MASTER BUILDERS
AUSTRALIA

SUBMISSION TO

Senate Education, Employment and Workplace Relations Committee

on

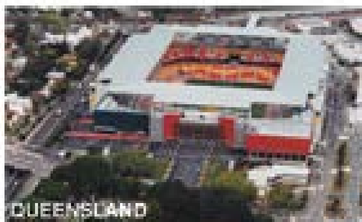
Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011

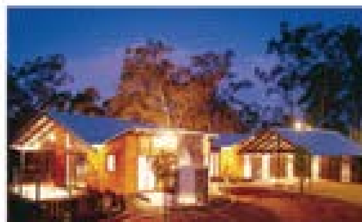
20 January 2012

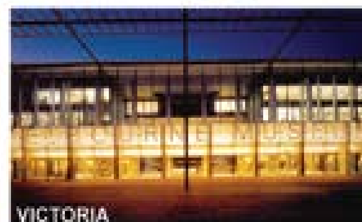
Master Builders Australia Ltd

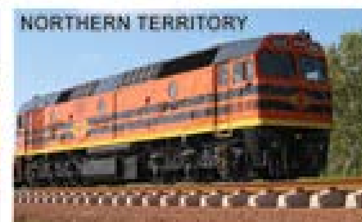
ABN 68 137 130 182

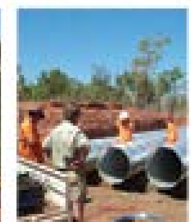
building australia

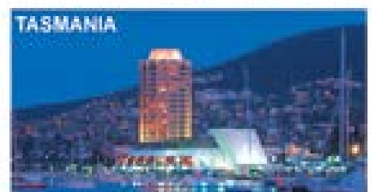












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EXECUTIVE SUMMARY

The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 (the Bill) is an unwarranted watering down of the powers exercised by the Australian Building and Construction Commission. The Government's own inquiry conducted by the Hon Justice Wilcox found that the work of the ABCC is not yet done. The Gillard Government has promised that "a strong cop on the beat" will be retained in the building and construction industry. But the Bill delivers a new organisation that will be a toothless tiger. Master Builders opposes the passage of the Bill, as it did when a similar Bill was introduced to Parliament in 2009.

The new organisation will be a toothless tiger because there are no separate building and construction laws for the new inspectorate to administer. This step will adversely affect the industry's productivity which has been boosted by the work of the ABCC to generate a welfare gain to the community of $5.9 billion per year.

The powers of the new inspectorate will be considerably less than those wielded by the ABCC. The most significant of these reductions are:

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

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

The fundamental problem with the apparatus established by the Bill is that the specialist inspectorate lacks the independence it needs to be effective. It is smothered in layers of costly bureaucracy and strangled by yards of red tape. There are so many safeguards against the abuse of its powers that there remains little scope for the proper exercise of such powers as it retains.

Master Builders calls on the Parliament to reconsider any changes to the law and to not proceed with the passage of the Bill.

1 INTRODUCTION

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

1.2 Master Builders represents the interest of all sectors of the building and construction industry. The association consists of nine State and Territory builders' associations with over 33,000 members.

2 PURPOSE OF SUBMISSION

2.1 The Government introduced the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 (the Bill) into Parliament on 3 November 2011. On 10 November 2011 the Senate referred the Bill to the Committee for inquiry and report. This submission addresses the Bill in detail.

2.2 The Bill largely emulates an earlier Bill, the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (the 2009 Bill), introduced to Parliament on 17 June 2009. That Bill lapsed. There are some differences between the 2009 Bill and the Bill, which are highlighted in this submission.

2.3 This submission outlines why Master Builders takes the view that the Bill, if passed, will damage industry productivity and cause a new wave of industrial disruption. At the start we emphasise that the proposed Building Industry Inspectorate will have no separate underlying provisions to enforce but will be enforcing provisions of the *Fair Work Act 2009 (Cth)* (FW Act) in the capacity of Inspector. This submission emphasises why this arrangement falls short of the "tough cop" promised by the Gillard Government[1] and why specific industry laws are needed.

2.4 The Bill has been developed from prior consultation about the Government's position. In June 2008 the then Deputy Prime Minister, the Hon Julia Gillard, now Prime Minister, appointed the Hon Justice Murray Wilcox QC, a retired Federal Court judge, to report on matters related to the creation of the specialist Fair Work Inspectorate. Master Builders provided a comprehensive submission to this inquiry, as well as a reply submission and a further submission directed to specific queries Mr Wilcox raised at a debate on the issues before him aired at the Sydney

[1] See *"Unions will get 'new tough cop'"* Sydney Morning Herald 14 June 2009

University Law School. Throughout those submissions, we maintained that the current law should not be watered down. That remains our policy.

2.5 Mr Wilcox submitted his report at the end of March 2009: *Transition to Fair Work Australia for the Building and Construction Industry* (the Wilcox Report).[2] A number of the provisions in the Bill are based upon the Wilcox Report but there are elements of the Bill which do not follow his recommendations, particularly the "switching off" mechanism, discussed at sections 6.16 and 6.17 of this submission.

2.6 Whilst the Wilcox Report recommended the repeal of industry-specific substantive laws, bringing an end to those laws is strongly opposed. Master Builders opposes the repeal of appropriate, tailored laws to deal with the industrial relations problems specific to the building and construction industry. In that regard, we believe the Wilcox Report is contradictory and misconceived. The building and construction industry needs specific workplace relations laws and this submission highlights why that is the case. Hence, this submission first sets out a case for maintaining separate building and construction industry laws, inclusive of providing a case study of a recent major dispute, and then provides a detailed analysis of the Bill.

3 SPECIFIC BUILDING AND CONSTRUCTION WORKPLACE RELATIONS LAWS

3.1 Following the recommendations of the Cole Royal Commission,[3] the then federal Government introduced legislation tailored to the needs of the industry, the *Building and Construction Industry Improvement Act 2005 (Cth)* (BCII Act) and established the Australian Building and Construction Commissioner (ABCC) from 1 October 2005. This followed on from an extensive investigation by a Royal Commission, one of the highest forms of inquiry that is undertaken in this country.

3.2 The Royal Commission found there to exist a culture of lawlessness that affected all commercial building industry participants. Cole found that the right of choice vested in all Australians to properly negotiate their terms and conditions of employment had been taken away by the actions of unions in undermining the rule of law especially via the practice of insisting on union pattern agreements being adopted by all building and construction participants:

[2] http://www.deewr.gov.au/workplacerelations/Policies/BuildingandConstruction/WilcoxReport/Pages/default.aspx

[3] See http://www.royalcombci.gov.au

> *In reality, the employees of businesses that wish to work on major CBD building sites do not have a choice. The 'one size fits all' approach of pattern bargaining impedes productivity, flexibility and in many cases the individual aspirations of workers. It assumes that all employees have the same wishes in relation to hours of work, wage structures and other conditions of employment. It assumes that the unions know best what is in the interests of and what the desires are of all employees, including those who have chosen not to join the union. It ignores the possibility that different levels of remuneration depending upon skill and productivity operate as an incentive to employees to achieve increased productivity and quality of work.*[4]

Master Builders' policy is to reverse the position set out in this telling quotation.

3.3 It is necessary to reinforce that in 2003, the Cole Royal Commission comprehensively documented the workplace relations problems of the industry. It found that unacceptable and unlawful behaviours of unions in the commercial sector were a systemic problem. Commissioner Cole recommended the establishment of a special regulatory authority to oversee the restoration of the rule of law in the industry. The task of restoring the rule of law is still underway. It is too easy to lose sight of the rationale for industry specific laws in the face of campaigns that are conducted which label the BCII Act and the work of the ABCC as unfair or as "undermining liberty."[5] They are certainly not of that character and the BCII Act contains a number of safeguards for those who are summoned to give evidence under compulsion, including immunity from prosecution, discussed below. The ABCC's role is to monitor, promote, investigate and enforce appropriate conduct by those engaged in building work, as defined in the BCII Act. Its fundamental purpose is the application of the rule of law in the industry. Its jurisdiction includes compliance with industrial instruments, the FW Act and the *Independent Contractors' Act* 2006 (together called "designated building laws") and, in principle, a statutory "building code" issued under the BCII Act. No statutory "building code" has ever been declared under the BCII Act, although the Minister has that power. Instead, under contract conditions attached to certain federal government funded projects, the ABCC has extensive powers to ensure that building industry participants adhere to Government procurement conditions set out in a Code and related Implementation Guidelines.

3.4 The BCII Act provides for high penalties for breaches of its terms, including breaches of designated building laws. As is emphasised in this submission, those

[4] Ibid para 44, chapter 5, Vol 3 at p212.

[5] See George Williams *Building Watchdog Undermines Liberty* Sydney Morning Herald 6 July 2010

comparatively higher fines have not yet succeeded in changing the industry's culture of lack of adherence to the rule of law, particularly by building unions in the commercial sector, a matter that was highlighted in the Cole Royal Commission report and identified in the Wilcox Report as an on-going feature of the industry, particularly in Victoria and Western Australia. Maximum penalties under the FW Act ($33,000 for a corporation; $6,600 for an individual) are less than a third of those under the BCII Act ($110,000 for a corporation; $22,000 for an individual).

3.5 As touched on in paragraph 3.3, the ABCC has strong but not unique investigation powers, and similar powers are held by comparable agencies such as the Australian Competition and Consumer Commission and the Australian Prudential Regulatory Authority. Persons required to provide information or answers cannot refuse on the basis of potential self-incrimination, public interest or potential breach of another law, but the material cannot be used against them in civil or criminal proceedings (unless they have lied). ABCC officers may require and administer oaths.

3.6 The extent of the ABCC's information gathering powers has been highly controversial. The Wilcox Report recommended that there be "safeguards" attached to the exercise of the powers. The current ABC Commissioner, Mr Leigh Johns, has determined to exercise his powers subject to the Wilcox safeguards, to the extent he is able, without a change to the law. Master Builders supports the use of appropriate safeguards and endorses, in part, supervision of the examination process by the Commonwealth Ombudsman, discussed below. However, we do not believe that the use of non-unique compulsory information gathering powers held by the ABCC should be used as a basis to argue that the substantive laws tailored to deal with the specific needs of the building and construction industry's workplace relations culture should be repealed.

3.7 In the Wilcox Report it was accepted that the Cole Royal Commission had got it right and that there are special features of the industry which merit a specialist regulator, and that the ABCC had improved relations among industry participants. He also admits that there is "more work to be done" in changing the industry. The Wilcox Report makes it clear that:

> *The ABCC's work is not yet done. Although I accept there has been a big improvement in building industry behaviour during recent years, some*

> *problems remain. It would be unfortunate if the inclusion of the ABCC in the OFWO led to a reversal of the progress that has been made.*[6]

3.8 Unfortunately, the sentiment reflected in that statement was not manifest in practical recommendations that would ensure the work of the ABCC continues. The Bill would ensure that the work does not continue to good effect. The proposed Inspectorate would administer the general law established by the FW Act without the specifically tailored laws the BCII Act contains and would have its powers hedged by clumsy levels of bureaucracy, with fines at levels that would make the cost of unlawful action cheaper, with a deleterious effect on productivity.

3.9 Two simple examples of how the FW Act provisions will be less effective than the substantive law under the BCII Act show how the absence of tailored laws will be to the detriment of the industry's industrial relations cultural change:

- Industrial Action The definition of building industrial action excludes action authorised in advance and in writing by the employer, per s36(1) BCII Act. This is designed to combat defences where settlements include an implied or retrospective agreement by the employer to the action, so that the strikers might be paid. The Fair Work Act definition of "industrial action" permits these defences to succeed. This will make prosecutions more difficult.

- Undue Pressure The BCII Act at s44 enables prosecution for undue pressure to make, vary or terminate an agreement. This ground is in addition to contravention through "coercion", also found in s44 BCII Act. The Wilcox Report considers undue pressure to be a form of coercion which should not be retained. However, contravention through undue pressure is a lower threshold for a prosecutor to satisfy. This ground has been relied upon in ABCC prosecutions, and was particularly helpful in the Westgate Bridge extension matter. It should be retained.

4 INDUSTRIAL RELATIONS AND PRODUCTIVITY

4.1 In assisting to restore the rule of law in the industry, the ABCC has made a major contribution to the industry's productivity, discussed in this section of our submission.

4.2 Productivity growth will be a major determinant of Australia's future income growth and of how well the country meets long-term challenges such as those relating to

[6] Supra note 2 at para 3.23

the environment and population ageing. Productivity-enhancing reform fuels the drivers of sustainable long term economic growth, lifting participation and easing constraints on growth from the increasing number of Australians who no longer work.

4.3 In this context, Master Builders strongly supports comments made by the Chairman of the Productivity Commission, Gary Banks, in a speech[7] delivered to the Australian Business Economists in late 2010. The Productivity Commission Chairman stressed the importance of economic reform to the Australian economy, touching not only on topics of contemporary relevance but also on the conditions necessary to facilitate the process of reform, including the quality of the advice received by government and the broader political environment.

4.4 Mr Banks noted that industrial relations regulation was arguably the most crucial to get right; that it was vital to ensure that regulations intended to promote fairness in Australia's workplaces do not detract unduly from their productivity; and that if Australia is to secure its productivity potential into the future, the regulation of labour markets cannot remain a no-go area for evidence-based policy making.

4.5 In industrial relations, less adversarial labour relations and greater labour flexibility in a more deregulated regime over approximately two decades between 1985 and 2005 encouraged innovation and facilitated greater acceptance of new work practices, organisational procedures and modern technologies. These developments also made a significant contribution to an observed acceleration in productivity in Australia.

4.6 Work in 2011 by Saul Eslake for the Grattan Institute[8] has, however, underlined that it is complacency of the worst order to assume that Australia's productivity growth slowdown is largely attributable to developments in two isolated sectors, namely mining and utilities. Challenging conventional wisdom, Eslake isolated that the decline in productivity is more likely to be due to the fading of the effects of previous initiatives, and the comparative lack of any new productivity-enhancing reforms post 2000. Eslake says that since then we have seen an increase in productivity-stifling regulation and legislation; a loss of appetite for productivity-enhancing change among governments, businesses and voters; the effect of 'capacity constraints' as

[7] G Banks *Successful Reform: Past Lessons, Future Challenges,* 8 December 2010 http://www.pc.gov.au/__data/assets/pdf_file/0018/104229/successful-reform.pdf

[8] S Eslake *Productivity* paper presented to the annual policy conference of the Reserve Bank of Australia 15-16 August 2011

the economy has approached 'full employment'; and slippage in Australia's take-up of productivity-enhancing technologies.

4.7 Since the high growth of the 1990s, productivity growth has slowed, and in recent years it has been unusually weak. Australia's recent poor productivity performance would have been even worse had it not been for strong productivity growth in the building and construction industry, which since 2002 has out-performed predictions based on historical performance relative to other industries by 7.7 per cent. Master Builders' commissioned research, the KPMG Econtech Report (the fourth) entitled *Economic Analysis of the Building and Construction Industry Productivity 2010* (the Econtech Report) demonstrates that this is largely attributable to the BCII Act. The work of the ABCC has allowed the industry to enjoy a period of significantly improved industrial relations and increased productivity in which industrial relations has not been the predominant and negative influence that it has been in the past, albeit with some way to go.

4.8 It is vital for both the industry and the wider Australian community that the factors driving strong productivity growth in the building and construction industry are not stifled but instead positively promoted through complementary government policies and reforms, particularly in relation to industrial relations. Master Builders is very concerned that the Bill will adversely affect productivity by constraining the activities of the ABCC's successor organisation.

4.9 The changes proposed in the Bill would not enhance the sector's productivity but instead would detract from the efficient operation of the successor to the ABCC. In particular, Master Builders believes that the added bureaucracy and the clumsy mechanisms for the operation of an additional agency concerned solely with "switching off" the power to obtain information compulsorily on particular projects are unnecessary and retrograde. As indicated throughout this submission, we also strongly oppose the abolition of the industry specific laws which underpin the sector's workplace relations reforms, especially the repeal of the appropriately higher level of penalties.

4.10 We reiterate that most of the concerns that the Bill addresses relate to alleged issues with fairness about the compulsory information gathering powers of the ABCC. Such a power has been traditionally recognised in liberal democracies to address significant law enforcement challenges. It should also be remembered that the genesis of the power in an investigatory context arose following the finding of a

culture of lawlessness in the building and construction industry as expressed in the Cole Royal Commission. In addition there is a perception (albeit misguided) that the ABCC does not act in the interests of workers in the industry. Increased productivity benefits all industry participants, including workers, and the community.

4.11 The Econtech Report's findings underline Master Builders' policy that labour productivity in the sector must be an essential part of the effort to increase industry level productivity. At the core of that effort must be the retention of the ABCC powers and the current related laws. This is at the heart of Master Builders' advocacy in calling for the retention of the powers of the ABCC and the current law.

4.12 We emphasise that the Econtech Report shows that productivity reforms in the building and construction industry through the ABCC and related industrial relations changes have added 9.4% to labour productivity in the construction industry. In addition, the community's welfare gain is $5.9 billion per annum. The effects of the ABCC have also contributed to a permanent reduction in inflation of around 0.7 per cent and have permanently contributed 0.6 per cent to gross domestic product.

4.13 As set out in paragraph 4.7, the industry's labour productivity since 2002 has out-performed predictions based on historical performance relative to other industries by 7.7 per cent. Multi-factor productivity in the industry was no higher in 2000-2001 than 20 years earlier but then accelerated by 14.8 per cent in the six years to 2007-2008. These productivity statistics are unambiguous. It is emphasised that the Econtech Report shows that the entire community is better off through economic welfare gain and the significant lift in productivity and industrial harmony since the ABCC was established in late 2005, work which was commenced by its predecessor body the Building Industry Task Force in 2002.

4.14 On this evidence, as well as based on member feedback, Master Builders contends that the advent of good industrial relations is related to the exercise of the powers of the ABCC, the work of which the Government's own inquiry into the industry found has not yet been done, as stated in paragraph 3.8 of this submission.

4.15 Accordingly, Master Builders' policy is that it is vital for productivity for the Government to retain the powers and funding of the ABCC. Master Builders also strongly advocates that the building and construction industry specific laws not be repealed because their retention is important for the proper conduct of industrial relations in the industry and in order for the productivity gains charted in the

Econtech Report to continue. Master Builders believes that reliance solely on the flawed FW Act will damage the industry's productivity.

4.16 Master Builders has commissioned an external firm of economic consultants to update the Econtech Report for the purposes of informing the Committee of the latest available information on the productivity-enhancing effects of the ABCC and the BCII Act. The report is in two stages. The first stage is attached at Attachment A. The second stage of the report will not, however, be available until mid to end February 2012.

4.17 The first stage report shows that the latest data (up to 2011) continue to point to industry reforms leading to a significant productivity outperformance in the industry. The report shows that the estimated gain ranges between 10 and 14.5 per cent, depending on the measure and the source of information that is used. Notably, the latest data indicates that the productivity outperformance of the construction industry has strengthened.

5 A CASE STUDY TO ILLUSTRATE THE ISSUES AT STAKE – THE MELBOURNE MARKETS DISPUTE

5.1 Master Builders now presents the Committee with a case study which shows how, in the face of the current tough laws, the CFMEU, for its own ends, denies the rule of law and damages productivity. Weakened laws and reduced fines will send the wrong message to the courts and the community and potentially unleash further industrial disruption.

5.2 In mid-2011, Tracey J of the Federal Court handed down $250,000 in fines and $190,000 in costs against the CFMEU after finding that the union had deliberately and illegally prevented work from going ahead on the new Melbourne Markets site in Epping, Victoria. The decision came after the subcontractor responsible for civil construction on the site entered into a greenfields agreement with the AWU for workers on site. Tracey J's decision is important. It details the reckless disregard for the law which typifies certain parts of the union movement. For example, when one of the subcontractors who was suffering significant economic loss as a result of the dispute asked how long it would continue, they were told by a union organiser: "It's a CFMEU site. It will go on for as long as we say it will go on".[9]

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

5.3 The head subcontractor had a history of industrial relations engagement with the CFMEU and agreements with that union covered its staff on similar projects. As a result, the CFMEU took the view that it should have been involved in any negotiations for an agreement covering personnel at the Melbourne Markets site. The union concluded that the head subcontractor was acting provocatively towards it. It filed a notice of appeal against FWA approval of the AWU greenfields agreement. However, it later decided to drop this appeal and instead embarked on a campaign of blockading the site so that workers could not enter. The action meant that employees of the head subcontractor, the site developer and numerous other sub-contractors could not work on the project.

5.4 The CFMEU was prosecuted for breaching s38 and s44 of the BCII Act for engaging in unlawful action and for attempting to coerce the head subcontractor to make an enterprise agreement with it or to vary the agreement with the AWU. It was also separately prosecuted for contempt in relation to its refusal to obey the court order obtained by the ABCC.

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

5.6 In accepting that $100,000 was an appropriate fine for its breaches, the Federal Court noted that the union had a 'deplorable' record when it came to contravening the BCII Act, discussed further below. It also noted that the CFMEU's conduct on this occasion was calculated and deliberate, and that union officials had taken the view that they should simply proceed with the action even though they knew it would cost an enormous amount of money. The cynical rationale behind this decision was that any fine would cost the CFMEU less than the membership benefit to be gained by engaging in the demarcation dispute. The Federal Court observed that the union had shown no contrition for its actions. Media[10] reported that these actions included using cars, 44-gallon drums set ablaze and crushed rock to restrict entry to the site with locks on gates being glued with superglue.

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

5.7 The Federal Court fined the CFMEU $150,000 for its contempt after having observed that the union had not apologised for its actions and had failed to be deterred in pursuing its blockade by the court order even though it had incurred heavy fines for contempt in the past. The Federal Court also found that the union should pay $150,000 in indemnity costs.

5.8 Finally, the Federal Court awarded another $40,000 in costs against the CFMEU in relation to its breaches of the BCII Act. It also accepted the CFMEU's word that it would compensate the subcontractors for the $120,000 loss they had sustained as a result of the blockade.

5.9 The Melbourne Markets Dispute demonstrates the indifference of the CFMEU in relation to the heavy fines imposed by the Federal Court. The Bill's reliance on the lower FW Act penalties sends the wrong message that lesser penalties for this behaviour are appropriate. They are not.

5.10 As set out earlier, with the passage of the Bill the penalties applicable to such behaviour would be reduced, from $110,000 for a corporation to $33,000.[11] This is likely to embolden unions to make increasingly cynical cost-benefit calculations when considering attempting to increase membership by engaging in unlawful industrial action. The CFMEU has been found to have engaged in similar conduct in at least 39 cases since 1999.[12] Further, the courts will be unlikely to do other than reduce the fines imposed on the CFMEU for the 40th incidence of the behaviour illustrated in this case. That matter is substantiated by the reverse trend currently recognised by the courts – when maximum penalties under statutes have increased so have the penalties imposed. The courts pay careful attention to maximum penalties when assessing their application. As Gleeson CJ, Gummow, Hayne and Callinan JJ observed in *Markarian v The Queen:*[13]

> *It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.*

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

[12] Melbourne Markets Dispute [2011] FCA 556 (unreported, Tracey J, 2 June 2011), at para 82.
[13] (2005) 228 CLR 357 at 372

5.11 The seriousness of disputes, which are only to foster the union's own ends, cannot be underestimated. As noted, in the Melbourne Markets Dispute alone, the subcontractors lost $120,000, despite having no influence in the dispute.

5.12 As a final specific comment, it is noted that the Melbourne Markets dispute is not unique. In his October 2011 speech to the Industrial Relations Society of Victoria the ABC Commissioner Leigh Johns said:

> *In the 3 years before my appointment as ABC Commissioner in October last year, on average the ABCC investigated 211 matters per annum involving unlawful industrial action. In the past year we have investigated 223 matters (a 7% increase on the average). Unlawful industrial action matters account for 25% of all of our investigations. These figures tell me that the parties need to try harder when it comes to lawful dispute resolution.*[14]

5.13 We disagree with the Commissioner to the extent that it is not the parties which need to try harder but the CFMEU. Tracey J has provided a cogent commentary on the fact that, in particular, the CFMEU is unable or unwilling to curb the unlawful activities of, in particular, its Victorian branch. Paragraph 84 of his judgment in the Melbourne Markets case is as follows:

> *Notwithstanding the fact that the CFMEU is a large national organisation which is divided into a series of divisions and branches, it is notable that the branch involved in the present contraventions has caused the organisation to incur an overwhelmingly disproportionate amount in pecuniary penalties when compared with the other constituent elements of the organisation. The BCII Act commenced operation in 2005. Since then the CFMEU and its officials have been found, in 28 cases, to be liable for contraventions of that Act. Of these, 22 cases have involved the Victorian branch of the Construction and General Division of the union ("the branch"). Pecuniary penalties totalling $2,711,150 have been imposed on the CFMEU under the BCII Act. Of this sum $2,328,550 has been attributable to the unlawful activities of the branch. It is inconceivable that the national governing councils of the CFMEU were and are unaware of the significant misconduct of the branch and the detrimental consequences for its members. They are either unable or unwilling to curb the unlawful activities of the branch. Moreover, an earlier offence of the CFMEU is no less an offence by that corporate body because it was committed by a division or branch other than the one responsible for the contravention presently under consideration. As Jessup J observed in Williams v Construction, Forestry, Mining and Energy Union (No 2) [2009] FCA 548 at [20], "the deterrent effect of a penalty would be significantly compromised if the court were obliged to turn a blind eye to a prior contravention merely because it occurred in a different division or branch of an organisation." The CFMEU's deplorable record of contraventions of the BCII Act must rank as a significant consideration when fixing a penalty in the present proceedings.*

[14] *Dispute Resolution: Respecting the Umpire.* Speech to the Industrial Relations Society of Victoria, 14 October 2011

6 PROVISIONS OF THE BILL

6.1 Introduction

This section of the submission provides a detailed analysis of the Bill.

6.2 General

6.2.1 Schedule 1 of the Bill contains amendments to the BCII Act including detailing the provisions which are to be repealed, with or without replacement.

6.2.2 Item 1 of Schedule 1 changes the title of the BCII Act to the *Fair Work (Building Industry) Act 2011*.

6.3 Objects

The objects of the Bill differ markedly from those of the BCII Act. This is especially evident in view of the deletion of a central current object in section 3(2)(d) BCII Act namely "ensuring that building industry participants are accountable for their unlawful conduct". This objective was a central aim of the legislation, arising from recommendations of the Cole Royal Commission and is an integral part of the separate building and construction industry laws. It will be difficult for the new agency to be "a tough cop on the beat" if its job does not include making building industry participants accountable for their unlawful actions. Making building industry participants accountable for their unlawful conduct must be a continuing object of the legislation and a main focus of the new agency.

6.4 Definition of Building Work

6.4.1 Items 3 to 48 of Schedule 1 have the effect of repealing or amending current definitions in the BCII Act and inserting new definitions. The main point of concern for Master Builders relates to item 48 of Schedule 1. That has the effect of repealing the definition of "building work" in subparagraph 5(1)(d)(iv) of the BCII Act. That subparagraph extends the definition to the prefabrication of made-to-order components to form part of any building structure or works whether or not that prefabrication is carried out on site or off site. The change made by the Bill will substitute coverage for on-site prefabrication only. This will cause much confusion as to the dividing line between when the Bill's provisions will or will not apply, since many businesses have staff engaged in both on-site and off-site fabrication.

6.4.2 There are several examples where both on-site and off-site work regularly occurs, particularly the making of tilt-up concrete panels, joinery businesses and glazing and glass cutting activities. These businesses often operate so that there is both on-site and off-site work undertaken, depending on the building project. These companies should be covered by the legislation. It is especially necessary for companies which may employ dedicated on-site or off-site teams where inconsistent obligations could arise across their workforce.

6.5 Functions of Director

6.5.1 The proposed section 10, which forms part of Chapter 2, sets out the functions of the Director of the Fair Work Building Industry Inspectorate. These functions are additional to the Director's status as an Inspector per proposed section 59A. The functions of the Director are now largely tailored to the role for the Inspectorate of ensuring compliance with safety net contractual entitlements. This will obviously divert resources from policing the obligation to act lawfully, especially regarding unlawful industrial action. The work of the ABCC has been focussed on restoring the rule of law in the industry and that process should not be undermined by the diversion of resources to other functions.

6.5.2 In the proposed section 10(a)(ii), 10(c), and 10(g), the Director is given a number of functions relating to the Building Code. The Government has not yet announced whether the National Code and related Implementation Guidelines (Code and Guidelines), as necessarily modified, will form the statutory Building Code under the Bill.

6.6 Minister's Directions

6.6.1 The proposed section 11 gives greater powers to the Minister than provided in the BCII Act. The proposed section 11(1)(a) states that the Minister may give directions to the Director about "the policies, programs and priorities of the Director." This level of Ministerial power could mean that the Director was, for example, guided by the proposed Advisory Board to meet a particular priority but then required by a Ministerial direction to place resources in a different area.

6.6.2 Master Builders considers this to be a retrograde step because the independence of the ABCC has been of great benefit to the industry. That

independence, shaped by the broad requirements of the BCII Act and activated by complaints, has enabled the ABCC to operate so that its principal purpose of restoring the rule of law to the industry is not lost from sight. Under the Bill, the Minister would have the power to neutralise the function of the successor body in relation to the enforcement of the law relating to industrial action by, for example, requiring the Inspectorate to devote an express percentage of its resources (say 90%) to the enforcement of safety net contractual entitlements. Master Builders recommends that the extension of the power of Ministerial direction be removed from the Bill.

6.6.3 Master Builders supports the retention of the requirement that the Minister not be permitted to provide directions about particular cases in proposed s11(2).

6.7 Reports and Delegation

Section 12 reflects the wording of the current provision regarding the Minister seeking reports from the Director and is supported. Section 12(3) in the 2011 Bill indicates that a direction under subsection 12(1) is not a legislative instrument. Master Builders considers that this might be so that the Parliament does not have the capacity to set aside relevant direction and on that basis opposes s12(3). We note that proposed s12(3) was not in the 2009 Bill.

6.8 Proposed Section 13 – Delegation by Director

This paragraph is not opposed.

6.9 Annual Report

6.9.1 Proposed section 14 is inadequate and would not provide the public with valuable information, such as about whether the Inspectorate was operating to enforce the sort of behaviour recently encountered at the Melbourne Markets project mentioned earlier in section 5 of this submission. The proposed section would only require the annual report to include:

(a) details of directions given by the Minister during the financial year under section 11 or 12; and

(b) details of delegations by the Director under section 13 during the financial year; and

(c) details of recommendations made to the Director by the Advisory Board during the financial year.

6.9.2 The Bill deletes the current BCII Act's requirements in section 14(2) as follows:

(a) details of the number, and type, of matters that were investigated by the ABC Commissioner during the financial year;

(b) details of financial assistance provided during the financial year to building employees and building contractors in connection with the recovery of unpaid entitlements; and

(c) details of the extent to which the Building Code was complied with during the financial year.

6.9.3 These provisions should be retained as they provide transparency to the functioning of the agency and alert the community to the work undertaken via investigation. Master Builders recommends that other operational details and statistics about the activities of the Inspectorate also be included: for example, any actions taken to enforce civil penalty provisions in particular those relating to industrial action per section 417(1) and 421(1) FW Act (the provisions of which are set out in paragraph 6.14.2 of this submission). These sorts of statistics show how much of the Inspectorate's resources are devoted to the ongoing task of maintaining the rule of law and how much were devoted to other tasks.

6.10 Appointment, Acting Appointments, Remuneration, Leave of Absences, Engaging in Other Paid Employment, Disclosure of Interests, Resignation and Termination

Master Builders does not have any concerns with proposed sections 15 to 22 of the Bill. However, we note that proposed s16 is different from the 2009 Bill with the deletion of proposed Clause 16(2) from that Bill which was as follows:

Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:

(a) the occasion for the appointment had not arisen; or

(b) there was a defect or irregularity in connection with the appointment; or

(c) the appointment had ceased to have effect; or

(d) the occasion to act had not arisen or had ceased.

6.11 Fair Work Building Industry Inspectorate

In addition to the difficulty that the Board's functions seem remote from the day to day activities of the Inspectorate, especially when it is considered that only two meetings per year would be required (see proposed section 26G(b)), the Director could be faced with a conflict of interest if the Advisory Board's priorities and recommended programs turned out to be different from those of the Minister who would in any event have the power to overrule the Board's recommendations by directions.

6.12 Office of the Fair Work Building Industry Inspectorate

Master Builders does not oppose proposed s26J to 26M.

6.13 Item 50

6.13.1 It is noted that Item 50 of Schedule 1 would have the effect of repealing current section 28 of the BCII Act. Section 27 relating to the capacity of the Minister to issue a Building Code would remain.

6.13.2 Without a Government decision as to whether the Code and Implementation Guidelines become the declared Building Code, it is difficult to comment on the utility of the repeal of section 28. However, it seems that the power of Inspectors under section 712 FW Act will be sufficient to make up for the repeal of section 28 in that by that provision inspectors are empowered to require persons to produce records or documents.

6.14 Item 51

6.14.1 Item 51 of Schedule 1 repeals chapters 5 and 6 of the BCII Act. Chapter 5 relates to industrial action and the like. Chapter 6 relates to discrimination, coercion and unfair contracts. The laws to be administered by the specialist division will not be sufficient to enable it to carry on the work of the ABCC. The Wilcox Report acknowledged that this work of transforming the industrial relations culture of the industry must continue, yet curiously Mr Wilcox did not recommend the continuation of a specialist legal regime. This contradiction has become manifest in the Bill, a principal reason Master Builders urges that it not proceed. In this context, it is evident that Chapters 5 and 6 are the heart and soul of the reforms and should remain.

Paragraph 3.11 of this submission sets out some of the differences which will detrimentally affect the sector's workplace relations.

6.14.2 Under the FW Act, Inspectors will have the power to bring civil penalty proceedings in relation to industrial action in only two circumstances: per section 417(1) and 421(1) and with penalty levels far below the current BCII Act levels. Those statutory provisions in full are as follows:

417 Industrial action must not be organised or engaged in before nominal expiry date of enterprise agreement etc.

No industrial action

(1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:

(a) an enterprise agreement is approved by FWA until its nominal expiry date has passed; or

(b) a workplace determination comes into operation until its nominal expiry date has passed;

whether or not the industrial action relates to a matter dealt with in the agreement or determination.

(2) The persons are:

(a) an employer, employee, or employee organisation, who is covered by the agreement or determination; or

(b) an officer of an employee organisation that is covered by the agreement or determination, acting in that capacity.

Injunctions and other orders

(3) If a person contravenes subsection (1), the Federal Court or Federal Magistrates Court may do either or both of the following:

(a) grant an injunction under this subsection;

(b) make any other order under subsection 545(1);

that the court considers necessary to stop, or remedy the effects of, the contravention.

(4) The court may grant an injunction under subsection (3) only on application by a person referred to in column 2 of item 14 of the table in subsection 539(2).

(5) Despite subsection 545(4), the court may make any other order under subsection 545(1) only on application by a person referred to in column 2 of item 14 of the table in subsection 539(2).

421 Contravening an order etc.

Contravening orders

(1) A person to whom an order under section 418, 419 or 420 applies must not contravene a term of the order.

(2) However, a person is not required to comply with an order if:

(a) the order is an order under section 418, or an order under section 420 that relates to an application for an order under section 418; and

(b) the industrial action to which the order relates is, or would be, protected industrial action.

Injunctions

(3) The Federal Court or Federal Magistrates Court may grant an injunction, under this subsection, on such terms as the court considers appropriate if:

(a) a person referred to in column 2 of item 15 of the table in subsection 539(2) has applied for the injunction; and

(b) the court is satisfied that another person to whom the order applies has contravened, or proposes to contravene, a term of the order.

No other orders

(4) Section 545 (which deals with orders that a court can make if a person has contravened etc. a civil remedy provision) does not apply to a contravention of a term of the order.

6.15 Enforcement

Item 52 of Schedule 1 of the Bill would repeal Chapter 7 of the BCII Act. Part 1 of Chapter 7 deals with the contravention of civil remedy provisions, and should be retained for the same reasons as Chapters 5 and 6 should be retained. Master Builders opposes the repeal of the existing civil remedy provisions of the BCII Act and supports the retention of the higher penalties, as previously discussed.

6.16 Item 52

6.16.1 The Part that is introduced by Item 52 of Schedule 1 contains proposed sections 36 to 58. These provisions relate to the powers to obtain information and would replace Part 2 of current Chapter 7. We now comment on each proposed section in turn.

6.16.2 Section 36 – Definitions This provision sets out two definitions to be used in the relevant Part of Chapter 7. The first relates to the definition of a building project, which is defined widely as a project that consists of or includes "building work", as defined earlier in the Bill.

6.16.3 The term "interested person" is also defined. This concept is critical to the operation of other provisions in new Chapter 7, particularly as it is "interested persons" who will be able to apply to "switch off" the power to

obtain information under compulsion. It is highly unsatisfactory that the definition only clarifies that the Minister is an interested person but the other components of this vital definition are left to the Regulations.

6.16.4 Master Builders recommends that persons given the power to bring an application be narrowly defined and that "interested persons" be limited to those who have a financial or commercial interest in the building project. This would then extend to employees who have a financial interest in the sense that their wages and related employment payments would provide the relevant financial connection. The concept would obviously apply to the developers, investors and contractors involved in the project. This limited definition would guard against abuse of the ability to make application to have the information gathering powers "switched off". The Government may decide that representative rights should be extended under the Bill to parties such as unions or employer associations who could be vested with a right to represent employers or employees. What must not be permitted is for persons who have an interest "at large" in building and construction industry matters to qualify as interested persons. Parties who also have been repeat offenders under the BCII Act or who have shown contempt for the law should also be excluded.

6.16.5 Section 36A – Application This provision narrows the basis on which the Director may carry out an investigation, the subject of the relevant Part of Chapter 7. Currently section 52 of the BCII Act enables the ABC Commissioner to obtain information and documents or require persons to attend in order to answer questions where the ABC Commissioner believes on reasonable grounds that a person has "information or documents relevant to an investigation or is capable of giving evidence that is relevant to the investigation".

6.16.6 The new provision would limit the information gathering powers to an investigation of a "suspected contravention" by a building industry participant of a designated building law or a safety net contractual entitlement.

6.16.7 Section 36A(2) of the Bill provides for an additional safeguard in respect of suspected contraventions of a safety net contractual entitlement. The relevant powers may be exercised only if the Director reasonably believes

that the building industry participant contravened a provision or a term of the NES or instruments set out in section 706(2) of the FW Act. We support this safeguard.

6.17 Sections 36B – 37G Independent Assessor

6.17.1 These provisions cover the establishment and appointment of a statutory office holder, the Independent Assessor (IA). This position was not recommended by the Wilcox Report but is a new and unrehearsed concept. The IA is vested with the power to determine that the provisions of proposed section 45 do not apply to a specific building project. The proposed section 45 sets out when and how the Director may apply for an examination notice that would enable him or her to use the compulsory interview powers.

6.17.2 Master Builders opposes the establishment of the IA as unnecessary and unwarranted. It creates a new bureaucratic structure that must incur establishment costs and have running costs. The creation of this office seems a waste of taxpayers' funds.

6.17.3 The appointment of the IA is based upon the misconceived notion that information gathering powers are so offensive to the trade unions that they need to be "switched off" on certain building projects. This idea defies logic: if there is to be lawful behaviour and ready compliance with the law on a building site, then proposed section 45 is unlikely to be utilised. If there are industrial relations problems on a site or a union wishes to take a militant stance, pressure will be placed on a contractor to support an "interested person" application to have the provisions turned off by means of, for example, a term in an enterprise agreement covering the relevant building project. That will, in turn, provoke arguments as to whether the matter pertains to the relationship of the employer and the union under section 172(1)(b) FW Act. In addition, the entire idea of "turning off" a law that Mr Wilcox considered important enough to retain and then be reviewed after five years, (now 3 years under the Bill) contradicts the structure of the legislation which is, in any case, already top heavy with so called safeguards.

6.17.4 There are a number of changes from the 2009 Bill in proposed sections 36B to 38. In proposed s36D, new s36D(3) indicates that where the

Minister gives the IA a direction about specified reports to be provided relating to the IA's functions and power, that direction is not a legislative instrument. Proposed s37D indicates that it is the Minister's opinion which now governs whether there is a conflict in any paid employment by the IA and his or her role.

6.17.5 There is no guidance in the Bill relating to the qualifications required to be held by the IA. Master Builders notes that in the Parliamentary Library Bills Digest on the Bill[15] the following is said with which we agree:

> *Given the significance of this role, neither the Bill nor Explanatory Memorandum provide what may be further useful guidance on what may count as suitable qualifications and experience.*[16]

6.18 Section 38

Section 38 provides that a determination under section 39 cannot be made in relation to a building project if building work had already begun before the commencement date of the Bill. Master Builders supports a provision that clearly isolates the powers of the IA to projects which will commence when the new legislation comes into effect.

6.19 Section 39

6.19.1 Section 39 vests the IA with the power to make a written determination that section 45 does not apply to one or more building projects. The provision stipulates that the IA may make a determination only on application by an interested person in relation to the building project. This point heightens Master Builders' concern that the scope of the definition of an interested person is not yet available because the Regulations have not yet been issued.

6.19.2 The basis upon which the IA must make a determination compounds the difficulty caused by the absence of the Regulations. Proposed section 39(3) states that the IA must be satisfied that it would be appropriate to make a determination that section 45 does not apply having regard to the objects of the Bill and any matters prescribed by the Regulations. Master Builders is unable to comment on the applicable criteria because the

[15] Parliamentary Library Bill Digest No 80 2011-12 "Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011" 24 November 2011

[16] Id at p12

Regulations are not available. This is a matter of some importance. What is the basis on which the IA may determine that the power to compel people to provide information is not available?

6.19.3 We note that the Parliamentary Library Digest referred to above says:

> *In relation to the same provisions in the previous Bill, it was the Government's intention that the regulations would require the Independent Assessor to be satisfied that the building industry participants in connection with the building project have a demonstrated record of compliance with workplace relations laws, including court or tribunal orders; and that the views of other interested persons in relation to the project have been considered.*[17]

6.19.4 Master Builders submits that these matters are so fundamental that they should be set out in the Bill, not in regulations.

6.20 <u>Section 40</u>

6.20.1 Section 40 provides that an interested person may apply for the relevant determination. It also sets out what the application must contain. Our concern here is again that stakeholders are being kept in the dark as to the significance of these provisions because the Regulations are not yet available. Section 40 states that the relevant application may be in a form prescribed by the Regulations and include the information prescribed by the Regulations. We strongly recommend that the Regulations be exposed as soon as possible for stakeholder comment and well before the Bill is enacted.

6.20.2 Proposed section 40(5) states that an interested person has the capacity to make a further application in relation to the same building project when the interested person "becomes aware of new information in relation to the building project". This is far too loose a criterion. While the provision is intended to prevent an interested person from making repeat applications in relation to the same building project on the same grounds in the absence of new information, a better approach would be to permit an application to be made only once. This is because building sites are constantly changing as each following trade conducts its particular work.

[17] Above note 15 at p13

6.20.3 In other words, because “new information” will be generated constantly as the building project changes and reaches its various stages of completion. As just set out, it would be better if only one application could be brought. However, instead, the proposed provision could be better drafted by making it clear that the new information had to relate to one of the criteria to be determined for the purposes of section 39. The new information must clearly relate to a matter about which the IA is required to be satisfied. There should be a link between the information on which a new application is founded and a specific factor upon which the IA has reached a decision.

6.21 Section 41

Section 41 sets out rules by which the IA must consider an application for determination, including the obligation to provide a copy to the Director of the Inspectorate. The Director must be given a reasonable opportunity to make submissions in relation to the application. The provision also permits the IA to make a decision about the operation of section 45 through a determination. The IA must give written notice of the decision to the applicant and the Director. The provision is silent as to whether or not reasons must be provided for reaching the decision. It might be assumed as a matter of natural justice that reasons would be given but Master Builders does not believe that it should be possible to make decisions without giving reasons, and this should be made plain in the Bill. That would also help to determine whether the “new information” discussed in the context of section 40 relates to a factor that lead the IA to make the relevant determination.

6.22 Section 42

The terms of section 42 reinforce the concerns expressed in the previous paragraph. Section 42 requires the IA to give a copy of any determination made to the Director and to the applicant and to publish it in the Gazette. The IA must take these actions as soon as practicable after making a determination. The determination takes effect on the day when it was published in the Gazette. We reiterate our call to require the IA to produce reasons for its decisions.

6.23 Section 43

Section 43 makes provision for the Director to request the IA to reconsider a determination made under section 39(1). The Director may make the request if underlying circumstances relating to the building project have changed so that the criteria that were satisfied at the time the IA’s original decision to make a

determination are no longer satisfied. The provision gives the IA the capacity to confirm or revoke the decision or vary it. If the structure adopted in the Bill is to be enacted, a provision of this kind is supported.

6.24 Section 44

This provision deals with the process for AAT Presidential members to be nominated in order to issue examination notices. Given the structure of the Bill, the section is boilerplate.

6.25 Section 45

6.25.1 Section 45 sets out when and how the Director may apply for an examination notice that may be served on the person who is required to give information. The form and content of the notice is set out in section 48 discussed below. It should be noted that section 45(3) enables Regulations to prescribe both a form for the application and additional information that may be required beyond information set out in section 45(5) that would constitute the basis of its issue. Once again, meaningful consideration of this provision is inhibited by the unavailability of the Regulations.

6.25.2 Section 45(5) sets out the terms which must be included in an affidavit made by the Director which must be provided with an application to the AAT Presidential member as a precursor to the issue of an examination notice. Part of that affidavit is a requirement to specify "other methods used to attempt to obtain information, documents or evidence". This requirement fails to take into account the fact that many witnesses have sheltered behind the current section 52 powers in order that their evidence may be given under compulsion and in confidence. There is evidence that many witnesses welcome the element of compulsion because they fear reprisals if it could be claimed that they provided the information voluntarily. Protection from retribution has proved to be a most effective means of assisting investigations uncover the facts.

6.25.3 Master Builders does not believe that the constraints implied in section 45(5) and discussed further below in the context of section 47 are warranted. The work of the Inspectorate in curbing unlawful industrial action should not be stifled through the over-elaborate precautions that this process would introduce. The entire structure for the issue of examination notices should not be based on the idea that witnesses always give

evidence reluctantly. What is needed is an overriding criterion that should automatically lead to the issue of an examination notice: that the person concerned seeks anonymity. This is a matter of great concern; the future work of the Inspectorate will be severely curtailed if building industry participants are fearful of the consequences of giving evidence or if the current s52 powers are viewed as akin to "bomb disposal." It will lead to a situation where complaints are not made or are withdrawn before they are dealt with.

6.25.4 This concern is reinforced from experience. In its previous form as the Building Industry Taskforce, the ABCC did not possess extensive information gathering powers, particularly the power to compel persons with information or documents about a building industry investigation to provide that material. The result was that the majority of complaints were not taken further. As the Taskforce reported:

> *A survey conducted on a number of clients who withdrew their complaint found that 52 per cent had done so for fear of the ramifications they may face should they pursue the matter.*[18]

6.25.5 As can be seen from this documented problem, the Bill should take into account the fact that those with information about a building industry investigation (or a contravention under the Bill) may need to be protected and to remain anonymous so that the information can be collected and used to assist with the restoration of the rule of law in the industry.

6.26 Section 46

Proposed section 46 is different from the provisions of the 2009 Bill. The sunset provision is now at three years rather than at five. Master Builders maintains the view that as similarly expressed in relation to the 2009 Bill, instead of the legislation containing the automatic sunset provision as expressed in section 46, Master Builders recommends that a review be scheduled twelve months before the period three years from the date of commencement of the legislation and that Parliamentary processes then be used to determine whether or not the building and construction industry should continue to have a separate inspectorate which possesses the relevant information gathering powers. Master Builders recommends

[18]Cth of Australia, Building Industry Taskforce, *Upholding the Law – Findings of the Building Industry Taskforce,* September 2005 p 11

that the review should also consider the efficacy of industry specific legislation and whether it should form part of the continuing law in this area.

6.27 Section 47

6.27.1 This section sets out the factors the AAT Presidential member must consider when determining an application. Some of the factors align with the information that is required to be in the affidavit of the Director. In particular, section 47(1)(d) suffers from the same problem that we have mentioned in connection with the requirement of the affidavit to contain sworn evidence about other methods of gathering the required information. That provision requires the AAT Presidential member to be satisfied that "any other methods of obtaining the information, documents or evidence has been attempted and has not been successful or is not appropriate". Section 47 offers a potential means to take into account the interests of those who wish to shelter under the power to require persons to give evidence in order to maintain anonymity in that it could be regarded as not "appropriate" to obtain the information in another way.

6.27.2 Master Builders submits that it would be preferable if there was an explicit provision in the new legislation to allow information to be given anonymously and under compulsion without the need to exhaust other avenues first. Some witnesses have been glad to be "forced" to give evidence because this gives them some protection from reprisals. These considerations reinforce the point that the confidentiality of the affidavit and the details of the AAT process should be set out in the legislation.

6.28 Section 48

As indicated earlier, this section sets out the form and content of an examination notice. A number of matters about its form and content will be left to the Regulations. Since these are not yet available, we reiterate our call for their early release.

6.29 Section 49

6.29.1 This section effects the Wilcox Report's recommendations that the Ombudsman monitor the use of the examination powers. This provision sets out the requirements of formal notification to the Ombudsman of matters connected with the examination, including a copy of the notice and

the affidavit that accompanied the application for an examination notice and any other information that was given to the AAT Presidential member who issued the notice. Master Builders' view is that installing both a "front end" and a "back end" safeguard is going too far. There is no reason other than the lobbying by the union movement, for the cumbersome layers of bureaucracy that the Bill piles up.

6.29.2 Master Builders contends the monitoring by the Commonwealth Ombudsman as proposed will be a sufficient safeguard to ensure that the Inspectorate exercises its compulsory powers appropriately and efficiently.

6.29.3 The Inspectorate should operate in the same way as other agencies with similar powers. In this context the similar provisions of the *Competition and Consumer Act* 2010 (Cth) (CCA) are relevant. Section 155 of the CCA permits the same type of compulsory powers to be exercised by the Chairman and Deputy Chairman of the Australian Consumer and Competition Commission without the need for prior judicial or other oversight as contemplated in the Wilcox Report and expressed in the Bill. Master Builders therefore recommends that the Ombudsman's oversight should be the only safeguard adopted in the Bill. This will also serve to ameliorate cost concerns expressed by the Ombudsman that were aired recently in the media.[19]

6.29.4 In *CDPP v Tribe* it was held that the examination notice issued by a Deputy Commissioner to Ark Tribe was defective in that the delegation of "powers" under s52 BCII Act by the ABC Commissioner to his Deputy was held not to include his "functions" under that section.[20] In addition in the absence of a formal instrument of delegation to inspectors, the BCII Act required the ABC Commissioner to personally undertake all investigations which were to be the subject of examinations. The Commissioner could not leave this to the inspectors whom he had appointed under the Act for this purpose. [21]

[19] See A Hepworth "*Ombudsman seeks Funds to Monitor Interrogation"* the Australian 13 January 2012 p2

[20] *CDPP v Tribe*, 24.11.10 (Whittle SM), at [93] and [98]. It was held that to form the belief under s 52(1) that a person could give relevant evidence was a "function" and that to issue a notice under s 52(1) was a "power". It had been unsuccessfully argued by the Cth DPP that the delegation of powers under s 52 to the Deputy Commissioner included a delegation of any function that it was necessary to perform in order to exercise those powers.

[21] *CDPP v Tribe*, at [97]. This was because the definition of "investigation" in s 52(8) BCII Act required that the investigation be "by the ABC Commissioner". The same problem will be encountered under the Bill: clause 36A (1) will require an investigation to be "by the Director" of the new Fair Work Building Industry Inspectorate. The Bill compounds this problem by requiring the Director to "commence" the investigation under clause 47(1).

Although the decision does not legally bind the ABCC, there have been public statements by the ABC Commissioner which seem to acknowledge that all s 52 notices in the past were "defective".[22] Master Builders disagrees with this proposition. The Ark Tribe case is not a precedent of a court of record. It therefore does not bind other courts and should have no substantive effect on the administration of the ABCC.

6.30 Section 50

6.30.1 Section 50 is concerned with the way in which the Director must give the relevant person the examination notice issued by the AAT Presidential member. The Director has the discretion not to provide the person with the notice. If the Director does not give the notice within three months of it being issued, the notice ceases to have effect. Within the structure of the current Bill, this provision is not opposed.

6.30.2 The drafting of proposed section 50(3) is confusing but the provision appears to mean that the Director may give a notice to a person and vary the time and the date so that the person must have at least fourteen days' notice of the examination time and date. This is substantiated at paragraph 140 of the Explanatory Memorandum which is as follows:

> *This power is necessary to ensure that the person is given at least fourteen days' notice of their requirement to attend as well as providing flexibility to set an alternate time or date such as where it is desirable to accommodate the wishes of the person subject to the notice.*

Master Builders recommends that proposed section 50 (subsection 3, 4 and 5) be drafted to make that intent clearer.

6.31 Section 51

6.31.1 Section 51 sets out the rules covering situations when a person is required to attend before the Director and answer questions, called an examination. Section 51(3) states that a person is entitled to be represented at the examination by a lawyer of their choice. The Explanatory Memorandum at paragraph 145 states that the intent of this provision is to expressly override *Bonan v Hadgkiss (Deputy Australian Building and Construction*

[22] The answer by ABC Commissioner Johns to DEEWR Question No EW0119_12 and Senate Estimates, 19.10.11, Hansard, pages 62-3.

Commissioner).[23] In this case Deputy ABC Commissioner Hadgkiss excluded a particular legal representative because she had appeared for another witness. Mr Hadgkiss ruled that her appearance for a second witness may have prejudiced the investigation. The Federal Court upheld this ruling. In Master Builders' understanding, in the unusual circumstance where a particular legal representative is excluded, the witness is given time by the ABCC to arrange for alternative legal representation of their choosing. This seems a better approach to the law and we recommend the Bill be altered to reflect this equitable practice rather than enshrining a practice that courts have found has the potential to be prejudicial.

6.31.2 Master Builders strongly opposes section 51(6). This could have disastrous consequences for an investigation into, say, widespread unlawful action where the content of the questions and confidential material was put to an examinee. The provision says that the Director is unable to require a person to give an undertaking not to disclose information or answers given at the examination or to discuss matters relating to the examination with another person. Such a provision departs from normal practices of not sharing such information because that creates scope for witnesses to coordinate their responses. The integrity of examinations of this kind rests upon the preservation of confidentiality ensuring that the investigation is not prejudiced or questions that might be asked of others are not "rehearsed" to the prejudice of the truth. Under the BCII Act, the content of the examination is confidential and may not be disclosed by the witness, legal counsel or the ABCC until the investigation is completed. The ABCC notifies witnesses as to when the investigation is complete and when they may disclose the evidence given in their examination. This procedure maintains the integrity of the examination process, a matter threatened by proposed section 51(6).

6.32 Section 52

6.32.1 Item 55 of Schedule 1 of the Bill repeals current section 52 and replaces it with a provision that creates the offence of failing to comply with an examination notice. As indicated at paragraph 151 of the Explanatory Memorandum, the proposed section 52(1) effectively replicates the existing

[23] [2006] FCA1334

subsection 52(6). This makes it an offence to fail to comply with the terms of an examination notice, with a maximum penalty of imprisonment for six months.

6.32.2 Proposed section 52(2) provides an exemption from the requirement to provide information or answer questions if the person would be required to disclose information that is subject to legal professional privilege or would be protected by public interest immunity. Master Builders' notes the terms of s155(7B) of the CCA as follows:

> *This section does not require a person to produce a document that would disclose information that is the subject of legal professional privilege.*

Accordingly we do not oppose the similar provision in proposed s52(2).

6.32.3 Master Builders does, however, oppose the extension of public interest immunity as an exemption to providing information. This is because the boundaries of this exemption would be too wide and could be highly prejudicial to an investigation under the Bill. There is no justification for its inclusion offered in the Wilcox Report.

6.32.4 Halsbury's *Laws of Australia* describes the immunity or privilege as follows:

> *The court will not compel or permit the disclosure of information that would be injurious to an identified public interest. The categories of public interest immunity are not closed and are not limited to issues involving central organs of government. Public interest immunity claims are characterised as either: class claims, where the documents belong to an identifiable class and where disclosure, regardless of the contents, would be injurious to the public interest; and contents claims, where the risk of injury is based on the particular contents of the documents.*
>
> *The court may limit the availability of the sensitive material. Non-disclosure is limited to secondary evidence of the document, not necessarily to secondary evidence of the matters referred to in the documents.*

6.32.5 A paper by Laughton[24] indicates that the interests of the State are broad and that there is a very real conflict between the application of the immunity and the idea of open democracy. Given the uncertain boundaries of the immunity and the many arguments that could be developed around its terms where Government infrastructure projects might be at jeopardy (e.g. the need or otherwise to disclose documents created by Government

[24] G Laughton SC, *Public Interest Immunity,* 25 May 2007

departments) if the Inspectorate was not able to exercise its powers, Master Builders opposes the extension of this exemption to evidence that would otherwise be required to be produced during an examination. The criterion is very broad and is likely to spark litigation and divert resources away from the principal purposes of the Inspectorate. In addition, we question for whose benefit is the immunity to be invoked in the current context. It is not an issue that impinges on civil liberties; the immunity protects disclosure of the interests of the State. This excuse should not be available to those who violate industrial relations laws.

6.33 Sections 53 and 54

6.33.1 There are a number of consequential amendments to the current sections 53 and 54 of the BCII Act made by Items 57 to 61 of Schedule 1 of the Bill.

6.33.2 It should be emphasised that there are worthwhile protections conferred by the existing sections 53 and 54. Under section 53(2) where a person provides information, documents or answers under a section 52 notice, these are only admissible in proceedings for an offence under section 52 and the offences under the criminal code mentioned in section 52. Section 54 provides that persons who in good faith provide documents or answer questions where section 52 applies are protected from liability if they have contravened another law and they are protected from civil liability where loss or damage has been suffered by another person. These are significant protections that should not be ignored when examining the safeguards that apply in the context of the compulsory examination powers. Their existence makes the proliferation of additional protections in the Bill both illogical and redundant. This is a further ground on which Master Builders supports only the monitoring role to be undertaken by the Commonwealth Ombudsman, discussed earlier.

6.34 Section 54A

6.34.1 Proposed section 54A deals with requirements relating to the oversight of examinations that will be undertaken by the Commonwealth Ombudsman. This provision epitomises the multi-layered bureaucratic procedures that the Bill will impose on the Director. When the examination is completed, the Director must provide the Ombudsman with a report about the examination, a video recording of the examination, and a transcript of the

examination. It does seem to be a case of gilding the lily to require a video as well as a transcript. It is not as though the examination notice permitted torture of the examinee.

6.34.2 Proposed section 54A(2) sets out the content of the report which must include a copy of the examination notice, the time and place of the examination was conducted and the name of each person present. What other detail will be required remains a mystery as the Regulations will prescribe the other information. The Ombudsman is required to review the exercise of the Director's powers and of any person assisting the Director.

6.34.3 In addition, at the end of each financial year the Ombudsman must prepare and present to the Parliament a report about examinations conducted during the year. The report must include the results of all reviews conducted by the Ombudsman during the year. Master Builders believes that the legislation should require that all such communications omit details that could reveal the identity of witnesses along the lines of current section 66 BCII Act. There should be a specific statutory provision that the identity of witnesses must not be disclosed.

6.34.4 It is interesting to compare the constraints placed on the Director compared with the capacity of the Ombudsman to obtain information, documents or records relevant to an Ombudsman's investigation under the *Ombudsman Act 1976* (Cth). This power of the Ombudsman includes the right to require a person to attend to answer questions relevant to the Ombudsman's investigation along the lines of the current powers vested in the ABCC. It is noted, however, that section 9(3) of the *Ombudsman Act* does contain a number of constraints on disclosure but it is very specific as to what is or is not in the public interest. In accordance with section 9(4)(b) of the *Ombudsman Act*, the general public interest excuse is not available to prevent a person from producing a document or other record or answering a question when required to do so under the *Ombudsman Act*. This comparison reinforces Master Builders' earlier points about the fact that the public interest is too broad a consideration when seeking provision of information relevant to a suspected contravention under the Bill.

6.35 Section 55-56

Items 63-69 of Schedule 1 make consequential changes to section 55 and 56 of the BCII Act. These are not opposed.

6.36 Section 57

Section 57 to be added by item 71 of Schedule 1, states that the Director's power to obtain information is not limited by a secrecy provision in another law unless the power to obtain information is expressly excluded. Master Builders supports this provision.

6.37 Section 58

6.37.1 This provision deals with payment for a person's expenses incurred in attending an examination. Reasonable expenses will be paid to cover matters such as travel, accommodation but also, as recommended in the Wilcox Report, includes legal expenses.

6.37.2 In Master Builders' view this involves a burden on the taxpayer that has no good policy justification. Master Builders supports the proposition that persons who attend to provide information etc should have their reasonable expenses paid. However, we do not support the extension of reimbursement to legal costs. The Inspectorate is not a court nor should its investigative processes be regarded as akin to a costs jurisdiction. Compensation for legal expenses incurred as a result of being compelled to assist the investigatory process is out-of-step with the rules and regulations which govern similar agencies of government. In circumstances where the cost of legal representation is reimbursed, it should be payable only for evidence given in court or for participation as a party to proceedings where the party has been successful. Legal expenses should not be reimbursed merely because a person has provided evidence at an investigatory level.

6.37.3 At the very least, if the provisions of the Bill proceed, the requirement about recovering legal costs should be subject to a means test and not made available to those above a certain income, not prescribed as an absolute right.

6.37.4 We note that the form and information required to make an application to be paid expenses under proposed section 58(3) is to be set out in the Regulations. This again reinforces the notion that the Regulations should be released as soon as possible so that more of the detail of the Bill is known before its enactment.

6.38 Fair Work Building Industry Inspectors

The appointment of inspectors, including appointment to that role of the Director, is covered in proposed sections 59-59A. These provisions are not opposed. Section 59B requires that identity cards are to be issued to Inspectors and be in a form approved by the Director, with a recent photograph of the Inspector. Master Builders has no concerns with the provision about identity cards.

6.39 Powers of Inspectors and the Director

6.39.1 Under proposed section 59C, an Inspector will have the same functions and powers as possessed by a Fair Work Inspector. An Inspector appointed under the Bill may perform those functions and exercise the relevant powers only in relation to "building matters" and subject to any restrictions that are contained in the Inspector's instrument of appointment. Building matter is defined in proposed section 59C(3) as a matter that relates to a building industry participant. The definition of this latter term is set out in sub-section 4(1) of the Bill.

6.39.2 Master Builders' only concern with the definition is that it encompasses a person who has entered into a contract with a building contractor under which the building contractor agrees to carry out building work or to arrange for building work to be carried out, and thus excludes off-site work. Master Builders reiterates its concern that off-site work should be covered, for the reasons set out earlier in this submission.

6.39.3 Proposed section 59C(5) would not permit the Fair Work Ombudsman to issue directions to Inspectors appointed under the Bill. As indicated earlier, how the Inspectorate will then operate to delimit its work and have consistent policy with regard to, for example, the making of applications for orders in relation to contraventions is unclear. The manner in which applications for orders about contraventions of the civil remedy provisions contained in the FW Act (which deal with inter alia the two provisions

concerning industrial action discussed earlier) should be clarified prior to the passage of the Bill.

6.39.4 Section 59D provides the Director with the same power to accept written undertakings as is vested in the Fair Work Ombudsman under section 715 FW Act.

6.39.5 Section 59E requires Inspectors to monitor compliance with any Building Code issued under the Bill. Questions that arose earlier about whether the Code and Guidelines would be declared as the Building Code are again raised in the context of this power. When an Inspector monitors any Building Code they have the same powers they would have if the Building Code were a Fair Work instrument. Master Builders supports this principle but points out that Commonwealth contracts could vest Inspectors with greater powers than those set out in the statute. Whether that will occur will be made clear when the status of the Code and Guidelines is announced by the Government.

6.39.6 Section 59F provides that the Director may give written directions to Inspectors relating to the performance of their functions or the exercise of their powers as inspectors. These directions are of a general nature. Master Builders does not oppose this power but submits that the directions should be, so far as possible, aligned with directions given by the Fair Work Ombudsman to Inspectors appointed under the FW Act.

7 FEDERAL SAFETY COMMISSIONER

7.1 Chapter 4 of the BCII Act establishes the position of the Federal Safety Commissioner and also the Australian Government Building and Construction OHS Accreditation Scheme (the Accreditation Scheme). The Accreditation Scheme overseen by the Federal Safety Commissioner has been a key government mechanism for working with the building and construction industry to achieve improved OHS performance and culture change both in the industry and in procurement agencies.

7.2 The Committee should note that it is the Federal Safety Commissioner, not the ABCC, which has a role in improving safety in the building and construction industry. This is contrary to the claims of the union movement which as part of its campaign against the ABCC has variously indicated that the ABCC does not do anything to improve safety and that the industry's safety performance has declined since the

establishment of the ABCC.[25] Most recently, CFMEU National Secretary Dave Noonan is quoted as saying in defence of the conduct of John Setka, a Victorian CFMEU assistant secretary that "… he's out there every day, trying to improve safety in the industry. People like Mr Johns don't do anything to improve safety." [26] Safety is used by the CFMEU to illegitimately foster other agendas. Gilmour J in *ABCC v Construction, Forestry, Mining & Energy Union*[27] said:

> *It is of particular concern that the CFMEU, Mr McDonald and Mr Buchan have, as I have found on a prima facie basis, hidden behind spurious concerns as to the health and safety of employees to advance, as I infer, their own unspecified industrial aims. It is the very behaviour which the Commonwealth Parliament has made clear should be eradicated from the building industry in this country. It is conduct that directly undermines the main object of the BCII Act (s 3(1)) which is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.*[28]

7.3 As well as misrepresenting the role of the ABCC, defending illegal conduct on the basis that it advances safety is spurious. Breaking the law does not advance safety in the industry. There are many cases which highlight the importance to safety of enforcing the rule of law. For example,[29] in December 2008 three union officials who entered a construction site in Manly engaged in practices that put their own safety, and the safety of workers, at risk. This included driving a car into a gate close to where an employee was standing and climbing on scaffolding that was undergoing alterations – the official refused to come down despite repeated requests from the OHS manager. The union officials received significant fines for this dangerous behaviour – behaviour which is completely at odds with the legitimate role that unions can play in improving occupational health and safety.

7.4 Available fatality data published by Safe Work Australia does not support the claim that the ABCC has led to reduced safety. Worker's compensation data published by Safe Work Australia shows a decrease in the incidence rate for fatalities - from 7.7 in 2005-06 (the first year of the ABCC's operation) to 5.9 in 2008-09.[30] More

[25] For example, see the ACTU Media Release *Workers' Memorial Day 2010 – unions and OHS representatives make workplaces safer,* 28 April 2010 available through the following link http://www.actu.org.au/Media/Mediareleases/WorkersMemorialDay2010unionsandOHSrepresentativesmakeworkplacessafer.aspx

[26] "Building industry watchdog is ready to growl at anyone", Financial Review, 4 January 2012, pages 44-45.

[27] [2009] FCA 1092 (29 September 2009)

[28] Ibid para 145

[29] *Darlaston v Parker* [2010] FAC 771 (23 July 2010)

[30] Compendium of Workers' Compensation Statistics Australia 2008-09, page 56

comprehensive fatality data published in the *Work-Related Traumatic Injury Fatalities Report*[31] shows that the fatality rate for the construction industry was higher in 2005-06 (4.9) than in 2008-09 (4.5).

7.5 It is true that this data shows that the construction industry fatality rate was higher in 2005-06 than the previous year (4.9 compared with 3.2)[32]. However, fifteen other industry sectors also had higher fatality rates, and the all industry rate was higher than the previous year (2.8 compared to 2.6). There is a similar picture for 2006-07 – the construction industry fatality rate was higher than in 2004-05, but the same is true for nine other industry sectors and the all industry rate was also higher (2.9 compared to 2.6). These figures show that the claim that there is a link between the role of the ABCC and construction industry fatalities is illogical.

7.6 Master Builders is strongly committed to improved safety outcomes in the building and construction industry and therefore supported the creation of the Federal Safety Commissioner. The Bill does not amend Chapter 4 of the BCII Act which means that the role of the Federal Safety Commissioner is unchanged. However, items 75 and 76 repeal subsections 62(14) and 63(14) of the BCII Act – these subsections created an offence if a person refuses or unduly delays entry of a Federal Safety Officer exercising powers under the BCII Act. The Explanatory Memorandum indicates that refusing or unduly delaying entry to premises by a Federal Safety Officer would fall within the scope of section 149.1 of the *Criminal Code* which deals with obstruction of Commonwealth public officials. Item 77 also inserts a new section 64A into the BCII Act which deals with the disclosure of information by the Federal Safety Commissioner.

7.7 Master Builders 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. However, since 2010 Master Builders has been calling for a review of Scheme administered by the Federal Safety Commissioner in order to address industry concerns about the operation of the Accreditation Scheme and to determine whether or not the current structure and operation of the Accreditation Scheme remains the most appropriate mechanism to

[31] Work-Related Traumatic Injury Fatalities, Australia 2008-09, Safe Work Australia, May 2011. The report uses coronial information, notified fatalities data and workers' compensation data to provide an estimate of the number of fatalities from work-related injuries.

[32] Ibid

achieve improved OHS performance. The Accreditation Scheme has been in operation for six years without a comprehensive external review.

7.8 The Government has indicated that it supports a review, and this was confirmed in the second reading speech for the Bill which stated as follows:

> *Finally, the Government understands the importance of safety at work in the building and construction industry. Mr Wilcox was not asked to review the operation of the Office of the Federal Safety Commissioner (OFSC) or the associated Australian Government Building and Construction OHS Accreditation Scheme (the Scheme). This bill therefore makes no changes to the provisions of the BCII Act that relate to the OFSC and the Scheme.*
>
> *The Government is of course conscious of the need for continuous improvement in regulatory arrangements and the Department of Education, Employment and Workplace Relations is currently considering the details of a review of the OFSC and Scheme.*

7.9 In Master Builders' view, the review should have been completed prior to the reintroduction of the Bill so that any changes to the legislation establishing the Federal Safety Commissioner and the Accreditation Scheme identified by the review could have been included in the Bill. Although this would have been optimal, Master Builders considers that the review, which has been under consideration by the Department of Education, Employment and Workplace Relations for more than 12 months, should proceed as soon as possible and should be the subject of separate statutory amendments if necessitated by the review's outcome.

8 PROJECT AGREEMENTS

8.1 Item 77 of Schedule 1 repeals current section 64 BCII Act. This provision is aimed at what were common adverse practices in the building and construction industry prior to the passage of the BCII Act – that is allowing unregistered agreements to operate as de facto project agreement arrangements. These agreements secured site wide terms and conditions of employment and involved instances where unions sought to impose, for example, site allowances that were to be paid in proportion to the monetary value of the project. These payments were unrelated to productivity and added unnecessary costs to projects. These unregistered agreements are made unenforceable by reason of current section 64 BCII Act.

8.2 A further means by which common site terms and conditions were rolled out was by including a "jump up" provision in an unregistered agreement. If an agreement contained provisions that were less than the agreed "industry" site terms and

conditions then the more favourable provisions would displace the less favourable. The effect of section 64 has effectively eliminated “jump up” provisions.

8.3 Master Builders supports the retention of a provision that continues to make unregistered project agreements unenforceable so that the disconnection between productivity and payments in relation to project agreements does not again become a burden on the industry.

9 DISCLOSURE OF INFORMATION

9.1 Item 77 of Schedule 1 substitutes a new section 64 for the repealed section 64, just discussed. Proposed section 64 permits disclosure of information, other than protected information under section 65. The Director may disclose or authorise the disclosure of information acquired by him or her and staff during the course of performing the Inspectorate’s work.

9.2 According to the Explanatory Memorandum, the provision is intended to achieve consistency with the approach to disclosure of information set out in section 718 FW Act, relating to the functions of the Fair Work Ombudsman. Master Builders disagrees and recommends that there be a general prohibition on the disclosure of personal information. Section 65 is limited to protecting disclosure of material gathered at an examination or via the issue of an examination notice. Building and construction industry participants will be reluctant to come forward if they face the possibility that details of their complaint or personal information will become public. This danger is currently recognised in section 66 BCII Act.

9.3 Master Builders recommends that there be an extension of the protections in section 66 so that its terms are not limited to the reports to be given under section 12 or 14 but should be extended to any disclosures made under section 64. Without a provision that restricts disclosure of personal details, it is likely that many people who would otherwise come forward to make complaints will be deterred. As indicated earlier in this submission, over half the complainants who made a complaint to the Building Industry Taskforce withdrew their complaint for fear of the consequences. The new regime should eliminate this possibility and ensure the security of witnesses.

9.4 Section 64A permits the Federal Safety Commissioner to make disclosures like those that can be made by the Director. We would anticipate that building and construction industry participants should also get similar protection from the

disclosure of their affairs by the Federal Safety Commissioner as we have recommended apply in respect to disclosures made under proposed section 64.

9.5 As indicated earlier, the Bill amends current 65 of the BCII Act to limit the application of the section only to information that was disclosed or obtained under an examination notice or at an examination. Master Builders believes that this is inadequate protection and reiterates the fact that the policy position envisaged by section 66 should not be altered and that individuals should have the protection envisaged in relation to the section 12 or section 14 reports extended to disclosure under the section 64 power.

9.6 Item 87 of the Bill repeals section 67 BCII Act. The Explanatory Memorandum at paragraph 221 states that section 67 is unnecessary in light of the proposed new disclosure provisions in section 64. Section 67, to be repealed, provides the ABC Commissioner with the capacity to publish details of non-compliance with the Building Code, including the names of the persons who have failed to comply, and non-compliance by a building industry participant with the BCII Act, including the names of those participants who failed to comply. Section 67 recognises that there is a public interest imperative that justified an exception to the general rule of non-disclosure of an individual's affairs. Master Builders submits that pressing public interest be the only ground on which disclosure of an individual's personal details is permitted. This would protect those who wish to come forward to make complaints. The proposed new disclosure provision permits disclosure of information in a much wider range of circumstances and is therefore more likely to prejudice the position of complainants who may now be reluctant to come forward with information.

10 OTHER MATTERS

10.1 Item 88 of Schedule 1 repeals current section 68 about delegation with a new provision about the same subject. The proposed section would allow the Minister to delegate all of the powers under Chapter 3 about the Building Code to the Director or the FSC. Master Builders does not oppose this consequential change.

10.2 Item 89 of Schedule 1 repeals current sections 69 and 70 BCII Act. The Explanatory Memorandum at paragraph 223 states that the repeal of these sections is consequential to other amendments but, in particular, the repeal of chapters 5 and 6. Earlier in this submission, Master Builders submitted strongly that these provisions should be retained. Accordingly, in Master Builders view, provisions similar to sections 69 and 70 should be retained.

10.3 Section 69 provides that for the purposes of the BCII Act, conduct of the committee of management of a building association or of an officer or agent of a building association acting in that capacity is taken to be the conduct of the building association. The provision sets out the circumstances the conduct of a member or group of members is also taken to be conduct of the building association. This provision is necessary in order to ensure that responsibility is taken by a building association where the conduct of the member or group of members is authorised by the rules or the committee of management of the association or a properly authorised officer or agent.

10.4 Section 70 is pivotal in applying a provision of the BCII Act (and should for building industry participants be applied in relation to coercion provisions under the FW Act) that refers to coercing, encouraging, advising or inciting a person to do something. Essentially, the provision states that whether or not the person is able, willing or eligible to do the particular thing about which pressure was applied should not be a relevant consideration when determining whether an offence against the legislation has occurred. This means that the conduct, coercion, encouragement, etc., can be established even if the person being coerced, etc. is not able, willing or eligible to do the thing he or she is being coerced to undertake. This is very important in focusing only on the behaviour of the building industry participant who illegitimately seeks to apply pressure amounting to coercion.

10.5 The balance of the items in Schedule 1 are not opposed.

11 SCHEDULE 2: TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

Schedule 2 foreshadows that Regulations may deal with transitional and consequential amendments. This again reinforces Master Builders' view that Regulations which affect substantive changes should be made available well prior to the enactment of the Bill.

12 CONCLUSION

12.1 The Bill, as with the 2009 Bill, represents a significant and potentially disastrous watering down of the powers now exercised by the ABCC. The result is the creation of a toothless tiger.

12.2 It is obvious that the proposed Building Industry Inspectorate will have significantly less clout than the ABCC. It will have less independence because it will no longer

be a separate commission based on its own statute. It will be subject to direction from:

- an advisory board;
- the Minister;
- the "Independent Assessor", who will have the superfluous yet daunting power of "switching off" the inspectorate's coercive interrogation power on any building project where he or she considers this warranted.

12.3 The powers of the new inspectorate will also be considerably less than those wielded by the ABCC. To name the most significant of these:

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

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

12.5 The fundamental problem with the apparatus established by the Bill is that the specialist inspectorate lacks the independence it needs to be effective. It is smothered in layers of costly bureaucracy and strangled by red tape. There are so many safeguards against the abuse of its powers that there remains little scope for the proper exercise of such powers as it retains. The ABCC is effective because it had the independence and the authority to exercise its powers without these burdensome constraints. Hamstrung as it is by an excessive weight of safeguards, and subject to directions from both an advisory board and the Minister, the new body has little prospect of achieving its stated aims.

12.6 The Bill reflects the resentment of the building unions that under the BCII Act they were singled out for special treatment and that this amounted to unjustified coercion and discrimination. Wilcox agreed that it was unfair not to accord the building unions equal treatment under the law. But what these politically correct sentiments ignore is that the building industry was, and remains, in Justice Cole's words, "a singular industry" in which the rule of law did not apply. The normal processes are fine for parties who agree to abide by the rules of the game, but for those who consistently reject and flout those rules, something stronger is needed. The only reason the ABCC was directed against a specific industry sector and armed with unusual powers is that the unions in the sector have consistently refused to adhere to the law, a matter brought out in the case study in this submission. Exceptional behaviour requires an exceptional response.

12.7 The building unions have stood out among the labour movement in their contempt for the law and the industrial tribunals, and were notorious for the enthusiasm with which they resorted to violence, intimidation and thuggery in pursuit of their aims, not merely against employers, but just as often against other unions. Among the union movement the building unions, and especially the old Builders Labourers Federation, were regarded as mavericks and feared as thugs, and it is a sad fact that some of this destructive and contrary spirit has been inherited by their contemporary successors. It was the uniquely lawless culture of the building and construction industry that created the need for a specialist body to supervise, investigate and recommend prosecution. If this is discrimination, it was made necessary by the building unions' own behaviour, illustrated in the case study set out at section 5 of this submission.

12.8 The establishment of the ABCC has led to a period of remarkable harmony and increased productivity in the building and construction industry, characterised by rising take-home pay, fewer days lost to industrial action and a record level of construction projects completed on or ahead of schedule and within budget. None of this has been at the expense of worker well-being: on the contrary, take-home pay has increased and workplaces have become safer during the period in which the ABCC has regulated the industry.

12.9 In his report on the future of the ABCC, Mr Wilcox recognised the existence of the old culture of violence that disfigures the building and construction industry and acknowledged the success of the ABCC in curbing lawlessness and transforming the culture of the industry. But he concluded that "The ABCC's work is not yet

done". Unfortunately, the provisions of the Bill, bowing to union resentment of the ABCC's powers, are likely to have the result the ABCC's work will be left undone.

****

Attachment A

Economic Analysis of Building and Construction Industry Productivity: 2012 Report (Stage 1)

This report was prepared for Master Builders Australia

19 January 2012

This report has been produced for Master Builders Australia (MBA) according to their terms of reference for the project. Independent Economics makes no representations to, and accepts no liability for, reliance on this report by any person or organisation other than the MBA. Any person, other than the MBA who uses this report does so at their own risk and agrees to indemnify Independent Economics for any loss or damage arising from such use.

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Executive Summary

Background

This is the fifth update of a seminal report on construction industry productivity. The initial report was prepared by us (Econtech Pty Ltd, trading as Independent Economics) on behalf of the Office of the Australian Building and Construction Commissioner and released in 2007. The first stage of the 2007 report analysed the contribution of industry reforms and other factors in driving construction industry productivity. The industry reforms analysed in the 2007 report include the Australian Building and Construction Commissioner (ABCC); its predecessor, the Building Industry Taskforce (the Taskforce); and industrial relations reforms in the years to 2006. The second stage of the 2007 report involved estimating the flow-on benefits to the wider economy from the lift in construction industry productivity as a result of these industry reforms.

Since this initial report in 2007, the analysis has been updated in 2008, 2009 and 2010. Each report took into consideration the latest information on construction industry productivity from various sources including the Australian Bureau of Statistics, the Productivity Commission, quantity surveyor data, case studies and other related research. An analysis of the updated data sources came to the same general conclusion; that after allowing for other factors which affect construction industry productivity, the data suggests that industry reforms have led to productivity outperformance within the industry.

This 2012 update will be completed in two stages. This first stage will analyse the contribution of industry reforms and other factors in driving construction industry productivity. The second stage of the update will use the findings of stage one to estimate the flow-on benefits to the wider economy from a lift in construction industry productivity. The second stage will be completed in late February.

Stage 1 methodology

Stage 1 involves reviewing the latest data on construction industry productivity from a variety of sources to provide an up-to-date analysis of trends in construction industry productivity and the factors driving these trends.

An analysis of the various indicators of construction industry productivity suggests that productivity in the construction industry has outperformed productivity in the wider economy. Following the identification of this productivity outperformance, the contribution of industry reform to the recent productivity outperformance in the construction industry is examined. To do this, the study uses the latest information to perform the same three types of productivity comparisons as reported in the previous reports. Broadly, the comparisons are designed to compare the timing of the period of outperformance with the timing and nature of changes in industrial relations policies and the timing and nature of the operations of the ABCC and the Taskforce. The three types of productivity comparisons and the reason for conducting the comparisons are outlined in detail below.

- **Year-to-year** comparisons of construction industry productivity are made using a variety of sources to determine whether there has been a link between the timing of industry reform and productivity outperformance in the construction industry.

- Rawlinsons data on costs is used to assess whether industry reforms have succeeded in improving productivity in **non-housing** construction vis-à-vis **housing** construction. Industry reforms have been focused on the more regulated, non-housing side of the industry, where costs for the same construction tasks are higher than on the housing side of the industry. We assess whether industry reforms have reduced this cost penalty for the non-housing side of the industry by improving its productivity.

- Comparisons are made of **individual projects** undertaken before and after industry reforms to see whether industry reform has affected productivity at the individual-project level.

The results of these three productivity comparisons were assessed to identify the outperformance in construction industry productivity that can be attributed to industry reforms.

In stage 2 of the analysis, the positive productivity impact identified in stage 1 will be introduced to an economy-wide model to estimate the flow-on benefits to the wider economy from industry reform.

The impact of reform on construction industry productivity

The analysis of the latest information continues to support the findings of the previous reports; that there has been a greater gain in construction industry productivity than would otherwise have been the case, due to industry reforms. Specifically, the productivity comparisons outlined above support the conclusions in the previous reports with respect to the source of the productivity outperformance – that the ABCC has played an essential role, but its effectiveness has depended on industry-specific industrial relations laws that it enforces.

This conclusion is based on the three types of productivity comparisons - year-to-year, residential versus non-residential and individual projects.

Year-to-Year Comparisons

- ABS data shows that, since the start of industry reforms in 2002, construction industry labour productivity has outperformed predictions based on its historical performance relative to other industries by **12.4 per cent**.

- The Productivity Commission's analysis of ABS data has found that multifactor productivity in the construction industry was no higher in 2000-01 than 20 years earlier[1]. In contrast, the latest ABS data on productivity shows that construction industry multifactor productivity accelerated to rise by **14.5 per cent** in the nine years to 2010-11.

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

- While the productivity indicators listed above are not directly comparable, they all indicate that the timing of improvements in construction industry coincides with the timing of industry reforms; the Taskforce was established in late 2002 and the ABCC was established in late 2005.

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

Non-residential versus residential

- As noted above, traditionally the same construction tasks have been more costly when undertaken on the non-residential side of the construction industry compared to the residential side. However, using Rawlinsons data to January 2011, this cost penalty for non-residential construction has shrunk in concert with industry reforms that have targeted improved productivity in non-residential construction. The shrinkage in the cost penalty implies a relative productivity gain for non-residential construction conservatively estimated at **12.4 per cent** between 2004 and 2011 on a simple analysis, or considerably higher once other factors are taken into account.

Individual Project Case Studies

- Case studies undertaken as part of the previous reports found that the ABCC and industrial relations reforms have improved productivity in the building and construction industry.

- Other studies considered in the previous reports support the findings of the analysis. These studies show that industry reform has lifted construction productivity by approximately **10 per cent**.

All of this evidence continues to support the findings of the previous reports, that there has been significant outperformance in construction industry productivity. What remains is to identify whether or not the productivity gain can be split by source. The data sources above indicate that significant productivity gains in construction industry productivity developed from 2002-03 onwards. This supports the interpretation that it was the activities of the Taskforce, established in October 2002, and the ABCC, when it was established in October 2005 that have made a major difference.

Thus, the productivity and cost difference data suggest that effective monitoring and enforcement of the general industrial relations reforms and those that relate specifically to the building and construction sector were necessary before the reforms could lead to labour productivity improvements. As such, the most appropriate finding is that separate attribution of labour productivity improvements to the ABCC and industrial relations reforms in the years to 2006 is not possible. This is because, to be effective, all of the industry reforms need to be in place, in other words, both the ABCC and relevant industrial relations reforms need to operate together.

All the latest data (up to 2011) continue to point to industry reforms leading to a significant productivity outperformance in the construction industry. As reported above, the estimated gain ranges between 10 and 14.5 per cent, depending on the measure and the source of information that is used. Notably, the latest data indicates that the productivity outperformance of the construction industry has strengthened. Based on data available to July 2010, the 2010 report estimated the gain in construction industry productivity to be between 7.7 per cent and 14.8 per cent.

Earlier reports found that the data continued to support an estimated gain in construction industry labour productivity, as a result of the ABCC and related industrial relations reforms, of 9.4 per cent. This was after taking into account that not all of the productivity measures are strictly comparable, and the magnitude of the estimated gain varies across measures.

The most recent data generally shows some strengthening of the productivity outperformance of the construction industry, as noted above. Hence, the latest available data could justify an increase in the estimate of the gain in construction industry productivity from industry reform. However, we continue to use a 9.4 per cent gain in productivity to estimate the economy-wide impact of industry reform for several reasons. Firstly, the same gain in productivity is used for comparability across reports. Secondly, it avoids placing too much weight on data for any single year. Finally, it avoids any possible overestimation of the productivity outperformance of the construction industry as a result of industry reforms.

Economic impact of improving productivity in the Building and Construction industry

As noted above, stage 2 of the analysis involves estimating the economy-wide impact of gains in construction industry productivity using a computable general equilibrium (CGE) model. The report outlining the findings from stage 2 of the analysis will be released in late February 2012. Based on the currently available information, it is likely that the results of this analysis would be similar to the results of the 2010 report. This is because both reports estimate the economy-wide impacts of outperformance in construction industry labour productivity of approximately 9.4 per cent.

Based on a gain in construction labour productivity of 9.4 per cent, the 2010 report estimates that production costs for the economy as a whole are lower by 0.9 per cent and GDP is higher by 0.6 per cent than would otherwise be the case without industry reforms. Lower production costs flows through to lower consumer prices; the consumer price index (CPI) is lower by 0.7 per cent, driven by savings in the price of housing services. Lower living costs leads to higher living standards. Consumer welfare, a rigorous measure of living standards, receives a boost as a result of higher construction productivity. There is an annual welfare gain of $5.9 billion in 2009-10 terms compared to what would otherwise be the case without industry reforms. Importantly, consumer welfare is the key measure by which to assess the benefits of a policy as this represents the gain to households from the policy. In other words, consumer welfare is the measure by which we can assess whether or not a particular policy is in the public interest.

1. Introduction

1.1 Background

This is the fifth update of a seminal report on construction industry productivity. The initial report was prepared by us (Econtech Pty Ltd, trading as Independent Economics) on behalf of the Office of the Australian Building and Construction Commissioner and released in 2007. The first stage of the 2007 report analysed the contribution of industry reforms and other factors in driving construction industry productivity. The industry reforms analysed in the 2007 report include the Australian Building and Construction Commissioner (ABCC); its predecessor, the Building Industry Taskforce; and industrial relations reforms in the years to 2006. The second stage of the 2007 report involved estimating the flow-on benefits to the wider economy from the lift in construction industry productivity as a result of these industry reforms.

Since this initial report in 2007, the analysis has been updated in 2008, 2009 and 2010. Each report took into consideration the latest information on construction industry productivity from various sources including the Australian Bureau of Statistics, the Productivity Commission, quantity surveyor data, case studies and other related research. An analysis of the updated data sources came to the same general conclusion; that after allowing for other factors which affect construction industry productivity, the data suggests that industry reforms have led to productivity outperformance within the industry.

In each report, components of construction industry outperformance attributed to industry reform were then introduced into an economy-wide model to estimate the impacts of the outperformance on the Australian economy as a whole. The modelling results suggest that improvements in labour productivity have lowered construction costs, relative to what they would otherwise have been. This has, in turn, reduced business costs across the economy, as all industries are significant users of commercial building or engineering construction. Lower business costs mean lower consumer prices. Furthermore, the reports found that, due to industry reforms, consumers are better off by about $6 billion in 2009-10 terms on an annual basis.

1.2 Objectives

It has been over one year since the economic analysis in the 2010 report was updated and new data has been released since the 2010 report was finalised. This 2012 update will be completed in two stages. The first stage will analyse the contribution of industry reforms and other factors in driving construction industry productivity. The findings of the first stage of the analysis are outlined in the report. The second stage of the update will use the findings of stage one to estimate the flow-on benefits to the wider economy from a lift in construction industry productivity. The analysis in this 2012 report fully updates, and therefore supersedes, the economic analysis contained in section two of the 2010 report.

The new data factored into this report include the following.

- Rawlinsons Australian Construction Handbook 2011, containing January 2011 data on comparative costs for the same tasks on the residential and non-residential sides of the construction industry.
- Australian Bureau of Statistics (ABS) national accounts and employment data (released in December 2011).

- The latest published estimates of total factor productivity (released in September 2010).
- ABS data on the number of working days lost from industrial disputes in the construction industry and the economy as a whole (released in December 2011).

1.3 Report structure

This report is structured as follows.

- Section 2 analyses productivity in the construction industry by undertaking a range of productivity comparisons. It compares construction industry productivity between different years, between the non-residential and residential sides of the industry and between individual projects. It then assesses the extent to which productivity changes can be attributed to industry reforms and other sources.
- Section 3 outlines the analysis which would be carried out in stage two of the study and discusses some preliminary results.

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

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

The findings in this report are subject to unavoidable statistical variation. While all care has been taken to ensure that the statistical variation is kept to a minimum, care should be taken whenever using this information. This report only takes into account information available to Independent Economics up to the date of this report and so its findings may be affected by new information. Should you require clarification of any material, please contact us.

2. Productivity comparisons in the Construction industry

This section provides an analysis of productivity trends in the construction industry. Firstly, the focus is in determining whether productivity in the construction industry has outperformed productivity in the wider economy. Secondly, an analysis of the sources of any identified productivity outperformance is completed. Similar to earlier reports, we perform several types of productivity comparisons.

- **Year-to-year** comparisons of construction industry productivity are made using the latest data from the Australian Bureau of Statistics (ABS), a Productivity Commission report and other published research. Our interest is in whether there was a link between the timing in industry reform and outperformance of construction industry productivity.

- Comparisons of productivity for the **non-residential versus residential sides** of the industry are made using Rawlinsons data on construction costs. One component of industry reform, the Taskforce and the ABCC have largely operated on the more regulated, non-residential side of the construction industry. Our focus is on whether this has resulted in any improvement in productivity compared with the residential side of the industry.

- Comparisons are made between **individual projects** undertaken before and after industry reforms.

The remainder of this section provides an explanation of differences in productivity measures. Following this explanation, each of the different types of productivity comparisons (listed above) are then discussed in turn. That is, subsection 2.1 examines year-to-year comparisons and subsection 2.2 compares residential and non-residential construction productivity. Subsection 2.3 outlines other studies in the area of construction industry productivity, including individual project case studies, while subsection 2.4 outlines other general indicators of the influence of industry reform on the construction industry. In subsection 2.5, an assessment of the impact of industry reform on productivity in the building and construction industry is presented. Specifically, the findings from the productivity comparisons are used to assess the extent to which construction productivity outperformance is attributable to the ABCC and its precursor, the Taskforce.

Differences in productivity measures

There are a number of alternative approaches to measuring industry productivity. The most common measures are labour productivity, capital productivity, multifactor productivity and total factor productivity. For ease of exposition, the discussion on these four productivity measures contained in earlier reports is included below.

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

- Capital Productivity. Capital productivity is measured as output per unit of capital. This ratio shows the time profile of how productively capital is used to generate output. Capital productivity reflects the joint influence of capital, labour, intermediate inputs, technical change, efficiency change, economies of scale and capacity utilisation.

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

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

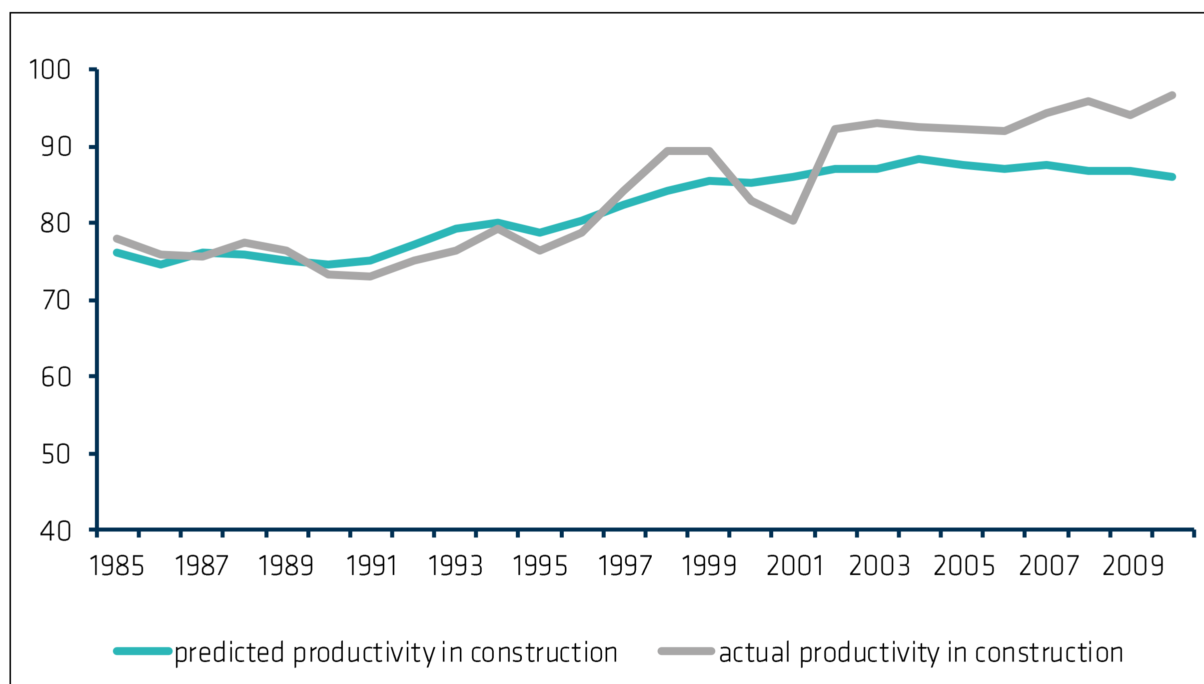
2.1 Year to year comparisons

This section reviews trends in productivity in the construction industry over a number of years for each of the three productivity measures outlined above. It begins by analysing the aggregate construction industry labour productivity data from the ABS. The section then reviews and extends an analysis of multifactor productivity trends in the construction industry undertaken by the Productivity Commission. Finally, the section analyses total factor productivity in the construction industry, using the latest published research. For each productivity indicator, the analysis is completed for data up to and including 2002, covering the period prior to the establishment of the Taskforce/ABCC and then for data post-2002.

2.1.1 Analysis of latest ABS data on labour productivity

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

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



Source: Independent Economics estimates based on ABS data

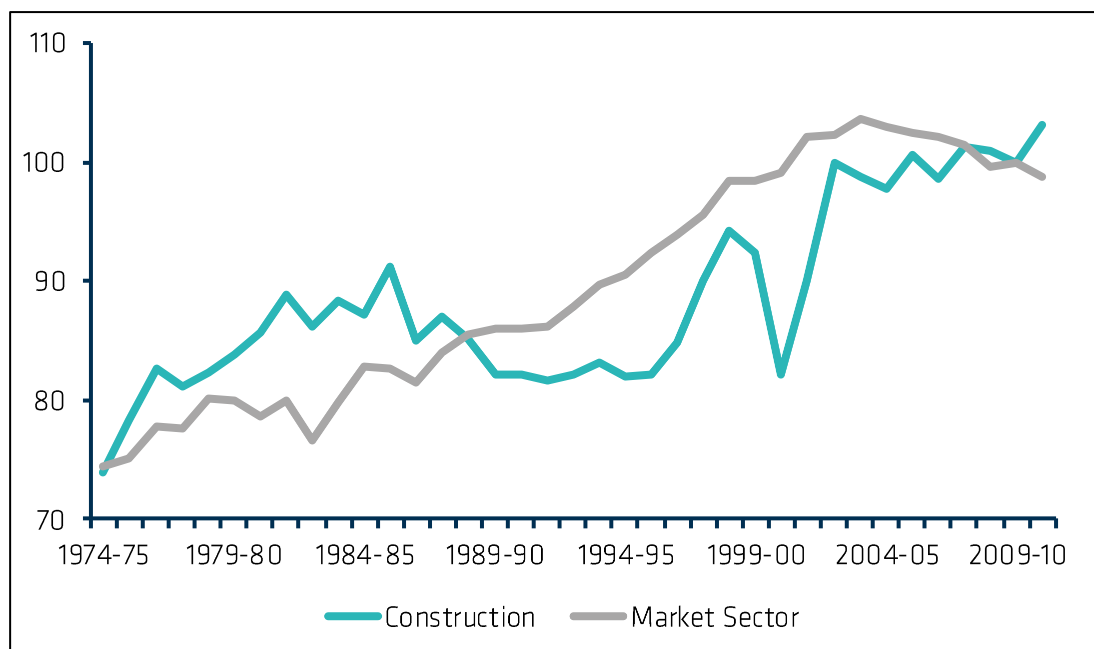
The historical productivity performance of the construction industry is assessed using data for the period from 1985 to 2002. This period was chosen as it is prior to the establishment of the Taskforce/ABCC. For this period, regression analysis was used to establish the trend in productivity in the construction industry, relative to the trend in productivity for the economy as a whole. A comparison between actual productivity and this estimated trend productivity may assist in identifying whether industry reforms have lifted productivity in the construction industry.

As can be seen in Diagram 2.1, since 2002 actual construction industry labour productivity has consistently outperformed predictions based on past trends. The latest reading, for 2010, shows that actual construction industry productivity was 12.4 per cent higher than predictions based on its relative historical performance.

2.1.2 Productivity Commission report on multifactor productivity

This section examines changes in multifactor productivity (MFP) in the construction industry using aggregate data from the Productivity Commission (PC) and the ABS. The PC calculates indices of productivity in 12 industry sectors based on data provided by the ABS. Specifically, the ABS provides estimates of multifactor productivity from 1985-86 onwards and the PC extends these estimates back to 1974-75 using published and unpublished ABS data. The data series was last updated by the PC in February 2009, with 2007-08 as the latest year of data. Since then, the ABS has released updated data on industry multifactor productivity, including productivity estimates for 2008-09, 2009-10 and 2010-11. Independent Economics has combined the PC and ABS data to develop estimates of multifactor productivity between 1974-75 and 2010-11 for the construction industry. Diagram 2.2 compares this multifactor productivity in the construction industry with multifactor productivity in the market sector as a whole from 1974-75 to 2010-11.

Diagram 2.2: Construction industry multifactor productivity, 1974-75 to 2010-11 (2009-10 = 100).



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

While productivity in the market sector has followed a fairly steady upward trend, productivity in the construction industry was fairly flat through the 1980s and 1990s. The PC found that multifactor productivity in the construction industry was no higher in 2000/01 than 20 years earlier[2]. In fact, Diagram 2.2 above shows that there have been periods where construction industry productivity is below the level seen in 1980/81.

However, construction industry productivity then strengthened considerably to achieve a higher level for the nine years from 2002-03 to 2010-11. The data shows construction industry productivity rising by 14.5 per cent in the nine years to 2010-11 (starting from a value of 90 in 2001-02 and escalating to 103.09 in 2010-11). This is a faster pace of growth compared to the nine years from 1993-94 to 2001-02; in the nine years to 2001-02 construction industry productivity increased by 9.6 per cent. In addition, between 2002-03 and 2010-11 the productivity performance of the construction industry outpaced that of the market sector; within this period multifactor productivity in the market sector fell by 3.3 per cent. This confirms the strong construction industry productivity outperformance of recent years, relative to other industry sectors, already seen using labour productivity in Diagram 2.1.

A study by the Grattan Institute has also noted that construction is one of only three industries that have enjoyed faster labour and multifactor productivity growth in the 2000s compared to the 1990s[3]. Administration and support services and arts and recreation services are the other two industries whose productivity performance has improved in the 2000s.

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

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

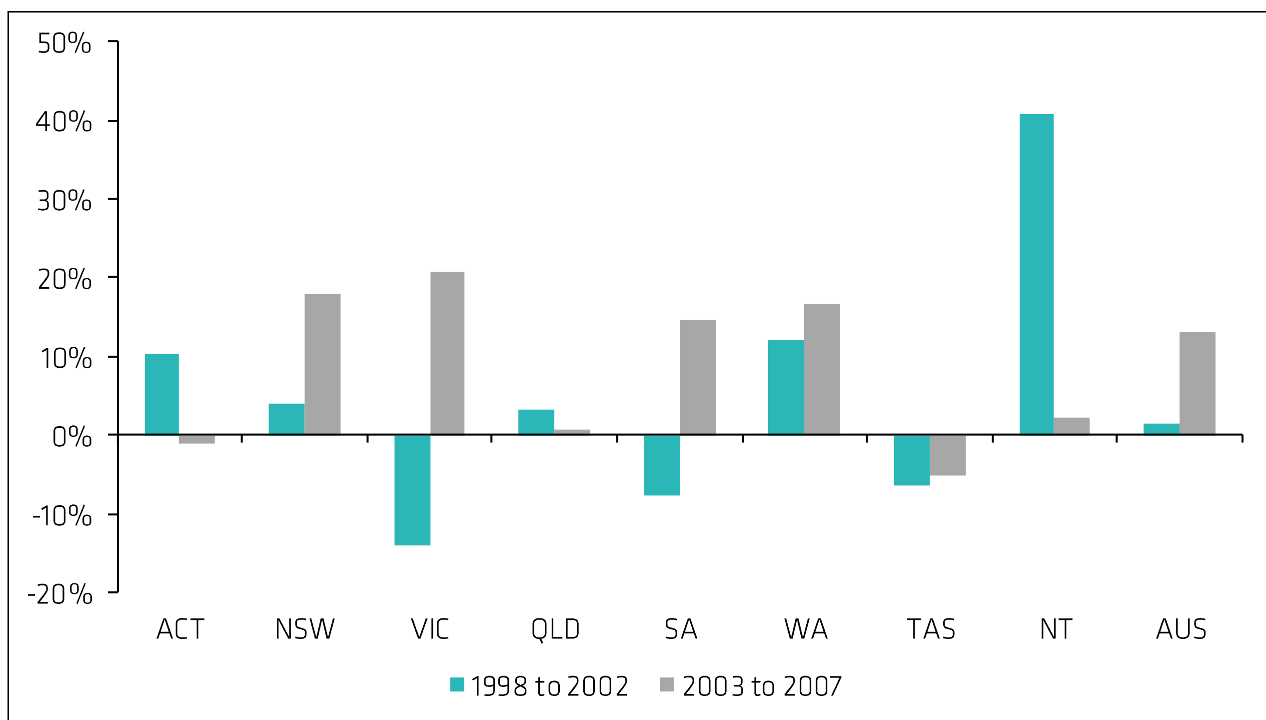
2.1.3 Total factor productivity

Recently, estimates of total factor productivity for the Australian construction industry have been developed and published in the journal of Construction and Management Economics[4]. This section reviews the findings of this research.

The estimates of total factor productivity presented in the paper are developed using ABS data for the construction industry. Productivity indices are estimated for each state and territory and cover the period between 1990 and 2007. This time period was chosen by the authors based on data availability.

The diagram below compares growth in total factor productivity in the five years to 2002 and the five years to 2007. The growth rate for each state and territory is calculated separately from the published data and then weighted to develop an aggregate growth rate for Australia. The weights are based on the value of construction work done in each state and territory. The construction work done data is also sourced from the ABS.

Diagram 2.3: Growth in Construction industry total factor productivity (per cent).



Source: Li and Liu (2010) and Independent Economics calculations.

Similar to the analysis performed using labour productivity and multi factor productivity, growth in total factor productivity is faster in the five years to 2007 compared to growth in the five years to 2002. Specifically, between 2002 and 2007, total factor productivity in the Australian construction industry grew by 13.2 per cent, whereas productivity grew by only 1.4 per cent between 1997 and 2002.

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

2.2 Commercial versus domestic residential comparison

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

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

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

Changes in the relative performance of the two sides of the industry can be assessed using quantity surveyors data. This data is used to investigate how the ABCC has affected the cost comparison between the two sides of the industry for the same building tasks in the same locations. This report updates the analysis of the Previous Reports by including the latest (January 2011) data available from Rawlinsons.

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

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

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

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

Table 2.1 shows the cost penalties for commercial building compared with domestic residential building for completing the same tasks, in the same states, for each year.

Table 2.1: Difference between the costs of tasks in commercial building and the same tasks in domestic residential building, in the same state, 2004 – 2011 (per cent).

	2004	2005	2006	2007	2008	2009	2010	2011	Change since 2004
SA	9.2	7.3	6.6	6.6	6.1	6.1	5.2	5.1	-4.1
Qld	23.9	20.8	21.7	22.4	22.7	24.8	21.7	16.5	-7.4
Vic.	22.7	24.0	21.8	15.1	15.7	15.7	15.2	14.2	-8.5
WA	15.5	11.3	10.4	10.5	12.0	11.6	10.2	9.4	-6.1
NSW	16.2	14.7	12.6	12.4	12.3	12.5	11.3	11.0	-5.2
Aust. Average	19.0	17.3	16.1	14.8	15.2	15.7	14.2	12.4	-6.6

Source: Rawlinsons Australian Construction Handbook, 2004 – 2011[5]

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

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

As outlined in the introduction, this report follows the same methodology as was employed in the previous reports. The only change in updating this analysis is to incorporate the latest Rawlinsons data (January 2011).

Similar to the previous reports, this report uses the Rawlinsons data to compare cost gaps in 2011 with cost gaps in 2004[6]. This comparison may yield insights into the economic effects of the activities of the Taskforce (established in October 2002) and its successor the ABCC (established in October 2005). Further, the base year is chosen to remove the effects of an apparent break in some of the data series.

Table 2.1 confirms that, similar to the findings of the reports since 2008, the average costs of completing the same tasks in the same states have been generally higher in the commercial building sector than in the domestic residential building sector. However, our interest is in whether this cost penalty for commercial building has shrunk since the introduction of industry reforms.

The final column of Table 2 shows that the cost penalty for commercial building compared with domestic residential building has fallen in all mainland states, suggesting that the industry reforms have been effective. The biggest fall is in Victoria, where it is down from about 23 per cent to about 14 per cent. Victoria is the state where restrictive work practices in commercial building were generally acknowledged to be most pervasive[7]. In contrast, between 2004 and 2010, the cost gap in Queensland has remained relatively stable. Restrictive work practices in commercial building were generally acknowledged to be less pervasive in Queensland.

The cost gap in Queensland shrunk substantially in 2011 to 16.5 per cent. While it is likely that the cost gap has shrunk further in 2011, the narrowing of the gap for this particular year is likely to be overstated. One driver of the narrowing gap in 2011 is a substantial cost increase in domestic residential building compared to commercial building. This spike in costs may be attributed to rebuilding efforts following natural

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

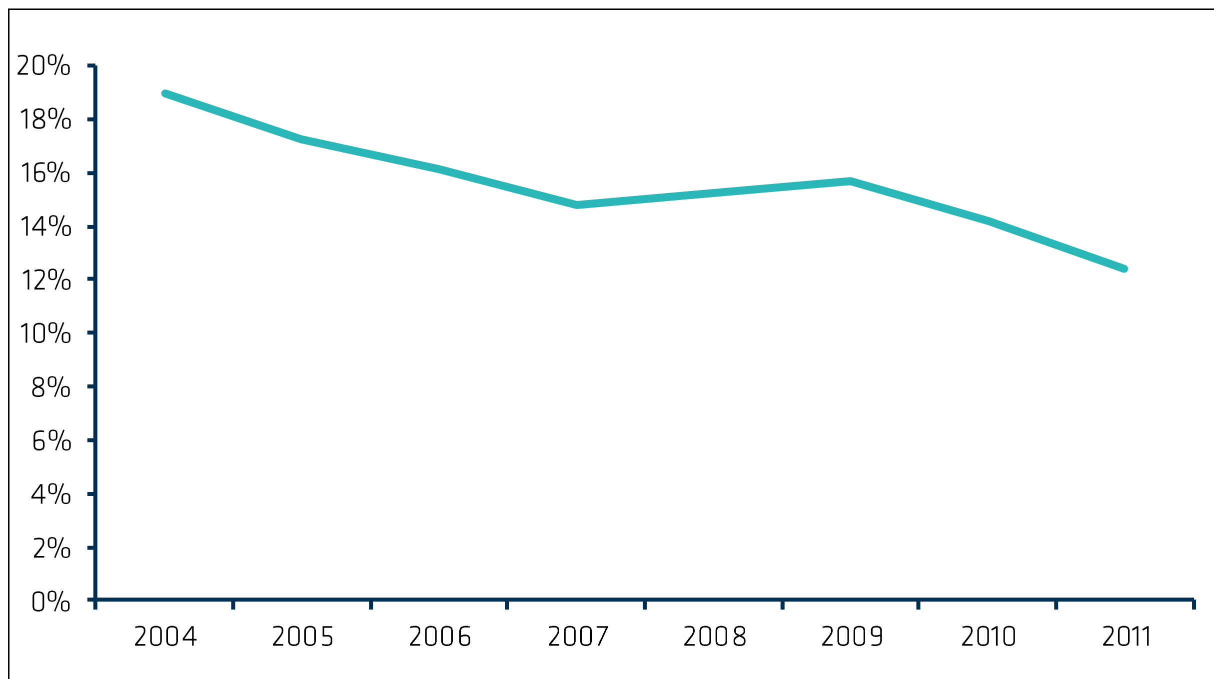
[6] Survey data refers to January of each year.

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

disasters in Queensland during late 2010 and early 2011. According to a construction cost consultant report, price pressures will be greater in the residential sector compared to others as a result of the lift in demand for materials and labour[8]. The report notes that these price pressures are likely to be temporary given the one-off nature of the boost in demand.

Table 2.1 also presents cost penalties for Australia as a whole, calculated as weighted averages of the cost penalties for individual states. These Australian cost penalties are also displayed in Diagram 2.4. Table 2.1 and Diagram 2.4 show that, since the introduction of the Taskforce[9], across Australia the cost penalty for commercial building compared with domestic residential building has fallen. The cost penalty was around 19 per cent in 2004, but has declined over the past six years to be 12.4 per cent in 2011, or a fall of 6.6 percentage points. The likely overstatement in the narrowing of the cost gap between commercial building and domestic residential building for Queensland in 2011 would flow through to the national figures quoted above.

Diagram 2.4: Average cost differences between commercial building and domestic residential building for the same tasks for five states, 2004 – 2011 (per cent).



Source: Independent Economics estimates.

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

[8] Davis Langdon, *The Impact of the Queensland Floods and Cyclone Yasi on Construction Costs*, March 2011.

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

This leaves a fall in the labour cost penalty (for commercial building) as the most plausible explanation for the fall in the total cost penalty. On this interpretation, Table 2.2 uses the fall in the total cost penalty for commercial building to estimate the fall in the labour cost penalty. It does this conversion using the average share of labour in total costs for the six building tasks. Information on labour cost shares are also sourced from Rawlinsons, and come to approximately 53 per cent. The result is an estimated fall from 2004 to 2011 in the labour cost penalty for commercial building of 12.4 percentage points, as shown in the table below.

Table 2.2: Average labour cost differences between commercial building and domestic residential building, 2004 – 2011 (per cent or percentage points).

	2004	2005	2006	2007	2008	2009	2010	2011	Change since 2004
Total Cost Gap	19.0	17.3	16.1	14.8	15.2	15.7	14.2	12.4	6.6
Labour Cost Gap	35.8	32.6	30.4	27.8	28.7	29.6	26.7	23.4	12.4

Source: Independent Economics estimates.

It is important to note that 12.4 per cent is a conservative estimate of the labour cost penalty as the cost measure published in Rawlinsons excludes the return to capital. Specifically, the cost measure excludes the components of cost related to off-site overheads and profit. As such, the true labour cost share, once allowing for a return to capital, is lower than 53 per cent. This means that the labour cost penalty for commercial building construction is greater than 12.4 per cent based on the latest data available.

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

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

This leaves post-2004 improvements in labour productivity in commercial building compared with domestic residential building as the most likely explanation for the fall in the commercial building labour cost penalty. This coincides with the activities of the Taskforce/ABCC in improving work practices and enforcing general industrial relations reforms in commercial building.

Thus, the conclusion is that there has been a recent improvement in labour productivity in commercial building compared with domestic residential building of 12.4 per cent. However, as Mitchell points out in his comment on the 2007 report[10], using the Rawlinsons domestic construction data "blurs the distinction [between commercial building and domestic construction categories] by including small-scale construction within domestic construction". To the extent that the classification blurs the desired distinction in categories, the cost gap and its movements will be understated.

That is, the Rawlinsons definition of domestic construction includes small-scale commercial construction. However, this type of construction also falls within the ABCC's mandate. Thus, the inclusion of small-scale

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

commercial construction in the Rawlinson domestic construction category means that this category would also show some gains in labour productivity (cost savings) as a result of commercial construction industry reforms. This means that without this blurring of categories the cost gap would have fallen by a greater magnitude.

In summary, the exclusion of a return to capital from Rawlinson's estimate of labour cost shares and the blurred distinction in categories means that the true gain in productivity is likely to be above 12.4 per cent. However, the likely overstatement in the narrowing of the cost gap in Queensland would mean that the gain in productivity may be below 12.4 per cent. On balance, 12.4 per cent is a conservative estimate of the recent gain in productivity for commercial building relative to domestic residential building from the industry reforms.

Domestic residential building is less useful as a cost benchmark for engineering construction, which largely involves other, unrelated tasks. However, as noted in our earlier reports, a previous study has estimated that there is a similar cost advantage for engineering construction projects by comparing the construction of EastLink to CityLink. Specifically, a previous study showed a significant "advantage to EastLink by operating under the post-WorkChoices/ABCC environments" of 11.8 per cent (see sub-section 2.3.2 for more details)[11]. Thus, in absence of any other information, it is reasonable to assume that the engineering cost improvement is likely to be at least equal to the estimate of the improvement in commercial building costs (of 12.4 per cent).

Hence, based on the evidence above, the relative labour productivity gain for the non-residential construction sector as a whole is conservatively estimated at 12.4 per cent, based on a simple analysis. As noted earlier, this is a conservative estimate for two reasons. Firstly, Rawlinson excludes a return to capital from the overall cost measure when calculating the labour cost share. Secondly, Rawlinsons' classification of domestic construction blurs the distinction between residential and non-residential construction. The productivity gain estimate from an analysis which incorporates these two factors is likely to be considerably higher. In addition, these two factors are likely to offset the overstated narrowing of the gap in Queensland during 2011.

2.3 Other supporting studies

Other studies also support the notion that there has been a labour productivity gain in commercial construction. The results from these studies are summarised in the table below. A more detailed discussion of these studies can be found in the 2009 report.

[11] Phillips, Ken (2006), *"Industrial Relations and the Struggle to Build in Victoria", Institute of Public Affairs Briefing Paper*, November 2006

Table 2.3: Summary of other supporting studies.

Study	Findings	Estimated gain in productivity
Econtech case studies	Projects undertaken post-ABCC activity have fewer project days lost per year than projects undertaken pre-ABCC activity	$2.71 million in cost saving from reduction in days lost to industrial dispute
The Allen Consulting Group	The report examined multifactor productivity in the non-residential construction industry and found that there had been a gain in productivity in the five years to 2007	12.2 per cent gain in multifactor productivity over 5 years
Ken Phillips	Comparison of two major construction projects in Victoria, the EastLink project and the CityLink project. The study found that there would have been additional costs for EastLink had it been constructed under industrial agreements outside of the ABCC and Workchoices environment.	$295 million in direct cost saving and toll revenue or 11.8 per cent of the total construction cost
BHP Billiton	Provided industry-wide observations and on-the-ground examples of changes that have occurred in their business. The business noted that there has been an improvement in industrial relations since the establishment of the ABCC.	N/A
Grocon	Provided industry-wide observations and on-the-ground examples of changes that have occurred in their business. The business noted that there was a fall in the number of days lost to industrial disputes following the introduction of the ABCC.	N/A
John Holland Group	The constructiom industry has enjoyed an "unprecendented increase in productivity" since the completion of the Cole Royal Commission.	10% productivity dividend

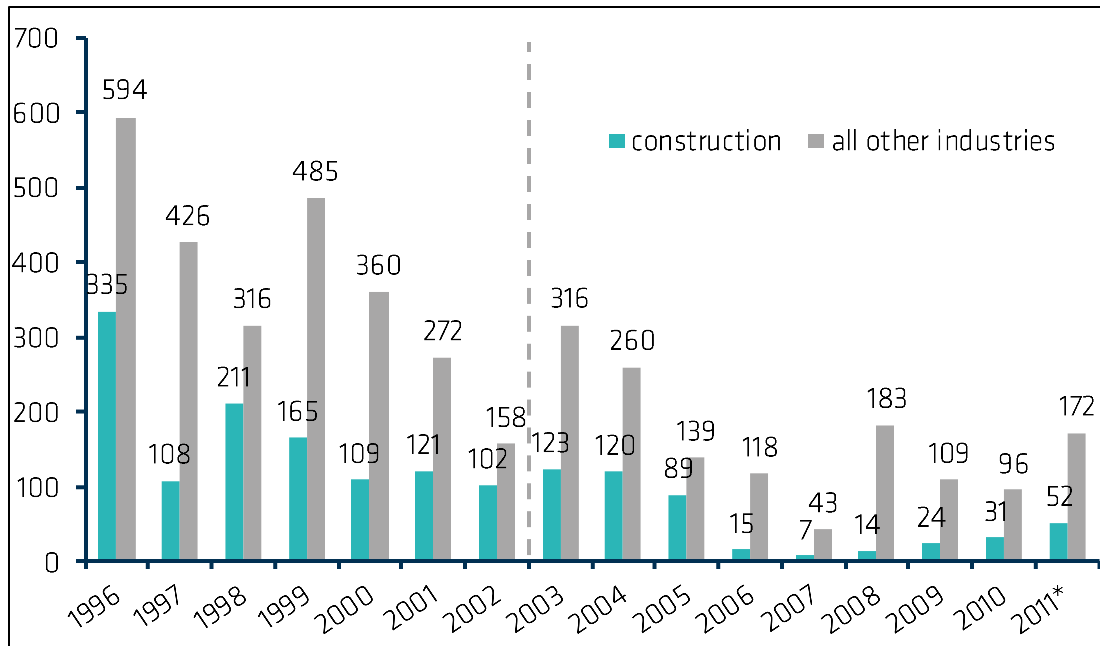
2.4 Other general indicators

An indication of the influence of industry reform across the construction industry as a whole is the considerable decrease in the number of days lost due to industrial action. Diagram 2.5 shows ABS data on the number of working days lost in the construction industry due to industrial disputes. The average number of working days lost each year for the period 1996 to 2002 was 164,000. In contrast, the diagram shows that since 2003 the number of days lost in the industry has been decreasing. 2003 was the full first year of operation of the Taskforce, which started operations in October 2002. The ABCC started its operations in October 2005. After five years of operation of the ABCC, the annual number of working days lost in the Construction industry due to industrial disputes has fallen dramatically to only 31,000 in 2010 (or 19 per cent of the 1996-02 average).

The diagram also shows work days lost in all other industries due to industrial disputes. While it is true that work days lost has been decreasing across all industries, construction has outperformed other industries in reducing its working days lost. While construction working days lost are at only 19 per cent of earlier levels (as noted above), for all other industries the corresponding figure is 26 per cent. In other words working days lost in all other industries, on average, are 74 per cent lower in 2010 than their 1996-2002 average. In contrast, the construction industry's working days lost in 2010 were 81 per cent lower than their 1996-2002 average.

For 2011, data is available for the March, June and September quarter. An estimate for the December quarter has been calculated by taking the average of the December quarter value over the last five years, for both the construction industry and the economy in aggregate. The number of industrial disputes in 2011 was relatively high, for both the construction industry and the rest of the economy, compared with recent history. Specifically, in 2011, an estimated 52,000 working days was lost in the construction industry as a result of industrial disputes; the corresponding figure for all other industries is estimated at 172,000 working days. However, similar to the data for 2010, the latest data shows that the construction industry continues to outperform other industries in reducing the number of working days lost to industrial disputes. In the construction industry, the number of working days lost are only 32 per cent of the industry's 1996-2002 average, while for other industries it is 46 per cent of the 1996-2002 average.

Diagram 2.5: Working days lost in construction due to industrial disputes ('000)



Source: ABS Cat No. 6321.0.55.001

Note: Independent Economics' estimate for December 2011 is included in the data for 2011.

2.5 Summary – the impact of Construction industry reform on productivity

The previous sub-sections update the analysis of the previous reports for the latest data. Importantly, the data covers a broad spectrum of productivity indicators. In each of the years that this analysis has been conducted, all the data continues to show that there has been significant outperformance in construction industry labour productivity in recent years.

- ABS data shows that, since the start of industry reforms in 2002, construction industry labour productivity has outperformed predictions based on its historical performance relative to other industries by **12.4 per cent**.

- The Productivity Commission's analysis of ABS data has found that multifactor productivity in the construction industry was no higher in 2000-01 than 20 years earlier[12]. The latest ABS data on productivity shows that construction industry multifactor productivity accelerated to rise by **14.5 per cent** in the nine years to 2010-11.

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

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

- Using Rawlinsons data to January 2011, the cost penalty for non-residential construction has shrunk in concert with the industry reforms that have targeted improved productivity in non-residential construction. The shrinkage in the cost penalty implies a relative productivity gain for non-residential construction conservatively estimated at **12.4 per cent** between 2004 and 2011, on a simple analysis, or considerably higher once other factors are taken into account.

- Other studies considered in the earlier reports support the findings of this analysis. These studies submit that industry reform has lifted construction productivity by approximately **10 per cent**.

All of this evidence continues to support the findings of the previous reports, that there has been significant outperformance in construction industry productivity. What remains is to identify whether or not the productivity outperformance can be separated into individual sources.

The key industry reforms that have occurred in the building and construction industry are the following:

- the Taskforce was established in October 2002 but it lacked enforcement powers;

- the ABCC was established in October 2005; and

- amendments to the Workplace Relations Act were implemented on the 27 March 2006.

The effectiveness of the ABCC relies mainly on the *Building and Construction Industry Improvement Act 2005* (BCII Act); a large number of the cases brought by the ABCC rely on this Act. The ABCC has also used the *Fair Work Act 2009*, which came into full effect from 1 January 2010, as a platform of prosecution.

In addition to the key industry reforms identified above, significant industrial relations reforms to encourage enterprise bargaining were introduced in 1993. Further changes were introduced in 1996 to reinforce the incentive for enterprise bargaining as well as reduce the scope for industrial action. These industrial relations reforms provided a more productivity-friendly environment.

However, these other reforms did not appear to have any effect in terms of improving construction industry productivity until after the Taskforce was put in place in October 2002. The data sources above indicate that the significant productivity gains in construction industry productivity appear around 2002/03. This supports the interpretation that it was the activities of the Taskforce and, more importantly, the ABCC (given its enforcement powers) when it was established in October 2005 that have made a major difference.

Thus, the productivity and cost difference data suggest that effective monitoring and enforcement of the general industrial relations reforms and those that related specifically to the building and construction sector were necessary before the reforms could lead to labour productivity improvements. As such, the most appropriate finding is that separate attribution of labour productivity improvements to the ABCC and industrial relations reforms in the years to 2006 is not possible. This is because, to be effective, all of the industry reforms need to be in place, in other words, both the ABCC and relevant industrial relations reforms need to operate together.

In summary, following this latest review of the data up to 2011, the updated evidence continues to point to industry reforms leading to a significant productivity outperformance in the construction industry. As reported above, the estimated gain ranges between 10 and 14.5 per cent, depending on the measure and the source of information that is used. Notably, the latest data indicates that the productivity outperformance of

the construction industry has strengthened. Based on data available to July 2010, the 2010 report estimated the gain in construction industry productivity to be between 7.7 per cent and 14.8 per cent.

Earlier reports found that the data continued to support an estimated gain in construction industry labour productivity, as a result of the ABCC and related industrial relations reforms, of 9.4 per cent. This was after taking into account that not all of the productivity measures are strictly comparable, and the magnitude of the estimated gain varies across measures.

The most recent data generally shows some strengthening of the productivity outperformance of the construction industry, as noted above. Hence, the latest available data could justify an increase in the estimate of the gain in construction industry productivity from industry reform. However, we continue to use a 9.4 per cent gain in productivity to estimate the economy-wide impact of industry reform for several reasons. Firstly, the same gain in productivity is used for comparability across reports. Secondly, it avoids placing too much weight on data for any single year. Finally, it avoids any possible overestimation of the productivity outperformance of the construction industry as a result of industry reforms.

Changes to the regulation of the building and construction industry are expected in the near future. *The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* was introduced to the House of Representatives in November 2011 and is currently the subject of a Senate inquiry. Under this bill, the building and construction industry will be regulated by the Office of the Fair Work Building Inspectorate instead of the ABCC. The bill will also repeal or amend several of the provisions under the BCII Act and renames the act to the *Fair Work (Building Industry) Act 2011*[13]. The effect of this regulatory change on building and construction industry productivity will need to be analysed following its implementation.

[13] Parliamentary Library, *Bills Digest No.80: Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, November 2011

3. Stage 2 analysis: economy-wide impacts of industry reform

Similar to previous years, stage 2 of the analysis involves estimating the economy-wide impacts of gains in construction industry productivity using a computable general equilibrium (CGE) model. Stage 2 draws on the findings of stage 1, which estimated the gains to the construction industry from industry reform. The report outlining the findings from stage 2 of the analysis will be released in late February 2012.

It is likely that the results of the 2012 analysis would be similar to the results of the 2010 report, because both reports estimate the economy-wide impacts of outperformance in construction industry labour productivity of a similar magnitude. That is, the 2010 report estimated the economy-wide impacts of a 9.4 per cent gain in construction industry productivity and based on the data currently available, the 2012 analysis will estimate the wider benefits of a boost to productivity in the construction industry of at least 9.4 per cent. To provide an indication of the likely findings of the stage 2 analysis, the economy-wide impacts of a gain in construction industry productivity as a result of industry reforms, based on the findings of the 2010 report, are discussed below.

For the construction industry, gains in labour efficiency within the industry leads to a cut in the cost of production within this industry compared to what would otherwise be the case without reform. Lower costs of production within the construction industry are reflected in lower prices for rental services and business investment. Lower prices leads to a boost in construction activity relative to what would otherwise be the case. These gains are concentrated in the non-residential side of the construction industry, because this is where the ABCC has jurisdiction (namely non-residential construction and multi-unit residential building). There is a loss in construction industry employment which is largely offset by gains in employment in other industries. This is because industry reforms lead to a shift of jobs away from construction towards other industries compared to the situation without reforms. Specifically, higher labour productivity reduces labour demand in construction and this effect is only partly offset by an increase in labour demand from higher construction activity.

The productivity gains in the construction industry as a result of industry reforms will also affect other industries in the economy. Specifically, lower prices for housing services stimulates a gain in demand for housing services compared to what would otherwise be the case without reforms. In addition the reduction on the cost of new business investment benefits capital-intensive sectors, such as utilities and communications, in the form of cost savings. These cost savings are then reflected in lower prices for goods and services produced by these industries, which in turn leads to production gains.

In the 2010 report, the gain in construction industry productivity from industry reform was estimated to range between 7.7 per cent and 14.8 per cent, depending on the measure and source of information used. Thus, consistent with earlier reports (in 2007, 2008 and 2009), the 2010 report bases its modelling of economy wide impacts on an outperformance in construction industry labour productivity of 9.4 per cent. Based on this estimate of the gain in construction labour productivity, production costs for the economy as a whole are lower by 0.9 per cent and GDP is higher by 0.6 per cent than would otherwise be the case without industry reforms. Lower production costs flows through to lower consumer prices; the consumer price index (CPI) is lower by 0.7 per cent, driven by savings in the price of housing services. Lower living costs leads to higher living standards. Consumer welfare, a rigorous measure of living standards, receives a boost as a

result of higher construction productivity. There is an annual welfare gain of $5.9 billion in 2009-10 terms compared to what would otherwise be the case without industry reforms. Importantly, consumer welfare is the key measure by which to assess the benefits of a policy as this represents the gain to households from the policy. In other words, consumer welfare is the measure by which we can assess whether or not a particular policy is in the public interest.