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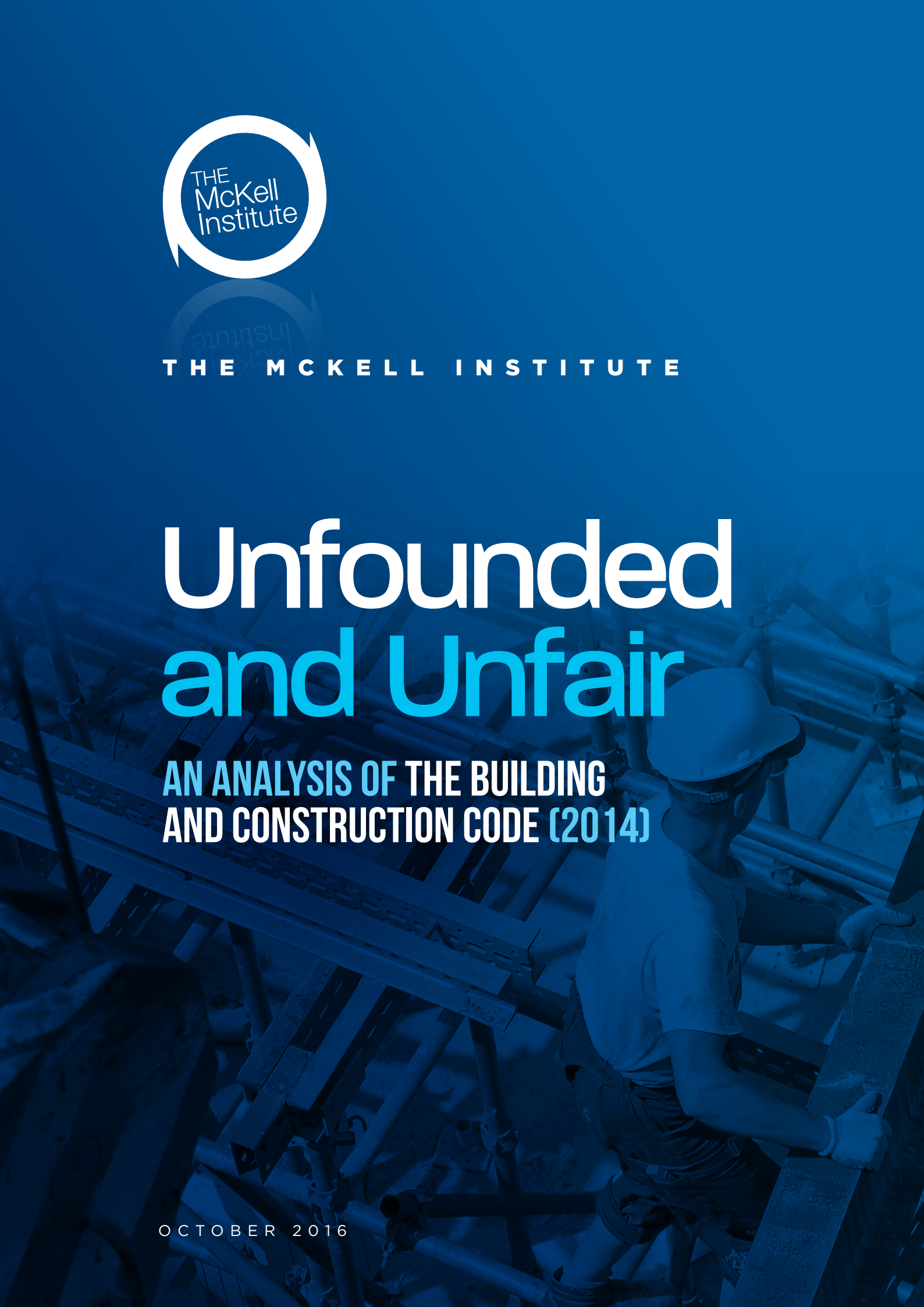
Unfounded and Unfair

AN ANALYSIS OF THE BUILDING AND CONSTRUCTION CODE (2014)



OCTOBER 2016

About the McKell Institute

The McKell Institute is an independent, not-for-profit, public policy institute dedicated to developing practical policy ideas and contributing to public debate. The McKell Institute takes its name from New South Wales' wartime Premier and Governor–General of Australia, William McKell.

William McKell made a powerful contribution to both New South Wales and Australian society through significant social, economic and environmental reforms.

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Background

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CONTENTS

Foreword 6

Executive Summary 8

Recommendations 9

- Recommendation 1 9
- Recommendation 2 9
- Recommendation 3 9

Key Findings 9

Introduction 10

Timeline 12

The intentions and the reality of the Code 14

- Objects of the Building and Construction Industry (Improving Productivity) Bill 2013 14

A booming construction sector undermines the government's justification 6

The Code adversely impacts the number of apprentices 18

The Code increases the number of 457 visa workers 20

Though not yet in force, the Code is already having an impact 24

The Code impacts more businesses & workers more harshly than ever before 25

The Code will impact the health and safety of workers 27

The additional bureaucracy placed on businesses large & small dampens growth 29

Major companies 29
Small business....29

The Code disproportionately impacts women, older workers and unions 32

The employment of women in the industry....32
The employment of mature age workers (45-64 years of age) in the industry 32
Minimum labour standards, including right of entry 32
Requirements for projects to have local procurement provisions 33

Political context 34

Coalition Government 34
Labor Opposition....34
The Greens....34
Former parliament independent and cross-bench summary....34
Disallowance: A path for action by the Senate 35
The disallowance process....36

Conclusion 37

References 38

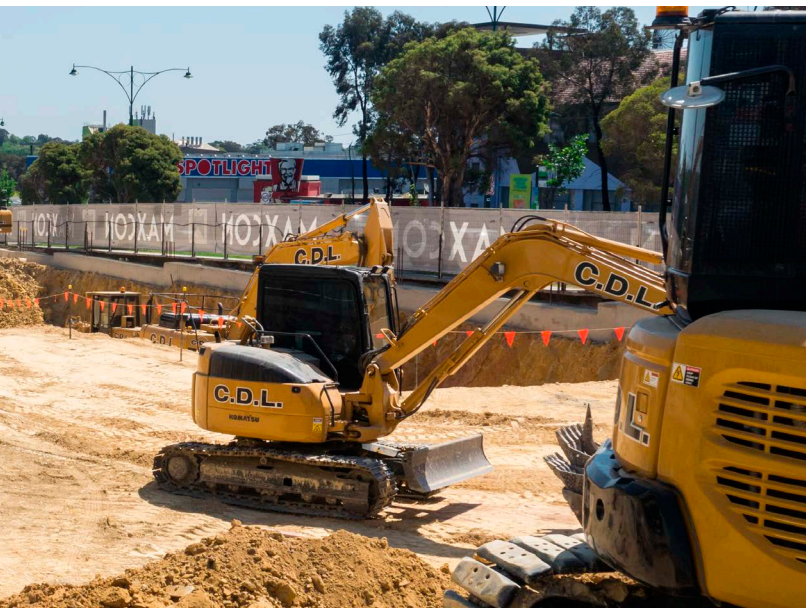
FOREWORD

Over the last term of parliament much has been made of the Australian Building and Construction Commission (ABCC) by politicians and political commentators alike. Indeed, it formed the spurious basis of the Government's decision to dissolve both houses of parliament and call a double dissolution election. But although the ABCC is important, an equally important - yet little discussed - issue is the Building and Construction Industry Code which will come into effect with the passing of the Building and Construction Industry (Improving Productivity) Bill 2014.

This Code represents a fundamental change to the existing code of practice and will effect a significant detrimental impact on the Australian construction industry.

Of particular concern is the impact on the number of Australians undertaking training and the number of Australians able to complete their apprenticeships. Last year, the number of completed apprenticeships decreased by 24%. This creates a significant gap in the pipeline of skilled employees which will increasingly be met by employers needing to rely on the import of a skilled workforce through 457 visa programs.

Importantly, this code of conduct seeks to undermine the ability of employers to make enterprise bargains directly with their own workforce. It is heavy with prescriptive red tape specifically designed to limit the ability of employers to manage their own staff and agree on conditions that are commercially right for them. In doing so it significantly changes the enterprise based workplace relations system that has underpinned productivity growth in Australia since the 1990s.



Despite the extra red tape, the code fails to take the necessary action on builders who have extremely poor safety records, bribery or have a history of bankruptcies and 'phoenixing' activity.

Finally, but perhaps of most critical concern to building workers, their families and their representatives, is that the Building and Construction Industry Code removes the ability to have adequate and mandated safety regimes.

As this report is finalised Safework Australia lists that there have been 30 deaths in the Construction; and Electricity, Gas, Water and Waste Services industries this year. This is an increase of seven deaths from the same point in the previous year. Additionally, there have been another 49 deaths in the associated industries of transport, postal and warehousing, many of which may be covered by the code of conduct. Building and electrical unions have justifiably guarded their function as safety inspectors ferociously for decades and see this Code as a fundamental attack on their ability to ensure a safe workplace.

To date, the Government has failed in its most basic task to justify the need for such invasive and heavy handed legislation. On all macroeconomic figures productivity in the sector outstrips most other industries and is significantly higher than the Australian average. This report makes the case that this code should be rejected and replaced with a more nuanced, data-driven approach.

The Hon John Watkins
CHAIR,
MCKELL INSTITUTE

Sam Crosby
EXECUTIVE DIRECTOR,
MCKELL INSTITUTE

EXECUTIVE SUMMARY

The Building and Construction Industry Code 2014 (the 2014 Code) will come into effect with the passing of the Building and Construction Industry (Improving Productivity) Bill 2014, which was first proposed under the Abbott Coalition Government and subsequently prosecuted by the Turnbull Coalition Government.

There is currently a national building code already in existence in Australia that was implemented under a previous federal government (the 2013 Code), and the 2014 Code represents a fundamental reworking of the existing Code.

In practice, in the construction industry the directions of the 2014 Code are already being enforced in many circumstances, despite not being legislated, due to the government's publicly announced intention to retrospectively apply the 2014 Code.

This has had the deliberate effect of encouraging supply arrangements and negotiated industrial arrangements in the construction industry to be compliant with the 2014 Code lest they be struck down, in full or part, if the 2014 Code would finally be made law.

The spectre of the 2014 Code has been hanging over the construction industry for over two years and continues to cause a significant detrimental impact on the Australian construction industry specifically and the national economy in general.

After careful analysis and exhaustive research, this report makes the case that the 2014 Code is not good for Australian Workplaces and should be rejected, because it:

- Reduces the successful completion of apprenticeships;
- Reduces the amount of Australian workers undertaking training;
- Encourages employers to Import skills through the 457 program;
- Eliminates the ability for employers to develop a social contract with their workforce;
- Does not allow for responsible employers to negotiate positive discrimination to have a more diverse workplace;
- Removes the ability to have adequate and mandated safety regimes; and
- Does not improve productivity within the Building and Construction Industry.

RECOMMENDATIONS

RECOMMENDATION 1

The 2014 Code should be rejected.

The code is superfluous to the stated aims of the Bill given the objects of the Bill can be mandated without the restrictions on legitimate industrial relations practices that are lawful in every other industry. If there was a well-balanced regulatory environment and a well-resourced and respected compliance body, then the need for the 2014 Code becomes obsolete. This would allow the provisions of the 2013 Code to be maintained, as they are consistent with the new Building and Construction Industry (Improving Productivity) Bill.

RECOMMENDATION 2

The 2014 Code should be disallowed under Section 42 of the Legislation Act 2003

RECOMMENDATION 3

It is noted that the 2014 Code fails to meet the objects of the Bill. In particular, it fails to allow for a more productive building and construction industry, it is punitive and one sided in nature, it compromises workplace safety, it does not allow for positive discrimination to benefit older workers and diverse workplaces, it does not allow for more local employment or procurement.

KEY FINDINGS

1. The Code is highly objectionable, as it contains restrictions on legitimate industrial relations practices that are lawful in every other industry.
2. A booming construction sector undermines the Government's justification.
3. The code adversely impacts the number of apprentices.
4. The code increases the number of 457 visa workers.
5. Though not yet in force, the Code is already having an impact.
6. The Code impacts more businesses & workers more harshly than ever before.
7. The additional bureaucracy placed on businesses large and small dampens growth.
8. The Code disproportionately impacts women, older workers and unions.

INTRODUCTION

On 17 April 2014, the Government published an advance release of the Building and Construction Industry (Fair and Lawful Building Sites) Code 2014. A revised advance release was announced on 28 November 2014.

The new code will come into effect when the Building and Construction Industry (Improving Productivity) Bill 2014 commences as an Act.

The 2014 Code sets out the standard conduct for workplace relations expected from contractors that want to perform work funded by the Commonwealth Government. Contractors will be required to meet the requirements of the Code, in order to be eligible to work on Commonwealth-funded projects. Contractors covered by the 2014 Code will be required to act consistently with it, including on future privately-funded work.

Under the 2014 Code, enterprise agreements and other "procedures" will not be able to contain custom and practice provisions that are lawful in any other context.

For example, the 2014 Code prohibits various clauses common in construction agreements, including clauses:

- That prevent unlimited ordinary hours worked per day;
- That guarantee the employee's ability to have a day off on Christmas Day, Easter Sunday, and other public holidays;
- That encourage employment of apprentices;
- That discourage discrimination against mature workers;
- That include agreed stable and secure shift arrangements or rosters;
- That ensures construction workers' conditions and entitlements cannot be eroded;
- That provide for equality and fairness onsite for construction workers; and
- That impact on the rights of construction workers to have a safe workplace.

The 2014 Code will also require strict compliance with the right of entry laws by all industry participants.

When it commences, the provisions of the Code will apply in respect of enterprise agreements made on or after 24 April 2014. This means that from commencement of the Code, contractors covered by agreements that were made on or after 24 April 2014 that do not meet the Code's content requirements for enterprise agreements, will not be eligible to tender for or be awarded Commonwealth-funded building work.

3

TIMELINE

14 NOVEMBER 2013

The Government introduces the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 in the House of Representatives. The purpose is to re-establish "the Australian Building and Construction Commissioner (ABC Commissioner) and the Australian Building and Construction Commission", while the BCI "repeals the Fair Work (Building Industry) Act 2012", introduced by the Gillard government. The Senate refers the bills to the Standing Committee on Education and Employment for inquiry and report by December 2, 2013.

2 DECEMBER 2013

The Government majority led committee recommends the passing of the Bills whilst the Labor and Greens members provide a dissenting report. Labor's minority report said the legislation was "excessive, discriminatory, unnecessary and unjustifiable ... The policy arguments in support of the bills are based on discredited analysis and faulty assumptions." The Greens' minority report said that during the seven years of its existence, the ABCC "was biased in its work as it was driven by an ideological attack on construction workers and unions."

30 DECEMBER 2015

Prime Minister Malcolm Turnbull and Minister for Employment Michaelia Cash announce the Government's intention to re-introduce legislation to re-establish the Australian Building and Construction Commission at a joint press conference in response to the final report of the Royal Commission into Union Corruption. Mr Turnbull declares that " the ABCC bill which has been rejected once by the Senate, will be re-introduced in the first sittings next year."

2 FEBRUARY 2016

Government reintroduces the Bills.

4 FEBRUARY 2016

The House of Representatives passes legislation to restore the Australian Building and Construction Commission.

11 MARCH 2016

The Senate Committee reports back, with Coalition senators recommending the ABCC legislation be passed and dissenting reports from Labor and the Greens recommending rejection. The Greens' report also called on the Government to establish a broad-based federal anti-corruption body and the provisions in relation to the building code be removed from the ABCC legislation.

21 MARCH 2016

Prime Minister Malcolm Turnbull recalls both houses to debate a potential double dissolution trigger. He said, "The restoration of the ABCC [Australian Building and Construction Commission] is a critical economic reform. The time for playing games is over." Parliament was recalled 18 April 2016.

Up until that point the Government needed six of the eight crossbenchers to pass the bill

4 DECEMBER 2013

The Senate refers the legislation back to the Standing Committee on Education and Employment to report by 27 March 2014.

12 DECEMBER 2013

The Bills are agreed to in the House of Representatives.

11 FEBRUARY 2014

The Bills are introduced in the Senate.

27 MAR 2014

The Senate Standing Committee recommends that the Senate not support the re-establishment of the Australian Building and Construction Commission and to not pass the two bills. It reached these recommendations "in view of the failure of the Government and proponents of the re-establishment of the ABCC to:

- establish an economic or productivity case for the ABCC;
- address the very serious incursions on human rights in the bills;
- establish the uniqueness of the building and construction industry sufficient to warrant draconian powers and penalties;
- establish that the coercive powers proposed for the ABCC are subject to sufficient oversight and safeguards;
- establish that the ABCC would improve occupational health and safety in the building and construction industry."

4 MARCH 2015

The Senate debates legislation to re-establish the Australian Building and Construction Commission.

17 AUGUST 2015

The Senate blocks the passage of legislation, which would re-establish the Australian Building and Construction Commission.

through the Senate. At that time, Senator Day (Family First) was the only confirmed supporter. Independent Senators Madigan, Lazarus and Lambie were against, while Senators Wang (PUP), Ricky Muir (Motoring Enthusiasts), and David Leyonjhelm (Liberal Democrat) were yet to confirm and Senator Xenophon indicated support for a second reading of the bill, with a series of amendments.

18 APRIL 2016

The Senate again rejects the legislation to restore the ABCC - 36 votes to 34. Labor and the Greens voted against the legislation, along with crossbench senators Jacqui Lambie, Glenn Lazarus, John Madigan and Ricky Muir. Prime Minister Malcolm Turnbull confirmed that the rejection of the bill would be used as a trigger for a double dissolution election.

THE INTENTIONS AND THE REALITY OF THE CODE

Objects of the Building and Construction Industry (Improving Productivity) Bill 2013

(1) The main object of this Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.

(2) This Act aims to achieve its main object by the following means:

(a) Improving the bargaining framework so as to further encourage genuine bargaining at the workplace level;

(b) Promoting respect for the rule of law;

(c) Ensuring respect for the rights of building industry participants;

(d) Ensuring that building industry participants are accountable for their unlawful conduct;

(e) Providing effective means for investigating and enforcing this Act, designated building laws (to the extent that those laws relate to building work) and the Building Code;

(f) Improving work health and safety in building work;

(g) Encouraging the pursuit of high levels of employment in the building industry; and

(h) Providing assistance and advice to building industry participants in connection with their rights and obligations under this Act, designated building laws and the Building Code.

Despite these admirable intentions as outlined in the Code's objects, the actual impact of the Code is far different.

The 2014 Code is a significant reworking of the existing code. It has been met with hesitation and concern by many in the sector. It is a fundamental change to the 2013 Code in that it significantly changes the penalties; bans certain types of participants in the industry (whilst not banning phoenix companies or those that have been found guilty of bribery or election funding breaches); outlaws enterprise bargaining (in favour of common award or individual contracts); extends the code provisions to any contractor now needing to comply with the code for work that is not within the terms; and does not allow for employers and unions to negotiate a social contract within their enterprise agreements that have the ability to:

- Mandate number of apprenticeships;
- Set benchmarks or agreed ratios for training;
- Encourage the use of local, skilled or trained employees and a disincentive for 457 workers;
- Positively discriminate for older workers;
- Guarantee days off for Christmas and Easter;
- Establish safety provisions for dangerous work.

The (2014) Code is highly objectionable, as it contains restrictions on legitimate industrial relations practices that are lawful in every other industry.[1] For example:

- Individual employment contracts can be made, but collective employment contracts cannot.
- Enterprise Agreements with building companies cannot prescribe safe staffing levels.

- Enterprise agreements with building companies cannot contain terms to ensure that labour hire workers are not discriminated against in their rates of pay for doing the same work.
- Enterprise agreements with builders cannot insist on only skilled, trained tradespeople doing dangerous work.
- Building company managers and union representatives are not allowed to agree to meet at building sites.
- The independent umpire, the Fair Work Commission, is not allowed to resolve disputes freely. For example, if workers complain about unfair rostering or unfair treatment of their leave requests, the Fair Work Commission cannot remedy the unfairness because it is not allowed to limit the employer's right to determine who does what work when.

This Bill has been used as a political football since its inception. The Senate referred the bills to the Standing Committee on Education and Employment for inquiry - twice. (See timeline) The first time, the Government majority led committee recommends the passing of the Bills whilst the Labor and Greens Members provide a dissenting report. Labor's minority report said the legislation was "excessive, discriminatory, unnecessary and unjustifiable". "The policy arguments in support of the bills are based on discredited analysis and faulty assumptions." The Greens' minority report said that during the seven years of its existence, the ABCC "was biased in its work as it was driven by an ideological attack on construction workers and unions."

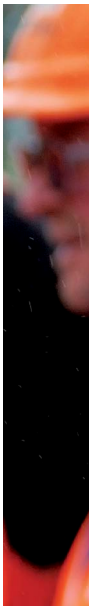
The Bills were then referred to the Committee for a second time. The Senate committee recommends that the Senate not support the re-establishment of the Australian Building and Construction Commission and not pass the two bills. It reached these recommendations "in view of the failure of the Government and proponents of the re-establishment of the ABCC to:

- establish an economic or productivity case for the ABCC;
- address the very serious incursions on human rights in the bills;
- establish the uniqueness of the building and construction industry sufficient to warrant draconian powers and penalties;
- establish that the coercive powers proposed for the ABCC are subject to sufficient oversight and safeguards;
- establish that the ABCC would improve occupational health and safety in the building and construction industry."

When the Senate did not pass the Bill the second time, Prime Minister Turnbull used this as the trigger to call for a double dissolution for the recent Federal Election.

Further, this was claimed at a time when The Australia Institute found that construction is a productive industry with a value added per worker above the average of all industries and well above the average if extremely productive industries such as mining are excluded. Some parts of construction such as heavy and civil engineering are very productive, generating productivity 53 per cent higher than the Australian average.[2] Further, this was under a regulatory environment that showed a decrease in the days lost due to industrial disputes.

A BOOMING CONSTRUCTION SECTOR UNDERMINES THE GOVERNMENT'S JUSTIFICATION



The Australian Building and Construction Industry is a key driver of the Australian economy. It employs more than one million Australians and contributes on average around 8 per cent of GDP.

It is volatile in nature and the number of employees and proportion of the economy has peaked and troughed over the years: including the slump after the 2000 Olympics construction and introduction of the GST, to the highs of the mining boom. Most economists and forecasters agree that at this current point in time the building and construction industry is in decline, but the outlook is solid. The Australian Construction Industry Forum (ACIF) recently claimed the industry had turnover of $212billion in 2015-2016, equating to 12.7 per cent of GDP.[3]

A Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education report issued in 2013 claimed the construction industry currently employs over one million people, representing approximately 8.6 per cent of total employment in Australia.[4] Total employment is forecast to increase by almost 10 per cent between FY13 and FY18. Revenue for the over 350,000 businesses in the construction industry totaled $332.8bn in 2012-13. They also state the construction and built environment industry sector accounts for between seven and eight per cent of Australia's GDP. Moreover, the importance of the construction and built environment industry to the Australian economy has increased during the past decade.

Revenue is projected to increase by an annualised 2.5 per cent[5] over the five years through 2015-16, to $354.6 billion. This includes an expected 1.1 per cent decline in the current year stemming from the winding back of investment in resource and other infrastructure projects and weaker residential construction. The decline in these markets is projected to outweigh growth in the construction of roads and non-residential buildings.

BCI Economics recently found the decline in mining-related investment since mid 2013[6] has only been partly offset by increased expenditure in other industries. Accordingly, they believe the next financial year will be similar to this year's experience.

It is critical to note that economist David Richardson estimates that total productivity in the construction sector is 24 per cent higher than the Australian industry average and productivity in the heavy and civil engineering construction sector is 53 per cent higher than the average. Moreover, since the ABCC was abolished in 2008, labour productivity in the construction sector has grown annually by an average of 4.81 per cent and in the heavy and civil engineering sector it grew by 6.38 per cent. This compares to the average for all industries of 3.52 per cent.[7]

Further, Professor David Peetz from Griffith University argued forcefully against the Econtech economic modelling commissioned by the ABCC and subsequently by Master Builders Australia (MBA) that has formed the basis of the Government's attempts to reinstate the ABCC.[8] Peetz found there was no measurable and statistical improvement to productivity because of the use of the coercive powers prescribed in the Bill and, by extension, the 2014 Code. He argues the cherry picking of data periods and data, as opposed to longitudinal studies such as ABS data, is used as a tool for political marketing, as opposed to scientific argument.

He concludes;

"If the ... data show anything, it is that productivity improved after the ABCC virtually ceased using its compulsory examination powers. However, it would not be safe to conclude from this that the end of compulsory examinations caused the improvement in productivity. A more appropriate conclusion would be that links between cause and effect are too easily drawn – especially, as in the Econtech reports, when cherry picking occurs. It is likely the public policy in industrial relations often has little impact on productivity in construction or many other industries, but it does have a major impact on the distribution of resources, income and wealth."

On the basis of the data available, there is not a compelling argument that the Building and Construction Industry is suffering from suboptimal productivity. The industry benchmarks demonstrate that productivity continues to grow modestly and in line with the national economy, and is stronger than other international standards.

THE CODE ADVERSELY IMPACTS THE NUMBER OF APPRENTICES

The Construction and Property Industry Skills Council estimated a 12 per cent increase in construction workers forecast by 2016-2017. This translates into an additional 127,000 additional workers who will be needed across construction occupations. Even accounting for the attrition of the ageing workforce, there will need to be a significant number of new entrants to the workforce to reach this figure.

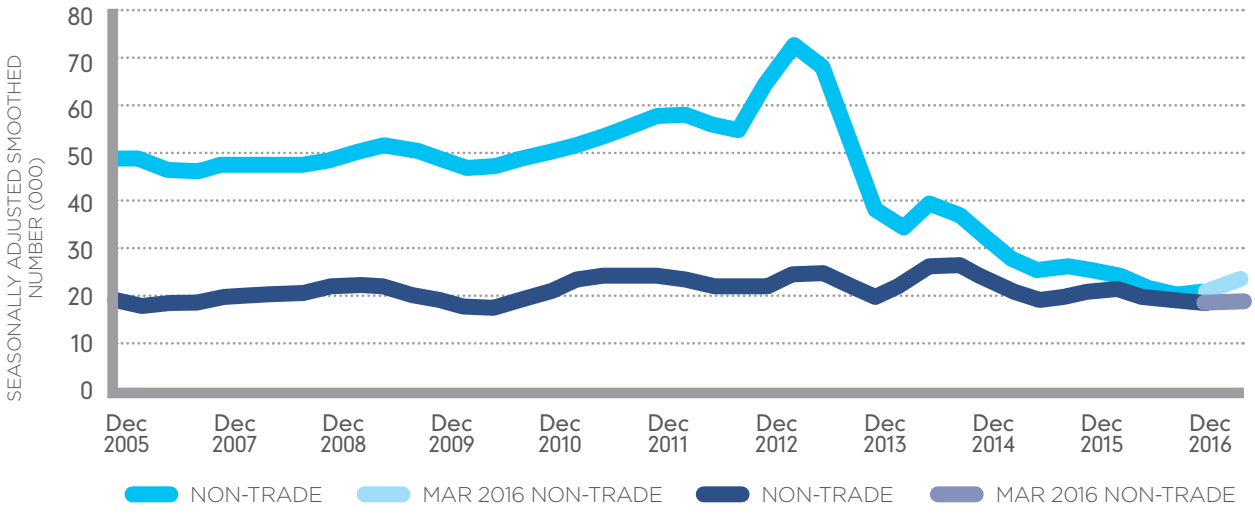
Despite this need, the National Centre for Vocational Education Research (NCVER) reported in June 2016[9] that the number of Australians beginning an apprenticeship has slumped by almost 20 per cent over the past year, with commencements in traditional trades recording a worrying fall.

Just 36,000 people began apprenticeships in the September quarter 2015, down 19.3 per cent on the same period the previous year. The number of people completing an apprenticeship fell by 6 per cent.[10]

However, it is also worth noting that the only instrument that guarantees the number of apprentices to a workforce can be found in suitable enterprise agreements that mandate safety and apprenticeship ratios. The construction industry is one of the few areas where this practice has been well established and works successfully. The 2014 Code outlaws such practices.

FIGURE 1

TRADES AND NON-TRADES INTERNSHIP COMMENCEMENTS (SEASONALLY ADJUSTED AND SMOOTHED) DECEMBER 2005-MARCH 2016



Source: : NCVER 2015

National Centre for Vocational Education Research (NCVER) data on apprenticeships also shows a decline in the number of workers completing their vocational training. By removing the ability to have enterprise agreements that allow for ratios, this will exacerbate the problem. As at 31 December 2015, there were 278,600 apprentices and trainees in-training, 11.8 per cent fewer than at 31 December 2014. Over the 2015 year, completions decreased 24.0 per cent to 118,600 and cancellations and withdrawals decreased 10.6 per cent to 98,200 compared with apprenticeship and traineeship activity over the same period in 2014. "The flow-on from fewer people starting apprenticeships and traineeships is fewer apprentices and trainees in-training and fewer completing", said Dr Mette Creaser, National Manager, Statistics and Analytics.

THE CODE INCREASES THE NUMBER OF 457 VISA WORKERS

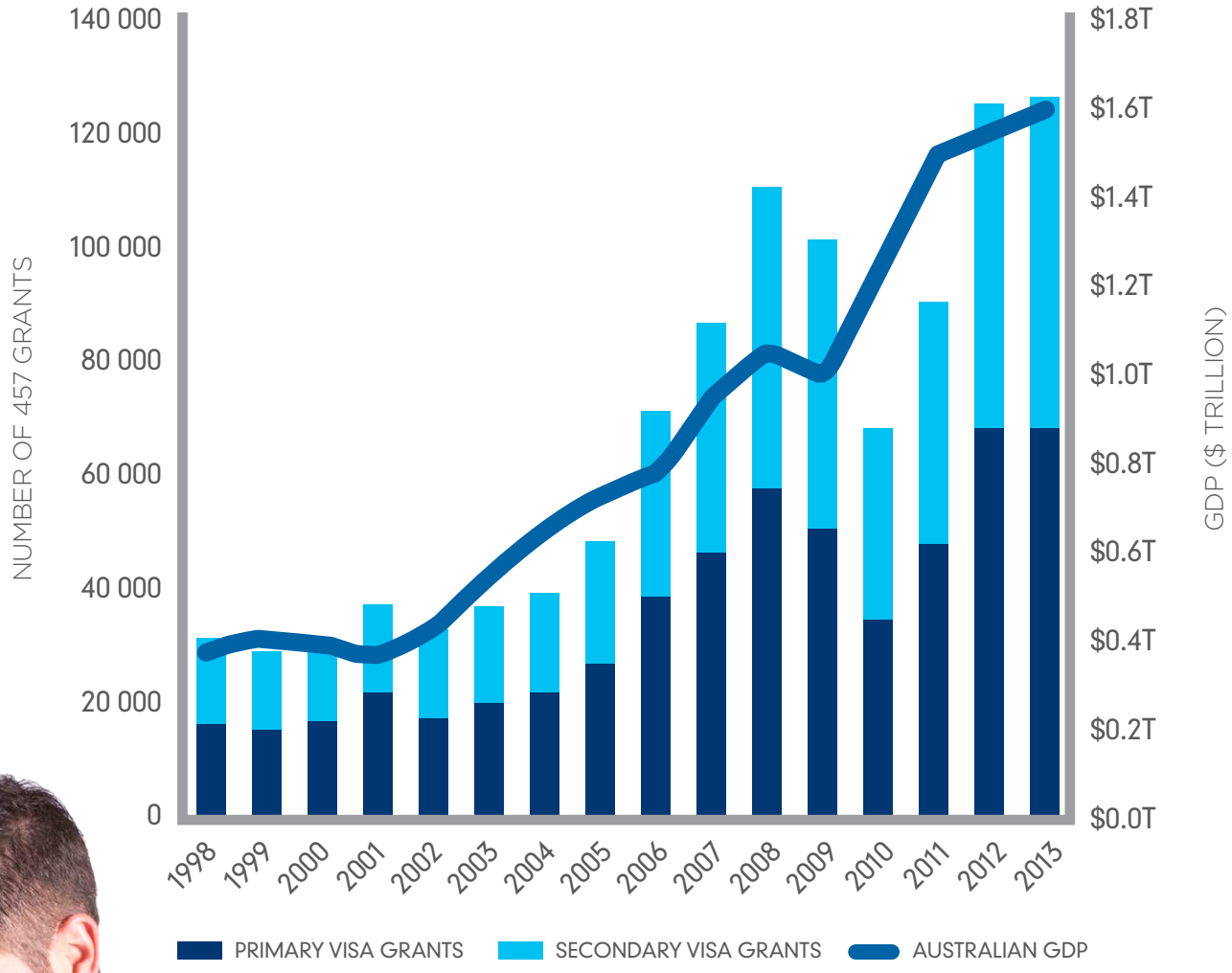
Coinciding with a decline in apprenticeships in real terms, there has been an increase in the number of workers entering the sector under the 457 visa program.

Researchers from the University of Western Sydney Philip Toner and Richard Woolley note that "there are only two ways for a nation to secure an adequate supply of skilled workers: domestic skill formation and immigration".[11] An elementary but crucial point of difference in the skill formation process between trades and the other three major occupational groups (Managers and Administrators, Professionals, and Associate Professionals) involved in the 457 program is that the decision to invest in entry-level training in trade occupations is effectively the prerogative of employers. In other words, the training rate is determined primarily by employers.

A point of difference is that for an apprenticeship, the cost of entry-level training for much of the (standard) four years of training is borne largely by the employer. It is generally agreed that over the course of an apprenticeship, the cost of training exceeds the output of the apprentice over the first two years. In addition, around 30 per cent of apprentices will leave their apprenticeship before they are complete.

Employers of tradespeople confront a fundamental choice in sourcing labour that is generally not faced by employers of managers, professionals and associate professionals. The choice is either to incur the expense of a long and, possibly, uncertain investment in entry level training or to hire already trained tradespeople from the external labour market. Firms that incur the cost of training, at least in the first few years of training, are at a competitive disadvantage compared to those who avail themselves of the 457 Worker. The key point is that an increase in an alternative supply of trades labour creates economic incentives for employers that may under-cut the need for a sustained period of investment in training apprentices, hence enterprise agreements are used to increase the number of apprenticeships in Australia.

FIGURE 2 NUMBER OF 457 VISA GRANTS AND AUSTRALIAN GDP 1998-2013



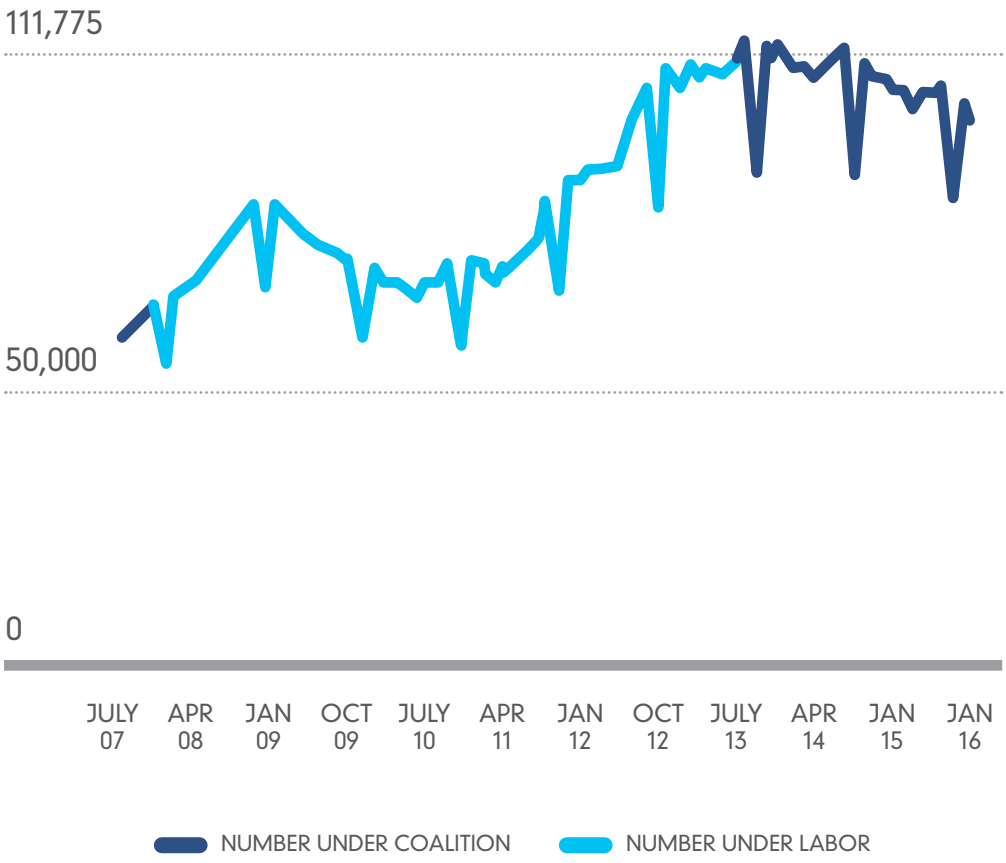
Source: DIAC and IMF WEO 2013

Current enterprise agreements can mandate the ratio of apprenticeships in the workforce for large building and construction jobs. The 2014 code makes this illegal. The ability to maintain apprenticeships requires the Code to be abolished. Meanwhile, the Department of Immigration statistics show the number of people who have been granted 457 visas (primary and secondary) which would still be valid as at March 2016, was 415,103.[12]

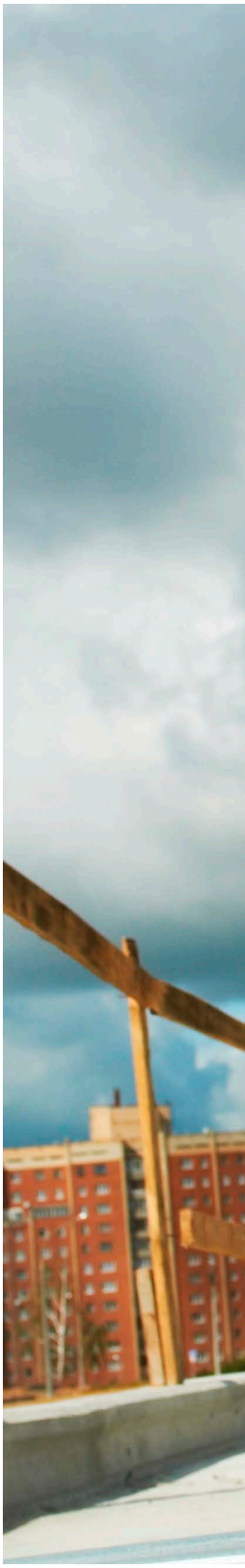
Figure 3 shows the increase in the number of 457 visas granted. The increase since 2007 has been maintained over the past eight years, and whilst there is a modest decline from 2014, the levels are expected to be maintained.

FIGURE 3

NUMBER OF PRIMARY 457 VISA HOLDERS IN AUSTRALIA, MONTHLY, 2007-2016



Source: Department of Immigration 2016



THOUGH NOT YET IN FORCE, THE CODE IS ALREADY HAVING AN IMPACT

The existing 2013 code allows for Enterprise agreements that comply with long established custom and practice. Currently these agreements are not being approved because they do not comply with the 2014 Code. Minister Cash gave a Ministerial direction to conduct an audit for the FWCC against the existing and proposed 2014 code. These subjective Audits have found legal agreements to be non-compliant. The code is a procurement document and does not allow for parties to challenge the outcomes.

The Code requires that Enterprise agreements made from 24 April 2014 need to be compliant with the requirements. As yet, the Bill has not passed. The limbo has led to significant confusion. There will obviously be a situation where some businesses have renegotiated their enterprise agreements to comply with the Code, and others have not. The enforcement of which is not a legislated matter, and not subject to appeal. If there are legal agreements made at this point of time, and the Bill comes into force as originally prescribed, that is without any amendments from either the government, cross benches or opposition, then termination of some agreements may be the outcome. This could lead to further and significant industrial disputation.

Like previous iterations of the Code, a building contractor or building industry participant who tenders for Commonwealth funded building work will need to demonstrate that they and any related entities are compliant with the Code. Once compliant, a contractor is required to act consistently with the Code, including when undertaking privately funded work.[13]

Importantly, any enterprise agreement entered into by a building industry participant from 24 April 2014 must be compliant with the new Code as the provisions relating to workplace arrangements will have a retrospective effect as of this date.

THE CODE IMPACTS MORE BUSINESSES & WORKERS MORE HARSHLY THAN EVER BEFORE

The Code introduces the requirement for a Workplace Relations Management Plan (WRMP), which is similar to the current Victorian and New South Wales State Guidelines.

A WRMP will be a condition of tender for any Commonwealth funded building work where:

- the value of the Commonwealth's contribution to the project that includes the building work is at least AUD5 million and represents at least 50% of the total construction project value, or
- the Commonwealth's contribution to the project that includes the building work is at least AUD10 million (irrespective of its proportion of the total construction project value).

The ABCC will be responsible for approving any WRMP which is required to be submitted by a prospective contractor and will only approve a proposed WRMP if it:

- demonstrates how the Code covered entity will comply with the requirements of the Code on the project to which the WRMP relates, and
- sufficiently addresses the matters required to be addressed in Schedule 3 of the Code (including information relating to workplace arrangements, productivity measures, risk management, past performance and Code compliance) for the particular project.

The 2014 Code introduces unprecedented government intervention, auditing compliance costs and liabilities to businesses:

- There will be an operational cost of having to negotiate with employees to lose pay, conditions, job security and access to their representatives;
- Legal and operational resources to revise project planning scheduling, re-contracting and monitoring of providers;
- To comply with the Code obligations on a daily basis;
- Increased insurance costs to cover increased risks and liabilities, i.e the cost and liability increase for commercial builders of having contractors or other suppliers 'banned' by government; and
- No commitment or agreement with all states to have a consistent Code.

The 2014 Code introduces tighter and more

prescriptive restrictions on what can or cannot be included in enterprise agreements. For example, section 11 of the Code sets out clauses and practices that will not be permitted by the Code, including job definitions, safety positions, guaranteed positions for apprentices, mandating positions for mature workers, safe staffing levels, protection of entitlements for labour hire workers, insistence on only skilled, trained tradespeople doing dangerous work, union and management meeting on sites, dispute resolutions that are within custom and practice of any other industry, and agreements that maintain a social contract.

These restrictions do not authorise the taking of action that would otherwise constitute a contravention of the Fair Work Act (FW Act), and should be read in a manner that ensures consistency with the FW Act. A specific example of the inconsistency is the prohibition on a clause which requires union approval over the number and types of employees a contractor may engage is not intended to override section 205 of the FW Act. Section 205 provides that an enterprise agreement must include a consultation term that provides for consultation on major changes at the workplace.

THE CODE WILL IMPACT THE HEALTH AND SAFETY OF WORKERS

The Code requires strict adherence to the Federal and relevant State right of entry and safety laws, and inviting an officer of a building association to enter the site other than as permitted under the FW Act will be considered a breach of the Code. This significantly impacts on the ability of safety specialists to maintain an active and effective role in safety on sites. It can have a significant impact on the safety culture of a work site as the deterrent effect as now safety inspections will require notice.

This was evident in July 2016 when a construction sub-contractor Yuanda was revealed to have imported and installed materials containing asbestos in at least two major projects around Australia. Construction workers at the Royal Perth Children's Hospital were exposed to the contaminated material however the company refused to close the site until tests confirmed the presence of asbestos. Ultimately more than 450 people were added to the federal asbestos exposure register. The Code, if it had been in operation, would have restricted the rights of unions in protecting the workers from further exposure to asbestos, and could have meant that the material went entirely undetected and unreported.[14]

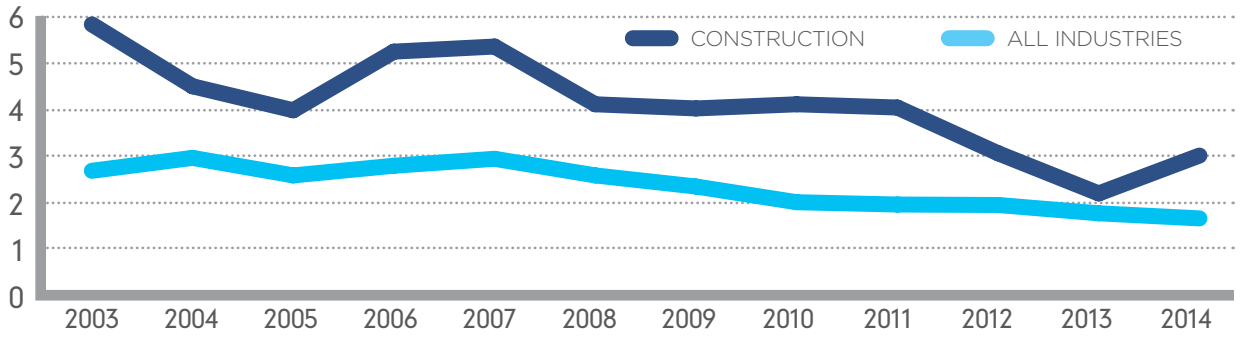
Also this year, the South Australian branch of the CFMEU has been charged nearly $1 million in fines for unlawful entrance to worksites in Adelaide and across the state. One unionist was quoted as saying his $700 personal fine was for entering a worksite to let workers know one of their colleagues was on suicide watch, and to ask them to keep an eye out for him over the weekend. Further, many of the fines were "issued when we went on sites to get asbestos report forms, to assist in suicide prevention and investigate unsafe practices."[15]

The building and construction industry has a number of characteristics that place extra pressure on workers. Factors including early starts and 6 day working weeks; tight deadlines and working at height, with heavy equipment and with electricity place construction workers at a higher risk of both physical and mental harm than workers in other industries. The stress resulting from such work factors can contribute to poor wellbeing in workers. As such, mental health is a major safety issue in the construction industry. The Code will have a significant negative impact on the safety and wellbeing of thousands of construction workers.[16]

Figure 4 shows the fatality rate (deaths per 100,000 workers) in both construction and across all industries from 2003-2014 in Australia. As can be witnessed, the fatality rate was falling in the early 2000s prior to the introduction of the ABCC in late 2005, before spiking when the ABCC was in full force. Since the ABCC abolition, fatality rates in construction have fallen again.

FIGURE 4

THE FATALITY RATE (DEATHS PER 100,000 WORKERS) IN CONSTRUCTION AND ALL INDUSTRIES, AUSTRALIA 2003-2014



Source: Safe Work Australia

In January 2016 ABC's 7.30 Report revealed that the deaths of two Irish workers on a Perth building site could have been avoided if union officials were allowed access to check safety standards on the site. The CFMEU claimed the construction company had more complaints submitted against it than any other builder in Perth, and any attempts by the union to check the safety standards had been thwarted by the company.[17]

In 2012-13 the construction industry accounted for about 9 per cent of the Australian workforce, but 10 per cent of workers' compensation claims for serious injuries and diseases (requiring more than one week off work for recovery). In 2013-14, the fatality rate represented about 12 per cent of all fatalities in Australian workplaces.[18] It is for this reason that the Australian Work Health and Safety Strategy 2012-2022 describes the construction industry as a priority industry for work health and safety.[19]

Safe Work Australia tracks the number of workplace injuries and fatalities around the nation and finds that on average, there are 35 serious injuries in the workplace in the construction industry in Australia each day.[20] With an average compensation payment of around $11,000 per serious injury, this equates to about $140 million per year in compensation claims in the construction industry alone. If the Code is written into law, this figure could grow exponentially as safety standards are not as adequately checked and enforced by third parties such as unions.

Although construction industry rates of workplace injuries and fatalities have decreased by 31 per cent and 48 per cent respectively since 2003 (to 2014), there is a serious concern that the Code will have a significant adverse impact on workplace health and safety.

THE ADDITIONAL BUREAUCRACY PLACED ON BUSINESSES LARGE & SMALL DAMPENS GROWTH

Major companies

Many industrial organisations and legal firms have advised members and clients that all enterprise agreements made as of April 2014 will need to be compliant with the new Code. Building contractors and building industry participants who are in the process of, or will soon be negotiating enterprise agreements, are ensuring their enterprise agreements meet the requirements of the Code. This is the case even if they currently do not have any contract that would qualify for the Code. If they are considering future contracts that they may bid for, they are taking precautionary steps. This is leading to significant loss of flexibility, workplace harmony and loss of productivity.

Once engaged on a Code compliant project, building participants must consider onsite behaviour, including ensuring they do not engage in conduct or implement a procedure or practice which is, or is likely to be prohibited under the Code, even if it is current practice or enshrined in an existing enterprise agreement. This is leading to significantly perverse behaviours.

There are current firms with existing agreements that share the benefits of a social contract. These agreements include socially responsible undertakings such as minimum number of apprenticeships-per-worker ratios.

Other examples include commitments to an Indigenous workforce and other diversity policies that an employer and union can negotiate in good faith. These positive social contracts are illegal within the new Code.

Given the Department can now Audit agreements, signaling to the employers within the Building and Construction Industry is to not contain any conditions that may be perceived to be in breach of a Code that has not yet come into place.

Specifically, it means that Enterprise Agreements with building companies cannot prescribe safe staffing levels or protections for labour hire workers. Building company managers and union representatives are not allowed to agree to meet at building sites, adding bureaucracy and complication to what should be simple meetings.

Small business

Building and construction is one of the most important small business sectors: ninety-five percent of all businesses in the building and construction industry employ fewer than five people, while less than one per cent employ 20 or more. In broad terms small business accounts for around half of national employment and over one-third of domestic product.

Small business operators find themselves in the extraordinary position of having to comply with a set of regulations designed to have a political impact on Trade Unions. Therefore, they are being over regulated and punished. Major Employees and Head Contractors are advising their subcontractors and small companies must also comply.

This represents a significant barrier to entry for small businesses in an already uneven playing field. The costs of complying with the rules and regulations, which can be subject to change on a political whim, can significantly impact small business operators with limited resources. This is particularly so for contracts where the Commonwealth funds a component.

Added compliance and expense will make it difficult for small business to tender for Government work under the Code. If contemplating tendering in the future, they will have to begin their compliance already. The 2014 Code mandates the standard of workplace relations conduct expected from contractors that want to perform work funded by the Commonwealth Government. Contractors will be required to meet the requirements of the code, to be eligible to work on Commonwealth-funded projects.

Conversely, they will now be subjected to unprecedented government intervention, auditing compliance costs and liabilities to businesses. There will be an operational cost of

having to negotiate or renegotiate agreements that may have been standing for many years. The renegotiation process will include issues such as reduced pay, conditions, job security and access to their representatives. Resources will need to be allocated to revise project planning, contractor monitoring, and this will be required on a daily basis. There will be an increase in insurance premiums to cover costs and liabilities, due to the Code banning certain suppliers and contractors that are beyond their control and influence.

Harmonized workplace safety laws will have a new level of bureaucracy and compliance costs with the establishment of the Federal Safety Commissioner.

Not only are parties required to report any threatened or actual unprotected industrial action in relation to building work generally, they must also take steps or action to actually prevent or bring to an end any unprotected industrial action. This means that employers must take court action to the Industrial or other courts, even though it may be in their interest to negotiate.

THE CODE DISPROPORTIONATELY IMPACTS WOMEN, OLDER WORKERS AND UNIONS

In the past clauses have been inserted into enterprise bargaining agreements to help protect and promote women and older workers. The Code now makes it unlawful to include any form of affirmative action in an enterprise bargain.

The employment of women in the industry

Currently 12 per cent of workers in the industry are women, and they leave the industry at a rate almost 40 per cent higher than men. Without a commitment to greater gender equality, the building and construction sector is at risk of missing out on attracting and retaining the best talent.

Women's participation is about 2 per cent in trades and approximately 14 per cent in professional and management roles.

Male representation is especially high in Building Services (93 per cent) and in Building Structure Services (92 per cent) and as one works down the supply chain and the business becomes smaller, the under-representation of women becomes steadily worse.

The employment of mature age workers (45-64 years of age) in the industry

Australia has an ageing workforce and a large percentage of labour market growth in the future will come from older workers (people aged 45 years and over). The average age in the Construction industry is 38.5 years, with less than 23 per cent of employees classified as mature age workers, i.e. over 50 years.

Research has shown that older workers have irreplaceable skills and experience and are valuable employees. They stay longer in their jobs and have low levels of absenteeism. They are also less likely to be distracted by social media and are generally flexible in their working hours and conditions.

Minimum labour standards, including right of entry

The 2013 Code allows for parties to agree to provisions for Right of Entry that would be banned under the 2014 Code. For example, agreements frequently allow for Unions to be

present at staff inductions, notice boards, safety talks and in areas such as lunch rooms for union discussions. These are not only disallowed in the 2014 Code, but the Code also requires parties to take an active role in ensuring that the right of entry only occurs in compliance with the Fair Work Act or workplace safety laws.

The Fair Work Act provides for unions to enter a workplace if there is an imminent risk of danger, and this right of entry should not be diminished for safety purposes. The Code requires strict adherence to the Federal and relevant State right of entry and safety laws and it will be a breach of the Code to invite an officer of a building association to enter the site other than as permitted under the Fair Work Act. This significant change to the custom and practice of having trained and authorised safety officers to be able to gain access to a site to investigate safety risks will likely lead to an increase in risk at the workplace, or possibly to a culture of lower compliance.

Currently Unions and Employers have negotiated successful Enterprise Agreements that allow for mandated training ratios and standards to be maintained. There is no evidence of other programmes that mandate skills and training to be part of the contract. Unions and Employers work together to negotiate sustainable enterprise agreements that have skills and training as part of the ratio for certain sites. This maintains the number of young people in training and increases completion rates. To mandate the removal of these conditions will have a detrimental impact on the number of completions of apprenticeships in the building and construction industry.

Requirements for projects to have local procurement provisions

The Code does not contain procurement provisions for locally sourced and manufactured building materials that comply with the relevant Australian Standards.

POLITICAL CONTEXT

Coalition Government

Senator Abetz said "Fair, productive and lawful building sites are critical to Australia's competitiveness, and job creation potential".

"It is important that contractors that want to work on projects funded by the taxpayer have the ability to operate efficiently and flexibly to ensure projects are delivered on time and on budget. For too long, the building and construction sector has provided the worst examples of industrial relations lawlessness. Our new code, together with a stronger ABCC, will help get the building and construction industry back on track."[21]

The political nature of this should not be understated. In the majority of releases and political statements the Minister argued the reason was to "reverse the previous Labor Government's changes which were made to appease the extreme CFMEU which holds sway in the ALP".

Labor Opposition

"Labor senators do not see the merit in this bill and oppose it in its entirety without amendment. The government has completely failed to establish an economic or productivity case for the ABCC … and has failed to establish that the ABCC would improve occupational health and safety in the building and construction industry."[22]

The Labor position also argued the Bill would have serious incursions on human rights; that the draconian powers and penalties of the Bill were not justified; and the coercive powers were not subject to sufficient oversight.

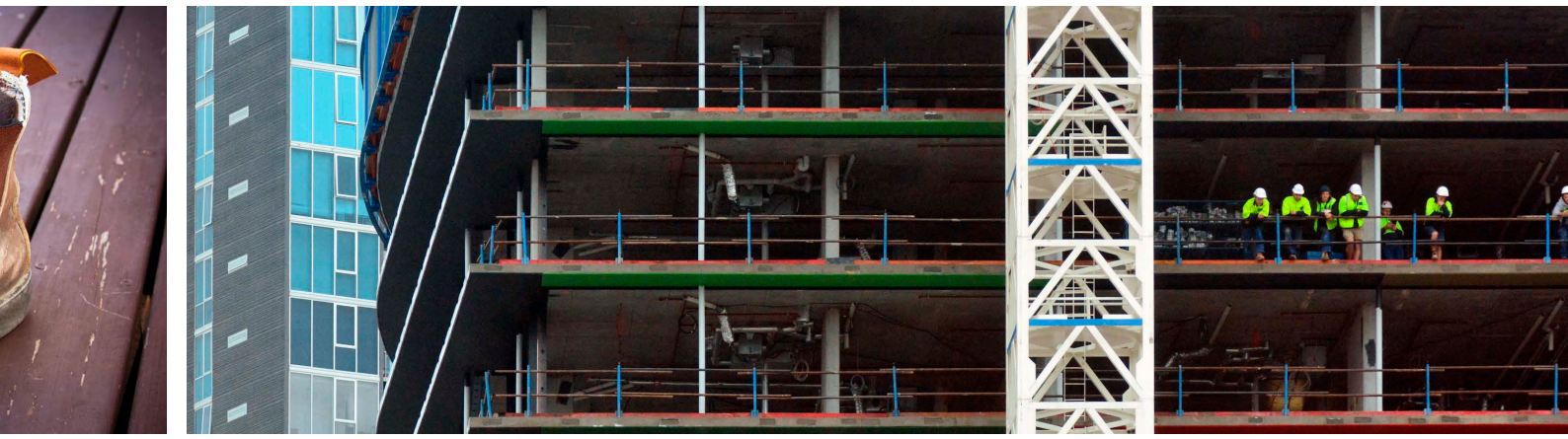
The Greens

The Greens position was similar to the Labor position, noting "productivity is actually up since the ABCC was abolished in May 2012, and yet the government has had the nerve to put the word 'productivity' in the title of the bill."

Former parliament independent and cross-bench summary

Senator Madigan argued the Bill did nothing to prevent corruption, and that there was not compelling argument to justify the coercive powers that the Bill was seeking. He said, "The ABCC is …the first salvo in an ideological crusade aimed at stripping Australians of their rights in the workplace. I oppose this attack on the rights of working Australians and I will be voting against the bill."[23]

Senator Lazarus argued the Bill was primarily used as a tool to reduce the rights of workers. His argument that the object to wind back corruption and lawlessness was a being used as an excuse to strip workers of their rights, including compelling of evidence; preventing them from accessing their lawyer; forcing



them to produce documents and evidence; and reverses the onus of proof. He said, "In my opinion, (the Bill) infringes on our basic human rights and the basic rights of workers.[24]

Senator Wang argued the Bill is unbalanced because of the Government's inability to work towards the middle ground. He moved various amendments regarding the reporting and occupational safety. He also had concerns regarding "factors that must be taken into account by a commissioner before they publish the names of individuals, companies or organisations for non-compliance with the Building Code... clarity around what behaviour or conduct would meet the elusive standard of 'good faith'."[25]

Senator Day has consistently supported the ABCC and was open to amendments from certain Senators.

Senator Leyonhjelm moved an amendment for a sunset provision.

Senator Xenophon acknowledged that there are problems on our nation's construction sites, and he wanted a strong and vibrant building and construction industry. Whilst he agreed there was a need for an ABCC, he argued the legislation in its current form would not deliver any of the productivity claims, did not have the appropriate checks and balances, had overly unnecessary coercive powers, and significant concerns regarding health and safety. Further, right of entry for unions was fundamental and should not be diminished. He also had strong views regarding the "lopsided approach" taken by the government and the lack of protection for whistle blowers. Whilst he did support the introduction of the Bill, he flagged he would be moving amendments in the committee stage to protect jobs of Australian workers.

Disallowance: A path for action by the Senate

Despite the extraordinary scope of this legislation, the Code is an instrument of the Minister but with the weight of legislation. Section 34 (1) of the Bill states;

"The Minister may, by legislative instrument, issue one or more documents that together constitute a code of practice that is to be complied with by persons in respect of building work."

The disallowance provisions could be used to block the 2014 Code and allow the 2013 Code to be maintained. The 2013 Code meets the objects of the new Bill and is consistent with sound industrial custom and practice, whilst acknowledging the special circumstances of the building and construction industry in Australia. Therefore, the path forward for Senators is to disallow the Code. No.19 of the Brief Guides to Senate Procedure mandates the procedures for

disallowance. It states in part:

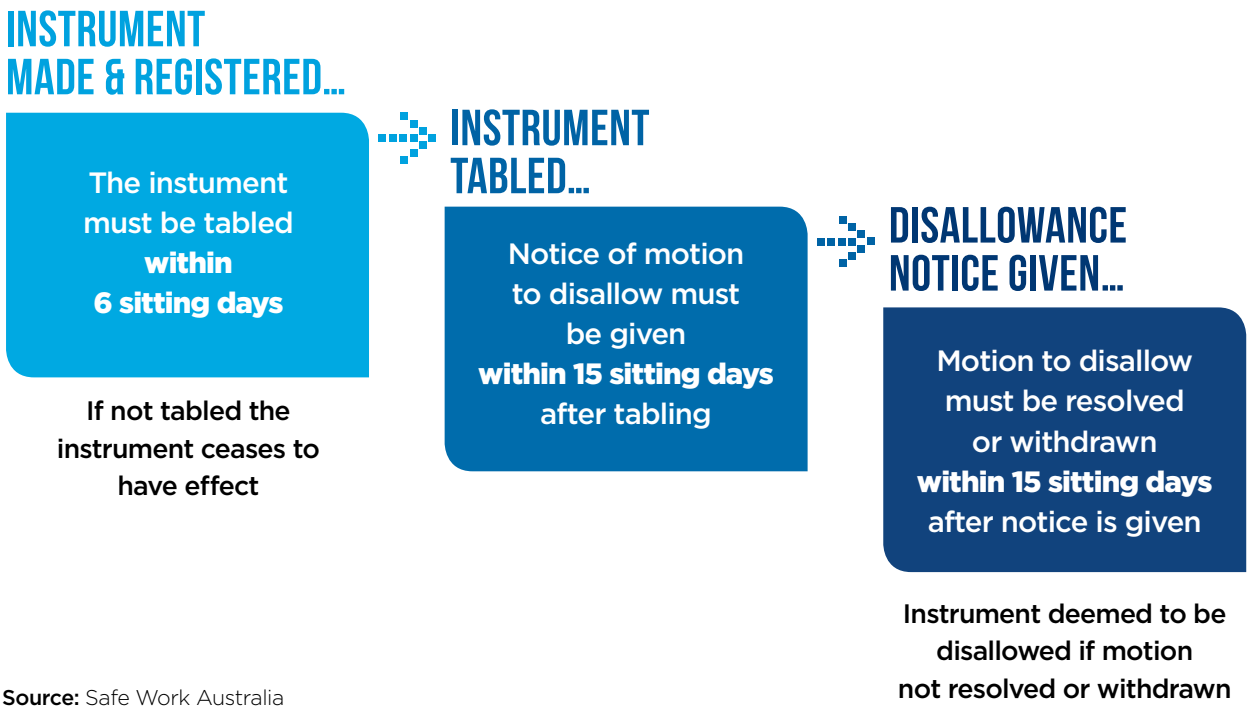
"Many Acts of Parliament delegate to the executive government the power to make detailed rules and regulations (delegated legislation) that supplement the parent Act (primary legislation) and have the same legal force. Such rules and regulations are not passed directly by both Houses of the Parliament, as bills are, but either House may veto (or disallow) them.

The disallowance process

The Act provides the framework for the standard disallowance regime, which is reflected in the standing orders. The key features are as follows:

- Within 15 sitting days after tabling, a senator or member of the House of Representatives may give notice of a motion to disallow the instrument (in whole or in part).
- If the motion is agreed to, the instrument is disallowed and it then ceases to have effect.
- If a notice of motion to disallow the instrument has not been resolved or withdrawn within 15 sitting days after having been given, the instrument is deemed to have been disallowed and it ceases to have effect.
- Disallowance has the effect of repealing the instrument – if the instrument repealed all or part of an earlier instrument then disallowance also has the effect of reviving that part of the earlier instrument.
- An instrument 'the same in substance' cannot be made again:
  - within 7 days after tabling (or, if the instrument has not been tabled, within 7 days after the last day on which it could have been tabled) (unless both Houses approve);
  - while it is subject to an unresolved notice of disallowance; and
  - within 6 months after being disallowed (without the approval of the House that disallowed the regulation).

FIGURE 5 USUAL DISALLOWANCE SYSTEM



Source: Safe Work Australia

CONCLUSION

The Building and Construction Industry Code 2014 is an ideologically driven document that is without justification. The productivity of the building and construction sector still outpaces most other sectors and the industry is still healthy and growing.

The Code's impact on apprenticeships, 457 visas and groups needing extra protection or encouragement are all warnings for policy makers. There is little evidence that the added bureaucracy and pernicious intervention into relationships between businesses and their workforce will add any benefit to those businesses, their workers or the economy as a whole and indeed there is mounting evidence that the impact it will have will be detrimental.

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