

Master Builders Australia

**Submission to the
Productivity Commission on its
Draft Report on Public Infrastructure
Comments on Productivity and Industrial Relations**

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1 Overview

1.1 Productivity Commission Right to Believe Changes to Work Practices Can and Should Affect Productivity

- 1.1.1 Master Builders strongly backs the various findings of the Productivity Commission that demonstrate how productivity improves through a myriad ways such as the adoption of technological and other advancements, including factors affecting work practices.
- 1.1.2 The Productivity Commission has in the past (for example, in the May 2013 PC Update) emphasised how important fundamental influences like regulatory and institutional frameworks are in facilitating productivity growth; how the industrial relations environment works to underpin aggregate economic performance.

1.2 Cole Royal Commission Predicted Changed Work Practices Would Improve Productivity

- 1.2.1 The Cole Royal Commission, after detailed and exhaustive examination into building and construction, determined that cultural and attitudinal change revolving around workplace practices was required to solve major, industry-specific problems.
- 1.2.2 The powers given to the ABCC were unique but necessary to respond to the extraordinary nature and extent of unlawful behaviour exhibited by building unions and the subsequent commercial and productivity damage caused to builders, the economy and the community as a whole. This is an inconvenient truth that the building unions ignore.
- 1.2.3 The Cole Royal Commission predicted that the recommended changes would result in improved productivity and very significant benefits to the industry and economy. This subsequently proved to be correct with the establishment of Building Industry Taskforce (BIT) and the Australian Building and Construction Commission (ABCC).

1.3 BIT/ABCC Era Led to Large Scale Removal of Restrictive Work Practices Hampering Productivity

1.3.1 The BIT/ABCC decade ushered in substantial positive change in workplace practices in the building and construction industry. Numerous restrictive practices that hampered the industry were largely removed during the decade (2002-2012) during which the BIT and ABCC existed.

1.3.2 The link between changed workplace practices has been noted by Peetz (Australian Bulletin of Labour Vol 38 No 4 2012):

*“The ways in which unions can impede economic performance of a firm are by imposing **restrictive work practices** or by impeding the introduction of innovations, such as new technology.”*

1.3.3 The reforms in the building and construction industry responded to the issues identified in the Cole Royal Commission and addressed the problems arising from the unique circumstances of the industry. They were expected to, and subsequently did, improve work practices and labour productivity in the construction industry.

1.4 Industry Experienced Changed Behaviour and Increase in Output per Worker

1.4.1 The BIT and ABCC assisted to change behaviour in an industry labelled as having a ‘toxic’ culture. This was done through tailored laws and administrative means including the Commonwealth’s National Code of Practice and Implementation Guidelines that led to removal of a number of restrictive and unlawful work practices and raised the output per worker from levels that would otherwise have prevailed.

1.4.2 In the building and construction industry the improvement in work practices that flowed from much better adherence to the rule of law, directly affected labour market risks and hence boosted productivity. The ability to raise output per worker is at the essence of productivity.

1.5 Marked Decline in Disputes Symptomatic of Changes/Productivity Improvements

- 1.5.1 After the improved workplace practices had been implemented, the building and construction industry outperformed other sectors of the economy in reducing in the number of work days lost.
- 1.5.2 ABS data shows that the days lost to industrial action in the building and construction industry averaged 159,000 per year between 1995/96 and 2001/02. This gradually declined during the first five years of the BIT/ABCC era, and work days lost then remained at a low level from 2006/07 to 2011/12. By 2011/12, the number of work days lost was only 24,000, or 15 per cent of the annual average for 1995/96 to 2001/02.

1.6 Quantity Surveyor Data Show Fall in Premium for Commercial Building

- 1.6.1 The finding from applied economic analysis by Econtec/Independent Economics is that the BIT/ABCC era did lead to a substantial improvement in productivity.
- 1.6.2 Rawlinsons data to January 2012 show that the cost penalty for completing the same tasks in the same State for commercial construction (which had been subject to restrictive work practices prior to the BIT/ABCC era) compared to domestic construction (which is largely free of restrictive work practices) shrank in the BIT/ABCC era.
- 1.6.3 This narrowing in the cost gap is consistent with a boost to productivity in the commercial construction sector. This narrowing in the cost gap, conservatively estimated at between 8 and 12 per cent between 2002 and 2012, developed over several years as the industry gradually adjusted to the industry-specific regulatory regime of the BIT/ABCC era.

1.7 Productivity Improvement No Great Surprise to Those in the Industry

- 1.7.1 For practitioners operating in or involved in analysing building and construction over 20, 30, even 40 year time spans, a major lift in productivity came as no surprise given the nature of such far

reaching industry economic reform and its ability to change participants' behaviour.

- 1.7.2 The work done by Econtec/Independent Economics determined that there had been a sizeable boost to construction industry productivity as a result of the reform period changes overseen by the BIT/ABCC. There has been scepticism expressed by some about the magnitude of the productivity boost assumed due to the changes.
- 1.7.3 But this is not a 'normal' industry. The starting point prior to the reform phase was an industry with particularly extreme restrictive work practices compounded by militant unions with a history of engaging in industrial thuggery.
- 1.7.4 The dramatic fall in industrial disputation and removal of a large number of restrictive work practices led to firms, informing Master Builders anecdotally, and on a commercial-in-confidence basis, that they were able to reduce their 'IR premium' by around 10 per cent of the value of individual projects.

1.8 Macro Data Supports Theory, Cole's Prediction and Industry Logic

- 1.8.1 Three decades of construction industry productivity data show an unambiguous pattern; weak growth until 2001-02, followed by stronger growth in the decade following. The lift in productivity coincides with dramatically changed industry work practices ushered in during the BIT/ABCC era.
- 1.8.2 The stronger productivity performance also coincided with poor aggregate productivity - as Productivity Commission Chairman Peter Harris stated in a media release of 13 June 2013:

"Australia's productivity growth has been poor over the past decade".
- 1.8.3 If factors at the total economy level weighed against industry by industry productivity growth, the lift in construction industry productivity during this period was even more impressive, understating the outperformance.
- 1.8.4 A study by the Grattan Institute found that the building and construction industry was one of only three industries to enjoy faster

labour and multifactor productivity growth in the 2000s compared to the 1990s (Eslake, Saul and Walsh, Marcus, Australia's Productivity Challenge, The Grattan Institute, Melbourne, February 2011). Administration/support services, and arts and recreation services were the other two industries whose productivity performance improved in the 2000s.

- 1.8.5 Reinforcing the value of the type of reform that occurred in the construction industry in the BIT/ABCC era, Harris also said:

"But the overall picture is one of the need for ongoing reform of the micro economy"

Commissioner Harris' observation rang true for the building and construction industry.

- 1.8.6 During the BIT/ABCC era, the construction industry's productivity improved markedly and outperformed other sectors of the economy as a result of improved workplace practices. Econtec/Independent Economics work finds that the estimated gain ranges between (nearly) 10 and (more than) 20 per cent, depending on the measure and the source of information that is used.
- 1.8.7 This reinforces the conclusion that improved workplace practices substantially boosted productivity in the building and construction industry.

1.9 No Reasonable Interpretation Exists to Refute There Was A Considerable Positive Impact

- 1.9.1 Some critics have cast doubt on individual aspects of the Econtec/Independent Economics work without stepping back to consider the work in totality or undertaking any robust analysis themselves to refute the finding that there was a considerable positive impact of the BIT/ABCC era on construction productivity.
- 1.9.2 Such criticism is considered highly unprofessional and does not recognise the strong and clear flow of logic and supporting evidence:
- economic theory suggests improved workplace reform will lift productivity;

- detailed examination by a Royal Commission concluded there would be productivity gains from industry reform;
- international comparisons suggest that, prior to the establishment of the BIT and ABCC, there was potential for large gains in construction industry productivity,
- industry participants found improved workplace practices delivered cost savings for building and construction projects;
- applied economic research shows the cost gap between commercial and residential building narrowed during the BIT/ABCC era; and
- decades of aggregate data reveal a sustained lift in construction industry productivity coinciding with the reform era.

1.10 Econtec/Independent Economics Work Highlights Wider Economic Benefits of Building Industry Productivity Gain

- 1.10.1 The Econtec/Independent Economics work brings a range of evidence together and makes a call on what was likely to have been the boost to industry productivity from the BIT/ABCC era. It then uses a computable general equilibrium model to estimate benefits for the wider economy.
- 1.10.2 Econtec/Independent Economics assumes improved work practices resulting from the BIT, ABCC and industrial relations reforms boosted building and construction productivity by close to 10 per cent. Of course, this is an estimate, around which there will be a margin of uncertainty. If a higher or lower estimate were to be adopted for modelling purposes, then the modelled benefits of higher productivity could be scaled up or down accordingly.
- 1.10.3 The improvements in labour productivity lowered construction costs relative to what they would otherwise have been, leading to reduced costs across the economy. In the private sector, cost savings to each industry flowed through to households in the form of lower consumer prices. In the government sector, budget savings flowing from lower costs of building schools, hospitals and constructing

roads and other infrastructure, are assumed to have been passed on to households in the form of a cut in personal income tax. Overall, consumers are estimated to have been better off by \$7.3 billion annually.

1.11 Serious Concern Regarding Productivity and Industrial Relations Sections in Draft Productivity Commission Report

- 1.11.1 Master Builders was very disappointed that the Productivity Commission chose to cast doubt on individual aspects of the Econtec/Independent Economics work without taking an overarching view. The Productivity Commission said that the Econtec/Independent Economics work was “not robust” and “not reliable, nor convincing”, when all other evidence clearly pointed to the contrary. The Productivity Commission failed to take the opportunity to make its own assessment as to whether major workplace reform in the building and construction industry led to productivity improvements, and if yes, by how much?
- 1.11.2 The effect of the Productivity Commission criticism is to seek to raise doubts rather than to provide any clarity or new analysis.
- 1.11.3 When interpreting the productivity data, the Productivity Commission does not take into account the detailed analysis conducted by the Cole Royal Commission that provides substantial evidence that poor work practices were impeding productivity in the industry.
- 1.11.4 Taken together, the analysis of the Cole Royal Commission and the major pieces of evidence pointing to higher productivity in the construction industry provide a compelling case that the activities of the BIT and ABCC substantially boosted productivity.

2 Introduction

- 2.1 Master Builders Australia is the peak national association for the building and construction industry in Australia. Its primary role is to champion the interests of the building and construction industry, representing residential and commercial building, and engineering construction.

- 2.2 Over 124 years membership has grown to over 32,000 businesses nationwide, including the top 100 construction companies with representation in every state and territory from all parts of the building and construction industry. Master Builders' members are large national, international, residential and commercial builders and civil contractors through to smaller local subcontracting firms, as well as suppliers and professional advisers.
- 2.3 The building and construction sector accounts for more than 8 per cent of gross domestic product and 9 per cent of employment in Australia. It makes an essential contribution to the generation of wealth and welfare of the community. At the same time, the wellbeing of the building and construction industry is closely linked to the prosperity of the domestic economy.
- 2.4 The cumulative building and construction task over the next decade will require work done to the value of \$2.8 trillion and for the number of people employed in the industry to rise to 1.3 million.

3 Focus of This Submission

- 3.1 In November 2013, the Federal Government announced an inquiry into infrastructure costs, to be undertaken by the Productivity Commission. In commissioning the review, the Federal Government observed:
- efficient public infrastructure has a vital role to play in facilitating a competitive and productive economy;
 - ongoing financing and funding of infrastructure development is of critical importance to Australia's economic future;
 - the capacity of governments to adequately fund new and improved infrastructure is limited; and,
 - in the future, there will be a greater need to rely on private sector financing of infrastructure supply.
- 3.2 Under the terms of reference, the inquiry was to examine ways to encourage private sector financing and funding for major infrastructure projects; and issues relating to the high costs and long lead times associated with such projects. Key elements of the review include examination of costs,

competitiveness and productivity in the provision of nationally significant economic infrastructure and identification of ways to reduce infrastructure construction costs.

- 3.3 The Productivity Commission released a draft report on 13 March 2014. In this submission, Master Builders Australia addresses issues raised in the draft report, specifically relating to productivity and industrial relations in the building and construction industry.
- 3.4 Master Builders Australia has long been advocating for a productive workplace relations environment. Harmonious and productive workplaces are vital to a strong building industry, a thriving economy and increasing employment opportunities. Sadly, building and construction industry unions have a long history of militant and unlawful behaviour, particularly wildcat strike activities that disrupt workplaces. Such irresponsible behaviour lowers productivity and adds to the cost of building much needed economic and social infrastructure, such as hospitals and schools - which are funded by taxpayers.
- 3.5 Both Master Builders Australia and the Productivity Commission, as articulated in the draft report, strongly recommend restoration of the Australian Building and Construction Commission (ABCC). However, parts of the Productivity Commission's draft report disappointingly appear to downplay evidence provided by Master Builders Australia and Independent Economics highlighting potential macroeconomic benefits of improved productivity in the building and construction industry.

4 Productivity Commission Right to Believe Changes to Work Practices Can and Should Affect Productivity

- 4.1 Master Builders strongly backs the various findings of the Productivity Commission and others that demonstrate how productivity improves through a myriad ways such as the adoption of technological and other advancements, including factors affecting work practices. Hancock et al makes the point in a 2007 NLS report to the Chifley Research Centre 'Industrial Relations and Productivity in Australia':

“. . . resistances to change in the areas of production, numbers of workers, technology and work practices are likely to act as a brake on

productivity growth. This is generally understood. Disagreements arise with respect to the means of releasing the brake.

- 4.2 The more open, competitive, flexible and innovative an industry, the more business is encouraged and enabled to be more productive. The Productivity Commission has emphasised how important fundamental influences like regulatory and institutional frameworks are in facilitating productivity growth; how the industrial relations environment works to underpin aggregate economic performance. In its May 2013 Productivity Update (page 10), the Productivity Commission makes this very point:

“There are also fundamental influences such as resource endowments, demography, geography, institutional frameworks and culture which set the general ‘environmental’ conditions which can affect productivity, especially over the long term.” and

“Formal and institutional ‘rules of the game’ influence the costs of coordinating production activities and conducting business. They can provide incentives for firms and individuals to raise productivity or, conversely, to engage in socially unproductive rent-seeking to obtain special treatment. Cultural factors refer broadly to the orientation of people toward change of the kind required to achieve further development.”

- 4.3 In a keynote address to the Annual Forecasting Conference of the Australian Business Economists in Sydney on 8 December 2010, Gary Banks, the (then) Chairman of the Productivity Commission said:

“Among these, industrial relations regulation is arguably the most crucial to get right. Whether productivity growth comes from working harder or working ‘smarter’, people in workplaces are central to it. The incentives they face and how well their skills are deployed and redeployed in the multitude of enterprises that make up our economy underpins its aggregate performance.”

5 Cole Royal Commission Predicted Changed Work Practices Would Improve Productivity

- 5.1 The Cole Royal Commission into building and construction concluded that the conditions in the Australian building and construction industry were unlike those in other industries (Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations, February 2003):

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

- 5.2 After detailed and exhaustive examination, the Cole Royal Commission determined that attitudinal and cultural change revolving around workplace practices was required to solve major, industry-specific problems. The Cole Royal Commission predicted that its recommended changes would result in improved productivity and very significant benefits to the industry and economy. This subsequently proved to be correct with the establishment of the BIT and ABCC.
- 5.3 The ABCC powers arose from damning findings about endemic unlawful behaviour in the commercial building sector which, as stated, was comprehensively documented in the 2003 Cole Royal Commission Report. The powers given to the ABCC were unique but necessary to respond to the extraordinary nature and extent of unlawful behaviour exhibited by building unions and the subsequent commercial damage caused to builders, the economy and the community as a whole. This is an inconvenient truth that the building unions ignore. This inconvenient truth of continued unlawful behaviour is demonstrated by the 107 court judgments against building unions charted by Master Builders in the table shown at Attachment A to this submission. The severity of court imposed fines and penalties are evidence of the gravity of the problem.
- 5.4 It is for these reasons that Master Builders Australia has been strident in its call for the restoration of the ABCC powers. The major criticism of the current regime that underpins the Fair Work Building and Construction agency is that it operates after the repeal of all of the building and construction industry-specific workplace laws that were designed following the handing down of the Cole Royal Commission report. The former Government took this step under the guise of changing the procedural mechanisms that the industry-specific agency must take in compulsorily acquiring information. No case for substantive change or repeal of all the industry-specific laws was made out.
- 5.5 The Wilcox Report commissioned by the Government and published in March 2009, accepted that there are features of the industry which merit a specialist regulator and the ABCC had improved relations amongst industry

participants. Mr Wilcox clearly stated there is more work to be done in changing the industry and it would be unfortunate if the inclusion of the ABCC in the new inspectorate led to a reversal of the progress that had been made. The sentiment reflected in that statement did not translate to practical recommendations that would ensure the work of the ABCC continued. That is the major contradiction in the Wilcox Report, especially the recommendation that specialist laws are not needed. Master Builders submits that the Wilcox Report shows a glaring contradiction in the finding that the ABCC's work "is not yet done" and then for the inquiry to recommend the repeal of specific sectoral laws that the ABCC enforced.

6 BIT/ABCC Era Led to Large Scale Removal of Practices Hampering Productivity

- 6.1 The BIT/ABCC decade ushered in substantial positive change in workplace practices in the industry. The link between changed workplace practices has been noted by Peetz (Australian Bulletin of Labour Vol 38 No 4 2012):

*"The ways in which unions can impede economic performance of a firm are by imposing **restrictive work practices** or by impeding the introduction of innovations, such as new technology."*

- 6.2 In the building and construction industry, restrictive practices and unlawful behaviour that hampered the industry were largely removed during the years of the BIT and ABCC era (2002-2012). In response to the recommendations of the Cole Royal Commission, laws and regulations governing the building and construction industry were introduced and strengthened. The Building Industry BIT was established in 2002 and given increased responsibility and regulatory powers. In 2005, the Building and Construction Industry Improvement Act 2005 (BCII Act) established the ABCC, among other things. The ABCC was provided with powers to monitor, investigate and enforce the laws and guidelines in the building and construction industry. These building industry-specific reforms built on the more general workplace relations reforms that were implemented across the economy in the years to 2006.
- 6.3 The main building industry-specific reforms associated with the BIT and ABCC were:

- The National Code of Practice for the Construction Industry and the associated Implementation Guidelines were strengthened. The National Code and Guidelines sought to influence work practices in the building and construction industry by setting “employer and employee standards relating to the performance of building and construction work and to conditions for bidding for Commonwealth funded construction work” (Parliamentary Library, Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011, Bills Digest No. 80, 2011-12, November 2011, p4).
 - Broader forms of industrial action were made unlawful in the building and construction industry compared to other industries.
 - The maximum penalties for unlawful conduct in the building and construction industry were trebled to \$110,000 for corporations and \$22,000 for an individual.
 - The ABCC was given powers to compulsorily acquire information either through compelling a person to attend an examination and answer questions, or through obtaining documents relevant to an investigation.
 - The ABCC was able to initiate proceedings on matters which have already been settled between the parties.
 - Greater restrictions were placed on the right of union representatives to enter construction sites.
- 6.4 The reforms responded to the issues identified in the Cole Royal Commission and addressed the problems arising from the unique circumstances of the building and construction industry. They were expected to, and subsequently did, improve work practices and labour productivity in the construction industry.

7 Industry Experienced Changed Behaviour and Increase in Output per Worker

- 7.1 Parts of the Productivity Commission’s draft report indicate that they are supportive of workplace relations reform. Master Builders strongly believes that the BIT and ABCC assisted to change behaviour in an industry labelled

as having a 'toxic' culture. That change in behaviour through tailored laws and by administrative means including via the Commonwealth's National Code of Practice and Implementation Guidelines led to removal of a number of restrictive work practices and raised the output per worker from levels that would otherwise have prevailed.

- 7.2 In the building and construction industry, non-adherence to the rule of law directly affects labour market risks and hence diminishes productivity. The ability to raise output per worker is at the essence of productivity.
- 7.3 The rule of law must be observed as an underpinning to productivity in every part of the industry. Law in this context serves an essentially practical function. It supplies the ground rules so that businesses, but particularly investors, can plan their actions to avoid disputes. Disputes and the risks of disputes vastly raise the risk and cost of new ventures. In this context, the most important function of the law is to lower the risks of uncertainty. Lack of certainty, caused by unlawful industrial action or certain types of lawful industrial action, drives up costs in every part of the system making timelines and expenditure harder to predict. As a result, risk factors attached to cash flows will be higher and the effective net present value of projects lower. When that uncertainty is deliberately and all too often unlawfully generated by a stakeholder, such as the CFMEU, there needs to be a counterfoil to that action. The counterfoil, the harbinger of certainty and cultural change, was the ABCC.
- 7.4 Industrial relations laws should not only provide fairness but assist to ensure that the necessary legal certainty attributed to agreements is not undermined by unlawful industrial action or, as demonstrated below, "dodgy" lawful industrial action. Industrial law should also make unlawful provisions which are clearly inserted only for the benefit of third party intermediaries, such as unions, and which damage the interests of workers, employers and investors alike. An example of this in use since 2009 is a provision which has been inserted in a large number of pattern enterprise agreements in Queensland. It is as follows:

UNION RIGHTS PROMOTING REPRESENTATION OF MEMBERS

- 33.1 *The company shall establish policies and procedures so that all reasonable steps are taken to encourage employees, to*

become financial members of the relevant branch of the Union, subject to relevant legislation.

- 33.2 *Any company representative who discourages an employee from becoming a financial member of the aforementioned unions breaches both the intent of this agreement and the Act.*
- 33.3 *The company must invite the union to attend every company induction for new employees and to address employees for at least half an hour per attendance.*
- 33.4 *A standing invitation exists for any representative of the Union covered by this agreement to enter any place where company employees or representatives are for purposes including, but not limited to, dispute resolution or consultation meetings but not for purposes for which a Right of Entry exists under Part 3-4 of the Fair Work Act.*
- 33.5 *The company will allow the Union to promote membership of the Union.*
- 33.6 *The company will provide a Union noticeboard at every workplace. The display of material upon the Union noticeboard will be under the control of the Union.*
- 33.7 *The company will provide any information to the Union about employees that the Union requires.*
- 33.8 *The company will provide information about the Union to an employee that the Union requires.*
- 33.9 *Employees are entitled to have paid time off to attend union meetings of up to 2 hours (or more by agreement) or participate in union activities.*

- 7.5 Since 2012 and currently the CFMEU and the BLF in Queensland demonstrated that the unions were willing to utilise the 2 hour clause to pressure employers to concede claims outside of protected action but not able to be characterised as unlawful industrial action rather undertaken by processes seemingly vindicated by this clause. If a contractor refused a union claim the project was often the subject of rolling two hour stoppages each day under the guise of compliance with this clause. Crane usage and concrete pours as well as other essential operations were targeted by the unions to cause maximum delay and cost to the builders. Whilst the two hour provision may or may not be a permitted matter for inclusion in enterprise agreements under the *Fair Work Act 2009*, it has appeared in now hundreds of pattern agreements, particularly in Queensland. It demonstrates that the certainty required of industrial relations law is easily undermined by a provision of this

kind and shows official statistics about industrial disputes are increasingly unreliable.

- 7.6 It is also a clause that the Code and Guidelines administered by the prior ABCC would have proscribed. The link between productivity and the removal of restrictive work practices has been acknowledged, even by the likes of Peetz (D Peetz [Does industrial relations policy affect productivity?](#) Australian Bulletin of Labour Vol 38 No 4 2012 at p268):

“The ways in which unions can impede economic performance of a firm are by imposing restrictive work practices or by impeding the introduction of innovations, such as new technology.”

- 7.7 Peetz also goes on to say (page 270) that restrictive work practices were common in Australia in the period up until the mid and late 1980s:

“but were mostly removed by the two-tier wage system, and then award restructuring and nearly two decades of enterprise bargaining.”

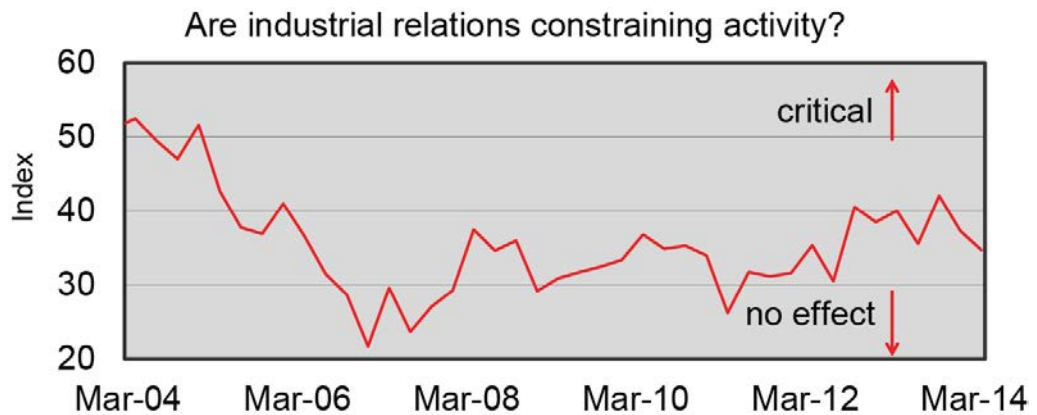
- 7.8 This is not the case for the building and construction industry where the 2 hour clause is one example of numerous restrictive practices which now hamper the industry but which, during the BIT and ABCC era, were largely removed. This micro-economic example underlines the macro-economic effects elsewhere demonstrated.

- 7.9 The above is a good example of how the BIT and ABCC assisted to change behaviour.

- 7.10 Tailored laws and administrative means led to removal of a number of restrictive work practices and raised the output per worker from levels that would otherwise have prevailed. As noted, the ability to raise output per worker is at the essence of productivity. In the building and construction industry, the improvement in work practices that flowed from much better adherence to the rule of law directly affected labour market risks and hence boosted productivity.

8 Marked Decline in Disputes Symptomatic of Changes/Productivity Improvements

- 8.1 After the improved workplace practices had been implemented, the building and construction industry outperformed other sectors of the economy in reducing in the number of work days lost.
- 8.2 ABS data shows that the work days lost to industrial action in the building and construction industry averaged 159,000 per year between 1995/96 and 2001/02. This gradually declined during the first five years of the BIT/ABCC era, and work days lost then remained at a low level from 2006/07 to 2011/12. By 2011/12, the number of work days lost was only 24,000, or 15 per cent of the annual average for 1995/96 to 2001/02.
- 8.3 The number of work days lost to industrial disputes in all other industries also fell, from an average of 401,000 days between 1995/96 and 2001/02, to 269,000 days in 2011/12. However, this implies that the construction industry outperformed other industries, because its work days lost fell to only 15 per cent of the earlier level whereas in other industries they fell to 67 per cent of earlier levels.
- 8.4 In terms of work days lost per employee, the construction industry has historically lost a large number when compared to other sectors. This metric moved to be more in line with other industries during the BIT/ABCC period, as industry-specific regulations apparently worked to control the number of days lost. This outperformance of the construction industry during the BIT/ABCC era is in accordance with analysis of labour productivity trends.
- 8.5 The marked change can also be seen in Master Builders' quarterly surveys of members that include a measure of industrial relations as a constraint on activity. As indicated in the chart, a dramatic fall in the index occurred in 2005 and 2006 meaning that this was a period when industrial relations issues were becoming a less serious hindrance to building activity.



- 8.6 This would appear to provide further evidence of a causal link between the introduction of the industry specific legislation and establishment of the ABCC, and a favourable change in the industrial relations climate.
- 8.7 Respondents are asked to indicate the degree to which they perceive industrial relations is acting as a constraint on their business and is a reliable time series of member opinion on the subject. The question asked of respondents in the survey since inception in 2003 is: "What effect are industrial relations having on activity?" Respondents are asked to select from a response of: 'No effect', 'Slight', 'Moderate', 'Large', 'Critical', 'N/A'. The graph dipped sharply following the introduction of industry specific legislation and the ABCC.
- 8.8 Following the dramatic fall in the index that occurred in 2005 and 2006 associated with the industry specific legislation and establishment of the ABCC, the index rose in the first three quarters of 2008 as industrial relations increased as an issue for builders then eased back in the wake of the global financial crisis. Despite quarterly volatility, there has been a steady rise in the index over the past three years although the index has fallen back in the past two quarters, after elevated readings in the previous six quarters. The sharp rise in the index experienced in the second half of 2012 was primarily due to major industrial relations disputes including the Grocon blockade in Melbourne and the Children's Hospital project in Brisbane.

9 Quantity Surveyor Data Show Fall in Premium for Commercial Building

- 9.1 Rawlinsons data to January 2012 show that the cost penalty for completing the same tasks in the same state for commercial construction (which had been subject to restrictive work practices prior to the BIT/ABCC era) compared to domestic construction (which is largely free of restrictive work practices) shrank in the BIT/ABCC era.
- 9.2 Econtec/Independent Economics found the narrowing in the cost gap was consistent with a boost to productivity in the commercial construction sector. They conservatively estimate this productivity effect at 11.8 per cent between 2004 and 2012. After adjusting the analysis to take into account a break in some of the series, the gain is estimated at 8.5 per cent between 2002 and 2012. This narrowing in the cost gap developed over several years, as the industry adjusted to the industry-specific regulatory regime of the BIT/ABCC era.
- 9.3 Improved workplace practices (consisting of the establishment of the BIT, the ABCC and supporting industrial relations reforms) were expected to have their main impact on the non-house building side of the construction industry, rather than on the house building side. The ABCC's jurisdiction did not cover housing construction of four dwellings or less (as well as the extraction of minerals, oil and gas).
- 9.4 The ABCC's impact was likely greatest on the non-house building side of this industry because this is where traditionally there have been more industrial disputes, poorer work practices and higher costs for specific tasks. The house building side, on the other hand, is considered to be more flexible – reflecting the involvement of many small, independent operators and the extensive use of piece rates for work performed.
- 9.5 The cost penalty analysis by Econtec/Independent Economics is a useful way of testing the impact of the BIT/ABCC era on whether it led to improvement in productivity on the non-house building side of the industry compared with the house building side.

- 9.6 The finding from this analysis by Econtec/Independent Economics is that the BIT/ABCC era did lead to a substantial improvement in productivity.

10 Productivity Jump No Great Surprise to Those in the Industry

- 10.1 For many practitioners operating in or involved in analysing the building and construction industry over 20, 30, even 40 year time spans, a major lift in productivity came as no surprise given the nature of such far reaching economic reform and its ability to change participants' behaviour.
- 10.2 The work done by Econtec/Independent Economics determined that there had been a sizeable boost to construction industry productivity as a result of the changes in the reform period overseen by the BIT/ABCC. There has been scepticism expressed by some about the magnitude of the productivity boost assumed due to the changes.
- 10.3 But this is not a 'normal' industry. The starting point – before the reform phase – was an industry with particularly extreme restrictive work practices compounded by militant unions with a history of engaging in industrial thuggery.
- 10.4 The dramatic fall in industrial disputation and removal of a large number of restrictive work practices led to firms, informing Master Builders anecdotally, and on a commercial-in-confidence basis, that they were able to reduce their 'IR premium' by around 10 per cent of the value of individual projects.

11 Macro Data Supports Theory, Cole's Prediction and Industry Logic

- 11.1 A look at the macro data can be used as a check on both the predictions made by the Cole Royal Commission and the substantial body of micro evidence already discussed.
- 11.2 Several decades of construction industry productivity data show an unambiguous pattern; weak growth until 2001-02 followed by stronger growth in the decade following. The lift in productivity coincides with dramatically changed industry work practices ushered in during the BIT/ABCC era.

- 11.3 The stronger productivity performance in the construction industry during the BIT/ABCC era coincided with poor aggregate productivity - as PC chairman Peter Harris stated in a media release of 13 June 2013:

“Australia’s productivity growth has been poor over the past decade”.

- 11.4 If factors at the total economy level weighed against industry by industry productivity growth, the lift in construction industry productivity during this period was even more impressive, understating the outperformance.

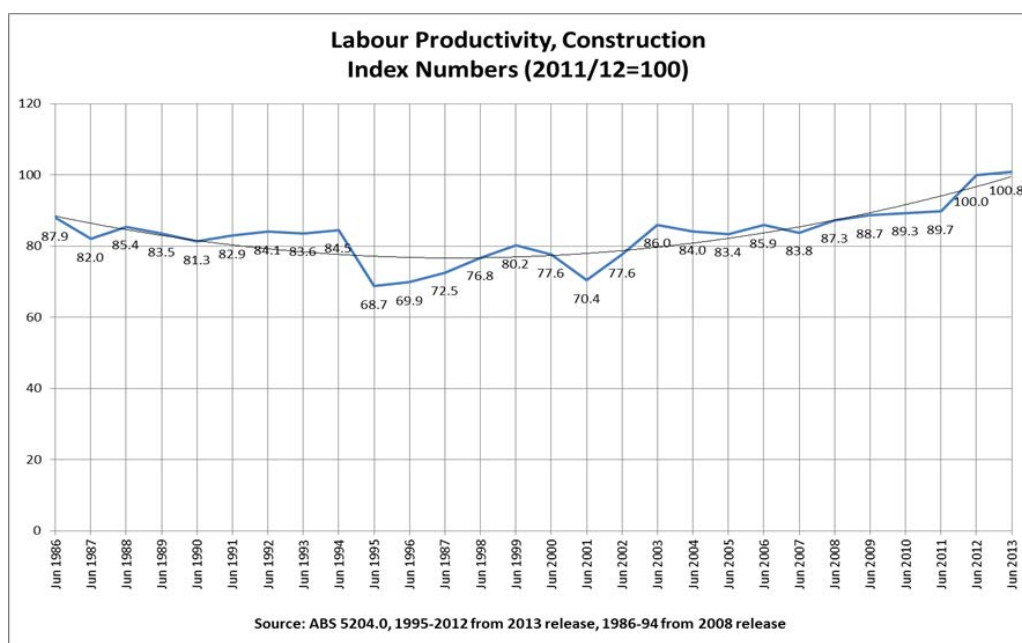
- 11.5 A study by the Grattan Institute found the building and construction industry was one of only three industries to enjoy faster labour and multifactor productivity growth in the 2000s compared to the 1990s (Eslake, Saul and Walsh, Marcus, Australia’s Productivity Challenge, The Grattan Institute, Melbourne, February 2011). Administration/support services, and arts and recreation services were the other two industries whose productivity performance improved in the 2000s.

- 11.6 Reinforcing the value of the type of reform that occurred in the construction industry in the BIT/ABCC era, Harris also said:

“But the overall picture is one of the need for ongoing reform of the micro economy”

Commissioner Harris’ observation rang true for the building and construction industry.

- 11.7 The following chart shows construction labour productivity from 1986 to 2013, in particular the lift that occurred after 2001-02. The simple trend line highlights the distinct patterns of growth: falling, flat or borderline positive up to 2001-02, then a shift to a sustained higher level after 2001-02.



11.8 Table 1 shows average labour productivity and multi-factor productivity growth, both based on ABS data, comparing the construction industry and the whole economy. The table highlights that whilst precise movements of the different measures will always differ, they show similar patterns when comparing productivity growth between the construction industry and the whole economy.

Table 1: Construction Productivity (average annual percentage change in productivity measures)

	Pre-Task Force/ABCC		Task Force/ABCC	
	Labour Productivity	Multifactor Productivity	Labour Productivity	Multifactor Productivity
Construction	1.9	0.8	2.7	2.1
All industries/12 selected industries	2.7	1.5	1.1	-0.2

Source: Labour productivity as measured by gross value added per hour worked from ABS 5204.0 Table 15 series 1995-2013 comparing construction and all industries (**Pre-Task Force/ABCC 1995-2002; Task Force/ABCC 2003-2012**). Multifactor Productivity as measured by gross value added multifactor productivity indexes on a quality adjusted hours worked basis from ABS 5260.0.55.002 Table 1 series 1989-90 – 2012-13 comparing construction and 12 selected industries (Pre-Task Force/ABCC 1989-90 – 2001-02; Task Force/ABCC 2002-03 – 2011-12).

11.9 Both measures show that in the years up to the establishment of the BIT/ABCC in 2002, average productivity growth was lower in construction than for the economy generally, while the opposite was true in the years from 2002 onwards. Table 2 shows the same pattern when the pre BIT/ABCC era is extended back to 1986.

Table 2: Construction Labour Productivity (average annual percentage change)

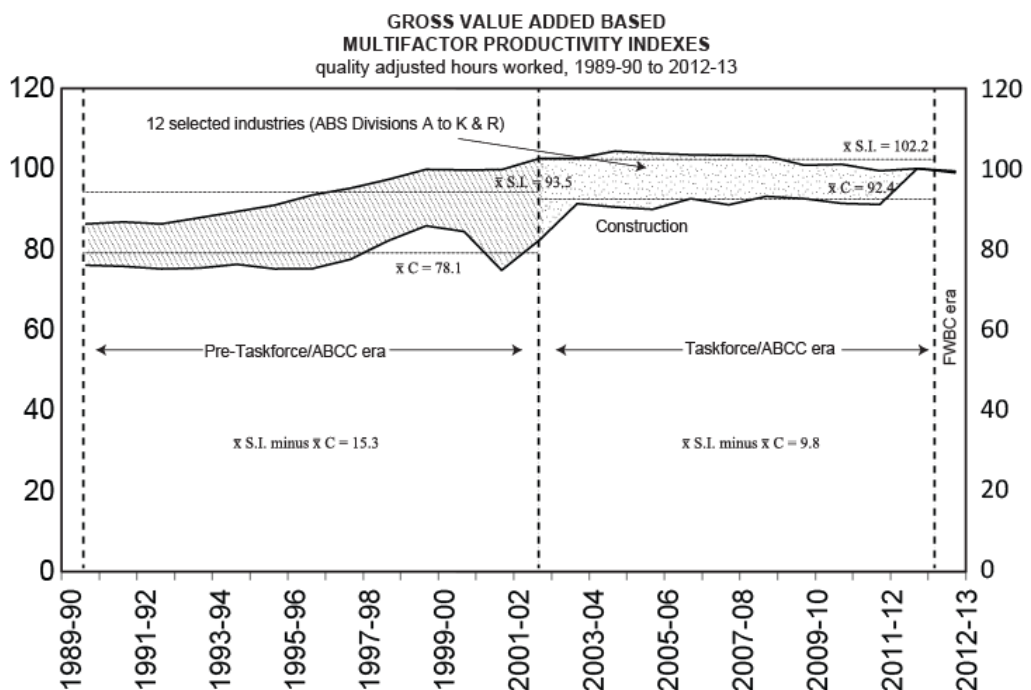
	Pre-Task Force/ABCC ^x	Task Force/ABCC ^{xx}
Construction	0.5	2.7
All Industries	1.7	1.1

^xPre-Task Force/ABCC period: 1986 to 2002

^{xx}Task Force/ABCC period: 2003 to 2012

Source: ABS 5204.0, Australian System of National Accounts, Table 15. Data for 1995 to 2012 from ABS 1/11/2013 release; data for 1986 to 1994 from 31/10/2008 release

- 11.10 Multifactor productivity growth exhibits the same pattern, although the outperformance versus the market sector is more pronounced.



Source: Master Builders Australia, ABS data (5260.0.55.002 Table 1)

- 11.11 All of the evidence supports the conclusion that there was a significant gain in construction industry productivity during the BIT and ABCC era. The question then becomes to what extent did improved workplace practices contribute to this improvement. The evidence suggests it was vital.
- 11.12 Econtech/Independent Economics found that ABS data show construction industry labour productivity outperformed predictions based on its historical performance relative to other industries by, in round terms, between 10 and 20 per cent. That is, a productivity outperformance is identified after allowing for factors driving productivity in the economy as a whole and trends in construction industry productivity prior to 2002 (the year improved workplace

practices began. They also document a Productivity Commission analysis of ABS data that found multifactor productivity in the construction industry was no higher in 2000/01 than 20 years earlier whereas, in contrast, the latest ABS data on productivity shows that construction industry multifactor productivity accelerated to rise by more than 20 per cent in the ten years to 2011/12. In addition, they refer to academic research on total factor productivity showing productivity in the construction industry grew by more than 10 per cent between 2003 and 2007, whereas productivity barely grew between 1998 and 2002.

- 11.13 Econtech/Independent Economics use data from Rawlinsons, a quantity surveyor, to show that the cost penalty for completing the same tasks in the same state for commercial construction compared to domestic construction shrank. The boost to productivity in the commercial construction sector, as reflected in the narrowing in the cost gap, was conservatively estimated at around 10 per cent. Econtech/Independent Economics also point to case studies demonstrating improved workplace practices led to better management of resources in the building and construction industry that, in turn, boosted productivity in the industry.
- 11.14 Econtech/Independent Economics make the point while the productivity indicators listed above are not directly comparable, they all indicate the significant productivity shift in construction industry productivity appear around 2002/03. This supports the interpretation that it was the activities of the BIT and the ABCC that made a major difference.
- 11.15 While general industrial relations reforms provided a more productivity-friendly environment, it was the ABCC with its enforcement powers that made a significant impact on building and construction industry productivity. In summary, the productivity and cost difference data suggest that effective monitoring and enforcement of general industrial relations reforms, and those that related specifically to the building and construction sector, played an important role in delivering labour productivity improvements. As such, it is considered that separate attribution of labour productivity improvements to the ABCC and industrial relations reforms is not possible, because they both need to operate together to be effective.

- 11.16 So during the BIT/ABCC era, the construction industry's productivity improved markedly and outperformed other sectors of the economy as a result of improved workplace practices. Econtec/Independent Economics work estimates the gain ranges between (nearly) 10 and (more than) 20 per cent, depending on the measure and the source of information that is used.
- 11.17 This reinforces the conclusion that improved workplace practices substantially boosted productivity in the building and construction industry.

12 No Reasonable Interpretation Exists to Refute There Was A Considerable Positive Impact

- 12.1 Some critics have cast doubt on individual aspects of the IE work without stepping back to consider the work in totality or undertaking any robust analysis themselves to refute the finding that there was a considerable positive impact of the BIT/ABCC era on construction productivity.
- 12.2 Such criticism is considered highly unprofessional and does not recognise the strong and clear flow of logic and supporting evidence:
- economic theory suggests improved workplace reform will lift productivity;
 - detailed examination by a Royal Commission concluded there would be productivity gains from industry reform;
 - International comparisons and the cost gap between commercial and residential building tasks suggest that, prior to the establishment of the BIT and ABCC, there was potential for large gains in construction industry productivity,
 - industry participants found improved workplace practices delivered cost savings for building and construction projects.
 - applied economic research shows the cost gap between commercial and residential building narrowed during the BIT/ABCC era; and
 - several decades of aggregate data reveal a sustained lift in construction industry productivity coinciding with the reform era.

- 12.3 The Cole Royal Commission investigated the productivity gap between building and construction industries in Australia and internationally (Royal Commission into the Building and Construction Industry, Discussion Paper 15, Workplace Regulation, Reform and Productivity in the International Building and Construction Industry, Unisearch Ltd University of New South Wales, 2002). The analysis implies that the construction industry productivity gap separating North America from Australia was large: about 50 per cent with North America (45 per cent compared with the USA and 52 per cent compared with Canada). Some improvement occurred during the BIT/ABCC era, however, given the initial extent to which Australian construction industry productivity lagged behind best practice, there was still likely to be room for further improvements.
- 12.4 Econtec/Independent Economics analysis shows the cost of undertaking specific building tasks for commercial buildings has historically been higher than the same tasks for residential buildings. This cost gap is likely to be mostly explained by differences in labour costs, rather than other factors. Labour costs may be higher due to high wage rates or lower labour productivity. The study explains how relative wages can be ruled out, leaving improvements in labour productivity in commercial building compared with domestic residential building as the most likely explanation for the fall in the commercial building labour cost penalty during the Taskforce/ABCC era.
- 12.5 In 2004, the total cost gap between the two sectors was around close to 20 per cent implying that the labour cost gap between the two sectors was around 35 per cent. That is, for the same task, labour costs 35 per cent more in commercial construction than in residential construction. This suggests that, in 2004, there were significant productivity gains to be made in the commercial sector. According to Econtec/Independent Economics, in 2014 the labour cost gap is 25 per cent, indicating that further improvements can still be made.
- 12.6 The evidence on construction industry productivity points to an improvement during the BIT/ABCC era. Considering this in the context of the analysis and expectations of the Cole Royal Commission and in the light of the potential for large gains in construction industry productivity, it is difficult not to conclude that the improved work practices associated with the BIT and ABCC

contributed substantially to productivity improvements in the building and construction industry.

13 Econtec/Independent Economics Work Highlights Wider Economic Benefits of Building Industry Productivity Gain

- 13.1 The Econtec/Independent Economics work brings a range of evidence together and makes a call on what was likely to have been the boost to industry productivity from the BIT/ABCC era. It then uses a computable general equilibrium model to estimate benefits for the wider economy.
- 13.2 Econtec/Independent Economics assumes improved work practices resulting from the BIT, ABCC and IR reforms boosted building and construction productivity by close to 10 per cent.
- 13.3 Of course, this is an estimate, around which there will be a margin of uncertainty. If a higher or lower estimate were to be adopted for modelling purposes, then the modelled benefits of higher productivity could be scaled up or down accordingly.
- 13.4 The improvements in labour productivity lowered construction costs relative to what they would otherwise have been, leading to reduced costs across the economy.
- 13.5 In the private sector, cost savings to each industry flowed through to households in the form of lower consumer prices.
- 13.6 In the government sector, budget savings flowing from lower costs of building schools, hospitals and constructing roads and other infrastructure, are assumed to have been passed on to households in the form of a cut in personal income tax.
- 13.7 The modelling estimates the benefits for the wider economy. Overall, consumers are estimated to have been better off by \$7.3 billion annually.

14 Serious Concern Regarding Sections on Productivity and Industrial Relations in Draft Productivity Commission Report

- 14.1 Master Builders was very disappointed that the Productivity Commission chose, like other critics including unions, to cast doubt on individual aspects of the Econtec/Independent Economics work without taking an overarching, big picture view. The Productivity Commission said that the Econtec/Independent Economics work was “not robust” and “not reliable, nor convincing”, when all the evidence clearly pointed to the contrary. The Productivity Commission failed to make its own assessment as to whether a large institutional economic reform that changed the building and construction industry led to productivity improvements, and if yes, by how much?
- 14.2 Whilst not exclusive, the workplace changes ushered in by the BIT/ABCC era represented a major change affecting how things were then done. The Productivity Commission argues, in our view unconvincingly, that technological and managerial changes may have been very different in dwellings and non-dwelling construction over this period of time. They use building information management systems (BIM) as an example. However, there is no evidence that potentially significant, productivity enhancing building information management systems had been widely adopted by firms in the period 2002 to 2012.
- 14.3 Also, as explained below, there is a strong likelihood that in the absence of the reforms, construction wage growth would have been even higher during 2002 to 2012, a point understated by the Productivity Commission in the draft report. On page 446 this is presented merely as an afterthought in parentheses:

“(or that wage growth would have been even higher in its absence)”

This gives the impression that the Productivity Commission is downplaying its possible significance. The counterfactual, in terms of ‘what would otherwise have happened’ may have been highly significant, that is, the lift in productivity associated with the BIT/ABCC era may well have been responsible for a significant damping of wage growth in construction during the period 2002 to 2012 (related references on page 448, para 4).

- 14.4 Construction wage inflation, as measured by the ABS's wage cost index, was higher than the all industries average in the period 2002 to 2012; higher by around one percentage point (occasionally slightly higher) per annum. It is entirely plausible, however, that the industry specific reforms during the BIT/ABCC era worked to keep a lid on construction wage growth during a period when the industry was under added pressure due to exceptionally strong construction demand. It is an entirely reasonable proposition to argue that wage growth in the construction industry would have been much higher in the absence of the widespread reforms enforcing lawful behaviour ushered in during the BIT/ABCC era.
- 14.5 The so-called 'mining boom' was actually a 'construction boom' (mining-related), specifically a boom in engineering construction. After a massive construction phase, Australia is only now moving into the mining 'production' phase. At the same time as one component of construction, engineering construction, was experiencing a 1 in 100 year increase in demand, another component, non-residential building, was also experiencing a very strong growth phase fuelled by demand for commercial and institutional buildings and civil infrastructure - albeit not on the same scale as the phenomenal rise in engineering construction demand.
- 14.6 The Australian economy could have been derailed by such potential imbalances between demand and supply in its third largest industry - building and construction. The risk of a price blow-out was high given the enormous shift of resources required to move into construction. In this context, the record on construction wage cost is a good one, likely to have been assisted – as noted – by benefits flowing from stronger productivity associated with the reforms enforcing lawful behaviour ushered in during the BIT/ABCC era.
- 14.7 The draft Productivity Commission report also contains a number of inconsistencies and errors. For example, compare:

"The available aggregate data points to positive but weak labour productivity growth within the Australian construction industry across the 2000s, with some stronger growth performance recently.

At the same time, the construction industry has seen multifactor productivity growth on par with, if not better than, the market sector." (Page 307)

to this:

“There is clear evidence that labour, capital and multifactor productivity improved significantly in the years immediately after 2001 02 (ch 9), and therefore coincident with the creation of the BIT. This was in contrast with the market sector as a whole, where productivity growth was weaker than the preceding years.” (P.451)

and this:

“the timing of higher productivity growth rates in the construction industry at the aggregate level do not appear to coincide strongly with the tougher industrial relations regimes that commenced with the establishment of the Building Industry Taskforce” (Page 405)

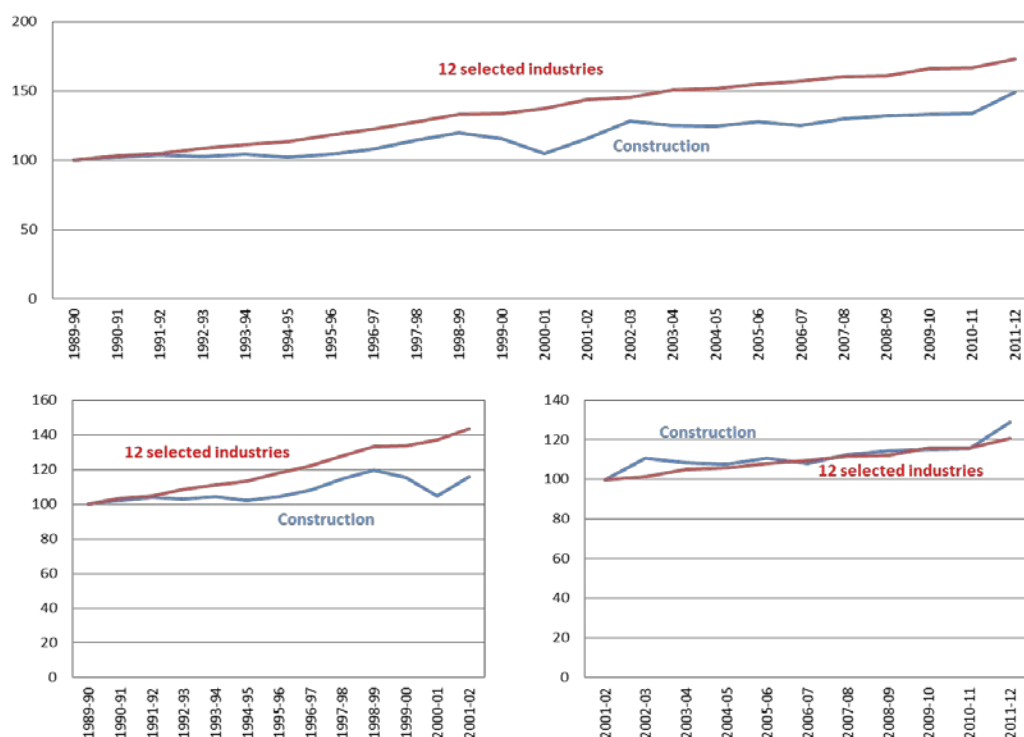
- 14.8 Appearing to directly contradict the statement on page 26 (also paraphrased on page 405, fourth dot point):

“higher productivity growth rates do not appear to be strongly coincident with the new construction-specific IR arrangements that commenced in 2002”

- 14.9 One of the draft report’s key findings of chapter 9: Productivity issues, makes the following statement (second paragraph, page 307):

“The available aggregate data points to positive but weak labour productivity growth within the Australian construction industry across the 2000s, with some stronger growth performance recently”

- 14.10 The Productivity Commission appears to base this observation in the draft report on an examination of labour productivity growth in construction versus the ABS Market sector (12) labour productivity illustrated by Figure 9.1 on page 311. The first chart shown below reproduces the chart used in the Productivity Commission’s draft report. However, once the pre-BIT/ABCC and BIT/ABCC eras are separated out as is done in the bottom two panels, the picture once again emerges of weak construction productivity until 2001-02 after which it matched or exceeded market sector (12) labour productivity.



	12 Selected			12 Selected			12 Selected			12 Selected	
	E Construction	industries		E Construction	industries		E Construction	industries		E Construction	industries
	Index base 100 = 2011-12			%ch			Index base 100 = 1989-90			Index base 100 = 2001-02	
1989-90	67.13	57.85					100.00	100.00			
1990-91	68.51	59.74		2.1	3.3		102.1	103.3			
1991-92	69.58	60.69		1.6	1.6		103.6	104.9			
1992-93	69.11	62.73		-0.7	3.4		102.9	108.4			
1993-94	70.00	64.20		1.3	2.3		104.3	111.0			
1994-95	68.72	65.41		-1.8	1.9		102.4	113.1			
1995-96	69.90	68.30		1.7	4.4		104.1	118.1			
1996-97	72.53	70.78		3.8	3.6		108.0	122.4			
1997-98	76.81	73.76		5.9	4.2		114.4	127.5			
1998-99	80.24	77.06		4.5	4.5		119.5	133.2			
1999-00	77.56	77.39		-3.3	0.4		115.5	133.8			
2000-01	70.38	79.28		-9.3	2.4		104.8	137.0			
2001-02	77.64	82.98		10.3	4.7		115.7	143.4	100.00	100.00	
2002-03	85.99	84.04		10.8	1.3		128.1	145.3	110.75	101.28	
2003-04	84.01	87.12		-2.3	3.7		125.1	150.6	108.20	104.99	
2004-05	83.45	87.78		-0.7	0.8		124.3	151.7	107.48	105.78	
2005-06	85.87	89.71		2.9	2.2		127.9	155.1	110.60	108.11	
2006-07	83.81	90.84		-2.4	1.3		124.8	157.0	107.95	109.47	
2007-08	87.31	92.62		4.2	2.0		130.1	160.1	112.45	111.62	
2008-09	88.70	92.94		1.6	0.3		132.1	160.7	114.25	112.00	
2009-10	89.32	95.99		0.7	3.3		133.1	165.9	115.04	115.68	
2010-11	89.67	96.21		0.4	0.2		133.6	166.3	115.49	115.94	
2011-12	100.00	100.00		11.5	3.9		149.0	172.9	128.80	120.51	
2012-13	100.77	102.07		0.8	2.1		150.1	176.4	129.79	123.01	

Source: Master Builders Australia, ABS 5260.0.55.002 Estimates of Industry Multifactor Productivity, Table 6 Labour Productivity Indexes

14.11 A better assessment would be:

“the new construction specific industrial relations arrangements that commenced in 2002 likely delivered higher productivity outcomes for the building and construction industry.”

- 14.12 As an example of errors, the following is the Productivity Commission's examination of productivity growth rates:

"The data are flanked by exceptionally high productivity growth rates in 2002 03 and 2011 12. These may be outliers in the data. If the period from 2002 03 to 2010 11 is considered (the bulk of the years of the operation of the BIT/ABCC), then the average labour and multifactor productivity growth rates are considerably lower than the period from 1989 90 to 2001 02." (Page 451)

- 14.13 The average growth rates appear to be incorrectly calculated. Average labour productivity growth was 1.3 per cent in the period 1989-90 to 2001-02. Average labour productivity was 2.7 per cent in the period 2002-03 to 2011-12, or 1.7 per cent for the period 2002-03 to 2020-11 – still considerably **higher** than the previous period.

- 14.14 So a statement colouring a substantial section of analysis is based on an erroneous calculation. Not only that, the question must be asked - why would the Productivity Commission want to simply ignore observations? The Productivity Commission would be right to point to the fact annual productivity data are revised. They could do a 'what if' the figure for 2011-12 was revised down, but they should not 'exclude' it! The object of the exercise is to compare the pre-BIT/ABCC era where we have close to two decades of data, with the BIT/ABCC era where we have one decade of data. It would be wrong to cherry pick out all the high observations, just as it would be wrong to take out the low ones.

- 14.15 Another point: ABS data quite clearly shows that multifactor growth in construction retained previous gains after the step up to a higher level from 2002 and outperformed the market sector. It then rose in 2011-12. The previous two (unexceptional) sentences contrast with the Productivity Commission on page 451:

"Multifactor productivity growth stalled after the creation of the ABCC (compared with the strong growth after the creation of the BIT)."

- 14.16 There are a number of other inconsistencies and possible errors. For example on page 443:

"For example, even were the additional costs of industrial disputes to be 100 times the direct economic impact of lost labour inputs in

2012 13, it would amount to only a 0.3 per cent loss in construction output.”

14.17 Given other inputs would not be able to be utilised, and assuming labour input to construction output of around 50 per cent, it would appear that the 0.3 per cent figure quoted should in fact be 0.6 per cent, a not insubstantial number.

14.18 And there are issues with the way the Productivity Commission has presented the Econtec/IE work, for example, on the issue of productivity indicators, the Productivity Commission stated on page 451:

“Master Builders Australia have emphasised the importance for productivity growth of the creation of the BIT and then the ABCC:

Research on total factor productivity shows that productivity in the building and construction industry grew by 13.2 per cent between 2003 and 2007, whereas productivity grew by only 1.4 per cent between 1998 and 2002. While these productivity indicators are not directly comparable, they all indicate that the timing of improvements in the building and construction industry coincides with the timing of improved workplace practices. (sub. 88, p. 6)”

14.19 But why choose this quote alone? The Productivity Commission could have chosen many others, for example from p vi of the Econtec/IE report:

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

14.20 We would also question why the Productivity Commission appeared to have been happy to endorse views of the ACTU and other academics without seeking clarification from the Econtec/IE author, Chris Murphy?

“Second, over a longer period, the link between the IR regimes and productivity is not robust (as suggested by the detailed analysis of Allan, Dungan and Peetz 2010).” Page 454

14.21 The link between productivity and industrial relations (more generally) is of course a matter of much controversy in the economic literature. The apparent

endorsement of one side of the range of views (and coming so close to an upcoming inquiry into IR) seems at odds with more balanced statements made previously by current and former Productivity Commission Chairman, for example, in the first edition of the PC Productivity Update (May 2013) Peter Harris notes in the Foreword on page 1: *“The Commission is charged with promoting public understanding of productivity issues”* and in the section on ‘Drivers of productivity growth’ lists as a ‘fundamental influence’:

“institutional frameworks and culture which set the general ‘environmental’ conditions which can affect productivity, especially over the long term: (p. 10 PC update)

and

“Formal and informal institutional ‘rules of the game’ influence the costs of coordinating production activities and conducting business. They can provide incentives for firms and individuals to raise productivity or, conversely, to engage in socially unproductive rent-seeking to obtain special treatment. Cultural factors refer broadly to the orientation of people toward change of the kind required to achieve further development.” (p. 10 PC update).

14.22 As discussed previously, the workplace changes ushered in by the BIT/ABCC era represented a major change affecting how things were then done. The Productivity Commission argues, in our view unconvincingly, that technological and managerial changes may have been very different in dwellings and non-dwelling construction over this period of time. As noted, they use building information management systems (BIM) as an example but without providing robust evidence that potentially significant, productivity enhancing building information management systems had been widely adopted by firms in the period 2002 to 2012. There is evidence to the contrary to demonstrate BIM is not widely adopted as yet.

14.23 We believe the Productivity Commission fails to argue strongly that technological and managerial change were very different in dwellings and non-dwelling construction over this time period:

“Third, even if the IE numbers were robust, concluding that IR is the exclusive factor explaining the trend fails to consider a range of rival explanations and considerations:

- *the method used by IE assumes that technological and managerial change is the same in dwellings and non*

dwelling construction — an assumption that deserves more scrutiny. For example, the adoption of improved management approaches to large building sites, the use of pre fabricated technologies and changes in labour and capital input prices facing the two segments could affect unit costs in non dwelling construction by more than dwellings construction.

- *aggregate productivity trends in construction do not appear to be rising throughout all of the years in the BIT/ABCC era”*
Page 455

14.24 The second dot point above is probably an example of the Productivity Commission confusing the timing of the ‘era’ in question (2002 to 2012). Alternatively, or relatedly, it may be another example of Productivity Commission inconsistency in addressing the question of whether there was a lift in productivity - responding at times yes, no, maybe! The proposition that productivity rose to a sharply high level in the BIT/ABCC era and held the gains before moving higher yet again towards the end of the era is even acknowledged by Econtec/IE’s harshest critics – the Productivity Commission appears to stand alone in its equivocation on this point.

14.25 Close to the end of the section on productivity and industrial relations, the Productivity Commission refers to a narrow and misleading quote relating to one year – 2012/13 – and not the bigger story relating to the decades spanning the pre BIT/ABCC era and during the BIT/ABCC era itself.

“For example, Allen Consulting argued in a report to the Business Council of Australia:

It is not feasible to link the size of the productivity shock to definitive evidence of recent performance. Events that have given rise to concerns about industrial relations unrest are too recent to appear in economic statistics. (ACG 2013, p. 39)47” Page 456

14.26 In a more general comment, the Productivity Commission does not take the detailed analysis conducted by the Cole Royal Commission into account when interpreting the productivity data. After a thorough review of the building and construction industry, the Cole Royal Commission gave substantial evidence that poor work practices were impeding productivity in the industry, however, although the Productivity Commission draft report reviews the findings of the Cole Royal Commission, it does not pay due regard to this evidence when drawing its conclusions.

- 14.27 The effect of the Productivity Commission criticisms, disappointingly, is to seek to raise doubts rather than to provide any clarity or new analysis. They do not put forward an estimate of the effect of the BIT/ABCC era on construction industry productivity. Instead, it attempts to find reasons why it should not offer any estimate. Similarly, it would lead some readers to conclude that no productivity gain of significance was delivered.
- 14.28 Again, any critic is entitled to interpret a data series in any way that they wish. However, the arguments made by the Productivity Commission are unconvincing when all the main pieces of evidence point in one direction; during the BIT/ABCC era there was productivity outperformance in the construction industry, a shrinking in the cost gap for commercial building, and a low level of construction work days lost.
- 14.29 Further, these productivity improvements should be considered in the context of the poor and unlawful work practices that prevailed prior to the BIT/ABCC. As the Cole Royal Commission argued, there are strong reasons to believe that an improvement in work practices and “cultural change” in the building and construction industry would boost its productivity, and that this can be achieved through strong institutions such as the ABCC (Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations, February 2003, p4). Thus, failing to link the boost in productivity to the BIT and ABCC requires the Productivity Commission to ignore an essential part of the analysis.
- 14.30 Taken together, the analysis of the Cole Royal Commission and the major pieces of evidence pointing to higher productivity in the construction industry provide a compelling case that the activities of the BIT and ABCC substantially boosted productivity.
- 14.31 Attachment B is an abridged copy of Independent Economics’ presentation to the Productivity Commission on 1 May 2014.

15 Other Matter – Federal Safety Commissioner

- 15.1 The Productivity Commission, at page 515 of the draft report, indicates categorically that the current review of the Government’s OHS Accreditation Scheme (Review) will not evaluate whether any safety productivity or other

benefits arising from the Scheme exceed the costs of the Scheme or whether existing safety regulations, alternate certification or accreditation standards would be likely to generate appropriate safety outcomes more cost-effectively. These are matters that, in the opinion of the Productivity Commission, should be studied. Master Builders understands that the Office of the Federal Safety Commissioner will respond to the draft report. Master Builders has highlighted this aspect of the draft report in its comprehensive submission to the Department of Employment on the Review (Attachment C).

- 15.2 We note, in addition, that the Productivity Commission is concerned that access to Commonwealth funded projects for firms not presently operating in Australia may be hampered by the operation of the Scheme. The Productivity Commission has indicated that options such as recognition of existing safety management systems for firms operating in countries with standards broadly comparable to Australia, or provisional accreditation for firms with appropriate safety records or like accreditation should be considered. Master Builders' view is that such a step should only be considered if safety could be guaranteed not to be jeopardised. How the notion of "standards broadly comparable" would be measured is at issue. The nature of the so-called "appropriate safety records or accreditation" referred to by the Productivity Commission at page 516 of the draft report would be highly contestable and difficult to identify between countries. We therefore are of the view that this proposal has the potential to hamper safety and on that basis is not supported.
- 15.3 We note that at the end of the discussion of this issue, the Productivity Commission has suggested an option which would be to await the report of the Review and then allow the Scheme, with improvements made in response to the Review's recommendations, to operate for a period. The Productivity Commission remark that this would enable current processes to take effect and potentially provide a better basis for any subsequent assessment of the benefits and costs of the Scheme and how they compare to other options. In the alternative, the Productivity Commission indicates that were it to be decided that the Scheme's compliance costs are unduly high and unlikely to be significantly reduced by implementing any of the review's recommendations "there would be a case for a more immediate assessment of the merits of maintaining the separate Commonwealth scheme."

- 15.4 Master Builders is of the view that part of the Review should be a demonstration that the Scheme is worthwhile in the interests of improving building and construction industry safety and the findings of the Productivity Commission underline that central tenet of the Review. We have communicated this perspective to the Department of Employment in our Review submission.

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2003					
1.	Clarke v Boulderstone Hornibrook Pty Ltd [2003] FCA 1426	Federal Court of Australia RD Nicholson J	Employees who were members of the CFMEU failed or refused to attend work for one day after an officer of the CFMEU withdrew permission for work to continue that day. The company paid the employees a total of \$1,520 for that day.	Woodside Towers Project, Perth, WA \$250 million	\$1,000 against Boulderstone Hornibrook (presumably referable to 1 contravention of s. 187AA WRA).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2004					
2.	Hadgkiss v Blevin [2004] FCA 697 (liability) [2004] FCA 917 (penalty)	Federal Court of Australia Conti J	The CFMEU, one of its organisers and one of its site delegates at the Clifton Apartments building at Pyrmont, NSW, coerced an employee of a building contractor to join the CFMEU. The employee initially refused to join the union but the employer subsequently paid his union dues on his behalf.	Clifton Apartments, NSW \$12 million	\$7,700 comprising: <ul style="list-style-type: none"> \$5,500 against the CFMEU (referable to 1 contravention of s. 298P(3) WRA). \$1,100 against McGahan (referable to 1 contravention of s. 298P(3) WRA). \$1,100 against Blevin (referable to 1 contravention of s. 298P(3) WRA).
3.	Alfred v AMWU (20153071/03/2) 24 February 2004	Industrial Magistrates Court of NSW Chief Industrial Magistrate	The AMWU took strike action to coerce a contractor to sign a new EBA at Shoalhaven District Hospital site. The AMWU's procedures were deficient in the service of a notice to take protected action.	Shoalhaven District Hospital, NSW	\$2,000 against the AMWU (referable to 1 contravention of s. 170NC WRA).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2005					
4.	Alfred v Walter Construction Group Limited [2005] FCA 497	Federal Court of Australia Branson J	The CFMEU, one of its organisers and one of its site delegates threatened to disrupt the work of a major subcontracting company because the subcontractor chose not to enter the CFMEU endorsed federal pre-reform certified agreement ("EBA").	Wollongong Sewage Treatment Plant, NSW	\$7,500 and declarations against the CFMEU (referable to 3 contraventions of s. 170NC WRA).
5.	Carr v AMWU, Mulipola, Eiffel, Thomas and Mansour [2005] FCA 1802	Federal Court of Australia Finkelstein J	On 11 June 2003, an organiser told a sole director that unless his company signed up to an EBA, work would stop on the Austin site on 14 June 2003. On 14 June 2003, two organisers parked their cars across entrances to prevent work being done on the Austin site. The sole director was told he had till 10 am on 16 June 2003 to sign up or he would not be allowed to work on site. On 18 June 2003, an organiser went to the Tribeca site and directed the company's employees to stop work and threatened them that if work continued something would happen.	Queensbury and Swanston Streets, Carlton, VIC	\$27,400 comprising: <ul style="list-style-type: none"> • \$25,000 and declarations against the AMWU (referable to 6 contraventions of s. 170NC WRA). • \$1,000 and declarations against Mulipola (referable to 5 contraventions of s. 170NC WRA). • \$600 and declarations against Eiffel (referable to 1 contravention of s. 170NC WRA). • \$400 and declarations against Thomas (referable to 1 contravention of s. 170NC WRA). • \$400 and declarations against Mansour (referable to 1 contravention of s. 170NC WRA).
6.	Ponzio v D and E Air Conditioning Pty Ltd [2005] FCA 964	Federal Court of Australia North J	After a death in the industry in Shepparton, pursuant to union policy being implemented, employees of D and E stopped work on four sites. D and E paid 34 employees strike pay.	Concept Blue Victoria Towers Freshwater Place Nolan Towers, VIC	Declarations against D and E (presumably referable to 1 contravention of s. 187AA WRA).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2005 continued					
7.	Pine v Austress Freyssinet (Vic) Pty Ltd [2005] FCA 583	Federal Court of Australia Ryan J	After a death in the industry in Shepparton, pursuant to union policy a site safety audit took place at the Concept Blue site in Melbourne. Four Austress workers did not work between 8:30 am on 5 August and 10:00 am on 6 August 2003. Austress paid strike pay to the four workers who stopped work when the leading hand recorded the workers as working 8 hours each day.	Concept Blue, Russell Street, Melbourne, VIC	\$800 and declarations against Austress (referable to multiple contraventions of s. 187AA WRA).
8.	Ponzio v Firebase Sprinkler Systems Pty Ltd [2005] FCA 733	Federal Court of Australia Merkel J	After a death in the industry unrelated to Firebase, the CFMEU took industrial action on two days at two sites Firebase was working on. From lack of care and diligence Firebase paid strike pay to 8 employees for this action.	Concept Blue, Russell Street, Melbourne, VIC	Declarations against Firebase (referable to 1 contravention of s. 187AA WRA).
9.	Pine v Expoconti Pty Ltd [2005] FCA 1434	Federal Court of Australia Kenny J	After a death in the industry in Shepparton, pursuant to union policy a site safety audit took place at the Concept Blue and Bio21 sites in Melbourne. Expoconti workers at Concept Blue did not work between 8:30 am on 5 August and 10:00 am on 6 August 2003. Expoconti workers at Bio21 did not work between 9:30 am and 1 pm on 5 August. BVM paid strike pay to 28 workers who stopped work.	Concept Blue, Russell Street, Melbourne, VIC	Declarations against Expoconti (referable to 1 contravention of s. 187AA WRA).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2005 continued					
10.	Pine v Seelite Windows & Doors Pty Ltd [2005] FCA 500	Federal Court of Australia Finkelstein J	After a death in the industry in Shepparton, four Seelite employees engaged in industrial action at a Multiplex site on two days. Seelite paid the employees strike pay when the foreman did not inform the managing director of the strike action.	Concept Blue, Russell Street, Melbourne, VIC	Declarations against Seelite (referable to 1 contravention of s. 187AA WRA).
11.	Ponzio v BVM Builders Pty Ltd [2005] FCA 238	Federal Court of Australia Kenny J	After a death in the industry in Shepparton, pursuant to union policy a site safety audit took place at the Concept Blue site in Melbourne. BVM workers did not work between 8:30 am on 5 August and 10:00 am on 6 August 2003. BVM paid strike pay to workers who stopped work.	Concept Blue, Russell Street, Melbourne, VIC	\$200 against BVM (referable to 1 contravention of s. 187AA WRA).
12.	Pine v Multiplex Constructions (Vic) Pty Ltd; Cruse v Multiplex Limited [2005] FCA 1428 (Multiplex) [2007] FCA 2015 (CFMEU first instance) [2008] FCAFC 179; (2008) 172 FCR 279; (2008) 177 IR 189 (appeal)	Federal Court of Australia Merkel J (Multiplex) North J (CFMEU) Federal Court of Australia Full Court Gray, Goldberg and Jessup JJ	After a death in the industry in Shepparton, pursuant to union policy CFMEU shop stewards conducted a stop work meeting followed by a site safety audit at Concept Blue site. Work was not done between 1:10 pm that day and 10:00 am next day. Through its shop stewards, the CFMEU made a claim for strike pay and organised and took industrial action with the intent to coerce Multiplex to make strike payments. Multiplex paid the strike pay.	Concept Blue, Russell Street, Melbourne, VIC	\$4,000 against Multiplex (referable to 1 contravention of s. 187AA WRA). On appeal: <ul style="list-style-type: none"> \$2,500 against the CFMEU (referable to 1 contravention of each of ss. 187AB(1)(a) and 187AB(1)(b) WRA) declarations against Thorson (referable to 1 contravention of each of ss. 187AB(1)(a), 187AB(1)(b), and 187AA(2) WRA).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2005 continued					
13.	Furlong v Maxim Electrical Services (Aust) Pty Ltd [2005] FCA 1518 (Pratt) (No 2) [2006] FCA 740 (Maxim) (No 3) [2006] FCA 1705 (CEPU)	Federal Court of Australia Marshall J	After a death in the industry in Shepparton, pursuant to union policy CEPU reps conducted a stop work meeting followed by a site safety audit at Concept Blue site. Work was not done between 1:10 pm that day and 10:00 am next day. The CEPU's reps organised industrial action with intent to coerce two companies to pay strike pay for the previous day. The companies paid the strike pay.	Concept Blue, Russell Street, Melbourne, VIC	Declarations against Pratt (referable to 1 contravention of s. 187AA WRA and 2 contraventions of EBA). \$1,750 against Maxim (referable to 1 contravention of s. 187AA) and declarations (referable to 1 contravention of EBA). \$1,750 against the CEPU (referable to 1 contravention of s. 187AB(1)(b) WRA) and declarations (referable to 1 contravention of EBA).
14.	Pine v Casello Constructions Pty Ltd [2005] FCA 1854	Federal Court of Australia North J	After a death in the industry in Shepparton, pursuant to union policy a site safety audit took place at the Concept Blue and Three Towers sites in Melbourne. Casello workers at Concept Blue stopped work for 6 ½ hours on 5 August and 3 hours on 6 August. Casello workers at Three Towers stopped work for 4 ½ hours on 5 August. Taking its lead from Multiplex (head contractor), Casello paid strike pay to 21 workers who stopped work.	Concept Blue, Russell Street, Melbourne, VIC	Declarations against Casello (referable to 1 contravention of s. 187AA WRA).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2006					
15.	Ponzio v Maxim Electrical Services (Vic) Pty Ltd (2006) 152 IR 347; [2006] FCA 579	Federal Court of Australia Ryan J	After a death in the industry in Shepparton, pursuant to union policy a site safety audit took place at the Three Towers site in Melbourne. Maxim employees did no work between 7:30 am and 1:30 pm while the safety audit was being conducted. Maxim paid strike pay to workers who stopped work.	Concept Blue, Russell Street, Melbourne, VIC	\$900 against Maxim (presumably referable to 1 contravention of s. 187AA WRA).
16.	Ponzio v B & P Caelli Constructions Pty Ltd [2006] FCA 1221 (first instance) [2007] FCAFC 65; (2007) 158 FCR 543; (2007) 162 IR 444 (appeal)	Federal Court of Australia North J Federal Court of Australia Full Court Marshall, Lander and Jessup JJ	After a death in the industry in Shepparton, Caelli's employees attended a stop work meeting then followed by a site safety audit at Concept Blue site. Work was not done from that day until 10:00 am next day. Through its shop stewards and organisers, the CFMEU made a claim for strike pay and organised and took industrial action - including later bans on the use of forklifts and access to balconies - with intent to coerce Caelli to make strike payments. Caelli paid the strike pay.	Concept Blue Apartments, VIC	On appeal, \$11,000 comprising: <ul style="list-style-type: none"> • \$6,000 against Caelli wholly suspended (referable to 1 contravention of s. 187AA WRA). • \$5,000 and declarations against the CFMEU (referable to 1 contravention of s. 187AB(1)(a) WRA and 3 contraventions of s. 187AB(1)(b) WRA). • declarations against Crnac and Spornovasilis (referable to 1 contravention each of s. 187AB(1)(a) WRA and 3 contraventions of s. 187AB(1)(b) WRA).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
	2006 continued				
17.	<p>Hadgkiss v Sunland Constructions Pty Ltd [2006] FCA 1566</p> <p>Hadgkiss v CFMEU [2007] FCA 346; (2007) 158 FCR 193; (2007) 161 IR 317</p> <p>Hadgkiss v CFMEU [2008] FCA 524; (2007) 162 IR 385</p>	<p>Federal Court of Australia</p> <p>Dowsett J (Sunland)</p> <p>Kiefel J (CFMEU)</p>	<p>A CFMEU delegate told three employees there was no way they could work at the Sunland joinery unless they joined the CFMEU. In a later conversation with a BIT Inspector he explained the site was a union shop. A Sunland employee represented to one of the employees that he had to be a member of the CFMEU. Sunland dismissed the employee because he was not a member of the CFMEU.</p>		<p>\$25,300 comprising:</p> <ul style="list-style-type: none"> • \$6,000 and declarations against the CFMEU (referable to 1 contravention of s. 298SC(c) WRA). • \$3,000 and declarations against the CFMEU QLD (referable to 1 contravention of s. 298SC(c) WRA). • \$300 against Oskam (referable to 1 contravention of s. 298SC(c) WRA). • \$15,000 and declarations against Sunland (\$12,000 referable to 1 contravention of s. 298K WRA and \$3,000 referable to 1 contravention of s. 298SC(c) WRA). • \$1,000 and declarations against Eshraghi (referable to 1 contravention of s. 298SC(c) WRA).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2007					
18.	<p>Hadgkiss v CFMEU</p> <p>(No 3) [2007] FCA 87 (liability)</p> <p>(No 4) [2007] FCA 425; (2007) 161 IR 338 (penalty)</p> <p>[2008] FCAFC 22 (appeal)</p> <p>(No 5) [2008] FCA 1040 (remitted penalty)</p> <p>[2009] FCAFC 17 (appeal)</p>	<p>Federal Court of Australia</p> <p>Graham J</p> <p>Federal Court of Australia Full Court</p> <p>North, Lander and Buchanan JJ</p>	<p>A CFMEU organiser and a CFMEU site delegate told subcontractors at Wollongong and Fairy Meadows they could not work on the site unless they were financial members of the CFMEU.</p>	<p>Fairy Meadow site, North Gate Apartments, Wollongong, NSW</p> <p>\$30 million</p>	<p>On remitter from appeal, \$35,250 comprising:</p> <ul style="list-style-type: none"> • \$15,000 and declarations against the CFMEU (referable to 4 contraventions of s. 298SC(c) WRA). • \$15,000 and declarations against the CFMEU NSW (referable to 4 contraventions of s. 298SC(c) WRA). • \$1,250 and declarations against Casper (referable to 1 contravention of s. 298SC(c) WRA). • \$4,000 and declarations against Lane (referable to 3 contraventions of s. 298SC(c) WRA).
19.	<p>Carr v CEPU [2007] FMCA 1526</p>	<p>Federal Magistrates Court of Australia</p> <p>Lucev FM</p>	<p>Snap strike by 81 employees of electrical contractors in Tasmania organised by CEPU Secretary Harkins</p>	<p>24 hour strike in electrical industry, Tasmania</p>	<p>\$19,800 comprising:</p> <ul style="list-style-type: none"> • \$11,000 and declarations against the CEPU (referable to 1 contravention of s.38 BCII Act). • \$8,800 and declarations against Harkins (referable to 1 contravention of s. 38 BCII Act).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2007 continued					
20.	<p>Hadgkiss v Aldin</p> <p>(2007) 164 FCR 394; (2007) 169 IR 50; [2007] FCA 2068</p> <p>(2007) 169 IR 76; [2007] FCA 2069</p>	<p>Federal Court of Australia</p> <p>Gilmour J</p>	Rolling stoppages by employees on Perth to Mandurah railway project.	New Metro City Rail Project – Package F from Perth to Mandurah, WA	<p>\$883,200 (\$594,300 suspended) comprising:</p> <ul style="list-style-type: none"> • \$9,000 and declarations against 84 respondents (\$6,000 suspended) (referable to 1 contravention of s.38 BCII Act). • \$1,000 and declarations against 64 respondents (\$750 suspended) (referable to 1 contravention of AIRC order). • \$7,500 and declarations against 3 respondents (\$5,000 suspended) (referable to 1 contravention of s. 38 BCII Act). • \$900 and declarations against 3 respondents (\$600 suspended) (referable to 1 contravention of AIRC order).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2007 continued					
21.	Furlong v AWU (2007) 162 IR 171; [2007] FMCA 443	Federal Magistrates Court of Australia Burchardt FM	An AWU organiser and two shop stewards were involved in a two-day strike of AWU members at a particularly sensitive time during construction on a Mineral Sands Separation Plant in Victoria. The strike was designed to bring pressure to bear on and cause difficulty to the head contractor when there was a dispute over taxation of a camp allowance.	Mineral Sands Separation Plant, Hamilton, VIC	\$56,000 comprising: <ul style="list-style-type: none"> • \$40,000 against the AWU ½ suspended (referable to 1 contravention of each of s. 38 BCII Act and EBA). • \$4,000 against Lee (referable to 1 contravention of s. 38 BCII Act). • \$4,000 against Lambe (referable to 1 contravention of each of s. 38 BCII Act and EBA). • \$4,000 against Brown (referable to 1 contravention of each of s. 38 BCII Act and EBA). • \$4,000 against Watkins (referable to 1 contravention of each of s. 38 BCII Act and EBA).
22.	Alfred v Lanscar [2007] FCA 1001; (2007) 167 IR 320	Federal Court of Australia Buchanan J	A CFMEU organiser advised, encouraged or incited Papas Painting to refuse to engage painters because they were not members of the union. Lanscar said that unless the painters joined the union they could not work on the project and he would “direct” the head contractor to use other painters. Also, Mr Lanscar threatened to take industrial action against Papas Painting with the intent to coerce it to refuse to use the painters.	Avenue Apartments, ACT	\$12,000 comprising: <ul style="list-style-type: none"> • \$10,000 and declarations against the CFMEU (referable to 1 contravention of each of ss. 298S(2)(a) and 298S(2)(b) WRA). • \$2,000 and declarations against Lanscar (referable to 1 contravention of each of ss. 298S(2)(a) and 298S(2)(b) WRA).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2007 continued					
23.	A & L Silvestri Pty Ltd v CFMEU [2007] FCA 1047 (liability) [2008] FCA 466 (penalty)	Federal Court of Australia Gyles J	Three CFMEU and CFMEU (NSW) organisers took unprotected industrial action and threatened further industrial disruption against a head contractor and an earthmoving subcontractor on a Wollongong site because they did not have industrial agreements with the CFMEU. The officials also threatened to shut down the site if the subcontractor was not removed.	Sunrise Apartments, Market Street, Wollongong, NSW	\$7,300 comprising: <ul style="list-style-type: none">• \$5,500 and declarations against the CFMEU (referable to 1 contravention of s. 170NC WRA).• \$1,800 and declarations against Lane (referable to 1 contravention of s. 170NC WRA).
24.	Martino v McLoughlin [2007] AIRC 717	Australian Industrial Relations Commission Watson SDP	A CFMEU organiser abused the right of entry system by his conduct at four separate building sites in Melbourne.	Cecil Street, Lifestyle Centre Yarra Arts Melbourne Recital Centre St Leonard's College AXA site, Docklands, VIC	Federal permit of McLoughlin suspended for two months and made subject to the condition that the permit holder undertake training (referable to abuse of ROE under s. 770 WRA).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2008					
25.	Alfred v Wakelin (No 1) [2008] FCA 1455 (CFMEU) (No 2) [2008] FCA 1543 (AWU) (No 4) [2009] FCA 267 (AWU)	Federal Court of Australia Jagot J	A strike of hundreds of AWU workers over food and hygiene standards at the kitchen and mess at the camp. A second strike of CFMEU and AWU workers following an authorised stop work meeting.	Lake Cowral Gold Mine, NSW	\$64,100 comprising: <ul style="list-style-type: none"> • \$8,000 against the CFMEU (referable to 1 contravention of s. 38 BCII Act). • \$1,100 against Wakelin (referable to 1 contravention of s. 38 BCII Act). • \$28,000 and declarations against the AWU (referable to 2 contraventions of each of s. 38 BCII Act and EBA) and other declarations (referable to 2 contraventions of s. 170MN WRA) • \$18,000 and declarations against the AWU NSW (referable to 2 contraventions of s. 38 BCII Act). • \$9,000 and declarations against O'Connor (referable to 2 contraventions of each of s. 38 BCII Act and EBA) and other declarations (referable to 2 contraventions of s. 170MN WRA).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2008 continued					
26.	Standen v Feehan (2008) 175 IR 297; [2008] FCA 1009 (liability) (No 2) (2008) 177 IR 276; [2008] FCA 1574 (penalty)	Federal Court of Australia Lander J	A CFMEU organiser, who parked his car to block access to a site, intentionally hindered or obstructed the project manager on the site and a concrete contractor working on the site between 8:15 am and 10:00 am.	Halifax Street, SA \$3 million	\$1,300 and declarations against Feehan (referable to 1 contravention of s 285E WRA).
27.	Cruse v CFMEU [2008] FCA 1267 (liability) (No 2) [2008] FCA 1637 (penalty)	Federal Court of Australia Marshall J	A CFMEU delegate made false and misleading statements regarding a Hamilton building contractor's obligation to join the union and negated the contractor's choice whether to enter into a certified agreement with the CFMEU.	Iluka Murray Basin Development Project, VIC \$270 million	\$4,000 against the CFMEU (referable to 1 contravention of s. 170NC WRA) and declarations (referable to 1 contravention of s. 290SC WRA). Declarations against Fry (referable to 1 contravention of each of ss. 170NC and 298SC WRA).
28.	Stuart-Mahoney v CFMEU (2008) 177 IR 61; [2008] FCA 1426	Federal Court of Australia Tracey J	A CFMEU delegate and organiser recommended and supported an overtime ban with intent to coerce Hooker Cockram to employ an apprentice on the police and law courts complex in Morwell, Victoria.	Police and Law Courts Complex, Morwell, VIC \$39 million	\$63,000 comprising: <ul style="list-style-type: none">• \$55,000 and declarations against the CFMEU (\$35,000 referable to 1 contravention of s. 43 BCII Act, \$20,000 referable to 1 contravention of s. 38 BCII Act).• \$8,000 and declarations against Parker wholly suspended (\$6,000 referable to 1 contravention of s. 43 BCII Act, \$2,000 referable to 1 contravention of s. 38 BCII Act).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2008 continued					
29.	Cahill v CFMEU [2008] FCA 495	Federal Court of Australia Marshall J	Through its organiser and delegate, the CFMEU made a claim for strike pay and organised, threatened and took industrial action – including a ban at a separate site - with intent to coerce Bovis to pay strike pay. Bovis paid the strike pay.	Herald & Weekly Times Building, VIC	\$4,000 against the CFMEU (referable to 1 contravention of each of ss. 187AB(1)(a) and 187AB(1)(b) WRA). Declarations against Setka and Tadic (referable to 1 contravention of each of ss. 187AB(1)(a) and 187AB(1)(b) WRA).
30.	Alfred v Primmer & Ors (No 2) [2008] FMCA 1476 (2008) 221 FLR 54 (liability) [2009] FMCA 158 (penalty)	Federal Magistrates Court of Australia Cameron FM	A CFMEU organiser entered the Kiama High School site and advised or encouraged the head contractor's foreman to stop an independent contractor from continuing to work as the independent contractor was involved in court proceedings over unpaid wages.	Kiama High School Redevelopment Project, NSW	\$23,500 comprising: <ul style="list-style-type: none">• \$10,000 and declarations against the CFMEU (referable to 2 contraventions of s. 800(1)(a) WRA).• \$10,000 and declarations against the CFMEU NSW (referable to 2 contraventions of s. 800(1)(a) WRA).• \$3,500 and declarations against Primmer (referable to 2 contraventions of s. 800(1)(a) WRA).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2008 continued					
31.	Radisich v Buchan, Heath, Molina and CFMEU [2008] AIRC 324 (penalty) PR984581 (penalty)	Australian Industrial Relations Commission Lacy SDP	A CFMEU organiser abused the right of entry system by his conduct at the Armadale Shopping Centre site, on 14 February 2007. Another CFMEU organiser abused the right of entry system by his conduct at the Parliament Place site on 22 February 2007. Another CFMEU organiser abused the right of entry system by their conduct at Q-Con's Condor Towers site on 24 and 27 April 2007.	Armadale Shopping Centre site Parliament Place site Q-Con's Condor Towers site	For abuse of ROE under s. 770 WRA: <ul style="list-style-type: none"> Federal permit of Buchan suspended for 3 months with further suspended 2-month suspension Federal permit of Molina suspended for 2 months with further suspended 1-month suspension. All CFMEU (C&G Div, WA Div Branch) permits subject to condition not to enter with McDonald except in certain circumstances.
32.	Australian Building and Construction Commissioner [2008] AIRC 1140 (liability) [2008] AIRCFB 898 (appeal) [2009] AIRC 86 (penalty)	Australian Industrial Relations Commission Watson SDP Australian Industrial Relations Commission Full Bench Kaufman SDP, Richards SDP and Roberts C	A CFMEU organiser abused his right to hold discussions when he performed unauthorised activities, including entering with the intention of doing other than speaking to employees during meal breaks and commencing a safety walk.	Mount Panorama Resort site, Bathurst, NSW	Suspended order suspending Lane's federal permit for 4 months (referable to abuse of ROE under s. 770 WRA).

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Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2008 continued					
33.	Alfred v Quirk [2008] AIRC 781 (liability) PR985044 (penalty)	Australian Industrial Relations Commission Lacy SDP	A CFMEU organiser abused his right to hold discussions when he failed to comply with a request to produce his entry permit upon request.	Castle Hill Road, Castle Hill, NSW \$6 million	Suspended order suspending federal permit of Quirk for 1 month (referable to abuse of ROE under s. 770 WRA).
34.	Stuart v AWU & Ors MLG1179/2008 Part of \$105k Maryvale settlement.	Federal Magistrates Court of Australia Burchardt FM	Unauthorised departure from 11am of 383 construction employees for mass meeting conducted by Lee, Mooney and Dodd off-site, failure by employees to return to work at Maryvale Pulp Mill	Maryvale Pulp Mill, VIC \$280 million	\$29,500 comprising: <ul style="list-style-type: none"> • \$8,750 and declarations against the AWU (referable to 1 contravention of s. 38 BCII Act). • \$1,750 and declarations against Lee (referable to 1 contravention of s. 38 BCII Act). • \$8,000 and declarations against the CEPU (referable to 1 contravention of s. 38 BCII Act). • \$1,500 and declarations against Mooney (referable to 1 contravention of s. 38 BCII Act). • \$8,000 and declarations against the AMWU (referable to 1 contravention of s. 38 BCII Act). • \$1,500 and declarations against Dodd (referable to 1 contravention of s. 38 BCII Act).

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Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2008 continued					
35.	Duffy v CFMEU [2008] FCA 1804 (No 2) [2009] FCA 299	Federal Court of Australia Marshall J	A CFMEU organiser procured a ban on concreting and earthworks because of the lack of a female toilet while a female worker was present and the absence of a site contamination report. The bans were effectively lifted by the afternoon of the next day.	University Hill, Plenty Road, Bundoora, VIC \$5 million	\$5,500 against the CFMEU (referable to 1 contravention of s. 38 BCII Act).
36.	Cozadinos v CFMEU & Anor [2008] FMCA 1591 [2009] FMCA 272	Federal Magistrates Court of Australia Burchardt FM	A CFMEU shop steward prevented a delivery of materials out of mischief and/or malice to spite a site manager.	Deakin University, VIC	\$9,600 comprising: <ul style="list-style-type: none"> \$5,000 and declarations against the CFMEU (referable to 1 contravention of s. 38 BCII Act) and other declarations (referable to 1 contravention of s. 494 WRA). \$4,600 and declarations against Johnston (referable to 1 contravention of s. 38 BCII Act) and other declarations (referable to 1 contravention of s. 494 WRA).

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Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2008 continued					
37.	Stuart-Mahoney v CFMEU and Anor (No 2) [2008] FMCA 1015 (liability) (No 3) [2008] FMCA 1435 (penalty) [2011] FCA 56 (appeal)	Federal Magistrates Court of Australia Burchardt FM Federal Court of Australia Full Court Ryan J	At inductions a CFMEU delegate made a false and misleading statement about the obligation of an excavator operator to join the union and took action against the excavator operator with intent to coerce him to become a member of the union.	CSL Parkville, VIC \$5 million	\$30,775 comprising: <ul style="list-style-type: none"> • \$24,775 and declarations against the CFMEU (referable to 1 contravention of each of ss. 789 and 790 WRA). • \$6,000 and declarations against Deans ½ suspended (referable to 1 contravention of each of s. 789 and 790 WRA).

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Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2009					
38.	Alfred v CFMEU & Ors [2009] FMCA 613 (liability) (No 2) [2009] FMCA 1003 (penalty) [2011] FCAFC 13 (appeal)	Federal Magistrates Court of Australia Smith FM Full Court of the Federal Court of Australia Buchanan, Flick and Katzmann JJ	A CFMEU and CFMEU (NSW) organiser threatened to organise or take action (including bankruptcy, auditing and “making life a misery”) against a subcontractor with intent to coerce him and his workers to become members of the CFMEU.	Portico Plaza, Toongabbie, NSW	\$28,600 comprising: <ul style="list-style-type: none"> • \$13,000 against the CFMEU (referable to 1 contravention of s. 789 WRA). • \$13,000 against the CFMEU NSW (referable to 1 contravention of s. 789 WRA). • \$2,600 against Manna (referable to 1 contravention of s. 789 WRA).
39.	Gregor v CFMEU and Berardi [2009] FMCA 1266	Federal Magistrates Court of Australia O’Sullivan FM	After a head contractor explained it believed it need not be party to a CFMEU EBA, a CFMEU organiser arranged for workers on site to stop work and attend a midday meeting. The organiser encouraged attendees to leave site and not perform any further work that day.	Bialik College, Hawthorn, VIC	\$8,500 comprising: <ul style="list-style-type: none"> • \$7,500 and declarations against the CFMEU (referable to 1 contravention of s. 38 BCII Act). • \$1,000 and declarations against Berardi wholly suspended (referable to 1 contravention of s. 38 BCII Act).
40.	Stuart v CFMEU [2009] FCA 1119 (first instance) [2010] FCAFC 65 (appeal)	Federal Court of Australia Gray J Federal Court of Australia Full Court Moore, Besanko and Gordon JJ	A CFMEU shop steward refused to induct employees of a subcontractor without a CFMEU EBA, stated that the work they were to do was CFMEU work, not AMWU work, and organised a stop work meeting of employees two weeks later, with intent to apply undue pressure to the subcontractor to make an EBA.	Police and Law Courts Complex, Morwell, VIC \$39 million	On appeal: <ul style="list-style-type: none"> • \$25,000 (increased from \$5,000) and declarations against the CFMEU (referable to 1 contravention of s. 44 BCII Act with no additional penalty for 1 s. 38 contravention) • Declarations against Corbett (referable to 1 contravention of each of ss. 44 and 38 BCII Act).

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Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2009 continued					
41.	Cozadinos v Dempster and Henry [2009] FMCA 265	Federal Magistrates Court of Australia O'Sullivan FM	A CFMEU employee representative, during an induction, made a false and misleading representation about the obligation to join the CFMEU – with intent to coerce inductees to join the CFMEU. A site peggy made a similar representation – without coercive intent - at a later date.	World Trade Centre, VIC \$200 million	\$2,000 comprising: <ul style="list-style-type: none"> \$1,000 and declarations against Dempster (referable to 1 contravention of s. 789 WRA). \$1,000 and declarations against Henry (referable to 1 contravention of s. 790 WRA).
42.	Wilson v Nesbit and CFMEU [2009] FCA 1574	Federal Court of Australia Dowsett J	A CFMEU organiser made threats to a company to ban it from any building site in Australia and have it audited (costing at least \$30,000) with intent to coerce the company to terminate its EBA and make a new EBA with the CFMEU.		\$49,000 comprising: <ul style="list-style-type: none"> \$40,000 and declarations against the CFMEU (referable to 1 contravention of s. 44 BCII Act.) \$9,000 and declarations against Nesbit (referable to contravention of s. 44 BCII Act).
43.	Stuart v AMWU & Dodd VID484/2009 Part of \$105k Maryvale settlement.	Federal Court of Australia North J	A union organiser threatened to organise unlawful industrial action by contractors working on Maryvale Pulp Mill project if a subcontractor (Sandvik) came on site, with intent to apply undue pressure on the subcontractor to agree to make an EBA with the AMWU.	Maryvale Pulp Mill project. \$280 million	\$30,000 comprising: <ul style="list-style-type: none"> \$25,000 and declarations against the AMWU (referable to 1 contravention of s. 44 BCII Act). \$5,000 and declarations against Dodd (referable to 1 contravention of s. 44 BCII Act).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
	2009 continued				
44.	<p>Draffin v CFMEU</p> <p>[2009] FCA 243 (CFMEU first instance)</p> <p>[2009] FCAFC 120 (appeal)</p>	<p>Federal Court of Australia</p> <p>Marshall J</p> <p>Federal Court of Australia Full Court</p> <p>Goldberg, Jacobson and Tracey JJ</p>	<p>A CFMEU delegate, CFMEU organiser and CFMEU branch secretary admitted to coercing a head contractor not to allocate traffic management responsibilities to a subcontractor whose employees were on AWAs, discriminating against the subcontractor and encouraging the head contractor to terminate the subcontract because of the AWAs. The head contractor terminated the subcontract.</p>	<p>Brunswick Police Station, VIC</p> <p>\$5.5 million</p>	<p>On CFMEU penalty appeal, \$132,750 comprising:</p> <ul style="list-style-type: none"> • \$50,000 against Walton ½ suspended (\$40,000 referable to 1 contravention of s. 45 BCII Act, \$10,000 referable to 1 contravention of s. 298K(2)(d) WRA). • \$52,750 (increased from \$22,750) against the CFMEU (\$50,000 referable to 1 contravention of s. 43 BCII Act, \$2,000 referable to 1 contravention of s. 45 BCII Act, \$750 referable to 1 contravention of s. 298P WRA). • \$10,000 (increased from \$2,000 wholly suspended) and declarations against Oliver ½ suspended (\$8,000 referable to 1 contravention of s. 43 BCII Act, \$1,250 referable to 1 contravention of s. 45 BCII Act and \$750 referable to 1 contravention of s. 298P WRA). • \$10,000 (increased from \$2,000 wholly suspended) against Benstead ½ suspended (\$8,000 referable to 1 contravention of s. 43 BCII Act, \$1,250 referable to 1 contravention of s. 45 BCII Act and

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					<p>\$750 referable to 1 contravention of s. 298P WRA) and declarations (referable to 1 contravention of each of ss. 45 BCII Act and 298P WRA).</p> <ul style="list-style-type: none"> • \$10,000 against Allen ½ suspended (\$8,000 referable to 1 contravention of s. 43 BCII Act, \$1,250 referable to 1 contravention of s. 45 BCII Act and \$750 referable to 1 contravention of s. 298P WRA) and declarations (referable to 1 contravention of each of ss. 45 BCII Act and 298P WRA).
45.	Cruse v CFMEU & Anor (2009) 182 IR 60; [2009] FMCA 236	Federal Magistrates Court of Australia Turner FM	Over 80% of employees walked off the job following a CFMEU organiser's conducting a 30 minute stop-work meeting during working hours.	Yarra Arts Site, Southbank, Melbourne, VIC \$120 million	<p>\$38,500 comprising:</p> <ul style="list-style-type: none"> • \$27,500 and declarations against the CFMEU (referable to 1 contravention of each of s. 38 BCII Act and EBA). • \$11,000 and declarations against McLoughlin ½ suspended (referable to 1 contravention of each of s. 38 BCII Act and EBA).

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Name of Case					
Jurisdiction					
Nature of Conduct					
Project and Value					
Penalties Imposed					
2009 continued					
46.	Hogan v Riley & Ors [2009] FMCA 269 (2009) 231 IR 267 (first instance) (2010) 182 FCR 583 (appeal) (No 2) [2010] FMCA 760 (remitter)	Federal Magistrates Court of Australia Full Federal Court of Australia Neville FM (first instance) Finn, Lander and Jessup JJ (appeal) Smith FM (on remitter)	2 CFMEU organisers were refused entry to the National Convention Centre site by Michael Riley, Wayne Clark, Brendan Byatt and Iqon Pty Ltd. The organisers were attempting to enter under local OHS laws to investigate suspected OHS breaches.	National Convention Centre, Canberra, ACT \$30 million	\$12,000 comprising: <ul style="list-style-type: none">• \$10,000 and a declaration against Iqon referable to 3 contraventions of s. 767(3)(b) WR Act• \$1,000 and a declaration against Byatt referable to 1 contravention of s. 767(3)(b) WR Act• \$1,000 and a declaration against Riley referable to 1 contravention of s. 767(3)(b) WR Act• A declaration against Clark referable to 1 contravention of s. 767(3)(b) WR Act.
47.	Cruse v CFMEU and Anor [2009] FCA 787	Federal Court of Australia Marshall J	A CFMEU senior vice president held a stop work meeting with crane workers at 3:10 pm at a Melbourne site. Following this, a ban was placed on crane installation work by the workers and continued for little over an hour.	Southbank Boulevard, Melbourne, VIC	\$15,000 comprising: <ul style="list-style-type: none">• \$10,000 and declarations against the CFMEU (referable to 1 contravention of s. 38 BCII Act).• \$5,000 and declarations against Washington (referable to 1 contravention of s. 38 BCII Act).

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SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case						Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2009 continued									
48.	Stuart v LU Simon Builders Pty Ltd [2009] FCA 107	Federal Court of Australia Marshall J	LU Simon discriminated against Peter Vanderkley on the grounds that he did not have a collective agreement, or a collective agreement with the CFMEU when they refused Vanderkley access to the Aquavista site on three occasions.	Aquavista site, Docklands, VIC	\$55,000 and declarations against LU Simon ½ suspended (referable to 2 contraventions of s. 45 BCII Act).				
49.	Williams v CFMEU [2009] FCA 223 (liability) (No 2) (2009) 182 IR 327; [2009] FCA 548 (penalty) [2009] FCAFC 171 (appeal)	Federal Court of Australia Jessup J Federal Court of Australia Full Court Moore, Middleton and Gordon JJ	A CFMEU organiser procured and threatened to procure a stoppage of work with intent to coerce a builder to employ or engage a building employee or contractor.	Darebin Road, Alphington, VIC	On appeal, \$42,500 comprising: <ul style="list-style-type: none">\$35,000 (reduced from \$100,000) against the CFMEU (referable to 1 contravention of s. 43 BCII Act).\$7,500 (reduced from \$15,000) against Mates (referable to 1 contravention of s. 43 BCII Act).				
50.	Stuart v AWU & Anor MLG339/2009 Part of \$105k Maryvale settlement.	Federal Magistrates Court of Australia Burchardt FM	Unauthorised failure by 17 employees of one contractor at Maryvale Pulp Mill to return to work from 1:30pm on 24 Jul 07 after holding discussions with Lee.	Maryvale Pulp Mill, VIC \$280 million	\$8,000 comprising: <ul style="list-style-type: none">\$6,700 and declarations against the AWU (referable to 1 contravention of s. 38 BCII Act).\$1,300 and declarations against Lee (referable to 1 contravention of s. 38 BCII Act).				

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Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2009 continued					
51.	Keene v AMWU & Anor MLG331/2009 Part of \$105k Maryvale settlement.	Federal Magistrates Court of Australia Burchardt FM	Unauthorised failure by 36 employees of one contractor to return to work from 10:20am on 5 Feb 08 after holding discussions with Dodd.	Maryvale Pulp Mill, VIC \$280 million	\$7,000 comprising: <ul style="list-style-type: none"> \$5,800 and declarations against the AMWU (referable to 1 contravention of s. 38 BCII Act). \$1,200 and declarations against Dodd (referable to 1 contravention of s. 38 BCII Act).
52.	Cozadinos v AWU & Ors MLG309/2009 Part of \$105k Maryvale settlement.	Federal Magistrates Court of Australia Burchardt FM	Unauthorised departure from 11am of 433 Maryvale Pulp Mill construction employees conducted by Lee, Mooney and Dodd off-site on 23 Nov 07, failure by employees to return to work; and in respect of AWU and Lee, failure by 17 AWU members employed by BMC Welding to work required overtime during 24-25 Nov 07	Maryvale Pulp Mill, VIC \$280 million	\$30,500 comprising: <ul style="list-style-type: none"> \$8,750 and declarations against the AWU (referable to 2 contraventions of s. 38 BCII Act). \$1,750 and declarations against Lee (referable to 2 contraventions of s. 38 BCII Act). \$8,000 and declarations against the CEPU (referable to 1 contravention of s. 38 BCII Act). \$1,500 and declarations against Mooney (referable to 1 contravention of s. 38 BCII Act). \$8,750 and declarations against the AMWU (referable to 1 contravention of s. 38 BCII Act). \$1,750 and declarations against Dodd (referable to 1 contravention of s. 38 BCII Act).

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Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2009 continued					
53.	Wotherspoon v Brown MLG362/2009 (no decision)	Federal Magistrates Court of Australia Burchardt FM	An employee carrying out inductions made a false or misleading statement about the obligation to join the union and prejudiced persons in their employment because they had not paid membership fees.		\$4,000 against Robert Brown ½ suspended (referable to 1 contravention of each of ss. 790 and 797(3) WRA).
54.	Cozadinos v CFMEU and Ioannidis MLG624/2009 (no decision)	Federal Magistrates Court of Australia Burchardt FM	A CFMEU organiser prejudiced two employees in their employment (telling them he would stop them from working at the site) because they were not members of the CFMEU.		\$7,000 comprising: <ul style="list-style-type: none"> • \$6,000 against the CFMEU (referable to 1 contravention of s. 797(3)(f) WRA). • \$1,000 against Ioannidis (referable to 1 contravention of s. 797(3)(f) WRA).
55.	Cozadinos v CFMEU and Salta MLG516/09	Federal Magistrates Court of Australia Burchardt FM	A CFMEU OH&S representative made a false or misleading representation about the obligation to join the CFMEU to two workers on the site after inductions.	Westfield Shopping Centre, Doncaster, VIC \$400 million	\$7,000 comprising: <ul style="list-style-type: none"> • \$6,000 against the CFMEU (referable to 1 contravention of s. 790 WRA). • \$1,000 against Salta (referable to 1 contravention of s. 790 WRA).

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Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2009 continued					
56.	Cahill v CFMEU (No 3) (2009) 178 IR 89; [2009] FCA 52 (liability) [2009] FCA 1040 (penalty) [2010] FCAFC 39 (appeal) [2010] HCATrans 324 (special leave disposition)	Federal Court of Australia Kenny J Federal Court of Australia Full Court Moore, Middleton and Gordon JJ High Court of Australia French CJ and Crennan J	A CFMEU organiser demanded that a new contractor on site employ two former shop stewards and the OH&S officer who had been employed by the previous contractor. He also demanded that the new contractor appoint these people as shop stewards and OHS officer respectively. The organiser demanded that the site's crane crew shut down the crane and leave the site, which they ultimately did. His intention in shutting down the crane operations was to coerce the labour hire company, Hardcorp, to re-employ the former CFMEU shop stewards and OHS officer.	Mount Street, Heidelberg, VIC	On appeal, upholding first instance, \$85,500 comprising: <ul style="list-style-type: none">\$75,500 and declarations against the CFMEU (referable to 3 contraventions of s. 43 BCII Act).\$10,000 and declarations against Mates (referable to 3 contraventions of s. 43 BCII Act).

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2010					
57.	Cozadinos v CFMEU, Berardi and Mates [2010] FCA 48	Federal Court of Australia Marshall J	A CFMEU organiser engaged in unlawful industrial action and took action with intent to coerce a contractor to employ a building employee.	Caulfield Grammar School, VIC \$6.8 million	\$45,000 comprising: <ul style="list-style-type: none"> \$40,000 against the CFMEU (\$20,000 referable to 1 contravention of s. 38 BCII Act and \$20,000 referable to 1 contravention of s. 43 BCII Act). \$5,000 against Mates (\$2,000 referable to 1 contravention of s. 38 BCII Act and \$3,000 referable to 1 contravention of s. 43 BCII Act).
58.	White v CFMEU and McLoughlin [2010] FMCA 693	Federal Magistrates Court of Australia Burchardt FM	An CFMEU organiser imposed a ban on steel fixing for a concrete pour by employees of a subcontractor. The ban interrupted the pour and was imposed to effect his intention to remove an elected OHS representative.	Alto Apartment Building, St Kilda, VIC \$45 million	\$46,200 comprising: <ul style="list-style-type: none"> \$38,500 and declarations against the CFMEU (referable to 1 contravention of s. 38 BCII Act) \$7,700 and declarations against McLoughlin (referable to 1 contravention of s. 38 BCII Act)

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Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2010 continued					
59.	<p>Gregor v Setka</p> <p>[2010] FMCA 690 (liability)</p> <p>Setka v Gregor</p> <p>[2011] FCAFC 64 (appeal)</p>	<p>Federal Magistrates Court of Australia</p> <p>Burchardt FM</p> <p>Full Court of Federal Court of Australia</p> <p>Lander, Tracey and Yates JJ</p>	<p>A CFMEU Vice President acted in an improper manner by making significant threats to the personal safety of two managers employed by a head contractor.</p>	<p>ANZ Docklands site, VIC</p> <p>\$20 million</p>	<p>\$3,000 against Setka (referable to 1 contravention of s. 767 WR Act) (lowered from \$6,000 on appeal).</p>
60.	<p>Darlaston v Parker</p> <p>[2010] FCA 771 (liability)</p> <p>[2010] FCA 1382 (penalty)</p>	<p>Federal Court of Australia</p> <p>Flick J</p>	<p>Three CFMEU and CFMEU NSW organisers failed to comply with an occupier's reasonable occupational health and safety request to be inducted to site.</p> <p>Another organiser failed to comply with an employer's reasonable occupational health and safety request to cease using scaffolding on site.</p> <p>An organiser intentionally hindered and obstructed employers and employees by inducing employees to stop work and leave site.</p> <p>An organiser failed to comply with an employer's reasonable occupational health and safety request to move vehicles in the vicinity of a crane to be dismantled.</p> <p>An organiser intentionally acted in an improper manner by driving a vehicle into a gate behind which stood an employee.</p>	<p>St Patrick's Estate, NSW</p> <p>\$5 million</p>	<p>\$50,500 comprising:</p> <ul style="list-style-type: none"> • \$15,000 and declarations against the CFMEU (presumably referable to 7 contraventions of ss 758(3) and 767(1) WR Act) • \$15,000 and declarations against the CFMEU NSW (presumably referable to 7 contraventions of ss 758(3) and 767(1) WR Act) • \$8,000 and declarations against Parker (referable to 2 contraventions of s 758(3) and 1 contravention of s 767(1) WR Act) • \$2,500 and declarations against Hanlon (referable to 1 contravention of s 758(3) WR Act) • \$7,500 and declarations against Mitchell (referable to 1 contravention each of s 758(3) and 767(1) WR Act) • \$2,500 and declarations against Kera (referable to 1 contravention of s 758(3) WR Act)

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Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2010 continued					
61.	Wotherspoon v CFMEU, Stephenson and Slater [2010] FMCA 184	Federal Magistrates Court of Australia Turner FM	Respondents engaged in meetings and stoppages on 30 April 2008 on Fulton Hogan Monash Freeway Road Widening Project as a result of which, employees of FHPL and others withdrew their labour and failed to perform their work for various periods on 30 April 2008.	Monash Freeway widening, VIC \$204 million	\$31,000 comprising: <ul style="list-style-type: none"> \$25,000 against the CFMEU (referable to 1 contravention of s. 38 BCII Act). \$5,000 against Stephenson (referable to 1 contravention of s. 38 BCII Act). \$1,000 against Slater wholly suspended (referable to 1 contravention of s. 38 BCII Act).
62.	Wotherspoon v CFMEU & Ors [2010] FCA 111 [2011] FCA 158 (penalty judgment)	Federal Court of Australia Jessup J	To protest the Bovis Blue Glue security system, two unions and five organisers involved themselves in employees' failures to work at up to 4 different building sites on 23 May and 28 August 2008. On 14 August 2008 the CFMEU and up to two organisers restricted concrete pumps from operating and directed concreters to abandon a pour.	Docklands projects and Royal Children's Hospital, Melbourne, VIC \$1 billion	\$110,000 comprising: <ul style="list-style-type: none"> \$48,250 against the CFMEU (referable to 3 contraventions of s. 38 BCII Act) \$36,250 against the CEPU (referable to 2 contraventions of s. 38 BCII Act) \$8,500 against McLoughlin (referable to 2 contraventions of s. 38 BCII Act) \$5,000 against Spornovasilis (referable to 2 contraventions of s. 38 BCII Act) \$5,000 against Gray (referable to 2 contraventions of s. 38 BCII Act) \$4,500 against Christopher (referable to 2 contraventions of s. 38 BCII Act) \$2,500 against Hudson (referable to 1 contravention of s. 38 BCII Act)

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2010 continued					
63.	Gregor v Berardi and CFMEU [2010] FMCA 805	Federal Magistrates Court of Australia O'Sullivan FM	A CFMEU organiser in a meeting banned work by approximately 14 employees in the context of the dismissal of the site peggy and OH&S representative the previous day	Residential Development, Hawthorn, VIC.	\$30,000 comprising: <ul style="list-style-type: none"> \$5,000 and declarations against Berardi (referable to 1 contravention of s 38 BCII Act) \$25,000 and declarations against the CFMEU (referable to 1 contravention of s 38 BCII Act)
64.	Williams v AMWU, CFMEU, Powell, Mavromatis & Pizarro [2010] FCA 754	Federal Court of Australia Jessup J	At the West Gate Bridge site, respondents authorised and organised industrial action, took action with intent to coerce John Holland to employ former employees of a subcontractor, and took action with intent to coerce John Holland and the subcontractor to make EBAs.	West Gate Bridge Project, VIC \$240 million	\$1,325,000 comprising: <ul style="list-style-type: none"> \$858,000 against the CFMEU (\$535,000 referable to 8 contraventions of s. 43 BCII Act, \$247,000 referable to 9 contraventions of s. 44 BCII Act, \$76,000 referable to 2 contraventions of s. 38 BCII Act). \$71,000 against Powell (\$45,000 referable to 4 contraventions of s. 43 BCII Act, \$21,000 referable to 5 contraventions of s. 44 BCII Act, \$5,000 referable to 1 contravention of s. 38 BCII Act). \$71,000 against Stephenson (\$45,000 referable to 5 contraventions of s. 43 BCII Act \$16,000 referable to 5 contraventions of s. 44 BCII Act, \$10,000 referable to 1 contravention of s. 38 BCII Act). \$298,000 against the AMWU \$185,000 referable to 3

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

					<p>contraventions of s. 43 BCII Act, \$78,000 referable to 4 contraventions of s. 44 BCII Act, \$35,000 referable to 1 contravention of s. 38 BCII Act).</p> <ul style="list-style-type: none"> • \$27,000 against Mavromatis (\$14,000 referable to 2 contraventions of s. 44 BCII Act, \$7,000 referable to 1 contravention of s. 43 BCII Act, \$6,000 referable to 1 contravention of s. 38 BCII Act).
65.	Hardwick v AMWU [2010] FCA 818	Federal Court of Australia Gordon J	At Patricia-Baleen Gas Plant site, various unions and organisers took various actions (including threats, pickets and protests) with intent to coerce subcontractors at the site to enter union building agreements.	Patricia-Baleen Gas Plant, Gippsland, VIC \$100 million	<p>\$67,500 comprising:</p> <ul style="list-style-type: none"> • \$9,000 against the CFMEU (referable to 1 contravention of s. 44 BCII Act) • \$3,500 against Parker (referable to 1 contravention of s. 44 BCII Act). • \$15,000 against the AMWU (referable to 1 contravention of s. 44 BCII Act). • \$5,000 against Warren (referable to 1 contravention of s. 44 BCII Act). • \$14,000 against the AWU (referable to 1 contravention of s. 44 BCII Act). • \$6,000 against Lee (referable to 1 contravention of s. 44 BCII Act). • \$11,000 against the CEPU (referable to 1 contravention of s. 44 BCII Act). • \$4,000 against Mooney (referable to 1 contravention of s. 44 BCII Act).

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SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2010 continued					
66.	Wotherspoon v CFMEU, Reardon and Hudson [2010] FMCA 786	Federal Magistrates Court of Australia O'Sullivan FM	Two CFMEU officials shut down the Walter and Eliza Hall Institute site in connection with a dispute with a head contractor over a height allowance.	Walter and Eliza Hall Institute, VIC	\$27,500 and declarations comprising: <ul style="list-style-type: none"> • \$22,500 and declaration against the CFMEU (referable to 1 contravention of s. 38 BCII Act) • \$2,500 and declaration against Reardon (referable to 1 contravention of s. 38 BCII Act) • \$2,500 and declaration against Hudson (referable to 1 contravention of s. 38 BCII Act)
67.	Jenkinson v Carter and CFMEU [2010] FMCA 462	Federal Magistrates Court of Australia Burnett FM	A CFMEU official made a misrepresentation when he faxed a notice of intention to enter under s 760 WR Act when there were in fact no eligible employees at the site. Next day on site, he acted in an improper manner when he abused management who requested he leave the site and struck a manager with his shoulder on two occasions.		\$8,800 against Carter (\$5,500 referable to 1 contravention of s. 767 WRA and \$3,300 referable to 1 contravention of s. 768 WRA).
68.	Australian Building and Construction Commissioner v CFMEU [2010] FCA 784 [2010] FCA 977 [2011] FCAFC 29	Federal Court of Australia Barker J Full Federal Court of Australia North, McKerracher and Jagot JJ	A CFMEU WA assistant state secretary was opportunistically involved in workers taking strike action for 24 hours calculated to make a subcontractor sign a written safety commitment other subcontractors had signed the previous day.	City Square Project, St Georges Terrace, Perth WA \$750 million	On appeal, \$48,000 comprising: <ul style="list-style-type: none"> • \$40,000 and declarations against the CFMEU (referable to 1 contravention of s. 38 BCII Act) • \$8,000 and declarations against McDonald (referable to 1 contravention of s. 38 BCII Act)

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Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2011					
69.	ABCC v Mitchell & Ors [2011] FMCA 622	Federal Magistrates Court of Australia Raphael FM	At a Dee Why site, Mitchell (and the CFMEU and CFMEU (NSW)) acted in an improper manner by being loud, extensively using expletives, and personally directing his behaviour at employees of Cavill Properties Pty Ltd		\$12,500 comprising: <ul style="list-style-type: none"> • \$2,500 against Mitchell (referable to 1 contravention of s. 500 FW Act) • \$5,000 against the CFMEU (referable to 1 contravention of s. 500 FW Act) • \$5,000 against the CFMEU (NSW) referable to 1 contravention of s. 500 FW Act.
70.	Cozadinos v CFMEU [2011] FMCA 284	Federal Magistrates Court of Australia Riethmuller FM	Unlawful industrial action During late January and early February 2008, a series of stoppages were allegedly instigated by CFMEU organisers Michael Powell and Alex Tadic. The stoppages were allegedly in breach of the agreements entered into for the Project, which required continual work on all critical stages, and adherence to dispute resolution processes. The ABCC alleged the CFMEU, Mr Powell and Mr Tadic engaged in unlawful industrial action and took industrial action before the nominal expiry date of a collective agreement.	EastLink Freeway, VIC \$2.5 billion	\$37,500 comprising: <ul style="list-style-type: none"> • \$30,000 against CFMEU (for 1 contravention of s.38 of the BCII Act) • \$5,000 against Powell (for 1 contravention of s.38 of the BCII Act) • \$2,500 against Tadic (for 1 contravention of s.38 of the BCII Act)

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2011 continued					
71.	Radisich v Molina & Ors (No 2) [2011] FMCA 66 (liability) (No 3) [2012] FMCA 419 (penalty)	Federal Magistrates Court of Australia Lucev FM	A CFMEU organiser made a false and misleading statement to Southern Wire workers that they had to be members of the CFMEU or CFMEUW or both of them, to work on the site.	Coles-Myer Regional Distribution Centre at Horrie Miller Driver, Perth Airport, WA \$120 million	\$9,240 comprising: <ul style="list-style-type: none"> • \$660 and declarations against Molina • \$3960 and declarations against CFMEUW • \$4620 and declarations against CFMEU all referable to 1 contravention of s. 790(1)(a) WR Act.
72.	ABCC v Gray and Anor [2011] FMCA 919	Federal Magistrates Court of Australia Hartnett FM	At 7 am, a CEPU official attended a Docklands site and organised and conducted a stopwork meeting of more than 100 employees until 8:30 am. The stopwork meeting was held with intent to coerce non-CEPU members at the site to become members of the CEPU.	ANZ Docklands Project \$600 million	\$10,000 against the CEPU referable to 1 contravention of s. 348 FW Act.
73.	White v Benstead, Beattie and CFMEU No judgment published Orders made August 2011	Federal Magistrates Court of Australia Riethmuller FM	At a Boulderstone site in Reservoir, two CFMEU officials hindered and obstructed and acted in an improper manner, and misrepresented their right to enter a Boulderstone site in Reservoir.	Preston Pump Station, VIC \$17 million	\$13,000 comprising: <ul style="list-style-type: none"> • \$10,000 against the CFMEU (referable to 1 contravention of each of s. 500 and 503 FW Act) • \$2,000 against Benstead (referable to 1 contravention of s. 500 FW Act) • \$1,000 against Beattie (referable to 1 contravention of s. 503 FW Act)
74.	White v Powell [2011] FMCA 509	Federal Magistrates Court of Australia Burchardt FM	Powell acted in an improper manner in the course of exercising his statutory right of entry powers on the site of a major public project.		\$5,000 on Powell (referable to 1 contravention of s. 767(1) of the WR Act).

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SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2011 continued					
75.	White v CFMEU [2011] FCA 192	Federal Court of Australia Kenny J	Up to 9 organisers of the CFMEU were involved in or organised industrial action on 3 sites for 1 day (strikes) and 8 sites for 4 hours (car blockades) with intent to coerce Abigroup to employ and allocate particular responsibilities to redundant employees.	Geelong, Southern Link and Monash projects, VIC \$455.8 million	<ul style="list-style-type: none"> • \$170,000 comprising: • \$105,000 against the CFMEU (referable to 1 contravention of ss. 38 and 43 BCII Act) • \$13,000 against Edwards (referable to 1 contravention of ss. 38 and 43 BCII Act) • \$5,000 against Graauwmans (referable to 1 contravention of ss. 38 and 43 BCII Act) • \$8,000 against Hill (referable to 1 contravention of ss. 38 and 43 BCII Act) • \$5,000 against Long (referable to 1 contravention of ss. 38 and 43 BCII Act) • \$5,000 against Murphy (referable to 1 contravention of ss. 38 and 43 BCII Act) • \$11,000 against Powell (referable to 1 contravention of ss. 38 and 43 BCII Act) • \$5,000 against Reardon (referable to 1 contravention of ss. 38 and 43 BCII Act) • \$5,000 against Stephenson (referable to 1 contravention of ss. 38 and 43 BCII Act) • \$8,000 against Tadic (referable to 1 contravention of ss. 38 and 43 BCII Act).

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SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2011 continued					
76.	Heyman v CFMEU, Washington, Hudson and Spervovasilis [2011] FMCA 145	Federal Magistrates Court of Australia O'Sullivan FM	Organisers of the CFMEU banned work on a tower crane at the Royal Children's Hospital site at Parkville, Victoria	Royal Children's Hospital, Melbourne, VIC \$1 billion	\$41,000 comprising: <ul style="list-style-type: none"> \$30,000 against the CFMEU (referable to 1 contravention of s. 38 BCII Act) \$6,000 against Washington (referable to 1 contravention of s. 38 BCII Act) \$5,000 against Hudson (referable to 1 contravention of s. 38 BCII Act)
77.	ABCC v CFMEU and McDonald (No 2) [2011] FCA 1518	Federal Court of Australia Barker J	On 15 January 2009 at a Perth CBD site, McDonald banned a concrete pour the next day which was forecast to be 40 degrees. The pour did not proceed though arrangements had been made for safe pouring. On 2 February 2009, McDonald prevented employees from completing inductions and working that evening because Ridgebay did not have a current CFMEU EBA. He told Ridgebay in effect that he required them to have an EBA to work on a city block. On 24 June 2009, employees were working undercover below level 8 on a day with intermittent rain and high wind. McDonald told the builder the project was inclement as a whole, called a meeting and encouraged employees not to resume work. They left shortly after 10:15 am for the day.	140 William Street, Perth, WA \$40 million	\$231,000 comprising: <ul style="list-style-type: none"> \$154,000 and declarations against the CFMEU (referable to 4 contraventions of s 38 BCII Act) \$38,500 and declarations against the CFMEU (referable to 1 contravention of s 44 BCII Act) \$30,800 and declarations against McDonald (referable to 4 contraventions of s 38 BCII Act) \$7,700 and declarations against McDonald (referable to 1 contravention of s 44 BCII Act)

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Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2011 continued					
78.	<p>Flynn v CFMEU and Feehan</p> <p>Mathers v CFMEU and Feehan</p> <p>[2011] FMCA 32</p>	<p>Federal Magistrates Court of Australia</p> <p>Simpson FM</p>	<p>In May 2008 a CFMEU organiser was involved in a strike by 30 employees in the context of safety issues that did not pose an immediate threat to their health and safety.</p> <p>In July 2008 the CFMEU organiser was involved in a strike by more than a dozen employees and a failure to work by 5 employees from 9:00 am onwards</p>	<p>Flinders University Education Building Project, SA</p> <p>\$10 million</p>	<p>\$45,000 comprising:</p> <p>In <i>Flynn</i></p> <ul style="list-style-type: none"> \$17,000 against the CFMEU (referable to 2 contraventions of s. 38 BCII Act) \$3,000 against Feehan (referable to 2 contraventions of s. 38 BCII Act) <p>In <i>Mathers</i></p> <ul style="list-style-type: none"> \$20,000 against the CFMEU (referable to 1 contravention of s. 38 BCII Act) \$5,000 against Feehan (referable to 1 contravention of s. 38 BCII Act)
79.	<p>Gregor v CFMEU and Travers</p> <p>[2011] FMCA 562</p>	<p>Federal Magistrates Court of Australia</p> <p>Riethmuller FM</p>	<p>A CFMEU official acted in an improper manner when entering to hold discussions by convening an unauthorised meeting and refusing to leave and directing profanities towards management of a site at Tullamarine Airport</p>	<p>Melbourne Airport, VIC</p> <p>\$65 million</p>	<p>\$6,000 comprising:</p> <ul style="list-style-type: none"> \$5,000 against the CFMEU (referable to 1 contravention of s. 767(1) WRA) \$1,000 against Travers (referable to 1 contravention of s. 767(1) WRA)

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2011 continued					
80.	ABCC v CFMEU [2011] FCA 810	Federal Court of Australia Gilmour J	A CFMEU WA assistant state secretary and an organiser procured industrial action on 3 occasions, involving four meetings and disrupting the performance of work.	Commercial Office Tower, 915 Hay Street, Perth, WA \$60 million	\$150,000 comprising: <ul style="list-style-type: none"> • \$120,000 against the CFMEU (referable to 3 contraventions of s. 38 BCII Act) • \$17,000 against McDonald (referable to 2 contraventions of s. 38 BCII Act) • \$13,000 against Buchan (referable to 3 contraventions of s. 38 BCII Act)
81.	Lovewell v Pearson & Anor [2011] FMCA 102	Federal Magistrates Court of Australia Jarrett FM	A union official who was a federal permit holder and state authorised representative intentionally hindered and obstructed a company in its work and otherwise acted in an improper manner when he disrupted a concrete pour and swore at employees at a building site in Queensland.	Rivers Point Apartments, Brisbane, QLD \$19 million	\$21,000 comprising: <ul style="list-style-type: none"> • \$16,500 and a declaration against the BLF (Qld) • \$4,500 and a declaration against Pearson
82.	Woodside Burrup Pty Ltd v CFMEU [2011] FCA 949	Federal Court of Australia Gilmour J	McDonald and the CFMEU called for a motion to strike for 48 hours after Woodside indicated it would not defer changes to accommodation known as "motelling". He declared the motion carried. As a result 1,200 workers did not work on 1 December. 1,340 workers did not work on 2 December.	Pluto LNG Project, WA \$15 billion	\$85,800 comprising: <ul style="list-style-type: none"> • \$71,500 against the CFMEU (referable to 2 contraventions of s 38 BCII Act) • \$14,300 against McDonald (referable to 2 contraventions of s. 38 BCII Act)

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2011 continued					
83.	Alfred v CFMEU [2011] FCA 556	Federal Court of Australia Tracey J	The CFMEU through various officials established and maintained a total ban on the performance of work at the Melbourne Markets site and established and maintained a blockade of the main entrance to the site with intent to coerce Fulton Hogan to agree to make an EBA and/or terminate or vary an existing EBA.	Melbourne Markets Relocation Project, VIC \$300 million	\$100,000 and declarations against the CFMEU (referable to 1 contravention of each of s. 38 and 44 BCII Act).

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	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2011 continued		
84.	Gregor v CFMEU; Cozadinos v CFMEU [2011] FCA 808	Federal Court of Australia Marshall J	The CFMEU and several officials engaged in unlawful industrial action and coercive action at several building sites on several occasions. The intent of the coercion was to force Caelli to employ an OHS representative.	\$2.4 billion Royal Children's Hospital, Melbourne Myer Project site at 800 Collins Street, Docklands ANZ Project site at 833 Collins Street, Docklands Merchant Project site at 834 Bourke Street, Docklands Montage Project site at 1 Encounter Way, Docklands collectively referred to as the Victoria Harbour Sites. Olsen Project site at 637 Chapel Street, South Yarra Robin Project site at 717 Bourke Street, Docklands	\$415,000 comprising: <ul style="list-style-type: none"> • \$85,000 against the CFMEU (referable to 3 contraventions of s. 38 BCII Act) • \$5,000 against Reardon (referable to 1 contravention of s. 38 BCII Act) • \$10,000 against Hudson (referable to 2 contraventions of s. 38 BCII Act) • \$5,000 against McLoughlin (referable to 1 contravention of s. 38 BCII Act) • \$5,000 against Christopher (referable to 1 contravention of s. 38 BCII Act) • \$218,000 against the CFMEU (referable to 7 contraventions of s. 43 BCII Act) • \$17,000 against Hudson (referable to 3 contraventions of s. 43 BCII Act) • \$17,000 against Washington (referable to 4 contraventions of s. 43 BCII Act) • \$12,000 against Christopher (referable to 3 contraventions of s. 43 BCII Act) • \$7,000 against Setka (referable to 2 contraventions of s. 43 BCII Act) • \$17,000 against Spornovasilis (referable to 4 contraventions of s. 43 BCII Act) • \$17,000 against Reardon (referable to 4 contraventions of s. 43 BCII Act)

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Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2011 continued					
85.	ABCC v Graauwmans & CFMEU MLG912/2011	Federal Magistrates Court, Melbourne FM Riley	Graauwmans came onto Barwon Heads Bridge Project in June 2010 and told the head contractor McConnell Dowell that anytime Elstone contractors came on site, CFMEU members would be shedded up as Elstone did not have an EBA with the CFMEU. On 17 August, Elstone returned to site and the CFMEU shut the job for the day.	Barwon Heads Bridge Project, VIC \$23 million	<ul style="list-style-type: none">• \$5000 against Robert Graauwmans and declaration of 1 contravention of s38• \$30,000 against the CFMEU Vic Branch and declaration of 1 contravention of s38
86.	ABCC v Doyle and CFMEU; Lukies v Doyle and CFMEU No judgment published Orders made in October and December 2011	Federal Magistrates Court of Australia Burchardt FM Turner FM	On 22 May 2009, Doyle did not comply with his obligation to be a federal permit holder when exercising OHS right of entry and was reckless in misrepresenting his right to enter a site at Beaconsfield. On 19 October 2009, Doyle did not comply with his obligation to produce his federal permit on request and hindered and obstructed and acted in an improper manner while exercising OHS right of entry at a site at Endeavour Hills.	Safeway Beaconsfield, VIC \$7 million	\$26,000 comprising: <ul style="list-style-type: none">• \$6,500 against the CFMEU (referable to 1 contravention of s. 497 FW Act)• \$6,500 against the CFMEU (referable to 1 contravention of s. 500 FW Act)• \$13,000 against the CFMEU (referable to 1 contravention of each of ss. 756 and 768 WRA).

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SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2012					
87.	Director, FWBII v Mates [2012] FMCA 475 (penalty)	Federal Magistrates Court of Australia O'Sullivan FM	A CFMEU officer/shop steward refused to induct two subcontractors on a building site because they were not members of the CFMEU, thereby taking adverse action against them	81 Lorimer Street, Docklands, VIC \$5 million	\$3,500 (\$1,750 for each breach) referable to 2 contraventions of s. 346(a) of the FW Act.
88.	ABCC v CFMEU and Reardon [2012] FCA 189 (penalty decision)	Federal Court of Australia Bromberg J	At a Bovis Lend Lease Caroline Springs site, CFMEU official Reardon directed 50-55 employees of 6 subcontractors not to perform work that day or for the next two days in the context of a broader industrial dispute between the CFMEU and Bovis about a Blue Glue security system on Bovis sites.	Caroline Springs Square Shopping Complex, VIC \$30 million	\$50,000 against the CFMEU (referable to 1 contravention of s. 38 BCII Act).
89.	ABCC v Jarvis, Temoho and CFMEU [2012] FMCA 189	Federal Magistrates Court of Australia Burnett FM	Three CFMEU organisers entered the Gold Coast University Hospital site and proceeded to hold a mass meeting of workers of 109 subcontractors on site. At the meeting the workers voted to stop work until 30 November 2009. The reason was that they asserted BLL had withheld entitlements from workers of another subcontractor on other sites.	Gold Coast University Project, QLD \$1.76 billion	\$46,860 comprising: <ul style="list-style-type: none"> • \$36,300 and declarations against CFMEU (for 1 contravention of s38 of the BCII Act) • \$7,260 and declarations against Jarvis (for 1 contravention of s38 of the BCII Act) • \$3,300 and declarations against Temoho (for 1 contravention of s38 of the BCII Act)

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Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2012 continued					
90.	United Group Resources Pty Ltd v Calabro (No 7) [2012] FCA 432	Federal Court of Australia McKerracher J	In the context of a dispute about "motelling", 1,336 employees failed to attend for work for the whole or part of their rostered shift. Some employees took this action prior to the nominal expiry date of their agreements and contrary to s. 420 orders of FWA.	Pluto LNG Project, WA \$15 billion	<ul style="list-style-type: none"> • \$1,300 (wholly suspended) for each day the respondents breached ss 38, 417 and 421 • \$1,200 (wholly suspended) for each day the respondents breached ss. 38 and 421 • \$1,100 (wholly suspended) for each day the respondents breached ss. 38 and 417 • \$1,000 (wholly suspended) for each day the respondents breached s. 38 only • \$300 for two respondents who breached s. 417 and 421.
91.	ABCC v Bolas [2012] FCA 484 (penalty)	Federal Court of Australia North J	A CFMEU member and OHS rep at several Brookfield Multiplex sites including Penders Grove, told two carpenters it was compulsory to join the CFMEU to work on the site and they could pack up and go unless they joined.	Penders Grove Primary School, VIC	\$2,000 against Bolas referable to 1 contravention of s. 349(1)(a) FW Act.

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SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2012 continued					
92.	Director, Fair Work Building Industry Inspectorate v CFMEU, Pearson, Vink, O'Doherty, CEPU, Hanna, Jarvis, Olsen & Malone [2012] FCA 1144 Regarding Injunction [2012] FCA 1273	Federal Court of Australia	The CFMEU, CEPU and officials engaged in unlawful industrial action and defied orders made by FWA, contravened right of entry provisions and engaged in work stoppages at a Brisbane and Gold Coast construction site at various dates between 28 February 2011 and 26 May 2011.	Gold Coast University Hospital, QLD \$600 million	\$590,000 comprising: <ul style="list-style-type: none">• A penalty of \$550,000 on the CFMEU and CEPU (jointly and severally liable) payable to Lend Lease (for 1x CEPU contravention of s.38 of the BCII Act and 12 x CFMEU contraventions s38)• A penalty of \$6,450 on the second respondent (Pearson) – for 4 contraventions of s38).• A penalty of \$6,450 on the third respondent (Vink) – for 2 contraventions of s.38.• A penalty of \$4,300 on the fourth respondent (O'Doherty)- for 2 contraventions of s.38.• A penalty of \$7,750 on the sixth respondent (Hanna)- for 6 contraventions of s.38.• A penalty of \$6,450 on the seventh respondent (Jarvis) – for 4 contraventions of s.38.• A penalty of \$6,450 on the eighth respondent (Olsen)- for 2 contraventions of s.38.• A penalty of \$2,150 on the ninth respondent (Malone) - for 1 contravention of s.38.

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2012 continued					
93.	Helal v Brookfield Multiplex Ltd [2012] FCA 653 (penalty)	Federal Court of Australia Bromberg J	A CFMEU officer threatened to organise or take action to coerce a company to employ two people as building employees. This occurred in an aggressive telephone discussion between the officer and the general manager after the company dismissed the employees for misconduct.	Southbank One project, VIC \$100 million	\$30,000 and declarations against the CFMEU referable to 1 contravention of s. 43(1) BCII Act.
94.	Cozadinos v CFMEU and Bell (First instance) [2012] FCA 46 [2013] FCAFC 8 (Appeal) [2013] FCA 1243	Federal Court of Australia, Melbourne Gray J FCAFC (Appeal) Besanko, Perram and Bromberg JJ Tracey J appointment on Gray, J's retirement Federal Court of Australia, Melbourne Tracey J	Union organiser coerced employee to join union or would be prevented from working on site.	Epsom Shopping Centre, Bendigo, VIC \$10 million	\$20,000 comprising: <ul style="list-style-type: none">• The CFMEU pay a penalty of \$20,000 in respect of contravention of s 44 of the BCII Act, charges dropped against Bell.• \$42,000 costs towards FWBC's appeal costs.

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2012 continued					
95.	Director of the Fair Work Building Industry Inspectorate v CFMEU, McDonald & Buchan [2012] FCA 966	The Federal Court of Australia, Perth Buchanan J	McDonald entered Diploma's Queens Riverside Apartments site with other CFEU organisers and directed the Inner Strength workers to go on strike on 2 February 2011 and 10 June 2011, engaged in a blockade on the site on 23 June 2011, and made a threat to Diploma's managing director on 27 June 2011 to continue strikes. McDonald entered the site on 4 July 2011 and arranged from workers to attend a picket on the site.	Queens Riverside Apartments Project, WA \$110 million	\$200,000 against CFMEU and its WA Assistant Secretary Joe McDonald, comprising of: <ul style="list-style-type: none"> • CFMEU: \$40,000 (for 2 contraventions contravention of s44 BCII Act). • Mr McDonald: \$10,000 (for 2 contraventions of s44 BCII Act) • CFMEU: Contempt of court x2 – totalling \$100,000.00; • Mr McDonald: Contempt of court x 2 – totalling \$50,000.00.
96.	Radisich v McDonald and CFMEU [2012] FMCA 919	Federal Magistrates Court, Perth	CFMEU WA assistant secretary Joe McDonald attended the Herdsman Business Park site on Walters Drive and made certain representations to workers, instructed workers to stop work, and attempted to coerce workers to become members of the union	Herdsman Business Park Project, WA	\$34,980 against CFMEU and McDonald, comprising of: <ul style="list-style-type: none"> • McDonald - \$1,980 contravention of s 790(1) WRA; \$4,400 contravention of s.38 BCII. • CFMEU - \$6,600 contravention of s 790(1) WRA; \$22,000 contravention of s 38 BCII.
97.	Director of the Fair Work Building Industry Inspectorate v CFMEU [2012] FMCA 916	Federal Magistrates Court of Australia, Melbourne	Hudson and the CFMEU engaged in unlawful industrial action at the Rosso Apartment project in Carlton and directed all workers at the site to take strike action.	Rosso Apartments, Carlton, VIC	\$25,000 comprising of: <ul style="list-style-type: none"> • \$7,500 imposed on Matthew Hudson for one contravention of s38 of the BCII Act; • \$17,500 imposed on the CFMEU for one contravention of s38 of the BCII Act by reason of vicarious liability for the conduct of Hudson

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case Jurisdiction Nature of Conduct Project and Value Penalties Imposed					
2013					
98.	Director of the Fair Work Building Industry Inspectorate v CFMEU, Berardi, Beattie, Theodorou, Pitt, Bell & Patching [2013] FCA 515	Federal Court of Australia, Melbourne Jessup J	CFMEU and six representatives engaged in strikes and blockades on five major St Hilliers Victorian construction sites (Ararat prison, Watsonia Military Camp, Carlton apartment and social housing project, Ashwood apartment project and Canterbury housing complex).	Ashwood Chadstone Gateway Project, VIC \$365.8 million	\$115,000 comprising of: <ul style="list-style-type: none"> • CFMEU \$84,000 (for 8 contraventions of s43 of the BCII Act); • Billy Beattie - \$10,500 (for 2 contraventions of s43); • Danny Berardi - \$9,500 (for 2 contraventions of s43); • Theo Theodorou - \$4500 (for 1 contravention of s.43); • Jason Bell - \$3500 (for 1 contravention of s43); • Brendan Pitt - \$3000 (for 1 contravention of s.43)
99.	Director, Fair Work Building Industry Inspectorate v Sutherland, Jarvis, O'Doherty, Pearson, Lynch, BLF, CFMEU & CEPU Order viewable per BRG1008/2011	Federal Circuit Court, Brisbane Judge Burnett	Brookfield Multiplex Constructions Pty Ltd engaged subcontractors for building work associated with the Gold Coast Hilton hotel (Surfers Paradise) and Wintergarden shopping precinct (Brisbane). The Director, Fair Work Building Industry Inspectorate, alleges that in early 2011, Andrew Sutherland, Timothy Jarvis, Patrick O'Doherty, Kane Pearson and Christopher Lynch engaged in unlawful industrial action.	Gold Coast Hilton Hotel (Surfers Paradise) and Wintergarden shopping precinct (Brisbane), QLD \$700 million	Penalties of \$65,000 comprising: <ul style="list-style-type: none"> • The CFMEU pay \$50,000 for 2 contraventions of s38 of the BCII Act; • The CEPU pay \$15,000 for 1 s38 contravention.

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case		Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2013 continued					
100.	Director, Fair Work Building Industry Inspectorate v CFMEU, CFMEUW and McDonald [2013] FCCA 1255	Federal Circuit Court of Australia, Perth Judge Lucev	Mirvac Constructions (WA) Pty Ltd was engaged to undertake building work at 'The Peninsula Project' in Burswood, Western Australia. FWBC alleged that on 12 September 2008 CFMEU and CFMEUW representative, Mr Joseph McDonald attended The Peninsula Project and attended and addressed a meeting of Mirvac employees and employees of building contractors at the site. At the conclusion of the meeting, alleged that approximately 100 workers left the site and failed to perform work that they were engaged to perform for the remainder of the day.	Peninsula Project, Burswood, WA \$700 million	One contravention by each Respondent of s.494(1) of the WR Act: \$7,260 comprising: <ul style="list-style-type: none"> • \$3,300.00 against the CFMEU • \$3,300.00 against the CFMEUW • \$660.00 against the Mr McDonald.
101.	Director, Fair Work Building Industry Inspectorate v CFMEU and Anor [2013] FCCA 2130	Federal Circuit Court of Australia, Brisbane Judge Burnett	Fair Work Building & Construction issued proceedings against the CFMEU, BLFQ and six union officials for allegedly engaging in unlawful industrial action at three Laing O'Rourke sites in Queensland during 2010.	Multi-Level Car Park, Albert Street and Brisbane Convention and Exhibition Centre projects \$140 million	Penalties of \$55,000 CFMEU and BLFQ were held to be jointly and severally liable for the pecuniary penalty (for 1 contravention each of s.38 of the BCII Act).

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2013 continued		
102.	Director, Fair Work Building Industry Inspectorate v Abbott and Ors (6) [2013] FCA 942	Federal Court of Australia, Perth Gilmour J	September 2006, Woodside engaged CBI to perform mechanical construction services at the North West Shelf LNG Plant. CBI had two agreements in place. The AMWU was a party to one and the CFMEU and AWU were party to the other. The nominal expiry date of both agreements was August 2009. On 13 October 2008, a representative of the CFMEU demanded that CBI terminate its employees at the site, make redundancy payments and then re-engage the employees for further works. This demand was on the basis that the union believed the project had been completed. CBI believed that additional works awarded by Woodside formed part of the ongoing project. On 14 October 2008, 157 employees engaged in strike action. On that same day CBI was granted an order pursuant to s.496 of the Workplace Relations Act 1996 that all CBI employees not take industrial action for one month. Strike action continued for seven days between 17 October 2008 and 24 October 2008.	North West Shelf LNG Plant. \$27 billion	Penalties and suspended penalties amount to \$1,068,000 . One contraventions by Respondents as listed in Schedule A attached to the Judgment, in respect of: s 38 of the BCII Act (2005); s 496(1) of the WR Act; and breaches of provisions within two Union Collective Agreement. Suspension is by way of 50% for a period of 3 years, whereby no contraventions of any industrial legislation or employment standards are found in the period. Penalties to be in immediate period \$680,125 comprising: <ul style="list-style-type: none">• <u>\$292,250: not suspended.</u>• Total of \$775,750 with suspensions attached. <u>The payable amount is: \$387,875.</u>

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
			2013 continued		
103.	Director, Fair Work Building Industry Inspectorate v CFMEU & Beattie [2013] FCA 981	Federal Court of Australia , Melbourne Jessup J	<p>Alleged breaches of s 38 of the BCII Act 2005 and s 417 of the FW Act.</p> <p>Alleged that on 8 July 2010, two employees of Glenn Industries Pty Ltd (GI) were working on a three-storey building at the Florey Neuroscience Institute within the Austin Hospital complex in Heidelberg, Victoria.</p> <p>It was alleged that CFMEU official Bill Beattie directed the two employees to stop working, which they did. Further, it was alleged that on 9 July 2010, Mr Beattie conducted a meeting with the two employees at the site and told them not to return to work.</p> <p>On 13 July, Mr Beattie and other CFMEU officials allegedly met with representatives of GI and Brookfield Multiplex Pty Ltd (Multiplex). The GI representatives agreed to the CFMEU's demand that the GI employees' rates of pay be increased to those contained in agreements negotiated with the Victorian branch of the CFMEU</p>	Florey Neuroscience Institute at the Austin Hospital, Heidelberg, VIC \$119 million	<p>\$15,000 comprising:</p> <ul style="list-style-type: none"> • \$12,500 against the CFMEU (for 1 contravention of s.417 of the FW Act) • \$2,500 against Bill Beattie (for 1 contravention of s.417 of the FW Act)

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

	Name of Case	Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2013 continued					
104.	Director, Fair Work Building Industry Inspectorate v CFMEU, Stephenson, Powell, MacDonald, Doyle, Benstead & Parker [2013] FCA 1014	Federal Court of Australia, Melbourne Gordon J	The CFMEU pressured Abigroup Contractors Pty Ltd (Abigroup) to employ particular CFMEU members on Abigroup’s Peninsula Link (PenLink) project. The CFMEU and its organisers also engaged in unlawful industrial action at five Abigroup construction projects at schools near the PenLink project.	Peninsula Link Project, VIC Southern Link Upgrade Alliance Project, VIC \$759 million.	\$230,000 comprising: <ul style="list-style-type: none">• \$155,000 against the CFMEU (for 3 contraventions of s.43 of the BCII Act)• \$11,000 on Mr Fergal Doyle (for 1 contravention of s43 and 1 contravention of s.38 BCII Act)• \$29,000 on Mr Gareth Stephenson (for 3 contraventions of s.43)• \$24,500 on Mr Michael Powell (for 2 contraventions of s.43)• \$5,000 on Mr Drew MacDonald (for 1 contravention of s.43)• \$3,000 on Mr Gerard Benstead (for 1 contravention of s.38)• \$2,500 on Mr John Parker (for 1 contravention of s.38)
105.	Director of the Fair Work Building Industry Inspectorate v CFMEU and Christopher [2013] FMCA 160	Federal Magistrates Court of Australia, Melbourne	The CFMEU and Mr Christopher threatened, assaulted, abused and vandalised property with the intent to coerce the site manager or Hooker Cockram to comply with his request.	Royal Melbourne Institute of Technology site, VIC \$25 million	\$10,000 against the CFMEU.

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AND FAIR WORK BUILDING INDUSTRY INSPECTORATE SELECTED
SUCCESSFUL LITIGATION OUTCOMES 2003 - 2013**

Name of Case						Jurisdiction	Nature of Conduct	Project and Value	Penalties Imposed
2013 continued									
106.	Director of the Fair Work Building Industry Inspectorate v O'Doherty, Myles, Ong, Clark, Bland, Temoho, Jarvis, CFMEU & CEPU [2013] FCA 846	Federal Court of Australia, Brisbane	The CFMEU, CEPU and seven union officials for taking—or threatening to take—unlawful industrial action against Watpac Construction (QLD) Pty Ltd. The action took place at three Watpac construction sites in Queensland with the intent to coerce Watpac to engage or not engage a person as a building contractor.	Translation Research Institute Project Queensland Institute of Medical Research Centre Project Carrara Stadium Project \$150 million	Orders made:				<ul style="list-style-type: none"> The CFMEU pay a sum of \$99,000.00; penalty in respect of contraventions of s 43(1)(b) and s 44 of the BCII Act. The CEPU pay a sum of \$20,000.00; penalty in respect of the contraventions of s 43(1)(b) of the BCII Act.
107.	Director, Fair Work Building Industry Inspectorate v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Anor [2013] FCA 82	Federal Court of Australia, Melbourne Marshall J	City West Waters engaged Tedra Australia Pty Ltd (Tedra) as the head contractor for the construction of a water treatment plant at Werribee. There were 61 workers engaged by either Tedra or a sub-contractor. Tedra contracted with Briagolong Engineering Pty Ltd (Briagolong) to construct two welded steel tanks. Briagolong engaged four workers who worked under subclass 457 visas. On 4 February 2013, a picket line at the entrance to the Site commenced, blocking workers and vehicles from entering the Site. The picket was disbanded on 15 February 2013.	West Werribee Dual Water Supply Project, VIC \$40 million	The parties agreed to settle on the basis that the AMWU pay compensation of \$62,000 to Tedra with no admission of wrongdoing.				

Economic Analysis of Building and
Construction Industry Productivity: an Update
11 May 2014

Outline

1. History of this study
2. Timeline of changes to industry regulation
3. Effect of industry reform on productivity
4. Economy-wide impact of industry reform
5. Productivity Commission Draft Report

History of this study

- Original report commissioned in 2007 by ABCC and updated for them in 2008
- Further updates commissioned by Master Builders Australia in 2009, 2010, 2012 and 2013
- This presentation:
update and extension taking into account the recent debate
- Consistent finding that reforms tailored to the building and construction industry, supported by general industrial relations reforms, have improved work practices and productivity

3

Timeline of changes to industry regulation



A vertical timeline with a central line and horizontal tick marks. To the right of each tick mark is a date and a description of an event.

October 2002	Taskforce established
October 2005	ABCC established
June 2006	National Code and Guidelines strengthened
August 2009	National Code and Guidelines weakened
October 2010	Greatly reduced use of compulsory examination powers by ABCC
June 2012	FWBC replaces ABCC

4

Effect of industry reform on productivity

independenteconomics

independenteconomics

Cole Royal Commission findings

- **Poor productivity performance due to poor work practices**
To achieve ... benefits by increasing productivity, structural and cultural reform is necessary.
- **Major problems in building and construction work practices**
 - unions assumed control of managing construction projects
 - unlawful and inappropriate conduct “reduces productivity”
 - rigid work practices under pattern bargaining
 - “widespread application of, and surrender to, inappropriate industrial pressure”
- **Benefits from reform are “very significant”**

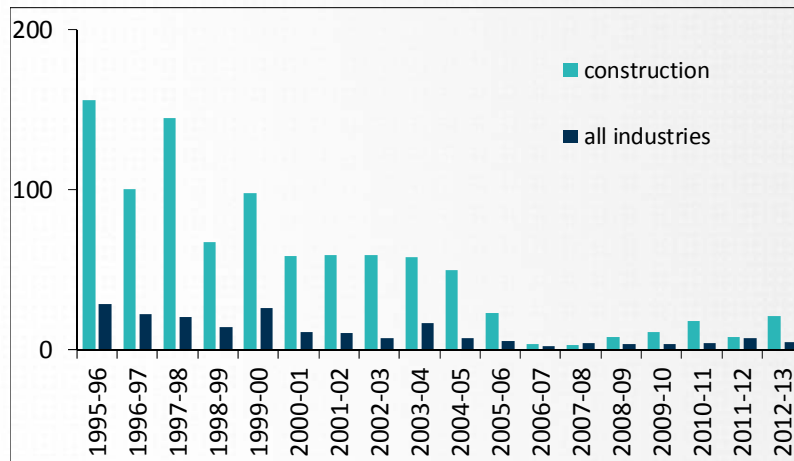
Case studies for individual projects

- **High density residential project (Econtech 2007)**
 - 7% cost saving from faster project completion post ABCC
- **Eastlink (Ken Phillips 2006)**
 - 11.8% cost saving due to ABCC and Workchoices
- **John Holland Group (2007)**
 - 10% productivity dividend since Cole Royal Commission
- **Successful ABCC & FWBC litigation (MBA 2014)**
 - documents 107 cases in which penalties were awarded

Work days lost to industrial disputes

- Construction has historically had very high rate of days lost to industrial action compared to the rest of the economy
- During the peak of regulatory activity, rate of days lost was down >80% to a rate comparable to the rest of the economy
- Industrial action is symptomatic of broader workplace problems

Work days lost to industrial disputes per '000 employees



Source: ABS

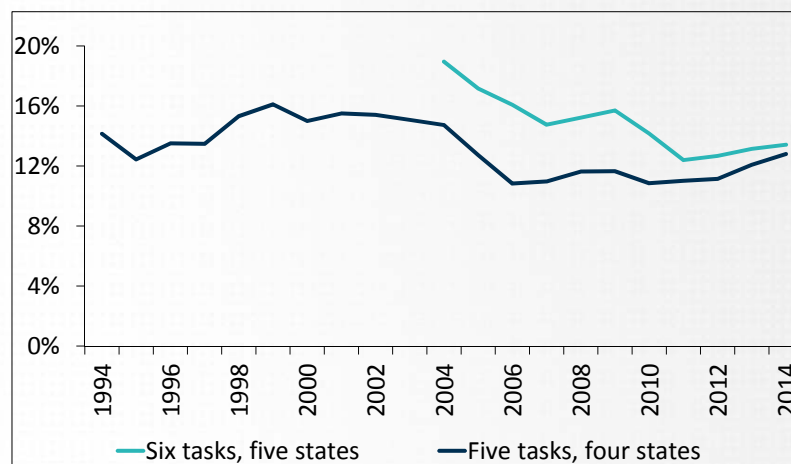
Tasks in commercial vs residential

- **Commercial building more affected by poor work practices than residential building:**
 - union-controlled work sites vs independent contractors
 - remuneration: time-based vs piece rates
- **Same tasks in the same state in the same year cost more for commercial building than for residential building**
- **Tasks chosen that are**
 - common to both types of building
 - significant costs
- **Large size of cost gap pre-2002 indicates high potential gains**

Movements in cost gap

- **Cost gap for commercial may also be affected by**
 - complex nature of multi-storey construction adding to costs
 - greater economies of scale reducing costs
- **Labour productivity gain estimated as %points fall in cost gap divided by labour cost share**
- **Two cost gap series examined due to break in data in 2004**
 - 6 tasks & 5 states: $(19.0-12.7)/0.53 = 11.8\%$ productivity gain from 2004 to 2012
 - 5 tasks & 4 states: $(15.4-11.1)/0.50 = 8.5\%$ productivity gain from 2002 to 2012

Cost of tasks in commercial vs residential



Source: Rawlinsons

Derivation of productivity gain formula – part 1

- Residential costs (CR) include labour (L) and non-labour costs (M).
- $CR = M + L$
- For commercial costs (CC) assume non-labour costs are the same, but labour efficiency is lower by a factor, A (where $A < 1$)
- $CC = M + L/A$
- Defining the proportionate cost gap, R
- $R = CC/CR - 1 = (L/A - L)/(M + L)$
- When A rises from A to A*, there is a narrowing in the cost gap from R to R* and a proportionate productivity gain (a)

Derivation of productivity gain formula – part 2

- $a = A^*/A - 1$
- after using algebra to solve for “a”

$$a = (R - R^*)/[R^* + L/(M + L)]$$
- Using “w” to represent the labour share of costs, this becomes

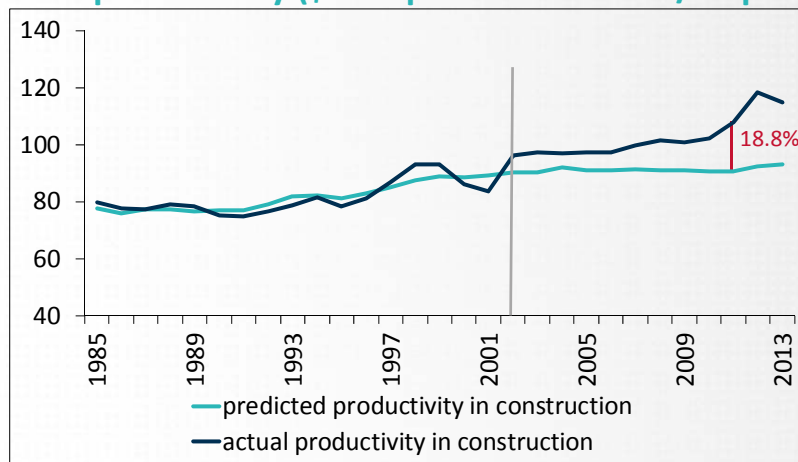
$$a = [(R - R^*)/wc^*] \cdot [(1 - wc^*)/(1 - wr)]$$
- The gain in productivity is the fall in the cost gap divided by the labour share (i.e. the report formula) times a correction factor.
- If the cost gap is closed completely ($wc^* = wr$), the correction factor is unity and report formula is exact. Otherwise, it is an approximation, but not an “error”.

Labour productivity

- Predict construction productivity post-2002 from productivity trends in construction relative to the economy up to 2002

$$\ln(YC(t)/NC(t)) = \ln(Y(t)/N(t)) + a_0 + a_1 * T$$
 estimation period: 1985-2002
- Choice of 2002 as end year for estimating trend evens out distortion from 1999 peak and 2001 trough associated with GST introduction effect on timing of residential construction
- Post-2002 saw gradual strengthening of regulation
- Construction productivity outperformed this historical trend benchmark by 18.8% in 2011

Labour productivity (\$'000 per head at 2011/12 prices)

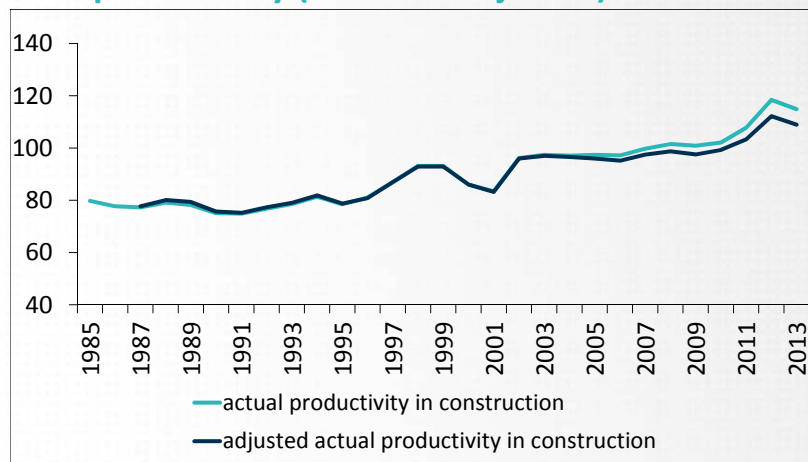


Source: ABS, Independent Economics analysis

Labour productivity – compositional effect

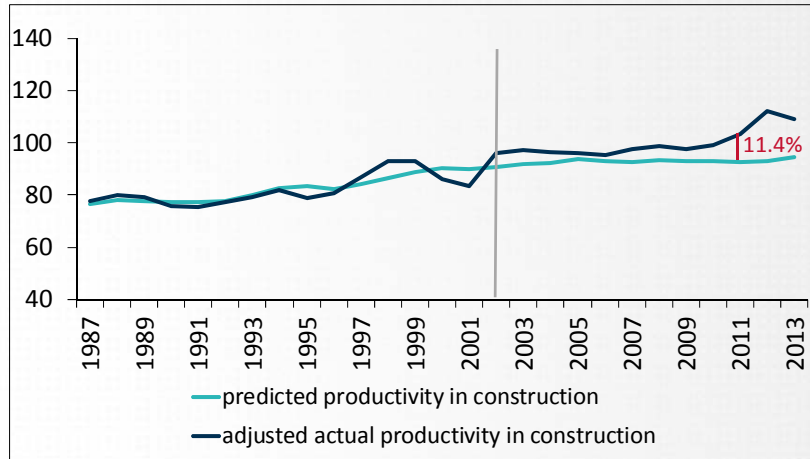
- Part of this labour productivity gain is a compositional shift from building to engineering construction
- This compositional effect can be removed from actual labour productivity, PROD, to obtain adjusted productivity, PROD*
- This requires estimates of productivity for each sub-sector of construction, “i”, in a base period $t=0$, $PROD(i,0)=Y(i,0)/N(i,0)$
- Actual productivity, $PROD(t) = \Sigma(i)Y(i,t)/N(t)$
- Adjusted productivity, $PROD^*(t) = \Sigma(i)Y^*(i,t)/N(t)$
where $Y^*(i,t) = Y(i,t).PROD(0)/PROD(i,0)$
- For adjusted productivity, outperformance is 11.4% in 2011

Labour productivity (actual vs adjusted)



Source: ABS, Independent Economics analysis

Labour productivity (adjusted for compositional shift)



Source: ABS, Independent Economics analysis

Adjusted labour productivity – derivation of formula

- assuming uniform productivity growth across sub-sectors

$$\text{PROD}(i,t)/\text{PROD}(i,0) = \text{PROD}^*(t)/\text{PROD}(0)$$
- using $\text{PROD}(i,t) = Y(i,t)/N(i,t)$ and re-arranging

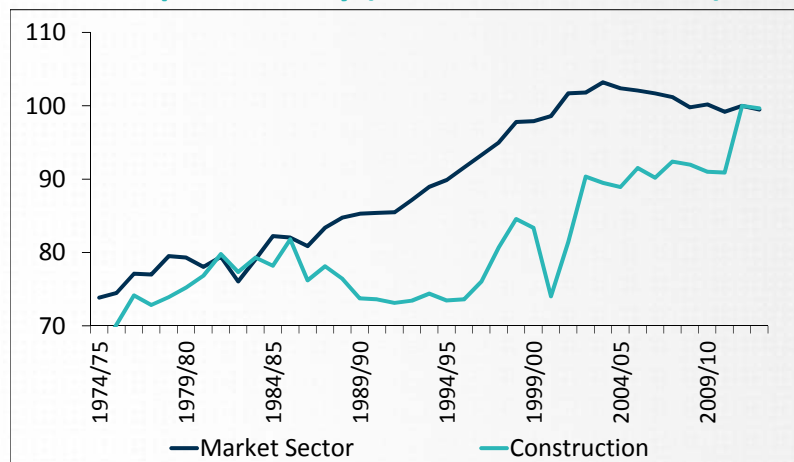
$$Y(i,t)/\text{PROD}(i,0) = N(i,t) \cdot \text{PROD}^*(t)/\text{PROD}(0)$$
- Summing over sub-sectors

$$\sum(i) Y(i,t)/\text{PROD}(i,0) = N(t) \cdot \text{PROD}^*(t)/\text{PROD}(0)$$
- Re-arranging gives the final adjusted productivity formula
- $\text{PROD}^*(t) = \sum(i) Y^*(i,t)/N(t)$
 where $Y^*(i,t) = Y(i,t) \cdot \text{PROD}(0)/\text{PROD}(i,0)$

Multifactor productivity

- **Market sector has followed a steady, upward trend**
- **Construction industry productivity flat through 1980s & 1990s**
 - Productivity Commission found it was no higher in 2000/01 than 20 years earlier
- **Construction productivity rose 22.8% in 10 years to 2011/12**
 - Market sector productivity fell over same period
- **A downward adjustment for the building to engineering compositional shift could be made and would be similar in size e.g. about 7% points in 2011**

Multifactor productivity (index = 100, 2011/12)

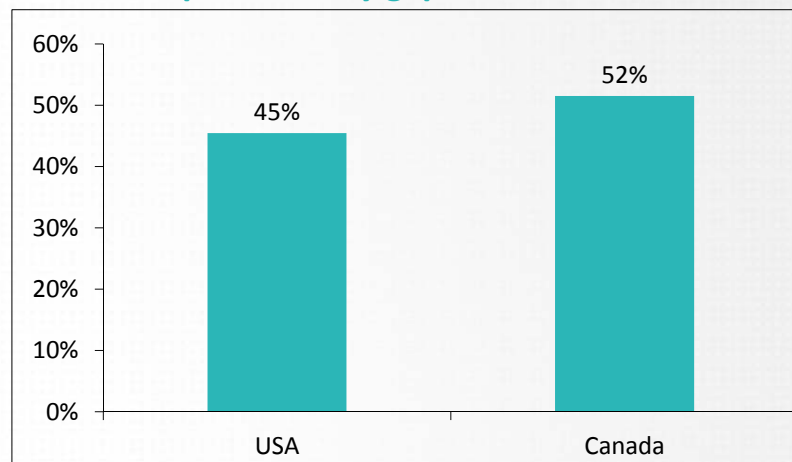


Source: ABS, Productivity Commission, Independent Economics analysis

Potential Gains: international comparisons

- **Analysis by Cole Royal Commission found that Australian construction productivity lagged the US and Canada, but was similar to European countries**
- **Not all of the gap will be due to labour productivity differences**
 - capital intensity may be different
 - converting into common currency has limitations
- **However, the very large gap compared to the US suggests that significant gains in labour productivity are available**

Construction productivity gap from Australia 1998



Source: Cole Royal Commission, Discussion Paper 15, based on OECD and ABS data

Evidence	IE finding	PC draft
Cole Commission	Poor work practices impede productivity	Issues identified but do not inform finding
Case studies	~ 10% gain	Issues identified
Days lost	Down more than 80%	Issues identified but do not inform finding
Cost gap	8.5% or 11.8% gain	Further work required
Labour productivity	11.4% gain (adjusted)	Given little weight
Multifactor productivity	22.8% gain (before adjustment)	Unclear
International comparisons	show very high potential for gains	Data limitations
Estimated impact	9.4%	None given

Conclusions

- Cole Royal Commission studied the industry and predicted suitable reform would have “very significant” benefits
- Evidence in all six of the most relevant areas is consistent with this prediction being borne out
- Focussing on each of the six areas in isolation would miss this bigger picture
- Thus, industry reforms have improved productivity
 - 9.4% remains a reasonable estimate of the gain
 - Estimation uncertainty means the gain may be up to 2-3% points higher or lower

Economy-wide impact of industry reform

independenteconomics

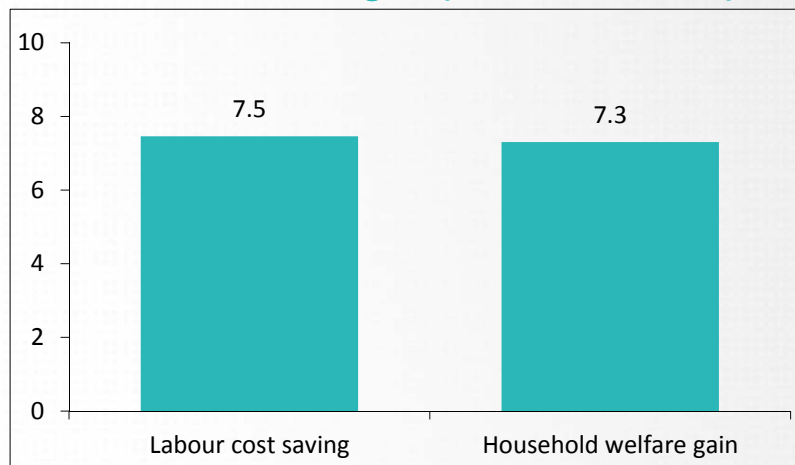
independenteconomics

The Independent CGE model

- **Model has strong reputation**
 - Refined in work with Australian Treasury to support the Business Tax Working Group
 - Used by Treasury in: 'The incidence of company tax in Australia', Economic Roundup, Issue 1 2014
 - We did the CGE modelling of tax excess burdens for Henry
- **Robust modelling approach**
 - Up-to-date database with four separate building sectors
 - Many types of labour, capital, land and natural resources
 - Robust estimates of consumer welfare impacts

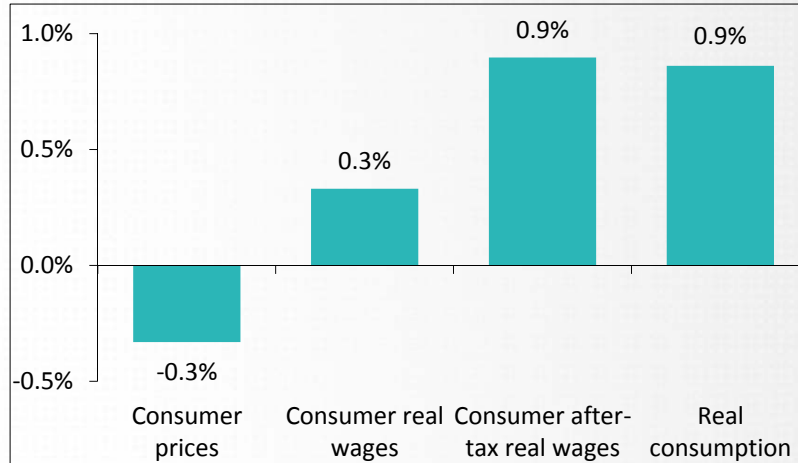
Construction sector	Assumed productivity gain	Model industries
Engineering construction	11.4%	16.5%
Non-residential building	12.3%	20.5%
Residential building	4.5%	0%
Construction services	NA	7.0%
Total construction	9.4%	9.4%

Labour cost and welfare gain (\$billion, 2012/13)



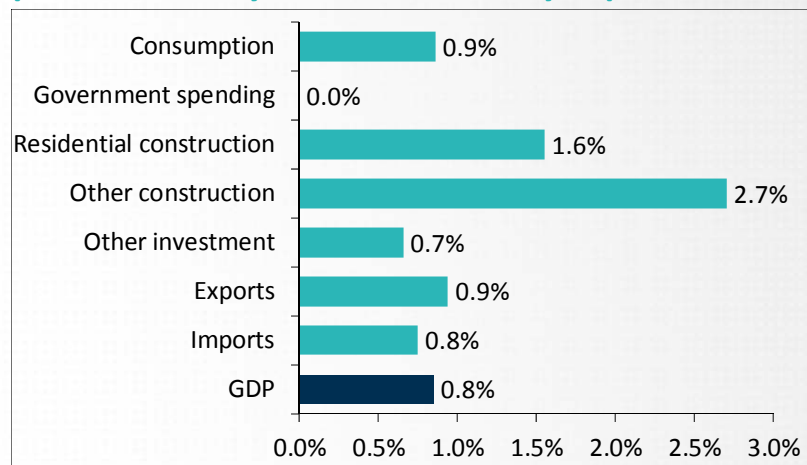
Source: Independent CGE model

Source of welfare gain



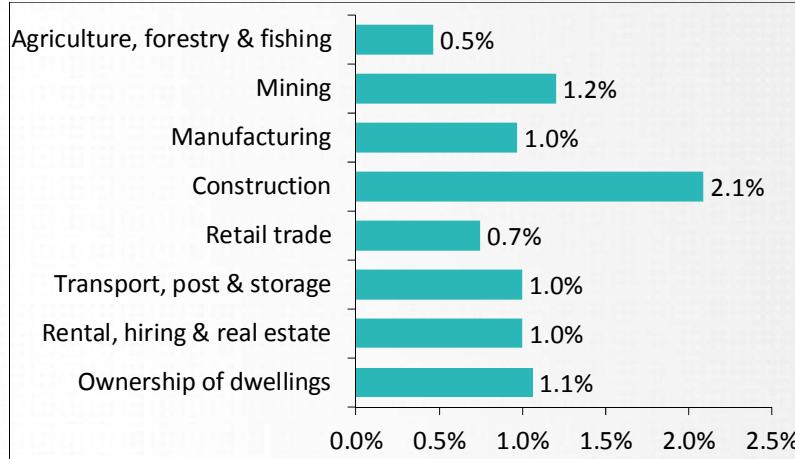
Source: Independent CGE model

Impact of industry reform on GDP by expenditure



Source: Independent CGE model

Impact of industry reform on GDP by industry



Source: Independent CGE model

Productivity Commission Draft Report

General approach

- Any one piece of data considered in isolation would not be able to conclusively show that industry reforms contributed to productivity improvements.
- All evidence must be considered as a whole:
 - Analysis of the industry environment, such as in the Cole Royal Commission report
 - Economic data in the six areas
- This is the approach taken by Independent Economics.

Chris Murphy
Director

Master Builders Australia

Submission to the Department of Employment

On

***Review of the Australian Government Building and
Construction OHS Accreditation Scheme***

4 April 2014



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RECOMMENDATIONS

Recommendation 1	That an embedded review process should be established with a legislated requirement that the Scheme must be reviewed at least every five years. In the alternative, a sunset provision should govern the Scheme's terms.
Recommendation 2	The OFSC should more actively manage criticisms or critiques of the Scheme.
Recommendation 3	Keep the current thresholds for directly and indirectly funded projects unchanged. However, indexation of the thresholds should be considered or a suitable adjustment made, say every 3 years.
Recommendation 4	The definition of building work for the purposes of the Scheme should be consistent with the definition of the <i>Building and Construction Industry (Improving Productivity) Bill 2013</i> , if that Bill is passed.
Recommendation 5	The Scheme should apply consistently to all sectors and agencies that undertake building work, subject to the Scheme's funding thresholds.
Recommendation 6	The OFSC should implement and adhere to strict timelines to respond to an initial application for accreditation and to carry out the onsite audit.
Recommendation 7	The OFSC should consider implementing a form of survey which measures costs and benefits and which properly assesses both the attitudes of member companies and which assesses the costs and benefits in an objective manner.
Recommendation 8	The prerequisite of needing to be certified to AS4801 or OHAS18001 should be removed from the Scheme requirements.
Recommendation 9	The Scheme criteria should be streamlined and written in plain English. The Scheme criteria should also be simplified and focused on outcomes rather than focusing on documentation.
Recommendation 10	The review panel should consider whether the Scheme should continue to apply solely to principal contractors and consider whether the Scheme is consistent with the harmonised WHS laws regarding co-operation.
Recommendation 11	The reaccreditation process should be abolished. Accredited companies should keep their accreditation subject to satisfactory results from ongoing compliance audits.
Recommendation 12	There should be no annual fee charged to accredited companies for maintaining accreditation.
Recommendation 13	The OFSC should collect and publish data annually that is comparable to the performance of the wider construction industry against the targets set in the National OHS Strategy and the

	Australian Strategy.
Recommendation 14	The OFSC should collect PPI data from accredited companies and publish the findings on the OFSC website.
Recommendation 15	Case studies should be developed by the OFSC to help provide companies with self-help opportunities.
Recommendation 16	Master Builders considers that there should be a strong role for FSOs in identifying and disseminating best practice examples.
Recommendation 17	FSOs should be direct employees of the OFSC to avoid a conflict of interest.
Recommendation 18	The OFSC should increase the focus on the role of funding agencies in driving WHS outcomes and on safety in design as is envisaged in the model client framework.
Recommendation 19	The Department of Employment should, with other Government agencies responsible for procurement, be bound to act as an exemplar.
Recommendation 20	SWMS should only be required for 'high risk' tasks and kept as simple as practicable.
Recommendation 21	The issue of state schemes recognising compliance of the Scheme as meeting the compliance requirements of the state scheme should be placed on the COAG agenda.
Recommendation 22	Anonymous third-party feedback should be sought after initial accreditation, upon a company ceasing to be accredited, and from accredited companies after compliance audits.
Recommendation 23	Part of the review process should be a demonstration that the Scheme has facilitated improvement in building and construction industry safety outcomes.

1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 124 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.
- 1.3 Master Builders has a strong demonstrated commitment to improving the work, health and safety of the building and construction industry.

2 Purpose of submission and Context of Review

- 2.1 The Australian Government Building and Construction OHS Accreditation Scheme (the Scheme) is now in its ninth year of operation. In that time the Scheme has grown considerably both in terms of the number of companies accredited and the number of projects within the purview of the Scheme. Master Builders' members accredited under the Scheme have raised a number of concerns about the operation of the Scheme over many years. Master Builders has consistently lobbied for a review of the Scheme in both written submissions to government and as a member of the Office of the Federal Safety Commissioner's (OFSC) Industry Reference Group. Hence, we express our strong support for the current review and commend the Government for undertaking this task. However, we submit that an embedded review process should be established with a legislated requirement that the Scheme must be reviewed at least every five years. In the alternative, a sunset provision should govern the Scheme's terms.

Recommendation 1: That an embedded review process should be established with a legislated requirement that the Scheme must be reviewed at least every five years. In the alternative, a sunset provision should govern the Scheme's terms.

- 2.2 In order to obtain feedback and examples of members' concerns, Master Builders has conducted a series of focus groups and surveys with both accredited and non-accredited member companies around Australia. In order to obtain uninhibited comment, member companies were promised anonymity in any feedback to be used by Master Builders. This submission therefore gives multiple examples of practical concerns without identifying individuals or companies.
- 2.3 This submission is structured so as to first comment generally on the Scheme and then detail answers to the individual questions in the Discussion Paper issued by the Department of Employment on 24 February 2014.¹ These answers commence from section 4 of this submission. For clarity, we make sequentially numbered recommendations that arise from the context of the discussion. Section 12 of the submission relates to the recent findings of the Productivity Commission on the Scheme that appeared in its draft report entitled "Public Infrastructure."²

3 General views of the Scheme

- 3.1 Views on the Scheme and the OFSC vary considerably between companies. Views range from high praise of the Scheme to calls for the immediate abolition of the Scheme. This submission takes into account all the views that Master Builders has received and attempts to present them together with possible solutions and recommendations for improvement.
- 3.2 There has been little academic work undertaken on the Scheme.³ However, we note that there has been recent criticism by an academic about how the OFSC has become 'fixated and consumed by petty, 'pissy', insignificant issues in paperwork'.⁴ In an article written by Dr Robert Long, these and other fulsome criticisms are made. Dr Long suggests that the OFSC is too concerned with the technique, design and presentation of safe work method statements (SWMS) as opposed to focusing on the purpose of SWMS.

¹ Department of Employment, 'Discussion Paper: A review to modernise the Office of the Federal Safety Commissioner and the Australian Government Building and Construction OHS Accreditation Scheme', http://docs.employment.gov.au/system/files/doc/other/scheme_review_discussion_paper_1.pdf.

² <http://www.pc.gov.au/projects/inquiry/infrastructure/draft>

³ An exception is found at R M Calver "Building and Construction Industry Occupational Health and Safety: The Work of the Federal Safety Commissioner" Australian Construction Law Newsletter 139, 32-37, July/August 2011.

⁴ Dr Robert Long, 'The Arse-Covering Myth', *Safety and Risk Management*, <http://www.safetyrisk.net/the-arse-covering-myth/> accessed 3 March 2014.

- 3.3 Dr Long's concern was also canvassed at WorkSafe ACT's conference, *Building Safety: Bridging the Gap*, held on 1-2 June 2013. In that context, the Safety-at-work blog reported that:

Several delegates stated their belief that the Office of the Federal Safety Commissioner (OFSC) is largely to blame for the over-emphasis on SWMS in the construction sector and for the bloating of SWMS into a document that does little to improve safety and is more related to meeting the audit criteria of the OFSC.⁵

- 3.4 Master Builders recommends that the OFSC should prepare material which specifically rebuts this criticism and which actively engages industry debate. The OFSC should not be absent from active debate about contentious Scheme issues.

Recommendation 2: The OFSC should more actively manage criticisms or critiques of the Scheme.

4 Application of the Scheme

Question 1: Should the thresholds for directly and indirectly funded projects be lowered, removed, increased, or remain unchanged? To what levels?

- 4.1 Master Builders has received no complaints from members about the thresholds for directly funded or indirectly funded projects. Master Builders therefore submits that the current thresholds appear to be adequate, but is mindful that the current thresholds will need to be regularly considered for the future. Therefore we would not object to the indexation of the threshold levels or a suitable adjustment, say every 3 years.
- 4.2 We also note that the thresholds do not appear to have an objective basis for their settings. The Scheme could, for example, reflect the thresholds set by the *Public Governance Performance and Accountability Act, 2013* (Cth) regime that commences on 1 July 2014. Whilst this would provide another criterion that is more readily known to Government and its agencies, that threshold is tied to the terms of Australian free trade agreements rather than any substantive criteria that directly affect the Scheme. Hence, on balance, it would seem that the market has become used to the current thresholds and they should not therefore be lightly set aside.

Recommendation 3: Keep the current thresholds for directly and indirectly funded projects unchanged. However, indexation of the thresholds should be considered or a suitable adjustment made, say every 3 years.

⁵ Kevin Jones, 'Serious questions raised over the role of Safe Work Method Statements', SafetyAtWorkBlog, <http://safetyatworkblog.com/2013/06/03/serious-questions-raised-over-the-role-of-safe-work-method-statements/> accessed 3 March 2014.

Question 2: Should the definition of building work be changed? If yes, how should building work be defined?

- 4.3 Master Builders submits that the definition of building work for the purposes of the Scheme should be consistent with the definition of building work in the *Building and Construction Industry (Improving Productivity) Bill 2013*, if that Bill is passed. We note that the Scheme will be reconstituted, but without substantive change, under the terms of that legislation.

Recommendation 4: The definition of building work for the purposes of the Scheme should be consistent with the definition of the *Building and Construction Industry (Improving Productivity) Bill 2013*, if that Bill is passed.

Question 3: Should exemptions to the Scheme apply to particular agencies or sectors of work (for example, residential)?

- 4.4 Master Builders submits that the Scheme should apply to all sectors and agencies that undertake building work as defined in the governing statute, subject to the financial thresholds. The setting of broad exemptions, such as occurred with the Building the Education Revolution (BER) funding, should not be replicated. We note that the definition of “building work” discussed in paragraph 4.3 will exclude the majority of residential construction.

Recommendation 5: The Scheme should apply consistently to all sectors and agencies that undertake building work, subject to the Scheme’s funding thresholds.

5 Accessibility of the Scheme

Question 4: What measures can be implemented to reduce the time taken to gain accreditation?

- 5.1 Master Builders considers that the lengthy process to become accredited can act as a disincentive for smaller companies to apply for accreditation. This is particularly the case for companies that are located in areas where the availability of Australian Government funded building work is sporadic (in particular, regional areas) and therefore does not form a significant part of the normal business of the company.
- 5.2 Master Builders understands that the introduction of the ‘gap-analysis’ process whereby the company undertakes a gap-analysis of their systems to ensure they are ready for Scheme accreditation that has replaced the ‘desk-top audit’ process has made the application process simpler by reducing the significant volumes of

documentary evidence required to be sent to the OFSC. Master Builders recommends that strict timelines are put in place for the OFSC to respond to the initial application and to carry out the onsite audit.

- 5.3 The OFSC could give consideration to holding meetings where potential applicants could be briefed on critical elements of the Scheme. These meetings would be given public notification. At these briefings a consistent message about the manner in which the Scheme would be implemented during and following the accreditation process should be maintained. This submission highlights the need for that level of consistency.

Recommendation 6: The OFSC should implement and adhere to strict timelines to respond to an initial application for accreditation and to carry out the onsite audit.

Question 5: How can the accreditation process and communication of the process be improved to assist first time applicants?

- 5.4 A forum of the kind referred to in the prior paragraph should be focused on first time applicants i.e. a dedicated forum for those applicants should be convened. This forum could be reinforced by simplified, tailored material aimed specifically at those with little or no knowledge of the Scheme that would be labelled as such on the OFSC web site.

Question 6: What are the net additional costs and benefits (for example, beyond legislative requirements) of achieving and retaining accreditation under the Scheme? How can costs be minimised while not reducing safety standards?

- 5.5 Many companies have expressed the opinion that there is little net benefit in accreditation other than being able to undertake government funded building projects, i.e. that the Scheme is not changing the WHS culture of the building and construction industry. There have, however, been focus groups where the opposite conclusion was voiced. The OFSC should consider implementing a form of survey which measures this issue and which properly assesses both the attitudes of member companies on this subject and which assesses the costs and benefits of the Scheme in an objective manner. The survey instrument could be designed with industry stakeholders. We also refer to the findings of the Productivity Commission discussed in detail in section 12 of this submission.

Recommendation 7: The OFSC should consider implementing a form of survey which measures costs and benefits and which properly assesses both the attitudes of member companies and which assesses the costs and benefits in an objective manner.

- 5.6 Costs can be minimised by obviating the need for companies to refer to Australian Standards in their work health and safety management system (WHSMS). One company gave an example of a FSO requiring the company to refer in the relevant WHSMS to a diagram contained in AS1576 – Code of practice for metal scaffolding (known as the SAA Metal Scaffolding Code). This is an example of additional expenses incurred by the company in needing to change the WHSMS and to purchase the Australian Standard for no identifiable safety benefit.
- 5.7 Throughout this submission unnecessary duplication of regulatory requirements is noted (in particular see section 6). The Scheme should be reviewed so that this level of duplication is removed.
- 5.8 We note that a number of the favourable conclusions about the performance of Scheme participants reached by the OFSC relate to improvements in safety measured via lost time injury frequency rates (LTIFRs). This measure is open to manipulation. The problem with LTIFRs is the corruption of data. They are a lag indicator that is easily manipulated. Lag indicators measure final outcomes – they are tools that identify the hazard once it has manifested. Factors like management attitude to restricted work, worker attitudes to light duties/compensation system/safety awards all have an impact on whether the incident will be recorded appropriately. LTIFRs should not be relied on as an integral component of measuring the Scheme's success or otherwise. The measure should not be the sole indicator of cost reduction; appropriate lead indicators should be considered.

Question 7: Should AS/NZS 4801:2001 certification be removed as a pre-requisite to applying for Scheme accreditation?

- 5.9 Although having AS4801 certification is a prerequisite to applying for Scheme accreditation, achieving this level of certification appears to have little bearing on Scheme accreditation. The Scheme accreditation process covers a number of the same areas as certification to AS4801, including consultation and communication processes and senior management commitment. Companies need to specifically address these areas and provide documentary evidence to the OFSC with the implication that these aspects of AS4801 are deficient in practice.
- 5.10 The criteria set for the Scheme are sufficiently distinct so that companies are unable to use systems and processes put into place to meet AS4801 in order to at the same time meet the Scheme requirements. For example, a company reported it sought to use AS4801 certified incident reporting and investigation forms in order to meet the

reporting obligations of the OFSC. The OFSC would not accept this approach, adding to the administrative burden for the company without adding to improved safety.

- 5.11 The harmonised model WHS legislation removes risk assessment where a control to a risk is known. In contrast, risk assessment is the cornerstone of AS4801. Another feature of AS4801 is the use of risk matrices, including calculations of residual risk, which have added a level of complexity for companies needing to be certified to AS4801. The use of risk matrices is inconsistent with the principles of the harmonised WHS laws where the requirements to carry out residual risk ratings have been removed from codes of practice such as the Construction Work code of practice.
- 5.12 One factor that has negatively affected the decision of one company to not proceed with Scheme accreditation is the requirement to be certified to AS4801 before then completing the Scheme audit criteria. As the certification standards differ between AS4801 and the Scheme, the company would need to concentrate on compliance with a document and use the “big stick” approach (in its words) to maintain compliance. Similarly, the cost of maintaining AS4801 as well as the Scheme requirements places the Scheme accreditation out of this particular company’s consideration.
- 5.13 Master Builders submits that certification to AS4801 or OHAS18001 should be removed from the Scheme requirements.

Recommendation 8: The prerequisite of needing to be certified to AS4801 or OHAS18001 should be removed from the Scheme requirements.

Question 8: What changes can be made to current requirements to make applying to the Scheme and achieving accreditation easier for smaller companies?

- 5.14 Removing the requirement of needing to be certified to AS4801 or OHAS18001 prior to accreditation will make applying the Scheme easier for smaller companies.
- 5.15 Despite the statement in the prior paragraph, in essence, the Scheme is not designed to accommodate small builders. Its fundamentals militate against smaller companies achieving accreditation. Smaller companies do not possess the internal infrastructure to achieve accreditation. A root and branch restructuring of the Scheme beyond the terms of the review would be required to formulate a better way of accommodating smaller companies.
- 5.16 Smaller companies claim that the Scheme acts as a barrier to entry in respect of government work and that the Scheme lessens competition.

6 Clarity of Scheme requirements

Question 9: What changes and support measures can be introduced to clarify criteria and Scheme requirements and assist companies in the accreditation process?

- 6.1 Master Builders submits that the Scheme criteria should be streamlined and written in plain English. The audit criteria should also be simplified and focused on outcomes rather than focusing on documented procedures.
- 6.2 The criteria are currently prescriptive and divorced from on-site safety. They should be re-framed to take away the emphasis on a paper driven system. With stricter interpretation of the criteria, vindicated by the OFSC, the level of auditor discretion will diminish. Hence, the criteria should focus on agreed outcomes and these should be settled via industry workshops post the review.

Recommendation 9: The Scheme criteria should be streamlined and written in plain English. The Scheme criteria should also be simplified and focused on outcomes rather than focusing on documentation.

- 6.3 Some companies have reported that the application of corrective action reports (CARs) by FSOs is inconsistent with the auditing standards of RABQSA and JAS-ANZ. There are two levels of CARs that can be raised as a result of Scheme audits; major and minor non-conformances defined at paragraph 6.6 below. Feedback from companies is that FSOs seem to have lost the concept of an 'opportunity for improvement' (OFI) and some CARs relate solely to a trivial need which is to insert a cross-reference between documents or the need to correct the title of a document or the description of a meeting which is inconsistently recorded in company records (but is not confused within the organisation).
- 6.4 One company reported that it had received a CAR as the FSO considered that the company had not communicated its OHS policy. The evidence the FSO relied on for coming to this conclusion was asking a second year apprentice what the company's OHS policy said and the apprentice not knowing. This does not show an appropriate recognition of the scale of importance of various factors at play in good WHS outcomes and hence diminishes credibility. What constitutes a CAR should be clearly defined and consistently applied to avoid undermining the credibility of the Scheme.
- 6.5 Companies have reported that there is an overemphasis on paperwork which does not add to an increase in safety, particularly in relation to risk assessments. For example, a FSO required a separate risk assessment to be prepared for each hazardous

substance used on site. In effect, this meant regurgitating the information on the existing material safety data sheet for each substance. In another example, a FSO required a company to complete a risk assessment for each item of plant on site. This task appeared to merely duplicate the information provided by the manufacturer and set out in the SWMS which outlined the method for safe use of the relevant plant. In typical feedback received from individual members one company expressed the view that “safety prevention is gauged in kilograms of paper and not on well managed safety performance.”

- 6.6 In the Fact Sheet entitled “Corrective actions and the Auditing Process”⁶ minor and major corrective actions are defined as follows:

A major non-conformance is where there is the absence of a documented process, and / or the absence of implementation of a process where the opportunity for implementation has occurred in relation to a specific criterion.

A minor non-conformance is where there is a partially documented and implemented process where the opportunity for implementation has occurred in relation to a specific criterion.

These definitions encapsulate the difficulties of the Scheme. The language is poor and one comment received is that they are unintelligible. The definitions are so broadly expressed that the level of discretion vested in FSOs is unacceptably high. These propositions reinforce the difficulties with the specific issues just discussed. The definitions show the unacceptable emphasis on documented processes.

Question 10: In what ways can the interaction between principal contractors and subcontractors be improved to increase clarity of requirements and reduce compliance costs?

- 6.7 As only principal contractors are required to be accredited under the Scheme in order to undertake Australian Government funded building and construction work, the principal contractor bears the responsibility for performance improvement and cultural change by subcontractors. Hampson and Kwok⁷ have noted that up to 90% of the work on a building site is undertaken by subcontractors. Accredited companies have provided Master Builders with a range of feedback on this issue, including the examples now set out:

⁶ See http://www.fsc.gov.au/sites/FSC/Resources/AZ/Documents/Corrective_actions_auditing_process.pdf

⁷ K Hampson and T Kwok, “Strategic Alliances in Building Construction: A Tender Evaluation Tool for the Public Sector” *Journal of Construction Procurement* Vol 3, No 1, (1997) p28.

- 6.7.1 Example 1: Substantial work is required to bring subcontractors up-to-speed because many have little or no understanding of the Scheme or its requirements and therefore their systems lack detail and maturity.
 - 6.7.2 Example 2: In order to improve industry safety outcomes resources and effort may have been better spent focussing on subcontractors. One respondent considered that at the time the Scheme was established more consideration could have been given to the then current level of compliance with legislative requirements and therefore where to establish the benchmark for the Scheme.
 - 6.7.3 Example 3: The Scheme should penetrate down the contractual chain. This would assist to change safety culture; especially where any subcontractor was a bigger employer than the principal contractor and engaged most workers on a project. This leads to a large percentage of the workforce on a site not committed to the Scheme even if the employees of the principal contractor are committed. The member commented that subcontractors should be directly bound by the Scheme.
 - 6.7.4 Example 4: The fact that the Scheme uses the principal contractor to drive subcontractor behaviour was one of the factors that deterred a company from seeking accreditation.
 - 6.7.5 Example 5: Many subcontractors are large, sophisticated companies that specialise in a particular field of work such as heavy lifting, electrical, steel fixing, scaffolding, fabrication, formwork and the like. Requiring the principal contractor to ensure that the subcontractor's systems are compliant with the Scheme requirements is made even more difficult when the specialised work being performed by the subcontractor is not completely understood by the principal contractor and where the subcontractor has no benefit or motivation derived from compliance with the Scheme.
- 6.8 A broader consideration for the review is whether the Scheme should continue to apply solely to principal contractors, including whether it is consistent with the approach adopted in the harmonised WHS laws. For complex workplaces such as construction sites, the model WHS laws establish a framework where there are multiple and

overlapping primary duty holders. Duty holders are required to formally consult, cooperate and coordinate with other duty holders.⁸ This process could be viewed as inconsistent with the compliance driven framework established by the Scheme and is worthy of further objective scrutiny. Obviously, merely imposing the current Scheme on subcontractors would be an insufficient response. It is only in the context of a revised Scheme that this step should be contemplated.

Recommendation 10: The review panel should consider whether the Scheme should continue to apply solely to principal contractors and consider whether the Scheme is consistent with the harmonised WHS laws regarding co-operation.

7 Ongoing accreditation compliance requirements

Question 11: Is the current accreditation period of up to three years appropriate? If not what should it be?

7.1 Master Builders submits that accreditation should be ongoing subject to the accredited company having a satisfactory record as a result of compliance audits, as discussed below.

Question 12: Should reaccreditation be treated differently to accreditation? In what ways?

7.2 The reaccreditation process requires a company to provide information that has already been supplied to the FSC and which is the focus of regular audits. One company noted that documentation provided does not appear to have been properly analysed by the FSC; in a follow-up telephone call from the FSC the vast majority of the additional information sought was already included in the documentation provided.

7.3 Master Builders submits that reaccreditation should be abolished. Accredited companies should keep their accreditation subject to satisfactory results from ongoing compliance audits.

Recommendation 11: The reaccreditation process should be abolished. Accredited companies should keep their accreditation subject to satisfactory results from ongoing compliance audits.

⁸ For example see: Model *Work Health and Safety Act 2011*, s46.

Question 13: How would we better ensure that companies maintain the standard achieved at accreditation into the future and across all projects? How can an element of the unknown be added to audits?

7.4 Each accredited company should be audited on an occasional basis to ensure ongoing compliance rather than re-accreditation relied on to the current extent.

7.5 Auditing should be undertaken regularly on a random basis but with a uniformly applied time scale. This concept would mean that during say a 2 year timeframe each accredited company would be audited, say, 4 times but at different intervals over those 2 years. The current procedure for selection of sites for the conduct of audits⁹ for accreditation could be usefully employed to identify appropriate sites but then the timing of audit visits could be less planned than is currently the case to bring with them an element of the random.

Question 14: What factors can be taken into account in undertaking a risk assessment of a company's performance during its accreditation? What would be the key risk indicators?

7.6 The answer to these questions is dependent on the manner in which the Scheme is re-framed and should be revisited post the review.

Question 15: Should there be an annual fee for maintaining accreditation once accredited? Would this fee foster greater voluntary compliance?

7.7 Master Builders strongly disagrees with the suggestion that an annual fee should be charged for maintaining accreditation. The levying of a fee would not foster greater voluntary compliance as the primary reason for accreditation is the ability to undertake government funded building projects. The Scheme is not a replacement or alternative to other commercial certifications such as AS4801, OHSAS18001 or the yet to commence ISO45001.

7.8 The levying of a fee would further discourage companies from seeking accreditation.

Recommendation 12: There should be no annual fee charged to accredited companies for maintaining accreditation.

Question 16: Is the WHS data collected by the OFSC and the data analysis produced appropriate and beneficial? How could collection and analysis be improved?

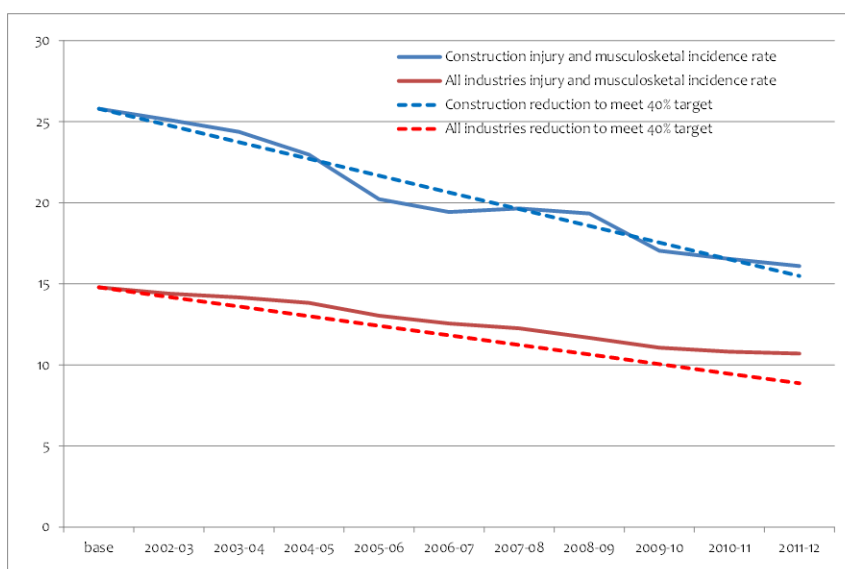
7.9 One of the goals of the OFSC when it was established in 2005 was to set up a mechanism to collate better and more reliable WHS data for the building and

⁹ See, for example, Fact Sheet "Site selection for on-site auditing for accreditation" at <http://www.fsc.gov.au/sites/fsc/resources/az/pages/factsheet-siteselectionforon-siteauditingforaccreditation>

construction industry and to provide leadership in achieving a reduction in fatalities and serious injuries. The industry was committed to playing its part in achieving the goals of the National OH&S Strategy.¹⁰ This commitment was reflected in the signing of the Leadership Charter at the OFSC's CEO Forum in August 2008 by the CEOs of leading building companies and by the Master Builders' Board endorsing the National Strategy shortly after its publication.

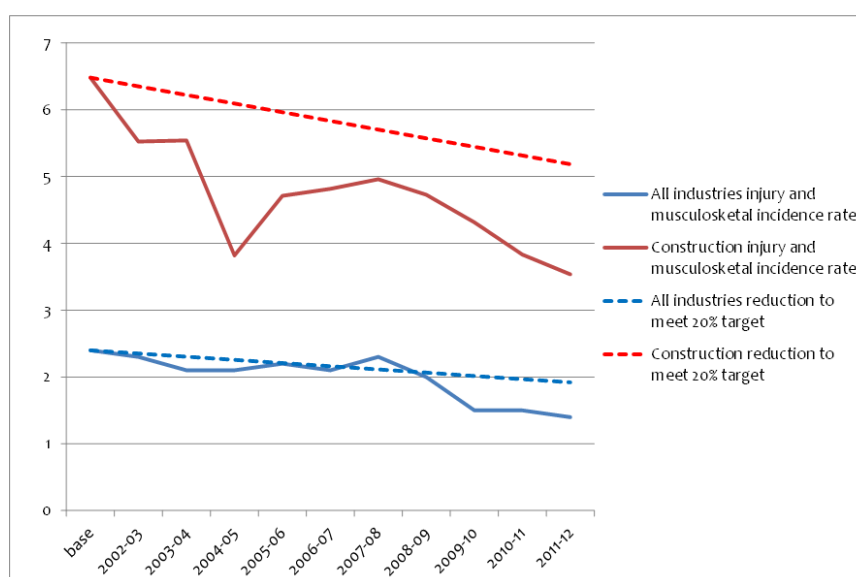
- 7.10 The Leadership Charter represented a public commitment to improving the health and safety of all those working on building and construction sites in Australia. Master Builders supported the National OH&S Strategy and endorsed the Leadership Charter. Master Builders was motivated to make these commitments by its concern to reduce fatalities and serious injuries in the industry and to become part of the improvement process. Some workshop participants have indicated that since the CEO Forum in 2008, the OFSC has lost its leadership function and appears to have become process driven. Even if this perspective is contested, it is a matter that the OFSC must address because that belief is widespread in the construction industry.
- 7.11 The goal of the National Strategy was a reduction in serious injuries by 40% and a reduction in compensated fatalities by 20% from the base period statistics of 2001 to 2012. The incidence rate of serious claims made per 1,000 employees in the construction industry was 25.8 in the base period. The sector experienced a reduction in serious claims over the 10 year period and the projected rate in 2011-12 was 16.6. This equates to a reduction of 35.7%, just short of the target of a 40% reduction: see Graph 1. The target was not met for the construction industry. This is in-line with the outcome of 'all industries' which missed the target by some margin. The OFSC should institute research which seeks to isolate the rationale for the improvements and which compares Scheme company performance against this measured experience. If possible, research, perhaps jointly undertaken with Safe Work Australia, could be commissioned which examined the principal variables that affected the result, inclusive of the variable of accreditation.

¹⁰ National OH&S Strategy 2002-2012, National Occupational Health and Safety Commission, Commonwealth of Australia, 2002.

Graph 1 – Serious claims incidence rate performance against 40% reduction target

Source: Safe Work Australia National Data Set for Compensation-based Statistics (NDS)

7.12 The compensated fatality incidence rate per 100,000 employees in the construction industry was 6.5 in the base period. That figure was reduced to a projected rate of 3.5 in 2011-12, a reduction of 46.2%: see Graph 2. This reduction rate is more than double the 20% target set in the 2002-2012 strategy, but Master Builders notes that more should always be done to prevent fatalities at work.

Graph 2 – Fatality incidence rate performance against 20% reduction target

Source: Safe Work Australia National Data Set for Compensation-based Statistics (NDS)

7.13 Data for accredited companies is not publically available. Hence, a comparison of the performance of accredited companies against the performance of the wider construction industry against the targets set in the National Strategy is unable to be made. The OFSC should collate this data and publish it on the OFSC website and consider the research mentioned above in paragraph 7.11.

7.14 Under the new Australian Strategy (2012-2022), progress against the fatality target will be measured using data from the Traumatic Injury Fatality collection. This collection contains information on all persons who died while working including unpaid volunteers, family workers and persons undertaking work experience. The Traumatic Injury Fatalities collection combines information from the following three datasets in order to have complete coverage of the Australian workforce:

- The National Data Set for Compensation-based Statistics (NDS)
- The Notifiable Fatalities Collection (NFC), and
- The National Coronial Information System (NCIS)

7.15 The OFSC should collect and publish data from accredited companies and Scheme projects that is comparable to the Traumatic Injury Fatality collection to be able to compare the performance of accredited companies against the performance of the wider construction industry against the target set in the Australian Strategy. This data collection should be a priority in any revised Scheme.

Recommendation 13: The OFSC should collect and publish data annually that is comparable to the performance of the wider construction industry against the targets set in the National OHS Strategy and the Australian Strategy.

7.16 The 1999 National Occupational Health and Safety Commission report on OH&S Performance in the Construction Industry¹¹ highlighted the importance of positive performance indicators (PPIs). The focus of PPIs is on assessing how successfully a workplace or enterprise is performing by monitoring the processes which should produce good OH&S outcomes. PPIs can be used to measure relevant WHS systems, process management and compliance with WHS practices in the workplace. The report goes on to construct a range of performance indicators by identifying the factors that influence performance. Following input from case studies and further elaboration

¹¹ National Occupational Health and Safety Commission, *OH&S Performance Measures in the Construction Industry*, (1999), Sydney.

of the model, the report identified 22 PPIs that covered planning and design, risk management, management processes, psycho-social working environment and monitoring.

7.17 Research commissioned by the Safety Institute of Australia found that:

Most CEOs no longer relied on the Lost Time Injury Frequency Rate (LTIFR) and OHS audits as primary performance measures. All reported some difficulty in measuring the effectiveness of their programs and most were exploring lead measures.¹²

(See comments in paragraph 5.8 above in addition)

7.18 Master Builders encourages PPIs to be adopted by building and construction industry participants that implement WHS management systems. The OFSC should collect PPI data from accredited companies and publish the findings on the OFSC website. This will demonstrate leadership by promoting the use of positive indicators.

Recommendation 14: The OFSC should collect PPI data from accredited companies and publish the findings on the OFSC website.

Question 17: How could the information disseminated to industry be improved to better educate for best practice and benchmarking to provide self-help opportunities for companies?

7.19 Master Builders notes that the OFSC has compiled various case studies which are published on the OFSC website. These case studies appear, however, to be more associated with Scheme requirements than being used to demonstrate best practice in WHS. The use of such case studies that have been compiled by the OFSC and disseminated anonymously would assist in providing self-help opportunities for companies. Similar case studies can be found at Appendix C of the Safe Work Australia model Code of Practice, *How to Manage WHS Risks*.¹³

Recommendation 15: Case studies should be developed by the OFSC to help provide companies with self-help opportunities.

¹² Peter Wagner & Associates, 'Safety – A Wicked Problem: Leading CEOs discuss their views on OHS transformation', 2010, p 3.

¹³ Safe Work Australia, *How to Manage WHS Risks*, model Code of Practice, http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/633/How_to_Manage_Work_Health_and_Safety_Risks.pdf, accessed 5 March 2014.

8 OFSC and FSO performance

Question 18: How can FSO consistency in behaviour and audit interpretation be improved and reporting of specific instances of inconsistency be increased?

- 8.1 Master Builders considers that there should be a role for FSOs in identifying and disseminating best practice examples. However, where FSOs identify best practice in a company, this methodology should be provided to other companies for advice only rather than be mandated through compliance action. It should then be up to that company to determine whether and how to apply the best practice methods in their operations, and any timeframe to achieve that end. This approach by FSOs would be consistent with the role of the OFSC of promoting best practice on building and construction projects, albeit that a more consistent approach to the concept amongst FSOs is currently needed. This comment was made despite the knowledge of the existence of an FSO Code of Conduct.¹⁴ In this context it is Master Builders' policy that the Code should be strictly adhered to with complaints made against FSOs independently reviewed.

Recommendation 16: Master Builders considers that there should be a strong role for FSOs in identifying and disseminating best practice examples.

- 8.2 Best practice principles should be consistently applied by FSOs. Subjectivity of the audit process does not provide companies with the certainty required in designing complaint systems. For example, one company advised that even after the OFSC had issued the Safe Work Method Statement Fact Sheet, one FSO required the inclusion of actual text from legislation to be specified in the SWMS while a second FSO questioned why so much information about the legislation had been included in the SWMS. Continuity about best practice was absent.
- 8.3 An example given of inconsistency from member feedback is based around providing a residual risk score to a project risk register. A FSO advised that the company was required to have a residual risk score. In order to comply with this request the company was required to change its WHS management system, communicate the change to staff across 16 projects, and had to risk-analyse every control on each project's risk register. On a follow up project surveillance audit, another FSO made the comment that residual risk scoring on the project risk register was not important. The concept of best practice was again lost in this bureaucratic and inconsistent approach that was costly but provided no benefit to the company.

¹⁴ See: http://www.fsc.gov.au/sites/FSC/Resources/AZ/Documents/Federal_Safety_Officer_Code_of_Conduct.pdf

8.4 Other feedback received indicates that FSOs are not following the evidence guide.

Question 19: Is FSO conflict of interest an issue? If yes, in what ways can it be addressed?

8.5 As FSOs are contractors appointed by the OFSC after a tender process, focus group participants considered that this model leads to a conflict of interest and has the potential to impact on the integrity of the audit process. For example, a company can engage a consultant who is on the FSO panel to undertake preparatory work for an audit. This means that the consultant is unable to participate in the FSC audit as an FSO. Focus group participants also considered that the appointment of FSOs as contractors meant that they did not “own” the culture of the OFSC. Master Builders submits that where possible FSOs should be direct employees of the OFSC to remove the potential for conflicts of interest.

Recommendation 17: FSOs should be direct employees of the OFSC to avoid a conflict of interest.

Question 20: How can the OFSC improve its own performance? In what ways can the OFSC better articulate its message of improved safety and cultural change to the industry?

8.6 The idea of what best practice comprises must be a known consideration.

8.7 This submission provides answers to these questions in the broad.

9 Agencies’ adherence to Scheme requirements

Question 21: What can the OFSC do to assist agencies to comply with Scheme requirements?

9.1 Construction industry clients are key drivers of performance improvement and innovation.¹⁵ As such, the OFSC has developed the *Model Client Framework*,¹⁶ (the Framework) which defines a ‘model client’ in the following terms:

*A model client is one which is openly and transparently committed to the principles of best practice in its organisational safety culture.*¹⁷

The Framework is intended to establish broad values by which Australian Government agencies should operate.¹⁸

¹⁵ G. A. Briscoe, et al, ‘Client-led strategies for construction supply chain improvement’ (2004) *Construction Management and Economics* 22, 193-201

¹⁶ Office of the Federal Safety Commissioner, ‘The Model Client Framework: The model client: Promoting safe construction’, <http://www.fsc.gov.au/sites/FSC/Resources/AZ/Documents/Booklet%201%20Model%20Client%20Framework.pdf> accessed 5 March 2014.

¹⁷ Ibid, p 6.

- 9.2 There is evidence that the desired cultural change among procurement agencies is not established sufficiently for WHS to be genuinely factored into the preparation of tenders for building and construction projects. Many agencies seem unaware of the Scheme. In addition, companies participating in focus groups indicated that it is possible for purchasers to structure projects so as to avoid triggering the thresholds at which the Scheme applies. One company gave an example of a federal government funded project which was tendered for by two accredited companies. Both the tendered amounts were over the budget for the project so the client split the job into two smaller contracts which enabled non-accredited companies to tender. Ultimately, a non-accredited builder was awarded the tender.
- 9.3 Master Builders has also become aware of an Australian Government funded project in South Australia being split into two smaller projects to avoid the financial thresholds of the Scheme. Government should not send the message that safety comes after cost savings; there should be no risk shifting of the kind demonstrated in these examples.
- 9.4 The Scheme's audit criteria¹⁹ pay particular attention to integration of design issues into the risk management process.²⁰ Principal contractors have little influence over design. Agencies that are responsible for a project need to be made responsible for safety in design. The OFSC should increase the focus on the role of the funding agency in driving WHS outcomes and on safety in design as is envisaged in the Framework. It should be much clearer in the audit criteria as to how the FSC gauges the notion of "OHS buildability issues" mentioned in SC2.1.
- 9.5 The Department of Employment should, with other Government agencies responsible for procurement, be bound to act as an exemplar. This notion is certainly reflected in the way, for example, the Commonwealth conducts litigation.²¹ This is not the case with the way in which Commonwealth department and agency procurers appear to have utilised the Scheme to date. Not only does disregard for the Scheme offend against ideas of fairness and consistency in practice, deliberate splitting of contracts and manipulation of the Scheme's application would, on its face, to lead to poor outcomes. As part of this review, the Department of Employment should investigate

¹⁸ Ibid, p 6.

¹⁹ See <http://www.fsc.gov.au/sites/FSC/Resources/AZ/Documents/RevAuditCriteria0709.pdf>

²⁰ Id sSC2

²¹ See appendix B Legal Services directions 2005 which sets out *the Commonwealth's obligation to act as a model litigant*.

establishing a model code which takes up the Framework and which requires Commonwealth departments and agencies when procuring construction work to adhere to the Framework. In this manner, Government would lead by example and would demonstrate commitment to work health and safety.

Recommendation 18: The OFSC should increase the focus on the role of funding agencies in driving WHS outcomes and on safety in design as is envisaged in the model client framework.

Recommendation 19: The Department of Employment should, with other Government agencies responsible for procurement, be bound to act as an exemplar.

10 Interaction of the Scheme with other compliance requirements

Question 22: What changes should be made to the way the industry utilises SWMS? What role can the OFSC play to facilitate this change?

10.1 Many companies believe that the OFSC has created confusion with respect to SWMS with some FSOs expecting SWMS for every single activity and process. This expectation is not aligned with the intended purpose and legislative requirement for SWMS; that they are only required for ‘high risk’ tasks. The removal of the SWMS fact sheet from the OFSC website without replacing it continues to create confusion and uncertainty around the requirements for SWMS. There is intense criticism of the OFSC around this issue – see section 3 of this submission.

10.2 The level of detail required to be placed in SWMS makes this document process too complicated for workers who are expected to use them on site. FSOs need to understand that SWMS are not the only means of communicating safe work practices and that SWMS are merely an administrative control. Master Builders submits that SWMS should only be utilised for high risk tasks as is required by the legislation.²² FSOs should not require a company to ‘pad out’ their SWMS during Scheme audits.

Recommendation 20: SWMS should only be required for ‘high risk’ tasks and kept as simple as practicable.

²² For example see: Model Work Health and Safety Regulations 2011, Reg 299.

Question 23: What measures can be considered to reduce procurement related compliance costs and administration?

10.3 This question should be posed to Government agencies in the context of the Coalition Government's priority in reducing red tape. After a review internally by those agencies, this question would be better discussed with stakeholders.

Question 24: What are the other pre-qualification Schemes that can be considered for mutual recognition in order to further reduce red tape?

10.4 Despite the success to date in achieving mutual recognition by some state and territory pre-qualification schemes, accredited companies which undertake both federal and state funded work still face significant administrative burdens. There remain a number of state and territory pre-qualification schemes where mutual recognition has not been achieved. The OFSC should continue to press state and territory governments to recognise Scheme accreditation as meeting the requirement of state and territory schemes. However, even where recognition is achieved, the compliance activities of all schemes are still applied. This means that companies need to prepare for and undertake audits for AS4801 accreditation, state government schemes as well as complying with the Scheme's requirements. This red tape burden imposes a significant compliance burden on companies as was found by the Productivity Commission in the research report *Regulator Engagement with Small Business*.²³ The focus on the paperwork required for all of these audits impacts on companies' capacity to prioritise on-site safety. As well as pressing for mutual recognition with state and territory pre-qualification schemes, the compliance obligations of the Scheme should also be recognised by state and territory governments as meeting their scheme requirements.²⁴

10.5 Master Builders submits that compliance with the Scheme should also mean compliance with state schemes and vice versa, and that this issue should be placed on the Council of Australian Governments' (COAG) agenda.

Recommendation 21: The issue of state schemes recognising compliance of the Scheme as meeting the compliance requirements of the state scheme should be placed on the COAG agenda.

²³ Australian Government, Productivity Commission Research Report, *Regulator Engagement with Small Business*, September 2013, p 15.

²⁴ This was suggested by the Productivity Commission in the report *Regulator Engagement with Small Business*.

11 Other issues

Question 25: Are there ways to increase feedback (both positive and negative) on the Scheme?

11.1 To encourage uninhibited feedback, the OFSC should seek feedback from companies by using a third-party so that companies are free to give opinions without fear of compromising their accreditation, or, at least, with viewing the provision of feedback as having that capability. Third party surveys work, as envisaged in this submission, would be one appropriate device.

Recommendation 22: Anonymous third-party feedback should be sought after initial accreditation, upon a company ceasing to be accredited, and from accredited companies after compliance audits.

Question 26: Are the audit criteria appropriate? Are there criteria that are redundant or that could be removed without impacting safety outcomes? What are the audit criteria that will improve safety in the industry?

11.2 This question has, in part, been answered at paragraph 9.4.

11.3 The audit criteria OH3.1 to OH17.3 all begin by requiring a documented process, procedure or programme to be in place. This aspect of the criteria emphasises the “paper work” flow of the Scheme and the framing of the criteria in this context reinforces that problematic component of the Scheme’s primary focus. The criteria and the focus of the Scheme must change from paperwork driven to outcomes driven perspectives.

Question 27: Are there any other issues specific to the terms of reference that have not been addressed in previous questions?

11.4 These are raised in section 12 of this submission.

12 Productivity Commission

12.1 As indicated in paragraph 2.3 of this submission, this section of the submission deals with the findings of the Productivity Commission that appeared in its recent draft report entitled “Public Infrastructure”. For convenience, pages 510-516 of the draft report containing the Productivity Commission’s considerations are set out as Attachment A.

12.2 We note the Productivity Commission at page 515 of the draft report indicates categorically that the current review will not evaluate whether any safety productivity or other benefits arising from the Scheme exceed the costs of the Scheme or whether

existing safety regulations, alternate certification or accreditation standards would be likely to generate appropriate safety outcomes more cost-effectively. These are matters that, in the opinion of the Productivity Commission, should be studied. Master Builders understands that the OFSC will respond to the draft report. The rationale for not undertaking the work that the Productivity Commission recommends should be encompassed in that response if it does not proceed as part of or separately from the review.

- 12.3 We note, in addition, that the Productivity Commission is concerned that access to Commonwealth funded projects for firms not presently operating in Australia may be hampered by the operation of the Scheme. The Productivity Commission has indicated that options such as recognition of existing safety management systems for firms operating in countries with standards broadly comparable to Australia, or provisional accreditation for firms with appropriate safety records or like accreditation, should be considered. Master Builders' view is that such a step should only be considered if safety could be guaranteed not to be jeopardised. How the notion of "standards broadly comparable" would be measured is at issue. The nature of the so-called "appropriate safety records or accreditation" referred to by the Productivity Commission at page 516 of the draft report would be highly contestable and difficult to identify between countries. We therefore are of the view that this proposal has the potential to hamper safety.
- 12.4 We note that at the end of the discussion in Attachment A, the Productivity Commission has suggested an option which would be to await the report of the current review and then allow the Scheme, with improvements made in response to the review's recommendations, to operate for a period. The Productivity Commission remark that this would enable current processes to take effect and potentially provide a better basis for any subsequent assessment of the benefits and costs of the Scheme and how they compare to other options. In the alternative, the Productivity Commission indicates that were it to be decided that the Scheme's compliance costs are unduly high and unlikely to be significantly reduced by implementing any of the review's recommendations "there would be a case for a more immediate assessment of the merits of maintaining the separate Commonwealth scheme."
- 12.5 As indicated earlier in this submission, Master Builders is of the view that part of the review process should be a demonstration that the Scheme is worthwhile in the interests of improving building and construction industry safety and the findings of the Productivity Commission underline that central tenet of the current review.

Recommendation 23: Part of the review process should be a demonstration that the Scheme has facilitated improvement in building and construction industry safety outcomes.

13 Conclusion

- 13.1 Master Builders’ criticisms of the Scheme should not be interpreted as a withdrawal of Master Builders’ Board’s support for the Scheme. Rather, Master Builders is motivated by a strong commitment to improving the building and construction industry’s work health and safety performance. The Scheme has been one of the Government’s key mechanisms for working with the industry to achieve improved work health and safety performance and culture change, both in the industry and in procurement agencies.
- 13.2 Clearly, it is well past time to have taken stock to determine what role the Scheme is playing in achieving the objectives of improved work health and safety performance and cultural change. What changes can be made to the Scheme to further achieve WHS improvements is a critical form of inquiry and the main worthwhile outcome of this review.
- 13.3 Accordingly, Master Builders supports the review that is proposed by the terms of reference but also supports follow-up of the more wider position proposed by the Productivity Commission.
- 13.4 Master Builders looks forward to participating further with the Department of Employment in this important work.

ABBREVIATIONS

AS4801	AS/NZS4801:2001 Occupational health and safety management systems – Specifications with guidance for use
CAR	Corrective Action Report
FSO	Federal Safety Officer
ISO45001	Draft International Standard: Occupational health and safety management systems – Requirements with guidance for use
JAS-ANZ	Joint Accreditation System of Australia and New Zealand
Master Builders	Master Builders Australia
Framework	Model Client Framework
Model WHS laws	model <i>Work Health and Safety Act 2011</i> , model <i>Work Health and Safety Regulations 2011</i> , model Codes of Practice
OFSC	Office of the Federal Safety Commissioner
OHS	Occupational health and safety
OHAS18001	British Standards Institution <i>OHAS18001:2007</i> Occupational health and safety management systems – Requirements
RABQSA	Registrar Accreditation Board – Quality Society of Australasia
Scheme	Australian Government Building and Construction OHS Accreditation Scheme
SWMS	Safe work method statement
WHS	Work health and safety
WHSMS	Work health and safety management system

14.5 Federal safety accreditation

To be eligible to bid for most Commonwealth-funded projects, head contractors must be accredited under the Australian Government Building and Construction OHS Accreditation Scheme, run by the Federal Safety Commissioner (FSC).⁵⁸

While it might seem that safety accreditation arrangements could have little more than minor effects on infrastructure construction, some inquiry participants have argued that the FSC scheme is unnecessary, costly to comply with and can hamper or deter some businesses from bidding for Commonwealth-funded projects. In calling for a review of the scheme's requirements, for instance, the Victorian Civil Construction Industry Alliance said that they 'place a restrictive burden on contractors wishing to undertake works that are federally funded. The requirements add significant annual operating costs to SMEs that intermittently undertake these works.' (sub. 28. p. 11). And a number of international constructors have indicated that the FSC scheme can hamper efforts of firms without recognised experience in Australia to lead major infrastructure projects here (sub. 74).

While many other regulatory arrangements affecting major infrastructure projects have been subject to analysis (as discussed earlier), the FSC scheme issue has not been covered in such detail. This section thus examines the scheme and the key concerns raised.

Background to the scheme

The scheme commenced in 2006 and was part of the response to the Cole Royal Commission. It had found that the building and construction industry's safety record was unacceptable, and recommended that the government use its influence as a client and provider of capital to foster better performance.

To obtain accreditation, a builder or construction business must first have its OHS management systems separately certified as meeting an Australian standard (AS 4801: 2001) or its international equivalent; and then must be assessed by the FSC against various additional criteria (box 14.4). The FSC assesses applicants through

⁵⁸ The FSC accreditation requirement applies for projects that are directly funded by the Australian Government with a value of \$3 million or more, and to joint projects where Australian Government funding either accounts for at least half of the cost and exceeds \$5 million or exceeds \$10 million (and the head contract accounts for at least \$3 million). Where these thresholds are met, any builder who is not a subcontractor to another builder requires accreditation to work on the site.

desktop reviews and a number of onsite inspections of a project. While there is flexibility in the way businesses can meet the requirements, the FSC notes that:

The Scheme sets a high benchmark and some applicants may need several months to reach the OHS standards required for accreditation. (OFSC 2012b)

Box 14.4 Requirements for FSC accreditation

- Evidence of an OHS management system, certified to AS/NZS 4801:2001 or the equivalent international standard.
- Demonstrated ability to manage construction hazards and high risk activities.
- Record in relation to workplace safety.
- On-site audit results.
- Performance against the following focus points
 - i) demonstrated senior management commitment to OHS
 - ii) integration of safe design principles into the risk management process
 - iii) whole of project OHS consultation and communication
 - iv) demonstrated effective subcontractor OHS management arrangements across building and construction projects
 - v) whole of project performance measurement
 - vi) OHS training and competency to deal with safety risks.

Importantly, the FSC requirements are additional to the standard OHS regulations that apply to building work generally. Head contractors on Commonwealth-funded projects must still comply with state-based regulations and may face penalties or stop work notices on building sites if specific breaches occur. The aim of the FSC scheme is to complement normal OHS regulations, inspections and enforcement procedures by ‘... assessing and auditing how well builders systematically manage work health and safety (including risks and the cause of problems) to minimise the likelihood of incidents occurring.’ (Department of Employment 2014, p. 5)

Does the scheme act as a barrier to foreign firms?

One concern is that the FSC requirements may deter foreign construction firms from entering the Australian market, in turn reducing the level of competition. This may arise partly because the FSC requirements differ from those in other countries, so foreign firms — even if operating with sound safety management systems — may need to alter their processes to gain accreditation (although, of course, this difficulty also arises for local firms currently meeting only state-based OHS regulations and pre-qualification requirements). A further problem for foreign firms is that, before they have actually entered the Australian market, they will have no

domestic sites that demonstrate compliance with FSC requirements and thus are unable to be audited for that purpose.

Foreign firms that wish to compete for Commonwealth-funded projects have three options in these circumstances.

- They can opt for an onsite audit of an overseas project, and make whatever adjustments are necessary at that site to comply with FSC requirements.
- They can enter the Australian market by first undertaking a project funded privately or by state or local governments (that does not require FSC accreditation), but subsequently use that project to develop compliance with FSC requirements and gain accreditation.
- Instead of obtaining accreditation, foreign firms can seek to participate in a Commonwealth-funded project as part of a joint venture or alliance, provided their partner is accredited with the FSC (and the arrangement is approved by the FSC). Under this arrangement, the management of OHS onsite must be undertaken by the accredited partner, utilising its systems.

However, all of these options may still impose significant costs, delays or other difficulties for foreign constructors. And even where international firms seek to side-step the accreditation requirements by coupling with domestic firms, this may reduce the total number of bids on a project and/or diminish the scope for the international firm to apply its full expertise to the project. In some cases, international firms could be precluded from bidding at all simply because they are unable to find a firm with which to partner.

The upshot is that benefits of the expertise, and additional competitive pressure, that foreign firms could bring to the Australian infrastructure market may be delayed or denied. As Austrade submitted:

... a number of international companies have advised Austrade the process is cumbersome and tends to eliminate the possibility for international firms (without recognised experience in Australia) to lead public project consortiums in Australia. This is regardless of the depth and breadth of their international business (sub. 74. p. 20).

The full extent of these problems is unclear. The Commission understands that a large proportion of the international firms that apply for accreditation ultimately obtain it. However, little is known about how many foreign firms, faced with the prospect of accreditation, have declined to apply. Without reasonable information on this matter, it is difficult to gauge the degree to which the accreditation requirements act as a barrier to entry.

Even so, given the concerns of international contractors and the importance of maintaining competitive pressure in the infrastructure construction market, there would be merit in examining means of addressing these problems:

- One option might be for the FSC to ‘recognise’ the existing safety management system requirements for firms operating in countries with standards broadly comparable to Australia (effectively waiving the requirement for separate accreditation using the specific FSC criteria and procedures). However, the Commission understands that requirements in other countries are far less demanding than those in the FSC scheme.
- Another option might be for the FSC to provide ‘provisional’ accreditation to firms with appropriate safety records, but different safety management systems. Were such a firm successful in bidding for a Commonwealth-funded project, it would be expected to subsequently demonstrate compliance with FSC requirements, in part via a satisfactory onsite audit of the Australian project.

These and other ideas could be further developed and evaluated as part of a broader review of the current scheme (discussed below).

Are the compliance costs too high, and is the scheme necessary?

Aside from the particular problems faced by foreign firms, participants argued that the FSC accreditation requirement inflates costs for businesses, in a way that could penalise smaller contractors in particular. If contractors are participating in Commonwealth-funded projects infrequently, they may find it difficult to recoup the costs of obtaining and maintaining FSC accreditation. If the costs are too high, it may not be feasible for them to participate in these projects at all. This would diminish competition for these projects, as well as being problematic in its own right.

Some of the scheme’s costs are borne directly by the FSC, which collects no fees for the consideration of applications and for carrying out onsite audits. The costs borne by the constructor are those associated with changing safety systems to comply with FSC requirements, collecting information necessary to demonstrate ongoing compliance, and making time and staff available for onsite audits.

According to the Victorian Civil Construction Industry Alliance (sub. 28), the costs to businesses can amount to around \$150 000 to initially gain FSC accreditation, and then around \$120 000 a year to maintain it. As there are currently over 300 firms accredited by the FSC, these figures could translate into a total compliance cost of around \$40 million annually. However, estimating compliance costs can be

difficult, and the Commission would welcome further information on these matters.⁵⁹

The broader issue raised by some inquiry participants is whether there is a case for retaining a separate set of conditions for Commonwealth-funded projects at all — conditions that are not required for other projects (including those of the same scale) elsewhere in Australia. Along these lines, the Civil Contractors Federation argued:

[I]t seems unreasonable and unwarranted that an additional layer of safety requirement is applied to the requirements they are already subject to in order to work for State and Territory Governments, and in fact Australia's recognised AS-NZ 4801-2001 standard.

Likewise, the Victorian Civil Construction Industry Alliance submitted:

The Government should investigate the warrant for federally funded projects to meet a higher standard for OH&S than the Australian Standards for Safety (AS4801) which is the current industry standard and can be independently certified by a third party. The investigation should be conducted with a view to adopting AS4801 as the acceptable Standard for federally funded projects. This would provide a level playing field for all.

It should be noted that the Australian Government has indicated its intention to retain the FSC scheme, and it is included in the Bill to re-establish the ABCC.

It should also be noted that the FSC has sought to reduce the administrative burden for builders by progressing arrangements with states and territories to recognise the Commonwealth scheme. Thus, builders accredited under the Commonwealth scheme are automatically deemed to comply with the relevant work health and safety requirements in certain state/territory prequalification schemes. The current Review of the scheme (discussed below) is also exploring other means of reducing compliance costs.⁶⁰ However, given that the FSC requirements are much more onerous than other existing requirements, the federal accreditation scheme will still add to compliance costs.

⁵⁹ One difficulty arises because businesses would need to undertake some expenditure to comply with workplace health and safety laws (and potentially obtain AS4801 certification) in any event: these are potential costs whether the company is FSC-accredited or not. Separating these different cost components can be challenging. The VCCIA's estimates were based mainly on feedback from a member company which was asked, among other things, to estimate the direct costs it incurred in achieving FSC accreditation, over and above what was required to achieve AS4801 certification (J. Stewart., pers. comm. 2 March 2014). The participant has undertaken to provide additional information on the compliance costs following this draft report.

⁶⁰ As part of examining means of reducing compliance costs, the Review is also considering whether AS4801 certification should continue to be a *prerequisite* from FSC accreditation. However, the issues paper for the review does not countenance *replacing* the FSC accreditation requirements with the (less onerous) requirement that firms have AS4801 certification.

Removing the requirement for FSC accreditation, and relying on other existing workplace health and safety regulation or pre-qualification requirements, would of course address concerns about the specific FSC requirements causing barriers to entry for foreign firms or small contractors, as well as reducing the compliance costs associated with accreditation. In supporting this option, the Civil Contractors Federation argued that the FSC's resources could be usefully redirected towards other means of improving OHS outcomes (sub. 34).

Equally, were it found that the FSC scheme confers net benefits and is more cost-effective than alternatives, there could be a case for expanding its reach.

Reviewing the scheme

As noted earlier, some of the above matters are likely to be considered in a review of the FSC scheme, which has just commenced. The Review is being undertaken by the Department of Employment in consultation with an advisory panel comprising representatives of industry associations, the Australian Council of Trade Unions, the FSC and government agencies that procure building works. The Review released a discussion paper in late February 2014. It is to report to the Minister for Employment by June 2014. Ideally, the Review's report will be released publicly soon after.

The scope of the Review is 'to modernise and streamline the Scheme while not reducing safety outcomes', and it will examine various means of reducing compliance costs, among other things.

However, as presently cast, it appears that the Review will not evaluate:

- whether any safety, productivity or other benefits arising from the scheme exceed the costs entailed⁶¹
- whether existing OHS regulations or alternative certification or accreditation standards (including AS 4801) would be likely to generate appropriate safety outcomes more cost-effectively

⁶¹ The discussion paper does, however, report some 'background' data showing a reduction in serious injuries and fatalities in the construction industry since the commencement of the scheme. It also points to a number of indicators suggesting that accredited companies have higher safety outcomes and improve their safety performance following accreditation, although it also notes that it is not possible to isolate the contribution of the scheme from other variables. (Department of Employment 2014, pp. 8–9). The FSC has also pointed to a range of (incidental) benefits for businesses that it claims might arise from accreditation (OFSC 2012).

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- options such as ‘recognition’ of the existing safety management system requirements for firms operating in countries with standards broadly comparable to Australia, or ‘provisional accreditation’ for firms with appropriate safety records or accreditation.

In view of the concerns of international contractors and the importance of maintaining competitive pressure in the infrastructure construction market, the Commission considers that the Review should examine the third of these matters, with a view to recommending measures to improve access to Commonwealth-funded projects for firms not presently operating in Australia.

DRAFT RECOMMENDATION 14.1

The current Review of the Australian Government Building and Construction OHS Accreditation Scheme should examine options such as ‘recognition’ and ‘provisional accreditation’, with a view to the implementation of measures to improve access to Commonwealth-funded projects for firms not presently operating in Australia.

It is less clear cut whether, and by what means, the first and second points above should be examined at this time. These points go to the costs and benefits of retaining the FSC scheme. As noted, the Australian Government is currently committed to its retention, and the present departmental Review is focused on making changes within the current scheme’s broad settings.

Examining the merits of the scheme, and of alternatives to it, would be a different analytical challenge and might best be undertaken in a transparent review process that is independent of the agency that oversees the scheme. One option would be to first await the report of the current Review and then allow the FSC scheme, with any improvements made in response to the Review’s recommendations, to operate for a period. This would enable current processes to take effect and potentially provide a better basis for any subsequent assessment of the benefits and costs of the scheme, and how they compare to other options. Alternatively, were it decided that the scheme’s compliance costs are unduly high and unlikely to be significantly reduced by implementing the Review’s recommendations, there would be a case for a more immediate assessment of the merits of maintaining the separate Commonwealth scheme.