Master Builders Australia

Submission to the Senate Education and Employment Standing Committee

on

Building and Construction Industry (Improving Productivity) Bill 2013 [No.2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No.2]

19 February 2016

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1 Introduction

1.1 This submission is made on behalf of Master Builders Australia Ltd.

1.2 Master Builders Australia (Master Builders) 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. Over 126 years the movement has grown to over 32,000 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.

2 Purpose of Submission

2.1 This submission is made to the Senate Standing Education and Employment Legislation Committee to assist in its inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013 [No.2]* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No.2]* (the Bills).

2.2 Master Builders strongly support the passage of the Bills.

2.3 In particular, Master Builders supports the re-establishment of the Australian Building and Construction Commission (ABCC) and has consistently argued that a strong regulator is crucial for the building and construction industry. The powers proposed to be available to the ABCC are necessary to ensure compliance with the rule of law on building sites and to deliver economic and productivity benefits to both the industry and the community more broadly.

2.4 The Bills, if enacted, will deliver on a clear election commitment and we support the preposition that the Government has a mandate for their successful passage.

2.5 This submission relies on, and should be read in conjunction with, several previous Master Builders' submissions to this Committee. Those earlier submissions are as follows:

2.5.1 *Master Builders Australia - Submission to the Senate Standing Education and Employment Legislation Committee on the Building*

and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 - 22 November 2013 **(Attachment A)**

2.5.2 Master Builders Australia – Supplementary Submission to the Senate Standing Education and Employment Legislation Committee on the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* - 27 November 2013 **(Attachment B)**

2.5.3 Master Builders Australia - Submission to the Senate Standing Education and Employment Legislation Committee on the *Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* – 17 January 2014 **(Attachment C)**; and

2.5.4 Master Builders Australia – Supplementary Submission to the Senate Standing Education and Employment Legislation Committee on the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* – 24 February 2014 **(Attachment D)**.

2.5.5 Master Builders Australia – Second Supplementary Submission to the Senate Standing Education and Employment References Committee on the the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* – 14 March 2014 **(Attachment E)**.

3 Developments since Previous Submissions

3.1 Earlier Master Builder's submissions established a basis for supporting the passage of the Bills with reference to particular types of evidence and conduct that affect the building and construction industry. Since that time, there have been further instances and developments which are relevant, and are detailed in this submission.

3.2 These developments include the findings and recommendations in the Final Report of the *Royal Commission into Trade Union Governance and Corruption* (the Heydon Royal Commission); changes to the *Building Code 2013* (the Code); and the *Final Report of the Productivity Commission Review of the Fair Work Laws* (the PC Report).

3.3 Each of these developments are dealt with variously hereunder.

4 Central Elements of the Bill

4.1 The *Building and Construction Industry (Improving Productivity) Bill 2013 [No.2] (*the Bill) is divided into nine chapters.

4.2 Chapter 1 sets out definitions and key objects. The views of Master Builders in respect of this chapter remains that set out in earlier submissions.

4.3 Chapter 2 establishes the Australian Building and Construction Commissioner. Master Builders relies on the relevant content of earlier submissions and elaborates on them in this submission at section 6.

4.4 Chapter 3 allows the Minister to issue a Building Code with which building industry participants must comply in order to undertake Commonwealth funded work. Master Builders relies on the relevant content of earlier submissions and elaborates on them in this submission at section 7.

4.5 Chapter 4 deals with the Office of the Federal Safety Commissioner. The views of Master Builders in respect of this chapter remains that set out in earlier submissions.

4.6 Chapter 5 deals with the prohibition of unlawful industrial action. Master Builders relies on the relevant content of earlier submissions and elaborates on them in this submission at section 8.

4.7 Chapter 6 deals with actions that are considered coercion, discriminatory or designed to apply undue pressure. Master Builders relies on the relevant content of earlier submissions and elaborates on them in this submission at section 9.

4.8 Chapter 7 deals with the powers of the ABCC to obtain information. Master Builders relies on the relevant content of earlier submissions and elaborates on them in this submission at section 10.

4.9 Chapter 8 deals with enforcement. Master Builders relies on the relevant content of earlier submissions and elaborates on them in this submission at section 11.

4.10 Chapter 9 deals with various miscellaneous matters. Master Builders relies on the relevant content of earlier submissions and elaborates on them in this submission at section 12.

5 Royal Commission into Trade Union Governance and Corruption

5.1 Master Builders submits that the nature of the building and construction industry and the work it undertakes, when considered conjunctively with its industrial history and practices, should be categorised as a special case exhibiting unique cultures and conduct that justify the necessity for sector specific industrial laws.

5.2 Support for this view can be found via reference to the Final Report of the Royal Commission.

5.3 Royal Commissioner John Dyson Heydon AC QC delivered his Final Report to the Governor General on 28 December 2015. It contained a large body of material that Master Builders considers to be further justification for the passage of the Bills and the re-establishment of the ABCC. The findings are consistent with the outcomes of previous Royal Commissions and the review conducted by Murray Wilcox, *Transition to Fair Work Australia for the Building and Construction Industry*, 31 March 2009.

5.4 Indeed, the Final Report devoted some 1160 pages to the building and construction sector alone. Of the six volumes in the Final Report, almost one and a half volumes were specific to the building and construction industry and the conduct of the Construction Forestry Mining and Energy Union (CFMEU).

5.5 In respect of this conduct, the Royal Commissioner stated:

> *The conduct that has emerged discloses systemic corruption and unlawful conduct, including corrupt payments, physical and verbal*

> *violence, threats, intimidation, abuse of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court.*[1]

5.6 Importantly, the Royal Commissioner observed:

> *The issues identified are not new. The same issues have been identified in reports of three separate Royal Commissions conducted over the past 40 years: the Winneke Royal Commission in 1982, the Gyles Royal Commission in 1992 and the Cole Royal Commission in 2003.*[2]

5.7 And later:

> *The continuing corruption and lawlessness that has been revealed during the Commission suggests a need to revisit, once again, the regulation of the building and construction industry.*[3]

5.8 And recommended:

> *…there continue to be a separate industry-specific regulator for the building and construction industry.*[4]

5.9 Six of the 79 recommendations made for law reform were specific to the building and construction industry.

5.10 The building and construction industry faces unique problems and the dominant union, the CFMEU, engages in conduct that appears ingrained and institutionalised.

5.11 In this regard, the Heydon Royal Commission found that there is a "*longstanding malignancy or disease*" within the CFMEU. It noted that this is not isolated but rather it was widespread.[5]

5.12 The Royal Commissioner held that senior CFMEU officials in various States (including Victoria, Queensland, New South Wales and the Australian Capital Territory (ACT)) had engaged in "*potential criminal offences against numerous*

[1] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8, para 1

[2] Ibid at para 2

[3] Ibid at para 3

[4] Ibid at para 109

[5] Ibid at para 23

laws" and that lawlessness within the union was commonplace, with over 100 adverse court finding against the union since 2000.[6]

5.13 The current industry regulator, Fair Work Building and Construction (FWBC), has 53 prosecutions involving 72 CFMEU officials currently before the courts with 67 continuing investigations.[7]

5.14 Specific building and construction sector industrial laws are therefore necessary to ensure compliance with the rule of law and effect lasting positive change to industry culture and practice.

6 The Australian Building and Construction Commission (ABCC)

6.1 Master Builders supports the establishment of the ABCC. Regrettably, it is essential that there be a building and construction industry specific regulator to monitor and enforce the specific laws proposed elsewhere in the Bill. Earlier submissions set out the basis for this view.

6.2 The need for an industry specific regulator was noted by the Heydon Royal Commission. The Royal Commissioner observed:

> *One consideration which supports the need for an industry specific regulator is the high level of unlawful conduct in the industry. This is demonstrated by Appendix A to this Chapter. The sustained and entrenched disregard for both industrial and criminal laws shown by the country's largest construction union further supports the need. Given the high level of unlawful activity within the building and construction sector, it is desirable to have a regulator tasked solely with enforcing the law within that sector.*[8]

6.3 And later:

> *Having regard to all of the available material, the argument that there is no need for an industry specific regulator cannot be sustained.*[9]

6.4 It was also observed:

[6] Ibid at paras 9 and 10

[7] https://www.fwbc.gov.au/compliance-and-enforcement/outcomes-investigations/legal-cases

[8] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8, para 83

[9] Ibid at para 97

> *Specialised treatment of a particular industry is not a novel concept: different areas of the financial services industry, for example, are subject to specialised laws and the supervision of a specialised regulator. Many professions are, likewise, subject to specialised laws that govern the manner in which their work is undertaken. It is not necessary to demonstrate in detail the public interest in that state of affairs. In the case of the building and construction industry, the justifications for special treatment have already been advanced.*[10]

6.5 The Heydon Royal Commission recommended as follows:

> *There should continue to be a building and construction industry regulator, separate from the Office of the Fair Work Ombudsman, with the role of investigating and enforcing the Fair Work Act 2009 (Cth) and other relevant industrial laws in connection with building industry participants.*[11]

6.6 Master Builders also notes other regulatory and law enforcement agencies are unable to fulfil the role of the proposed ABCC.

6.7 In this regard, we note Victoria Police has expressed concern about their ability and capacity to deal with unlawful behaviour and conduct in the building and construction sector. They identified several obstacles including the difficulty in distinguishing between criminal activity and lawful industrial activity; the prevalence of witness and victim intimidation; the lack of advance notice by regulators of industrial activity and delayed assessment of publicly available information; and a delay in redress for companies.[12]

6.8 Victoria Police set out several recommendations to improve the effectiveness of their involvement in the industry and took the view that not only is it necessary for there to be a stronger building and construction industry specific penalty regime, but also a '*well-resourced and empowered industrial regulator for that sector*.'[13]

6.9 Master Builders supports this view.

[10] Ibid at para 108

[11] Ibid refer to recommendation 61

[12] Victoria Police's Response to the Discussion Paper Options for Law Reform, 19 May 2015, released by the Royal Commission into Trade Union Governance and Corruption, 10 September 2015

[13] Ibid at page 39

7 The Building Code

7.1 An essential element of the Bill is the requirement for building industry participants to comply with the Building Code **(Attachment F)** in order to undertake Commonwealth funded work. This is dealt with in Chapter 3 of the Bill.

7.2 The intention of the Building Code is to encourage "*productivity and lawful workplace relations on building sites. It sets out the Australian Government's expected standards for building contractors or building industry participants involved in Commonwealth funded construction projects*."[14]

7.3 A revised advanced release of the Building Code 2014 was published on 28 November 2014. The Building Code 2014 will be given effect subsequent to the passage of the Bill.

7.4 The obligations imposed by the Building Code are fundamental to ensuring the rule of law is observed on building and construction sites and that unlawful behaviours are curtailed.

7.5 The Senate Committee should have particular regard to the section of the Building Code that requires participants to uphold freedom of association laws.

7.6 The Heydon Royal Commission considered evidence of threats that impinge upon the right to freedom of association.

7.7 In one instance, telephone evidence gathered by the Australian Federal Police revealed an ACT CFMEU organiser telling an employer to move an employee off the job because he didn't join the union. When the employer refused, the official suggested he '*might make a little donation... or something*' to the union charity to '*smooth things over'*.[15]

7.8 In other telephone evidence between a CFMEU organiser and a contractor, during which the local CFMEU Assistant Secretary was present, the organiser was recorded telling the employer that, if he didn't pay for some more union

[14] Australian Government, Department of Employment, Building Code http://www.employment.gov.au/building-code

[15] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 3, Chapter 6-4, para 55

memberships, the union would '*deliver… some action*' to ensure that he '*won't be doing any work on commercial sites'*.[16]

7.9 In this regard, the Heydon Royal Commission noted:

> *….that the above conduct was not isolated, but rather part of a culture that derived in part from pressure imposed on organisers to increase membership numbers. The existence of that culture was said to be demonstrated, amongst other matters, by Jason O'Mara's acquiescence to Johnny Lomax's threats to Anthony Costanzo. Counsel assisting submitted that such a culture is contrary to the policy and objects of the Fair Work Act 2009 (Cth), and, in some of the particular cases identified, may have involved contraventions of that Act.*[17]

7.10 The Heydon Royal Commission noted the CFMEU did not contest the submissions of Counsel Assisting. The Royal Commissioner then found the submissions were "*in substance correct*".[18]

7.11 A further requirement of the Building Code is that building industry participants comply with all building industry laws and other relevant legislation including the *Competition and Consumer Act 2010 (Cth).*

7.12 Industrial coercion creates an environment within which anti-competitive behaviours ripple throughout the industry. Emerging small-to-medium sized (and often more innovative) competitors are excluded from the market when faced with union rents unaffordable at their economy of scale. For companies that meet union demands, the inflated costs of CFMEU enterprise bargaining agreements (EBAs) (which direct substantial monies to the union) and other on-costs (donations, payment for memberships etc) make it impossible for them to compete, unless they are protected from competition by the union.

7.13 The CFMEU's tactics are an unfortunate vehicle for market manipulation, whereby contractors can either acquiesce or actively cooperate with the union to suppress competition and even fix prices. Contractors from the concreting, formwork and scaffolding industries all testified that ACT CFMEU officials had instructed them to fix charge-out rates, which the union offered to enforce, as revealed in recorded telephone evidence.

[16] Ibid at para 37

[17] Ibid at para 81

[18] Ibid at para 83

7.14 In a series of text messages aired before the Heydon Royal Commission, a contractor informed a CFMEU official that a competitor (one without a CFMEU EBA) had won a contract and that the official should '*hammer him*'. The evidence revealed the union official as having told the competitor he '*can't be going around pricing'*, saying: *'I need to give you rates, I need to get you an EBA if you want to do commercial [work] … we've … got a system in place and can't have you … disrupting it.*'[19]

7.15 The effect of this 'system' is obviously severely restricted competition, which tends to entrench the market dominance of larger commercial subcontractors and impede the entry of emergent contractors into the commercial market.

7.16 When coupled with on-costs associated with payments to the union, this restriction in competition is calculated to inflate construction costs by between 20 to 30 per cent – something the community and the economy have to pay for.

7.17 Safety on building and construction sites is also an important element in the Building Code.

7.18 Being affected by drugs or alcohol is an issue that bears directly on the fitness of a worker to carry out their work safely and without risks to their own health and others. This is particularly important in the building and construction industry, given the nature, location and type of work undertaken.

7.19 Regrettably, the incidence of drug and alcohol affected workers in the building and construction industry appears to be far higher than other industries. Reports from Safe Work Australia have noted 17 per cent of building and construction employers consider drugs and alcohol to be the main cause of work-related injuries in their workplaces, far higher than other sectors where only 2 per cent identify drugs and alcohol to be the main cause.[20]

7.20 Master Builders therefore supports the recent amendments to the Building Code 2013 that require contractors to have a comprehensive policy for

[19] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 3, Chapter 6-5, paras 72 and 78

[20] Safe Work Australia, Work Health and Safety Perceptions: Construction Industry, December 2014 - http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/905/whs-perceptions-construction-industry.pdf

managing drug and alcohol issues in the workplace, including mandatory random drug and alcohol testing on Commonwealth-funded projects.

7.21 It is essential the Bill be enacted so as to enable the application of the proposed Building Code 2014 to ensure the ABCC has the appropriate powers to enforce its compliance.

8 Unlawful Industrial Action

8.1 Chapter 5 of the Bill prohibits unlawful industrial action and unlawful picketing. Earlier submissions set out Master Builders views on this provision.

8.2 In addition to earlier submissions, Master Builders notes the concept of unlawful industrial action was the subject of the Heydon Royal Commission attention. It heard a significant number of case studies and evidence demonstrating this type of conduct and its prevalence in the building and construction sector.

8.3 The Heydon Royal Commission noted:

> *In an environment where union officials openly acknowledge that they will take industrial action to achieve the union objectives without regard to whether that action might break the laws governing protected and unprotected industrial action, there is a need for laws that expressly address what is prohibited conduct and provide strong penalties for contravention of them.*[21]

8.4 Master Builders strongly agrees with the observation above.

8.5 Further, Master Builders has consistently argued the current level of penalties for unlawful industrial action are not high enough to act as an effective deterrent.

8.6 The Heydon Royal Commission also considered whether the level of penalties was appropriate. It observed:

> *It is apparent …. that the present penalties are an ineffective deterrent to unlawful conduct on the part of the construction unions, and judicial officers have noted that the CFMEU appear to regard financial penalties as simply a business cost like any other. That suggests that higher maximum penalties could not be considered disproportionate to the harm caused by unlawful industrial action*

[21] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8, para 185

> *and coercion, particularly when the selection of particular penalties from case to case are subject to the usual judicial discretion.*[22]

8.7 The Royal Commissioner recommended that:

> *The Fair Work Act 2009 (Cth) be amended:*
>
> *(a) to increase the maximum penalties for contraventions of ss 343(1), 348 and 355 (coercion) and ss 417(1) and 421(1) (prohibited industrial action) to 1,000 penalty units for a contravention by a body corporate and 200 penalty units otherwise;…*[23]

8.8 The PC Report also canvassed the question of whether or not penalties were set at a level that provided an effective deterrent.

8.9 It found "*there are several shortcomings in current arrangements that allow the excessive strategic use of industrial action*".[24] The PC Report recommended:

> *The penalties for unlawful industrial action (by any party) should be increased by a factor of three, as this would allow the FWC and the Federal Court more scope to apply penalties commensurate with the harm associated with such action.* [25]

8.10 Master Builders supports this recommendation and notes it is reflected in the Bill.

8.11 The Bill also proposes to prohibit unlawful picketing. This is a type of conduct which is frequently deployed in the building and construction industry.

8.12 The Heydon Royal Commission canvassed the notion of unlawful picketing. After considering evidence, the Royal Commissioner noted:

> *…picketing – which may be an actionable nuisance at common law – is considerably more prevalent in the construction industry than in other industries. It may be argued that to prohibit certain pickets in the building industry, as the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) endeavoured to do, simply reflects the fact that there are real differences between the building and construction industry and others.*[26]

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[22] Ibid at para 188

[23] Ibid refer to Recommendation 66

[24] The Australian Government Productivity Commission Inquiry Report, Workplace Relations Framework, 30 November 2015, Volume 1 at page 44

[25] Ibid at page 45

[26] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8 at para 157

8.13 Insofar as ways to address unlawful picketing, the Heydon Royal Commission noted it was highly anomalous that the Fair Work Commission could not stop this type of tortious conduct but it could make stop orders in relation to other types of industrial action.

8.14 The Heydon Royal Commission recommended the *Fair Work Act 2009 (Cth)* (Fair Work Act) be amended *"to provide that picketing by employees or employee associations is 'industrial action', and to deal specifically with the consequences of industrially motivated pickets."*[27]

8.15 The intention of this recommendation is reflected in the present Bill, albeit limited to participants in the building and construction industry, and is supported by Master Builders. Master Builders does not, at this time, make any submission as to whether the proposed provision be included in the Fair Work Act.

9 Coercion and Discrimination

9.1 Chapter 6 of the Bill deals with coercion and discrimination.

9.2 The various provisions prohibit coercion in relation to the duties of a particular person, contributions to a particular superannuation fund, and to make, vary, terminate etc. enterprise agreements etc. It also prohibits a person from advising, encouraging or inciting such coercive conduct.

9.3 Earlier submissions set out Master Builders' views on these provisions.

9.4 Master Builders again reiterates that this conduct is particularly acute in the building and construction industry and the proposed provisions are essential to the successful operation of the Bill.

9.5 In the commercial sector, builders are effectively project managers and most physical construction is undertaken by specialist sub-contractors. It is not uncommon for building unions to influence the awarding of tenders to union 'approved' sub-contractors. Where sub-contractors refuse union demands, ranging from a pattern union EBAs, union memberships, engagement of union-nominated personnel and 'donations', they can expect to be 'black-banned' or

[27] Ibid refer to Recommendation 66

excluded from the commercial market, via a mixture of site disruption (which prevents builders from engaging them) unlawful conduct and intimidation. Similarly, where builders refuse union demands, they can expect workplace disruption, interference with clients and union-induced boycotts from suppliers.

9.6 The Heydon Royal Commission heard a significant volume of evidence of coercion and undue influence being applied to employers in the building and construction sector.

9.7 The testimony of one small formwork company owner before the Heydon Royal Commission was typical. The Heydon Royal Commission accepted evidence a CFMEU organiser told the owner to sign the union's pattern enterprise agreement (EBA) as '*this is the way the industry is going… we will take control of the jobs. We will … tell… you which ones you can and can't go on*', before offering '*other ways*' to come to an '*arrangement*', including '*donations*' or payment for union memberships.[28]

9.8 When the employer said he couldn't afford these demands, the organiser was reported to have said he '*didn't give a f**k about small businesses*' and allegedly ordered a builder to black-ban the company and engage a union-endorsed rival (one which had a pattern CFMEU EBA, had paid for union memberships and made cash payments to the then lead local organiser).[29]

9.9 The Heydon Royal Commission also heard evidence with regard to EBAs and submissions that the CFMEU 'required' all builders, also in the ACT, to have a union EBA for all workers.

9.10 One piece of evidence that was adduced was a telephone conversation that was noted in evidence by Denis Milin, Managing Director of Milin, a company which was contracted to construct 320 residential apartments in Woden in the ACT. Mr Milin provided evidence that in August 2014, he received a phone call from the Secretary of the CFMEU ACT Division. Mr Milin stated during that conversation the Secretary allegedly threatened disruption to the site if Milin did not put a CFMEU EBA in place for the project. Despite the CFMEU's attempts to discredit Mr Milin's evidence, in his report, the Royal Commissioner found

[28] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 3, Chapter 6-3 at para 168

[29] Ibid at para 171

that the evidence was credible. It was only on the basis of counsel assisting not pressing the issue of a possible contravention of the existing coercion provisions of the Fair Work Act which the Royal Commissioner stated as being an "*over-generous stance in relation to evidence demonstrating a consistency of position on Dean Hall's part…*", that an adverse finding wasn't made on this occasion.[30]

9.11 The Royal Commissioner also referred to numerous evidence of circumstances where it was alleged CFMEU officials solicited payment from sub-contractors in order to secure them with work on construction sites in the ACT.

9.12 One example of this practice was provided following evidence presented by Elias Taleb of Class 1 Form Pty Ltd (Class 1 Form) a formwork business operating in the ACT. [31]

9.13 In that evidence, Mr Taleb alleged that in 2012/13 a CFMEU union official made demands for a payment of $50,000 to him directly in order to secure work for Class 1 Form on a 38 residential unit site in Yarralumla in the ACT. In his witness statement, Mr Taleb alleged the official demanded the payment and that *'if you don't pay someone else will'*. Mr Taleb stated he made the payment, to be paid in five separate instalments, as he believed if Class 1 Form missed out on the work, the financial consequences would be dire for his company.[32] Mr Taleb's evidence to the Heydon Royal Commission was that he paid $50,000 in total to the official in connection with the Yarralumla unit development.[33]

9.14 In addition, Mr Taleb gave evidence that he made further payments, also totalling $50,000, to secure work on a 77 unit retirement village development in Griffith (ACT), as well as an additional one-off payment of $15,000 to obtain work on a site in Gungahlin, also in the ACT.[34] Mr Taleb claimed he then grew tired of making payments to the official and ceased doing so in late 2013.

[30] Ibid at para 82

[31] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 3, Chapter 6-2 at para 9

[32] Ibid at para 11

[33] Ibid at para 12

[34] Ibid at paras 20 and 22

9.15 The director, Ivan Bulum, of the head contracting company on the Yarralumla site, also gave evidence to the Heydon Royal Commission that the CFMEU had tried to tell him which sub-contractors to use on the project.

9.16 Mr Taleb's evidence was just one of many similar arrangements in the ACT allegedly facilitated by the same union official involved in the example referred to above. Although the Heydon Royal Commission did not hear any evidence in relation to other CFMEU union officials receiving payments in the ACT, there was some evidence CFMEU officials had some knowledge the practice might be taking place.

9.17 The Royal Commissioner concluded it was obvious from the evidence adduced that the union official in question was *'demanding money in connection with construction sites and that some money had already been paid.'*[35] After considering the evidence, with regard to the alleged payment of union officials, the Royal Commissioner concluded by stating the CFMEU required a system that fully investigated rumours of improper payments to union officials and reported any suspicion of corruption to the police.[36]

9.18 The Senate Committee should also have regard to the Heydon Royal Commission report and the use of 'safety' as a method to apply industrial pressure.

9.19 Chapter 6.3 canvassed several case studies, many relating to conduct in the ACT. It contended one of the reasons why the CFMEU was so effective in threatening contractual relationships was its ability to enter construction sites at any time, without notice, to initiate 'safety' inspections. The Heydon Royal Commission observed:

> *CFMEU officials … view it [as] compulsory to have a CFMEU EBA to do construction work in the ACT' and that they were 'prepared to abuse' statutory safety rights of entry 'for the purposes of bringing about that reality.*[37]

9.20 The Heydon Royal Commission found these 'safety' inspections were targeted at builders and / or sub-contractors which had failed to meet an industrial /

[35] Ibid at para 107

[36] Ibid at para 113

[37] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 3, Chapter 6-7 at para 1

commercial demand, as a way to cause '*delay, disruption and the financial consequences that flow from it*' until the demand was met. Such inspections were often timed with concrete pours, when maximum financial damage could be inflicted.[38]

9.21 One Canberra case study was particularly telling and involved evidence obtained by the Australian Federal Police (AFP).

9.22 The Heydon Royal Commission intercepted phone calls of union officials discussing how the ACT CFMEU Secretary was '*f**king dirty*' that the builder didn't have a pattern EBA and that they were going to 'sort out' the builder, who testified that he had been warned by the Secretary that if he didn't sign-up he wouldn't '*get access during a concrete pour'*.[39] Organisers were recorded asking subcontractors when a concrete pour would occur. On the scheduled day, one union organiser was recorded calling a colleague to tell him that '*they're attempting to set up a pump, so we – we're all down here – gonna to have a bit of a fuckin' crack'*. Four union officials then entered the site and successfully disrupted the pour.[40]

9.23 Union officials are only entitled to enter sites if they reasonably suspect a safety breach has been or is occurring prior to the entry. However, in further recorded phone evidence played before the Heydon Royal Commission, a union official was recorded saying nobody had *'rung with any problems… we were just waiting for [the builder] to start their pour so we could identify their problems.*'[41] In fact, no records of any member complaints about safety on that site could be provided to the Heydon Royal Commission.[42]

9.24 The Heydon Royal Commission concluded the 'safety' visit was in fact a '*planned and co-ordinated*' attack '*akin to a military-style raid'*, aimed at '*intimidating the builder and sending a message that the CFMEU would not tolerate a builder without a CFMEU EBA in… Canberra'*.[43] The Heydon Royal

[38] Ibid Chapter 6-3 at para 60

[39] Ibid at para 73

[40] Ibid at para 120

[41] Ibid at para 122

[42] Ibid at para 125

[43] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 9 at para 85

Commission also observed '*were it not for the fact that the Commission had access to intercepted telephone conversations, it would have been very difficult to challenge the claims of CFMEU officials that the visit was just a routine safety visit'*, especially given the '*refusal of CFMEU officials to admit the truth even when it is revealed by tape recordings'*.[44]

9.25 In another case study, witnesses recounted how CFMEU officials blocked a concrete truck, claiming it was unsafe, despite WorkSafe ACT indicating there were no safety issues associated with the pour. Witnesses gave evidence a CFMEU organiser threatened management and attempting to incite violence. A week later, at a meeting between the same organiser and the builder, safety was not even discussed. Instead, the builder was told '*if we had a better relationship [with the union] these sorts of 'incidents' wouldn't occur*' before giving the builder a pattern CFMEU EBA to sign and a list of 'approved' sub-contractors to use.[45]

9.26 Work safety regulators who don't agree with CFMEU officials' assessment of alleged safety issues are not immune from intimidation. One example detailed before the Royal Commission involved disruption to a concrete pour. Multiple witnesses observed the local CFMEU Secretary standing in close proximity to a WorkSafe ACT Inspector, pointing a finger at him at shouting: '*if you don't f**king stop the pour and someone dies, you go to gaol*'. The Inspector gave evidence he found the 'situation intimidating', not least because 'there were four or five angry CFMEU officials standing around me, some of whom are very large men'. Although the Inspector did not find safety issues sufficient to justify a stop work notice, he nevertheless issued one after the Secretary's intervention.[46]

9.27 The next day, the apparent true purpose of the visit became evident. A CFMEU organiser informed the builder they had to 'get rid of' a contractor that was not 'approved' by the union, or else the CFMEU would 'make life hell'. The contractor in question had refused to sign a CFMEU EBA.[47]

[44] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 3, Chapter 6-3 at para 136

[45] Ibid at para 162

[46] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 3, Chapter 6-3 at para 214

[47] Ibid at para 201

9.28 The evidence given in the ACT is representative of behaviours elsewhere.

9.29 Royal Commission hearings in Queensland, New South Wales and Victoria all uncovered similar patterns of behaviour in which lists of 'approved' contractors are forced on builders. One such example involved the Queensland CFMEU:

> *… when [the builder] received the call that a union representative had shut down [the contractor] on site, he went down to the site and heard a union representative yelling and screaming, saying 'fu**ing stop you c**ts, you're not working, you're not allowed on site, you don't have an EBA so f**k off' and 'they have been banned from all sites in Brisbane and you will be next'. They said to [the builder]: 'You can't use [the contractor] they haven't signed an EBA. You need to use one of these companies [handing a list across]…'*[48]

9.30 The circumstances involving Boral in Melbourne is a further example. Boral refused a demand to participate in a union-coordinated black-ban against building company Grocon. It was within these circumstances a CFMEU official in Victoria said words to the effect of:

> *All wars end and once peace is established the CFMEU will be at the table to divide up the spoils. The CFMEU will decide who gets what and what market share Boral will get.*[49]

9.31 In November 2015, Justice Richard Tracey ordered the CFMEU and eight of its senior officials to pay more than $150,000 in fines for their coercive conduct in the 2012 blockade of Grocon sites, finding:

> *[The cases] bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country.*
>
> *This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account.*[50]

9.32 The penalties follow Justice Tracey's March 2015 that the CFMEU was vicariously liable for the conduct of eight of its officials whom he had found

[48] Counsel Assisting Opening Statement, 18 September 2014 www.tradeunionroyalcommission.gov.au/Media/Documents/OpeningStatements/OpeningStatement-CFMEU-IssuesRelatingToBoral-18September2014.pdf

[49] Counsel Assisting Opening Statement, 18 September 2014 www.tradeunionroyalcommission.gov.au/Media/Documents/OpeningStatements/OpeningStatement-CFMEU-IssuesRelatingToBoral-18September2014.pdf

[50] Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 1213 (11 November 2015)

unlawfully coerced Grocon to agree to its demand to employ union-nominated representatives on site.

9.33 The fines include nearly $20,000 against Victorian CFMEU Secretary John Setka, whom Justice Tracey found to have a "*long and deplorable history of contravening industrial laws*".

9.34 Referring to specific incidents, Justice Tracey ordered Mr Setka to pay $4,000 for punching the windscreen of a van and telling a Grocon manager he hoped he would "*die of your cancer*" and would "*come after* [him]" – finding the comments "*particularly callous*", given Mr Setka knew the manager was being treated for cancer at the time. Justice Tracey also ordered Setka to pay $3500 for calling a group of Grocon employees "*f***ing dogs*" and "*rats"* for wanting to work.[51]

9.35 Master Builders notes further that of the penalties imposed by courts in proceedings pursued by the Director of Fair Work Building Industry Inspectorate during 2014/2015, almost half of total were for incidents of coercion.[52]

10 Powers of the ABCC to Obtain Information

10.1 Chapter 7 sets out the proposed powers of the ABCC to obtain information. Earlier submissions set out Master Builders views on this provision.

10.2 Once again, this subject was the topic of consideration by the Heydon Royal Commission. It made two relevant recommendations being:

> *Legislation be enacted conferring the building and construction industry regulator with compulsory investigatory and information gathering powers equivalent to those possessed by other civil regulators. The powers set out in the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) appear appropriate in this regard.*
>
> *There should be oversight by the Commonwealth Ombudsman of the powers exercised by the building and construction regulator in*

[51] Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 225 (17 March 2015)

[52] FWBC Annual Report 2014-15 at p. 45 Table 2.19

> *the manner provided for in the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth).*[53]

10.3 Master Builders notes these recommendations and supports their adoption in the present Bill.

11 Enforcement

11.1 Chapter 8 of the Bill deals with enforcement. Earlier submissions set out Master Builders' views on this provision.

11.2 The proposed enforcement provisions were also canvassed by the Heydon Royal Commission, with particular attention given to the capacity of a building industry regulator to maintain enforcement proceedings.

11.3 In short, the attention was focussed on existing provisions in the *Fair Work (Building Industry) Act 2012 (Cth)* that have the effect of preventing the commencement or maintenance of enforcement proceedings in circumstances where the affected parties have resolved the dispute giving rise to those proceedings.

11.4 It observed:

> *Whether that power should be constrained according to whether separate proceedings concerning private individuals are settled raises two issues. The first is the need for finality in litigation. The second is the need for an appropriate regulatory response to unlawful conduct. In the present context, it is important for the regulator to be able independently to maintain enforcement proceedings in relation to unlawful conduct without being subject to the private concerns of those affected by the conduct.*[54]

11.5 It then recommended:

> *The building and construction industry regulator continue to investigate and enforce the Fair Work Act 2009 (Cth) and other existing designated building laws. The power of the building and construction industry regulator to commence and maintain enforcement proceedings should not be constrained according to whether any other proceedings in respect of the same conduct have*

[53] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8 at para 155, refer to Recommendations 62 and 63

[54] Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8 at para 192

> *been settled. Accordingly, ss 73 and 73A of the Fair Work (Building Industry) Act 2012 (Cth) should be repealed.*[55]

11.6 This recommendation is supported and endorsed to the extent that it is reflected in the proposed Bill.

12 Miscellaneous

12.1 Chapter 9 of the Bill deals with miscellaneous provisions. Earlier submissions set out Master Builders' views on these provisions.

12.2 We note, however, the provisions dealing with immunity and derivative use immunity were the subject of a Heydon Royal Commission recommendation. It found:

> *Consideration be given to redrafting the use/derivative use immunity provisions in clauses 102 and 104 of the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) to provide protections equivalent to those available in relation to the powers exercised by the Australian Securities and Investments Commission.*[56]

12.3 Master Builders notes this recommendation and would not object were the Government minded to amend the Bill to reflect it.

13 Conclusion

13.1 Master Builders strongly supports the passage of the Bills.

13.2 It is evident from the content of this submission the building and construction industry is a special case featuring particular types of unlawful conduct. Industry specific laws are required to curtail unlawful behaviour and restore the rule of law on building sites.

13.3 This view is supported by numerous Royal Commissions and other similar inquiries, most recently the Heydon Royal Commission and the Final Report of the Productivity Commission Review of the Fair Work Laws.

[55] Ibid refer to Recommendation 65

[56] Ibid at para 155 refer to Recommendation 64

14 Attachments

14.1 The attachments listed in this submission can be found following this page.

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Attachment A

Master Builders Australia

Submission to the Senate Standing Education and Employment Legislation Committee

The Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

22 November 2013

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CONTENTS

Recommendations

Master Builders makes the following recommendations in relation to the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and construction Industry (Consequential and Transitional Provisions) Bill 2013*

Recommendation 1:	**Delete the reference to "employees" of an organisation or association from the definition of "officer" in s4 BCII Act and include it instead under the definition of "building industry participant".**
Recommendation 2:	**Change the use of the term "employee" in the definition of "industrial action" in clause 7 and replace it with either the term "person" or the term "building industry participant".**
Recommendation 3:	**Remove the term "appropriate" in clause 7(2)(c).**
Recommendation 4:	**Change the period of "14 days" in clause 35(3)(b) to "21 days".**
Recommendation 5:	**Provide the Federal Safety Commissioner with the responsibility for monitoring and promoting compliance with WHS provisions of the Building Code.**
Recommendation 6:	**A review of the WHS Accreditation Scheme be undertaken as a matter of urgency.**
Recommendation 7:	**Include a provision in the Bill that requires the accreditation scheme to be independently reviewed at least every five years.**

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. Over 122 years the movement has grown to 32,000 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.

1.2 The building and construction industry 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. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of Submission

2.1 Master Builders fully supports the passage of both Bills; that is the Building *and Construction Industry (Improving Productivity) Bill 2013* (Productivity Bill) and the *Construction Industry (Consequential and Transitional Provisions) Bill 2013* (Transitional Bill). Master Builders has consistently argued for a strong industrial relations regulator to be in place in the building and construction industry. Both Bills would restore the Australian Building and Construction Commission (ABCC) and provide appropriate underpinning powers to that organisation. It is necessary that the ABCC be re-introduced to the industry in order to ensure a return to compliance with the rule of law on building sites and to boost the industry's and the nation's productivity. As will be demonstrated in this submission, these are linked considerations.

2.2 This submission establishes the rationale for the reintroduction of the ABCC by indicating Master Builders' policy and the productivity arguments for the Bill's passage. It then analyses a number of provisions of the Productivity Bill. It will also comment on the Transitional Bill.

2.3 Master Builders notes that the introduction of the Bills follows the Coalition Government's election policy set out in its "Policy to Improve the Fair Work Laws". In that policy the following was said:

> *The Coalition will re-establish the Australian Building and Construction Commission (ABCC) to ensure it maintains the rule of law and drives productivity on commercial building sites and construction projects whether on-shore or off-shore.*
>
> *Until it was abolished by Labor, the ABCC had been very effective in addressing workplace militancy and improving productivity in the building and construction industry. It helped increase industry productivity by around 10 per cent, reduced days lost to strikes, and provided an annual economic welfare gain of over $6 billion per year.*
>
> *The ABCC will replace Labor's failed Fair Work Building Construction unit and will administer a national code and guidelines that will govern industrial relations arrangements for Government projects. This step will ensure that taxpayers' dollars are used efficiently. We will work with state governments who have put in place their own codes, to ensure consistency.*[1]

2.4 Accordingly, Master Builders strongly endorses the proposition that the Government has a mandate for the passage of the Bills.

3 Productivity and Restoration of the ABCC

3.1 Industrial relations reform should be on-going to meet Australia's economic needs. Sound economic policy requires productivity based reform that includes assessment of the utility of current labour market policy and regulation. Where productivity would be positively affected by change to the workplace relations system, that change should be embraced.

3.2 Productivity must be the abiding concern of Government. As Krugman has said:

> *Productivity isn't everything, but in the long run it is almost everything. A country's ability to improve its standard of living over time depends almost entirely on its ability to raise its output per worker.*[2]

3.3 In this context whilst there is some speculation, with which Master Builders disagrees, that there is little or no economy-wide evidence that changes to the industrial relations system have affected labour market outcomes or macro-

[1] The Coalition's Policy to Improve the Fair work Laws May 2013 page 5-6

[2] P Krugman *The Age of Diminishing Expectations (1994)* as cited by OECD http://www.oecd.org/std/productivity-stats/40526851.pdf

economic performance,[3] the same cannot be said for the building and construction industry. Productivity enhancing industrial relations reforms were repealed by the Gillard Government. Those repealed reforms also reinforced respect for and adherence to the rule of law. The reforms should be reinstated and that will occur as a result of the passage of the Bills. The Productivity Bill in many respects emulates the prior law contained in the *Building and Construction Industry Improvement Act, 2005 (Cth)* (BCII Act) which delivered positive outcomes to the industry and to the national economy and which are now absent.

3.4 Following the passage of the BCII Act, which created the ABCC from 1 October 2005, the building and construction industry enjoyed a period of significantly improved industrial relations and increased productivity in which industrial relations was not the predominant and negative influence that it had been in the past and which it has become again in the current environment. This change benefited all parties in the industry, including workers. Equally importantly, it benefited the Australian economy and the community with a multi-billion dollar per annum pay-off as later discussed. These benefits are easily reversed where the rule of law is disregarded. The climate has changed and industrial relations in the sector has again turned ugly. This occurred in 2012 following the repeal of the BCII Act with the outbreak of unlawful behaviour epitomised in the appalling events surrounding the Grocon blockade in Melbourne during August and September 2012 (the Blockade).[4]

3.5 The militant and unlawful behaviour displayed by the CFMEU, and captured vividly in the Blockade, we believe, is part of a concerted national campaign to exploit the weaknesses in the *Fair Work (Building Industry) Act 2012* (Cth) (FWBI Act), which renders the new inspectorate which succeeded the prior ABCC powerless to intervene where proceedings are already on foot or where proceedings have been commenced by an interested party. Last minute amendments to the law which replaced the BCII Act mean that the new agency is unable to commence or continue litigation where the litigation on the same subject matter had been discontinued because the building industry

[3] E.g. J Borland "Industrial Relations Reform: Chasing a pot of gold at the end of the rainbow? 19 March 2012.

[4] See Shannon Deery *Calls for $5 million CFMEU fine* Herald Sun 19 August 2013 where it was said: *Michael McDonald SC, for Grocon, today told the court almost 4000 protesters blocked access to the site over four days and said Melbourne descended into "anarchy" as a result. He said the unrepentant union had failed to be deterred from breaching court orders despite a recent spate of fines in the hundreds of thousands of dollars being imposed on it.*

parties settled their differences (s73 and 73A *Fair Work Building Industry Act 2012 (Cth)* (FWBI Act). This is one defect amongst many.

3.6 Indeed, the powers of the new inspectorate which was established in June 2012 are considerably less than those wielded by the ABCC. The other most significant reductions are:

- The maximum level of fines that may be imposed for proven breaches was cut by two thirds.
- The range of circumstances in which industrial action is unlawful and attracts penalties has narrowed, in that the inspectorate enforces the flawed *Fair Work Act, 2009 (Cth)*(FW Act).
- Parties are no longer forbidden to apply "undue pressure" to make, vary or terminate an agreement.
- The definition of building work has been narrowed to exclude work performed off-site, thus limiting the ambit of the inspectorate's authority.

3.7 The power to compel witnesses to give evidence has been retained in the FWBI Act, but this is now hedged about with so many so-called "safeguards", including the ever-present threat of being "switched off,"[5] that its effectiveness as a tool of information gathering is substantially reduced. On top of this, the confidentiality requirements have been watered down, making it less likely that witnesses will have the confidence to come forward to the inspectorate for fear of retribution.

3.8 Master Builders believes the only way to curb the unacceptable behaviour which has emerged since the repeal of the BCII Act is to re-introduce the former regime. Passage of the Bills would achieve that step as well as introduce some improvements to the prior law.

3.9 To underline the benefits brought about by the work of the ABCC and to reinforce our call for the re-introduction of an agency that has substantial powers, Master Builders commissioned a report in 2013 about the productivity benefits of the ABCC and its work. The research underlines Master Builders'

[5] See *Fair Work (Building Industry) Act 2012* (Cth) s39.

policy that labour productivity in the sector must be an essential part of the effort to increase industry level productivity. At the core of that effort must be the restoration of the ABCC's powers and the related laws. Enhancing productivity is at the heart of Master Builders' advocacy in calling for the restoration of the powers of the ABCC and the passage of the Bills.

3.10 The 2013 Report (full copy attached as Attachment A) was one of a series. In 2007, Econtech Pty Ltd (now trading as Independent Economics) was commissioned by the then ABCC to prepare a report on building and construction industry productivity. The 2007 Econtech Report estimated the effects of improved workplace practices on productivity in the building and construction industry, and the flow-on effects to the wider economy.

3.11 The first stage of the 2007 Report analysed the contribution of improved workplace practices and other factors in driving building and construction industry productivity. The contribution to productivity was analysed for improved workplace practices associated with the following:

- the ABCC;
- its predecessor, the Building Industry Taskforce (the Taskforce); and
- industrial relations reforms in the years to 2006.

The second stage of the 2007 Report took the estimated gain in productivity from improved workplace practices and estimated its economy-wide impacts using a Computable General Equilibrium (CGE) model, the current methodology of which is explained in detail at page 34 and following of the 2013 Report.

3.12 The 2013 Report was the fifth update of the 2007 Report on building and construction industry productivity. Since the initial report in 2007, the analysis was updated in 2008, 2009, 2010, 2012 and 2013. Each report incorporated up-to-date information on building and construction industry productivity from the Australian Bureau of Statistics (ABS), the Productivity Commission, quantity surveyor data, case studies and other related research. Importantly, the data analysed for each update continues to support the findings of the 2007 Report; that there has been a productivity outperformance in the building and construction industry compared to other sectors of the economy and its

historical productivity performance prior to the implementation of improved workplace practices.

3.13 An analysis of the various indicators of building and construction industry productivity suggests that productivity in the building and construction industry has outperformed productivity in the wider economy. Following the identification of this productivity outperformance, the contribution of improved workplace practices to the productivity outperformance in the building and construction industry is examined in the 2013 Report. Three types of productivity indicators are assessed.

3.14 Each of the productivity indicators shows that improved workplace practices have been responsible for a part of the building and construction industry's outperformance. The analysis supporting this conclusion is now outlined:

- ABS data shows that, from 2002 to 2012, construction industry labour productivity has outperformed by 21.1 per cent. This productivity outperformance is identified after controlling for factors driving productivity in the economy as a whole and trends in construction industry productivity prior to 2002 (the year improved workplace practices began).

- The Productivity Commission's analysis of ABS data has found that multifactor productivity in the construction industry was no higher in 2000/01 than 20 years earlier.[6] In contrast, the latest ABS data on productivity shows that construction industry multifactor productivity accelerated to rise by 16.8 per cent in the ten years to 2011/12.

- Published academic research on total factor productivity shows that productivity in the construction industry grew by 13.2 per cent, between 2003 and 2007, whereas productivity grew by only 1.4 per cent between 1998 and 2002. Data on total factor productivity is only available up to 2007.

3.15 We also note that case studies undertaken as part of the original 2007 Econtech Report found that improved workplace practices have led to better

[6] Productivity Commission, *Productivity estimates to 2005-06* December 2006.

management of resources in the building and construction industry. This, in turn, has boosted productivity.

3.16 All of this evidence confirms that there has been significant gain in building and construction industry productivity and that improved workplace practices have contributed to productivity outperformance. The data sources indicate that significant productivity gains in building and construction industry productivity developed from 2002-03 onwards. This supports the interpretation that it was the activities of the Taskforce (from 2002) and the ABCC (from 2005) that made a major difference. Thus, the productivity and cost difference data suggest that effective monitoring and enforcement of the general industrial relations reforms and those that relate specifically to the building and construction sector were necessary before the reforms could lead to labour productivity improvements.

3.17 Earlier reports found that the data continued to support an estimated gain in building and construction industry labour productivity, as a result of the ABCC and related industrial relations reforms, of 9.4 per cent. While not all of the productivity measures are strictly comparable, and the magnitude of the estimated gain varies across measures, the data analysed in the 2013 Report generally shows some strengthening of the productivity outperformance of the building and construction industry.

3.18 Notably, the effect on consumer welfare is marked. The 2013 Report shows that the ABCC and related reforms would mean a $7.5 billion per annum gain in consumer welfare (in 2012/13 dollars). The passage of the Bills would assist to restore the benefits to the community previously encountered.

4 Restoring the Rule of Law

4.1 The 2001 Royal Commission into the Building and Construction Industry (Cole Royal Commission) was the first national review of conduct and practices in the building and construction industry in Australia.[7] The principal reasons given by the then Minister for Employment and Workplace Relations for commissioning the inquiry included high levels of complaint about freedom of association ('no ticket no start'), a strike rate that was five times the national

[7] *Final Report of the Royal Commission into the Building and Construction Industry*, Summary of Findings and Recommendations, volume 1, February 2003, p 3.

average, massive variations in commercial construction costs from state to state as a result (sometimes as much as 25 per cent), and concerns about violence and intimidation on building sites.[8] The Royal Commission found that the building and construction industry was characterised by a widespread disregard for the law. That disregard continues. This is evident from the continuing behaviour of the building unions which is only touched on in this submission but illustrated by a number of examples.

4.2 In the building and construction industry adherence to the rule of law is a factor that directly affects labour market risk and hence productivity; this is why it is Master Builders' main policy priority to have the Bills passed so that a re-established ABCC is able to assist in the independent application of the rule of law in the building and construction industry. The rule of law must be observed to underpin productivity. As Singleton from the Cato Institute has observed:

> *(L)aw in our society serves an essential practical function - that is, to supply the ground rules so that businesses, investors, and individuals can plan their actions to avoid disputes with one another. Disputes and the risk of disputes vastly raise the risk and cost of new ventures. That is, the most important function of the law is to lower the risks of uncertainty in making long term plans.*[9]

4.3 Lack of certainty caused by unlawful industrial action drives up costs in every part of the system, making time lines and expenditure harder to predict. As a result, risk factors attached to cash flows will be higher and effective net present values of projects lower. When that uncertainty is deliberately and unlawfully generated by a stakeholder in the system that seeks an unjustified economic rent, then governments are obliged to act. This action protects the community by ensuring that the cost of infrastructure including schools and hospitals is not inflated by this factor. Industrial relations law should not only provide fairness but assist to ensure that the necessary legal certainty attributed to agreements is not undermined by unlawful industrial action.

4.4 The CFMEU has a history of disobeying industrial laws to maintain its presence on building sites both actual and symbolic. Master Builders notes that even in the face of the previous tough laws, the CFMEU, for its own ends,

[8] *Current Issues Brief* no. 30 2002-03, Building Industry Royal Commission: Background, Findings and Recommendations.
[9] S Singleton, *Capital Markets: The Rule of Law and Regulatory Reform* http://research.policyarchive.org/5823.pdf accessed 18 November 2013

denied the rule of law and damaged productivity as a pattern of conduct which the ABCC's actions were slowly but surely ameliorating. The current weakened laws and reduced fines (discussed at paragraph 3.6) have sent the wrong message to the courts and the community.

4.5 The Melbourne Markets case shows how the courts have recognised, in particular, the deliberate flouting of the law by the CFMEU to obtain industrial advantage. In mid-2011, Tracey J of the Federal Court handed down $250,000 in fines and $190,000 in costs against the CFMEU after finding that the union had deliberately and illegally prevented work from going ahead on the new Melbourne Markets site in Epping, Victoria. The decision came after the subcontractor responsible for civil construction on the site entered into a greenfields agreement with the AWU for workers on site. Tracey J's decision is important. It details the reckless disregard for the law which typifies certain parts of the union movement. For example, when one of the subcontractors who was suffering significant economic loss as a result of the dispute asked how long it would continue, they were told by a union organiser: "It's a CFMEU site. It will go on for as long as we say it will go on".[10]

4.6 The head subcontractor had a history of industrial relations engagement with the CFMEU and agreements with that union covered its staff on similar projects. As a result, the CFMEU took the view that it should have been involved in any negotiations for an agreement covering personnel at the Melbourne Markets site. The union concluded that the head subcontractor was acting provocatively towards it. It filed a notice of appeal against the then Fair Work Australia approval of the AWU greenfields agreement. However, it later decided to drop this appeal and instead embarked on a campaign of blockading the site so that workers could not enter. The action meant that employees of the head subcontractor, the site developer and numerous other sub-contractors could not work on the project. The CFMEU was prosecuted for breaching s38 and s44 of the then BCII Act for engaging in unlawful action and for attempting to coerce the head subcontractor to make an enterprise agreement with it or to vary the agreement with the AWU. It was also separately prosecuted for contempt in relation to its refusal to obey the court order obtained by the ABCC. This refusal to follow court orders is endemic.

[10] Melbourne Markets Dispute [2011] FCA 556 (unreported, Tracey J, 2 June 2011), at para 34.

The union admitted the facts necessary to establish the contraventions of s38 and s44 of the BCII Act. It also pleaded guilty of contempt. It agreed with the ABCC that an appropriate penalty would be $100,000 for its breaches of the BCII Act and between $100,000 and $175,000 for its contempt, as well as a payment of $150,000 in indemnity costs to the ABCC.

4.7 In accepting that $100,000 was an appropriate fine for its breaches, the Federal Court noted that the union had a 'deplorable' record when it came to contravening the BCII Act, discussed further below. It also noted that the CFMEU's conduct on this occasion was calculated and deliberate, and that union officials had taken the view that they should simply proceed with the action even though they knew it would cost an enormous amount of money. The cynical rationale behind this decision was that any fine would cost the CFMEU less than the membership benefit to be gained by engaging in the demarcation dispute. The Federal Court observed that the union had shown no contrition for its actions. Media[11] reported that these actions included using cars, 44-gallon drums set ablaze and crushed rock to restrict entry to the site with locks on gates being glued with superglue. These tactics are unacceptable in a civilised society. The Federal Court fined the CFMEU $150,000 for its contempt after having observed that the union had not apologised for its actions and had failed to be deterred in pursuing its blockade by the court order even though it had incurred heavy fines for contempt in the past. The Federal Court also found that the union should pay $150,000 in indemnity costs. Finally, the Federal Court awarded another $40,000 in costs against the CFMEU in relation to its breaches of the BCII Act. It also accepted the CFMEU's word that it would compensate the subcontractors for the $120,000 loss they had sustained as a result of the blockade.

4.8 As set out earlier, with the passage of the FWBI Act the penalties applicable to the sort of behaviour typified in this dispute have been reduced.[12] This has emboldened unions to make increasingly cynical cost-benefit calculations when considering attempting to increase membership by engaging in unlawful industrial action. The CFMEU were found to have engaged in similar conduct

[11] E. Hannan "Union Blockade to Pay Out $560,000" The Australian 3 June 2011

[12] BCII Act, s38, 49; *Fair Work Act*, s 409(5), 418, 421, 539, 546.

in at least 39 cases since 1999[13] and that number has risen markedly since the relevant finding.

4.9 The ongoing experience of Master Builders is that the CFMEU has an array of tactics which deliberately transgress the rule of law. Master Builders is aware of a number of CFMEU officials, particularly those operating in Victoria, who for some time have let their right of entry permits lapse deliberately to avoid prosecution for their onsite conduct. Others have been refused permits on the basis of failing to meet the required 'fit and proper person' test. No member of the CFMEU Construction and General Division Victoria and Tasmania Branch Executive, currently hold a permit.

4.10 The FW Act per s489 requires union right of entry permit holders to inter alia show their permit on request from the occupier of the site. It is custom and practice for CFMEU officials that hold a federal permit, to not only refuse to produce their permit when requested (and refuse other requirements such as providing written notice) but to abuse and threaten site managers that request the required right of entry documentation. As recently reported in The Age,[14] current CFMEU Vice President Derek Christopher was convicted of assaulting a site manager as a result of that manager's request to see Mr Christopher's identification when Mr Christopher was a CFMEU organiser in 2010.

4.11 Abuse of right of entry is also particularly evident when it comes to union entry for alleged OHS reasons. Whilst the Blockade serves as an instructive case study on how the CFMEU abuse OHS in order to further their industrial interests, Grocon, the company at the centre of that action, is only one of a large number of contractors which routinely must deal with union entry under spurious safety concerns or merely without formal motivation, as discussed below.

4.12 Common examples of routine breach of union right of entry by the CFMEU noted by Master Builders in 2013 include the following examples, none of which are before the courts:

- CFMEU organiser who holds a federal permit enters a construction site without permission from the occupier or exercising a formal right of

[13] Melbourne Markets Dispute [2011] FCA 556 (unreported, Tracey J, 2 June 2011), at para 82.

[14] Steve Butcher The Age 28 August 2013 *CFMEU official Derek Christopher fined for assaulting manager*

entry. The organiser initially alleges that there is an immediate risk to health and safety and directs workers to stop work and vacate the site. When challenged by management on the immediate risk, the organiser advises that no further work will occur until a CFMEU–appointed health and safety representative is employed on site. Despite best efforts of site management, employees of a number of subcontractors engaged on-site leave site at the direction of the organiser.

- CFMEU official who holds a federal permit enters a construction site without permission of the occupier or exercising a formal right of entry. When told by site management to leave as he has no right to be there, he refuses to follow the formal right of entry process and threatens to close down the site (and other projects of the company) if they seek to have him removed. The organiser advises site management that he will stop all of its jobs around Melbourne unless they sign the union pattern agreement. This unlawful demand is refused. The following day, access to five of their sites is blocked by workers from other sites, allegedly at the direction of the CFMEU. This results in the prevention of concrete truck deliveries to the site.

- CFMEU organiser who holds a federal permit enters construction site asserting that it is in accordance with right of entry. The organiser presents inter alia a Notice of Suspected Contravention (as required under the Victorian OHS Act) to a subcontractor alleging that the workers had not been provided with manual handling training and that an immediate risk to health and safety exists. Prior to issuing the notice, the organiser had directed work to cease (something that the organiser has no power to do). Whilst on site, the organiser advises the subcontractor not to work on the upcoming long weekend and also seeks to have them appoint a CFMEU nominated health and safety representative/shop steward. WorkSafe is called in and confirms that there was no immediate risk to workers such that work should have ceased, but does not follow up on the alleged clear breach of the OHS Act by the CFMEU.

4.13 The reality reported to Master Builders by members is that in addition to union reprisals, there is simply no appetite by the relevant authorities to actively follow up on right of entry/trespass abuses, which are regularly

mischaracterised as safety disputes: see below at section 9 for more detail on this issue. This lack of appetite must be reversed and an active, well empowered watchdog reinstated.

5 Objects of the Act

5.1 Clause 3 of the Productivity Bill contains the objects of the legislation. Master Builders supports the objects noting that they are substantially in the same terms as s3 of the BCII Act.

5.2 Master Builders commends the main object as being focused on productive outcomes for the industry and the economy in the context of the prior discussion in this submission of the need to enhance the industry's productivity.

6 Definitions – General

6.1 Clause 5 of the Productivity Bill sets out most of the definitions.

6.2 Master Builders has no concerns with these definitions save that the term "officer" extends to employees of an organisation or association, unlike the definition in s4 BCII Act. This phrase extends the definition to a category not normally acting as officers under the *Fair Work (Registered Organisations) Act, 2009* (RO Act). Master Builders submits that it would be preferable to merely reflect that the term is as defined in the RO Act and to have employees of an organisation or association covered under the definition of "building industry participant".

Recommendation 1:	**Delete the reference to "employees" of an organisation or association from the definition of "officer" in s4 BCII Act and include it instead under the definition of "building industry participant".**

7 Meaning of Building Work

7.1 Master Builders notes that clause 6 emulates to a large extent the provisions of s5 BCII Act. There are two exceptions. Clause 6 of the Productivity Bill includes a new paragraph relating to the coverage of the transport or supply of goods to be used and work covered by paragraphs (a) to (d) of clause 6(1). This is a supply "directly to building sites". Master Builders supports the

extension of the powers of the ABCC represented by this change as unions often target deliveries of product to building sites as a means to control industrial relations on that site and also to disrupt the work of a builder or subcontractors where they have not acceded to the union's demands. This factor was evident when the ABC 7.30 Report on 28 October 2013[15] noted that because of the Blockade the CFMEU had targeted one of Grocon's suppliers, building materials company Boral.

7.2 The other subclause which differs from the prior BCII Act provision is clause 6(2). This new provision is also supported because it would not preclude the ABCC from acting where, for example, unlawful industrial action occurred on land where a mining interest was present. The provision clarifies the reach of the exceptions in clause 6.1(f) and (g).

8 Meaning of Industrial Action – General

8.1 The pivotal definition of "industrial action" is contained in clause 7 of the Productivity Bill. The previous terminology in the BCII Act was "building industrial action" and it was defined in s36 of the BCII Act. The definition used in the Productivity Bill emulates, instead, the definition contained in s19(1) of the FW Act. This definition has the disadvantage of relying on the notion of an employee to define the terms of "industrial action". Master Builders would prefer that the section revolved around persons taking action so it is clear that union officials could also take industrial action in the statutory sense. "Person" is defined in clause 5 of the Productivity Bill and the provision could be directed to "persons" who take the requisite action. Alternatively, with the change suggested at paragraph 6.2 of this submission, the Bill could set out that industrial action is action of the kind currently described but which is undertaken by a "building industry participant" as defined.

Recommendation 2:	**Change the use of the term "employee" in the definition of "industrial action" in clause 7 and replace it with either the term "person" or the term "building industry participant".**

8.2 In the context of the recommended change, Master Builders notes that the FW Act is flawed in relation to remedies for the taking of unlawful industrial action by union officials. This proposition was recently illustrated in *Lend*

[15] See Master Builders' website at http://www.masterbuilders.com.au/NewsArticles/transcript-7-30-report-abbott-govt-prepares-for-new-battle-with-construction-unions for a transcript of this 7.30 Report story.

Lease Building Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union.[16] In that case the learned Senior Deputy President was satisfied that the CFMEU had threatened "and may organise industrial action by one or more employees that would not be protected industrial action." What had occurred was that there was a threat of a work stoppage at the Tonsley Park Flinders University site unless the CFMEU flag was flown in a particular manner. When the company, with Master Builders acting on its behalf, sought that the actions of the CFMEU be stopped under s418 of the FW Act, the Senior Deputy President found that on the authority of *MUA v Patrick Stevedores Holdings Pty Ltd*[17] he was unable to make an order under s418 because that provision refers to "industrial action by an employee, or employees, or by an employer."

8.3 Accordingly, industrial action which may be the subject of a "stop, not occur, not be organised" order under s418 was found to be necessarily industrial action engaged in by employees or employers as the case may be. While a union can plainly be ordered not to organise industrial action, it was found that it could not be ordered to stop or not engage in industrial action which is necessarily engaged in by employees. The flaw in the law which led to this outcome should not be replicated in the Productivity Bill.

9 Meaning of Industrial Action – the Safety Exception

9.1 The Productivity Bill seeks to reinstate the reverse onus of proof for employees relying on the health and safety exception for industrial action, as was the case in the repealed BCII Act.

9.2 The wording of clause 7(2)(c) which contains the OHS exception from industrial action has been taken from section 19(2) of the FW Act. Master Builders submits that clause 7(2)(c) of the Productivity Bill should replicate section 36(1)(g) of the repealed BCII Act; namely, the performance of other available work need only be safe for the employee to perform, not 'safe and appropriate' for the employee to perform. The appropriateness of the work is irrelevant in considering whether the other available work presents a risk to

[16] [2013] FWC 8659, SDP O'Callaghan 1 November 2013. See also report in E Hannan *Watchdog targets union threats* The Australian 7 November 2013, pg 1 where the following is said: *The CFMEU conceded the right-of-entry breaches but insisted the comments to the Lend Lease manager were "off the cuff" and should not be regarded as threats*.

[17] [2013] FWCFB 7736

the health or safety of the employee and hence this flawed criterion from the FW Act should not be carried over into the Productivity Bill.

Recommendation 3: Remove the term "appropriate" in clause 7(2)(c).

9.3 Clause 7(4) of the Productivity Bill stipulates that 'whenever a person seeks to rely on paragraph (2)(c), the person has the burden of proving the paragraph applies'. Master Builders supports the re-establishment of this provision, i.e. the reverse onus of proof criterion.

9.4 The Cole Royal Commission reported that:

> *OH&S is often misused by unions as an industrial tool. This trivialises safety, and deflects attention away from real problems. The scope for misuse of safety must be reduced and if possible eliminated.*[18]

9.5 The Royal Commission found that misuse of safety for industrial purposes compromises safety in important respects:

- it trivialises safety, and deflects attention away from the real resolution of safety problems on sites;
- the view that unions manipulate safety concerns inhibits the unions' capacity to effect constructive change;
- the widespread anticipation that safety issues may be misused may distort the approach that is taken to safety; and
- time taken by health and safety regulators to attend and deal with less important issues detracts from their capacity to deal with more substantial issues elsewhere.[19]

9.6 One of the responses to the Cole Royal Commission was the passage of the BCII Act. Section 36(1)(g) of that Act, which as noted is now repealed, provided that employees and others were not taking building industrial action where:

> *the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and*
>
> *the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at*

[18] Supra note 7, volume 6, p 108.
[19] Above n7, p 102.

the same or another workplace that was safe for the employee to perform.

9.7 The Revised Explanatory Memorandum for the BCII Act stated that 'this provision has been included to prevent persons engaging in industrial action from avoiding responsibility for their actions by relying on spurious health and safety risks'.[20] Despite this provision, employers in the construction industry reported that abuse of work, health and safety (WHS) continued to be a problem. The issue is often confronted and, on some sites, occurs on a regular basis over protracted periods, as set out in section 4 of this submission. The former ABCC brought a number of cases of abuse of WHS for industrial purposes to the courts.[21]

9.8 The introduction of the FW Act changed the law about the relevant exception to the definition of industrial action on occupational health and safety grounds. Section 19(2) of the FW Act excludes from the notion of industrial action, action taken by an employee based on his or her concern about an imminent risk to their health or safety and where they have not unreasonably failed to comply with an employers' direction to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform. The onus of proof appears not to be the same as under the BCII Act per *CFMEU v Hooker Cockram Projects NSW Pty Ltd*[22] where Master Builders intervened. The Full Bench of the then Fair Work Australia was of the opinion that the decision to not include a similar provision (i.e. the reverse onus) into the FW Act was intentional and therefore did not apply under the FW Act.

9.9 There have been many examples of unions using spurious health and safety issues as justification for the disruption of work on construction sites. For example, in the recent case of *Laing O'Rourke Australia Pty Ltd v CFMEU*,[23] the allegations by the CFMEU, CEPU and BLF of serious workplace health and safety issues were contradicted by an independent inspection conducted by Work Health and Safety Queensland.[24] Justice Collier stated that:

[20] Revised Explanatory Memorandum, Building and Construction Industry Improvement Bill 2005 (Cth) at 5.134.
[21] See for example: *Cruse v Construction, Forestry, Mining & Energy Union* (2009) 187 IR 335; *Alfred v Wakelin (No 4)* (2009) 180 IR 335; *Draffin v Construction, Forestry, Mining & Energy Union* [2009] FCAFC 120; *Hadgkiss v Construction, Forestry, Mining & Energy Union* (2008) 178 IR 123.
[22] [2013] FWAFB 3658 at [4].
[23] [2013] FCA 133.
[24] Ibid, at [33].

> *The contrary views upon which the union officials appeared to insist during the inspection, in the face of the views adopted at the site by WHS Qld, suggest an agenda by the relevant union officials other than a pure interest in workplace health and safety issues*.[25]

9.10 Master Builders contends that the reverse onus of proof provision contained in the repealed BCII Act is essential if disruption of work on dubious WHS grounds is to be eliminated. Master Builders therefore strongly supports the provisions contained in clauses 7(2)(c) and 7(4) of the Productivity Bill which essentially forestall the misuse of safety but protect the rights of employees to refuse to perform duties which are genuinely unsafe.

10 Meaning of Protected Industrial Action

Master Builders refers to the comments of the definition of "industrial action" set out in section 8 of this submission. We believe it is necessary to make the change suggested earlier. In addition, the considerations raised above make clause 8(2) of the Productivity Bill vital. Clause 8(2) provides that action is not protected industrial action if the action is protected industrial action (within the meaning of the FW Act) but:

- the action is engaged in in concert with one or more persons who are not protected persons; or
- the organisers include one or more persons who are not protected persons.

11 Clauses 9 to 13

Master Builders has no comments on these provisions of the Productivity Bill which we support.

12 The Australian Building and Construction Commissioner

12.1 Chapter 2 of the Productivity Bill comprises clauses 14 to 32. Master Builders supports the manner in which the Productivity Bill sets out the establishment of the ABCC and the ABC Commissioner and Deputy Commissioners. We note that clause 29 sets out that the body that is the current inspectorate will continue in force but with a change of name to the ABCC.

[25] Ibid, at [33].

12.2 Master Builders supports the restoration of the name as well as the functions of the ABC Commissioner and related staff.

13 The Building Code

13.1 Master Builders notes that Chapter 3 comprising clauses 33 to 35 deals with the Building Code. These clauses are similar to the BCII Act and the FWBI Act provisions dealing with this subject.

13.2 Master Builders notes, however, that the Building Code now extends per clause 34(3)(c) to building work where the relevant person is the Commonwealth or Commonwealth authority. Essentially, Master Builders believes that this will extend the Building Code to funding entities and we agree with this extension. They should be bound by the Building Code.

13.3 Master Builders notes that clause 35 is in the same terms as former s28 of the BCII Act. We support the ABC Commissioner being given the requisite power to request a report about compliance. Because the new Building Code to be declared under the Productivity Bill is not yet known, Master Builders would note that if the requirement to provide a compliance report is long and complex, 14 days may be an inadequate period for response. We recommend that the minimum period in clause 35(3)(b) be 21 days.

Recommendation 4:	**Change the period of "14 days" in clause 35(3)(b) to "21 days".**

14 Federal Safety Commissioner

14.1 Chapter 4 of the Productivity Bill establishes the position of the Federal Safety Commissioner (FSC) and establishes the WHS Accreditation Scheme (Accreditation Scheme), currently known as the Australian Government Building and Construction OHS Accreditation Scheme. The Accreditation Scheme, which is administered by the Office of the FSC, has now been in operation since 2005. In that time there has not been any comprehensive review of the Accreditation Scheme, despite the previous Labor government's

promises to that effect, inclusive of the formal promise made by the Hon Simon Crean when introducing the Fair Work Building Industry Bill.[26]

14.2 The provisions of Chapter 4 are based on similar provisions concerning the FSC that are contained in the FWBI Act and previously contained in the BCII Act. Chapter 4 of the Productivity Bill diverges in two areas from the provisions contained in the FWBI Act and BCII Act; the omission of the function of the FSC to monitor and promote compliance with the Building Code, so far as the Code deals with work health and safety, and the Accreditation Scheme being prescribed by rules instead of by regulations.

14.3 Master Builders submits that the responsibility for monitoring and promoting compliance with any WHS provision of the Building Code should rest with the FSC, not with the ABCC or the Minister. Master Builders therefore calls for this function to be restored under clause 38 of the Productivity Bill. Master Builders' policy is for the FSC to have responsibility for any Commonwealth administered WHS initiatives affecting the building and construction industry. Keeping all Commonwealth administered WHS initiatives affecting the building and construction industry under the one agency will reduce red tape and duplication.

Recommendation 5:	**Provide the Federal Safety Commissioner with the responsibility for monitoring and promoting compliance with WHS provisions of the Building Code.**

Recommendation 6:	**A review of the WHS Accreditation Scheme be undertaken as a matter of urgency.**

14.4 Clause 43 of the Productivity Bill provides the ability to prescribe the Accreditation Scheme by rules. Currently, regulations made under the FWBI Act set out the relevant provisions governing the detail of the operation of the Accreditation Scheme and the like. Master Builders notes that in a practical sense this will make little difference to the workings of the Scheme.

[26] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2011, 12689 (Hon Simon Crean, Minister for Regional Australia, Regional Development and Local Government and Minister for the Arts).

14.5 As discussed earlier, the Cole Royal Commission placed a great deal of emphasis on occupational health and safety. The Royal Commissioner stated that the Commission examined no subject more important than occupational health and safety.

14.6 The Royal Commissioner stated that what was needed above all else was cultural and behavioural change in the industry.[27] The primary measure introduced to achieve this objective in the context of health and safety is the Accreditation Scheme. The Scheme currently applies to construction projects of $3 million or more where the project is directly funded by the Australian Government, and to projects indirectly funded by the Australian Government where the Australian Government contribution is at least $5 million and at least 50 per cent of the total project value, or is $10 million or more.

14.7 Master Builders is strongly committed to improved safety outcomes in the building and construction industry. We therefore supported the creation of this role and continue to support the work of the FSC. The work of the FSC is an important component of improving WHS outcomes in the building and construction industry. While Master Builders generally supports the Accreditation Scheme, we are aware that there are aspects of the Scheme that are not working effectively and which have the potential to undermine the objectives of the Scheme if they are not rectified. Master Builders has therefore asked the Government to undertake an independent review of the Scheme. A requirement for the Accreditation Scheme to be independently reviewed at least every five years should be set out in the Productivity Bill to facilitate a regular, established review of its operations.

Recommendation 7:	**Include a provision in the Bill that requires the accreditation scheme to be independently reviewed at least every five years.**

15 Unlawful Action

15.1 Chapter 5 comprising ss44 to 49 deals with unlawful action. One of the fundamental difficulties with the repeal of the BCII Act and the FWBI Act's introduction, is the assumption that the provisions in the FW Act governing the conduct of employers, employees and industrial associations appropriately

[27] Supra note 7, Volume 6, page 35

apply unchanged to building and construction industry participants. Accordingly, the substance of what is now chapter 5 does not appear in the FWBI Act, as industrial action is dealt with under the FW Act with some perverse outcomes as set out in paragraph 8.2 of this submission.

15.2 Master Builders notes in particular that the FW Act does not have a general prohibition about unlawful industrial action which is contained in clause 46 of the Productivity Bill. That provision emulates s38 of the former BCII Act. This is a better approach than set out in the FW Act as it establishes a civil penalty for unlawful industrial action rather than permitting orders to be obtained under s418 which may lead to penalties and injunctions if breached. The tailored laws are much more attuned to the tactics used by the building unions, touched on in section 3 of this submission in particular. The tailored laws are appropriate in effecting cultural change.

15.3 We note that clause 46, however, now clarifies that organising unlawful industrial action is proscribed. This may still, however, be insufficient to cure the problem mentioned at paragraph 8.2 because of the linkage between the activity of employees in clause 7 (which defines the term "industrial action" as discussed earlier in this submission) with the notion of unlawful industrial action. The definition of unlawful industrial action contained in clause 5 of the Productivity Bill requires the action to be "industrial action" as defined by clause 7 and for that action not to be protected as defined in clause 8.

15.4 In our consideration, despite the extension from the prior BCII provision in clause 46 to "organising" unlawful industrial action, union officials would not necessarily be caught by the legislation without the change suggested earlier.

16 Unlawful Picketing

16.1 Clause 47, which is part of Chapter 5, contains a new provision. This provision per clause 47(1) states that "a person must not organise or engage in an unlawful picket".

16.2 Clause 47(2) sets out the definition of an unlawful picket:

- has the purpose of preventing or restricting a person from accessing or leaving a building site or an ancillary site. This would operate

irrespective of whether someone is actually accessing (or leaving) a site.

- directly prevents or restricts a person accessing or leaving a building site or an ancillary site. This is to deal with persons who are intentionally blocking access to building work but is not intended to capture unintentional blockages.

- would reasonably be expected to intimidate a person accessing or leaving a building site or an ancillary site. This would mean that it would not be necessary to prove that the person attempting to access was intimidated but that a reasonable person would be intimidated.[28]

16.3 The provision also provides that action is not an unlawful picket action unless there are relevant motivations as established in clause 47(2). That motivation is motivation for the purpose of:

- supporting or advancing claims against the building industry participant in respect of the employment of employees or the engagement of contractors; or

- advancing industrial objectives of a building association; or

- is separately unlawful.

16.4 Clause 48 permits a person to apply to a relevant court for an injunction. This provision is similar to s39 of the BCII Act but is now extended to injunctions for unlawful picketing. Clause 48 makes it clear that injunctions can be sought for organising unlawful industrial action or against an unlawful picket.

16.5 Master Builders strongly supports the extension of the provisions of the Productivity Bill to what is defined as an unlawful picket. Picketing has become an integral part of the tactics which the CFMEU applies in seeking to advance its industrial objectives. This is evident from a number of decided cases,[29] and from the Blockade.

[28] These dot points are derived from the Explanatory Memorandum for the Productivity Bill at para 126

[29] See for example *Cape (CHS)P/L v CFMEU* [2013] FWC 4691 15 July 2013 DP Gooley

16.6 Other unions, particularly the Maritime Union of Australia, also use picketing as an industrial tool. Recently in the case of *Cooperative Bulk Handling Ltd v Maritime Union of Australia.*[30] Justice Gilmour was asked to consider whether the relevant conduct, that is in establishing a picket line, is protected industrial action for the purposes of the FW Act. Justice Gilmour quoted with approval the Full Court in *Davids Distribution P/L v National Union of Workers*.[31] Justice Gilmour relied on the joint judgment of Justices Wilcox and Cooper in that case where this matter is dealt with at length. In that context, the joint judgment concluded that picketing did not fall within the definition of industrial action. The judges found that to interpret it otherwise would be an infringement on the rights and freedoms of others and would, in effect, confer a statutory immunity on such conduct provided only that it was engaged in on proper notice to the employer.

16.7 The case of *Davids Distribution* has been criticised. In particular, we note that Creighton and Stewart[32] state as follows:

> *The reasoning in Davids arguably does not take sufficient account of the fact that in most circumstances picketing would be an integral part of the 'bans, limitations or restrictions on the performance of work' which are the principal focus of the definition for industrial action in s19(1).*[33]

16.8 We agree with the argument made by Creighton and Stewart. So-called community pickets have become an integral part of protests which cause severe economic disruption and they have become part of the more militant unions' industrial arsenal. This was particularly evident in the case involving a so-called community picket of the City West Water site in Victoria where approximately 50 protestors blockaded the project at Werribee merely because a small number of 457 visa holders were engaged.[34] When the matter was litigated, the Federal Court stated that the injunction it issued against the union and Mr Mavromatis could not deal with the position of people at the site who remained as part of the picket formed to protest the engagement of the 457 visa holders. This was because they were not

[30] [2013] FCA 940 (2 July 2013)

[31] (1999) 91 FCR 463

[32] B Creighton and A Stewart *Labour Law* 5th Edition, the Federation Press 2010

[33] Ibid at p772

[34] See *Director of the Fair Work Building Inspectorate v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Tony Mavromatis* [2013] FCA 82 per Marshall J 14 February 2013

employees of the union and were not encouraged or supported by the union, its organisers or employees. The employees of Tedra, the subcontractor involved in the matter, or of City West Water were unable to safely access their place of work and the site was disrupted at an estimated cost of $300,000 a day.[35]

16.9 "Community pickets" should not be free from court orders where they are motivated by restricting the employment of persons or contractors or where they are motivated by advancing the interests of the union or are generally unlawful, as is required by clause 47. Their formation and related consequences should be categorised as unlawful industrial action and treated in the same way. Master Builders fully supports the law as set out in clauses 47 and 48 of the Productivity Bill.

16.10 Master Builders notes that the Tedra dispute was recently settled, with The Australian[36] reporting:

> *The Australian Manufacturing Workers Union will pay $62,000 compensation without any admission of wrongdoing under the settlement of a controversial workplace dispute that cost employers an estimated $1.5 million.*

and

> *In statement published on the FWBC website, the inspectorate said it had discontinued its legal action and the matter had been settled. 'The parties have agreed to settle this matter on the basis that the AMWU pay compensation of $62,000 to Tedra with no admission of wrongdoing by the AMWU'.*

The conduct is typical of the sort that undermines investment and appropriate certainty, as outlined in section 3 of this submission.

16.11 What follows is a case study of the Royal Children's Hospital – South Brisbane Queensland dispute which further shows how so-called community protests are having a very negative effect on the industry. It is one of many such disputes.

16.12 Royal Children's Hospital – South Brisbane Queensland is a significant nine (9) week industrial dispute that stopped work at the $1 billion Royal Children's

[35] The Australian 13 February 2013

[36] *AMWU avoids prosecution over 457 visa dispute* The Australian 19 November 2013 (electronic subscription)

Hospital from 7 August 2012 for nine weeks. The lost productivity cost Abigroup around $300,000 a day during the dispute that saw a picket line preventing subcontractors and their employees from entering the site. The unions stepped around previous Fair Work Australia return-to-work orders by keeping their distance and maintaining that the stopwork was a community protest action comprised of concerned citizens.

16.13 As stated elsewhere in this submission "community protests" – with which unions are careful to avoid direct links – have developed as a means to support striking workers but to avoid orders covering unions and union officials.

16.14 The Children's Hospital strike began as a dispute with a subcontractor over benefits but was engulfed in the claim for site rates for subcontractors that the construction unions were pursuing against other builders during bargaining "negotiations". Abigroup is the principal contractor on the project and became caught up in the Queensland building unions' site rates campaign, despite being mid-way through the term of an enterprise agreement.

16.15 In our understanding, the picket line was coordinated by a former MUA and CFMEU (BLF) organiser at the site. The Queensland Police maintained a clear footpath for the public but were reluctant to go further in disrupting a "protest". This is common where picketing is involved. As McCrystal[37] has noted "police are generally reluctant to become involved in picket lines and such disputes have historically been left to the State and Federal industrial relations systems."[38] Senior police estimated 150-200 police and two weeks' notice would be required to control the protesters in order to effect a return to work. Abigroup and its contractors secured s418 orders in September 2012, which they backed up with court injunctions, against industrial action at the site.

16.16 Senior Deputy President Peter Richards in September 2012 ordered the unions and their members working at the project not to engage in, organise, threaten or encourage any industrial action for six months under s418 of the FW Act.

[37] S McCrystal *The Right to Strike in Australia* The Federation Press 2010

[38] Ibid at pg101

16.17 On appeal the FWC Full Bench upheld the six-month industrial action bans against the CFMEU and CEPU and building workers that sought to halt strikes that delayed construction.

16.18 The Full Bench took a dim view of the CEPU's argument that its members had taken no part in industrial action, but had stopped work because they believed their health and safety was at risk, a reverberation of comments earlier made in this submission. It said:

> *We are also satisfied that there was evidence to find that the CFMEU and CEPU were involved in the industrial action and their conduct fell within the description of organising industrial action.*[39]

16.19 Abigroup is suing the unions and 12 of their officials claiming they breached the FW Act and committed common law torts during the long-running dispute at the hospital last year. The company sought to rely on s24 of the RO Act, as well as s793 of the FW Act, to argue the conduct of the officials could be attributed to the unions. But Judge Michael Jarrett said s24 of the RO Act was part of a division that dealt with prohibited conduct in the formation or registration of unions, it was not relevant to Abigroup's prosecution.

16.20 He said Abigroup could, however, rely on s793 of the FW Act and the principle of vicarious liability to argue the unions were responsible for the conduct of their officials:

> *In my view, no basis has been demonstrated to strike out those parts of the pleading that rely upon s793 of the FW Act as the source of the union respondent's derivative liability. [Abigroup's] pleading, particularised as it is, provides a sufficient foundation upon which it can be said that the case made against the respondents pursuant to s793 of the Fair Work Act is revealed to them and about which there will be no surprise.*[40]

16.21 On 16 August 2013 the Federal Circuit Court dismissed criminal contempt charges against the former MUA and CFMEU (BLF) organiser over his involvement in the "community protest". Federal Magistrate Michael Burnett

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[39] Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and another v Abigroup Contractors Pty Ltd [2013] FWCFB 453 (25 January 2013) para 42

[40] Abigroup Contactors Pty Ltd v Construction, Forestry, Mining and Energy Union & Ors (No.2) [2013] FCCA 1472 (26 September 2013) para 12

rejected all 18 charges. He originally faced 54 counts of criminal contempt, but 36 were dismissed during hearings in February 2013.

16.22 The charges were brought by Abigroup, the principal contractor on the site and part of the Lend Lease group. It alleged the former MUA and CFMEU(BLF) Organiser breached September court orders it had secured in his support for the nine-week project stopwork.

16.23 The new laws as discussed in this section of the submission are necessary.

17 Coercion, Discrimination and Unenforceable Agreements

17.1 Chapter 6 comprises clauses 50 – 59 and deals with coercion, discrimination and unenforceable agreements. Clause 51 is new and essentially provides a constitutional connection for the matters set out in Part 2 of Chapter 6. Master Builders strongly supports these provisions.

17.2 Clause 52 contains the substance of what was previously s43 BCII Act. It deals with coercion relating to the allocation of duties et cetera to a particular person. It provides a grade A civil penalty where a person organises or threatens to organise or takes action against another person with the intent to coerce the other person or third person to, for example, employ or not to employ a particular person. This is highly relevant in the context of the Blockade where, essentially, the union caused the relevant disruption with the intent of coercing the employer to employ its nominated safety personnel. The provision is supported.

17.3 Clause 53 deals with coercion relating to superannuation. It contains the substance of former s46 BCII Act and is supported.

17.4 Clause 54 contains the substance of s44 BCII Act. It deals with coercion of persons to make or terminate et cetera enterprise agreements. The provision is supported.

17.5 Clause 55 contains the substance of s45 BCII Act but deals with the types of industrial instruments as set out in the FW Act; that is the National Employment Standard, a particular type of workplace instrument or enterprise agreements as expressed in s354 FW Act. The clause proscribes a person taking an action against a building employer because the employees of that

building employer are covered or not covered by a particular kind of instrument, or are proposed to be so-covered. It is supported

17.6 Clause 56 essentially emulates s360 of the FW Act, a provision not previously in the BCII Act. It covers the extent to which a person's action must be motivated by a particular reason to establish a contravention of clause 47 and the other provisions of Part 2 of Chapter 6. It sets out that a person takes action for a particular reason if the reasons for the action include that reason.

17.7 Clause 57 reverses the onus of proof in civil proceedings for contravention of clause 47 and the other matters set out in Part 2 of Chapter 6. Master Builders supports this provision as, where issues of intent are concerned, they are notoriously difficult for those commencing the proceedings to prove. Thus, if the contrary intent can be shown, for example, that the relevant picket was indeed a community protest, then this will lead to the quicker and more efficient closing down of faux community pickets where the relevant intent is present.

17.8 Clause 58 is similar to s363 of the FW Act. Per the Explanatory Memorandum, its intent is so that a person cannot avoid being subject to the prohibitions as s47 and Part 2 of Chapter 6 by getting another person to carry out the prohibited conduct. Master Builders supports this provision.

17.9 Clause 59 relates to the unenforceability of project agreements. In substance it reflects s64 of the BCII Act. Master Builders notes that the Cole Royal Commission indicated that pattern bargaining, where unions seek to obtain a mirror agreement throughout the industry or at particular commercial projects, is the target of many of the recommendations to change the industry's culture. The Productivity Bill does not contain any provisions specifically aimed at making pattern bargaining unlawful. However, clause 59 makes an agreement unenforceable if certain conditions are met, one of which is that the agreement is entered into with the intention to secure standard employment conditions for building employees for a particular site. This is the case where not all employees are employed by the same employer. As this is an anti-pattern bargaining measure, Master Builders supports its terms.

17.10 In addition, clause 59 is aimed at curbing adverse practices which negatively affect productivity. One such practice is to permit unregistered agreements to

operate as de facto project agreements. Those agreements secure site-wide terms and conditions of employment and involve instances where unions seek to impose, for example, site allowances that are to be paid in proportion to the monetary value of the project. These practices damage productivity. They should be curtailed.

18 Chapter 7 Powers to Obtain Information

18.1 Chapter 7 dealing with the ABCC's power to obtain information comprises clauses 60 to clause 79. Master Builders supports these provisions.

18.2 Clause 61 emulates the substance of s52 of the BCII Act. This provision has generated a great deal of controversy. It permits the ABC Commissioner to give written notice to a person who has documents or may give evidence in relation to an investigation of a suspected contravention of the legislation or a related law. The ABCC's powers set out in the Productivity Bill taken from the BCII Act are not unusual. Similar powers are exercised by a range of other organisations and government agencies. Those powers are not called into question because it is accepted they are a necessary part of the operation of the relevant agency. In the context of the ABCC, however, they have invoked some civil libertarian views which ignore the context i.e. the need to obtain evidence in circumstances where parties are reluctant to come forward voluntarily.

18.3 The provision, for example, is very similar to s19 of the *Australian Securities and Investments Commission Act 2001 (Cth)* (ASIC Act). The power used by, for example, ASIC, and of course, by the ABCC, assists in requiring participants to provide evidence that is mandatory in establishing a breach, evidence that would not otherwise be available because of fear of retribution. This is an issue which pervades the building and construction industry and one which should be eliminated. That elimination will only occur if cultural change is permitted to change industrial relations practices based on coercion and intimidation. In this context the ABCC predecessor, the Building Industry Taskforce, did not possess such powers. The result was that most complaints were withdrawn:

> *The survey conducted on a number of clients who withdrew their complaint found that 52 per cent had done so for fear of the ramifications they may face should they pursue the matter.*[41]

18.4 We believe that the same issue has arisen in relation to the FWB inspectorate given the fact that the examination powers have been very rarely used and having regard to the FWB inspectorate policy of seeking voluntary co-operation from industry participants.

18.5 Clause 61(4) permits a person attending an examination to be represented by a lawyer. This is an appropriate safeguard – others are discussed below.

18.6 Clause 62 makes it an offence to fail to comply with an examination notice. This is a criminal offence. It carries a maximum sentence of 6 months' imprisonment. Notably, s63 of the ASIC Act provides for 100 penalty units or 2 years' imprisonment or both for a similar offence i.e. intentionally failing to comply with s19 of the ASIC Act. Hence, allegations that the provision is dire, do not take into account other more severe penalties where other agencies administer similar laws.

18.7 Clause 63 provides that a person is entitled to be paid reasonable expenses for attendance at an examination. This is a fair provision and is supported.

18.8 Further and appropriate protection for those who are called to an examination is contained in clause 64 and clause 65 of the Productivity Bill. Under clause 64 the ABC Commissioner must notify the Commonwealth Ombudsman of the use of the power. The material set out in clause 65 must be provided to the Ombudsman as soon as practicable after an examination has been completed. The Ombudsman must review the exercise of the powers and report to Parliament about the reviews. These are appropriate safeguards and are supported.

18.9 Part 3 of Chapter 7 deals with the powers of the ABCC inspectors and federal safety officers (FSO).

18.10 Clause 66 provides for the appointment of inspectors.

[41] Commonwealth of Australia Building Industry Taskforce *Upholding the law – findings of the building industry taskforce* September 2005 pg11.

18.11 Clause 67 provides that an identity card must be issued to, and carried by, an inspector.

18.12 Clause 68 relates to the appointment of FSOs.

18.13 Clause 69 provides for the issue in carrying of identity cards by FSOs. Master Builders supports these machinery provisions.

18.14 Clause 70 sets out the compliance powers that are able to be exercised by inspectors and FSOs in a general sense.

18.15 Clause 71 indicates that compliance powers may be exercised during working hours or at any other time if the authorised officer reasonably believes that is necessary to do so for compliance purposes.

18.16 Clause 72 sets out powers to enter premises, noting that entry may only occur without force.

18.17 Clause 73 requires the production of an identity card before entering premises.

18.18 Clause 74 sets out the powers of authorised officers whilst on premises. The substance is effectively replicated from parts of s59 of the BCII Act in respect of ABCC inspectors.

18.19 Clause 75 relates to persons assisting an ABCC inspector or FSO. No former provision of the BCII Act reflected the substance of clause 75. However, the substance emulates s710 of the FW Act and is supported.

18.20 Clause 76 is, similarly, new to the ABCC inspectors' powers and replicates s711 of the FW Act. The clause confers on an ABCC inspector or FSO the right to require the person to tell them that person's name and address in the event that they have reason to believe that the person has contravened a civil remedy provision. If the inspector or FSO believes that the name or address is false, the inspector or FSO may require the person to provide evidence of the correctness of the name and address.

18.21 Clause 77 provides a power similar to that possessed by Fair Work inspectors set out in s712 of the FW Act. This is an appropriate power for inspectors to hold. This is a very necessary power which was not previously available to

ABCC inspectors. Previously there was no ability to compel the person to provide a document or record. There was no sanction for refusing the request of an inspector. In practice this meant that the examination power was required to be used to substantiate matters which could otherwise have been obtained through documents or records. Accordingly, this new power is strongly supported.

18.22 Clause 78 makes it an offence to intentionally hinder or obstruct an authorised officer in exercising their compliance powers, or induce or attempt to induce any other person to do so. This in turn is a new provision and will mean that inspectors are able to appropriately carry out their tasks.

18.23 Clause 79 deals with the power to keep records and documents. The provision contains no explicit safeguards about the retention of the relevant record of document. However, at paragraph 252 of the Explanatory Memorandum the following is said:

> *It is important to note that the period of retention of any personal information, as defined in the Privacy Act 1988, is strictly as necessary for the period of investigation. Personal information should not be disclosed unnecessarily, collected or used for purposes other than the original purpose, or retained for periods when it is no longer needed.*

19 Chapter 8 Enforcement

19.1 Chapter 8 comprises clauses 80 – 100 of the Productivity Bill. Master Builders supports these provisions.

19.2 Clause 81 deals with penalties and the like for contravention of the civil remedy provisions. Clause 81(2) sets the maximum pecuniary penalties for Grade A and Grade B civil remedy provisions. In respect of Grade A civil remedy provisions the maximum is 1000 penalty units or $170,000 if the defendant is a body corporate and otherwise 200 penalty units or $34,000. In respect of a Grade B civil remedy provision it is 100 penalty units if the defendant is a body corporate or $17,000 and otherwise $3,400. Master Builders notes that these maximums exceed those set out in the FW Act. For example, under s546 of the FW Act the amount of pecuniary penalty is the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2) which is 60 penalty units or $10,200. Section 546(2)(b) indicates that if the defendant is a body corporate five times the

maximum number of penalty units referred to in the same place is the maximum, that is the equivalent to 300 penalty units or $51,000.

19.3 The additional penalty units which are a maximum in the Productivity Bill are designed to show the courts that the community believes the sorts of behaviours touched upon in section 3 of this submission and which are endemic in the building and construction industry are unacceptable. This is a message which should be brought home in order to effect cultural change. The lessening of the fines payable by the unions in the FWBI Act context in the face of consistent resistance to the law has sent the wrong message and enabled the unions to factor in a lower cost of taking unlawful industrial action.

19.4 The courts, pursuant to clause 81(6)(d), when determining a pecuniary penalty will be able to take into account whether the person has previously been found by a court to have engaged in any similar conduct. This is important because of the pattern of conduct that the courts have previously found in respect of the CFMEU in particular, and the ability of the courts to therefore act to deter future unlawful behaviour bearing in mind that pattern of conduct.

19.5 Clause 82 is a new provision and not found in the prior BCII Act. This is a sensible provision as it permits interest to be payable on a sum ordered to be paid where a breach of the Bill arises and other than a civil penalty order is made. This would occur, obviously, in instances where a court ordered the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention of the Productivity Bill per clause 81(1)(b).

19.6 Clause 83 deals with a situation where there is conduct which contravenes more than one civil remedy provision. Clause 83(2) states that the person is not liable to more than one pecuniary penalty in relation to the same conduct. This is, similarly, a new provision that is not opposed.

19.7 Clause 84 deals with multiple contraventions. This provision permits a court to make a single civil penalty order where multiple contraventions of a civil remedy provision are founded on the same facts or are part of, or a similar character relating to the contravention. Clause 84(2) places a cap on the pecuniary penalty imposed which must not exceed the sum of the maximum

penalties that could be ordered if a separate penalty were ordered for each of the contraventions. We support this provision.

19.8 Clause 85 permits two or more proceedings relating to contraventions of civil remedy provisions to be heard together.

19.9 Clause 86 requires the rules of evidence and procedure for civil matters to be applied. These provisions are supported.

19.10 Clauses 87 – 291 of the legislation relate to the inter-relation between civil proceedings and criminal proceedings and are essentially technical in that regard. These provisions are supported.

19.11 Clause 92 relates to an ancillary contravention of a civil remedy provision for example, by aiding, abetting or counselling or procuring a contravention by another person. This is similar to s550 of the FW Act and will assist in enforcing the provisions of the Productivity Bill.

19.12 Clauses 93 and 94 relate to, respectively, exceptions to the burden of proof for a civil remedy provision with an evidentiary burden placed on those who wish to rely on an exemption or excuse or qualification provided by the law. Clause 94 sets out the way in which conduct is able to be imputed to bodies corporate. These provisions are supported.

19.13 Clause 95 relates to the actions of building associations, that is employer associations or unions, and contains the substance of s69 of the BCII Act. This is important in imputing conduct to the agents and officers of unions in particular.

19.14 Clause 97 is in substance is the same as s70 of the former BCII Act and is supported.

19.15 Clause 98 enables enforceable undertakings to be obtained in relation to the contravention of civil remedy provisions. This provision was not in the former BCII Act. However, it is similar to the provision in s715 FW Act and is a useful tool in applying the terms of the legislation.

19.16 Clause 99 permits inspectors to provide compliance notices which would require the person to take action to remedy the effects of the contravention and produce reasonable evidence of the person's compliance with the notice.

This is a new provision in the construct of the legislation but is similar to s716 of the FW Act and is supported.

19.17 Clause 100 relates to the ability of a person to apply for a review of the notice given under clause 99 and is necessary protection similar to that found in s717 of the FW Act.

20 Chapter 9 Miscellaneous

20.1 Clauses 101 – 120 deal with miscellaneous matters under the Productivity Bill. Master Builders supports these provisions.

20.2 Clause 102 has the effect of abrogating the common law privilege against self-incrimination. The protections that are then provided to an individual in those circumstances are set out in clause 102(2). Where an individual who gives information produces a record or document or answers a question under an examination notice the information produced cannot be used against an individual other than where they failed to comply with an examination notice or effectively where they have lied or obstructed a Commonwealth officer.

20.3 Clause 102(3) provides protections against use of information obtained by inspectors in respect of criminal proceedings. However, it permits the use of that information for civil remedy actions.

20.4 Clause 103 relates to protection from liability relating to examination notices and contains the substance of s54 of the BCII Act.

20.5 Clause 104 sets out that certain other records and documents are inadmissible in criminal proceedings other than the proceedings mentioned already as exceptions set out in clause 102. The material set out as inadmissible include records and documents which have been inspected or copied by inspectors who have exercised a power when entering premises and all the records and documents retained as a direct or indirect consequence of inspecting or copying documents.

20.6 Clause 105 relates to disclosure of information by the ABC Commissioner or the FSC. The BCII Act did not permit disclosure of protected information obtained for the purposes of the BCII Act to the Minister unless required in

respect of a report. Here the relevant disclosure is permitted if the Commissioner believes that the disclosure is likely to assist the Minister to consider a complaint or issue in relation to a matter arising under the FW Act or the Transitional Act. The more general power to disclose matters is where it is appropriate for the performance of the ABCC's functions or powers or is likely to assist in the administration or enforcement of the law. Limited disclosure rights to the Department are permitted. These provisions are supported.

20.7 Clause 106 effectively replicates s65 of the BCII Act but in respect of clause 106 the information that is protected only relates to that obtained under an examination notice.

20.8 Clause 107 contains the substance of s66 of the BCII Act which proscribes reports containing information relating to an individual's affairs. It is supported.

20.9 Clauses 108 – 112 deal with the powers of the ABC Commissioner. They provide extensive powers to the Commissioner. These provisions are supported.

20.10 Clause 108 gives the power, in the public interest, to publish details of non-compliance with the Building Code and name the person who has failed to comply. Further non-compliance by a building industry participant with the Act or a designated building law may also be published in the public interest including the name of the participant.

20.11 Clause 109 sets out the authority of the ABC Commissioner to intervene in the public interest in civil proceedings before a court that arises under the legislation, the Independent Contractors Act, the FW Act, and the Fair Work Transitional Act where that proceeding involves a building industry participant or building work.

20.12 Clause 110 permits the ABC Commissioner to make submissions in FWC proceedings.

20.13 Clause 111 permits the ABC Commissioner to institute proceedings under the FW Act, Fair Work Transitional Act and effectively enables the ABC Commissioner to stand in the shoes of a Fair Work inspector.

20.14 Clause 112 places an obligation on the General Manager of the FWC to notify the ABC Commissioner of every application lodged with the FWC or with the General Manager of the FWC under the FW Act or the Fair Work Transitional Act where the application relates to a matter that involves a building industry participant or building work, as well as a requirement to notify the outcome of each application.

20.15 Clauses 113 – 117 deals with the inter-relationship of the court system with the administration of the legislation and each provision is supported.

20.16 Clause 118 provides protection to the ABC Commissioner and a number of other persons appointed under the legislation where the exercise of functions and powers that might result in loss or damage arise under the legislation. The provision is supported.

20.17 Clause 119 enables the Minister to delegate the Minister's functions or powers relating to the Building Code to the ABC Commissioner under direction.

20.18 Clause 120 relates to the capacity of the Minister to make rules and the Governor-General to make regulations under the legislation.

21 The Transitional Bill

The Transitional Bill deals with consequential and transitional matters relating to the re-establishment of the ABCC. Master Builders has no concerns with any of the machinery provisions set out in the Transitional Bill and fully supports its terms.

22 Conclusion

Master Builders, with the seven minor changes recommended in this submission, fully supports the passage of both Bills. The passage of those Bills will assist with restoring the rule of law to the building and construction industry and hence assist to improve the industry's productivity.

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Attachment A to Master Builders submission to Senate Committee

independent economics

Economic Analysis of Building and Construction Industry Productivity: 2013 Update

This report was prepared for Master Builders Australia

26 August 2013

Independent Economics is an independent provider of economic modelling services to support economic policy analysis and forecasting. We are strongly committed to independent modelling that provides robust analysis and real solutions to meet client needs. In Australia, we provide services to government and industry, and we also provide services internationally.

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Executive summary

Introduction

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

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

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

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

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

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

Methodology

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

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

- Year-to-year comparisons of construction industry productivity are made using data from the Australian Bureau of Statistics (ABS), the Productivity Commission (PC) and academic research. The timing of any shifts in productivity trends is compared with the timing of the three regulatory regimes.

- Industry reforms have focussed on the commercial construction sector, comprising non-residential building and multi-unit residential building, where construction costs have historically been higher than for the housing construction sector. Rawlinsons data is used to compare the timing of any changes in this cost gap (for undertaking the same building tasks in the same states) with the timing of the three regulatory regimes.

- Case studies of individual projects, undertaken for earlier reports by Econtech Pty Ltd and by other researchers, are used to provide comparative information on productivity performance between the three regulatory regimes.

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

- First, the boost to productivity from improved workplace practices associated with the Taskforce and ABCC is estimated.

- Second, the extent to which this productivity boost is expected to be preserved under the FWBC regime is also estimated.

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

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

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

- The model separately identifies four sectors within the building and construction industry: residential building; non-residential building; engineering construction; and construction trade services. This means that the model can better trace the economy-wide impact of improved workplace practices in different sectors of the building and construction industry. It also means that the jurisdiction of the ABCC and FWBC can be more closely identified.

- The modelling is contemporary, adopting 2012/13 as its reference year. This involves using Input-Output (IO) tables for 2007/08 released by the ABS in late 2011, and uprating this snapshot of the economy to a normalised 2012/13, by allowing for growth in wages, productivity, population and normalised commodity prices. Likewise, the model uses the latest ABS industry classification, ANZSIC 2006.

- The production process in each of the model's 120 industries distinguishes nine different types of capital, including dwellings and buildings and structures. This supports more robust estimates of the flow-on effects from reform in the building and construction industries, which produce the dwellings, buildings and structures used by the 120 industries.

- The model provides a robust measure of consumer welfare derived from the consumption of goods and services. Consumer welfare is the key measure used to assess the public policy merits of economic policies, such as the changes in workplace practices analysed here.

Workplace practices in the building and construction industry

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

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

[1] Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003, p4.
[2] Ibid., p11.

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

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

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

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

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

Productivity comparisons in the building and construction industry

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

[3] Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003
[4] Ibid., p13

Year-to-Year Comparisons

- ABS data shows that, from 2002 to 2012, construction industry labour productivity has outperformed by 21.1 per cent. This productivity outperformance is identified after controlling for factors driving productivity in the economy as a whole and trends in construction industry productivity prior to 2002 (the year improved workplace practices began). Data for 2013 is not yet available.

- The Productivity Commission's analysis of ABS data has found that multifactor productivity in the construction industry was no higher in 2000/01 than 20 years earlier[5]. In contrast, the latest ABS data on productivity shows that construction industry multifactor productivity accelerated to rise by 16.8 per cent in the ten years to 2011/12. Similar to the labour productivity data, multifactor productivity data for 2012/13 is not yet available.

- Published academic research on total factor productivity shows that productivity in the construction industry grew by 13.2 per cent, between 2003 and 2007, whereas productivity grew by only 1.4 per cent between 1998 and 2002. Data on total factor productivity is only available up to 2007.

Commercial versus domestic

- Rawlinsons data to January 2012 shows that the cost penalty for completing the same tasks in the same state for commercial construction compared to domestic construction has shrunk. The boost to productivity in the commercial construction sector, as estimated by the narrowing in the cost gap, is conservatively estimated at 11.8 per cent between 2004 and 2012. This narrowing in the cost gap developed over several years, as the industry gradually adjusted to the industry-specific regulatory regime of the Taskforce/ABCC era.

- Similarly, the cost gap can be expected to widen again over several years, as the industry gradually adjusts to the weaker regulatory environment in the FWBC era. However, the latest cost gap data refers to January 2013, when the FWBC had been in operation for only seven months. Over that time, from January 2012 to January 2013, the cost penalty for commercial construction widened by 0.9 percentage points. Based on past experience, this is likely to represent the start of a widening trend in the cost gap, driven by an erosion in the productivity outperformance of the Taskforce/ABCC era.

Individual Projects

- Case studies undertaken as part of the original 2007 Econtech report found that improved workplace practices in the Taskforce/ABCC era led to better management of resources in the building and construction industry. This, in turn, has boosted productivity in the building and construction industry compared to the pre-Taskforce/ABCC era.

- Other studies considered reached similar conclusions, including those assessing the impact of improved workplace practices on major engineering construction projects. The gain in productivity as a result of improved workplace practices in the Taskforce/ABCC era is estimated at around 10 per cent.

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

Days lost to industrial action

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

The impact of changes in workplace practices on construction industry productivity

Productivity gains in the Taskforce/ABCC era

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

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

Productivity losses in the FWBC era

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

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

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

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

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

Modelling the impact of changes to workplace practices

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

- A "Baseline Scenario" provides a snapshot of the Australian economy representing the workplace practices in place before the Taskforce and ABCC era.

- An "ABCC Scenario" provides a snapshot of the Australian economy with higher productivity in the construction industry due to improved workplace practices resulting from the ABCC, Taskforce and industrial relations reforms in the years to 2006. That is, productivity in the construction industry is 9.4 per cent higher than in the baseline scenario.

- An "FWBC Scenario" provides a snapshot of the Australian economy where 75 per cent of the productivity boost achieved in the Taskforce/ABCC era is unwound in the FWBC era. This deliberately-conservative estimate can be refined in future annual updates as more data on the FWBC era becomes available.

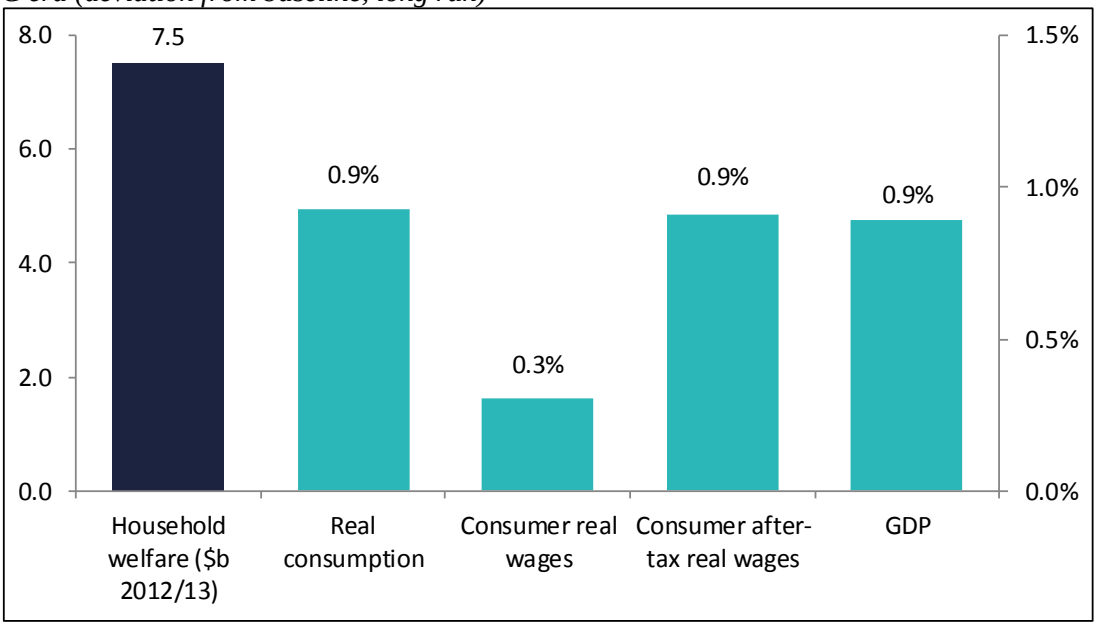
The economic benefits of improved workplace practices in the Taskforce/ABCC era are estimated as the difference between the ABCC scenario and the baseline scenario. The economic losses from the less productive workplace practices during the FWBC era are estimated as the difference between the FWBC scenario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

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

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

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

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



Source: Independent CGE model simulations

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

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

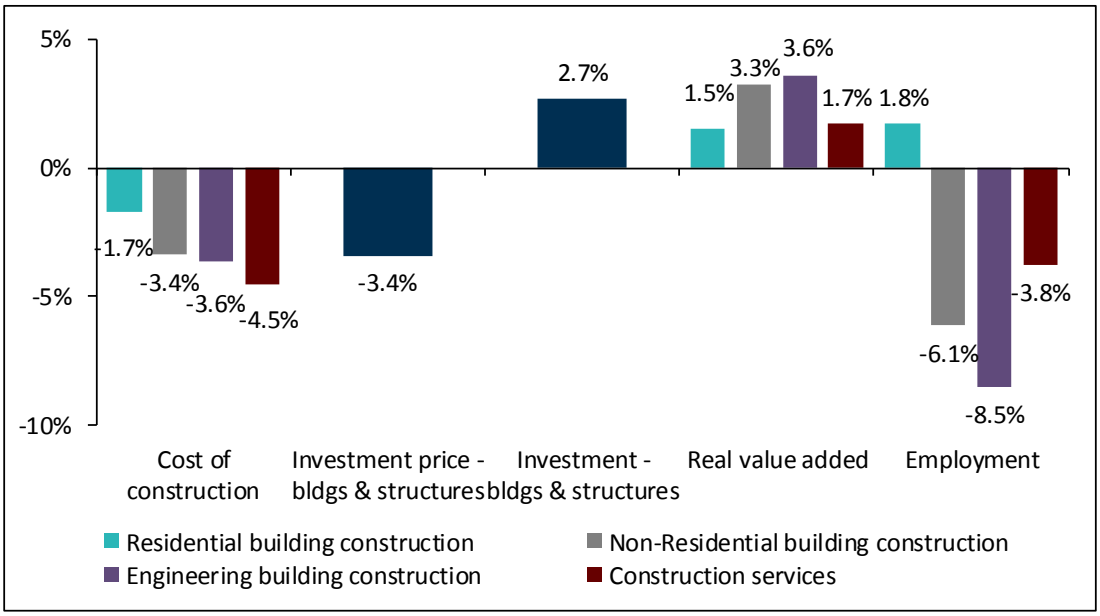
In the government sector, the budget saving from the lower cost of public investment in schools, hospitals, roads and other infrastructure is assumed to be passed on to households in the form of a cut in personal income tax. This boosts the gain in consumer real wages from 0.3 per cent on a pre-tax basis,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

After allowing for economic growth over the last year, this is consistent with the consumer gain estimated in the 2012 report of $6.3 billion in 2011/12 terms[6]. The estimate of consumer gains is similar across reports, since each report has consistently modelled a productivity gain of the same magnitude (9.4 per cent) and from the same source (improved workplace practices in the building and construction industry). Chart B summarises the effects on the building and construction industry.

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

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

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



Source: Independent CGE model simulations

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

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

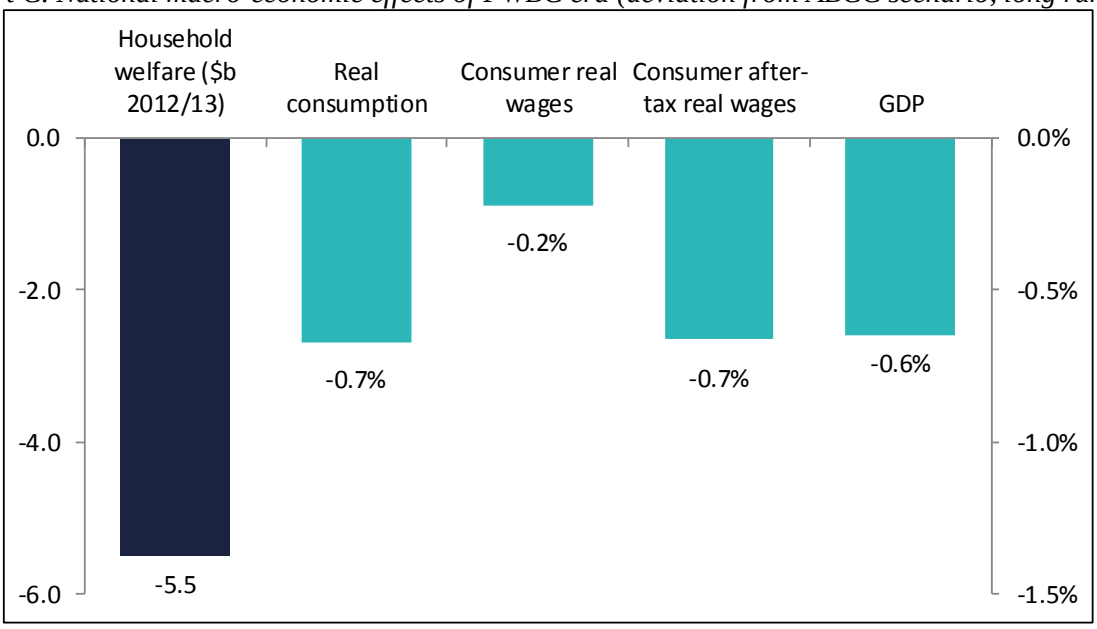
Economic impact of less productive workplace practices during the FWBC era

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

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

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

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

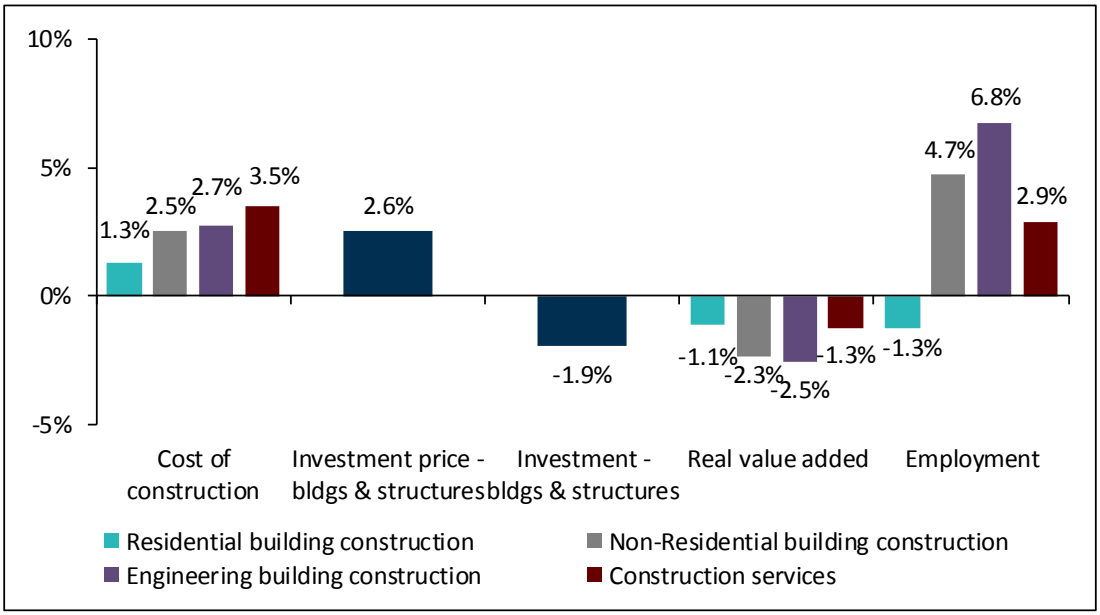


Source: Independent CGE model simulations

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

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

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



Source: Independent CGE model simulations

1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1 Workplace practices in the building and construction industry

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

2.1.1 Before the Taskforce and ABCC

In 2001, the Royal Commission into the Building and Construction Industry (Cole Royal Commission) was established to review the conduct and practices in the Australian building and construction industry. The final Cole Royal Commission Report[7] was released in 2003 and concluded that there was widespread misconduct and poor work practices in the industry.

The Cole Royal Commission found that the industry's productivity performance was below that of the market sector average. For example, Tasman Economics[8] found that, between 1988/89 and 1999/00, multifactor productivity grew by 15.3 per cent in the market sector. By comparison, multifactor productivity in the construction sector grew by only 4.3 per cent over the same period.

[7] Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003
[8] Tasman Economics, *Productivity and the Building and Construction Industry*, Discussion Paper 17, prepared for the Royal Commission into the Building and Construction Industry, 2002

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

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

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

Based on its investigations, the Cole Royal Commission concluded that these problems occurred because of the unique structure of the building and construction industry. Head contractors had an "unwillingness and incapacity … to respond to unlawful industrial conduct causing them loss"[12]. Short term profitability considerations together with the importance of building a reputation for on-time delivery meant that contractors preferred to quickly resolve issues rather than become involved in long conflicts[13]. As such, contractors tended to concede to union demands for reasons of commercial expediency.

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

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

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

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

[9] Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003, p12
[10] Ibid., p5.
[11] Ibid., p4.
[12] Ibid., p11.
[13] Ibid., p11.
[14] Ibid., p6

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

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

2.1.2 The Taskforce and ABCC era

In response to the recommendations of the Cole Royal Commission, laws and regulations governing the building and construction industry were introduced and strengthened. The Building Industry Taskforce (the Taskforce) was established in 2002[17], and given increased responsibility and regulatory powers. In 2005, the *Building and Construction Industry Improvement Act 2005* (BCII Act) established the ABCC, among other things. The ABCC was provided with powers to monitor, investigate and enforce the laws and guidelines in the building and construction industry. These building industry-specific reforms built on the more general workplace relations reforms that were implemented across the economy in the years to 2006.

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

- The National Code of Practice for the Construction Industry (the National Code) and the associated Implementation Guidelines (Guidelines) were strengthened. The National Code and Guidelines seek to influence work practices in the building and construction industry by setting "employer and employee standards relating to the performance of building and construction work and to conditions for bidding for Commonwealth funded construction work"[18].

- Broader forms of industrial action were made unlawful in the building and construction industry compared to other industries.

- The maximum penalties for unlawful conduct in the building and construction industry were trebled.

- The ABCC was given powers to compulsorily acquire information either through compelling a person to attend an examination and answer questions, or through obtaining documents relevant to an investigation.

[15] Ibid., p13
[16] Ibid., p13
[17] The *Interim* Building Industry Task Force was set up in response to the first report of the Cole Royal Commission in November 2002. In April 2003, the operation of the Building Industry Task Force was extended, pending the establishment of the then proposed ABCC. In March 2004, it was announced that the taskforce would become a permanent body, and would operate until the ABCC was established. For more information, see the following link.
http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0405/05bd139
[18] Parliamentary Library, *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, Bills Digest No. 80, 2011-12, November 2011, p4.

- The ABCC was able to initiate proceedings on matters which have already been settled between the parties.

- Greater restrictions were placed on the right of union representatives to enter construction sites.

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

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

2.1.3 The FWBC era

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

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

> *However, the ABCC's work is not yet done. Although I accept there has been a big improvement in building industry behaviour during recent years, some problems remain. It would be unfortunate if the inclusion of the ABCC in the OFWO[19] led to a reversal of the progress that has been made.*[20]

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

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

[19] Office of the Fair Work Ombudsman
[20] Wilcox, M, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, p14.

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

Weaker building industry code and guidelines

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

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

However, from August 2009, "less stringent"[21] Guidelines have operated. More importantly, wide-ranging changes were implemented in May 2012. Following these changes, the Guidelines "no longer try to impose formal requirements upon the construction industry that do not apply to employers and employees elsewhere in the labour market"[22]. Since February 2013, a new Code has applied which involves some further weakening of restrictions on right of entry requirements and enterprise bargaining[23].

State governments have expressed concern that the weakened National Code and Guidelines are likely to increase the cost of state construction projects.[24, 25, 26] Therefore, the Victorian, NSW and Queensland governments have strengthened their own State Guidelines in 2013[27]. However, it is unclear whether these guidelines are able to be applied by State governments, and so their impact on productivity cannot yet be assessed.[28]

More limited function and weaker powers of the FWBC

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

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

[21] Parliamentary Library, *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, Bills Digest No. 80, 2011-12, November 2011, p4.
[22] Creighton, B; 'Government procurement as a vehicle for workplace relations reform: the case for the national code of practice for the construction industry', *Federal Law Review*, Vol. 40 (3), 2012, p364
[23] Gadens Lawyers, 'Don't be 'blindsided' by the new Building Code 2013', www.gadens.com.au; viewed 16/08/2013.
[24] The Hon Robert Clark MP, *CCU to target work site conduct under revised construction guidelines* [Press Release], 20 May 2013
[25] Mike Baird MP, *Delivering value on infrastructure – construction guidelines now in force* [Press Release], 1 July 2013
[26] Jarrod Bleijie, *Feedback sought on construction code guidelines*, [Press Release], 4 March 2013
[27] Workplace Express, *Eastern States line up on construction*, 22 March 2013, www.workplaceexpress.com.au, viewed 16 July 2013.
[28] Corrs Chambers Westgarth, *Federal Court Rules on the Interaction Between the Victorian Construction Code and Implementation Guidelines and the Adverse Action Provisions*, 28 May 2013 www.corrs.com.au viewed 1 August 2013.

Table 2.1: Comparison of ABCC and FWBC regulatory regimes

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

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

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

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

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

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

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

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

[29] Parliament of the Commonwealth of Australia, *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012*, Revised Explanatory Memorandum
[30] FWBC, *Penalties for Breaches of Workplace Relations Law Rise by 54.5 per cent*, January 2013, www.fwbc.gov.au, viewed 1 August 2013.
[31] ABCC Annual report 2009/10, pg 43
[32] ABCC Annual report 2010/11, pg 49

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

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

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

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

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

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

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

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

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

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

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

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

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

Unique circumstances in the building and construction industry unchanged

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

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

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

[34] Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003
[35] Wilcox, M, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, p51.
[36] Fair Work Ombudsman, Right of Entry Fact Sheet, www.fairwork.gov.au, viewed 7 August, 2013

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

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

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

> *I am satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the BCD[37] to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove.*[38]

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

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

[37] BCD refers to the 'Building and Construction Division' which went on to become the FWBC.
[38] Wilcox, M, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, p3.

2.2 Productivity comparisons in the building and construction industry

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

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

- **Year-to-year** comparisons of building and construction industry productivity are made using data from the Australian Bureau of Statistics (ABS), the Productivity Commission and published academic research to determine whether there was any shift in construction industry productivity following the changes in workplace practices.

- The non-residential building sector and multi-unit residential sector (i.e. commercial construction) have been the focus of improved workplace practices because this is traditionally the higher cost side of the building and construction industry. Historically, the housing construction (domestic construction) sector of the industry can complete the same construction tasks at lower cost than the commercial construction sector. We use Rawlinsons data on construction costs to determine whether changes in workplace practices have affected the cost gap between **commercial construction and domestic construction**. For example, a narrowing of the cost gap may indicate that improved workplace practices have boosted productivity in commercial construction.

- Case studies of **individual projects**, completed in earlier reports by Econtech Pty Ltd and other sources, compare projects completed before and after changes in workplace practices to provide information on the impact of changed workplace practices on the productivity performance of individual projects.

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

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

Differences in productivity measures

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

- **Labour Productivity.** Labour productivity is the ratio of real output produced to the quantity of labour employed. Labour productivity is typically measured as output per person employed or per hour worked. Changes in labour productivity can be attributed to labour where they reflect improvements in education levels, labour efficiency, technology or work practices that makes labour more productive. Changes in labour productivity can also reflect changes in capital and intermediate inputs, in technical and organisational efficiency, as well as the influence of economies of scale and varying degrees of capacity utilisation.

- **Multifactor Productivity (MFP).** MFP is defined as the ratio of output to combined inputs of labour and capital. In principle, MFP is a more comprehensive productivity measure because it identifies the contribution of both capital and labour to output. In practice, labour input can be measured more accurately than capital input. Reflecting these competing considerations, both labour productivity and MFP continue to be used as measures of productivity.

- **Total Factor Productivity (TFP).** TFP is the ratio of output to the combined inputs of labour, capital and intermediate inputs (such as fuel, electricity and other material purchases). While this measure is the most comprehensive, often it cannot be calculated because there is insufficient data on intermediate inputs.

2.2.1 Year-to-year comparisons

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

- data up to and including 2002, the period prior to the establishment of the Taskforce/ABCC;

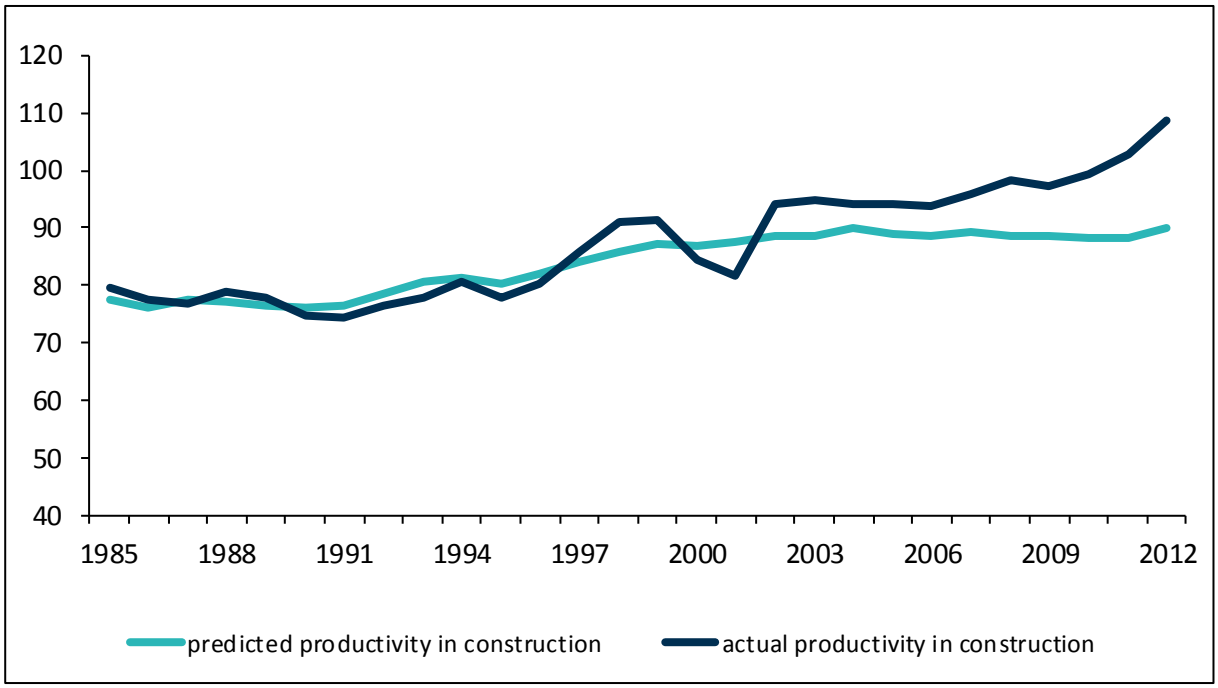
- data between 2002 and mid-2012, the period of operation for the Taskforce/ABCC; and

- data from mid-2012 onwards, when the FWBC was established.

Labour productivity

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

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



Source: Independent Economics estimates based on ABS data

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

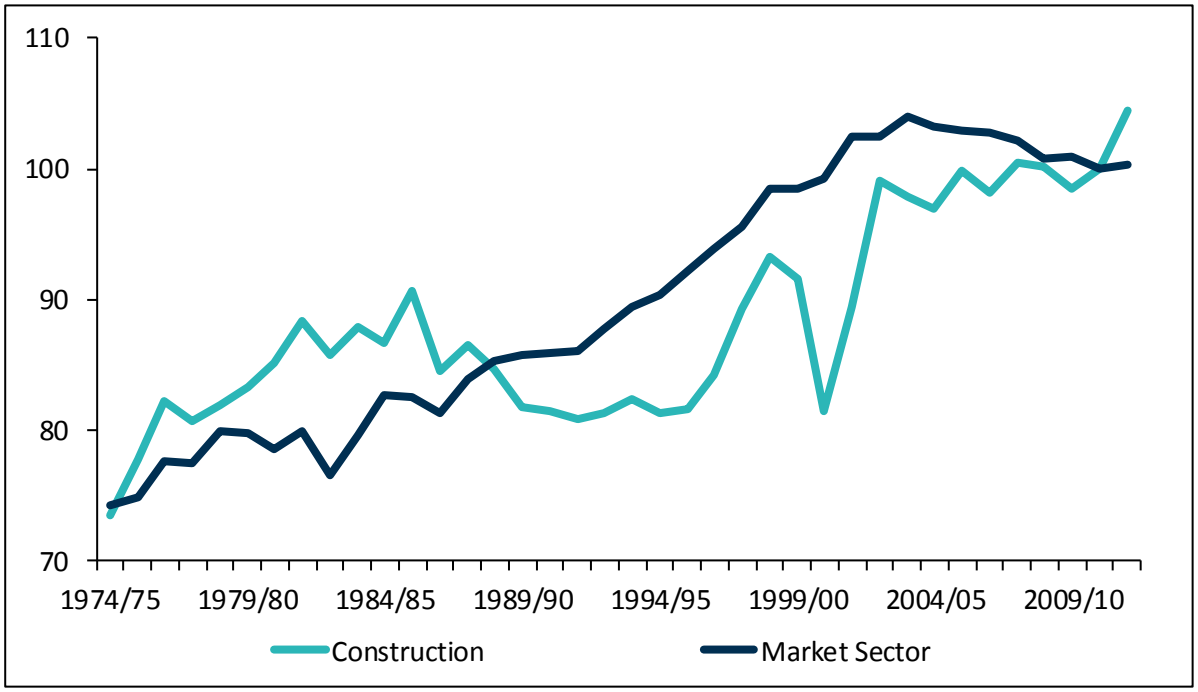
As can be seen in Chart 2.1, since 2002 actual construction industry labour productivity has consistently outperformed predictions based on past trends. In 2010, actual construction industry productivity was approximately 12.6 per cent higher than predictions based on its relative historical performance.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

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

Multifactor productivity

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

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



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

While productivity in the market sector has followed a fairly steady upward trend, productivity in the construction industry was fairly flat through the 1980s and 1990s. The PC found that multifactor productivity in the construction industry was no higher in 2000/01 than 20 years earlier[39]. As shown in Chart 2.2, construction industry productivity is below the level seen in 1980/81 during several periods, including between 1988/89 and 1996/97.

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

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

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

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

As noted in the 2012 report, a study by the Grattan Institute also found that the building and construction industry was one of only three industries that have enjoyed faster labour and multifactor productivity growth in the 2000s compared to the 1990s[41]. Administration and support services and arts and recreation services are the other two industries whose productivity performance has improved in the 2000s.

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

Total factor productivity

The 2012 report discussed a study by Li and Liu which estimated total factor productivity for the Australian building and construction industry using ABS data[42]. The results of this research are summarised here for ease of reference; for further details please refer to the 2012 report.

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

2.2.2 Commercial versus domestic residential comparisons

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

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

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

[41] Eslake, Saul and Walsh, Marcus, *Australia's Productivity Challenge*, The Grattan Institute, Melbourne, February 2011
[42] Yan Li and Chunlu Liu, *Malmquist indices of total factor productivity changes in the Australian construction industry*, Construction Management and Economics, 28:9, September 2010

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

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

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

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

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

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

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

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

Source: Rawlinsons Australian Construction Handbook, 2004 – 2013[43]

Notes: (1) Australia Average is weighted according to turnover on a state-by-state basis.
(2) Dates indicate beginning of each calendar year, for example 2004 refers to January 2004.

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

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

Source: Independent Economics estimates.

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

As outlined in the introduction, this report follows the same methodology as was employed in the earlier reports since 2008. The analysis has simply been updated to incorporate the January 2013 Rawlinsons data. Specifically, Rawlinsons data is used to compare cost gaps between commercial and domestic construction in 2012 with the same cost gaps in 2004 to see whether the cost penalty in commercial construction has shrunk as a result of improved workplace practices[44]. This base year was chosen because the Taskforce was established in October 2002 and the ABCC was established in 2005. The base year was also chosen to remove the effects of an apparent break in some of the data series. Hence, a narrowing of the cost gap over this period would suggest that improved workplace practices have had a positive effect on productivity.

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

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

Between January 2004 and January 2012, Table 2.3 shows that the cost penalty for commercial building compared to domestic residential building fell in all mainland states, suggesting improved workplace practices. The biggest fall is in Victoria, where it is down from about 23 per cent to about 14 per cent. Victoria is the state where restrictive work practices in commercial building were generally acknowledged to be most pervasive[45].

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

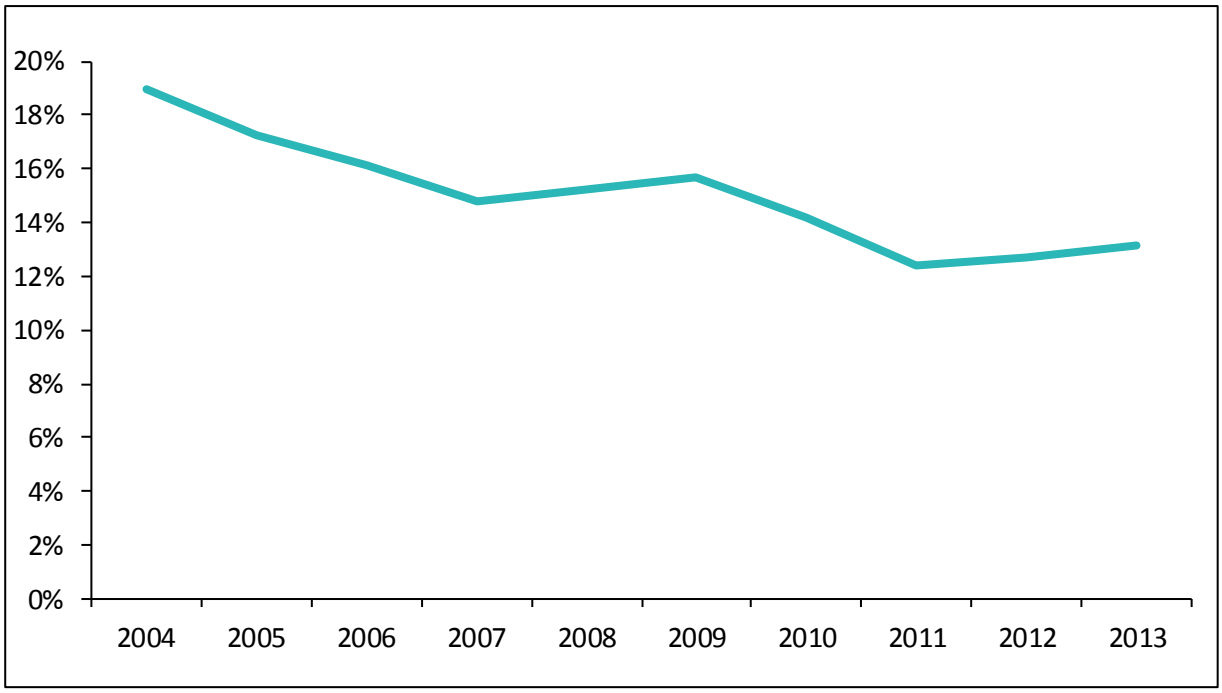
The widening in the cost gap in New South Wales between 2012 and 2013, led to an increase in the cost penalty in Australia over the same time period. The cost penalty is estimated to be 13.2 per cent in 2013. This represents a small increase, of 0.5 percentage points, from the 2012 level. This increase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

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

[44] Survey data refers to January of each year.
[45] Wilcox, *Transition to Fair Work Australia for the Building and Construction Industry*, April 2009

averages of the cost penalties for individual states,[46] while Chart 2.3 shows the Australian cost penalties alone. In January 2005, the ABCC had been in operation for approximately four months and the data showed only a small fall of 1.8 percentage points in the cost penalty. Over the period of operation of the Taskforce[47] and the ABCC, across Australia, the cost penalty for commercial building compared with domestic residential building continued to fall. The cost penalty was around 19 per cent in 2004, but fell gradually over the following years to be 12.7 per cent in 2012, or a fall of 6.3 percentage points.

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



Source: Independent Economics estimates.

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

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

[46] Between this report and the 2012 reports the weights used to calculate this nationwide average have been updated to reflect more recent data.
[47] The Taskforce was established in October 2002 but it is reasonable to expect a lag before its activities started to make an impact. The data also relate to January of each year so that for 2004, the data relates to January 2004.

approximately 53 per cent[48]. This results is an estimated fall from 2004 to 2012 in the labour cost gap for commercial building of 11.8 percentage points, as shown in Table 2.4. That is, using the Rawlinson's data, applying the labour share of 53 per cent to the estimated fall in the labour cost gap of 11.8 percentage points replicates the observed fall in the total cost gap of 6.3 percentage points.

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

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

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

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

As Mitchell points out in his comment on the 2007 report[49], to the extent that the Rawlinsons classification blurs the desired distinction in categories, the cost gap and its movements will be understated. As noted earlier, the ABCC's jurisdiction includes housing construction of four dwellings or more. However, this type of small-scale commercial construction is included in the definition of domestic construction used by Rawlinsons. This means that a small sector of domestic construction would have also benefited from improved workplace practices and associated labour productivity boost. The inclusion of small-scale construction in the domestic construction category means that the cost gap would have narrowed further had this not been the case.

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

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

[48] Information on labour cost shares are sourced from Rawlinsons.

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

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

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

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

2.2.3 Other supporting studies

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

- case studies completed by Econtech as part of the 2007 report which estimated a 7 per cent ($2.71 million) cost saving from a reduction in days lost to industrial disputes;
- research by the Allen Consulting group which estimated a 12.2 per cent gain in multifactor productivity in the five years to 2007[50];
- a study by Ken Phillips which estimated a 11.8 per cent saving in total construction costs for Eastlink because it was constructed under the ABCC and within the Workchoices environment[51]; and
- research by the John Holland Group which estimated that the construction industry has enjoyed a 10 per cent productivity dividend since the completion of the Cole Royal Commission[52].

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

Recently, the Business Council of Australia commissioned the Allen Consulting Group to conduct an analysis of the potential impact of industrial relations developments in the New South Wales construction industry[53]. The report examines a case study by Woodside Petroleum, which outlines the differences in the cost of constructing two similar LNG trains. One train (Train 4) was constructed between 2001 and 2005; thus the majority of construction was undertaken before the establishment of the ABCC. The other train (Train 5) was constructed between 2005 and 2008, and thus the majority

[50] The Allen Consulting Group, *The Economic Importance of the Construction Industry in Australia*, 2007, p18
[51] Ken Phillips, *Industrial Relations and the struggle to build Victoria*, Institute of Public Affairs, Briefing Paper, November 2006
[52] John Holland Group, *Preliminary Assessment of Economic benefits of industrial relations reform in the construction industry*, 2007
[53] The Allen Consulting Group, *Economic impact of construction industrial relations arrangements and investment in infrastructure – A New South Wales perspective*, 2013

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

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

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

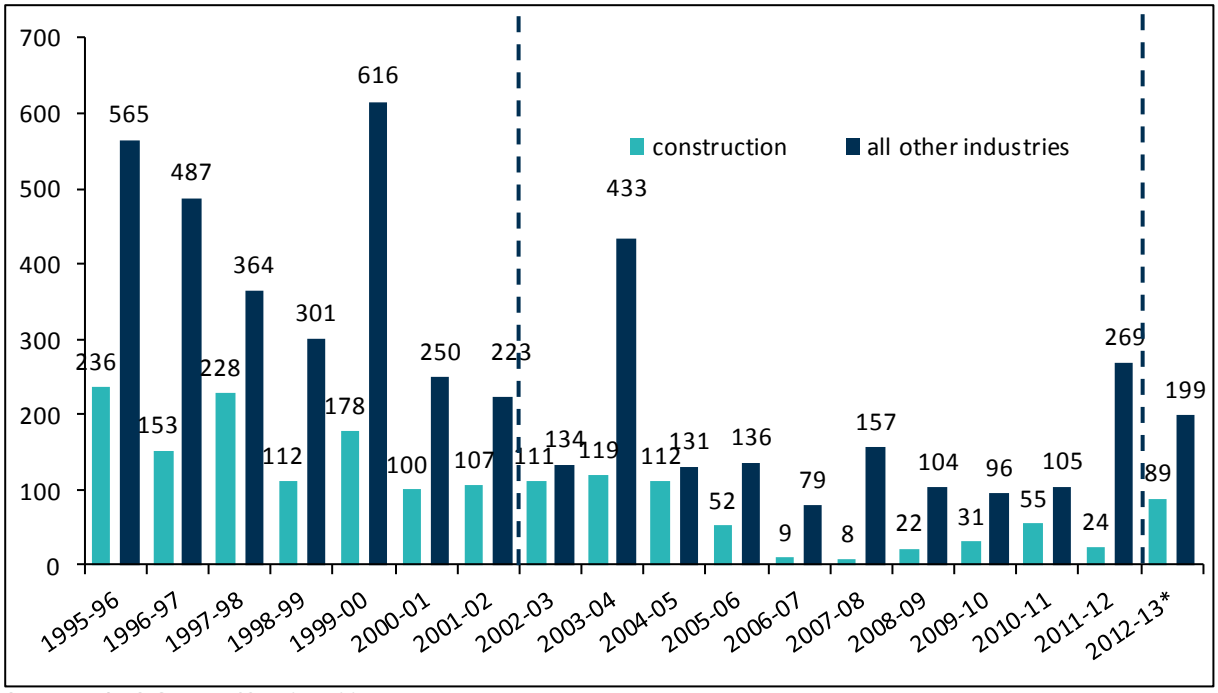
2.2.4 Days lost to industrial action

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

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

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

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



Source: ABS Cat No. 6321.0.55.001
Note: * Independent Economics' estimate for June 2013 is included in the data for 2012/13

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

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

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

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

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

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

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

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

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

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

2.3.1 Productivity gains in the Taskforce and ABCC era

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

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

- ABS data shows that, in 2012, construction industry labour productivity has outperformed predictions based on its historical performance relative to other industries by **21.1 per cent**. That is, a productivity outperformance is identified after allowing for factors driving productivity in the economy as a whole and trends in construction industry productivity prior to 2002 (the year improved workplace practices began).

- The Productivity Commission's analysis of ABS data has found that multifactor productivity in the construction industry was no higher in 2000/01 than 20 years earlier[54]. In contrast, the latest ABS data on productivity shows that construction industry multifactor productivity accelerated to rise by **16.8 per cent** in the ten years to 2011/12.

- Academic research on total factor productivity shows that productivity in the construction industry grew by **13.2 per cent**, between 2003 and 2007, whereas productivity grew by only 1.4 per cent between 1998 and 2002.

- Rawlinsons data to January 2012 shows that the cost penalty for completing the same tasks in the same region for commercial construction compared to domestic construction shrunk. The boost to productivity in the commercial construction sector, as estimated by the narrowing in the cost gap, is conservatively estimated at **11.8 per cent** between 2004 and 2012. This estimate is considerably higher once other factors are taken into account.

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

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

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

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

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

2.3.2 Productivity losses in the FWBC era

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

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

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

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

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

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

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

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

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

3 Modelling the impact of changes to workplace practices

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

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

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

3.1 Previous studies

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

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

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

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

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

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

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

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

3.2 Scenarios

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

- A "Baseline Scenario" provides a snapshot of the Australian economy representing the workplace practices in place before the Taskforce/ABCC era.

- An "ABCC Scenario" provides a snapshot of the Australian economy with higher productivity in the construction industry due to better workplace practices resulting from the ABCC, Taskforce and industrial relations reforms in the years to 2006. Specifically, productivity in the construction industry is 9.4 per cent higher than in the baseline scenario. This scenario is the same scenario that has been modelled in previous updates of this report. As explained in Section 2.3, it has been adopted for this report after considering the latest economic data, case studies and other research.

- An "FWBC Scenario" provides a snapshot of the Australian economy where 75 per cent of the productivity boost achieved in the Taskforce/ABCC era is unwound in the FWBC era. As explained in Section 2.3, this conservative assumption has been adopted following analysis of the workplace relations changes associated with abolishing the ABCC and establishing the FWBC, as well as the latest data.

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

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

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

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

3.3 Model inputs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.4 The Independent CGE model

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

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

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

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

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

- Profit maximisation: the representative business in each industry chooses how to produce (primary factors, intermediate inputs) and how much to produce to maximise profit subject to constraints such as prices and a production function.

- Utility maximisation: a representative household chooses a consumption bundle to maximise utility, which depends on the consumption of products and leisure time, subject to a budget constraint.

- Labour market equilibrium: in the long term the labour market is assumed to clear, so that an economic shock will have no lasting effects on unemployment.

- External balance: in the long term, external balance is assumed to be achieved by adjustment of the real exchange rate, so that trade shocks have no lasting effect on external balance.

- Budget balance: the budget is balanced because in the long run fiscal policy must be sustainable. The policy instrument which adjusts to ensure the budget is balanced, otherwise known as the swing policy instrument, is labour income tax.

- Private saving: in the long run the level of private sector saving and associated asset accumulation must be sustainable.

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

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

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

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

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

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

4.1 Building and construction industry effects

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

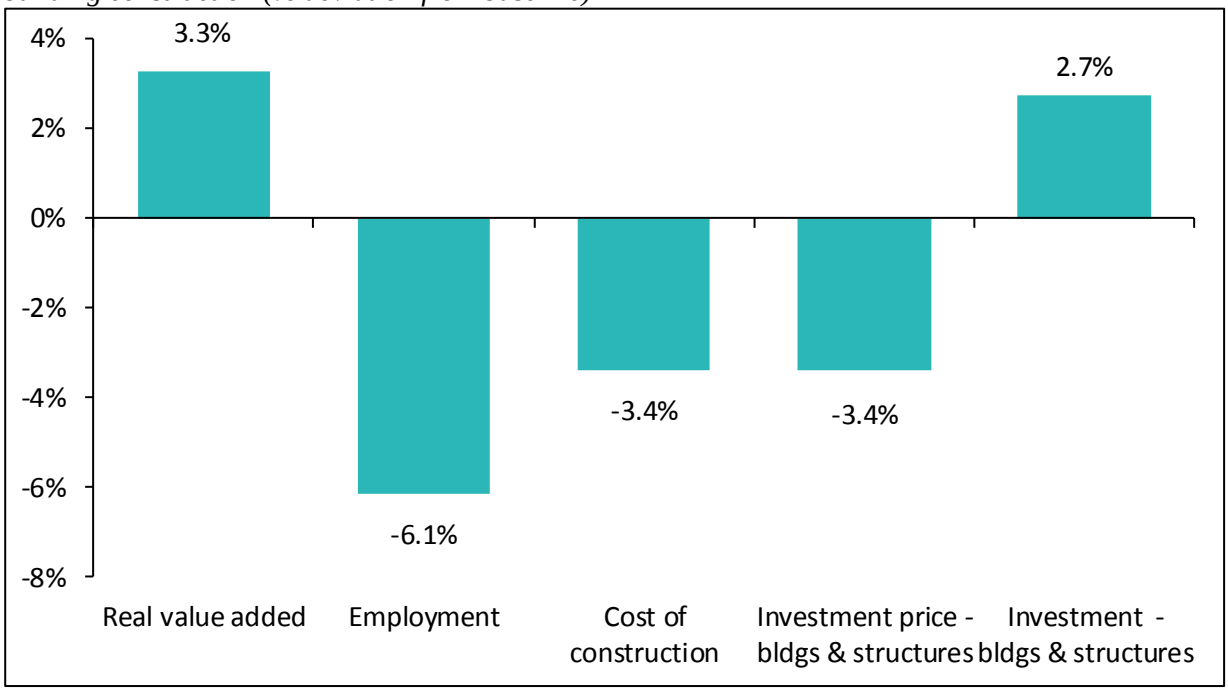
The analysis of productivity gains from improved workplace practices in section 3 indicated that the productivity gains are concentrated in the non-residential building, engineering and multi-unit side of the construction industry. Therefore, in considering the effects on the construction industry itself,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

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

Non-residential building

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

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



Source: the Independent CGE model simulations

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

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

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

- The assumed gain in labour efficiency of 20.5 per cent reduces employment by a similar percentage, for an unchanged level of activity ("labour saving effect").

- The rise in activity of 3.3 per cent adds a similar percentage to employment ("output effect").

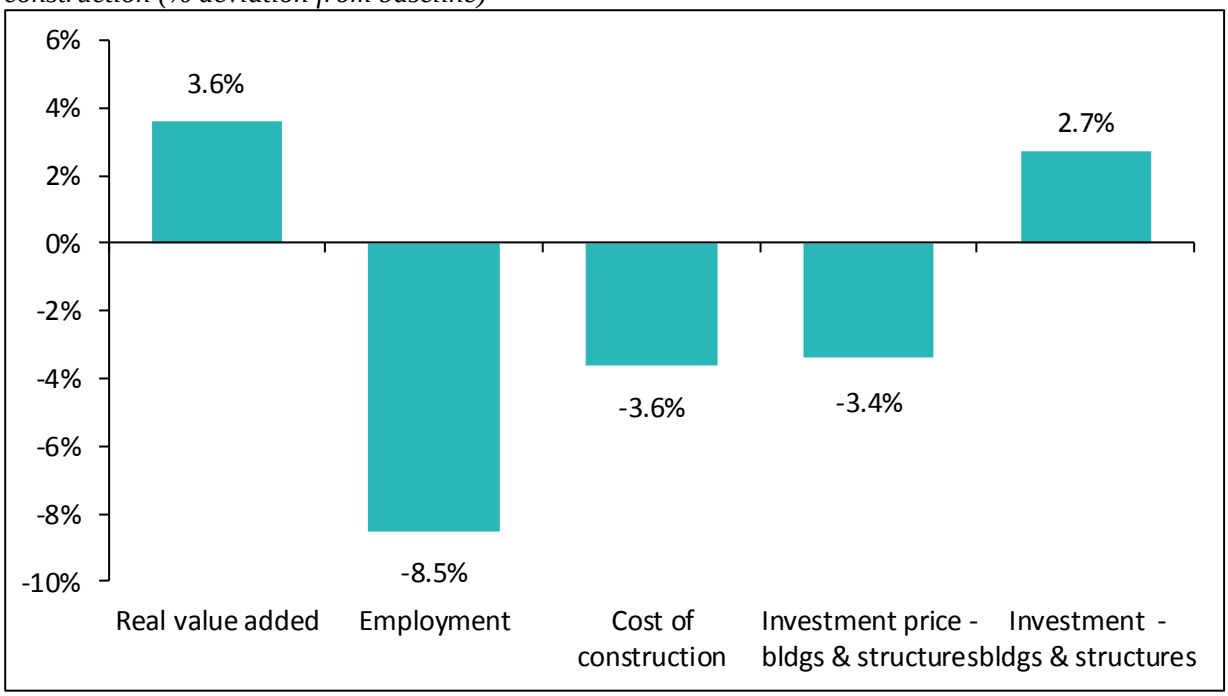
- The gain in labour efficiency makes labour cheaper, inducing some substitution towards labour and away from other inputs, such as capital and land ("substitution effect").

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

Engineering construction

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

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



Source: the Independent CGE model simulations

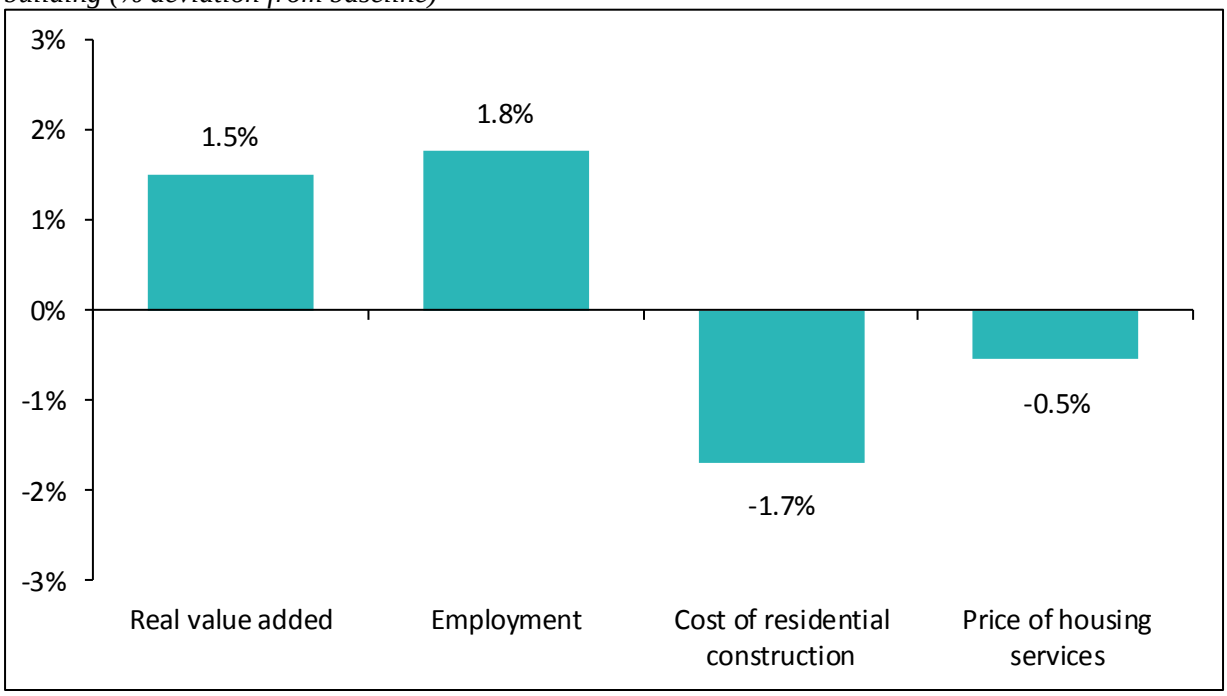
Similar to non-residential building construction, this gain in efficiency leads to a reduction in engineering construction costs of 3.6 per cent. As noted earlier, lower engineering construction costs, combined with lower non-residential building construction costs, lower the overall cost of business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

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

Residential building

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

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



Source: the Independent CGE model simulations

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

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

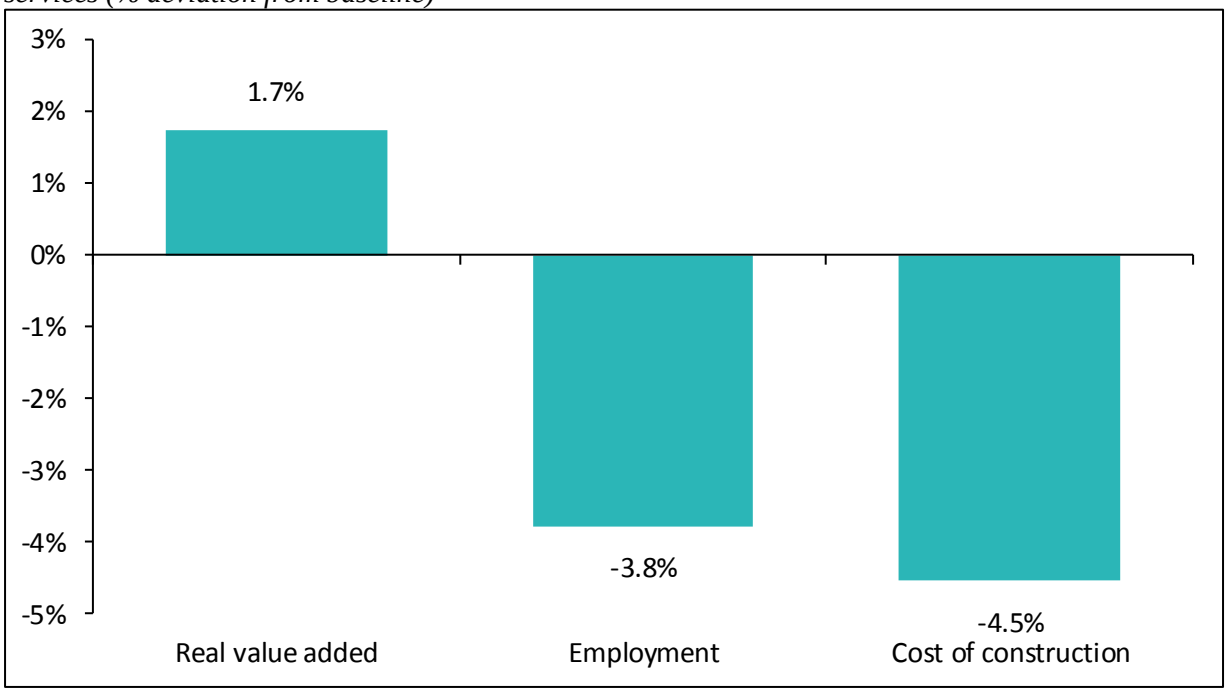
Interestingly, unlike for non-residential construction, where there are employment losses, for residential building there is an employment gain. As discussed above, large productivity gains in non-residential construction (including both non-residential building and engineering construction) reduce demand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

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

Construction services

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

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



Source: the Independent CGE model simulations

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

Total construction industry

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

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

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

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

4.2 Wider industry effects

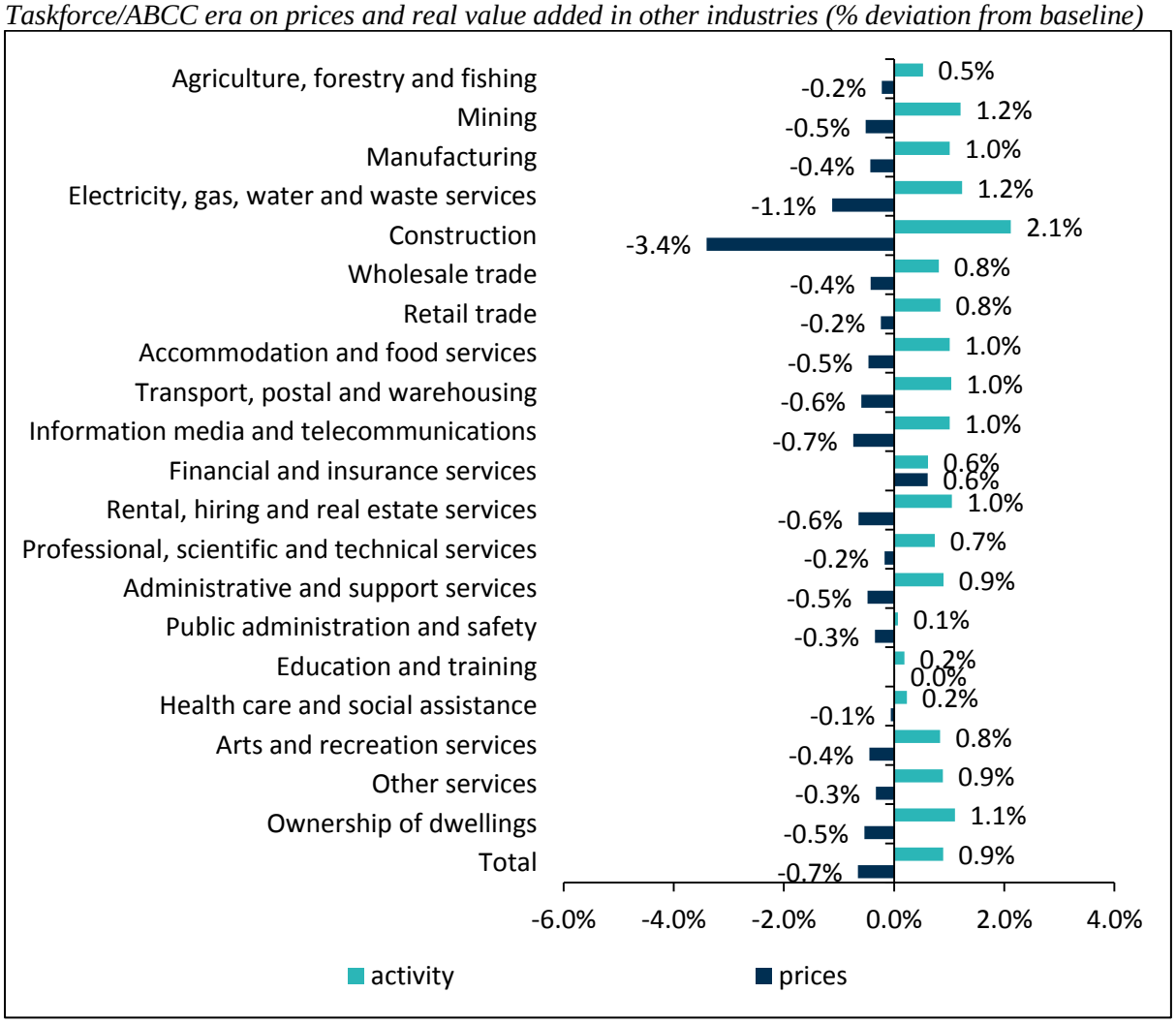
The change in activity in the building and construction industry is expected to affect activity in other industries. This section outlines the simulated production impacts on other industries of improved workplace practices in the building and construction industry as a result of the ABCC, Taskforce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

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

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

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

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



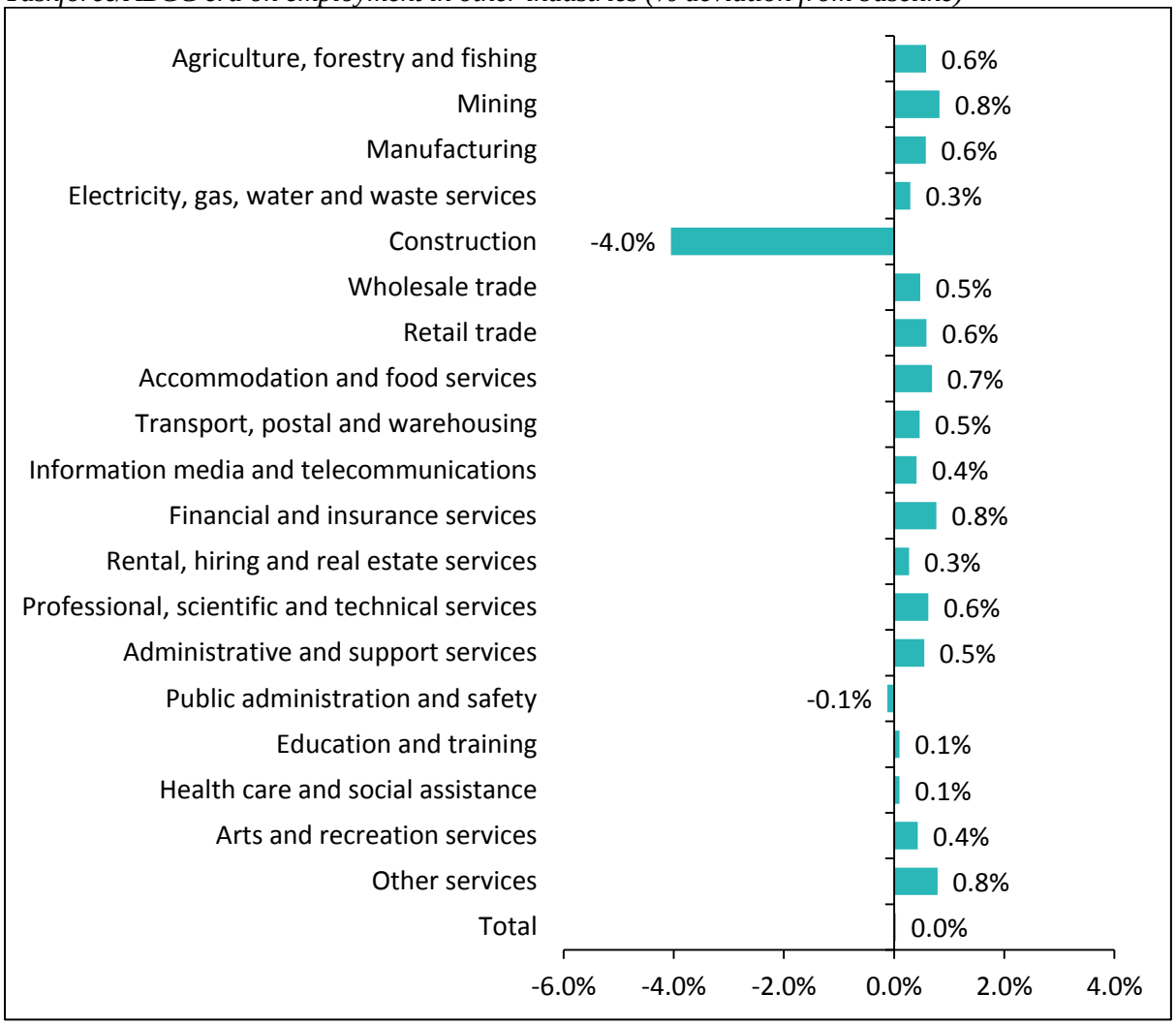
Source: the Independent CGE simulations

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

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

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

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



Source: the Independent CGE simulations

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

4.3 National Macroeconomic effects

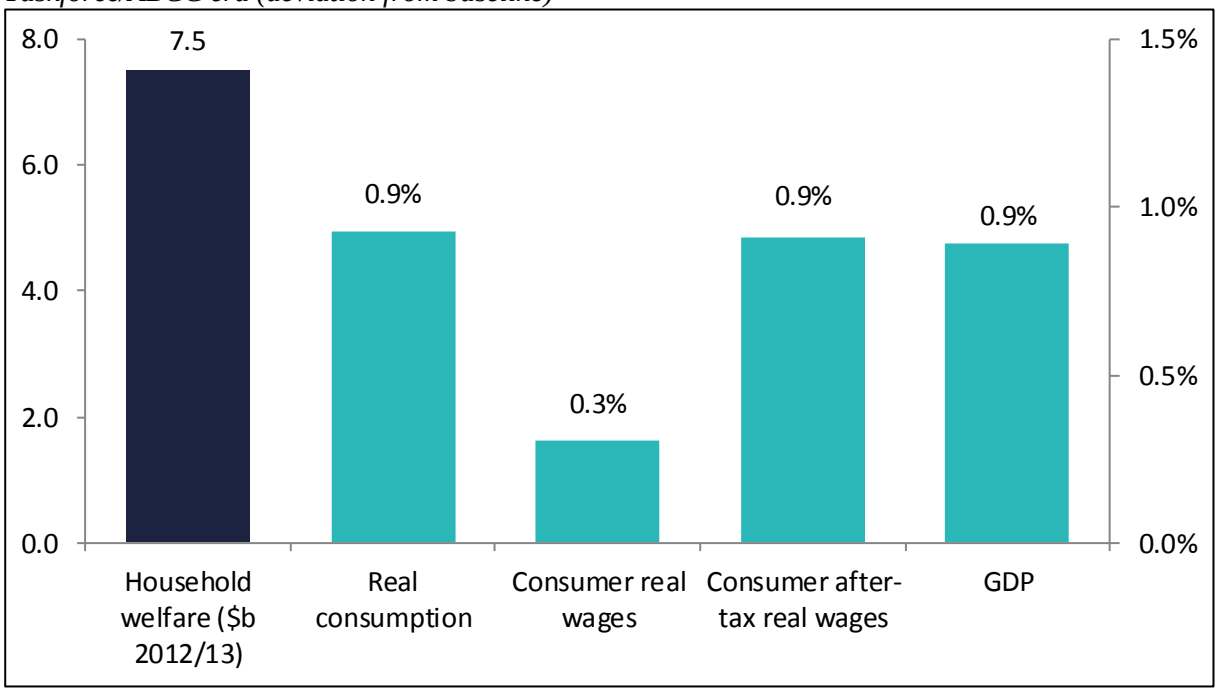
As explained in the previous sections, higher construction productivity leads to lower construction prices. This flows through to savings in production costs across the economy, because all industries are reliant on construction to some extent as part of their business investment. As shown in Chart 4.5,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

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

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

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

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



Source: Independent CGE model simulations

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

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

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

After allowing for economic growth over the last year, this is similar to the consumer gain estimated in the 2012 report of $6.3 billion in 2011/12 terms[55]. The estimate of consumer gains is similar across reports, since each report has consistently modelled a productivity gain of the same magnitude (9.4 per cent) and from the same source (improved workplace practices in the building and construction industry).

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

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

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

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

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

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

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

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

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

5.1 Building and construction industry effects

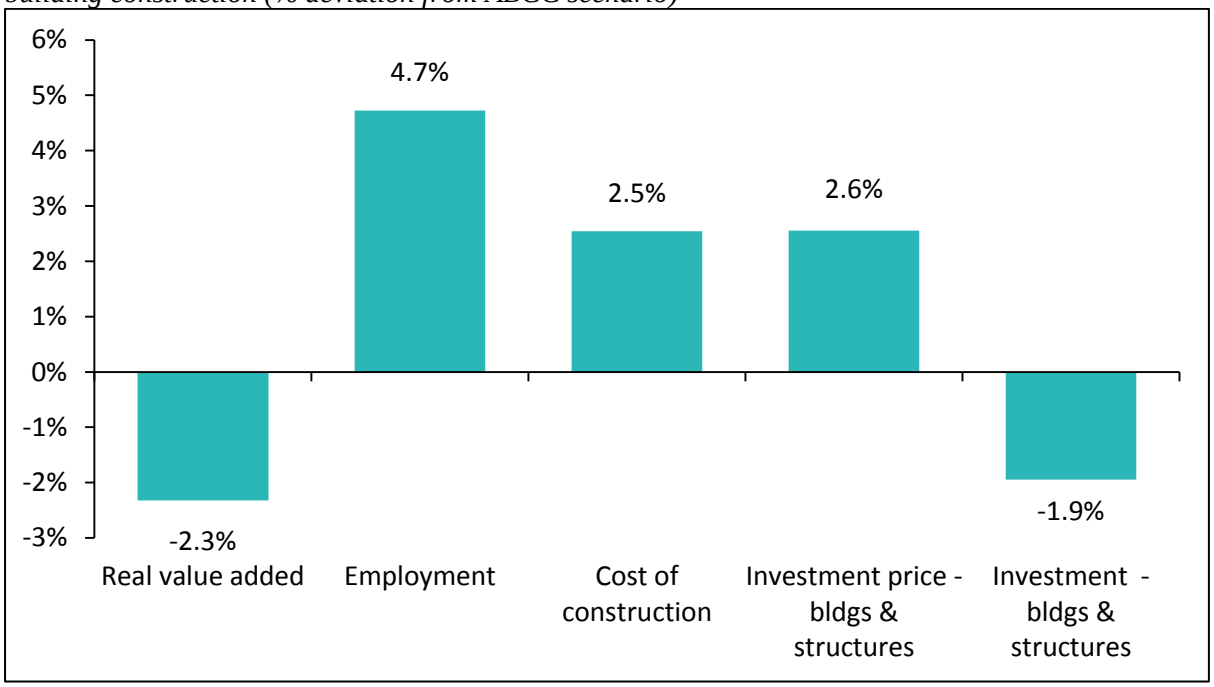
This section presents the economic impacts on the building and construction industry of the labour productivity loss in the industry stemming from abolishing the ABCC and replacing it with the FWBC.

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

Non-residential building

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

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



Source: the Independent CGE model simulations

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

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

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

- The assumed loss in labour productivity of 12.8 per cent means that the number of employees required for an unchanged level of activity is higher ("labour *dis*-saving effect").

- The reduction in activity of 2.3 per cent subtracts a similar percentage from employment ("output effect").

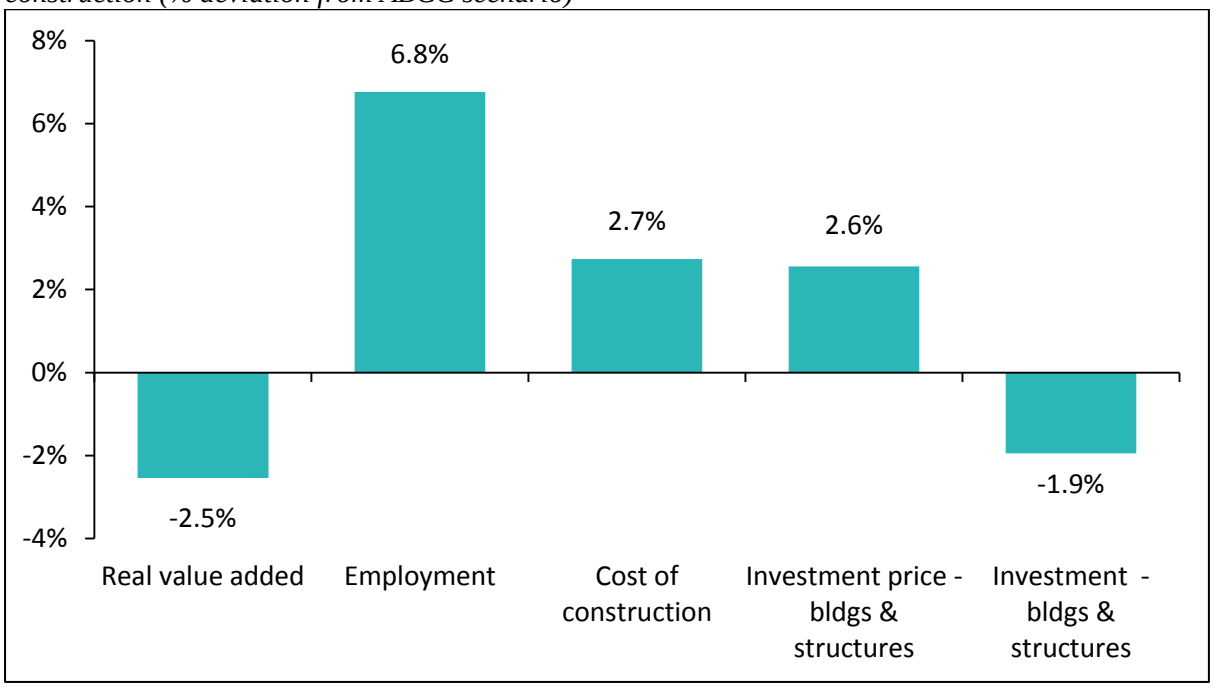
- The reduction in labour efficiency makes labour more expensive, inducing some substitution away from labour towards capital and land ("substitution effect").

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

Engineering construction

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

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



Source: the Independent CGE model simulations

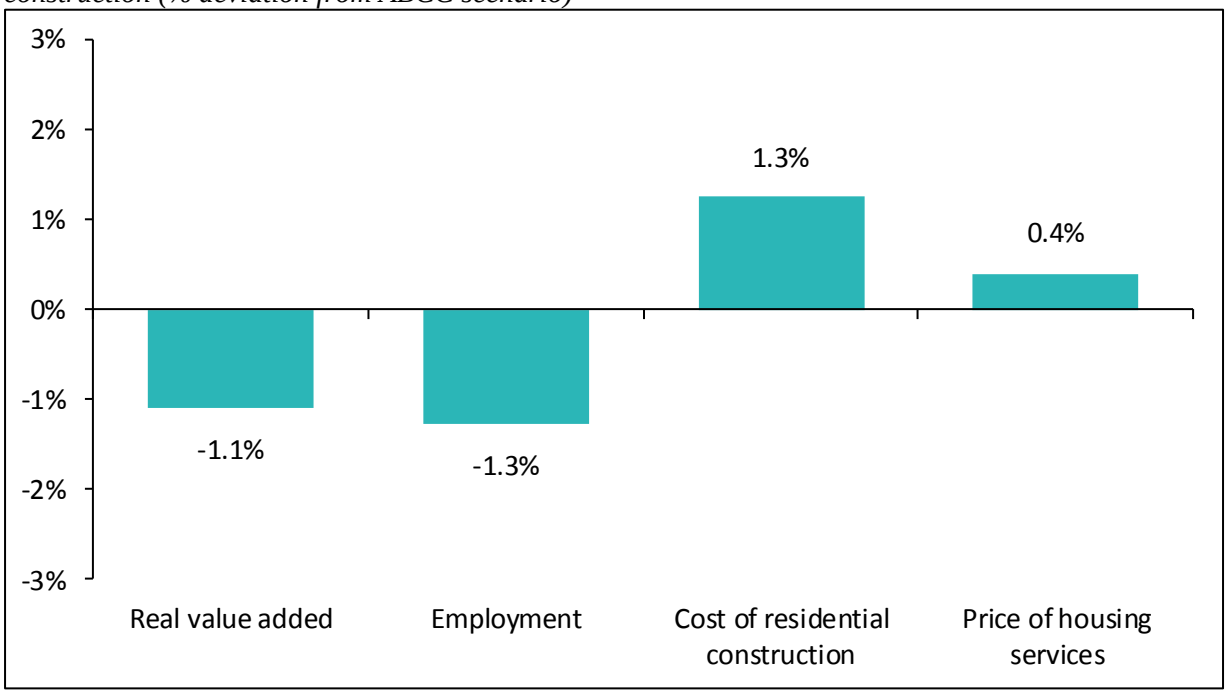
Similar to non-residential building construction, this reduction in labour efficiency leads to an increase in engineering construction costs of 2.7 per cent. As noted earlier, higher engineering construction costs, combined with higher non-residential building construction costs, increase the overall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

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

Residential building

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

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



Source: the Independent CGE model simulations

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

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

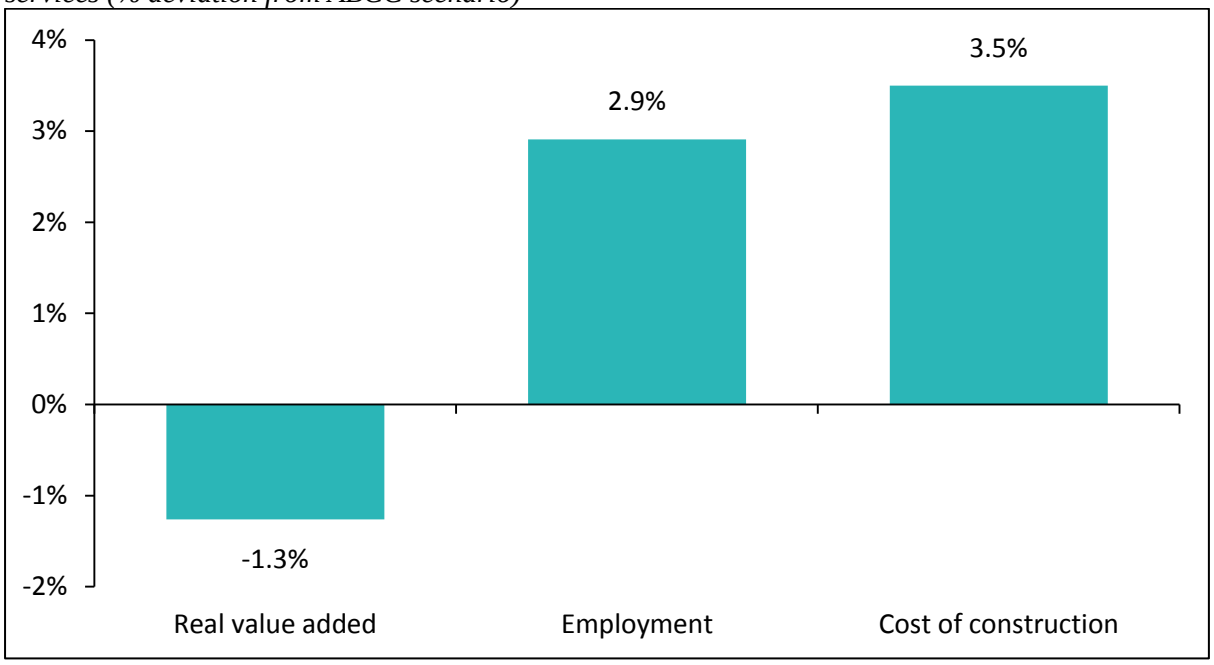
Interestingly, unlike for non-residential construction, where there are employment gains, for residential building there is an employment loss. As discussed above, large productivity losses in non-residential construction (including both non-residential building and engineering construction) increase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

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

Construction services

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

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



Source: the Independent CGE model simulations

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

Total construction industry

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

- 2.3 per cent loss for non-residential building;

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

5.2 Wider industry effects

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

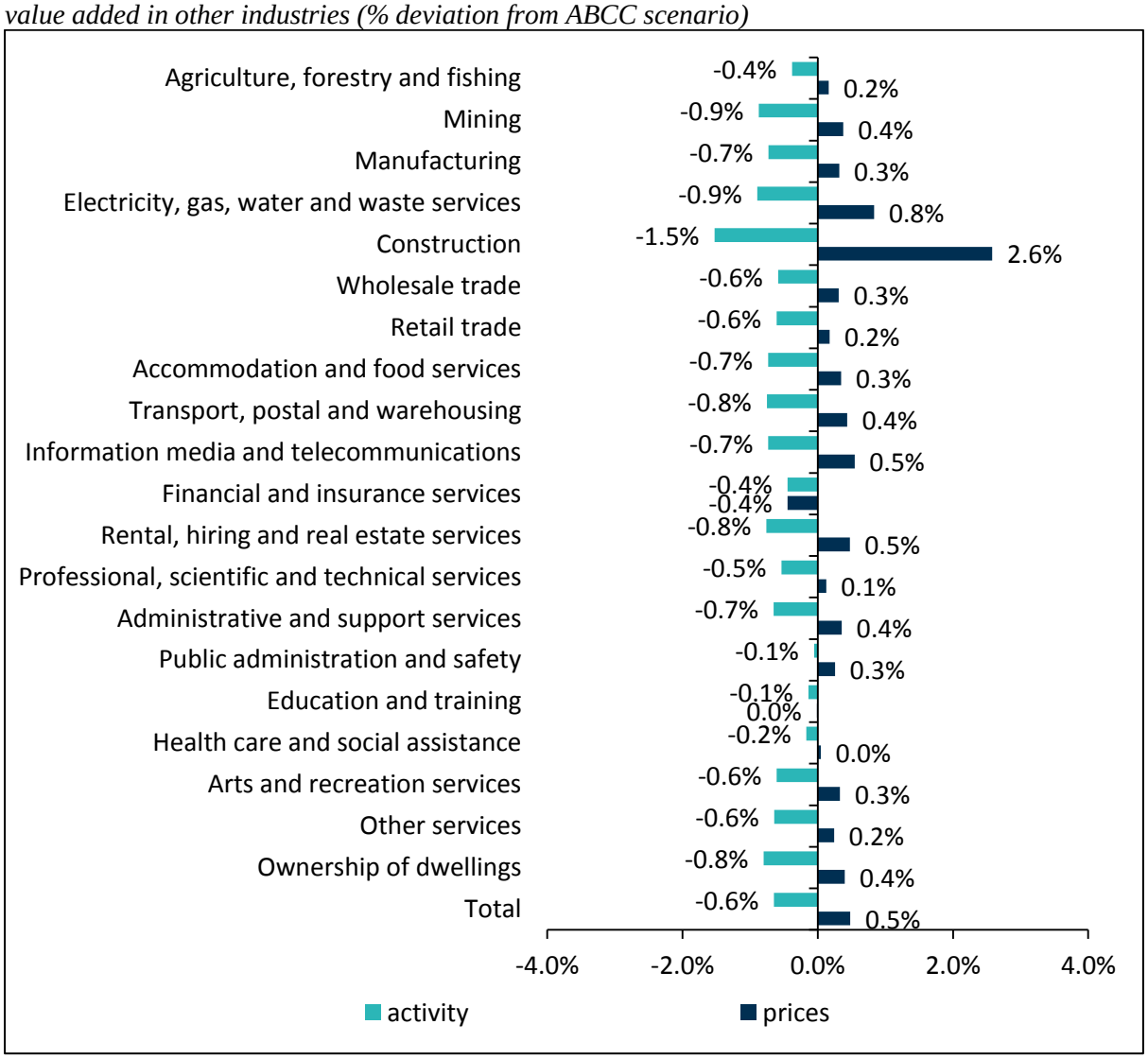
As discussed in Section 5.1, lower labour productivity flows through to raise the cost of dwellings by around 0.4 per cent (also shown in Chart 5.5). This leads to a long-term reduction in the level of demand for housing services ("ownership of dwellings") of 0.8 per cent, relative to what it would be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

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

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

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

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



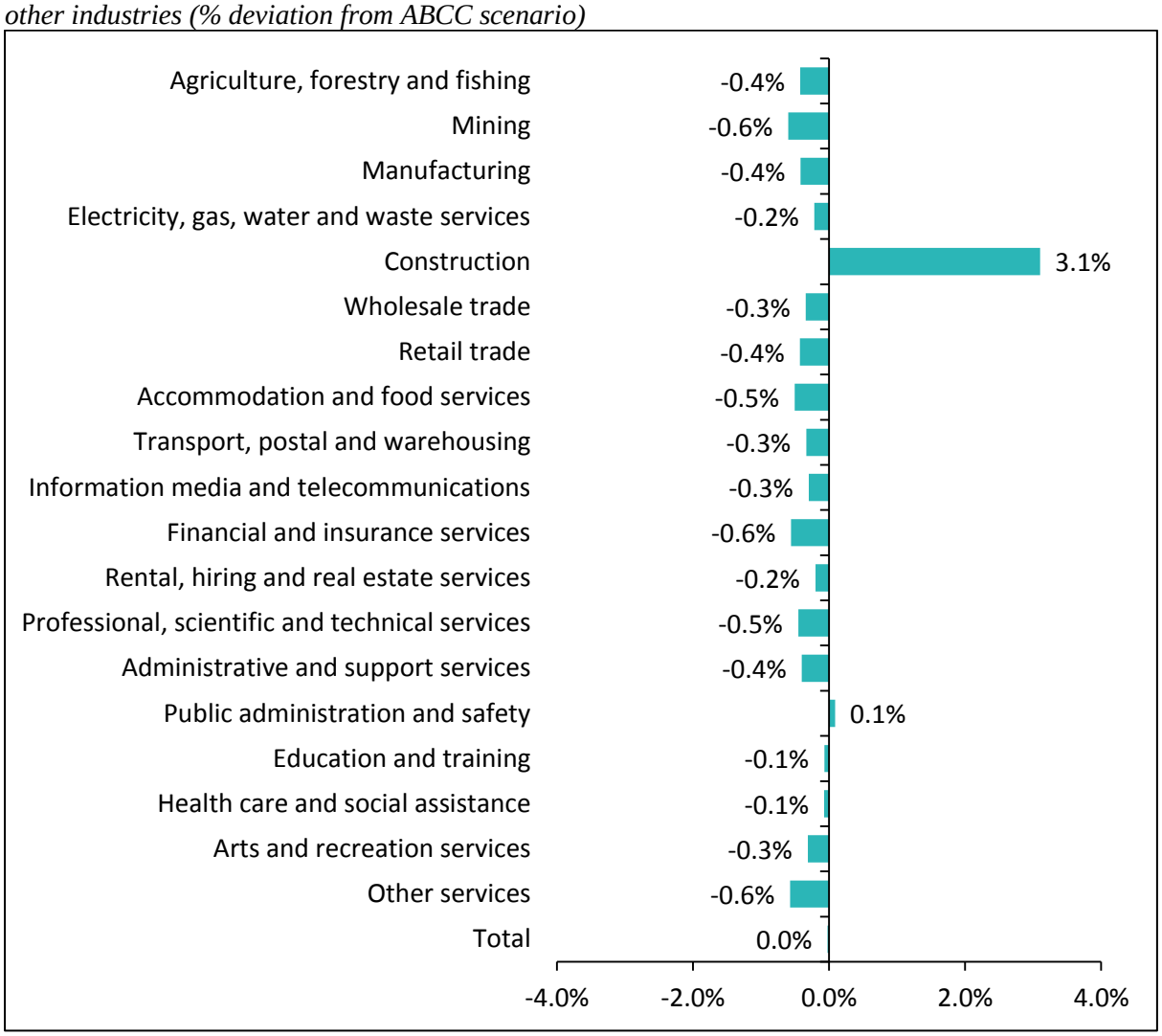
Source: the Independent CGE simulations

Chart 5.6 shows the pattern of industry job shifting induced by lower productivity in the construction sector. While employment in construction increases by 3.1 per cent, the effect of this on national employment is offset by employment losses in other industries. The biggest reductions in employment are in the industries of mining, other services and finance and insurance services (of 0.6 per cent in each case). This is a direct effect of the lower production levels in these industries.

As discussed in Section 5.1, employment in the construction industry itself is expected to be higher than otherwise, with the positive labour *dis*-saving effect only partly offset by the negative output and substitution effects in this industry. A minor increase is also expected in employment in the public administration and safety industry as government substitute towards labour as capital has become relatively more expensive.

Chart 5.6 also shows that, overall, there is no change in the level of employment in the economy. As explained in Section 3.4, national unemployment is not affected in the long-term because wage adjustments allow the labour market to clear.

Chart 5.6. Effects of less productive workplace practices during the FWBC era on employment in other industries (% deviation from ABCC scenario)



Source: the Independent CGE simulations

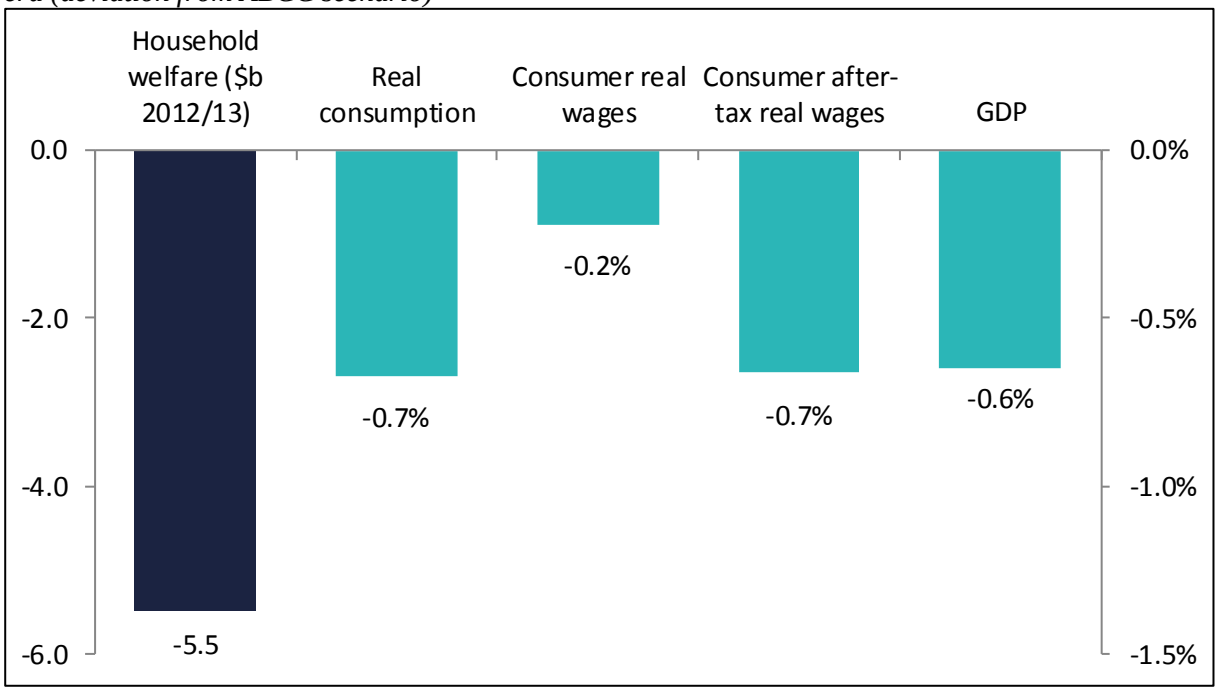
5.3 National Macroeconomic effects

As explained in the previous sections, lower productivity in the construction industry leads to higher construction costs and prices. This flows through to higher production costs across the economy, because all industries are reliant on construction to some extent as part of their business investment. As shown in Chart 5.5, the average increase in production costs is reflected in a rise in the economy-wide price of production by 0.5 per cent.

This cost increase is borne across the economy, as both the private and government sectors are significant users of commercial building or engineering construction. Importantly, consumers lose out through a fall in their real after-tax wage. This fall is distributed through two channels, a reduction in the real wage and increases to personal income tax rates.

In the private sector, the cost increases to each industry from higher costs for buildings and engineering construction flows through to households in the form of higher consumer prices. This is reflected in the 0.2 per cent lower consumer real wages seen in Chart 5.7.

Chart 5.7. National macro-economic effects of less productive workplace practices during the FWBC era (deviation from ABCC scenario)



Source: the Independent CGE model simulations

In the government sector, higher construction costs mean that the same level of public investment in schools, hospitals, roads and other infrastructure can now only be provided at a higher cost. This sees the government's budget position deteriorate, and it is assumed this is passed on to households in the form of higher personal income tax rates, which is the model's swing fiscal policy instrument, as discussed in section 3.4. This tax hike adds to the reduction in the consumer real wage from 0.2 per cent on a pre-tax basis, to 0.7 per cent on a post-tax basis, as seen in Chart 5.7.

In short, there is a fall in the real consumer after-tax wage, because labour in the construction industry has become less productive as a result of replacing the ABCC with the FWBC, and this productivity loss flows through to the wider economy and ultimately to consumers.

Chart 5.7 also shows the effects of lower construction productivity on other economy-wide indicators. The fall of 0.7 per cent in consumer real after-tax wages leads to a loss in real private consumption of 0.7 per cent. That is, a lower real wage leads to lower living standards.

This loss in living standards is more rigorously measured as an annual loss in consumer welfare. The Independent CGE model provides estimates of the change in annual economic welfare by using the equivalent variation measure from welfare economics. This rigorously measures the loss in real consumption. Chart 5.7 shows that lower construction productivity leads to a fall in consumer living standards (the annual economic welfare loss) of $5.5 billion in current (2012/13) dollars.

Chart 5.7 also shows a 0.6 per cent reduction in the level of GDP in the long-term, relative to what it otherwise would have been if the ABCC had not been replaced by the FWBC. This loss was reported earlier in Chart 5.5 as the loss in real value added for all industries added together. Activity losses for individual industries can be seen in the same chart.

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Appendix A: Independent CGE Model

Computable General Equilibrium (CGE) models provide a powerful tool for simulating the economic impacts of changes in government economic policies, industry developments, and the world economy. They show impacts on economic activity, employment, trade and investment at the level of individual industries, impacts on households and impacts on the economy as a whole.

The Independent CGE Model is Independent Economics' CGE model of the Australian economy, first developed in early 2012. It includes a number of notable features that set it apart from other models of the Australian economy.

- The model uses recent data from the Australian Bureau of Statistics (ABS). The starting point was calibrating the model to the 2007/08 Input-Output (IO) tables from the ABS, which were released in late 2011. The model is then uprated in the baseline scenario to a normalised version of the Australian economy in 2012/13. This includes allowing for growth in wages, prices, productivity and employment from 2007/08 to 2012/13, as well as normalised commodity prices.

- The model is based on the most up-to-date ABS industry classification, ANZSIC 2006, which replaces ANZSIC 1993. The 111 industries originally in the ABS data have been extended so that the model distinguishes 120 industries.

- The model incorporates a sophisticated modelling of production in each industry. Production in a standard CGE involves at least three factors of production - labour, capital and intermediate inputs. The Independent CGE model extends this to distinguish 43 types of labour, nine types of capital, land and natural resources. The model also allows for different degrees of substitutability between these different inputs.

- The model provides a valid measure of changes in consumer welfare or living standards based on the equivalent variation, so that policy changes can be correctly evaluated in terms of the public interest.

This appendix explains the main features of the Independent CGE Model, starting with its general features, which are common to most long-run CGE models. Then, the overall structure of the model is described, including the different sources of supply and the end users in the model. Following this, the behaviour of each of the agents in the model is outlined – industries, households, government and then the foreign sector. The final section explains the baseline scenario and validation procedures undertaken in ensuring that the model meets high professional standards.

A.1 General features

The Independent CGE Model makes a number of general assumptions that are consistent with its long-term time horizon. Many of these features are shared with other long-run CGE models.

Long-term model

The Independent CGE Model is a long-term model, meaning that results refer to the ongoing effects on the economy after it has fully adjusted to economic shocks. In keeping with this, all markets are assumed to have reached equilibrium. This includes key markets such as the labour market, where the real wage adjusts so that labour demand from industries is equal to labour supply from households. In addition, the behaviour of households and government is consistent with the inter-temporal budget constraints that they face. This involves levels of household saving and foreign capital inflow that are consistent with stocks of assets growing at the same rate as real GDP.

The long-term time horizon is fitting because economic policies should be judged against their lasting effects on the economy, not just their effects in the first one or two years.

Optimising behaviour

Industries and households in the Independent CGE Model choose the best possible outcome, while still remaining within the constraints of their budgets.

- **Profit maximisation**: the representative business in each industry chooses how to produce (with a mix of primary factors and intermediate inputs) and how much to produce to maximise its profit subject to the prices of its inputs and outputs.
- **Utility maximisation**: A representative household chooses their consumption levels of leisure and each of the 120 goods and services in a way that maximises their well-being (or utility), subject to a budget constraint.

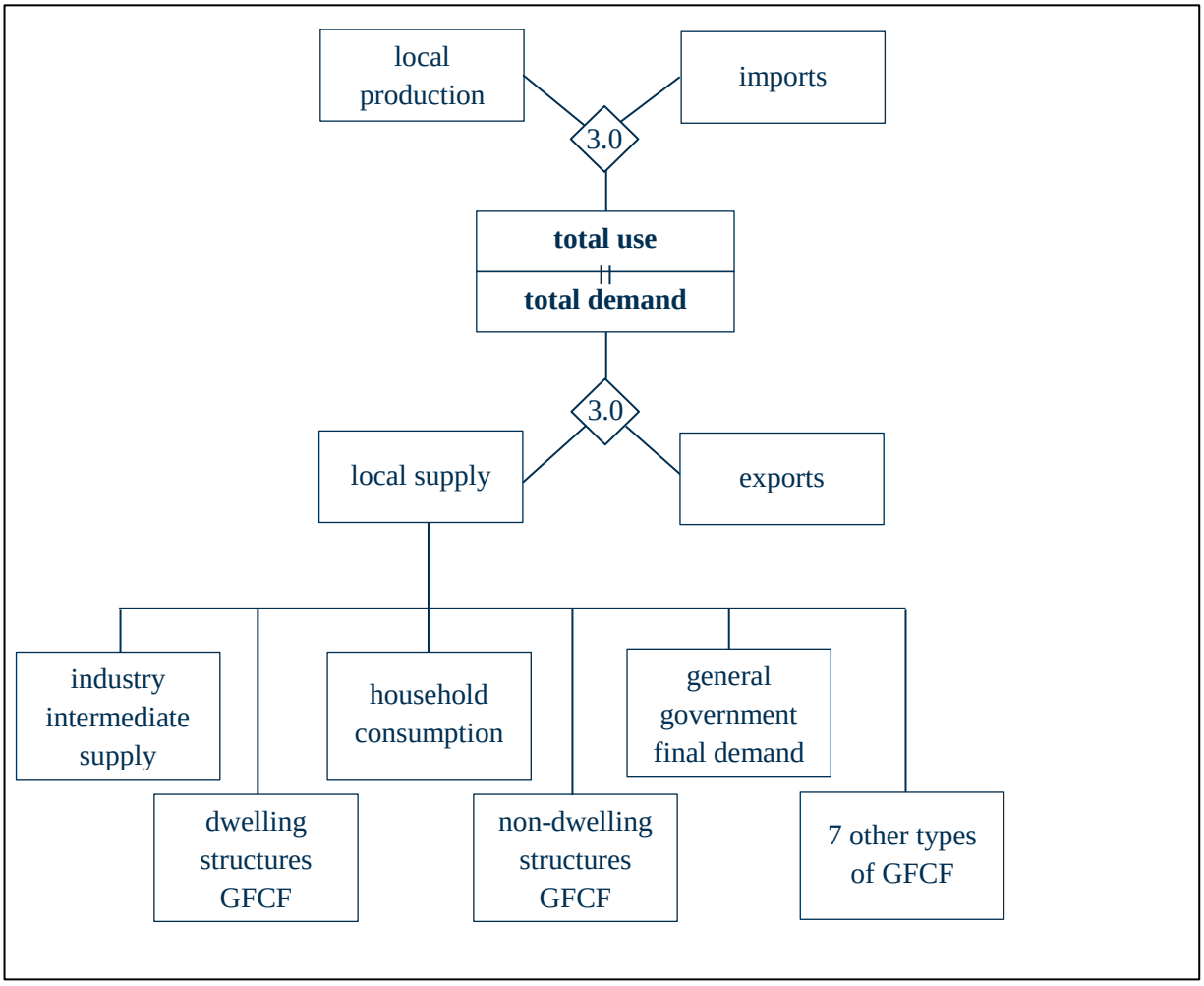
Budget constraints

In a sustainable equilibrium, governments and households must meet their budget constraints. For simplicity, we assume that the government budget is balanced in the long run. Given its expenditure requirement, the government chooses its level of taxation consistent with achieving this outcome. In the private sector, a sustainable outcome is one in which household saving is sufficient to generate growth in household assets in line with growth in real GDP.

A.2 Trade and demand

This section discusses the overall structure of the Independent CGE Model. The connection between total use and total demand is shown in Diagram A.1.

Diagram A.1 Trade and demand for each product



Note: GFCF is Gross Fixed Capital Formation, or investment.

As shown in Diagram A.1, total supply in the Independent CGE Model is made up of locally produced and imported varieties of each good. Local production competes with imports so that if imports become cheaper relative to the locally-produced equivalent, domestic users will purchase more imports and less locally produced goods and services. This substitution is modelled using a Constant Elasticity of Substitution (CES) function, where the elasticity of substitution has been set at 3.0. That is, if the price of imports relative to local production is 1 per cent lower, then the quantity used of imports relative to local production will be 3.0 per cent higher.

The value of 3.0 for the elasticity has been chosen after considering the economic literature for Australia. For example, Zhang and Verikios have estimated the elasticity of substitution between locally produced and imported goods for a number of countries, including Australia, using data from 1997, 1998 and 2002. Their estimates for this elasticity in industries for which Australia is a large importer suggest an overall substitutability of around 3.0.

In each industry, the representative firm chooses the amount to supply to the export market and the amount to supply to the domestic market. Some CGE models unrealistically assume that a firm can switch between supplying the domestic and export markets without incurring a cost. However, there are a number of inherent costs involved in export activities, such as the costs of establishing and maintaining a client base in foreign countries and/or of producing goods that satisfy foreign tastes. In line with this, the Independent CGE model takes into account that firms cannot costlessly switch between supplying the domestic and export markets. It does this using a constant elasticity of transformation (CET) function, with an elasticity of 3.0. That is, if the price received for exports relative to the price received in the domestic market is 1 per cent higher, then the quantity that firms supply to the export market relative to the quantity supplied to the domestic market will be 3.0 per cent higher. This represents a relatively high level of sensitivity to export prices, but is still less sensitive than models that assume that exports and domestic supply are perfect transformates.

Total supply must equal total demand in a long-run equilibrium. In the Independent CGE Model, local production and imports supply the 13 different categories of demand that are shown in Diagram A.1.

- Industries demand intermediate inputs.
- Industries also make decisions about their nine different types of capital– including stocks of dwellings structures, non-dwellings structures and seven other types of produced capital. In turn, these capital stocks determine the gross fixed capital formation (GFCF or investment) required to maintain sustainable growth in these assets.
- Households demand consumption goods and services.
- The general government sector demands final goods and services on behalf of households.
- The foreign sector demands exports from Australia.

The following sections describe the behaviour of each of these agents in the model – industries, households, the government and the foreign sector.

A.3 Industry production

Production in each of the 120 industries in the Independent CGE Model is modelled in a sophisticated way that identifies a large set of inputs used by industries.

It is a standard practice in a CGE model to at least distinguish between labour and capital as primary factors. Krusell et al. (1997) go further and distinguish between capital structures and capital equipment, as well as between skilled labour and unskilled labour. In the Independent CGE model, we adopt their idea of distinguishing between capital equipment and capital structures. The model also identifies industry use of labour by skill level and occupation.

Fraser and Waschik (2010) note that the GTAP7 Dataset distinguishes the primary factors of land, skilled labour, unskilled labour, capital and natural resources. Hertel et al. (2008) discuss land use in CGE models. Land and natural resources can be regarded as location-specific fixed factors which earn economic rents, setting them apart from mobile factors such as labour and capital. In each

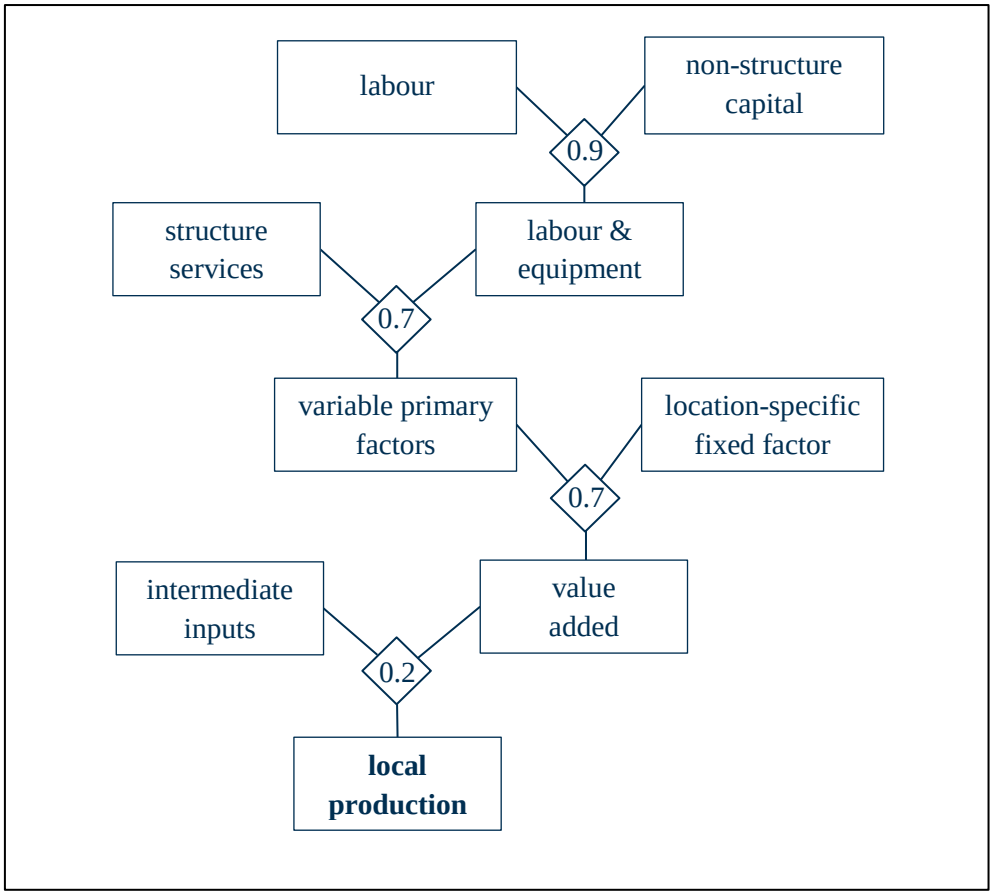
industry in the Independent CGE model, there are three fixed factors to capture economic rents. These fixed factors are land and two industry-specific fixed factors, one of which is fixed in supply in Australia (location specific) and the other which is fixed in supply globally (or firm-specific).

Each industry other than Dwelling Services in the Independent CGE model can use 43 different types of labour, nine types of produced capital and three fixed factors. It combines these primary factors with intermediate inputs purchased from other industries. The structure of the production decisions is shown in Diagram A.2.

Each industry can change the mix of primary factors that it uses as their relative prices change. Some types of primary factors are more substitutable with other factors, and other types of primary factors are less substitutable. To reflect this, the nesting structure of production decisions in the Independent CGE Model is set up in a way that allows for a high degree of flexibility.

Diagram A.2 below shows an overview of the production technology used by firms in each industry in the Independent CGE model. The full production technology is illustrated in the set of three diagrams including Diagram A.2 below, along with Diagrams A.3, A.4 and A.5 which are presented later.

Diagram A.2 Production in each industry



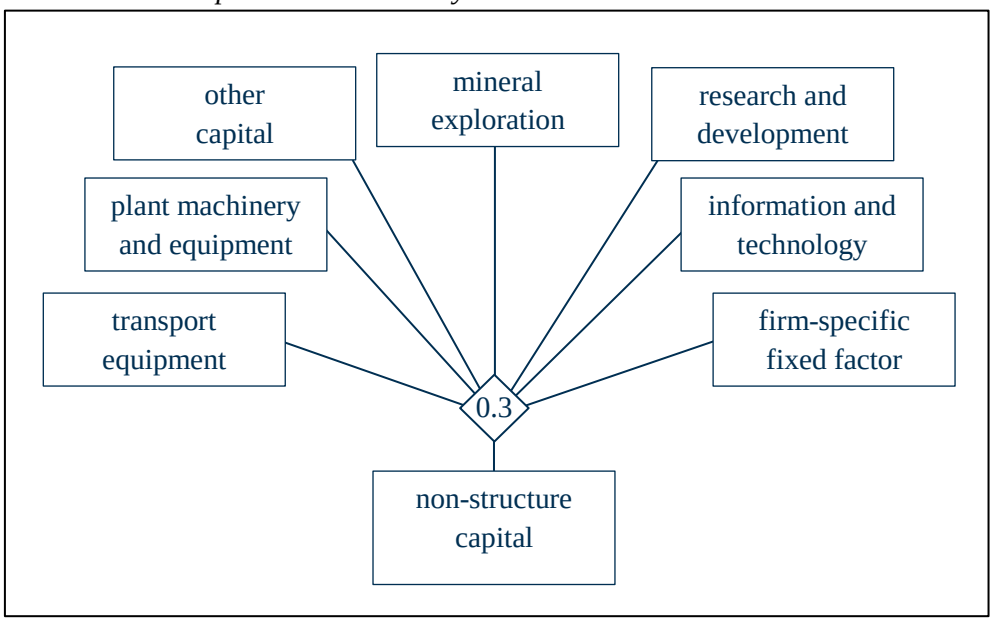
Labour and non-structure capital are modelled to be relatively substitutable with each other. As the non-structure capital bundle becomes more expensive, an industry may choose to use more labour instead. The elasticity of substitution for labour and non-structure capital measures the per cent increase in the ratio of labour to non-structure capital for a 1 per cent decrease in the ratio of their

prices. Gunning et al. (2007) review the CGE modelling literature, showing that the consensus for this elasticity appears to be between 0.7 and 1.0. Following this, we set the elasticity of substitution between labour and non-structure capital at 0.9.

A.3.1 Non-structure Capital

Non-structure capital is itself a combination of seven different types of capital, as shown in Diagram A.3. The representative firm in each industry chooses a different combination of the seven types of non-structure capital, and substitutes between each type as their relative prices change. The elasticity of substitution is set relatively low, at 0.3, reflecting the limited substitution possibilities between the different capital types. This implies that, when the cost of one capital type is higher by 1 per cent, relative to the overall cost of non-structure capital, firms will use 0.3 per cent less of this capital type, relative to their overall use of non-structure capital.

Diagram A.3 Non-structure capital in each industry



Of the seven different types of non-structure capital, six are produced (all types except the firm-specific fixed factor). Each of these types of capital is produced using different inputs. Firms can vary their use of each produced capital asset, through investment, as its return changes. Firms are able to attract funds to invest in the stock of each type capital as long as the return that can be earned is at least as high as the return that could be earned on the global market.

However, the other type of non-structure capital, the firm-specific fixed-factor, is not produced. Income from the firm-specific fixed factor reflects the rents generated by intangible assets such as brand names, patents and market power. This firm-specific fixed factor is assumed to be owned by multi-national firms, who can allocate the factor between its Australian and international operations. Although the amount of this factor globally available to multinational firms is fixed, firms can choose to change the amount that they use within Australia to generate rents. Firms will allocate their fixed factor to Australia as long as the after-tax rate of return earned in Australia is at least as high as the return that could be earned in the rest of the world.

A.3.2 Labour

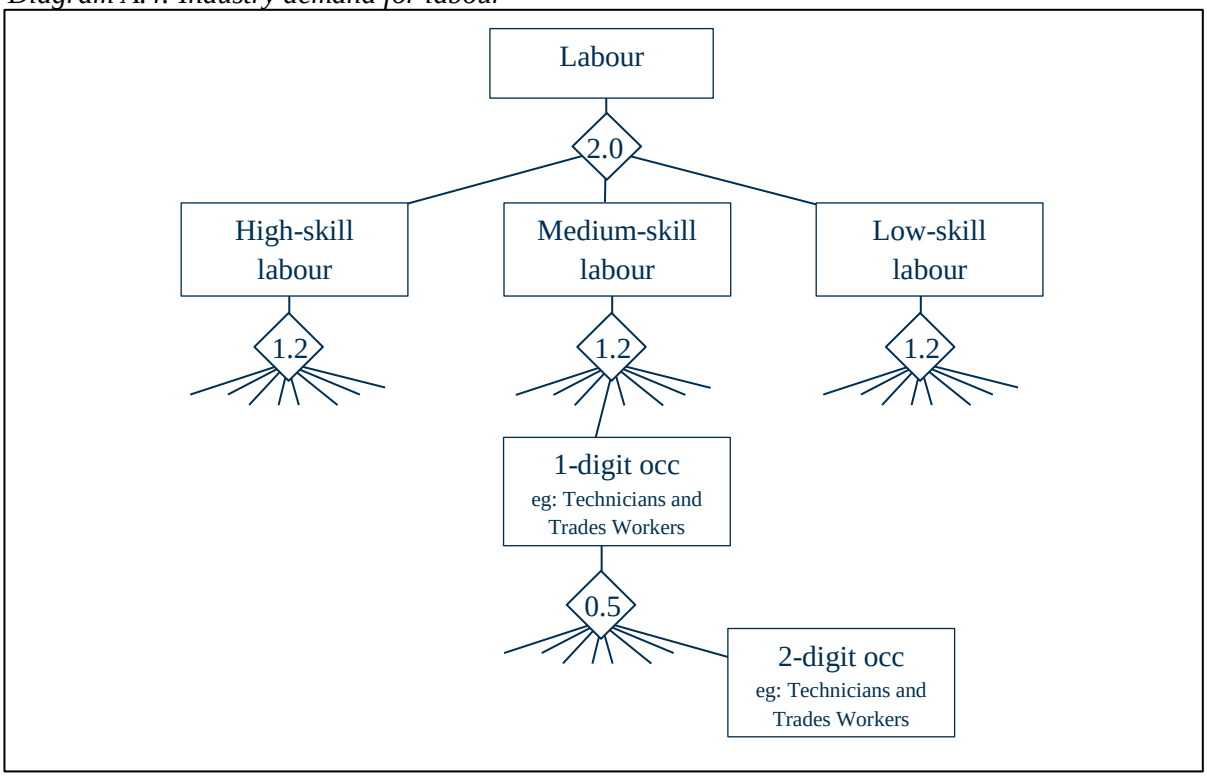
The Independent CGE model includes detailed modelling of the labour market. Specifically, it distinguishes industry use of labour according to 43 different occupations. The modelling approach in the Independent CGE model takes into account three main features of the labour market.

- Firstly, different industries demand different kinds of labour, depending on their skill level and occupation. For example, the Automotive and Engineering Trades Workers make up a relatively large share of employment in manufacturing industries, compared to their share of employment in the finance industry.
- Secondly, to a certain extent, industries are able to substitute between the types of labour that they use.
- Thirdly, through training and education (including formal and informal learning), individuals are able to adjust their skills and occupations in response to industry demand.

The initial pattern of employment in each industry is based on a number of ABS data sources showing employment by occupation by industry. Specifically, detailed data from the recent census is used to enhance data from the Labour Force Survey to estimate the pattern of employment in each of the 120 industries in the model.

The Independent CGE model uses a three-tiered system to model labour demand. This is represented in the following diagram, and then discussed below.

Diagram A.4: Industry demand for labour



Generally, the modelling of industry demand for each occupation takes into account that while industries can substitute relatively easily between broad skill levels, they are less able to substitute

between more detailed types of occupations. In addition, the parameters used in the model take into account that the occupational pattern of labour supply can respond to labour demand from industry. This is discussed below.

As shown in Diagram A.4 above, an industry first distinguishes between the different skill levels that it requires. These skill levels are defined as broad groupings of the 1-digit ANZSCO occupations.

- **High Skill Labour**: Managers and Professionals
- **Medium Skill Labour**: Technicians and Trades Workers, Community and Personal Service Workers, and Clerical and Administrative workers
- **Low Skill Labour**: Sales Workers, Machinery Operators and Drivers and Labourers

The econometric literature provides evidence that the elasticity of substitution between broad skill categories is relatively high. If it is cost-effective to do so, firms can substitute low, medium or high skilled labour relatively easily. This does not imply that the workers need to be substituted one for one. For example, the work of a team of Low Skill Workers might instead be undertaken by a smaller team of Medium Skill Workers. A firm's choice between lower and higher skilled workers will depend on the wages paid to each type of worker, and their relative productivities. However, industries will always need to use some combination of the three types of workers. The elasticity of substitution for the broad skill types is set at 2.0 – that is if the wage for high skill labour relative to the other types of labour is higher by 1 per cent, then demand for high skill labour is 2.0 per cent lower.

This level of substitutability is slightly higher than estimates from Katz and Murphy (1992) and Acemoglu and Autor (2010). This is to allow for flexibility in the supply side of the labour market. For example, if industries increase their demand for high-skilled labour, then households are likely to respond by undertaking more education or training so that they can supply this kind of labour.

After the amount of high, medium and low skilled labour is chosen, industries then choose the amount of labour from each broad (1-digit) occupation to employ. To recognise that industries are less able to substitute workers at this 1-digit occupational level, a lower elasticity of substitution is used, of 1.2. For example, if the wage for Clerical and Administrative workers relative to other medium skill occupations is higher by 1 per cent, then the demand for Clerical and Administrative workers relative to other medium skill occupations is lower by 1.2 per cent.

This elasticity is set relatively high to mimic the responsiveness of labour supply to changes in industry demand. Supply side responses are likely to have a relatively large effect at this level, because retraining from a Clerical and Administrative worker to a Community and Personal Service worker in response to industry demand is likely to be easier than retraining from a medium skill worker to a high skill worker.

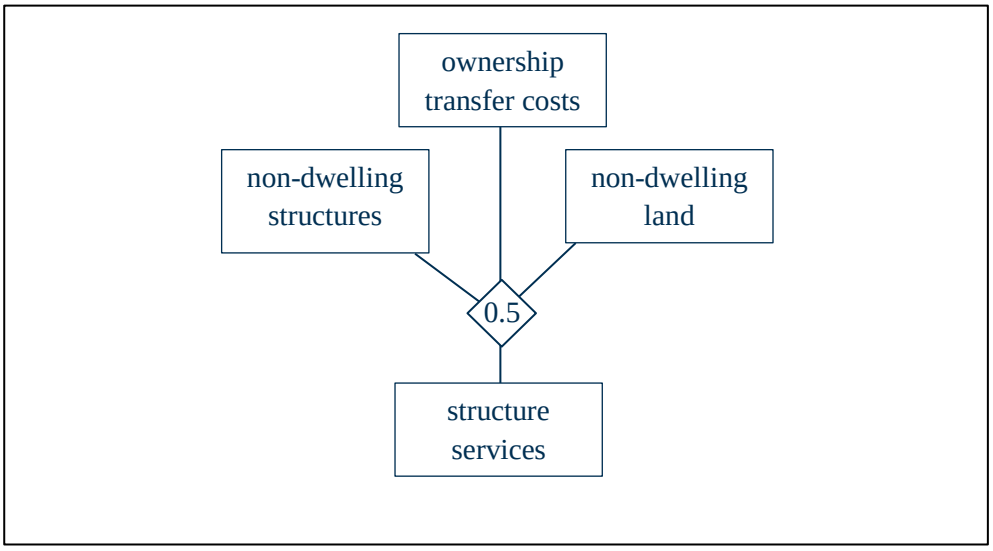
Finally, industries distinguish between more specialised fields of skills that it requires, as represented by the 2-digit ANZSCO occupations. These 43 different occupations represent skills which are closely associated with work in particular industries. The modelling takes into account that it is relatively difficult for firm's to substitute between different types of labour at this detailed occupational level. Therefore, the elasticity of substitution between these one digit occupations is set lower, at 0.5.

Both labour demand and labour supply have an influence on the wage paid to each occupation. The wage is determined in the labour markets in the Independent CGE model. If demand for a particular occupation is larger than supply, then the wage will be bid upwards. Likewise, if demand for a particular occupation is smaller than supply, then the wage will be bid downwards. The wage continues to adjust until demand for labour equals the supply of labour in the long run.

A.3.3 Structure services

Diagram A.5 shows that structure services is itself modelled as a bundle of different factors of production. Firms can substitute between using non-dwelling structures (which includes commercial buildings and engineering structures such as roads and bridges), non-dwelling land and ownership transfer costs. As shown in Diagram A.5, the elasticity of substitution between non-dwelling structures, non-dwelling land and ownership transfer costs is 0.5. This is based on the literature survey and assessment of Zhao (2010, p. 31-32, 51).

Diagram A.5 Structure Services in each industry (except Dwellings Services)



The amount of non-dwelling structures and ownership transfer costs used by an industry can be varied, through investment in the capital stock. Firms are able to attract funds to invest in the capital stock as long as the return that can be earned is at least as high as the return that could be earned on the global market. The amount of non-dwelling land used by any particular industry can also be varied. However, the overall quantity of land available to the whole economy is fixed. Non-dwelling land is allocated to its most productive use through a market, where the rental price of land adjusts to reflect its marginal product.

A.3.4 Location-specific fixed factors

The next tier in each industry's production decision models the choice between variable primary factors and location-specific fixed factors, as shown in Diagram A.2. Variable primary factors are inputs for which firms vary their level of use over the long-run – labour & equipment and structure services. On the other hand, location-specific fixed factors are inputs that are fixed in supply to any particular industry, such as natural resources. Each industry uses a different type of location-specific fixed factor. For example, each industry within the mining sector will use a different type of natural resource – the coal industry requires coal resources and the iron-ore industry requires iron-ore resources. In the banking sector, a location-specific fixed factor generates rents associated with the large networks required. These fixed factors generate location-specific economic rents, which are unable to be obtained unless they are exploited within Australia. Fixed factors are used in combination with variable primary factors, where the elasticity of substitution is set at 0.7, similar to the substitutability between structure services and labour & equipment.

A.3.5 Intermediate inputs

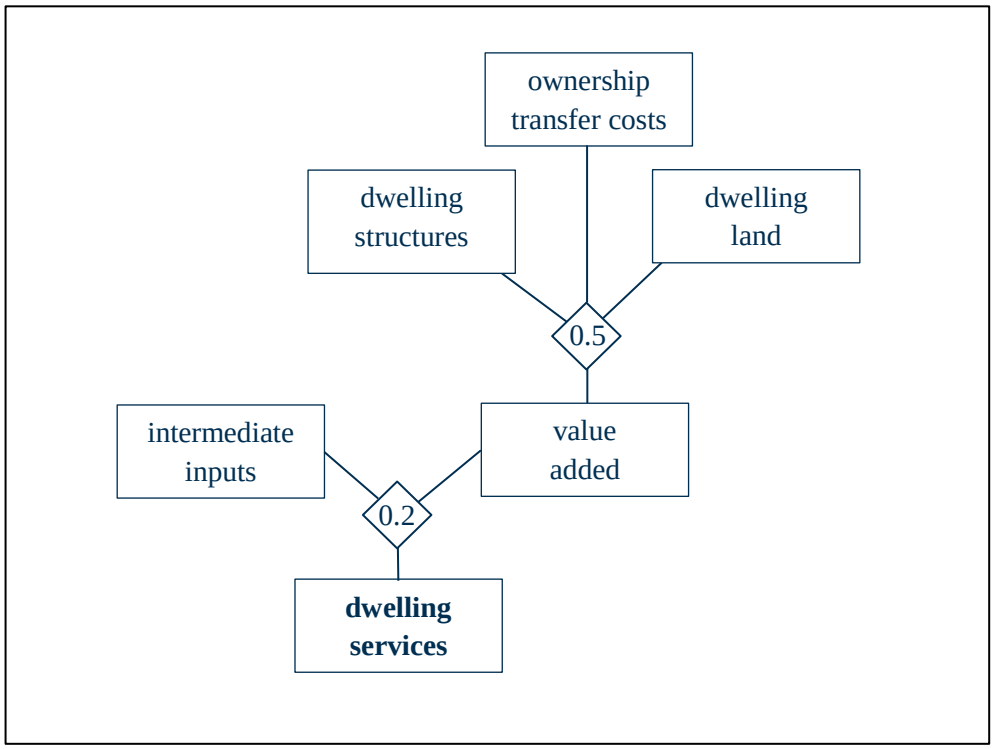
Finally, each industry combines the bundle of their primary factors, or value added, with intermediate inputs, which are the goods and services it purchases from other industries. Industries are assumed to use intermediate inputs and value added in variable proportions, but with a low elasticity of substitution of 0.2, as shown in Diagram A.2.

A.3.6 Dwellings Services

The Dwellings Services sector in the Independent CGE Model follows a similar structure as other industries, but uses primary factors specific to the industry – dwelling structures and dwelling land. The production technology for the Dwellings sector is shown in Diagram A.6 below, which reflects the more limited range of inputs that are used in this sector.

The Dwelling Services industry uses inputs which are similar to the factors of production used to create structure services in the other industries in the Independent CGE model. However, the structures and land used in the Dwelling services industry are different to those used in other industries. Specifically, dwelling structures are produced by the Residential Construction industry, whereas the non-dwelling structures used by other industries are produced by another two industries – the Non-residential Building Construction industry and the Heavy and Civil Engineering Construction industry. In addition, the land used by the Dwelling services industry can only be used within this industry, and is not available to other industries. This means that changes affecting inputs into dwelling services can be modelled separately to changes that affect the rest of the economy.

Diagram A.6 Production of Dwelling Services



As shown in Diagram A.6, the elasticity of substitution between dwelling structures, dwelling land and ownership transfer costs (from moving house) is 0.5. This is based on the literature survey and assessment of Zhao (2010, p. 31-32, 51).

A.4 Households

Households in the Independent CGE model derive well-being (or utility) from leisure and their consumption of the 120 different goods and services included in the model. However, as described in Section 2, households cannot spend more than their income. After taking into account tax and saving at a sustainable rate, households divide their full income between leisure and consumption, and then divide their consumption between the 120 goods and services. They do so in a way that maximises their utility. This behaviour is explained below, and illustrated in Diagram A.7.

Household full income is the amount of income that they would earn if they spent all of their available time working, and took no leisure. Full income is made up of the following components.

- Full labour income is the after-tax labour income that would be earned if households spent all of their time working. The wage is determined in the labour market, where it adjusts so that the demand for labour equals the amount supplied in the long run. Households value their time at the real after-tax wage that could be earned. The labour income tax rate is set by government policy, and all other taxes are built into the price of goods and services.

- Households generate income from owning a certain amount of the capital and fixed factor assets identified in the model. These include: the six types of capital that make up non-structure capital (not including firm-specific fixed factors), dwellings and non-dwellings

structures, ownership transfer costs, land and location-specific fixed factors. Households are able to earn the rates of return demanded by global capital markets on these assets.

- Households also receive income through government transfers, including cash benefits and transfers related to franking credits.

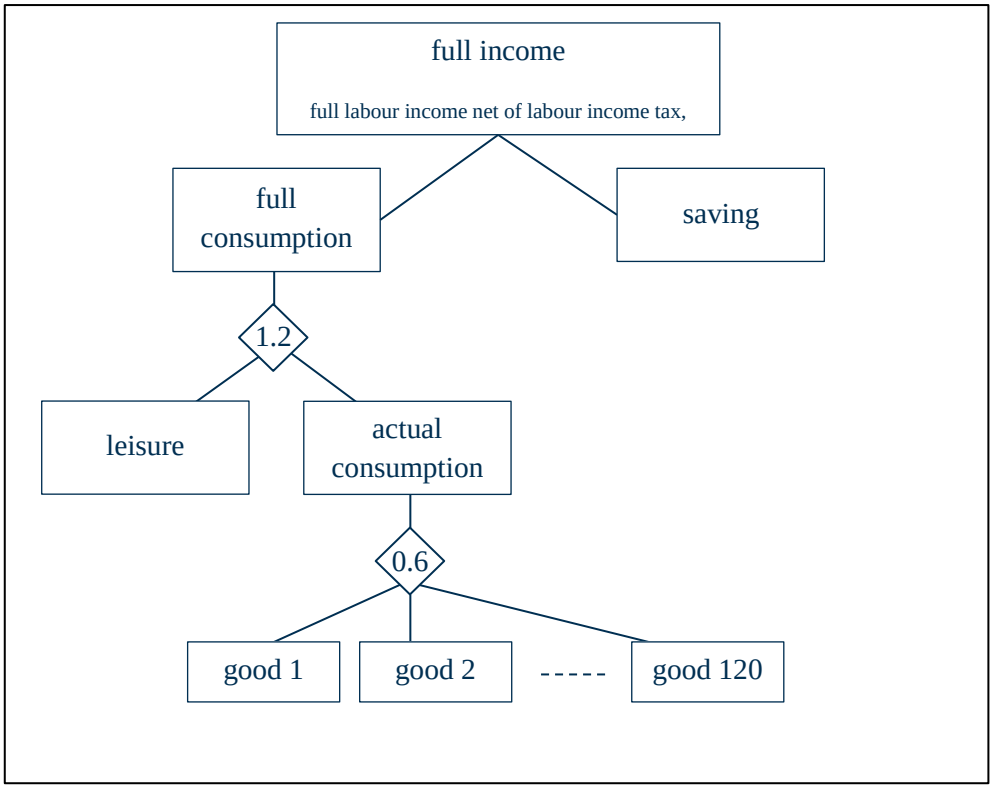
Household saving must be enough to maintain sustainable growth in the assets owned by households i.e. the domestically-owned capital stock. This sustainable rate of growth is the same as the long-run real GDP growth rate, which is consistent with the long-run time horizon of the Independent CGE model. After saving enough to cover this growth in their capital stock, the remainder of full income is spent on 'full consumption' – which includes the consumption of leisure and of goods and services.

The Independent CGE model uses a nested Constant Elasticity of Substitution (CES) utility function to describe the utility that households derive from leisure and their consumption bundle. This means that households make price-sensitive decisions in two tiers. The first tier describes their choice between leisure and consumption, and the second tier describes their choices about their mix of consumption goods and services. These two tiers are discussed below.

After meeting their savings target, households decide how much of their time to spend in leisure, and how much to spend working. The cost of taking leisure is the amount that would have been earned if the time were instead spent working – which is the real after-tax wage. If the real after-tax wage is higher, then the cost of taking leisure is higher, and households are expected to reduce their consumption of leisure and raise their labour supply. The parameters used in the Independent CGE model reflect an elasticity of labour supply similar to that used by de Mooij and Devereux (2011), of around 0.2. If the real after-tax wage increases by 1 per cent, then labour supply increases by 0.2 per cent. This outcome reflects the net impact of a higher wage on labour supply, through both the substitution effect (where a higher wage rate encourages households to take less leisure and supply more labour) and the income effect (where higher income levels encourage households to take more leisure and supply less labour). In the Independent CGE model, households substitute between leisure and consumption in the first tier of the nested CES utility function. An elasticity of substitution of 1.2 is used in this tier to implement the assumption that the uncompensated elasticity of labour supply is 0.2, as shown in Diagram A.7.

The amount that households spend on actual consumption is determined by the income generated from their chosen level of labour supply (net of labour income taxes), plus income from other sources and saving. As mentioned above, households make price-sensitive decisions about the goods and services they consume. If the price of one good becomes higher relative to the price of others, then households will substitute away from consuming that good. The elasticity of substitution governs how readily households would be willing to substitute between goods and services when their relative prices change. The elasticity of substitution in consumption in the Independent CGE Model is 0.6.

Diagram A.7 Household choices and utility



A.4.1 Measuring household living standards

Since household decisions are modelled using a consistent utility function, the Independent CGE model is able to provide valid measures of changes in consumer welfare, or living standards, from economic shocks or policy changes. The measure used is the equivalent variation, from welfare economics. This is the income transfer that would need to be given to households before the economic shock or policy change to enable the same level of utility as they would have after the change.

A.5 Government

Given the policy choices of the government, it will have certain expenditure requirements. Therefore, it is assumed that real government expenditure is not influenced by changes in the economy – that is real expenditure is exogenous. However, the model user can specify a change in government spending policies. For example, government spending on Defence-specific industries can be increased. In addition, since only real government expenditure is exogenous, if prices change, then nominal government expenditure changes accordingly.

Cash benefits paid to households are an additional government expenditure. These cash benefits are modelled as lump-sum transfers to households which are proportional to labour income. Franking credits are also modelled as transfers to households. These are the credits that households receive against personal income tax payments because their income from owning assets has already been taxed through business income tax.

The government collects tax revenue to finance its expenditure. In the Independent CGE model, it collects indirect taxes, business income tax, labour income tax, mining royalties and mining resource rent tax.

In the long-run, the government must have a sustainable budget position. For simplicity, in the Independent CGE model it is assumed that the government has a balanced budget.

When an economic shock is applied to the model, the government's budget position is affected, as changes in economic activity and prices affect government expenditure requirements and tax collections. Therefore, a swing fiscal policy instrument must be nominated, which adjusts so that the budget is always in balance. In the Independent CGE Model, either the tax rate on labour income or cash benefits can be used for this purpose.

A.6 Foreign sector

The modelling of Australia's relationship with the foreign sector recognises Australia's position as a small economy. This is the case for both trade and capital flows, which are now considered in turn.

Australia is a price taker for imports, meaning that changes in the Australian economy do not influence the foreign-currency price of imports. Likewise, Australia is also close to being a price taker for exports, with a standard value for the export price elasticity of demand of -12. For the following industries, where Australia has some market power or product differentiation (e.g. tourism services) a lower value of -6 is used:

- Sheep, grains, beef, dairy;
- Coal;
- Iron ore;
- Accommodation;
- Food and beverage service;
- Air and space transport; and
- Education.

Under the small country assumption, Australia can access the world market for funds, so long as the rate of return that is achieved matches the given rate required on the world capital market. That is, the after tax required rate of return on capital is determined overseas and is not influenced by changes in the domestic economy.

Australian ownership of the capital stocks is determined by their initial asset holdings. As discussed in Section A.4, the rate of growth in Australian-owned assets is assumed to be fixed, at a rate that implies sustainable growth in the initial locally-owned asset stock. Since foreign investors are willing to invest funds as long as the rate of return is at a given level, any change in the capital stock is met by a change in foreign-owned capital.

Foreign ownership of the capital stock must also be in a sustainable long-run equilibrium. The annual inflow of investment funds, recorded on the capital account in the balance of payments, is an amount that ensures that the foreign-owned capital stock grows at a sustainable rate – the long-run rate of real GDP growth. The payments to service this borrowing, an outflow on the current account, is equal to the required return on the foreign-owned assets.

Together, the inflow on the capital account and the outflow on the current account imply a certain trade balance if external balance is to be achieved. Exchange rate adjustments ensure that this balance occurs.

A.7 Baseline scenario and validation

This section first explains the construction of the baseline scenario and then outlines the validation procedures undertaken in ensuring that the model is robust.

The model uses a variety of recent data, but the main source is the detailed Input-Output (IO) tables from the ABS, giving the model a detailed picture of the Australian economy. Specifically, the 2007/08 IO tables released in late 2011 are used, which means that the model also uses the contemporary ABS industry classification, ANZSIC 2006. The model is calibrated so that it exactly reproduces this 2007/08 data.

The next step is to simulate a baseline scenario for use as a point of reference. This involves two aspects, uprating the economy from 2007/08 to 2012/13 and normalising the economy to a sustainable position. That is, the baseline scenario provides a normalised, or sustainable, version of the 2012/13 economy.

Uprating the economy from 2007/08 to 2012/13 involves simulating the model after adjusting the model's inputs for the effects of economic developments from 2007/08 to 2012/13. This includes allowing for growth in wages, import prices, productivity and employment from 2007/08 to 2012/13.

Normalising the economy involves taking into account the differences between the structure of the economy in 2007/08, compared to an economy in a long-run sustainable equilibrium.

- In 2007/08 capital inflow was well above a sustainable level, as the share of foreign liabilities in the capital stock was on the rise. In the normalised economy, capital inflow is set at the sustainable level, so that foreign liabilities grow at the same rate as the economy. This external balance is achieved through flexible adjustment of the exchange rate, as described in section A.6.

- In 2007/08 business investment was well above a sustainable level (reaching a peak as a share of GDP), as capital-output ratios were on the rise. In the normalised economy, business investment is set so that the stocks of capital grow at the same rate as real GDP.

The model has also been tested to ensure that it observes a number of widely-accepted balance and neutrality properties for CGE models.

- GDP by expenditure (the sum of household consumption, gross fixed capital formation, general government final demand and exports, less imports) always equals GDP by income (the sum of value added across all industries). This is true for both nominal and real GDP in all simulations, which is a useful check on the consistency of the model's coding.

- Walras' Law states that if all but one market is in equilibrium, then the last market must also be in equilibrium. This is the case in the Independent CGE Model. All markets other than the labour market are in equilibrium because the model equations are set up to achieve this. On

the other hand, equilibrium in the labour market is not explicitly modelled. Rather, the balance between labour demand and supply is monitored in simulation results. Exact balance is always achieved, meaning that Walras' Law holds precisely, which is an important test of the internal consistency of a CGE model.

- The Independent CGE Model observes price neutrality. In all CGE models, one price must be fixed exogenously as the numeraire, to provide an anchor for the price level. This is because the price level is usually considered to be determined by monetary policy, which is outside the scope of a CGE model. Just as it is argued that the real economy should be neutral to monetary policy in the long run, real outcomes from CGE models should be unaffected by a shock to the level of the numeraire. The numeraire in the Independent CGE model is the wage. When it is increased by one per cent, all prices in the model increase by exactly one per cent, and all real variables are unaffected, in accordance with the expected price neutrality property.

- The Independent CGE Model also observes real neutrality. This means that when all of the exogenous real variables are one per cent higher, all of the endogenous real variables are also one per cent higher. The exogenous real variables in the Independent CGE Model are: employment; real general government final demand; the fixed factors available to each industry; the real assets owned by the household sector; and the size of the economy in the rest of the world.

Attachment B

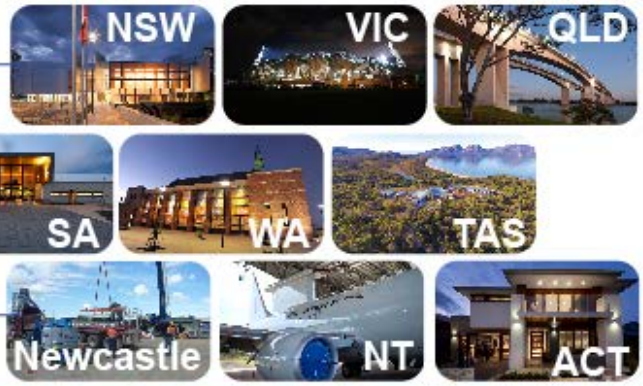
Master Builders Australia

Supplementary Submission to the Senate Standing Education and Employment Legislation Committee

The Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

27 November 2013

MASTER BUILDERS AUSTRALIA



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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. Over 122 years the movement has grown to 32,000 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.

1.2 The building and construction industry 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. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of Submission

2.1 Master Builders lodges this submission as a result of appearing in the hearing of the Senate Standing Education and Employment Legislation Committee (the Committee) on the *Building and Construction Industry (Improving Productivity) Bill 2013* (Productivity Bill) and the *Building and Construction Industry (Consequential and Transitional Provision) Bill 2013* (Transitional Bill) on 26 November 2013.

2.2 The Chair of the Committee asked that Master Builders provide a response to the questions asked by no later than close of business 27 November 2013.

3 Question about Judicial Review

Senator Cameron asked that Master Builders comment on the safeguards that Commissioner Cole in the Cole Royal Commission Report[1] indicated should be in place concerning the ABCC's operations, particularly the aspect of judicial review. Master Builders notes the discussion of this issue in Chapter 3 of Volume 11 of the Cole Royal Commission Final Report where after indicating that the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* "ought to apply to the ABCC, according to

[1] http://www.royalcombci.gov.au/docs/finalreport/V11CulturalChng_PressFinal.pdf

its terms,"[2] the Royal Commissioner set out Recommendation 196 and Recommendation 197 which, in our understanding, are effected in the Productivity Bill. The recommendations are as follows:

> *196 The Australian Building and Construction Commission report annually to the responsible Minister, such report to be tabled in each House of the Parliament. Such re[port shall include information on the number and types of matters investigated, the amount of employee entitlements recovered from recalcitrant employers, and the aggregate cost of unlawful industrial action in the industry.*
>
> *197 The Australian Building and Construction Commission be subject to the jurisdiction of the Commonwealth Ombudsman.*[3]

4 Independent Economics Report

4.1 Attachment A to Master Builders submission dated 22 November 2013 to the Committee is the report commissioned by Master Builders entitled *Economic Analysis of Building and Construction Industry Productivity: 2013 Update* prepared by Independent Economics (2013 Report).

4.2 At the last page of the Proof Hansard the following is said by the Chair:

> *A lot of the debate this morning has centred on the reliability and validity of the Independent Economics report used by the Master Builders. Has the department used Independent Economics to provide any advice over the last five years?*

4.3 For the record, and completeness, Master Builders believes Independent Economics has undertaken the following:

> **"Deed of standing offer for the operation, maintenance and further developments of the Independent Economics Computable General Equilibrium Model", Australian Treasury, ongoing.**
>
> Independent Economics provided economy-wide modelling services to the Australian Treasury under a Deed of Standing Offer that was initiated for the 2012/13 year and renewed in 2013/14
>
> **"Economic modelling of the business tax system for the Business Tax Working Group", Australian Treasury, 2012.**
>
> Independent Economics worked with Treasury to model options for reforming the company tax system, and our modelling was published as

[2] Ibid at para 206 of Chapter 3 of Vol 11 p49

[3] Ibid at page 50

part of the Final Report of the Australian Government's Business Tax Working Group.

"CGE Analysis of the Current Australian Tax System" Australian Treasury, 2009-2010.

Chris Murphy from Independent Economics led the team which estimated the effects of 19 different taxes on the Australian economy for the Australian Treasury. The analysis formed a key part of the final report of the Henry Tax Review

"CGE Analysis of Part of the Government's AFTSR Response" Australian Treasury, 2010

Chris Murphy and his team were commissioned by the Treasury to estimate the impacts of some of the Government's policy reforms in response to the Henry Tax Review. This included the impact of introducing a resource rent tax on the Mining sector

"Measuring the impact of the Productivity Agenda, Department of Education, Employment and Workplace Relations, 2010

Chris Murphy led the team which estimated the economy-wide benefits of the Government achieving its targets under the participation and productivity reform agenda in education, employment and workplace relations. The report was launched by the Hon. Julia Gillard MP, the then Minister for Education, Employment and Workplace Relations at the National Press Club on 26 May 2010.

4.4 At page 25 Proof Hansard Master Builders is asked why the period 1995 – 2003 was used as a baseline period in the 2013 Report. The question was put to Independent Economics. Their response is as follows:

> *The data in the years immediately preceding the taskforce/ABCC era is more relevant than data from the more distant past in establishing the impact of the productivity gains or otherwise. Therefore, the 2013 Update Report compares working days lost immediately before the era (1995-1996 to 2001-2002) to working days lost after the taskforce/ABCC had been in place long enough to have a major impact i.e. 2006-2007 to 2011-2012.*

4.5 Senator Cameron also then asked whether or not all analysis in the report would be open to academic scrutiny, "independent academic analysis".

4.6 Master Builders, at the hearing, advised that the methodology for the Independent CGE model was set out in Appendix A of the 2013 Report. Master Builders also outlined that Independent Economics/Econtech had responded to previous critiques relating to the previous reports. Master Builders noted that Econtech had responded to those critiques and had amended the prior reports. Master Builders notes that the 2013 Update Report is a public document and therefore by its very nature is open to review and critique and there is no attempt to hide its results or its methodology.

4.7 Master Builders understands that separate approaches have been made to Independent Economics about the analysis and the underlying methodology in the 2013 Report.

4.8 Master Builders would be happy to act as a channel for forwarding any critiques to Independent Economics.

5 Days Lost to Industrial Action

5.1 The paragraph which appears at the top of the summary component of the 2013 Report as follows was the subject of some discussion:

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

5.2 Master Builders was asked to estimate what proportion of hours 89,000 working days lost represents to the total number of hours worked in the industry. We were also asked to estimate a cost that 89,000 working days lost represent: see page 24 of the Proof Hansard. Master Builders estimates that around 55 million days are worked by the cohort of workers that are likely to be affected by industrial disputation. The estimate is based on the following assumptions:

Number of tradespeople/labourers 568,000

- less 25 percent working in engineering construction

- less 0.5 FTE for each part time worker
- less 30 per cent for self-employed or non-unionised industrial residential area.

5.3 This amounts to 268,000 people likely to be affected based on a cohort population of 568,000. The number of days worked by this cohort is a simple arithmetic calculation of using 205 standard working days.

5.4 Master Builders would contend that to calculate the percentage of days last due to industrial disputation is meaningless statistical data. The fact is that 89,000 days lost are 89,000 days lost and represents a major cost to the contractor and the industry as a whole. See below.

5.5 It is not possible to generalise the cost of each working day lost due to industrial disputation. For instance, each construction project is different e.g. simple warehouse, high rise offices and complex scientific/medical institutions. The cost of construction also differs markedly between the different stages of construction which then also reflects the number and skill range of industry participants affected on the day of the strike. Given the very tight time frame provided by the Committee it is not possible to provide the level of granularity that has been requested, however, other estimates have been provided.

5.6 In addition, it is important for the Committee to note that the cost is not simply the labour cost or the loss in labour productivity for that day or days that workers are on strike. For instance, a one day strike can have massive consequential and cost damaging effects if the strike was called (as is often the case) during a critical concrete pour in a high rise building. These wild cat strikes regrettably are “normal” union tactics. The cost to the contractor is not just the loss of one day labour productivity, but weeks of rework as the partially poured concrete floor is demolished and the concrete pour recommenced.

5.7 There are other costs and/or damages that can result from a strike particularly where these involve days and weeks. The costs include expensive plant and equipment such as cranes and other major construction equipment lying idle. It is normal practice for this plant and equipment to be leased or hired for the period of the project. Contractors also face the risk of incurring liquidated damages from the client for any delay in completing the project. Liquidated

damages can be as much as $1 million a day. These industrial relation risks are priced into the tender price.

5.8 The extent of the direct costs of a protracted strike can be gleaned from the Myer Emporium strike where Grollo incurred, according to the public record, losses of millions of dollars as a consequence.

5.9 Similarly, strikes have consequential effects throughout the supply chain, affecting offsite manufacturers and building material suppliers who work to very close time frames to meet the industry's practice of just-in-time delivery of products and services. The rescheduling and delay in the delivery of products and the delay in the various specialist labour based services means that the schedule of not only the immediate construction project involved is affected but also other non-related construction projects which products and subcontracting services. In other words, the non-affected parties also suffer from the strike action.

5.10 While it is not possible to accurately calculate the construction cost of a day lost, Master Builders can confidently say that the economic damage is not in the hundreds of dollars but tens of thousands for the less critical projects, to hundreds of thousands for complex or critical phases of construction. These would be the direct costs; as mentioned elsewhere there are indirect costs that flow through the supply chain that would also be affected by the industrial action. The other costs that need to also be taken into account as mentioned elsewhere are liquidated damages imposed by the client for not completing the project on time.

5.11 If it is assumed that the direct cost of a strike is $100,000 per day then 89,000 days lost to industrial action would equate to $8.9 billion.

5.12 It should be noted that building unions also use the industrial tactic of calling for a strike then at the last moment calling it off. These are not formally recorded in the ABS statistics but they have an equally damaging impact on the construction process. For instance, once a union advises the contractor that it is intending to strike, the contractor then makes arrangements for halting all work which affects not only the workers involved but also the other suppliers that may be scheduled for that day. This means that the contractor arranges for the site to be non-operational that day and is unable at short

notice to recommence work even though the union has reversed its decision to strike. These situations are equally damaging and not recorded in the ABS statistics.

6 Productivity and Technology

6.1 Master Builders was asked whether or not an increase in non-labour factors could explain an increase in productivity during the period of the ABCC: page 27 of the Proof Hansard.

6.2 It is generally accepted that the labour component in construction represents in the order of 40-60% of the total cost of construction. Labour and labour productivity therefore represents a major cost component during the construction phase.

6.3 The other major components that could influence productivity during the construction phase include:

1. Building design innovation, either architecturally or engineering.
2. Construction techniques.
3. Use and installation of building materials.
4. Project management.

6.4 During the period of the ABCC that is 2005 – 2012 which was the period of analysis in the 2013 Report, there was no substantial or major step-change advance industry-wide in innovation on technology that could credibly be advanced as having significant improvement in raising productivity that could have contributed to the 9.4 per cent increase calculated in the 2013 Report. This proposition was tested with two major construction firms in Australia. It is accepted that at an individual enterprise level some innovation or improved construction techniques may have been employed but none of which would have contributed to an industry-wide productivity increase.

7 Industrial Disputes

7.1 Master Builders was asked to comment on the small number of industrial disputes which were alleged to have occurred as expressed in the evidence of the ACTU and “spikes and peaks” in the numbers.

7.2 Master Builders notes that in the industry there are now fewer strikes but more disruptive tactics and where the official ABS statistics do not reflect the disruption to work. This is in part facilitated by clauses which permit stoppages which are at the boundary of what may or may not be lawful. These clauses are in agreements where "sign up or else" tactics are used. The following clause for example is in the pattern CFMEU Queensland agreement:

> *Employees are entitled to have paid time off to attend union meetings of up to 2 hours (or more by agreement) or participate in union activities.*

7.3 As the standard clause is vague in respect of the frequency and type of union activity the unions have been using the clause to gain unprecedented power over employers. In 2012, in Queensland, the CFMEU/BLF demonstrated that it was willing to use the 2 hour clause to pressure employers to concede to claims outside of protected industrial action rather than following formal bargaining processes. If the contractor refused a particular claim, the project was subjected to rolling 2 hour stoppages invoking the entitlement under the standard clause. None of these activities would have registered in the working days lost statistics. Hence, larger disputes result in more "spikes" in the statistics.

7.4 Master Builders notes that unlawful industrial action occurs almost daily in some States and Territories. The following is a list of matters where s418 orders were sought in Queensland and the Northern Territory from July 2013:

> *Laing O'Rourke Australia Construction Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and another PR538778 09/07/2013 -Alleged industrial action at the Northern Water Treatment Plant project*
>
> *Laing O'Rourke Australia Construction Pty Ltd v Construction, Forestry, Mining and Energy Union PR540450 19/08/2013 - Alleged industrial action at Laing O'Rourke Australia Construction Pty Ltd, Condabri Gas Construction project*
>
> *Fluor Construction Services Pty Ltd v Construction, Forestry, Mining and Energy Union and another PR541318 04/09/2013- Alleged industrial action at Fluor Construction Services Pty Ltd*
>
> *Pradstruct Pty Ltd v Construction, Forestry, Mining and Energy Union [2013] FWC 7868 08/10/2013- Summary: s.418 order -*

demand to employee union delegate - CFMEU rules - divisional branches

Pradstruct Pty Ltd v Construction, Forestry, Mining and Energy Union PR543009 08/10/2013 -Alleged industrial action at Skyview Project, 63 Blamey Street, Kelvin Grove Brisbane

Lend Lease Engineering Pty Limited v Construction, Forestry, Mining and Energy Union and another PR543476 17/10/2013- Alleged industrial action by employees employed by a subcontractor to Lend Lease at the Academic & Research Facility Project - interim order Lend Lease Project Management & Construction (Australia) Pty Ltd v Construction, Forestry, Mining and Energy Union and another PR538822 10/07/2013 -Alleged industrial action at Lend Lease Project Management & Construction at the Oral Health Centre, Herston

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another PR543477 18/10/2013 -Alleged industrial action of employees of Lend Lease Building or a subcontractor to Lend Lease Building at the University of Queensland Oral Health Project located in Herston, Brisbane Qld - interim order

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another PR543490 18/10/2013 -Alleged industrial action of employees of Lend Lease Building or a subcontractor to Lend Lease Building at the University of Queensland Oral Health Project located in Herston, Brisbane Qld - interim order extended.

Lend Lease Engineering Pty Limited v Construction, Forestry, Mining and Energy Union and another PR543489 18/10/2013 - Alleged industrial action by employees employed by a subcontractor to Lend Lease at the Academic & Research Facility Project interim order extended

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another PR543520 21/10/2013- Alleged industrial action of employees of Lend Lease Building or a subcontractor to Lend Lease Building at the University of Queensland Oral Health Project located in Herston, Brisbane Qld

Lend Lease Engineering Pty Limited v Construction, Forestry, Mining and Energy Union and another PR543519 21/10/2013- Alleged industrial action by employees employed by a subcontractor to Lend Lease at the Academic & Research Facility Project

Laing O'Rourke Australia Construction Pty Ltd v Construction, Forestry, Mining and Energy Union PR543610 22/10/2013 - Alleged industrial action at Ichthys Accommodation Village Project, Darwin

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another [2013] FWC 8274 25/10/2013 -Alleged industrial action by employees employed by a subcontractor to Lend Lease at the Academic & Research Facility Project Alleged industrial action of employees of Lend Lease Building or a subcontractor to Lend Lease Building at the University of Queensland Oral Health Project - corrected by 2013 FWC 8274 - PR543830 re preamble

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another [2013] FWC 8274 25/10/2013 - Correction to preamble re Alleged industrial action at two Lend Lease sites

John Holland Group Pty Ltd v Construction, Forestry, Mining and Energy Union [2013] FWC 8552 30/10/2013- Alleged industrial action at the Gallipoli Barracks, Enoggera - Enhanced Land Force Stage 2 - industrial action is happening - CFMEU's actual conduct was to organise industrial action. See PR544002

John Holland Queensland Pty Limited v Construction, Forestry, Mining and Energy Union [2013] FWC 8554 30/10/2013- Alleged industrial action at the Queensland University of Technology Creative Industries Precinct Project site - purpose for being on site concealed - identity of organiser concealed - deliberate obfuscation - finding that union was organising industrial action - order for six months - correction order see PR544003

8 Discrimination

8.1 Master Builders was asked to address the claims of discrimination set out by the ACTU and the CFMEU.

8.2 The legislation does not discriminate against building workers. Instead, it provides a regime recommended by the Cole Royal Commission which deals with the industry in a singular way to meet singular problems. The legislation covers building industry participants. Insofar as there are allegations that fundamental principles have been breached by the terms of the legislation, Master Builders notes the extensive human rights implications discussed in the statement of compatibility with human rights prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* which appears on page 50 and following of the Explanatory Memorandum for the Productivity Bill.

9 Focus on the Grocon Dispute

9.1 Master Builders was asked to comment on the ACTU allegation that the evidence was focussed overly on the Grocon dispute: page 27 of the Proof Hansard.

9.2 As is evident from paragraph 7.4 of this submission and table 1 below, Master Builders does not rely solely on the Grocon dispute to substantiate its position or the position of the Government as expressed in the Bills.

Table 1 Other Disputes

PARAGRAPH NUMBER FROM SUBMISSION DATED 22 NOVEMBER 2013	**DISPUTE SUBJECT**
4.5	Melbourne Markets
4.8	39 cases before the court since 1999
4.10	Assault by Derek Christopher
4.12	Three right of entry abuses
8.2	*Lease Building Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union*
9.9	*Laing O'Rourke Australia Pty Ltd v CFMEU*
16.5	*Cape (CHS)P/L v CFMEU*
16.8	Tedra/City West Water and the AMWU
16.12 and following	Royal Children's Hospital South Brisbane

****

Attachment C

Master Builders Australia

Submission to the Senate Standing Education and Employment References Committee

The Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

17 January 2014

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1.2 The building and construction industry 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. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of Submission

2.1 This submission responds to the Committee's terms of reference. It does so largely on the basis of Master Builders' submission to the Senate Standing Education and Employment Legislation Committee dated 22 November 2013 (Attachment A) and our supplementary submission dated 27 November 2013 (Attachment B), only the former being available on that Committee's website.[1] We also support the findings of the Senate Standing Education and Employment Legislation Committee in its Report dated December 2013[2] (the Report).

2.2 This submission expands on some of the points made in Attachment A and Attachment B, but, in essence, this inquiry covers the same matters previously considered by the Legislation Committee. In this submission we use the headings adopted from the current terms of reference as headings to each section.

3 The potential impact of the re-establishment of the Australian Building and Construction Commission on the building and construction industry

This matter is covered widely in section 3 and 4 of Attachment A. It is considered in Chapter 2 of the Report.

[1] See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ABCC_2013/Submissions

[2] See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ABCC_2013/report/~/media/Committees/Senate/committee/eet_ctte/building/report/report.ashx

4 The need or otherwise for a specialist industrial regulator in the building and construction industry

See sections 2, 3 and 4 of Attachment A.

5 The potential impact of the bills on productivity in the building and construction industry

See section 3 of Attachment A and section 6 of Attachment B.

6 Whether the bills are consistent with Australia's obligations under international law

This issue is dealt with at paragraphs 1.26 – 1.29 of the Report.

7 The potential impact of the bills on employees, employers, employer bodies, trade and labour councils, unions and union members

The re-introduction of the rule of law in the industry will favourably affect all stakeholders – see especially paragraphs 4.2 and 4.3 of Attachment A.

8 The extreme and heavy-handed proposed powers of the Australian Building and Construction Commission, including coercive powers, conduct of compulsory interviews, and imprisonment for those who do not co-operate

The powers are not extreme and heavy-handed. They are appropriate – see section 18 of Attachment A.

9 The provisions of the bills relating to requirements to provide information to the Australian Building and Construction Commission during interviews including provisions that interviewees have no right to silence

These are supported – see section 18 of Attachment A.

10 The provisions of the bills that introduce the law of conspiracy into the industrial regulation of the building and construction industry

We believe this term of reference refers to clause 92 of the Productivity Bill. We support clause 92 – see paragraph 19.11 of Attachment A. It is noted that a similar provision exists in the Fair Work Act, that is section 550. As with that provision, being involved in a contravention should be extended to where a person conspires with others to effect a contravention.

11 Whether the provisions of the bills relating to occupational health and safety in the building and construction industry are adequate to protect the health and safety of employees and contractors in the industry

11.1 One of the objects of the Productivity Bill is 'improving work health and safety in building work'.[3] This is achieved by the continuance of the role and office of the Federal Safety Commissioner and the WHS Accreditation Scheme. The WHS Accreditation Scheme, currently known as the Australian Government Building and Construction OHS Accreditation Scheme, is currently being reviewed by the Department of Employment. Master Builders is hopeful that this review will improve the scheme by reducing red tape and modernising the scheme, while at the same time enhancing the health and safety of all participants in the building and construction industry.

11.2 The Bills, however, are not the primary means of regulating work health and safety within the building and construction industry. Work health and safety is primarily regulated by the state and territory based WHS Acts which are complemented by subordinate legislation, codes of practice and guidance material. The WHS laws are enforced by the WHS regulators in each jurisdiction, which is why Master Builders remains confounded by the Australian Greens' claim that the former ABCC never took an employer to court over breaches of occupational health and safety laws.[4] That was never its role.

11.3 The health and safety of employees and contractors in the building and construction industry continues to be of great concern to Master Builders. The safety performance of the industry has improved steadily over the past decade contrary to the misleading and erroneous statistics published by the Australian Greens in its dissenting report[5] to the Senate Education and Employment Legislation Committee inquiry into the Productivity Bill. The Australian Greens claimed that the number of deaths in the building and construction industry increased during the period that the ABCC was in operation. The Greens assert that in 2004 the fatality frequency rate was 3.14 and in 2007 was 4.8.[6] Master Builders believes these figures to be wrong. Safe Work Australia statistics for compensated fatalities show that in 2003-04 the fatality frequency rate was 5.2, in 2004-05 the frequency rate was 4.3, in 2006-07 the frequency rate was 3.1, and in 2007-08 the frequency rate was 3.0.[7] The statistics show that the frequency rates has declined. Nevertheless

[3] Building and Construction Industry (Improving Productivity) Bill 2013 (Cth), cl 3(2)(f).

[4] Senate Education and Employment Legislation Committee, Australian Greens' Dissenting Report, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ABCC_2013/report/~/media/Committees/Senate/committee/eet_ctte/building/report/report.ashx, 23 at [1.4].

[5] Ibid, 23.

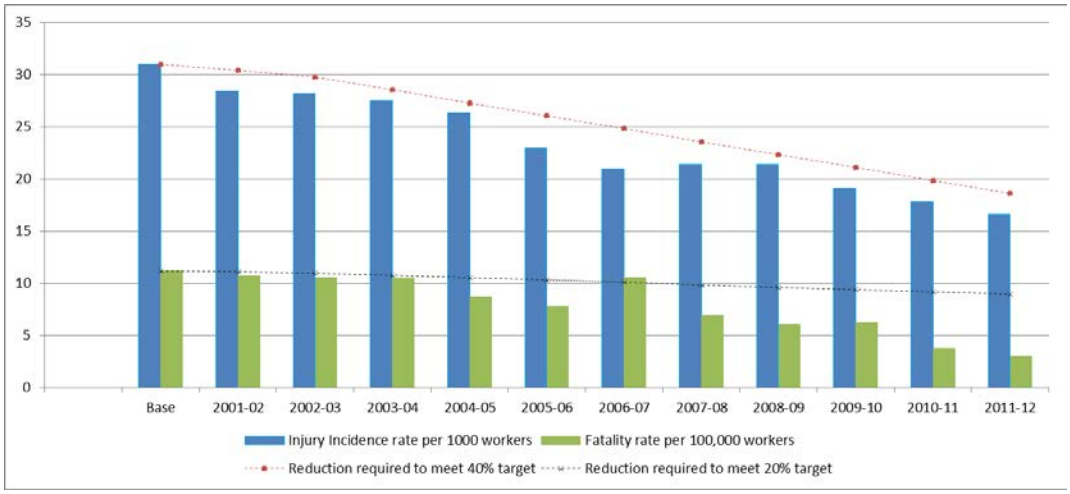
[6] Ibid, at [1.4].

[7] Safe Work Australia, 'Compendium of Workers' Compensation Statistics Australia 2010-11', March 2013, http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/compendium-2010-11, 48.

it is accepted that more needs to be done to improve the industry's safety performance but this is not the role of the proposed ABCC.

11.4 Further to the reduction in fatality incidence rates, the following graph shows that the building and construction industry has met the reduction targets set in the National OHS Strategy 2002-2012,[8] being a reduction of the injury incidence rate per 1000 workers by 40% and reduction of the fatality rate per 100,000 workers by 20%.

Building and Construction National OHS Strategy 2002-2012 Targets



Source: Safe Work Australia National Data Set for Compensation-based Statistics (NDS)

11.5 There have been many factors which have contributed to the reduction in serious incidents and fatalities in the building and construction industry, including the harmonisation of work health and safety laws in a majority of jurisdictions and the establishment of the Federal Safety Commissioner and the WHS Accreditation Scheme. Master Builders submits that the Bills are another component that affect the health and safety of employees and contractors in the industry via the Federal Safety Commissioner's jurisdiction and that the ultimate answer to the question posed will await the review of that scheme.

12 Any other related matter

Attachment C is a table identifying successful litigation which the dedicated building regulator has been involved with since 2003. This comprises 107 cases which are summarised. The behaviour analysed, which is the subject of the litigation, shows a pattern of conduct which derogates from productivity and the rule of law.

13 Conclusion

The Bill should be passed.

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[8] Safe Work Australia, *National OHS Strategy 2002-2012*, http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/sp200208nationalohsstrategy2002to2012.

ATTACHMENT A

Master Builders Australia

Submission to the Senate Standing Education and Employment Legislation Committee

The Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

22 November 2013

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Recommendations

Master Builders makes the following recommendations in relation to the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and construction Industry (Consequential and Transitional Provisions) Bill 2013*

Recommendation 1:	**Delete the reference to "employees" of an organisation or association from the definition of "officer" in s4 BCII Act and include it instead under the definition of "building industry participant".**
Recommendation 2:	**Change the use of the term "employee" in the definition of "industrial action" in clause 7 and replace it with either the term "person" or the term "building industry participant".**
Recommendation 3:	**Remove the term "appropriate" in clause 7(2)(c).**
Recommendation 4:	**Change the period of "14 days" in clause 35(3)(b) to "21 days".**
Recommendation 5:	**Provide the Federal Safety Commissioner with the responsibility for monitoring and promoting compliance with WHS provisions of the Building Code.**
Recommendation 6:	**A review of the WHS Accreditation Scheme be undertaken as a matter of urgency.**
Recommendation 7:	**Include a provision in the Bill that requires the accreditation scheme to be independently reviewed at least every five years.**

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. Over 122 years the movement has grown to 32,000 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.

1.2 The building and construction industry 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. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of Submission

2.1 Master Builders fully supports the passage of both Bills; that is the Building *and Construction Industry (Improving Productivity) Bill 2013* (Productivity Bill) and the *Construction Industry (Consequential and Transitional Provisions) Bill 2013* (Transitional Bill). Master Builders has consistently argued for a strong industrial relations regulator to be in place in the building and construction industry. Both Bills would restore the Australian Building and Construction Commission (ABCC) and provide appropriate underpinning powers to that organisation. It is necessary that the ABCC be re-introduced to the industry in order to ensure a return to compliance with the rule of law on building sites and to boost the industry's and the nation's productivity. As will be demonstrated in this submission, these are linked considerations.

2.2 This submission establishes the rationale for the reintroduction of the ABCC by indicating Master Builders' policy and the productivity arguments for the Bill's passage. It then analyses a number of provisions of the Productivity Bill. It will also comment on the Transitional Bill.

2.3 Master Builders notes that the introduction of the Bills follows the Coalition Government's election policy set out in its "Policy to Improve the Fair Work Laws". In that policy the following was said:

> *The Coalition will re-establish the Australian Building and Construction Commission (ABCC) to ensure it maintains the rule of law and drives productivity on commercial building sites and construction projects whether on-shore or off-shore.*
>
> *Until it was abolished by Labor, the ABCC had been very effective in addressing workplace militancy and improving productivity in the building and construction industry. It helped increase industry productivity by around 10 per cent, reduced days lost to strikes, and provided an annual economic welfare gain of over $6 billion per year.*
>
> *The ABCC will replace Labor's failed Fair Work Building Construction unit and will administer a national code and guidelines that will govern industrial relations arrangements for Government projects. This step will ensure that taxpayers' dollars are used efficiently. We will work with state governments who have put in place their own codes, to ensure consistency.*[1]

2.4 Accordingly, Master Builders strongly endorses the proposition that the Government has a mandate for the passage of the Bills.

3 Productivity and Restoration of the ABCC

3.1 Industrial relations reform should be on-going to meet Australia's economic needs. Sound economic policy requires productivity based reform that includes assessment of the utility of current labour market policy and regulation. Where productivity would be positively affected by change to the workplace relations system, that change should be embraced.

3.2 Productivity must be the abiding concern of Government. As Krugman has said:

> *Productivity isn't everything, but in the long run it is almost everything. A country's ability to improve its standard of living over time depends almost entirely on its ability to raise its output per worker.*[2]

3.3 In this context whilst there is some speculation, with which Master Builders disagrees, that there is little or no economy-wide evidence that changes to the industrial relations system have affected labour market outcomes or macro-

[1] The Coalition's Policy to Improve the Fair work Laws May 2013 page 5-6

[2] P Krugman *The Age of Diminishing Expectations (1994)* as cited by OECD http://www.oecd.org/std/productivity-stats/40526851.pdf

economic performance,[3] the same cannot be said for the building and construction industry. Productivity enhancing industrial relations reforms were repealed by the Gillard Government. Those repealed reforms also reinforced respect for and adherence to the rule of law. The reforms should be reinstated and that will occur as a result of the passage of the Bills. The Productivity Bill in many respects emulates the prior law contained in the *Building and Construction Industry Improvement Act, 2005 (Cth)* (BCII Act) which delivered positive outcomes to the industry and to the national economy and which are now absent.

3.4 Following the passage of the BCII Act, which created the ABCC from 1 October 2005, the building and construction industry enjoyed a period of significantly improved industrial relations and increased productivity in which industrial relations was not the predominant and negative influence that it had been in the past and which it has become again in the current environment. This change benefited all parties in the industry, including workers. Equally importantly, it benefited the Australian economy and the community with a multi-billion dollar per annum pay-off as later discussed. These benefits are easily reversed where the rule of law is disregarded. The climate has changed and industrial relations in the sector has again turned ugly. This occurred in 2012 following the repeal of the BCII Act with the outbreak of unlawful behaviour epitomised in the appalling events surrounding the Grocon blockade in Melbourne during August and September 2012 (the Blockade).[4]

3.5 The militant and unlawful behaviour displayed by the CFMEU, and captured vividly in the Blockade, we believe, is part of a concerted national campaign to exploit the weaknesses in the *Fair Work (Building Industry) Act 2012* (Cth) (FWBI Act), which renders the new inspectorate which succeeded the prior ABCC powerless to intervene where proceedings are already on foot or where proceedings have been commenced by an interested party. Last minute amendments to the law which replaced the BCII Act mean that the new agency is unable to commence or continue litigation where the litigation on the same subject matter had been discontinued because the building industry

[3] E.g. J Borland "Industrial Relations Reform: Chasing a pot of gold at the end of the rainbow? 19 March 2012.

[4] See Shannon Deery *Calls for $5 million CFMEU fine* Herald Sun 19 August 2013 where it was said: *Michael McDonald SC, for Grocon, today told the court almost 4000 protesters blocked access to the site over four days and said Melbourne descended into "anarchy" as a result. He said the unrepentant union had failed to be deterred from breaching court orders despite a recent spate of fines in the hundreds of thousands of dollars being imposed on it.*

parties settled their differences (s73 and 73A *Fair Work Building Industry Act 2012 (Cth)* (FWBI Act). This is one defect amongst many.

3.6 Indeed, the powers of the new inspectorate which was established in June 2012 are considerably less than those wielded by the ABCC. The other most significant reductions are:

- The maximum level of fines that may be imposed for proven breaches was cut by two thirds.
- The range of circumstances in which industrial action is unlawful and attracts penalties has narrowed, in that the inspectorate enforces the flawed *Fair Work Act, 2009 (Cth)*(FW Act).
- Parties are no longer forbidden to apply "undue pressure" to make, vary or terminate an agreement.
- The definition of building work has been narrowed to exclude work performed off-site, thus limiting the ambit of the inspectorate's authority.

3.7 The power to compel witnesses to give evidence has been retained in the FWBI Act, but this is now hedged about with so many so-called "safeguards", including the ever-present threat of being "switched off,"[5] that its effectiveness as a tool of information gathering is substantially reduced. On top of this, the confidentiality requirements have been watered down, making it less likely that witnesses will have the confidence to come forward to the inspectorate for fear of retribution.

3.8 Master Builders believes the only way to curb the unacceptable behaviour which has emerged since the repeal of the BCII Act is to re-introduce the former regime. Passage of the Bills would achieve that step as well as introduce some improvements to the prior law.

3.9 To underline the benefits brought about by the work of the ABCC and to reinforce our call for the re-introduction of an agency that has substantial powers, Master Builders commissioned a report in 2013 about the productivity benefits of the ABCC and its work. The research underlines Master Builders'

[5] See *Fair Work (Building Industry) Act 2012* (Cth) s39.

policy that labour productivity in the sector must be an essential part of the effort to increase industry level productivity. At the core of that effort must be the restoration of the ABCC's powers and the related laws. Enhancing productivity is at the heart of Master Builders' advocacy in calling for the restoration of the powers of the ABCC and the passage of the Bills.

3.10 The 2013 Report (full copy attached as Attachment A) was one of a series. In 2007, Econtech Pty Ltd (now trading as Independent Economics) was commissioned by the then ABCC to prepare a report on building and construction industry productivity. The 2007 Econtech Report estimated the effects of improved workplace practices on productivity in the building and construction industry, and the flow-on effects to the wider economy.

3.11 The first stage of the 2007 Report analysed the contribution of improved workplace practices and other factors in driving building and construction industry productivity. The contribution to productivity was analysed for improved workplace practices associated with the following:

- the ABCC;
- its predecessor, the Building Industry Taskforce (the Taskforce); and
- industrial relations reforms in the years to 2006.

The second stage of the 2007 Report took the estimated gain in productivity from improved workplace practices and estimated its economy-wide impacts using a Computable General Equilibrium (CGE) model, the current methodology of which is explained in detail at page 34 and following of the 2013 Report.

3.12 The 2013 Report was the fifth update of the 2007 Report on building and construction industry productivity. Since the initial report in 2007, the analysis was updated in 2008, 2009, 2010, 2012 and 2013. Each report incorporated up-to-date information on building and construction industry productivity from the Australian Bureau of Statistics (ABS), the Productivity Commission, quantity surveyor data, case studies and other related research. Importantly, the data analysed for each update continues to support the findings of the 2007 Report; that there has been a productivity outperformance in the building and construction industry compared to other sectors of the economy and its

historical productivity performance prior to the implementation of improved workplace practices.

3.13 An analysis of the various indicators of building and construction industry productivity suggests that productivity in the building and construction industry has outperformed productivity in the wider economy. Following the identification of this productivity outperformance, the contribution of improved workplace practices to the productivity outperformance in the building and construction industry is examined in the 2013 Report. Three types of productivity indicators are assessed.

3.14 Each of the productivity indicators shows that improved workplace practices have been responsible for a part of the building and construction industry's outperformance. The analysis supporting this conclusion is now outlined:

- ABS data shows that, from 2002 to 2012, construction industry labour productivity has outperformed by 21.1 per cent. This productivity outperformance is identified after controlling for factors driving productivity in the economy as a whole and trends in construction industry productivity prior to 2002 (the year improved workplace practices began).

- The Productivity Commission's analysis of ABS data has found that multifactor productivity in the construction industry was no higher in 2000/01 than 20 years earlier.[6] In contrast, the latest ABS data on productivity shows that construction industry multifactor productivity accelerated to rise by 16.8 per cent in the ten years to 2011/12.

- Published academic research on total factor productivity shows that productivity in the construction industry grew by 13.2 per cent, between 2003 and 2007, whereas productivity grew by only 1.4 per cent between 1998 and 2002. Data on total factor productivity is only available up to 2007.

3.15 We also note that case studies undertaken as part of the original 2007 Econtech Report found that improved workplace practices have led to better

[6] Productivity Commission, *Productivity estimates to 2005-06* December 2006.

management of resources in the building and construction industry. This, in turn, has boosted productivity.

3.16 All of this evidence confirms that there has been significant gain in building and construction industry productivity and that improved workplace practices have contributed to productivity outperformance. The data sources indicate that significant productivity gains in building and construction industry productivity developed from 2002-03 onwards. This supports the interpretation that it was the activities of the Taskforce (from 2002) and the ABCC (from 2005) that made a major difference. Thus, the productivity and cost difference data suggest that effective monitoring and enforcement of the general industrial relations reforms and those that relate specifically to the building and construction sector were necessary before the reforms could lead to labour productivity improvements.

3.17 Earlier reports found that the data continued to support an estimated gain in building and construction industry labour productivity, as a result of the ABCC and related industrial relations reforms, of 9.4 per cent. While not all of the productivity measures are strictly comparable, and the magnitude of the estimated gain varies across measures, the data analysed in the 2013 Report generally shows some strengthening of the productivity outperformance of the building and construction industry.

3.18 Notably, the effect on consumer welfare is marked. The 2013 Report shows that the ABCC and related reforms would mean a $7.5 billion per annum gain in consumer welfare (in 2012/13 dollars). The passage of the Bills would assist to restore the benefits to the community previously encountered.

4 Restoring the Rule of Law

4.1 The 2001 Royal Commission into the Building and Construction Industry (Cole Royal Commission) was the first national review of conduct and practices in the building and construction industry in Australia.[7] The principal reasons given by the then Minister for Employment and Workplace Relations for commissioning the inquiry included high levels of complaint about freedom of association ('no ticket no start'), a strike rate that was five times the national

[7] *Final Report of the Royal Commission into the Building and Construction Industry*, Summary of Findings and Recommendations, volume 1, February 2003, p 3.

average, massive variations in commercial construction costs from state to state as a result (sometimes as much as 25 per cent), and concerns about violence and intimidation on building sites.[8] The Royal Commission found that the building and construction industry was characterised by a widespread disregard for the law. That disregard continues. This is evident from the continuing behaviour of the building unions which is only touched on in this submission but illustrated by a number of examples.

4.2 In the building and construction industry adherence to the rule of law is a factor that directly affects labour market risk and hence productivity; this is why it is Master Builders' main policy priority to have the Bills passed so that a re-established ABCC is able to assist in the independent application of the rule of law in the building and construction industry. The rule of law must be observed to underpin productivity. As Singleton from the Cato Institute has observed:

> *(L)aw in our society serves an essential practical function - that is, to supply the ground rules so that businesses, investors, and individuals can plan their actions to avoid disputes with one another. Disputes and the risk of disputes vastly raise the risk and cost of new ventures. That is, the most important function of the law is to lower the risks of uncertainty in making long term plans.*[9]

4.3 Lack of certainty caused by unlawful industrial action drives up costs in every part of the system, making time lines and expenditure harder to predict. As a result, risk factors attached to cash flows will be higher and effective net present values of projects lower. When that uncertainty is deliberately and unlawfully generated by a stakeholder in the system that seeks an unjustified economic rent, then governments are obliged to act. This action protects the community by ensuring that the cost of infrastructure including schools and hospitals is not inflated by this factor. Industrial relations law should not only provide fairness but assist to ensure that the necessary legal certainty attributed to agreements is not undermined by unlawful industrial action.

4.4 The CFMEU has a history of disobeying industrial laws to maintain its presence on building sites both actual and symbolic. Master Builders notes that even in the face of the previous tough laws, the CFMEU, for its own ends,

[8] *Current Issues Brief* no. 30 2002-03, Building Industry Royal Commission: Background, Findings and Recommendations.
[9] S Singleton, *Capital Markets: The Rule of Law and Regulatory Reform* http://research.policyarchive.org/5823.pdf accessed 18 November 2013

denied the rule of law and damaged productivity as a pattern of conduct which the ABCC's actions were slowly but surely ameliorating. The current weakened laws and reduced fines (discussed at paragraph 3.6) have sent the wrong message to the courts and the community.

4.5 The Melbourne Markets case shows how the courts have recognised, in particular, the deliberate flouting of the law by the CFMEU to obtain industrial advantage. In mid-2011, Tracey J of the Federal Court handed down $250,000 in fines and $190,000 in costs against the CFMEU after finding that the union had deliberately and illegally prevented work from going ahead on the new Melbourne Markets site in Epping, Victoria. The decision came after the subcontractor responsible for civil construction on the site entered into a greenfields agreement with the AWU for workers on site. Tracey J's decision is important. It details the reckless disregard for the law which typifies certain parts of the union movement. For example, when one of the subcontractors who was suffering significant economic loss as a result of the dispute asked how long it would continue, they were told by a union organiser: "It's a CFMEU site. It will go on for as long as we say it will go on".[10]

4.6 The head subcontractor had a history of industrial relations engagement with the CFMEU and agreements with that union covered its staff on similar projects. As a result, the CFMEU took the view that it should have been involved in any negotiations for an agreement covering personnel at the Melbourne Markets site. The union concluded that the head subcontractor was acting provocatively towards it. It filed a notice of appeal against the then Fair Work Australia approval of the AWU greenfields agreement. However, it later decided to drop this appeal and instead embarked on a campaign of blockading the site so that workers could not enter. The action meant that employees of the head subcontractor, the site developer and numerous other sub-contractors could not work on the project. The CFMEU was prosecuted for breaching s38 and s44 of the then BCII Act for engaging in unlawful action and for attempting to coerce the head subcontractor to make an enterprise agreement with it or to vary the agreement with the AWU. It was also separately prosecuted for contempt in relation to its refusal to obey the court order obtained by the ABCC. This refusal to follow court orders is endemic.

[10] Melbourne Markets Dispute [2011] FCA 556 (unreported, Tracey J, 2 June 2011), at para 34.

The union admitted the facts necessary to establish the contraventions of s38 and s44 of the BCII Act. It also pleaded guilty of contempt. It agreed with the ABCC that an appropriate penalty would be $100,000 for its breaches of the BCII Act and between $100,000 and $175,000 for its contempt, as well as a payment of $150,000 in indemnity costs to the ABCC.

4.7 In accepting that $100,000 was an appropriate fine for its breaches, the Federal Court noted that the union had a 'deplorable' record when it came to contravening the BCII Act, discussed further below. It also noted that the CFMEU's conduct on this occasion was calculated and deliberate, and that union officials had taken the view that they should simply proceed with the action even though they knew it would cost an enormous amount of money. The cynical rationale behind this decision was that any fine would cost the CFMEU less than the membership benefit to be gained by engaging in the demarcation dispute. The Federal Court observed that the union had shown no contrition for its actions. Media[11] reported that these actions included using cars, 44-gallon drums set ablaze and crushed rock to restrict entry to the site with locks on gates being glued with superglue. These tactics are unacceptable in a civilised society. The Federal Court fined the CFMEU $150,000 for its contempt after having observed that the union had not apologised for its actions and had failed to be deterred in pursuing its blockade by the court order even though it had incurred heavy fines for contempt in the past. The Federal Court also found that the union should pay $150,000 in indemnity costs. Finally, the Federal Court awarded another $40,000 in costs against the CFMEU in relation to its breaches of the BCII Act. It also accepted the CFMEU's word that it would compensate the subcontractors for the $120,000 loss they had sustained as a result of the blockade.

4.8 As set out earlier, with the passage of the FWBI Act the penalties applicable to the sort of behaviour typified in this dispute have been reduced.[12] This has emboldened unions to make increasingly cynical cost-benefit calculations when considering attempting to increase membership by engaging in unlawful industrial action. The CFMEU were found to have engaged in similar conduct

[11] E. Hannan "Union Blockade to Pay Out $560,000" The Australian 3 June 2011

[12] BCII Act, s38, 49; *Fair Work Act*, s 409(5), 418, 421, 539, 546.

in at least 39 cases since 1999[13] and that number has risen markedly since the relevant finding.

4.9 The ongoing experience of Master Builders is that the CFMEU has an array of tactics which deliberately transgress the rule of law. Master Builders is aware of a number of CFMEU officials, particularly those operating in Victoria, who for some time have let their right of entry permits lapse deliberately to avoid prosecution for their onsite conduct. Others have been refused permits on the basis of failing to meet the required 'fit and proper person' test. No member of the CFMEU Construction and General Division Victoria and Tasmania Branch Executive, currently hold a permit.

4.10 The FW Act per s489 requires union right of entry permit holders to inter alia show their permit on request from the occupier of the site. It is custom and practice for CFMEU officials that hold a federal permit, to not only refuse to produce their permit when requested (and refuse other requirements such as providing written notice) but to abuse and threaten site managers that request the required right of entry documentation. As recently reported in The Age,[14] current CFMEU Vice President Derek Christopher was convicted of assaulting a site manager as a result of that manager's request to see Mr Christopher's identification when Mr Christopher was a CFMEU organiser in 2010.

4.11 Abuse of right of entry is also particularly evident when it comes to union entry for alleged OHS reasons. Whilst the Blockade serves as an instructive case study on how the CFMEU abuse OHS in order to further their industrial interests, Grocon, the company at the centre of that action, is only one of a large number of contractors which routinely must deal with union entry under spurious safety concerns or merely without formal motivation, as discussed below.

4.12 Common examples of routine breach of union right of entry by the CFMEU noted by Master Builders in 2013 include the following examples, none of which are before the courts:

- CFMEU organiser who holds a federal permit enters a construction site without permission from the occupier or exercising a formal right of

[13] Melbourne Markets Dispute [2011] FCA 556 (unreported, Tracey J, 2 June 2011), at para 82.

[14] Steve Butcher The Age 28 August 2013 *CFMEU official Derek Christopher fined for assaulting manager*

entry. The organiser initially alleges that there is an immediate risk to health and safety and directs workers to stop work and vacate the site. When challenged by management on the immediate risk, the organiser advises that no further work will occur until a CFMEU–appointed health and safety representative is employed on site. Despite best efforts of site management, employees of a number of subcontractors engaged on-site leave site at the direction of the organiser.

- CFMEU official who holds a federal permit enters a construction site without permission of the occupier or exercising a formal right of entry. When told by site management to leave as he has no right to be there, he refuses to follow the formal right of entry process and threatens to close down the site (and other projects of the company) if they seek to have him removed. The organiser advises site management that he will stop all of its jobs around Melbourne unless they sign the union pattern agreement. This unlawful demand is refused. The following day, access to five of their sites is blocked by workers from other sites, allegedly at the direction of the CFMEU. This results in the prevention of concrete truck deliveries to the site.

- CFMEU organiser who holds a federal permit enters construction site asserting that it is in accordance with right of entry. The organiser presents inter alia a Notice of Suspected Contravention (as required under the Victorian OHS Act) to a subcontractor alleging that the workers had not been provided with manual handling training and that an immediate risk to health and safety exists. Prior to issuing the notice, the organiser had directed work to cease (something that the organiser has no power to do). Whilst on site, the organiser advises the subcontractor not to work on the upcoming long weekend and also seeks to have them appoint a CFMEU nominated health and safety representative/shop steward. WorkSafe is called in and confirms that there was no immediate risk to workers such that work should have ceased, but does not follow up on the alleged clear breach of the OHS Act by the CFMEU.

4.13 The reality reported to Master Builders by members is that in addition to union reprisals, there is simply no appetite by the relevant authorities to actively follow up on right of entry/trespass abuses, which are regularly

mischaracterised as safety disputes: see below at section 9 for more detail on this issue. This lack of appetite must be reversed and an active, well empowered watchdog reinstated.

5 Objects of the Act

5.1 Clause 3 of the Productivity Bill contains the objects of the legislation. Master Builders supports the objects noting that they are substantially in the same terms as s3 of the BCII Act.

5.2 Master Builders commends the main object as being focused on productive outcomes for the industry and the economy in the context of the prior discussion in this submission of the need to enhance the industry's productivity.

6 Definitions – General

6.1 Clause 5 of the Productivity Bill sets out most of the definitions.

6.2 Master Builders has no concerns with these definitions save that the term "officer" extends to employees of an organisation or association, unlike the definition in s4 BCII Act. This phrase extends the definition to a category not normally acting as officers under the *Fair Work (Registered Organisations) Act, 2009* (RO Act). Master Builders submits that it would be preferable to merely reflect that the term is as defined in the RO Act and to have employees of an organisation or association covered under the definition of "building industry participant".

Recommendation 1:	**Delete the reference to "employees" of an organisation or association from the definition of "officer" in s4 BCII Act and include it instead under the definition of "building industry participant".**

7 Meaning of Building Work

7.1 Master Builders notes that clause 6 emulates to a large extent the provisions of s5 BCII Act. There are two exceptions. Clause 6 of the Productivity Bill includes a new paragraph relating to the coverage of the transport or supply of goods to be used and work covered by paragraphs (a) to (d) of clause 6(1). This is a supply "directly to building sites". Master Builders supports the

extension of the powers of the ABCC represented by this change as unions often target deliveries of product to building sites as a means to control industrial relations on that site and also to disrupt the work of a builder or subcontractors where they have not acceded to the union's demands. This factor was evident when the ABC 7.30 Report on 28 October 2013[15] noted that because of the Blockade the CFMEU had targeted one of Grocon's suppliers, building materials company Boral.

7.2 The other subclause which differs from the prior BCII Act provision is clause 6(2). This new provision is also supported because it would not preclude the ABCC from acting where, for example, unlawful industrial action occurred on land where a mining interest was present. The provision clarifies the reach of the exceptions in clause 6.1(f) and (g).

8 Meaning of Industrial Action – General

8.1 The pivotal definition of "industrial action" is contained in clause 7 of the Productivity Bill. The previous terminology in the BCII Act was "building industrial action" and it was defined in s36 of the BCII Act. The definition used in the Productivity Bill emulates, instead, the definition contained in s19(1) of the FW Act. This definition has the disadvantage of relying on the notion of an employee to define the terms of "industrial action". Master Builders would prefer that the section revolved around persons taking action so it is clear that union officials could also take industrial action in the statutory sense. "Person" is defined in clause 5 of the Productivity Bill and the provision could be directed to "persons" who take the requisite action. Alternatively, with the change suggested at paragraph 6.2 of this submission, the Bill could set out that industrial action is action of the kind currently described but which is undertaken by a "building industry participant" as defined.

Recommendation 2:	**Change the use of the term "employee" in the definition of "industrial action" in clause 7 and replace it with either the term "person" or the term "building industry participant".**

8.2 In the context of the recommended change, Master Builders notes that the FW Act is flawed in relation to remedies for the taking of unlawful industrial action by union officials. This proposition was recently illustrated in *Lend*

[15] See Master Builders' website at http://www.masterbuilders.com.au/NewsArticles/transcript-7-30-report-abbott-govt-prepares-for-new-battle-with-construction-unions for a transcript of this 7.30 Report story.

Lease Building Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union.[16] In that case the learned Senior Deputy President was satisfied that the CFMEU had threatened "and may organise industrial action by one or more employees that would not be protected industrial action." What had occurred was that there was a threat of a work stoppage at the Tonsley Park Flinders University site unless the CFMEU flag was flown in a particular manner. When the company, with Master Builders acting on its behalf, sought that the actions of the CFMEU be stopped under s418 of the FW Act, the Senior Deputy President found that on the authority of *MUA v Patrick Stevedores Holdings Pty Ltd*[17] he was unable to make an order under s418 because that provision refers to "industrial action by an employee, or employees, or by an employer."

8.3 Accordingly, industrial action which may be the subject of a "stop, not occur, not be organised" order under s418 was found to be necessarily industrial action engaged in by employees or employers as the case may be. While a union can plainly be ordered not to organise industrial action, it was found that it could not be ordered to stop or not engage in industrial action which is necessarily engaged in by employees. The flaw in the law which led to this outcome should not be replicated in the Productivity Bill.

9 Meaning of Industrial Action – the Safety Exception

9.1 The Productivity Bill seeks to reinstate the reverse onus of proof for employees relying on the health and safety exception for industrial action, as was the case in the repealed BCII Act.

9.2 The wording of clause 7(2)(c) which contains the OHS exception from industrial action has been taken from section 19(2) of the FW Act. Master Builders submits that clause 7(2)(c) of the Productivity Bill should replicate section 36(1)(g) of the repealed BCII Act; namely, the performance of other available work need only be safe for the employee to perform, not 'safe and appropriate' for the employee to perform. The appropriateness of the work is irrelevant in considering whether the other available work presents a risk to

[16] [2013] FWC 8659, SDP O'Callaghan 1 November 2013. See also report in E Hannan *Watchdog targets union threats* The Australian 7 November 2013, pg 1 where the following is said: *The CFMEU conceded the right-of-entry breaches but insisted the comments to the Lend Lease manager were "off the cuff" and should not be regarded as threats*.

[17] [2013] FWCFB 7736

the health or safety of the employee and hence this flawed criterion from the FW Act should not be carried over into the Productivity Bill.

Recommendation 3: Remove the term "appropriate" in clause 7(2)(c).

9.3 Clause 7(4) of the Productivity Bill stipulates that 'whenever a person seeks to rely on paragraph (2)(c), the person has the burden of proving the paragraph applies'. Master Builders supports the re-establishment of this provision, i.e. the reverse onus of proof criterion.

9.4 The Cole Royal Commission reported that:

> *OH&S is often misused by unions as an industrial tool. This trivialises safety, and deflects attention away from real problems. The scope for misuse of safety must be reduced and if possible eliminated.*[18]

9.5 The Royal Commission found that misuse of safety for industrial purposes compromises safety in important respects:

- it trivialises safety, and deflects attention away from the real resolution of safety problems on sites;
- the view that unions manipulate safety concerns inhibits the unions' capacity to effect constructive change;
- the widespread anticipation that safety issues may be misused may distort the approach that is taken to safety; and
- time taken by health and safety regulators to attend and deal with less important issues detracts from their capacity to deal with more substantial issues elsewhere.[19]

9.6 One of the responses to the Cole Royal Commission was the passage of the BCII Act. Section 36(1)(g) of that Act, which as noted is now repealed, provided that employees and others were not taking building industrial action where:

> *the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and*
>
> *the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at*

[18] Supra note 7, volume 6, p 108.
[19] Above n7, p 102.

the same or another workplace that was safe for the employee to perform.

9.7 The Revised Explanatory Memorandum for the BCII Act stated that 'this provision has been included to prevent persons engaging in industrial action from avoiding responsibility for their actions by relying on spurious health and safety risks'.[20] Despite this provision, employers in the construction industry reported that abuse of work, health and safety (WHS) continued to be a problem. The issue is often confronted and, on some sites, occurs on a regular basis over protracted periods, as set out in section 4 of this submission. The former ABCC brought a number of cases of abuse of WHS for industrial purposes to the courts.[21]

9.8 The introduction of the FW Act changed the law about the relevant exception to the definition of industrial action on occupational health and safety grounds. Section 19(2) of the FW Act excludes from the notion of industrial action, action taken by an employee based on his or her concern about an imminent risk to their health or safety and where they have not unreasonably failed to comply with an employers' direction to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform. The onus of proof appears not to be the same as under the BCII Act per *CFMEU v Hooker Cockram Projects NSW Pty Ltd*[22] where Master Builders intervened. The Full Bench of the then Fair Work Australia was of the opinion that the decision to not include a similar provision (i.e. the reverse onus) into the FW Act was intentional and therefore did not apply under the FW Act.

9.9 There have been many examples of unions using spurious health and safety issues as justification for the disruption of work on construction sites. For example, in the recent case of *Laing O'Rourke Australia Pty Ltd v CFMEU*,[23] the allegations by the CFMEU, CEPU and BLF of serious workplace health and safety issues were contradicted by an independent inspection conducted by Work Health and Safety Queensland.[24] Justice Collier stated that:

[20] Revised Explanatory Memorandum, Building and Construction Industry Improvement Bill 2005 (Cth) at 5.134.
[21] See for example: *Cruse v Construction, Forestry, Mining & Energy Union* (2009) 187 IR 335; *Alfred v Wakelin (No 4)* (2009) 180 IR 335; *Draffin v Construction, Forestry, Mining & Energy Union* [2009] FCAFC 120; *Hadgkiss v Construction, Forestry, Mining & Energy Union* (2008) 178 IR 123.
[22] [2013] FWAFB 3658 at [4].
[23] [2013] FCA 133.
[24] Ibid, at [33].

> *The contrary views upon which the union officials appeared to insist during the inspection, in the face of the views adopted at the site by WHS Qld, suggest an agenda by the relevant union officials other than a pure interest in workplace health and safety issues*.[25]

9.10 Master Builders contends that the reverse onus of proof provision contained in the repealed BCII Act is essential if disruption of work on dubious WHS grounds is to be eliminated. Master Builders therefore strongly supports the provisions contained in clauses 7(2)(c) and 7(4) of the Productivity Bill which essentially forestall the misuse of safety but protect the rights of employees to refuse to perform duties which are genuinely unsafe.

10 Meaning of Protected Industrial Action

Master Builders refers to the comments of the definition of "industrial action" set out in section 8 of this submission. We believe it is necessary to make the change suggested earlier. In addition, the considerations raised above make clause 8(2) of the Productivity Bill vital. Clause 8(2) provides that action is not protected industrial action if the action is protected industrial action (within the meaning of the FW Act) but:

- the action is engaged in in concert with one or more persons who are not protected persons; or
- the organisers include one or more persons who are not protected persons.

11 Clauses 9 to 13

Master Builders has no comments on these provisions of the Productivity Bill which we support.

12 The Australian Building and Construction Commissioner

12.1 Chapter 2 of the Productivity Bill comprises clauses 14 to 32. Master Builders supports the manner in which the Productivity Bill sets out the establishment of the ABCC and the ABC Commissioner and Deputy Commissioners. We note that clause 29 sets out that the body that is the current inspectorate will continue in force but with a change of name to the ABCC.

[25] Ibid, at [33].

12.2 Master Builders supports the restoration of the name as well as the functions of the ABC Commissioner and related staff.

13 The Building Code

13.1 Master Builders notes that Chapter 3 comprising clauses 33 to 35 deals with the Building Code. These clauses are similar to the BCII Act and the FWBI Act provisions dealing with this subject.

13.2 Master Builders notes, however, that the Building Code now extends per clause 34(3)(c) to building work where the relevant person is the Commonwealth or Commonwealth authority. Essentially, Master Builders believes that this will extend the Building Code to funding entities and we agree with this extension. They should be bound by the Building Code.

13.3 Master Builders notes that clause 35 is in the same terms as former s28 of the BCII Act. We support the ABC Commissioner being given the requisite power to request a report about compliance. Because the new Building Code to be declared under the Productivity Bill is not yet known, Master Builders would note that if the requirement to provide a compliance report is long and complex, 14 days may be an inadequate period for response. We recommend that the minimum period in clause 35(3)(b) be 21 days.

Recommendation 4:	**Change the period of "14 days" in clause 35(3)(b) to "21 days".**

14 Federal Safety Commissioner

14.1 Chapter 4 of the Productivity Bill establishes the position of the Federal Safety Commissioner (FSC) and establishes the WHS Accreditation Scheme (Accreditation Scheme), currently known as the Australian Government Building and Construction OHS Accreditation Scheme. The Accreditation Scheme, which is administered by the Office of the FSC, has now been in operation since 2005. In that time there has not been any comprehensive review of the Accreditation Scheme, despite the previous Labor government's

promises to that effect, inclusive of the formal promise made by the Hon Simon Crean when introducing the Fair Work Building Industry Bill.[26]

14.2 The provisions of Chapter 4 are based on similar provisions concerning the FSC that are contained in the FWBI Act and previously contained in the BCII Act. Chapter 4 of the Productivity Bill diverges in two areas from the provisions contained in the FWBI Act and BCII Act; the omission of the function of the FSC to monitor and promote compliance with the Building Code, so far as the Code deals with work health and safety, and the Accreditation Scheme being prescribed by rules instead of by regulations.

14.3 Master Builders submits that the responsibility for monitoring and promoting compliance with any WHS provision of the Building Code should rest with the FSC, not with the ABCC or the Minister. Master Builders therefore calls for this function to be restored under clause 38 of the Productivity Bill. Master Builders' policy is for the FSC to have responsibility for any Commonwealth administered WHS initiatives affecting the building and construction industry. Keeping all Commonwealth administered WHS initiatives affecting the building and construction industry under the one agency will reduce red tape and duplication.

Recommendation 5:	**Provide the Federal Safety Commissioner with the responsibility for monitoring and promoting compliance with WHS provisions of the Building Code.**

Recommendation 6:	**A review of the WHS Accreditation Scheme be undertaken as a matter of urgency.**

14.4 Clause 43 of the Productivity Bill provides the ability to prescribe the Accreditation Scheme by rules. Currently, regulations made under the FWBI Act set out the relevant provisions governing the detail of the operation of the Accreditation Scheme and the like. Master Builders notes that in a practical sense this will make little difference to the workings of the Scheme.

[26] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2011, 12689 (Hon Simon Crean, Minister for Regional Australia, Regional Development and Local Government and Minister for the Arts).

14.5 As discussed earlier, the Cole Royal Commission placed a great deal of emphasis on occupational health and safety. The Royal Commissioner stated that the Commission examined no subject more important than occupational health and safety.

14.6 The Royal Commissioner stated that what was needed above all else was cultural and behavioural change in the industry.[27] The primary measure introduced to achieve this objective in the context of health and safety is the Accreditation Scheme. The Scheme currently applies to construction projects of $3 million or more where the project is directly funded by the Australian Government, and to projects indirectly funded by the Australian Government where the Australian Government contribution is at least $5 million and at least 50 per cent of the total project value, or is $10 million or more.

14.7 Master Builders is strongly committed to improved safety outcomes in the building and construction industry. We therefore supported the creation of this role and continue to support the work of the FSC. The work of the FSC is an important component of improving WHS outcomes in the building and construction industry. While Master Builders generally supports the Accreditation Scheme, we are aware that there are aspects of the Scheme that are not working effectively and which have the potential to undermine the objectives of the Scheme if they are not rectified. Master Builders has therefore asked the Government to undertake an independent review of the Scheme. A requirement for the Accreditation Scheme to be independently reviewed at least every five years should be set out in the Productivity Bill to facilitate a regular, established review of its operations.

Recommendation 7:	**Include a provision in the Bill that requires the accreditation scheme to be independently reviewed at least every five years.**

15 Unlawful Action

15.1 Chapter 5 comprising ss44 to 49 deals with unlawful action. One of the fundamental difficulties with the repeal of the BCII Act and the FWBI Act's introduction, is the assumption that the provisions in the FW Act governing the conduct of employers, employees and industrial associations appropriately

[27] Supra note 7, Volume 6, page 35

apply unchanged to building and construction industry participants. Accordingly, the substance of what is now chapter 5 does not appear in the FWBI Act, as industrial action is dealt with under the FW Act with some perverse outcomes as set out in paragraph 8.2 of this submission.

15.2 Master Builders notes in particular that the FW Act does not have a general prohibition about unlawful industrial action which is contained in clause 46 of the Productivity Bill. That provision emulates s38 of the former BCII Act. This is a better approach than set out in the FW Act as it establishes a civil penalty for unlawful industrial action rather than permitting orders to be obtained under s418 which may lead to penalties and injunctions if breached. The tailored laws are much more attuned to the tactics used by the building unions, touched on in section 3 of this submission in particular. The tailored laws are appropriate in effecting cultural change.

15.3 We note that clause 46, however, now clarifies that organising unlawful industrial action is proscribed. This may still, however, be insufficient to cure the problem mentioned at paragraph 8.2 because of the linkage between the activity of employees in clause 7 (which defines the term "industrial action" as discussed earlier in this submission) with the notion of unlawful industrial action. The definition of unlawful industrial action contained in clause 5 of the Productivity Bill requires the action to be "industrial action" as defined by clause 7 and for that action not to be protected as defined in clause 8.

15.4 In our consideration, despite the extension from the prior BCII provision in clause 46 to "organising" unlawful industrial action, union officials would not necessarily be caught by the legislation without the change suggested earlier.

16 Unlawful Picketing

16.1 Clause 47, which is part of Chapter 5, contains a new provision. This provision per clause 47(1) states that "a person must not organise or engage in an unlawful picket".

16.2 Clause 47(2) sets out the definition of an unlawful picket:

- has the purpose of preventing or restricting a person from accessing or leaving a building site or an ancillary site. This would operate

irrespective of whether someone is actually accessing (or leaving) a site.

- directly prevents or restricts a person accessing or leaving a building site or an ancillary site. This is to deal with persons who are intentionally blocking access to building work but is not intended to capture unintentional blockages.

- would reasonably be expected to intimidate a person accessing or leaving a building site or an ancillary site. This would mean that it would not be necessary to prove that the person attempting to access was intimidated but that a reasonable person would be intimidated.[28]

16.3 The provision also provides that action is not an unlawful picket action unless there are relevant motivations as established in clause 47(2). That motivation is motivation for the purpose of:

- supporting or advancing claims against the building industry participant in respect of the employment of employees or the engagement of contractors; or

- advancing industrial objectives of a building association; or

- is separately unlawful.

16.4 Clause 48 permits a person to apply to a relevant court for an injunction. This provision is similar to s39 of the BCII Act but is now extended to injunctions for unlawful picketing. Clause 48 makes it clear that injunctions can be sought for organising unlawful industrial action or against an unlawful picket.

16.5 Master Builders strongly supports the extension of the provisions of the Productivity Bill to what is defined as an unlawful picket. Picketing has become an integral part of the tactics which the CFMEU applies in seeking to advance its industrial objectives. This is evident from a number of decided cases,[29] and from the Blockade.

[28] These dot points are derived from the Explanatory Memorandum for the Productivity Bill at para 126

[29] See for example *Cape (CHS)P/L v CFMEU* [2013] FWC 4691 15 July 2013 DP Gooley

16.6 Other unions, particularly the Maritime Union of Australia, also use picketing as an industrial tool. Recently in the case of *Cooperative Bulk Handling Ltd v Maritime Union of Australia.*[30] Justice Gilmour was asked to consider whether the relevant conduct, that is in establishing a picket line, is protected industrial action for the purposes of the FW Act. Justice Gilmour quoted with approval the Full Court in *Davids Distribution P/L v National Union of Workers*.[31] Justice Gilmour relied on the joint judgment of Justices Wilcox and Cooper in that case where this matter is dealt with at length. In that context, the joint judgment concluded that picketing did not fall within the definition of industrial action. The judges found that to interpret it otherwise would be an infringement on the rights and freedoms of others and would, in effect, confer a statutory immunity on such conduct provided only that it was engaged in on proper notice to the employer.

16.7 The case of *Davids Distribution* has been criticised. In particular, we note that Creighton and Stewart[32] state as follows:

> *The reasoning in Davids arguably does not take sufficient account of the fact that in most circumstances picketing would be an integral part of the 'bans, limitations or restrictions on the performance of work' which are the principal focus of the definition for industrial action in s19(1).*[33]

16.8 We agree with the argument made by Creighton and Stewart. So-called community pickets have become an integral part of protests which cause severe economic disruption and they have become part of the more militant unions' industrial arsenal. This was particularly evident in the case involving a so-called community picket of the City West Water site in Victoria where approximately 50 protestors blockaded the project at Werribee merely because a small number of 457 visa holders were engaged.[34] When the matter was litigated, the Federal Court stated that the injunction it issued against the union and Mr Mavromatis could not deal with the position of people at the site who remained as part of the picket formed to protest the engagement of the 457 visa holders. This was because they were not

[30] [2013] FCA 940 (2 July 2013)

[31] (1999) 91 FCR 463

[32] B Creighton and A Stewart *Labour Law* 5th Edition, the Federation Press 2010

[33] Ibid at p772

[34] See *Director of the Fair Work Building Inspectorate v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Tony Mavromatis* [2013] FCA 82 per Marshall J 14 February 2013

employees of the union and were not encouraged or supported by the union, its organisers or employees. The employees of Tedra, the subcontractor involved in the matter, or of City West Water were unable to safely access their place of work and the site was disrupted at an estimated cost of $300,000 a day.[35]

16.9 "Community pickets" should not be free from court orders where they are motivated by restricting the employment of persons or contractors or where they are motivated by advancing the interests of the union or are generally unlawful, as is required by clause 47. Their formation and related consequences should be categorised as unlawful industrial action and treated in the same way. Master Builders fully supports the law as set out in clauses 47 and 48 of the Productivity Bill.

16.10 Master Builders notes that the Tedra dispute was recently settled, with The Australian[36] reporting:

> *The Australian Manufacturing Workers Union will pay $62,000 compensation without any admission of wrongdoing under the settlement of a controversial workplace dispute that cost employers an estimated $1.5 million.*

and

> *In statement published on the FWBC website, the inspectorate said it had discontinued its legal action and the matter had been settled. 'The parties have agreed to settle this matter on the basis that the AMWU pay compensation of $62,000 to Tedra with no admission of wrongdoing by the AMWU'.*

The conduct is typical of the sort that undermines investment and appropriate certainty, as outlined in section 3 of this submission.

16.11 What follows is a case study of the Royal Children's Hospital – South Brisbane Queensland dispute which further shows how so-called community protests are having a very negative effect on the industry. It is one of many such disputes.

16.12 Royal Children's Hospital – South Brisbane Queensland is a significant nine (9) week industrial dispute that stopped work at the $1 billion Royal Children's

[35] The Australian 13 February 2013

[36] *AMWU avoids prosecution over 457 visa dispute* The Australian 19 November 2013 (electronic subscription)

Hospital from 7 August 2012 for nine weeks. The lost productivity cost Abigroup around $300,000 a day during the dispute that saw a picket line preventing subcontractors and their employees from entering the site. The unions stepped around previous Fair Work Australia return-to-work orders by keeping their distance and maintaining that the stopwork was a community protest action comprised of concerned citizens.

16.13 As stated elsewhere in this submission "community protests" – with which unions are careful to avoid direct links – have developed as a means to support striking workers but to avoid orders covering unions and union officials.

16.14 The Children's Hospital strike began as a dispute with a subcontractor over benefits but was engulfed in the claim for site rates for subcontractors that the construction unions were pursuing against other builders during bargaining "negotiations". Abigroup is the principal contractor on the project and became caught up in the Queensland building unions' site rates campaign, despite being mid-way through the term of an enterprise agreement.

16.15 In our understanding, the picket line was coordinated by a former MUA and CFMEU (BLF) organiser at the site. The Queensland Police maintained a clear footpath for the public but were reluctant to go further in disrupting a "protest". This is common where picketing is involved. As McCrystal[37] has noted "police are generally reluctant to become involved in picket lines and such disputes have historically been left to the State and Federal industrial relations systems."[38] Senior police estimated 150-200 police and two weeks' notice would be required to control the protesters in order to effect a return to work. Abigroup and its contractors secured s418 orders in September 2012, which they backed up with court injunctions, against industrial action at the site.

16.16 Senior Deputy President Peter Richards in September 2012 ordered the unions and their members working at the project not to engage in, organise, threaten or encourage any industrial action for six months under s418 of the FW Act.

[37] S McCrystal *The Right to Strike in Australia* The Federation Press 2010

[38] Ibid at pg101

16.17 On appeal the FWC Full Bench upheld the six-month industrial action bans against the CFMEU and CEPU and building workers that sought to halt strikes that delayed construction.

16.18 The Full Bench took a dim view of the CEPU's argument that its members had taken no part in industrial action, but had stopped work because they believed their health and safety was at risk, a reverberation of comments earlier made in this submission. It said:

> *We are also satisfied that there was evidence to find that the CFMEU and CEPU were involved in the industrial action and their conduct fell within the description of organising industrial action.*[39]

16.19 Abigroup is suing the unions and 12 of their officials claiming they breached the FW Act and committed common law torts during the long-running dispute at the hospital last year. The company sought to rely on s24 of the RO Act, as well as s793 of the FW Act, to argue the conduct of the officials could be attributed to the unions. But Judge Michael Jarrett said s24 of the RO Act was part of a division that dealt with prohibited conduct in the formation or registration of unions, it was not relevant to Abigroup's prosecution.

16.20 He said Abigroup could, however, rely on s793 of the FW Act and the principle of vicarious liability to argue the unions were responsible for the conduct of their officials:

> *In my view, no basis has been demonstrated to strike out those parts of the pleading that rely upon s793 of the FW Act as the source of the union respondent's derivative liability. [Abigroup's] pleading, particularised as it is, provides a sufficient foundation upon which it can be said that the case made against the respondents pursuant to s793 of the Fair Work Act is revealed to them and about which there will be no surprise.*[40]

16.21 On 16 August 2013 the Federal Circuit Court dismissed criminal contempt charges against the former MUA and CFMEU (BLF) organiser over his involvement in the "community protest". Federal Magistrate Michael Burnett

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[39] Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and another v Abigroup Contractors Pty Ltd [2013] FWCFB 453 (25 January 2013) para 42

[40] Abigroup Contactors Pty Ltd v Construction, Forestry, Mining and Energy Union & Ors (No.2) [2013] FCCA 1472 (26 September 2013) para 12

rejected all 18 charges. He originally faced 54 counts of criminal contempt, but 36 were dismissed during hearings in February 2013.

16.22 The charges were brought by Abigroup, the principal contractor on the site and part of the Lend Lease group. It alleged the former MUA and CFMEU(BLF) Organiser breached September court orders it had secured in his support for the nine-week project stopwork.

16.23 The new laws as discussed in this section of the submission are necessary.

17 Coercion, Discrimination and Unenforceable Agreements

17.1 Chapter 6 comprises clauses 50 – 59 and deals with coercion, discrimination and unenforceable agreements. Clause 51 is new and essentially provides a constitutional connection for the matters set out in Part 2 of Chapter 6. Master Builders strongly supports these provisions.

17.2 Clause 52 contains the substance of what was previously s43 BCII Act. It deals with coercion relating to the allocation of duties et cetera to a particular person. It provides a grade A civil penalty where a person organises or threatens to organise or takes action against another person with the intent to coerce the other person or third person to, for example, employ or not to employ a particular person. This is highly relevant in the context of the Blockade where, essentially, the union caused the relevant disruption with the intent of coercing the employer to employ its nominated safety personnel. The provision is supported.

17.3 Clause 53 deals with coercion relating to superannuation. It contains the substance of former s46 BCII Act and is supported.

17.4 Clause 54 contains the substance of s44 BCII Act. It deals with coercion of persons to make or terminate et cetera enterprise agreements. The provision is supported.

17.5 Clause 55 contains the substance of s45 BCII Act but deals with the types of industrial instruments as set out in the FW Act; that is the National Employment Standard, a particular type of workplace instrument or enterprise agreements as expressed in s354 FW Act. The clause proscribes a person taking an action against a building employer because the employees of that

building employer are covered or not covered by a particular kind of instrument, or are proposed to be so-covered. It is supported

17.6 Clause 56 essentially emulates s360 of the FW Act, a provision not previously in the BCII Act. It covers the extent to which a person's action must be motivated by a particular reason to establish a contravention of clause 47 and the other provisions of Part 2 of Chapter 6. It sets out that a person takes action for a particular reason if the reasons for the action include that reason.

17.7 Clause 57 reverses the onus of proof in civil proceedings for contravention of clause 47 and the other matters set out in Part 2 of Chapter 6. Master Builders supports this provision as, where issues of intent are concerned, they are notoriously difficult for those commencing the proceedings to prove. Thus, if the contrary intent can be shown, for example, that the relevant picket was indeed a community protest, then this will lead to the quicker and more efficient closing down of faux community pickets where the relevant intent is present.

17.8 Clause 58 is similar to s363 of the FW Act. Per the Explanatory Memorandum, its intent is so that a person cannot avoid being subject to the prohibitions as s47 and Part 2 of Chapter 6 by getting another person to carry out the prohibited conduct. Master Builders supports this provision.

17.9 Clause 59 relates to the unenforceability of project agreements. In substance it reflects s64 of the BCII Act. Master Builders notes that the Cole Royal Commission indicated that pattern bargaining, where unions seek to obtain a mirror agreement throughout the industry or at particular commercial projects, is the target of many of the recommendations to change the industry's culture. The Productivity Bill does not contain any provisions specifically aimed at making pattern bargaining unlawful. However, clause 59 makes an agreement unenforceable if certain conditions are met, one of which is that the agreement is entered into with the intention to secure standard employment conditions for building employees for a particular site. This is the case where not all employees are employed by the same employer. As this is an anti-pattern bargaining measure, Master Builders supports its terms.

17.10 In addition, clause 59 is aimed at curbing adverse practices which negatively affect productivity. One such practice is to permit unregistered agreements to

operate as de facto project agreements. Those agreements secure site-wide terms and conditions of employment and involve instances where unions seek to impose, for example, site allowances that are to be paid in proportion to the monetary value of the project. These practices damage productivity. They should be curtailed.

18 Chapter 7 Powers to Obtain Information

18.1 Chapter 7 dealing with the ABCC's power to obtain information comprises clauses 60 to clause 79. Master Builders supports these provisions.

18.2 Clause 61 emulates the substance of s52 of the BCII Act. This provision has generated a great deal of controversy. It permits the ABC Commissioner to give written notice to a person who has documents or may give evidence in relation to an investigation of a suspected contravention of the legislation or a related law. The ABCC's powers set out in the Productivity Bill taken from the BCII Act are not unusual. Similar powers are exercised by a range of other organisations and government agencies. Those powers are not called into question because it is accepted they are a necessary part of the operation of the relevant agency. In the context of the ABCC, however, they have invoked some civil libertarian views which ignore the context i.e. the need to obtain evidence in circumstances where parties are reluctant to come forward voluntarily.

18.3 The provision, for example, is very similar to s19 of the *Australian Securities and Investments Commission Act 2001 (Cth)* (ASIC Act). The power used by, for example, ASIC, and of course, by the ABCC, assists in requiring participants to provide evidence that is mandatory in establishing a breach, evidence that would not otherwise be available because of fear of retribution. This is an issue which pervades the building and construction industry and one which should be eliminated. That elimination will only occur if cultural change is permitted to change industrial relations practices based on coercion and intimidation. In this context the ABCC predecessor, the Building Industry Taskforce, did not possess such powers. The result was that most complaints were withdrawn:

> *The survey conducted on a number of clients who withdrew their complaint found that 52 per cent had done so for fear of the ramifications they may face should they pursue the matter.*[41]

18.4 We believe that the same issue has arisen in relation to the FWB inspectorate given the fact that the examination powers have been very rarely used and having regard to the FWB inspectorate policy of seeking voluntary co-operation from industry participants.

18.5 Clause 61(4) permits a person attending an examination to be represented by a lawyer. This is an appropriate safeguard – others are discussed below.

18.6 Clause 62 makes it an offence to fail to comply with an examination notice. This is a criminal offence. It carries a maximum sentence of 6 months' imprisonment. Notably, s63 of the ASIC Act provides for 100 penalty units or 2 years' imprisonment or both for a similar offence i.e. intentionally failing to comply with s19 of the ASIC Act. Hence, allegations that the provision is dire, do not take into account other more severe penalties where other agencies administer similar laws.

18.7 Clause 63 provides that a person is entitled to be paid reasonable expenses for attendance at an examination. This is a fair provision and is supported.

18.8 Further and appropriate protection for those who are called to an examination is contained in clause 64 and clause 65 of the Productivity Bill. Under clause 64 the ABC Commissioner must notify the Commonwealth Ombudsman of the use of the power. The material set out in clause 65 must be provided to the Ombudsman as soon as practicable after an examination has been completed. The Ombudsman must review the exercise of the powers and report to Parliament about the reviews. These are appropriate safeguards and are supported.

18.9 Part 3 of Chapter 7 deals with the powers of the ABCC inspectors and federal safety officers (FSO).

18.10 Clause 66 provides for the appointment of inspectors.

[41] Commonwealth of Australia Building Industry Taskforce *Upholding the law – findings of the building industry taskforce* September 2005 pg11.

18.11 Clause 67 provides that an identity card must be issued to, and carried by, an inspector.

18.12 Clause 68 relates to the appointment of FSOs.

18.13 Clause 69 provides for the issue in carrying of identity cards by FSOs. Master Builders supports these machinery provisions.

18.14 Clause 70 sets out the compliance powers that are able to be exercised by inspectors and FSOs in a general sense.

18.15 Clause 71 indicates that compliance powers may be exercised during working hours or at any other time if the authorised officer reasonably believes that is necessary to do so for compliance purposes.

18.16 Clause 72 sets out powers to enter premises, noting that entry may only occur without force.

18.17 Clause 73 requires the production of an identity card before entering premises.

18.18 Clause 74 sets out the powers of authorised officers whilst on premises. The substance is effectively replicated from parts of s59 of the BCII Act in respect of ABCC inspectors.

18.19 Clause 75 relates to persons assisting an ABCC inspector or FSO. No former provision of the BCII Act reflected the substance of clause 75. However, the substance emulates s710 of the FW Act and is supported.

18.20 Clause 76 is, similarly, new to the ABCC inspectors' powers and replicates s711 of the FW Act. The clause confers on an ABCC inspector or FSO the right to require the person to tell them that person's name and address in the event that they have reason to believe that the person has contravened a civil remedy provision. If the inspector or FSO believes that the name or address is false, the inspector or FSO may require the person to provide evidence of the correctness of the name and address.

18.21 Clause 77 provides a power similar to that possessed by Fair Work inspectors set out in s712 of the FW Act. This is an appropriate power for inspectors to hold. This is a very necessary power which was not previously available to

ABCC inspectors. Previously there was no ability to compel the person to provide a document or record. There was no sanction for refusing the request of an inspector. In practice this meant that the examination power was required to be used to substantiate matters which could otherwise have been obtained through documents or records. Accordingly, this new power is strongly supported.

18.22 Clause 78 makes it an offence to intentionally hinder or obstruct an authorised officer in exercising their compliance powers, or induce or attempt to induce any other person to do so. This in turn is a new provision and will mean that inspectors are able to appropriately carry out their tasks.

18.23 Clause 79 deals with the power to keep records and documents. The provision contains no explicit safeguards about the retention of the relevant record of document. However, at paragraph 252 of the Explanatory Memorandum the following is said:

> *It is important to note that the period of retention of any personal information, as defined in the Privacy Act 1988, is strictly as necessary for the period of investigation. Personal information should not be disclosed unnecessarily, collected or used for purposes other than the original purpose, or retained for periods when it is no longer needed.*

19 Chapter 8 Enforcement

19.1 Chapter 8 comprises clauses 80 – 100 of the Productivity Bill. Master Builders supports these provisions.

19.2 Clause 81 deals with penalties and the like for contravention of the civil remedy provisions. Clause 81(2) sets the maximum pecuniary penalties for Grade A and Grade B civil remedy provisions. In respect of Grade A civil remedy provisions the maximum is 1000 penalty units or $170,000 if the defendant is a body corporate and otherwise 200 penalty units or $34,000. In respect of a Grade B civil remedy provision it is 100 penalty units if the defendant is a body corporate or $17,000 and otherwise $3,400. Master Builders notes that these maximums exceed those set out in the FW Act. For example, under s546 of the FW Act the amount of pecuniary penalty is the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2) which is 60 penalty units or $10,200. Section 546(2)(b) indicates that if the defendant is a body corporate five times the

maximum number of penalty units referred to in the same place is the maximum, that is the equivalent to 300 penalty units or $51,000.

19.3 The additional penalty units which are a maximum in the Productivity Bill are designed to show the courts that the community believes the sorts of behaviours touched upon in section 3 of this submission and which are endemic in the building and construction industry are unacceptable. This is a message which should be brought home in order to effect cultural change. The lessening of the fines payable by the unions in the FWBI Act context in the face of consistent resistance to the law has sent the wrong message and enabled the unions to factor in a lower cost of taking unlawful industrial action.

19.4 The courts, pursuant to clause 81(6)(d), when determining a pecuniary penalty will be able to take into account whether the person has previously been found by a court to have engaged in any similar conduct. This is important because of the pattern of conduct that the courts have previously found in respect of the CFMEU in particular, and the ability of the courts to therefore act to deter future unlawful behaviour bearing in mind that pattern of conduct.

19.5 Clause 82 is a new provision and not found in the prior BCII Act. This is a sensible provision as it permits interest to be payable on a sum ordered to be paid where a breach of the Bill arises and other than a civil penalty order is made. This would occur, obviously, in instances where a court ordered the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention of the Productivity Bill per clause 81(1)(b).

19.6 Clause 83 deals with a situation where there is conduct which contravenes more than one civil remedy provision. Clause 83(2) states that the person is not liable to more than one pecuniary penalty in relation to the same conduct. This is, similarly, a new provision that is not opposed.

19.7 Clause 84 deals with multiple contraventions. This provision permits a court to make a single civil penalty order where multiple contraventions of a civil remedy provision are founded on the same facts or are part of, or a similar character relating to the contravention. Clause 84(2) places a cap on the pecuniary penalty imposed which must not exceed the sum of the maximum

penalties that could be ordered if a separate penalty were ordered for each of the contraventions. We support this provision.

19.8 Clause 85 permits two or more proceedings relating to contraventions of civil remedy provisions to be heard together.

19.9 Clause 86 requires the rules of evidence and procedure for civil matters to be applied. These provisions are supported.

19.10 Clauses 87 – 291 of the legislation relate to the inter-relation between civil proceedings and criminal proceedings and are essentially technical in that regard. These provisions are supported.

19.11 Clause 92 relates to an ancillary contravention of a civil remedy provision for example, by aiding, abetting or counselling or procuring a contravention by another person. This is similar to s550 of the FW Act and will assist in enforcing the provisions of the Productivity Bill.

19.12 Clauses 93 and 94 relate to, respectively, exceptions to the burden of proof for a civil remedy provision with an evidentiary burden placed on those who wish to rely on an exemption or excuse or qualification provided by the law. Clause 94 sets out the way in which conduct is able to be imputed to bodies corporate. These provisions are supported.

19.13 Clause 95 relates to the actions of building associations, that is employer associations or unions, and contains the substance of s69 of the BCII Act. This is important in imputing conduct to the agents and officers of unions in particular.

19.14 Clause 97 is in substance is the same as s70 of the former BCII Act and is supported.

19.15 Clause 98 enables enforceable undertakings to be obtained in relation to the contravention of civil remedy provisions. This provision was not in the former BCII Act. However, it is similar to the provision in s715 FW Act and is a useful tool in applying the terms of the legislation.

19.16 Clause 99 permits inspectors to provide compliance notices which would require the person to take action to remedy the effects of the contravention and produce reasonable evidence of the person's compliance with the notice.

This is a new provision in the construct of the legislation but is similar to s716 of the FW Act and is supported.

19.17 Clause 100 relates to the ability of a person to apply for a review of the notice given under clause 99 and is necessary protection similar to that found in s717 of the FW Act.

20 Chapter 9 Miscellaneous

20.1 Clauses 101 – 120 deal with miscellaneous matters under the Productivity Bill. Master Builders supports these provisions.

20.2 Clause 102 has the effect of abrogating the common law privilege against self-incrimination. The protections that are then provided to an individual in those circumstances are set out in clause 102(2). Where an individual who gives information produces a record or document or answers a question under an examination notice the information produced cannot be used against an individual other than where they failed to comply with an examination notice or effectively where they have lied or obstructed a Commonwealth officer.

20.3 Clause 102(3) provides protections against use of information obtained by inspectors in respect of criminal proceedings. However, it permits the use of that information for civil remedy actions.

20.4 Clause 103 relates to protection from liability relating to examination notices and contains the substance of s54 of the BCII Act.

20.5 Clause 104 sets out that certain other records and documents are inadmissible in criminal proceedings other than the proceedings mentioned already as exceptions set out in clause 102. The material set out as inadmissible include records and documents which have been inspected or copied by inspectors who have exercised a power when entering premises and all the records and documents retained as a direct or indirect consequence of inspecting or copying documents.

20.6 Clause 105 relates to disclosure of information by the ABC Commissioner or the FSC. The BCII Act did not permit disclosure of protected information obtained for the purposes of the BCII Act to the Minister unless required in

respect of a report. Here the relevant disclosure is permitted if the Commissioner believes that the disclosure is likely to assist the Minister to consider a complaint or issue in relation to a matter arising under the FW Act or the Transitional Act. The more general power to disclose matters is where it is appropriate for the performance of the ABCC's functions or powers or is likely to assist in the administration or enforcement of the law. Limited disclosure rights to the Department are permitted. These provisions are supported.

20.7 Clause 106 effectively replicates s65 of the BCII Act but in respect of clause 106 the information that is protected only relates to that obtained under an examination notice.

20.8 Clause 107 contains the substance of s66 of the BCII Act which proscribes reports containing information relating to an individual's affairs. It is supported.

20.9 Clauses 108 – 112 deal with the powers of the ABC Commissioner. They provide extensive powers to the Commissioner. These provisions are supported.

20.10 Clause 108 gives the power, in the public interest, to publish details of non-compliance with the Building Code and name the person who has failed to comply. Further non-compliance by a building industry participant with the Act or a designated building law may also be published in the public interest including the name of the participant.

20.11 Clause 109 sets out the authority of the ABC Commissioner to intervene in the public interest in civil proceedings before a court that arises under the legislation, the Independent Contractors Act, the FW Act, and the Fair Work Transitional Act where that proceeding involves a building industry participant or building work.

20.12 Clause 110 permits the ABC Commissioner to make submissions in FWC proceedings.

20.13 Clause 111 permits the ABC Commissioner to institute proceedings under the FW Act, Fair Work Transitional Act and effectively enables the ABC Commissioner to stand in the shoes of a Fair Work inspector.

20.14 Clause 112 places an obligation on the General Manager of the FWC to notify the ABC Commissioner of every application lodged with the FWC or with the General Manager of the FWC under the FW Act or the Fair Work Transitional Act where the application relates to a matter that involves a building industry participant or building work, as well as a requirement to notify the outcome of each application.

20.15 Clauses 113 – 117 deals with the inter-relationship of the court system with the administration of the legislation and each provision is supported.

20.16 Clause 118 provides protection to the ABC Commissioner and a number of other persons appointed under the legislation where the exercise of functions and powers that might result in loss or damage arise under the legislation. The provision is supported.

20.17 Clause 119 enables the Minister to delegate the Minister's functions or powers relating to the Building Code to the ABC Commissioner under direction.

20.18 Clause 120 relates to the capacity of the Minister to make rules and the Governor-General to make regulations under the legislation.

21 The Transitional Bill

The Transitional Bill deals with consequential and transitional matters relating to the re-establishment of the ABCC. Master Builders has no concerns with any of the machinery provisions set out in the Transitional Bill and fully supports its terms.

22 Conclusion

Master Builders, with the seven minor changes recommended in this submission, fully supports the passage of both Bills. The passage of those Bills will assist with restoring the rule of law to the building and construction industry and hence assist to improve the industry's productivity.

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Attachment A to Master Builders submission to Senate Committee

independent economics

Economic Analysis of Building and Construction Industry Productivity: 2013 Update

This report was prepared for Master Builders Australia

26 August 2013

Independent Economics is an independent provider of economic modelling services to support economic policy analysis and forecasting. We are strongly committed to independent modelling that provides robust analysis and real solutions to meet client needs. In Australia, we provide services to government and industry, and we also provide services internationally.

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Contents

Executive summary

Introduction

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

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

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

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

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

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

Methodology

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

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

- Year-to-year comparisons of construction industry productivity are made using data from the Australian Bureau of Statistics (ABS), the Productivity Commission (PC) and academic research. The timing of any shifts in productivity trends is compared with the timing of the three regulatory regimes.

- Industry reforms have focussed on the commercial construction sector, comprising non-residential building and multi-unit residential building, where construction costs have historically been higher than for the housing construction sector. Rawlinsons data is used to compare the timing of any changes in this cost gap (for undertaking the same building tasks in the same states) with the timing of the three regulatory regimes.

- Case studies of individual projects, undertaken for earlier reports by Econtech Pty Ltd and by other researchers, are used to provide comparative information on productivity performance between the three regulatory regimes.

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

- First, the boost to productivity from improved workplace practices associated with the Taskforce and ABCC is estimated.

- Second, the extent to which this productivity boost is expected to be preserved under the FWBC regime is also estimated.

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

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

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

- The model separately identifies four sectors within the building and construction industry: residential building; non-residential building; engineering construction; and construction trade services. This means that the model can better trace the economy-wide impact of improved workplace practices in different sectors of the building and construction industry. It also means that the jurisdiction of the ABCC and FWBC can be more closely identified.

- The modelling is contemporary, adopting 2012/13 as its reference year. This involves using Input-Output (IO) tables for 2007/08 released by the ABS in late 2011, and uprating this snapshot of the economy to a normalised 2012/13, by allowing for growth in wages, productivity, population and normalised commodity prices. Likewise, the model uses the latest ABS industry classification, ANZSIC 2006.

- The production process in each of the model's 120 industries distinguishes nine different types of capital, including dwellings and buildings and structures. This supports more robust estimates of the flow-on effects from reform in the building and construction industries, which produce the dwellings, buildings and structures used by the 120 industries.

- The model provides a robust measure of consumer welfare derived from the consumption of goods and services. Consumer welfare is the key measure used to assess the public policy merits of economic policies, such as the changes in workplace practices analysed here.

Workplace practices in the building and construction industry

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

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

[1] Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003, p4.
[2] Ibid., p11.

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

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

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

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

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

Productivity comparisons in the building and construction industry

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

[3] Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003
[4] Ibid., p13

Year-to-Year Comparisons

- ABS data shows that, from 2002 to 2012, construction industry labour productivity has outperformed by 21.1 per cent. This productivity outperformance is identified after controlling for factors driving productivity in the economy as a whole and trends in construction industry productivity prior to 2002 (the year improved workplace practices began). Data for 2013 is not yet available.

- The Productivity Commission's analysis of ABS data has found that multifactor productivity in the construction industry was no higher in 2000/01 than 20 years earlier[5]. In contrast, the latest ABS data on productivity shows that construction industry multifactor productivity accelerated to rise by 16.8 per cent in the ten years to 2011/12. Similar to the labour productivity data, multifactor productivity data for 2012/13 is not yet available.

- Published academic research on total factor productivity shows that productivity in the construction industry grew by 13.2 per cent, between 2003 and 2007, whereas productivity grew by only 1.4 per cent between 1998 and 2002. Data on total factor productivity is only available up to 2007.

Commercial versus domestic

- Rawlinsons data to January 2012 shows that the cost penalty for completing the same tasks in the same state for commercial construction compared to domestic construction has shrunk. The boost to productivity in the commercial construction sector, as estimated by the narrowing in the cost gap, is conservatively estimated at 11.8 per cent between 2004 and 2012. This narrowing in the cost gap developed over several years, as the industry gradually adjusted to the industry-specific regulatory regime of the Taskforce/ABCC era.

- Similarly, the cost gap can be expected to widen again over several years, as the industry gradually adjusts to the weaker regulatory environment in the FWBC era. However, the latest cost gap data refers to January 2013, when the FWBC had been in operation for only seven months. Over that time, from January 2012 to January 2013, the cost penalty for commercial construction widened by 0.9 percentage points. Based on past experience, this is likely to represent the start of a widening trend in the cost gap, driven by an erosion in the productivity outperformance of the Taskforce/ABCC era.

Individual Projects

- Case studies undertaken as part of the original 2007 Econtech report found that improved workplace practices in the Taskforce/ABCC era led to better management of resources in the building and construction industry. This, in turn, has boosted productivity in the building and construction industry compared to the pre-Taskforce/ABCC era.

- Other studies considered reached similar conclusions, including those assessing the impact of improved workplace practices on major engineering construction projects. The gain in productivity as a result of improved workplace practices in the Taskforce/ABCC era is estimated at around 10 per cent.

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

Days lost to industrial action

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

The impact of changes in workplace practices on construction industry productivity

Productivity gains in the Taskforce/ABCC era

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

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

Productivity losses in the FWBC era

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

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

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

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

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

Modelling the impact of changes to workplace practices

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

- A "Baseline Scenario" provides a snapshot of the Australian economy representing the workplace practices in place before the Taskforce and ABCC era.

- An "ABCC Scenario" provides a snapshot of the Australian economy with higher productivity in the construction industry due to improved workplace practices resulting from the ABCC, Taskforce and industrial relations reforms in the years to 2006. That is, productivity in the construction industry is 9.4 per cent higher than in the baseline scenario.

- An "FWBC Scenario" provides a snapshot of the Australian economy where 75 per cent of the productivity boost achieved in the Taskforce/ABCC era is unwound in the FWBC era. This deliberately-conservative estimate can be refined in future annual updates as more data on the FWBC era becomes available.

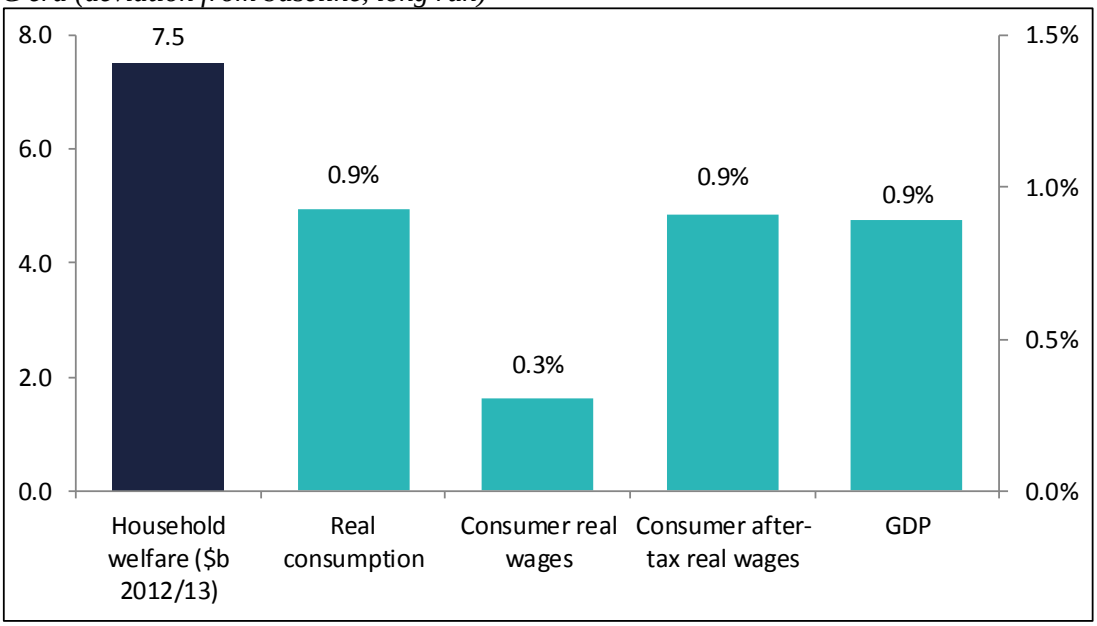
The economic benefits of improved workplace practices in the Taskforce/ABCC era are estimated as the difference between the ABCC scenario and the baseline scenario. The economic losses from the less productive workplace practices during the FWBC era are estimated as the difference between the FWBC scenario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

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

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

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

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



Source: Independent CGE model simulations

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

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

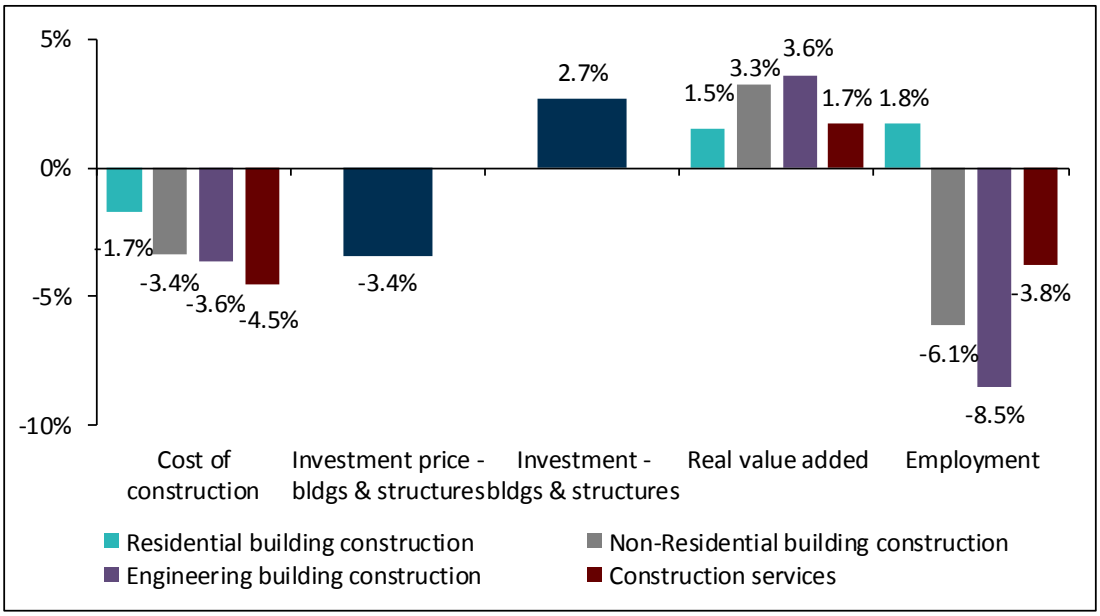
In the government sector, the budget saving from the lower cost of public investment in schools, hospitals, roads and other infrastructure is assumed to be passed on to households in the form of a cut in personal income tax. This boosts the gain in consumer real wages from 0.3 per cent on a pre-tax basis,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

After allowing for economic growth over the last year, this is consistent with the consumer gain estimated in the 2012 report of $6.3 billion in 2011/12 terms[6]. The estimate of consumer gains is similar across reports, since each report has consistently modelled a productivity gain of the same magnitude (9.4 per cent) and from the same source (improved workplace practices in the building and construction industry). Chart B summarises the effects on the building and construction industry.

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

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

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



Source: Independent CGE model simulations

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

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

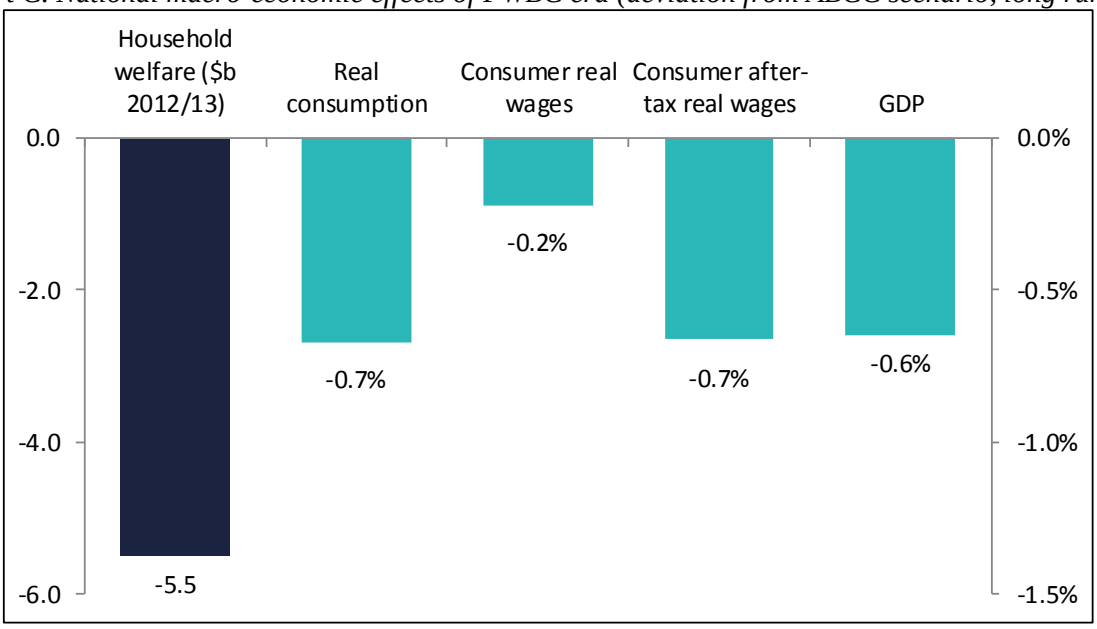
Economic impact of less productive workplace practices during the FWBC era

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

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

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

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

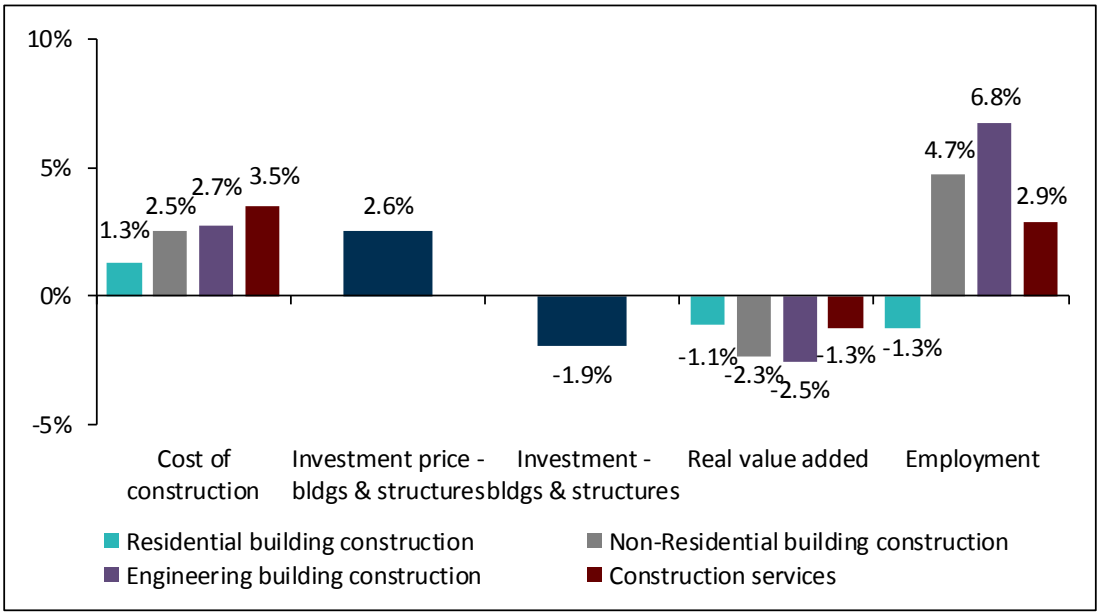


Source: Independent CGE model simulations

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

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

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



Source: Independent CGE model simulations

1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1 Workplace practices in the building and construction industry

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

2.1.1 Before the Taskforce and ABCC

In 2001, the Royal Commission into the Building and Construction Industry (Cole Royal Commission) was established to review the conduct and practices in the Australian building and construction industry. The final Cole Royal Commission Report[7] was released in 2003 and concluded that there was widespread misconduct and poor work practices in the industry.

The Cole Royal Commission found that the industry's productivity performance was below that of the market sector average. For example, Tasman Economics[8] found that, between 1988/89 and 1999/00, multifactor productivity grew by 15.3 per cent in the market sector. By comparison, multifactor productivity in the construction sector grew by only 4.3 per cent over the same period.

[7] Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003
[8] Tasman Economics, *Productivity and the Building and Construction Industry*, Discussion Paper 17, prepared for the Royal Commission into the Building and Construction Industry, 2002

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

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

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

Based on its investigations, the Cole Royal Commission concluded that these problems occurred because of the unique structure of the building and construction industry. Head contractors had an "unwillingness and incapacity … to respond to unlawful industrial conduct causing them loss"[12]. Short term profitability considerations together with the importance of building a reputation for on-time delivery meant that contractors preferred to quickly resolve issues rather than become involved in long conflicts[13]. As such, contractors tended to concede to union demands for reasons of commercial expediency.

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

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

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

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

[9] Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003, p12
[10] Ibid., p5.
[11] Ibid., p4.
[12] Ibid., p11.
[13] Ibid., p11.
[14] Ibid., p6

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

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

2.1.2 The Taskforce and ABCC era

In response to the recommendations of the Cole Royal Commission, laws and regulations governing the building and construction industry were introduced and strengthened. The Building Industry Taskforce (the Taskforce) was established in 2002[17], and given increased responsibility and regulatory powers. In 2005, the *Building and Construction Industry Improvement Act 2005* (BCII Act) established the ABCC, among other things. The ABCC was provided with powers to monitor, investigate and enforce the laws and guidelines in the building and construction industry. These building industry-specific reforms built on the more general workplace relations reforms that were implemented across the economy in the years to 2006.

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

- The National Code of Practice for the Construction Industry (the National Code) and the associated Implementation Guidelines (Guidelines) were strengthened. The National Code and Guidelines seek to influence work practices in the building and construction industry by setting "employer and employee standards relating to the performance of building and construction work and to conditions for bidding for Commonwealth funded construction work"[18].

- Broader forms of industrial action were made unlawful in the building and construction industry compared to other industries.

- The maximum penalties for unlawful conduct in the building and construction industry were trebled.

- The ABCC was given powers to compulsorily acquire information either through compelling a person to attend an examination and answer questions, or through obtaining documents relevant to an investigation.

[15] Ibid., p13
[16] Ibid., p13
[17] The *Interim* Building Industry Task Force was set up in response to the first report of the Cole Royal Commission in November 2002. In April 2003, the operation of the Building Industry Task Force was extended, pending the establishment of the then proposed ABCC. In March 2004, it was announced that the taskforce would become a permanent body, and would operate until the ABCC was established. For more information, see the following link.
http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0405/05bd139
[18] Parliamentary Library, *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, Bills Digest No. 80, 2011-12, November 2011, p4.

- The ABCC was able to initiate proceedings on matters which have already been settled between the parties.

- Greater restrictions were placed on the right of union representatives to enter construction sites.

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

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

2.1.3 The FWBC era

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

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

> *However, the ABCC's work is not yet done. Although I accept there has been a big improvement in building industry behaviour during recent years, some problems remain. It would be unfortunate if the inclusion of the ABCC in the OFWO[19] led to a reversal of the progress that has been made.*[20]

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

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

[19] Office of the Fair Work Ombudsman
[20] Wilcox, M, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, p14.

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

Weaker building industry code and guidelines

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

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

However, from August 2009, "less stringent"[21] Guidelines have operated. More importantly, wide-ranging changes were implemented in May 2012. Following these changes, the Guidelines "no longer try to impose formal requirements upon the construction industry that do not apply to employers and employees elsewhere in the labour market"[22]. Since February 2013, a new Code has applied which involves some further weakening of restrictions on right of entry requirements and enterprise bargaining[23].

State governments have expressed concern that the weakened National Code and Guidelines are likely to increase the cost of state construction projects.[24, 25, 26] Therefore, the Victorian, NSW and Queensland governments have strengthened their own State Guidelines in 2013[27]. However, it is unclear whether these guidelines are able to be applied by State governments, and so their impact on productivity cannot yet be assessed.[28]

More limited function and weaker powers of the FWBC

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

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

[21] Parliamentary Library, *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, Bills Digest No. 80, 2011-12, November 2011, p4.
[22] Creighton, B; 'Government procurement as a vehicle for workplace relations reform: the case for the national code of practice for the construction industry', *Federal Law Review*, Vol. 40 (3), 2012, p364
[23] Gadens Lawyers, 'Don't be 'blindsided' by the new Building Code 2013', www.gadens.com.au; viewed 16/08/2013.
[24] The Hon Robert Clark MP, *CCU to target work site conduct under revised construction guidelines* [Press Release], 20 May 2013
[25] Mike Baird MP, *Delivering value on infrastructure – construction guidelines now in force* [Press Release], 1 July 2013
[26] Jarrod Bleijie, *Feedback sought on construction code guidelines*, [Press Release], 4 March 2013
[27] Workplace Express, *Eastern States line up on construction*, 22 March 2013, www.workplaceexpress.com.au, viewed 16 July 2013.
[28] Corrs Chambers Westgarth, *Federal Court Rules on the Interaction Between the Victorian Construction Code and Implementation Guidelines and the Adverse Action Provisions*, 28 May 2013 www.corrs.com.au viewed 1 August 2013.

Table 2.1: Comparison of ABCC and FWBC regulatory regimes

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

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

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

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

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

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

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

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

[29] Parliament of the Commonwealth of Australia, *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012*, Revised Explanatory Memorandum
[30] FWBC, *Penalties for Breaches of Workplace Relations Law Rise by 54.5 per cent*, January 2013, www.fwbc.gov.au, viewed 1 August 2013.
[31] ABCC Annual report 2009/10, pg 43
[32] ABCC Annual report 2010/11, pg 49

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

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

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

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

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

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

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

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

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

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

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

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

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

Unique circumstances in the building and construction industry unchanged

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

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

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

[34] Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations*, February 2003
[35] Wilcox, M, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, p51.
[36] Fair Work Ombudsman, Right of Entry Fact Sheet, www.fairwork.gov.au, viewed 7 August, 2013

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

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

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

> *I am satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the BCD[37] to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove.*[38]

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

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

[37] BCD refers to the 'Building and Construction Division' which went on to become the FWBC.
[38] Wilcox, M, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, p3.

2.2 Productivity comparisons in the building and construction industry

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

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

- **Year-to-year** comparisons of building and construction industry productivity are made using data from the Australian Bureau of Statistics (ABS), the Productivity Commission and published academic research to determine whether there was any shift in construction industry productivity following the changes in workplace practices.

- The non-residential building sector and multi-unit residential sector (i.e. commercial construction) have been the focus of improved workplace practices because this is traditionally the higher cost side of the building and construction industry. Historically, the housing construction (domestic construction) sector of the industry can complete the same construction tasks at lower cost than the commercial construction sector. We use Rawlinsons data on construction costs to determine whether changes in workplace practices have affected the cost gap between **commercial construction and domestic construction**. For example, a narrowing of the cost gap may indicate that improved workplace practices have boosted productivity in commercial construction.

- Case studies of **individual projects**, completed in earlier reports by Econtech Pty Ltd and other sources, compare projects completed before and after changes in workplace practices to provide information on the impact of changed workplace practices on the productivity performance of individual projects.

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

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

Differences in productivity measures

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

- **Labour Productivity.** Labour productivity is the ratio of real output produced to the quantity of labour employed. Labour productivity is typically measured as output per person employed or per hour worked. Changes in labour productivity can be attributed to labour where they reflect improvements in education levels, labour efficiency, technology or work practices that makes labour more productive. Changes in labour productivity can also reflect changes in capital and intermediate inputs, in technical and organisational efficiency, as well as the influence of economies of scale and varying degrees of capacity utilisation.

- **Multifactor Productivity (MFP).** MFP is defined as the ratio of output to combined inputs of labour and capital. In principle, MFP is a more comprehensive productivity measure because it identifies the contribution of both capital and labour to output. In practice, labour input can be measured more accurately than capital input. Reflecting these competing considerations, both labour productivity and MFP continue to be used as measures of productivity.

- **Total Factor Productivity (TFP).** TFP is the ratio of output to the combined inputs of labour, capital and intermediate inputs (such as fuel, electricity and other material purchases). While this measure is the most comprehensive, often it cannot be calculated because there is insufficient data on intermediate inputs.

2.2.1 Year-to-year comparisons

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

- data up to and including 2002, the period prior to the establishment of the Taskforce/ABCC;

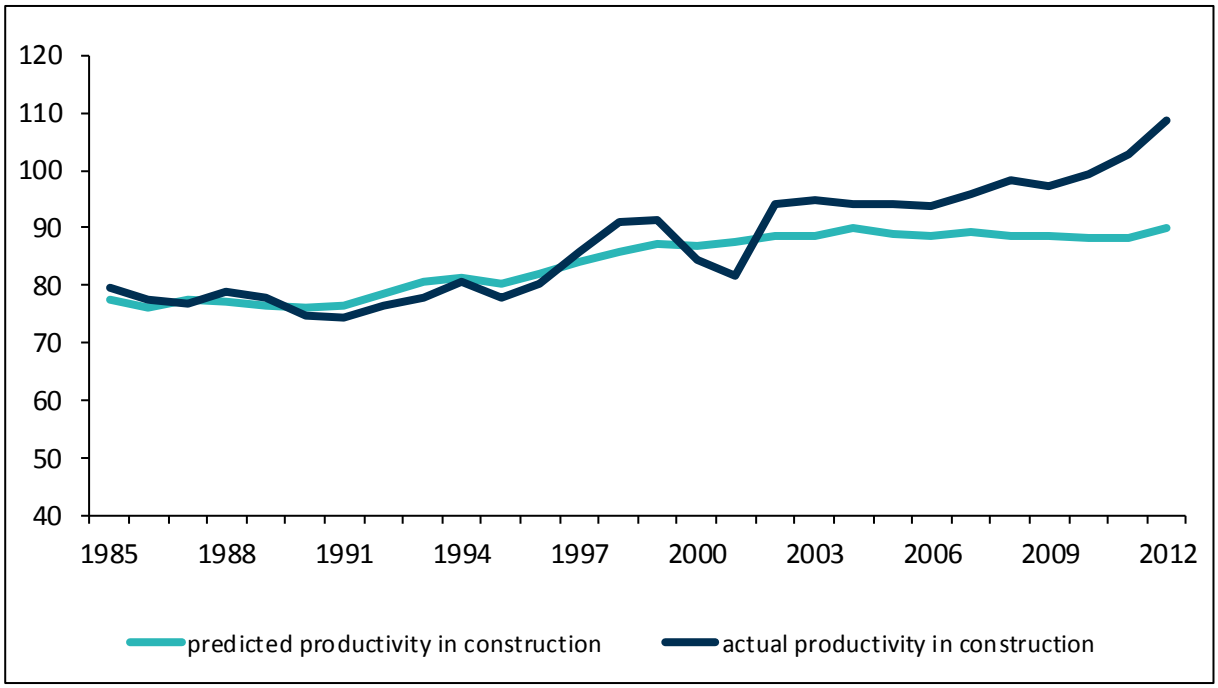
- data between 2002 and mid-2012, the period of operation for the Taskforce/ABCC; and

- data from mid-2012 onwards, when the FWBC was established.

Labour productivity

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

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



Source: Independent Economics estimates based on ABS data

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

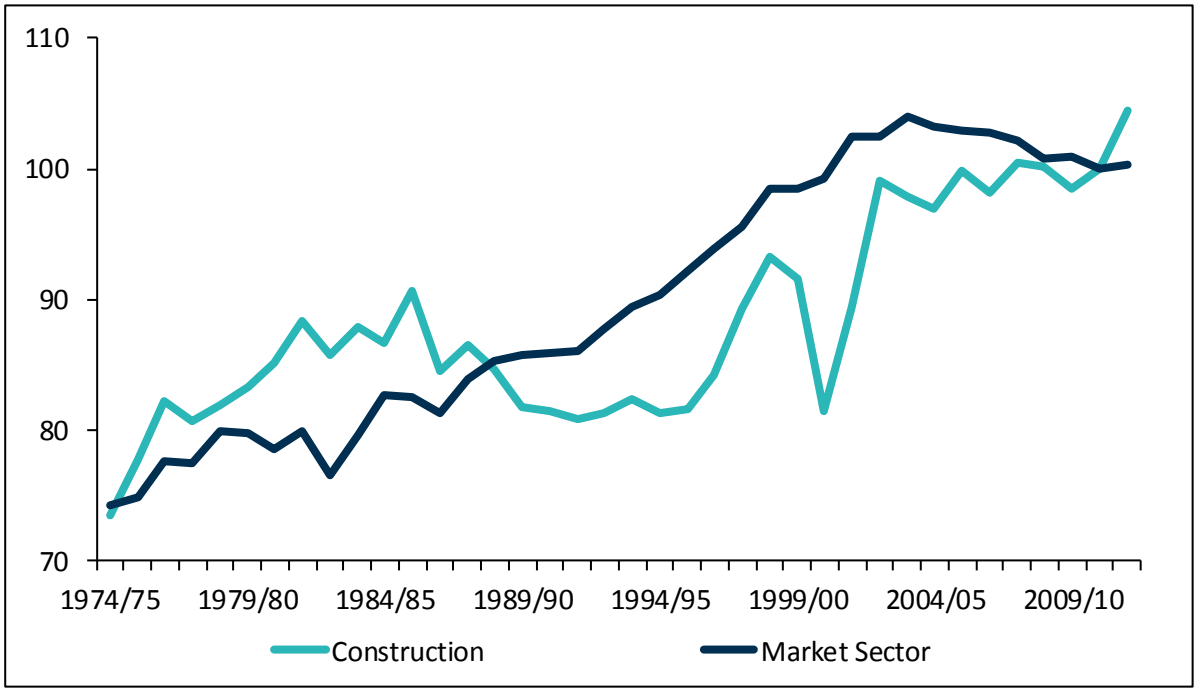
As can be seen in Chart 2.1, since 2002 actual construction industry labour productivity has consistently outperformed predictions based on past trends. In 2010, actual construction industry productivity was approximately 12.6 per cent higher than predictions based on its relative historical performance.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

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

Multifactor productivity

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

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



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

While productivity in the market sector has followed a fairly steady upward trend, productivity in the construction industry was fairly flat through the 1980s and 1990s. The PC found that multifactor productivity in the construction industry was no higher in 2000/01 than 20 years earlier[39]. As shown in Chart 2.2, construction industry productivity is below the level seen in 1980/81 during several periods, including between 1988/89 and 1996/97.

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

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

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

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

As noted in the 2012 report, a study by the Grattan Institute also found that the building and construction industry was one of only three industries that have enjoyed faster labour and multifactor productivity growth in the 2000s compared to the 1990s[41]. Administration and support services and arts and recreation services are the other two industries whose productivity performance has improved in the 2000s.

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

Total factor productivity

The 2012 report discussed a study by Li and Liu which estimated total factor productivity for the Australian building and construction industry using ABS data[42]. The results of this research are summarised here for ease of reference; for further details please refer to the 2012 report.

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

2.2.2 Commercial versus domestic residential comparisons

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

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

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

[41] Eslake, Saul and Walsh, Marcus, *Australia's Productivity Challenge*, The Grattan Institute, Melbourne, February 2011
[42] Yan Li and Chunlu Liu, *Malmquist indices of total factor productivity changes in the Australian construction industry*, Construction Management and Economics, 28:9, September 2010

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

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

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

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

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

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

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

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

Source: Rawlinsons Australian Construction Handbook, 2004 – 2013[43]

Notes: (1) Australia Average is weighted according to turnover on a state-by-state basis.
(2) Dates indicate beginning of each calendar year, for example 2004 refers to January 2004.

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

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

Source: Independent Economics estimates.

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

As outlined in the introduction, this report follows the same methodology as was employed in the earlier reports since 2008. The analysis has simply been updated to incorporate the January 2013 Rawlinsons data. Specifically, Rawlinsons data is used to compare cost gaps between commercial and domestic construction in 2012 with the same cost gaps in 2004 to see whether the cost penalty in commercial construction has shrunk as a result of improved workplace practices[44]. This base year was chosen because the Taskforce was established in October 2002 and the ABCC was established in 2005. The base year was also chosen to remove the effects of an apparent break in some of the data series. Hence, a narrowing of the cost gap over this period would suggest that improved workplace practices have had a positive effect on productivity.

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

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

Between January 2004 and January 2012, Table 2.3 shows that the cost penalty for commercial building compared to domestic residential building fell in all mainland states, suggesting improved workplace practices. The biggest fall is in Victoria, where it is down from about 23 per cent to about 14 per cent. Victoria is the state where restrictive work practices in commercial building were generally acknowledged to be most pervasive[45].

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

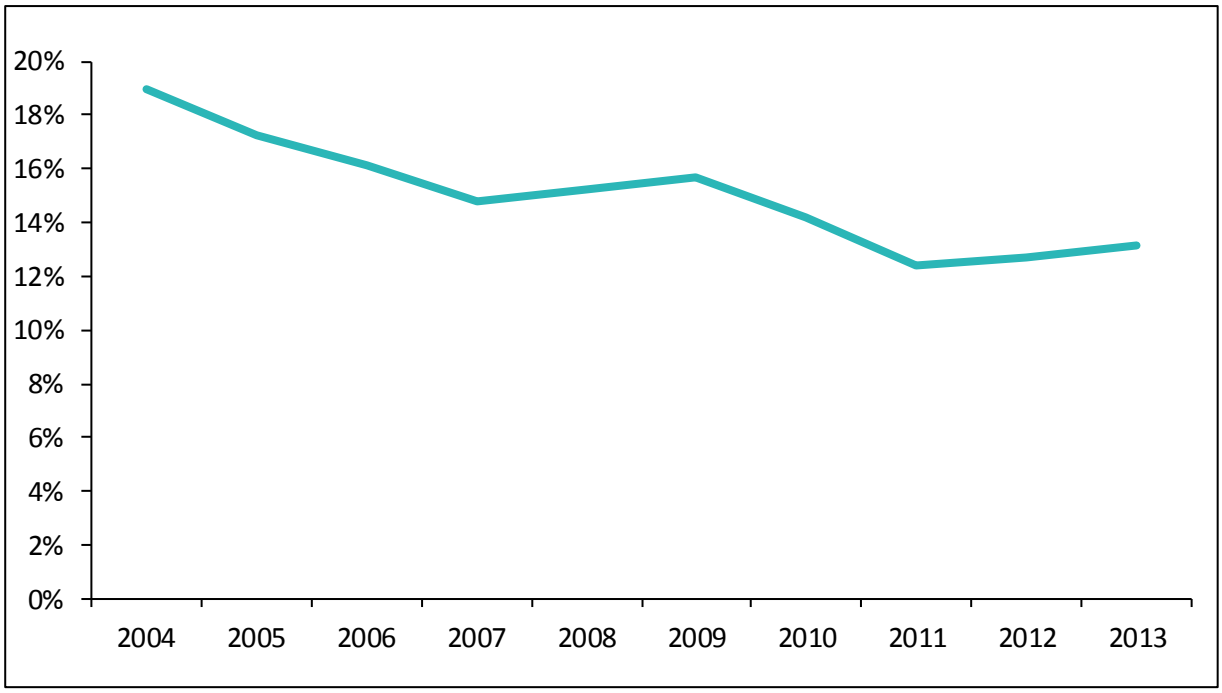
The widening in the cost gap in New South Wales between 2012 and 2013, led to an increase in the cost penalty in Australia over the same time period. The cost penalty is estimated to be 13.2 per cent in 2013. This represents a small increase, of 0.5 percentage points, from the 2012 level. This increase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

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

[44] Survey data refers to January of each year.
[45] Wilcox, *Transition to Fair Work Australia for the Building and Construction Industry*, April 2009

averages of the cost penalties for individual states,[46] while Chart 2.3 shows the Australian cost penalties alone. In January 2005, the ABCC had been in operation for approximately four months and the data showed only a small fall of 1.8 percentage points in the cost penalty. Over the period of operation of the Taskforce[47] and the ABCC, across Australia, the cost penalty for commercial building compared with domestic residential building continued to fall. The cost penalty was around 19 per cent in 2004, but fell gradually over the following years to be 12.7 per cent in 2012, or a fall of 6.3 percentage points.

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



Source: Independent Economics estimates.

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

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

[46] Between this report and the 2012 reports the weights used to calculate this nationwide average have been updated to reflect more recent data.
[47] The Taskforce was established in October 2002 but it is reasonable to expect a lag before its activities started to make an impact. The data also relate to January of each year so that for 2004, the data relates to January 2004.

approximately 53 per cent[48]. This results is an estimated fall from 2004 to 2012 in the labour cost gap for commercial building of 11.8 percentage points, as shown in Table 2.4. That is, using the Rawlinson's data, applying the labour share of 53 per cent to the estimated fall in the labour cost gap of 11.8 percentage points replicates the observed fall in the total cost gap of 6.3 percentage points.

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

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

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

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

As Mitchell points out in his comment on the 2007 report[49], to the extent that the Rawlinsons classification blurs the desired distinction in categories, the cost gap and its movements will be understated. As noted earlier, the ABCC's jurisdiction includes housing construction of four dwellings or more. However, this type of small-scale commercial construction is included in the definition of domestic construction used by Rawlinsons. This means that a small sector of domestic construction would have also benefited from improved workplace practices and associated labour productivity boost. The inclusion of small-scale construction in the domestic construction category means that the cost gap would have narrowed further had this not been the case.

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

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

[48] Information on labour cost shares are sourced from Rawlinsons.

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

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

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

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

2.2.3 Other supporting studies

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

- case studies completed by Econtech as part of the 2007 report which estimated a 7 per cent ($2.71 million) cost saving from a reduction in days lost to industrial disputes;
- research by the Allen Consulting group which estimated a 12.2 per cent gain in multifactor productivity in the five years to 2007[50];
- a study by Ken Phillips which estimated a 11.8 per cent saving in total construction costs for Eastlink because it was constructed under the ABCC and within the Workchoices environment[51]; and
- research by the John Holland Group which estimated that the construction industry has enjoyed a 10 per cent productivity dividend since the completion of the Cole Royal Commission[52].

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

Recently, the Business Council of Australia commissioned the Allen Consulting Group to conduct an analysis of the potential impact of industrial relations developments in the New South Wales construction industry[53]. The report examines a case study by Woodside Petroleum, which outlines the differences in the cost of constructing two similar LNG trains. One train (Train 4) was constructed between 2001 and 2005; thus the majority of construction was undertaken before the establishment of the ABCC. The other train (Train 5) was constructed between 2005 and 2008, and thus the majority

[50] The Allen Consulting Group, *The Economic Importance of the Construction Industry in Australia*, 2007, p18
[51] Ken Phillips, *Industrial Relations and the struggle to build Victoria*, Institute of Public Affairs, Briefing Paper, November 2006
[52] John Holland Group, *Preliminary Assessment of Economic benefits of industrial relations reform in the construction industry*, 2007
[53] The Allen Consulting Group, *Economic impact of construction industrial relations arrangements and investment in infrastructure – A New South Wales perspective*, 2013

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

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

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

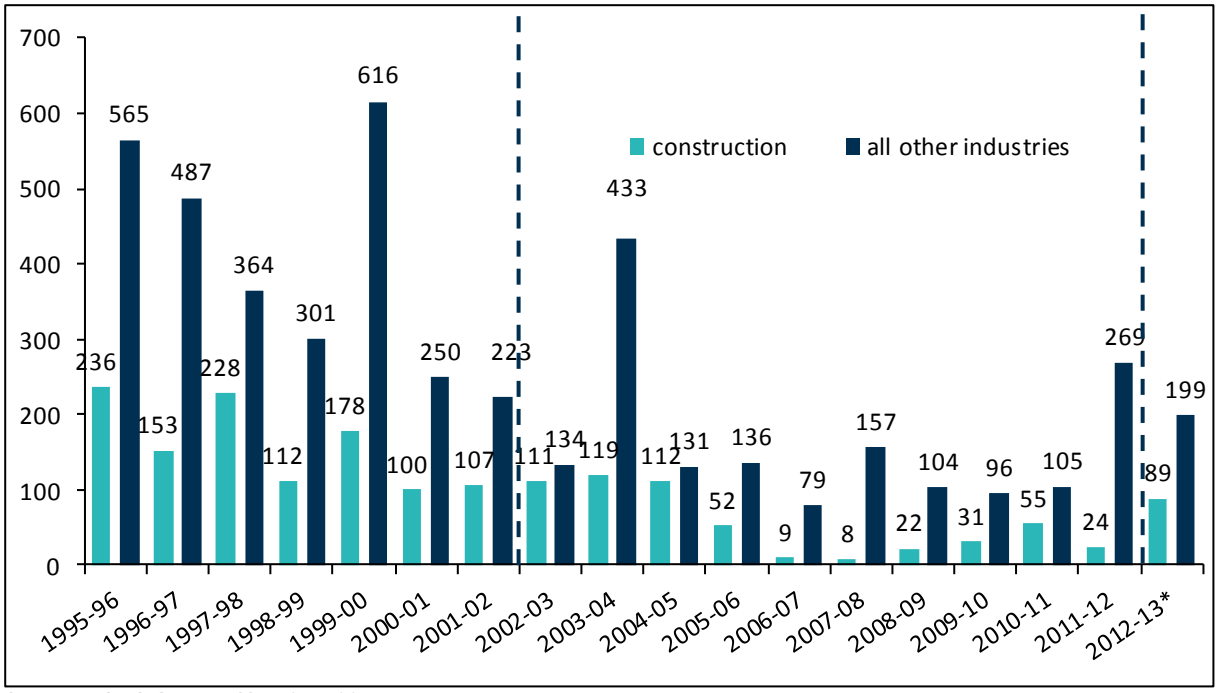
2.2.4 Days lost to industrial action

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

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

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

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



Source: ABS Cat No. 6321.0.55.001
Note: * Independent Economics' estimate for June 2013 is included in the data for 2012/13

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

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

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

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

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

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

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

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

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

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

2.3.1 Productivity gains in the Taskforce and ABCC era

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

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

- ABS data shows that, in 2012, construction industry labour productivity has outperformed predictions based on its historical performance relative to other industries by **21.1 per cent**. That is, a productivity outperformance is identified after allowing for factors driving productivity in the economy as a whole and trends in construction industry productivity prior to 2002 (the year improved workplace practices began).

- The Productivity Commission's analysis of ABS data has found that multifactor productivity in the construction industry was no higher in 2000/01 than 20 years earlier[54]. In contrast, the latest ABS data on productivity shows that construction industry multifactor productivity accelerated to rise by **16.8 per cent** in the ten years to 2011/12.

- Academic research on total factor productivity shows that productivity in the construction industry grew by **13.2 per cent**, between 2003 and 2007, whereas productivity grew by only 1.4 per cent between 1998 and 2002.

- Rawlinsons data to January 2012 shows that the cost penalty for completing the same tasks in the same region for commercial construction compared to domestic construction shrunk. The boost to productivity in the commercial construction sector, as estimated by the narrowing in the cost gap, is conservatively estimated at **11.8 per cent** between 2004 and 2012. This estimate is considerably higher once other factors are taken into account.

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

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

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

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

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

2.3.2 Productivity losses in the FWBC era

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

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

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

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

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

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

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

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

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

3 Modelling the impact of changes to workplace practices

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

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

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

3.1 Previous studies

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

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

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

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

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

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

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

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

3.2 Scenarios

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

- A "Baseline Scenario" provides a snapshot of the Australian economy representing the workplace practices in place before the Taskforce/ABCC era.

- An "ABCC Scenario" provides a snapshot of the Australian economy with higher productivity in the construction industry due to better workplace practices resulting from the ABCC, Taskforce and industrial relations reforms in the years to 2006. Specifically, productivity in the construction industry is 9.4 per cent higher than in the baseline scenario. This scenario is the same scenario that has been modelled in previous updates of this report. As explained in Section 2.3, it has been adopted for this report after considering the latest economic data, case studies and other research.

- An "FWBC Scenario" provides a snapshot of the Australian economy where 75 per cent of the productivity boost achieved in the Taskforce/ABCC era is unwound in the FWBC era. As explained in Section 2.3, this conservative assumption has been adopted following analysis of the workplace relations changes associated with abolishing the ABCC and establishing the FWBC, as well as the latest data.

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

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

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

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

3.3 Model inputs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.4 The Independent CGE model

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

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

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

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

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

- Profit maximisation: the representative business in each industry chooses how to produce (primary factors, intermediate inputs) and how much to produce to maximise profit subject to constraints such as prices and a production function.

- Utility maximisation: a representative household chooses a consumption bundle to maximise utility, which depends on the consumption of products and leisure time, subject to a budget constraint.

- Labour market equilibrium: in the long term the labour market is assumed to clear, so that an economic shock will have no lasting effects on unemployment.

- External balance: in the long term, external balance is assumed to be achieved by adjustment of the real exchange rate, so that trade shocks have no lasting effect on external balance.

- Budget balance: the budget is balanced because in the long run fiscal policy must be sustainable. The policy instrument which adjusts to ensure the budget is balanced, otherwise known as the swing policy instrument, is labour income tax.

- Private saving: in the long run the level of private sector saving and associated asset accumulation must be sustainable.

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

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

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

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

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

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

4.1 Building and construction industry effects

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

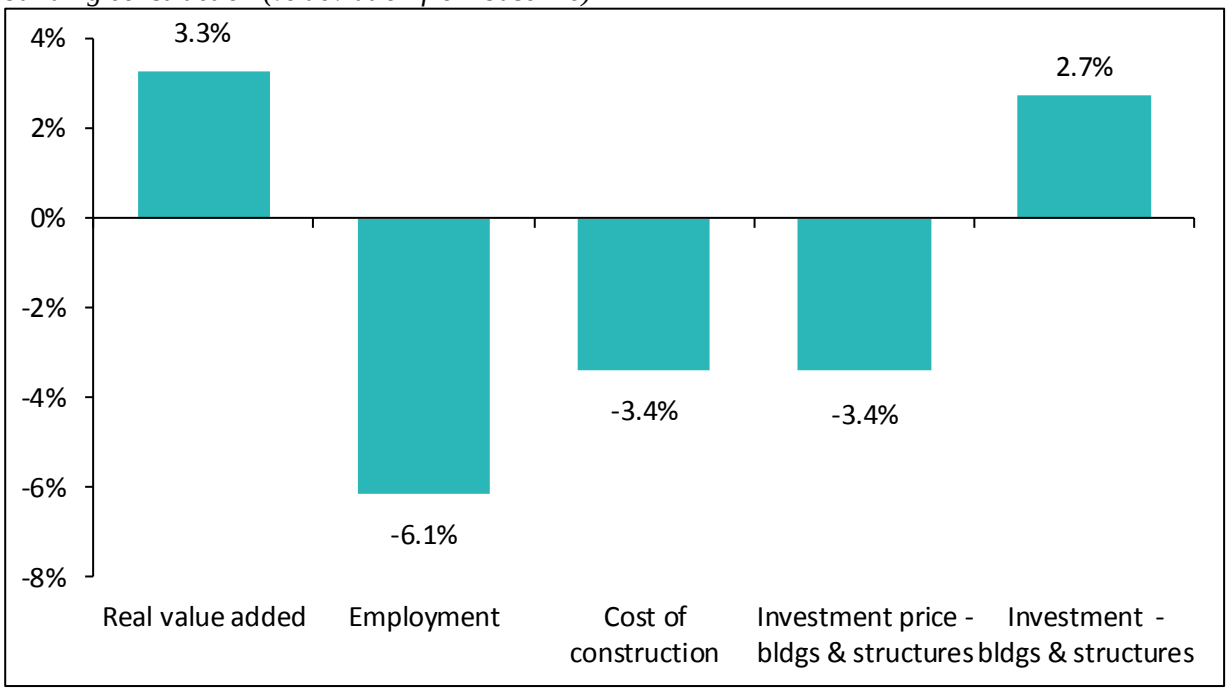
The analysis of productivity gains from improved workplace practices in section 3 indicated that the productivity gains are concentrated in the non-residential building, engineering and multi-unit side of the construction industry. Therefore, in considering the effects on the construction industry itself,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

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

Non-residential building

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

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



Source: the Independent CGE model simulations

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

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

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

- The assumed gain in labour efficiency of 20.5 per cent reduces employment by a similar percentage, for an unchanged level of activity ("labour saving effect").

- The rise in activity of 3.3 per cent adds a similar percentage to employment ("output effect").

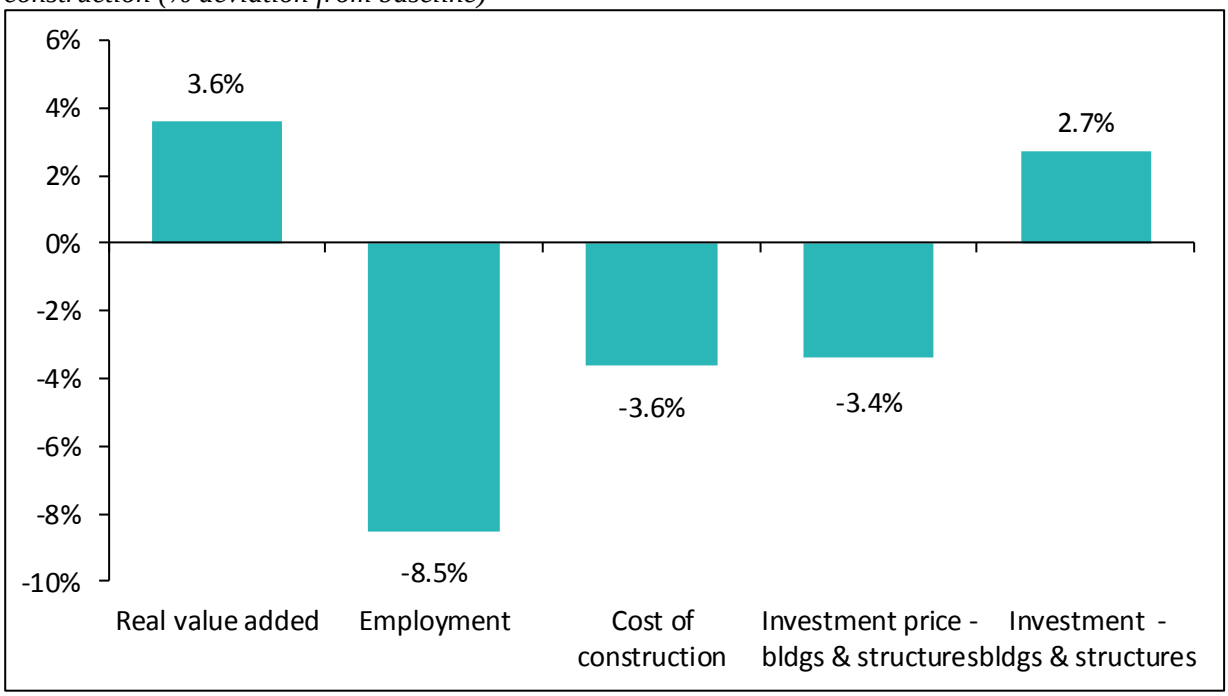
- The gain in labour efficiency makes labour cheaper, inducing some substitution towards labour and away from other inputs, such as capital and land ("substitution effect").

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

Engineering construction

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

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



Source: the Independent CGE model simulations

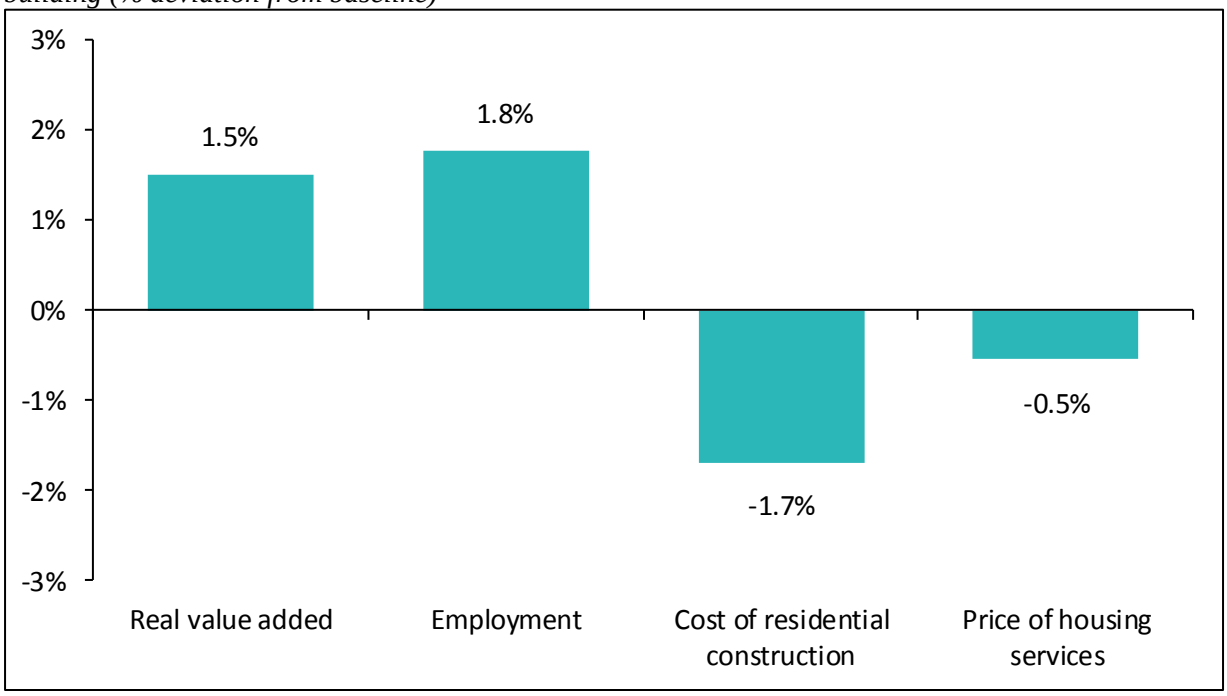
Similar to non-residential building construction, this gain in efficiency leads to a reduction in engineering construction costs of 3.6 per cent. As noted earlier, lower engineering construction costs, combined with lower non-residential building construction costs, lower the overall cost of business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

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

Residential building

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

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



Source: the Independent CGE model simulations

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

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

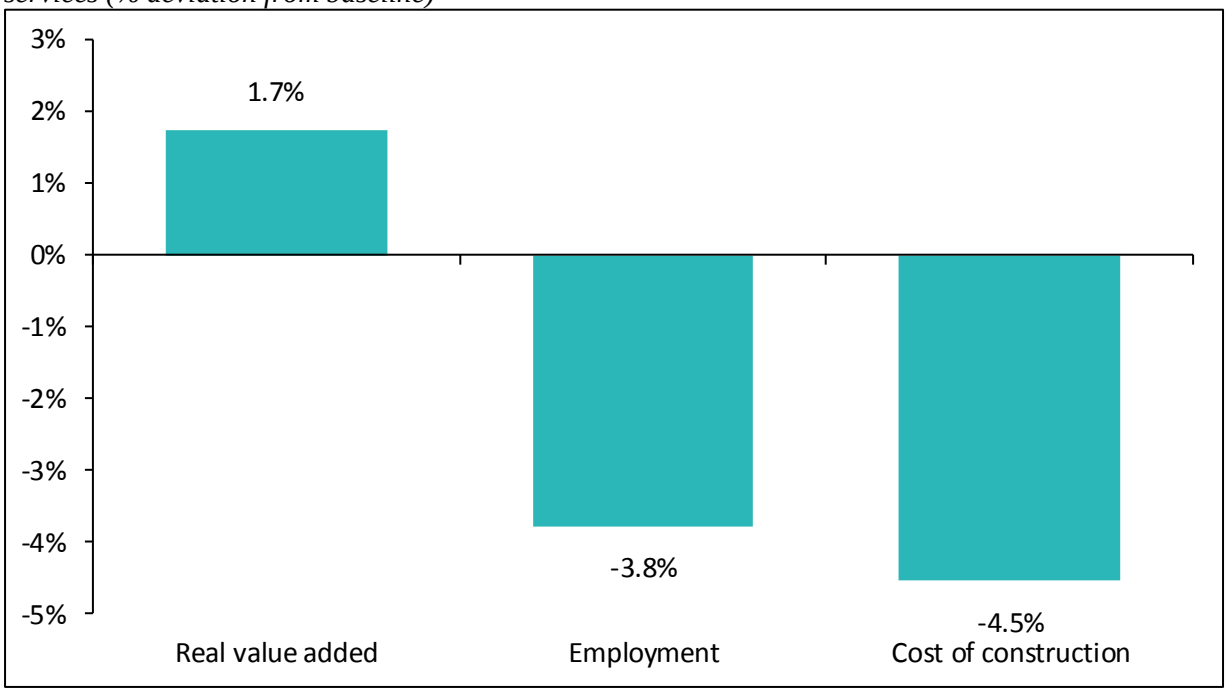
Interestingly, unlike for non-residential construction, where there are employment losses, for residential building there is an employment gain. As discussed above, large productivity gains in non-residential construction (including both non-residential building and engineering construction) reduce demand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

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

Construction services

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

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



Source: the Independent CGE model simulations

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

Total construction industry

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

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

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

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

4.2 Wider industry effects

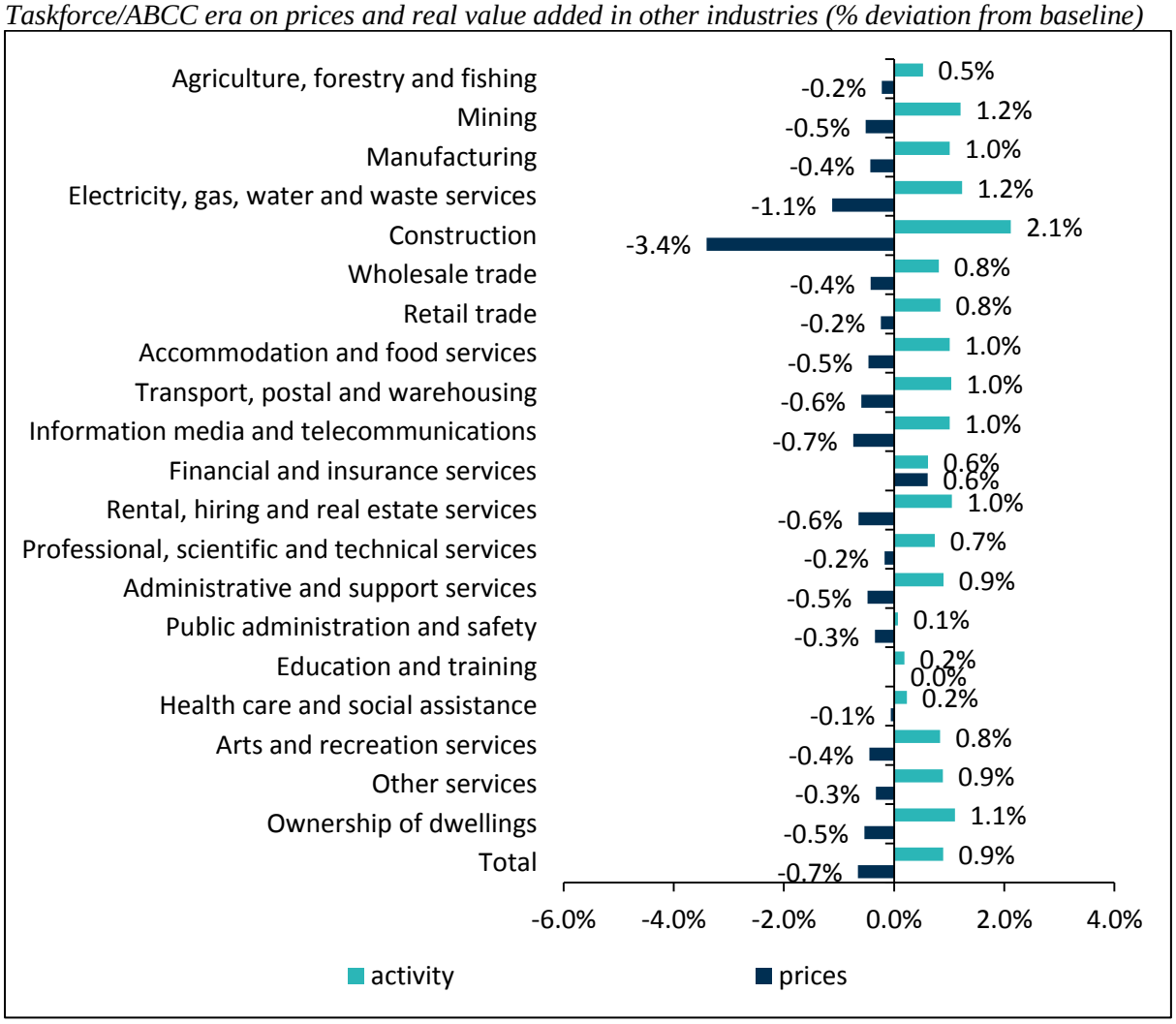
The change in activity in the building and construction industry is expected to affect activity in other industries. This section outlines the simulated production impacts on other industries of improved workplace practices in the building and construction industry as a result of the ABCC, Taskforce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

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

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

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

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



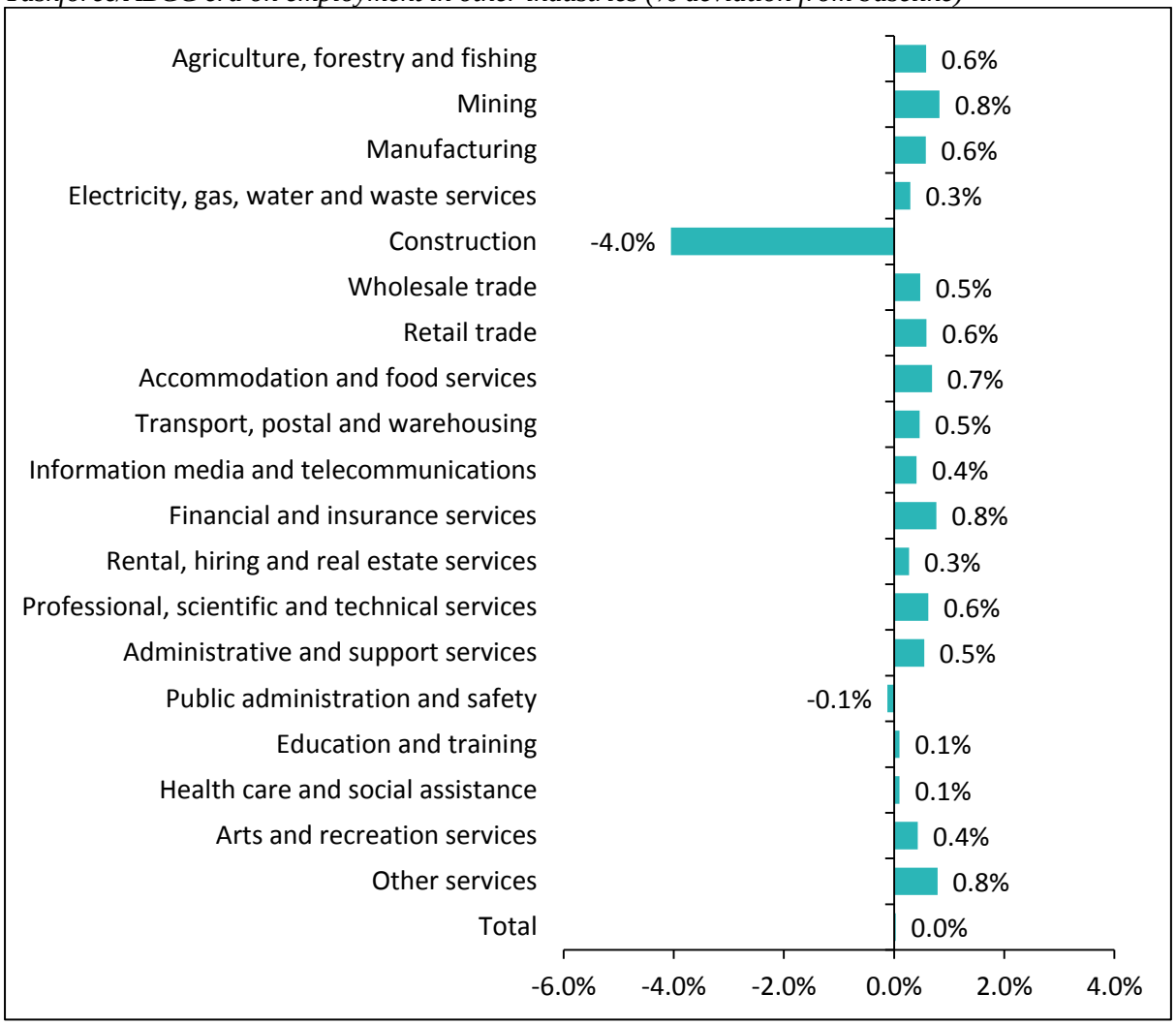
Source: the Independent CGE simulations

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

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

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

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



Source: the Independent CGE simulations

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

4.3 National Macroeconomic effects

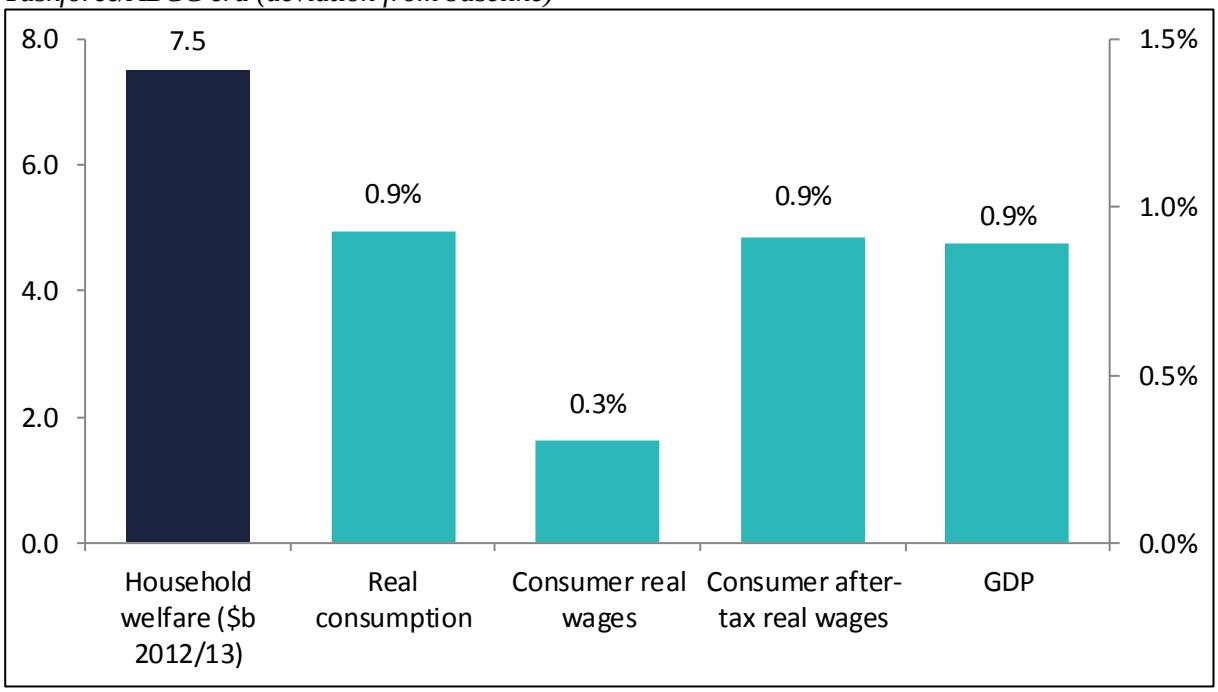
As explained in the previous sections, higher construction productivity leads to lower construction prices. This flows through to savings in production costs across the economy, because all industries are reliant on construction to some extent as part of their business investment. As shown in Chart 4.5,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

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

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

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

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



Source: Independent CGE model simulations

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

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

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

After allowing for economic growth over the last year, this is similar to the consumer gain estimated in the 2012 report of $6.3 billion in 2011/12 terms[55]. The estimate of consumer gains is similar across reports, since each report has consistently modelled a productivity gain of the same magnitude (9.4 per cent) and from the same source (improved workplace practices in the building and construction industry).

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

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

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

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

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

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

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

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

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

5.1 Building and construction industry effects

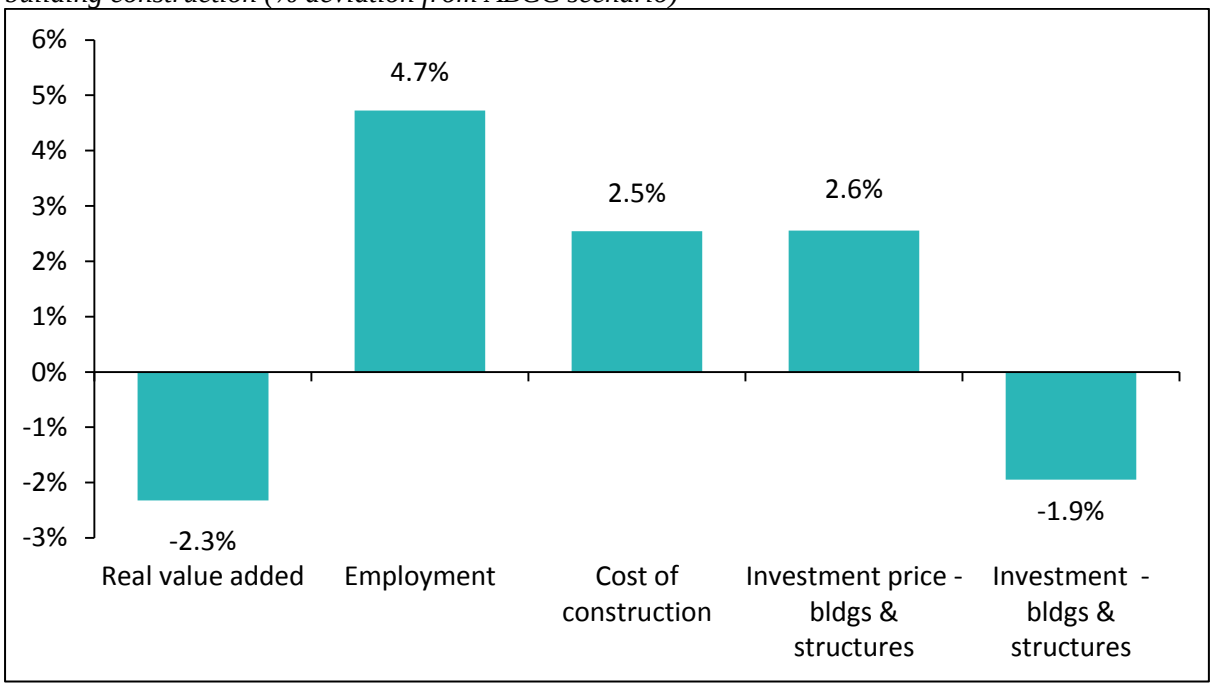
This section presents the economic impacts on the building and construction industry of the labour productivity loss in the industry stemming from abolishing the ABCC and replacing it with the FWBC.

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

Non-residential building

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

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



Source: the Independent CGE model simulations

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

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

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

- The assumed loss in labour productivity of 12.8 per cent means that the number of employees required for an unchanged level of activity is higher ("labour *dis*-saving effect").

- The reduction in activity of 2.3 per cent subtracts a similar percentage from employment ("output effect").

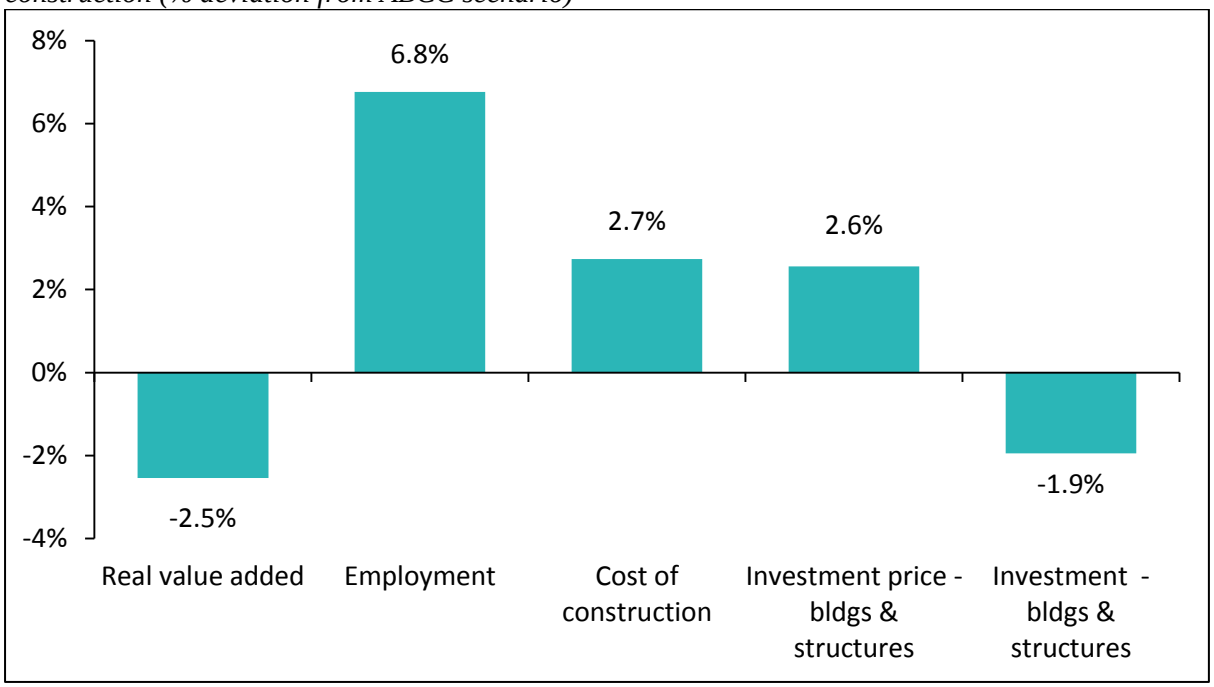
- The reduction in labour efficiency makes labour more expensive, inducing some substitution away from labour towards capital and land ("substitution effect").

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

Engineering construction

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

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



Source: the Independent CGE model simulations

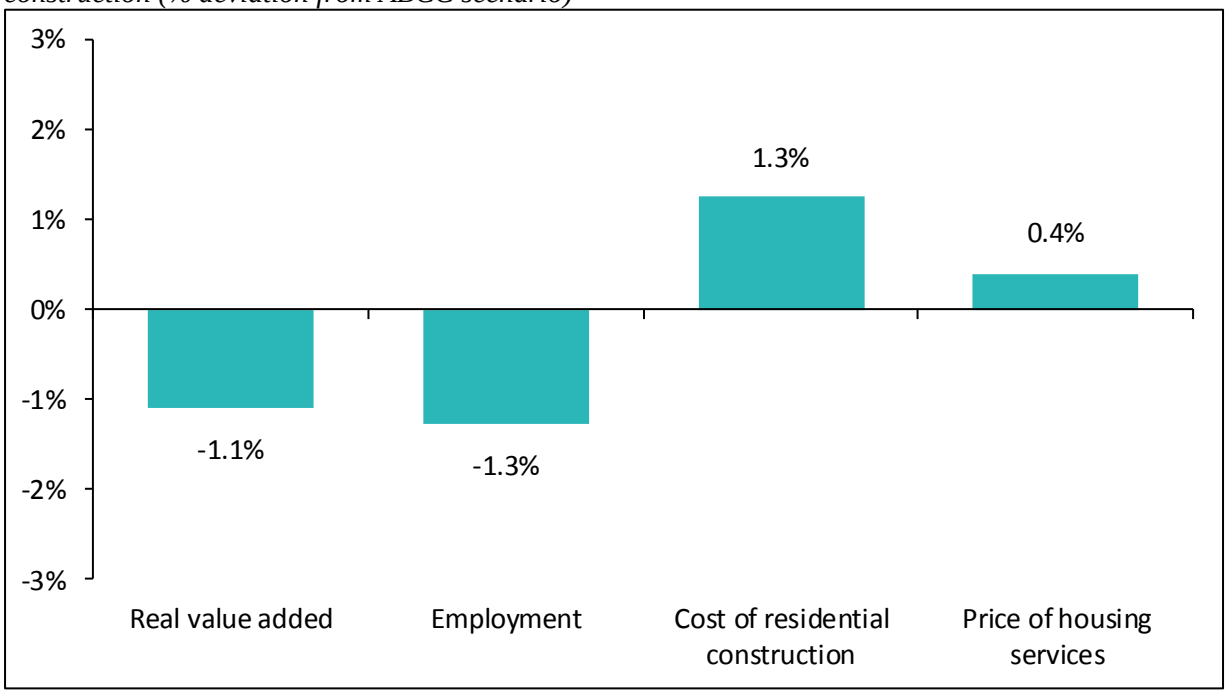
Similar to non-residential building construction, this reduction in labour efficiency leads to an increase in engineering construction costs of 2.7 per cent. As noted earlier, higher engineering construction costs, combined with higher non-residential building construction costs, increase the overall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

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

Residential building

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

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



Source: the Independent CGE model simulations

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

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

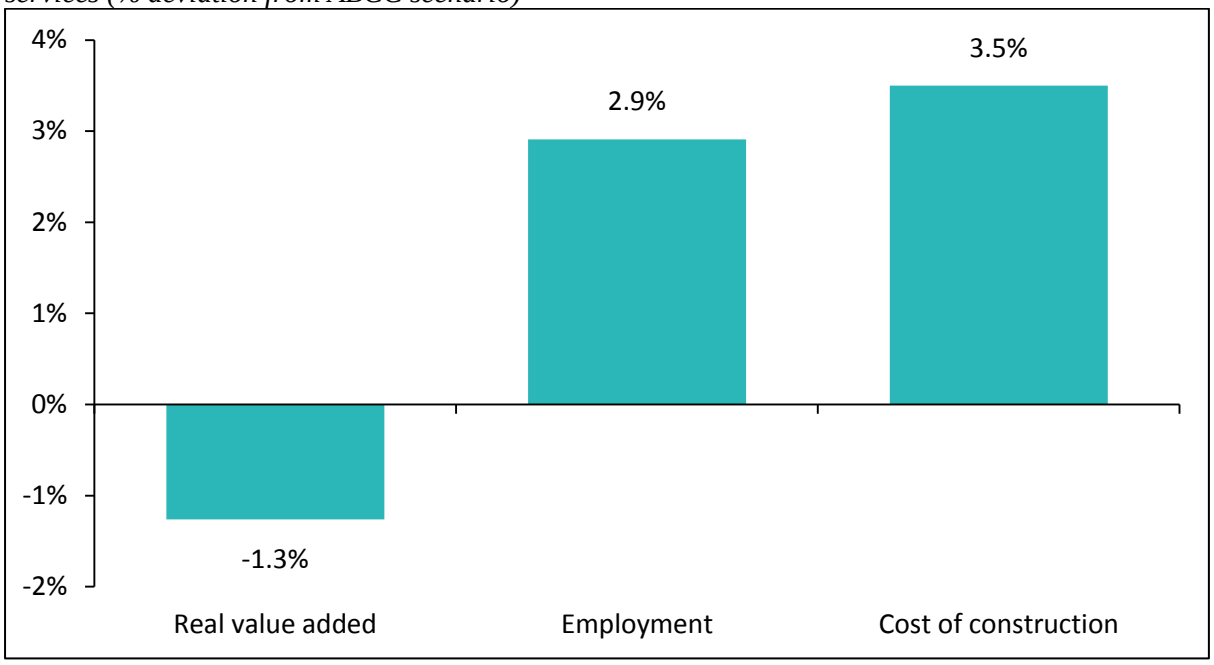
Interestingly, unlike for non-residential construction, where there are employment gains, for residential building there is an employment loss. As discussed above, large productivity losses in non-residential construction (including both non-residential building and engineering construction) increase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

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

Construction services

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

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



Source: the Independent CGE model simulations

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

Total construction industry

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

- 2.3 per cent loss for non-residential building;

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

5.2 Wider industry effects

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

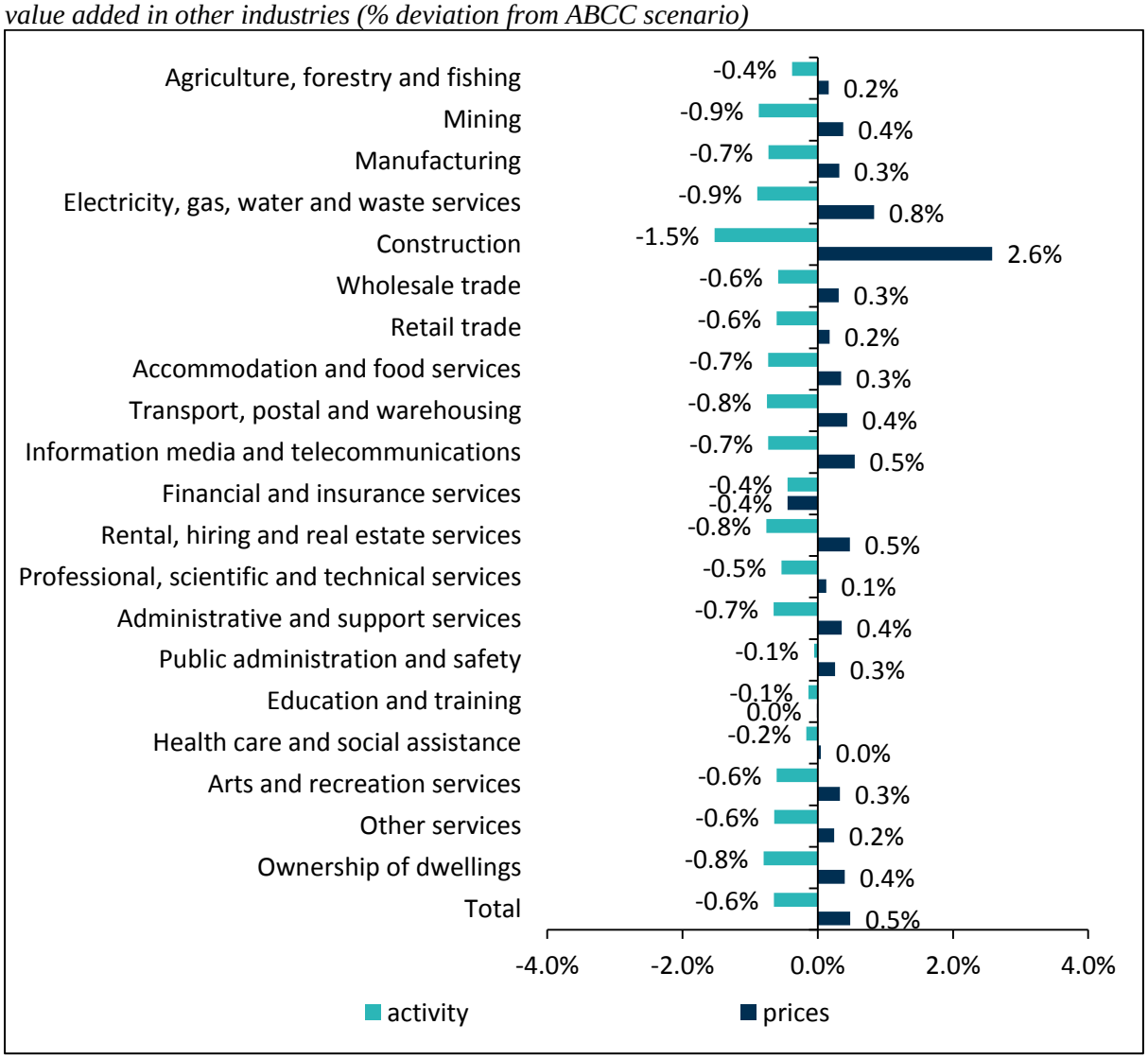
As discussed in Section 5.1, lower labour productivity flows through to raise the cost of dwellings by around 0.4 per cent (also shown in Chart 5.5). This leads to a long-term reduction in the level of demand for housing services ("ownership of dwellings") of 0.8 per cent, relative to what it would be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

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

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

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

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



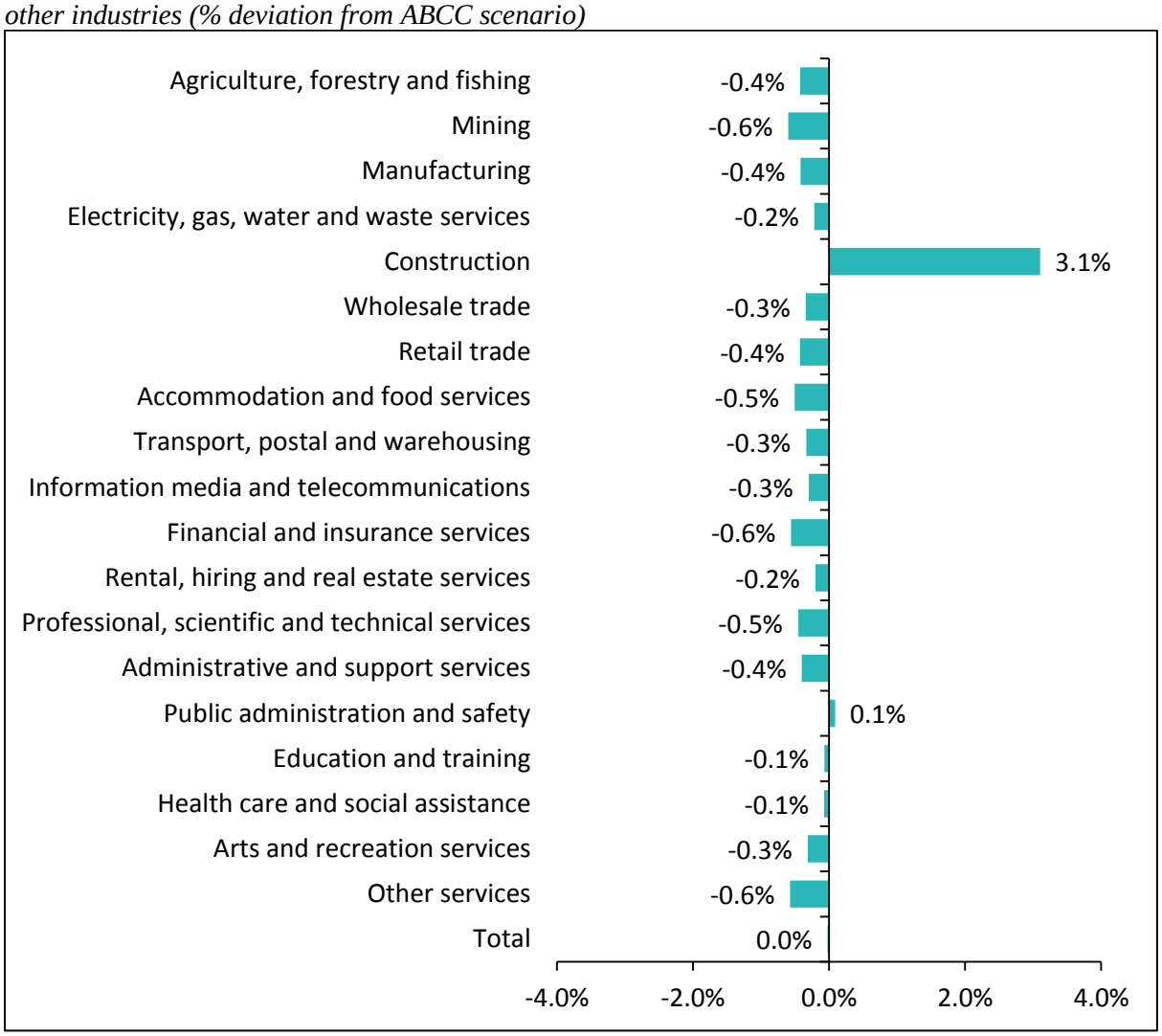
Source: the Independent CGE simulations

Chart 5.6 shows the pattern of industry job shifting induced by lower productivity in the construction sector. While employment in construction increases by 3.1 per cent, the effect of this on national employment is offset by employment losses in other industries. The biggest reductions in employment are in the industries of mining, other services and finance and insurance services (of 0.6 per cent in each case). This is a direct effect of the lower production levels in these industries.

As discussed in Section 5.1, employment in the construction industry itself is expected to be higher than otherwise, with the positive labour *dis*-saving effect only partly offset by the negative output and substitution effects in this industry. A minor increase is also expected in employment in the public administration and safety industry as government substitute towards labour as capital has become relatively more expensive.

Chart 5.6 also shows that, overall, there is no change in the level of employment in the economy. As explained in Section 3.4, national unemployment is not affected in the long-term because wage adjustments allow the labour market to clear.

Chart 5.6. Effects of less productive workplace practices during the FWBC era on employment in other industries (% deviation from ABCC scenario)



Source: the Independent CGE simulations

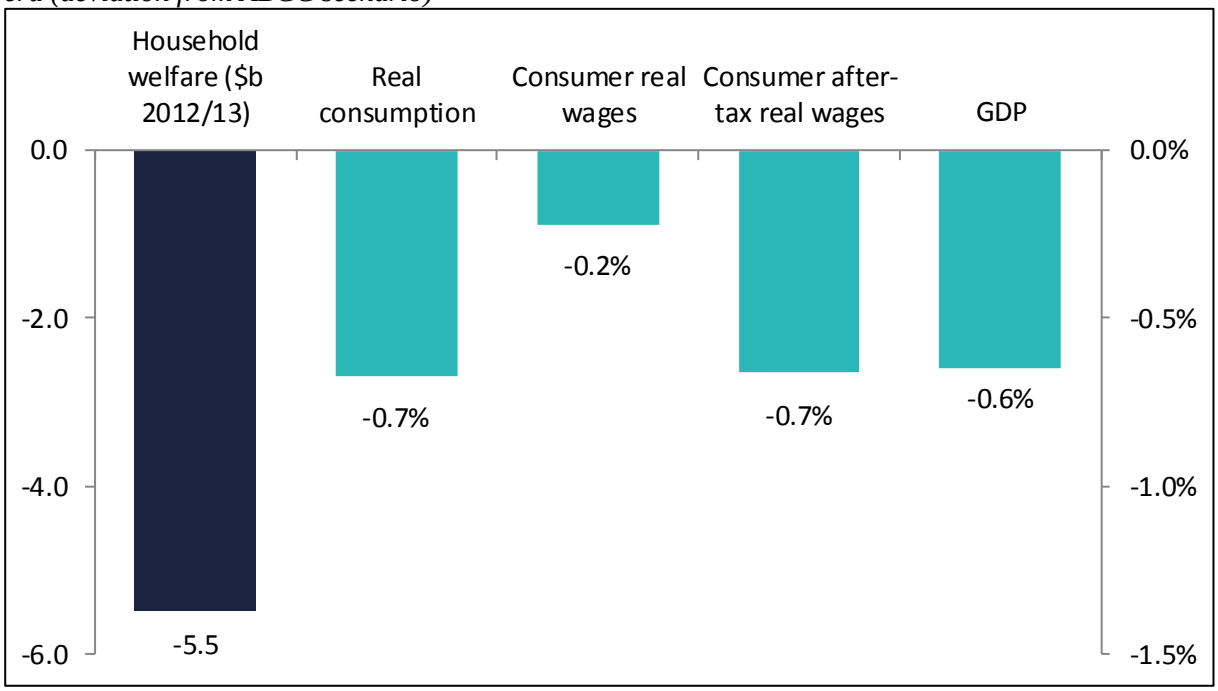
5.3 National Macroeconomic effects

As explained in the previous sections, lower productivity in the construction industry leads to higher construction costs and prices. This flows through to higher production costs across the economy, because all industries are reliant on construction to some extent as part of their business investment. As shown in Chart 5.5, the average increase in production costs is reflected in a rise in the economy-wide price of production by 0.5 per cent.

This cost increase is borne across the economy, as both the private and government sectors are significant users of commercial building or engineering construction. Importantly, consumers lose out through a fall in their real after-tax wage. This fall is distributed through two channels, a reduction in the real wage and increases to personal income tax rates.

In the private sector, the cost increases to each industry from higher costs for buildings and engineering construction flows through to households in the form of higher consumer prices. This is reflected in the 0.2 per cent lower consumer real wages seen in Chart 5.7.

Chart 5.7. National macro-economic effects of less productive workplace practices during the FWBC era (deviation from ABCC scenario)



Source: the Independent CGE model simulations

In the government sector, higher construction costs mean that the same level of public investment in schools, hospitals, roads and other infrastructure can now only be provided at a higher cost. This sees the government's budget position deteriorate, and it is assumed this is passed on to households in the form of higher personal income tax rates, which is the model's swing fiscal policy instrument, as discussed in section 3.4. This tax hike adds to the reduction in the consumer real wage from 0.2 per cent on a pre-tax basis, to 0.7 per cent on a post-tax basis, as seen in Chart 5.7.

In short, there is a fall in the real consumer after-tax wage, because labour in the construction industry has become less productive as a result of replacing the ABCC with the FWBC, and this productivity loss flows through to the wider economy and ultimately to consumers.

Chart 5.7 also shows the effects of lower construction productivity on other economy-wide indicators. The fall of 0.7 per cent in consumer real after-tax wages leads to a loss in real private consumption of 0.7 per cent. That is, a lower real wage leads to lower living standards.

This loss in living standards is more rigorously measured as an annual loss in consumer welfare. The Independent CGE model provides estimates of the change in annual economic welfare by using the equivalent variation measure from welfare economics. This rigorously measures the loss in real consumption. Chart 5.7 shows that lower construction productivity leads to a fall in consumer living standards (the annual economic welfare loss) of $5.5 billion in current (2012/13) dollars.

Chart 5.7 also shows a 0.6 per cent reduction in the level of GDP in the long-term, relative to what it otherwise would have been if the ABCC had not been replaced by the FWBC. This loss was reported earlier in Chart 5.5 as the loss in real value added for all industries added together. Activity losses for individual industries can be seen in the same chart.

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Appendix A: Independent CGE Model

Computable General Equilibrium (CGE) models provide a powerful tool for simulating the economic impacts of changes in government economic policies, industry developments, and the world economy. They show impacts on economic activity, employment, trade and investment at the level of individual industries, impacts on households and impacts on the economy as a whole.

The Independent CGE Model is Independent Economics' CGE model of the Australian economy, first developed in early 2012. It includes a number of notable features that set it apart from other models of the Australian economy.

- The model uses recent data from the Australian Bureau of Statistics (ABS). The starting point was calibrating the model to the 2007/08 Input-Output (IO) tables from the ABS, which were released in late 2011. The model is then uprated in the baseline scenario to a normalised version of the Australian economy in 2012/13. This includes allowing for growth in wages, prices, productivity and employment from 2007/08 to 2012/13, as well as normalised commodity prices.

- The model is based on the most up-to-date ABS industry classification, ANZSIC 2006, which replaces ANZSIC 1993. The 111 industries originally in the ABS data have been extended so that the model distinguishes 120 industries.

- The model incorporates a sophisticated modelling of production in each industry. Production in a standard CGE involves at least three factors of production - labour, capital and intermediate inputs. The Independent CGE model extends this to distinguish 43 types of labour, nine types of capital, land and natural resources. The model also allows for different degrees of substitutability between these different inputs.

- The model provides a valid measure of changes in consumer welfare or living standards based on the equivalent variation, so that policy changes can be correctly evaluated in terms of the public interest.

This appendix explains the main features of the Independent CGE Model, starting with its general features, which are common to most long-run CGE models. Then, the overall structure of the model is described, including the different sources of supply and the end users in the model. Following this, the behaviour of each of the agents in the model is outlined – industries, households, government and then the foreign sector. The final section explains the baseline scenario and validation procedures undertaken in ensuring that the model meets high professional standards.

A.1 General features

The Independent CGE Model makes a number of general assumptions that are consistent with its long-term time horizon. Many of these features are shared with other long-run CGE models.

Long-term model

The Independent CGE Model is a long-term model, meaning that results refer to the ongoing effects on the economy after it has fully adjusted to economic shocks. In keeping with this, all markets are assumed to have reached equilibrium. This includes key markets such as the labour market, where the real wage adjusts so that labour demand from industries is equal to labour supply from households. In addition, the behaviour of households and government is consistent with the inter-temporal budget constraints that they face. This involves levels of household saving and foreign capital inflow that are consistent with stocks of assets growing at the same rate as real GDP.

The long-term time horizon is fitting because economic policies should be judged against their lasting effects on the economy, not just their effects in the first one or two years.

Optimising behaviour

Industries and households in the Independent CGE Model choose the best possible outcome, while still remaining within the constraints of their budgets.

- **Profit maximisation**: the representative business in each industry chooses how to produce (with a mix of primary factors and intermediate inputs) and how much to produce to maximise its profit subject to the prices of its inputs and outputs.
- **Utility maximisation**: A representative household chooses their consumption levels of leisure and each of the 120 goods and services in a way that maximises their well-being (or utility), subject to a budget constraint.

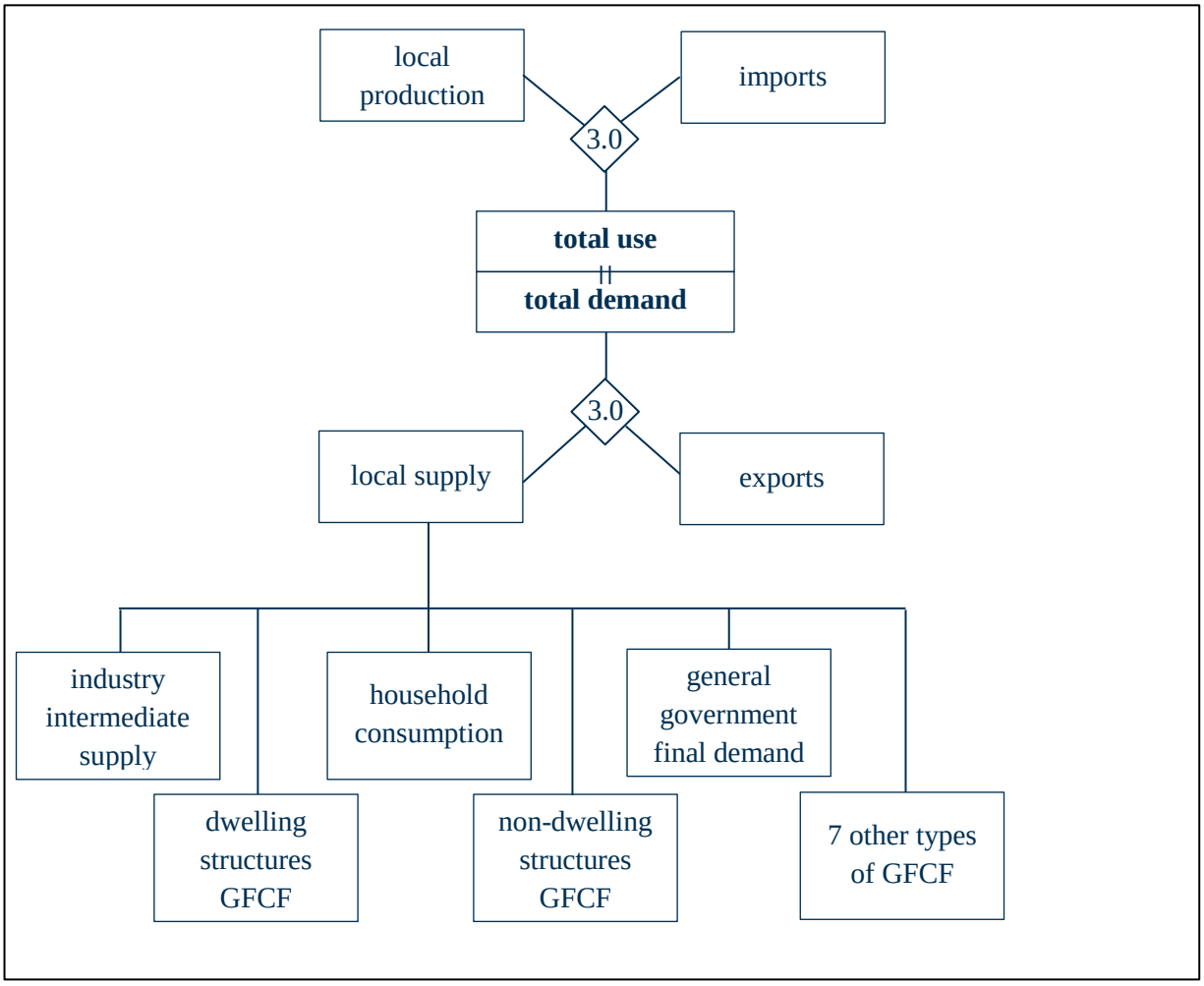
Budget constraints

In a sustainable equilibrium, governments and households must meet their budget constraints. For simplicity, we assume that the government budget is balanced in the long run. Given its expenditure requirement, the government chooses its level of taxation consistent with achieving this outcome. In the private sector, a sustainable outcome is one in which household saving is sufficient to generate growth in household assets in line with growth in real GDP.

A.2 Trade and demand

This section discusses the overall structure of the Independent CGE Model. The connection between total use and total demand is shown in Diagram A.1.

Diagram A.1 Trade and demand for each product



Note: GFCF is Gross Fixed Capital Formation, or investment.

As shown in Diagram A.1, total supply in the Independent CGE Model is made up of locally produced and imported varieties of each good. Local production competes with imports so that if imports become cheaper relative to the locally-produced equivalent, domestic users will purchase more imports and less locally produced goods and services. This substitution is modelled using a Constant Elasticity of Substitution (CES) function, where the elasticity of substitution has been set at 3.0. That is, if the price of imports relative to local production is 1 per cent lower, then the quantity used of imports relative to local production will be 3.0 per cent higher.

The value of 3.0 for the elasticity has been chosen after considering the economic literature for Australia. For example, Zhang and Verikios have estimated the elasticity of substitution between locally produced and imported goods for a number of countries, including Australia, using data from 1997, 1998 and 2002. Their estimates for this elasticity in industries for which Australia is a large importer suggest an overall substitutability of around 3.0.

In each industry, the representative firm chooses the amount to supply to the export market and the amount to supply to the domestic market. Some CGE models unrealistically assume that a firm can switch between supplying the domestic and export markets without incurring a cost. However, there are a number of inherent costs involved in export activities, such as the costs of establishing and maintaining a client base in foreign countries and/or of producing goods that satisfy foreign tastes. In line with this, the Independent CGE model takes into account that firms cannot costlessly switch between supplying the domestic and export markets. It does this using a constant elasticity of transformation (CET) function, with an elasticity of 3.0. That is, if the price received for exports relative to the price received in the domestic market is 1 per cent higher, then the quantity that firms supply to the export market relative to the quantity supplied to the domestic market will be 3.0 per cent higher. This represents a relatively high level of sensitivity to export prices, but is still less sensitive than models that assume that exports and domestic supply are perfect transformates.

Total supply must equal total demand in a long-run equilibrium. In the Independent CGE Model, local production and imports supply the 13 different categories of demand that are shown in Diagram A.1.

- Industries demand intermediate inputs.
- Industries also make decisions about their nine different types of capital– including stocks of dwellings structures, non-dwellings structures and seven other types of produced capital. In turn, these capital stocks determine the gross fixed capital formation (GFCF or investment) required to maintain sustainable growth in these assets.
- Households demand consumption goods and services.
- The general government sector demands final goods and services on behalf of households.
- The foreign sector demands exports from Australia.

The following sections describe the behaviour of each of these agents in the model – industries, households, the government and the foreign sector.

A.3 Industry production

Production in each of the 120 industries in the Independent CGE Model is modelled in a sophisticated way that identifies a large set of inputs used by industries.

It is a standard practice in a CGE model to at least distinguish between labour and capital as primary factors. Krusell et al. (1997) go further and distinguish between capital structures and capital equipment, as well as between skilled labour and unskilled labour. In the Independent CGE model, we adopt their idea of distinguishing between capital equipment and capital structures. The model also identifies industry use of labour by skill level and occupation.

Fraser and Waschik (2010) note that the GTAP7 Dataset distinguishes the primary factors of land, skilled labour, unskilled labour, capital and natural resources. Hertel et al. (2008) discuss land use in CGE models. Land and natural resources can be regarded as location-specific fixed factors which earn economic rents, setting them apart from mobile factors such as labour and capital. In each

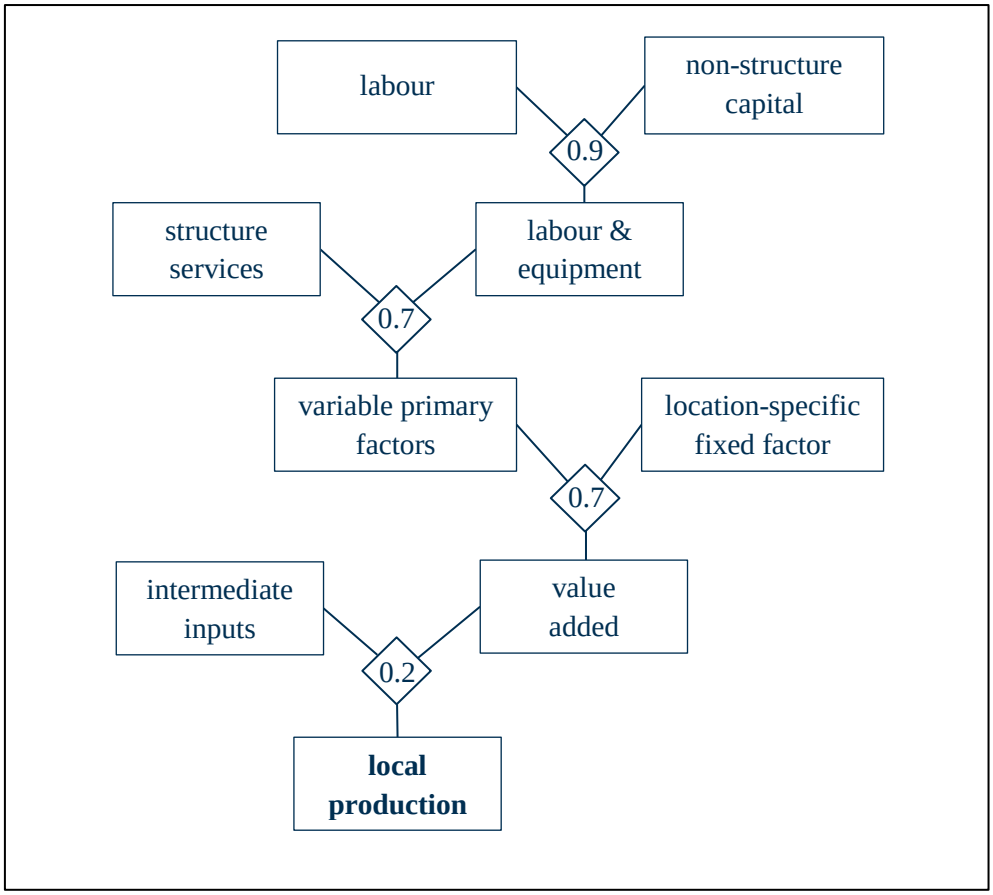
industry in the Independent CGE model, there are three fixed factors to capture economic rents. These fixed factors are land and two industry-specific fixed factors, one of which is fixed in supply in Australia (location specific) and the other which is fixed in supply globally (or firm-specific).

Each industry other than Dwelling Services in the Independent CGE model can use 43 different types of labour, nine types of produced capital and three fixed factors. It combines these primary factors with intermediate inputs purchased from other industries. The structure of the production decisions is shown in Diagram A.2.

Each industry can change the mix of primary factors that it uses as their relative prices change. Some types of primary factors are more substitutable with other factors, and other types of primary factors are less substitutable. To reflect this, the nesting structure of production decisions in the Independent CGE Model is set up in a way that allows for a high degree of flexibility.

Diagram A.2 below shows an overview of the production technology used by firms in each industry in the Independent CGE model. The full production technology is illustrated in the set of three diagrams including Diagram A.2 below, along with Diagrams A.3, A.4 and A.5 which are presented later.

Diagram A.2 Production in each industry



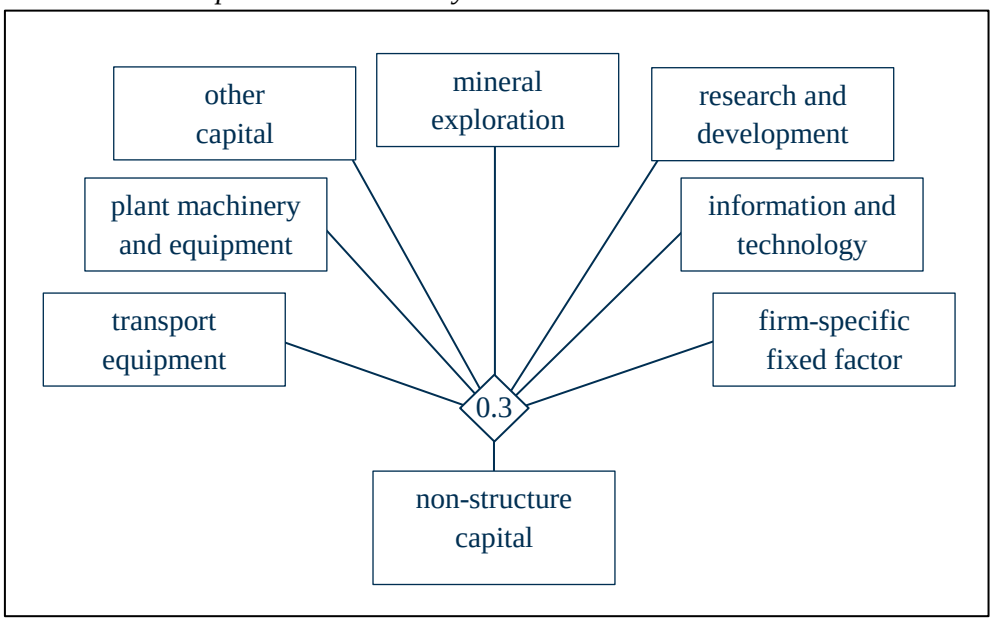
Labour and non-structure capital are modelled to be relatively substitutable with each other. As the non-structure capital bundle becomes more expensive, an industry may choose to use more labour instead. The elasticity of substitution for labour and non-structure capital measures the per cent increase in the ratio of labour to non-structure capital for a 1 per cent decrease in the ratio of their

prices. Gunning et al. (2007) review the CGE modelling literature, showing that the consensus for this elasticity appears to be between 0.7 and 1.0. Following this, we set the elasticity of substitution between labour and non-structure capital at 0.9.

A.3.1 Non-structure Capital

Non-structure capital is itself a combination of seven different types of capital, as shown in Diagram A.3. The representative firm in each industry chooses a different combination of the seven types of non-structure capital, and substitutes between each type as their relative prices change. The elasticity of substitution is set relatively low, at 0.3, reflecting the limited substitution possibilities between the different capital types. This implies that, when the cost of one capital type is higher by 1 per cent, relative to the overall cost of non-structure capital, firms will use 0.3 per cent less of this capital type, relative to their overall use of non-structure capital.

Diagram A.3 Non-structure capital in each industry



Of the seven different types of non-structure capital, six are produced (all types except the firm-specific fixed factor). Each of these types of capital is produced using different inputs. Firms can vary their use of each produced capital asset, through investment, as its return changes. Firms are able to attract funds to invest in the stock of each type capital as long as the return that can be earned is at least as high as the return that could be earned on the global market.

However, the other type of non-structure capital, the firm-specific fixed-factor, is not produced. Income from the firm-specific fixed factor reflects the rents generated by intangible assets such as brand names, patents and market power. This firm-specific fixed factor is assumed to be owned by multi-national firms, who can allocate the factor between its Australian and international operations. Although the amount of this factor globally available to multinational firms is fixed, firms can choose to change the amount that they use within Australia to generate rents. Firms will allocate their fixed factor to Australia as long as the after-tax rate of return earned in Australia is at least as high as the return that could be earned in the rest of the world.

A.3.2 Labour

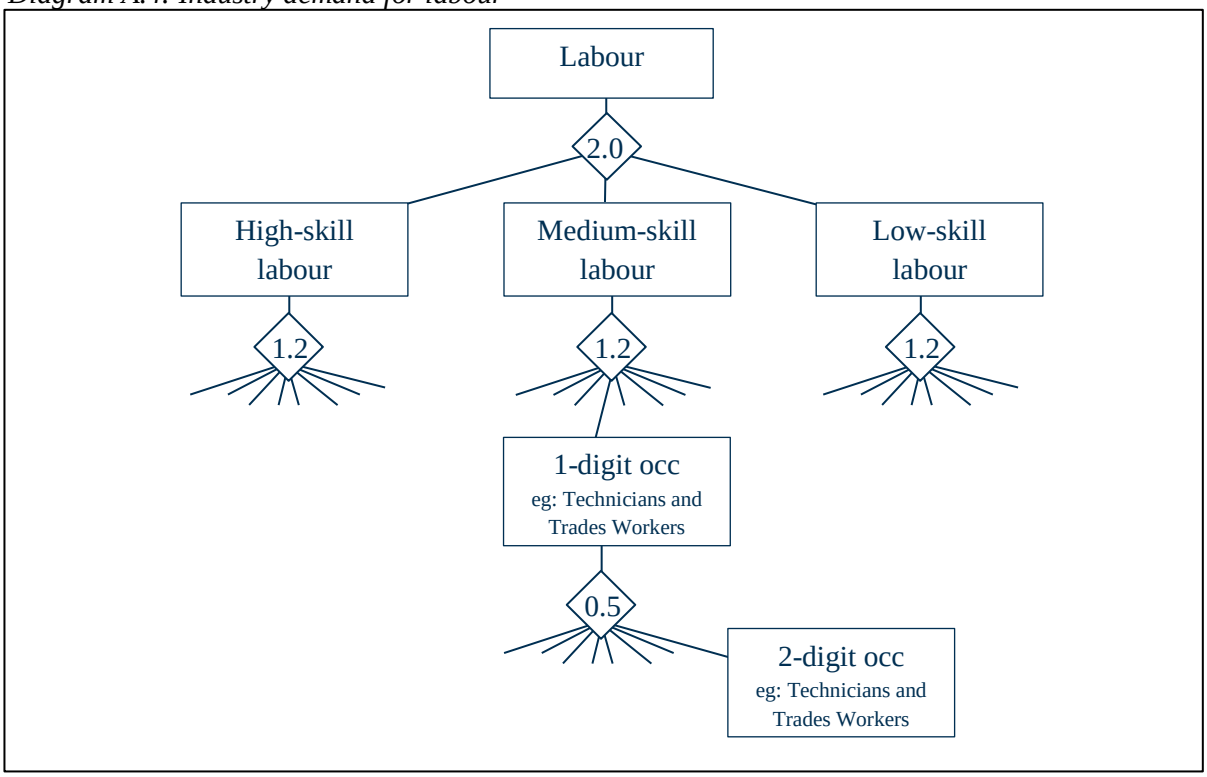
The Independent CGE model includes detailed modelling of the labour market. Specifically, it distinguishes industry use of labour according to 43 different occupations. The modelling approach in the Independent CGE model takes into account three main features of the labour market.

- Firstly, different industries demand different kinds of labour, depending on their skill level and occupation. For example, the Automotive and Engineering Trades Workers make up a relatively large share of employment in manufacturing industries, compared to their share of employment in the finance industry.
- Secondly, to a certain extent, industries are able to substitute between the types of labour that they use.
- Thirdly, through training and education (including formal and informal learning), individuals are able to adjust their skills and occupations in response to industry demand.

The initial pattern of employment in each industry is based on a number of ABS data sources showing employment by occupation by industry. Specifically, detailed data from the recent census is used to enhance data from the Labour Force Survey to estimate the pattern of employment in each of the 120 industries in the model.

The Independent CGE model uses a three-tiered system to model labour demand. This is represented in the following diagram, and then discussed below.

Diagram A.4: Industry demand for labour



Generally, the modelling of industry demand for each occupation takes into account that while industries can substitute relatively easily between broad skill levels, they are less able to substitute

between more detailed types of occupations. In addition, the parameters used in the model take into account that the occupational pattern of labour supply can respond to labour demand from industry. This is discussed below.

As shown in Diagram A.4 above, an industry first distinguishes between the different skill levels that it requires. These skill levels are defined as broad groupings of the 1-digit ANZSCO occupations.

- **High Skill Labour**: Managers and Professionals
- **Medium Skill Labour**: Technicians and Trades Workers, Community and Personal Service Workers, and Clerical and Administrative workers
- **Low Skill Labour**: Sales Workers, Machinery Operators and Drivers and Labourers

The econometric literature provides evidence that the elasticity of substitution between broad skill categories is relatively high. If it is cost-effective to do so, firms can substitute low, medium or high skilled labour relatively easily. This does not imply that the workers need to be substituted one for one. For example, the work of a team of Low Skill Workers might instead be undertaken by a smaller team of Medium Skill Workers. A firm's choice between lower and higher skilled workers will depend on the wages paid to each type of worker, and their relative productivities. However, industries will always need to use some combination of the three types of workers. The elasticity of substitution for the broad skill types is set at 2.0 – that is if the wage for high skill labour relative to the other types of labour is higher by 1 per cent, then demand for high skill labour is 2.0 per cent lower.

This level of substitutability is slightly higher than estimates from Katz and Murphy (1992) and Acemoglu and Autor (2010). This is to allow for flexibility in the supply side of the labour market. For example, if industries increase their demand for high-skilled labour, then households are likely to respond by undertaking more education or training so that they can supply this kind of labour.

After the amount of high, medium and low skilled labour is chosen, industries then choose the amount of labour from each broad (1-digit) occupation to employ. To recognise that industries are less able to substitute workers at this 1-digit occupational level, a lower elasticity of substitution is used, of 1.2. For example, if the wage for Clerical and Administrative workers relative to other medium skill occupations is higher by 1 per cent, then the demand for Clerical and Administrative workers relative to other medium skill occupations is lower by 1.2 per cent.

This elasticity is set relatively high to mimic the responsiveness of labour supply to changes in industry demand. Supply side responses are likely to have a relatively large effect at this level, because retraining from a Clerical and Administrative worker to a Community and Personal Service worker in response to industry demand is likely to be easier than retraining from a medium skill worker to a high skill worker.

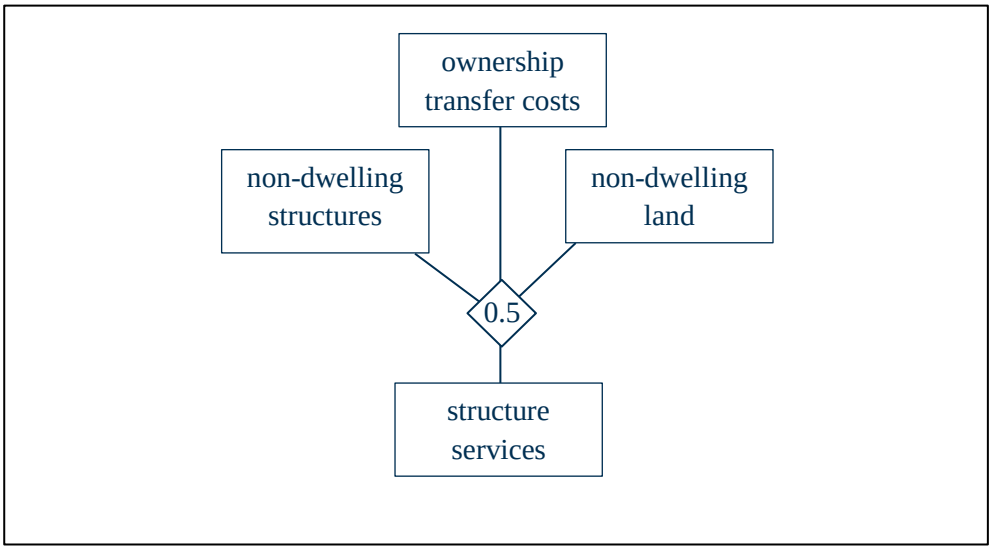
Finally, industries distinguish between more specialised fields of skills that it requires, as represented by the 2-digit ANZSCO occupations. These 43 different occupations represent skills which are closely associated with work in particular industries. The modelling takes into account that it is relatively difficult for firm's to substitute between different types of labour at this detailed occupational level. Therefore, the elasticity of substitution between these one digit occupations is set lower, at 0.5.

Both labour demand and labour supply have an influence on the wage paid to each occupation. The wage is determined in the labour markets in the Independent CGE model. If demand for a particular occupation is larger than supply, then the wage will be bid upwards. Likewise, if demand for a particular occupation is smaller than supply, then the wage will be bid downwards. The wage continues to adjust until demand for labour equals the supply of labour in the long run.

A.3.3 Structure services

Diagram A.5 shows that structure services is itself modelled as a bundle of different factors of production. Firms can substitute between using non-dwelling structures (which includes commercial buildings and engineering structures such as roads and bridges), non-dwelling land and ownership transfer costs. As shown in Diagram A.5, the elasticity of substitution between non-dwelling structures, non-dwelling land and ownership transfer costs is 0.5. This is based on the literature survey and assessment of Zhao (2010, p. 31-32, 51).

Diagram A.5 Structure Services in each industry (except Dwellings Services)



The amount of non-dwelling structures and ownership transfer costs used by an industry can be varied, through investment in the capital stock. Firms are able to attract funds to invest in the capital stock as long as the return that can be earned is at least as high as the return that could be earned on the global market. The amount of non-dwelling land used by any particular industry can also be varied. However, the overall quantity of land available to the whole economy is fixed. Non-dwelling land is allocated to its most productive use through a market, where the rental price of land adjusts to reflect its marginal product.

A.3.4 Location-specific fixed factors

The next tier in each industry's production decision models the choice between variable primary factors and location-specific fixed factors, as shown in Diagram A.2. Variable primary factors are inputs for which firms vary their level of use over the long-run – labour & equipment and structure services. On the other hand, location-specific fixed factors are inputs that are fixed in supply to any particular industry, such as natural resources. Each industry uses a different type of location-specific fixed factor. For example, each industry within the mining sector will use a different type of natural resource – the coal industry requires coal resources and the iron-ore industry requires iron-ore resources. In the banking sector, a location-specific fixed factor generates rents associated with the large networks required. These fixed factors generate location-specific economic rents, which are unable to be obtained unless they are exploited within Australia. Fixed factors are used in combination with variable primary factors, where the elasticity of substitution is set at 0.7, similar to the substitutability between structure services and labour & equipment.

A.3.5 Intermediate inputs

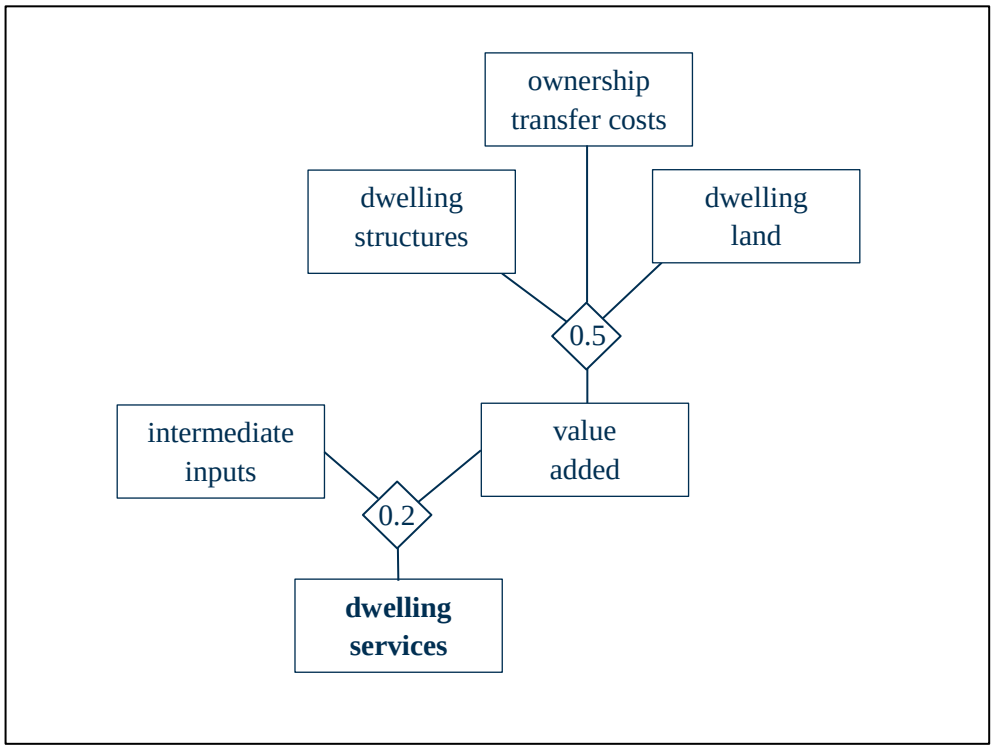
Finally, each industry combines the bundle of their primary factors, or value added, with intermediate inputs, which are the goods and services it purchases from other industries. Industries are assumed to use intermediate inputs and value added in variable proportions, but with a low elasticity of substitution of 0.2, as shown in Diagram A.2.

A.3.6 Dwellings Services

The Dwellings Services sector in the Independent CGE Model follows a similar structure as other industries, but uses primary factors specific to the industry – dwelling structures and dwelling land. The production technology for the Dwellings sector is shown in Diagram A.6 below, which reflects the more limited range of inputs that are used in this sector.

The Dwelling Services industry uses inputs which are similar to the factors of production used to create structure services in the other industries in the Independent CGE model. However, the structures and land used in the Dwelling services industry are different to those used in other industries. Specifically, dwelling structures are produced by the Residential Construction industry, whereas the non-dwelling structures used by other industries are produced by another two industries – the Non-residential Building Construction industry and the Heavy and Civil Engineering Construction industry. In addition, the land used by the Dwelling services industry can only be used within this industry, and is not available to other industries. This means that changes affecting inputs into dwelling services can be modelled separately to changes that affect the rest of the economy.

Diagram A.6 Production of Dwelling Services



As shown in Diagram A.6, the elasticity of substitution between dwelling structures, dwelling land and ownership transfer costs (from moving house) is 0.5. This is based on the literature survey and assessment of Zhao (2010, p. 31-32, 51).

A.4 Households

Households in the Independent CGE model derive well-being (or utility) from leisure and their consumption of the 120 different goods and services included in the model. However, as described in Section 2, households cannot spend more than their income. After taking into account tax and saving at a sustainable rate, households divide their full income between leisure and consumption, and then divide their consumption between the 120 goods and services. They do so in a way that maximises their utility. This behaviour is explained below, and illustrated in Diagram A.7.

Household full income is the amount of income that they would earn if they spent all of their available time working, and took no leisure. Full income is made up of the following components.

- Full labour income is the after-tax labour income that would be earned if households spent all of their time working. The wage is determined in the labour market, where it adjusts so that the demand for labour equals the amount supplied in the long run. Households value their time at the real after-tax wage that could be earned. The labour income tax rate is set by government policy, and all other taxes are built into the price of goods and services.

- Households generate income from owning a certain amount of the capital and fixed factor assets identified in the model. These include: the six types of capital that make up non-structure capital (not including firm-specific fixed factors), dwellings and non-dwellings

structures, ownership transfer costs, land and location-specific fixed factors. Households are able to earn the rates of return demanded by global capital markets on these assets.

- Households also receive income through government transfers, including cash benefits and transfers related to franking credits.

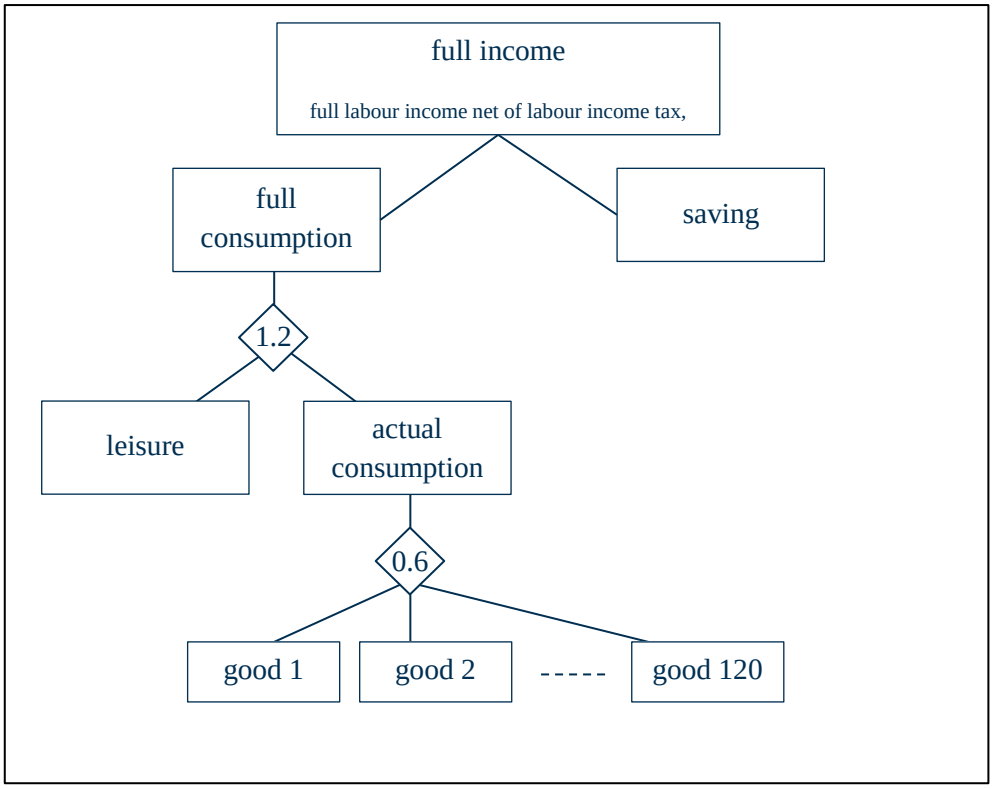
Household saving must be enough to maintain sustainable growth in the assets owned by households i.e. the domestically-owned capital stock. This sustainable rate of growth is the same as the long-run real GDP growth rate, which is consistent with the long-run time horizon of the Independent CGE model. After saving enough to cover this growth in their capital stock, the remainder of full income is spent on 'full consumption' – which includes the consumption of leisure and of goods and services.

The Independent CGE model uses a nested Constant Elasticity of Substitution (CES) utility function to describe the utility that households derive from leisure and their consumption bundle. This means that households make price-sensitive decisions in two tiers. The first tier describes their choice between leisure and consumption, and the second tier describes their choices about their mix of consumption goods and services. These two tiers are discussed below.

After meeting their savings target, households decide how much of their time to spend in leisure, and how much to spend working. The cost of taking leisure is the amount that would have been earned if the time were instead spent working – which is the real after-tax wage. If the real after-tax wage is higher, then the cost of taking leisure is higher, and households are expected to reduce their consumption of leisure and raise their labour supply. The parameters used in the Independent CGE model reflect an elasticity of labour supply similar to that used by de Mooij and Devereux (2011), of around 0.2. If the real after-tax wage increases by 1 per cent, then labour supply increases by 0.2 per cent. This outcome reflects the net impact of a higher wage on labour supply, through both the substitution effect (where a higher wage rate encourages households to take less leisure and supply more labour) and the income effect (where higher income levels encourage households to take more leisure and supply less labour). In the Independent CGE model, households substitute between leisure and consumption in the first tier of the nested CES utility function. An elasticity of substitution of 1.2 is used in this tier to implement the assumption that the uncompensated elasticity of labour supply is 0.2, as shown in Diagram A.7.

The amount that households spend on actual consumption is determined by the income generated from their chosen level of labour supply (net of labour income taxes), plus income from other sources and saving. As mentioned above, households make price-sensitive decisions about the goods and services they consume. If the price of one good becomes higher relative to the price of others, then households will substitute away from consuming that good. The elasticity of substitution governs how readily households would be willing to substitute between goods and services when their relative prices change. The elasticity of substitution in consumption in the Independent CGE Model is 0.6.

Diagram A.7 Household choices and utility



A.4.1 Measuring household living standards

Since household decisions are modelled using a consistent utility function, the Independent CGE model is able to provide valid measures of changes in consumer welfare, or living standards, from economic shocks or policy changes. The measure used is the equivalent variation, from welfare economics. This is the income transfer that would need to be given to households before the economic shock or policy change to enable the same level of utility as they would have after the change.

A.5 Government

Given the policy choices of the government, it will have certain expenditure requirements. Therefore, it is assumed that real government expenditure is not influenced by changes in the economy – that is real expenditure is exogenous. However, the model user can specify a change in government spending policies. For example, government spending on Defence-specific industries can be increased. In addition, since only real government expenditure is exogenous, if prices change, then nominal government expenditure changes accordingly.

Cash benefits paid to households are an additional government expenditure. These cash benefits are modelled as lump-sum transfers to households which are proportional to labour income. Franking credits are also modelled as transfers to households. These are the credits that households receive against personal income tax payments because their income from owning assets has already been taxed through business income tax.

The government collects tax revenue to finance its expenditure. In the Independent CGE model, it collects indirect taxes, business income tax, labour income tax, mining royalties and mining resource rent tax.

In the long-run, the government must have a sustainable budget position. For simplicity, in the Independent CGE model it is assumed that the government has a balanced budget.

When an economic shock is applied to the model, the government's budget position is affected, as changes in economic activity and prices affect government expenditure requirements and tax collections. Therefore, a swing fiscal policy instrument must be nominated, which adjusts so that the budget is always in balance. In the Independent CGE Model, either the tax rate on labour income or cash benefits can be used for this purpose.

A.6 Foreign sector

The modelling of Australia's relationship with the foreign sector recognises Australia's position as a small economy. This is the case for both trade and capital flows, which are now considered in turn.

Australia is a price taker for imports, meaning that changes in the Australian economy do not influence the foreign-currency price of imports. Likewise, Australia is also close to being a price taker for exports, with a standard value for the export price elasticity of demand of -12. For the following industries, where Australia has some market power or product differentiation (e.g. tourism services) a lower value of -6 is used:

- Sheep, grains, beef, dairy;
- Coal;
- Iron ore;
- Accommodation;
- Food and beverage service;
- Air and space transport; and
- Education.

Under the small country assumption, Australia can access the world market for funds, so long as the rate of return that is achieved matches the given rate required on the world capital market. That is, the after tax required rate of return on capital is determined overseas and is not influenced by changes in the domestic economy.

Australian ownership of the capital stocks is determined by their initial asset holdings. As discussed in Section A.4, the rate of growth in Australian-owned assets is assumed to be fixed, at a rate that implies sustainable growth in the initial locally-owned asset stock. Since foreign investors are willing to invest funds as long as the rate of return is at a given level, any change in the capital stock is met by a change in foreign-owned capital.

Foreign ownership of the capital stock must also be in a sustainable long-run equilibrium. The annual inflow of investment funds, recorded on the capital account in the balance of payments, is an amount that ensures that the foreign-owned capital stock grows at a sustainable rate – the long-run rate of real GDP growth. The payments to service this borrowing, an outflow on the current account, is equal to the required return on the foreign-owned assets.

Together, the inflow on the capital account and the outflow on the current account imply a certain trade balance if external balance is to be achieved. Exchange rate adjustments ensure that this balance occurs.

A.7 Baseline scenario and validation

This section first explains the construction of the baseline scenario and then outlines the validation procedures undertaken in ensuring that the model is robust.

The model uses a variety of recent data, but the main source is the detailed Input-Output (IO) tables from the ABS, giving the model a detailed picture of the Australian economy. Specifically, the 2007/08 IO tables released in late 2011 are used, which means that the model also uses the contemporary ABS industry classification, ANZSIC 2006. The model is calibrated so that it exactly reproduces this 2007/08 data.

The next step is to simulate a baseline scenario for use as a point of reference. This involves two aspects, uprating the economy from 2007/08 to 2012/13 and normalising the economy to a sustainable position. That is, the baseline scenario provides a normalised, or sustainable, version of the 2012/13 economy.

Uprating the economy from 2007/08 to 2012/13 involves simulating the model after adjusting the model's inputs for the effects of economic developments from 2007/08 to 2012/13. This includes allowing for growth in wages, import prices, productivity and employment from 2007/08 to 2012/13.

Normalising the economy involves taking into account the differences between the structure of the economy in 2007/08, compared to an economy in a long-run sustainable equilibrium.

- In 2007/08 capital inflow was well above a sustainable level, as the share of foreign liabilities in the capital stock was on the rise. In the normalised economy, capital inflow is set at the sustainable level, so that foreign liabilities grow at the same rate as the economy. This external balance is achieved through flexible adjustment of the exchange rate, as described in section A.6.

- In 2007/08 business investment was well above a sustainable level (reaching a peak as a share of GDP), as capital-output ratios were on the rise. In the normalised economy, business investment is set so that the stocks of capital grow at the same rate as real GDP.

The model has also been tested to ensure that it observes a number of widely-accepted balance and neutrality properties for CGE models.

- GDP by expenditure (the sum of household consumption, gross fixed capital formation, general government final demand and exports, less imports) always equals GDP by income (the sum of value added across all industries). This is true for both nominal and real GDP in all simulations, which is a useful check on the consistency of the model's coding.

- Walras' Law states that if all but one market is in equilibrium, then the last market must also be in equilibrium. This is the case in the Independent CGE Model. All markets other than the labour market are in equilibrium because the model equations are set up to achieve this. On

the other hand, equilibrium in the labour market is not explicitly modelled. Rather, the balance between labour demand and supply is monitored in simulation results. Exact balance is always achieved, meaning that Walras' Law holds precisely, which is an important test of the internal consistency of a CGE model.

- The Independent CGE Model observes price neutrality. In all CGE models, one price must be fixed exogenously as the numeraire, to provide an anchor for the price level. This is because the price level is usually considered to be determined by monetary policy, which is outside the scope of a CGE model. Just as it is argued that the real economy should be neutral to monetary policy in the long run, real outcomes from CGE models should be unaffected by a shock to the level of the numeraire. The numeraire in the Independent CGE model is the wage. When it is increased by one per cent, all prices in the model increase by exactly one per cent, and all real variables are unaffected, in accordance with the expected price neutrality property.

- The Independent CGE Model also observes real neutrality. This means that when all of the exogenous real variables are one per cent higher, all of the endogenous real variables are also one per cent higher. The exogenous real variables in the Independent CGE Model are: employment; real general government final demand; the fixed factors available to each industry; the real assets owned by the household sector; and the size of the economy in the rest of the world.

ATTACHMENT B

Master Builders Australia

Supplementary Submission to the Senate Standing Education and Employment Legislation Committee

The Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

27 November 2013

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CONTENTS

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. Over 122 years the movement has grown to 32,000 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.

1.2 The building and construction industry 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. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of Submission

2.1 Master Builders lodges this submission as a result of appearing in the hearing of the Senate Standing Education and Employment Legislation Committee (the Committee) on the *Building and Construction Industry (Improving Productivity) Bill 2013* (Productivity Bill) and the *Building and Construction Industry (Consequential and Transitional Provision) Bill 2013* (Transitional Bill) on 26 November 2013.

2.2 The Chair of the Committee asked that Master Builders provide a response to the questions asked by no later than close of business 27 November 2013.

3 Question about Judicial Review

Senator Cameron asked that Master Builders comment on the safeguards that Commissioner Cole in the Cole Royal Commission Report[1] indicated should be in place concerning the ABCC's operations, particularly the aspect of judicial review. Master Builders notes the discussion of this issue in Chapter 3 of Volume 11 of the Cole Royal Commission Final Report where after indicating that the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* "ought to apply to the ABCC, according to

[1] http://www.royalcombci.gov.au/docs/finalreport/V11CulturalChng_PressFinal.pdf

its terms,"[2] the Royal Commissioner set out Recommendation 196 and Recommendation 197 which, in our understanding, are effected in the Productivity Bill. The recommendations are as follows:

> *196 The Australian Building and Construction Commission report annually to the responsible Minister, such report to be tabled in each House of the Parliament. Such re[port shall include information on the number and types of matters investigated, the amount of employee entitlements recovered from recalcitrant employers, and the aggregate cost of unlawful industrial action in the industry.*
>
> *197 The Australian Building and Construction Commission be subject to the jurisdiction of the Commonwealth Ombudsman.*[3]

4 Independent Economics Report

4.1 Attachment A to Master Builders submission dated 22 November 2013 to the Committee is the report commissioned by Master Builders entitled *Economic Analysis of Building and Construction Industry Productivity: 2013 Update* prepared by Independent Economics (2013 Report).

4.2 At the last page of the Proof Hansard the following is said by the Chair:

> *A lot of the debate this morning has centred on the reliability and validity of the Independent Economics report used by the Master Builders. Has the department used Independent Economics to provide any advice over the last five years?*

4.3 For the record, and completeness, Master Builders believes Independent Economics has undertaken the following:

> **"Deed of standing offer for the operation, maintenance and further developments of the Independent Economics Computable General Equilibrium Model", Australian Treasury, ongoing.**
>
> Independent Economics provided economy-wide modelling services to the Australian Treasury under a Deed of Standing Offer that was initiated for the 2012/13 year and renewed in 2013/14
>
> **"Economic modelling of the business tax system for the Business Tax Working Group", Australian Treasury, 2012.**
>
> Independent Economics worked with Treasury to model options for reforming the company tax system, and our modelling was published as

[2] Ibid at para 206 of Chapter 3 of Vol 11 p49

[3] Ibid at page 50

part of the Final Report of the Australian Government's Business Tax Working Group.

"CGE Analysis of the Current Australian Tax System" Australian Treasury, 2009-2010.

Chris Murphy from Independent Economics led the team which estimated the effects of 19 different taxes on the Australian economy for the Australian Treasury. The analysis formed a key part of the final report of the Henry Tax Review

"CGE Analysis of Part of the Government's AFTSR Response" Australian Treasury, 2010

Chris Murphy and his team were commissioned by the Treasury to estimate the impacts of some of the Government's policy reforms in response to the Henry Tax Review. This included the impact of introducing a resource rent tax on the Mining sector

"Measuring the impact of the Productivity Agenda, Department of Education, Employment and Workplace Relations, 2010

Chris Murphy led the team which estimated the economy-wide benefits of the Government achieving its targets under the participation and productivity reform agenda in education, employment and workplace relations. The report was launched by the Hon. Julia Gillard MP, the then Minister for Education, Employment and Workplace Relations at the National Press Club on 26 May 2010.

4.4 At page 25 Proof Hansard Master Builders is asked why the period 1995 – 2003 was used as a baseline period in the 2013 Report. The question was put to Independent Economics. Their response is as follows:

> *The data in the years immediately preceding the taskforce/ABCC era is more relevant than data from the more distant past in establishing the impact of the productivity gains or otherwise. Therefore, the 2013 Update Report compares working days lost immediately before the era (1995-1996 to 2001-2002) to working days lost after the taskforce/ABCC had been in place long enough to have a major impact i.e. 2006-2007 to 2011-2012.*

4.5 Senator Cameron also then asked whether or not all analysis in the report would be open to academic scrutiny, "independent academic analysis".

4.6 Master Builders, at the hearing, advised that the methodology for the Independent CGE model was set out in Appendix A of the 2013 Report. Master Builders also outlined that Independent Economics/Econtech had responded to previous critiques relating to the previous reports. Master Builders noted that Econtech had responded to those critiques and had amended the prior reports. Master Builders notes that the 2013 Update Report is a public document and therefore by its very nature is open to review and critique and there is no attempt to hide its results or its methodology.

4.7 Master Builders understands that separate approaches have been made to Independent Economics about the analysis and the underlying methodology in the 2013 Report.

4.8 Master Builders would be happy to act as a channel for forwarding any critiques to Independent Economics.

5 Days Lost to Industrial Action

5.1 The paragraph which appears at the top of the summary component of the 2013 Report as follows was the subject of some discussion:

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

5.2 Master Builders was asked to estimate what proportion of hours 89,000 working days lost represents to the total number of hours worked in the industry. We were also asked to estimate a cost that 89,000 working days lost represent: see page 24 of the Proof Hansard. Master Builders estimates that around 55 million days are worked by the cohort of workers that are likely to be affected by industrial disputation. The estimate is based on the following assumptions:

Number of tradespeople/labourers 568,000

- less 25 percent working in engineering construction

- less 0.5 FTE for each part time worker
- less 30 per cent for self-employed or non-unionised industrial residential area.

5.3 This amounts to 268,000 people likely to be affected based on a cohort population of 568,000. The number of days worked by this cohort is a simple arithmetic calculation of using 205 standard working days.

5.4 Master Builders would contend that to calculate the percentage of days last due to industrial disputation is meaningless statistical data. The fact is that 89,000 days lost are 89,000 days lost and represents a major cost to the contractor and the industry as a whole. See below.

5.5 It is not possible to generalise the cost of each working day lost due to industrial disputation. For instance, each construction project is different e.g. simple warehouse, high rise offices and complex scientific/medical institutions. The cost of construction also differs markedly between the different stages of construction which then also reflects the number and skill range of industry participants affected on the day of the strike. Given the very tight time frame provided by the Committee it is not possible to provide the level of granularity that has been requested, however, other estimates have been provided.

5.6 In addition, it is important for the Committee to note that the cost is not simply the labour cost or the loss in labour productivity for that day or days that workers are on strike. For instance, a one day strike can have massive consequential and cost damaging effects if the strike was called (as is often the case) during a critical concrete pour in a high rise building. These wild cat strikes regrettably are “normal” union tactics. The cost to the contractor is not just the loss of one day labour productivity, but weeks of rework as the partially poured concrete floor is demolished and the concrete pour recommenced.

5.7 There are other costs and/or damages that can result from a strike particularly where these involve days and weeks. The costs include expensive plant and equipment such as cranes and other major construction equipment lying idle. It is normal practice for this plant and equipment to be leased or hired for the period of the project. Contractors also face the risk of incurring liquidated damages from the client for any delay in completing the project. Liquidated

damages can be as much as $1 million a day. These industrial relation risks are priced into the tender price.

5.8 The extent of the direct costs of a protracted strike can be gleaned from the Myer Emporium strike where Grollo incurred, according to the public record, losses of millions of dollars as a consequence.

5.9 Similarly, strikes have consequential effects throughout the supply chain, affecting offsite manufacturers and building material suppliers who work to very close time frames to meet the industry's practice of just-in-time delivery of products and services. The rescheduling and delay in the delivery of products and the delay in the various specialist labour based services means that the schedule of not only the immediate construction project involved is affected but also other non-related construction projects which products and subcontracting services. In other words, the non-affected parties also suffer from the strike action.

5.10 While it is not possible to accurately calculate the construction cost of a day lost, Master Builders can confidently say that the economic damage is not in the hundreds of dollars but tens of thousands for the less critical projects, to hundreds of thousands for complex or critical phases of construction. These would be the direct costs; as mentioned elsewhere there are indirect costs that flow through the supply chain that would also be affected by the industrial action. The other costs that need to also be taken into account as mentioned elsewhere are liquidated damages imposed by the client for not completing the project on time.

5.11 If it is assumed that the direct cost of a strike is $100,000 per day then 89,000 days lost to industrial action would equate to $8.9 billion.

5.12 It should be noted that building unions also use the industrial tactic of calling for a strike then at the last moment calling it off. These are not formally recorded in the ABS statistics but they have an equally damaging impact on the construction process. For instance, once a union advises the contractor that it is intending to strike, the contractor then makes arrangements for halting all work which affects not only the workers involved but also the other suppliers that may be scheduled for that day. This means that the contractor arranges for the site to be non-operational that day and is unable at short

notice to recommence work even though the union has reversed its decision to strike. These situations are equally damaging and not recorded in the ABS statistics.

6 Productivity and Technology

6.1 Master Builders was asked whether or not an increase in non-labour factors could explain an increase in productivity during the period of the ABCC: page 27 of the Proof Hansard.

6.2 It is generally accepted that the labour component in construction represents in the order of 40-60% of the total cost of construction. Labour and labour productivity therefore represents a major cost component during the construction phase.

6.3 The other major components that could influence productivity during the construction phase include:

1. Building design innovation, either architecturally or engineering.
2. Construction techniques.
3. Use and installation of building materials.
4. Project management.

6.4 During the period of the ABCC that is 2005 – 2012 which was the period of analysis in the 2013 Report, there was no substantial or major step-change advance industry-wide in innovation on technology that could credibly be advanced as having significant improvement in raising productivity that could have contributed to the 9.4 per cent increase calculated in the 2013 Report. This proposition was tested with two major construction firms in Australia. It is accepted that at an individual enterprise level some innovation or improved construction techniques may have been employed but none of which would have contributed to an industry-wide productivity increase.

7 Industrial Disputes

7.1 Master Builders was asked to comment on the small number of industrial disputes which were alleged to have occurred as expressed in the evidence of the ACTU and “spikes and peaks” in the numbers.

7.2 Master Builders notes that in the industry there are now fewer strikes but more disruptive tactics and where the official ABS statistics do not reflect the disruption to work. This is in part facilitated by clauses which permit stoppages which are at the boundary of what may or may not be lawful. These clauses are in agreements where "sign up or else" tactics are used. The following clause for example is in the pattern CFMEU Queensland agreement:

> *Employees are entitled to have paid time off to attend union meetings of up to 2 hours (or more by agreement) or participate in union activities.*

7.3 As the standard clause is vague in respect of the frequency and type of union activity the unions have been using the clause to gain unprecedented power over employers. In 2012, in Queensland, the CFMEU/BLF demonstrated that it was willing to use the 2 hour clause to pressure employers to concede to claims outside of protected industrial action rather than following formal bargaining processes. If the contractor refused a particular claim, the project was subjected to rolling 2 hour stoppages invoking the entitlement under the standard clause. None of these activities would have registered in the working days lost statistics. Hence, larger disputes result in more "spikes" in the statistics.

7.4 Master Builders notes that unlawful industrial action occurs almost daily in some States and Territories. The following is a list of matters where s418 orders were sought in Queensland and the Northern Territory from July 2013:

> *Laing O'Rourke Australia Construction Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and another PR538778 09/07/2013 -Alleged industrial action at the Northern Water Treatment Plant project*
>
> *Laing O'Rourke Australia Construction Pty Ltd v Construction, Forestry, Mining and Energy Union PR540450 19/08/2013 - Alleged industrial action at Laing O'Rourke Australia Construction Pty Ltd, Condabri Gas Construction project*
>
> *Fluor Construction Services Pty Ltd v Construction, Forestry, Mining and Energy Union and another PR541318 04/09/2013- Alleged industrial action at Fluor Construction Services Pty Ltd*
>
> *Pradstruct Pty Ltd v Construction, Forestry, Mining and Energy Union [2013] FWC 7868 08/10/2013- Summary: s.418 order -*

demand to employee union delegate - CFMEU rules - divisional branches

Pradstruct Pty Ltd v Construction, Forestry, Mining and Energy Union PR543009 08/10/2013 -Alleged industrial action at Skyview Project, 63 Blamey Street, Kelvin Grove Brisbane

Lend Lease Engineering Pty Limited v Construction, Forestry, Mining and Energy Union and another PR543476 17/10/2013- Alleged industrial action by employees employed by a subcontractor to Lend Lease at the Academic & Research Facility Project - interim order Lend Lease Project Management & Construction (Australia) Pty Ltd v Construction, Forestry, Mining and Energy Union and another PR538822 10/07/2013 -Alleged industrial action at Lend Lease Project Management & Construction at the Oral Health Centre, Herston

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another PR543477 18/10/2013 -Alleged industrial action of employees of Lend Lease Building or a subcontractor to Lend Lease Building at the University of Queensland Oral Health Project located in Herston, Brisbane Qld - interim order

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another PR543490 18/10/2013 -Alleged industrial action of employees of Lend Lease Building or a subcontractor to Lend Lease Building at the University of Queensland Oral Health Project located in Herston, Brisbane Qld - interim order extended.

Lend Lease Engineering Pty Limited v Construction, Forestry, Mining and Energy Union and another PR543489 18/10/2013 - Alleged industrial action by employees employed by a subcontractor to Lend Lease at the Academic & Research Facility Project interim order extended

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another PR543520 21/10/2013- Alleged industrial action of employees of Lend Lease Building or a subcontractor to Lend Lease Building at the University of Queensland Oral Health Project located in Herston, Brisbane Qld

Lend Lease Engineering Pty Limited v Construction, Forestry, Mining and Energy Union and another PR543519 21/10/2013- Alleged industrial action by employees employed by a subcontractor to Lend Lease at the Academic & Research Facility Project

Laing O'Rourke Australia Construction Pty Ltd v Construction, Forestry, Mining and Energy Union PR543610 22/10/2013 - Alleged industrial action at Ichthys Accommodation Village Project, Darwin

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another [2013] FWC 8274 25/10/2013 -Alleged industrial action by employees employed by a subcontractor to Lend Lease at the Academic & Research Facility Project Alleged industrial action of employees of Lend Lease Building or a subcontractor to Lend Lease Building at the University of Queensland Oral Health Project - corrected by 2013 FWC 8274 - PR543830 re preamble

Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union and another [2013] FWC 8274 25/10/2013 - Correction to preamble re Alleged industrial action at two Lend Lease sites

John Holland Group Pty Ltd v Construction, Forestry, Mining and Energy Union [2013] FWC 8552 30/10/2013- Alleged industrial action at the Gallipoli Barracks, Enoggera - Enhanced Land Force Stage 2 - industrial action is happening - CFMEU's actual conduct was to organise industrial action. See PR544002

John Holland Queensland Pty Limited v Construction, Forestry, Mining and Energy Union [2013] FWC 8554 30/10/2013- Alleged industrial action at the Queensland University of Technology Creative Industries Precinct Project site - purpose for being on site concealed - identity of organiser concealed - deliberate obfuscation - finding that union was organising industrial action - order for six months - correction order see PR544003

8 Discrimination

8.1 Master Builders was asked to address the claims of discrimination set out by the ACTU and the CFMEU.

8.2 The legislation does not discriminate against building workers. Instead, it provides a regime recommended by the Cole Royal Commission which deals with the industry in a singular way to meet singular problems. The legislation covers building industry participants. Insofar as there are allegations that fundamental principles have been breached by the terms of the legislation, Master Builders notes the extensive human rights implications discussed in the statement of compatibility with human rights prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* which appears on page 50 and following of the Explanatory Memorandum for the Productivity Bill.

9 Focus on the Grocon Dispute

9.1 Master Builders was asked to comment on the ACTU allegation that the evidence was focussed overly on the Grocon dispute: page 27 of the Proof Hansard.

9.2 As is evident from paragraph 7.4 of this submission and table 1 below, Master Builders does not rely solely on the Grocon dispute to substantiate its position or the position of the Government as expressed in the Bills.

Table 1 Other Disputes

PARAGRAPH NUMBER FROM SUBMISSION DATED 22 NOVEMBER 2013	**DISPUTE SUBJECT**
4.5	Melbourne Markets
4.8	39 cases before the court since 1999
4.10	Assault by Derek Christopher
4.12	Three right of entry abuses
8.2	*Lease Building Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union*
9.9	*Laing O'Rourke Australia Pty Ltd v CFMEU*
16.5	*Cape (CHS)P/L v CFMEU*
16.8	Tedra/City West Water and the AMWU
16.12 and following	Royal Children's Hospital South Brisbane

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ATTACHMENT C

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2003		
1.	Clarke v Baulderstone Hornibrook Pty Ltd [2003] FCA 1426	Federal Court of Australia RD Nicholson J	Employees who were members of the CFMEU failed or refused to attend work for one day after an officer of the CFMEU withdrew permission for work to continue that day. The company paid the employees a total of $1,520 for that day.	Woodside Towers Project, Perth, WA **$250 million**	**$1,000** against Baulderstone Hornibrook (presumably referable to 1 contravention of s. 187AA WRA).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2004		
2.	Hadgkiss v Blevin [2004] FCA 697 (liability) [2004] FCA 917 (penalty)	Federal Court of Australia Conti J	The CFMEU, one of its organisers and one of its site delegates at the Clifton Apartments building at Pyrmont, NSW, coerced an employee of a building contractor to join the CFMEU. The employee initially refused to join the union but the employer subsequently paid his union dues on his behalf.	Clifton Apartments, NSW **$12 million**	**$7,700** comprising: • $5,500 against the CFMEU (referable to 1 contravention of s. 298P(3) WRA). • $1,100 against McGahan (referable to 1 contravention of s. 298P(3) WRA). • $1,100 against Blevin (referable to 1 contravention of s. 298P(3) WRA).
3.	Alfred v AMWU (20153071/03/2) 24 February 2004	Industrial Magistrates Court of NSW Chief Industrial Magistrate	The AMWU took strike action to coerce a contractor to sign a new EBA at Shoalhaven District Hospital site. The AMWU's procedures were deficient in the service of a notice to take protected action.	Shoalhaven District Hospital, NSW	**$2,000** against the AMWU (referable to 1 contravention of s. 170NC WRA).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2005		
4.	Alfred v Walter Construction Group Limited [2005] FCA 497	Federal Court of Australia Branson J	The CFMEU, one of its organisers and one of its site delegates threatened to disrupt the work of a major subcontracting company because the subcontractor chose not to enter the CFMEU endorsed federal pre-reform certified agreement ("EBA").	Wollongong Sewage Treatment Plant, NSW	**$7,500** and declarations against the CFMEU (referable to 3 contraventions of s. 170NC WRA).
5.	Carr v AMWU, Mulipola, Eiffe, Thomas and Mansour [2005] FCA 1802	Federal Court of Australia Finkelstein J	On 11 June 2003, an organiser told a sole director that unless his company signed up to an EBA, work would stop on the Austin site on 14 June 2003. On 14 June 2003, two organisers parked their cars across entrances to prevent work being done on the Austin site. The sole director was told he had til 10 am on 16 June 2003 to sign up or he would not be allowed to work on site. On 18 June 2003, an organiser went to the Tribeca site and directed the company's employees to stop work and threatened them that if work continued something would happen.	Queensbury and Swanston Streets, Carlton, VIC	**$27,400** comprising: • $25,000 and declarations against the AMWU (referable to 6 contraventions of s. 170NC WRA). • $1,000 and declarations against Mulipola (referable to 5 contraventions of s. 170NC WRA). • $600 and declarations against Eiffe (referable to 1 contravention of s. 170NC WRA). • $400 and declarations against Thomas (referable to 1 contravention of s. 170NC WRA). • $400 and declarations against Mansour (referable to 1 contravention of s. 170NC WRA).
6.	Ponzio v D and E Air Conditioning Pty Ltd [2005] FCA 964	Federal Court of Australia North J	After a death in the industry in Shepparton, pursuant to union policy being implemented, employees of D and E stopped work on four sites. D and E paid 34 employees strike pay.	Concept Blue Victoria Towers Freshwater Place Nolan Towers, VIC	Declarations against D and E (presumably referable to 1 contravention of s. 187AA WRA).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2005 continued		
7.	Pine v Austress Freyssinet (Vic) Pty Ltd [2005] FCA 583	Federal Court of Australia Ryan J	After a death in the industry in Shepparton, pursuant to union policy a site safety audit took place at the Concept Blue site in Melbourne. Four Austress workers did not work between 8:30 am on 5 August and 10:00 am on 6 August 2003. Austress paid strike pay to the four workers who stopped work when the leading hand recorded the workers as working 8 hours each day.	Concept Blue, Russell Street, Melbourne, VIC	**$800** and declarations against Austress (referable to multiple contraventions of s. 187AA WRA).
8.	Ponzio v Firebase Sprinkler Systems Pty Ltd [2005] FCA 733	Federal Court of Australia Merkel J	After a death in the industry unrelated to Firebase, the CFMEU took industrial action on two days at two sites Firebase was working on. From lack of care and diligence Firebase paid strike pay to 8 employees for this action.	Concept Blue, Russell Street, Melbourne, VIC	Declarations against Firebase (referable to 1 contravention of s. 187AA WRA).
9.	Pine v Expoconti Pty Ltd [2005] FCA 1434	Federal Court of Australia Kenny J	After a death in the industry in Shepparton, pursuant to union policy a site safety audit took place at the Concept Blue and Bio21 sites in Melbourne. Expoconti workers at Concept Blue did not work between 8:30 am on 5 August and 10:00 am on 6 August 2003. Expoconti workers at Bio21 did not work between 9:30 am and 1 pm on 5 August. BVM paid strike pay to 28 workers who stopped work.	Concept Blue, Russell Street, Melbourne, VIC	Declarations against Expoconti (referable to 1 contravention of s. 187AA WRA).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2005 continued		
10.	Pine v Seelite Windows & Doors Pty Ltd [2005] FCA 500	Federal Court of Australia Finkelstein J	After a death in the industry in Shepparton, four Seelite employees engaged in industrial action at a Multiplex site on two days. Seelite paid the employees strike pay when the foreman did not inform the managing director of the strike action.	Concept Blue, Russell Street, Melbourne, VIC	Declarations against Seelite (referable to 1 contravention of s. 187AA WRA).
11.	Ponzio v BVM Builders Pty Ltd [2005] FCA 238	Federal Court of Australia Kenny J	After a death in the industry in Shepparton, pursuant to union policy a site safety audit took place at the Concept Blue site in Melbourne. BVM workers did not work between 8:30 am on 5 August and 10:00 am on 6 August 2003. BVM paid strike pay to workers who stopped work.	Concept Blue, Russell Street, Melbourne, VIC	**$200** against BVM (referable to 1 contravention of s. 187AA WRA).
12.	Pine v Multiplex Constructions (Vic) Pty Ltd; Cruse v Multiplex Limited [2005] FCA 1428 (Multiplex) [2007] FCA 2015 (CFMEU first instance) [2008] FCAFC 179; (2008) 172 FCR 279; (2008) 177 IR 189 (appeal)	Federal Court of Australia Merkel J (Multiplex) North J (CFMEU) Federal Court of Australia Full Court Gray, Goldberg and Jessup JJ	After a death in the industry in Shepparton, pursuant to union policy CFMEU shop stewards conducted a stop work meeting followed by a site safety audit at Concept Blue site. Work was not done between 1:10 pm that day and 10:00 am next day. Through its shop stewards, the CFMEU made a claim for strike pay and organised and took industrial action with the intent to coerce Multiplex to make strike payments. Multiplex paid the strike pay.	Concept Blue, Russell Street, Melbourne, VIC	**$4,000** against Multiplex (referable to 1 contravention of s. 187AA WRA). On appeal: • $2,500 against the CFMEU (referable to 1 contravention of each of ss. 187AB(1)(a) and 187AB(1)(b) WRA) • declarations against Thorson (referable to 1 contravention of each of ss. 187AB(1)(a), 187AB(1)(b), and 187AA(2) WRA).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2005 continued		
13.	Furlong v Maxim Electrical Services (Aust) Pty Ltd [2005] FCA 1518 (Pratt) (No 2) [2006] FCA 740 (Maxim) (No 3) [2006] FCA 1705 (CEPU)	Federal Court of Australia Marshall J	After a death in the industry in Shepparton, pursuant to union policy CEPU reps conducted a stop work meeting followed by a site safety audit at Concept Blue site. Work was not done between 1:10 pm that day and 10:00 am next day. The CEPU's reps organised industrial action with intent to coerce two companies to pay strike pay for the previous day. The companies paid the strike pay.	Concept Blue, Russell Street, Melbourne, VIC	Declarations against Pratt (referable to 1 contravention of s. 187AA WRA and 2 contraventions of EBA). $1,750 against Maxim (referable to 1 contravention of s. 187AA) and declarations (referable to 1 contravention of EBA). $1,750 against the CEPU (referable to 1 contravention of s. 187AB(1)(b) WRA) and declarations (referable to 1 contravention of EBA).
14.	Pine v Casello Constructions Pty Ltd [2005] FCA 1854	Federal Court of Australia North J	After a death in the industry in Shepparton, pursuant to union policy a site safety audit took place at the Concept Blue and Three Towers sites in Melbourne. Casello workers at Concept Blue stopped work for 6 ½ hours on 5 August and 3 hours on 6 August. Casello workers at Three Towers stopped work for 4 ½ hours on 5 August. Taking its lead from Multiplex (head contractor), Casello paid strike pay to 21 workers who stopped work.	Concept Blue, Russell Street, Melbourne, VIC	Declarations against Casello (referable to 1 contravention of s. 187AA WRA).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2006		
15.	Ponzio v Maxim Electrical Services (Vic) Pty Ltd (2006) 152 IR 347; [2006] FCA 579	Federal Court of Australia Ryan J	After a death in the industry in Shepparton, pursuant to union policy a site safety audit took place at the Three Towers site in Melbourne. Maxim employees did no work between 7:30 am and 1:30 pm while the safety audit was being conducted. Maxim paid strike pay to workers who stopped work.	Concept Blue, Russell Street, Melbourne, VIC	**$900** against Maxim (presumably referable to 1 contravention of s. 187AA WRA).
16.	Ponzio v B & P Caelli Constructions Pty Ltd [2006] FCA 1221 (first instance) [2007] FCAFC 65; (2007) 158 FCR 543; (2007) 162 IR 444 (appeal)	Federal Court of Australia North J Federal Court of Australia Full Court Marshall, Lander and Jessup JJ	After a death in the industry in Shepparton, Caelli's employees attended a stop work meeting then followed by a site safety audit at Concept Blue site. Work was not done from that day until 10:00 am next day. Through its shop stewards and organisers, the CFMEU made a claim for strike pay and organised and took industrial action - including later bans on the use of forklifts and access to balconies - with intent to coerce Caelli to make strike payments. Caelli paid the strike pay.	Concept Blue Apartments, VIC	On appeal, **$11,000** comprising: • $6,000 against Caelli wholly suspended (referable to 1 contravention of s. 187AA WRA). • $5,000 and declarations against the CFMEU (referable to 1 contravention of s. 187AB(1)(a) WRA and 3 contraventions of s. 187AB(1)(b) WRA). • declarations against Crnac and Spernovasilis (referable to 1 contravention each of s. 187AB(1)(a) WRA and 3 contraventions of s. 187AB(1)(b) WRA).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2006 continued		
17.	Hadgkiss v Sunland Constructions Pty Ltd [2006] FCA 1566 Hadgkiss v CFMEU [2007] FCA 346; (2007) 158 FCR 193; (2007) 161 IR 317 Hadgkiss v CFMEU [2008] FCA 524; (2007) 162 IR 385	Federal Court of Australia Dowsett J (Sunland) Kiefel J (CFMEU)	A CFMEU delegate told three employees there was no way they could work at the Sunland joinery unless they joined the CFMEU. In a later conversation with a BIT Inspector he explained the site was a union shop. A Sunland employee represented to one of the employees that he had to be a member of the CFMEU. Sunland dismissed the employee because he was not a member of the CFMEU.		**$25,300** comprising: • $6,000 and declarations against the CFMEU (referable to 1 contravention of s. 298SC(c) WRA). • $3,000 and declarations against the CFMEU QLD (referable to 1 contravention of s. 298SC(c) WRA). • $300 against Oskam (referable to 1 contravention of s. 298SC(c) WRA). • $15,000 and declarations against Sunland ($12,000 referable to 1 contravention of s. 298K WRA and $3,000 referable to 1 contravention of s. 298SC(c) WRA). • $1,000 and declarations against Eshraghi (referable to 1 contravention of s. 298SC(c) WRA).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2007		
18.	Hadgkiss v CFMEU (No 3) [2007] FCA 87 (liability) (No 4) [2007] FCA 425; (2007) 161 IR 338 (penalty) [2008] FCAFC 22 (appeal) (No 5) [2008] FCA 1040 (remitted penalty) [2009] FCAFC 17 (appeal)	Federal Court of Australia Graham J Federal Court of Australia Full Court North, Lander and Buchanan JJ	A CFMEU organiser and a CFMEU site delegate told subcontractors at Wollongong and Fairy Meadows they could not work on the site unless they were financial members of the CFMEU.	Fairy Meadow site, North Gate Apartments, Wollongong, NSW **$30 million**	On remitter from appeal, **$35,250** comprising: • $15,000 and declarations against the CFMEU (referable to 4 contraventions of s. 298SC(c) WRA). • $15,000 and declarations against the CFMEU NSW (referable to 4 contraventions of s. 298SC(c) WRA). • $1,250 and declarations against Casper (referable to 1 contravention of s. 298SC(c) WRA). • $4,000 and declarations against Lane (referable to 3 contraventions of s. 298SC(c) WRA).
19.	Carr v CEPU [2007] FMCA 1526	Federal Magistrates Court of Australia Lucev FM	Snap strike by 81 employees of electrical contractors in Tasmania organised by CEPU Secretary Harkins	24 hour strike in electrical industry, Tasmania	**$19,800** comprising: • $11,000 and declarations against the CEPU (referable to 1 contravention of s.38 BCII Act). • $8,800 and declarations against Harkins (referable to 1 contravention of s. 38 BCII Act).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2007 continued		
20.	Hadgkiss v Aldin (2007) 164 FCR 394; (2007) 169 IR 50; [2007] FCA 2068 (2007) 169 IR 76; [2007] FCA 2069	Federal Court of Australia Gilmour J	Rolling stoppages by employees on Perth to Mandurah railway project.	New Metro City Rail Project – Package F from Perth to Mandurah, WA	**$883,200** ($594,300 suspended) comprising: • $9,000 and declarations against 84 respondents ($6,000 suspended) (referable to 1 contravention of s.38 BCII Act). • $1,000 and declarations against 64 respondents ($750 suspended) (referable to 1 contravention of AIRC order). • $7,500 and declarations against 3 respondents ($5,000 suspended) (referable to 1 contravention of s. 38 BCII Act). • $900 and declarations against 3 respondents ($600 suspended) (referable to 1 contravention of AIRC order).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2007 continued		
21.	Furlong v AWU (2007) 162 IR 171; [2007] FMCA 443	Federal Magistrates Court of Australia Burchardt FM	An AWU organiser and two shop stewards were involved in a two-day strike of AWU members at a particularly sensitive time during construction on a Mineral Sands Separation Plant in Victoria. The strike was designed to bring pressure to bear on and cause difficulty to the head contractor when there was a dispute over taxation of a camp allowance.	Mineral Sands Separation Plant, Hamilton, VIC	**$56,000** comprising: • $40,000 against the AWU ½ suspended (referable to 1 contravention of each of s. 38 BCII Act and EBA). • $4,000 against Lee (referable to 1 contravention of s. 38 BCII Act). • $4,000 against Lambe (referable to 1 contravention of each of s. 38 BCII Act and EBA). • $4,000 against Brown (referable to 1 contravention of each of s. 38 BCII Act and EBA). • $4,000 against Watkins (referable to 1 contravention of each of s. 38 BCII Act and EBA).
22.	Alfred v Lanscar [2007] FCA 1001; (2007) 167 IR 320	Federal Court of Australia Buchanan J	A CFMEU organiser advised, encouraged or incited Papas Painting to refuse to engage painters because they were not members of the union. Lanscar said that unless the painters joined the union they could not work on the project and he would "direct" the head contractor to use other painters. Also, Mr Lanscar threatened to take industrial action against Papas Painting with the intent to coerce it to refuse to use the painters.	Avenue Apartments, ACT	**$12,000** comprising: • $10,000 and declarations against the CFMEU (referable to 1 contravention of each of ss. 298S(2)(a) and 298S(2)(b) WRA). • $2,000 and declarations against Lanscar (referable to 1 contravention of each of ss. 298S(2)(a) and 298S(2)(b) WRA).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2007 continued		
23.	A & L Silvestri Pty Ltd v CFMEU [2007] FCA 1047 (liability) [2008] FCA 466 (penalty)	Federal Court of Australia Gyles J	Three CFMEU and CFMEU (NSW) organisers took unprotected industrial action and threatened further industrial disruption against a head contractor and an earthmoving subcontractor on a Wollongong site because they did not have industrial agreements with the CFMEU. The officials also threatened to shut down the site if the subcontractor was not removed.	Sunrise Apartments, Market Street, Woolongong, NSW	**$7,300** comprising: • $5,500 and declarations against the CFMEU (referable to 1 contravention of s. 170NC WRA). • $1,800 and declarations against Lane (referable to 1 contravention of s. 170NC WRA).
24.	Martino v McLoughlin [2007] AIRC 717	Australian Industrial Relations Commission Watson SDP	A CFMEU organiser abused the right of entry system by his conduct at four separate building sites in Melbourne.	Cecil Street, Lifestyle Centre Yarra Arts Melbourne Recital Centre St Leonard's College AXA site, Docklands, VIC	Federal permit of McLoughlin suspended for two months and made subject to the condition that the permit holder undertake training (referable to abuse of ROE under s. 770 WRA).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2008		
25.	Alfred v Wakelin (No 1) [2008] FCA 1455 (CFMEU) (No 2) [2008] FCA 1543 (AWU) (No 4) [2009] FCA 267 (AWU)	Federal Court of Australia Jagot J	A strike of hundreds of AWU workers over food and hygiene standards at the kitchen and mess at the camp. A second strike of CFMEU and AWU workers following an authorised stop work meeting.	Lake Cowral Gold Mine, NSW	**$64,100** comprising: • $8,000 against the CFMEU (referable to 1 contravention of s. 38 BCII Act). • $1,100 against Wakelin (referable to 1 contravention of s. 38 BCII Act). • $28,000 and declarations against the AWU (referable to 2 contraventions of each of s. 38 BCII Act and EBA) and other declarations (referable to 2 contraventions of s. 170MN WRA) • $18,000 and declarations against the AWU NSW (referable to 2 contraventions of s. 38 BCII Act). • $9,000 and declarations against O'Connor (referable to 2 contraventions of each of s. 38 BCII Act and EBA) and other declarations (referable to 2 contraventions of s. 170MN WRA).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2008 continued		
26.	Standen v Feehan (2008) 175 IR 297; [2008] FCA 1009 (liability) (No 2) (2008) 177 IR 276; [2008] FCA 1574 (penalty)	Federal Court of Australia Lander J	A CFMEU organiser, who parked his car to block access to a site, intentionally hindered or obstructed the project manager on the site and a concrete contractor working on the site between 8:15 am and 10:00 am.	Halifax Street, SA **$3 million**	**$1,300** and declarations against Feehan (referable to 1 contravention of s 285E WRA).
27.	Cruse v CFMEU [2008] FCA 1267 (liability) (No 2) [2008] FCA 1637 (penalty)	Federal Court of Australia Marshall J	A CFMEU delegate made false and misleading statements regarding a Hamilton building contractor's obligation to join the union and negated the contractor's choice whether to enter into a certified agreement with the CFMEU.	Iluka Murray Basin Development Project, VIC **$270 million**	**$4,000** against the CFMEU (referable to 1 contravention of s. 170NC WRA) and declarations (referable to 1 contravention of s. 290SC WRA). Declarations against Fry (referable to 1 contravention of each of ss. 170NC and 298SC WRA).
28.	Stuart-Mahoney v CFMEU (2008) 177 IR 61; [2008] FCA 1426	Federal Court of Australia Tracey J	A CFMEU delegate and organiser recommended and supported an overtime ban with intent to coerce Hooker Cockram to employ an apprentice on the police and law courts complex in Morwell, Victoria.	Police and Law Courts Complex, Morwell, VIC **$39 million**	**$63,000** comprising: • $55,000 and declarations against the CFMEU ($35,000 referable to 1 contravention of s. 43 BCII Act, $20,000 referable to 1 contravention of s. 38 BCII Act). • $8,000 and declarations against Parker wholly suspended ($6,000 referable to 1 contravention of s. 43 BCII Act, $2,000 referable to 1 contravention of s. 38 BCII Act).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2008 continued		
29.	Cahill v CFMEU [2008] FCA 495	Federal Court of Australia Marshall J	Through its organiser and delegate, the CFMEU made a claim for strike pay and organised, threatened and took industrial action – including a ban at a separate site - with intent to coerce Bovis to pay strike pay. Bovis paid the strike pay.	Herald & Weekly Times Building, VIC	**$4,000** against the CFMEU (referable to 1 contravention of each of ss. 187AB(1)(a) and 187AB(1)(b) WRA). Declarations against Setka and Tadic (referable to 1 contravention of each of ss. 187AB(1)(a) and 187AB(1)(b) WRA).
30.	Alfred v Primmer & Ors (No 2) [2008] FMCA 1476 (2008) 221 FLR 54 (liability) [2009] FMCA 158 (penalty)	Federal Magistrates Court of Australia Cameron FM	A CFMEU organiser entered the Kiama High School site and advised or encouraged the head contractor's foreman to stop an independent contractor from continuing to work as the independent contractor was involved in court proceedings over unpaid wages.	Kiama High School Redevelopment Project, NSW	**$23,500** comprising: • $10,000 and declarations against the CFMEU (referable to 2 contraventions of s. 800(1)(a) WRA). • $10,000 and declarations against the CFMEU NSW (referable to 2 contraventions of s. 800(1)(a) WRA). • $3,500 and declarations against Primmer (referable to 2 contraventions of s. 800(1)(a) WRA).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2008 continued		
31.	Radisich v Buchan, Heath, Molina and CFMEU [2008] AIRC 324 (penalty) PR984581 (penalty)	Australian Industrial Relations Commission Lacy SDP	A CFMEU organiser abused the right of entry system by his conduct at the Armadale Shopping Centre site, on 14 February 2007. Another CFMEU organiser abused the right of entry system by his conduct at the Parliament Place site on 22 February 2007. Another CFMEU organiser abused the right of entry system by their conduct at Q-Con's Condor Towers site on 24 and 27 April 2007.	Armadale Shopping Centre site Parliament Place site Q-Con's Condor Towers site	For abuse of ROE under s. 770 WRA: • Federal permit of Buchan suspended for 3 months with further suspended 2-month suspension • Federal permit of Molina suspended for 2 months with further suspended 1-month suspension. • All CFMEU (C&G Div, WA Div Branch) permits subject to condition not to enter with McDonald except in certain circumstances.
32.	Australian Building and Construction Commissioner [2008] AIRC 1140 (liability) [2008] AIRCFB 898 (appeal) [2009] AIRC 86 (penalty)	Australian Industrial Relations Commission Watson SDP Australian Industrial Relations Commission Full Bench Kaufman SDP, Richards SDP and Roberts C	A CFMEU organiser abused his right to hold discussions when he performed unauthorised activities, including entering with the intention of doing other than speaking to employees during meal breaks and commencing a safety walk.	Mount Panorama Resort site, Bathurst, NSW	Suspended order suspending Lane's federal permit for 4 months (referable to abuse of ROE under s. 770 WRA).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2008 continued		
33.	Alfred v Quirk [2008] AIRC 781 (liability) PR985044 (penalty)	Australian Industrial Relations Commission Lacy SDP	A CFMEU organiser abused his right to hold discussions when he failed to comply with a request to produce his entry permit upon request.	Castle Hill Road, Castle Hill, NSW **$6 million**	Suspended order suspending federal permit of Quirk for 1 month (referable to abuse of ROE under s. 770 WRA).
34.	Stuart v AWU & Ors MLG1179/2008 Part of $105k Maryvale settlement.	Federal Magistrates Court of Australia Burchardt FM	Unauthorised departure from 11am of 383 construction employees for mass meeting conducted by Lee, Mooney and Dodd off-site, failure by employees to return to work at Maryvale Pulp Mill	Maryvale Pulp Mill, VIC **$280 million**	**$29,500** comprising: • $8,750 and declarations against the AWU (referable to 1 contravention of s. 38 BCII Act). • $1,750 and declarations against Lee (referable to 1 contravention of s. 38 BCII Act). • $8,000 and declarations against the CEPU (referable to 1 contravention of s. 38 BCII Act). • $1,500 and declarations against Mooney (referable to 1 contravention of s. 38 BCII Act). • $8,000 and declarations against the AMWU (referable to 1 contravention of s. 38 BCII Act). • $1,500 and declarations against Dodd (referable to 1 contravention of s. 38 BCII Act).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2008 continued		
35.	Duffy v CFMEU [2008] FCA 1804 (No 2) [2009] FCA 299	Federal Court of Australia Marshall J	A CFMEU organiser procured a ban on concreting and earthworks because of the lack of a female toilet while a female worker was present and the absence of a site contamination report. The bans were effectively lifted by the afternoon of the next day.	University Hill, Plenty Road, Bundoora, VIC **$5 million**	**$5,500** against the CFMEU (referable to 1 contravention of s. 38 BCII Act).
36.	Cozadinos v CFMEU & Anor [2008] FMCA 1591 [2009] FMCA 272	Federal Magistrates Court of Australia Burchardt FM	A CFMEU shop steward prevented a delivery of materials out of mischief and/or malice to spite a site manager.	Deakin University, VIC	**$9,600** comprising: • $5,000 and declarations against the CFMEU (referable to 1 contravention of s. 38 BCII Act) and other declarations (referable to 1 contravention of s. 494 WRA). • $4,600 and declarations against Johnston (referable to 1 contravention of s. 38 BCII Act) and other declarations (referable to 1 contravention of s. 494 WRA).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2008 continued		
37.	Stuart-Mahoney v CFMEU and Anor (No 2) [2008] FMCA 1015 (liability) (No 3) [2008] FMCA 1435 (penalty) [2011] FCA 56 (appeal)	Federal Magistrates Court of Australia Burchardt FM Federal Court of Australia Full Court Ryan J	At inductions a CFMEU delegate made a false and misleading statement about the obligation of an excavator operator to join the union and took action against the excavator operator with intent to coerce him to become a member of the union.	CSL Parkville, VIC **$5 million**	**$30,775** comprising: • $24,775 and declarations against the CFMEU (referable to 1 contravention of each of ss. 789 and 790 WRA). • $6,000 and declarations against Deans ½ suspended (referable to 1 contravention of each of s. 789 and 790 WRA).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2009		
38.	Alfred v CFMEU & Ors [2009] FMCA 613 (liability) (No 2) [2009] FMCA 1003 (penalty) [2011] FCAFC 13 (appeal)	Federal Magistrates Court of Australia Smith FM Full Court of the Federal Court of Australia Buchanan, Flick and Katzmann JJ	A CFMEU and CFMEU (NSW) organiser threatened to organise or take action (including bankruptcy, auditing and "making life a misery") against a subcontractor with intent to coerce him and his workers to become members of the CFMEU.	Portico Plaza, Toongabbie, NSW	**$28,600** comprising: • $13,000 against the CFMEU (referable to 1 contravention of s. 789 WRA). • $13,000 against the CFMEU NSW (referable to 1 contravention of s. 789 WRA). • $2,600 against Manna (referable to 1 contravention of s. 789 WRA).
39.	Gregor v CFMEU and Berardi [2009] FMCA 1266	Federal Magistrates Court of Australia O'Sullivan FM	After a head contractor explained it believed it need not be party to a CFMEU EBA, a CFMEU organiser arranged for workers on site to stop work and attend a midday meeting. The organiser encouraged attendees to leave site and not perform any further work that day.	Bialik College, Hawthorn, VIC	**$8,500** comprising: • $7,500 and declarations against the CFMEU (referable to 1 contravention of s. 38 BCII Act). • $1,000 and declarations against Berardi wholly suspended (referable to 1 contravention of s. 38 BCII Act).
40.	Stuart v CFMEU [2009] FCA 1119 (first instance) [2010] FCAFC 65 (appeal)	Federal Court of Australia Gray J Federal Court of Australia Full Court Moore, Besanko and Gordon JJ	A CFMEU shop steward refused to induct employees of a subcontractor without a CFMEU EBA, stated that the work they were to do was CFMEU work, not AMWU work, and organised a stop work meeting of employees two weeks later, with intent to apply undue pressure to the subcontractor to make an EBA.	Police and Law Courts Complex, Morwell, VIC **$39 million**	On appeal: • **$25,000** (increased from $5,000) and declarations against the CFMEU (referable to 1 contravention of s. 44 BCII Act with no additional penalty for 1 s. 38 contravention) • Declarations against Corbett (referable to 1 contravention of each of ss. 44 and 38 BCII Act).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2009 continued		
41.	Cozadinos v Dempster and Henry [2009] FMCA 265	Federal Magistrates Court of Australia O'Sullivan FM	A CFMEU employee representative, during an induction, made a false and misleading representation about the obligation to join the CFMEU – with intent to coerce inductees to join the CFMEU. A site peggy made a similar representation – without coercive intent - at a later date.	World Trade Centre, VIC **$200 million**	**$2,000** comprising: • $1,000 and declarations against Dempster (referable to 1 contravention of s. 789 WRA). • $1,000 and declarations against Henry (referable to 1 contravention of s. 790 WRA).
42.	Wilson v Nesbit and CFMEU [2009] FCA 1574	Federal Court of Australia Dowsett J	A CFMEU organiser made threats to a company to ban it from any building site in Australia and have it audited (costing at least $30,000) with intent to coerce the company to terminate its EBA and make a new EBA with the CFMEU.		**$49,000** comprising: • $40,000 and declarations against the CFMEU (referable to 1 contravention of s. 44 BCII Act.) • $9,000 and declarations against Nesbit (referable to contravention of s. 44 BCII Act).
43.	Stuart v AMWU & Dodd VID484/2009 Part of $105k Maryvale settlement.	Federal Court of Australia North J	A union organiser threatened to organise unlawful industrial action by contractors working on Maryvale Pulp Mill project if a subcontractor (Sandvik) came on site, with intent to apply undue pressure on the subcontractor to agree to make an EBA with the AMWU.	Maryvale Pulp Mill project. **$280 million**	**$30,000** comprising: • $25,000 and declarations against the AMWU (referable to 1 contravention of s. 44 BCII Act). • $5,000 and declarations against Dodd (referable to 1 contravention of s. 44 BCII Act).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2009 continued		
44.	Draffin v CFMEU [2009] FCA 243 (CFMEU first instance) [2009] FCAFC 120 (appeal)	Federal Court of Australia Marshall J Federal Court of Australia Full Court Goldberg, Jacobson and Tracey JJ	A CFMEU delegate, CFMEU organiser and CFMEU branch secretary admitted to coercing a head contractor not to allocate traffic management responsibilities to a subcontractor whose employees were on AWAs, discriminating against the subcontractor and encouraging the head contractor to terminate the subcontract because of the AWAs. The head contractor terminated the subcontract.	Brunswick Police Station, VIC **$5.5 million**	On CFMEU penalty appeal, **$132,750** comprising: • $50,000 against Walton ½ suspended ($40,000 referable to 1 contravention of s. 45 BCII Act, $10,000 referable to 1 contravention of s. 298K(2)(d) WRA). • $52,750 (increased from $22,750) against the CFMEU ($50,000 referable to 1 contravention of s. 43 BCII Act, $2,000 referable to 1 contravention of s. 45 BCII Act, $750 referable to 1 contravention of s. 298P WRA). • $10,000 (increased from $2,000 wholly suspended) and declarations against Oliver ½ suspended ($8,000 referable to 1 contravention of s. 43 BCII Act, $1,250 referable to 1 contravention of s. 45 BCII Act and $750 referable to 1 contravention of s. 298P WRA). • $10,000 (increased from $2,000 wholly suspended) against Benstead ½ suspended ($8,000 referable to 1 contravention of s. 43 BCII Act, $1,250 referable to 1 contravention of s. 45 BCII Act and

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					\$750 referable to 1 contravention of s. 298P WRA) and declarations (referable to 1 contravention of each of ss. 45 BCII Act and 298P WRA). • \$10,000 against Allen ½ suspended (\$8,000 referable to 1 contravention of s. 43 BCII Act, \$1,250 referable to 1 contravention of s. 45 BCII Act and \$750 referable to 1 contravention of s. 298P WRA) and declarations (referable to 1 contravention of each of ss. 45 BCII Act and 298P WRA).
45.	Cruse v CFMEU & Anor (2009) 182 IR 60; [2009] FMCA 236	Federal Magistrates Court of Australia Turner FM	Over 80% of employees walked off the job following a CFMEU organiser's conducting a 30 minute stop-work meeting during working hours.	Yarra Arts Site, Southbank, Melbourne, VIC **\$120 million**	**\$38,500** comprising: • \$27,500 and declarations against the CFMEU (referable to 1 contravention of each of s. 38 BCII Act and EBA). • \$11,000 and declarations against McLoughlin ½ suspended (referable to 1 contravention of each of s. 38 BCII Act and EBA).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2009 continued		
46.	Hogan v Riley & Ors [2009] FMCA 269 (2009) 231 IR 267 (first instance) (2010) 182 FCR 583 (appeal) (No 2) [2010] FMCA 760 (remitter)	Federal Magistrates Court of Australia Full Federal Court of Australia Neville FM (first instance) Finn, Lander and Jessup JJ (appeal) Smith FM (on remitter)	2 CFMEU organisers were refused entry to the National Covention Centre site by Michael Riley, Wayne Clark, Brendan Byatt and Iqon Pty Ltd. The organisers were attempting to enter under local OHS laws to investigate suspected OHS breaches.	National Convention Centre, Canberra, ACT **$30 million**	**$12,000** comprising: • $10,000 and a declaration against Iqon referable to 3 contraventions of s. 767(3)(b) WR Act • $1,000 and a declaration against Byatt referable to 1 contravention of s. 767(3)(b) WR Act • $1,000 and a declaration against Riley referable to 1 contravention of s. 767(3)(b) WR Act • A declaration against Clark referable to 1 contravention of s. 767(3)(b) WR Act.
47.	Cruse v CFMEU and Anor [2009] FCA 787	Federal Court of Australia Marshall J	A CFMEU senior vice president held a stop work meeting with crane workers at 3:10 pm at a Melbourne site. Following this, a ban was placed on crane installation work by the workers and continued for little over an hour.	Southbank Boulevard, Melbourne, VIC	**$15,000** comprising: • $10,000 and declarations against the CFMEU (referable to 1 contravention of s. 38 BCII Act). • $5,000 and declarations against Washington (referable to 1 contravention of s. 38 BCII Act).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2009 continued		
48.	Stuart v LU Simon Builders Pty Ltd [2009] FCA 107	Federal Court of Australia Marshall J	LU Simon discriminated against Peter Vanderkley on the grounds that he did not have a collective agreement, or a collective agreement with the CFMEU when they refused Vanderkley access to the Aquavista site on three occasions.	Aquavista site, Docklands, VIC	**$55,000** and declarations against LU Simon ½ suspended (referable to 2 contraventions of s. 45 BCII Act).
49.	Williams v CFMEU [2009] FCA 223 (liability) (No 2) (2009) 182 IR 327; [2009] FCA 548 (penalty) [2009] FCAFC 171 (appeal)	Federal Court of Australia Jessup J Federal Court of Australia Full Court Moore, Middleton and Gordon JJ	A CFMEU organiser procured and threatened to procure a stoppage of work with intent to coerce a builder to employ or engage a building employee or contractor.	Darebin Road, Alphington, VIC	On appeal, **$42,500** comprising: • $35,000 (reduced from $100,000) against the CFMEU (referable to 1 contravention of s. 43 BCII Act). • $7,500 (reduced from $15,000) against Mates (referable to 1 contravention of s. 43 BCII Act).
50.	Stuart v AWU & Anor MLG339/2009 Part of $105k Maryvale settlement.	Federal Magistrates Court of Australia Burchardt FM	Unauthorised failure by 17 employees of one contractor at Maryvale Pulp Mill to return to work from 1:30pm on 24 Jul 07 after holding discussions with Lee.	Maryvale Pulp Mill, VIC **$280 million**	**$8,000** comprising: • $6,700 and declarations against the AWU (referable to 1 contravention of s. 38 BCII Act). • $1,300 and declarations against Lee (referable to 1 contravention of s. 38 BCII Act).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2009 continued		
51.	Keene v AMWU & Anor MLG331/2009 Part of $105k Maryvale settlement.	Federal Magistrates Court of Australia Burchardt FM	Unauthorised failure by 36 employees of one contractor to return to work from 10:20am on 5 Feb 08 after holding discussions with Dodd.	Maryvale Pulp Mill, VIC **$280 million**	**$7,000** comprising: • $5,800 and declarations against the AMWU (referable to 1 contravention of s. 38 BCII Act). • $1,200 and declarations against Dodd (referable to 1 contravention of s. 38 BCII Act).
52.	Cozadinos v AWU & Ors MLG309/2009 Part of $105k Maryvale settlement.	Federal Magistrates Court of Australia Burchardt FM	Unauthorised departure from 11am of 433 Maryvale Pulp Mill construction employees conducted by Lee, Mooney and Dodd off-site on 23 Nov 07, failure by employees to return to work; and in respect of AWU and Lee, failure by 17 AWU members employed by BMC Welding to work required overtime during 24-25 Nov 07	Maryvale Pulp Mill, VIC **$280 million**	**$30,500** comprising: • $8,750 and declarations against the AWU (referable to 2 contraventions of s. 38 BCII Act). • $1,750 and declarations against Lee (referable to 2 contraventions of s. 38 BCII Act). • $8,000 and declarations against the CEPU (referable to 1 contravention of s. 38 BCII Act). • $1,500 and declarations against Mooney (referable to 1 contravention of s. 38 BCII Act). • $8,750 and declarations against the AMWU (referable to 1 contravention of s. 38 BCII Act). • $1,750 and declarations against Dodd (referable to 1 contravention of s. 38 BCII Act).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2009 continued		
53.	Wotherspoon v Brown MLG362/2009 (no decision)	Federal Magistrates Court of Australia Burchardt FM	An employee carrying out inductions made a false or misleading statement about the obligation to join the union and prejudiced persons in their employment because they had not paid membership fees.		**$4,000** against Robert Brown ½ suspended (referable to 1 contravention of each of ss. 790 and 797(3) WRA).
54.	Cozadinos v CFMEU and Ioannidis MLG624/2009 (no decision)	Federal Magistrates Court of Australia Burchardt FM	A CFMEU organiser prejudiced two employees in their employment (telling them he would stop them from working at the site) because they were not members of the CFMEU.		**$7,000** comprising: • $6,000 against the CFMEU (referable to 1 contravention of s. 797(3)(f) WRA). • $1,000 against Ioannidis (referable to 1 contravention of s. 797(3)(f) WRA).
55.	Cozadinos v CFMEU and Salta MLG516/09	Federal Magistrates Court of Australia Burchardt FM	A CFMEU OH&S representative made a false or misleading representation about the obligation to join the CFMEU to two workers on the site after inductions.	Westfied Shopping Centre, Doncaster, VIC **$400 million**	**$7,000** comprising: • $6,000 against the CFMEU (referable to 1 contravention of s. 790 WRA). • $1,000 against Salta (referable to 1 contravention of s. 790 WRA).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2009 continued		
56.	Cahill v CFMEU (No 3) (2009) 178 IR 89; [2009] FCA 52 (liability) [2009] FCA 1040 (penalty) [2010] FCAFC 39 (appeal) [2010] HCATrans 324 (special leave disposition)	Federal Court of Australia Kenny J Federal Court of Australia Full Court Moore, Middleton and Gordon JJ High Court of Australia French CJ and Crennan J	A CFMEU organiser demanded that a new contractor on site employ two former shop stewards and the OH&S officer who had been employed by the previous contractor. He also demanded that the new contractor appoint these people as shop stewards and OHS officer respectively. The organiser demanded that the site's crane crew shut down the crane and leave the site, which they ultimately did. His intention in shutting down the crane operations was to coerce the labour hire company, Hardcorp, to re-employ the former CFMEU shop stewards and OHS officer.	Mount Street, Heidelberg, VIC	On appeal, upholding first instance, **$85,500** comprising: • $75,500 and declarations against the CFMEU (referable to 3 contraventions of s. 43 BCII Act). • $10,000 and declarations against Mates (referable to 3 contraventions of s. 43 BCII Act).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2010		
57.	Cozadinos v CFMEU, Berardi and Mates [2010] FCA 48	Federal Court of Australia Marshall J	A CFMEU organiser engaged in unlawful industrial action and took action with intent to coerce a contractor to employ a building employee.	Caulfield Grammar School, VIC **$6.8 million**	**$45,000** comprising: • $40,000 against the CFMEU ($20,000 referable to 1 contravention of s. 38 BCII Act and $20,000 referable to 1 contravention of s. 43 BCII Act). • $5,000 against Mates ($2,000 referable to 1 contravention of s. 38 BCII Act and $3,000 referable to 1 contravention of s. 43 BCII Act).
58.	White v CFMEU and McLoughlin [2010] FMCA 693	Federal Magistrates Court of Australia Burchardt FM	An CFMEU organiser imposed a ban on steel fixing for a concrete pour by employees of a subcontractor. The ban interrupted the pour and was imposed to effect his intention to remove an elected OHS representative.	Alto Apartment Building, St Kilda, VIC **$45 million**	**$46,200** comprising: • $38,500 and declarations against the CFMEU (referable to 1 contravention of s. 38 BCII Act) • $7,700 and declarations against McLoughlin (referable to 1 contravention of s. 38 BCII Act)

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2010 continued		
59.	Gregor v Setka [2010] FMCA 690 (liability) Setka v Gregor [2011] FCAFC 64 (appeal)	Federal Magistrates Court of Australia Burchardt FM Full Court of Federal Court of Australia Lander, Tracey and Yates JJ	A CFMEU Vice President acted in an improper manner by making significant threats to the personal safety of two managers employed by a head contractor.	ANZ Docklands site, VIC **$20 million**	**$3,000** against Setka (referable to 1 contravention of s. 767 WR Act) (lowered from $6,000 on appeal).
60.	Darlaston v Parker [2010] FCA 771 (liability) [2010] FCA 1382 (penalty)	Federal Court of Australia Flick J	Three CFMEU and CFMEU NSW organisers failed to comply with an occupier's reasonable occupational health and safety request to be inducted to site. Another organiser failed to comply with an employer's reasonable occupational health and safety request to cease using scaffolding on site. An organiser intentionally hindered and obstructed employers and employees by inducing employees to stop work and leave site. An organiser failed to comply with an employer's reasonable occupational health and safety request to to move vehicles in the vicinity of a crane to be dismantled. An organiser intentionally acted in an improper manner by driving a vehicle into a gate behind which stood an employee.	St Patrick's Estate, NSW **$5 million**	**$50,500** comprising: • $15,000 and declarations against the CFMEU (presumably referable to 7 contraventions of ss 758(3) and 767(1) WR Act) • $15,000 and declarations against the CFMEU NSW (presumably referable to 7 contraventions of ss 758(3) and 767(1) WR Act) • $8,000 and declarations against Parker (referable to 2 contraventions of s 758(3) and 1 contravention of s 767(1) WR Act) • $2,500 and declarations against Hanlon (referable to 1 contravention of s 758(3) WR Act) • $7,500 and declarations against Mitchell (referable to 1 contravention each of s 758(3) and 767(1) WR Act) • $2,500 and declarations against Kera (referable to 1 contravention of s 758(3) WR Act)

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2010 continued		
61.	Wotherspoon v CFMEU, Stephenson and Slater [2010] FMCA 184	Federal Magistrates Court of Australia Turner FM	Respondents engaged in meetings and stoppages on 30 April 2008 on Fulton Hogan Monash Freeway Road Widening Project as a result of which, employees of FHPL and others withdrew their labour and failed to perform their work for various periods on 30 April 2008.	Monash Freeway widening, VIC **$204 million**	**$31,000** comprising: • $25,000 against the CFMEU (referable to 1 contravention of s. 38 BCII Act). • $5,000 against Stephenson (referable to 1 contravention of s. 38 BCII Act). • $1,000 against Slater wholly suspended (referable to 1 contravention of s. 38 BCII Act).
62.	Wotherspoon v CFMEU & Ors [2010] FCA 111 [2011] FCA 158 (penalty judgment)	Federal Court of Australia Jessup J	To protest the Bovis Blue Glue security system, two unions and five organisers involved themselves in employees' failures to work at up to 4 different building sites on 23 May and 28 August 2008. On 14 August 2008 the CFMEU and up to two organisers restricted concrete pumps from operating and directed concreters to abandon a pour.	Docklands projects and Royal Children's Hospital, Melbourne, VIC **$1 billion**	**$110,000** comprising: • $48,250 against the CFMEU (referable to 3 contraventions of s. 38 BCII Act) • $36,250 against the CEPU (referable to 2 contraventions of s. 38 BCII Act) • $8,500 against McLoughlin (referable to 2 contraventions of s. 38 BCII Act) • $5,000 against Spernovasilis (referable to 2 contraventions of s. 38 BCII Act) • $5,000 against Gray (referable to 2 contraventions of s. 38 BCII Act) • $4,500 against Christopher (referable to 2 contraventions of s. 38 BCII Act) • $2,500 against Hudson (referable to 1 contravention of s. 38 BCII Act)

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2010 continued		
63.	Gregor v Berardi and CFMEU [2010] FMCA 805	Federal Magistrates Court of Australia O'Sullivan FM	A CFMEU organiser in a meeting banned work by approximately 14 employees in the context of the dismissal of the site peggy and OH&S representative the previous day	Residential Development, Hawthorn, VIC.	**$30,000** comprising: • $5,000 and declarations against Berardi (referable to 1 contravention of s 38 BCII Act) • $25,000 and declarations against the CFMEU (referable to 1 contravention of s 38 BCII Act)
64.	Williams v AMWU, CFMEU, Powell, Mavromatis & Pizarro [2010] FCA 754	Federal Court of Australia Jessup J	At the West Gate Bridge site, respondents authorised and organised industrial action, took action with intent to coerce John Holland to employ former employees of a subcontractor, and took action with intent to coerce John Holland and the subcontractor to make EBAs.	West Gate Bridge Project, VIC **$240 million**	**$1,325,000** comprising: • $858,000 against the CFMEU ($535,000 referable to 8 contraventions of s. 43 BCII Act, $247,000 referable to 9 contraventions of s. 44 BCII Act, $76,000 referable to 2 contraventions of s. 38 BCII Act). • $71,000 against Powell ($45,000 referable to 4 contraventions of s. 43 BCII Act, $21,000 referable to 5 contraventions of s. 44 BCII Act, $5,000 referable to 1 contravention of s. 38 BCII Act). • $71,000 against Stephenson ($45,000 referable to 5 contraventions of s. 43 BCII Act $16,000 referable to 5 contraventions of s. 44 BCII Act, $10,000 referable to 1 contravention of s. 38 BCII Act). • $298,000 against the AMWU $185,000 referable to 3

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					contraventions of s. 43 BCII Act, $78,000 referable to 4 contraventions of s. 44 BCII Act, $35,000 referable to 1 contravention of s. 38 BCII Act). • $27,000 against Mavromatis ($14,000 referable to 2 contraventions of s. 44 BCII Act, $7,000 referable to 1 contravention of s. 43 BCII Act, $6,000 referable to 1 contravention of s. 38 BCII Act).
65.	Hardwick v AMWU [2010] FCA 818	Federal Court of Australia Gordon J	At Patricia-Baleen Gas Plant site, various unions and organisers took various actions (including threats, pickets and protests) with intent to coerce subcontractors at the site to enter union building agreements.	Patricia-Baleen Gas Plant, Gippsland, VIC **$100 million**	**$67,500** comprising: • $9,000 against the CFMEU (referable to 1 contravention of s. 44 BCII Act) • $3,500 against Parker (referable to 1 contravention of s. 44 BCII Act). • $15,000 against the AMWU (referable to 1 contravention of s. 44 BCII Act). • $5,000 against Warren (referable to 1 contravention of s. 44 BCII Act). • $14,000 against the AWU (referable to 1 contravention of s. 44 BCII Act). • $6,000 against Lee (referable to 1 contravention of s. 44 BCII Act). • $11,000 against the CEPU (referable to 1 contravention of s. 44 BCII Act). • $4,000 against Mooney (referable to 1 contravention of s. 44 BCII Act).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2010 continued		
66.	Wotherspoon v CFMEU, Reardon and Hudson [2010] FMCA 786	Federal Magistrates Court of Australia O'Sullivan FM	Two CFMEU officials shut down the Walter and Eliza Hall Institute site in connection with a dispute with a head contractor over a height allowance.	Walter and Eliza Hall Institute, VIC	**$27,500** and declarations comprising: • $22,500 and declaration against the CFMEU (referable to 1 contravention of s. 38 BCII Act) • $2,500 and declaration against Reardon (referable to 1 contravention of s. 38 BCII Act) • $2,500 and declaration against Hudson (referable to 1 contravention of s. 38 BCII Act)
67.	Jenkinson v Carter and CFMEU [2010] FMCA 462	Federal Magistrates Court of Australia Burnett FM	A CFMEU official made a misrepresentation when he faxed a notice of intention to enter under s 760 WR Act when there were in fact no eligible employees at the site. Next day on site, he acted in an improper manner when he abused management who requested he leave the site and struck a manager with his shoulder on two occasions.		**$8,800** against Carter ($5,500 referable to 1 contravention of s. 767 WRA and $3,300 referable to 1 contravention of s. 768 WRA).
68.	Australian Building and Construction Commissioner v CFMEU [2010] FCA 784 [2010] FCA 977 [2011] FCAFC 29	Federal Court of Australia Barker J Full Federal Court of Australia North, McKerracher and Jagot JJ	A CFMEU WA assistant state secretary was opportunistically involved in workers taking strike action for 24 hours calculated to make a subcontractor sign a written safety commitment other subcontractors had signed the previous day.	City Square Project, St Georges Terrace, Perth WA **$750 million**	On appeal, **$48,000** comprising: • $40,000 and declarations against the CFMEU (referable to 1 contravention of s. 38 BCII Act) • $8,000 and declarations against McDonald (referable to 1 contravention of s. 38 BCII Act)

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2011		
69.	ABCC v Mitchell & Ors [2011] FMCA 622	Federal Magistrates Court of Australia Raphael FM	At a Dee Why site, Mitchell (and the CFMEU and CFMEU (NSW)) acted in an improper manner by being loud, extensively using expletives, and personally directing his behaviour at employees of Cavill Properties Pty Ltd		**$12,500** comprising: • $2,500 against Mitchell (referable to 1 contravention of s. 500 FW Act) • $5,000 against the CFMEU (referable to 1 contravention of s. 500 FW Act) • $5,000 against the CFMEU (NSW) referable to 1 contravention of s. 500 FW Act.
70.	Cozadinos v CFMEU [2011] FMCA 284	Federal Magistrates Court of Australia Riethmuller FM	Unlawful industrial action During late January and early February 2008, a series of stoppages were allegedly instigated by CFMEU organisers Michael Powell and Alex Tadic. The stoppages were allegedly in breach of the agreements entered into for the Project, which required continual work on all critical stages, and adherence to dispute resolution processes. The ABCC alleged the CFMEU, Mr Powell and Mr Tadic engaged in unlawful industrial action and took industrial action before the nominal expiry date of a collective agreement.	EastLink Freeway, VIC **$2.5 billion**	**$37,500** comprising: • $30,000 against CFMEU (for 1 contravention of s.38 of the BCII Act) • $5,000 against Powell (for 1 contravention of s.38 of the BCII Act) • $2,500 against Tadic (for 1 contravention of s.38 of the BCII Act)

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2011 continued		
71.	Radisich v Molina & Ors (No 2) [2011] FMCA 66 (liability) (No 3) [2012] FMCA 419 (penalty)	Federal Magistrates Court of Australia Lucev FM	A CFMEU organiser made a false and misleading statement to Southern Wire workers that they had to be members of the CFMEU or CFMEUW or both of them, to work on the site.	Coles-Myer Regional Distribution Centre at Horrie Miller Driver, Perth Airport, WA **$120 million**	**$9,240** comprising: • $660 and declarations against Molina • $3960 and declarations against CFMEUW • $4620 and declarations against CFMEU all referable to 1 contravention of s. 790(1)(a) WR Act.
72.	ABCC v Gray and Anor [2011] FMCA 919	Federal Magistrates Court of Australia Hartnett FM	At 7 am, a CEPU official attended a Docklands site and organised and conducted a stopwork meeting of more than 100 employees until 8:30 am. The stopwork meeting was held with intent to coerce non-CEPU members at the site to become members of the CEPU.	ANZ Docklands Project **$600 million**	**$10,000** against the CEPU referable to 1 contravention of s. 348 FW Act.
73.	White v Benstead, Beattie and CFMEU No judgment published Orders made August 2011	Federal Magistrates Court of Australia Riethmuller FM	At a Baulderstone site in Reservoir, two CFMEU officials hindered and obstructed and acted in an improper manner, and misrepresented their right to enter a Baulderstone site in Reservoir.	Preston Pump Station, VIC **$17 million**	**$13,000** comprising: • $10,000 against the CFMEU (referable to 1 contravention of each of s. 500 and 503 FW Act) • $2,000 against Benstead (referable to 1 contravention of s. 500 FW Act) • $1,000 against Beattie (referable to 1 contravention of s. 503 FW Act)
74.	White v Powell [2011] FMCA 509	Federal Magistrates Court of Australia Burchardt FM	Powell acted in an improper manner in the course of exercising his statutory right of entry powers on the site of a major public project.		**$5,000** on Powell (referable to 1 contravention of s. 767(1) of the WR Act).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2011 continued		
75.	White v CFMEU [2011] FCA 192	Federal Court of Australia Kenny J	Up to 9 organisers of the CFMEU were involved in or organised industrial action on 3 sites for 1 day (strikes) and 8 sites for 4 hours (car blockades) with intent to coerce Abigroup to employ and allocate particular responsibilities to redundant employees.	Geelong, Southern Link and Monash projects, VIC **$455.8 million**	• **$170,000** comprising: • $105,000 against the CFMEU (referable to 1 contravention of ss. 38 and 43 BCII Act) • $13,000 against Edwards (referable to 1 contravention of ss. 38 and 43 BCII Act) • $5,000 against Graauwmans (referable to 1 contravention of ss. 38 and 43 BCII Act) • $8,000 against Hill (referable to 1 contravention of ss. 38 and 43 BCII Act) • $5,000 against Long (referable to 1 contravention of ss. 38 and 43 BCII Act) • $5,000 against Murphy (referable to 1 contravention of ss. 38 and 43 BCII Act) • $11,000 against Powell (referable to 1 contravention of ss. 38 and 43 BCII Act) • $5,000 against Reardon (referable to 1 contravention of ss. 38 and 43 BCII Act) • $5,000 against Stephenson (referable to 1 contravention of ss. 38 and 43 BCII Act) • $8,000 against Tadic (referable to 1 contravention of ss. 38 and 43 BCII Act).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2011 continued		
76.	Heyman v CFMEU, Washington, Hudson and Spernovasilis [2011] FMCA 145	Federal Magistrates Court of Australia O'Sullivan FM	Organisers of the CFMEU banned work on a tower crane at the Royal Children's Hospital site at Parkville, Victoria	Royal Children's Hospital, Melbourne, VIC **$1 billion**	**$41,000** comprising: • $30,000 against the CFMEU (referable to 1 contravention of s. 38 BCII Act) • $6,000 against Washington (referable to 1 contravention of s. 38 BCII Act) • $5,000 against Hudson (referable to 1 contravention of s. 38 BCII Act)
77.	ABCC v CFMEU and McDonald (No 2) [2011] FCA 1518	Federal Court of Australia Barker J	On 15 January 2009 at a Perth CBD site, McDonald banned a concrete pour the next day which was forecast to be 40 degrees. The pour did not proceed though arrangements had been made for safe pouring. On 2 February 2009, McDonald prevented employees from completing inductions and working that evening because Ridgebay did not have a current CFMEU EBA. He told Ridgebay in effect that he required them to have an EBA to work on a city block. On 24 June 2009, employees were working undercover below level 8 on a day with intermittent rain and high wind. McDonald told the builder the project was inclement as a whole, called a meeting and encouraged employees not to resume work. They left shortly after 10:15 am for the day.	140 William Street, Perth, WA **$40 million**	**$231,000** comprising: • $154,000 and declarations against the CFMEU (referable to 4 contraventions of s 38 BCII Act) • $38,500 and declarations against the CFMEU (referable to 1 contravention of s 44 BCII Act) • $30,800 and declarations against McDonald (referable to 4 contraventions of s 38 BCII Act) • $7,700 and declarations against McDonald (referable to 1 contravention of s 44 BCII Act)

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2011 continued		
78.	Flynn v CFMEU and Feehan Mathers v CFMEU and Feehan [2011] FMCA 32	Federal Magistrates Court of Australia Simpson FM	In May 2008 a CFMEU organiser was involved in a strike by 30 employees in the context of safety issues that did not pose an immediate threat to their health and safety. In July 2008 the CFMEU organiser was involved in a strike by more than a dozen employees and a failure to work by 5 employees from 9:00 am onwards	Flinders University Education Building Project, SA **$10 million**	**$45,000** comprising: In *Flynn* • $17,000 against the CFMEU (referable to 2 contraventions of s. 38 BCII Act) • $3,000 against Feehan (referable to 2 contraventions of s. 38 BCII Act) In *Mathers* • $20,000 against the CFMEU (referable to 1 contravention of s. 38 BCII Act) • $5,000 against Feehan (referable to 1 contravention of s. 38 BCII Act)
79.	Gregor v CFMEU and Travers [2011] FMCA 562	Federal Magistrates Court of Australia Riethmuller FM	A CFMEU official acted in an improper manner when entering to hold discussions by convening an unauthorised meeting and refusing to leave and directing profanities towards management of a site at Tullamarine Airport	Melbourne Airport, VIC **$65 million**	**$6,000** comprising: • $5,000 against the CFMEU (referable to 1 contravention of s. 767(1) WRA) • $1,000 against Travers (referable to 1 contravention of s. 767(1) WRA)

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2011 continued		
80.	ABCC v CFMEU [2011] FCA 810	Federal Court of Australia Gilmour J	A CFMEU WA assistant state secretary and an organiser procured industrial action on 3 occasions, involving four meetings and disrupting the performance of work.	Commercial Office Tower, 915 Hay Street, Perth, WA **$60 million**	**$150,000** comprising: • $120,000 against the CFMEU (referable to 3 contraventions of s. 38 BCII Act) • $17,000 against McDonald (referable to 2 contraventions of s. 38 BCII Act) • $13,000 against Buchan (referable to 3 contraventions of s. 38 BCII Act)
81.	Lovewell v Pearson & Anor [2011] FMCA 102	Federal Magistrates Court of Australia Jarrett FM	A union official who was a federal permit holder and state authorised representative intentionally hindered and obstructed a company in its work and otherwise acted in an improper manner when he disrupted a concrete pour and swore at employees at a building site in Queensland.	Rivers Point Apartments, Brisbane, QLD **$19 million**	**$21,000** comprising: • $16,500 and a declaration against the BLF (Qld) • $4,500 and a declaration against Pearson
82.	Woodside Burrup Pty Ltd v CFMEU [2011] FCA 949	Federal Court of Australia Gilmour J	McDonald and the CFMEU called for a motion to strike for 48 hours after Woodside indicated it would not defer changes to accommodation known as "motelling". He declared the motion carried. As a result 1,200 workers did not work on 1 December. 1,340 workers did not work on 2 December.	Pluto LNG Project, WA **$15 billion**	**$85,800** comprising: • $71,500 against the CFMEU (referable to 2 contraventions of s 38 BCII Act) • $14,300 against McDonald (referable to 2 contraventions of s. 38 BCII Act)

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2011 continued		
83.	Alfred v CFMEU [2011] FCA 556	Federal Court of Australia Tracey J	The CFMEU through various officials established and maintained a total ban on the performance of work at the Melbourne Markets site and established and maintained a blockade of the main entrance to the site with intent to coerce Fulton Hogan to agree to make an EBA and/or terminate or vary an existing EBA.	Melbourne Markets Relocation Project, VIC **$300 million**	**$100,000** and declarations against the CFMEU (referable to 1 contravention of each of s. 38 and 44 BCII Act).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2011 continued		
84.	Gregor v CFMEU; Cozadinos v CFMEU [2011] FCA 808	Federal Court of Australia Marshall J	The CFMEU and several officials engaged in unlawful industrial action and coercive action at several building sites on several occasions. The intent of the coercion was to force Caelli to employ an OHS representative.	**$2.4 billion** Royal Children's Hospital, Melbourne Myer Project site at 800 Collins Street, Docklands ANZ Project site at 833 Collins Street, Docklands Merchant Project site at 834 Bourke Street, Docklands Montage Project site at 1 Encounter Way, Docklands collectively referred to as the Victoria Harbour Sites. Olsen Project site at 637 Chapel Street, South Yarra Robin Project site at 717 Bourke Street, Docklands	**$415,000** comprising: • $85,000 against the CFMEU (referable to 3 contraventions of s. 38 BCII Act) • $5,000 against Reardon (referable to 1 contravention of s. 38 BCII Act) • $10,000 against Hudson (referable to 2 contraventions of s. 38 BCII Act) • $5,000 against McLoughlin (referable to 1 contravention of s. 38 BCII Act) • $5,000 against Christopher (referable to 1 contravention of s. 38 BCII Act) • $218,000 against the CFMEU (referable to 7 contraventions of s. 43 BCII Act) • $17,000 against Hudson (referable to 3 contraventions of s. 43 BCII Act) • $17,000 against Washington (referable to 4 contraventions of s. 43 BCII Act) • $12,000 against Christopher (referable to 3 contraventions of s. 43 BCII Act) • $7,000 against Setka (referable to 2 contraventions of s. 43 BCII Act) • $17,000 against Spernovasilis (referable to 4 contraventions of s 43 BCII Act) • $17,000 against Reardon (referable to 4 contraventions of s. 43 BCII Act)

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2011 continued		
85.	ABCC v Graauwmans & CFMEU MLG912/2011	Federal Magistrates Court, Melbourne FM Riley	Graauwmans came onto Barwon Heads Bridge Project in June 2010 and told the head contractor McConnell Dowell that anytime Elstone contractors came on site, CFMEU members would be shedded up as Elstone did not have an EBA with the CFMEU. On 17 August, Elstone returned to site and the CFMEU shut the job for the day.	Barwon Heads Bridge Project, VIC **$23 million**	• **$5000** against Robert Graauwmans and declaration of 1 contravention of s38 • **$30,000** against the CFMEU Vic Branch and declaration of 1 contravention of s38
86.	ABCC v Doyle and CFMEU; Lukies v Doyle and CFMEU No judgment published Orders made in October and December 2011	Federal Magistrates Court of Australia Burchardt FM Turner FM	On 22 May 2009, Doyle did not comply with his obligation to be a federal permit holder when exercising OHS right of entry and was reckless in misrepresenting his right to enter a site at Beaconsfield. On 19 October 2009, Doyle did not comply with his obligation to produce his federal permit on request and hindered and obstructed and acted in an improper manner while exercising OHS right of entry at a site at Endeavour Hills.	Safeway Beaconsfield, VIC **$7 million**	**$26,000** comprising: • $6,500 against the CFMEU (referable to 1 contravention of s. 497 FW Act) • $6,500 against the CFMEU (referable to 1 contravention of s. 500 FW Act) • $13,000 against the CFMEU (referable to 1 contravention of each of ss. 756 and 768 WRA).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2012		
87.	Director, FWBII v Mates [2012] FMCA 475 (penalty)	Federal Magistrates Court of Australia O'Sullivan FM	A CFMEU officer/shop steward refused to induct two subcontractors on a building site because they were not members of the CFMEU, thereby taking adverse action against them	81 Lorimer Street, Docklands, VIC **$5 million**	**$3,500** ($1,750 for each breach) referable to 2 contraventions of s. 346(a) of the FW Act.
88.	ABCC v CFMEU and Reardon [2012] FCA 189 (penalty decision)	Federal Court of Australia Bromberg J	At a Bovis Lend Lease Caroline Springs site, CFMEU official Reardon directed 50-55 employees of 6 subcontractors not to perform work that day or for the next two days in the context of a broader industrial dispute between the CFMEU and Bovis about a Blue Glue security system on Bovis sites.	Caroline Springs Square Shopping Complex, VIC **$30 million**	**$50,000** against the CFMEU (referable to 1 contravention of s. 38 BCII Act).
89.	ABCC v Jarvis, Temoho and CFMEU [2012] FMCA 189	Federal Magistrates Court of Australia Burnett FM	Three CFMEU organisers entered the Gold Coast University Hospital site and proceeded to hold a mass meeting of workers of 109 subcontractors on site. At the meeting the workers voted to stop work until 30 November 2009. The reason was that they asserted BLL had withheld entitlements from workers of another subcontractor on other sites.	Gold Coast University Project, QLD **$1.76 billion**	**$46,860** comprising: • $36,300 and declarations against CFMEU (for 1 contravention of s38 of the BCII Act) • $7,260 and declarations against Jarvis (for 1 contravention of s38 of the BCII Act) • $3,300 and declarations against Temoho (for 1 contravention of s38 of the BCII Act)

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2012 continued		
90.	United Group Resources Pty Ltd v Calabro (No 7) [2012] FCA 432	Federal Court of Australia McKerracher J	In the context of a dispute about "motelling", 1,336 employees failed to attend for work for the whole or part of their rostered shift. Some employees took this action prior to the nominal expiry date of their agreements and contrary to s. 420 orders of FWA.	Pluto LNG Project, WA **$15 billion**	• $1,300 (wholly suspended) for each day the respondents breached ss 38, 417 and 421 • $1,200 (wholly suspended) for each day the respondents breached ss. 38 and 421 • $1,100 (wholly suspended) for each day the respondents breached ss. 38 and 417 • $1,000 (wholly suspended) for each day the respondents breached s. 38 only • $300 for two respondents who breached s. 417 and 421.
91.	ABCC v Bollas [2012] FCA 484 (penalty)	Federal Court of Australia North J	A CFMEU member and OHS rep at several Brookfield Multiplex sites including Penders Grove, told two carpenters it was compulsory to join the CFMEU to work on the site and they could pack up and go unless they joined.	Penders Grove Primary School, VIC	**$2,000** against Bollas referable to 1 contravention of s. 349(1)(a) FW Act.

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2012 continued		
92.	Director, Fair Work Building Industry Inspectorate v CFMEU, Pearson, Vink, O'Doherty, CEPU, Hanna, Jarvis, Olsen & Malone [2012] FCA 1144 Regarding Injunction [2012] FCA 1273	Federal Court of Australia	The CFMEU, CEPU and officials engaged in unlawful industrial action and defied orders made by FWA, contravened right of entry provisions and engaged in work stoppages at a Brisbane and Gold Coast construction site at various dates between 28 February 2011 and 26 May 2011.	Gold Coast University Hospital, QLD **$600 million**	**$590,000** comprising: • A penalty of $550,000 on the CFMEU and CEPU (jointly and severally liable) payable to Lend Lease (for 1x CEPU contravention of s.38 of the BCII Act and 12 x CFMEU contraventions s38) • A penalty of $6,450 on the second respondent (Pearson) – for 4 contraventions of s38). • A penalty of $6,450 on the third respondent (Vink) – for 2 contraventions of s.38. • A penalty of $4,300 on the fourth respondent (O'Doherty)- for 2 contraventions of s.38. • A penalty of $7,750 on the sixth respondent (Hanna)- for 6 contraventions of s.38. • A penalty of $6,450 on the seventh respondent (Jarvis) – for 4 contraventions of s.38. • A penalty of $6,450 on the eighth respondent (Olsen)- for 2 contraventions of s.38. • A penalty of $2,150 on the ninth respondent (Malone) - for 1 contravention of s.38.

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2012 continued		
93.	Helal v Brookfield Multiplex Ltd [2012] FCA 653 (penalty)	Federal Court of Australia Bromberg J	A CFMEU officer threatened to organise or take action to coerce a company to employ two people as building employees. This occurred in an aggressive telephone discussion between the officer and the general manager after the company dismissed the employees for misconduct.	Southbank One project, VIC **$100 million**	**$30,000** and declarations against the CFMEU referable to 1 contravention of s. 43(1) BCII Act.
94.	Cozadinos v CFMEU and Bell (First instance) [2012] FCA 46 [2013] FCAFC 8 (Appeal) [2013] FCA 1243	Federal Court of Australia, Melbourne Gray J FCAFC (Appeal) Besanko, Perram and Bromberg JJ Tracey J appointment on Gray, J's retirement Federal Court of Australia, Melbourne Tracey J	Union organiser coerced employee to join union or would be prevented from working on site.	Epsom Shopping Centre, Bendigo, VIC **$10 million**	**$20,000** comprising: • The CFMEU pay a penalty of $20,000 in respect of contravention of s 44 of the BCII Act, charges dropped against Bell. • $42,000 costs towards FWBC's appeal costs.

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2012 continued		
95.	Director of the Fair Work Building Industry Inspectorate v CFMEU, McDonald & Buchan [2012] FCA 966	The Federal Court of Australia, Perth Buchanan J	McDonald entered Diploma's Queens Riverside Apartments site with other CFEU organisers and directed the Inner Strength workers to go on strike on 2 February 2011 and 10 June 2011, engaged in a blockade on the site on 23 June 2011, and made a threat to Diploma's managing director on 27 June 2011 to continue strikes. McDonald entered the site on 4 July 2011 and arranged from workers to attend a picket on the site.	Queens Riverside Apartments Project, WA **$110 million**	**$200,000** against CFMEU and its WA Assistant Secretary Joe McDonald, comprising of: • CFMEU: $40,000 (for 2 contraventions contravention of s44 BCII Act). • Mr McDonald:$10,000 (for 2 contraventions of s44 BCII Act) • CFMEU: Contempt of court x2 – totalling $100,000.00; • Mr McDonald: Contempt of court x 2 – totalling $50,000.00.
96.	Radisich v McDonald and CFMEU [2012] FMCA 919	Federal Magistrates Court, Perth	CFMEU WA assistant secretary Joe McDonald attended the Herdsman Business Park site on Walters Drive and made certain representations to workers, instructed workers to stop work, and attempted to coerce workers to become members of the union	Herdsman Business Park Project, WA	**$34,980** against CFMEU and McDonald, comprising of: • McDonald - $1,980 contravention of s 790(1) WRA; $4,400 contravention of s.38 BCII. • CFMEU - $6,600 contravention of s 790(1) WRA; $22,000 contravention of s 38 BCII.
97.	Director of the Fair Work Building Industry Inspectorate v CFMEU [2012] FMCA 916	Federal Magistrates Court of Australia, Melbourne	Hudson and the CFMEU engaged in unlawful industrial action at the Rosso Apartment project in Carlton and directed all workers at the site to take strike action.	Rosso Apartments, Carlton, VIC	**$25,000** comprising of: • $7,500 imposed on Matthew Hudson for one contravention of s38 of the BCII Act; • $17,500 imposed on the CFMEU for one contravention of s38 of the BCII Act by reason of vicarious liability for the conduct of Hudson

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2013		
98.	Director of the Fair Work Building Industry Inspectorate v CFMEU, Berardi, Beattie, Theodorou, Pitt, Bell & Patching [2013] FCA 515	Federal Court of Australia, Melbourne Jessup J	CFMEU and six representatives engaged in strikes and blockades on five major St Hilliers Victorian construction sites (Ararat prison, Watsonia Military Camp, Carlton apartment and social housing project, Ashwood apartment project and Canterbury housing complex).	Ashwood Chadstone Gateway Project, VIC **$365.8 million**	**$115,000** comprising of: • CFMEU $84,000 (for 8 contraventions of s43 of the BCII Act); • Billy Beattie - $10,500 (for 2 contraventions of s43); • Danny Berardi - $9,500 (for 2 contraventions of s43); • Theo Theodorou - $4500 (for 1 contravention of s.43); • Jason Bell - $3500 (for 1 contravention of s43); • Brendan Pitt - $3000 (for 1 contravention of s.43)
99.	Director, Fair Work Building Industry Inspectorate v Sutherland, Jarvis, O'Doherty, Pearson, Lynch, BLF, CFMEU & CEPU Order viewable per BRG1008/2011	Federal Circuit Court, Brisbane Judge Burnett	Brookfield Multiplex Constructions Pty Ltd engaged subcontractors for building work associated with the Gold Coast Hilton hotel (Surfers Paradise) and Wintergarden shopping precinct (Brisbane). The Director, Fair Work Building Industry Inspectorate, alleges that in early 2011, Andrew Sutherland, Timothy Jarvis, Patrick O'Doherty, Kane Pearson and Christopher Lynch engaged in unlawful industrial action.	Gold Coast Hilton Hotel (Surfers Paradise) and Wintergarden shopping precinct (Brisbane), QLD **$700 million**	Penalties of **$65,000** comprising: • The CFMEU pay $50,000 for 2 contraventions of s38 of the BCII Act; • The CEPU pay $15,000 for 1 s38 contravention. .

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2013 continued		
100.	Director, Fair Work Building Industry Inspectorate v CFMEU, CFMEUW and McDonald [2013] FCCA 1255	Federal Circuit Court of Australia, Perth Judge Lucev	Mirvac Constructions (WA) Pty Ltd was engaged to undertake building work at 'The Peninsula Project' in Burswood, Western Australia. FWBC alleged that on 12 September 2008 CFMEU and CFMEUW representative, Mr Joseph McDonald attended The Peninsula Project and attended and addressed a meeting of Mirvac employees and employees of building contractors at the site. At the conclusion of the meeting, alleged that approximately 100 workers left the site and failed to perform work that they were engaged to perform for the remainder of the day.	Peninsula Project, Burswood, WA **$700 million**	One contravention by each Respondent of s.494(1) of the WR Act: **$7,260** comprising: • $3,300.00 against the CFMEU • $3,300.00 against the CFMEUW • $660.00 against the Mr McDonald.
101.	Director, Fair Work Building Industry Inspectorate v CFMEU and Anor [2013] FCCA 2130	Federal Circuit Court of Australia, Brisbane Judge Burnett	Fair Work Building & Construction issued proceedings against the CFMEU, BLFQ and six union officials for allegedly engaging in unlawful industrial action at three Laing O'Rourke sites in Queensland during 2010.	Multi-Level Car Park, Albert Street and Brisbane Convention and Exhibition Centre projects **$140 million**	Penalties of **$55,000** CFMEU and BLFQ were held to be jointly and severally liable for the pecuniary penalty (for 1 contravention each of s.38 of the BCII Act).

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2013 continued		
102.	Director, Fair Work Building Industry Inspectorate v Abbott and Ors (6) [2013] FCA 942	Federal Court of Australia, Perth Gilmour J	September 2006, Woodside engaged CBI to perform mechanical construction services at the North West Shelf LNG Plant. CBI had two agreements in place. The AMWU was a party to one and the CFMEU and AWU were party to the other. The nominal expiry date of both agreements was August 2009. On 13 October 2008, a representative of the CFMEU demanded that CBI terminate its employees at the site, make redundancy payments and then re-engage the employees for further works. This demand was on the basis that the union believed the project had been completed. CBI believed that additional works awarded by Woodside formed part of the ongoing project. On 14 October 2008, 157 employees engaged in strike action. On that same day CBI was granted an order pursuant to s.496 of the Workplace Relations Act 1996 that all CBI employees not take industrial action for one month. Strike action continued for seven days between 17 October 2008 and 24 October 2008.	North West Shelf LNG Plant. **$27 billion**	Penalties and suspended penalties amount to **$1,068,000.** One contraventions by Respondents as listed in Schedule A attached to the Judgment, in respect of: s 38 of the BCII Act (2005); s 496(1) of the WR Act; and breaches of provisions within two Union Collective Agreement. Suspension is by way of 50% for a period of 3 years, whereby no contraventions of any industrial legislation or employment standards are found in the period. Penalties to be in immediate period $680,125 comprising: • $292,250: not suspended. • Total of $775,750 with suspensions attached. The payable amount is: $387,875.

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2013 continued		
103.	Director, Fair Work Building Industry Inspectorate v CFMEU & Beattie [2013] FCA 981	Federal Court of Australia , Melbourne Jessup J	Alleged breaches of s 38 of the BCII Act 2005 and s 417 of the FW Act. Alleged that on 8 July 2010, two employees of Glenn Industries Pty Ltd (GI) were working on a three-storey building at the Florey Neuroscience Institute within the Austin Hospital complex in Heidelberg, Victoria. It was alleged that CFMEU official Bill Beattie directed the two employees to stop working, which they did. Further, it was alleged that on 9 July 2010, Mr Beattie conducted a meeting with the two employees at the site and told them not to return to work. On 13 July, Mr Beattie and other CFMEU officials allegedly met with representatives of GI and Brookfield Multiplex Pty Ltd (Multiplex). The GI representatives agreed to the CFMEU's demand that the GI employees' rates of pay be increased to those contained in agreements negotiated with the Victorian branch of the CFMEU	Florey Neuroscience Institute at the Austin Hospital, Heidelberg, VIC **$119 million**	**$15,000** comprising: • $12,500 against the CFMEU (for 1 contravention of s.417 of the FW Act) • $2,500 against Bill Beattie (for 1 contravention of s.417 of the FW Act)

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2013 continued		
104.	Director, Fair Work Building Industry Inspectorate v CFMEU, Stephenson, Powell, MacDonald, Doyle, Benstead & Parker [2013] FCA 1014	Federal Court of Australia, Melbourne Gordon J	The CFMEU pressured Abigroup Contractors Pty Ltd (Abigroup) to employ particular CFMEU members on Abigroup's Peninsula Link (PenLink) project. The CFMEU and its organisers also engaged in unlawful industrial action at five Abigroup construction projects at schools near the PenLink project.	Peninsula Link Project, VIC Southern Link Upgrade Alliance Project, VIC **$759 million.**	**$230,000** comprising: • $155,000 against the CFMEU (for 3 contraventions of s.43 of the BCII Act) • $11,000 on Mr Fergal Doyle (for 1 contravention of s43 and 1 contravention of s.38 BCII Act) • $29,000 on Mr Gareth Stephenson (for 3 contraventions of s.43) • $24,500 on Mr Michael Powell (for 2 contraventions of s.43) • $5,000 on Mr Drew MacDonald (for 1 contravention of s.43) • $3,000 on Mr Gerard Benstead (for 1 contravention of s.38) • $2,500 on Mr John Parker (for 1 contravention of s.38)
105.	Director of the Fair Work Building Industry Inspectorate v CFMEU and Christopher [2013] FMCA 160	Federal Magistrates Court of Australia, Melbourne	The CFMEU and Mr Christopher threatened, assaulted, abused and vandalised property with the intent to coerce the site manager or Hooker Cockram to comply with his request.	Royal Melbourne Institute of Technology site, VIC **$25 million**	**$10,000** against the CFMEU.

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2013 continued		
106.	Director of the Fair Work Building Industry Inspectorate v O'Doherty, Myles, Ong, Clark, Bland, Temoho, Jarvis, CFMEU & CEPU [2013] FCA 846	Federal Court of Australia, Brisbane	The CFMEU, CEPU and seven union officials for taking—or threatening to take—unlawful industrial action against Watpac Construction (QLD) Pty Ltd. The action took place at three Watpac construction sites in Queensland with the intent to coerce Watpac to engage or not engage a person as a building contractor.	Translation Research Institute Project Queensland Institute of Medical Research Centre Project Carrara Stadium Project **$150 million**	Orders made: • The CFMEU pay a sum of **$99,000.00**; penalty in respect of contraventions of s 43(1)(b) and s 44 of the BCII Act. • The CEPU pay a sum of **$20,000.00**; penalty in respect of the contraventions of s 43(1)(b) of the BCII Act.
107.	Director, Fair Work Building Industry Inspectorate v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Anor [2013] FCA 82	Federal Court of Australia, Melbourne Marshall J	City West Waters engaged Tedra Australia Pty Ltd (Tedra) as the head contractor for the construction of a water treatment plant at Werribee. There were 61 workers engaged by either Tedra or a sub-contractor. Tedra contracted with Briagolong Engineering Pty Ltd (Briagolong) to construct two welded steel tanks. Briagolong engaged four workers who worked under subclass 457 visas. On 4 February 2013, a picket line at the entrance to the Site commenced, blocking workers and vehicles from entering the Site. The picket was disbanded on 15 February 2013.	West Werribee Dual Water Supply Project, VIC **$40 million**	The parties agreed to settle on the basis that the AMWU pay compensation of **$62,000** to Tedra with no admission of wrongdoing.

Attachment D

Master Builders Australia

Supplementary Submission to the Senate Standing Education and Employment References Committee

The Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

24 February 2014

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CONTENTS

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. Over 124 years the movement has grown to 32,000 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.

1.2 The building and construction industry 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. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of Submission

2.1 On 6 February 2014 Master Builders appeared before the Senate Education and Employment References Committee in respect of its reference about the Government's approach to re-establishing the Australian Building and Construction Commission (ABCC). That oral evidence supplemented our written submission dated 17 January 2014. During the course of the hearing, Master Builders was asked to provide further information to Senators. This submission provides answers to questions on notice. By email dated 12 February 2014, we received material from the Committee Secretariat isolating five matters referred to by way of label Question 1 to Question 5. These are referred to in this submission.

2.2 In addition, Master Builders was accused by Senator Cameron of "trying to manipulate statistics to try to get an outcome" (proof Hansard page 13, fourth paragraph from the top). This submission also expands on the notion explained to the Senator that the statistics Master Builders presented are directly from the data used to measure the National OHS Strategy 2002-2012 (National Strategy).

2.3 However, Master Builders did revert to Safe Work Australia (SWA) to ensure that its use of that body's statistics were accurate and to ensure that the

Committee had the most accurate data. SWA has, on 18 February 2014, indicated its view that the following is not correct in the use of the data:

- The data that we used in our submission dated 17 January 2014 at item 11.4 are for all serious claims in the construction industry, and they are not scoped for National OHS Strategy measurement.

- The data that we present in the submission at item 11.3 on fatality frequency rates are correct but they reflect all serious workers' compensation claims and are not scoped for the National OHS Strategy measurement.

2.4 Whilst the data provided in the 17 January 2014 submission is correct, following further intense exchanges with SWA, we are now aware that they represent all serious claims in the construction industry and should not have been used to measure progress against the National OHS Strategy. Properly scoped data for this supplementary submission provided by SWA appears below.

3 Wages Growth

3.1 We were asked by Senator Back to provide comparative wages data, at the least data which covers the period when the ABCC was in operation. This matter is labelled Question 1 by the Secretariat.

3.2 Attachment A shows the comparative wage growth by industry collected from ABS catalogue 6345 ABS Wage Price Index for 1998–2013. The percentage difference from the all industry index is shown for each sector identified by number. The construction sector is identified with the number 4.

4 Work Health and Safety

4.1 Senator Cameron indicated that Master Builders had used data from all-industries in the graph entitled, 'Building and Construction National OHS Strategy 2002-2012 Targets' at paragraph 11.4 of Master Builders' submission to the Committee. That was in fact not the all industries data but the construction industry specific data.

4.2 The National Strategy was agreed by all Australian governments, the Australian Chamber of Commerce and Industry (ACCI) and the Australian Council of Trade Unions (ACTU) in 2002. The National Strategy was also endorsed by the Master Builders' Board. The National Strategy set a national target to reduce the incidence of compensated work-related injury fatalities at least 20% and a national target to reduce the incidence of serious work-related injuries at least 40% by 30 June 2012.

4.3 Under the National Strategy, progress against the injury target is measured using serious injury and musculoskeletal disorders claims from the National Data Set for Compensation-based Statistics (NDS). Serious claims include all compensated fatalities, all claims for permanent incapacity and temporary incapacity claims involving one or more working weeks of time lost from work. However, we are now aware from SWA that it does not include disease claims (other than musculoskeletal disorders) or journey claims.

4.4 SWA has advised us that progress against the National OHS Strategy targets was measured using serious injury and musculoskeletal disorder claims. The main difference between these figures and those SWA report as 'serious claims' is that they exclude all disease claims except for musculoskeletal disorders. SWA excludes other diseases because it is acknowledged that workers' compensation data on much of the remaining work-related disease is incomplete and underestimates the true incidence of work-related disease in Australia. Additionally, many compensation claims for work-related disease involve long latency diseases. For instance, in the case of mesothelioma, the time between exposure to asbestos and development of the disease may be 30 years or more. Deafness, which accounts for around 5000 claims a year, also tends to occur over long periods. This means that disease statistics during the period of the National OHS Strategy could have reflected work health and safety environments of prior decades and would not reflect gains made as a result of work done under the National OHS Strategy. Journey claims are excluded from the measurement of the National OHS Strategy because not all jurisdictions' workers' compensation schemes cover journey claims. Where they are not covered there are no corresponding statistics. Therefore, because the disease data are an underestimate and the journey data are not national, they were not considered to provide reliable information for the purpose of reporting progress against the National Strategy.

4.5 These issues only became clear after we had sought further checking of the data with SWA. Hence, what follows is the properly scoped data which replaces the material in the 17 January 2014 submission.

4.6 There was a 28% decrease in the incidence rate of work-related injuries for all industries between the base period and 2011–12. This is below the rate of improvement required to achieve a 40% reduction in the incidence rate of work-related injuries by June 2012.

Table 1 – All-industries: Incidence rate of serious compensated injury and musculoskeletal claims per 1,000 employees

Base period	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12 (projected)*
14.8	14.4	14.2	13.8	13.0	12.6	12.3	11.7	11.1	10.8	10.7

Source: Safe Work Australia, Comparative Performance Monitoring Report (15th ed), October 2013. *The data that Safe Work Australia has for 2011-12 is preliminary and has been projected to estimate final claims figures.

4.7 The incidence rate of serious claims made per 1,000 employees in the construction industry was 25.8 in the base period. The sector experienced a reduction in serious claims over the 10 year period and the projected rate in 2011-12 was 16.6. This equates to a reduction of 35.7% just short of the target of a 40% reduction. The target was not met for the construction industry. This is in-line with the outcome of "all industries" which missed the target by some margin.

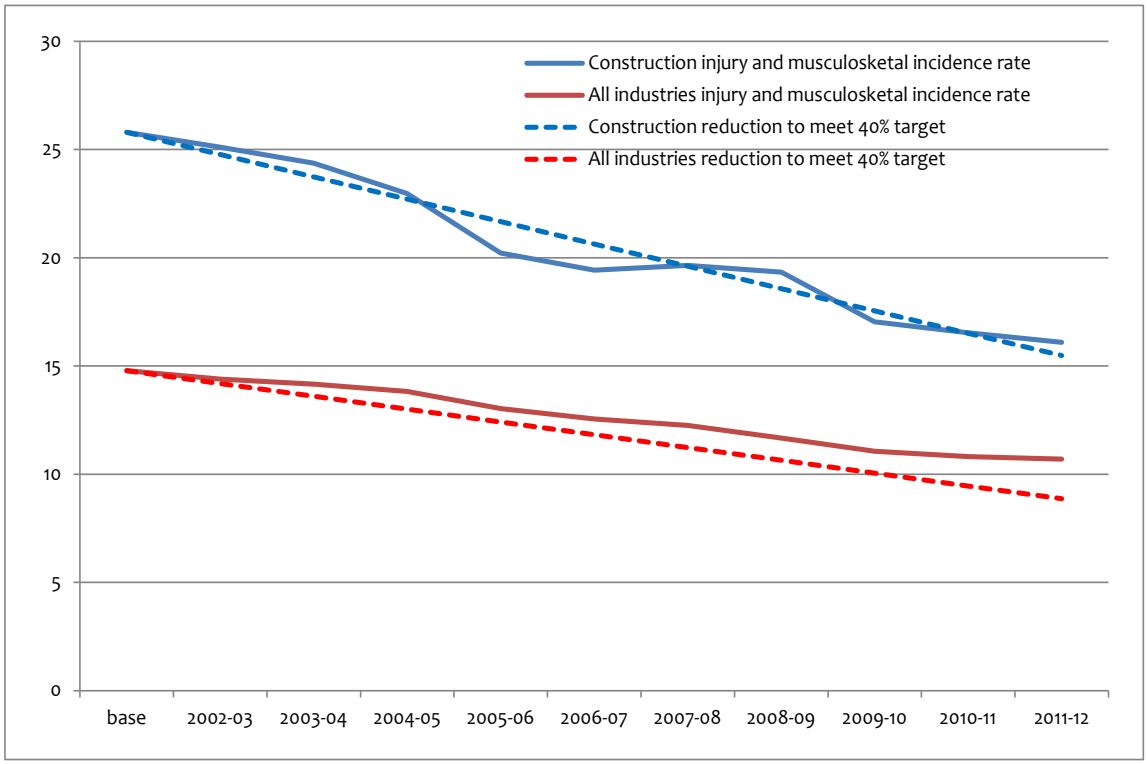
Table 2 – Construction: Incidence rate of serious compensated injury and musculoskeletal claims per 1,000 employees

Base period	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12 (projected)*
25.8	25.1	24.4	23.0	20.2	19.4	19.6	19.3	17.0	16.5	16.6

Source: Safe Work Australia National Data Set for Compensation-based Statistics (NDS),. *The data that Safe Work Australia has for 2011-12 is preliminary and has been projected to estimate final claims figures.

4.8 The following graph compares the performance of the construction industry against the 40% reduction target and the performance of all-industries against the 40% reduction target.

Graph 1 – Serious claims incidence rate performance against 40% reduction target



4.9 There was a 42% decrease in the incidence rate of compensated work-related injury and musculoskeletal fatalities for all-industries between the base period and 2011–12. This is more than twice the desired result and Australia met the target of a 20% reduction in the incidence rate of compensated work-related injury fatalities by June 2012.

Table 3 – All-industries: Incidence rates of compensated injury & musculoskeletal fatalities per 100,000 employees

Base period	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12 (projected)*
2.4	2.3	2.1	2.1	2.2	2.1	2.3	2.0	1.5	1.5	1.4

Source: Safe Work Australia, Comparative Performance Monitoring Report (15th ed), October 2013

*The data that Safe Work Australia has for 2011-12 is preliminary and has been projected to estimate final claims figures.

4.10 The compensated fatality incidence rate per 100,000 employees in the construction industry was 6.5 in the base period. That figure was reduced to a projected rate of 3.5 in 2011-12, a reduction of 46.2% This reduction rate is

mor than double the 20% target set in the 2002-2012 strategy, but Master Builders notes that more should always be done to prevent fatalities at work.

Table 4 - Construction: Incidence rates of compensated injury & musculoskeletal fatalities per 100,000 employees

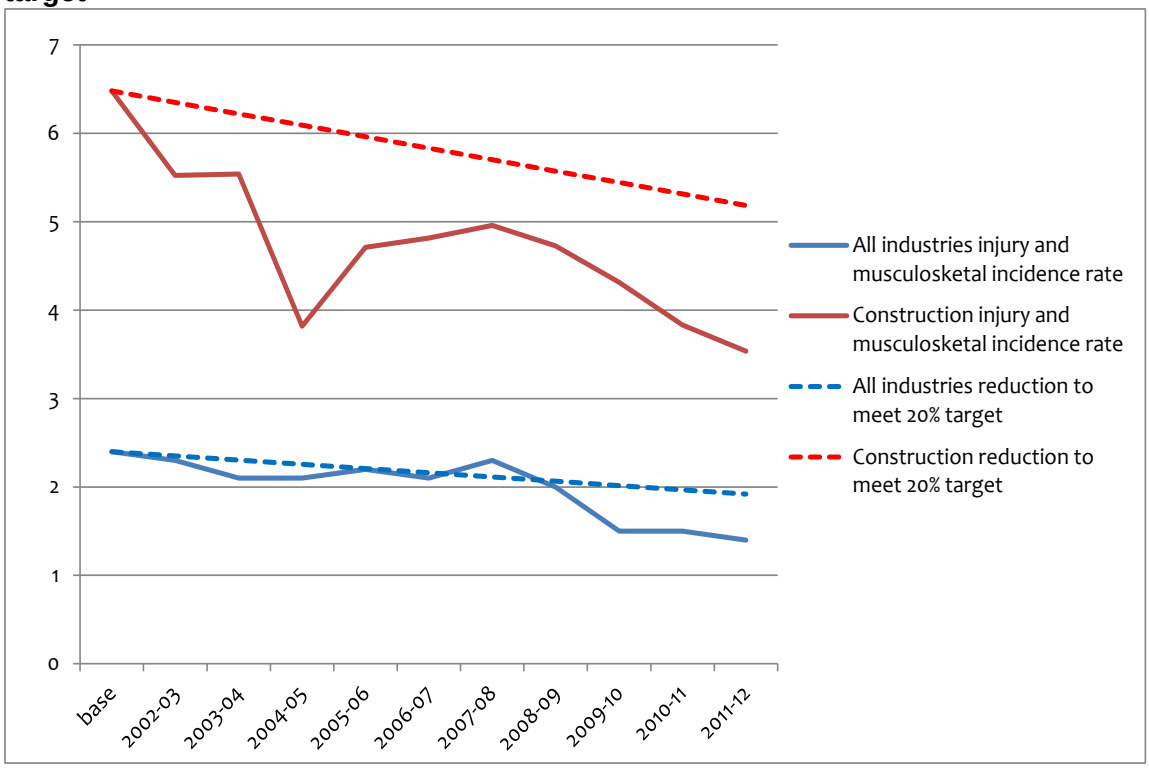
Base period	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12 (projected)*
6.5	5.5	5.5	3.8	4.7	4.8	5.0	4.7	4.3	3.8	3.5

Source: Safe Work Australia National Data Set for Compensation-based Statistics (NDS)

*The data that Safe Work Australia has for 2011-12 is preliminary and has been projected to estimate final claims figures.

4.11 The following graph compares the performance of the construction industry against the 20% reduction target and the performance of all-industries against the 20% reduction target.

Graph 2 – Fatality incidence rate performance against 20% reduction target



4.12 Under the new Australian Strategy (2012-2022), progress against the fatality target will be measured using data from the Traumatic Injury Fatality collection. This collection contains information on all persons who died while

working including unpaid volunteers, family workers and persons undertaking work experience.

4.13 The Traumatic Injury Fatalities collection combines information from the following three datasets in order to have complete coverage of the Australian workforce:

- The National Data Set for Compensation-based Statistics (NDS)
- The Notifiable Fatalities Collection (NFC), and
- The National Coronial Information System (NCIS)

4.14 The following table provides the Traumatic Injury Fatalities report data for worker fatalities and the fatality rate per 100,000 workers for the construction industry from 2003 to 2012. Data from the Traumatic Injury Fatalities report is not available prior to 2003.

Table 5 - Construction: Traumatic Injury Fatalities

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Worker fatalities	44	36	34	48	51	41	40	44	42	30
Fatality rate per100,000 workers	5.84	4.50	3.98	5.25	5.36	4.11	4.02	4.33	4.07	3.00

Source: Safe Work Australia, Traumatic Injury Fatalities (2012)

4.15 Finally, we note that a number of results set out above for the first year of the 2011-2012 National Strategy are labelled as preliminary or 'projected'. SWA advises that this is because:

> *This reflects the supply of workers' compensation data to Safe Work Australia. Safe Work Australia is supplied with workers' compensation data by jurisdictional workers' compensation authorities on an annual basis. It takes them some time to assess the claims and determine liability. Also claims lodged late in the financial year need time to finalise to determine if they meet our definition of 'serious'. The 2011-12 data for the National Data Set for Compensation-based Statistics (NDS) were supplied by jurisdictions between March and June 2013 but because the liability on some claims had not been determined before the NDS*

data supply deadline, the total number of claims is expected to be revised up by about 3% when the data for the next financial year are supplied. Jurisdictions supply updates on data back five years. Thus, when the 2012-13 data are supplied in March 2014, they will contain an update on the 2011-12 data plus much less significant updates on the four years prior to 2011-12. When the first revision of the 2011-12 data is provided the National OHS Strategy results will be able to be finalised.

5 Judicial Criticism of the ABCC

5.1 At page 16 of the Proof Hansard, Senator Cameron said:

> *Mr Calver, I have asked the Constructors Association to provide me their views on the judicial criticism that has generally been applied to the ABCC, including from the Federal Court, which is clearly a court of record. Could you also take on notice to provide the committee with the MBA's views on the judicial criticism that has been made and also the critiques that were made by Justice Wilcox when he had a look at the ABCC?*

Our understanding of what that criticism comprises follows with the question label shown by the relevant case.

5.2 *Steven Lovewell v Bradley O'Carroll & Others* (unreported matter QUD 427 2007) (Question 2)

5.2.1 In the case, the ABCC alleged that an organiser acted with intent to coerce a head contractor to terminate the contract of a plumbing subcontractor. The proceeding ended after the first day. The ABCC discontinued the civil penalty proceeding after assessing that there was no real prospect of success.

5.2.2 Following the discontinuance, Spender J criticised the ABCC saying the case should not have been brought and that it lacked an even-handed approach as expressed in the material from the Committee Secretariat. The judge also made allegations of fraud against the company involved.

5.2.3 We are informed that then Acting ABCC Commissioner, Ross Dalgleish wrote a letter of complaint to the Attorney General on 14 November 2008, with particular reference to the Judge's allegations of fraud, which were not a subject of the case.

5.2.4 We are informed that on 7 January 2009, the then Acting ABCC Commissioner received a letter from the AG stating that the matter

had been forwarded to Chief Justice Black. No further correspondence was received.

5.3 *Duffy v Construction, Forestry, Mining & Energy Union* [2008] FCA 1804 (Question 3)

5.3.1 In this case the ABCC alleged that the CFMEU engaged in unlawful industrial action and breached the act by threatening to take action with intent to coerce.

5.3.2 The judicial criticism is with regard to the particular interviewing technique of an inspector. The inspector is described as "avidly anti-union," as expressed in the material from the Committee Secretariat.

5.3.3 The interview, submitted as evidence, was described as "inherently unreliable."

5.3.4 Marshall J ruled against the ABCC. The material shows that one inspector was impugned, not the agency itself.

5.4 *Cozadinos v CFMEU* [2008] FMCA 1591

5.4.1 Here the ABCC alleged that the CFMEU and organiser Jason Bell breached the Act by threatening to take action with the intent to coerce.

5.4.2 Gray J criticised the evidence and stated that Ms Cozandinos "failed to prove her claim in any respect."

5.4.3 An appeal by FWBC was upheld and an agreement reached between the parties as to settlement. The CFMEU admitted to the breach in the settlement.

5.4.4 The CFMEU was penalised $20K and paid $42,500 in costs to FWBC.

5.5 *ABCC v Stephenson & Ors [2013] FCA* 1014 (Question 4)

ABCC alleged false safety claims that were linked to coercion. Evidence made available showed that safety was actually an issue and the statement of claim was amended. Coercion was still considered. Criticism relates to the close relationship between safety and coercion in the evidence provided by ABCC, even after the contention on safety was removed.

5.6 *Director, FWBII v Myles & Ors* [2013] FCCA 2229

5.6.1 In this case the FWBC alleged officials when exercising right of entry permit entry, failed to comply with reasonable safety requirements at the site and/or intentionally hindered, obstructed or acted in an improper manner when exercising these rights.

5.6.2 The Court criticised technical issues relating to the pleadings.

5.6.3 The Court acknowledged it did not draw the issues to anyone's attention during the hearing.

5.6.4 His Honour stated that "While the applicant cannot be criticised for following the processes provided for under the Court's rules, it ought not consider itself to slavishly be bound by them when a more suitable process is available".

5.6.5 Interestingly, at footnote 8 the judge accepted responsibility for his failing to be more vigilant in his oversight of the case. Court found against the union officials and unions. Matter listed for Directions on 19 February 2014. Penalty hearing on 28 February 2014. As the matter is before the court no further comment should be made.

6 Compulsory Powers Challenges: Further Comments

6.1 On each occasion that the powers were challenged, the courts ruled in favour of ABCC, with the exception of the Ark Tribe matter discussed at paragraph 6.3, brought by the Commonwealth Director of Public Prosecutions (CDPP) rather than the ABCC. The magistrate in that case dismissed the CDPP's charge on the basis of a technicality in the legislation which was remedied by administrative action. The other case that covers the same ground is next discussed.

6.2 *Washington v Hadgkiss* [2008] FCA 28

6.2.1 In 2007, the ABCC served notices on Noel Washington, CFMEU Victorian Senior Vice President and Ivan Balta, Communications Electrical and Plumbers Union (CEPU) official, to attend and answer questions in relation to an ABCC investigation. The investigation related to alleged threats and intimidation by CFMEU officials, including then Assistant Secretary John Setka, of a witness who

was to give evidence against a CFMEU official at a proceeding in the Australian Industrial Relations Commission in Melbourne.

6.2.2 The ABCC notice alleged that Mr Setka had directed workers at a barbeque to call an employee who had proposed to appear as a witness in an AIRC proceeding 'Lassie'. The ABCC notice also alleged that Mr Setka and/or Mr Washington and David Mier, ETU official, distributed a flyer which contained derogatory comments about the employee and referred to the employee as a 'No Good Give Up Dog' and contained a photo of a dog resembling the television show dog called 'Lassie'. The ABCC notice further alleged Mr Setka had made threats of violence to the employee and assaulted another employee who had proposed to appear as a witness.

6.2.3 On 19 November 2007, Mr Washington, Mr Setka, Mr Balta, Communications Electrical and Plumbers Union (CEPU) official, and Mr Mier filed an application in the Federal Court of Australia in Melbourne alleging that the ABCC had issued notices for an improper purpose. On 11 December 2007 the challenge was heard before Marshall J.

6.2.4 On 29 January 2008 His Honour dismissed the application.

6.3 *Commonwealth Director of Public Prosecutions v Tribe* ('Ark Tribe'), Whittle SM 24 November 2010

6.3.1 A further challenge to the ABCC's compulsory powers was successful, following the refusal of a worker to be interviewed by the ABCC or attend an ABCC hearing as a witness in respect of unlawful industrial action. As a result, the Commonwealth Director of Public Prosecutions (CDPP) instituted proceedings against the worker. Following a week's hearing before a Magistrate, the worker was found not guilty. The matter concerned an incident which took place on 30 May 2008 at a building site at Flinders University, Adelaide. The event involved approximately 30 workers walking off the site to attend an unauthorised meeting, at the conclusion of which the majority of those in attendance left the site for the day.

6.3.2 On 24 November 2010, in response to the Ark Tribe decision, ABCC Commissioner Johns announced that he would conduct all compulsory examinations personally. In the financial year 2011-12 a total of four examinations were conducted. This compared with 175 between 2006 and 2010.

6.3.3 In 2012, the compulsory examination powers under s. 52 of the BCII Act were changed. The FWBI Act retains the examination powers, but they are subject to over-elaborate safeguards.

7 Wilcox Criticisms

7.1 Here we further respond to Senator Cameron's comments set out at paragraph 5.1 of this submission.

7.2 The Wilcox Report should be read as a whole. Throughout the Wilcox Report an assessment of the ABCC is made. The categoric statement from Mr Wilcox that stands out however is contained at paragraph 3.23 of his report as follows:

> *(T)he ABCC's work is not yet done. Although I accept there has been a big improvement in building industry behavior during recent years, some problems remain. It would be unfortunate if the inclusion of the ABCC in the OFWO led to a reversal of the progress that has been made.*

7.3 Despite all of the other material in his report, Mr Wilcox believed that the work of the ABCC was not yet done.

8 AAT Supervisory Role

8.1 The Committee Secretariat (Question 5) advised on 12 February 2014 that Senator Cameron has requested submitters' views on the following:

> *The checks and balances applied by the Administrative Appeals Tribunal on the use of the Fair Work Building Industry Inspectorate's coercive powers and to address specifically why the proposed legislation should not maintain those checks and balances, as recommended by his Honour Justice Wilcox.*

8.2 Master Builders' view is that the Productivity Bill contains sufficient safeguards relating to the use of the coercive powers, especially the role of the

Commonwealth Ombudsman. Supervision by the AAT is clunky and unwarranted.

8.3 Appropriate protection for those who are called to an examination is contained in clause 64 and clause 65 of the Productivity Bill. Under clause 64 the ABC Commissioner must notify the Commonwealth Ombudsman of the use of the power. The material set out in clause 65 must be provided to the Ombudsman as soon as practicable after an examination has been completed. The Ombudsman must review the exercise of the powers and report to Parliament about the reviews. These are appropriate safeguards and are supported.

9 Productivity Trends

9.1 Master Builders' written submission attaches the Independent Economics' Report which shows clear linkages between the work of the ABCC and its predecessor, the Building Industry Taskforce, and productivity improvement in the building and construction industry.

9.2 During the course of the hearing on 6 February 2014, Senator Urquhart provided charts (reproduced together as Attachment B) to Master Builders for comment. Senator Urquhart asked for an explanation of what is shown in the charts compared with the productivity data used by Independent Economics.

9.3 In respect of the charts which are attached together as Attachment B, Independent Economics has been shown those charts and has stated as follows:

> *Labour Productivity and Multi-factor productivity are two alternative measures of productivity, both based on ABS data. As different measures, their precise movements will always differ, but they both show similar patterns when comparing productivity growth between the construction industry and the whole economy.*
>
> *Both alternative measures show that in the years up to the establishment of the BITF/ABCC in 2002, average productivity growth was lower in construction than for the economy generally, while the opposite was true in the years from 2002 onwards. Professor Peetz acknowledges this productivity pattern, which is shown in Charts 2.1 and 2.2 of the 2013 Independent Economics report.*
>
> *What Peetz has done is to propose explanations for this productivity pattern that do not involve the activities of the*

BITF/ABCC. However, this is unconvincing because this pattern of construction industry economic benefit from the BITF/ABCC era is not only seen in the productivity statistics, but also in the other major relevant statistics, for working days lost and for building costs in commercial building relative to domestic building. This is detailed in section 2.2 of the 2013 Independent Economics report.

9.4 Table 6 shows average labour productivity and multi-factor productivity growth, both based on ABS data. The table highlights, as noted above, that whilst precise movements of the different measures will always differ, they show similar patterns when comparing productivity growth between the construction industry and the whole economy.

Table 6: Construction Productivity (average annual percentage change in productivity measures)

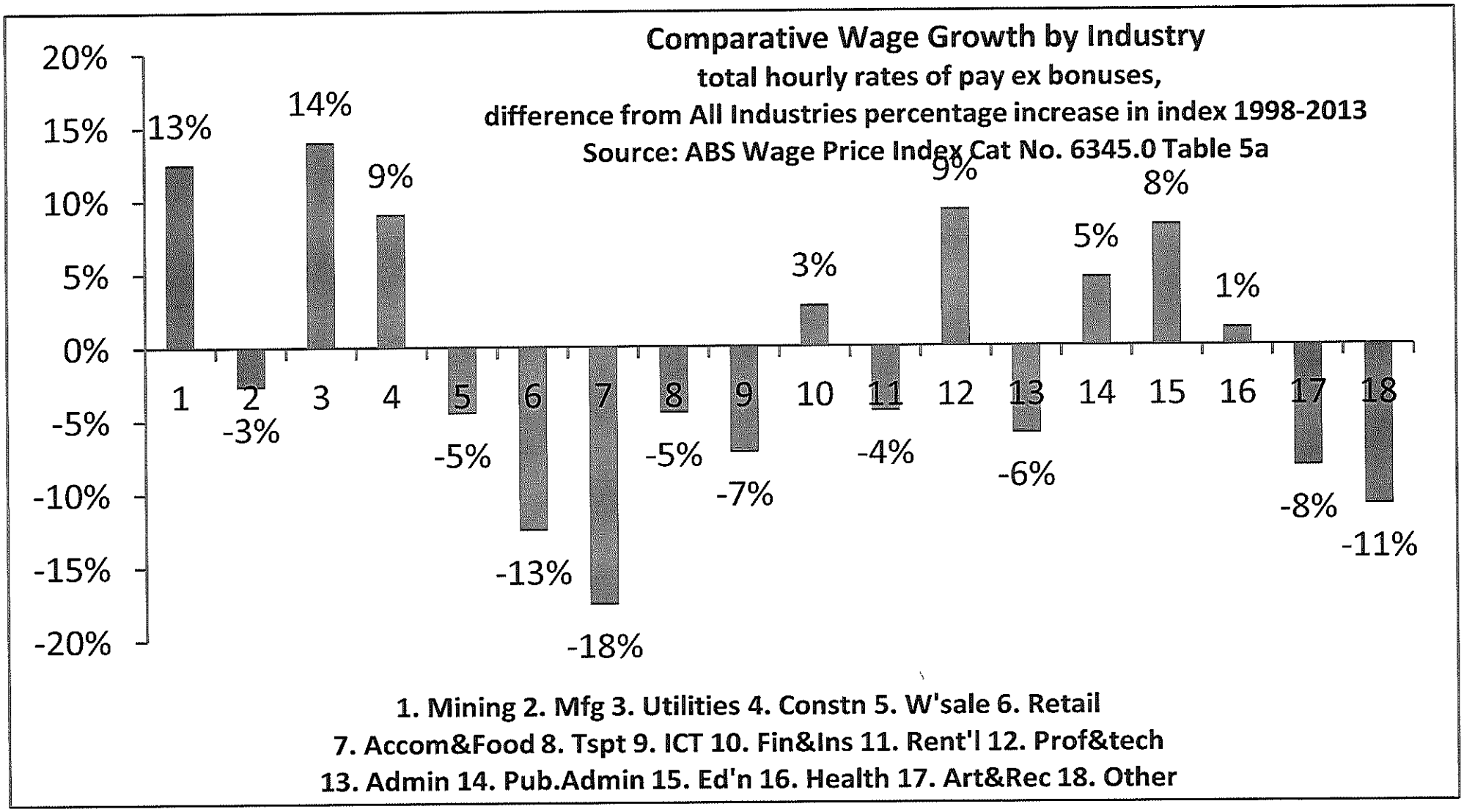
	Pre-Task Force/ABCC		Task Force/ABCC	
	Labour Productivity	Multifactor Productivity	Labour Productivity	Multifactor Productivity
Construction	1.9	0.8	2.7	2.1
All industries/12 selected industries	2.7	1.5	1.1	-0.2

Source: Labour productivity as measured by gross value added per hour worked from ABS 5204.0 Table 15 series 1995-2013 comparing construction and all industries (Pre-Task Force/ABCC 1995-2002; Task Force/ABCC 2003-2012). Multifactor Productivity as measured by gross value added multifactor productivity indexes on a quality adjusted hours worked basis from ABS 5260.0.55.002 Table 1 series 1989-90 – 2012-13 comparing construction and 12 selected industries (Pre-Task Force/ABCC 1989-90 – 2001-02; Task Force/ABCC 2002-03 – 2011-12).

9.5 Both measures show that in the years up to the establishment of the Building Industry Task Force/Australian Building and Construction Commission in 2002, average productivity growth was lower in construction that for the economy generally, while the opposite was true in the years from 2002 onwards.

****

Attachment A



Attachment B

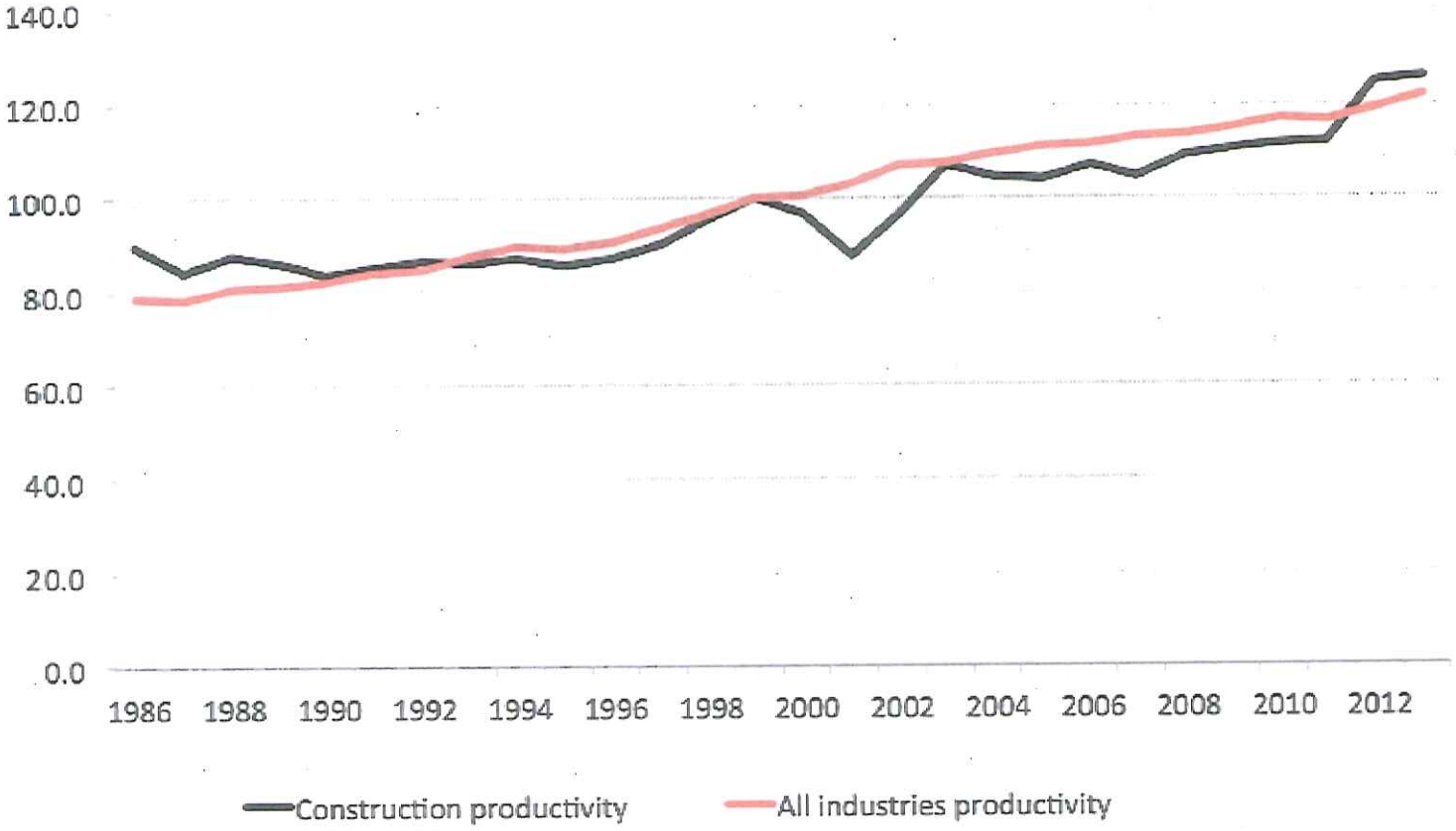
ATTACHMENTS

TABLES AND CHARTS FROM SUBMISSION OF PROFESSOR DAVID PEETZ

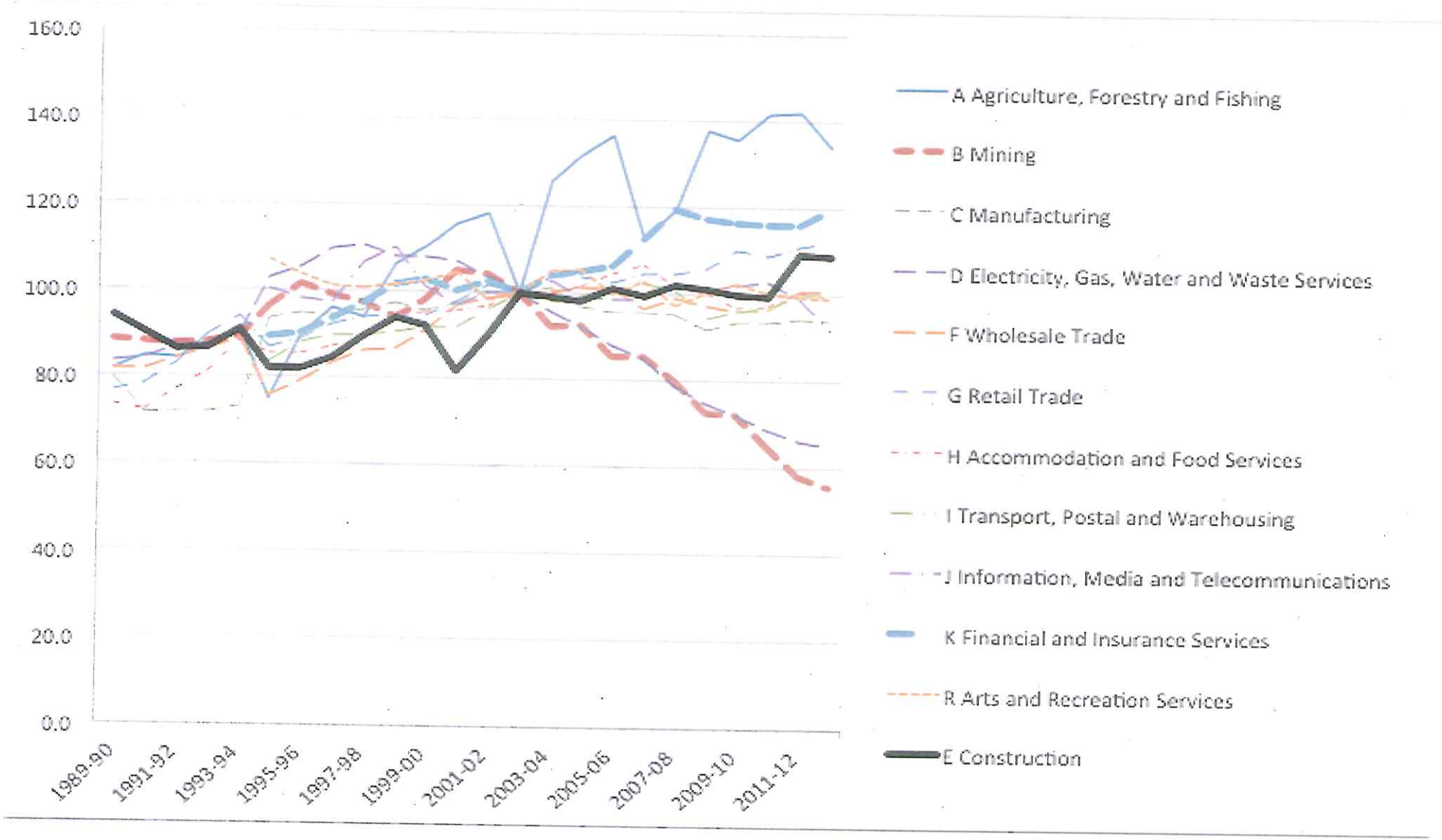
ABS MULTIFACTOR PRODUCTIVITY DATA - CONSTRUCTION AND ALL INDUSTRIES 1989-90 TO 2011-12

CHART OF GROSS VALUE ADDED PER HOUR WORKED INDEX – CONSTRUCTION AND ALL INDUSTRIES 1995 TO 2013

Chart 3 Comparison on construction industry labour productivity and national labour productivity indices



Source: ABS Cat 5204.0 Australian System of National Accounts, Table 15.


160.0
140.0
120.0
100.0
80.0
60.0
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20.0
0.0
1989-90
1991-92
1993-94
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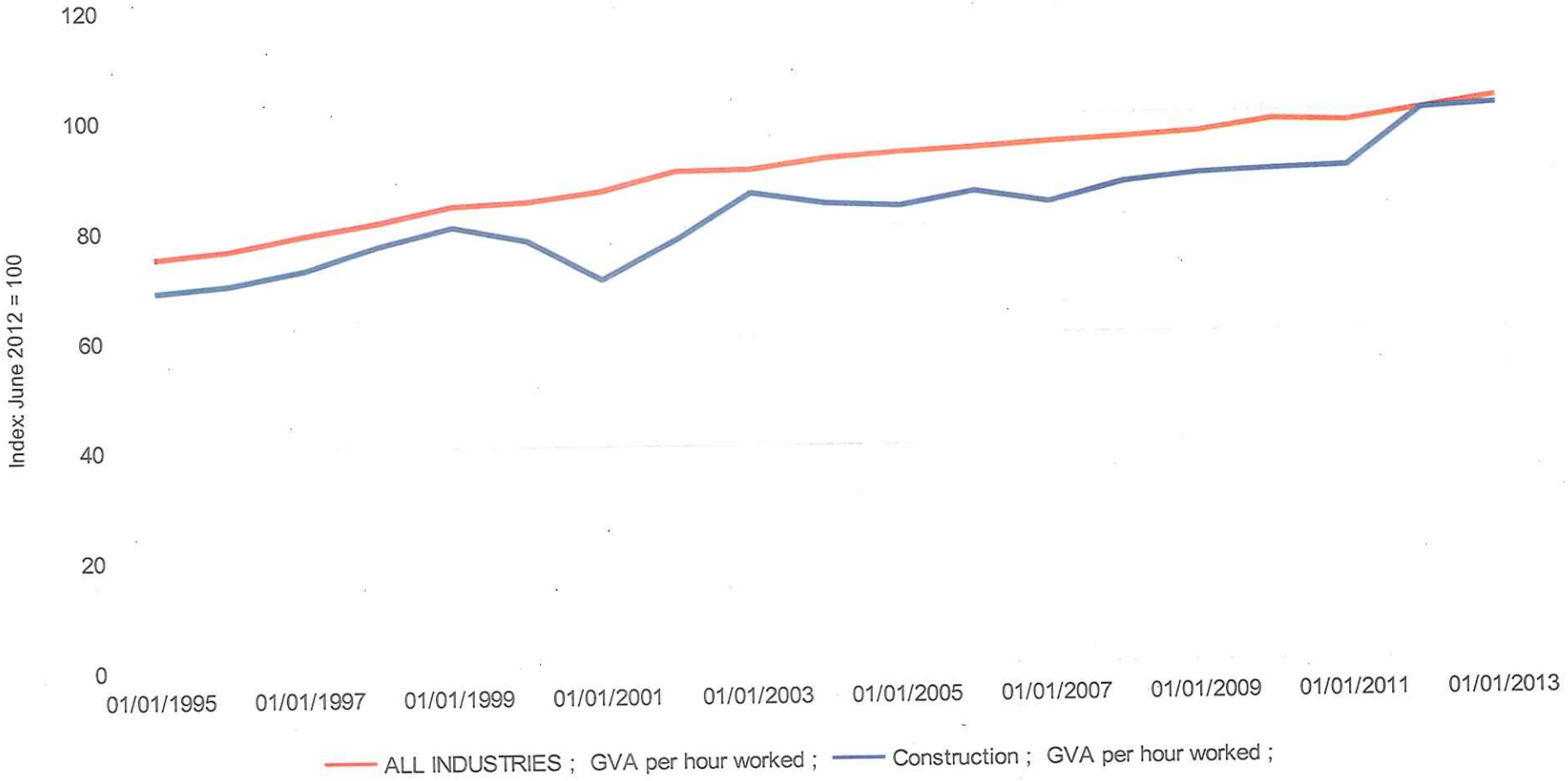
1997-98
1999-00
2001-02
2003-04
2005-06
2007-08
2009-10
2011-12
A Agriculture, Forestry and Fishing
B Mining
C Manufacturing
D Electricity, Gas, Water and Waste Services
F Wholesale Trade
G Retail Trade
H Accommodation and Food Services
I Transport, Postal and Warehousing
J Information, Media and Telecommunications
K Financial and Insurance Services
R Arts and Recreation Services
E Construction

Gross Value Added (GVA) per hour worked index - Construction and All Industries June 1995 to June 2013

Source: ABS Cat. no 5204.0 Table 15



Australian Bureau of Statistics

5260.0.55.002 Estimates of Industry Multifactor Productivity, Australia: Detailed Productivity Estimates.

Released at 11.30am (Canberra time) 7 December 2012

Table 1: Gross value added based multifactor productivity indexes (a)

	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12
Quality adjusted hours worked basis																							
E Construction	82.44	82.16	81.40	81.70	82.66	81.48	81.57	83.99	88.83	92.62	90.86	80.59	88.44	98.10	96.86	95.98	98.86	97.38	99.73	99.76	98.30	100.00	104.78
Annual percentage change for construction from previous year		-0.34	-0.93	0.37	1.18	-1.43	0.11	2.97	5.76	4.27	-1.90	-11.30	9.74	10.92	-1.26	-0.91	3.00	-1.50	2.41	0.03	-1.46	1.73	4.78
12 Selected industries (b)	86.10	86.62	86.13	87.71	89.30	90.87	93.40	94.92	97.13	99.67	99.59	99.82	102.67	102.73	104.51	104.08	103.80	103.81	103.59	101.32	101.36	100.00	100.00
16 Market Sector industries (c)	na	na	na	na	na	93.83	95.44	96.77	98.26	100.87	100.64	101.16	104.11	103.97	105.16	104.23	103.66	103.23	102.47	100.92	101.05	100.00	100.11
Annual percentage change for market sector from previous year							1.72	1.39	1.54	2.66	-0.23	0.52	2.92	-0.13	1.14	-0.88	-0.55	-0.41	-0.74	-1.51	0.13	-1.04	0.11
Hours worked basis																							
E Construction	81.69	81.51	80.89	81.32	82.40	81.35	81.58	84.17	89.20	93.21	91.64	81.46	89.38	99.13	97.86	96.94	99.83	98.20	100.41	100.23	98.54	100.00	104.47
Annual percentage change for construction from previous year		-0.22	-0.76	0.53	1.33	-1.27	0.28	3.17	5.98	4.50	-1.68	-11.11	9.72	10.91	-1.28	-0.94	2.98	-1.63	2.25	-0.18	-1.69	1.48	4.47
12 Selected industries (b)	82.22	82.91	82.63	84.36	86.08	87.81	90.45	92.18	94.58	97.32	97.51	97.99	101.02	101.29	103.26	103.05	102.98	103.17	103.12	101.02	101.21	100.00	100.14
16 Market Sector industries (c)	na	na	na	na	na	90.38	92.22	93.79	95.54	98.39	98.48	99.30	102.45	102.55	103.96	103.28	102.95	102.68	102.08	100.67	100.93	100.00	100.21
Annual percentage change for market sector from previous year							2.0	1.7	1.9	3.0	0.1	0.8	3.2	0.1	1.4	-0.7	-0.3	-0.3	-0.6	-1.4	0.3	-0.9	0.2

(a) Chain volume gross value added at basic prices. Reference year for indexes is 2010-11 = 100.0.

(b) Divisions A to K and R

(c) Divisions A to N, R and S

Table 2: Construction as a share of all working days lost through industrial disputes, per quarter, 1995-96 to date

	Construction	All industries	Proportion of all days lost, in construction
average 1995/96 - 2001/2	39.8	139.9	28%
average 2002/3 to 2011/12	13.6	54.7	25%
average 2012/13 to date[a]	13.7	46.1	30%

(a) Latest data are for September quarter 2013.

Source: ABS Cat 6321.0.55.001 Industrial Disputes, Australia, Table 2a.

Attachment E

Master Builders Australia

Second Supplementary Submission to the Senate Standing Education and Employment References Committee

The Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

14 March 2014

MASTER BUILDERS AUSTRALIA

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CONTENTS

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. Over 124 years the movement has grown to over 32,000 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.

1.2 The building and construction industry 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. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of Submission

2.1 This submission responds to the questions taken on notice at the Senate Committee hearing on 12 March 2014 in respect of the inquiry concerning the Government's approach to re-establishing the Australian Building and Construction Commission (ABCC).

2.2 On 13 March 2014, the Senate Committee Secretariat notified Master Builders of the requirements to provide further answers on notice. These issues are provided below under the substantive headings which follow.

3 Working Days Lost

3.1 At page 24 of the proof Hansard from 12 March 2014 the following was said:

> *Senator BACK: I'm delighted!—showing that days per annum lost to industrial action in building and construction between 1995-96 and 2001-02 averaged 159,000; this declined during the task force/ABCC period, down to a figure of 24,000 in 2011-12; and then increased again in the post-ABCC era, back up to 89,000. I ask if you could source that ABS data, because it is not apparent from your submission specifically where you have drawn that ABS data from; and if you would care to comment on it as a result of the question asked.*
>
> *Mr Calver: We will take that question on notice.*

Senator BACK: Good. Thanks.

3.2 The source of the statistics is ABS Cat 6321.0.55.001.

4 Productivity in other industries

4.1 As pointed out by the Secretariat, at page 24 of the proof Hansard the following was said:

> *CHAIR: I know you are the Master Builders association, so you may not be able to answer this, but could you point to any other areas of Australian industry where the increase or decrease in productivity is entirely slated to one factor? You are claiming that, in the building industry, increased productivity was solely the impact of the ABCC. So I am asking you to take on notice if you can point to any other industry where you would rely on one single factor that influences whether productivity goes up or down.*
>
> *Mr Jones: Could you just clarify? Are you saying in the last 200 years, in all countries, in all industries—*
>
> *CHAIR: I am talking about Australia. If I am hearing your evidence correctly—and I certainly do not want to misquote you—the Master Builders association is claiming that the reason productivity went up was solely the impact of the ABCC. Now, if that is your claim, I would like to take on notice to demonstrate to us in other parts of the Australian industry—in the early-childhood education and care sector, in the retail sector, in the aged-care sector—where a reliance on one single aspect, in your view, leads to an increase in productivity.*
>
> *Mr Jones: That is a fairly broad brief.*
>
> *CHAIR: Justice Wilcox makes the statement: 'Professor Peetz, in a published work, takes the report apart. He's an academic with an impeccable record.' I appreciate you were not here at the last hearings, Mr Jones, but I believe we did discuss Professor Peetz's report. Are you able to take on notice my original question: are there other parts of the Australian economy, other industries, that you can point to where a single factor is increasing productivity?*

4.2 We note that at page 25 of the proof Hansard the following is said:

> *CHAIR: Justice Wilcox makes the statement: 'Professor Peetz, in a published work, takes the report apart. He's an academic with an impeccable record.' I appreciate you were not here at the last hearings, Mr Jones, but I believe we did discuss Professor Peetz's report. Are you able to take on notice my original question: are there other parts of the Australian economy, other industries, that you can point to where a single factor is increasing productivity?*

Mr Jones: No. We understand our industry and what we know from our—

Mr Calver: We do not profess to be experts about other sectors of the economy. We are Master Builders Australia and we are giving evidence about our own industry. We believe that that task, with respect, would be unreasonable.

CHAIR: All right. Perhaps we will ask the department this afternoon.

4.3 Master Builders is unable to find evidence of the kind sought by the Chair.

5 Coercive Powers

5.1 At page 29 of the proof Hansard the following was said:

Senator CAMERON: So you did not make the most accurate figures your headline approach. I do not want to go into that any more because I want to go on to another issue. Do you agree with the proposition that has been put in so many submissions to us here that the coercive powers to be used by the proposed ABCC are consistent with the coercive powers of other organisations like APRA and the Taxation Office?

Mr Calver: The powers that are included in the bill are similar to those used by other agencies, such as ASIC. Certainly the ACCC, ASIC and APRA all have similar coercive powers.

Senator CAMERON: So, tell me the differences. You say 'similar', but what are the differences in the powers of the ABCC against ASIC?

Mr Calver: I would have to take that on notice. We have previously put that in tabular form, so I can update that table if you wish.

Senator CAMERON: But the point the ACTU is making is that the argument has been put—and you have put the argument here as well—that the coercive powers are similar to those powers that apply elsewhere. They are not similar to the ACCC coercive powers, under point 8 in the submission of the ACTU, are they? They are not similar.

Mr Calver: I am happy to take an assessment of that matter on notice so that I can look at what the ACTU has said. I can go back to the table that the Master Builders Association prepared on a previous occasion and give you accurate data. I do not believe there is any point in us going through the list of things the ACTU has put now.

Senator CAMERON: I see a lot of point in this, because you are using the argument that workers in the building and construction

industry will not be disadvantaged, because these types of coercive powers happen elsewhere. And it is not true. It is very important, so I am going to take you through each one and I am going to get your point of view on it. So, on the ACCC, if that statement is correct they are not similar, are they?

Mr Calver: If the statement is correct—and I would like the opportunity to check that.

Senator CAMERON: You can do that. Take it on notice, go back and check it and tell me whether it is similar.

Senator CAMERON: They are not similar. Sending someone to prison under the ABCC Act is not similar to not sending them to prison under the ACCC Act. Surely you can accept that. Is that similar?

Mr Calver: Senator, I quite reasonably said that we are happy to go away to check what the ACTU have put here and to give you an answer on notice. I admit we have said, and we provided a table, which has been made publicly available, to show where the powers are similar between the agencies of the type the ACTU have referred to and the ABCC are in existence. We are happy to do that work. As I said, I cannot answer that question now because I have not checked.

Senator CAMERON: That argument is demolished. You come here and argue an economic argument. That argument is demolished. You want to go away and look at things again. Sometimes you have to stand up and say 'I'm wrong' when you are faced with the facts. That is all I am saying to you. Let us go to the Commissioner of Taxation. There is no imprisonment for a first offence for not attending an examination by the Commissioner of Taxation. Is that your understanding of taxation?

Mr Calver: If the ACTU's citation is correct, then that appears to be what they are saying.

Senator CAMERON: So your submission to this inquiry is wrong.

Mr Calver: No, I do not admit that. We will come back to the committee. We have taken it on notice.

5.2 Since 2007 Master Builders has stated publicly the ABCC's coercive powers are similar to those held by other agencies: see table at Attachment A taken from "Working Together: Master Builders Workplace Relations Blueprint 2007".

5.3 The Macquarie Dictionary defines the word "similar" to mean:

Having a likeness or resemblance, especially in a general way

Hence, highlighting highly specific issues attached to the exercise of those powers in particular statutes does not render them dissimilar.

5.4 Using this definition of "similar," Master Builders notes that coercive information-gathering powers are common administrative and regulatory devices for government. At the national level in Australia many agencies use them to compel the provision of information and the production of documents in the answering of questions. In that sense, the powers that are held by the Australian Competition and Consumer Commission, Australian Prudential Regulation Authority, the Australian Securities Investments Commission, Australian Taxation Officer, Centrelink and Medicare Australia are all similar to the powers proposed to be held by the ABCC under the restoration bills.

5.5 In 2008 the Administrative Review Council (ARC) published a document entitled "The Coercive Information-Gathering Powers of Government Agencies".[1] In this report the ARC provided 20 principles which should guide the manner in which agencies exercise coercive powers. Within that framework, Master Builders submits that the exercise of coercive powers is appropriate. We are aware that the ABCC conducted a review of its operations and successfully self-assessed against the principles in the ARC report. Despite some differences in safeguards and penalties associated with the exercise of coercive powers, the underlying information-gathering purpose of those powers held by all of these nominated agencies are similar.

****

[1] See http://www.arc.ag.gov.au/Documents/a00Final+Version+-+Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf

Attachment A

Table 5: Powers of the Australian Building and Construction Commissioner

Sections of the BCII	What is the power	How and when used	Why	Reason to be retained
Australian Building and Construction Inspectors (ABC Inspectors)				
59(3)	may, without force, enter premises	To inspect building sites and obtain information that is relevant to an investigation. Before entering premises, an ABC Inspector must announce that they are authorised to enter and produce their identity card to the occupier for inspection.	For compliance purposes That is, ascertaining whether: ▪ the BCII ▪ the WRA; ▪ the *Independent Contractors Act 2006 (Cth)*; ▪ an order of the Australian Industrial Relations Commission; or ▪ a Commonwealth industrial instrument; has or is being complied with, by a building industry participant.	Powers are equivalent to those given to 'workplace inspectors' under section 169 of WRA. Without these powers, ABC inspectors would be unable to attend sites unless invited on, and would have virtually no evidence gathering capability.
59(9)	may, without force, enter business premises			
59(5)(a)	may inspect, any work, material, machinery, appliance, article or facility			
59(5)(b)	may take samples of goods or substances			
59(5)(c) & 59(11)	may interview any person (voluntarily)			
59(5)(d)	may inspect, and make copies of, any document on the premises			
59(5)(e)	may require that documents be produced			
59(6)	may, by written notice, require that documents be produced			
ABCC or Deputy ABCC ONLY				
52(1)(c)	Require a person by written notice to give the information	To obtain information when unable to do so using the powers available under section 59.	If the ABCC believes on reasonable grounds that a person: ▪ has information; ▪ has documents; or ▪ is capable of giving evidence; that is relevant to an investigation.	Without section 52 there is no way of compelling information or evidence (see also ABCC Examinations report). Same powers as: ▪ Australian Competition and Consumer Commission (Section 155 *Trade Practices Act 1974* (Cth)); ▪ Australian Taxation Office (Section 353 Taxation Administration Act 1953 (Cth)); and ▪ Australian Securities and Investment
52(1)(d)	Require a person by written notice to produce the documents			
52(1)(e)	Require a person by written notice to attend and answer questions			

				Commission (Section 19 *Australian Securities and Investment Commission Act 2001* (Cth)).
ABCC ONLY				
67	The ABCC may publish details of non-compliance with the: ▪ BCII; ▪ WR; or ▪ *Independent Contractors Act*.	If the ABCC considers that it is in the public interest to do so he/she may publish details of non-compliance, including the names of participants who have failed to comply.	The ABCC must apply the public interest test having regard to his/her functions and the purposes set out in the BCII.	This is an important option. It enables the ABC Commissioner to use alternative methods (to court proceedings) to address non-compliance, when it is in the public interest to do so. To date this power has been used once.

Attachment F

Building Code 2013

made under subsection 27(1) of the

Fair Work (Building Industry) Act 2012

Compilation No. 02

Compilation date: **16 October 2015**

Includes amendments up to: ***Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015***

Prepared by Department of Employment

About this compilation

This compilation

This is a compilation of the *Building Code 2013* that shows the text of the law as amended and in force on 16 October 2015 (the ***compilation date***).

This compilation was prepared on 16 October 2015.

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on ComLaw (www.comlaw.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on ComLaw for the compiled law.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on ComLaw for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

Contents

Part 1 Introductory

1 Name of code of practice

This code of practice is the *Building Code 2013* .

3 Definitions

(1) In this code of practice:

Act means the *Fair Work (Building Industry) Act 2012*.

bargaining representative has the same meaning as in the FW Act.

building contractor means a building contractor that could be required to comply with this code of practice in accordance with subsection 27(3) of the Act.

Note This code of practice may require a person to comply with it in respect of particular building work only if:

(a) the person is a building contractor that is a constitutional corporation; or

(b) the person is a building industry participant and the building work is to be carried out in a Territory or Commonwealth place.

building industry participant means a building industry participant that could be required to comply with this code of practice in accordance with subsection 27(3) of the Act.

Note This code of practice may require a person to comply with it in respect of particular building work only if:

(a) the person is a building contractor that is a constitutional corporation; or

(b) the person is a building industry participant and the building work is to be carried out in a Territory or Commonwealth place.

CAC Act means the *Commonwealth Authorities and Companies Act 1997*.

enterprise agreement has the same meaning as in the FW Act.

funding entity: see section 4.

FW Act means the *Fair Work Act 2009*.

industrial action has the same meaning as in the FW Act.

industrial association has the same meaning as in the FW Act.

industrial instrument means an award or agreement, however designated, that:

(a) is made under or recognised by an industrial law (within the meaning of the FW Act); and

(b) relates to the relationship between an employer and the employer's employees.

Inspector means a person appointed as, or taken to be appointed as, a Fair Work Building Industry Inspectorate Inspector under the Act.

over-award payment means a payment or benefit above the amount or value of a payment or benefit set out in a designated building law.

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privately funded building work: see item 9 of Schedule 1.

WHS&R means work health safety and rehabilitation.

Note For the definitions of the following terms, see subsection 4(1) of the Act:

- building association
- building contractor
- building industry participant
- building work
- designated building law
- Director.

(2) In this code of practice, an entity is a ***related entity*** of a tenderer if the entity is engaged in building work and is:

(a) connected to the tenderer by:

(i) being able to control, or materially influence, the tenderer's activities or internal affairs; or

(ii) being able to determine, or materially influence, the outcome of the tenderer's financial and operating policies; or

(iii) being a member of the tenderer; or

(iv) being financially interested in the tenderer's success or failure or apparent success or failure; or

(b) a body corporate (within the meaning of the *Corporations Act 2001*) that is related to the tenderer by:

(i) being a holding company of the tenderer; or

(ii) being a subsidiary of the tenderer; or

(iii) being a subsidiary of a holding company of the tenderer; or

(iv) having one or more directors who are also directors of the tenderer; or

(v) controlling the tenderer.

4 Funding entities

In this code of practice, each of the following is a ***funding entity***:

(a) a Department of State of the Commonwealth;

(b) a Department of the Parliament;

(c) a prescribed Agency under the *Financial Management and Accountability Regulations 1997*;

(d) a Commonwealth authority that is required by a General Policy Order, issued under section 48A of the CAC Act, to apply this code of practice;

(e) a wholly-owned Commonwealth company that is required by a General Policy Order, issued under section 48A of the CAC Act, to apply this code of practice.

Part 2 Conduct

5 General

This code of practice has been developed to:

(a) promote fair, cooperative and productive workplace relations in the building and construction industry; and

(b) assist industry stakeholders to understand the Commonwealth's expectations and requirements in relation to entities that tender for Commonwealth funded construction-related work, are awarded Commonwealth funded construction-related work, or both; and

(c) promote workplace reform.

Note 1 The Director is responsible for monitoring compliance with this code of practice: see paragraph 10(b) of the Act.

Note 2 A failure to comply with this code of practice may result in a building contractor or building industry participant being unable to be granted a tender for Commonwealth funded construction-related work.

6 Application of requirements

(1) This code of practice sets out requirements to be complied with by building contractors and building industry participants in respect of building work.

Note This code of practice may require a person to comply with it in respect of particular building work only if:

(a) the person is a building contractor that is a constitutional corporation; or

(b) the person is a building industry participant and the building work is to be carried out in a Territory or Commonwealth place.

(2) A building contractor or building industry participant becomes subject to this code of practice as follows:

(a) the contractor or participant is not subject to the code of practice in respect of any building work unless one or more of paragraphs (b) to (d) apply;

(b) the contractor or participant becomes subject to the code of practice if:

(i) the contractor or participant submits an expression of interest or tender for building work that is described in any of items 1 to 8 of Schedule 1; and

(ii) the expression of interest or tender for the building work was called for before this code of practice commenced;

(c) the contractor or participant becomes subject to the code of practice when the contractor or participant submits an expression of interest or tender for building work that is described in any of items 1 to 8 of Schedule 1;

(d) after the contractor or participant first becomes subject to the code of practice in accordance with paragraph (b) or (c), the contractor or participant is subject to the code in respect of all building work that is described in Schedule 1.

(3) The requirements of this code of practice apply only in relation to:

(a) participation in on-site activities; and

(b) conduct that relates to on-site activities but does not occur on the site;

including building work performed on an auxiliary or holding site separate from the primary construction site or sites.

Part 3 Requirements to be complied with by building contractors and participants in respect of building work

7 General responsibilities of building contractors and building industry participants

Building contractors and building industry participants undertaking building work to which this code of practice applies must:

(a) comply with this code of practice; and

(b) require compliance with this code of practice from all subcontractors before doing business with them relating to the building work, including ensuring that all contracts specifically require this code of practice to be complied with:

(i) at the time of lodging an expression of interest or tender; or

(ii) in the absence of an expression of interest or tender process, before entering into a contract; and

(c) ensure that contracts and related documents allow Inspectors access to sites, documents and personnel to monitor compliance with this code of practice; and

(d) ensure there is a WHS&R plan for the building work; and

(e) ensure that, if threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or project managers report the action to the funding entity; and

(f) respond to requests for information concerning matters relating to this code of practice made by the Director; and

(g) proactively ensure compliance with this code of practice by subcontractors, including by confirming compliance at site or project meetings, and by making compliance a contractual obligation; and

(h) if practicable, ensure that contractors and subcontractors initiate voluntary remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention; and

(i) ensure that the Director is notified of any alleged breaches, voluntary remedial action taken or other matters relating to this code of practice within 21 days of becoming aware of the alleged breach.

Note Additional requirements may apply in respect of Commonwealth procurement.

8 Subcontractors and related bodies and entities

(1) A building contractor or building industry participant must ensure that:

(a) an agreement entered into with a subcontractor in relation to building work that is not privately funded building work requires the subcontractor to act in a manner that is consistent with this code of practice on and after entering into the agreement; and

(b) the requirement is not removed from the agreement.

(2) A building contractor or building industry participant must ensure that each tenderer of which the contractor or participant is a related entity in relation to building work that is not privately funded building work acts in a manner that is consistent with this code of practice in relation to the building work.

(3) A building contractor or building industry participant must ensure that each tenderer to which the contractor or participant is related in relation to building work that is not privately funded building work acts in a manner that is consistent with this code of practice in relation to the building work.

9 Compliance with laws, decisions, directions and orders

(1) A building contractor or building industry participant must comply with all designated building laws that apply to the contractor or participant.

Examples

1 Laws relating to general protections such as freedom of association.

2 Laws relating to the right to enter a site where building work is performed and to have access to records.

3 Laws relating to payments made to employees for time spent engaged in industrial action (strike pay).

4 Industrial instruments.

(2) A building contractor or building industry participant must comply with the *Competition and Consumer Act 2010* to the extent that it relates to tendering or building work.

(3) A building contractor or building industry participant:

(a) must comply with a decision, direction or order made or given by a court or tribunal that applies to the contractor or participant; and

(b) must not enter into, participate in or facilitate an arrangement or practice which conflicts with a decision, direction or order made or given by a court or tribunal that applies to the building contractor or building industry participant.

Note An infringement notice or provisional improvement notice issued by an Inspector is not a decision, direction or order made or given by a court or tribunal.

(4) Subsection (3) does not apply if:

(a) the period for payment, or for other compliance with the decision, direction or order, has not expired; or

(b) the decision, direction or order is the subject of an appeal; or

(c) the period for appealing against the decision, direction or order has not expired; or

(d) the decision, direction or order has been revoked.

10 Unregistered written agreements and other agreements

(1) A building contractor or building industry participant must not bargain in relation to an agreement, or make an agreement:

(a) that provides for terms, conditions or benefits of employment of the employer's employees (which may include over-award payments); and

(b) that either:

(i) will not be certified, registered, lodged or otherwise approved under a designated building law; or

(ii) the contractor or participant reasonably believes will not be certified, registered, lodged or otherwise approved under a designated building law; and

(c) to which subsection (3) does not apply.

(2) In this section:

unregistered written agreement means an individual or collective agreement that:

(a) is made between an employer and either or both of the employer's employees and an industrial association; and

(b) provides for terms, conditions or benefits of employment of the employer's employees (which may include over-award payments); and

(c) has not been certified, registered, lodged or otherwise approved under a designated building law.

(3) However, an agreement described in subsection (2) is not an unregistered written agreement to the extent that the agreement:

(a) relates to participation in:

(i) community, welfare or charitable activities; or

(ii) initiatives to promote the employment of women, Indigenous, mature age or other groups of workers disadvantaged in the labour market; or

(iii) workers' health and wellbeing initiatives (such as health checks, suicide prevention, screening for dust diseases, drug and alcohol awareness and treatment); or

(iv) waste-reduction, carbon pollution reduction and recycling initiatives; or

(v) programs to reduce bullying, sexual harassment or workplace discrimination; or

(vi) initiatives to encourage fair, cooperative and productive workplace relations across the industry; or

(vii) initiatives to promote the take-up and completion of apprenticeships, such as mentoring programs; and

(b) does not provide for an entitlement or another benefit related to that participation as mentioned in paragraph (1)(a).

(4) Also, a common law agreement made between an employer and an individual employee is not an unregistered written agreement.

11 Sham contracting

(1) A building contractor or building industry participant must not engage in activity that is prohibited under a provision of Division 6 of Part 3-1 of the FW Act.

Note When this code of practice commenced, Division 6 of Part 3-1 of the FW Act dealt with the following conduct:

(a) misrepresenting employment as an independent contracting arrangement;

(b) dismissing an employee to engage the individual as an independent contractor to perform the same, or substantially the same, work;

(c) making a false statement in order to persuade or influence an individual who is, or was, an employee to enter into a contract for services under which the individual would perform the same work, or substantially the same work, as an independent contractor.

(2) A building contractor or building industry participant must not enter into a service contract which is unfair or harsh within the meaning of Part 3 of the *Independent Contractors Act 2006*.

12 Engagement of non-citizens or non-residents

(1) A building contractor or building industry participant must ensure that a person engaged to undertake building work for the contractor or participant (as an employee or as an independent contractor) is lawfully entitled to be so engaged under Australian law.

Example

The *Migration Act 1958* deals with some aspects of the lawful engagement of persons.

(2) A building contractor or building industry participant must ensure that it complies with its responsibilities under Australian law in relation to the sponsorship, engagement and employment of a person who is not an Australian citizen.

Example

The *Migration Act 1958* and its subordinate legislation may impose conditions and obligations on the sponsorship, engagement and employment of persons who hold visas under that Act.

13 Workplace arrangements

A building contractor or building industry participant must not engage in activity that:

(a) requires a subcontractor or supplier (through the tendering process or otherwise) to have particular workplace arrangements in place; or

(b) attempts to unduly influence a subcontractor or supplier (through the tendering process or otherwise) to have particular workplace arrangements in place.

Example

A head contractor must not coerce a contractor, subcontractor or consultant into making an over-award payment.

14 Over-award payments and related matters

(1) A building contractor or building industry participant must ensure that:

(a) a contractor, subcontractor or consultant is not coerced into making an over-award payment; and

(b) undue influence or undue pressure is not exerted, directly or indirectly, on a contractor, subcontractor or consultant to make an over-award payment.

(2) A building contractor or building industry participant must ensure that:

(a) a contractor, subcontractor or consultant is not coerced into contributing to a particular redundancy or superannuation fund; and

(b) undue influence or undue pressure is not exerted, directly or indirectly, on a person to contribute to a particular redundancy or superannuation fund.

15 Freedom of association

(1) A building contractor or building industry participant must protect freedom of association by adopting policies that:

(a) are consistent with applicable industrial law; and

(b) ensure that persons are:

(i) free to become, or not become, members of industrial associations; and

(ii) free to be represented, or not represented, by industrial associations; and

(iii) free to participate, or not participate, in lawful industrial activities.

(2) Without limiting subsection (1), the building contractor or building industry participant must ensure that:

(a) personal information is not dealt with in breach of the *Privacy Act 1988* or the FW Act; and

(b) 'no ticket, no start' signs are not displayed; and

(c) 'show card' days do not occur; and

(d) there is:

(i) no discrimination against elected employee representatives; and

(ii) no disadvantage to elected employee representatives; and

(e) forms are not used to require:

(i) an employee to identify his or her union status; or

(ii) an employer to identify the union status of employees; or

(iii) a contractor to identify the union status of subcontractors; and

(f) individuals are not refused employment because of their union status; and

(g) employees are not terminated because of their union status; and

(h) reasonable requests from workplace delegates to represent an employee of the contractor or participant in relation to a grievance, a dispute or a discussion with a member of an industrial association are not refused; and

(i) requirements are not imposed, or attempted to be imposed, on a contractor, subcontractor or employer to:

(i) employ a non-working shop steward or job delegate; or

(ii) hire an individual nominated by a union; and

(j) individuals are not required to pay a 'bargaining fee' (however described) to an industrial association of which the individual is not a member, in respect of services provided by the association.

16 Right of entry

(1) A building contractor or building industry participant must comply with all laws of the Commonwealth and each State and Territory to which the contractor or participant is subject to that give a permit holder of a building association a right to enter premises where work is performed and where the permit holder seeks to exercise that right.

Examples

1 The FW Act.

2 Work Health and Safety Acts.

3 Part 8 of the *Occupational Health and Safety Act 2004* of Victoria.

4 Sections 49G and 49I to 49O of the *Industrial Relations Act 1979* of Western Australia.

Note The laws mentioned in this section may not regulate all circumstances in which a person (whether a permit holder or not) may be invited to visit a site or in which a person such as a principal contractor may agree to allow a person to enter a site. A building contractor or building industry participant would not contravene this section in circumstances that are not regulated by those laws.

(2) For the purposes of subsection (1), a building contractor or building industry participant may make provision in an industrial instrument for:

(a) entry to premises where work is performed, as permitted by the FW Act; and

(b) the terms and conditions on which the premises may be entered.

17 Dispute settlement

(1) A building contractor or building industry participant must:

(a) include a genuine dispute settlement procedure in each enterprise agreement that it enters into on or after the commencement of this code of practice; and

(b) comply with the other requirements of the FW Act relating to dispute settlement that apply to the contractor or participant.

(2) The minimum requirements for a genuine dispute settlement procedure are:

(a) the ability for employees to appoint a representative in relation to the dispute; and

(b) procedures to settle the dispute at the workplace level in the first instance; and

(c) if a dispute is not settled at the workplace level, the capacity for a party to the dispute to refer the matter to an independent third party for mediation or conciliation; and

(d) if the dispute is still not settled, the capacity for an independent third party to settle the dispute by a decision binding on the parties.

Note The independent third party mentioned in paragraphs (c) and (d) may be Fair Work Australia.

18 Workplace reform

(1) A building contractor or building industry participant must comply with the requirements of the FW Act in relation to:

(a) making agreements; and

(b) showing good faith when bargaining.

Note Parties to building work are subject to the good faith bargaining requirements under the FW Act. As part of those requirements, bargaining representatives for an enterprise agreement must:

(a) respond to proposals made by other bargaining parties in a timely manner; and

(b) give genuine consideration to proposals made by other bargaining representatives and provide reasons for responses to those proposals.

A bargaining representative is not obliged to make concessions during bargaining, or to reach agreement on terms to be included in an agreement.

(2) A building contractor or building industry participant that is bargaining for an enterprise agreement:

(a) must, as part of bargaining in good faith, genuinely consider a proposal made by a bargaining representative; and

(b) subject to the other provisions of this code of practice—must not refuse to consider a proposal made by a bargaining representative on the ground that a third party has indicated that:

(i) it will not procure services from a person covered by an industrial instrument that contains a provision of a particular type; or

(ii) it will procure services only from a person covered by an industrial instrument that contains a provision of a particular type.

19 Industrial impacts

A building contractor or building industry participant must report actual or threatened industrial action to the Director of the Fair Work Building Industry Inspectorate as soon as practicable after the action or threat occurs.

20 Work health safety and rehabilitation

(1) A building contractor or building industry participant must have a WHS&R management system that:

(a) is fully documented and clearly communicated to people in the contractor's or participant's business; and

(b) systematically covers the ways in which people in the contractor's or participant's business are expected to work safely; and

(c) shows the way in which the contractor or participant will ensure that other people work safely; and

(d) shows the ways in which the contractor or participant intends to improve its practices over time, including defining roles, duties and responsibilities so that persons know what they have to do, when and in what circumstances; and

(e) shows the way in which drug and alcohol issues in the workplace will be managed to help ensure that no person attending the site to perform building work does so under the influence of alcohol or other drugs.

(2) A building contractor or building industry participant that is required to establish a management plan for WHS&R at a site as a principal contractor must:

(a) prepare the plan before work commences; and

(b) ensure that the plan:

(i) complies with the law; and

(ii) is comprehensive and site-specific; and

(c) not pass the implementation and cost of drug and alcohol testing to its subcontractors.

Note The Commonwealth is committed to being both a model client and to influence the WHS&R outcomes for the industry. The Commonwealth has introduced the *Australian Government Building and Construction OHS Accreditation Scheme* to be administered by the Federal Safety Commissioner in accordance with the Act. The Scheme is separate to this code of practice, and further information about the Scheme is available at www.fsc.gov.au.

(3) The minimum requirements for a management plan for WHS&R at a site are:

(a) explicit management commitment to the plan; and

(b) employee involvement in the implementation of the plan; and

(c) arrangements for rigorous work practices analysis; and

(d) arrangements for proactive worksite analysis that anticipates and assigns roles and responsibilities and defines efficient procedures while on site; and

(e) arrangements for hazard identification, risk assessment and risk control; and

(f) arrangements for induction and task training including, with the consent of the contractor or participant, participation of the WHS&R representative for the site; and

(g) arrangements for appropriate case management and rehabilitation; and

(h) arrangements for the efficient maintenance of records.

(4) The management plan for WHS&R for building work of a type described in Schedule 2 must include a fitness for work policy to manage alcohol and other drugs in the workplace that applies to all persons engaged to perform building work on a project and addresses the issues set out in Schedule 3.

21 Security of payment

A building contractor or building industry participant must:

(a) comply with all applicable laws and other requirements relating to the security of payments that are due to persons; and

(b) ensure that payments made by the contractor or building industry participant are made in a timely manner; and

(c) as far as practicable, ensure that disputes about payments are resolved in a reasonable, timely and cooperative way.

Part 4 Compliance and monitoring arrangements

22 Notification

A building contractor or a building industry participant must notify the Director of a breach, or a suspected breach, of this code of practice within 21 days after becoming aware of the breach or suspected breach.

Schedule 1 Building work to which code of practice applies

(subsection 6(2))

1 Building work that is being undertaken by or on behalf of a funding entity (irrespective of the value of a project).

2 Building work:

(a) that is indirectly funded by the Commonwealth by a grant or other program in circumstances in which funding for the building work is an explicit component of the grant or program; and

(b) for which:

(i) the value of the Commonwealth's contribution to the project that includes the building work is at least $5,000,000, and represents at least 50% of the total construction project value; or

(ii) the Commonwealth's contribution to the project that includes the building work is at least $10,000,000 (irrespective of its proportion of the total construction project value).

3 Building work:

(a) for which the Commonwealth provides assistance in advance of the commencement of construction; and

(b) which has an identified capital component; and

(c) for which:

(i) the value of the Commonwealth's contribution to the project that includes the building work is at least $5,000,000, and represents at least 50% of the total construction project value; or

(ii) the Commonwealth's contribution to the project that includes the building work is at least $10,000,000 (irrespective of its proportion of the total construction project value).

4 A Build, Own, Operate, Transfer ('BOOT') project initiated by an agency of the Commonwealth for the delivery of functions or services of the Commonwealth.

5 A Build, Own, Operate ('BOO') project initiated by an agency of the Commonwealth for the delivery of functions or services of the Commonwealth.

6 Building work that involves a pre-commitment lease to which a funding entity is a party.

7 Building work that involves a Public Private Partnership ('PPP') for the delivery of functions or services of the Commonwealth.

Note A PPP involves the creation of an asset through financing and ownership control by a private party and private sector delivery of related services that may normally have been provided by the Commonwealth. An agency of the Commonwealth may contribute to establishing the infrastructure, for example through land, capital works or risk sharing. The service delivered may be paid for by the Commonwealth or directly by the end user.

8 Building work that involves a Private Finance Initiative ('PFI') for the delivery of functions or services of the Commonwealth.

Note A PFI involves the creation of an asset through financing and ownership control by a private party and private sector delivery of related services that may normally have been provided by the Commonwealth. An agency of the Commonwealth may contribute to establishing the infrastructure, for example through land, capital works or risk sharing. The service delivered may be paid for by the Commonwealth or directly by the end user.

9 Building work whose funding is not described in items 1 to 3 (***privately funded building work***).

Schedule 2 Building work requiring a fitness for work policy to manage alcohol or other drugs in the workplace

(subsection 20(4))

1 Building work that is described in items 1 to 8 of Schedule 1 for which:

(a) the value of the Commonwealth's contribution to the project that includes the building work is at least $5,000,000 and represents at least 50% of the total construction project value; or

(b) the Commonwealth's contribution to the project that includes the building work is at least $10,000,000 (irrespective of its proportion of the total construction project value).

Schedule 3 Fitness for Work/Alcohol and other drugs in the workplace

(subsection 20(4))

The fitness for work policy referred to in subsection 20(4) must address:

1 how those on site (including employees of the principal contractor, subcontractors and their employees and others) will be required to comply with the relevant fitness for work policy (i.e. through contract or some other enforceable means).

2 the use of an objective medical testing method/s to detect the presence of drugs or alcohol in a worker's system and outline the detection method/s to be used on the project.

3 the requirement that all of the following substances are tested for:

(a) Alcohol;
(b) Opiates;
(c) THC:
(d) Cocaine;
(e) Benzodiazepines;
(f) Amphetamine; and
(g) Methamphetamine.

4 that a person who returns a positive result for any of the substances listed above will be deemed not to be fit for work (in respect of each substance listed above, subject to testing detectable levels, there is a zero level tolerance).

5 how a person who returns a positive result will be prevented from performing work until they can prove they are fit to return to work, and other processes that will apply in the event of a positive result or deemed positive result (i.e. a failure to submit to a test).

6 the requirement that, as a minimum, frequent and periodic testing (at least once per month) of the workforce (both construction workers and site office workers) will be as follows:

(a) where there are less than 30 workers on site – at least 10% of the workforce;
(b) where there are 30 to 100 workers on site – a minimum of 5 workers per month; and
(c) where there are greater than 100 workers on site – a minimum of 10 workers per month.

7 procedures for the selection of personnel to be tested (including staged selection across a worksite or random selection for testing if the entire workforce is not to be tested in a testing round).

8 procedures for the targeted testing of higher-risk activities, voluntary testing and for-cause testing.

9 how workers who attend for work affected by drugs or alcohol will be counselled and assisted, apart from any disciplinary process that might apply.

Endnotes

Endnote 1—About the endnotes

The endnotes provide information about this compilation and the complied law.

The following endnotes are included in each compilation:

Endnote 1—About the endnotes
Endnote 2—Abbreviation key
Endnote 3—Legislation history
Endnote 4—Amendment history

Endnotes about misdescribed amendments and other matters are included in a compilation only as necessary.

Abbreviation key—Endnote 2
The abbreviation key sets out abbreviations that may be used in the endnotes.

Legislation history and amendment history—Endnotes 3 and 4
Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.

Misdescribed amendments
A misdescribed amendment is an amendment that does not accurately describe the amendment to be made. If, despite the misdescription, the amendment can be given effect as intended, the amendment is incorporated into the compiled law and the abbreviation "(md)" added to the details of the amendment included in the amendment history.

If a misdescribed amendment cannot be given effect as intended, the amendment is set out in the endnotes.

Endnotes

Endnote 2—Abbreviation key

Endnote 2—Abbreviation key

A = Act
ad = added or inserted
am = amended
amdt = amendment
c = clause(s)
C[x] = Compilation No. x
Ch = Chapter(s)
def = definition(s)
Dict = Dictionary
disallowed = disallowed by Parliament
Div = Division(s)
exp = expires/expired or ceases/ceased to have effect
F = Federal Register of Legislative Instruments
gaz = gazette
LI = Legislative Instrument
LIA = *Legislative Instruments Act 2003*
(md) = misdescribed amendment
mod = modified/modification
No. = Number(s)
o = order(s)
Ord = Ordinance
orig = original
par = paragraph(s)/subparagraph(s) /sub-subparagraph(s)
pres = present
prev = previous
(prev…) = previously
Pt = Part(s)
r = regulation(s)/rule(s)
Reg = Regulation/Regulations
reloc = relocated
renum = renumbered
rep = repealed
rs = repealed and substituted
s = section(s)/subsection(s)
Sch = Schedule(s)
Sdiv = Subdivision(s)
SLI = Select Legislative Instrument
SR = Statutory Rules
Sub-Ch = Sub-Chapter(s)
SubPt = Subpart(s)
underlining = whole or part not commenced or to be commenced

Endnote 3—Legislation History

Name	FRLI registration	Commencement	Application, saving and transitional provisions
Building Code 2013	31 January 2013 (F2013L00130)	1 February 2013	
Amendment No.1 to the Building Code 2013	24 December 2013 (F2013L02196)	25 December 2013	
Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015	18 September 2015 (F2015L01462)	16 October 2015	

Endnotes

Endnote 4—Amendment History

Endnote 4—Amendment History

Provision affected	How affected
Pt 1	
s 2	rep s. 48D LIA
Pt 2	
s 6(4).....	rep F2013L02196
Pt 3	
s20	am F2015L01462
Sch 2	
Sch 2.....	ad F2015L01462
Sch 3	
Sch 3.....	ad F2015L01462