MASTER BUILDERS
AUSTRALIA

Working Together:

Master Builders
Workplace Relations Blueprint

2007

building australia





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About Master Builders Australia Inc

Master Builders Australia (Master Builders) is the pre-eminent Australian building and construction industry association. Its main goals are to promote the viewpoints and advance the interests of the building and construction industry, and to provide services to its member associations in a range of areas, including training, OH&S, legal services, industrial relations, building codes and standards, industry economics and international relations.

Master Builders is Australia's oldest and most respected industry association. Founded in the early 1870s in Melbourne, Sydney and Newcastle, the movement was federated in 1890 and, over the past 117 years, it has grown to more than 30,000 member companies with representation in every state and territory. Today, Master Builders' membership consists of national, international and regional businesses, representing residential, commercial and industrial builders and civil contractors, together with subcontracting firms, suppliers and industry professionals. Membership of Master Builders represents 95 per cent of all sectors of the building and construction industry.

Master Builders has offices in all Australian capital cities as well as in major regional centres. The movement employs over 280 experienced staff with qualifications in a diverse range of disciplines including building, engineering, law, management, economics, marketing, accounting, industrial relations, safety, surveying, international business and training.

Master Builders Australia is the national body representing the Master Builders Associations of each state and territory.

OUTCOMES

Outcome 1: Respect for and adherence to the rule of law must guide workplace relations in the industry.

Outcome 2: Independent contractors' legislation that preserves and enhances the subcontracting system must be maintained and strengthened.

***Outcome 3*:** A workplace bargaining system in which employers and employees may freely enter into appropriate and lawful workplace agreements underpinned by simple safety net conditions must be maintained.

Outcome 4: The introduction of a wages and safety net system that incorporates clearly stated wage(s) and conditions defined in a statutory schedule. If Awards are to be retained, there should be only one industry Award that is not overly prescriptive.

Outcome 5: The workplace relations system should focus on cooperative relations between employees and employers. It should emphasise the resolution of any disputes at the workplace level without the need for external party involvement.

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RECOMMENDATIONS

Recommendation 1: The Australian Building and Construction Commissioner, the industry specific agency that is responsible for ensuring that the rule of law is followed in building and construction industry workplace relations, should be retained with all of its current powers. Its role should be expanded so that it becomes a 'one stop shop' for building and construction industry complaints.

Recommendation 2: In order to strengthen the current right of entry laws (which must be maintained), union officials should be required to report all proposed entries to building sites to the Australian Building and Construction Commissioner, in addition to notifying the occupier of the site and the relevant employer.

Recommendation 3: The definition of independent contractor in the independent contractors' legislation should override the definitions of that term in state and territory workplace relations and workers compensation legislation.

Recommendation 4: Application of clear and simple legal tests that define a subcontractor and maintain and enhance the efficiencies of the subcontract system.

Recommendation 5: The independent contractors' legislation be amended so that unions are not entitled to initiate prosecutions.

Recommendation 6: Employers should be free to enter into any lawful form of workplace agreement, including collective agreements and Australian Workplace Agreements (or similar individual statutory instruments). These should be retained as part of the Australian workplace relations system.

Recommendation 7: The National Code and Implementation Guidelines should be converted to regulations made under the *Building and Construction Industry Improvement Act 2005* (Cth), so that they become a permanent feature of the workplace relations system.

Recommendation 8: Processing of agreements should take no longer than 30 days from date of lodgement, with automatic effect from the date of lodgement unless within that time the registering authority has issued a notification that that there has been a defect in process or substance.

Recommendation 9: Industrial action in support of pattern bargaining should not be lawful.

Recommendation 10: Awards should be rationalised across the board so that they become simple, easily understandable documents that reduce the complexity of the workplace relations system.

Recommendation 11: The fairness test introduced from 7 May 2007 should be reviewed to ensure that all agreements are assessed against an objective, simple set of statutory criteria that encourage agreement-making at the workplace level.

Recommendation 12: The creation of one building industry award against which minimum wages for broad categories and classifications are set.

Recommendation 13: Workplace relations agreements, once formally registered, should automatically proscribe industrial action during their currency.

Recommendation 14: Secret ballots prior to strike action must remain as a fundamental component of the workplace relations system.

Master Builders believes that the adoption of these recommendations will deliver the outcomes proposed.

Master Builders' Workplace Relations Vision

Master Builders advocates a workplace relations system in which employer and employee parties are empowered to enter freely into appropriate and lawful workplace arrangements that suit the particular enterprise.

Principles upon which to build a Workplace Relations System

Master Builders policy principles set out a number of criteria against which any system of workplace relations for the industry should be assessed.

Principle 1: provides a legal framework which is simple, readily accessible and easily understood.

Principle 2: avoids excessive legalism as well as the delays and costs of the legal process.

Principle 3: covers the field to the extent of federal constitutional power and eliminates jurisdiction swapping.

Principle 4: ensures respect for the rule of law by providing effective sanctions to eliminate coercion, as well as illegal and inappropriate behaviour by all industry participants.

Principle 5: provides rapid (24-48 hour) access to effective enforcement and compliance provisions of industrial instruments, legislation and orders of relevant tribunals.

Principle 6: establishes a 'one stop shop' for the building and construction industry that brings together the work of all Australian Government agencies, thus avoiding multiple levels of bureaucracy. Such an agency can stand in the shoes of employers and employees who are unable to fund litigation.

Principle 7: establishes adequate and timely remedies for damages arising from industrial action taken outside a bargaining period or in breach of dispute settlement provisions.

Principle 8: promotes the effective operation of competitive market forces and fair competition. It rejects the industry's former culture of expediency.

Principle 9: requires the Australian Government, as a major investor in the industry, to lead by setting an example in the consistent application of legislative codes and policies which exemplify best practice in the industry.

Principle 10: promotes uniform tender conditions to be applied by the Australian Government and its agencies for all works where the Australian Government is a principal or contributing source of funding.

Workplace relations policies are judged against these criteria. Master Builders' extended vision is for a workplace relations system that incorporates all these principles.

Employment Characteristics and Opportunities

According to ABS data[1] there were over 900,000 people employed in the building and construction sector in 2006/07 (see Table 1). Over the past five years, employment in the industry has grown by more than 240,000, or 35 per cent. Building and construction activity is characterised by cyclical peaks and troughs, and in the wake of such a strong phase of employment growth it would be reasonable to expect a period of more moderate job growth, but with the maintenance of record numbers employed.

Table 1: Construction Employment 1997-2007

	Construction Employment	Change	% Change
1996/97	587,900	-14,500	-2.4
1997/98	598,700	10,800	1.8
1998/99	632,400	33,700	5.6
1999/2000	687,100	54,700	8.7
2000/01	670,000	-17,100	-2.5
2001/02	693,700	23,700	3.5
2002/03	718,300	24,600	3.6
2003/04	775,800	57,500	8.0
2004/05	835,600	59,800	7.7
2005/06	876,000	40,400	4.8
2006/07	936,100	60,100	6.9

Source: ABS 6291.0.55.003, average of 4 quarters (Aug, Nov, Feb, May) rounded to 100.

Activity in the building and construction industry remains at a high level, although escalating construction costs (materials, labour and costs associated with delays) and the downturn in housing have had an impact in recent times. Employment remains at all-time highs, and recent national surveys undertaken by Master Builders have found that there is still plenty of work scheduled. Non-residential construction is becoming increasingly important as a means to offset weakness in the housing sector.

Aggressive tendering and rising wage and material costs are nonetheless affecting profits. Construction wage costs are currently increasing at 5 per cent per annum (see Table 2), and workers in the building and construction industry are experiencing higher wage growth than other Australian workers.

[1] ABS Labour Force, Cat 6291.0.55.003.

Table 2: Construction Price Indices

	Labour Price Index		Implicit Price Deflator	
	Construction	Total Aust	Construction	Total Aust
1998-99	3.5	3.2	2.2	1.3
1999-00	3.0	2.9	4.3	1.6
2000-01	4.3	3.4	6.8	4.5
2001-02	3.3	3.3	1.4	2.6
2002-03	3.4	3.4	3.5	2.0
2003-04	3.8	3.6	5.9	1.2
2004-05	5.1	3.8	6.9	2.4
2005-06	4.9	4.1	5.5	2.9
Year on Year to Mar 07	5.0	4.0	6.8	2.9

Source: ABS Cat No 6345.0, 8782.0.65.001, 5206.0 Labour Price Index: Total hourly rates of pay excluding bonuses. Domestic Demand used as Implicit Deflator for Total Australia.

As is indicated in Figure 1, construction output is much more volatile than the economy in total, and as Figure 2 shows, employment follows output with a lag. Growth of output in the construction industry has averaged around 3.5 per cent per annum in real terms since the late 1980s peak. Over the same period, employment growth in the construction sector has averaged 2 per cent per annum, implying labour productivity growth of 1.5 per cent per annum.

Figure 1
Construction Output and GDP Sep 1991-2006

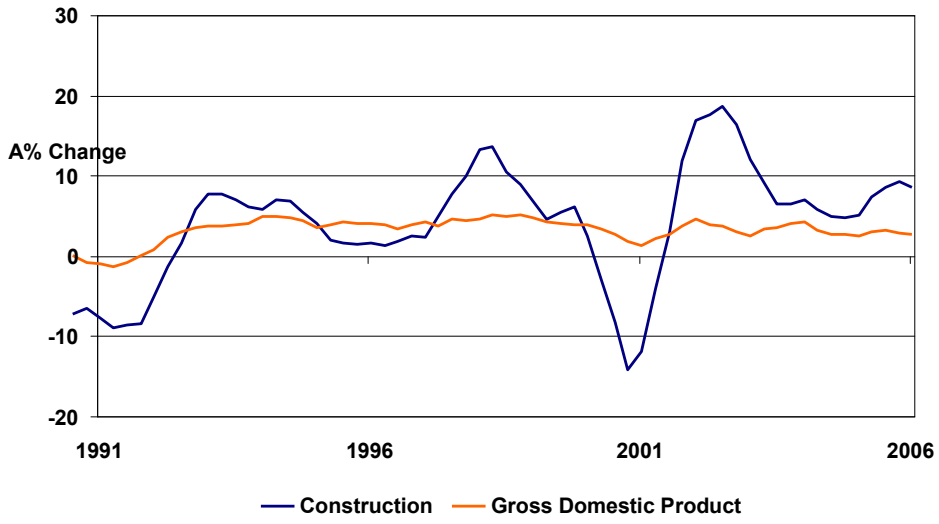
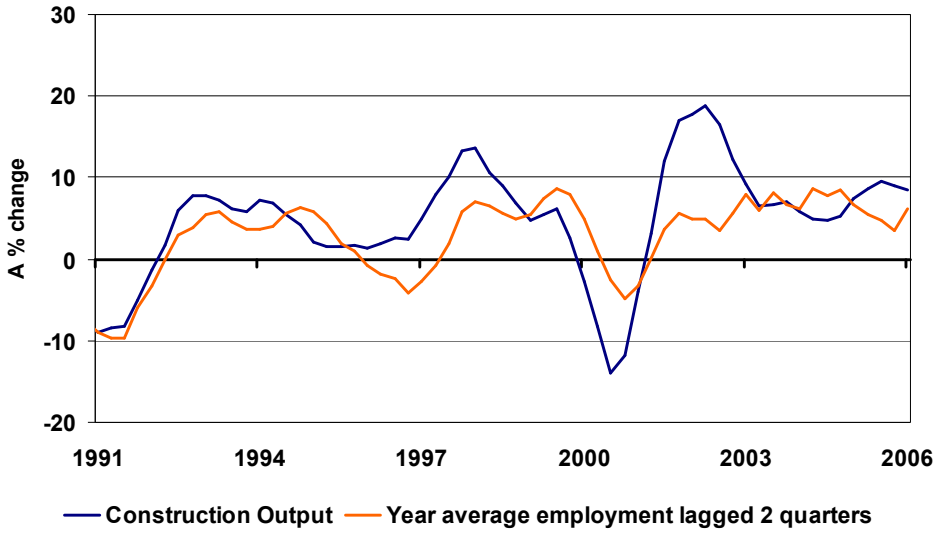


Figure 2
Construction Output and Employment Dec 1991-2006



Output in the non-residential building and engineering construction sectors of the industry are currently offsetting weakness in the residential sector, driven by industrial and commercial building, minerals-related investment and infrastructure projects. After contributing strongly to growth, residential building had little impact on economic growth in 2004, and detracted from growth in 2005 and 2006.

Employment in the construction industry can be expected to surpass the one million mark sometime during the next five years, even on the assumption of a phase of more moderate output and employment growth.

Skill shortages are affecting the industry now and are projected to continue. Given the ageing workforce, skill shortages can be expected to constrain building activity well into the future. Economic modelling conducted for the Department of Employment and Workplace Relations shows that Australia faces a potential shortfall of 195,000 workers in five years time as a result of population ageing.[2] In other words, while employment is expected to continue to grow at a solid pace over the next five years, it is likely to be substantially less than it would be if the age structure of the adult population remained unchanged. All occupational groups are expected to be adversely affected by the ageing of the population. Trades and semi-skilled occupations are forecast to experience the largest reduction in employment growth as a result.

[2] Commonwealth of Australia, Department of Workplace Relations, Workforce Tomorrow: Adapting to a more diverse Australian Labour Market' (March 2006)

The projected growth in employment will be insufficient to meet the projected shortfall of skilled workers. Accordingly, strategies for working together using workplace relations as a means to advance the interests of employees and employers are essential in creating an environment where workers are encouraged to join the industry and upgrade their skills.

More flexible working conditions that accommodate those who wish to work part-time in semi-retirement or incentives to encourage women to join the industry must be adopted if the industry is to reach its full potential.

There is nothing in the available statistics to show that Australian workers are other than secure in their employment, and the projections for the building and construction industry show no reason for concern in the medium term. This is especially the case for skilled workers. Conducted annually by employee survey since the mid-1970s, the Morgan Job Security Index is widely regarded as the principal measure of job security in Australia. Employees are asked if: (i) they 'believe their current job is safe'; and (ii) they believe they could find another job quickly if they were to become unemployed. With 81 per cent of all employees currently reporting that they believe their job to be safe, the 2006 survey reveals one of the highest figures recorded. This figure is higher than the average results of the 1970s (78.4 per cent), 1980s (78.6 per cent) and 1990s (72.4 per cent).

Recent changes in workplace relations laws have emphasised the role of bargaining and have facilitated the making of workplace agreements tailored to the individual circumstances of each business. Workplace relations reform is not an end in itself, but a catalyst for creating economic efficiencies, particularly at the enterprise level. To ignore the optimal solutions to workplace efficiency at the industry's disposal will mean that individual businesses face the prospect of failing to compete, leading to possible exit from the industry.

This Blueprint sets out recommendations that will assist the industry to use workplace relations as a means to help achieve its full potential and contribute to labour market reforms to maintain Australia's competitiveness. The initiatives to secure the rule of law in the industry through the establishment of the Office of the Australian Building and Construction Commissioner (ABCC), following on from the Building Industry Taskforce established as an interim body in the wake of the Cole Royal Commission, have generated benefits for the industry (see Box 1). These must not be lost through policy changes that wind back the reform efforts but must instead be strengthened with policies that increase labour market flexibility and productivity.

Box 1: Benefits of Reform

- Annual working days lost in the construction industry fell to only 15,200 in 2006. This compares to 89,400 in 2005 and an annual average well in excess of 100,000 in the previous 5 years (see over page).
- Costs related to industrial disputation have fallen in line with the decline in working days lost, that is, in the order of 85 per cent from previous levels.
- Construction industry employees, have increased aggregate earnings by close to $18 million per annum via the benefits of fewer working days lost in a more harmonious industrial relations environment.
- Overall savings would (conservatively) be in the order of $80 million per annum given that the total cost of disputes is likely to have fallen from over $90 million annually to around $13 million currently. (Estimate based on methodology used in an Econtech study in 2003.)
- Master Builders National Survey of Building and Construction has revealed a sharp decline in the proportion of builders believing that industrial relations were having a negative impact on business activity. The index for the December quarter 2006 was 21.7, compared with 41.0 for December quarter 2005 and readings above 50 in the preceding two years.
- Construction output has increased by 8.5 per cent in real terms in the year following the establishment of the ABCC. Output rose by 5.9 and 7.4 per cent in the previous two years.
- Construction employment has risen by 6.1 per cent in the year following establishment of the ABCC. Employment rose by 6.2 and 6.7 per cent in the previous two years, even though housing activity has declined since then.
- Construction productivity is up 2.3 per cent in the year following establishment of the ABCC. Productivity was -0.3 and 0.6 per cent in the previous two years.
- Construction hourly rates of pay have increased by 5.1 per cent and total earnings by 3.4 per cent in the year following establishment of the ABCC. In the previous two years, the figures were 5.6 and 4.5 per cent, and -0.1 and 5.8 per cent respectively.

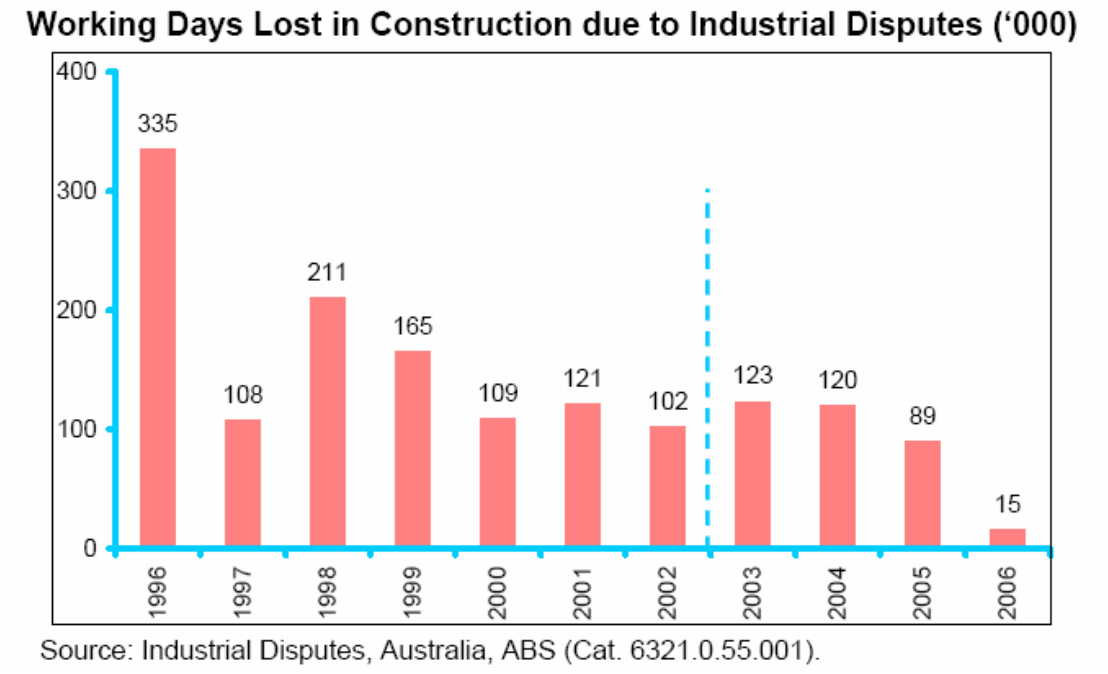
Economic Impact of the ABCC on the Construction Industry

The Econtech study[3] shows that the ABCC has had a positive impact in boosting Australia's economic growth, has reduced the cost of living and has led to a significant fall in construction costs both for commercial and residential building.

The authoritative study reports a major reduction in the cost gap between commercial and residential building from 10.7 per cent to 1.7 per cent. The ABCC has overseen a construction industry workplace relations environment characterised by less industrial action, greater flexibility in rostering, and cost savings stemming from the prohibition of pattern bargaining. The industry specific watchdog has contributed markedly to the favourable industry climate with wider economic impacts through improvements to the construction industry helping all Australians.

The first indication of the influence of the ABCC across the construction industry as a whole is a considerable decrease in the number of days lost due to industrial action. Figure 3 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 2006 was 136,000. In contrast, the chart shows that since 2003 the number of days lost in the industry has decreased sharply. The year 2003 was the first full year of operation of the Taskforce, which started operations in October 2002. The ABCC started operations in October 2005. After just over one year, the annual number of working days lost in the industry was down to only 15,000.

Figure 3

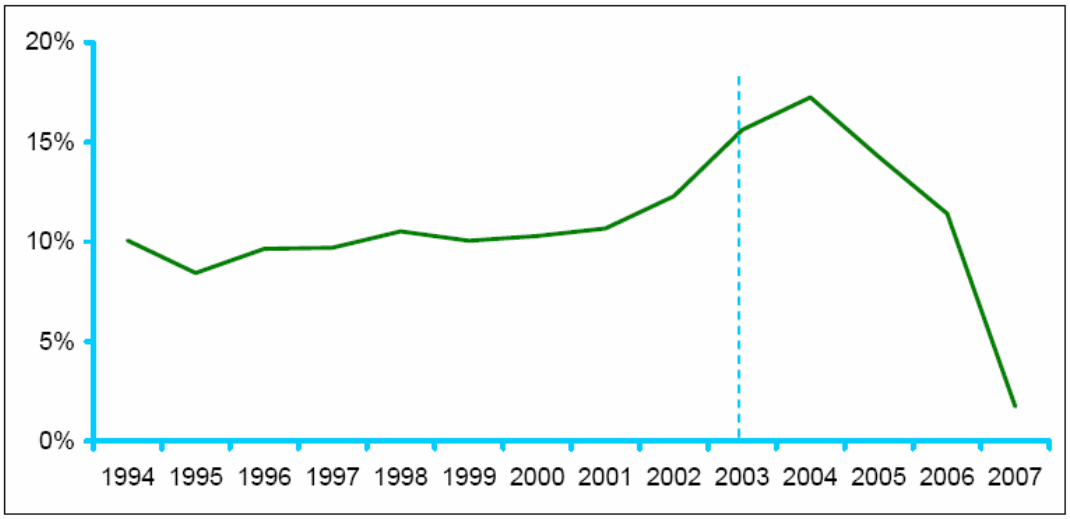


[3] Econtech, Economic analysis of building and construction industry productivity 16 July 2007, released 25 July 2007

The Econtech report shows that over the ten year period prior to the introduction of the Taskforce in October 2002, the average difference between the cost of completing identical tasks in commercial building and domestic residential building across Australia was 10.7 per cent. The cost differentials were greatest in Victoria and Western Australia, the states where restrictive work practices in commercial building were generally acknowledged to be the most pervasive.

Figure 4

Average Cost Differences between Commercial Building and Domestic Residential Building for the Same Tasks for 5 States, 1994 – 2007 (per cent)



Source: Econtech calculations from Rawlinsons data.

After remaining at around 10 per cent from 1994 to 2001, the average difference increased considerably to peak in 2004, before declining sharply in 2005 and 2006 to a small difference at the start of 2007. There is no evidence of a general pattern of significant reductions in cost differences across the different states until after the start of 2004. During 2005 and 2006, however, all states observed substantial reductions in the cost differences between the two sectors for the eight standard building tasks.

Table 3 Summary of Economy-Wide Effects of the Impact of ABCC

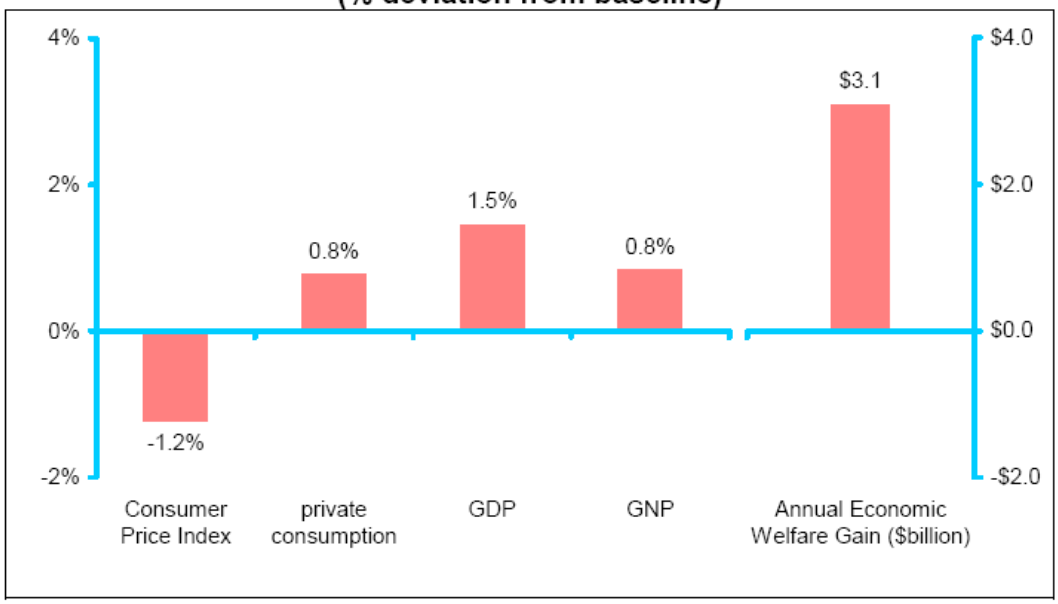
	Impact of ABCC Scenario
Consumer Price Index (CPI)	-1.2%
Real Consumption	0.8%
Annual Economic Welfare Gain ($billion)	3.1
GDP	1.5%
GNP	0.8%

Source: Eontech MM600+ simulation

The modelling results suggest that the improvements in labour productivity through the establishment of the ABCC have lowered construction costs relative to what they would otherwise be. 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. As shown in Table 3, the Consumer Price Index is an estimated 1.2 per cent lower than what it would be without the ABCC. Furthermore, consumers are better off by $3.1 billion annually.

Figure 5

National Macro-economic Effects
(% deviation from baseline)



Source: Econtech MM600+ simulation

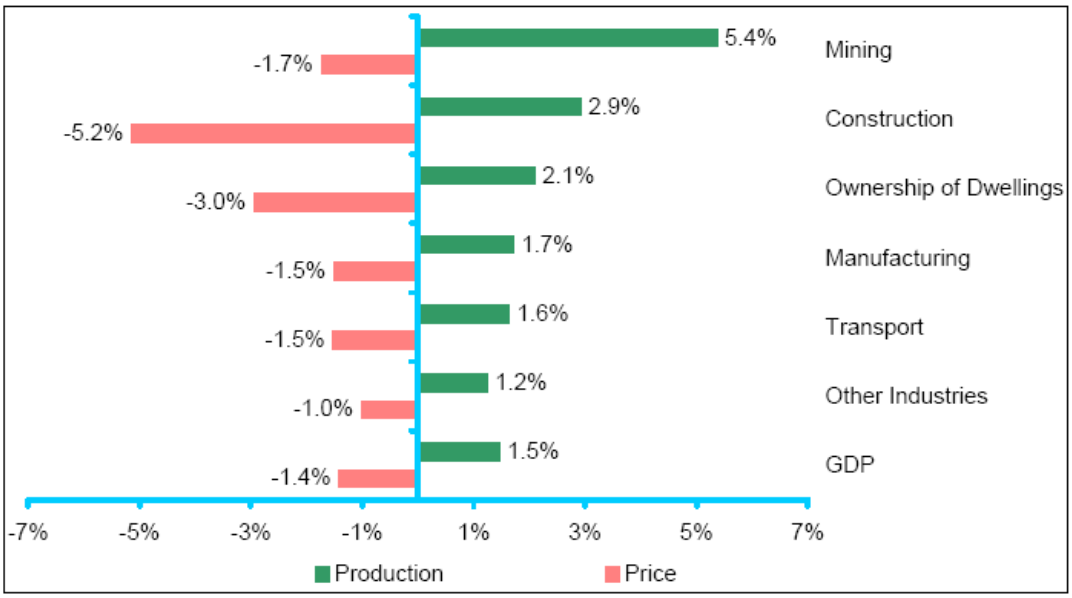
The modelling also shows a 1.5 per cent increase in the level of GDP in the long-term, relative to what it would have been in the absence of the reforms.

Higher productivity in the construction industry as a result of the operations of the ABCC has lowered its costs, leading to lower prices for new construction. This has stimulated demand for new construction, leading to a significant permanent gain in construction activity of 2.9 per cent. This comprises a gain of 2.3 per cent for residential construction and 2.8 per cent for non-residential construction.

The change in activity in the building and construction industry affects activity in other industries: see Figure 6. Modelling by Econtech shows that higher labour productivity reduces the price of dwellings by around 3 per cent, which flows through to a similar fall in the cost of housing services. This stimulates a long-term rise in demand for housing services (“ownership of dwellings”) of 2.1 per cent.

Figure 6

Effect of Increased Efficiency in the Construction Industry on Production in Other Industries (% deviation from baseline)



Source: Econtech MM600+ simulation

Outcomes

Outcome 1:

Respect for and adherence to the rule of law must guide workplace relations in the industry.

The Royal Commission into the Building and Construction Industry in 2003 (the Cole Royal Commission)[4] comprehensively documented the past workplace relations woes of the industry, specifically focusing upon unacceptable and unlawful behaviours of unions in the commercial sector. The findings of the Commission were supported by the work of the Interim Building Industry Taskforce which became the Building Industry Taskforce (the Taskforce) and then the Australian Building and Construction Commissioner (the ABCC). Both taskforces published reports that documented the unacceptable face of the building and construction industry.[5] In addition, the ABCC has published an Annual Report that summarises the first nine months of its activities,[6] as well as two subsequent reports on its compliance activities.[7]

The September 2005 Taskforce report[8] highlighted the rationale for specific building industry workplace reform. It found that the industry norm was to disregard the *Workplace Relations Act 1996* (Cth) (WRA) and adhere instead to 'the law of the jungle'. The Taskforce reported that incidences of inappropriate industrial pressure, sometimes involving violent and thuggish behaviour, contributed to the lawless culture that has plagued the industry for decades.

The Government has emphasised that the specific reforms for the building and construction industry have been introduced to transform the culture identified by the Cole Royal Commission. This has long been the objective of Master Builders.

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[4] Commonwealth of Australia, *Final Report of the Royal Commission into the Building and Construction Industry February 2003*, www.royalcombci.gov.au.

[5] Commonwealth of Australia, Interim Building Taskforce, *Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce,* March 2004 and Commonwealth of Australia, Taskforce, *Upholding the Law – Findings of the Building Industry Taskforce,* September 2005.

[6] Commonwealth of Australia, Office of the Australian Building and Construction Commissioner, *Annual Report 2005-2006,* http://www.abcc.gov.au/abcc/Reports/AnnualReports/.

[7] Commonwealth of Australia, Office of the Australian Building and Construction Commissioner, *Report on the Exercise of Compliance Powers by the ABCC For the Period 1 October 2005 to 30 June 2006* and *Report on the Exercise of Compliance Powers by the ABCC For the Period 1 October 2005 to 31 December 2006,* http://www.abcc.gov.au/abcc/Reports/LegalReports/.

[8] Note 5.

The ABCC has stated:

> *Prosecutions (in the sense of civil penalty proceedings) have centred on recurring issues in the building industry, such as coercion, strike pay and unlawful industrial action. The ABCC is prepared to take on unlawful aspects of the ingrained culture within the building and construction industry. Apart from the immediate impact, prosecutions highlight to the industry that the law will be enforced on building sites.*[9]

The *Building and Construction Industry Improvement Act 2005* (Cth) (BCII) was passed on 7 September 2005 and received Royal Assent on 12 September 2005. It has been amended in many respects by the March 2006 amendments to the WRA.[10] The benefits set out in Box 1 have flowed from those statutory reforms, together with the other reforms set out in Table 4.

Table 4: Building and Construction Industry Reform Measures

Reform Measure	Effective Date
BCII administered by the ABCC	• Stricter rules re unlawful industrial action retrospective to 9 March 2005 • ABCC commenced 1 October 2005 • Other provisions took effect 12 September 2005
Building and Construction Industry Improvement Regulations 2005	• 1 October 2005, as amended
WRA as amended by the *Workplace Relations Amendment (WorkChoices) Act 2005*	• New regime in operation from 27 March 2006 • WRA amended in December 2006
Principally the *Workplace Relations Regulations 2006*	• WorkChoices regulations commenced operation on 27 March 2006, but have since been amended
National Code of Practice for the Construction Industry Implementation Guidelines	• 1 November 2005 changes significant • June 2006 reissue took into account changes brought about by the amendments to the WRA • Further revision in November 2006 to ensure side deals do not contain prohibited content • Industry Guidelines discontinued (announced by the Government on 12 December 2006)
Independent Contractors Act 2006 *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006*	• Commenced 1 March 2007
Independent Contractors Regulations 2007	• Commenced 1 March 2007

[9] Note 6 at page 32.
[10] *Workplace Relations Amendment (WorkChoices) Act* 2005 (Cth) amended the WRA. General reference is made to the industrial relations reforms, but specific reference will be made to the amended WRA.

The changes to the WRA, however, are of a different kind to the industry specific reforms. They principally arise from the Australian Government's desire to move away from the traditional institutions of industrial relations, to vest more power in the industry participants rather than third parties and, until the introduction of the recent 'fairness' test (discussed under outcome 4), reduce reliance on Awards.

The building and construction industry reforms empower a third party to enforce the law in the industry, principally by prosecuting offenders. Although this position appears inconsistent with the direction of the main reforms, it is of a different character. The industry specific reforms permit the parties to negotiate in a system governed by the rule of law. The general and the industry specific reforms, on the other hand, were both fuelled by the idea that workplace reform will positively affect the system.

In the building and construction industry adherence to the rule of law is a factor that directly affects labour market risk and hence productivity; this is why it is Master Builders' main policy priority. The rule of law must be observed.

As Singleton from the Cato Institute has observed:

> *(L)aw in our society serves an essential practical function - that is, to supply the ground rules so that businesses, investors, and individuals can plan their actions to avoid disputes with one another. Disputes and the risk of disputes vastly raise the risk and cost of new ventures. That is, the most important function of the law is to lower the risks of uncertainty in making long term plans.*[11]

Lack of certainty drives up costs in every part of the system, making time lines and expenditure harder to predict. As a result, risk factors attached to cash flows will be higher and effective net present values of projects lower. When that uncertainty is deliberately and unlawfully generated by a stakeholder in the system that seeks an unjustified economic rent, then governments are obliged to act. This action protects the community by ensuring that the cost of infrastructure including schools and hospitals is not inflated by this factor.

The changes to the WRA have also sought to achieve productivity increases by elevating agreement-making to centre stage. Discarding the rigidities of an Award based system, and permitting parties to reach enterprise bargains or other workplace agreements that are mutually beneficial, will raise productivity, especially where more flexible patterns of work emerge. This factor is also highly relevant to building and construction industry productivity because part of the unions' former strategy was to require adherence to so-called agreements that were submitted on a 'sign up or else' basis.

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[11] S Singleton, *Capital Markets: The Rule of Law and Regulatory Reform* http://www.cato.org/pubs/wtpapers/990913catorule.html accessed 9 February 2007.

Master Builders is receiving a groundswell of feedback that the reforms are positive and have generated increased productivity, especially where employers have moved away from inflexible working conditions. An example of such conditions are 'lock down' days where no work may be undertaken on a specific day, or the engagement of non-working delegates – practices which no longer prevail (see Box 2). These practices were common in the days of union-based pattern bargains. The opportunity now exists under the WRA, supported by the enforcement structures of BCII, for agreements to be made which mutually advantage employees and employers.

Box 2: Non Working Delegates

The practice of employers being forced to hire persons nominated by unions and to permit them to act as full-time agents of unions while on site results not only in the employer paying wages without any productive work, but also in extensive interference with the orderly running of sites. The practice has been dominant in the commercial building sector, particularly in Perth and Melbourne, but has also been seen in other parts of the construction sector. The direct cost effects of non-working delegates are manifested in the coercion of subcontractors to be party to pattern and site agreements; the monitoring of payments to third parties (superannuation and redundancy funds); and delays in mobilising subcontractors and new employees. Prior to the current workplace reforms, every major construction site in the CBD in Perth and Melbourne had at least one non-working delegate, and sometimes up to 15 or more. The practice was also evident in other states and territories, although sporadic.

Assume 200 non-working delegates, each costing $100,000 per annum, produce a direct cost to the industry of $20,000,000 with greater costs indirectly through industrial unrest. Their non-engagement also assists to engender industrial peace.

Master Builders quarterly economic surveys from December 2003 to December 2006 show that members' concern about industrial relations acting as a business constraint more than halved.[12] The December 2006 Master Builders' quarterly survey showed that concern about industrial relations as an obstacle to business efficiency fell dramatically. Over three quarters of builders surveyed believed that industrial relations were having only a slight or nil effect on their business activity in the December quarter 2006; and the overall index was down sharply on the previous quarter and during the course of the past year.

[12] Master Builders Australia, *IR No Longer A Drag*, Media release, 18 December 2006.

On 1 October 2005 the ABCC took over the work of the Taskforce. The ABCC is the independent statutory body that the Royal Commissioner believed would be pivotal in bringing about the required change to an industry culture where respect for the rule of law was absent.[13] At the core of the building and construction industry workplace relations reforms is reliance on this specifically empowered statutory body to enforce the rule of law. Much of the BCII is centred on the powers and operations of the ABCC. Master Builders supports this because the absence of the rule of law undermines certainty and stability as economic cornerstones.

The Econtech report[14] released in late July 2007 and discussed in detail earlier, showed that the activities of the ABCC have dramatically improved the productivity of the building and construction industry and have also benefited the wider community. The main findings of the report confirm the utility of the ABCC.

The report compares the costs of the same building tasks in commercial building with domestic residential building. This indicates the extent to which workplace relations reforms have improved productivity. In the 10 years to the end of 2002, the cost gap was on average 10.7 per cent. By 1 January 2007 the cost gap was just 1.7 per cent. Significantly, the closing of this gap coincided with the operation of the ABCC and the Taskforce.

The study estimates that as a result of the activities of the ABCC, along with the industrial relations reforms, the labour productivity gain for the building and construction industry is 9.4 per cent. This figure represents the difference between the average labour cost difference of 11.2 per cent for the period 1994 to 2003 and a figure of 1.8 per cent for 2007. The report also indicates that construction industry labour productivity has been noticeably stronger in recent years, with actual construction industry labour productivity outperforming predictions based on historic performance by 9.5 per cent.

The report finds that the ABCC has led to a drop in construction costs relative to what they would otherwise be. This ultimately has a flow-on effect to the greater economy, where a drop in construction costs leads to lower business costs and thus to lower consumer prices. The study confirms that higher productivity in the construction industry has lowered its costs, leading to lower prices for new construction.

In summary, the report estimates that as a result of the ABCC:

- GDP is 1.5 per cent higher than it otherwise would be;

[13] Note 4 Volume 11 page 27 of the Cole Royal Commission report, the Royal Commissioner sets out eight reasons for the establishment of an independent statutory body to investigate and enforce the law.
[14] Note 3 above.

- the CPI is 1.2 per cent lower than it otherwise would be; and
- there has been a gain in real consumption of 0.8 per cent. Lower living costs mean higher living standards.

Essentially, the ABCC is an industry watchdog, vested with broad powers to investigate breaches of the BCII, the WRA and the new independent contractors' legislation. Its principal job is the enforcement of workplace relations law. The ABCC is not empowered to act directly where breaches of other laws (criminal law and trade practices law in particular) are notified to it. The ABCC is also limited in its ability to refer these matters on, often by privacy constraints.

These matters must be referred to the agencies responsible for enforcement in those specific areas. The necessity to refer those matters to other agencies is less than efficient and causes delays, industry frustration and the engendering of a mentality that perceives the ABCC as overly bureaucratic. This offends against Principle 6 of the principles against which Master Builders judges the workplace relations system. This is said without criticism of the ABCC, whose hands are tied by the jurisdiction that the BCII confers. The proposition that the ABCC should move closer to the model of a 'one stop shop' arises from the findings of the Cole Royal Commission.
The Commission was firmly of the view that the ABCC should monitor, investigate and prosecute[15] any breaches of industrial law, criminal law and aspects of civil law in relation to the building and construction industry.[16] Hence, Master Builders' policy is for an expansion of the role of the ABCC to clearly capture the criminal and civil law jurisdiction envisioned by the Commission.

The ABCC has extensive powers conferred by the BCII. Each of these powers is necessary for the proper maintenance of the rule of law in the industry. Table 5 shows what each of the current powers are and explains the reason the particular power should be retained.

[15] This is not meant in the sense of taking the formal prosecution function which will remain vested in the Director of Public Prosecutions but in advancing the case so as to prosecute it for trial.
[16] Master Builders' emphasis note 4 at Volume 11 page 31.

Table 5: Powers of the Australian Building and Construction Commissioner

Sections of the BCII	What is the power	How and when used	Why	Reason to be retained
Australian Building and Construction Inspectors (ABC Inspectors)				
59(3)	**may, without force, enter premises**	To inspect building sites and obtain information that is relevant to an investigation. Before entering premises, an ABC Inspector must announce that they are authorised to enter and produce their identity card to the occupier for inspection.	For compliance purposes That is, ascertaining whether: ▪ the BCII ▪ the WRA; ▪ the *Independent Contractors Act 2006 (Cth)*; ▪ an order of the Australian Industrial Relations Commission; or ▪ a Commonwealth industrial instrument; has or is being complied with, by a building industry participant.	Powers are equivalent to those given to 'workplace inspectors' under section 169 of WRA. Without these powers, ABC inspectors would be unable to attend sites unless invited on, and would have virtually no evidence gathering capability.
59(9)	may, without force, enter business premises			
59(5)(a)	may inspect, any work, material, machinery, appliance, article or facility			
59(5)(b)	may take samples of goods or substances			
59(5)(c) & 59(11)	**may interview any person (voluntarily)**			
59(5)(d)	may inspect, and make copies of, any document on the premises			
59(5)(e)	may require that documents be produced			
59(6)	**may, by written notice, require that documents be produced**			

Sections of the BCII	What is the power	How and when used	Why	Reason to be retained
ABCC or Deputy ABCC ONLY				
52(1)(c)	Require a person by written notice to give the information	To obtain information when unable to do so using the powers available under section 59.	If the ABCC believes on reasonable grounds that a person: ▪ has information; ▪ has documents; or ▪ is capable of giving evidence; that is relevant to an investigation.	Without section 52 there is no way of compelling information or evidence (see also ABCC Examinations report). Same powers as: ▪ Australian Competition and Consumer Commission (Section 155 *Trade Practices Act 1974* (Cth)); ▪ Australian Taxation Office (Section 353 Taxation Administration Act 1953 (Cth)); and ▪ Australian Securities and Investment Commission (Section 19 *Australian Securities and Investment Commission Act 2001* (Cth)).
52(1)(d)	Require a person by written notice to produce the documents			
52(1)(e)	**Require a person by written notice to attend and answer questions**			
ABCC ONLY				
67	The ABCC may publish details of non-compliance with the: ▪ BCII; ▪ WR; or ▪ *Independent Contractors Act*.	If the ABCC considers that it is in the public interest to do so he/she may publish details of non-compliance, including the names of participants who have failed to comply.	The ABCC must apply the public interest test having regard to his/her functions and the purposes set out in the BCII.	This is an important option. It enables the ABC Commissioner to use alternative methods (to court proceedings) to address non-compliance, when it is in the public interest to do so. To date this power has been used once.

The overwhelming evidence presented to the Cole Royal Commission was that industrial disruption on building and construction sites was a consequence of union officials entering sites as a result of the exercise of a purported statutory entitlement. The Cole Royal Commission's finding was that industrial disputation was almost always the result of intervention in workplace relations by union officials. That intervention was often contrived, uninvited and unwanted by affected employees. The Report found that entry and inspection provisions in the building and construction industry were routinely contravened.

As noted in the Cole Report:

> *Statutory provisions which entitle officers and employees of unions to enter premises authorise conduct which would otherwise constitute a trespass. Because they are a statutory intrusion into the premises and business affairs of another and because of their potential to cause disruption to workplaces, the circumstances in which entry is permitted need to be precisely defined and limited to what is necessary to achieve the purpose for which entry is permitted*.[17]

As part of the restoration of the rule of law in the building and construction industry, the changes relating to entry and inspection provisions that were part of the March 2006 workplace relations reforms were strongly supported by Master Builders.

These reforms:

- strengthen the provisions for dealing with the issue, suspension and revocation of right of entry permits;
- imposes a 'fit and proper person' requirement for union officials seeking a right of entry permit;
- clarify the rights and obligations of union officials, employers and occupiers of premises.

Master Builders particularly supports the change to the law so that union officials now need a federal permit to gain access to a workplace, even on occupational health and safety grounds (OH&S) where that right of entry exists under prescribed state or territory OH&S laws. Despite this change, there remains evidence that health and safety concerns are being used to push other agendas, particularly about wages and conditions. There is also evidence that union officials who have had their federal and state right of entry permits cancelled regularly trespass on building sites.

[17] Note 4, Volume 7, page 175, paragraph 3.

The practical, on-ground problems implicit in the current laws were encapsulated in the decision of a Perth magistrate.[18] This decision points to the inadequacies of the law, particularly relating to the jurisdiction of the ABCC mentioned earlier. The media reported that on 31 March 2003 Perth Magistrate Paul Heaney criticised police for wrongly arresting three militant union officials involved in violence at a building site two years before the court hearing. The Magistrate's reported criticism of police was that they had not been trained in industrial relations law and did not understand the notion of the right of entry. This statement was made after the conviction and fine of a mere $500 imposed on one of the accused union officials for assaulting a policeman. The case exemplifies what is wrong with the current system: the delay in coming to court, the small fine, and the unduly harsh criticism of the police. Cases such as this will act as a disincentive for the police to bother with criminal matters on building sites as well as intensifying the greyness of right of entry laws, at least in the mind of the police, if not the Magistrate. Master Builders understands that there was no appeal against the Magistrate's decision. Clarity in the law must prevail so that this sort of case outcome becomes a thing of the past.

Master Builders solution to the problem is to vest greater authority in the ABCC in this area of the law, expanding its jurisdiction to investigate criminal matters arising from scenarios such as that which arose before the Magistrate. This step would permit sworn police officers seconded to the ABCC to investigate matters of this kind and to assist to bring a prosecution. The ability of the ABCC to fulfil this increased responsibility would be enhanced by an additional legal requirement that entry to building sites by officials must be notified to the ABCC. This requirement would also reduce the potential for the abuse of right of entry powers by pre-arming the ABCC with knowledge about proposed entry to building sites.

Recommendation 1:

The Australian Building and Construction Commissioner, the industry specific agency that is responsible for ensuring that the rule of law is followed in building and construction industry workplace relations, should be retained with all of its current powers. Its role should be expanded so that it becomes a 'one stop shop' for building and construction industry complaints.

Recommendation 2:

In order to strengthen the current right of entry laws (which must be maintained), union officials should be required to report all proposed entries to building sites to the Australian Building and Construction Commissioner, in addition to notifying the occupier of the site and the relevant employer.

[18] Vanda Carson, *Militant Union Wins Right-of Entry Case,* The Australian 1 April 2003 page 8.

Outcome 2:

Independent contractors' legislation that preserves and enhances the subcontracting system must be maintained and strengthened.

Master Builders is a strong advocate of the subcontract system. The subcontract system has demonstrably been shown to be a very productive and cost effective method of building. More importantly, the subcontract system exemplifies the principles of freedom of association, enterprise, competition and independent endeavour. Earnings are directly related to labour efficiency, thus enabling efficient trade persons to maximise their income.

Independent contractors play a fundamental role in the building and construction industry, particularly because of its volatility and fluctuations, increasing labour costs (as illustrated in Table 2) and the move towards specialisation. The Cole Royal Commission recognised that contracting is a legitimate and important form of business activity and working arrangement. The Commission also found that the trend to contracting has been accepted by significant numbers of workers,[19] which accords with industry's view.

The *Independent Contractors Act 2006* (Cth) (IC) and the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth) were passed by the Federal Parliament on 4 December 2006 and came into effect on 1 March 2007. Some changes were made to the original bills following a Senate committee inquiry, to which Master Builders gave oral and written submissions. The federal laws override a number of state and territory laws, as well as creating new provisions that no longer permit state and territory laws to deem contractors to be employees, establish a national unfair contracts jurisdiction, and crack down on 'sham' contracting arrangements.

The Independent Contractors Bill's Explanatory Memorandum acknowledged the importance of the subcontract system to the building and construction industry as follows:

> *Self-employment in the construction industry is common, especially in housing as opposed to commercial construction. The construction industry is sensitive to the economic cycle which means that the demand for labour fluctuates with the peaks and troughs of the cycle. In 1998, almost one quarter of self-employed contractors worked in this industry.*[20]

[19] Note 4 at paragraph 277, Chapter 23, Volume 9.
[20] The Parliament of the Commonwealth of Australia – House of Representatives, *Explanatory Memorandum – Independent Contractors Bill 2006*, June 2006, page 5.

The Productivity Commission report released in May 2006[21] highlights the positive role that non-traditional work plays in the labour market for employees and employers. The Commission warned against attempts to regulate and restrict access to non-traditional employment. It also found that the use of self-employed contractors in the construction industry is prominent: almost a quarter of the workforce was engaged in this form of work.

Businesses in the building and construction industry use independent contracting arrangements to deliver the following efficiencies:

- Contractors can enter the industry with very little capital outlay, resulting in a very competitive environment, as barriers to entry are low.
- The system provides an important opportunity for skilled tradespersons with the necessary motivation to significantly increase their earnings. Their income is directly related to their efficiency in the actual time they work.
- The system is administratively simple and reduces supervision considerably because the principal contractor does not incur the administrative overheads of employing staff.
- There is an incentive to solve problems which develop on site quickly and effectively, as contractors do not get paid for delays; employees, on the other hand, have little incentive to solve such problems.
- A contractor quotes a price for a job which reflects the situation in regard to work on hand, and the market price reflects the level of demand.
- Results-based contracts are generally more efficient than time-costed labour working towards the same ends.
- The production process requires a variety of tasks that require different skills at different points in time. Because the completion of these tasks to a certain level of quality can be easily monitored it is well suited to the work of contractors.
- Because of fluctuations in demand in building and construction, there is much competition between firms and there can be much uncertainty about demand; many firms therefore prefer to use contract labour.
- The current skills shortage in the industry means that contractors are able to mobilise quickly and more efficiently place themselves to meet the needs of companies, projects and the industry at a particular time.
- Regional variations in prices paid to contractors encourage mobility of those contractors, thus helping to achieve and improve balance within regional markets.
- The housing sector predominately uses contractors. Unlike all other sectors in the construction industry, it has not faced any major stoppages or strikes, as a contractor is bound by the contract he enters into in respect of the work to be performed and has an incentive to get on with the job.

[21] Productivity Commission 2006, *The Role of Non-Traditional Work in the Australian Labour Market,* Commission Research Paper, Melbourne, May, page 62.

The use of contractors throughout the building and construction industry is one of the most positive features of this sector of the Australian labour market. The workplace relations system should facilitate contracting, not restrict it by excessive regulation. Regulation of contractors should arise from commercial law,[22] a principle expressed in one of the main objects of the IC: 'recognise independent contracting as a legitimate form of work arrangement that is primarily commercial.'[23]

Principle 8 applies because independent contracting promotes the effective operation of market forces.

Master Builders strongly advocates policies which preserve and enhance the subcontract system in the building and construction industry. Master Builders has criticised legislation introduced in a number of states and territories that enabled contractors to be retrospectively deemed employees.

Master Builders strongly advocates clarity in the legal distinction between an employee and a contractor across all laws. The current IC provides a basis upon which contracting arrangements may be distinguished from employment arrangements, thus preserving freedom of contract. However, in distinguishing between contractors and employees, it is recommended that the current common law test adopted in the legislation be modified and codified. A system of statutory registration would assist the task of distinguishing contractors and employees even more clearly. The system advocated would achieve consistent treatment across laws and jurisdictions in accordance with Principles 1, 2 and 3.

Three ways to secure these objectives are as follows:

(i) The ordinary common law test as established in *Stevens v Brodbribb Sawmilling Co Pty Ltd*[24] should continue to be used as the main basis upon which the distinction between a contractor and an employee is assessed. In this case, the High Court established that the major test is if an employer has the right to control the manner of doing the work. But that test is one of many:

> *Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, and the provision of holidays, the deduction of income tax and the delegation of work by the putative employee*.[25]

[22] J Riley, *A Fair Deal for the Entrepreneurial Worker? Self Employment and Independent Contracting Post Work Choices* (2006) 19 Australian Journal of Labour Law 246 at 260 discusses the issue of whether existing commercial laws offer a promise of "a legal guarantee of fairness and equality at work."
[23] Section 3(1)(b) IC.
[24] (1986) 160 CLR 16.
[25] Note 24, page 24 per Mason J.

(ii) External indications of the status of contractor should be used as a reinforcement of the common law test or otherwise. A strong indicator, for example, is an individual having an Australian Taxation Office personal service business determination in effect.[26]

(iii) Having regard to the common law test and other statutorily recognised criteria, the independent contractor could choose to be registered with a dedicated Australian Government agency. The application for registration could be accompanied by a certificate from a legal practitioner or other suitably qualified professional, to the effect that, having regard to the statutory criteria, the contractor should be registered and for which particular project or job. The registration would be for fixed periods but renewable where circumstances changed if the contractor was an individual who also worked occasionally as an employee. Registration of this type would increase certainty. This process would require minimal Australian Government supervision, probably limited to some random audits, for example. It would operate to take into account the dynamic nature of the contractor status and would permit registration as a contractor for a limited period or only in respect of particular projects.

The IC reflects the common law test (as detailed in point (i) above) in drawing the distinction between a contractor and an employee. This distinction has exercised the courts in many cases.[27] To determine whether the relationship is that of independent contractor and principal or employee and employer, it is necessary to look at the totality of the relationship between the parties. This use of the common law does not provide enough clarity for parties to determine their relationship in practice.

The main thrust of the IC is to negate state and territory legislation[28] which deems independent contractors to be employees for 'workplace relations purposes'.[29] This limitation on the reach of the IC means that state and territory legislation in a number of areas will continue to apply with respect to the placing of 'employer-like' obligations on those engaging, for example, subcontractors. The legislation does not affect (among others) the following state and territory laws:

- workers compensation
- OH&S
- anti-discrimination
- equal opportunity.

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[26] Section 87-60 *Income Tax Assessment Act* 1997 (Cth).
[27] The first seventy pages of Macken J O'Grady P and Sapideen C, *The Law of Employment* (4th ed) (1997) LBC is largely taken up with distinguishing the employment relationship from contracts for services and a number of other relationships such as partners, tenants, office holders etc.
[28] There are exceptions for owner drivers in New South Wales and Victoria and for clothing outworkers.
[29] 'Workplace relations purposes' is defined to include remuneration, allowances or other amounts payable to employees, leave entitlements of employees, hours of work of employees, enforcing or terminating contracts of employment, making, enforcing or terminating agreements determining terms and conditions of employment, disputes between employees or employers or the resolution of such disputes, and industrial action.

Because of these limitations, a principal to a contract will still need to assess the obligations to pay subcontractors under state and territory laws, despite the provisions of the IC.

Workers compensation continues to remain the responsibility of state and territory governments. Every state and territory has its own legislation which may or may not also cover OH&S. The responsibility for payment of workers compensation depends upon the definition of 'worker' in the relevant legislation. The state or territory workers compensation legislation may define a person as a 'worker' and therefore an employee regardless of their status at common law. The definition of 'worker' is different in every state and territory.

If the criteria set by state and territory legislation are satisfied, the head contractor is liable to pay the independent contractor's workers compensation premiums. Quite unsatisfactorily, if an independent contractor has a sickness and accident policy, the fact that the subcontractor has this protection is often not taken into account by the state or territory system. Master Builders' policy is for the IC to override definitions in state and territory workers compensation laws that deem contractors (as defined under the IC) to be employees.

This is one example of the need to monitor the IC so that it becomes an instrument of reform rather than a weapon of those who wish to reverse the protection given to freedom of contract by, for example, increasing litigation that pushes the boundaries of the unfair contracts jurisdiction.

The new unfair contracts jurisdiction will need to be carefully monitored so that all building industry participants are clear about the boundaries of what is and is not 'fair' in contracts with subcontractors. Case law will set those boundaries. There is the potential for this area of the law to markedly affect the terms of contracts with subcontractors.

Australian, state and territory governments must urgently focus on the task of aligning the distinction between employee and contractor under state and territory legislation, such as workers compensation laws. This would assist in ensuring that the administration of subcontractor arrangements is not riddled with inconsistencies between federal legislation and that of the states, or among the states and territories themselves.

The IC also consolidates unfair contracts into the federal jurisdiction, with state and territory laws being declared unenforceable. A single national scheme for the review of independent contractor arrangements has been established, and this will provide new jurisprudence for challenging the terms of engagement of contractors who are individuals or who are working directors of the company with which the contract was made. This area of the law will require close monitoring for its practical effect on day to day contracting arrangements.

There is concern, however, that the provisions for 'sham contracting' could be unfairly used as a weapon against employers by means of vexatious claims against the employer and a reverse onus of proof. These provisions could impede the very freedom of contract that the legislation is designed to protect. Master Builders is concerned that this presumption and reverse onus of proof will add to the already heavy administrative burden of employers. It further appears to fly in the face of the methods of operation in the building and construction industry, whereby individuals regularly work as both employees and as sole-trader businesses or in partnerships, usually with their spouse. These provisions are of concern to business, particularly small business, having regard to the power of unions to prosecute offences under the legislation.

Master Builders recommends that these laws, whether in their current form or as amended in the future, should operate to advance rather than impede reform. It is necessary to reinforce the original intention of the policy and for there to be a realistic definition of offences in the real world. Principle 1 set out in this Blueprint must be addressed.

Recommendation 3:

The definition of independent contractor in the independent contractors' legislation should override the definitions of that term in state and territory workplace relations and workers compensation legislation.

Recommendation 4:

Application of clear and simple legal tests that define a subcontractor and maintain and enhance the efficiencies of the subcontract system.

Recommendation 5:

The independent contractors' legislation be amended so that unions are not entitled to initiate prosecutions.

Outcome 3:

A workplace bargaining system in which employers and employees may freely enter into appropriate and lawful workplace agreements underpinned by simple safety net conditions must be maintained.

Agreement-making is at the heart of the workplace relations system envisioned by Master Builders. The parties to agreements should be empowered to enter into agreements that best suit the individual enterprise. The phenomenon of direct bargaining is one of many trends emerging in the wake of Australia's dramatically altered education patterns and recognition of the efficiency of bargaining after 1993. Collective and individual bargaining will continue to increase because they cater better to the labour force's heightened desire for self determination and advancement, especially given the current skills shortages in the building and construction industry.

Master Builders supports genuine enterprise bargaining[30] where workplace changes to enhance productivity may be introduced into the workplace for the benefit of employees and employers. Enterprise bargaining underpinned by an appropriate safety net must become the mainstay of the Australian industrial relations system; the Award system is no longer relevant to a community that believes in self-determination. Pattern bargaining modelled on union-imposed terms and conditions that incorporate restrictive work practices is not acceptable to the Australian community. Even before the recent workplace reform, bargaining was increasingly important to the industry (see Table 6).

[30] Enterprise bargaining is defined as "the process of negotiation between an employer and employees (or their representatives) in order to reach an agreement regulating the terms and conditions of employment within a particular enterprise or workplace": Nygh P and Butt P, *Concise Australian Legal Dictionary*, 2nd Ed, Butterworths, 1998, Sydney.

Table 6: Agreements in the Building, Metal and Civil Construction Industries' Certified Between 27 March 2001 and 26 March 2006

Type of Agreement	ACT	Adel	Bris	Dar	Hobt	Melb	Per	Syd	Total
March 2001-02									
s.170LJ	42	20	13		7	1048	18	199	1347
s.170LK	1	29	8	1	3	12	10	51	115
s.170LL	1		70		10	136	47	4	268
s.170LS		22			29	107	5		163
Total	**44**	**71**	**91**	**1**	**49**	**1303**	**80**	**254**	**1893**
March 2002-03									
s.170LJ	14	11	9	2	4	1272	14	263	1589
s.170LK		26	14	4		3	18	71	136
s.170LL		1	191			77	76	11	356
s.170LS		1			3	24		1	29
Total	**14**	**39**	**214**	**6**	**7**	**1376**	**108**	**346**	**2110**
March 2003-04									
s.170LJ	51	52	36		38	2384	31	479	3071
s.170LK		34	18	3	1	15	15	91	177
s.170LL		4	64	1		52	53	1	175
s.170LS		1	1		13	73			88
Total	**51**	**91**	**119**	**4**	**52**	**2524**	**99**	**571**	**3511**
March 2004-05									
s.170LJ	9	72	26		7	594	54	215	977
s.170LK	2	33	12	2	3	14	10	100	176
s.170LL		1	100		1	21	65	10	198
s.170LS		1			8	56			65
Total	**11**	**107**	**138**	**2**	**19**	**685**	**129**	**325**	**1416**
March 2005-06									
s.170LJ	5	4	34		8	1329	54	512	1946
s.170LK	2	13	30	3		15	11	76	150
s.170LL	1	2	275			24	33	26	361
s.170LS					1	24			25
Total	**8**	**19**	**339**	**3**	**9**	**1392**	**98**	**614**	**2482**

Since March 2006 the forms of workplace agreements are:

- Australian Workplace Agreements (AWAs) – an individual agreement between an employer and employee.
- Employee collective agreements – a collective agreement made between an employer and its employees without union involvement.

- Union collective agreements – a collective agreement made between an employer and an organisation of employees.
- Employer greenfields agreements – an agreement which the employer makes for future employees, without union involvement; highly suitable for construction projects.
- Union greenfields agreements – a collective agreement made between an employer and an organisation of employees, where a union negotiates an agreement on behalf of future employees of a new business or project; also highly suitable for construction work.
- Multiple business agreement – an agreement that applies the same pay and conditions to a number of businesses. This can be an employee collective, union collective, union greenfields or employer greenfields agreement.

Although the WRA does not formally recognise unregistered collective agreements or common law agreements, the Government has extended reform to these forms of agreement by using its purchasing power to effect reform. The content of building industry common law agreements may be affected by the National Code of Practice and Implementation Guidelines where a builder seeks to undertake Australian Government work. Master Builders fully supports this additional element of reform, as reflected in Principles 9 and 10. Extending workplace reform to non-registered agreements accelerates change in the industry and contributes to changing the industry's culture. The Code and Implementation Guidelines act as a catalyst for positive change in the industry.

Accordingly, Master Builders advocates that the Code and Guidelines become formalised and enacted as regulations to the BCII. This will ensure that clarity is enhanced when interpreting these documents, particularly the Guidelines. Further, this step will also mean that the regulations would need to be formally set aside to reverse the reforms that they have facilitated.

The WRA also provides that AWAs have priority over other industrial instruments, another element of accelerated reform. Collective agreements and awards have no effect where an employee is covered by an AWA. This policy is supported as it is in line with Master Builders' overall vision.

Master Builders advocates a system where employer and employee parties are empowered to enter directly into an appropriate workplace agreement, above safety net standards, set by statutory conditions, that suits the particular workplace and employees. This process produces individual or collective agreements that reflect the employer's situation and take account of employees' performance and circumstances.

The certainty as to labour costs that employers need to properly price risk will not be achieved unless individual agreements can operate even where a collective agreement applies in the relevant workplace. The increasing popularity of AWAs is indicated by Table 7 below, which demonstrates the increasing take-up of this type of agreement.

Table 7: Agreement-making in the Construction industry – National (for the period 27/03/06 - 30/04/07)

Agreement Type	ECA	UCA	AWA	EG	UG	Total
Number of agreements lodged	593	671	18122	127	166	19679
Estimated number of employers who have lodged agreements	463	550	971	91	108	2006
Number of employees covered by lodged agreements	10279	20834	18122	205	78	49518
Percentage of employees by agreement type	21%	42%	37%	0%*	0%*	100%

Key: ECA = Employee Collective Agreement; UCA = Union Collective Agreement; AWA = Australian Workplace Agreement; EG = Employer Greenfields Agreement; UG = Union Greenfields Agreement

Note: An employer may lodge more than one type of agreement hence there may be some double counting in the number of employers across the different type of agreements. Employees covered under EGs and UGs are based on variations made to those agreements.

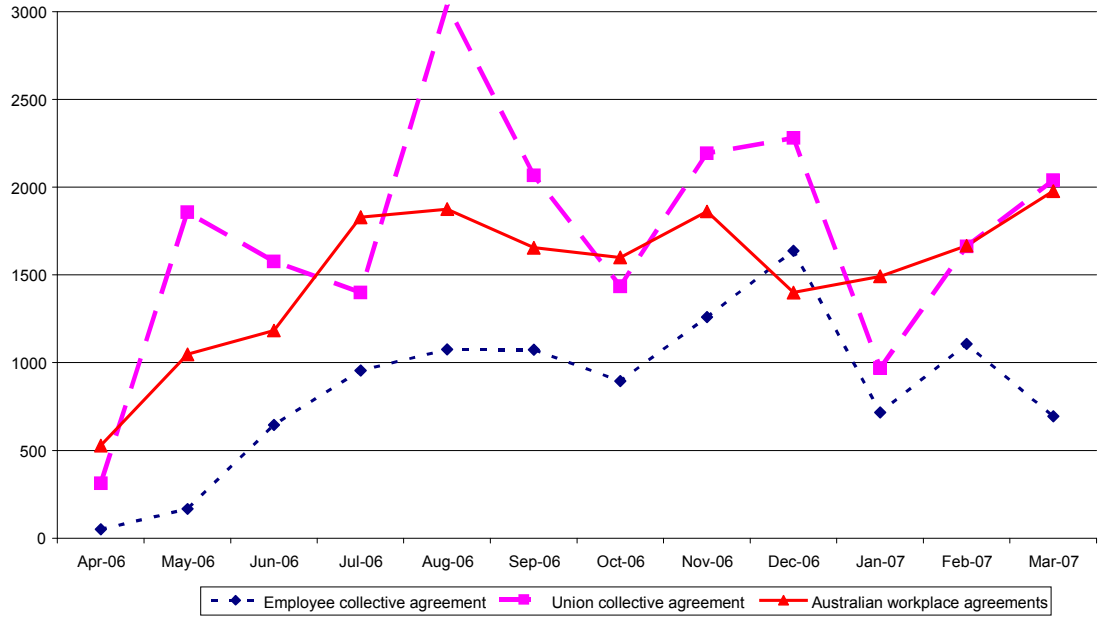
Source: Workplace Authority

Table 8: Monthly employee coverage data

Date	Employee Collective Agreement	Union Collective Agreement	Australian Workplace Agreements
Apr-06	52	314	529
May-06	167	1857	1049
Jun-06	645	1577	1184
Jul-06	955	1400	1829
Aug-06	1075	3037	1875
Sep-06	1074	2067	1655
Oct-06	895	1436	1600
Nov-06	1260	2194	1862
Dec-06	1638	2281	1400
Jan-07	717	969	1492
Feb-07	1106	1663	1667
Mar-07	695	2039	1978

Source: Workplace Authority

Figure 7: Number of employees per Agreement type at the date of making the agreement in the Construction Industry



Source: Workplace Authority

Figure 7 and Table 8 demonstrate the coverage of employees by various types of agreements in the construction industry. A large number of employees in the industry continue to make union collective agreements. Recent (June 2007) figures from the Workplace Authority show that employee collective agreements in the construction industry now cover 14,256 employees; union collective agreements cover 27,077 employees; and AWAs cover 23,703. This means that of all employees in the construction sector employed under a workplace agreement, 42 per cent are covered by union agreements and 58 per cent by non-union agreements.

AWAs should be retained as an integral part of the workplace relations system. They are becoming more frequently used by the construction industry (demonstrated in Tables 6 and 7) because they permit higher levels of flexibility in specific enterprises. In contrast, reliance on common law contracts means that Awards gain currency because Awards are able to override common law contracts. Master Builders supports the power of AWAs to exclude or vary award provisions (see below). A move to flexible workplace relations practices is evidenced by this trend and the trend to sub-contracting, as noted earlier.

Table 9: Number of employees in the construction industry by State and Territory under WorkChoices to the end of March 2007

State	Australian Workplace Agreement	Employee Collective Agreement	Union Collective Agreement
ACT	215	189	489
NSW	2826	2872	5392
NT	445	189	100
QLD	3702	2543	5205
SA	970	651	1070
TAS	677	263	600
VIC	1070	583	3279
WA	8215	1118	3426
Multiple States		1470	1031
Grand Total	**18120**	**9878**	**20592**

Note: All agreements that did not disclose a state or territory have been excluded, hence some minor differences from the figures in Table 7. Multiple state agreements refer to collectives that cover employees in more than one state or territory.

Source: Workplace Authority

Employees and employers should continue to be allowed the flexibility to decide what type of agreement best suits their needs and circumstances. They should not be forced to make pattern agreements, as has occurred in the past. Accordingly, Master Builders supports the retention of AWAs or other similar individual statutory workplace agreements that can be tailored to meet the circumstances of specific enterprises and which displace Awards.

Bargaining at a workplace level is particularly suited to tailoring working arrangements so as to assist employees balance work and family responsibility. This is particularly demonstrated in the inclusion of part-time work provisions, which will also assist older workers who wish to reduce the number of hours they work, but remain in the industry. There must be recognition that bargaining at the workplace level is a legitimate method of achieving agreements that suit both the interests of employees and employers, enabling them to work together. A cultural shift must occur to ensure that best practice approaches in agreement-making by employers are identified and promoted.

Master Builders strongly advocates mechanisms to encourage the making of agreements by businesses, particularly small to medium sized employers. Hence, any process that unnecessarily adds to the administrative burden experienced by these employers will increase frustration with the system, as will substantial lag time between the making of an agreement and its approval. The agreement-making process itself, therefore, also requires certainty and timeliness. The Australian Government should ensure that there are clear and simple agreement-making registration processes in place. In particular, the date at which an agreement takes effect must be easily identifiable with guaranteed time lines for processing. This accords with Principle 2.

We emphasise the need for certainty in the workplace relations system. Employers need to know that their arrangements will continue without a disruptive swing of the industrial relations 'pendulum'.[31] Master Builders advocates that enterprise bargaining agreements continue to be permitted to have a term of up to five years in order to create greater certainty about labour cost issues. The agreement-making stream of the current workplace relations system in large part fulfils this vision. As has been noted by Colvin et al:

> *[T]he opportunity arises for more innovative and flexible workplace arrangements which can depart from award restrictions more than ever.*[32]

Bargaining should be reached without the interference of external parties, except when there is a lawful request that unions or other third parties be involved in representing the interests of employees and/or employers. There should be zero tolerance for bargaining or agreements that include or seek to include content that is contrary to law. Freedom of association also means that there should be a choice not to enter into a statutory agreement.

In particular, pattern bargaining is a practice which subverts and inhibits the capacity of the parties at the workplace to understand and explore alternatives. Making an effective workplace agreement that genuinely reflects the interests of the parties to the enterprise is often a laborious and confronting process.

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[31] Term created by Mr Stephen Knott see for example paper entitled *The Changing Face of Employee Relations,* March 2006, page 15 where the following is said:

> *Our hope for the future is that the IR pendulum stops swinging and there is bi-partisan support for a single, simple National IR system that supports business efficiencies and working relationships within enterprises.*

[32] JHC Colvin, G Watson and N Ogilvie, *An Introduction to the Industrial Relations Reforms,* Lexis Nexis Butterworths, 2006, page 99.

Industrial action during the term of an enterprise bargaining agreement should be unlawful. The structures in place under the BCII and WRA combine to provide a comprehensive series of protections to the bargaining parties that have led to an environment where building and construction industry enterprises are reaching new and innovative agreements with their employees. This system should not be fundamentally altered.

Recommendation 6:

Employers should be free to enter into any lawful form of workplace agreement, including collective agreements and Australian Workplace Agreements (or similar individual statutory instruments). These should be retained as part of the Australian workplace relations system.

Recommendation 7:

The National Code and Implementation Guidelines should be converted to regulations made under the *Building and Construction Industry Improvement Act 2005* (Cth), so that they become a permanent feature of the workplace relations system.

Recommendation 8:

Processing of agreements should take no longer than 30 days from date of lodgement, with automatic effect from the date of lodgement unless within that time the registering authority has issued a notification that that there has been a defect in process or substance.

Recommendation 9:

Industrial action in support of pattern bargaining should not be lawful.

Outcome 4:

The introduction of a wages and safety net system that incorporates clearly stated wage(s) and conditions defined in a statutory schedule. If Awards are to be retained, there should be only one industry Award that is not overly prescriptive.

The March 2006 changes to workplace relations represented the first step on the path to replacing the Award safety net system with a set of minimum statutory conditions, the Australian Fair Pay and Conditions Standard. Until the introduction of the 'fairness' test, on 7 May 2007, workplace agreements were not required to pass a test similar to the former 'no disadvantage' test. In other words, up to 7 May 2007 employers were relieved of the obligation to show that a proposed workplace agreement would not result in a reduction in overall employment, nor in the terms and conditions of the employees making the agreement, when compared with any applicable Award. Agreements merely had to provide that wages and conditions were not less favourable than the minimum wages and conditions specified in the Australian Fair Pay and Conditions Standard.

The overwhelming experience of the building and construction industry during the first 16 months of the workplace relations reforms is that their application produced higher levels of remuneration and more flexible terms and conditions under agreements than under the previous arrangements. There have been clear net benefits to employees from entering into agreements.

These benefits arise because employees in the building and construction industry have entered into agreements which secure additional operational flexibility, meaning that employers benefit from higher levels of productivity and employees receive better remuneration. The experience in the building and construction industry is not one of applying the minimum wages and conditions under the Australian Fair Pay and Conditions Standard, or seeking to modify or exclude protected award conditions, but of using agreements to generate productivity to benefit employees and employers alike.

The fairness test has, at its core, the belief that fair compensation should be provided where there is a modification or exclusion of protected award conditions in respect of all personnel on collective agreements, and for those on $75,000 per year or less when on AWAs:

- rest breaks
- incentive based payments and bonuses
- annual leave loadings
- monetary allowances
- observance of and payment for public holidays

- overtime and shift loadings
- penalty rates

The test operates where the employees are employed in an industry or occupation that is usually regulated by an Award. The safety net for building and construction industry workers where industry awards predominate has, therefore, meant a substantial extension of the safety net.

Master Builders believes that this extension was not warranted. The fairness test has made Awards a vital element in the workplace relations system in contrast to the intent of the reforms introduced in March 2006. Master Builders recommends that the fairness test should be altered by referencing it to a minimum statutory set of conditions rather than to a plethora of award conditions. To the extent that they have continuing relevance, Awards should reflect their safety net characteristics and be simply worded and accessible to the layperson. Awards should not continue to be used as a yardstick to determine safety net terms and conditions in the long term.

Master Builders strongly advocates this policy because award arrangements in the building and construction industry have hampered productivity. As noted by the Cole Royal Commission:

> *The principal award of the Australian Industrial Relations Commission (AIRC) which bears upon the building and construction industry in Australia is the National Building and Construction Industry Award 2000 (NBCIA). Despite attempts to simplify the NBCIA and circumscribe the number of allowable award matters the NBCIA is highly prescriptive. Among other matters, it prescribes a wide range of allowances and special rates, and complicated provisions in relation to rostered days off (RDOs), crib time, overtime, special time, shift work and weekend work.*[33]

The introduction of the fairness test that references Awards leads Master Builders to support the acceleration of the task of simplifying and rationalising Awards so that they become documents that simply and effectively communicate employment obligations. The manner in which the fairness test now operates appears to offend against Principles 1 and 2. Further, Master Builders prefers an early and comprehensive change to Awards, since the award simplification restructuring and rationalisation tasks in themselves do not engender productivity: it is only the outcome which assists this process. Master Builders would prefer that any test of fairness be clear by reference to a statutory schedule of items that reflects community values, rather than on the basis of different Awards with different standards for matters such as penalty rates.

[33] Note 4 volume 8 chapter 9 page 43 paragraphs 4 and 5.

Following a comprehensive inquiry, the Australian Government should modify the fairness test to ensure that all new agreements are assessed against a simple, objective, statutory criteria that encourages agreement-making at the workplace level. Master Builders' vision is of bargaining at the centre of any workplace relations system. In turn, Master Builders advocates that wages and wage increases should be overwhelmingly set by workplace bargaining, either collectively or individually with a statutory safety net.

Where a central agency, such as the Australian Fair Pay Commission, sets minimum wages, the rates and their application to particular classifications should be easily maintained and understood. This is far from the case at present, with a confusing number of wage rates applying to far too many classification categories. Part of the urgent need to rationalise and simplify Awards is to correct this situation. There should be one industry Award (defined by reference to the definition of 'building work' in the BCII but expanded to include single dwellings) with a limited number of classifications which attract minimum wages.

Recommendation 10:

Awards should be rationalised across the board so that they become simple, easily understandable documents that reduce the complexity of the workplace relations system.

Recommendation 11:

The fairness test introduced from 7 May 2007 should be reviewed to ensure that all agreements are assessed against an objective, simple set of statutory criteria that encourage agreement-making at the workplace level.

Recommendation 12:

The creation of one building industry award against which minimum wages for broad categories and classifications are set.

Outcome 5:

The workplace relations system should focus on cooperative relations between employees and employers. It should emphasise the resolution of any disputes at the workplace level without the need for external party involvement.

Disputes at the workplace are neither inevitable nor desirable. Yet for a long time the industrial relations jurisdictions within Australia required the existence of a dispute, paper or otherwise, to shape the relationships between employees and employers.

This system encouraged parties to make broad claims in order to advance their industrial objectives. Ambit claims provoked ambit responses, which led to excessive reliance on external parties to achieve outcomes in an environment where both parties occupied unreasonable positions to maximise their (perceived) chances in an arbitrated or negotiated outcome. This long, complicated and unduly technical process of dispute resolution did not create an environment in which it was possible to move forward for the benefit of all parties.

A dispute-oriented system based on this type of claim drives a wedge between employers and employees, instead of allowing them to embrace mutual self-interest in working cooperatively within an enterprise. As stated by the Cole Royal Commission:

> *True enterprise bargaining requires the direct input of those whose interests are most directly affected by its outcomes – workers and their employer. The circumstances of individual businesses will differ. So too will the needs and aspirations of individual workers. If they are to be considered and accommodated in ways that are mutually beneficial and acceptable, the workers and their employers need to discuss how an agreement can be structured which advances their respective interests. Ninety four percent of employers in the building and construction industry have less than five employees. Given the relatively small number of employees engaged by most contractors in the building and construction industry, there is clearly scope for discussions to take place, both formally and informally, at the workplace in order to arrive at mutually beneficial outcomes. Pattern bargaining and the impact of project agreements have meant that both workers and employers have become accustomed to merely adopting a common form of agreement which has been determined by others.*
>
> *One form of centralised wage and condition fixation has been replaced by another. Initiative is stifled; the scope for creativity is denied. The reforms introduced by successive Governments, to make agreements struck at enterprise level the principal instruments whereby terms and conditions of employment are established, are circumvented and negated. The results have been detrimental to both workers and employers, to the industry and to the national economy.*[34]

[34] Note 4, Volume 1, pages 27 – 28.

Long-term reliance on this system, coupled with industrial hostility and unlawful behaviour in the building and construction industry, has disempowered employees and employers, leading to failure to manage human resources properly. Rigid working conditions have therefore resulted and continue to characterise the industry. These conditions reduce productivity and, importantly in times of skill and labour shortages, limit opportunities within the industry to those workers whose circumstances fit into the inflexible industrial framework. The workplace relations system must encourage the creation of workplace arrangements that suit the needs of employees and employers, as reflected in Master Builders' main vision. Parties should be able to agree on how workplace conflicts can be managed and resolved without having to defer to an institution for every minor issue.

The reliance on external parties in a dispute oriented system is compounded where the system is dominated by legalism. Master Builders supports a move away from a system of dispute resolution that is dominated by the strict interpretation of legislation. Legal proceedings as a means to resolve disputes should be a last resort. As Niland has stated:

> *In legal contexts precedent and the status quo occupy sovereign positions. For this reason the law is a guardian against change, whereas an approach that accommodates and facilitates change is needed in industrial relations dispute resolution. Work rules developed many years ago have a better chance of persisting in a legally dominated system, even though the technology over that period has undergone massive change. It is not in the mentality of a legally dominated system to accommodate productivity bargaining or other processes for revising work rules in line with changing conditions.*[35]

A move away from legalism to a system that does not require gratuitous recourse to lawyers and other external parties must continue.

Master Builders supports agreements that prohibit strike action during their term. Bargaining, with a strong emphasis on dispute resolution at the employer or site level, creates a more diversified system but one where disputes are more likely to be dealt with during the proper negotiation of the agreement. To the fullest extent possible the workplace relations system must seek to obtain solutions via negotiation rather than through the involvement of third parties who, in an effort to be recognised and to have a legitimate place in dispute resolution, seek to provide a legal solution.

This is different from, and should not be confused with, third party intervention to create the system by which the rule of law operates. As is evident from the prior discussion, Master Builders recommends that industrial action in the building and construction industry should be constrained to the period during which a bargain is being struck and that industrial action should otherwise be outlawed.

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[35] J Niland, *Collective Bargaining and Compulsory Arbitration in Australia* (1978), NSW University Press at page 77.

Legislation must specify the circumstances under which strike or other industrial action is a legitimate option in the bargaining process, as this will reduce the costs incurred in having to determine the legality of action before the courts. As stated in the Cole Royal Commission Report:

> ***Principles governing cultural change***
>
> *There are four tenets that should drive reform and cultural change.*
>
> *First, there should be as clear a definition as possible of that industrial activity which is permitted, and that which is not.*
>
> *Second, the rule of law should be re-established so that conduct which is not permitted attracts serious consequences. Penalties for breaches must be increased substantially.*
>
> *Third, those who engage in unlawful conduct or practices should bear the loss suffered by other participants in the industry. A quick, cheap and effective method of establishing and imposing liability for that loss must be established.*
>
> *Fourth, it should become widely known and accepted within the industry that there is an independent body, not subject to the pressures applicable to participants in the industry, which will, with vigour, uphold the law and prosecute any participant in the industry who breaches.*[36]
>
> …

The circumstances in which industrial action can be taken must be limited to ensure that resolution is achieved at a workplace level without unwarranted external pressure. Hence, secret ballots prior to taking strike action are justifiable, not only because they alter the incidence of strikes, but because they help to establish the legitimacy of that strike action in the mind of the community. Accordingly, legal sanctions against unlawful industrial behaviour must be a strong characteristic of the dispute resolution system, particularly for the building and construction industry. The balance of the system now reflects the other tenets identified by the Cole Royal Commission Report.

Recommendation 13:

Workplace relations agreements, once formally registered, should automatically proscribe industrial action during their currency.

Recommendation 14:

Secret ballots prior to strike action must remain as a fundamental component of the workplace relations system.

[36] Note 4, Volume 11, page 11, paragraphs 34 – 39 and 42.