

Master Builders Australia

Submission to House of Representatives  
Standing Committee on  
Education and Employment:  
*Encouraging Employment in Small Business*

June 2015



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## 1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations.
- 1.2 Over 125 years the movement has grown to over 33,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.3 The building and construction industry (BCI) is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter.
- 1.4 At the same time, the wellbeing of the BCI is closely linked to the general state of the domestic economy

## 2 Overview

- 2.1 Small businesses are the backbone of the building and construction industry (BCI) in Australia.
- 2.2 According to official statistics (ABS, 2015), almost 63 per cent of firms in the BCI have no employees (that is, are sole operators/traders), with a further 36 per cent of firms in the industry having between 1 and 19 employees.
  - 2.2.1 Small businesses also constitute a sizeable share of employment (60 per cent) and value-added (46 per cent) in the BCI.
- 2.3 Small business are not, and should not, be regarded as just 'big businesses in miniature'. They can, and do, differ quite significantly from larger businesses.
- 2.4 A recent study by the Reserve Bank of Australia (Nicholls and Orsmond, 2015) found:
  - small businesses tend to incur relatively greater costs than larger businesses in understanding, and complying with, labour, tax and other regulations;

- small business managers tend to be 'more thinly spread' than larger business managers in performing their duties, often being called upon to stretch their skills across new areas whilst also keeping abreast of current obligations; and,
  - small businesses are more sensitive than larger businesses to cash flow issues, in particular delayed or late payments by customers.
- 2.5 Econometric modelling undertaken by Master Builders' specifically for this inquiry indicates there are real differences in the drivers in small versus medium/large business employment.
- 2.6 Key findings of the modelling include:
- the more optimistic the outlooks for profits, for industry activity generally, and for investment in plant and equipment by small business the more likely they are to increase their demand for labour (that is, create new employment or make greater use of sub-contractors),
  - while expectations of higher interest rates mean small businesses are more likely than otherwise to lower their demand for labour.
- 2.7 Master Builders has identified four key policy priorities for action by the Federal Government, either alone or in conjunction with the State/Territory and Local Governments, which could constructively assist the small business sector: namely reforms to: regulation; skills and training; independent contracting; and, unfair dismissal law.
- 2.8 In the area of regulation, key priorities include:
- substantially reducing State, Territory and Local Government variations to the National Construction Code (NCC);
  - eliminating the differential classification and treatment of employees and sub-contractors within and between jurisdictions; and,
  - improving third-party regulatory processes, especially where these regulations and their associated requirements are imported and/or referenced in Federal Government et al regulatory instruments.

- (For more information see Section 8).

2.9 In the area of skills and training, key priorities include:

- greater harmonisation of apprenticeship systems;
- introduction of a system of “Passports to Competencies”; and,
- wider application of industry-owned qualification and competency development.
- (For more information see Section 9).

2.10 In the area of independent contracting:

- the creation of a government supervised register, preferably hosted by the Australian Taxation Office (ATO) where contractors can voluntarily register for contractor status, subject to a single set of tests, recognised across agencies and jurisdictions which reflect the operation and conduct of a modern building sector
- (For more information see Section 10).

2.11 In the area of unfair dismissals:

- the reintroduction of a true ‘exemption’ for, where a remedy for alleged unfair dismissal is unavailable to employees of, small business;
- the exemption should be set at a threshold of a business employing fewer than 20 people; and,
- the small business definition (for identifying the number of employees) should not include related entities.
- (For more information see Section 11).

### 3 Terms of Reference

- 3.1 The House of Representatives Standing Committee on Education and Employment was given a reference in March 2015 to examine barriers to employment amongst private sector small business.
- 3.2 The Terms of Reference require the Committee to examine, inter alia:
- Federal, State and Territory laws and regulations which impose excessive red tape and compliance costs on small business;
  - laws and regulations which inhibit small business expansion to create new employment; and,
  - any other matters the Committee sees relevant to the employment creation capacity of small business.
- 3.3 The Committee has indicated it would welcome submissions from interested parties.
- 3.4 This submission is made by Master Builders Australia as the peak representative body for Australia's building and construction industry.

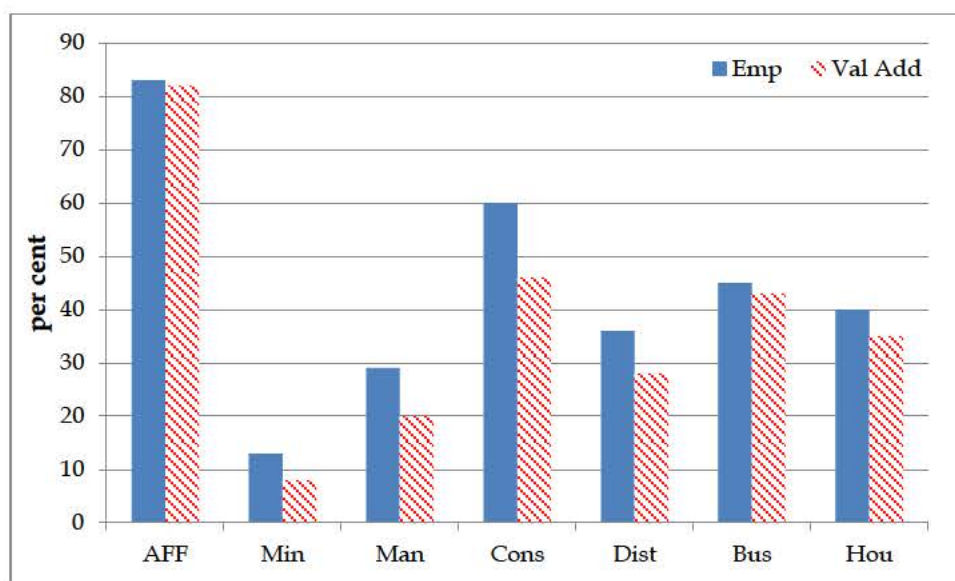
### 4 Building and Construction Industry

- 4.1 Small businesses are the backbone of the building and constructing industry (BCI) in Australia.
- 4.2 According to official statistics (ABS, 2015):
- 62.8 per cent of firms in the BCI have no employees (that is, are sole operators/traders), compared to the all-industry average for Australia of 60.6 per cent;
  - 36 per cent of firms in the BCI have between 1 and 19 employees (which could well include just a single skilled tradesperson and/or an apprentice), compared to the all-industry average of Australia of 36.7 per cent; and,
  - taken together, almost 99 per cent of firms in the BCI (compared to just over 97 per cent for all industries) can be regarded as small businesses.



- 4.3 However, Master Builders must underscore indicators of direct employment, such as count of employees, do not necessarily measure the nature and extent of usage of labour resources in the BCI.
- 4.3.1 While firms in the BCI have ‘employees’, in the conventional sense of the term, a substantial proportion of the labour resources used by businesses, and small businesses in particular, in the BCI are sub-contractors.
- 4.3.2 Indeed, it is fairly commonplace for small builders to use multiple sub-contractors on any given building project (depending, for example, on their trade skill set), and for sub-contractors to be engaged by multiple builders across numerous projects sites (depending, for example, on the availability and flow of work).
- 4.4 In short, in contrast to many other industries where the labour resources are primarily direct employees, the BCI uses both direct (employee) and indirect (sub-contractor) labour resources.
- 4.5 Small businesses account for a relatively larger share of both direct employment and value-added in the BCI, compared to a number of other industries in Australia, as can be seen in Graph 4.1 (derived from Nicholls and Orsmond, 2015).

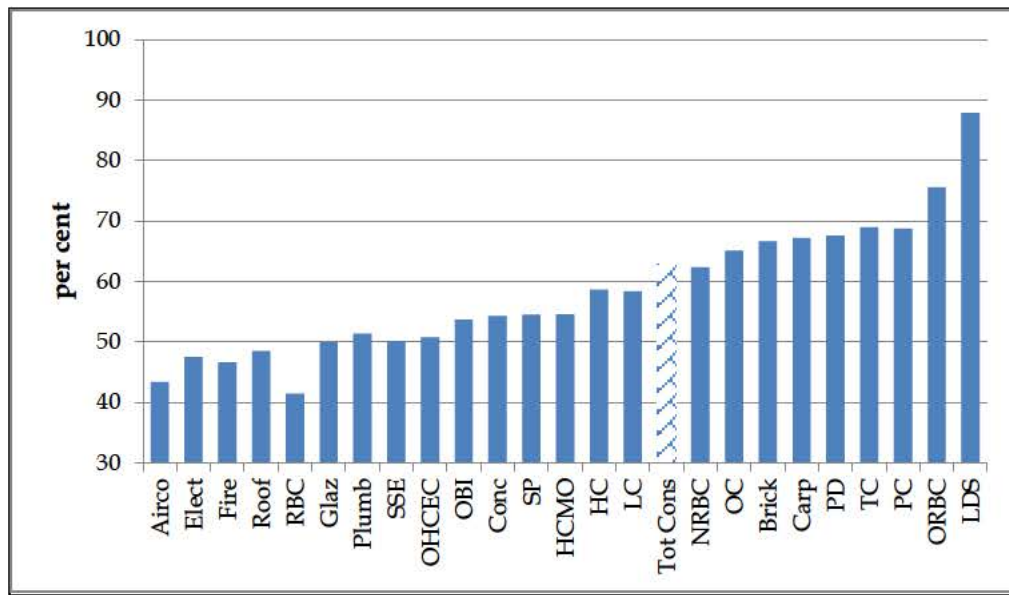
**Graph 4.1: Employment and Value-Added**



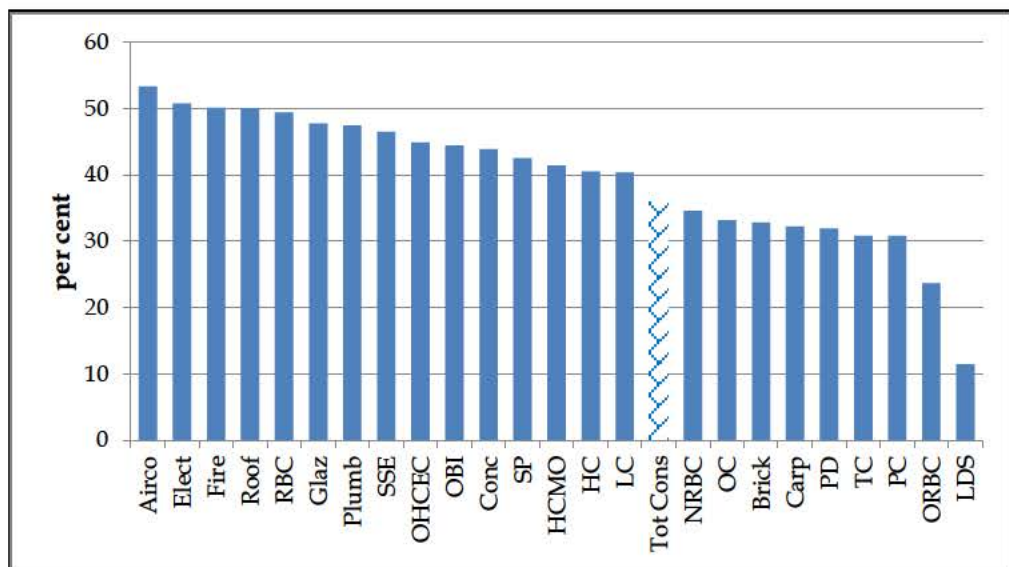


- 4.6 Several observations stand out from Graph 4.1, most notably small businesses:
- dominate both employment and value-added in the agriculture, forestry and fishing industry (AFF) 83 and 82 per cent respectively;
  - constitute a sizeable share of employment and value-added in the construction industry (Cons) 60 and 46 per cent, respectively, as well as the business services (Bus) 45 and 43 per cent, respectively and the household services (Hou) 40 and 35 per cent, respectively industries; and,
  - account for more modest shares in the distribution services (Dist) 36 and 28 per cent, respectively, the manufacturing (Man) 29 and 20 per cent, respectively and the mining (Min) 13 and 8 per cent, respectively.
- 4.7 While small businesses may be the dominant form of enterprise, by type within the BCI, their incidence is not homogeneous across the main sectors of the industry, as can be seen in Graphs 4.2 and 4.3.
- 4.8 Graph 4.2 reports the incidence of non-employing firms by sector of the BCI, while Graph 4.3 reports the incidence of firms employing between 1 and 19 persons by sector of the BCI. The mnemonics (codes) used for each sector in the two Graphs can be found in Appendix A.

**Graph 4.2: Non-Employing Firms in the BCI, by Sector**



**Graph 4.3: Firms Employing 1 – 19 Persons in the BCI, by Sector**



4.9 Looking first at non-(directly) employing firms in the BCI:

- the highest incidence of such firms by sector was found in Land Development and Subdivision (LDS) where almost 88 per cent of firms in this sector have no employees, followed by Other Residential Building Construction (ORBC) 76 per cent and Tiling and Carpentry Services (TC) and Plastering and Ceiling Services (PC) both around 69 per cent;

- the lowest incidence of such firms by sector was found in Road and Bridge Construction (RBC) 42 per cent, Air-conditioning and Heating Services (AIRCO) 43 per cent, and Fire and Security Alarm Installation Services (FIRE) 47 per cent, while the overall average incidence of such firms in the BCI was 63 per cent.

4.10 Turning to firms directly employing between 1 and 19 persons in the BCI:

- the highest incidence of such firms by sector was found in Air-conditioning and Heating Services (AIRCO) 53 per cent, Electrical Services (Elect) 51 per cent, and Fire and Security Alarm Installation (FIRE) and Roofing Services (ROOF) both around 50 per cent; and,
- the lowest incidence of such firms by sector was found in Land Development and Subdivision (LDS) 11 per cent, followed by Other Residential Building Construction (ORBC) 24 per cent, and Tiling and Carpentry Services (TC) and Plastering and Ceiling Services (PC) both just under 31 per cent, while the overall average incidence of such firms in the BCI was 36 per cent).

## 5 Key Drivers

5.1 Small business are not, and should not, be regarded as just 'big businesses in miniature'. They can, and do, differ quite significantly from larger businesses.

5.2 As the Federal Government's recently released Tax Discussion Paper (Australian Government, 2015) correctly recognises:

- larger businesses tend to be more widely held companies (that is, incorporated entities) primarily motivated to maximise profits for the benefit of their owner-shareholders, with the owners and the managers of the firm being different people;
- by comparison, smaller businesses tend to be more narrowly held, taking a range of different legal forms (sole trader, partnership, company), with the owner being simultaneously also the manager (performing multiple functions), the employer (if any employees) and even the sole employee; and,

- small businesses, while understandably looking to make a profit (to ensure their ongoing viability) can also be motivated by considerations such as family, independence and life-style.

5.3 Similarly, as has been pointed out elsewhere (Nicholls and Orsmond, 2015), small businesses tend to focus on providing an existing service to a standing market, and often do not intend to grow their businesses significantly (if at all).

5.4 These authors also usefully point out:

- small businesses tend to be more vulnerable than larger businesses to swings in the business cycle (especially in demand for their products/services);
- small businesses tend to incur relatively greater costs than larger businesses in understanding, and complying with, labour, tax and other regulations;
- small business managers tend to be 'more thinly spread' than larger business managers in performing their duties, often being called upon to stretch their skills across new areas whilst also keeping abreast of current obligations; and,
- small businesses are more sensitive than larger businesses to cash flow issues, in particular delayed or late payments by customers.

## 6 Employment Drivers

6.1 A key issue for the current inquiry must be whether the drivers of employment by smaller businesses are the same, or different, to those of medium to larger sized businesses – the corollary of which is whether 'one size fits all' or 'tailored-by-size' policy responses are required.

6.2 Econometric modelling undertaken by Master Builders' specifically for this inquiry indicates there are real differences in the drivers in small compared to medium/large business employment.

- 6.3 The econometric modelling draws upon Master Builders' quarterly National Survey of Building and Construction, which collects the views of around 450 practicing builders on current conditions, outlooks and challenges confronting their firms and the industry around the nation four times each calendar year.
- 6.3.1 The modelling undertaken and reported here is based on 1812 respondents to the four quarterly surveys conducted during the 2014 calendar year.
- 6.3.2 Of these respondents, just over 80 per cent were small businesses (employing less than 20 persons), with a further 19 per cent being medium to larger businesses (employing 20 or more persons), with the remaining 1 per cent being size-unknown (and excluded from the modelling).
- 6.4 The modelling focused on the impact of the business outlook, using a number of metrics, on the employment intentions of small, and medium-large businesses, in the building and construction industry.
- 6.4.1 The mnemonics and other technical information related to the modelling can be found at Appendix B.
- 6.4.2 The detailed results of the modelling can be found in Appendix C. The first panel reports the results for small businesses, and the second panel medium-large businesses in the building and construction industry.
- 6.5 Looking first at the small business model, several key messages stand out, including:
- expectations of higher interest rates mean small businesses are more likely than otherwise to lower their demand for labour; while,
  - the more optimistic the outlooks for profits, for industry activity generally, and for investment in plant and equipment by small business the more likely they are to increase their demand for labour (that is, create new employment or make greater use of sub-contractors).

- 6.6 Turning to the medium-large business model, key messages include:
- expectations of higher interest rates mean they are less likely than otherwise to increase their demand for labour; while,
  - the more optimistic the outlooks for profits, for industry activity in general, and for investment in plant and equipment amongst the medium-large businesses, the more likely they are to increase their demand for labour;.
- 6.7 While comparing the results of separate models can be a challenging exercise, a very broad brush picture emerges of the impact of the outlook for business conditions amongst small and medium-large firms, and their impact on employment, most notably:
- medium to larger firms are more sensitive than are smaller businesses to shifts in business expectations for profits, industry activity, investment, and interest rates in framing their employment decisions; and,
  - this situation may reflect the tendency for smaller firms to have fewer employees, to have closer personal engagement with them, and willingness to 'carry' them across the business cycle, while larger firms (especially when concentrated within a single industry) may not have the same capacities.

## 7 Policy Priorities

- 7.1 Master Builders has identified three policy priorities for action by the Federal Government, either alone or in conjunction with the State/Territory and Local Governments, which could constructively assist the small business sector.
- 7.2 This listing, however, is not exhaustive, and does not exclude necessary action across a broad range of other policy domains impacting the small business community, such as infrastructure, taxation, workplace relations, to name just a few.
- 7.3 In the area of regulation: the BCI is one of the most intensely regulated in Australia, with regulation imposed by all three tiers of government.

- 7.3.1 The compliance and reporting burden of regulation diverts scarce business resources away from entrepreneurial and innovative activities into form-filling (often of duplicative and/or of questionable value), and in the BCI this adds to the cost of housing supply and thus compounds other housing affordability stresses.
  - 7.3.2 Anecdotal evidence provided to Master Builders by our rank-and-file members indicates regulations add between eight and twelve per cent to the cost of construction of the average Australian residential dwelling.
- 7.4 In the area of skills and training: the BCI is 'moving up the skills curve', evident in the changing skills composition of its labour force – a trend which Master Builders expects to continue well into the foreseeable future.
  - 7.4.1 However, the gradient and the pace with which the industry is able to move up this 'skills curve' is, according to our rank-and-file members, being held back by shortages of skilled and para-professional labour.
  - 7.4.2 At the same time, the nature of employment in the BCI is changing due to the introduction of new technologies and pre-fabrication. This is leading to altered work practices which no longer guarantee traditional career paths will generate the mix of skills needed to meet the future demands of the industry, and through it, the Australian economy.
- 7.5 In the area of independent contracting: the BCI continues to have a very serious problem with the differential classification and treatment of employees and sub-contractors between and within jurisdictions in Australia. In the federal domain, this problem is particularly onerous under industrial relations and taxation law.
  - 7.5.1 The status and treatment of employees' versus sub-contractors under federal law is a significant issue for the BCI given these people, whether professionals such as architects, engineers or the like, or tradespeople, such as electricians, plumbers, concreters or the like, are the backbone of the industry.



- 7.5.2 The independent subcontractor system in Australia's BCI has been, and remains, a factor which distinguishes it from many other industries and which has resulted in the efficient construction of quality housing and other buildings at a relatively lower cost.
- 7.6 Master Builders addresses each of these issues in detail in the following three section of this submission.

## 8 Regulations

- 8.1 Regulation, whether 'red' or 'green' tape, is a significant burden on the BCI, which is one of the most intensely regulated in Australia, with regulation imposed by all three tiers of government.
- 8.2 The compliance and reporting burden of regulation diverts scarce business resources away from entrepreneurial and innovative activities into form-filling (often of duplicative and/or of questionable value), and in the BCI this adds to the cost of housing supply and thus compounds other housing affordability stresses.
- 8.2.1 Anecdotal evidence provided to Master Builders by our rank-and-file members indicates regulations add between eight and twelve per cent to the cost of construction of the average Australian residential dwelling.
- 8.3 The Abbott Government has adopted an active and constructive regulation review, reform and repeal (4R) agenda, into which Master Builders has and will continue to advocate for a less burdensome and more efficient approach to regulation, in its design, in its administration, and in compliance.
- 8.4 In this context, Master Builders welcomes key initiatives taken by the Abbott Government, such as:
- publication of its "Australian Government Guide to Regulation", which will strengthen and make more transparent the regulatory development processes of federal agencies;
  - publication of its "Regulator Performance Framework", which will improve the consistency and the transparency with which regulators undertake their responsibilities; and,

- twice-yearly regulation repeal days, which have, to date, made useful contributions to eliminating redundant regulations (although a sizeable challenge remains).
- 8.5 Nevertheless, Master Builders has identified a number of priority areas where further meaningful action is required, all of which will contribute to reducing the regulatory burden imposed on businesses in the BCI.
- 8.6 These include:
- substantially reducing State, Territory and Local Government variations to the National Construction Code (NCC);
  - eliminating the differential classification and treatment of employees and sub-contractors within and between jurisdictions; and,
  - improving third-party regulatory processes, especially where these regulations and their associated requirements are imported and/or referenced in Federal Government et al regulatory instruments.
- 8.7 Of particular irritation to our builder-members is the sizeable (and growing) number of variations to the (supposedly) uniform NCC by State/Territory, but more significantly, Local Governments around the nation.
- 8.8 Such variations add to uncertainty in regulatory compliance for builders, and to the costs of construction for home and business owners. Builder-members have told Master Builders, inter alia:

*'There are too many documents to supply to councils that take too much time to get and in most cases are extremely expensive. e.g. Bushfire reports, acoustic reports, flood reports, shadow diagrams, site analysis, waste management plans, traffic management plans, streetscape analysis plans, hydraulic details, landscape plans, external colours, arborist reports, road opening permits and a myriad of council application documents.'*

*'We deal with over 50 Councils and each one has a different set of application paperwork, documents, fees, contributions, building controls, cut and fill policies, storm water policies and tree preservation policies.'*

*'The time taken to approve very simple homes can take between 3 weeks to 3 months. If councils are busy e.g., Baulkham Hills, Blacktown or Liverpool then the time taken is ridiculous in most cases, up to 15 weeks.'*

- 8.9 Additional quotes from our member-focus groups on regulation issues can be found at Appendix D.
- 8.10 Master Builders recommends the Federal Department of Industry be charged with compiling and reporting on its website by the end of 2015 (with annual updates) a definitive and exhaustive list of all State, Territory and Local Government variations from the NCC.
- 8.11 In the short term, such a listing would promote greater transparency and competitive benchmarking of the incidence and impact of, as well as acting as the platform for subsequent program of work in reviewing, rationalising and potentially eliminating, such variations.
- 8.12 Master Builders welcomes the directions set down in the "Australian Government Guide to Regulation" requiring regulators to consider alternatives to regulatory interventions, greater use and rigor in preparing high-quality cost/benefit and regulatory impact analyses, and increased transparency in the regulation development/review processes.
- 8.13 Of specific importance to the BCI is the obligation for Federal Government agencies, departments et al using standards et al created by third parties, such as Standards Australia, to ensure these instruments meet the Regulatory Impact Statement (RIS) requirements set down in the Guide.
- 8.14 This new threshold for the inclusion of third party standards or performance requirements into Federal regulations is significant for the BCI, given the expansive practice of the Australian Building Codes Board (ABCB) of importing Australian Standards into the NCC.
- 8.15 While Master Builders sees merit-in-principle in the privatisation of the regulatory process, through entities such as Standards Australia, this must not come at the expense of analytical rigor in the development and evaluation of the instruments thus created.

- 8.16 Master Builders recommends the ABCB be directed by the relevant Minister(s) that Standards or the like promoted or developed by third parties imported into federal government regulation be required to meet, as minimum, the performance thresholds set down in “The Australian Government Guide to Regulation”.
- 8.17 At the very least, this must include rigorous and transparent Preliminary Impact Analyses, Cost/Benefit Analyses and RISs for each and every third party instrument adopted or imported into federal legislation or regulation.
- 8.18 To ensure third party instruments remain relevant to current practices, and do not unnecessarily impede innovation and change in future practices, such instruments where adopted or imported in to federal legislation or regulation should be subject to mandatory, defined (preferably not more than five year) sunset provisions.

## 9 Skills and Training

- 9.1 The BCI is ‘moving up the skills curve’, evident in the changing skills composition of its labour force – a trend which Master Builders expects to continue well into the foreseeable future. However, the gradient and the pace with which the industry is able to move up this ‘skills curve’ is, according to our rank-and-file members, being held back by shortages of skilled and para-professional labour.
- 9.2 At the same time, the nature of employment in the BCI is changing due to the introduction of new technologies and pre-fabrication. This is leading to altered work practices which no longer guarantee traditional career paths will generate the mix of skills needed to meet the future demands of the industry, and through it the Australian economy.
- 9.3 This situation is being compounded by the mismatch between Australia’s industrial relations and its workplace relations systems.
- 9.4 Consultations with our members continually report the workplace relations system does not currently complement the Australian Apprenticeship system and has created potential barriers to the apprenticeship system being able to deliver maximum productivity benefits.

- 9.5 Other key messages coming from our member consultations, such as the member-focus groups conducted specifically for this submission, include:

*'If the young blokes don't have business or entrepreneurial skills then they won't last very long in the industry.'*

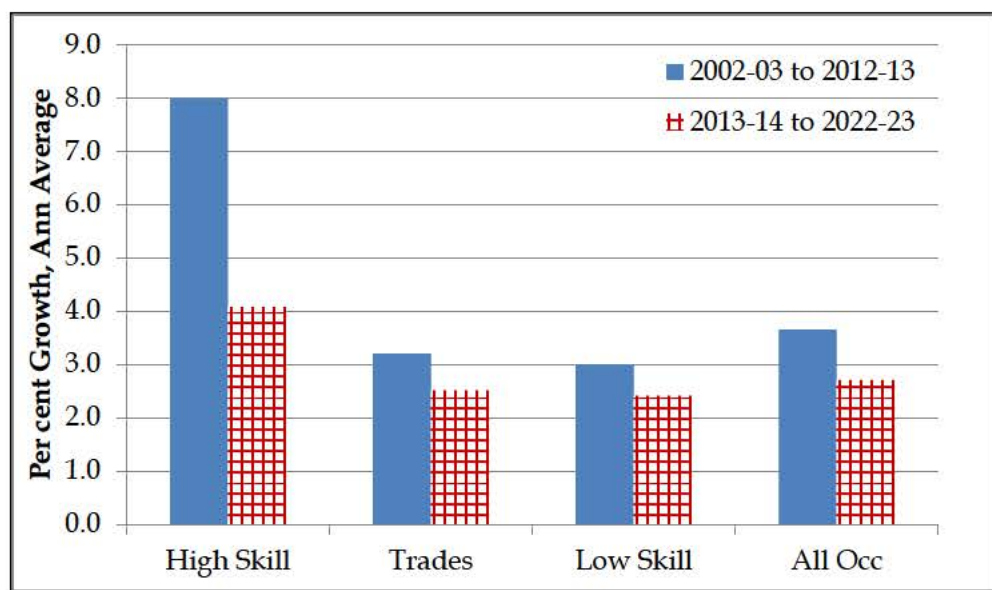
*'Getting (home warranty insurance) is a huge issue for new builders. But, they don't teach them this at trade school.'*

*'The industry needs more business skills training. As an industry we do a poor job of teaching apprentices about business management.'*

*'We should add one or two modules on business management to Cert 4.'*

- 9.6 Additional quotes from our member focus groups on skills and training issues can be found at Appendix E.
- 9.7 Graph 9.1 reports the changing skills composition of the BCI over the period 2002-03 to 2012-13 (n = 11 years), and then our forecasts of what we expect to happen over the 2013-14 to 2022-23 (n = 10 years).
- 9.8 The actual and forecast figures cover high skilled occupations (such as engineers and surveyors), tradespeople (such as electricians, plumbers), and lower skilled labour (such as general hand labourers).

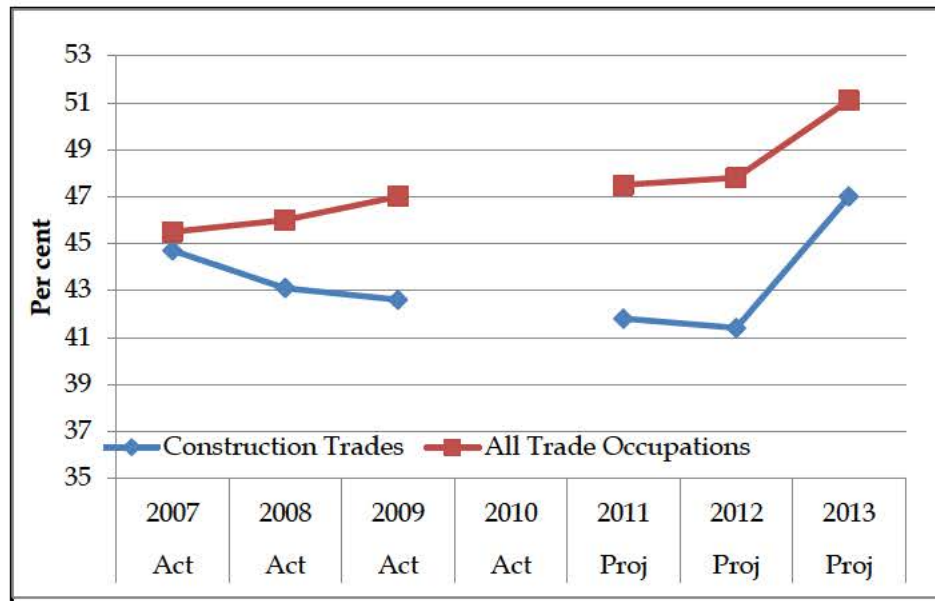
**Graph 9.1: Building Labour Force: Actuals and Forecasts**



- 9.9 As can be seen, high skilled labour expanded by 8 per cent per annum, annual average, over the period 2003-03 to 2012-13, far-and-away ahead of the comparable growth rates for trades-skilled person (3.2 per cent) and low-skilled labour (3.0 per cent).
- 9.10 Master Builders expects this outperformance to continue over the 2013-14 to 2022-23 period, albeit with a narrower gap between the growth of highly skilled compared to trades and low-skilled labour.
- 9.10.1 The growth rate for highly skilled labour is forecast to average around 4.1 per cent per annum over the forecast horizon, ahead of that for trades-skilled (2.5 per cent) and low-skilled (2.4 per cent).
- 9.11 Looked at another way, highly skilled labour accounted for 11 per cent of the labour force in the BCI in 2002/03. Master Builders forecasts this share will increase to 16.4 per cent by 2022/23.
- 9.11.1 This increase will be accounted for by declines in the shares of both trades-skilled (down from 53 per cent to 50.4 per cent), and low-skilled (down from 36 per cent to 33.2 per cent) over the same period.
- 9.12 While the faster growth/rise in the share of highly skilled labour in the BCI is to be welcomed, of concern is the slower/growth decline in the share of skilled trades people in the industry, which if left unactioned, could cause serious 'labour bottlenecks' in the building supply chain, and the efficiency and productivity of the industry.
- 9.13 This problem in part reflects, and is likely to be compounded by, the relatively lower completion/higher attrition rates for apprentices in the BCI (NCVER 2014).
- 9.14 Graph 9.2 reports completion rates for apprentices and trainees in the BCI, and all trades occupations over the 2007 to 2009 (actual) and the 2011 to 2013 (projections) period (all data are derived from NCVER 2014).



**Graph 9.2: Completion Rates**



9.15 As can be seen, the completion rates for apprentices and trainees in the BCI (the blue line; diamond marker) has fallen below that for all trade occupations (red line; square marker) over the period under review.

9.15.1 Completion rates for apprentices and trainees in the BCI averaged 43.4 per cent for the six years for which there are reported observations, compared to 47.5 per cent for all trades occupations, a difference which is statistically significant ( $t = 4.93$ ;  $t\text{-crit} = 2.57$ ;  $p = 0.00$ ) – that is, highly unlikely to be due to chance alone.

9.16 From a practical standpoint, it is deeply disturbing to observe more than half of all apprentices and trainees in the BCI (and indeed, in all trades occupations) fail to complete their apprentice/trainee-ships.

9.16.1 This situation amounts to an inefficient use of labour resources (both amongst the apprentice/trainee, and their mentors), the diversion of scarce financial resources (especially amongst smaller builders/firms) into activities which do not appear to generate a return to the individuals and the firm(s) concerned, and to the wider industry and the national economy.



- 9.17 This 'loss of return on investment' is especially disconcerting when it is realised (NCVER 2014) 34 per cent of apprentices/trainees in the BCI (and 31 per cent across all trades and occupations) cease their training within just one year of commencement.
- 9.18 For many employers/mentors, this situation amounts to 'money down the drain', as few apprentices/trainees have acquired sufficient proficiency or skill in this short time frame to deliver any economic return-on-investment to their employer/mentor.
- 9.19 Master Builders has identified three potential initiatives which will help our industry and, if taken up and more widely applied elsewhere, the wider Australian economy to take meaningful action to deal with the existing, and potentially increasingly acute, shortage of skilled labour.
- 9.20 These initiatives are:
- greater harmonisation of apprenticeship systems and public sector funding policies around the nation;
  - the development of "Passports of Competencies"; and,
  - wider industry-owned qualification and competency development.

#### *Harmonisation of apprenticeship systems*

- 9.21 The inconsistency of the apprenticeship system between State and Territories is a significant issue for the BCI, and it is important the development and enforcement processes of national qualifications be simplified.
- 9.22 The harmonisation of apprenticeship pathways and funding of qualifications is a micro-economic reform that is required to provide national consistency in the implementation of apprenticeship reform. This reform is necessary to reduce barriers to apprentice labour mobility and to reduce costs for business.

9.23 Against this background, Master Builders proposes the Vocational Education Training (VET) system become:

- nationally focussed with greater collaboration between the Commonwealth, and the States and Territories to meet the needs of industry and the economy including improved implementation and outcomes across jurisdictions;
- leading edge in the design and development of national training packages that are flexible to meet the needs of industry and provide clear guidance to Registered Training Organisations (RTOs) on the training and skills outcomes sought by industry. They must also clearly codify the skills and knowledge that a worker needs to perform a task or job; and,
- responsive to the ever changing needs of industry to compete within a globally competitive economy.

***“Passport to Competencies”***

9.24 This initiative recognises Australia’s apprenticeship system is currently heavily focussed on the completion of full qualifications, despite the completion rate for publicly funded VET qualifications being only 36 per cent. A result of this is that in many trades the proportion of workers holding formal qualifications is actually dropping over time.

9.25 Part-qualifications, or skill sets, which may be appropriate to undertake a particular job role in the industry, should be recognised as a viable pathway to a job. Skill sets should not be seen as the end to training, but the ‘building blocks’ to gain a full qualification over time where it is supported by the worker and employer.

9.26 Master Builders recommends the introduction of a ‘skills passport’ for the BCI where skill sets and individual units of competency can be undertaken in stages as a person’s skills needs develop over time.

- 9.27 The 'passport' would allow for improved safety and quality outcomes and enable employers to quickly access workers' existing skills. The introduction of the Unique Student Identifier will be beneficial in helping employers and workers track their competencies.
- 9.28 By combining a series of units of competency and skill sets within the passport, students and workers could obtain a full qualification over time. The passport would be a mechanism to support life-long learning. In order to achieve this aim, the funding of skill sets and individual units of competency would need to be agreed on a national basis as currently there are different funding guidelines in each jurisdiction.

### *Industry-owned qualification and competency development*

- 9.29 Master Builders supports the Australian Government's review into *Industry Engagement in Training Packages: Towards a Contestable Model*. The centrality of industry in training package design, development, implementation and review is the cornerstone of the National Training System.
- 9.30 As VET is essentially an economic strategy to develop a skilled workforce to enable Australia to compete globally, the Government must remain committed to supporting their continual development and review to ensure they are meeting the needs of industry. Training packages are an essential component of the national VET system. In fact, they are one of the few truly national components of the system.
- 9.31 Master Builders recommends training packages, inter alia:
- be informed by real-time intelligence that identifies the changing nature of industry, work practices and disruptive events including technological change and its resulting impact on required skills and knowledge;
  - specify the knowledge and skills required to perform effectively in the workplace as determined by industry;
  - provide clear guidance to RTOs on the skills and knowledge students are expected to acquire; and inform course design and assessment practices to ensure consistent outcomes across VET; and,

- be responsive to changing industry requirements including ensuring licensing requirements for specific occupations are considered in training package development and continually updated as needed.

9.32 Absent such reforms, the BCI will likely find it increasingly difficult over the coming decade, and potentially beyond, to meet the rising demand for a skilled workforce against a background of a decreasing number of apprentices in accredited training, high drop-out training rates, an ageing workforce and an exit rate of existing workers of 30,000 persons per annum.

## 10 Independent Contractor Status

- 10.1 The BCI continues to have a very serious problem with the differential classification and treatment of employees and sub-contractors between and within jurisdictions in Australia. In the federal domain, this problem is particularly onerous under industrial relations and taxation law.
- 10.2 The status and treatment of employees' versus sub-contractors under federal law is a significant issue for the BCI given these people, whether professionals such as architects, engineers or the like, or tradespeople, such as electricians, plumbers, concreters or the like, are the backbone of the industry.
- 10.3 The independent subcontractor system in Australia's BCI has been, and remains, a factor which distinguishes it from many other industries and which has resulted in the efficient construction of quality housing and other buildings at a relatively lower cost; this fact is recognised both nationally and internationally.
- 10.4 The subcontract system is an important feature of a modern economy; it provides a flexible and cost effective solution to changing economic conditions and is a deliberate and legitimate choice made by individuals and small businesses.
- 10.5 The tests in determining the status of contractor or employee vary across different legal regimes.

10.6 In our view the legal distinction has been developed over time to cover a variety of industries, other than the BCI, such as couriers, the transport industry, particularly in the context of owner/drivers and with other industries in mind.

10.6.1 As a consequence, these tests do not accommodate the unique practices and current operation of the Australian building and construction industry.

10.7 Federal and State legislation has, over time, added to the confusion which often attends the application of the legal tests when considering the distinction between subcontractors and employees.

10.7.1 The lack of national recognition of a single set of tests applied by one agency to the satisfaction of other agencies is evident by what is effectively a disclaimer included in advisory sheets or fact sheets issued separately by the various agencies. The different agencies include the *Fair Work Act*, taxation, workers' compensation expanded upon below.

#### *Fair Work Act*

10.8 The Office of Fair Work Building & Construction advisory sheet titled, *Employee or Independent Contractor?* states:

*Being a contractor for tax purposes may be a relevant consideration but does not determine an individual's status for independent contractors' legislation purposes.*

#### *Taxation*

10.9 The Australian Business Number (ABN) is a fundamental requirement for businesses having certain dealings with the ATO and other agencies; however, it generally holds little weight in determining whether an individual is a contractor or employee in a particular context.

10.9.1 This is often the case in the BCI when the status of an individual may change from being an employee on one project to being employed as a subcontractor on another project.

- 10.9.2 Indeed all status tests apply a caution in using an ABN as a definitive indicator. It would seem sensible that if the process of determining the status of a contractor could be resolved, then as a consequence the issuing of an ABN would be automatic, thus reducing related administration and red-tape in separately making an application for an ABN.

#### *Workers' Compensation*

- 10.10 Workers' compensation is administered by State or Territory jurisdictions and therefore provides additional variables and ambiguity, in particular in its application.

10.10.1 Whether a builder has responsibility for payment of workers' compensation to a subcontractor depends upon the definition of 'worker' in the workers' compensation legislation of the State or Territory where the work is being done.

10.10.2 The legislation may define persons as 'workers', and therefore as employees, despite the fact that by other tests, and for all other purposes they are independent contractors.

10.10.3 WorkCover NSW provides the following advice (per an advisory sheet titled Worker or Contractor?):

*A person may have been hired as a contractor and be a contractor for other purposes such as tax, but still be a worker for the purpose of workers' compensation.*

- 10.11 These are but a short list of examples that highlight the diverse nature of these requirements and the complexity they impose, particularly on small business and independent contractors themselves. This complexity is further compounded by practices and other tests that are applied and which add to the already complex and costly nature of compliance.

- 10.12 Master Builders would like to expand on two areas, incorporation and the "independence" and "supervision" tests.

### *Incorporations*

- 10.13 In many jurisdictions subcontractors are required by head contractors to be incorporated because of the complexity of the tests under, for example, workers' compensation law.
- 10.13.1 The enticement to incorporate may add unnecessary costs, administration and additional reporting obligations to many small businesses, especially new and small business entrants in the residential sector.
- 10.13.2 In regard to sole traders, additional administration is imposed on builders by ensuring sole traders have current income protections or accident insurance cover where they are not captured by the definition of 'worker' just discussed.
- 10.13.3 However, it is recognised that incorporation can have the offsetting advantage of reducing complexity and uncertainty for contractors at the Federal and State levels.

### *Competing tests and obligations*

- 10.14 The 'Independence' and the 'Supervision' test are just two tests used by various agencies in determining a contractor or employee status which can be in direct conflict to significant licensing laws applying to the residential sector.
- 10.14.1 Licensing obligations across jurisdictions consistently require that a principal contractor is obligated in the overall supervision of work and quality of work provided by contractors.
- 10.14.2 This obligation ensures that a principal contractor must have supervision and control over subcontractors which is in direct conflict to the control or 'supervision' test for contractor/employee status, whereby the greater control, the greater the likelihood that an individual will be classified as an employee.



- 10.14.3 This issue is compounded by the fact that under the harmonised work health and safety legislation (WHS) and in the anti-bullying laws set out in the *Fair Work Act, 2009* (Cth) the legislature has determined that subcontractors are within the definition of “worker” for the purposes of the operative provisions of these laws. They are treated as equivalent to employees. This is despite the fact that under the WHS laws subcontractors have similar duties as persons conducting a business or undertaking (PCBUs).
- 10.15 Master Builders accepts there is no easy solution but contends that there are ways where greater certainty can be achieved at the Federal level and therefore can reduce costs as a consequence.
- 10.16 Master Builders proposes a system of statutory registration to provide greater certainty for those who choose to operate as an independent contractor.
- 10.16.1 The proposal is for a government supervised register, preferably hosted by the Australian Taxation Office (ATO) where contractors can voluntarily register for contractor status, subject to a single set of tests, recognised across agencies and jurisdictions which reflect the operation and conduct of a modern building sector.
- 10.16.2 The tests would also establish clear separation between commercial law which should govern independent contractors, and workplace relations law which should govern employers and employees.
- 10.16.3 The application for registration or ‘independent contractor status’ would be supported by a certificate giving evidence of satisfying statutory criteria issued by a legal practitioner or suitably qualified professional or industry association.
- 10.16.4 The registration would be for fixed periods but renewable where circumstances may change where the contractor as an individual also worked occasionally as an employee.
- 10.16.5 Master Builders suggests this proposal will require minimal Government supervision, likely limited to an audit process based upon the negative licensing process whereby sanctions apply via the removal of registration or the removal of the authority to issue a certificate.

10.17 In summary the proposal would:

- be administered by the ATO;
- be a voluntary system;
- allow individuals to seek registration status as a contractor;
- require applicants to provide evidence from a legal practitioner or other suitably qualified professional that the bona fides of the worker have been assessed as those of a contractor;
- provide registration only in relation to the employee's circumstances as assessed by the relevant professional;
- provide registration only in relation to the employee's circumstances as assessed by the relevant professionals;
- provide registration that is time limited; and
- have the consequence of individuals being precluded from registration, where misuse of the system occurs.

10.18 In our model, the application for registration could be accompanied by a certificate from a legal practitioner, other suitably qualified professional or an industry association, to the effect that, having regard to the statutory criteria (which would accommodate external indications of the status of a contractor being applied to reinforce the common law test or otherwise) the contractor should be registered and for which particular project or job inclusive of a temporal limitation.

10.19 Master Builders recommends the Treasurer direct the ATO to establish a Government-Industry Working Party to implement by the end of 2015 the proposed system of statutory registration for independent contractors, and advance the necessary changes in federal law, regulation and/or administration.

## 11 Unfair Dismissals

- 11.1 The unfair dismissal laws under the Fair Work Act ('the Act') have failed to deliver a fair outcome for employers.
  - 11.1.1 There is growing anecdotal evidence the objectives of the Act in relation to unfair dismissals remain purely aspirational, and the needs of business are not being met.
  - 11.1.2 The procedures for dealing with unfair dismissal are neither quick, nor flexible, nor informal, and compliance is not easy for business, especially for small business.
- 11.2 The Act has failed to provide fundamental protection for small business employers, with the legislative balance clearly favouring employees.
- 11.3 The simple reality is employers are forced to spend time and money defending often speculative claims, with the vast majority being resolved through commercial settlements.
  - 11.3.1 It remains a jurisdiction of "go away" money, where reinstatement remains impracticable.
- 11.4 Master Builders recognises the Act provides an exemption for employers with less than fifteen (15) full-time employees.
  - 11.4.1 However, the current exemption law still exposes the small business to the high standards of procedural and substantive requirements.
- 11.5 After the first 12 months of service of an employee, a dismissal by a small business employer can be challenged on both substantive fairness and procedural grounds.
  - 11.5.1 The consequences can be long mediation and Fair Work Commission (FWC) procedures with uncertain outcomes, especially with regard to compensation.
  - 11.5.2 The dismissal might be declared invalid by the FWC and create uncertainties, particularly if reinstatement is ordered.

- 11.6 The unreasonable additional costs and resources expended by a typical small business to introduce advanced employee management systems and to contest potential claims of unfair dismissal have been acknowledged by every government since 1982.
- 11.6.1 Notwithstanding this prior consideration the current termination laws are the least supportive of small business in 30 years.
- 11.7 Master Builders supports the reintroduction of a true 'exemption', where a remedy for alleged unfair dismissal is unavailable to employees of small business.
- 11.7.1 The exemption should be set at a threshold of a business employing fewer than 20 people.
- 11.8 Further, the small business definition (for identifying the number of employees) should not include related entities.
- 11.8.1 Related entities are often operationally and financially distinct. It does not follow that an employer will have sufficient resources to justify being described as other than a small business simply because they are related to other organisations which, in the aggregate, employ 20 or more people.
- 11.9 The preferred form of exemption would have no need for a supplementary instrument, such as the current unworkable Small Business Fair Dismissal Code (SBFDC). The SBFDC is a poor substitute for a genuine small business exemption.
- 11.9.1 The termination laws must be recalibrated, so as to place more emphasis on the employer's prerogative to manage their business. This can be achieved by reinstating in legislation that substantive and valid reasons for termination will be the primary test for fairness.
- 11.10 Over time, a mountain of case law has accumulated in the determination of applications for alleged unfair dismissal. This has resulted in the refining and weighting of harsh, unjust and unreasonable factors in termination.

11.10.1 Unfortunately, this has also made the assessment of any application for remedy much more unpredictable than if the assessment was largely confined to addressing the valid reason and written warnings to the employee.

11.10.2 Such is the reputation of the existing test for “unfair dismissal”, employers are more concerned with what they may have done wrong, than what they have done right.

## 12 Conclusion

12.1 Small businesses are the backbone of the BCI in Australia:

- almost 63 per cent of firms in the BCI have no employees (that is, are sole operators/traders), with a further 36 per cent of firms in the industry having between 1 and 19 employees; and,
- constitute a sizeable share of employment (60 per cent) and value-added (46 per cent) in the BCI.

12.2 Small business are not, and should not, be regarded as just ‘big businesses in miniature’. They can, and do, differ quite significantly from larger businesses.

12.3 For example:

- small businesses tend to incur relatively greater costs than larger businesses in understanding, and complying with, labour, tax and other regulations; and,
- small business managers tend to be ‘more thinly spread’ than larger business managers in performing their duties, often being called upon to stretch their skills across new areas whilst also keeping abreast of current obligations.

12.4 Master Builders has identified four key policy priorities for action by the Federal Government, either alone or in conjunction with the State/Territory and Local Governments, which could constructively assist the small business sector: namely reforms to:

- regulation;
- skills and training;

- independent contracting; and,
- unfair dismissal law.

12.5 Master Builders will be looking to the Report(s) of this inquiry to provide substantive Recommendations for meaningful reform in each of these areas, consistent with the argument and evidence presented in this submission.

## 13 Bibliography

Australian Bureau of Statistics (2015) “Counts of Australian Businesses, including Entries and Exits” (ABS Cat 8165.0), Australian Bureau of Statistics, Canberra

Australian Government (2015) “Re:Think – Tax Discussion Paper”, Australian Treasury, Canberra

Nicholls S and Orsmond D (2015) “The Economic Trends, Challenges and Behaviours of Small Businesses in Australia”, Paper presented to “Small Business Conditions Finance” Conference, Reserve Bank of Australia, Sydney

## Appendix A: Mnemonics

Sector	Mnemonic
Air Conditioning and Heating Services	Airco
Bricklaying Services	Brick
Carpentry Services	Carp
Concreting Services	Conc
Electrical Services	Elect
Fire and Security Alarm Installation Services	Fire
Glazing Services	Glaz
House Construction	HC
Hire of Construction Machinery with Operator	HCMO
Landscape Construction Services	LC
Land Development and Subdivision	LDS
Non-Residential Building Construction	NRBC
Other Building Installation Services	OBI
Other Construction Services n.e.c.	OC
Other Heavy and Civil Engineering Construction	OHCEC
Other Residential Building Construction	ORBC
Plastering and Ceiling Services	PC
Painting and Decorating Services	PD
Plumbing Services	Plumb
Road and Bridge Construction	RBC
Roofing Services	Roof
Site Preparation Services	SP
Structural Steel Erection Services	SSE
Tiling and Carpeting Services	TC
Total Construction	Tot Cons



## Appendix B: Modelling Details

All of the variables are categorical in nature, coded from lowest to highest/pessimistic to optimistic, using multinomial probit design, with the parameter coefficients being reported as likelihood impacts relative to the ‘same’ as baseline.

The dependent variable in each of the models is respondent’s expectations of labour demand (both for employees and/or subcontractors) over the coming six months, while the explanatory (also known as independent) variables are expectations over the same time horizon (except for interest rates, where it is twelve months) for the following variables.

### Modelling Explanatory Variables

Theme	Mnemonic
Direction of your business activity over next 6 months	Bus Act
Direction of your profits over next 6 months	Profits
Direction of building industry activity over next 6 months	Ind Act
Investment intentions for plant and equipment over next 6 months	Investment
Expected capacity, relative to demand, over the next 6 months	Capacity
Where are business conditions heading	Bus Cond
Direction of interest rates in the next 12 months	Int Rates
Input costs over the next 6 months	Input Costs

## Appendix C: Econometric Modelling

### Business Conditions – Outlook – Small Business

	Labour Demand	<b>b</b>	<b>z</b>	<b>p</b>
Lower				
	Bus Act	0.00	-1.77	0.08
	Profits	-0.62	-5.14	<b>0.00</b>
	Ind Act	-0.60	-4.30	<b>0.00</b>
	Investment	-0.70	-7.43	<b>0.00</b>
	Capacity	-0.02	-0.16	0.87
	Bus Cond	-0.03	-0.24	0.81
	Int Rates	0.39	2.69	<b>0.01</b>
	Input Costs	0.00	-0.03	0.98
	Cons	3.34	4.22	0.00
Same		(base)		
Higher				
	Bus Act	0.00	-0.04	0.97
	Profits	0.84	6.88	<b>0.00</b>
	Ind Act	0.56	4.92	<b>0.00</b>
	Investment	0.63	6.29	<b>0.00</b>
	Capacity	-0.43	-3.44	<b>0.00</b>
	Bus Cond	0.14	1.36	0.17
	Int Rates	-0.02	-0.20	0.84
	Input Costs	0.07	0.65	0.52
	Cons	-7.57	-9.29	0.00
	n	1205		
.	Wald (chi2)	387.04		
	LLR	-784.98		
	Pr (Chi2)	0.00		
	AIC	1605.96		
	BIC	1697.65		

### Business Conditions – Outlook – Medium/Large Business

	Labour Demand	<b>b</b>	<b>z</b>	<b>p</b>
Lower				
	Bus Act	-0.78	-2.81	<b>0.01</b>
	Profits	-0.28	-1.05	0.29
	Ind Act	-0.61	-2.31	<b>0.02</b>
	Investment	-0.43	-2.00	<b>0.05</b>
	Capacity	0.31	1.22	0.22
	Bus Cond	-0.06	-0.21	0.84
	Int Rates	-0.31	-0.94	0.35
	Input Costs	0.22	0.83	0.41
	Cons	4.70	2.87	0.00
Same		(base)		
Higher				
	Bus Act	0.00	-0.47	0.64
	Profits	0.99	3.33	<b>0.00</b>
	Ind Act	1.27	4.49	<b>0.00</b>
	Investment	1.29	4.19	<b>0.00</b>
	Capacity	0.11	0.40	0.69
	Bus Cond	-0.04	-0.16	0.87
	Int Rates	-0.89	-2.74	<b>0.01</b>
	Input Costs	0.49	1.81	<b>0.07</b>
	Cons	-12.20	-5.56	0.00
	n	284		
	Wald (chi2)	113.35		
	LLR	-159.74		
	Pr (Chi2)	0.00		
	AIC	355.47		
	BIC	421.15		

## Appendix D: Focus Groups on Regulation

*"It really frustrates me that so many bureaucrats are really just trying to make work for themselves at my cost."*

*"I'm a small business, and really don't have the 'free time' for dealing with regulations. NSW is just so pro-reg."*

*"I'm not sure building regulators are always up to speed with the building regulations. Some of the things they ask for just make me wonder."*

*"The costs of going through the (regulator name here) are so prohibitive; we just had to settle (the claim) even though we were in the right. Our barrister just said 'pay up, and close it off'. We had to do, and fund, the remediation work when really it (the claim) was a maintenance issue which is the client's responsibility."*

*"The ATO (Australian Taxation Office) and some of the (State name here) regulators want builders to become their (enforcement) agents, which isn't right."*

*"You have to price red tape into your quote."*

*"Regulators don't understand the cash flow constraints small business in this industry work under. Workcover is the worst, with all of its upfront fees."*

*"There should be more use of 'one stop regulatory shops' – one place where you can go for advice and to get everything done, rather than having to run around all over the place."*

*"One area where they should tighten the regulations is owner builders."*

*"There really is two standards – one for registered builders, and one for owner-builders."*

*"Owner builders are a pain. They watch these (home renovation) shows on television, and think they can do it. Then we have to come along and clean up the mess."*

*"The worst thing (about local government) is inconsistency. One method or rule is applied in Gippsland, and another one in Kew."*

*"It is almost a lottery by postcode."*

*"Local governments are virtually unaccountable to anyone; little baronies."*

*"Regulations are a case of rolling with the punches."*

*"You can't afford to alienate local government. They get back at you, such as by delaying your paperwork."*

## Appendix E: Focus Groups on Skills and Training

*“We need to train young builders much better in running a business. There is not enough ‘running a business’ (training) in Cert Four.”*

*“We have to inculcate in apprentices that they are running a business – in building.”*

*“If we sell a business, then ‘long tail liabilities’ go with the business.”*

*“Most builders need to be ‘off the tools’ by the time they are forty (years of age). Their bodies just can’t take it. So they need to have skills in project management.”*

*“Building licences are too easy to get. We need to have a tiered licencing system. HWI (home warranty insurance) at the moment in (State name here) really is the de facto licencing system.”*

*“HWI is really the framework for licencing – what you can do, the value of the work you can do.”*

*“(Regulators and the industry) should look at a bronze/silver/gold tiered licensing system, which applies as the business scales up.”*

*“We need tiering (of licences). Younger builders should have to get at least two years post ticket experience. They should also have a diversity of experience across a range of projects before they can get an unrestricted licence.”*