. Underinvestment in training can occur when those required to make the investment are not accruing the commensurate benefits of that investment. Conversely, over investment can occur if those receiving the benefits of training are deciding on the level of investment but not adequately contributing to it.

As the benefits of training can be widely diffused among prospective and existing workers, individual businesses, the broader industry and the general community, contributions to training could come from a number of sources such as tuition fees, the employing businesses, general taxation and industry levies. While industry levies imposed by government can suffer from inefficiencies, they can be justified when certain conditions are met. For example, when they fund public goods or price externalities which are concentrated in a particular sector, and if the sector could suffer from 'free riding' if the sector attempted to collect the levy itself (PC 2023d, pp. 17–21). The level and quality of training can be affected by how decisions for investment training are made and funding contributions are shared and managed.

Governments already provide a range of incentive payments and other forms of support to apprentices and their employers. Nevertheless, stakeholders have argued there is a need for further industry support. Given the productivity lens of this inquiry, financial subsidies are generally not a preferred option since they raise the risk of distorting market outcomes and resulting in other unintended consequences. However, to the extent financial support for industry is to be provided, payments should reflect the public/private split of benefits from training and be structured and targeted such that additional apprentices will commence and complete placements relative to a scenario without the incentive schemes.

Just as under-provision of support can create inefficiencies, over investment can also distort efficient market outcomes by diverting funds from more productive uses.

A way forward on apprenticeship and training reform

The issues raised in stakeholder submissions indicate there may be opportunities to improve the apprenticeship and training system. Considerations include:

- CSQ's analysis suggests that skill shortages are an immediate issue and will increase in the next several years. Improvements that have a positive impact on skills acquisition in the short to medium term will be responding in the same timeframe of the commensurate need. Issues relating to more deep-seated problems in the apprenticeship and training system should be addressed, but in some cases that may only be possible in the longer term and through a more comprehensive process.
- Immediate attention should be given to making better use of existing training capacity and better targeting of current government financial assistance to increase their effectiveness and efficiency. Increases in funding will require a rigorous business case, with consideration of other government priorities and the risk of creating market distortions and other unintended consequences.
- The Queensland apprenticeship and training system does not represent the only mechanism by which construction skills can be developed. Industry may consider working outside the existing formal system, or using its expertise to improve or complement training offerings, as Stockland appears to be doing in relation to the creation of local Skills Exchanges.

There have been many reviews of the VET system. In the current context, what is required is a reform process that:

- coordinates efforts across government and industry – skill shortages may be more concentrated in specific occupational areas, but specific skill shortages affect everyone given the interlinked nature of the industry
- should be inclusive of the industry, to draw on its experience and give it the confidence that possible labour capacity constraints are being effectively addressed and therefore the confidence it requires to invest
- focuses on what the Queensland Government and construction industry can do in the short and medium term, while recognising any need for, and preparing for, longer term reform.

This will likely require a process of collaboration between the construction industry (including peak bodies, businesses and workers) and relevant government bodies to identify problems, reform opportunities and priorities. Such a process is beyond the capacity of this inquiry to undertake. The Department of Trade, Employment and Training (sub. 17, p. 4) is already establishing a collaborative process (Strategic Dialogue Series) with the construction industry that could serve as a possible model or as support for the collaborative process.

Support for the apprenticeship pipeline

If more immediate action to support the apprenticeship pipeline is deemed necessary — see Recommendation 14 on the removal of the Building and Construction Training Policy — any additional support for the attraction and retention of apprentices would be best delivered through better targeting of existing industry and government schemes, rather than expanding or developing new schemes.

Particular consideration should be given to leveraging the Building and Construction Industry Training Fund (BCITF), which is administered by CSQ and funded by industry training levies.

If this approach of leveraging the BCITF is adopted, the Department of Trade, Employment and Training should be tasked to work with Queensland Treasury and CSQ to determine the policy settings so the BCITF can most effectively and efficiently contribute to sustaining an appropriate pipeline of apprentices.

When reviewing the policy settings, consideration should be given to:

- approaches for determining the need for apprentices and the skills required for a future workforce
- efficient mechanisms for incentivising industry to take up apprentices
- options for broadening the candidate pool for apprenticeships
- the appropriateness of the existing training levy rate and mechanisms for reviewing the training levies imposed on industry.

16.2 Recommendations

Recommendation 51 TRAINING AND APPRENTICESHIPS

The Queensland Government should establish a collaborative process with industry and relevant government organisations and agencies to identify problems, reform opportunities and priorities to improve the training and apprenticeship system for the construction industry in Queensland. Issues that should be considered include:

- the attraction and retention of prospective students and apprentices, including the efficacy of pre-apprenticeship and mentoring programs
- the design, capacity and quality of the training system, and how these can be improved to meet the needs of industry and prospective and existing workers
- financial considerations for employers, apprentices and students, including whether the efficacy of apprenticeship subsidies can be improved
- development pathways to encourage a career in construction.

In considering these issues, attention should be given to:

- any legal or institutional barriers to reform in this area
- the appropriate sharing of funding among government, students and apprentices, individual businesses and industry generally, considering the incidence of benefits from training
- the design of measures to minimise market distortions to the construction industry and the broader economy
- broader reforms of the education and training systems, and how these interact with reforms proposed under this process
- addressing barriers to the broadening of the pool of prospective apprentices
- the requirements of regional and remote areas.

Recommendation 52 SUPPORT FOR APPRENTICESHIP PIPELINE

If the Queensland Government Building and Construction Training Policy is removed (Recommendation 14), to the extent additional support for the attraction and retention of apprenticeships is warranted, it would be best supported through better targeting of existing industry and government schemes.

Consideration should be given to leveraging the industry-funded Building and Construction Industry Training Fund administered by Construction Skills Queensland (CSQ) by tasking the Department of Trade, Employment and Training to work with Queensland Treasury and CSQ to determine the appropriate policy settings to sustain a pipeline of apprentices. Determination of these policy settings should consider:

- approaches for determining the need for apprentices and the skills required for a future workforce
- efficient mechanisms for incentivising industry to take up apprentices
- options for broadening the candidate pool for apprenticeships
- whether the existing training levy rate is appropriate, and mechanisms for reviewing the training levies imposed on industry.

Labor 'failed to learn' from CFMEU scandal

David Marin-Guzman

Employers have blasted the Albanese government over its move to change industrial laws so the Commonwealth can lawfully discriminate against businesses without a union agreement on federally-funded construction projects, claiming it learns all the wrong lessons from the CFMEU scandal.

The surprise measure was slipped into new industrial legislation introduced to parliament on Wednesday that was mostly intended to reduce the Fair Work Commission's tasks to enable it to battle a surge in dismissal claims driven by paid agents and AI.

It carves out the Commonwealth from prohibitions against it preferencing contractors with enterprise agreements and ensures the government cannot be accused of coercion when doing so.

It comes as construction unions are pushing for the government's new procurement code to preference contractors with union agreements on government projects.

Business Council of Australia chief executive Bran Black warned removing the provision opened a path for unions to have "effective control over where taxpayer money goes".

"It is being introduced against every

lesson the country has learned from the recent CFMEU investigations," Black said.

He said CFMEU administration investigator Geoffrey Watson SC found some CFMEU agreements were bought for cash. Black argued that now the government wanted to make those same agreements a "gateway to public contracts and grants".

"That creates a major corruption risk," he said. "The reach goes far beyond a single contract. A single Commonwealth project could impose these conditions on every business in its supply chain. The consequences would ripple through entire industries."

Australian Chamber of Commerce and Industry chief of policy David Alexander urged all of parliament to oppose the provision.

"When the government gives itself a new power to discriminate against businesses without union-endorsed arrangements, it will send a chill down the spine of the entire business community," he said.

He claimed it threatened to penalise businesses that did not use union-endorsed agreements, drive up costs of procurement and undermine freedom of association.

He accused the government of seeking to replicate Queensland Labor's controversial Best Practice Industry Conditions for construction projects.

BPIC, scrapped under the Coalition Crisafulli government, is under scrutiny from the Queensland commission of inquiry into the CFMEU. While it did not require enterprise agreements for state construction projects it established them as best practice and the conditions mirrored CFMEU agreements.

Master Builders Australia chief executive Denita Wawn said the bill "seems inconsistent" with the government's previous statements it would not replicate BPIC or require enterprise agreement on Commonwealth projects.

"We are seeking clarification from the government as to these inconsistencies and will highlight them in any Senate inquiry relating to the bill," she said.

The bill captures subcontractors not just direct government contractors and would allow the government to preference contractors with union EAs, not just non-union EAs.

"The amendments would allow the Commonwealth to preference employers whose employees are covered by an EA... or who are covered by an EA that covers an employee organisation," the explanatory memorandum said.

Brazil, China, India, Japan, New Zealand and South Korea are among the 54

American workers are forced to compete globally on an unlevel playing field.

Jamieson Greer, US Trade Representative

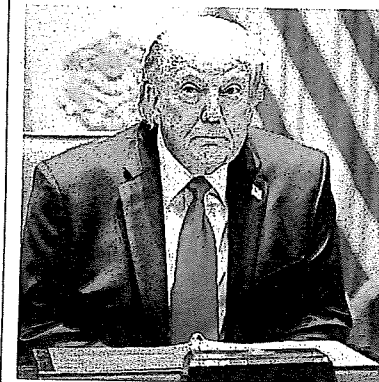
countries the USTR has proposed hitting with a 12.5 per cent levy.

A government source speaking on the condition of anonymity said it was unclear whether the 12.5 per cent levy would apply to products where Australia had previously been granted an exemption from tariffs, including beef and gold.

US Trade Representative Jamieson Greer said the failure of his country's most important trading partners to address the importation of goods made with forced labour was unacceptable.

"This creates a dynamic where American workers are forced to compete globally on an unlevel playing field," Greer said.

A spokesman for Trade Minister Don Farrell said Australia maintained that any tariffs on Australian exports to the United States were inconsistent with the two countries' free trade agreement.



Donald Trump. PHOTO: NEW YORK TIMES

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ME040626



Fair Work Act 2009

No. 28, 2009

Compilation No. 71

Compilation date: 2 April 2026

Includes amendments: Act No. 20, 2026

This compilation is in 4 volumes

Volume 1: sections 1-257
Volume 2: sections 258-536NK
Volume 3: sections 536NL-800
Volume 4: Schedules
Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

Division 2—Object of this Act

3 Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (ca) ensuring a safety net of fair and relevant minimum terms and conditions for regulated workers through enforceable minimum standards orders and related measures; and
- (caa) ensuring a safety net of fair and relevant minimum terms and conditions for persons in a road transport contractual chain through enforceable road transport contractual chain orders and through road transport contractual chain guidelines; and
- (cb) providing appropriate remedies in relation to unfair terms of services contracts; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
- (g) acknowledging the special circumstances of small and medium-sized businesses.



Building and Construction Industry (Improving Productivity) Act 2016

No. 87, 2016

Compilation No. 1

Compilation date:	2 December 2016
Includes amendments up to:	Act No. 88, 2016
Registered:	7 December 2016

Prepared by the Office of Parliamentary Counsel, Canberra

Section 3

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Main object of this Act

- (1) The main object of this Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively, without distinction between interests of building industry participants, and for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.
- (2) This Act aims to achieve its main object by the following means:
- (a) improving the bargaining framework so as to further encourage genuine bargaining at the workplace level;
 - (b) promoting respect for the rule of law;
 - (c) ensuring respect for the rights of building industry participants;
 - (d) ensuring that building industry participants are accountable for their unlawful conduct;
 - (e) providing effective means for investigating and enforcing this Act, designated building laws (to the extent that those laws relate to building work) and the Building Code;
 - (f) improving work health and safety in building work;
 - (g) encouraging the pursuit of high levels of employment in the building industry, including by encouraging youth employment with an emphasis on engaging apprentices;
 - (h) providing assistance and advice to building industry participants in connection with their rights and obligations under this Act, designated building laws and the Building Code.

4 Simplified outline of this Act

This Act regulates certain conduct of building industry participants who perform building work.

FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Cup of Tea Case) [2018] FCA 402

File number: VID 333 of 2015

Judge: **NORTH J**

Date of judgment: 26 March 2018

Catchwords: **INDUSTRIAL LAW** – allegations of contraventions of s 500 of the *Fair Work Act 2009* (Cth) – whether the respondents sought to exercise a right conferred by s 484 were exercising or seeking to exercise rights under Pt 3-4 of the Act – whether the entry on a site for a social purpose falls within s 484 of the Act

INDUSTRIAL LAW – allegation of contraventions of s 348 of the *Fair Work Act 2009* (Cth) – whether respondent threatened to take action against a contractor – oral evidence from two witnesses of the same conversation – evidence from both witnesses exactly balanced – burden of proof is not discharged

Legislation: *Fair Work Act 2009* (Cth) ss 348, 500

Date of hearing: 6 December 2016 and 10 March 2017

Registry: Victoria

Division: Fair Work Division

National Practice Area: Employment & Industrial Relations

Category: Catchwords

Number of paragraphs: 83

Counsel for the Applicant: Mr D Star QC with Mr R O'Neill

Solicitor for the Applicant: Lander & Rogers

Counsel for the Respondents: Dr G Boas

Solicitor for the Respondents: Slater & Gordon Lawyers

ORDERS

VID 333 of 2015

BETWEEN: **AUSTRALIAN BUILDING AND CONSTRUCTION
COMMISSIONER**
Applicant

AND: **CONSTRUCTION, FORESTRY, MINING AND ENERGY
UNION**
First Respondent

MARK TRAVERS
Second Respondent

ADAM HALL
Third Respondent

JUDGE: **NORTH J**

DATE OF ORDER: **26 MARCH 2018**

THE COURT ORDERS THAT:

1. The application is dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

NORTH J:

1 The Australian Building and Construction Commissioner, the Commissioner, the applicant, previously the Director of the Fair Work Building Inspectorate, alleges that Mark Allan Travers, the second respondent, contravened s 500 and s 348 of the *Fair Work Act 2009* (Cth) (the Act), that Adam Hall, the third respondent, contravened s 500 of the Act, and that the Construction, Forestry, Mining and Energy Union, the CFMEU, the first respondent, was also responsible for the contraventions both under ss 793 and 550 of the Act and at common law. The Commissioner seeks declarations of contraventions and the imposition of pecuniary penalties on the respondents.

RELEVANT STATUORY PROVISIONS

2 Section 500 of the Act provides:

A permit holder exercising, or seeking to exercise, **rights** in accordance with this Part must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.

[Emphasis added.]

3 The right in question in this case is the right provided in s 484 of the Act as follows:

A permit holder may enter premises **for the purposes of holding discussions** with one or more employees or TCF outworkers:

- (a) who perform work on the premises; and
- (b) whose industrial interests the permit holder's organisation is entitled to represent; and
- (c) who wish to participate in those discussions.

[Emphasis added.]

4 Section 348 of the Act provides:

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.

5 Section 347 of the Act relevantly provides that a person engages in industrial activity if the person:

(b) does, or does not:

- (iv) comply with a lawful request made by, or requirement of, an industrial

association;

OVERVIEW

6 The critical issue in respect of the s 500 allegations is whether Mr Travers and Mr Hall were exercising or seeking to exercise a right under s 484 of the Act to enter the site for the purpose of holding discussions with an employee, Rodney Shane Duggan. The resolution of that issue depends on the evidence of the events in question. That evidence demonstrates that Mr Travers and Mr Hall visited the site solely for social purposes, to have a cup of tea with Mr Duggan, and were not exercising or seeking to exercise rights under s 484 of the Act. Thus, the allegations of contraventions of s 500 of the Act have not been made out.

7 The critical issue in respect of the s 348 allegation against Mr Travers is whether the Commissioner has established, on the balance probabilities, that Mr Travers said to David John White, in a phone conversation, that if he called the police he would be starting a war and it would be no different to what was done to Kane Constructions, that is to say, there would be disruption on the site. It has not been established on the balance of probabilities that the words were said. Hence the allegation of a contravention of s 348 of the Act has not been made out.

8 In these circumstances, no occasion arises for consideration of the responsibility of the first respondent for the alleged contraventions.

9 For the reasons which follow the application is dismissed.

THE FACTS

10 Save in several critical areas identified below, the facts were not in contest.

11 The following findings are based on the evidence given by Luke Anthony Naughton, the project manager employed by McConnell Dowell on the PUG project, Gavin Carter, the supervisor employed by McConnell Dowell, and Mr White, now retired, previously employed by McConnell Dowell as the operations manager for the southern region, each of whom gave evidence for the Commissioner, and on the evidence given by Mr Travers, Mr Hall and Mr Duggan, a labourer employed by McConnell Dowell on the site and CFMEU shop steward, each of whom gave evidence for the respondents.

12 Mr Travers and Mr Hall were organisers employed by the CFMEU, and were permit holders within the meaning of s 500. Construction work was being undertaken at Melbourne Airport by three contractors, McConnell Dowell, Fulton Hogan, and Negri.

13 McConnell Dowell were engaged on the PUG project which involved the removal and replacement of the concrete taxiways P, U and G. McConnell Dowell employed five direct employees on the work. McConnell Dowell had a compound consisting of demountable buildings used as offices and a lunch room. The compound was on the edge of the airport area. The work was airside, that is to say where aircraft operated. Beyond the compound, which was landside, was gate 22 which provided airside access and was subject to security control.

14 The Fulton Hogan compound was immediately adjacent to the McConnell Dowell compound. The PUG project had been underway, on one version, for about 18 months, or on another a version, for three years, when the events in question occurred. Mr Travers was the main CFMEU organiser for the project. Mr Hall was the CFMEU organiser for the Fulton Hogan employees. Mr Travers had visited the McConnell Dowell site about three or four times on a three or six monthly basis and had not been there for the last three months. There had been no safety issues on the site in the past. Mr Naughton dealt with Mr Travers on the PUG project which he thought had been underway for three years. His relationship with both Mr Travers and Mr Hall was good, there were no difficulties. He had met Mr Hall once earlier when Mr Naughton worked for Negri.

15 On 17 June 2014, Mr Travers had his car serviced. Mr Hall picked him up, and Mr Travers went with Mr Hall whilst the car was being serviced. Around 12.30 pm Mr Hall stopped at the Fulton Hogan compound to speak to the project manager and the shop steward. In the meantime, Mr Travers decided to walk over to the adjacent McConnell Dowell site and visit Mr Duggan.

16 Around his lunchtime, Mr Duggan received a phone call from Mr Travers. Mr Duggan explained in evidence-in-chief what happened then:

He [Mr Travers] said that he was – his car was in for a service and he was next door and he would just call over and have a cuppa and say hello.

Okay. And what did you say to him? --- I said, “Yes, no problems. Yes.”

Okay. And did he come over? --- Yes.

All right. So when he came over, where did you meet? --- I’m not sure. It would

have been around the lunchroom somewhere, but not exactly sure.

Okay. And what did you do? --- Went and had a cup of tea.

Where was that? --- In the lunchroom.

All right. What were you discussing --- I'm not exactly sure, but it would have just been general -- you know, "I've been on holidays," and he has got somewhere down the coast and I go for trips interstate, so just general sort of -- just general talk like people do.

Okay. During the course of that conversation were there any safety or industrial relations issue raised? --- No, not -- nothing to me; nothing specific.

Do you recall - - ? He might have asked how the job was going, but that was just -- you know, of course he is going to ask that, yes.

And do you recall anything specific being raised in relation to the worksite or the project? --- No.

17 Mr Duggan elaborated in cross-examination thus:

And you can't recall two and a half years later whether there was some work topics in your conversation with Mr Travers and Mr Hall, can you? Well, nothing specific, no.

Well, you say "nothing specific". You can't say that you didn't talk about some work issues in the course of that conversation? Well, we would have asked -- we would have been -- it's like I said earlier. We would have mentioned the job -- "How's it going?" -- just general, but there was nothing, no specific issues at the time.

18 Mr Travers in evidence-in-chief described the conversation with Mr Duggan as follows:

So I went and got a cup of coffee -- a cup of tea, sorry, and me and Rod were just having a chat. He does a lot of travelling throughout Australia, four-wheel driving and that, so basically that's what I was talking about. He hadn't long been on another one of his trips. And I'm not sure exactly, maybe 15, 20 minutes -- this was at lunchtime too, by the way -- when Luke and another bloke, I don't know his name, he, basically, come into the -- they both come into the crib hut and asked me to leave. I said, "Well, I'm here on more of a social visit. I'm not here -- it had nothing to do with work. I was just here to say hello to Rod."

19 Mr Hall finished his visit at the Fulton Hogan site and joined Mr Travers and Mr Duggan, next door at the McConnell Dowell site.

20 Mr Naughton became aware that Mr Travers and Mr Hall were on site. In the past such visits were informal. Before the events in question, Mr Travers and Mr Hall did not give formal notice of visits and McConnell Dowell did not require any such notice to be given by them.

21 But unknown to Mr Travers and Mr Hall things had changed for McConnell Dowell by 17 June 2014. On another site McConnell Dowell had not enforced the right of entry provisions of the Act and, as Mr White explained, “we were looking down the barrel of sanctions by the Victorian government for tendering future work ... we were very sensitive to the fact that we [did not have] any room to move ... we were fairly jumpy about the situation”. As a result of those events, McConnell Dowell staff had received refresher training about a month before concerning the requirements of the right of entry provisions of the Act.

22 Thus, faced with the presence of Mr Travers and Mr Hall, who had not given notice of their intention to visit the site, Mr Naughton phoned Mr White. Mr White said Mr Naughton must tell Mr Travers and Mr Hall to leave. Mr Naughton then went with Mr Carter and did so.

23 Mr Naughton explained the nature of the change in practice. When relating the events on 17 June 2014 to the Court, Mr Naughton conveyed the impression that the visit of Mr Travers and Mr Hall gave him no cause for concern as a practical matter in the administration of the site, but that, reluctantly, he had to implement the new policy adopted by McConnell Dowell in response to pressure from the government. He explained the position to the Court thus:

Well, you're not giving me the impression that you saw either any danger, any wrongdoing that you want to tell the court about as having suggested to you that this was a really bad thing that happened? --- No. But we – our company prior to this event had had a sanction against it for not complying with right of entry, which had led – which was – so we had been, I suppose, briefed to ensure we were in strict adherence with the right of entry process which

You had – McConnell Dowell - - - ? McConnell Dowell.

- - - had had a sanction from? Fair Work.

I see? --- FWBC.

I follow? --- Prior to this event, for issues regarding right of entry, etcetera. So we had been briefed to ensure 100 per cent compliance going forward.

I see? --- And at that point we had – as a result, I had arranged the refresher training for our project staff, which had occurred, as I say, about one month before this event. So in relation to, yes, right of entry there was sort of like a zero tolerance sort of policy. So that's why in this case – it was the first case or event after that sanction and our refresher training that the union officials had visited site.

Yes. Thank you. Well, that's very helpful to provide a context, because I felt that there was certain reluctance in the way you were explaining how things were happening that it doesn't – you know, this is not a case of a concrete pour that was

stopped or a big building site that – where there was mass industrial action. I mean, on the scale of things it's of – apparently, from what I presently see, a matter of very minor significance? --- Yes, but none of the questioning had – I was answering questions. None of them led me to explain that position until just now.

24 Mr Naughton said “it wasn't a comfortable thing for [him] to be asking Mr Travers and Mr Hall to leave”, in part because he “had a good working relationship with them”. He said that Mr Travers, Mr Hall and Mr Duggan had an “incredulous or surprised look on their face” in response to the demand to leave.

25 Mr Hall described in evidence-in-chief what happened when Mr Naughton told him and Mr Travers to leave:

Okay. And what happened then? What happened when they arrived? --- Well, they basically sort of said, “Well, you have to leave site.” We said, “What for?” I said, “We're just here having a cup of tea with Rod Duggan.” “We have been instructed to – you haven't give right of entry.” I said, “We have never give [sic] a right of entry on this job for at least 18 months. What's – what's the problem now?” “I have been instructed by management.” And I basically said, “Who was it?” “David White.” Yes. “Could you ring David White up?” He went outside in the foyer to ring David White. Basically - - -

While he was out in the foyer, did you have any conversations with anyone? --- No. Oh, Carter. I said to Carter, “This is bullshit, mate. We have never had a right of entry here. We have always had a good relationship. There's no drama on the job. Why is all this happening”? He goes, “Mate, I reckon it's bullshit too, but it's out of my hands.”

26 Mr Travers described, in evidence-in-chief, the conversation with Mr Naughton at that time as follows:

... they both come into the crib hut and asked me to leave. I said, “Well, I'm here on more of a social visit. I'm not here – it had nothing to do with work. I was just here to say hello to Rod.” With that they wouldn't take that. I said, “Look, I've nearly finished. I will be five minutes and I'm going, so I don't know why everyone is so excited all of a sudden.” With that he said, “I have to call the police if you don't leave.” I told him to ring his boss, White.

27 Mr Naughton described the circumstances in evidence-in-chief as follows:

I approached Rod, Mark and Adam and asked them to leave as they hadn't given me 24 hours' notice under the right of entry process.

All right. Rather than summarising, are you able to recall what it was that you said? --- I said, “Gentlemen, you're going to have to leave – I'm going to have to ask you to leave. You've not given me the 24 hours' notice in accordance with the right of entry process.”

All right. What response did you get? --- They said, “We don't have to give you 24 hours' notice.”

You say they said. Can you recall whether it was Travers or Hall or both who said

that? --- It was – it was both. They sort of spoke over each other.

Okay. Was there anything else said? --- Mark said, “I’m just here to catch up on my mate, Rod.”

That’s Mark Travers obviously? --- Yes.

And did you respond to that? --- I said, “I understand, but I’m going to have to ask you to leave.”

All right. And was there a response to that? --- Mark said, “We’re here to discuss a safety issue but call whoever you need to call.”

28 In relation to Mr Naughton’s evidence concerning Mr Travers mentioning a safety issue, Mr Naughton explained further in cross-examination:

You said in your evidence-in-chief that there was a point at which Mr Travers said to you, “We’re here to discuss a safety issue. But call whoever you need”? --- Yes. Yes.

And that was in response to you saying you would have to call the police. Was that right? --- I would think so, yes.

Okay. You’ve confirmed already in your evidence that there were no safety issues in play at the time? --- Not that I’m aware of.

There had been no safety issues in play for some time? --- Not that I can recall.

There were no safety issues on the horizon in relation to the project that you knew of? --- No.

HIS HONOUR: And, Mr Naughton, you would be the person who would know about safety issues, if there were any, would you? --- Yes, they would have been reported back to me through our reporting process from either personnel onsite, supervisors or safety adviser or even the client, yes.

Thank you.

DR BOAS: And you were aware of no such safety issues at the time of this event? --- Yes.

None emerged subsequent to this event that you can recall? --- No.

There was no conversation between you and Mr Travers in relation to anything relating to safety or even of an industrial nature until some time much later? --- By that statement, he said he was here to discuss the safety issue. There was nothing raised at that time.

There was nothing raised at that time. There was nothing raised subsequent to that? --- No.

29 At 4.16 pm on 17 June 2014, Mr Naughton sent an email to Mr White and others about what had transpired on the site that afternoon. The record of the response to Mr Naughton’s demand that Mr Travers and Mr Hall leave the site was “they refused and told me to go call the police or whoever I needed to call”. There was no mention of a reference to a safety issue in that email. On 26 June 2014, Mr Naughton made a statement to a Fair Work

Building and Construction inspector. For the first time mention of a safety issue was reported as part of the conversation with Mr Travers. Mr Naughton explained in his evidence that the email was intended as a summary of the events and hence the mention of the safety issue was not included.

30 Mr Carter, who was present at this time, made no reference to the mention of a safety issue.

31 Mr Hall said in examination-in-chief that he did not discuss any issues relating to the worksite on 17 June 2014. In cross-examination he said that industrial issues were definitely not discussed and that he could not recall if some issues to do with safety were discussed. He said that he was confident that Mr Duggan was competent to deal with health and safety issues on site. He said that if there were health and safety issues to be dealt with by the organiser, those issues would have been dealt with through Mr Naughton.

32 Mr Duggan gave evidence in cross-examination about the discussion as follows:

Now, when – I suggest to you though that when Mr Naughton came in and asked the two workers to leave, that he – that Mr Travers said to him, “We have just been having a chat about safety with Rod”? --- No, he said it was a social call. He said, “I’m not even here as an official. I’m just here having a chat.”

33 Mr Naughton then left the room and rang Mr White again to tell him what had happened. In the following phone call, Mr White told Mr Naughton to tell Mr Travers and Mr Hall again to leave and to call the police if they did not do so.

34 Mr Naughton returned and said to Mr Travers and Mr Hall that they had to leave because they had not given 24 hours’ notice, and, if they refused, he would call the police. Mr Hall asked Mr Naughton who was giving him instructions. Mr Naughton replied that Mr White was the person. Mr Naughton then left and called the police.

35 Mr Travers said that once the police are called it is the practice of union officials to remain until the police arrive. For that reason he and Mr Hall waited until the police arrived at the site.

36 At about 12.50 pm Mr Naughton called the police. At about 1.15 pm four Australian Federal Police officers arrived in two vehicles, took some personal details and left.

37 In the course of these events, Mr Travers phoned Mr White and asked him “what the go was, because we have never had to go through this sort of issue before”.

38 Mr White gave evidence-in-chief of that conversation as follows:

I then had the phone call from Mark Travers who said what he was doing. He was going to talk to the shop steward. He was only going to be there five minutes. He's going to leave after that. I told him he – he shouldn't be there. We have to call the police. That's right. And then he said something along the lines of, "If you call the police you will be starting a war, and – and we will deal with you like we have with Kane Constructions."

Did you understand, or at least did you have an understanding, of what he might be referring to when he referred to Kane Constructions? --- At or about that same time there was an ongoing dispute at a Kane Site out in Ringwood or Box Hill at a swimming pool I recall, and there was almost daily disruption on that site. Yes.

And given that context, what did you understand him to mean when he said it would be like the situation with Kane? --- I – I expected he – he was – he was more or less intimating that they were going to be out on this PUG site on a daily basis giving us the same sort of industrial workover that they were giving Kane.

What tone of voice was he using when he said that? --- Not at all aggressively, no. It was just a telephone conversation. I asked him to leave or we would have to call the police. He said, "We're not leaving and if you do that it's game on, and we will deal with you like we have with Kanes."

39 Although Mr Carter heard some of the phone conversation between Mr Travers and Mr White, he did not give evidence that he heard Mr Travers mention starting a war or a reference to Kane Constructions.

40 Mr Duggan also overheard part of the conversation between Mr Travers and Mr White. He said he did not hear Mr Travers mention war or Kane.

41 Mr Travers denied that he said to Mr White "if you're doing that you are starting a war and it will be no different than what we have done with Kane", and was cross-examined about a dispute involving Kane Constructions as follows:

Now, at this time there was a dispute going on between the Union and Kane Constructions; is that right? --- I think so.

And there had been, as you were aware of, Union officials from the CFMEU turning up at various Kane Construction sites around Melbourne at that time? --- I had one of them myself.

You attended at one yourself, did you? --- I had a job in my area from Kane's, yes.

Yes. And at that time the Union was conducting a campaign against Kane? --- I don't know. It might have been for an agreement. I'm not sure. There was a campaign. I'm not sure what it was. It's a fair while ago now. It might have been EBA time possibly or – yes, I'm not sure.

...

There had been disruption of the Emporia apartment site? --- The what, sorry?

Emporia apartments? --- What - - -

Did you know about that? --- Where's that? I don't - - -

All right. Did you know about it or not? --- I don't know where the Emporium apartments are.

All right? --- Yes.

What about the Epworth redevelopment? --- They're not my jobs, so if they're not my jobs, I – my job is – my Kane's job in Broadmeadows is exactly the same as what we have just been talking about for the last half an hour and that is I never put a right of entry in there either. I had the same relationship with them that I had with McConnell & Dowell.

THE SECTION 500 ALLEGATION

42 The contravention of s 500 of the Act alleged by the Commissioner required proof that Mr Travers and Mr Hall exercised or sought to exercise a right conferred by s 484 to enter the compound for the purpose of holding discussions with Mr Duggan.

43 The first issue to be considered is the factual issue, namely, for what purpose did Mr Travers and Mr Hall enter the premises.

For what purpose Mr Travers and Mr Hall enter the site?

44 The evidence is replete with references to Mr Travers visiting his friend, Mr Duggan, to have a cup of tea. That was the reason for the visit which Mr Travers gave to Mr Duggan and also to Mr Naughton. When Mr Travers and Mr Duggan met they talked about their common interest in four wheel driving. The evidence to that point described a wholly social visit.

45 One of the contested factual issues is whether Mr Travers entered the site to discuss a safety issue. The Commissioner relied on evidence given by Mr Naughton that Mr Travers told him that "we are here with Rod discussing a safety issue".

46 Mr Travers denied that he said to Mr Naughton that he was on site discussing safety issues with Mr Duggan.

47 Mr Travers was a convincing and reliable witness. He gave evidence in a direct and forthright way. He had a clear recollection of that conversation and gave the impression of providing an honest account of the circumstances to the Court.

48 Mr Travers' denial of the mention of safety issues is consistent with the fact that no safety issues were current on the site and the project had been free of safety issues.

49 Further, Mr Travers had a reason to speak to Mr Duggan without reference to work issues because they shared an interest in four wheel drive travel and Mr Travers knew that Mr Duggan had recently been on a trip.

50 Then, if a safety issue arose on site, it would be expected that, if it were necessary to involve Mr Travers, then Mr Duggan would have taken the initiative. It seems unlikely that the organiser would raise the matter without a prior report from the site.

51 Mr Naughton's evidence of the reference to safety was at a high level of generality. No specific safety issue was indicated.

52 Importantly, when Mr Naughton sent the email to Mr White on the same day as the events had occurred, he did not make any reference to the mention of a safety issue. It was only nine days later that such a reference was made in the statement which Mr Naughton made to the Fair Work Building Industry inspector. Mr Naughton explained the absence of any reference to the safety issue in the email. He said that the email account was a summary of the events rather than a full account of them as appeared in the later statement.

53 Generally, Mr Naughton was a straightforward witness. He gave evidence to the best of his recollection. In respect of his account of the events of the day there is no reason to doubt his general accuracy. However, on the subject of the conversation about a safety issue his evidence was defensive and rather less credible than the rest of his evidence.

54 On that subject, the evidence of Mr Travers should be preferred to the evidence of Mr Naughton. Apart from the impressions which both witnesses made in the witness box, the probabilities are against the mention of a safety issue when none was identified and none existed.

55 No assistance on this issue is provided by the evidence of Mr Duggan or Mr Hall. Mr Duggan did not recall any specific matter being raised as appears from the extract from his evidence-in-chief set out in [16] of these reasons for judgment, and from the extracts from his cross-examination set out in [17] of these reasons for judgment.

56 It is clear from his evidence that Mr Duggan had no recollection of any reference to a safety issue and was speculating on what might have been discussed. He agreed in cross-examination that he had no particular reason to think of the events in question between when they occurred and when he was asked to be a witness in 2017. He said "yes, it was two and a half years ago. It's a bit vague".

57 Mr Hall said he could not recall safety issues being discussed.

58 I find that on the balance of probabilities Mr Travers did not say to Mr Naughton that “we are here with Rod discussing a safety issue”, or that safety or work issues were discussed.

59 The Commissioner argued that even if the direct reference to a safety issue was not made by Mr Travers, the Court should infer that the visit of Mr Travers was at least in part to discuss matters relating to work with Mr Duggan. The circumstances from which that inference should be drawn are that Mr Travers and Mr Hall were organisers, that the visit occurred on the worksite, that the discussion was held with the CFMEU delegate, and that Mr Travers usually visited every three to six months and had not been there for the previous three months.

60 The Commissioner also relied on evidence of Mr Naughton that after the police left, Mr Duggan followed Mr Travers and Mr Hall to the car and Mr Duggan returned to the site with some colourful leaflets or pamphlets. Mr Duggan explained what happened on that occasion as follows:

All right. And then, right at the end, after the police had come and the guys were leaving, you went down to the car with him, didn't you? --- Yes.

And they gave you some pamphlets? --- No, they gave me a business card as the police wanted – wanted their ID. Mark gave the police a business card and Adam didn't have any on him, so he went to the car and I grabbed it and bought it back for him.

61 Neither Mr Travers nor Mr Hall could remember whether Mr Travers had given Mr Duggan some pamphlets. Mr Duggan was the only person directly involved in the transaction who knew whether Mr Travers gave him pamphlets. He said that Mr Travers had not done so. That evidence should be accepted.

62 The circumstances relied on by the Commissioner must be viewed against the direct evidence of Mr Travers that he went on site to say hello to Mr Duggan, to have a cup of tea and to pay a social visit, the evidence of Mr Duggan that no specific safety issues were discussed, and that Mr Travers said to Mr Naughton that the visit was a social call to have a chat and that he was not there as an official. Further, Mr Travers and Mr Duggan chatted about their common interest in four wheel driving and Mr Duggan's recent four wheel drive trip. Finally, there were no existing safety issues to discuss. In view of these circumstances,

no inference should be drawn that Mr Travers and Mr Hall were on site for the purpose of discussing work issues.

63 I find on the balance of probabilities that Mr Travers and Mr Hall entered the site solely for the purpose of a social visit to a friend.

The construction issue

64 The legal question then arises whether the entry on site solely for a social purpose falls within the description in s 484 of the Act as an entry for the purpose of holding discussions with an employee who works on the site.

65 The Commissioner submitted that s 484 of the Act encompassed an entry on premises by permit holders solely for the purpose of social discussions with workers on site. The Commissioner argued that the nature of the discussions was not limited to discussions about work.

66 The consequence of such a construction can be seen in a simple example. Imagine that Mr Duggan and Mr Travers and their families were friends. Mr Duggan was working on the McConnell Dowell site. He packed himself lunch but forgot it at home. Knowing that Mr Travers was on the road, he phoned Mr Hall and asked him to collect his lunch from his home and bring it to work. Mr Travers collected the lunch. Mr Travers also decided to ask Mr Duggan to come to the football with him on the following Saturday. When he got to the site he took the lunch to Mr Duggan and they discussed going to the football together. The Commissioner would say that Mr Travers' entry on site was as a permit holder exercising a right of entry for the purpose of holding discussions with an employee who performs work on the premises within the meaning of s 484 of the Act.

67 The vice in such an approach to the construction of s 484 of the Act is that it focuses on the reference to the activity of holding a discussion without taking into account the context provided by the section and by Part 3-4 within which the section is found. The particular discussions to which the section is directed are discussions which take place between a permit holder and a person who performs work on the site. That worker must be one whose industrial interests the permit holder's organisation is entitled to represent. The contextual features indicate that the discussions in question must relate to the work performed and the representational role of the permit holder.

68 That construction is supported by s 480 of the Act which sets out the object of Part 3-4 which deals with the right of entry. The object of the Part is stated to be to provide a balance between the representational role of organisations and the right of occupiers and employers to go about their business without undue inconvenience. The right of entry is thus a right which is bestowed for the purpose of the representation of workers who are members of the organisation.

69 The Commissioner referred to passages in the judgments of White J in *Director of the Fair Work Building Inspectorate v Construction Forestry Mining and Energy Union and ors* [2015] FCA 1293 at [72] and Charlesworth J in *Director of the Fair Work Building Inspectorate v McDermott* [2016] FCA 1147 at [114], to support the argument that discussions in s 484 of the Act should be read broadly and include wholly social discussions. The passages, however, do not support that argument. In each case the officials were clearly exercising a representational role. They were not cases about purely social engagements.

70 The Commissioner further argued that such a construction would allow permit holders to avoid the operation of the statutory conditions governing the right of entry by claiming that their visit was solely a social visit. To allow permit holders to do so would create uncertainty for occupiers and employers and that would not meet the object of the Part which places the right of occupiers and employers to go about their business without undue inconvenience into the balance. The argument should not be accepted. First, the circumstances of most visits will flag the purpose of discussions without much room for debate. In other words, the uncertainty argument is unlikely to be a live issue in most cases. Second, the occupiers of sites are protected by the law if they do not wish social encounters to occur on site. The laws of trespass, both civil and criminal, are available to those occupiers. Instead of proceeding under the Act in this Court for pecuniary penalties, the occupiers could proceed in a State court on a cause of action in trespass for an injunction and/or damages, or have the police charge the intruders under the criminal law. The inconvenienced occupier is not left without a remedy. It is just not the remedy claimed in this proceeding.

71 In the result, Mr Travers and Mr Hall entered the site solely for the purpose of a social discussion with Mr Duggan. Section 500 of the Act does not apply to an entry for that purpose. The allegations against Mr Travers and Mr Hall under s 500 of the Act are therefore not made out.

THE SECTION 348 ALLEGATION

72 The Commissioner alleges that Mr Travers contravened s 348 of the Act by saying to Mr White that if Mr White called the police to the site “you are starting a war and it will be no different to what we have done with Kane”.

73 The evidence upon which the Commissioner relied is the oral evidence of Mr White that Mr Travers made that statement to him in a phone call on 17 June 2014. Further, on 27 June 2014, Mr White provided a statement to a Fair Work Building and Construction inspector which included reference to those words used by Mr Travers.

74 The Commissioner contended that the evidence of Mr White should be accepted because he had no interest in the outcome of the proceeding, there was no antagonism between him and Mr Travers, he had no motive to lie and his evidence was consistent with the contemporaneous statement made to the inspector.

75 Mr Travers denied that he said the words in question. On his behalf it was contended that it was improbable that he made the threat because the relations between Mr White and Mr Travers were good, the site had been free of safety issues, and there was no extant safety concern. The surrounding circumstances did not appear to call for such a spirited response. That benign nature of the incident is captured by Mr White in the concluding sentence of his statement which referred to a meeting he had with Ralph Edwards, whom he referred to as the President of the CFMEU, on the day after the events in question, as follows:

18. I met with Edwards regarding another project and we had a brief discussion about the events on 17 June 2014 and had a laugh about it and moved on.

76 Mr White was an impressive witness. He gave every indication of telling the truth as he recalled it. He retired in 2014 and doubtless his recall of the events was aided by the statement he made soon after they occurred. I accept that he believes that Mr Travers said the words in question.

77 Mr Travers was an equally impressive witness. He appeared to have a clear recollection of the events. He also gave every indication of telling the truth. To the extent that the Commissioner implicitly suggested that because he had an interest in the outcome he may not have told the truth, there was nothing in his evidence or the way in which he gave it which indicated that he was not truthful when he denied saying the words in question. I accept that he believes that he did not say the words in question.

78 The position which is reached is that the only two witnesses to the conversation have contrary views about the relevant event. They were both impressive and truthful witnesses. There are no circumstances from which an inference should be drawn which supports one version rather than the other.

79 In *Millar v Minister of Pensions* [1947] 2 All ER 372, Lord Denning explained at 374B:

If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, **but, if the probabilities are equal, it is not.**

[Emphasis added.]

80 In *Carney v Newton* [2006] TASSC 4 the Full Court of the Tasmanian Supreme Court (Underwood CJ, Evans and Blow JJ) at [61] said that if, in a civil case, the evidence was "exactly balanced" the jury must return a verdict for the defendant.

81 It follows that the Commissioner has not established, on the balance of probabilities, that Mr Travers said the words in question to Mr White. Consequently, the s 348 allegation is not made out.

DISPOSITION

82 The law has always had a fondness for expressions in Latin. In that vein, following Cicero in *De Legibus*, this case may be accurately described as *excitare fluctus in simpulo*.

83 The application is dismissed.

I certify that the preceding eighty-three (83) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North.

Associate:

Dated: 26 March 2018

FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate [2017] FCA 1166

File number:	NSD 1379 of 2016
Judge:	COLLIER J
Date of judgment:	29 September 2017
Catchwords:	INDUSTRIAL LAW – proceedings brought against regulator – admitted contravention of s 503(1) <i>Fair Work Act 2009</i> (Cth) – appropriate form of declaration to reflect agreed facts – relevant considerations in determining penalty – principles of deterrence – utility in pecuniary penalty – importance of general deterrence – payment of penalty to applicant
Legislation:	<i>Building and Construction Industry (Consequential and Transitional Provisions) Act 2016</i> (Cth) Sch 1 Pt 1 <i>Crimes Act 1914</i> (Cth) s 4AA <i>Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012</i> (Cth) Sch 3 <i>Evidence Act 1995</i> (Cth) ss 55, 191(2) <i>Fair Work (Building Industry) Act 2012</i> (Cth) ss 10, 15(1) <i>Fair Work Act 2009</i> (Cth) ss 492, 503, 503(1), 539(2), 545, 546, 546(3) <i>Fair Work Amendment Act 2013</i> (Cth) s 2, Sch 4 s 7 <i>Federal Court of Australia Act 1976</i> (Cth) s 21 <i>Workplace Relations Act 1996</i> (Cth) s 187AA, 187AD(1)
Cases cited:	<i>Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union</i> [2017] FCAFC 113 <i>Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union (The Kane Constructions Case) (No 2)</i> [2017] FCA 368 <i>Carr v Higgins Coatings Pty Ltd</i> [2005] FCA 1809 <i>Comcare v Post Logistics Australasia Pty Limited</i> [2012] FCAFC 168 <i>Commonwealth v Director, Fair Work Building Industry Inspectorate</i> [2015] HCA 46; (2015) 258 CLR 482 <i>Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of</i>

Australia v Telstra Corporation Ltd [2007] FCA 1607
Community and Public Sector Union v Telstra Corporation Ltd [2001] FCA 1364
Murrihy v Betezy.com.au Pty Ltd and Another (No 2)
 [2013] FCA 1146; (2013) 221 FCR 118
Pine v Casello Constructions Pty Ltd [2005] FCA 1854
Pine v Expoconti Pty Ltd [2005] FCA 1434
Pine v Seelite Windows & Doors Pty Ltd [2005] FCA 500
Ponzio v D and E Air Conditioning Pty Ltd [2005] FCA 964
Ponzio v Firebase Sprinkler Systems Pty Ltd [2005] FCA 733
R v Harrison (1997) 93 A Crim R 314
Sayed v Construction, Forestry, Mining and Energy Union
 [2016] FCAFC 4; (2016) 239 FCR 336

Date of hearing:	11, 12 and 15 September 2017
Registry:	New South Wales
Division:	General Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	76
Counsel for the Applicant:	Mr JV Agius SC with Mr R Reitano and Mr P Boncardo
Counsel for the Respondent:	Mr M Wheelahan QC with Mr M Follett and Mr P Herzfeld
Solicitor for the Respondent:	Ashurst Australia

ORDERS

NSD 1379 of 2016

BETWEEN: **CONSTRUCTION, FORESTRY, MINING AND ENERGY
UNION**
Applicant

AND: **DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY
INSPECTORATE**
Respondent

JUDGE: **COLLIER J**

DATE OF ORDER: **29 SEPTEMBER 2017**

THE COURT DECLARES THAT:

The respondent contravened s 503(1) of the *Fair Work Act 2009* (Cth) (**FW Act**), when on 19 December 2013, he directed staff employed by the Office of the Fair Work Building Inspectorate (known as “Fair Work Building and Construction” (**FWBC**)) that no changes were to be made to existing FWBC educational material concerning right of entry under Pt 3-4 of the FW Act, in circumstances where a reasonable person, with the knowledge of the respondent, could reasonably be expected to have foreseen that that action would lead to the impression being given, by the continued availability of the educational material on the FWBC website, that an employer or occupier was authorised to give a union official exercising a right of entry a reasonable request which had to be followed by the union official, about the room or areas they may use on the site for holding discussions or interviews with employees, when such a thing was not so authorised.

THE COURT ORDERS THAT:

The respondent pay a pecuniary penalty in the amount of \$8,500 to the applicant pursuant to s 546(3) of the FW Act within 30 days of the date of this order.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLLIER J:

1 This matter concerns an amended originating application and further amended statement of claim filed on 21 October 2016 by the applicant (the **CFMEU**). The CFMEU sought declarations and an order for the imposition of a pecuniary penalty pursuant to the *Fair Work Act 2009* (Cth) (**FW Act**) in respect of conduct of the respondent. Notwithstanding that the respondent's position is now more properly described as the Australian Building and Construction Commissioner, at the time of relevant conduct he was the Director of the Fair Work Building Industry Inspectorate (the **Director**). The parties were content for the respondent to remain so described.

2 On 11 September 2017, the day the hearing was listed to commence, the parties sought a number of adjournments for the purpose of discussions. The parties returned the next day and informed me that they had agreed on a statement of facts, wherein the Director made a number of admissions. The statement of agreed facts was formally filed on 13 September 2017.

3 In light of the admissions in the statement of facts, the CFMEU pressed for a declaratory order and an order for the imposition of a penalty, forgoing the balance of the relief originally sought.

4 On resumption of the hearing, it then became apparent that there were three issues requiring resolution. These issues were:

- (1) Notwithstanding the agreed statement of facts – the admissibility of additional evidence the CFMEU sought to tender;
- (2) An appropriate declaratory order; and
- (3) The appropriate penalty (if any).

5 At the hearing, I ordered that the additional evidence tendered by the CFMEU be admitted, and indicated that I would give my reasons for that ruling at a later date. Before turning to this, and the two remaining issues for determination, it is convenient to summarise the facts as agreed by the parties.

Agreed facts

Background

6 The CFMEU is an industrial association and organisation within the meaning of the FW Act. It has members who work at building sites, where work is also performed by building contractors and building employers.

7 The Director was appointed by the Minister of Employment on 15 October 2013 pursuant to s 15(1) of the *Fair Work (Building Industry) Act 2012* (Cth) (**FWBI Act**) to head the statutory agency then known as the Office of the Fair Work Building Industry Inspectorate (also known as “Fair Work Building and Construction” (**FWBC**)).

8 I note that the FWBI Act was repealed by Sch 1 Pt 1 of the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (Cth). That the FWBI Act is applicable in these proceedings is, however, common ground.

9 The functions of the Director were set out in s 10 of the FWBI Act as follows:

- (a) to promote:
 - (i) harmonious, productive and cooperative workplace relations in the building industry; and
 - (ii) compliance with designated building laws and the Building Code by building industry participants;including by providing education, assistance and advice to building industry participants;
- (b) to monitor compliance with designated building laws and the Building Code by building industry participants;
- (c) to inquire into, and investigate, any act or practice by a building industry participant that may be contrary to a designated building law, a safety net contractual entitlement or the Building Code;
- (d) to commence proceedings in a court, or to make applications to the FWC, to enforce designated building laws and safety net contractual entitlements as they relate to building industry participants;
- (e) to refer matters to relevant authorities;
- (f) to represent building industry participants who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC, under a designated building law, if the Director considers that representing the building industry participants will promote compliance with designated building laws;
- (g) to disseminate information about designated building laws and the Building Code, and about other matters affecting building industry participants, including disseminating information by facilitating ongoing discussions with

building industry participants;

- (h) to make submissions and provide information to the Independent Assessor in accordance with this Act;
- (i) any other functions conferred on the Director by any Act.

Note: The Director also has the functions of an inspector (see section 59A).

10 The Director was supported by approximately 130 staff at the time of his appointment, including approximately 20 lawyers and 30 officers undertaking corporate functions. “Corporate functions” included communications/media. “Communications/media” staff were responsible for, *inter alia*, the maintenance of the FWBC intranet and website, and the production of educational materials by the FWBC. The legal group was responsible for the preparation of the content of those educational materials.

11 The Director acknowledged that he had ultimate responsibility for the operations of the FWBC, including managing personnel, agency finances and engaging with stakeholders. He also had responsibility for major decisions in relation to the commencement, conduct and settlement of litigation by the FWBC.

12 From prior to the time of the Director’s appointment until 28 July 2016, the following material was available for download on the FWBC website:

- A document entitled “What to do when a union official comes on your site” (**Factsheet**);
- A poster on right of entry (**Poster**); and
- A pocket guide on right of entry (**Pocket Guide**).

13 The Factsheet, Poster and Pocket Guide gave the impression that an employer or occupier was authorised to give a union official a reasonable request, which had to be followed by the official, about the room or areas they could use on the site for holding discussions or interviews with employees.

14 It was not in dispute that, prior to the commencement of these proceedings, the Director had not read any of the Factsheet, the Poster or the Pocket Guide, and was not aware of their specific content.

15 The parties agreed that the Poster was displayed in lunch rooms where employees ordinarily took meal and other breaks at various building sites in Western Australia between April and July 2016.

Legislative developments

16 Prior to 31 December 2013, s 492 of the FW Act provided, relevantly, that in relation to the location of interviews and discussions between employees and permit holders exercising right of entry under Pt 3-4 of the FW Act, a union official was required to comply with a reasonable request by the occupier about the rooms or areas they could use for holding discussions or interviews with employees.

17 On 28 June 2013, the *Fair Work Amendment Act 2013* (Cth) (**Amending Act**) received Royal Assent. Section 7 of Sch 4 to the Amending Act repealed s 492 of the FW Act and replaced it with a new provision in the following terms:

492 Location of interviews and discussions

- (1) The permit holder must conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises.
- (2) Subsection (3) applies if the permit holder and the occupier cannot agree on the room or area of the premises in which the permit holder is to conduct an interview or hold discussions.
- (3) The permit holder may conduct the interview or hold the discussions in any room or area:
 - (a) in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and
 - (b) that is provided by the occupier for the purpose of taking meal or other breaks.

Note 1: The permit holder may be subject to an order by the FWC under section 508 if rights under this section are misused.

Note 2: A person must not intentionally hinder or obstruct a permit holder exercising rights under this section (see section 502).

18 Additional provisions were enacted including s 492A (route to location of interview and discussions determined under s 492) and Pt 3-4 Div 7 (accommodation and transport arrangements in remote areas for the purpose of permit holders exercising rights under that Part of the FW Act). It is convenient to refer to these amendments cumulatively as the **right of entry amendments**.

19 Section 2 of the Amending Act provided that, *inter alia*, the right of entry amendments would commence on 1 January 2014.

20 In August and September 2013, FWBC staff drafted amendments to the Factsheet, Poster and Pocket Guide referable to the right of entry amendments including removal of

references to union officials being required to comply with reasonable requests about rooms or areas for interviews or discussions, and insertion of information consistent with s 492 as amended by the Amending Act. Senior legal officers of the FWBC cleared the amendments to the Factsheet, Poster and Pocket Guide for publication by 17 December 2013.

21 Following a federal election on 7 September 2013, the government changed. In mid-December 2013, the new government announced its intention to repeal the right of entry amendments in early 2014.

22 When Parliament resumed sitting on 11 February 2014, the government did not have a majority in the Senate. A Bill was introduced to the House of Representatives to, *inter alia*, repeal and substitute s 492 of the FW Act. However, the proposed changes to s 492 were not passed by Parliament.

Relevant directions

23 On 19 December 2013, the Director directed Mr Matthew Hurst (Assistant Director, Education at FWBC) and staff member Tone Doyle to not make changes to FWBC educational material reflecting the right of entry amendments. The Director's admission of this direction is identified at [29] of the statement of agreed facts.

24 The Director's reasons for this direction as summarised from [30]-[38] were:

(1) The new Minister for Employment had expressed an intention that the Federal government would repeal the right of entry amendments when Parliament resumed sitting in February 2014. If FWBC educational materials were amended in January 2014, the FWBC would be required to amend its materials again in the very near future to put them back to the way they stood prior to the right of entry amendments. The Director wished to avoid confusion from having multiple and conflicting versions of materials issued over a few months. This was particularly so in circumstances where, over the December/January period, the building and construction industry largely shuts down. The Director did not turn his mind to the possibility that legislation repealing the right of entry amendments might not be passed.

(2) Although the Director had not studied the right of entry amendments or read the Amending Act, he generally understood the broad nature of the right of entry amendments from contemporaneous media reports and commentary. He understood that the amendments permitted union officials access to lunchrooms for meetings and to cast a new obligation on employers to transport union officials to meet workers. As a result, the Director believed that

the amendments concerning transporting union officials were relevant for remote locations and were not relevant to the building and construction industry (especially in the central business districts of capital cities).

(3) The Director did not believe that the right of entry amendments were likely to cause dispute or disagreement because meetings in the building and construction industry almost always occur in crib rooms or car parks.

(4) The Director understood that the FWBC educational materials were not intended to be an exhaustive statement of all of the statutory provisions which may apply in every situation which could conceivably arise at a building site – rather they were intended to provide a fair and useful summary only. The FWBC materials could, in the Director’s view, remain a fair and accurate summary without additional material relating to the right of entry amendments.

25 As a result of the Director’s direction, the Factsheet, Poster and Pocket Guide were not revised and remained in their unamended form on the FWBC website until 28 July 2016.

26 Between 20 December 2013 and 9 January 2014, there was email correspondence between the Director, Mr Hurst and Mr Adam Copp (Director, Stakeholder Engagement, FWBC) concerning the nature of internal information (including an intranet article) which was to be provided to FWBC staff concerning the right of entry amendments. The tenor of an intranet article subsequently produced by Mr Copp was that, although right to entry amendments had been made, the new Federal government intended to roll back those amendments, and therefore no changes had been made to FWBC materials.

27 The uncontested evidence before the Court was that the Director was fully aware of this approach, and that senior staff were concerned about it. For example, on 9 January 2014 following receipt of Mr Copp’s intranet article, Mr Jeff Radisich (the Executive Director of the FWBC Operations North/West) emailed Mr Copp as follows:

Do we have any idea when the roll-back will occur? I thought we would be stuck with these provisions until the Senate change over in July. If that’s the case we are running something of a political and industrial risk by withholding info on the law as it currently stands. Ref penultimate line of para under “Advice” below.

28 On 10 January 2014, Mr Copp sent the following response to Mr Radisich:

To be honest, I do share your concerns and talked to Nigel about it last year.

However, he was absolutely adamant that he didn’t want us to change anything as the Government intention is to change the legislation. He said he was extremely comfortable handling it in Estimates or the media or wherever. He felt pretty strongly

about it.

I double checked the intranet story and email off with him as well yesterday and he was happy with these (see attached).

29 It was not in dispute that the FWBC continued to promulgate a position where the right of entry amendments had not taken effect. For example, on 21 January 2014, Mr Copp emailed the Director in relation to the request of the Master Builders Association of the Australian Capital Territory (**MBA ACT**) to review MBA ACT documents concerning right of entry and proposed FWBC comments on those documents. The comments included that new laws began on 1 January 2014, however the government indicated it would change the laws back to the previous provisions, and therefore the FWBC was not changing its public facing content to reflect the new laws.

30 Between February and June 2014, there were numerous public instances of the FWBC stating that right of entry material was available on its website, and that information about right of entry was important for building and construction industry participants. These instances included FWBC industry updates (in February, March and July 2014), public speeches by the Director (in March and May 2014), an FWBC media release on 11 June 2014 and an interview with the Director published on 27 February 2015.

31 In March 2016, the Director commenced proceedings against officers and agents of the CFMEU in the Western Australian Registry of the Federal Court of Australia, alleging contraventions of the FW Act (including s 492) relating to the exercise of rights of entry. In May 2016, the Director commenced an action in the Fair Work Commission concerning the exercise of rights of entry. There were also a significant number of investigations by the FWBC of alleged contraventions of right of entry provisions, and proceedings commenced by the FWBC, between 2013 and 2016.

32 On 25 July 2016, Mr David Noonan, the National Secretary of the Construction and General Division of the CFMEU, wrote to the Director and informed him that the Factsheet, Poster and Pocket Guide misrepresented the requirements of s 492 of the FW Act. On 28 July 2016, the Director directed that the Factsheet, Poster and Pocket Guide be removed from circulation and the FWBC website pending receipt of advice concerning Mr Noonan's letter.

33 Amended versions of the Factsheet, Poster and Pocket Guide, updated to reflect s 492 of the FW Act, were published on the FWBC website on 2 August 2016.

Admitted contravention

34 At [74] of the statement of agreed facts, the Director admitted contravention of s 503 of the FW Act in the following terms:

The First Respondent contravened s 503(1) of the FW Act by giving the direction referred to in paragraph 29 above in circumstances where, whilst the First Respondent did not intend, believe or advert to the possibility that an impression would or might be given that something was authorised by Pt 3-4 of the FW Act when it was not so authorised, a reasonable person, with the knowledge of the First Respondent, could reasonably be expected to have foreseen that that action would lead to the impression being given, by the continued availability of the Factsheet, Poster and Pocket Guide on the Website, that an employer or occupier was authorised to give a union official a reasonable request which had to be followed by the union official about the room or areas they may use on the site for holding discussions or interviews with employees. An employer or occupier was not authorised to give such a request by the FW Act from 1 January 2014. From that date and to this day, s 492 provided that if a permit holder and occupier did not agree on the rooms or areas of the premises where interviews or discussions could be held, the permit holder may conduct the interview or hold the discussion in any room or area in which one or more of the person who may be interviewed or participate in the discussions ordinarily take meal or other breaks and that is provided by the occupier for the purpose of taking meal or other breaks.

35 I now turn to my reasons for admission of evidence and the two remaining issues requiring determination in this case.

Admissibility of additional evidence

36 It was common ground at the hearing that, in light of s 191(2) of the *Evidence Act 1995* (Cth) (**Evidence Act**), leave of the Court was required for the admission of additional evidence sought to be adduced by the CFMEU. In particular, s 191(2)(b) provides that evidence may not be adduced to contradict or qualify an agreed fact unless the Court gives leave.

37 The additional evidence was an email from the Director sent at 9.36 pm on 21 January 2014 to Mr Copp in which the Director responded to an email sent to him earlier that day by Mr Copp concerning the material the MBA ACT sought reviewed by the FWBC. Relevantly, Mr Copp's earlier email provided:

Dear Nigel

As you may recall, MBA ACT asked if we could review their ROE materials.

We have consulted with Liz Hayes on updating this content and some of the advice is quite complex and technical. It may be beneficial if John and the other reps from MBA review the changes we are suggesting, and we offer to let them talk to Liz if they would like to discuss further.

The advice is summarised below. Full advice is available in the attached documents that have been marked up.

ROE Summary for members

- We have included our suggested changes from Liz, including strengthening the sections referring to misconduct from permit holders on site.
- We have added a section specifically about the role of FWBC and where we can provide assistance. This addresses other areas of concern that may flow on from misconduct on site e.g. coercion breaches, unlawful industrial action etc.
- There is still a bit of an open question on who is the intended audience for this document? Will it be the IR Managers for larger organisations? It is well researched and referenced, however it will be difficult to digest for members not as familiar with the specifics of the legislation. A simplified version without footnotes may assist this.

Full marked up advice available attached and here: [MBA ACT Right of Entry summary](#). (Please note on page 7 there is advice around the changes to RoE from the previous government. You may want to review that section to make sure the messaging is ok with you.)

ROE Flowcharts

- The structure and visual design of the content could be reviewed – currently it is not particularly straight forward.
- FWBC's [ROE pocket guide](#) provides an example of how the content could be summarised and structured. We would be happy for MBA to use and adapt this content as they see fit.
- Suggest removing FW Act section numbers throughout content.
- It would be good for them to emphasise FWBC's hotline number throughout these resources – particularly following sections where entry is not permitted or reused.
- In "Permit holder's duties", we recommend the removal of the section that references 'a breach will not allow removal from site'. This is the main area where this can be strengthened, as head contractors do not have to tolerate misconduct on-site and can ask that they are removed (or contact the police if the union official refuses).
- For the WHS Act flowchart it is important that members are also told to ask for the FW Act permit, as this is also a requirement.

Marked up versions of the flow charts are attached to this email.

Happy to discuss.

(Original emphasis.)

38 In his emailed response, the Director wrote:

Agreed Adam. Please proceed as per your recommendation.

Many thanks, particularly Liz for her work involving a safety regime apparently unique to the ACT.

39 Relevantly to s 191(2)(b) of the Evidence Act, the email of the Director appeared to add to material in [50]-[53] of the statement of agreed facts concerning the Director's knowledge of material relating to right of entry publications of the MBA ACT.

40 After hearing submissions, I granted leave for the Director's email to be adduced as evidence.

41 I did so for the following reasons:

- I accepted the submission of Mr Agius SC for the CFMEU that, at least from his client's perspective, the email had been inadvertently omitted from material annexed to the agreed statement of facts.
- The contents of the email constituted a potential answer to a point made in the submissions of the lawyers for the Director, namely that the Director had not read, and no-one had drawn to his attention, a document that was to be a publication of the MBA ACT dealing with rights of entry of permit holders.
- While I note the submission of Mr Wheelahan QC for the Director that the email was not relevant for the purposes of s 55 of the Evidence Act because the contravention was the direction referred to in [74] of the statement of agreed facts, nonetheless the breadth of conduct referable to the contravention and the proposed declaration was a matter of dispute notwithstanding the agreed facts. To that extent the email was relevant.
- I note the submission of Mr Wheelahan QC for the Director that what the Director appeared to be agreeing with in his email was a suggestion of Mr Copp that "John and other reps from MBA review the changes we are suggesting, and we offer to let them talk to Liz if they would like to discuss further". While this may be the case, nonetheless the Director's email acknowledged the Director's receipt from Mr Copp of material concerning the MBA ACT which is detailed in the statement of agreed facts, including Mr Copp's comment "(Please note on page 7 there is advice around the changes to RoE from the previous government. You may want to review that section to make sure the messaging is ok with you.)" To that extent the import of the Director's email is not as narrow as he has advanced.
- It is important for the Court to have access and regard to comprehensive and accurate evidence in the proceedings.

- The email was relevant to the objective seriousness of the matter, in that it demonstrated knowledge on the part of the Director as to materials reviewed (and to that extent, approved) by the FWBC.
- Ultimately, Counsel for the Director informed me that my decision concerning the admissibility of the email would not affect the course of his submissions.

Issues for determination

Form of the declaratory relief

42 The Court is empowered to order declaratory relief pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) or s 545 of the FW Act. It is common ground between the parties that the Court should make a declaration in respect of the conduct of the Director.

43 I consider that a declaration of contravention of the legislation by the Director is appropriate. The conduct of the Director was serious. The Director admitted to contravening a law he was required to police. The consequence of his conduct was the dissemination by the FWBC – at his direction – of false information to the industry of which the FWBC was not only the regulator, but supposedly a trustworthy source of reliable information for industry participants. Making matters worse, the wrongdoing was exacerbated by the fact that right of entry is commonly a source of industrial dispute in a frequently volatile industrial environment. Indeed the Director has not hesitated to commence legal proceedings against the CFMEU in circumstances where the FWBC alleges CFMEU officers or agents infringe rights of entry on to building sites.

44 However, whilst the parties agree that a declaration of contravention of s 503 of the FW Act ought be made, they disagree on the terms of such a declaration.

45 The CFMEU sought a declaration in the following terms:

The First Respondent contravened s.503(1) of the *Fair Work Act 2009* (Cth) between 1 January 2014 and 28 July 2016 by directing that no changes be made to a Factsheet, Poster and Pocket Guide published on a website of the Office of the Fair Work Building Industry Inspectorate, in circumstances where a reasonable person with the knowledge of the First Respondent could reasonably be expected to have foreseen that that action would lead to the impression being given, by the continued availability of the Factsheet, Poster and Pocket Guide on the website, that an employer or occupier was authorised to give a union official a reasonable request which had to be followed by the union official about the rooms or areas they may use on the site for holding discussions or interviews with employees, when the giving of such a direction was not authorised from 1 January 2014 by Part 3-4 of the *Fair Work Act 2009* (Cth).

(the CFMEU's version)

46 The Director sought a different order, as follows:

The first respondent contravened section 503(1) of the Fair Work Act 2009 (Cth) (FW Act), when on 19 December 2013, he directed staff employed by the Office of the Fair Work Building Inspectorate (known as "Fair Work Building and Construction" (FWBC)) that no changes were to be made to existing FWBC educational material concerning right of entry under Part 3-4 of the FW Act, in circumstances where a reasonable person, with the knowledge of the first respondent, could reasonably be expected to have foreseen that that action would lead to the impression being given, by the continued availability of the educational material on the FWBC website, that an employer or occupier was authorised to give a union official exercising a right of entry a reasonable request which had to be followed by the union official, about the room or areas they may use on the site for holding discussions or interviews with employees, when such a thing was not so authorised.

(the Director's version)

47 The terms of these draft orders are substantially identical. The key difference concerns the relevant date(s) identified in each draft. The CFMEU submitted, in summary:

- There is no warrant to limit the declaration to the act of the Director on 19 December 2013 directing staff employed by the FWBC not to make changes to the website;
- If the Director's direction occurred in December 2013, but the effect of the direction was to leave on the website information which was false until 2016, the effect is relevant to the objective seriousness of the matter.
- The language proposed in the CFMEU's version is compatible with [74] of the statement of agreed facts.

48 The Director submitted, in summary:

- The wording proposed by the CFMEU is a significant and material departure from the agreed basis on which liability was admitted, as reflected in [74] of the statement of agreed facts.
- The agreed contravention is the direction of the Director on 19 December 2013.
- Section 503 of the FW Act requires an action and leaves no room to construe action as including omission for the purposes of that section. The agreed fact focuses on an action, that being the direction of the Director of 19 December 2013.

49 Section 503 of the FW Act provides:

Misrepresentations about things authorised by this Part

(1) A person must not take action:

- (a) with the intention of giving the impression; or
- (b) reckless as to whether the impression is given;

that the doing of a thing is authorised by this Part if it is not so authorised.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply if the person reasonably believes that the doing of the thing is authorised.

50 Although the heading of s 503 refers to misrepresentations about “things” authorised by Pt 3-4 of the FW Act, s 503(1) specifically states that a person must not take action with the proscribed intention or recklessness. I am not aware of authority which casts light on the concept of “taking action” in the context of s 503(1). Some assistance can be derived from [2001] of the *Explanatory Memorandum to the Fair Work Bill 2008* which stated:

2001. This clause provides that a person must not take action with the intention of giving the impression, or reckless as to whether the impression is given, that the action is authorised by the Part when this is not the case. An example of behaviour that this clause would cover is where a person represents himself or herself as a permit holder when she or he does not hold a valid entry permit. Other examples would include where a person asserts she or he is entitled to represent particular employees when the union’s eligibility rules do not extend to that class of employees, or where an employer asserts to employees that the union is not allowed to talk to them when it can.

51 The examples to which [2001] refers, involving “represents himself or herself” and “asserts”, were all positive actions on the part of the contravenor. Indeed the expression “take action” is defined by the Oxford English Dictionary as including:

(more generally) *to take steps* in regard to any matter, *to act*.

(Emphasis added.)

52 “Taking” action connotes positive action and would not, as a general proposition, mean a failure to “take action”. However, it is unnecessary for me to conclusively decide this point. At [74] of the statement of agreed facts the parties agreed that the Director contravened s 503(1) of the FW Act by giving the direction referred to in [29]. Paragraph 29 read:

On 19 December 2013, the First Respondent met with Matthew Hurst (**Hurst**) who was the Assistant Director, Education at FWBC and Tone Doyle who was a staff member of FWBC. This meeting is recorded in the First Respondent’s diary as having occurred at 3:00 PM. During the meeting, the First Respondent directed that no changes be made to FWBC educational material concerning right of entry to reflect the amendments to the FW Act. The First Respondent’s reasons for this decision were as follows.

53 It is clear from [74] that it is the direction of 19 December 2013 by the Director which contravened s 503. It is that direction which was the relevant “action” within the meaning of s 503 of the FW Act.

54 While [74] goes on to refer to the terms of s 492 of the FW Act from 1 January 2014 “to this day” the contravention as agreed by the parties did not refer to actions of the Director “to this day”. I do not accept the submission of the CFMEU that there was no warrant to limit the declaration to one act on 19 December 2013 when the parties agreed that the contravention was constituted by that one act. That is not to say that the effect of that misrepresentation until 2016 was not material – however it was relevant to the objective seriousness of the action of the Director and not part of the agreed contravention.

55 The form of declaratory relief is at the discretion of the Court, and I am not bound to make orders in the terms advanced by either party. However in light of the statement of agreed facts, and in particular the terms of [29] and [74], I am satisfied that the Director’s version accurately reflects the declaratory relief agreed by the parties, and that it is appropriate for the Court to make a declaration in those terms.

Penalty

56 The CFMEU sought the imposition of a pecuniary penalty on the Director pursuant to s 546 of the FW Act. The maximum penalty which the Court could impose on the Director for the contravention of s 503(1) of the FW Act is 60 penalty units (Column 4 of item 25 of s 539(2) of the FW Act). As I have decided that the contravention of s 503(1) was the action taken on 19 December 2013, the value of the penalty unit is that at the time of the conduct: *Murrihy v Betezy.com.au Pty Ltd and Another (No 2)* [2013] FCA 1146; (2013) 221 FCR 118 at [6]-[28]; *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union (The Kane Constructions Case) (No 2)* [2017] FCA 368 at [9]. The penalty unit on 19 December 2013 was \$170 as per the amendment to the s 4AA of the *Crimes Act 1914* (Cth) in item 7, Sch 3 of the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth). The maximum penalty the Court could impose in this case is therefore \$10,200.

57 The CFMEU has further urged the Court to impose a penalty on the Director at the highest end of the scale. Conversely, the Director has submitted that the imposition of a pecuniary penalty will serve no purpose, and that this is an appropriate case for making no more than a declaration of contravention.

58 Recently the Full Court of this Court reviewed principles and authorities pertinent to the imposition of pecuniary penalties. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113, Dowsett, Greenwood and Wigney JJ said:

98 Whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty is primarily, if not wholly, protective in promoting the public interest in compliance: *Trade Practices Commission v CSR Ltd* [1990] FCA 521; (1991) ATPR 41-076 at 52,152 [42]; *Commonwealth v Director, FWBII* at [55] (per French CJ, Kiefel, Bell, Nettle and Gordon JJ). The principal object of a pecuniary penalty is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene; both specific and general deterrence are important: *Chemeq* at [90]; *Ponzio* at [93]. A pecuniary penalty for a contravention of the law must be fixed with a view to ensuring that the penalty is not to be regarded by the offender or others as an acceptable cost of doing business: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 659 [66]; *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at 265 [62]-[63]. In relation to general deterrence, it is important to send a message that contraventions of the sort under consideration are serious and not acceptable: *Australian Securities and Investments Commission v Southcorp Ltd (No 2)* (2003) 130 FCR 406

at 418 [32].

- 99 The question whether a pecuniary penalty involves an element of punishment remains somewhat controversial: see the discussion in *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2016] FCA 453; 242 FCR 389 at [76]; *ACCC v ANZ* at [78]–[83]; *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2016] FCAFC 184; 341 ALR 383 at [8], referring to *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 296-7; *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238 at 241; *Trade Practices Commission v Stihl Chainsaws (Aust) Pty Ltd* (1978) ATPR 40-091 at 17,896; *Australian Competition and Consumer Commission v Ithaca Ice Works Pty Ltd* [2001] FCA 1716; (2002) ATPR 41-851 at 44,543 [50]. To a certain extent, that debate appears to be more semantic or philosophical than real. It is sufficient to say that, accepting that the primary purpose of imposing a pecuniary penalty is to protect and deter, that purpose is achieved by imposing a punishment in the form of a pecuniary penalty: *ACCC v ANZ* at [83].

(Emphasis omitted.)

59 Their Honours noted that the fixing of a pecuniary penalty may be likened to the “instinctive synthesis” involved in criminal sentencing. This entails the identification and balancing of all factors relevant to the contravention and the circumstances of the defendant, and making a value judgment as to what the appropriate penalty is in light of the protective and deterrent purpose of a pecuniary penalty (at [100]). Importantly, the Court then turned to relevant considerations in respect of evaluation of penalty:

- 101 In fixing the amount of a civil penalty, reference is frequently made to the lists of factors or considerations identified by Santow J in *Australian Securities and Investments Commission v Adler (No 5)* [2002] NSWSC 483; (2002) 42 ACSR 80 at 114-115 [126] and French J in *Chemeq* at 534 [99]. Those lists of relevant considerations, which have been approved and elaborated on by many subsequent decisions of this Court, were not, and plainly were not intended to be, exhaustive. Nor was it suggested that each of the factors referred to in the respective lists was necessarily relevant or important in every case. These lists of factors should not be treated as a rigid catalogue or checklist of matters to be applied in each case; the overriding principle is that the Court should weigh all relevant circumstances: *Australian Securities and Investments Commission v GE Capital Finance Australia* [2014] FCA 701 at [72].
- 102 In general terms, the factors that may be relevant when fixing a pecuniary penalty may conveniently be categorised according to whether they relate to the objective nature and seriousness of the offending conduct, or concern the particular circumstances of the defendant in question.
- 103 The factors relating to the objective seriousness of the contravention include: the extent to which the contravention was the result of deliberate, covert or reckless conduct, as opposed to negligence or carelessness; whether the contravention comprised isolated conduct, or was systematic or occurred over a period of time; if the defendant is a corporation, the seniority of the

officers responsible for the contravention; the existence, within the corporation, of compliance systems and whether there was a culture of compliance at the corporation; the impact or consequences of the contravention on the market or innocent third parties; and the extent of any profit or benefit derived as a result of the contravention.

104 The factors that concern the particular circumstances of the defendant, particularly where the defendant is a corporation, generally include: the size and financial position of the contravening company; whether the company has been found to have engaged in similar conduct in the past; whether the company has improved or modified its compliance systems since the contravention; whether the company (through its senior officers) has demonstrated contrition and remorse; whether the company had disgorged any profit or benefit received as a result of the contravention, or made reparation; whether the company has cooperated with and assisted the relevant regulatory authority in the investigation and prosecution of the contravention; and whether the company has suffered any extra-curial punishment or detriment arising from the finding that it had contravened the law.

105 ...

106 Careful attention must also be given to the maximum penalty for the contravention. That is so for at least three reasons: first, because the legislature has legislated for the maximum penalty and it is therefore an expression of the legislature's policy concerning the seriousness of the prescribed conduct; second, because it permits comparison between the worst possible case and the case that the Court is being asked to address; and third, because the maximum penalty provides a "yardstick" which should be taken and balanced with all the other relevant factors: *Markarian* at 372 [31] (per Gleeson CJ, Gummow, Hayne and Callinan JJ).

60 These principles are apposite to the circumstance of the present case.

61 Whether there is utility to imposing a penalty on the Director in this case is a question which properly arises in the context of considering the issue of deterrence. In many ways this is a seminal question, given that a primary purpose of the imposition of civil penalties is deterrence, both general and specific: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 at [55], [59].

62 The Director relied on a number of authorities in relation to this point to support his contention that a pecuniary penalty was not warranted, in particular *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Telstra Corporation Ltd* [2007] FCA 1607; *Pine v Seelite Windows & Doors Pty Ltd* [2005] FCA 500; *Ponzio v Firebase Sprinkler Systems Pty Ltd* [2005] FCA 733; *Ponzio v D and E Air Conditioning Pty Ltd* [2005] FCA 964; *Pine v Expoconti Pty Ltd* [2005] FCA 1434; *Pine v Casello Constructions Pty Ltd* [2005] FCA 1854; and *Carr v Higgins Coatings Pty Ltd* [2005] FCA 1809.

63 In *CEPU v Telstra Corporation Ltd* [2007] FCA 1607, Gordon J noted at [13] that there is no principle that a Court must impose a penalty in all cases of proven breach. In that case her Honour considered that there was no purpose to be served by the imposition of a penalty where:

- the unlawful conduct arose out of an arguable but erroneous construction of a relevant term of an enterprise agreement,
- the subsequent breach could not be characterised as demonstrating a flagrant or wilful disregard for the relevant enterprise agreement, and
- the complainant had been fully compensated for the loss suffered as a result of the breach.

64 The other authorities on which the Director relied all concerned circumstances where an employer had paid employees wages while the employees were engaged in industrial stoppages in contravention of the *Workplace Relations Act 1996* (Cth), and where the Court found that there was no utility in imposing a pecuniary penalty on the employer.

65 So:

- In *Pine v Seelite Windows & Doors Pty Ltd* [2005] FCA 500 the relevant application concerned the imposition of a pecuniary penalty under s 187AD(1) of the *Workplace Relations Act 1996* (Cth). The respondent had contravened s 187AA of that Act in respect of the payment of two days wages totalling \$656.72 to four employees during a period when the employees were engaged in industrial action. Finkelstein J noted that the managing director of the employer had not been informed that the relevant employees had not worked on the particular days, but on learning of the days not worked had taken steps including communicating with the employees and informing them that they would not be paid for any lost time arising out of industrial action other than in circumstances where they were exposed to an immediate safety risk. In relation to the issue of imposition of penalty on the company his Honour continued:

- 9 In these circumstances this action is much ado about nothing. True it is that the laws of the land must be obeyed. It is also true that the Building Industry Taskforce is entitled to take all reasonable steps to ensure that the laws, for which it has some responsibility in enforcing, are complied with. As I have said, not every contravention of every law needs to be punished. Often a caution will suffice. But, as it has been decided that there should be an action, I must deal with it.

- 10 Should I impose a penalty on the respondents? No harm has been done to anyone. The contravention was inadvertent. It is unlikely to occur again. The amount of wages involved is insignificant. In these circumstances it would be quite wrong to punish the respondents. Nothing would be achieved by the imposition of a pecuniary penalty. There is no need for a specific deterrent: it is simply not necessary. And if any penalty were imposed it would be so low that it could not act as a general deterrent.

- In *Ponzio v Firebase Sprinkler Systems Pty Ltd* [2005] FCA 733, Merkel J declined to impose a penalty, emphasising that it was most unlikely the respondent would reoffend, and the respondent did not make the relevant payments recklessly or indifferently. His Honour observed, however, that the circumstances of the case were exceptional (at [10]).

- In *Ponzio v D and E Air Conditioning Pty Ltd* [2005] FCA 964, an application for imposition of penalty was again sought against an employer for paying employees in respect of periods when those employees were engaged in industrial action as defined in the legislation. After examining relevant authorities and the facts, North J concluded:

30. Given the nature of the breaches, the record of the respondent, its subsequent conduct and the amount of disadvantage already suffered, I do not regard the imposition of a penalty as serving the purpose of either particular deterrence or general deterrence.

- In *Pine v Expoconti Pty Ltd* [2005] FCA 1434, in similar circumstances Kenny J said:

- 15 The present case involves payments to 28 employees at two sites in respect of periods of industrial action over two days by a subcontractor. The payments totalled a little less than \$3,500. At the time they were made, the respondent believed there was a safety issue preventing its employees from working. It believed that its employees were ready and willing to work but that the alimaks and lifts had been shut down because of a safety audit, thereby preventing them from working. There was an absence of harm as a result of the stoppages. The respondent has no prior contraventions of Pt VIII of the Act and has since changed its policy to prevent a recurrence of this conduct. The respondent has admitted the contraventions at the earliest opportunity and co-operated with the applicant in dealing with the matter efficiently. There appears little likelihood that the respondent will repeat the contravening conduct. Further, the respondent has plainly incurred significant costs in defending these proceedings; and the applicant accepted that they were not insignificant.

16. I accept that this is not an appropriate case for particular weight to be given to the matter of general deterrence; and, in any event, this interest has been served by the bringing of this proceeding and the time and cost that the respondent has as a consequence been required to spend in relation to the proceeding, although I note the comments of Merkel J in *Multiplex* at [9]. I do not consider that this case is materially different from *Firebase* or *D and E Air Conditioning*; and, in this particular case, which arises out of the same factual

background, interests of parity should prevail. I note too that the contraventions arise out of essentially the same course of conduct. Accordingly, although I regard the course as suited only to the exceptional case, I would make declarations concerning the respondent's contravening conduct but not impose a penalty in this case.

- In *Pine v Casello Constructions Pty Ltd* [2005] FCA 1854, again involving payment of workers during industrial stoppages in contravention of the Workplace Relations Act, North J observed at [8]-[9] that:

- The relevant conduct occurred on two days and the issue was different on each day;
- In the circumstances where the respondent had been required to incur costs in its defence of \$8,000, in respect of a payment to its workers of \$2,000, it was unlikely it (or any other employer) would be inclined to make similar payments to employees. General deterrence did not require the imposition of a monetary penalty;
- Given the record of the respondent, its co-operation with the applicant, acknowledgment of the alleged contravention early on and the amount of disadvantage already suffered, it was unlikely the respondent will be involved in any further contraventions of the Act

- In *Carr v Higgins Coatings Pty Ltd* [2005] FCA 1809, Gray J noted that the respondent had had no prior contravention of the relevant legislation, had co-operated, was “essentially innocent” of wrongdoing, and the applicant conceded that there would be no utility in the imposition of a pecuniary penalty.

66 So far as concerns specific deterrence, the Director has resigned from his statutory appointment and there is no present risk of any recurrence or prospect of him contravening the FW Act again. The Director submits that his resignation is itself an adverse consequence of his contravention.

67 I accept the submission of the Director so far as concerns the need for specific deterrence in this case. It is fair to say that the Director has had a long and distinguished career in public service, and that his resignation from office was a direct result of his admission of contravention in this case. In that respect, I do not consider that any pecuniary penalty the Court could impose referable to specific deterrence would meaningfully add to the price the Director has already paid for his contravention of s 503(1) of the FW Act.

68 A different issue arises however insofar as concerns principles of general deterrence in this context. In this case, the Director submitted that there was no case for general deterrence, in circumstances where there is only one Australian Building and Construction Commissioner, and to his knowledge there has never been a recorded contravention of s 503(1) of the FW Act by any person within any of the organisations established under or in relation to the FW Act. The Director further submitted that, unlike industrial protagonists or participants, there is no need for broader deterrence because the FWBC is not selling anything, has no interests to pursue or preserve, and has no profit to make or anything to gain from the conduct of its affairs.

69 In cases of contravention of civil penalty provisions, the Court has a duty to consider whether a penalty should be imposed as a factor preventing the commission of similar contraventions by those who may otherwise be tempted by the prospect that only light punishment will be imposed (see *R v Harrison* (1997) 93 A Crim R 314 at 320-321, *Comcare v Post Logistics Australasia Pty Limited* [2012] FCAFC 168 at [46]). In this context I note apt comments of Finkelstein J in *Community and Public Sector Union v Telstra Corporation Ltd* [2001] FCA 1364 at [9] where his Honour observed:

On the other hand, the basic objective of punishment should be to enhance social welfare by minimising the net social cost of wrongdoing. This is achieved by deterrence. Here I speak not only of specific deterrence but also general deterrence. In a case such as the present, that may be of some importance. ***The reason is that Telstra submits that there is no need to impose any penalty because it will not offend again. That may be true. But even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and to act as a warning to others not to engage in similar conduct: R v Thompson (1975) 11 SASR 217.***

(Emphasis added.)

70 The authorities to which the Director referred as supporting his submission that no pecuniary penalty should be imposed in this case are of little assistance in considering whether the principles of general deterrence are relevant. This is because:

- Unlike in the circumstances of the present case, none of the cases to which the Director referred involved a contravenor who was the industry regulator, whose role it was to ensure that accurate information be promulgated to industry participants as well as the broader public;

- Unlike in the present circumstances where the conduct occurred at the Director's specific direction, in a number of the cases the conduct resulting in the contravention occurred without the knowledge of the contravenor (for example *Carr* [2005] FCA 1809 and *Pine v Seelite Windows & Doors Pty Ltd* [2005] FCA 500);
- The present circumstances can be contrasted with *CEPU v Telstra* [2007] FCA 1607 where the contravention arose from an **arguable** interpretation of an enterprise agreement. In the current proceedings there was no ambiguity concerning the status of the relevant law – rather in making the direction the Director appeared to take a calculated risk that the Federal government would eventually get the numbers to pass its legislation and in the interim the FWBC should not amend the information either on its website or in its published materials;
- Most of the relevant cases involved payments of relatively small amounts of wages in specific companies, and involved conduct confined to a few days. In the current proceedings, the Director's action resulted in a misrepresentation concerning the state of the law being perpetuated by the FWBC over several years;
- In *Carr* [2005] FCA 1809, the applicant conceded that there would be no utility in the imposition of a pecuniary penalty. That is clearly not the case here.

71 Further, while the Director is correct in submitting that the FWBC does not, and could not, profit from the misrepresentation to which he admits, this in itself is not a standard against which the need for deterrence should be judged in this case. The conduct in question exhibited on the Director's part a degree of carelessness and, indeed, somewhat arrogant ignorance, in respect of the truth of information concerning the right of entry of industry participants in an often charged industrial environment. His careless conduct resulted in incorrect information remaining on the FWBC website for several years, in apparent disregard of the reputational risk to the FWBC, and in circumstances where the Director promoted the supposed accuracy of that information in communications with industry and the general public. Whether the CFMEU was misled by the misrepresentation on the FWBC website resulting from the Director's conduct is not the test. There is utility in ensuring that any successor to the Director, other staff of the FWBC, and staff of other regulators are adequately warned against engaging in similar conduct.

72 The Director did not intend to contravene s 503(1) of the FW Act. I note the contrition expressed by the Director, his remorse for his actions, the fact that he has no record of

previous contravention of the FW Act, and that fact that he has paid a high personal price in the loss of his position as a result of his contravention.

73 The Director referred to his co-operation with the CFMEU in enabling appropriate discovery orders to be made unopposed, and his admission of the contravention of s 503(1) of the FW Act in the statement of agreed facts. I accord little weight to the Director refraining from opposing discovery orders. I give more weight to the fact that the Director reached a position of agreement with the CFMEU on key facts, and admitted the contravention, thus obviating the need for a five day trial with associated costs on the parties and Court time. In saying so, I give less weight to this concession than I would have accorded had the Director's admission occurred before the first listed day for hearing, rather than after (as was the case here).

74 Taking into consideration the factors I have mentioned, I consider that there is utility in a pecuniary penalty order. I consider that the conduct of the Director is at the higher end of the scale of seriousness so far as concerns breach of s 503(1) of the FW Act. The penalty should reflect that fact. The penalty should, however, also reflect the circumstances of remorse, extra-curial consequences to the Director, his co-operation and his record.

75 It is appropriate that the Director be ordered to pay a penalty in the amount of \$8,500.

76 The CFMEU has sought an order that the Director pay the pecuniary penalty to the CFMEU pursuant to s 546(3) of the FW Act, on the basis that it is “the usual position”. That an order in such terms is usual is clear from principles explained by the Full Court in *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4; (2016) 239 FCR 336 at [72] *et seq* and [117]-[118]. The Director did not oppose an order in such terms, were the Court minded to order payment of a pecuniary penalty. I will order that the pecuniary penalty of \$8,500 be paid to the CFMEU within 30 days of the date of this order.

I certify that the preceding seventy-six (76) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier.

Associate:

Dated: 29 September 2017