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**SUBMISSION OF THE VICTORIAN GOVERNMENT**

In response to:

Senate Committee on Education, Employment and Workplace  
Relations inquiry into the Building and Construction Industry  
Improvement Amendment (Transition to Fair Work) Bill 2011

February 2012

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## SUMMARY

1. The Victorian Government opposes the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011.
2. The Victorian Government opposes the abolition of the Office of the Australian Building and Construction Commissioner (ABCC) and any diminution of the powers of the industry regulator.
3. The Commonwealth Bill will, if passed, not only hurt Victoria and its economy, but will do so disproportionately in comparison to other States and Territories.
4. The Victorian Government considers that abolishing the ABCC will give a green light to further unlawful behaviour and misconduct within the Victorian building and construction industry.
5. The current ABC Commissioner, Mr Leigh Johns, himself recognises that the industry still faces serious problems. In his *Industry Update*, issued on 11 October 2011, Mr Johns said:

*Unlawful industrial action persists as an area of concern for the industry and remains a significant part of our day to day regulatory work.*

*The ABCC has recently intervened in proceedings and commenced proceedings in our own right involving allegations of unlawful industrial action targeting Queensland Government projects and the Wonthaggi Desalination plant in Victoria.*

*During the past financial year, a staggering \$2.5 million in civil penalties were imposed on the Victorian Branch of the CFMEU.*

6. The building and construction industry is integral to Australia's economy as well as its social development. It has crucial impacts on liveability for citizens, through the provision of housing and public infrastructure such as schools, hospitals, social housing and the provision of utilities. It is also fundamental to the productivity of our businesses through the design and construction of efficient commercial buildings and high quality public transport.
7. The Victorian Government is concerned that low productivity growth and high costs within the building and construction industry have a significant negative impact on the Australian and Victorian economies, on the provision of public infrastructure and essential services and on the productivity of other industries.
8. Building and construction projects of greater than three storeys are at higher risk of industrial disputation. This drives up costs and in doing so affects people's choices about the type and location of their housing, and through this the shape of Australia's cities.

9. To foster and maintain a more efficient and productive building and construction industry, there must be appropriate mechanisms in place to assist industry participants to resolve disputes without resort to industrial action, to deter participants from engaging in unlawful industrial action and other inappropriate behaviour, and to deal promptly and effectively with unlawful behaviour if and when it occurs.
10. The Victorian Government has implemented initiatives across a range of portfolios to assist in addressing the rising costs and low productivity growth in the industry. These include development of the Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry. The Implementation Guidelines reflect the determination of the Victorian Government to use its purchasing power to promote compliance and productivity across the Victorian building and construction industry.
11. The cost and productivity challenges facing the building and construction industry have significant consequences for the nation. Responsibility for the many areas of policy affecting the building and construction industry spans multiple levels of government. Accordingly, Victoria will seek national consideration of these challenges through the Council of Australian Governments.
12. The Victorian Government considers that a strong ABCC is critical to containing construction costs.
13. The ABCC and industry-specific workplace relations laws for the building and construction industry were established in response to recommendations of the Cole Royal Commission, which found widespread unlawful and inappropriate workplace practices in the industry. The rationale for these measures remains valid today.
14. Many industry stakeholders consider that the activities of the ABCC and these industry-specific laws have contributed significantly to improvements in the culture and performance of the building and construction industry, but that the necessary lasting reforms have not yet been achieved. The Victorian Government concurs with these views.
15. The Victorian Government considers that provisions of the Commonwealth Bill would:
  - hamper the ability of the industry regulator to deal with unlawful industrial action quickly and effectively and make it more difficult for industry participants to recover the costs resulting from such action;
  - narrow the legislative prohibitions of inappropriate and damaging conduct;
  - reduce the deterrent effect of the civil penalty regime applying to the industry;

- put at risk the independence, impartiality and accountability of the industry regulator, which would in turn compromise its effectiveness;
  - put at risk essential information gathering powers of the industry regulator, with no guarantee that a proper assessment will be made as to whether or not they are still required before they lapse; and
  - introduce “switch off” arrangements for these powers that appear to have no sound policy rationale.
16. The Victorian Government considers that abolishing the ABCC will increase the costs to Victorian taxpayers of publicly-funded projects and undermine the Victorian Government’s ability to fund and build infrastructure into the future.

## INTRODUCTION

17. The Victorian Government welcomes the opportunity to provide a submission to the Senate Education, Employment and Workplace Relations Committee inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 (Commonwealth Bill).
18. The building and construction industry is a crucial component of the Australian and Victorian economies. Necessary improvements to its cost and productivity performance will contribute to the prosperity and well being of all Victorians.
19. In the Committee's inquiry into the predecessor to the Commonwealth Bill, the Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, industry stakeholders raised serious concerns about the impact of that Bill on the progress that has been made in addressing unlawful and inappropriate behaviour in the industry and its impact on the performance of the industry. The present Bill raises the same concerns.

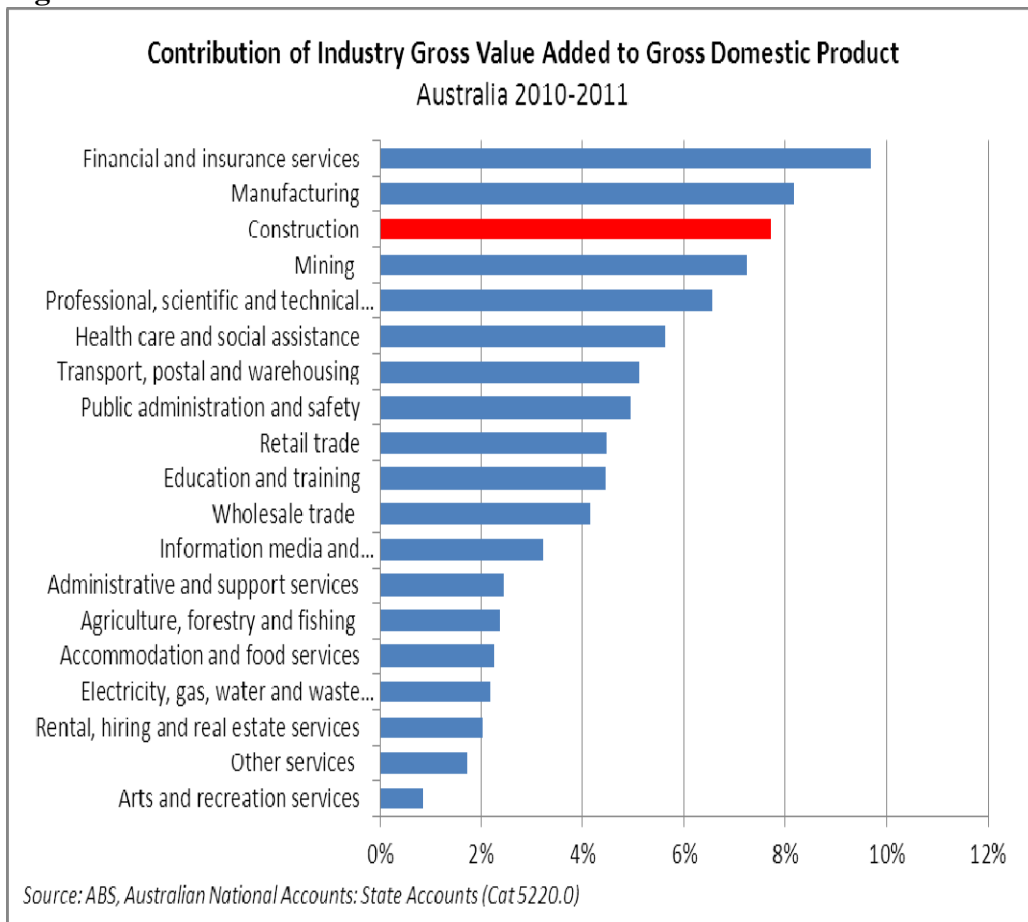
## THE BUILDING AND CONSTRUCTION INDUSTRY

20. The building and construction industry is integral to Australia’s economy as well as its social development. It has crucial impacts on liveability for citizens, through the provision of housing and public infrastructure such as schools, hospitals, social housing and to the provision of utilities. It is also fundamental to the productivity of our businesses through the design and construction of efficient commercial buildings and high quality public transport.

### The Economic Significance of the Industry

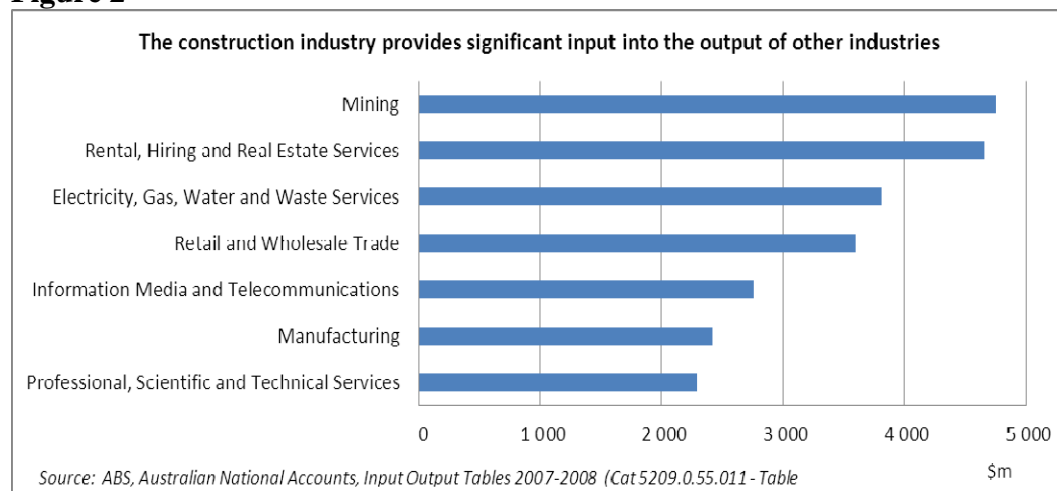
21. The building and construction industry is a large contributor to both Australia’s gross domestic product (GDP) and Victoria’s gross state product (GSP), highlighting its importance to the economy. Across Australia in the 2010-2011 financial year the gross value added by the building and construction industry was 7.7 per cent of GDP, making it the third largest contributor to GDP nationally (see Figure 1). At a State level, the industry is similarly important, contributing 6.6 per cent to GSP.

**Figure 1**



22. At the national level, the value of construction work done in the 2010-2011 financial year was \$168 billion. Approximately half of this value was derived from the engineering and infrastructure construction sector which accounted for \$86 billion, while residential and non-residential construction contributed \$48 billion and \$34 billion respectively.<sup>1</sup> The strength of the industry is demonstrated by the fact that the value of construction work done has close to doubled over the last ten years.<sup>2</sup>
23. The picture in Victoria is similar. In the 2010-2011 financial year the value of work done was \$35 billion, an increase of close to \$15 billion over the last ten years. Victoria differs slightly from the national picture in that the residential sector contributed more than \$16 billion in value, while the engineering and infrastructure sectors contributed \$11 billion.
24. Building and construction also contributes significant value to the output of other industries (see Figure 2). This is felt across a wide range of building and construction consumers including governments, citizens and businesses including sectors that are vitally important to Australia's prosperity. Notably, in the 2007-08 financial year, \$4.8 billion of construction was undertaken for the mining sector, indicating the importance of the construction industry to the resources boom, while \$3.8 billion of construction was undertaken for the electricity, gas, water and waste sectors.
25. These figures highlight the need for a well-functioning construction industry given its inter-dependence within the Australian economy.

**Figure 2**



<sup>1</sup> The ABS uses the Australia-NZ Standard Industrial Classification (ANZSIC) for construction, whereas activities covered by the ABCC are limited to the definition in the BCII Act. Key differences between these classifications include: (i) the definition of building work in the BCII Act excludes single-dwelling housing whereas this is included under the ANZSIC of residential construction; and (ii) the definition of building work in the BCII Act excludes drilling and extraction (including tunnelling), whereas these activities are included under the ANZSIC for engineering construction.

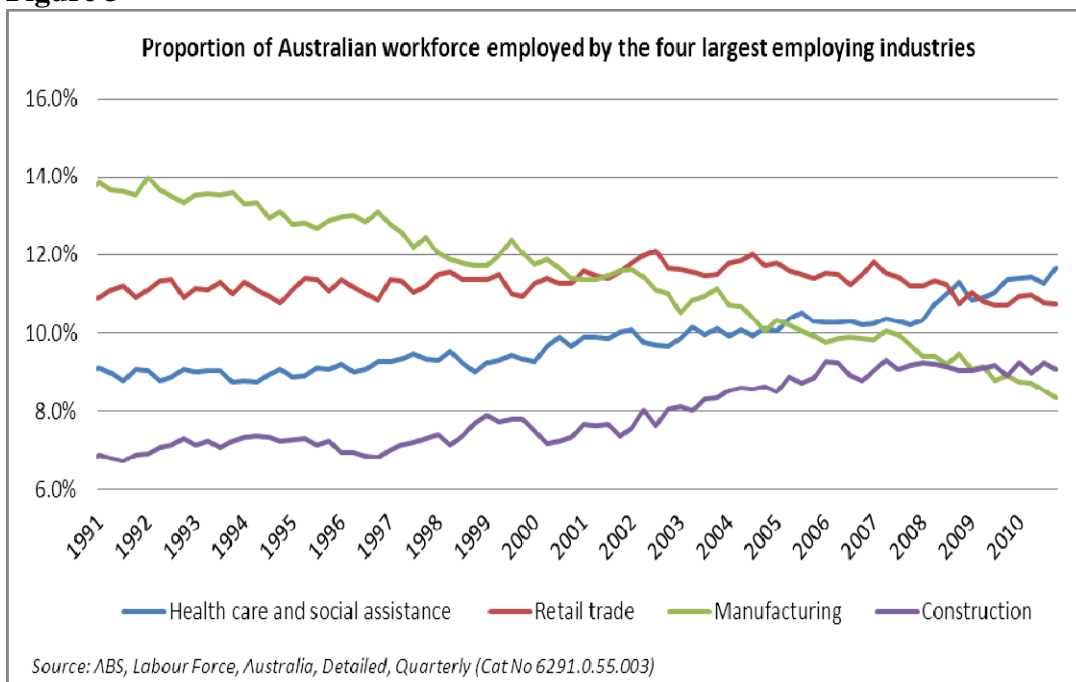
<sup>2</sup> Source: ABS, Construction Work Done, Australia, Preliminary Jun 2011 (Cat. 8755.0). Increases over time are quoted in terms of Chain Volume measures.



### Employment in the Industry

26. In 2010, the construction industry employed 9.1 per cent of the Australian workforce (over one million people) making it the third largest employing industry nationally. This proportion has increased steadily over time, up from 7.4 per cent ten years ago (see Figure 3). At the State level, in 2010-11 the construction industry employed 9.2 per cent of the Victorian workforce, making it the fourth largest employing industry in the state.
27. These figures highlight the importance of the construction industry, not only to the national and State economies, but also to the livelihoods of Australian employees.

**Figure 3**



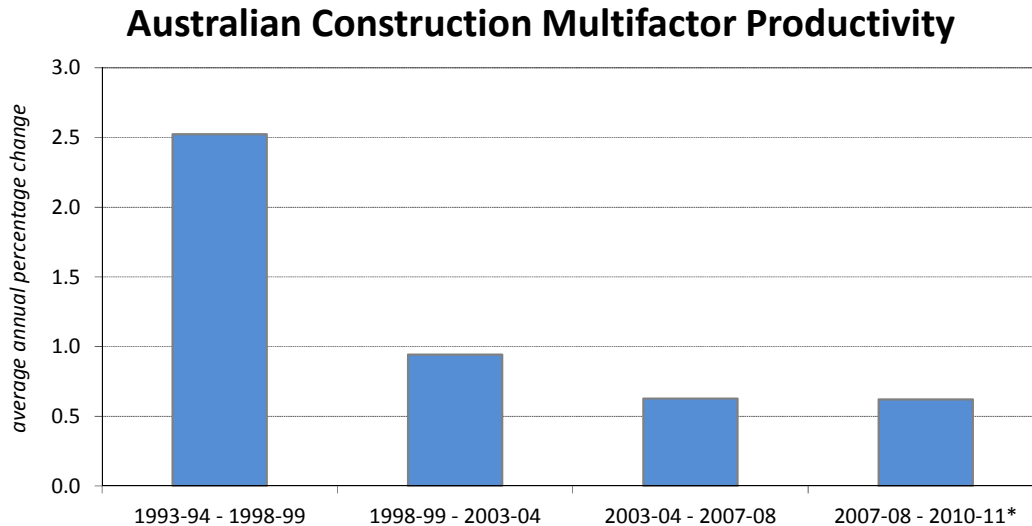
### COST AND PRODUCTIVITY CHALLENGES FACED BY THE INDUSTRY

28. The Victorian Government is concerned that low productivity growth and high costs within the building and construction industry have a significant negative impact on the Australian and Victorian economies, on the provision of public infrastructure and essential services and on the productivity of other industries.
29. Growth in labour productivity in the Australian and Victorian building and construction industries is low and construction costs are higher than comparable jurisdictions and are continuing to rise. The relatively high level of industrial disputation in the industry results in significant additional costs and has flow on effects to many other sectors.

## Lagging Productivity

30. The productivity challenge is clearly illustrated by an examination of multifactor productivity (MFP), which encompasses the contribution of both labour and capital inputs. Figure 4 demonstrates the clear downwards trend in MFP growth rates for the Australian construction industry over recent productivity cycles (including partial data from the latest incomplete productivity cycle ending 2010-2011).

**Figure 4**



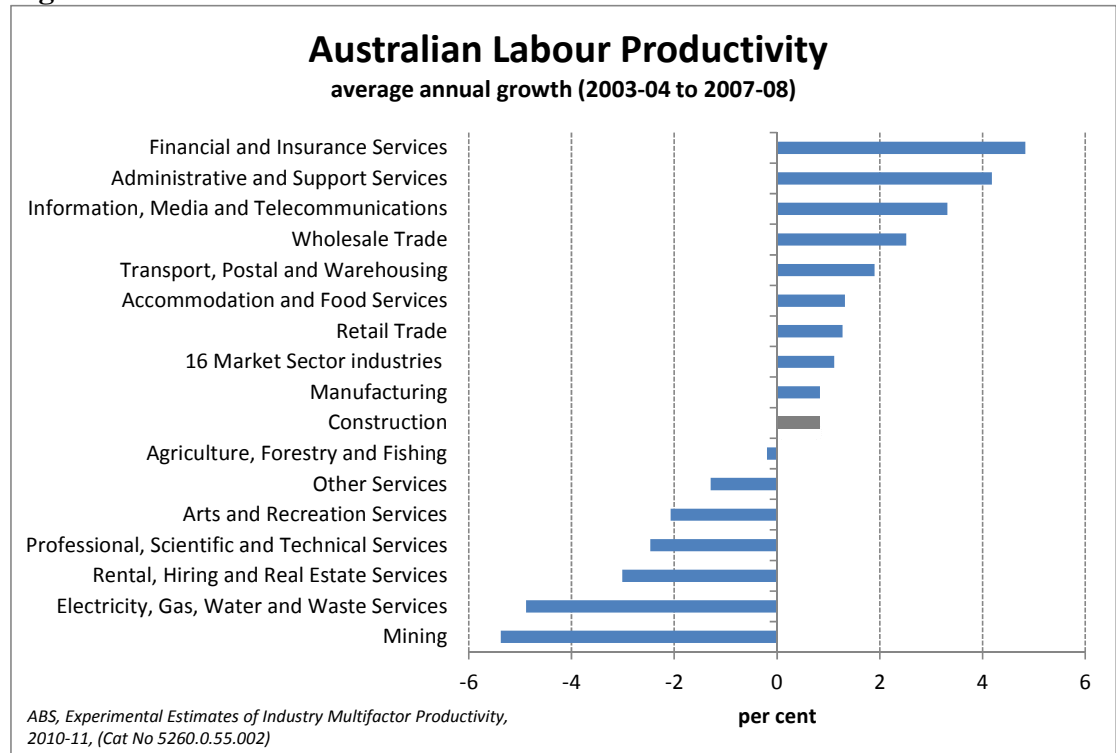
ABS, *Experimental Estimates of Industry Multifactor Productivity, 2010-11*,  
(Cat No 5260.0.55.002)  
\* incomplete productivity cycle

31. Another method to measure productivity growth is labour productivity, which expresses output relative to labour input. While labour productivity represents a partial measure, it allows us to benchmark the construction industry across jurisdictions. In 1990, productivity of the construction industry was 77 per cent of that of the United States. This figure dropped substantially by 2005 to 51.9 per cent.<sup>3</sup>
32. Figure 5 shows a comparison of labour productivity across different sectors using the last available productivity growth cycle (2003-04 to 2007-08) indicating that the construction industry has performed worse than a number of other sectors in the economy.

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<sup>3</sup> Source: Commonwealth Treasury, *International comparison of industry productivity*.

**Figure 5**



33. Using either productivity measure, it is clear that the building and construction industry faces significant productivity challenges. Any diminution of the ABCC’s powers would likely compound the weak productivity of the industry.

**Building and Construction Costs**

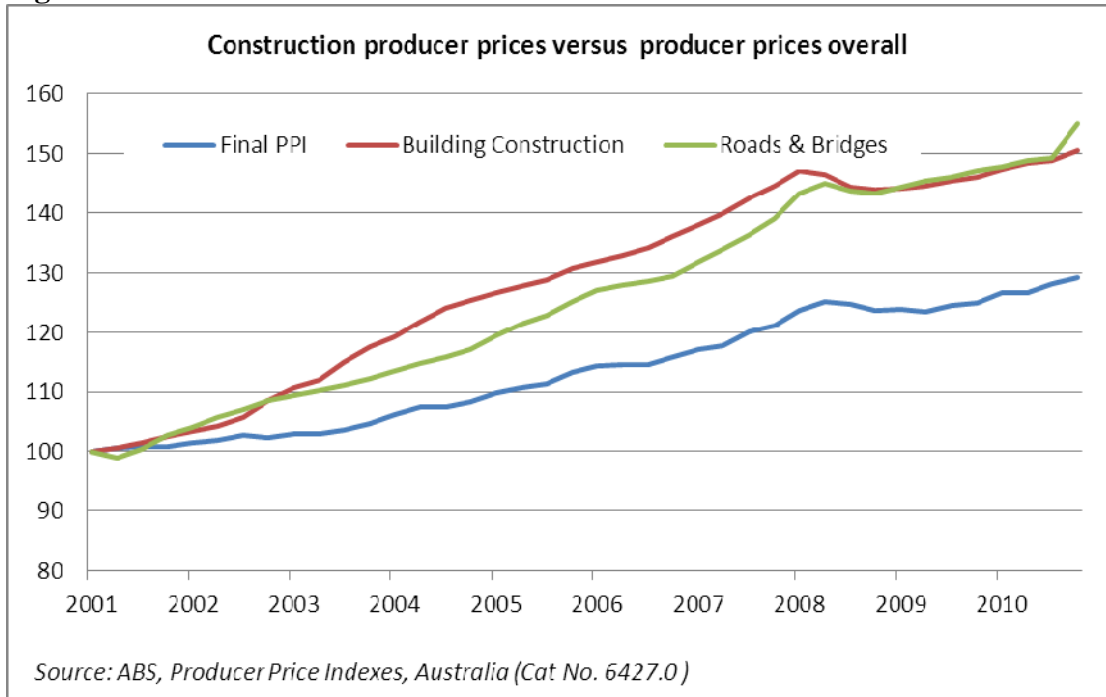
34. The Victorian Government is concerned that building and construction costs in Victoria and Australia are higher than comparable jurisdictions and are continuing to rise.
35. The Final Producer Price Index (which provides a general measure of output or producer prices averaged across all industries in Australia) has increased by 29 per cent since 2001. Over this same period, the producer prices of the building construction and road and bridge construction sectors have risen by 51 per cent and 55 per cent respectively (see Figure 6). Of particular note is the increase in producer prices for road and bridge construction, which has outpaced growth in the Final Producer Price Index across all States.<sup>4</sup>
36. Research shows that when compared to similar eastern capital cities (Sydney and Brisbane), Melbourne rates as the most expensive city for construction projects across a range of residential, commercial, industrial and infrastructure-related projects, though the extent of the differences do vary.<sup>5</sup> Specifically, Melbourne is the most expensive of the three cities for high-rise apartment, hospital and school construction, as well as for electricity distribution line construction.

<sup>4</sup> Source: ABS, Producer Price Indexes (Cat 6427.0).

<sup>5</sup> Source: DPC analysis, Turner and Townsend, *International Construction Cost Survey 2010-11*.

37. Australian construction costs are also uncompetitive internationally across a range of cost components, including road construction, high-rise apartments and raw material costs. Research has identified that Australia has the highest or second highest construction costs in 17 out of the 33 cost components analysed, when compared to Canada, Germany, the United Kingdom and the United States.<sup>6</sup> Specifically, Australia is uncompetitive in road construction, high-rise apartments and raw material costs.

**Figure 6**



38. Data from Urbis and industry consultancy Rider Levett Bucknall suggests that construction costs per square metre escalate noticeably for residential buildings greater than three storeys.<sup>7</sup> Contributors to this include the higher complexity of these projects, more stringent and complex regulatory requirements and higher levels of industrial disputation on these sites.
39. This appears to be having a significant impact on patterns of development in Melbourne, with incentives on the supply side of the market favouring the construction of detached housing on outer-urban, greenfield sites.<sup>8</sup>
40. In this way, increased costs affect people’s choices about the type and location of their housing and through this the shape of Australia’s cities.

<sup>6</sup> Ibid.

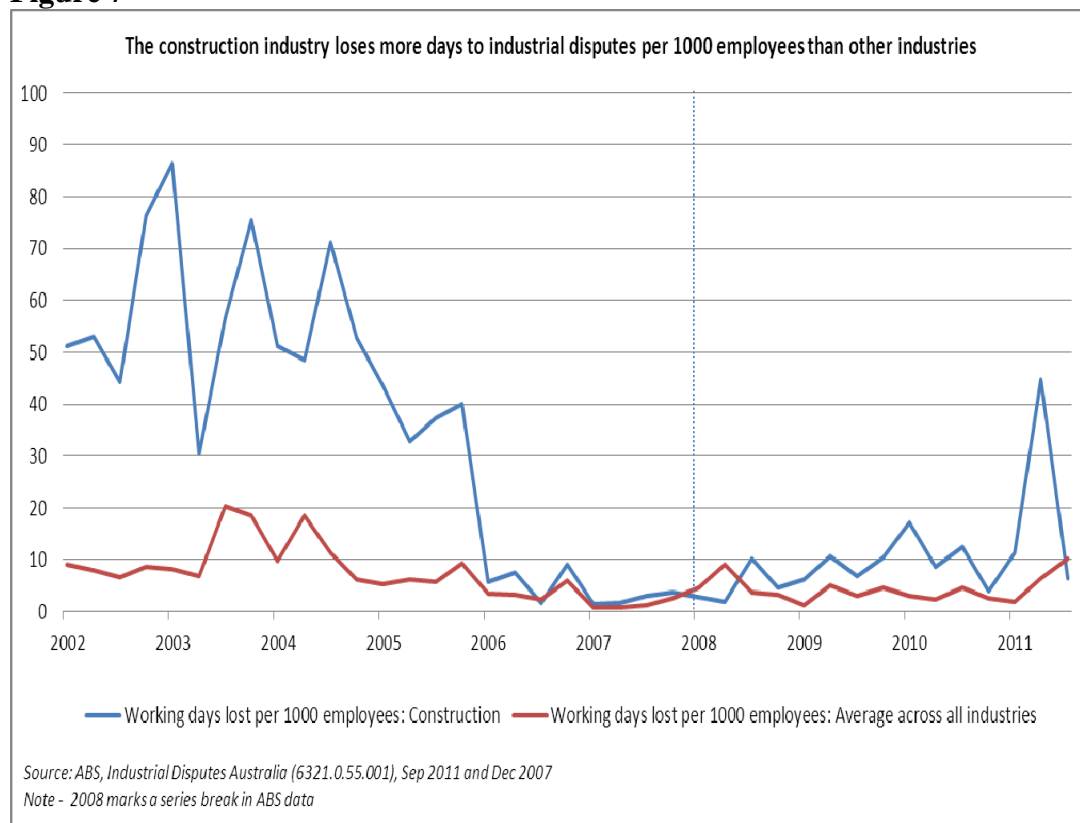
<sup>7</sup> Urbis and Department of Sustainability and Environment, *Dwelling Costs Study: Final Report*, April 2007.

<sup>8</sup> Grattan Institute, *The Housing We’d Choose*, June 2011, page 37.

## Industrial Disputes

41. Productivity in the building and construction industry is negatively impacted by industrial disputes. Industrial disputes can result in significant additional direct and indirect costs which must be borne by the industry, its clients and ultimately by the community as a whole. Delays resulting from industrial action can give rise to costs including:
- liquidated damages;
  - program acceleration expenses inducing extra overtime;
  - daily costs of hire and rental of equipment including cranes, mobile plant, and sheds;
  - inflated sub-contractor tender prices on troubled projects; and
  - damage to a contractor’s reputation which could result in loss of future business.<sup>9</sup>
42. The building and construction industry consistently loses more days per 1000 employees due to industrial disputes than the average of all other industries in Australia (see Figure 7). Since building and construction is a large contributor to Australia’s GDP and has flow on effects to many other sectors, it is clear that increased levels of industrial disputation have a negative impact on the Australian and Victorian economies.

**Figure 7**



<sup>9</sup> Australian Industry Group submission to Royal Commission into the Building and Construction Industry Papers 1-5, 2002, p 12.

43. In October 2011, the ABC Commissioner observed that:

*The most recent ABS industrial disputations data show a significant spike in 'days lost' to industrial action. In the June 2011 quarter there were 44.7 days lost per 1000 employees in the sector. This was driven by high disputation levels on Queensland Government-funded jobs and at Victoria's desalination plant.*

*Disputation levels this high are unacceptable ...*<sup>10</sup>

44. To foster and maintain a more efficient and productive building and construction industry, there must be appropriate mechanisms in place to assist industry participants to resolve disputes without resort to industrial action, to deter participants from engaging in unlawful industrial action and other inappropriate behaviour, and to deal promptly and effectively with unlawful behaviour if and when it occurs.

## **VICTORIAN INITIATIVES**

45. Recognising the importance of the building and construction industry to the Victorian economy and to the interests of all Victorians, the Victorian Government has implemented initiatives across a range of portfolios to assist in addressing the rising costs and low productivity growth in the industry. Some of the key initiatives are outlined below.
46. In addition to its own initiatives, the Victorian Government considers that a strong ABCC is critical to containing construction costs.

### **Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry**

47. The Victorian Government considers industrial relations practices to be a significant contributor to the building and construction industry's rising costs and low productivity performance.
48. In June 2011, the Premier announced a review of the Industrial Relations Principles in section 2 of the Victorian Code of Practice for the Building and Construction Industry. Premised on the Government using its purchasing power to more proactively influence standards of behaviour and conduct in the industry, the review considered means to promote the adoption of workplace practices that foster productivity and compliance with workplace laws, by parties that wish to participate in Victorian Government funded building and construction projects.
49. The key outcome of the review was the development of the Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry (Victorian Implementation Guidelines) to replace the Industrial

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<sup>10</sup> Leigh Johns, address to The Air Conditioning and Mechanical Contractors Association National Conference, 7 October 2011.

Relations Principles. The Victorian Implementation Guidelines are modelled on the Implementation Guidelines for the National Code of Practice for the Construction Industry. Amongst other matters, the Victorian Implementation Guidelines require compliance with all applicable workplace laws, prohibit arrangements that avoid right of entry and freedom of association rights and obligations, and require contractors to take all reasonable steps to bring any unlawful industrial action to an end.

50. The Victorian Implementation Guidelines require firms submitting expressions of interest or tendering for State Government building and construction work to demonstrate how they meet the Guidelines, including the preparation of management plans detailing how they will manage industrial relations and occupational health and safety issues to deliver value for money for Victorian taxpayers.
51. Recognising the importance of proactive on-the-ground monitoring and enforcement of workplace laws and appropriate standards of behaviour, it is intended that the implementation and ongoing operation of the Victorian Implementation Guidelines will be overseen by a Monitoring and Compliance Unit (MCU) to be established this year. The MCU will monitor compliance with the Guidelines, review provisions in project contracts, receive reports of alleged breaches and report proven breaches to the Minister for Finance. The MCU will refer breaches of the law to appropriate enforcement agencies, including WorkSafe and Commonwealth enforcement agencies.
52. The Victorian Guidelines were released to the public in October 2011 and will be fully implemented during 2012. The Government has already applied sections of the Guidelines to the tender process for current major Government projects such as Regional Rail Link and the Bendigo Hospital.

#### **Other Victorian Initiatives**

53. The Victorian Government is implementing a range of other initiatives to support an efficient and productive building and construction industry in areas such as planning, regulation, innovation and public infrastructure. These initiatives include:
  - The Plan for Planning which sets out the reform agenda for planning. The Victorian Government is in the process of delivering on a range of reforms, including a full review of Victoria's planning zones, the trial use of a 'code-assessment' permit process to drive efficiencies in the planning process (by giving greater clarity around what can be built where) and the replacement of Development Assessment Committees with other arrangements, which give autonomy to local councils as key decision makers within their municipality, but provide support to achieve local planning outcomes and better relationships with developers.
  - The new Metropolitan Planning Strategy will establish a new framework for managing growth and change in Melbourne. One of the key principles underlying this strategy is the integration and optimisation of existing and future infrastructure provision.

- The Minister for Planning has appointed a Ministerial Advisory Committee of industry experts to undertake a broad scale review of the planning system. The outcomes and recommendations of this review are pending.
  - The Government has established the Public Transport Development Authority and commenced reviews into new rail lines to Melbourne Airport, Doncaster and Rowville and a feasibility study for the return of passenger trains between Geelong, Ballarat and Bendigo.
54. The Victorian Government has already established a Housing Affordability Unit within the Department of Planning and Community Development to provide whole of government advice on policies, legislation and procedures, an Urban Renewal Authority, Places Victoria (to facilitate large scale urban renewal) and the Victorian Design Review Panel chaired by the Victorian Government Architect (to have oversight of design competitions for government-funded infrastructure projects).
55. Victoria's analysis shows the building and construction industry faces cost and productivity challenges. However, the complexity and high level of interdependency across multiple policy domains means further research and analysis is necessary to understand the policy options and responsibilities for State, Territory and Commonwealth governments to drive improved building and construction sector productivity and control recent cost growth.
56. There are several reasons why a coherent national approach, coordinated across State, Territory and national governments is needed:
- Several important policy levers that influence building and construction sector costs and productivity fall within the Commonwealth's domain – for instance workplace relations and immigration. Action in these areas needs to be coordinated with States and Territories to ensure they have their intended impact.
  - Other policy levers are joint responsibilities or fall more within States and Territories' domain – for instance skills and education policy, infrastructure procurement, and local and State and Territory regulations. However, unilateral action by one jurisdiction can have unintended distortionary consequences elsewhere.
  - In developing the Seamless National Economy reform agenda, the Commonwealth and States and Territories recognised the potential benefits of reducing costs to business and enhancing competition, productivity and workforce participation and mobility in areas of shared responsibility. The same potential benefits, and shared responsibilities, exist in the building and construction industry.



57. The Victorian Government, in recognition of the important role the building and construction industry plays, and cost and productivity challenges it faces, will raise this matter through the Council of Australian Governments. Victoria will seek a referral to a Productivity Commission inquiry into the causes and possible policy responses to building and construction sector costs and productivity challenges.

## **RATIONALE FOR ESTABLISHMENT OF THE ABCC AND INDUSTRY-SPECIFIC WORKPLACE LAWS**

58. The Cole Royal Commission found that the building and construction industry was characterised by a high level of unlawful and inappropriate practices and made 212 recommendations directed to structural and cultural reform. The ABCC and industry-specific workplace relations laws were established by the then Commonwealth Government in response to those findings and recommendations.
59. The Victorian Government concurs with the views of industry stakeholders that the activities of the ABCC and these industry-specific laws have contributed to improvements in the culture and performance of the industry. However, while some progress has been made, the Victorian Government considers that the original rationale for these measures remains valid today.

### **The Cole Royal Commission**

60. In 2001, the then Commonwealth Government appointed the Honourable TRH Cole RDF, QC, (Commissioner Cole) to conduct a Royal Commission into the Australian building and construction industry (Cole Royal Commission).
61. The Cole Royal Commission found that industry unions organised and engaged in industrial conflict that resulted in debilitating disruptions to major projects with little risk of being held accountable. The conduct of these unions was often driven by a disregard or contempt for the law and its institutions, particularly where the policy of the law was to foster individualism, freedom of choice or genuine enterprise bargaining. The Commission found that unions were pursuing industrial objectives through industrial conduct, rather than relying on negotiation or the law and legal institutions.<sup>11</sup>
62. The Cole Royal Commission found that the standards of commercial and industrial conduct exhibited in the building and construction industry represented a significant departure from that in the rest of the Australian economy. The structure of the industry coupled with the different focus of the participants resulted in unlawful and inappropriate conduct and practices. In particular, the Commission highlighted the clash between the short-term project profitability focus of the providers of capital, clients, head contractors and subcontractors and the long term aspirations of industry unions to dominate,

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<sup>11</sup> Cole RFD QC, *Royal Commission into the Building and Construction Industry, Final Report Volume 1*, p 11.

control and regulate the industry. The Commission found that quick fix solutions driven by commercial expediency were used to supplant insistence on legal rights, adherence to ethical and legal norms and the pursuit of legal remedies.<sup>12</sup>

63. A key finding of the Cole Royal Commission was the recognition that the building and construction industry was characterised by widespread disregard for the law and that existing regulatory bodies had insufficient powers and resources to enforce the law.<sup>13</sup>
64. The Royal Commission noted previous attempts to reform the building and construction industry, but found that:

*To achieve cultural change in the industry, specific legislation targeted at all participants in the industry is necessary ... There is no point in attempting to reform the culture of the industry by revisiting particular reforms. A comprehensive package of reforms implemented on a long term basis is required.*<sup>14</sup>

65. As a result, the Cole Royal Commission recommended the establishment of an independent commission to monitor conduct in the building and construction industry.<sup>15</sup> The Commission believed that specific industry-focused legislation was necessary to remove the substantial impediments to the industry operating in a productive, efficient, harmonious and safe manner with the rights of all participants being respected.<sup>16</sup> The Commission believed this structural change would gradually result in cultural change.

### **Building and Construction Industry Improvement Act 2005**

66. The *Building and Construction Industry Improvement Act 2005* (BCII Act) was the then Commonwealth Government's legislative response to the Cole Royal Commission. The BCII Act put in place a range of industry specific measures including new prohibitions of unlawful industrial action, discrimination and coercion, easier access to remedies for breaches of these laws and higher civil penalties for breaches of these laws than those applying generally. The BCII Act established the ABCC and conferred upon it substantial investigative and enforcement powers. The Act also sought to improve occupational health and safety in the industry through the establishment of the Office of the Federal Safety Commissioner.

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<sup>12</sup> Ibid p 11.

<sup>13</sup> Ibid p 12.

<sup>14</sup> Ibid p 7.

<sup>15</sup> Ibid pp 13- 14.

<sup>16</sup> Ibid p 7.

67. The main object of the BCII Act is:

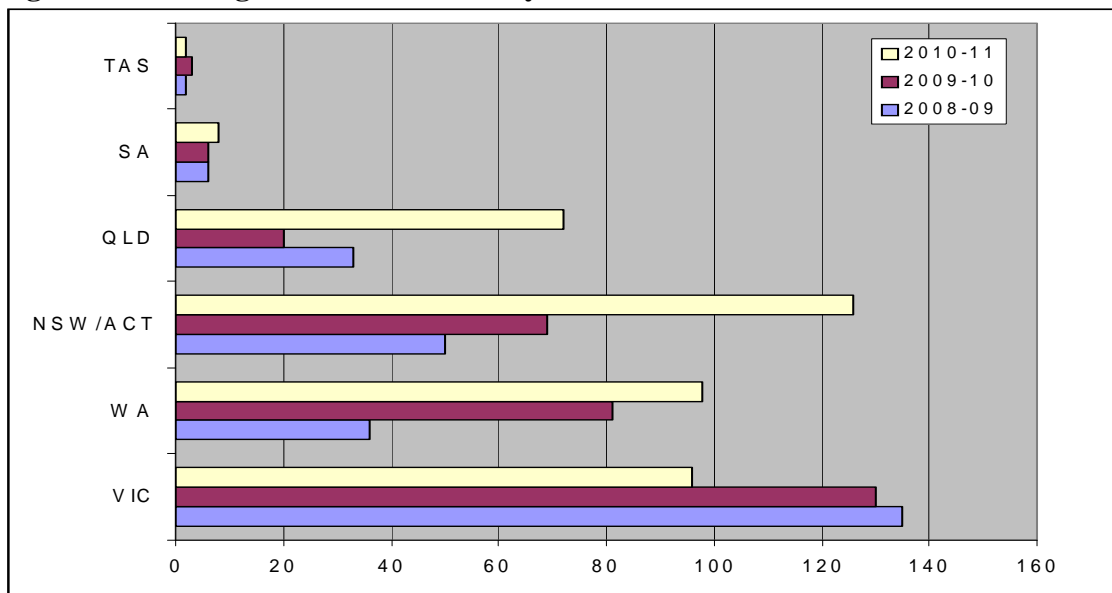
*to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.*<sup>17</sup>

**ABCC Activities**

68. Since it commenced operating on 1 October 2005, the ABCC has undertaken over 1,500 investigations into suspected contraventions of workplace laws. The total number of investigations undertaken annually has continued to increase since its inception. In the 2010-2011 financial year, 402 investigations were commenced.

69. Figure 8 provides a snapshot of ABCC investigations undertaken by jurisdiction since 1 July 2008.

**Figure 8 Investigations undertaken by ABCC 2008 - 2011**



Source: Australian Building and Construction Commission, Annual Report 2010-2011, p. 40

70. Figure 9 details the types of contraventions investigated. In the 2010-2011 financial year, over 900 breaches of workplace laws were investigated and contraventions related to right of entry, unlawful industrial action and coercion continue to be a major focus of the ABCC. This clearly indicates that the ABCC is continuing to perform a vital role in enforcing the rule of law on building and construction sites not only in Victoria but throughout Australia.

<sup>17</sup> *Building and Construction Industry Improvement Act 2005 section 3(1).*

**Figure 9 Contraventions investigated by ABCC 2007 - 2011**

Contravention	2007-08	2008-09	2009-10	2010-11
Right of entry	139	109	213	90
Unlawful industrial action	199	222	200	223
Coercion	156	107	157	103
Independent contractor	11	11	109	238
Freedom of association	114	67	65	37
Strike pay	67	62	50	17
Breach of other WR Act provisions	97	84	41	1
Breach of other FW Act provisions	–	–	32	45
Wages and entitlements	–	–	–	154
Other	29	21	20	27
<b>Total</b>	<b>812</b>	<b>683</b>	<b>812</b>	<b>935</b>

Source: Australian Building and Construction Commission, Annual Report 2010-2011, p. 39

71. In the 2009 report *Transition to Fair Work Australia for the Building and Construction Industry* (Wilcox Report), the Hon Murray Wilcox QC, observed that:

*One of the most impressive aspects of the ABCC's work ... is the speed with which the ABCC responds to requests for assistance. Apparently, it is not unusual for the ABCC to have somebody on a building site within an hour of receiving a telephone call. I was told that, once the ABCC inspector explains the parties' legal positions, the dispute often resolves itself.*<sup>18</sup>

72. Many industry stakeholders consider that the activities of the ABCC and the BCII Act have contributed significantly to improvements in the culture and performance of the building and construction industry, but that the necessary lasting reforms have not yet been achieved.<sup>19</sup> The Victorian Government concurs with these views.

<sup>18</sup> Wilcox, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, para 3.24.

<sup>19</sup> See for example, ACCI Submission to the Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, pp 6-7. Australian Industry Group Submission to the Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, p 2. Master Builders Australia, Submission to the Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, pp 43-44. See also Wilcox, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, para 1.5.

## **IMPACT OF THE COMMONWEALTH BILL**

73. The Victorian Government opposes the abolition of the ABCC and any diminution of the powers of the industry regulator.
74. Despite the Commonwealth Government's stated intention that there will always be a "tough cop on the beat in the building and construction industry",<sup>20</sup> the Victorian Government considers that the Commonwealth Bill would water down the status, independence and powers of the industry regulator.
75. The Commonwealth Bill would also discard industry specific legal reforms that the Cole Royal Commission found to be required on a long term basis and which are still required.
76. The Victorian Government considers that the changes proposed in the Commonwealth Bill will risk an escalation of industrial unrest and loss of the progress that has been made in improving the culture and productivity of the building and construction industry. The costs of this would ultimately be borne by the community as a whole.

### **The Status, Independence and Transparency of the Industry Regulator**

77. The Commonwealth Bill proposes to abolish the ABCC and create a new statutory agency called the Office of the Fair Work Building Industry Inspectorate (Building Inspectorate). The Building Inspectorate would be headed by a Director appointed by the Commonwealth Minister.
78. The Victorian Government is concerned that the proposed new industry regulator could have, or could be perceived by industry participants to have, lesser status and authority than the ABCC. This would compromise its effectiveness.
79. Section 11 of the Commonwealth Bill provides for the Commonwealth Minister to give general directions to the Director of Building Inspectorate about policies, programs and priorities and the manner in which the Director is to exercise these powers and functions. There is no equivalent power for the Minister to direct the activities of the ABCC in respect of "policies, programs and priorities" under the current legislation.
80. The Victorian Government is concerned that this power to direct the industry regulator will compromise its independence and impartiality, or be perceived to do so by building industry participants. This would compromise its effectiveness.
81. Part 2 of the Commonwealth Bill provides for the establishment of a Fair Work Building Inspectorate Advisory Board (Advisory Board), empowered to make

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<sup>20</sup> Hon Julia Gillard MP, Media Release 'Wilcox reports to Government on transition consultation', 3 April 2009.

recommendations to the Director about the performance of the Director's functions and powers, priorities and programs to be implemented by the Director, and any matter the Minister requests.

82. The Victorian Government notes the potential for conflict between the directions of the Commonwealth Minister, the recommendations of the Advisory Board and the views of the industry regulator as to the manner in which it should discharge its statutory obligations. Again, this would compromise its effectiveness.
83. Section 14 of the Commonwealth Bill sets out the annual reporting requirements of the Building Inspectorate and removes legislative requirements under the BCII Act for the industry regulator to report details of the number and type of matters investigated by the industry regulator, and assistance to building employees and contractors in connection with the recovery of unpaid entitlements.
84. The Victorian Government is concerned that the removal of these legislated reporting requirements may reduce the transparency and accountability of the industry regulator.

#### **The Compulsory Examination Powers**

85. Section 52 of the BCII Act confers on the Australian Building and Construction Commissioner (ABC Commissioner) powers to compel a person to provide information, produce documents or attend before the ABC Commissioner or an assistant to answer questions, if the ABC Commissioner believes on reasonable grounds that the person has evidence or information relevant to an ABCC investigation.
86. The inclusion of compulsory examination powers was a key recommendation of the Cole Royal Commission, which found that in view of the problems in obtaining information due to the "closed culture of the industry", the industry regulator would not be able to adequately perform its functions unless it had the power to compel persons to provide information.<sup>21</sup>
87. In 2009, the Wilcox Report noted that:

*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 BCD to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove.*<sup>22</sup>

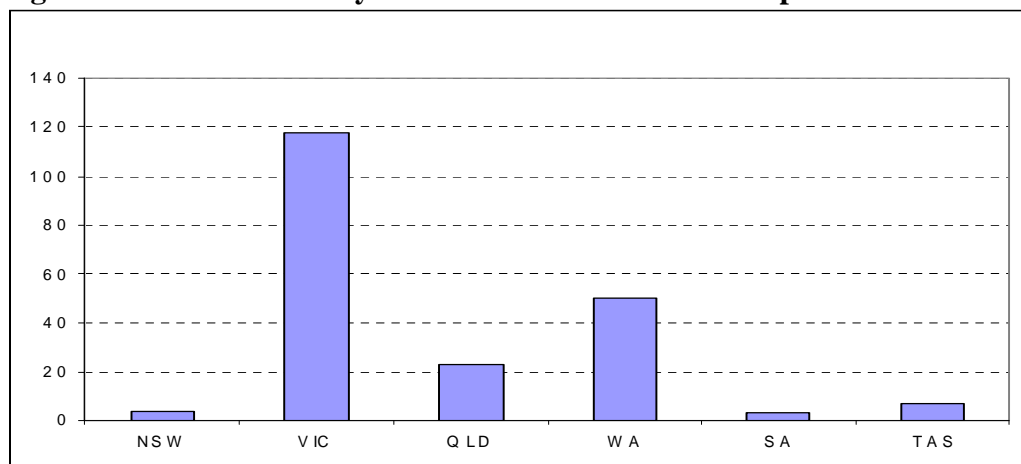
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<sup>21</sup> Cole RFD QC, *Royal Commission into the Building and Construction Industry, Final Report Volume 1*, February 2003, p 159.

<sup>22</sup> Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, para 1.23.

88. The Wilcox report found that while “any tough new regulator in the building and construction industry will need a power of coercive interrogation, at least under present conditions”,<sup>23</sup> the position may change. Accordingly, the Wilcox Report recommended that the granting of the power be reviewed after five years and that in order to ensure review, that the provisions in the proposed new legislation providing for compulsory examination be subject to a five-year sunset clause.<sup>24</sup>
89. From 1 October 2005 to 30 September 2011, the ABCC has used the compulsory powers on 205 occasions. Figure 10 illustrates that Victoria has been overrepresented in the need to resort to these powers, with 118 (58 per cent) of all compulsory examinations occurring in Victoria.

**Figure 10 Examinations by State 1 October 2005 to 30 September 2011**



Source: Australian Building and Construction Commission, *Report of the exercise of compliance powers by ABCC for the period 1 October 2005 to 30 September 2011*

90. Of the 205 examinations, close to half (48 per cent) have resulted in litigation being commenced.<sup>25</sup> In relation to completed proceedings, the Wilcox Report noted that most had been successful and in many cases because of information acquired by the ABCC at compulsory interrogations.<sup>26</sup>
91. Clause 46 of the Commonwealth Bill has the effect that the industry regulator’s compulsory examination powers will automatically lapse after three years. The Explanatory Memorandum to the Bill indicates the Commonwealth Government’s intention that, prior to end of that period, a review will be undertaken as to whether the compulsory examination powers continue to be required. However, there is no legislative requirement to undertake such a review.

<sup>23</sup> Ibid para 5.109.

<sup>24</sup> Ibid Recommendation 3, p 6.

<sup>25</sup> Office of the Australian Building and Construction Commissioner, *Report on the Exercise of Compliance Powers by the ABCC for the period 1 October 2005 to 30 September 2011*, p 7.

<sup>26</sup> Murray, Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, para 1.4.

92. Clause 46 of the Bill appears to pre-empt the outcome of such a review. The Victorian Government is concerned that the powers will lapse without a proper assessment being made as to whether or not they are still warranted.
93. There is no evidence on which to conclude that the conditions which currently warrant retention of the compulsory examination powers will have been eliminated in three years time. Indeed, the evidence is to the contrary.
94. The Commonwealth Bill also introduces a range of “safeguards” on the exercise of the compulsory examination powers. The Victorian Government notes the concerns previously expressed by industry groups that such processes and requirements may risk slowing down and impeding the work of the industry regulator.<sup>27</sup>

### **The Independent Assessor**

95. The Bill also provides for the appointment of an Independent Assessor – Special Building Industry Powers who may make a determination that the compulsory examination powers not apply to a particular project or projects (clause 45).
96. The Commonwealth Government justifies this provision on the basis that it will ensure that the powers to undertake compulsory examinations are focussed where they are needed most.<sup>28</sup> However by the Commonwealth Government’s own acknowledgement:

*... whether or not the powers are used is in the hands of all building industry participants themselves. If the law is abided by then the powers will not be used.*<sup>29</sup>

97. The Victorian Government submits that, as there will be no reason to use the compulsory powers if there is no unlawful behaviour on a particular building project, there is no sound policy rationale for a provision enabling the powers to be “switched off”.

### **Reduction in Maximum Penalties**

98. The Commonwealth Bill would have the effect that the civil penalties available under the *Fair Work Act 2009* (Cth) (FW Act) would apply to unlawful industrial action and coercion in the building and construction industry, a reduction in the maximum available penalties by almost two thirds: from

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<sup>27</sup> Master Builders Australia, Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, p 23. AMMA, Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, pp 25 – 26. ACCI, Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, p 70.

<sup>28</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 17 June 2009, 6250 (Julia Gillard).

<sup>29</sup> *Ibid.*



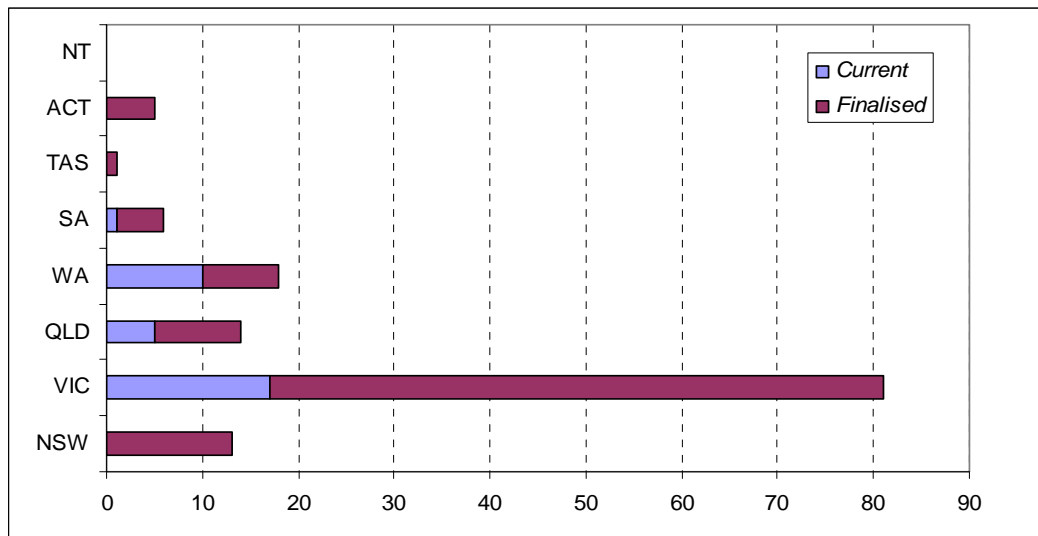
\$110,000 to \$33,000 for a body corporate and from \$22,000 to \$6,600 for an individual.

99. The introduction of higher penalties than those generally applying was recommended by the Cole Royal Commission. The Royal Commission found that the (then) civil penalties available under the *Workplace Relations Act 1996* (Cth) offered “no deterrent at all to unlawful conduct in the building and construction industry”.<sup>30</sup> The Royal Commission found that:

*If the rule of law is to be restored to the industry, much more substantial maximum penalties must be available in cases where serious contraventions of the law are proved.*<sup>31</sup>

100. Victoria is noticeably overrepresented in both finalised and current proceedings for penalties for breaches of workplace laws (see Figure 11). Between 1 October 2005 and 31 December 2011, the ABCC finalised 105 proceedings before the courts, with a success rate of 85 per cent. Victoria accounted for 60 per cent of all finalised court proceedings. The ABCC currently has 33 proceedings on foot of which the Victorian industry accounts for 51 per cent.<sup>32</sup>

**Figure 11 Finalised and current proceedings 1/10/05 – 31/12/11**



Source: Australian Building and Construction Commissioner, *Court Case, 1 October 2005 to 31 December 2011*

101. Since the commencement of the BCII Act, the Construction, Forestry, Mining and Energy Union (CFMEU) has had in excess of \$2.7 million dollars in penalties imposed with over \$2.5 million attributable to the unlawful activities of the Victorian branch.<sup>33</sup> A number of cases brought by the ABCC have

<sup>30</sup> Cole RFD QC, *Royal Commission into the Building and Construction Industry, Final Report Volume 1*, February 2003, p 134.

<sup>31</sup> *Ibid.*

<sup>32</sup> Australian Building and Construction Commissioner, *Current Court Cases 1 October 2005 – 31 December 2011*.

<sup>33</sup> In *Alfred v Construction, Forestry, Mining and Energy Union* [2011] FCA 556 at para 84 the Federal Court found that since the commencement of the BCII Act, pecuniary penalties of \$2,328,550 had been

resulted in penalties which exceed the maximum penalties in the FW Act and the former ABC Commissioner has noted that the courts are generally awarding higher penalties as time goes on.<sup>34</sup>

102. The Federal Court recently observed that the national governing councils of the CFMEU “are either unable or unwilling to curb the unlawful activities” of the Victorian branch.<sup>35</sup>
103. Recent Victorian cases where significant penalties have been imposed include:
  - West Gate Bridge strengthening project: penalties totalling \$1.32 million were imposed in respect of 52 breaches of workplace laws.<sup>36</sup>
  - Royal Children’s Hospital: penalties totalling \$415,000 were imposed for unlawful industrial action and coercion.<sup>37</sup>
  - Melbourne markets relocation project: penalties, fines, costs and compensation totalling \$560,000 in relation to unlawful industrial action, coercion and contempt of court.<sup>38</sup>
104. The Victorian Government notes the opposition to the proposed reduction in maximum penalties by a range of industry groups, who consider that they have acted as a significant deterrent to unlawful action.<sup>39</sup>
105. The Victorian experience demonstrates that it is essential that the civil penalty regime applying to the building and construction industry operates as an effective deterrent to unlawful behaviour. Accordingly, the Victorian Government opposes any reduction in the maximum civil penalties applying to the industry.

### **Removal of the Prohibition of Unlawful Industrial Action**

106. Under the BCII Act, engaging in unlawful industrial action is a stand alone offence (section 38) and broad orders are available for contravention, including orders imposing a pecuniary penalty, compensation for damages suffered or any

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awarded against the Victorian branch of the CFMEU. Since this case was handed down further penalties have been imposed on the Victorian branch of the CFMEU.

<sup>34</sup> J Lloyd, Letter to Deputy Prime Minister, Melbourne, 27 April 2009, para 9.

<sup>35</sup> *Alfred v Construction, Forestry, Mining and Energy Union* [2011] FCA 556.

<sup>36</sup> *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2010] FCA 754.

<sup>37</sup> *Gregor v Construction, Forestry, Mining and Energy Union, Christopher & Ors* [2011] FCA 808; *Cozadinos v Construction, Forestry, Mining and Energy Union, Christopher & Ors* [2011]; ABCC, ‘Union made to pay for economic impact of industrial action’ (media release, 2 June 2011).

<sup>38</sup> *Ibid.*

<sup>39</sup> See for example, AMMA, Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, p 6; Chamber of Commerce and Industry WA, Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, p 5 Australian Chamber of Commerce and Industry, Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, p 37.

other order that the Court considers appropriate (including injunctions or other orders considered necessary to stop the conduct or remedy its effects, such as orders for the sequestration of assets) (section 49).

107. The inclusion of specific provisions dealing with unprotected industrial action in the BCII Act gave effect to a recommendation of the Cole Royal Commission, which found that:

*Section 127 of the Workplace Relations Act 1996 (C'wth) has proved to be ineffectual in preventing unlawful industrial action taking place in the building and construction industry.*<sup>40</sup>

108. The Bill will repeal section 38 and the general provisions of the FW Act dealing with unlawful industrial action will apply. Under the FW Act, taking unprotected industrial action outside the life of an enterprise agreement or workplace determination is not an offence per se and there is no stand alone penalty for it. Penalties for taking unprotected industrial action outside the life of an agreement or workplace determination cannot be imposed unless a stop order is first obtained from FWA under section 418 and then, if those orders are not complied with, making an application to the Federal Court or Federal Magistrates Court for an injunction and penalties.

109. Master Builders Australia has previously pointed out that “in Victoria, building industry participants routinely operate under agreements that have passed their nominal expiry date while awaiting negotiations to be finalised”.<sup>41</sup>

110. Breach of section 418 of the FW Act also does not provide a basis for compensation under section 545 of the FW Act (see section 421(4)). Any action for damages would need to be pursued separately. This contrasts with section 49 of the BCII Act, which provides the ABCC with power to seek compensation for damages suffered for unlawful industrial action.

111. This risks a return to the difficulties identified by the Cole Royal Commission, which found:

*The legal processes at present available to enforce industrial or civil rights, and to recover losses are slow, cumbersome and expensive. Whilst losses from unlawful industrial action may be immediate, recovery of those losses may take some years. Outcomes are uncertain, technical difficulties of recovering losses caused by union officials from the union are significant, and above all, contractors and subcontractors know that if they seek recovery of loss from unions, their future prospect of uninterrupted work is remote.*<sup>42</sup>

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<sup>40</sup> Cole RFD QC, *Royal Commission into the Building and Construction Industry, Final Report Volume 1*, February 2003, p 63.

<sup>41</sup> Master Builders Australia, Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, p 4.

<sup>42</sup> Cole RFD QC, *Royal Commission into the Building and Construction Industry, Final Report Volume 1*, February 2003, p 13.

112. Industry groups have previously submitted that the present provisions of the BCII Act have been particularly effective in limiting wildcat and unlawful industrial action.<sup>43</sup>
113. The Victorian Government also notes concerns previously raised by industry groups that the effect of the Commonwealth Bill will be to narrow the scope of the prohibitions of unlawful industrial action and coercion and their effectiveness, by narrowing the applicable definitions of industrial action and building work.<sup>44</sup>
114. The Victorian Government opposes repeal of the provisions in the BCII Act dealing with unlawful industrial action as it considers this will hamper the ability of the industry regulator to deal with unlawful industrial action quickly and effectively and make it more difficult for industry participants to recover the costs resulting from unlawful industrial action from the parties responsible for those costs.

### **Removal of the Prohibition of Coercion and Undue Pressure**

115. In addition to removing the prohibition of unlawful industrial action in the BCII Act, the Commonwealth Bill would repeal the provisions of the BCII Act dealing with discrimination, coercion and unfair contracts.
116. Section 44 of the BCII Act prohibits a person using ‘undue pressure’ or ‘coercion’ to get another person to agree or not agree to make, vary or terminate, or extend the nominal expiry date of, a building enterprise agreement.
117. This provision was included in order to address particular practices found by Commissioner Cole to be prevalent in the building industry, specifically unprotected industrial action taken in support of claims made in respect of proposed agreements.<sup>45</sup>
118. While the general provisions of the FW Act would apply (sections 340 and 343), section 343 of the FW Act refers to an intention to “coerce” but does not extend to “undue pressure”. While section 344 of the FW Act does cover undue influence or pressure, it is restricted to certain conduct of employers as against

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<sup>43</sup> See ACCI, Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, p.71; Chamber of Commerce and Industry WA, Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, p.17.

<sup>44</sup> See ACCI Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009 p71. Master Builders Australia, Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009 pp 14-15, Property Council of Australia, Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, p 16.

<sup>45</sup> Cole RFD QC, *Royal Commission into the Building and Construction Industry, Final Report Volume 1*, February 2003, p 33.

employees. It appears that “undue pressure” has a wider meaning than ‘coercion’.<sup>46</sup>

119. The Victorian Government notes the concerns previously expressed by industry groups that repeal of section 44 of the BCII Act will raise the bar for establishing unlawful coercion and that section 44 has been relied upon in ABCC enforcement proceedings.<sup>47</sup>
120. The Victorian Government opposes any changes to the present legislation governing the building and construction industry that would narrow the scope of prohibited conduct.

### **Conclusion**

121. The Victorian Government considers that provisions of the Commonwealth Bill would:
  - hamper the ability of the industry regulator to deal with unlawful industrial action quickly and effectively and make it more difficult for industry participants to recover the costs resulting from such action;
  - narrow the legislative prohibitions of inappropriate and damaging conduct;
  - reduce the deterrent effect of the civil penalty regime applying to the industry;
  - put at risk the independence, impartiality and accountability of the industry regulator, which would in turn compromise its effectiveness;
  - put at risk essential information gathering powers of the industry regulator, with no guarantee that a proper assessment will be made as to whether or not they are still required before they lapse; and
  - introduce “switch off” arrangements for these powers that appear to have no sound policy rationale.
122. The Victorian Government opposes the abolition of the ABCC and any diminution of the powers of the industry regulator.

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<sup>46</sup> See Fair Work Bill 2008, Explanatory Memorandum, para 1396 and *John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2009] FCA 235.

<sup>47</sup> See Master Builders Australia, Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009 pp 21-22, Property Council of Australia, Submission to Senate Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, p 29.