MASTER BUILDERS
AUSTRALIA

Supplementary Submission To The

Senate Education, Employment and Workplace Relations Committee Inquiry

into

the Fair Work Bill 2008

Master Builders Australia Inc

February 2009

Master Builders Australia Inc ABN 701 134 221 001

building australia

1 INTRODUCTION

1.1 This supplementary submission is made by Master Builders Australia Inc (Master Builders).

1.2 Master Builders represents the interests of all sectors of the building and construction industry. The association consists of nine State and Territory builders associations with over 31,000 members.

2 PURPOSE OF SUBMISSION

2.1 On 28 January 2009 Master Builders provided evidence to the Committee on the provisions of the *Fair Work Bill 2008* (the Bill). A number of questions were taken on notice. This submission provides Master Builders' response.

2.2 The issues are addressed in the order that they were raised in oral evidence.

3 DEMARCATION DISPUTES

3.1 At page 29 of the transcript of evidence for 28 January 2009 (Transcript) Senator Cash asked Mr Harnisch to provide further examples of demarcation disputes in the industry. These examples would be in addition to the material provided by Master Builders in section 18 of Master Builders' first submission to the Committee that is submission 64 on the Committee's web site. The Cole Royal Commission (the 'Commission') contains examples of the history of demarcation disputes in the industry, and of their disastrous impact on employers, employees and contractors. In his Final Report[1], which was tabled in Parliament in March 2003, the Commissioner notes that evidence was presented to the Commission of demarcation disputes in Victoria, Queensland, South Australia and Western Australia.[2] This included evidence of disputes between:

3.1.1 The CFMEU and the AWU;

[1] Final Report of the Royal Commission, Volume 7 'Reform: National Issues Part 1', Chapter 4, pp 147-150 at: http://www.royalcombci.gov.au/
[2] Ibid, 147.

3.1.2 The CFMEU and the CEPU Plumbing Division;

3.1.3 Two branches (the Victorian Building Unions Divisional Branch and the Federated Engine Drivers' and Firemen's Association Division (FEDFA) Victorian Divisional Branch) of the CFMEU;

3.1.4 The CFMEU and the AMWU;

3.1.5 The AWU and the AMWU; and

3.1.6 The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland(CFMEU Q), the Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees (BLF Q) and the Australian Workers' Union of Employees, Queensland (AWU Q).[3]

3.2 These disputes are the subject of detailed findings in the relevant State volumes of the Cole Royal Commission Report.[4] A brief summary of the key features of a few representative case studies provides an illustration of the nature and extent of the problem. These summaries are extracted from the Commission's report.

TARONG NORTH POWER STATION PROJECT

3.3 The evidence concerning the Tarong North Power Station project in Queensland was an example of a demarcation dispute between the BLF Q and the AWU Q over the right to cover certain workers engaged in the erection of a boiler. The project was covered by a project agreement which had been certified in the Queensland Industrial Relations Commission (QIRC), to which a number of unions, including both the BLF Q and AWU Q, were parties. The project agreement required the parties to attempt to resolve grievances at the workplace level or, if that proved unsuccessful, by application to the QIRC. The project agreement required that work continue normally on the site while these steps occurred. In addition, the BLF Q and AWU Q had reached an agreement regarding

[3] Ibid, 147.
[4] Ibid, 147.

their respective representation of workers on the project.[5] Despite these matters, the project was beset by a number of demarcation disputes relating to the workers engaged in the erection of the boiler. The scaffolders on the project, who were covered by the AWU Q, began a strike on 10 October 2001. The dispute came on for hearing before the QIRC on 12 October 2001. The QIRC recommended the lifting of bans and limitations to allow work to recommence on 14 October 2001. That recommendation was ignored and the AWU Q members remained on strike even on 15 October 2001. In total, the demarcation dispute resulted in five days of stoppages affecting the boiler, in breach of the project agreement, the QIRC's recommendation and s181(2) of the Industrial Relations Act 1999 (Qld).[6]

CHARLES GRIMES BRIDGE PROJECT

3.4 The case study concerning the Charles Grimes Bridge project in Victoria was another example of a demarcation dispute. In February 2000 Walter Construction Group Ltd (Walters) proposed to engage a company, CSR Emoleum Pty Ltd (CSR), to undertake the road asphalting on the Charles Grimes Bridge, a job which was estimated to require less than a week's work. CSR employed 33 workers, all of whom were AWU members, to do the work in question. The Branch President of the CFMEU, Construction and General Division, Victorian Building Unions Divisional Branch, placed bans on all asphalting work on the bridge because the CSR workers did not have CFMEU tickets.[7] Walters was faced with potentially heavy liquidated damages for delay in completing the bridge project. The Commission found that it thus had a strong commercial incentive to complete the asphalting. Walters and the CFMEU agreed that if Walters paid for CFMEU tickets for the CSR employees who were to do the work on the bridge, the CFMEU bans preventing that work from taking place would be lifted. Walters purchased 33 CFMEU tickets at $145 each, totalling $4785. None of the 33 workers wanted to join the CFMEU. CSR, the employer of the workers, did not know that Walters had bought the tickets. The bans were lifted immediately after the CFMEU had agreed to the payment being made by Walters.[8]

THE AGE PRINT CENTRE PROJECT

[5] Ibid, 147-148.

[6] Ibid, 148.
[7] Ibid, 148.
[8] Ibid, 148.

3.5 A further case study illustrating the nature of demarcation disputes in the building and construction industry involved the Age Print Centre project in Victoria. The project was governed by a project agreement signed by a number of parties, including the CFMEU FEDFA Division on 14 August 2000, and the CEPU Plumbing Division on 22 September 2000.[9] Clause 12 of the project agreement provided that each union signatory was entitled to have a delegate from its union members on site who, along with the relevant companies, would be responsible for ensuring that all parties adhered to the dispute settlement procedure. The dispute settlement procedure involved discussions and negotiations within the various levels of the contracting company and the union without recourse to industrial action, bans or work limitations, with the status quo, as it was prior to the dispute, preserved. If the dispute could not be settled by a conference between the parties, it was to be referred to the AIRC, or, by agreement, to the Victorian Building Industry Disputes Board.[10] Clause 13 of the project agreement prescribed a demarcation disputes procedure. Cause 13.1(a) was in the following terms:

> *Without prejudice to final resolution, normal work shall continue at all times in accordance with the Company's normal work allocation; progress on the Project will not be affected by any dispute in respect of demarcation.*[11]

3.6 The Branch Secretary of the CEPU, Plumbing Division, Victorian Branch, telephoned the site shop steward for that union on 13 September 2000 and instructed that all plumbers were to 'sit in the sheds' until he attended the site, due to a demarcation dispute between the CEPU Plumbing Division and the CFMEU FEDFA Division over coverage of the operator of a subcontractor's forklift. Later, an organiser employed by the CEPU Plumbing Division arrived on site and met with the plumbers, the result of which was that the plumbers returned to work.[12] The organiser told the head contractor's On Site Project Manager that the forklift operator, a CEPU Plumbing Division member, had been directed to continue operating the forklift and that, if the operator was not a CEPU Plumbing Division member, all plumbers would cease work on site.[13] The CEPU Plumbing Division organiser had a discussion with a shop steward for the CFMEU FEDFA Division

[9] Ibid, 148.
[10] Ibid, 148.
[11] Ibid, 149.
[12] Ibid, 149.
[13] Ibid, 149.

regarding the demarcation dispute but the issue was not resolved and each union claimed that, if the opposing union operated the forklift, its members would cease work.[14] During the dispute, the subcontractor was permitted to unload the trucks off site, in the car park, but was not permitted to bring the materials onto the site. This meant that delays occurred and trucks had to wait until a CFMEU FEDFA Division member became available to drive the forklift to unload the truck. This resulted in manual labour being used to unload the trucks as the subcontractor's forklift was not allowed to be used. In one instance, a shipment of spiral ducts, each weighing 300 kilograms, was unloaded by hand. Ramps had to be constructed so that the workers could roll the ducts off the truck. Obviously, it would have been safer to use forklifts for this work.[15] On 14 September 2000, two CFMEU organisers attended the site between 7.30 am and 8 am and held a meeting with the shop stewards regarding the demarcation dispute. A CEPU Plumbing Division organiser also attended the site. The head contractor complained that each union was threatening that its members would stop work if a member of the opposing union operated the forklift. The union organisers were unable to reach a resolution on the matter. The dispute continued until 6 October 2000 when it was resolved by the respective shop stewards agreeing that CFMEU FEDFA Division members could offload plumber's deliveries once the plumbers had unloaded 'one truck' with their forklift.[16]

SUN METALS PROJECT

3.7 On the Sun Metals project in Townsville, the Commission found that unlawful industrial action was taken between 2 and 25 March 1999 in furtherance of a campaign by the CFMEU, the CFMEU Q, and the BLF Q to recruit workers on the project at the expense of the AWU Q, and to further their opposition to the use of 'greenfields agreements'. The Commission noted that officers and employees of the CFMEU and the CFMEU Q had from at least December 1997, and the BLF Q had from at least February 1999, deliberately set out to foment industrial discontent, and in the course of doing so counselled and encouraged workers at the site (including, but not limited to, their members) to take unlawful industrial action. The dispute was a demarcation dispute in the sense that it involved

[14] Ibid, 149.
[15] Ibid, 149.
[16] Ibid, 149.

competition between two unions for the representation of the industrial interests of workers on the project.[17]

3.8 The Commission noted that officers and employees of the CFMEU, the CFMEU Q and the BLF Q:

3.8.1 Took an active part in the dispute;

3.8.2 Counselled, procured and aided others engaged in the industrial action;

3.8.3 Encouraged the industrial action; and

3.8.4 Were directly and indirectly concerned about the industrial action.[18]

3.9 During the course of the campaign, the National Secretary of the CFMEU Construction and General Division wrote to striking workers thanking them for 'supporting the inclusion of the CFMEU/BLF in any settlement reached with the employer'. After the dispute had ended, a BLF Q organiser wrote in a BLF Q journal to thank the BLF Q State Secretary on behalf of the striking workers for his support and to thank 'all branches of the CFMEU around Australia who provided moral and financial assistance and in many cases actually visited the picket line'.[19] The Commission noted that on several occasions, the CFMEU and BLF Q misled workers, and promoted claims which a QIRC Commissioner said were 'not achievable under the [project agreement]' and that '[bordered] on being mischievous'. [20] The Commission found that this industrial action put at risk the continuation of the project and the considerable advantages that the project brought to Townsville, Queensland and Australia. It damaged the reputation of Australia and Townsville as places in which to invest. The client, Sun Metals Corporation Pty Ltd, estimated its total losses as a result of the strike to be at least $7.3 million.[21] The Commissioner stated that it was also reasonable to infer that subcontractors would have suffered losses as a consequence of the industrial action. The general sentiment among electricians working for one of the

[17] Ibid, 149.

[18] Ibid, 149.
[19] Ibid, 149.
[20] Ibid, 149.
[21] Ibid, 149.

subcontractors was that they had lost $6000 to make $1000 as a result of the strike.[22]

3.10 A recent Queensland case demonstrates the continuing underlying tensions between the CFMEU and the AWU. In a decision of Commissioner Fisher of the Queensland Industrial Relations Commission on 27 August 2008 these issues came to the surface.

3.11 The AWU applied to the Commission seeking Declarations under s274 of the *Industrial Relations Act 1999 (Qld)* as follows:

3.11.1. That the Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland (CFMEU) does not have the right to enrol as members and/or represent the industrial interests of, employees of Somerset Regional Council, employed in the occupations or callings identified in Schedule 1; and

3.11.2 The Australian Workers' Union of Employees, Queensland (AWUEQ) does have the right to enrol as members and/or represent the industrial interests of, employees of Somerset Regional Council, employed in the occupations or callings identified in Schedule 1."

3.12 Schedule 1 contained a list of occupations and callings which came into dispute.

3.13 Enterprise negotiations occurred at the Somerset Regional Council (the Council) after the amalgamation of local councils in March 2008.

3.14 The AWU argued that the CFMEU purported to enrol as members various employees of the Council in breach of their Rules and Callings. They also argued that the CFMEU had been purporting to represent these employees at the EBA negotiations by attending meetings of the Local Government Employment Group (LGEG). The AWU argued that such conduct had "the potential to cause industrial disputation and disruption" whilst EBA negotiations were continuing and sought "clear guidance" from the QIRC to ensure that employees had the correct industrial representation.

3.15 S274A gives the Commission power to issue a declaration about an industrial matter. The section does not provide guidance about the circumstances in which a declaration may be issued. The power given to the Commission is discretionary.

[22] Ibid, 149.

Case law suggests that the discretion must be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Furthermore, declarations are not usually issued where the determination would nave no practical relevance or utility or where the application deals with abstract or hypothetical issues.

3.16 The Commission noted that there must be some real controversy to invoke the exercise of the discretion.

3.17 In terms of the relevance of job titles and occupations to callings, the AWU argued that the occupations or callings in the Schedule to the application were taken directly from the list of job titles in use by the Council. The AWU argued that 'occupation' and 'calling' could be used interchangeably as the Act defined a calling to mean among other things an occupation. The CFMEU noted that the AWU's application was misconceived based on s531 of the Act which provided that:

> *"531 Eligibility*
> *A person is eligible to become a member of an organization if the person:*
> *(a) by the nature of the person's occupation or employment, engages in a calling for which the organization is registered; and*
> *(b) complies with the organization's rules."*

3.18 The Commission found that it was inappropriate to consider issuing declarations about industrial organizations' rights to enrol and represent employees using job titles of positions. Callings play a critical role in the IR system as they determine elgibility for membership of industrial organizations; the ability of an industrial association to represent particular employees and whether an industrial organization can be a party to an industrial instrument.

3.19 On this basis, the Commission found that the rights of the AWU to enrol or represent the industrial interests of employees at the Council were not being infringed by the CFMEU and declined to make a declaration about those matters. The Commission noted however that the CFMEU were neglectful in not correctly identifying the basis of their attendance at various meetings of the Council. However this conduct was isolated to a few occasions and was insufficient to cause the Commission to decide to exercise the discretion and make a declaration.

3.20 Another ground for issuing a declaration may be where there is an immediate and real controversy. However, the Commission was not satisfied that there was a sufficient controversy in this situation to justify invoking the discretion. Although the AWU referred to the situation as a 'dispute', representation issues did not appear to be affecting the work of the LGEG or work on site.

Western Australia

3.21 The Western Australian construction industry has been relatively free from inter-union demarcation disputes during much of this decade though there have been two notable exceptions. The industry however, has a long history of turmoil involving union demarcation disputes during the 1970s, 1980s and early 1990s. The demarcation disputes of this decade occurred in 2002, on the economically strategic Burrup Peninsula gas expansion project between the CFMEU, AWU and AMWU, and in 2005 between the CFMEU and local plumbing union. **See attachments A and B.**

3.22 The 2002 incident resulted in strike action lasting about one week on this nationally important economic project. The level of feeling between the major union protagonists can be gauged by the press report of 6 October 2002 in which it is alleged the CFMEU's Joe McDonald assaulted AMWU secretary Jock Ferguson. Regrettably, the alleged assault of a union official by CFMEU officials in a demarcation dispute is not isolated as laid out the second press item of 8 March 2005.

3.23 Notably, the press report of 25 November 2002 quotes the then state Minister for Employment Protection, John Kobelke, indicating the previous state Labor government were powerless to intervene in what was emerging as a damaging inter-union demarcation dispute on the Burrup gas plant expansion project on the grounds the matter was subject to the federal industrial relations system. The importance therefore of the federal industrial relations system providing an effective framework to minimise the potential for union demarcation disputes rather than promote such disputes is crucial.

3.24 Towards the end of 2004 the CFMEU began recruiting plumbing tradesmen on construction sites on the pretext the union representing plumbers in Western Australia was dysfunctional and unable to properly represent the best interests of

these tradespeople. This assertion is substantiated by the comments of CFMEU secretary, Kevin Reynolds, in the press item dated 8 March 2005.

3.25 This attempt by the CFMEU echoed similar unsuccessful moves by the union to recruit plumbers on construction sites in the early and late 1990s. The CFMEU in the late 1990s as part of a concerted effort to enlist construction plumbers employed the former Plumbing Union secretary, Mr Bob Bryant, to head up the CFMEU's plumbing division.

3.26 Master Builders Western Australia was aware of, and involved in, these demarcation disputes. In 2004/2005 Master Builders Western Australia provided advice and assistance to commercial plumbing sub-contractor members whose plumbing employees were being encouraged by CFMEU officials to join the CFMEU on Perth construction sites with tensions arising on site as a result. The level of tension due to this CFMEU activity can be assessed by the assault reported in the press item of 8 March 2005.

3.27 An assessment of the CFMEU's registered union rules shows that the union has no legitimate claim over the classification of plumber; however, this technicality has not prevented the CFMEU from launching three unsuccessful bids over the past two decades to enlist construction plumbers as members of the CFMEU. An attempt by Unions WA to broker a peace deal between the CFMEU and CEEPU in 2005 was apparently ignored by the CFMEU.

3.28 As Master Builders Western Australia understands, reports of between 100 to 200 plumbing union members joining the CFMEU in 2004/2002 were exaggerated but this ought not be misinterpreted to suggest the CFMEU was not successful in its recruitment drive of construction plumbers. We understand that it was.

3.29 The CFMEU's 2004/05 attempt to displace CEEPU as the appropriate representative organisation of plumbing tradespeople on construction sites failed.

Civil/Resource Construction Work

3.30 In Western Australia tension exists between the three major construction unions, the CFMEU, AWU and AMWU with the CFMEU adopting an aggressive stance in the resource and civil construction sectors involving membership recruitment. This tension is identified by the press reports of 2002 and remains to the current time as identified by the CFMEU's recent refusal to be party to a union demarcation

agreement brokered by Unions WA mentioned in Master Builders' principal submission to the Committee.

3.31 An example of the demarcation tensions that exist between the AWU and CFMEU in the civil construction sector is illustrated in a flyer put out by the CFMEU in 2004 attacking an AWU EBA on a major transport project at Geraldton, some 300 kms north of Perth. **See attachment C.**

Pre-cast Demarcation

3.32 Master Builders Western Australia was advised in late 2008 of approaches by the AWU to contractors who operate pre-cast concrete yards in which the AWU organisers were encouraging these contractors to sign up to an AWU enterprise agreement. Master Builders Western Australia has provided advice to these contractor members as and when called on.

3.33 The AWU has made the assertion it has coverage of this work under the federal *Cement and Concrete Products Award 2000.* The contractors approached in Western Australia are not a named respondent to this award meaning the AWU does not have rights to enter the premise under the federal union right provisions of the *Workplace Relations Act* 1996, but has done so nevertheless.

3.34 The precast concrete panel yards and the work performed by the employees of those contractors are covered by the state *Building Trades Award* 1968 with the CFMEUW (state union) rules covering this work. A number of these contractors have entered into an EBA with the CFMEU.

3.35 In late December 2008 an AWU organiser indicated to Master Builders Western Australia it was the union's intention to claim coverage of the work performed in the pre-cast concrete yards to displace the CFMEU.

3.36 The contractors see little merit in being caught in the middle of a demarcation dispute between the CFMEU and AWU over which union has coverage of the work done by their employees as it is a matter the contractors have little or no control over. They are also deeply concerned about having their production disrupted as a result of an inter-union dispute about coverage of this work.

4 INDUSTRIAL DISPUTES

4.1 At page 30 of the Transcript Senator Cash asks "In WA was there a decrease in industrial activity on sites under the previous regime?"

4.2 In order to answer this query, we contacted the Australian Bureau of Statistics (ABS) in order to obtain time series data over ten years for the Western Australian building and construction industry. This data is not published as part of the relevant regular reporting by the ABS in its industrial disputes data.[23] ABS advised that the data would be able to be provided to Master Builders at a cost of $1,770 and accordingly on 5 February 2009 we notified the Committee Secretariat and mentioned that the cost was prohibitive. The Committee, we are informed, will make a decision about this matter.

5 AFFECT ON UNION MEMBERSHIP OF DEFAULT REPRESENTATION

5.1 At page 32 of Transcript, Senator Fisher asks whether there will be an impact in practical terms on union membership arising from the provision of the Bill where an employer wants an agreement and at least one employee is a member of a union. This question arises because it is a requirement of clause 174(3) that if an employee is a member of a union and the employee has not appointed another person as a bargaining representative, the union automatically becomes the bargaining representative for that employee.

5.2 Graph 1 on page 15 of the principal Master Builders' submission to the Committee showed the industry's unionisation rate from 1994 to 2007. Graph 1 showed a steady decline from 35 percent in 1994 to 19 percent in 2007. This is in line with the decline in union membership in the private sector generally. Graph 1 is useful when assessing the new powers provided to unions in the Bill. The Bill reflects an assumption that unions play a greater role than is reflected in this level of membership and shows that providing unions with institutional rights in agreement making is not founded upon their universal involvement. That involvement in our assessment is likely to increase union membership where the union is able to demonstrate to workers that, as a result of their representation, the terms and conditions of the agreement reached were favourable to employees. It is Master Builders assessment that it is likely that there will be a number of "high profile" disputes where unions seek to publicise success with increasing benefits to workers as a means to recruit members.

[23] Catalogue 6321.0

6 OCCUPATIONAL HEALTH AND SAFETY (OH&S)

6.1 At page 33 of Transcript the Chair sought statistics on OH&S; that is industry fatalities and serious incidents. As indicated in transcript Master Builders recently updated its OH&S Blueprint which is attached as Attachment D. A discussion of industry fatalities occurs at page 14 et seq. Incidence rates generally are discussed on page 12. Figure 1 on page 13 shows that the industry's incidence rate of serious claims has fallen by 23 per cent since 2002.

7 NUMBER OF PROJECTS UNDER 26 WEEKS

7.1 As indicated in the Transcript at page 26, Senator Siewert's question of the number of building and construction projects under 26 weeks is not possible to answer. No industry wide statistics are collected. However, in order to reinforce Master Builders' point that a large number of commercial projects are beyond 26 weeks in duration, we asked a large commercial member of Master Builders which operates in three States the question of the number of projects on its books over the last 12 months that were under 26 weeks. There were none. All ten major commercial projects exceeded 26 weeks.

8 CONCLUSION

8.1 Master Builders reiterates its thanks to the Committee for the opportunity to provide further evidence.

25/11/02

Attachment A

Burrup industrial unrest simmering

☐ A union row may threaten Woodside's massive LNG project. JERRY PRATLEY analyses the state of play.

AS THE Pilbara enters another searing summer, not all the heat is a result of the weather.

Industrial unrest has boiled over in recent weeks on the Burrup Peninsula, the site of Woodside Petroleum's massive liquefied natural gas project.

An ugly union demarcation dispute is emerging that has prompted the State Opposition to call on the Government to intervene.

Employment Minister John Kobelke claims there is little he can do because the matter is subject to Federal, not State laws.

The Opposition says that is wrong and claims Labor's changes to industrial laws have given unions too much power.

The Burrup project is expanding to cope with increased demand, in particular a long-term contract to supply $25 billion worth of LNG to China.

For about the past 18 months, the construction of a fourth LNG processing train had been running smoothly and strike-free.

The project is being undertaken for Woodside by the Kellogg joint venture, a consortium of construction, engineering and electrical companies.

Workers on the project are covered under a Federal greenfields agreement struck with the Australian Workers Union, the Australian Metal Workers Union and the Communications, Electrical and Plumbing Union.

Tellingly, the militant Construction, Forestry Mining and Energy Union was excluded from the agreement but is nonetheless busy stirring up unrest on the Burrup.

About eight weeks ago, the CFMEU put an organiser in Karratha and firebrand assistant State secretary Joe McDonald was sent from Perth to conduct union meetings that led to the strike action.

The meetings were held off site because Mr McDonald was not allowed on to the project by Woodside, which said he did not have a right of entry.

The right of entry issue was one of the matters cited by Mr McDonald but his main thrust involved telling workers they were being ripped off by the AMWU/AWU/CEPU agreement.

In classic CFMEU style, Mr McDonald used safety as a springboard and claimed people's health was being put at risk because they had to work in temperatures up to 60C.

Out of a workforce of 900, Mr McDonald said about 400 went on strike over the issue but Woodside said the figure was closer to 300.

Some workers spent more than a week on strike.

A concrete worker collapsed and died on the Woodside project on November 18. Police said it appeared the man had died of natural causes.

CFMEU State secretary Kevin Reynolds said the Burrup death vindicated his union's push for better working conditions on the site.

Earlier, Mr Reynolds accused the AMWU and the AWU of not representing their members and being in bed with the bosses.

He said the CFMEU was exercising its right to represent civil workers, a claim denied by AWU construction organiser Glen Anderton.

Mr Anderton said the CFMEU was stirring up trouble in the guise of safety concerns at the Burrup in a bid raise its profile in the North-West.

AMWU State president Colin Saunders claimed he was not particularly concerned with the CFMEU.

He said the CFMEU might try to entice workers with all manner of promises but at the end of the day the AMWU negotiated a better pay deal without the industrial turmoil.

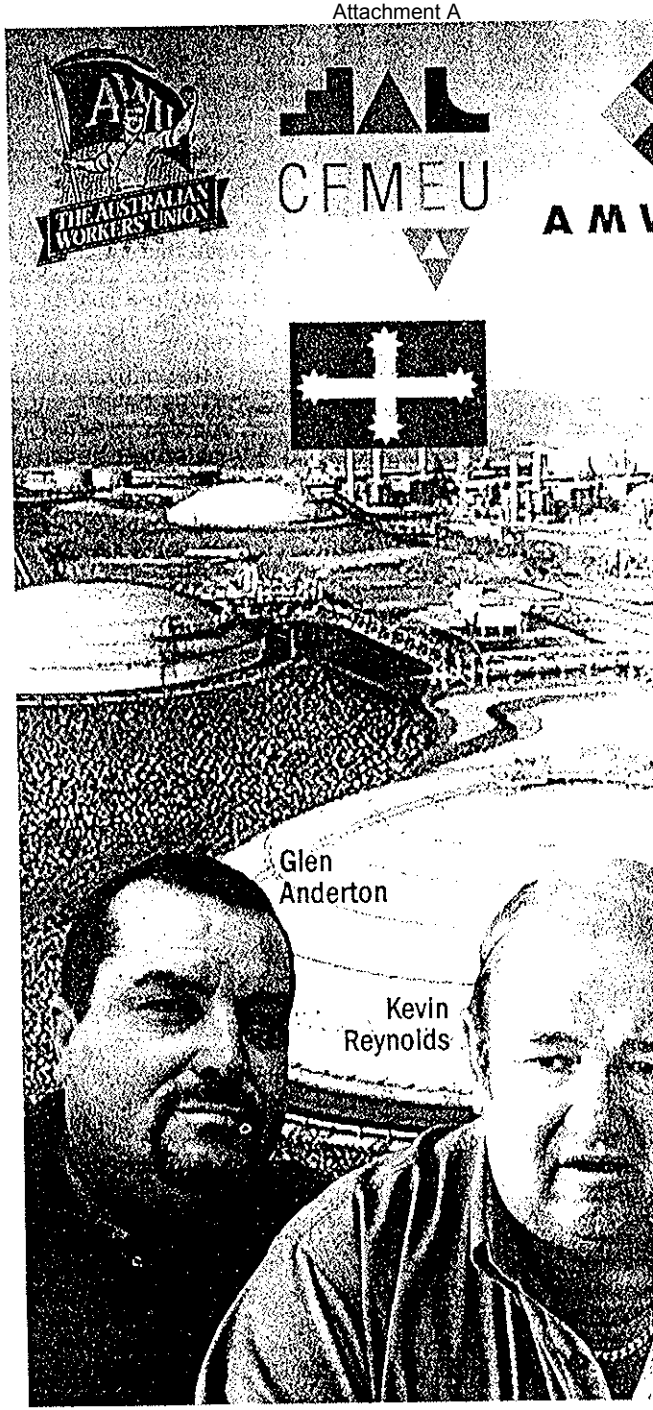
Mr Saunders said based on the CFMEU's history and evidence at the Cole royal commission into the building and construction industry, the union could be chasing so-called "casual tickets" at the Burrup.

Evidence to the commission included claims that industrial action would be called off by the CFMEU if an employer paid for casual union tickets.

Interestingly, the CFMEU is party to agreements signed in relation to the construction of Rio Tinto's $400 million HIsmelt iron plant at Kwinana.

Mr Saunders said Rio Tinto included the CFMEU after pressure from the ACTU.

The CFMEU announced last week it had struck a deal with 10 builders and 40 major subcontractors for a 36-hour week, a deal benefiting up to 6000 workers.



Sunday Times 6.10.02

Union muscles in on Burrup

By JOHN FLINT

THE militant building workers union, the CFMEU, has begun a big push for a slice of the action on the North-West Shelf.

Its firebrand assistant secretary, Joe McDonald, and another official flew to the Burrup Peninsula on Thursday to address the growing workforce.

This week the union will install a permanent official in the area as part of a recruitment drive, and will defy all efforts to lock it out.

Three other unions, the Australian Manufacturing Workers Union (metal workers), the Australian Workers' Union (AWU) and the Electricians' Union, have signed a greenfields site agreement with contractors.

They claim the CFMEU has no role in civil construction and should stay away.

The Sunday Times understands that the State Government and Woodside Petroleum are also keen to prevent the CFMEU getting a foothold on the Burrup, which is set to boom on the back of the recent $30 billion gas deal with China.

The union's track record on resource projects such as Murrin Murrin is almost legendary and it has featured prominently in adverse evidence before the Cole royal commission.

Mr McDonald said he wasn't looking for a brawl with other unions on the Burrup, but he wouldn't be told where he could and couldn't go. He said his frustration with the metal workers' union had "boiled over" at a recent Unions WA meeting.

AMWU state secretary Jock Ferguson has made an official complaint that Mr McDonald grabbed him and knocked him to the ground.

"I was happy to put everything behind me," Mr McDonald said yesterday. "I got a hell of a lot of phone calls from workers up there (on the Burrup) that they wanted representation.

"The night I got up there (AMWU president) Colin Saunders rang me and asked what I was doing up there.

"I told him quite frankly that I wasn't up there for a brawl with him, but to service our members.

"I told the meeting of workers that the metal workers had done a deal behind closed doors to lock us out, as they have done on several other jobs. They have tried before to lock us out elsewhere and have failed.

"The response (from the workers) was absolutely magnificent.

"We had an agreement today that we were going to meet some more people at the front gate, but when I got there the coppers were waiting for us and they would not let us on the job. We were escorted off the lease.

"I had to come back today because I am in court all next week, but the CFMEU are back in the Pilbara."

Mr Saunders said there was currently a strike on the project involving more than 250 of his members over bussing arrangements and some other matters, and he had "told Joe McDonald to keep his nose out of our blue".

On Friday, AWU national secretary Bill Shorten denied claims that his union had done or was poised to do any deals with the CFMEU on the North-West Shelf.

"It's a nonsense to say there's any deal," he said. "We are putting fulltime resources into Karratha. (CFMEU national secretary) John Sutton has recently initiated a propaganda campaign against the AWU which certainly puts back any prospects of working together."

The Cole royal commission finished its Perth hearings on Thursday.

CFMEU chief Kevin Reynolds, called to give evidence on Wednesday, spent just over two hours in the witness box, including a short confidential session.

Royal Commissioner Terry Cole will hand down his report on illegal practices within the building and construction industry on December 5.

The Sunday Times understands that several matters of inquiry have been passed to other law-enforcement agencies for completion.

Most of the material will be passed to investigators from the Federal Government's new building industry taskforce which began its work on Tuesday.

The taskforce has officers in Perth, Sydney and Melbourne

3/10

AWU SELLS OUT WORKERS AT GERALDTON

606.02

The AWU has signed and registered an agreement for the Geraldton Southern Transport Corridor Project being constructed by Thiess Constructions.

This AWU agreement purports to cover all workers on site other than Carpenters. Steel fixers, Concretors and general Labourers are being forced to join the AWU.

The agreement was done by the AWU after the AWU and the CFMEU agreed not to do one-off Greenfields agreements to exclude the other Union.

Over the page is a comparison between the AWU agreement and a similar agreement completed by the CFMEU.

There really is no comparison!

STOP THE SELL OUT

JOIN THE CFMEU - A FIGHTING UNION

Attachment C

AGREEMENT COMPARISON

CFMEU

CFMEU/BARCLAY MOWLEM THORNLIE RAILWAY STATION AND ASSOCIATED BRIDGES AGREEMENT

JOB IS WORTH $26 MILLION

Rates	Rigger, Dogman, Scaffolder, Steel fixer	$21.90
	Concretor, Concrete Finisher	$20.94
	Labourer	$20.03
	Crane over 250t	$26.09
	Crane 180 - 250t	$24.96
	Crane 80 - 180t	$23.82

Payrises	5% + 5% 1st increase after 3 mths, 2nd after further 9 mths)
Site Allowance	$2.40 per hour
Project Incentive Payment	$110 per week or $22.00 per day pr-rata Forfeited on any day of industrial action
Travel Allowance	$22.50 per day
Meal Allowance	$9.90
Leading Hand Allowance	$22.56 minimum payment
Superannuation	Payable on rate of pay including fares & travel, tool and leading hand allowances and shift loading
Redundancy	$60 per week increasing to $65 in 2005
First Aid Allowance	$3.10 per day
Ordinary Hours	38 hours per week changing to 36 in 2005 Plus RDO's and PDO's
Shift Allowance	15% for afternnon shifts Monday to Friday 25% for night shifts from Monday to Friday
Income Protection Insurance	Full coverage for all workers
First Aid	Senior First Aider on site at all times with dedicated first aid room
Safety equipment	Company to supply safety boots, helmets (with sun brim if erequired), safety glasses, if own prescrition glasses damaged they are to be replaced by company
Inclement Weather	Workers do not work during inclement weather and leave site after 4 hours with full day's payment

AWU

AWU/THIESS GERALDTON SOUTHERN TRANSPORT CORRIDOR PROJECT 2004 - 2006 AGREEMENT

JOB IS WORTH $80 MILLION

Rates	Dogman, Rigger, Scaffolder	$18.34
	Concrete Finisher, Steel fixer	$17.51
	Concretor, Labourer	$17.04
	Crane over 220t	$20.33
	Crane 180 - 220t	$19.78
	Crane 80 - 180t	$19.80

Payrises	2% + 3% (increases are yearly)
Site Allowance	NIL
Project Incentive Payment	$95.00 per week or $2.50 per hour x 38 hours Forfeited for whole week when industrial action occurs on any day
Travel Allowance	$17.95 per day
Meal Allowance	$8.30
Leading Hand Allowance	$12.92 minimum payment
Superannuation	Payable only on rate of pay
Redundancy	$40 per week
First Aid Allowance	NIL
Ordinary Hours	38 hours per week
Shift Allowance	15% for afternoon and night shifts from Monday to Friday
Income Protection Insurance	NIL
First Aid	NIL
Safety equipment	NIL
Inclement Weather	Employer decides what is inclement weather

FRON

MASTER BUILDERS
AUSTRALIA

Building a Safer Future:

Master Builders Occupational Health and Safety Policy Blueprint

2009-2015

building australia

Table of Contents

About Master Builders

Master Builders Australia (Master Builders) is the major Australian building and construction industry association. Its primary role is to promote the viewpoints and interests of the building and construction industry and to provide services to members in a broad range of areas. These include training, occupational health and safety (OH&S), legal services, industrial relations, building codes and standards, industry economics and international relations.

Master Builders is Australia's oldest industry association. Founded in the early 1870s in Melbourne, Sydney and Newcastle, the movement quickly grew with Master Builders Associations being established in each State and Territory of Australia. It was federated in 1890.

Over the past 114 years, Master Builders has grown to cover more than 31,000 member companies, with representation in every State and Territory in Australia.

Today, Master Builders' membership consists of national, international, local and residential, commercial and industrial builders and civil contractors together with subcontracting firms, suppliers and professional industry advisors. Membership of the Master Builders' movement represents 95 per cent of all sectors of the building industry.

Master Builders has offices in all capital cities, as well as major regional cities in Australia. The movement employs over 300 experienced staff, with qualifications in a diverse range of disciplines including building, engineering, law, management, economics, marketing, accounting, industrial relations, safety, building surveying, international business and training.

Master Builders Australia is the national body representing the Master Builders movement. Its members include all nine State and Territory Master Builders Associations.

Master Builders' OH&S Policies

Master Builders' two main policy objectives for OH&S are to achieve:

- improved building and construction industry OH&S performance; and
- a national, consistent OH&S regulatory framework that is reasonable and fair to employers.

The Government is currently undertaking a review of the OH&S laws that apply in the States and Territories, in order to determine the content of nationally consistent model OH&S laws. Master Builders supports the development of a nationally consistent regulatory framework that will reduce the complexity of the regulatory burden on businesses operating across jurisdictions. However, Master Builders considers that the content of those national model laws must be reasonable and fair to employers.

In developing the model national OH&S laws, the Government will also propose model national OH&S regulations and codes of practice. Master Builders also supports more consistency in the OH&S regulation that affects the building industry, provided that the content of the regulations and codes are appropriate and reasonable for employers.

Master Builders supports national hazard based standards supported by national codes of practice, underpinned by guidance materials. We also support appropriate mandatory requirements for national introduction of OH&S training programmes.

It is important that the specific situation of small business be recognised in planning for OH&S. Small firms predominate. Around 95 per cent businesses operating in the building and construction industry are small businesses that employ fewer than five people. Contracting and subcontracting is a notable feature of the industry. There are also substantial numbers of owner/builders.[1] Practical guidance material should be promoted to and accessible to small business employers and owner/builders.

A greater focus upon the needs of small business does not mean that Master Builders is in favour of two sets of laws, one law for large participants and another for small and medium sized enterprises. Master Builders supports the consistent application of OH&S duties to all building and construction industry enterprises, including owner/builders. The model OH&S laws provide the opportunity for this consistency to be achieved. Importantly, all businesses should be free to choose OH&S management systems best suited to their needs in discharging their OH&S responsibilities, rather than being subject to a cumbersome and overly prescriptive process that is imposed upon them. The focus should be on outcomes, not processes, and should be structured so as to engage the participants.

Master Builders supports the principle that all businesses and all employees have a basic duty of care to safeguard both their own and others health and safety.

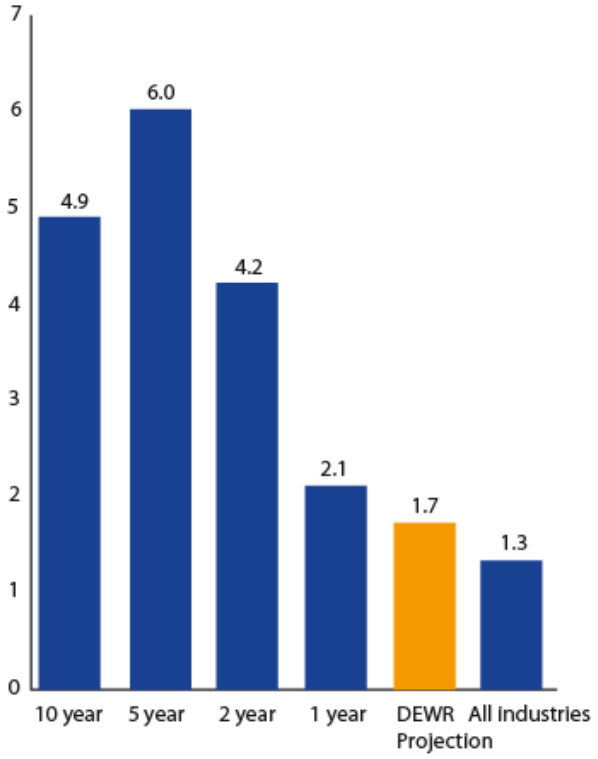
[1] For example, in NSW the Office of Fair Trading issued nearly 11,000 owner/builder permits in 2007-08.

Employment Profile of the Building and Construction Industry

Construction is the fifth largest employing industry in Australia, employing 994,000 people (or 9½ per cent of the total workforce) as at November 2008. The construction industry is strongly influenced by economic cycles and can therefore be susceptible to skill shortages as well as oversupply for some skills. In recent years the construction industry, in line with the strong economy, has experienced sustained and robust employment growth, although this looks set to change as the impact of the current global financial crisis flows through to a weaker labour force.

The Department of Education, Employment and Workplace Relations (DEEWR) has projected employment growth for the construction industry for the next five years, although it should be noted that some risk is attached to this outlook, particularly in light of the changing economic environment. Over a five year period, employment in the construction industry was expected to grow at an average rate of 1.7 per cent per annum, which equates to around 82,100 new jobs (see figure). This compares with an average annual growth rate of 1.3 per cent across all industries over the same period. Projected job growth for the construction industry is more subdued than growth in the past five years. The projected job growth 'locks in' the much higher employment level reached in recent years, and anticipates further employment gains, albeit at a lower growth rate into the future.

Construction – Recent and future employment growth (%pa)



Source: ABS labour Force Survey (DEEWR trend data); DEEWR projections.

The Australian workforce is becoming skewed to older age groups as a result of an ageing population. However, the construction industry has a higher share of prime aged workers between the ages of 20 years and 44 years in comparison with all other industries. The construction industry is below the percentage share of all industries for ages 15 years to 19 years (6.1 per cent compared with 6.9 per cent), 45 years to 54 years (19.6 per cent compared with 22.2 per cent), 55 years to 64 years (11.1 per cent compared with 12.7 per cent) and 65 years and over (1.8 per cent compared with 2.2 per cent).

The age profile of the construction industry is relatively young in comparison with the rest of the workforce. In 2006, the median age of workers in construction was 37 years, compared with 39 years for all industries.

In the last 10 years, all of the age groups in the construction industry experienced employment growth. Workers aged between 55 and 64 years experienced the strongest employment growth, up by 129.7 per cent. Although they represent a smaller proportion of the construction workforce, workers aged between 15 and 19 years also experienced strong growth (114.9 per cent) over the same period. In recent years, the construction industry has, unlike many other industries, experienced an influx of workers in all age groups and may be better placed to adapt to workforce ageing.

Nonetheless, the construction industry does face a real issue, with age cohort analysis of the construction industry suggesting that over 80,000 workers will exit the industry over the next 5 years. The challenge will be to boost current levels of new skilled entrants over the same period or the industry will suffer an increasing skills gap, or ageing worker effect.

This changing dynamic means that training for OH&S and engendering a culture that integrates OH&S in all aspects of work is a priority, especially for young people entering the industry. OH&S must be a vital component of education for all industry participants. This stance on education is the best way of changing the culture of the industry so that OH&S becomes integral to all workplace tasks.

Blueprint Outcomes 2009-2015

Master Builders is committed to the concept of continual improvement in OH&S. That improvement can occur only within a policy framework that provides an environment that is conducive to the advancement of OH&S and one which is structured to engage the participants. Accordingly, Master Builders has adopted this policy Blueprint in which five key outcomes have been identified. If all the recommendations proposed in this Blueprint are adopted by regulators, industry, contractors and employees, the following outcomes are achievable:

1) The collection and dissemination of relevant and timely data about trends in the industry.

2) A significant and sustained reduction in building and construction workplace fatalities and injuries that is achieved from the 'ground up'.

3) Reduced human and economic costs from workplace fatalities and injuries.

4) Increased awareness, communication and co-operation on Occupational Health and Safety amongst employers, employees and all persons in the procurement and building process.

5) Reasonable, balanced and practical Occupational Health and Safety regulation that contributes to Australia having world class OH&S systems and performance.

Summary of Recommendations

Recommendation 1:
To achieve the national targets and contribute to priority strategies, the building and construction industry will be assisted by more relevant and timely data and evidence about the trends in the industry.

Recommendation 2:
Where companies adopt an OH&S management system, positive performance indicators should be utilised as a means to implement the process of continuous improvement.

Recommendation 3:
Commonwealth funding of the OH&S component of vocational education should be tied to the requirement that OH&S training as part of endorsed training packages is consistently taught Australia wide.

Recommendation 4:
OH&S training should be vested in the agencies responsible for vocational education and training.

Recommendation 5:
Authorities such as the Federal Safety Commissioner should monitor and regularly update appropriate guidance material for small business.

Recommendation 6:
The case for regulation should not only consider costs and benefits but also evidence about the impact of the proposed regulation in achieving reductions in risk (whether new or being remade) and evidence about how the most effective outcomes can be achieved.

Recommendation 7:
Regulatory review should take into account the impact of regulation on organisations that operate across adjacent jurisdictions and there should be a cross border "no disadvantage test" that the initiating jurisdiction should satisfy.

Recommendation 8:
There should be nationally consistent *hazard based* standards instead of industry based OH&S standards to reduce compliance costs and increase certainty about what is required of construction companies, no matter where they undertake projects.

Recommendation 9:
The significant body of administrative and welfare regulation should be subject to a national consistency review and a national approach should be taken to key matters such as reporting and recording of incidents and injury.

Recommendation 10:
The current range of approved codes of practice should be considered as a national database of risk control solutions and should be able to be adopted in any jurisdiction to the extent they address a relevant duty. Deemed to comply provisions mirrored across legislation, would be one means of achieving this goal; this option should be examined by the successor to the Australian Safety and Compensation Council in the context of harmonised laws.

Recommendation 11:
Owner builders should have the same OH&S obligations as registered builders in every jurisdiction to ensure that OH&S standards are consistently applied across the industry.

Recommendation 12:
Regulatory agencies should develop common strategies for dealing with construction risks, including consistent enforcement protocols and profiles.

Recommendation 13:
A duty for clients in commercial construction should be included in jurisdiction based legislation.

Recommendation 14:
The responsibility for safe construction, maintenance and repair should rest with those who have the direct ability to control and manage safety at the relevant time. The concepts of safe design as outlined in the National Standard for Construction Work should be promoted but not regulated.

Recommendation 15:
End use designer obligations should be supported by guidance materials which clearly set out how obligations can be met. The focus should be on specific building types in which the hazards are foreseeable and risk controls are reasonably practicable.

Recommendation 16:
The Federal Safety Commissioner should provide companies seeking accreditation with more detailed information on what is required for accreditation, based on lessons learnt from companies which have already achieved accreditation.

Recommendation 17:
Qualification under the Australian Government Building and Construction OH&S Accreditation Scheme should be recognised as sufficient for automatic pre-qualification under State and Territory accreditation schemes.

Recommendation 18:
To ensure integrated regulation of occupational health and safety for the building and construction industry, the successor to the Australian Safety and Compensation Council should be required to formally consult with the Federal Safety Commissioner on all work specific to the building and construction industry.

Recommendation 19:
The Federal Safety Commissioner should be given the power to require Australian Government agencies to adopt OH&S standards during the design and construction phases of building and construction work.

Recommendation 20:
All governments should adopt a consistent legislative approach to the management of alcohol and other drugs in the workplace

Recommendation 21:
Building and construction industry employers should develop fitness for work policies, which incorporate a workplace alcohol and other drugs policy. Fitness for work policies should aim at prevention, education, counselling and rehabilitation as part of an organisation's overall occupational health and safety strategy.

Recommendation 22:
Testing regimes for alcohol and other drugs should not be mandated but should be a matter for workplaces to decide and to undertake if a risk assessment identifies testing as necessary to manage health and safety risks in a workplace.

Recommendation 23:
Given the history and ongoing occurrence of abuse of right of entry for OH&S purposes in the building and construction industry, any right of entry for union officials should be subject to their being accompanied by an authorised inspector from the relevant regulatory body.

Recommendation 24:
Only union officials who are 'fit and proper persons' should be entitled to exercise the right of entry under a permit issued by an independent government authority or judicial officer.

Recommendation 25:
The model OH&S laws should specify that individuals with criminal records or a history of breaches of right of entry and related provisions under Commonwealth and State and Territory law should not be eligible to obtain a permit.

Recommendation 26:
Union representatives exercising right of entry powers for OH&S purposes should be required to hold approved nationally recognised OH&S qualifications under the Australian Qualifications Framework system. Qualifications should be updated at least every five years.

OH&S Performance – outcomes 1, 2 and 3

Outcome 1: **The collection and dissemination of relevant and timely data about trends in the industry**

Outcome 2: **A significant and sustained reduction in building and construction workplace fatalities and injuries that is achieved from the 'ground up'**

and

Outcome 3: **reduced human and economic costs from workplace fatalities and injuries**

OH&S Performance in the Industry is Improving

The building and construction industry's OH&S performance remains a matter of concern to all industry participants. However, the industry has responded to the various pressures for improved occupational health and safety management, and according to the data analysed here, OH&S performance is improving. The data are drawn from the National Online Statistics Interactive system (NOSI)[2], available from the Australian Safety and Compensation Council as of the first quarter 2008 (unless otherwise stated).

The most recently published Comparative Performance Monitoring (CPM) Report (10th edition) does not disaggregate data down to industry sectors, except for the incidence rate shown in Figure 1. In this latest report preliminary data is used for 2006-07. The caution about preliminary data stated in the CPM Report should be noted:

> The preliminary workers' compensation claims data for Australia indicate that in 2006–07 the incidence of serious injury and disease claims was 14.2 claims per 1000 employees. It is expected that this rate will increase by around 2 per cent when the liability on all the claims submitted in 2006–07 is determined.[3]

In this section of the Blueprint the trends of improvement and the areas that need to be targeted for future improvement are outlined.

Incidence and Frequency Rates Show Reductions

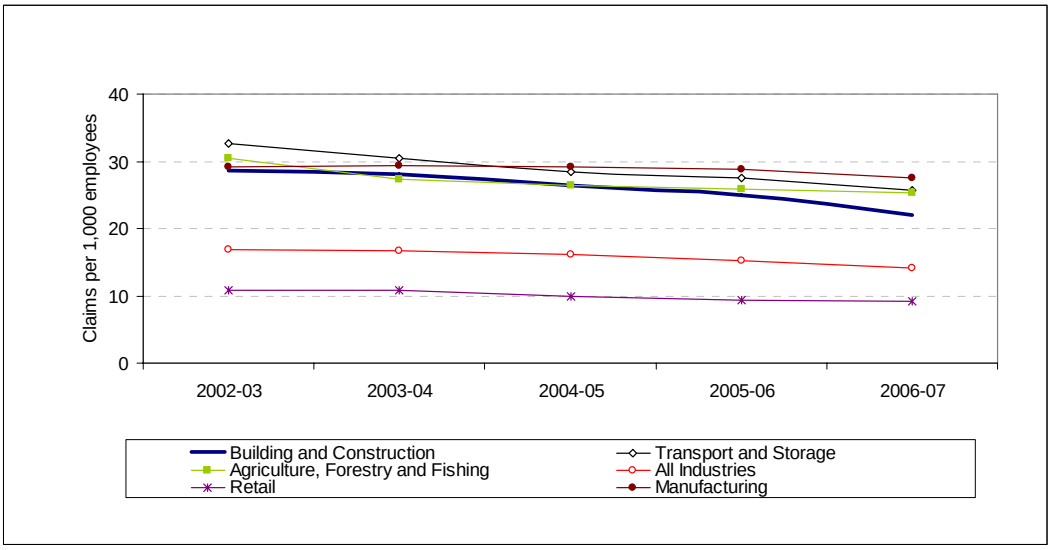
Figure 1 below shows that the industry's incidence rate has fallen by 23 per cent since 2002, a much higher rate of decrease than in the Manufacturing, Transport and Storage and Agricultural industries. These three industries have been adopted as high risk benchmark industries and the retail industry as a lower risk benchmark

2 The NOSI database is continually updated so there will be minor differences from published data.

3 Workplace Relations Ministers' Council, Commonwealth of Australia, *Comparative Performance Monitoring, Report*, 10th edition, August 2008, p.vii.

industry. The all industry rate has fallen by 16 per cent in the same period, and the low risk retail sector rate by 15 per cent.

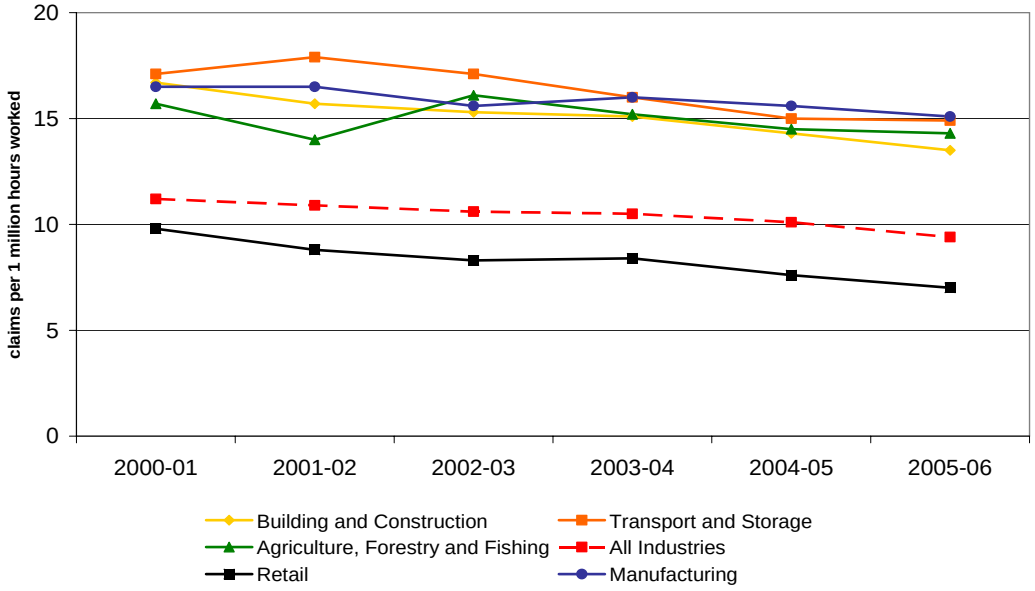
Figure 1: Incidence rate of serious claims[4] per 1,000 employees



The industry is reducing its incidence rate (22.1 in 2006-07), but it is still much higher than that for all industries (14.2 in 2006-07).

In Figure 2 the frequency rate shows a similar trend, with building and construction outperforming the three high risk benchmark industries but still having a significantly higher frequency rate than the all industries rate (in 2005-06 13.5 compared with 9.4 for all industries).

Figure 2: Frequency rate of serious claims per 1 million hours



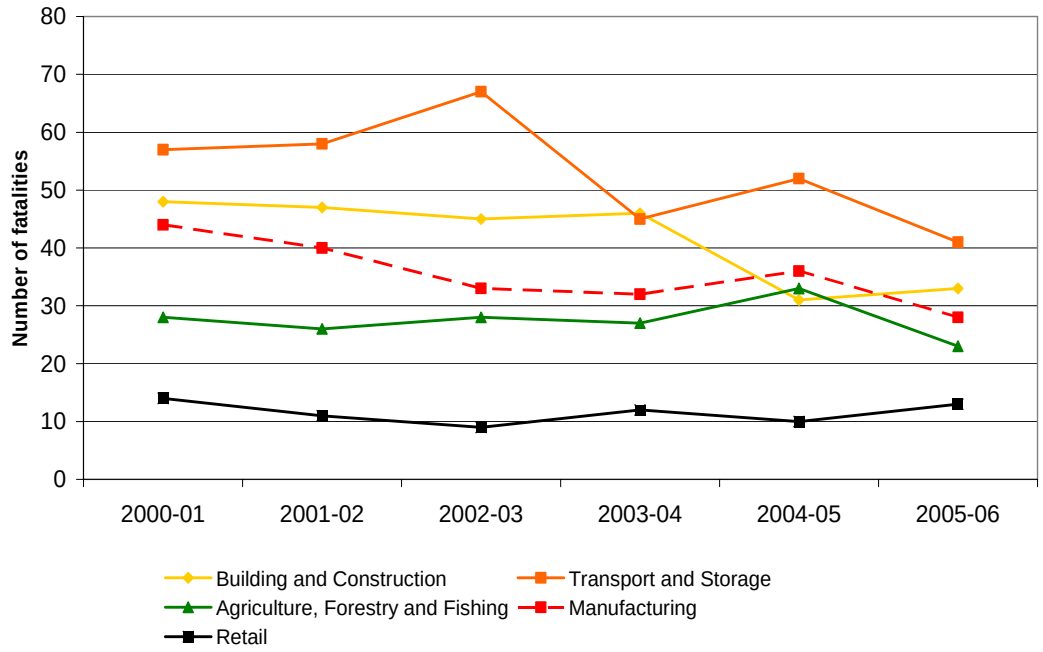
4 The expression 'serious claims' is now used in the latest CPM report. Serious claims include all fatalities, all permanent incapacity claims (as defined by the jurisdictions) and temporary claims for which one or more weeks of time lost from work has been recorded.

Fatalities Still a Major Concern

Understanding fatality data in the construction industry is a complex matter. It is accepted that the compensated fatality data reported below are likely to understate disease-related deaths, and also that the construction industry, having a significant percentage of self employed workers, is also likely to underestimate fatality numbers and rates. These matters are taken into account so far as available data allow.

The raw number of fatalities shown in Figure 3 highlights two points. First, the number of fatalities (33 in 2005-06) is unacceptably high, although there has been some reduction (a 31 per cent reduction since 2000). While the reduction is encouraging, the significant human and economic cost associated with fatalities means that this area needs to be given the highest order priority.

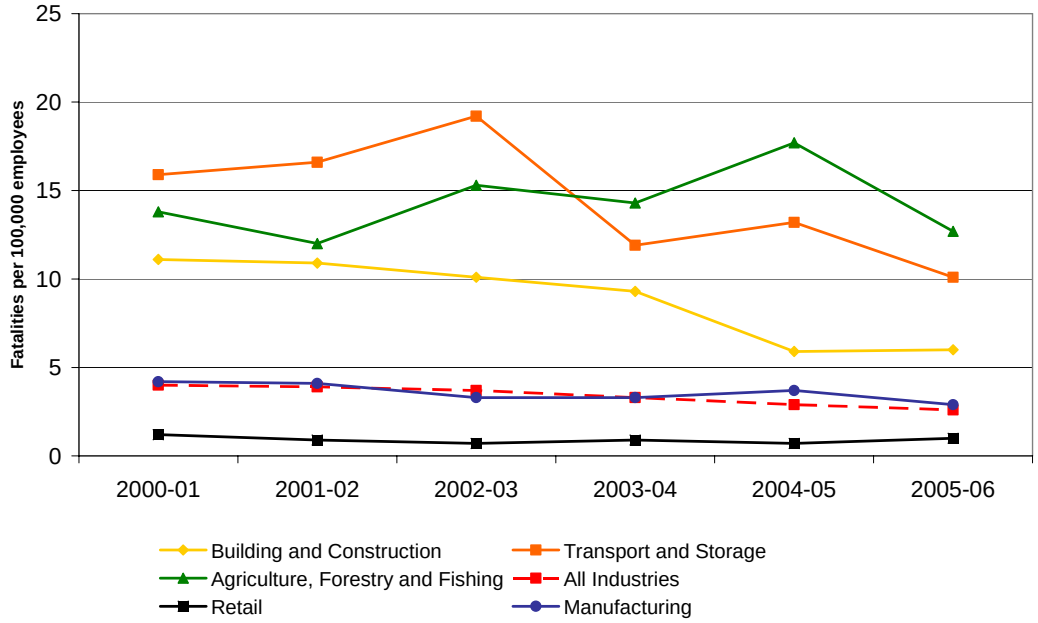
Figure 3: Number of compensated fatalities



Second, from a statistical standpoint, the numbers do not allow much confidence in predicting sustainable trends into the future.

In Figure 4 the incidence rate for compensated fatalities shows that the building and construction industry has been gradually reducing the fatality rate and is currently less volatile than the high risk benchmark industries. The fatality rate for construction has fallen by 46 per cent in the period, compared with 35 per cent for all industries. Even so, the construction fatality rate is still over two times higher than the all industries rate.

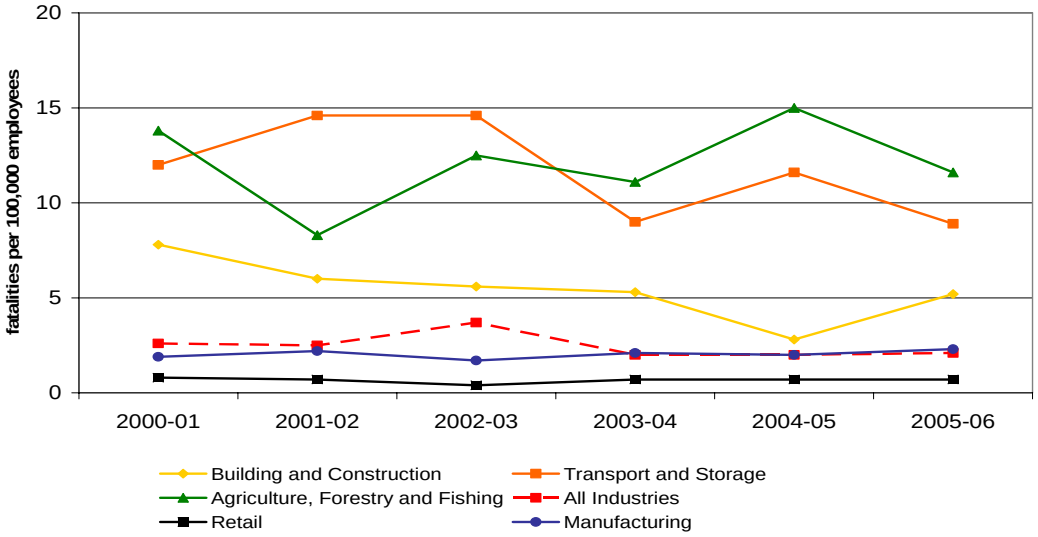
Figure 4: Incidence rate of compensated fatalities per 100,000 employees



Given the importance of reducing fatality rates, it is useful to note the difference between traumatic and gradual onset fatalities. The traumatic fatality cases directly reflect conditions in the period shown, whereas gradual onset fatalities may indicate the results of substances, materials and practices used in previous time periods. A disease such as asbestosis is an example.

Figure 5 shows fatalities related to immediate causes (injury and poisoning) and excluding disease-related fatalities. Construction has reduced its rate by 33 per cent in the period, compared with 19 per cent for all industries. Comparison with the latest year is not very reliable, given the time needed for claims to present themselves. There has been improvement in all sectors, but the rate of improvement is skewed by the underdeveloped numbers in the last period.

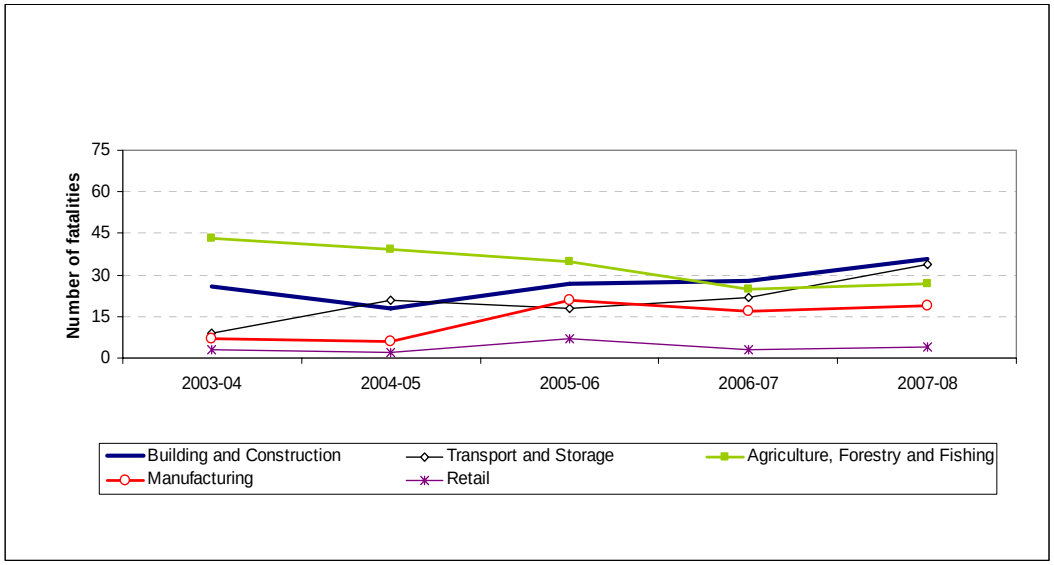
Figure 5: Incidence rate of compensated fatalities per 100,000 employees (injury only)



Another measure of fatalities more directly related to conditions at the time is Notified Fatalities. Each jurisdiction has legislation requiring notification of work related fatalities, and the notification data used here is drawn from Australian Safety and Compensation Council reports commencing in 2003. [5]

Figure 6 shows the number of notified fatalities for selected industries. These data allow more recent information to be included and show that construction fatalities have increased by 38 per cent in the period. Again, the relatively small numbers suggest caution in the predictive power of these trends.

Figure 6: Number of notified fatalities

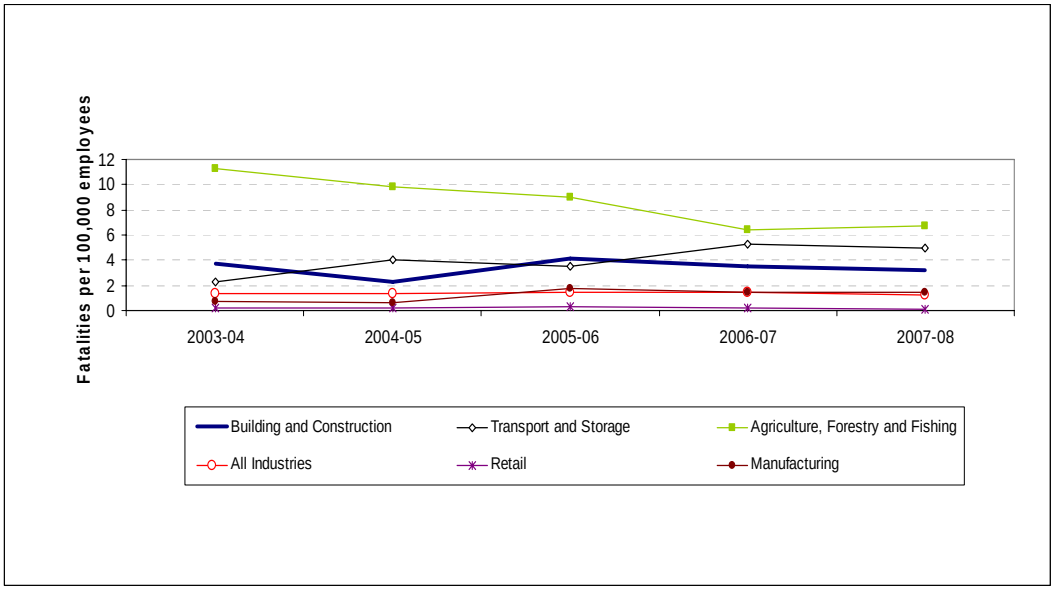


As with compensated fatalities an examination of incidence rates is important in understanding any trends.

Figure 7 shows the incidence rate of notified fatalities per 100,000 employees. The construction industry rate fell by 14 per cent over the period, compared with 8 per cent for all industries. Rates for Manufacturing and Transport at least doubled in the same period.

5 Australian Safety and Compensation Council, Statistical Report Notified Fatalities, Reports 2003 onwards.

Figure 7: Incidence rate of notified fatalities per 100,000 employees



The other source of data is the Work-Related Traumatic Injury Fatalities, Australia 2004-05 report.[6] In addition to workers' compensation data this uses coronial information and notified fatalities data to provide an estimate of the number of fatalities from work-related injuries. This report is noted by the latest CPM report as providing a more accurate representation of fatalities in industries such as construction.

The report shows that the construction industry had the third highest number of fatalities in the 2004-05 period, but also that the fatality rate of 3.7 deaths per 1000 workers was well below Agriculture at 20.7 and Transport at 13.2. The report also shows that while 68 per cent of construction workers are classified as employees, the National Data Set (NDS) captures a higher than average level of employee deaths. This means that the use of compensated fatality data (which is based on the NDS) is much more reliable than for other industries.

Another perspective on fatality data is to compare numbers and trends with an exposure denominator such as the level of building activity (Figure 8). One of the intuitive responses to fatalities is that they are more likely to occur when time pressures and labour supply shortages lead to poor practices.

[6] Australian Safety and Compensation Council, *Work-Related Traumatic Injury Fatalities, Australia 2004-05 report,* April 2008.

Figure 8: Number of compensated fatalities per $billion building work done

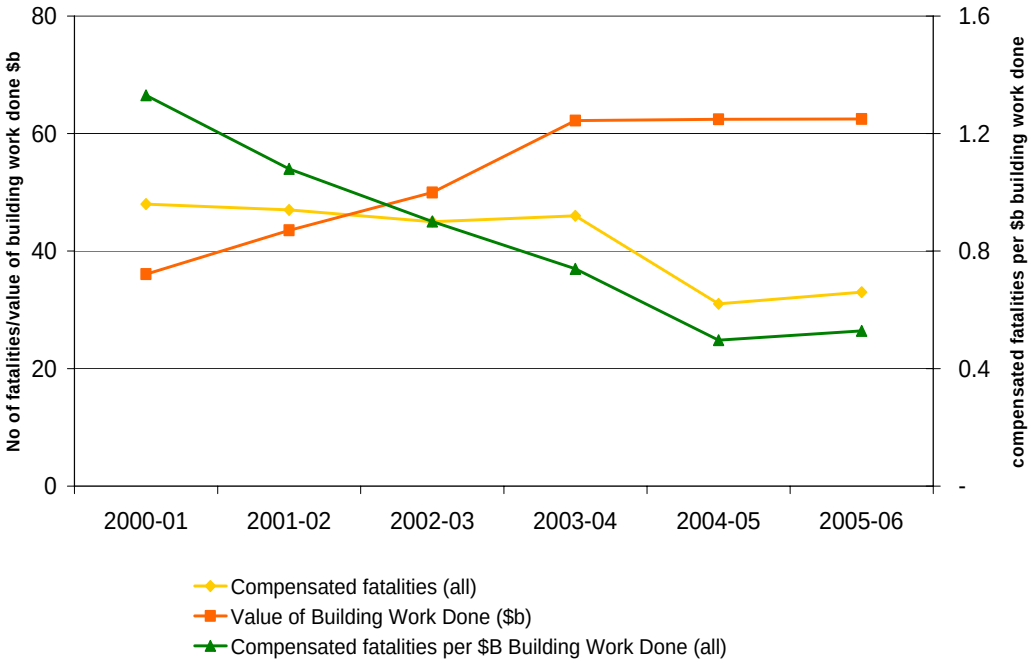
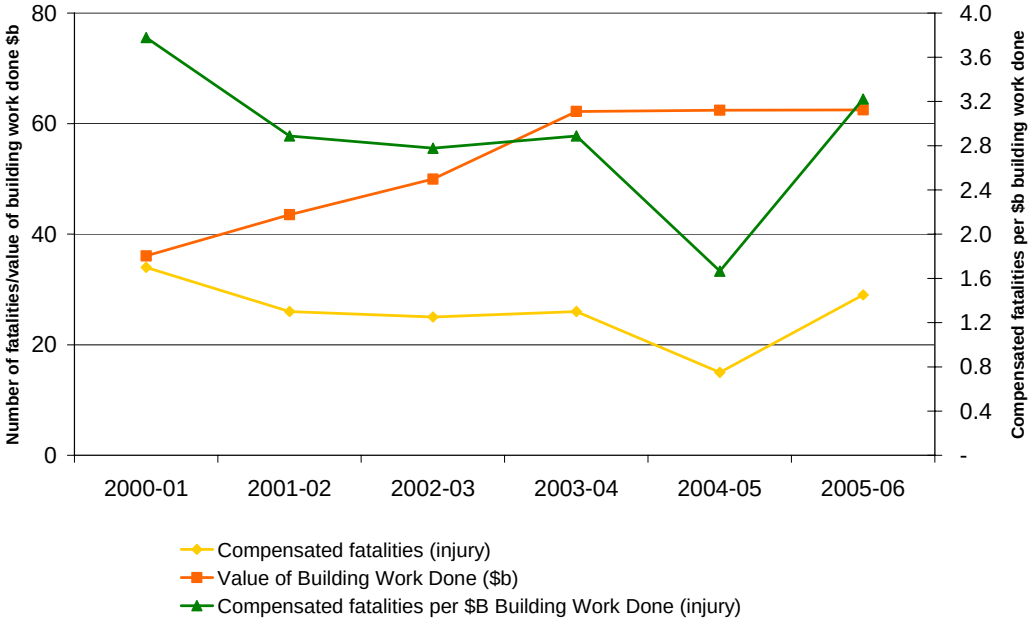


Figure 8 shows the relationship between the level of building activity and the number and rate of fatalities. The raw numbers suggest there is no relationship between the level of building activity and fatality numbers and rates: as activity has increased the number of fatalities has decreased. Nor does the compensated fatalities rate suggest a relationship. One further test of this is to look at traumatic fatalities using injury-only data or notified fatality data. Figure 9 shows a similar pattern, and the notified fatalities rate also is similar. If all compensated claims associated with traumatic injury are charted there is also no apparent relationship.

Figure 9: Number of compensated fatalities (injury only) per $b building work done



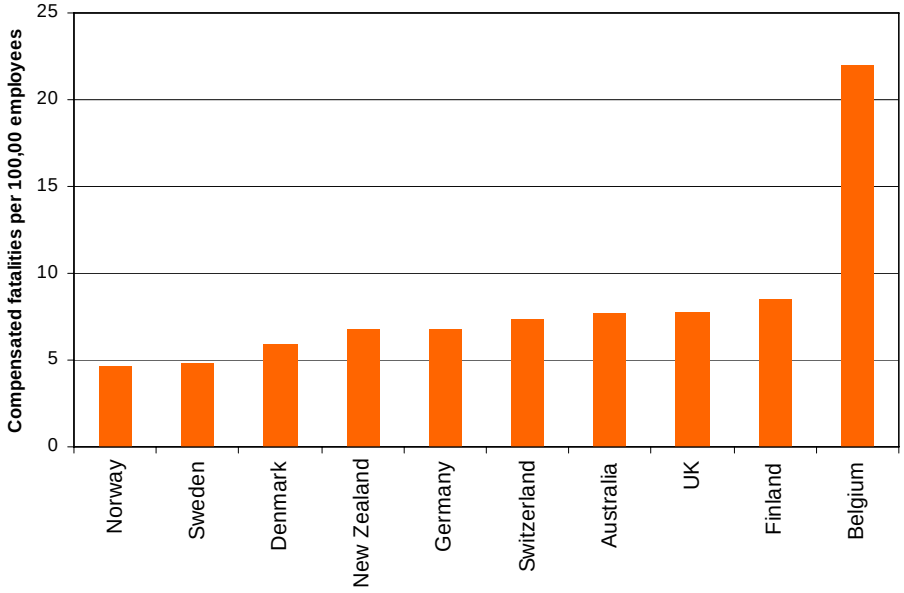
The compensated fatalities per billion dollars of building work done suggests there is no relationship between the two variables and indicates that the reasons for fatalities may be more to do with practices unaffected by activity peaks. This observation does not rule out the possibility that, with better and more extensive data, especially a longer time series, the relationship will prove positive.

A further dimension in trying to understand fatality data is to see how Australia compares with other countries. In the previous version of the OH&S Blueprint, data drawn from the Japan Construction Safety and Health Association (Visual Statistics of Industrial Accidents in Construction Industry 2001) and published by the Japan Industrial Centre for Occupational Safety and Health, showed Australia as a middle-ranked performer. This table has not been updated and the data are now ten years out of date.

Given the lack of standardisation in data sources, comparison of international fatality rates is complex. In 2004 the National Occupational Health and Safety Commission (NOHSC) prepared a report comparing fatality rates internationally. [7] Emphasising the difficulty in establishing a reliable basis for comparison, the report stated that Australia was middle-ranked against the 10 countries used in the comparison. Industry level data are even more difficult to find and compare, but the report presented data to compare industries using three year average fatalities to calculate an incidence rate.

Figure 10 shows the comparison. This data series uses different countries to the previous comparison and, again, Australia is up with the higher rate countries. Combined with the data used in the previous version of the Blueprint, Australia would be middle ranked.

Figure 10: International fatality rates for construction (1998-2001)

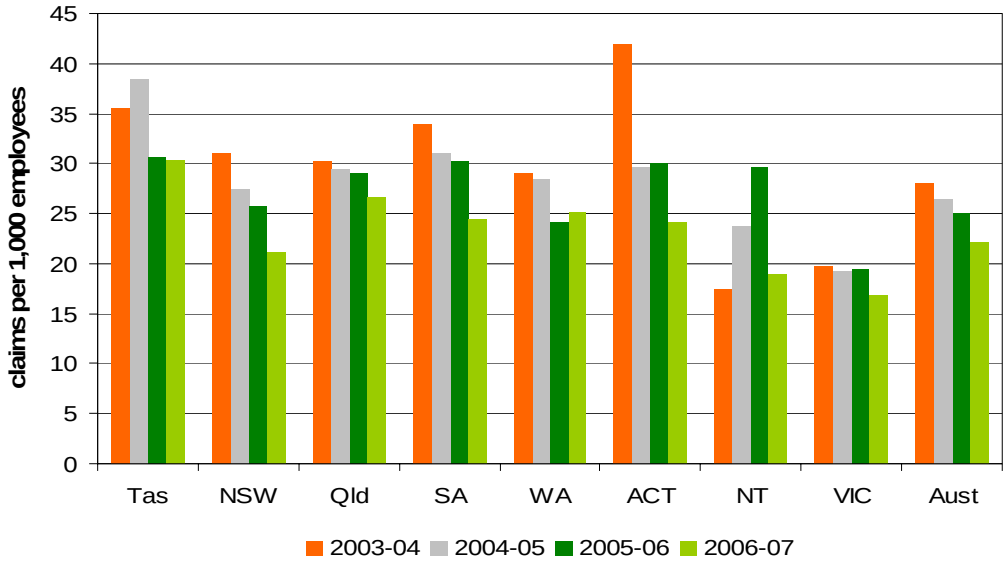


7 National Occupational Health and Safety Commission, *Fatal Occupational Injuries – How does Australia Compare?* 2004.

Performance Varies Across Jurisdictions

The variation in performance across jurisdictions can be a basis for trying to identify success factors or barriers to improvement. The latest jurisdiction based comparison can be found in the ASCC Information Sheet for Construction.[8] Table 2 from that report is reproduced below.

Figure 11: Incidence rates by jurisdiction, 1 or more weeks off work



Only Victoria has been consistently below the national incidence rate.

Performance Varies Within Different Building and Construction Sectors

The building and construction industry is diverse and represents many different types of construction activities and their attendant hazards. For statistical purposes the industry is classified into two divisions, each with a number of sub-categories as described below:

41 General Construction

411: Building Construction: covers the construction, alteration and repair of housing and other residential buildings; and non-residential buildings such as hotels, hospitals and prisons.

412: Non-Building Construction: covers the construction and repair of structures such as roads and bridges, railways, harbours, dams and pipelines.

8 Australian Safety and Compensation Council, *Information Sheet Construction*, 2008.

42 *Construction Trade Services*

421: *Site Preparation Services:* covers activities such as earthmoving, such as in excavating and trench-digging, and the hire of excavation equipment with operators.

422: *Building Structure Services:* covers activities such as concreting, bricklaying, roofing services and structural steel erection services.

423: *Installation Trade Services:* covers activities such as plumbing, electrical, air conditioning and heating services and fire and security system services.

424: *Building Completion Services:* covers activities such as plastering and ceiling services, carpentry, tiling, painting, decorating and glazing services.

425: *Other Construction Services:* covers activities such as landscaping and other special services such as sand blasting and scaffold construction.

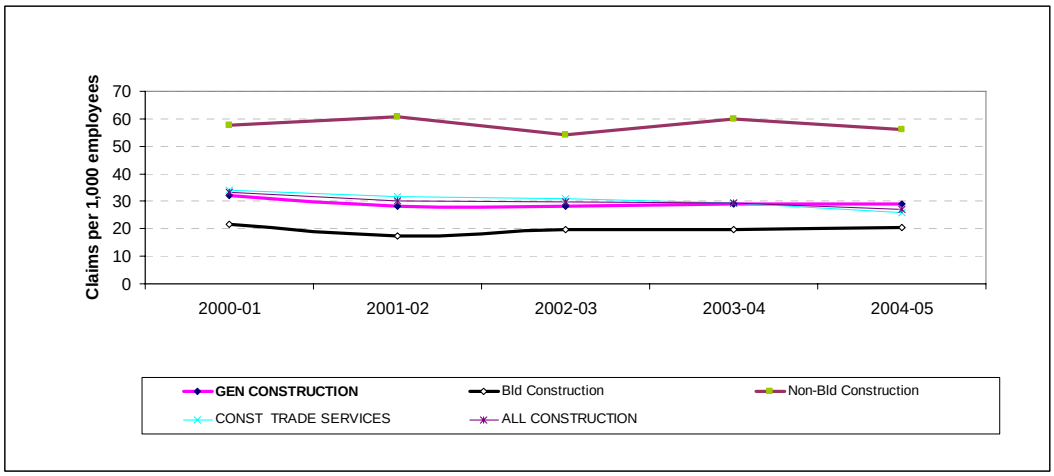
Differences in risk exposure are found in these industry sub-groups, and these may influence claims performance.

The most recent data for subdivisions can only be broken down into the two major categories, and Figure 12 shows that these two subdivisions have similar rates over the period. As noted in the previous OH&S Blueprint, the real differences are in the categories within these sub-divisions.

Figure 12: Incidence rate of serious claims per 1,000 employees for major subdivisions

The most recent data available to explore these finer differences is from 2004-05.[9] Figure 13 compares sectors at the subdivision level and shows that 411: Building Construction has the lowest incidence rate and 412: Non-Building Construction has the highest.

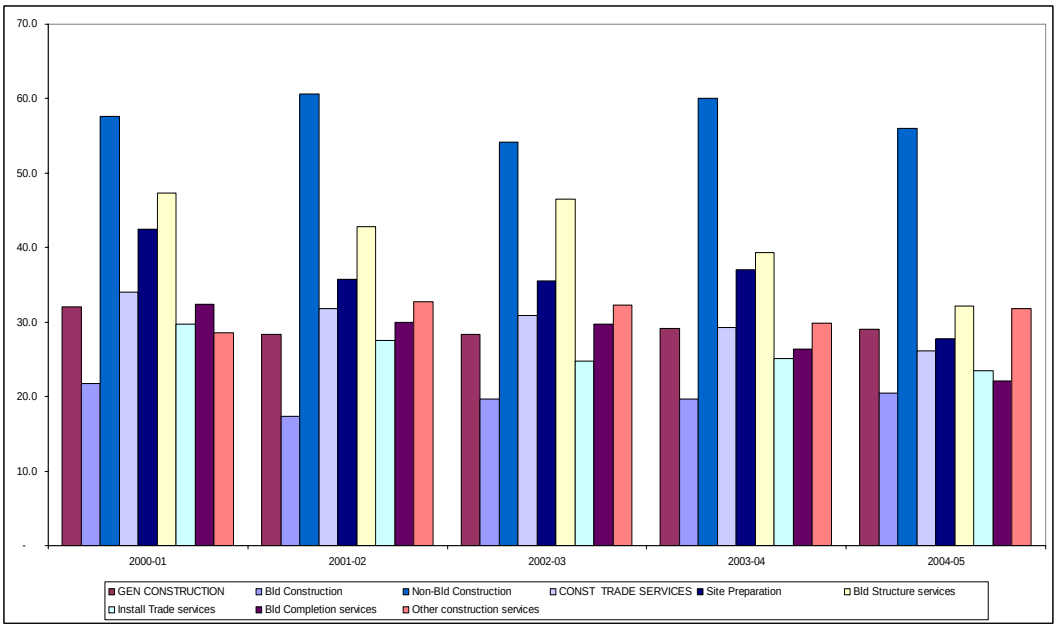
Figure 13: Incidence rate of serious claims per 1,000 employees for major subdivisions



Construction Trades Services tracks the rate for the whole industry, while the composite General Construction category is lower than the whole industry rate.

In Figure 14 the rates are broken down into more detail, with all the groups within Construction Trade Services also shown. Again, the most recent data is from 2004-05.[10]

Figure 14: Incidence rate of serious claims per 1,000 employees x industry subdivision



9 Australian Safety and Compensation Council, *Compendium of Workers Compensation Statistics 2005-06*, June 2008.

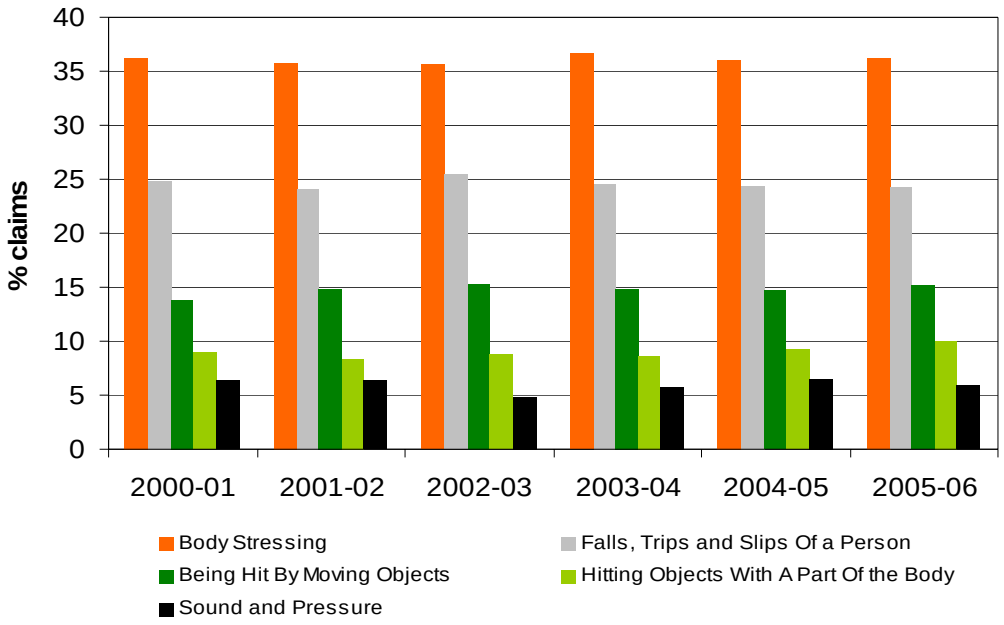
10 ibid

Building Structure Services (e.g. concreting, bricklaying) has the highest rate in the trade services subdivision, while non-building construction has the consistently highest incidence rate.

Injury Profile Has Not Changed Significantly

Although there is evidence of reductions in the number and rate of claims, the profile of injury has not changed significantly. The most recent data shown in Figure 15 illustrate how rigid the profile is, with little change in the relative importance of the major mechanisms of injury revealed.

Figure 15: Percentage serious claims x mechanism of injury or disease



Other Factors: Size and Occupation

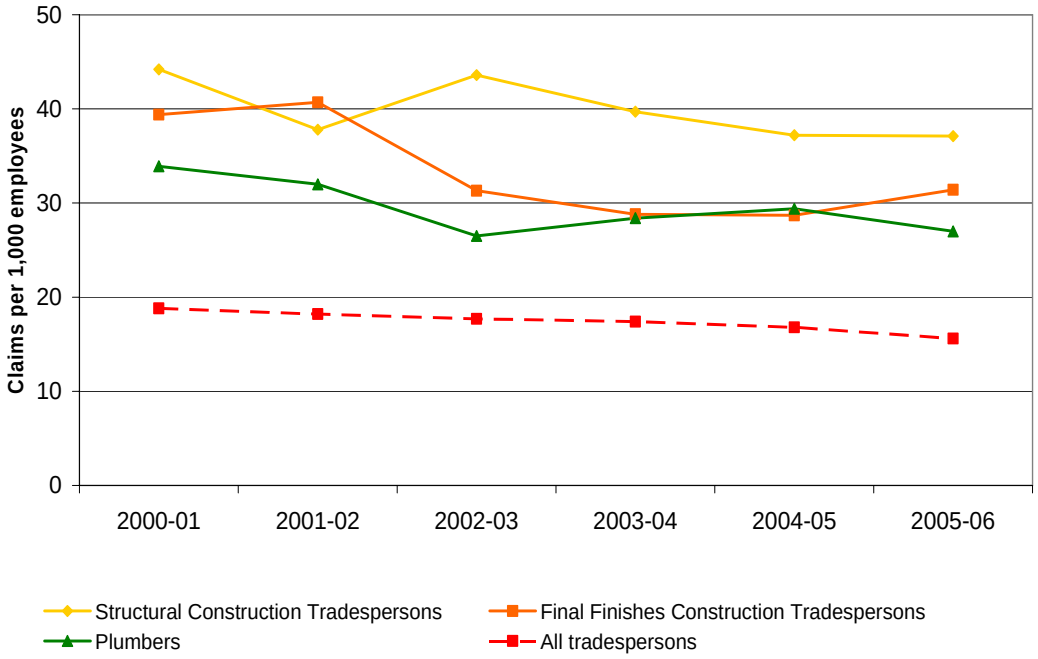
Not all jurisdictions collect data about the size of company, but in those that do the pattern is that the very small organisations have higher incidence rates than larger firms. This was confirmed in a recent study of safety management in the civil construction industry in Western Australia, which found that, as business size grows, the likelihood of receiving injury at work decreases.[11] This factor influences Master Builders' focus on the need for small business and owner/builders to be an important target group in efforts to promote better OH&S performance.

Reliable data about occupational experience in the building and construction industry are difficult to find, as statistical collections do not disaggregate the data into meaningful classifications. Using the limited data available, Figure 16 shows incidence rates for selected tradespersons in the construction industry.

11 Bahn, S, Size does matter: the influence of business size on incident rates, *Journal of Occupational Health and Safety,* Volume 24(4), August 2008, p.343.

The first point to note is that tradespersons in construction have much higher incidence rates than that for all tradespersons working in all industries. Secondly, structural construction tradespersons have the highest incidence rate, probably a consequence of their employment in the non-building construction sector. Rates for construction tradespersons have reduced by about 20 per cent since 2000-01.

Figure 16: Incidence rate of serious claims of selected tradespersons occupations in construction



Summary of the industry in 2008

To the extent that national level statistics can adequately describe the state of OH&S performance in the construction industry, the following points are clear.

In nearly all respects the construction industry has continued to improve performance:

- The incidence rate for serious claims per 1000 employees is down 23 per cent (2002-07).
- The incidence rate for compensated fatalities is down 46 per cent (2001-06).
- The incidence rate for compensated fatalities related to traumatic injury only is down by 33 per cent (2001-06).
- The raw number of compensated fatalities is down by 31 per cent (2001-06).

However, construction is still well behind the all industry rate:

- Claims incidence rates in construction are still over 50 per cent higher than the national average.

- Compensated fatality incidence rates are still twice the rate of the national average.
- Construction tradespersons have much higher incidence rates than tradespersons working in all other industries.

Some other features are also evident:

- The level of injury does not seem related to the level of construction activity, suggesting that risks are generated mainly by the operating practices of companies not the pressure of economic activity.
- The injury profile of the industry is dominated by manual handling and falls; there has been no change in this profile over the period.
- The non-building construction sector has the highest incidence rates compared with other categories in the construction industry.

Focus for the Future

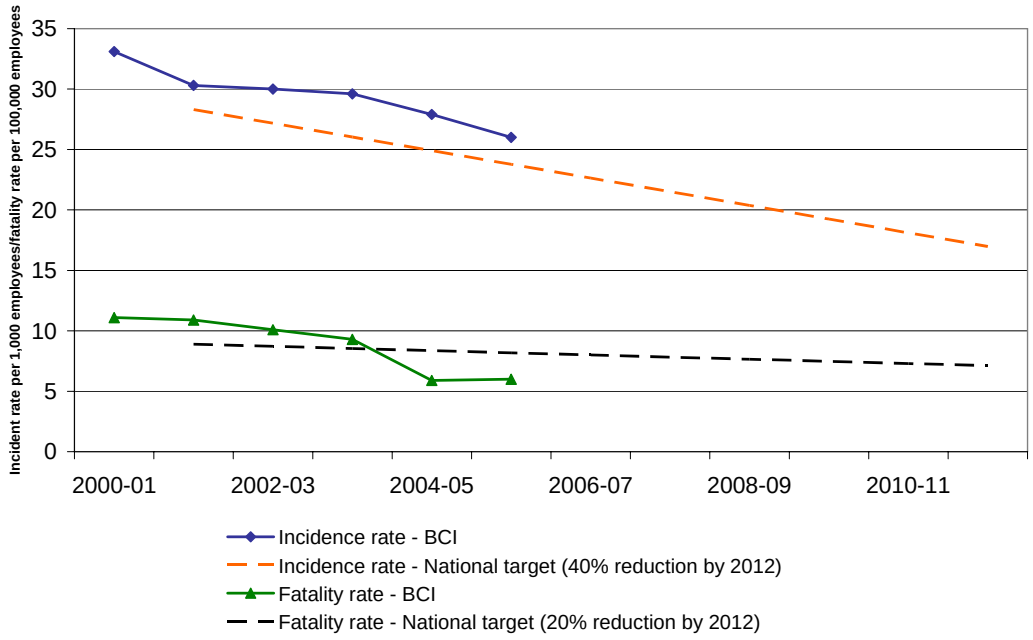
The focus for the building and construction industry is to maintain the current trend of reductions in injury and fatality incidence rates. The industry is committed to playing its part in achieving the goals of the National OH&S Strategy.[12] This commitment is reflected in the signing of the Leadership Charter at the Federal Safety Commissioner's CEO Forum in August 2008 by the CEOs of leading building companies. The Leadership Charter represents a public commitment to improving the health and safety of all those working on building and construction sites in Australia. Master Builders supports the National OH&S Strategy and has endorsed the Leadership Charter. Master Builders was motivated to make these commitments by its concern to reduce fatalities and serious injuries in the industry and to become part of the improvement process. The National OH&S Strategy is centred on the achievement of the following targets:

- Sustain a significant, continual reduction in the incidence of work-related fatalities, with a reduction of at least 20 per cent by 30 June 2012 (and with a reduction of 10 per cent being achieved by 30 June 2007).
- Reduce the incidence of workplace injury by at least 40 per cent by 30 June 2012 (with a reduction of 20 per cent being achieved by 30 June 2007).

Figure 17 below shows the improvement trend required by the building and construction industry to achieve these national targets.

12 National OH&S Strategy 2002-2012, National OH&S Commission, Commonwealth of Australia, 2002.

Figure 17: Construction industry OH&S outcomes vs national OH&S strategy targets



Never losing sight of the fact that one death is one death too many, the statistics should be analysed. Translating the statistical trends into raw data with 35 to 40 fatalities a year in recent years, the building industry would need to reduce fatalities to around 32 per year by 2012 to achieve a 20 per cent reduction. The industry is currently below the trend line, and if this rate of progress can be sustained the target can be met. With claim numbers at 10,000-11,000 per year currently, a 30 per cent reduction would be needed to reduce this number to about 7,500 by 2012. With the employment growth outlined earlier, the target might be better expressed as about 8,000 claims.

The National OH&S Strategy is to be achieved by a number of strategic priorities. They are:

- reduce high incidence/severity risks;
- develop the capacity of business operators and workers to manage OH&S effectively;
- prevent occupational disease more effectively;
- eliminate hazards at the design stage;
- strengthen the capacity of government to influence OH&S outcomes.

The building and construction industry has a key role to play in each of these priorities but has particular impact in the areas of management of high risk, capacity development and safe design.

The necessity for more timely data is obvious when it is noted that the National OH&S Strategy targets for 2007 cannot yet be properly assessed. Compensated fatality data lag behind industry performance to an unacceptable degree.

Recommendation 1:
To achieve the national targets and contribute to priority strategies, the building and construction industry will be assisted by more relevant and timely data and evidence about the trends in the industry.

The state of play regarding data and evidence is examined in the NOHSC report Data on OH&S in Australia.[13] The report uses a three-part model to consider the adequacy of data sources.

- The "Prevailing Conditions" encompass what are also called drivers of OH&S and include such things as OH&S education, training and legislation.
- The "Relationships" area considers how such Prevailing Conditions might be linked to or associated with OH&S outcomes.
- The "Outcomes" are the health-related consequences of work activity, with injury and disease the most commonly described.

The NOHSC review of OH&S data confirms that "Outcomes" is the field in which there is most data available; despite the limitations of claims-based data this will remain the best current source of traditional outcome measures.

The assessment of the data sources for each of the categories is essentially that there is much outcome data (although with various consistency problems) and little or no national-level data on prevailing conditions or relationships. Consequently, it is difficult to separate out the intrinsic level of risk in the building and construction industry and the quality of the management of risk from current data sources. Performance measurement continues to be dominated by "lag" or negative measures.

The NOHSC report on OH&S Performance in the Construction Industry[14] highlighted the importance of positive performance indicators (PPIs). These focus on assessing how successfully a workplace or enterprise is performing by monitoring the processes which should produce good OH&S outcomes.

PPIs can be used to measure relevant OH&S systems, process management and compliance with OH&S practices in the workplace.

The report goes on to construct a range of performance indicators by identifying the factors that influence performance. Following input from case studies and further elaboration of the model, the report identified 22 positive performance indicators that covered planning and design, risk management, management processes, psycho-social working environment and monitoring.

13 National Occupational Health and Safety Commission, *Data on OH&S in Australia: An Overview*, (2000), Sydney.

14 National Occupational Health and Safety Commission, *OH&S Performance Measures in the Construction Industry*, (1999), Sydney.

PPIs should be adopted by building and construction industry participants that implement OH&S management systems, either as a result of the Federal Safety Commissioner Accreditation Scheme or for other reasons.

Master Builders will continue to strive to meet or exceed national targets, and it will be assisted by performance measures that track management of risk, application of known and effective risk controls and the increased capability of all industry players to meet their responsibilities.

Recommendation 2:
Where companies adopt an OH&S management system, positive performance indicators should be utilised as a means to implement the process of continuous improvement.

Outcome 4

Outcome 4: **Increased awareness, communication and co-operation on occupational health and safety amongst employers, employees and all persons in the procurement and building process**

(A) Safety as a Corporate Aim

Policy Direction

There is a powerful business case for safer workplaces and, over time, achieving a significant and sustained reduction in workplace fatalities, injuries and disease consistent with the National OH&S Strategy outlined in the discussion of Outcomes 1-3. OH&S management and training should be viewed in the same business context as production, efficiency and cost control because they have a similar impact on the "bottom line".

To the extent practical, publicly listed companies and large employers should establish arrangements whereby executive management and those responsible for corporate governance and legal compliance – including boards of directors – are committed to the priority that is necessary to achieve workplace safety. They must demonstrate leadership on this issue. Directors and senior executives should lead by example and ensure that the size of their business and layers of decision making do not diminish accountability or the capacity of staff to provide leadership on workplace safety.

Policies should be seen and understood as a means to an end, not an end in themselves. Owners, executives and directors have OH&S responsibilities in the workplace that extend beyond the existence of safety policies or procedures. Active management of OH&S must occur; it is not a passive process. Employees as well as managers must be involved in ensuring that OH&S outcomes are achieved.

Small and medium sized employers are well placed to use the close personal relationships developed in their businesses between owners, managers and employees for regular and two-way communication on risk and hazard identification. At the same time, small and medium sized employers should ensure that the informality of their workplace relations is not a substitute for specific attention to workplace safety issues.

What Needs to be Done?

There has been a strong impetus for the adoption of OH&S management systems in the building and construction industry. Much of this impetus has come from Government measures to require their introduction as part of State and Territory schemes for pre-qualification in respect of procurement, or through the Federal Safety Commissioner's Accreditation Scheme.

The building and construction industry is diverse, with employment in businesses ranging from a few people in family-owned firms to hundreds of people in major firms that perform work domestically and internationally. However, nearly all firms are small businesses (404,352 non-employing firms or firms employing between 1 and 19 people). There are some medium sized firms (2,709 firms employing between 20 and 199 people) and a small number of large firms (127 firms employing 200 or more people).[15] The construction industry is project-based and exhibits highly volatile characteristics that have a profound affect on its structure and the way it operates. Intense price competition and low profit margins keep fixed overheads low and have spawned the growth of the subcontracting system.

Formalised OH&S Management Systems can be integral to the successful application of OH&S, where they are part of a holistic approach to managing risks rather than an end in themselves. However, OH&S Management Systems are generally difficult for small business to apply. Master Builders therefore does not support a regulatory approach based upon duties underpinned by adherence to an OH&S Management System. Non-regulatory strategies to promote the systematic management of OH&S in the building and construction industry are preferred. Master Builders accordingly supports initiatives such as the OSHE subcontractor pack and case studies developed by the Federal Safety Commissioner, which focus on practical examples of how small businesses have successfully implemented OH&S management. These are distinct from formalised OH&S management systems.

Where OH&S safety management systems are developed by employers they should incorporate the following elements:

- the establishment of a health and safety policy that defines the OH&S roles and responsibilities of workplace parties and sets workplace safety as a high level corporate aim with a view to achieving defined outcomes, preferably via PPIs;

[15] ABS Catalogue No 8155, November 2007, Table 2.1, page 22

- consideration of the elements of safe design and of work environments, plant and equipment;
- a joint approach that involves employees at the workplace;
- the provision of appropriate information and training;
- risk minimisation, including the identification, assessment and control of hazards;
- the development of safe work methods; and
- ongoing monitoring, evaluation and review of outcomes, including lessons to be learned from incident investigation.

Businesses could also consider incorporating aspects of the goals, strategies, priorities or targets of this Blueprint and the National OH&S Strategy discussed under Outcome 1 in their corporate and management planning.

The method of implementing what needs to be done must take into account the differing sizes, cultures and capacities of businesses, recognising, however, that all businesses have fundamental responsibilities that cannot be ignored.

The OH&S management system should be developed as a tool to assist in improvement of OH&S outcomes rather than to merely record information that may or may not have a bearing on improved safety outcomes.

The culture required at all levels is to move from a punitive focus (punishing those responsible for the incident), to a learned and correction focus (fixing the problems created by the incident) and ultimately to a prevention focus (instigating systems that prevent the incident in the first place). This prevention focus should be everyone's responsibility – outcomes are what count. One of the keys to achieving a prevention focus is communication with workers, including the identification of potential incidents or near misses.

Opting out should be permitted where an employer wishes to implement OH&S standards that are equivalent to or higher than the legislated minimum. As the Productivity Commission noted:

> *Employers who choose neither to conform to an industry-based code of practice nor to develop an enterprise safety management system would still be subject to all the provisions of the OH&S legislation. These include the duty of care and the other obligations in the principal OH&S Act, as well as the full range of requirements in the subordinate legislation — exposure limits, process and technical requirements.*[16]

[16] Supra n 14 at p50

Accordingly, there should be a clear articulation of what comprises an enterprise safety management system: for the building and construction industry this could be, an accredited OH&S management system.

B) Training and Education

Policy Direction

Training and education initiatives play a vital role in ensuring that everyone in the workplace is equipped with the necessary OH&S knowledge and skills. The attitudes and behaviour of workplace parties will be influenced by information and training that are directly relevant to them and deal with the environment in which they operate. Information and training programs should therefore be tailored to the needs of the industry or the enterprise. They can help drive cultural change.

What Needs to be Done?

The Australian Quality Training Framework provides the formal basis for developing and implementing national training packages that are delivered on a nationally consistent basis across Australia. It is important that all packages, commencing with those that are used in school/industry-based programs, in apprentice training and in tertiary training have competencies covering all aspects of OH&S.

It is necessary that these competencies are embedded in the curriculum for all subject areas and that they are taught in the context of the subject matter, and not as a separate competency. For example, if the competency is use of power tools, then the safety issues surrounding the use of the tools should be explained and learnt as the trainee uses the tools rather than theoretically or in isolation from the practical issue. It is also important that OH&S competencies are gradually built up in the curriculum, from basic levels of principle through to advanced construction activities that require higher order tasks and application of OH&S principles and practices. Training packages must be specific in their coverage of OH&S and avoid use of generalities, such as references to “appropriate safe work practices”.

It is also essential that the principles of OH&S are not seen as stand-alone issues, but are mapped into existing competencies for all training packages, induction programs and individual corporate or project information packs. The Construction and Property Services Industry Skills Council (CPSISC)[17] includes these competencies and principles into new training packages as well as in existing packages. During the approval process for packages, it is required that State/Territory Governments endorse the detail contained in each of the packages and then ensure that the curriculum is implemented in their jurisdiction in a nationally consistent manner. Mechanisms to deliver this consistency are currently inadequate. This is demonstrated by the failure to achieve nationally consistent OH&S induction training despite the National Code of Practice for Induction for Construction Work being declared by the Australian Safety and Compensation Council in May 2007. Its

17 http://www.cpsisc.com.au/Home/

implementation has been hampered by different training regimes in different jurisdictions and different approaches to the assessment of competencies.

The State and Territory training authorities conduct their supervision of this process in a partisan manner. The funding of the OH&S component of vocational education and training should be tied to an audit of appropriately consistent presentation of the training.

Recommendation 3:
Commonwealth funding of the OH&S component of vocational education should be tied to the requirement that OH&S training as part of endorsed training packages is consistently taught Australia wide.

Master Builders considers that the training regime, through the CPSISC, should be the driver to ensure that the principles of OH&S are embedded in training at all levels and that OH&S authorities should not create an additional regime. The OH&S training regime should be the responsibility of those with competence in training, not left to the OH&S authorities to licence or maintain.

Learning on the job also means that builders should provide OH&S training for their employees so that their system of work is safe for particular tasks. Self-employed and specialist contractors should ensure that they regularly refresh their OH&S knowledge. Master Builders promotes a suite of training in OH&S and encourages lifelong learning and at least annual upgrading of skills in this essential discipline.

Recommendation 4:
OH&S training should be vested in the agencies responsible for vocational education and training.

C) Small Business and OH&S

Actively engaging with small to medium sized business (SMEs) on OH&S issues has been and continues to be a major challenge for governments and regulators. They rely heavily on employer and industry associations like Master Builders for this purpose.

Meeting that challenge is a priority in the National OH&S Strategy. Small business must be recognised as having a different range of needs from that of other OH&S stakeholders.

While businesses with significant OH&S skills and resources need to be allowed to apply appropriate common systems across the nation, the OH&S system must also be sympathetically crafted to the special needs of businesses with lower level skills or resources.

To achieve improved OH&S performance in the SME sector, it is necessary to develop initiatives that provide:

- meaningful guidance materials;
- a reduced level of regulation, with national consistency;
- improved quality of regulation with provisions that can be properly understood;
- targeted workplace assistance; and
- face-to-face advice.

Small business is the growth sector of the Australian economy, yet is the sector with the fewest capacities and resources to manage OH&S regulatory obligations or to invest heavily in new plant or equipment.

Regulation must adequately recognise the differing capacities of various employers, especially small and medium businesses. Given the growth of small business in Australia, examination should be made of OH&S regulatory frameworks that are more responsive to business realities in this sector. Master Builders supports the development of practical tools such as the OSHE SubbyPack[18] as an appropriate mechanism to assist small businesses to meet their OH&S duties

Recommendation 5:
Authorities such as the Federal Safety Commissioner should monitor and regularly update appropriate guidance material for small business.

Outcome 5

Outcome 5: **Reasonable, balanced and practical occupational health and safety regulation that contributes to Australia having world class OH&S systems and performance, based upon national uniform standards**

The Role of Regulators

Just as workplace safety matters, so does the quality of workplace regulation and its framework. Poor regulation or bureaucratic frameworks set by governments, parliaments or regulators can hinder, not help, the delivery of safe workplace outcomes.

Industry is seeking to improve the quality and structure of OH&S regulation, not the removal of sensible regulation in areas where it is needed. This is the fundamental principle that has underpinned the four submissions made by Master Builders to the review of OH&S legislation.[19] The capacity of industry to deliver on its commitment to safety relies in part on the practicality of installing and maintaining all the elements

18 The OH&SE SubbyPack is available from the OH&S authorities in NSW, WA and the ACT.

19 Master Builders' submissions to the review address the nature of offences for wrongful death; implementation of the national standard for construction work; right of entry for OH&S purposes and the model OH&S laws issues paper. Copies of the submission are available on the review web site www.nationalOH&Sreview.gov.au

of safe systems of work. Merely prescribing regulation without bearing this issue in mind will have adverse consequences for building industry participants, and may also raise construction costs, particularly the cost of housing.

To attempt to change a workplace culture by simply introducing more legislation, or to see regulation as a first or ideal response, is inconsistent with modern workplace management and good human resource practices. It may also have adverse consequences for housing affordability. With the extent and range of often inconsistent regulation currently in force, this is a major issue for the industry. This proposition does not mean that builders should be free of regulation or that small business should have the capacity to opt out of the OH&S regulatory environment.

However, the role of governments and regulators is to focus on what is reasonable, practical and achievable and to make the right interventions if and when they are needed. This means a framework that facilitates high level OH&S awareness and culture in workplaces, not the micro-management of OH&S in workplaces.

For the framework to be effective, it must be consistent with the realities of operating businesses in the modern economy and the mobile labour force characteristic of the building and construction industry. Poorly established frameworks detract from the achievement of safer workplaces through the objectives set out in this Blueprint.

Regulators also have an important role as information providers in conjunction with business and employer organisations. Regulators should not merely introduce and enforce the law but should actively pursue educational aims that guide industry participants, particularly small business operators and owner/builders, in how to comply with the law. As indicated earlier in this Blueprint, promotion of practical means to comply with the law should be a function required of all OH&S regulators.

The UK government undertook a major review of all regulatory bodies in 2005,[20] and the resulting report recommended the adoption of certain principles. These were enshrined in law in 2006 and require regulators to incorporate them in their processes. The principles are as follows:

- Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most.
- Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take.
- No inspection should take place without a reason.
- Businesses should not have to give unnecessary information, nor give the same piece of information twice.
- The few businesses that persistently break regulations should be identified quickly.

20 Reducing administrative burdens: effective inspection and enforcement, Philip Hampton, HM Treasury, March 2005.

- Regulators should provide authoritative, accessible advice easily and cheaply.
- Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.[21]

Master Builders believes these are sound principles on which to base the role of OH&S regulators.

Problems with OH&S Regulation

There are significant problems with regulatory design and administration of OH&S in Australia.

Over the past decade qualitative and quantitative research and surveys of Australian business have identified OH&S compliance as a critical issue for industry. While this is welcome, in that it reflects a heightened awareness of and commitment to OH&S outcomes, it also reveals that the compliance and red tape burdens arising from OH&S regulation are assuming a high order concern that needs to be tackled by governments and regulators.

Some current regulation and the way it is interpreted and implemented, although well intended, is counterproductive rather than being a formula for improved OH&S performance.

OH&S systems have generated a plethora of regulation across Australia over the past generation. The major problems identified by employers are:

Quantity: The quantity of regulation

- There are multiple sources of regulation on the same topics, including by each Australian government, each Australian parliament and multiple government departments, WorkCover authorities, OH&S regulators and in some cases, industrial tribunals.
- Alternatives to regulation or black letter law are not properly considered or assessed.

Quality: The quality of regulation

- The 'duty of care' is interpreted to impose extreme, absolute and, in some cases, impossible duties on employers and designers in meeting performance-based obligations – to foresee the unforeseeable, to know the unknowable and to control the uncontrollable.
- Regulation is expressed in complex and legalistic terms.
- Inadequate defences where conduct has been reasonable.

21 Implementing Hampton: from enforcement to compliance, HM Treasury, November 2006, p.2.

- Regulation fails to account for particular circumstances of small and medium businesses.
- Regulation is developed without proper cost or economic impact assessments.
- Once made, regulation is not accompanied by effective communication to industry, especially about the new duties created.

Frequency of Change: The frequency of change to regulation

- Regulation, once introduced, is not properly reviewed.
- Additions and amendments to regulation are ad hoc and based on inadequate industry consultation.
- Employers cannot keep up with the volume of new regulation – for example in the five years to 2003 there were 166 amending instruments of OH&S regulation in Australia involving 1,796 changes to rights and obligations of employers and employees on workplace safety.
- It is in practice impossible for many businesses to keep pace with often obscure changes in scientific, technical, medical or attitudinal data affecting what they do and the way they work.

Red Tape: The compliance and red tape burden of regulation

- Regulation creates excessive compliance and red tape burdens, especially form filling, written reporting and data collection.
- Red tape focuses on compliance, not outcomes.
- This is increasingly a high order issue in business surveys, research and census data.
- Businesses carry an excessive burden of compliance with ever changing laws and keeping abreast of those changes.

The impact of regulation

At the heart of each of the problems above is the effectiveness and efficiency of OH&S regulation. Evaluation of the effectiveness of regulations in meeting their objectives is rarely undertaken. Consequently the potential for changes to the style and content of regulations, and more importantly the measures required to implement changes and inform duty holders of the ways in which they can meet their obligations, are not fully accounted for.

The Office of the Federal Safety Commissioner recently commissioned a Cochrane Review on the effectiveness of interventions in the building and construction industry.[22] The review noted that:

[22] The Office of the Federal Safety Commissioner. Cochrane systematic review on the efficacy of interventions to prevent injuries in the construction industry, p.2.

> There is moderate evidence that regulation alone is not effective in preventing non-fatal and fatal injuries in the construction industry. There is limited evidence that a safety campaign and a drug-free workplace program are effective in reducing non-fatal injuries in the construction industry. Introducing regulation alone is not effective in reducing fatal and non-fatal injuries in the construction industry. Additional strategies are needed to increase the compliance of employers and workers to the safety measures as prescribed by regulation.[23]

The Cochrane review process filters out research that does not meet criteria such as evidence that the regulation was responsible for sustained change. The three regulatory studies selected covered trenching and falls; each had some influence on injury reduction but needed to be supported by other measures.

> Trying to influence the safety culture and the enforcement of the implementation of safety measures at worksites among management and construction workers appear to be important activities in these multifaceted interventions.[24]

The focus in regulatory review is on the costs and benefits of any proposed regulation. This should continue, but a much more searching examination of the effectiveness of regulations should be conducted to better understand what is required in regulation and what is best achieved by other mechanisms, such as information, advisory services and training.

Recommendation 6:
The case for regulation should not only consider costs and benefits but also evidence about the impact of the proposed regulation in achieving reductions in risk (whether new or being remade) and evidence about how the most effective outcomes can be achieved.

No National Consistency: The lack of national consistency in core regulation

As indicated earlier, Master Builders is in favour of uniform national laws and regulations for the building and construction industry. Master Builders supports the review of OH&S laws and believes that this is an opportunity for better, rather than more, OH&S regulation. Better, rather than greater, regulation will assist to improve OH&S performance in the sector.

23 Ibid, p.12.

24 Ibid, p.16.

The case for regulatory benchmarking

In the process of moving to nationally consistent standards the role of regulatory benchmarking is important. Master Builders notes the use of this technique by the Australian Safety and Compensation Council (ASCC) in preparing impact statements. The value of this method is to identify not only the differences across jurisdictions against a particular standard, but also the opportunities to improve and streamline regulation.

Benchmarking of falls from height requirements has identified clear differences in approach. The differences include:

- five different height thresholds and several jurisdictions with no height thresholds;
- height thresholds that only apply to certain types of construction;
- different actions required when a height threshold is met;
- adoption of the national standard height threshold but conflicting regulatory and code provisions;
- limited guidance on standard risk control measures.

Another example is the different ways of dealing with tilt-up construction methods. This is a technical subject matter that has been long covered by an Australian Standard, but jurisdictions have produced their own codes that incorporate OH&S issues in ways that Australian Standards typically do not.

The result is a number of codes that cover similar areas but selectively use technical details drawn from the Australian Standard. One jurisdiction has an approved code and regulatory provisions that call up the Australian Standard. This is in contrast with four other jurisdictions that have no specific legislative reference to tilt-up construction.

As noted, the ASCC conducts regulatory benchmarking, but this is a matter to which individual jurisdictions should also give consideration. Changes to regulations in one jurisdiction should also consider the interface with adjacent jurisdictions. This is not just a matter of knowing what differences might exist, but of taking action to minimise and harmonise those differences. This is especially important for regulation outside the priority standards given attention by ASCC.

Recommendation 7:
Regulatory review should take into account the impact of regulation on organisations that operate across adjacent jurisdictions and there should be a cross border “no disadvantage test” that the initiating jurisdiction should satisfy.

Why inconsistency is significant to the building and construction industry

Inconsistency is significant in the construction industry because of the number of companies that operate across state borders. The Productivity Commission report estimated the number of businesses operating across jurisdictions at 1 per cent of all businesses but representing about 30 per cent of all employees. Businesses employing more than 200 employees accounted for 99 per cent of all businesses operating across jurisdictions.

The Australian Business Register[25] shows the operating locations of multi-state businesses. For example, in Victoria there are 4121 multi-state businesses and those businesses have 3096 locations in NSW and 1744 locations in Queensland. These figures are not disaggregated by industry, but if the proportion of construction companies in each State is applied to these multi-state businesses, then in Victoria there would be:

- an estimated 412 Victorian construction companies operating in NSW;
- an estimated 232 Victorian construction companies operating in Queensland.

While the Productivity Commission states that medium to large companies dominate the employment share, smaller employers are still affected; this can be estimated by noting the number of companies on the Australian Business Register with a payroll of more than $1m. Applying this to the construction scenario as before, we find that only 31 per cent of Victorian companies operating in NSW and Queensland are larger companies. Consequently, national inconsistency is a price paid by all, but disproportionately by smaller construction companies.

Despite this, there is a groundswell of opinion amongst Master Builders' smaller members in particular that the price of uniformity should not mean an increase in the regulatory burden or in greater levels of regulation. For those businesses that do not operate across State boundaries, there is very little benefit from uniformity, especially where there is a perception that uniformity will bring additional and unwarranted regulation. There should not be the adoption of what is termed the "highest common denominator" when moving to uniformity; volume of regulation or the most stringent regulatory environment does not necessarily lead to the required shift in culture to improve OH&S performance or provide better OH&S outcomes. The price of addressing the issue of fragmentation should not be a red tape burden that increases administration.

25 Productivity Commission, National Worker's Compensation and Occupational Health and Safety Frameworks, Report number 27, 2004.

No National Consistency: Other sources of inconsistency and additional cost

While it is critical that the core regulations (typically called national standards) provide a basis for consistency there are other concerns about the regulatory framework. These include:

- different formulation and types of duties in primary legislation;
- additional hazard regulations;
- different and inconsistent administrative regulations;
- different and inconsistent welfare regulations;
- different and additional codes of practice.

Master Builders had hoped that these differences would be reduced by the adoption of the National Standard for Construction Work (the National Standard). Despite the importance of reducing workplace death and injury in the building and construction industry, and the consultative manner in which the National Standard was developed, to date it has been adopted by only some of the States and Territories. Queensland, Victoria, Western Australia, the Northern Territory and the ACT have adopted the National Standard in full or in part. It has not yet been explicitly adopted in South Australia, NSW or Tasmania. Moreover, inconsistent definitions of terms as fundamental as "Construction Work" have meant that the goal of achieving consistency across jurisdictions has not been achieved.

Given these difficulties with implementation, Master Builders does not believe that the National Standard represents an appropriate vehicle for reform and no longer supports it. Instead, Master Builders supports hazard based standards as a more appropriate approach.

Recommendation 8:
There should be nationally consistent *hazard based* standards instead of industry based OH&S standards to reduce compliance costs and increase certainty about what is required of construction companies, no matter where they undertake projects.

The national consistency program does not reach down to the variety of additional hazard regulations found in many jurisdictions, the conflicting standards for basic aspects such as first aid, reporting and recording differences, permissioning regime differences and the plethora of approved codes of practice.

A Victorian construction company operating in NSW, in addition to any differences in primary legislation, may have to be aware of another 6 hazard regulations, another 6 codes of practice and up to 10 different administrative and welfare regulations (e.g. first aid, amenities, demolition permit etc.).

Administrative regulations such as permits and licensing arrangement create a regulatory burden when adjustments have to be made for the same operation conducted across different jurisdictions.

It is ironic that consistency in more complex hazard based regulations is much greater than the less safety critical and more straightforward welfare and administrative parts of OH&S law.

First Aid regulation in NSW is detailed and prescriptive, while in Victoria First Aid depends on a general duty and non-statutory guidance. This represents the extremes in regulating a matter under OH&S law, yet the subject matter is not particularly complex.

Master Builders supports recent work done by several jurisdictions to set out some common standards that will be recognised in NSW, Victoria and Queensland.[26] So far guidance has been produced on site security, amenities and supervision.

In each case the publication states that guidance is consistent with the law in each jurisdiction. These guides are still pitched at a general level and there is devil in the detail. For example, the guide sets out matters to consider in deciding on access to toilets, yet both NSW and Queensland have prescriptive requirements in codes for certain ratios of workers to toilets to be met.

Master Builders has vigorously pursued the need for better and more consistent data about hazards and injuries. Standardising workers compensation data is one pathway, yet the data collected by regulators through injury and incident reporting and recording requirements is neither consistent nor publicly available.

The test for data collection is whether it permits decisions to be made to improve health and safety and prevent reoccurrences of safety failures. The current reporting requirements do not meet this test except at the extremes (i.e. death and traumatic injury), meaning that much of this data collection can be considered burdensome and unhelpful to the case for better national data.

These are just examples of the inconsistencies found in the lower level administrative and welfare based regulatory that seem not to have attracted much attention in the national consistency debate yet are tangible contributors to a growing regulatory burden.

Recommendation 9:
The significant body of administrative and welfare regulation should be subject to a national consistency review and a national approach should be taken to key matters such as reporting and recording of incidents and injury.

[26] For example, OH&S Guidance for house builders amenities on housing sites, Working Across Borders, NSW WorkCover, 2007.

In 2006 there were 138 approved codes listed in the Workplace Relations Ministers' Council report, *Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand*.[27] Adding the 42 NSW codes not listed gives approximately 180 approved codes.[28] There is some double counting as a result of the adoption of national codes but still this is a significant body of information about hazards.

While each approved code is prepared to give guidance on duties in the specific jurisdiction's legislation, most of the solutions have application in other jurisdictions. Given the performance basis of much OH&S legislation, the availability of solutions that duty holders can adopt with confidence and certainty is very important. It is at this level of guidance that "what compliance looks like" is most commonly articulated.

An avenue for improving the ability of companies to meet their obligations across borders is through more constructive use of these approved codes of practice issued by regulators across Australia.

Consequently, the quest for national consistency should also be encouraged at the level at which workplaces implement risk controls. Given the immensity of the task of rationalising and harmonising all the respective jurisdiction codes, it would make sense to use mechanisms that allow good solutions to travel across state borders.

One mechanism would be the use of deemed to comply agreements by which participating jurisdictions mutually recognise risk control solutions in approved codes of practice as deemed to comply solutions for a relevant Act or regulation duty. This would increase the coverage and depth of acceptable risk control solutions available to employers.

Recommendation 10:

The current range of approved codes of practice should be considered as a national database of risk control solutions and should be able to be adopted in any jurisdiction to the extent they address a relevant duty. Deemed to comply provisions mirrored across legislation would be one means of achieving this goal; this option should be examined by the successor to the Australian Safety and Compensation Council in the context of harmonised laws.

27 With the introduction of the OH&S Act 2004 in Victoria the status of all existing approved codes lapsed. They are expected to be gradually replaced by compliance codes.

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No National Consistency: Inconsistent enforcement models and practices

OH&S regulators not only administer different legislation, but even when it is similar there is no benchmark for how the law is to be applied or which instruments are to be used to enforce compliance.

Most Australian OH&S jurisdictions have inadequate data collection methods for field activity, making comparisons of enforcement approaches difficult. Recent CPM reports have included enforcement data and this can be used to develop a profile of enforcement across selected jurisdictions.

The most recent CPM report has 2006-07[29] data that we can use to consider differences in enforcement. It lists the number of inspectors to 10,000 employees as one dimension of comparison. Since there are no big differences between jurisdictions on this measure it may be more relevant to look at inspector to business ratios. The table below uses the CPM data with Australian Business Register data for employing businesses.[30]

	Vic	NSW	Qld	WA	SA
Inspectors per 1000 businesses	1.1	1.1	1.6	1.3	1.6
Interventions per 1000 businesses	209	na	177	126	364
Prohibition notices per 1000 businesses	7.5	4.0	16.6	8.0	13.3
Improvement notices per 1000 businesses	58.8	46.7	100.7	130.1	59.4
Prosecutions per 1000 businesses	0.1	1.0	0.7	0.3	1.0
Average Fine per prosecution ($)	$49,028	$36,953	$28,950	$15,758	$23,196

The differences across jurisdictions can be interpreted in a number of ways, but the key point is the differing patterns of intervention and enforcement strategy that are evident across the country. A construction employer operating in several jurisdictions would experience quite different approaches to enforcement in each one.

In the special 2004 CPM report on construction,[31] an analysis of enforcement patterns showed that all jurisdictions placed resources and enforcement activity into the construction industry that were disproportionately high in relation to its share of injury claims. If this effort is based on the higher risk profile of the industry the lack of consistency in regulation and enforcement becomes even more problematic for the industry.

29 Comparative Performance Monitoring, 10th report, Australian and New Zealand Occupational Health and Safety and Workers' Compensation Schemes, Workplace Relations Ministers' Council, Commonwealth of Australia, 2008.

30 ABS catalogue No. 1369.0.55.001, Australian Business Register, June 2001.

31 Comparative Performance Monitoring, Case Study on Performance Outcomes in the Building and Construction Industry, Bryan Bottomley and Associates, Workplace Relations Ministers' Council, Commonwealth of Australia, 2004.

Master Builders recognises that some steps have been taken to achieve more consistency in national hazard campaigns but that, while steps are being to taken to close the legislative inconsistency gap, equal effort has to go into achieving a national perspective on compliance and enforcement.

One area in which there needs to be a national perspective on compliance and enforcement is the application of OH&S laws to owner builders. Master Builders' experience is that even where it is clear that owner builders are duty holders under State and Territory OH&S legislation, regulators are reluctant to conduct compliance activities. There are significant numbers of owner builders around Australia. For example, in 2007-08, the New South Wales Office of Fair Trading issued nearly 11,000 owner/builder permits.[32] In Western Australia, around 11 per cent of building approvals are for owner builders. This represents a large number of individual workplaces.

Inconsistent compliance and enforcement activity in respect of owner builders is of concern because contractors may see operating in an owner/builder capacity as a mechanism to avoid OH&S obligations or reduce OH&S compliance costs. It also fails to encourage owner/builders to proactively address risks to the health and safety of workers.

Master Builders supports the consistent application of OH&S duties to all building and construction industry enterprises, including owner/builders. The model OH&S laws provide the opportunity for this consistency to be achieved.

Practical guidance material should be promoted to and be accessible to small business employers and owner/builders.

Recommendation 11:
Owner builders should have the same OH&S obligations as registered builders in every jurisdiction to ensure that OH&S standards are consistently applied across the industry.

Master Builders supports the adoption of a "tall" OH&S enforcement pyramid, with many levels. This would provide scope for a proper escalation of enforcement responses by regulators and provide regulators with flexibility to tailor their response to the facts. A "tall" OH&S enforcement pyramid[33] provides a framework to facilitate an agency's efforts to promote prevention. Even if the sanctions at the peak are criminal, prosecutions should be launched under the OH&S statutes so as to preserve the integrity of the system.

Master Builders believes that it is inappropriate to locate offences arising from a workplace death within the criminal law; the preferable approach is to locate this type of offence at the tip of the enforcement pyramid within OH&S law. Accordingly,

32 *Owner builder permits issued, 05-08*, Office of Fair Trading web site www.fairtrading.nsw.gov.au .
33 Drawing broadly on N Gunningham and R Johnstone, *Regulating Workplace Safety: System and Sanctions* (1999), p 184.

Master Builders rejects the industrial manslaughter provisions introduced in the ACT. The ACT is the only Australian jurisdiction to have enacted a specific offence of "industrial manslaughter". This offence applies in addition to both the provisions at the top of the enforcement pyramid in the *Occupational Health and Safety Act 1989* (ACT), and to the independent offence of manslaughter in s15 of the *Crimes Act 1900* (ACT). This duplication is one of the main reasons that other legislatures have rejected industrial manslaughter legislation.

In Master Builders' view, as part of the optimal approach for improving workplace safety, a reckless endangerment style of offence consistent with the Victorian model, should be combined with funding for education and advice for employers and improved assistance with compliance strategies provided separately from the agencies that enforce the legislation.

Recommendation 12:
Regulatory agencies should develop common strategies for dealing with construction risks including consistent enforcement protocols and profiles.

Safe Design

The incorporation of safe design principles in OH&S legislation requires robust evaluation if the objective of reducing risk at source is to be achieved.

Inclusion of designer duties in OH&S legislation has been based on extending the chain of responsibility to those with influence over risk at the conceptual and planning stage. The United Kingdom Construction, Design and Management Regulations (CDM) (2007) are the most advanced example of legislation on design and safety. In these regulations the supply chain includes duties for clients, and the focus is on the reducing risk during construction and, to a lesser extent, the future use of the structure.

In the amended CDM regulations of 2007 clients have the duty to take reasonable steps to ensure that managerial arrangements made by duty holders (including time and other resources) enable construction work to be carried out without risk to health or safety. Clients also have the duty to ensure that the arrangements are maintained and reviewed throughout the project. Clients must tell designers and contractors before the start of work on site how much time they have for planning and preparing construction work.

Elevating the obligations imposed upon designers without recognising the important influence that clients can have on OH&S outcomes will lead to a regime that is impracticable and which will distort the market, with little incentive for clients to pay for the additional cost of proactively addressing OH&S at each stage of the building lifecycle. This problem is exacerbated by the prevalence of clients' lowest price mentality when engaging planners and designers. In Master Builders' experience clients have unrealistic experience about time and cost constraints and are reluctant

to bear the risks of the design and construction phases of a project. Their aim is to transfer these risks to the contractor.

The importance of client influence on OH&S outcomes has been well documented in the UK Rethinking Construction agenda.[34] The role of the client has also been taken up in Australia by the Federal Safety Commissioner in encouraging model client practices from agencies that interact with the OH&S Accreditation Scheme.

The National Standard included a definition of a client as "any person who commissions design work for a structure". Duties included:

> A client must consult with the designer to ensure that any construction work in connection with the design can be undertaken without risk to the health and safety of any person undertaking the construction work.

No such duty holder exists in current Australian OH&S legislation.

In the Victorian guide on designer duties (under section 28 of the Victorian OH&S Act) there is recognition of the role of clients. The guide, using some extrapolation of section 21 duties, states that clients have duties.[35] This use of section 21 and section 26 duties is a less than transparent statement of the specific design duties of clients. Such extrapolation, for example, does not establish that clients have a duty to provide information to designers.

Imposition of client duties for domestic construction is problematic. Unlike commercial clients, domestic construction clients are generally members of the public with limited or no understanding of building techniques and OH&S principles. Imposing client duties in domestic construction would be unreasonably onerous and unlikely to improve OH&S outcomes, since domestic clients do not possess the requisite level of responsibility in relation to OH&S management on a housing site.

Recommendation 13:
A duty for clients in commercial construction should be included in jurisdiction based legislation.

One of the major barriers to achieving the objectives of legislative efforts to enshrine safe design is the lack of national purpose in the attempt to define designer duties. Most jurisdictions currently have some form of designer duty for "end use". That is, designers are expected to discharge duties in the light of the end use of the building or structure. Only Western Australia and South Australia has designer duties for "safe construction".

34 For example, Rethinking the Construction Client: Guidelines for construction clients in the public sector and others who receive public funding for construction, www.rethinkingconstruction.org, 2003.

35 WorkSafe Victoria, Designing Safer Buildings and Structures, 2005.

At this point there is no definitive evidence about which form of the designer duty is likely to have the greatest impact on reducing injury.

A study commissioned by the NOHSC examined the causes of death and injury in Australia arising from poor design in the period 1997-2002.[36] An injury was defined as a design-related case if:

- any aspect of the construction of equipment, plant, tools or structure involved in the incident made a meaningful contribution to the occurrence of the injury-causing incident and/or to the occurrence of fatal injury resulting from the incident; and
- it was realistic to expect that this factor could have been modified to avoid the incident or the subsequent fatal injury.

The study reported that seventy-seven (37 per cent) of the 210 identified workplace fatalities definitely or probably had design-related issues involved. In another 29 (14 per cent), the circumstances suggested that design issues were involved.[37] The study also found that design issues appeared to contribute to at least 30 per cent of serious injuries.

The study was restricted by the lack of detailed information about the potential contribution of the design of systems, processes and buildings to work-related injury. Consequently, the NOHSC study, while identifying design as a key factor, does not provide any reliable basis for extrapolating design-related factors to construction. It is not possible to distinguish construction stage design factors from end use design factors.

The Western Australian Code and comparable guidance released by the Federal Safety Commissioner imply that architects and designers ought to have knowledge of the concepts of safe construction. Designers are rarely involved during the construction phase of a project – their involvement frequently ends with the handing over of the building design. Given that in most instances architects or designers have little interaction with the builder it is difficult to envisage how the architect or designer could be expected to engage in consultation with the person who would ultimately be responsible for the demolition of the building. The theoretical approach to safe design outlined in the National Standard is therefore nonsensical

The designer duties outlined in the National Standard, and in the State Acts in which the National Standard has been applied (i.e. Western Australia and South Australia), overlap the duties of the builders, subcontractors and demolishers. It is these duty holders who ultimately have control over the budget and health and safety resources in the workplace and who are thus best placed to control the health and safety of their employees and others affected by their undertaking. The overlapping of responsibilities becomes even more convoluted given that each of the subsequent

36 *The role of design issues in work-related injuries in Australia 1997-2002*, NOHSC: July 2004.

37 Ibid, p.1.

duty holders is required to produce coordination plans and safe work method statements articulating how they will conduct their undertakings in a safe manner.

It is also these duty holders who are more likely to be prosecuted under the relevant State Acts in the event of a serious workplace accident. The concept of a designer being deemed liable for an accident stemming from the demolition of a building or structure, without any statute of limitation as to how long the obligation extends, is totally unreasonable. The potential for a designer to be prosecuted for an accident on a demolition site occurring, say, thirty years after the original designs were put together is preposterous.

Expanding designer duties beyond ensuring the safe design of the building for the purpose for which it is intended diverts responsibility from those who have the ability to exert direct influence and control over the hazards and risks at the time. Such duties are therefore likely to be unenforceable.

Recommendation 14:
The responsibility for safe construction, maintenance and repair should rest with those who have the direct ability to control and manage safety at the relevant time. The concepts of safe design as outlined in the National Standard for Construction Work should be promoted but not regulated.

Consideration of an "end use" designer duty should take into account the practical difficulties of translating this into meaningful and cost effective pathways for duty holders to follow.

It is interesting to compare the level of detail in the duties of designers of plant with those of designers of buildings and structures.

Designers of plant have detailed duties, including quite specific matters that they need to take into account. Duties of designers of buildings and structures are broad, largely undefined duties without any further specification in regulations.

In addition, there is little or no supporting guidance that goes beyond generic processes and restatement of the duty. Here lies the key issue in relation to the specification of design duties. Designers of plant (which are often high volume products) are given immeasurably more detail, whereas designers of buildings (which are usually unique designs) are given no specification.

It is instructive to note the experience in the UK. Duties were detailed in regulations and supported by guidance. The regulations run to over thirty pages, and there is a supporting code of practice, plus duty holder guides. The Designers guide alone is 50 pages. Thirteen years on, the Health and Safety Executive, while having evidence to

demonstrate the value of the regulations, was still looking for ways to clarify duties and, in particular, to reduce the bureaucracy associated with the regulations.[38]

To date, the Australian codification of design duties is lacking in detail about what duty holders must do. It is clear that such duties about end use are most meaningful when applied to specific building types and most difficult to apply to buildings with general or mixed use and lacking a clear body of evidence about hazards and injuries.

For example, health facilities such as nursing homes can call on evidence about design-related causes of injury (e.g. inadequate door widths, inadequate space between beds and ensuites, inadequate storage space for mechanical aids, lack of structural strength to accommodate ceiling mounted lifting devices) and known design controls for these problems.[39] These issues are increasingly incorporated into generic design briefs administered by the government as the client.

If there are common hazard issues that should be addressed in all buildings, this should be included in more detailed regulatory or guidance form. The current guidance provides process advice (e.g. risk management process) and some indications of the hazards to be considered, but not the structured detail found in both regulation and guidance on plant.[40]

Recommendation 15:
End use designer obligations should be supported by guidance materials which clearly set out how obligations can be met. The focus should be on specific building types in which the hazards are foreseeable and risk controls are reasonably practicable.

Federal Safety Commissioner

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.

The Federal Safety Commissioner was established in 2005 as a direct result of the recommendations of the Cole Royal Commission. Master Builders supported the creation of this role and continues to support the work of the Federal Safety Commissioner as an important component of improving occupational health and safety outcomes in the building and construction industry.

38 Construction (Design and Management) Regulations 2007 Baseline Study. Prepared by BOMEL Ltd for the Health and Safety Executive 2007.

39 See VHIA Design Advisory Service Report which sets out evidence about reducing injury through design in health and aged care facilities, found at www.worksafe.vic.gov.au

40 Guidance on the Principles of Safe Design for Work, Australian Safety and Compensation Council, 2006 and WorkSafe Victoria, Designing Safer Buildings and Structures, 2005.

The Royal Commissioner stated that what was needed above all else was cultural and behavioural change in the industry.[41] The primary measure introduced to achieve this objective is the Australian Government Building and Construction OH&S Accreditation Scheme (the Accreditation Scheme). This 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 $5million and at least 50 per cent of the total project value, or is $10 million or more.

Master Builders supports the work of the Federal Safety Commissioner and believes that the Accreditation Scheme has resulted in improvements in the OH&S performance of accredited companies. The Federal Safety Commissioner's 2006-07 progress report identified a reduction in the median Lost Time Injury Frequency Rate (LTIFR) of 41.52 per cent (from 11.97 to 7.00); and median Medical Treatment Injury Frequency Rate (MTIFR) of 31.82 per cent (from 28.78 to 19.62) between 2005-06 and 2006-07.[42]

One issue that has arisen in the implementation of the Accreditation Scheme is that there is a divergence between the desk-based and site implementation components of the assessment. The desk-based assessment considers the implementation of an OH&S management system certified to Australian Standard AS/NZS4801:2001 along with other Scheme criteria. However, there must be a demonstrated commitment to OH&S on site. Employers who have implemented OH&S management systems to the Australian Standard have therefore found that they have not necessarily done enough to meet the Accreditation Scheme requirements through the implementation of the OH&S management system. Master Builders would encourage the Federal Safety Commissioner to ensure that this disconnect is not exacerbated by any differences in auditing procedures and requirements by JAS-ANZ auditors and auditors appointed by the Federal Safety Commissioner.

It is particularly important to address this issue because increasing numbers of smaller companies are seeking accreditation in light of the reduced threshold which came into effect on 1 October 2007. Implementation of OH&S management systems certified to Australian Standard AS/NZS4801:2001 represents a substantial up-front cost to such companies. Master Builders is not seeking a watering down of the Accreditation Scheme, but considers that barriers to entry should be minimised to the maximum extent possible to ensure that smaller companies can participate in the scheme. In this respect, Master Builders believes that additional guidance should be provided by the Federal Safety Commissioner so that smaller companies, which have limited access to specialist OH&S knowledge and expertise, know what is expected of them when applying for accreditation. Such guidance should include information on areas where companies commonly require additional effort in order to meet the Accreditation Scheme requirements and regular, planned industry liaison seminars.

41 Royal Commission, Volume 6, page 35

42 Federal Safety Commissioner, *Federal Safety Commissioner's 2006-07 Progress Report,* December 2007, page 12

Recommendation 16:
The Federal Safety Commissioner should provide companies seeking accreditation with more detailed information on what is required for accreditation, based on lessons learnt from companies which have already achieved accreditation.

There are a number of other audit related issues with the Accreditation Scheme which affect the costs for accredited companies and the overall efficiency of the Scheme. These include significant delays in closing out areas of non-conformance raised in previous audits, particularly where a different auditor is involved.

For the cultural and behavioural change called for by the Royal Commissioner, OH&S needs to be viewed by the industry as integral to doing the job rather than as an added extra. Layers of bureaucracy which do nothing to enhance OH&S outcomes do not help. The Accreditation Scheme is separate from State and Territory pre-qualification schemes, meaning that contractors are required to jump through separate hoops to undertake work funded by different jurisdictions. This is unnecessary and unhelpful to the objective of improving occupational health and safety outcomes. The Accreditation Scheme exceeds the requirements under State and Territory pre-qualification regimes and should therefore be sufficient for a contractor to be qualified automatically under those regimes.

Recommendation 17:
Qualification under the Australian Government Building and Construction OH&S Accreditation Scheme should be recognised as sufficient for automatic pre-qualification under State and Territory accreditation schemes.

At the time that the Federal Safety Commissioner role was created, Master Builders called for integration of the work of the Federal Safety Commissioner with that of the National Occupational Health and Safety Commission (subsequently the Australian Safety and Compensation Council). Without this integration there is a risk of fragmentation in regulation of occupational health and safety for the industry. An example of this is the development of the guidance for occupational health and safety in government procurement. This document does not cover procurement of building and construction services. Integration could be achieved by requiring the successor to the ASCC to consult with the Federal Safety Commissioner on all work specific to building and construction undertaken by the successor to the ASCC.

Recommendation 18:
To ensure integrated regulation of occupational health and safety for the building and construction industry, the successor to the Australian Safety and Compensation Council should be required to formally consult with the Federal Safety Commissioner on all work specific to the building and construction industry.

The Royal Commissioner also placed strong emphasis on the principle of the Commonwealth acting as a model client as a necessary part of achieving improved

occupational health and safety standards in the building and construction industry. The Federal Safety Commissioner has produced guidance documents for Australian Government agencies to assist them to develop the knowledge and expertise to improve and integrate safety into construction projects. Given the important role that clients play in safe design, Master Builders believes that these documents are critical, but we are concerned that there is no requirement for Australian Government agencies to practise model client behaviour. Master Builders is concerned that existing tendering practices highlight gaps in the knowledge of the Accreditation Scheme and safe design, particularly on the part of client agencies. Making model client behaviour mandatory is a necessary step because, as the Royal Commissioner noted, the Australian Government must take the lead, not be persuaded into following procedures that it imposes on others.

In adopting model client behaviour, Australian Government agencies must ensure that OH&S costs are taken into account prior to and during the procurement process. Master Builders believes that this should be included as a specific requirement of the tender process.

Recommendation 19:
The Federal Safety Commissioner should be given the power to require Australian Government agencies to adopt OH&S standards during the design and construction of building and construction work.

Fitness for Work

Fitness for work means that an individual is in a state (physical, mental and emotional) that enables him or her to perform assigned tasks competently and in a manner that does not compromise or threaten the safety or health of themselves and others. Fitness for work can be affected by a variety of factors, including the adverse effects of medical conditions, fatigue, stress, alcohol and other drugs, and an individual's emotional state.

Alcohol and other drug abuse put a safe working environment at risk. Policies to address drug and alcohol abuse are therefore a key component of fitness for work policies developed by employers.

The available evidence indicates that alcohol is a prevalent problem in Australia. For example, the 2007 National Drug Strategy Household Survey indicates that between 1993 and 2007, for Australians aged 14 years or older the proportion that had recently used alcohol increased from 77.9 per cent to 82.9 per cent.

In March 2007 the Australian Safety and Compensation Council issued a paper *Work-Related Alcohol and Drug Use: A Fit for Work Issue.* The paper provided a summary of the key activities and developments in Australia and overseas on drug and alcohol use in the workplace from 1992 to 2006. Key messages from that document were that:

- the impairment that comes from both acute and chronic symptoms of alcohol and drug use could lead to occupational health and safety issues for both the workers who consumed these products and the people they work with; and
- the workplace is ideally situated to change attitudes and behaviour in regard to alcohol and other drug use.[43]

The ASCC study found that there was sparse evidence for linkages between the drug levels derived from samples and subsequent performance impairment. However, the National Drug Law Enforcement Research Fund study *The Impact of Drugs on road crashes, assaults and other trauma – a prospective trauma toxicology study* found that the incidence of positive tests for alcohol and other drugs in patients injured at industrial/construction sites was 24 per cent, and for those injured in trade/service areas was 55.7 per cent. The report pointed out that this was of concern from an occupational health and safety viewpoint. The findings from the National Drug Law Enforcement Research Fund study support anecdotal evidence that alcohol and other drugs are an issue in the building and construction industry.

There is substantial evidence that co-occurring depression/anxiety and alcohol or other drug misuse is highly prevalent. Research on the links between alcohol and other drug use and depression is therefore a priority research area for beyondblue.[44] Workers in the construction industry are 39 per cent more likely to die by suicide when compared with the Australian working age male population as a whole.[45] Action by building and construction industry employers to address alcohol and other drug abuse therefore has the potential to assist with this tragic issue.

There is currently no consistent approach in OH&S legislation to the use of alcohol and other drugs in the workplace. Only South Australia, Tasmania and Queensland mention drugs and/or alcohol as a specific issue, though it is implied in duty of care statements in other jurisdictions. Master Builders believes that a consistent policy and legislative approach is necessary to enable employers to properly discharge their obligations and manage their exposure to the risks that alcohol and drug use present.

Recommendation 20:
All governments should adopt a consistent legislative approach to the management of alcohol and other drugs in the workplace.

A legislative approach in itself is unlikely to be successful in addressing alcohol and other drug use which results in risks to the health and safety of employees. A review of published findings of studies of injury prevention initiatives in construction in the United States found that legislation alone is not effective in reducing fatal and non-

43 Australian Safety and Compensation Council, *Work-Related Alcohol and Drug Use: A Fit for Work Issue,* March 2007, page 2

44 beyondblue Research Book 2001-2007

45 Australian Institute for Suicide Research and Prevention, *Suicide in Queensland's Commercial Building and Construction Industry, 2006* quoted in the Queensland Workplace Health and Safety Strategy, Industry Action Plan 2008-2010,

fatal injuries in the construction industry. Rather, multifaceted and continuing interventions such as a targeted safety campaign or a drug-free workplace program seem to be effective for reducing injuries in the longer term. The review also noted that a safety culture and the enforcement of safety measures at worksites among management and construction workers appear to be important elements of such interventions.[46]

This is consistent with the ASCC study on work-related drug use which reported that there was evidence that good general management practices are the most effective method for achieving enhanced safety and productivity, and lower absenteeism and turnover rates.

Master Builders supports the development of workplace alcohol and other drugs policies by building and construction employers that aim at prevention, education, counselling and rehabilitation as part of an organisation's overall OH&S strategy. The focus of workplace alcohol and other drugs policies should be to reduce or eliminate the hazards associated with alcohol use in the workplace in a way that is consistent and fair to all employees.

Recommendation 21:
Building and construction industry employers should develop fitness for work policies, which incorporate a workplace alcohol and other drugs policy. Fitness for work policies should aim at prevention, education, counselling and rehabilitation as part of an organisation's overall occupational health and safety strategy.

Drug testing

Drug testing is a contentious area, not least because except for alcohol testing, a positive drug test is not directly related to impairment, nor does it currently provide a reliable indicator of impairment. Current testing techniques do not disclose the quantity of drug consumed, exactly when it was consumed or the level of impairment resulting from the drug consumption.

Master Builders does not therefore support the mandating of testing regimes, or the mandating of one particular testing regime over another. Master Builders believes that implementation of a testing regime is a matter for individual workplaces to decide where a risk assessment identifies testing as necessary to manage health and safety risks in the workplace and where it might be considered reasonable in the circumstances.

Testing regimes need to be very carefully designed and implemented, especially where disciplinary action, potentially resulting in dismissal, is a possible consequence of failure to comply with the employer's requirements. Recent court cases have highlighted the need for thorough consultation on the development of the testing

[46] Lehtola, M et al, *The Effectiveness of Interventions for Preventing Injuries in the Construction Industry: A Systematic Review,* 2008 American Journal of Preventive Medicine, p83

policy, for proper training in the policy, including keeping a record of the training provided, and consistent application of the policy.[47]

Master Builders supports employers' right to choose any testing mechanism that manages their exposure to risk. The testing methodology implemented should comply with the relevant Australia Standards.

Recommendation 22:
Testing regimes for alcohol and other drugs should not be mandated but should be a matter for workplaces to decide and undertake if a risk assessment identifies testing as necessary to manage health and safety risks in a workplace.

Right of Entry for OH&S purposes

The Cole Royal Commission into the building and construction industry was the first national review of conduct and practices in the building and construction industry in Australia.[48] 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 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,[49] which is clearly an OH&S issue.

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."[50]

The Royal Commission found that:

> Misuse of safety for industrial purposes compromises safety in important respects:
>
> (a) it trivialises safety, and deflects attention away from the real resolution of safety problems on sites;
>
> (b) the view that unions manipulate safety concerns inhibits the unions' capacity to effect constructive change;
>
> (c) the widespread anticipation that safety issues may be misused may distort the approach that is taken to safety; and
>
> (d) 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.[51]

47 For example, see *Peter Kidd* v *Linfox Australia Pty Ltd* [2008] AIRC 398 (30 May 2008)

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

49 *Current Issues Brief* no. 30 2002-03, Building Industry Royal Commission: Background, Findings and Recommendations, at http://www.aph.gov.au/library/pubs/cib/2002-03/03cib30.htm

50 Supra note 6, volume 6, p 108.

One of the responses to the Cole Royal Commission was the passage of the *Building and Construction Industry Improvement Act, 2005* (Cth). Section 36(1)(g) of that Act provides that employees and others are not taking building industrial action where:

> i. the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and
>
> ii. the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe for the employee to perform.

This provision proscribes the taking of industrial action on the basis of spurious OH&S grounds. Despite this provision, employers in the construction industry report that abuse of OH&S continues to be a problem that is confronted regularly and, on some sites, on a regular basis over protracted periods. The Australian Building and Construction Commissioner has brought a number of cases of abuse of OH&S for industrial purposes to the courts.[52]

This ongoing abuse of OH&S jeopardises the objective of achieving a significant and sustained reduction in building and construction workplace fatalities and injuries because it does nothing to foster the constructive approach required to achieve this outcome. The practice of using OH&S as a smokescreen for other issues denigrates its importance on building sites and shows gross disrespect to those who are genuinely seeking to improve OH&S performance. Safety should not be relegated to a device to obtain workplace relations outcomes.

Recommendation 23:

Given the history and ongoing occurrence of abuse of right of entry for OH&S purposes in the building and construction industry, any right of entry for union officials should be subject to their being accompanied by an authorised inspector from the relevant regulatory body.

Recommendation 24:

Only union officials who are 'fit and proper persons' should be entitled to exercise the right of entry under a permit issued by an independent government authority or judicial officer.

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51 Cited in the *Final Report of the Royal Commission into the Building and Construction Industry*, Summary of Findings and Recommendations, volume 1, February 2003, p 102.

52 See for example Cruse v CFMEU and Stewart; Alfred v Wakelin, Abela, Batzloff, Jones, O'Connor, CFMEU, CFMEU QLD branch, FEDFA QLD, AWU and AWU (NSW); Draffin v CFMEU, Allen, Benstead, Oliver and Walton Constructions and A & L Silvestri Pty Ltd & Hadgkiss v CFMEU, CFMEU (NSW), Primmer, Lane & Kelly

The provisions of the *Workplace Relations Act 1996* provide a sound model as a guide as to who should be eligible to exercise the right of entry. The model OH&S laws should specify that individuals with criminal records or a history of breaches of right of entry and related provisions under Commonwealth and State and Territory law should not be eligible to obtain a permit.

Recommendation 25:
The model OH&S laws should specify that individuals with criminal records or a history of breaches of right of entry and related provisions under Commonwealth and State and Territory law should not be eligible to obtain a permit.

OH&S is a complex area in which regulations, codes of practice and guidelines change frequently, and nowhere is this more true than in the building and construction industry. This is sufficient reason in itself to require officials who wish to enter a site for OH&S purposes to have specialised OH&S knowledge and relevant industry experience. Right of entry powers are more likely to be inappropriately exercised by union representatives who do not have relevant OH&S training and expertise, thereby causing disruption to the workplace where there may not be a genuine OH&S issue.

Recommendation 26:
Union representatives exercising right of entry powers for OH&S purposes should be required to hold approved nationally recognised OH&S qualifications under the Australian Qualifications Framework system. Qualifications should be updated at least every five years.