

# FACT SHEETS

## Factsheet 1:

### THE ABCC'S BUILDING CODE WILL DISCOURAGE THE EMPLOYMENT OF APPRENTICES AND LOCAL WORKERS AND PREVENT THE UNION FROM ENSURING WORKERS ARE SAFE.

Accompanying the ABCC legislation is a Building Code that applies to construction sites that receive funding from the Government. The code places restrictions on what can be included in Enterprise Bargaining Agreement (EBAs) linked with Commonwealth funded work. The code not only applies to construction sites but also to all employees working in the private sector of the organisation tendering for government work and all organisations that supply some prefabricated materials.

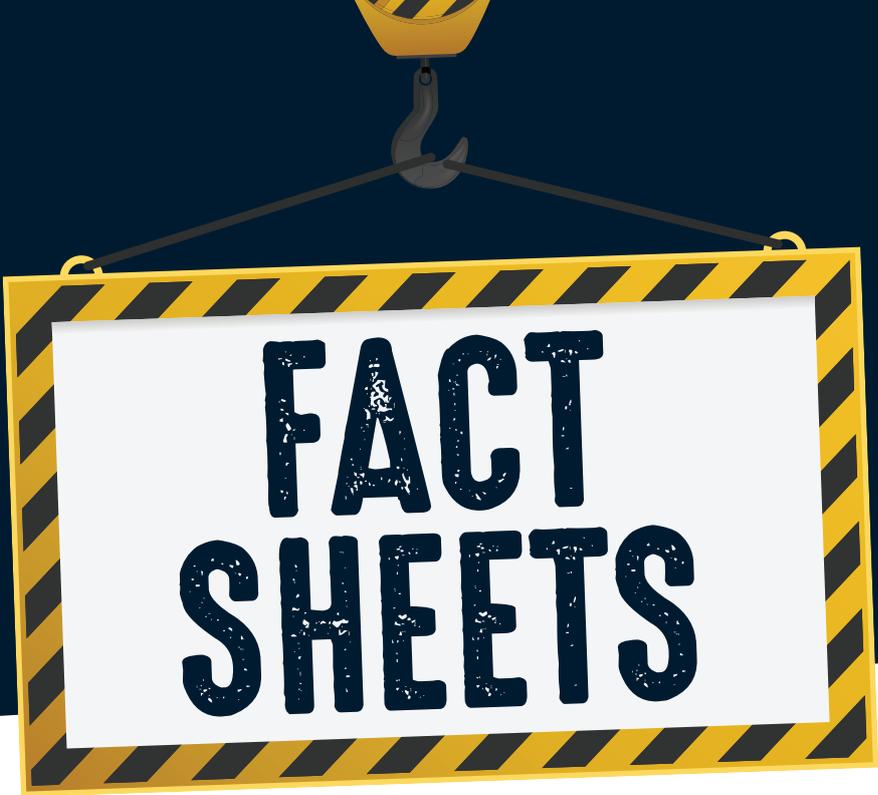
The code not only prohibits 'union friendly' clauses, it also prohibits EBAs from including clauses that:

- **Encourage the employment of apprentices:** such as those which require the employment of a certain number of apprentices in relation to the number of tradespersons employed. If the union can't bargain to encourage businesses to take up apprentices, many young Australians will not get an opportunity to take up a trade. Approximately 13% of young workers in Australia are unemployed, a further 20% are underemployed. Around 1 in 3 young workers cannot find enough work. The Government should not be discouraging policies which promote opportunities for young Australians.
- **Require employers look for local workers first:** if companies are not required to make reasonable efforts to attract job candidates amongst suitably skilled Australians or permanent residents before engaging foreign visa holders, many unscrupulous employers will bring in and exploit cheap overseas labour, including 457 workers, instead of employing young Australians.
- **Prevent unlimited ordinary working hours:** Unions will not be able to place restrictions on the number of hours worked. The prohibition on clauses requiring safe working hours will lead to more deaths and injuries due to accidents as a result of worker fatigue. It will also lead to the exploitation of workers. Clauses that provide agreed stable and secure shift arrangements or rosters will also be prohibited. If workers can't have stable and fair rosters many children will miss out on spending time with their parents and workers health will be placed at risk.

- **Allow construction workers to have a fair and safe workplace:** The Building Code will prohibit any clauses that permit union officials to come onto site to assist with a dispute settlement process, or (most extraordinarily and in curtailment of a property owner's right to invite people onto their premises as they see fit) at the invitation of the employer. The absurdity of these restrictions is highlighted by the fact that clauses which allow union members and delegates to undertake site induction processes are prohibited, even though it is a general occupational health and safety requirement that all persons at a workplace be properly inducted.
- **Place limits on labour hire and casual work:** This will mean even more insecure work and instability for workers.

The list is not exhaustive, other examples of clauses that would be prohibited under the code are:

- clauses that protect the employment security of employees by requiring that employees of businesses to whom work is contracted out be paid no less than the rates and conditions of permanent employees;
- clauses that require employees to only perform tasks that are able to be safely performed having regard to their skills/competencies/experience;
- clauses that provide for consultation with unions or their delegates or members about the use of subcontractors;
- clauses that limit the 'cashing-out' of entitlements through the use of 'rolled-up' rates of pay;
- clauses that allow the Fair Work Commission to arbitrate a dispute outcome which is not consistent with the new Code; etc.



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## Factsheet 2:

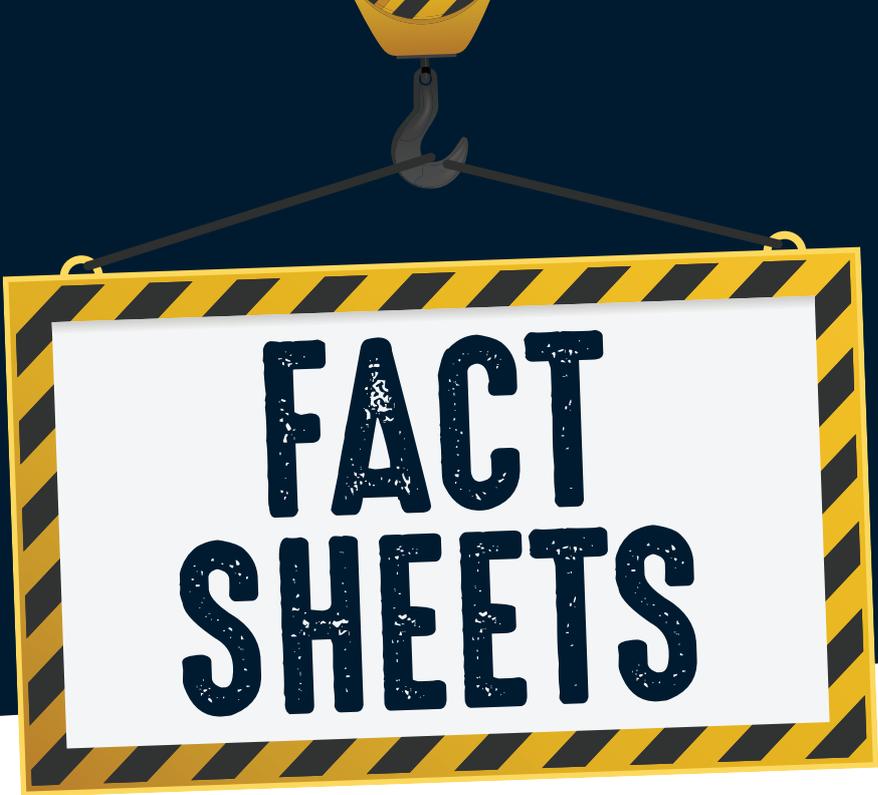
### THE ABCC ATTACKS CIVIL LIBERTIES AND BREACHES INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

*A number of features of the Bill are contrary to rule of law principles and traditional common law rights and privileges such as those relating to the burden of proof, the privilege against self-incrimination, the right to silence, freedom from retrospective laws and the delegation of law making power to the executive. It is also unclear as to whether aspects of the Bill which infringe upon rights and freedoms are a necessary and proportionate response to allegations of corruption and illegal activity within the building and construction industry... For these reasons, the Law Council's primary recommendation is that the Bill not be passed in its current form.*

- **No right to silence or protection from self-incrimination:** New investigative powers means that any person (including construction workers; workers in transport, warehousing and manufacturing; and even bystanders) can be forced to provide information and documents to the ABCC. People must answer questions without the ability to refuse on the grounds of self-incrimination, a protection required by the International Covenant on Civil and Political Rights. The ABCC laws remove individuals' right to silence and 'render legal representation a mere nicety'. Anyone who fails to comply with the law faces 6 months in jail.
- **No right to tell even your family:** The ABCC law also means that people taken in for questioning cannot discuss the details of his or her interrogation, even with their immediate family. There is no restriction on who a notice can be issued against. This is so absurd that even a bystander, not connected with a building company or a union, can be taken in and interrogated and can't even talk about it to their family.
- Professor Andrew Stewart, former Dean of Flinders University Law School stated that the ABCC's potential powers are "extraordinary, analogous to those of ASIO.. Ordinarily, under our laws, you have certain rights not to answer questions... you have privileges against self-incrimination. But

*these rights do not exist when you are being interviewed by the ABCC. That an innocent member of the public can get caught up in these powers simply increases the concerns.”*

- It's not far-fetched, in 2007 under the previous ABCC an academic walking passed a building site witnessed a confrontation on a building site. The man was tracked down and hauled in for several hours of secret questioning, he could then not discuss the details of the interrogation with his family.
- **Restricting freedom of association and expression:** The ABCC laws mean that workplace meetings, even some stoppages over safety concerns are illegal and can fine workers \$36,000 for participating and the union \$180,000 if it called the meeting. That's almost as much as bosses responsible for workers being killed on site get fined. The Law Council states that prohibitions on picketing and other restrictions on industrial action are incompatible with the right to freedom of association, the right to freedom of expression and the right to form and join trade unions. The Law Council also finds that the ABCC limits individuals' right to privacy.
- **Power to enter residential premises without consent or warrant:** The ABCC bill authorises Australian Building and Construction Inspectors and Federal Safety Offices (FSO) to enter premises, ask a person's name and require them to produce records or documents without consent or warrant. This even includes residential premises in some circumstances. The Law Council argues *“Entry to premises without consent or warrant may be reasonable in situations of emergency, serious danger to public health, or where there is a serious threat to national security. However, it is not clear how these circumstances involving the checking of compliance meets these criteria.”*
- **Reversal of the onus of proof:** Under the ABCC, a legal burden of proof is placed on workers to prove that any action they are involved in is not industrial action but rather based on health and safety concerns. This places the onus on a worker to prove they weren't breaching the law. This can have huge implications as it is often difficult for workers to prove a safety issue. Workers may avoid discussing health and safety issues out of fear.



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## Factsheet 3:

### CAUGHT RED HANDED - DEBUNKING THE GOVERNMENT'S ABCC LIES

#### **LIE: THE ABCC IS NECESSARY TO DEAL WITH CORRUPTION AND CRIMINALITY**

**FACT:** The Coalition Government and sections of the media are trying to give the public the impression that a new ABCC would tackle criminality in the construction industry. For example, Turnbull's letter requesting parliament's recall to Governor General said the bills were to *"deal with widespread and systematic criminality in the building and construction industry"*. Ironically, the ABCC/ FWBC has never had any role in investigating breaches of the criminal law. The ABCC only has powers to deal with industrial matters. It can neither investigate nor prosecute corruption or allegations of a criminal nature. Where there is any evidence of either type of behaviour, there are already other systems in place, the police and other authorities should be the ones dealing with them. This Bill would not change that situation at all. Anthony Forsyth, Professor of Workplace Law at RMIT states *"[The ABCC bill] does not include any measures to tackle union corruption."*

#### **LIE: THE ABCC IS NECESSARY TO IMPROVE PRODUCTIVITY**

**FACT:** The figures used by Government that claimed the ABCC increased productivity are based on economic analysis performed by Independent Economics (formerly Econtech) that has been widely discredited. At least two academic reports have found replicating the results of the Econtech report impossible and stated that the results contain errors and are *"largely a case of generating whatever results you want"*. Econtech eventually acknowledged errors in their figures. The reality is there is no evidence that the ABCC has improved productivity. Even the Productivity Commission states *"higher productivity growth rates in the aggregate construction industry do not appear to be associated with the construction-specific IR arrangements that commenced in 2002.."*

*the evidence that the ABCC stimulated material improvements in aggregate productivity or achieved cost reductions is weak.”*

Even the Heydon Royal Commission accepted the Productivity Commission conclusions:

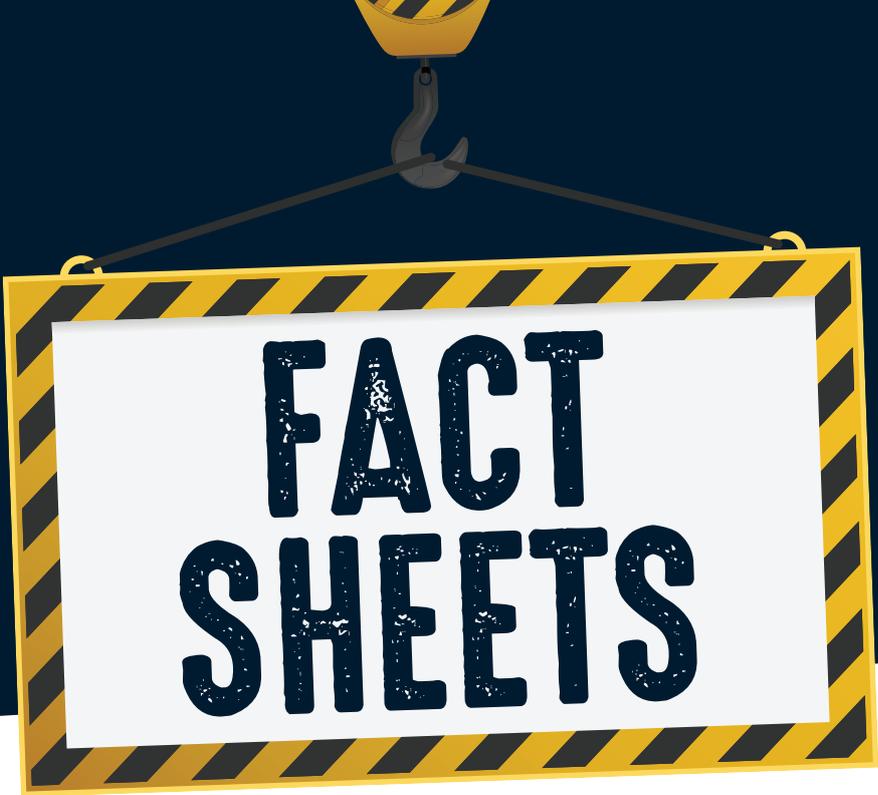
*“.....when scrutinised meticulously, the quantitative results provided by [Independent Economics] and others **do not provide credible evidence that the [Building Industry Taskforce]/ABCC regime created a resurgence in aggregate construction productivity or that the removal of the ABCC has had material aggregate effects. Indeed, the available data suggests that the regime did not have a large aggregate impact.”***

### **LIE: THE ABCC WILL REDUCE THE HIGH LEVEL OF INDUSTRIAL ACTION**

**FACT:** Levels of industrial action in construction are at an historic low and have been for a number of years. Independent reports commissioned by the Government have noted difficulty in making a link between the ABCC and industrial dispute rates. Regardless, like every other industry, when the union is negotiating Enterprise Bargaining Agreements, workers have a right to take industrial action. The ABCC has no power over protected strikes. Phil Lewis, Director for the Centre for Labour market Research at the University of Canberra, states *“Industrial disputes are quite a legitimate union activity... the point of the ABCC was to investigate and to try and prevent unlawful activity, which is a different thing altogether.”*

### **LIE: THE ABCC WILL IMPROVE SAFETY**

**FACT:** During the last ABCC, the number of deaths on construction sites almost doubled. In contrast, following the abolition of the ABCC in 2012 the number of deaths fell significantly. The ABCC and associated building code will increase safety problems as the code restricts unlimited working hours which will lead to worker fatigue and increase workplace industries. The reversal of the onus of proof onto workers to prove any action they are involved in is based on health and safety concerns (and not industrial action) and threat of being pursued by the ABCC will also make workers less likely to speak out about safety concerns.



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## Factsheet 4:

### MISUSED, MANIPULATED AND MISLEADING: THE GOVERNMENT'S ABCC PRODUCTIVITY FIGURES

The Government is claiming that the ABCC is improved productivity by 20%. This claim is incorrect for a number of reasons, and the Government knows it:

- The Government has overestimated its own commissioned figure. The Independent Economics (formerly Econtech) reports estimate the impact of workplace practices (including the ABCC) on productivity at 9.4%.
- Politics editor, Bernard Keane states: *“And where did Turnbull’s claim of a 20% rise in productivity come from? He appears simply to have invented that”*
- Even the 9.4% figure has been widely discredited. At least two academic reports have found replicating the results of the Econtech report impossible.

Allen et al (2010) state that the data behind Econtech’s claims were *“erroneous, probably due to incorrect transcription, and that the source data indicated no relative productivity*

*gains”* and that Econtech had made *“major errors in its calculations...correcting these mistakes meant that the change in the gap identified by Econtech [between non-residential (union) and residential (non-union) construction used on which the productivity figure is based] almost disappeared”*.

Mitchell (2007) stated *“the modelling exercise, while seemingly authoritative, not the least because it is unfathomable to the general reader, is largely a case of generating whatever results you want.”*

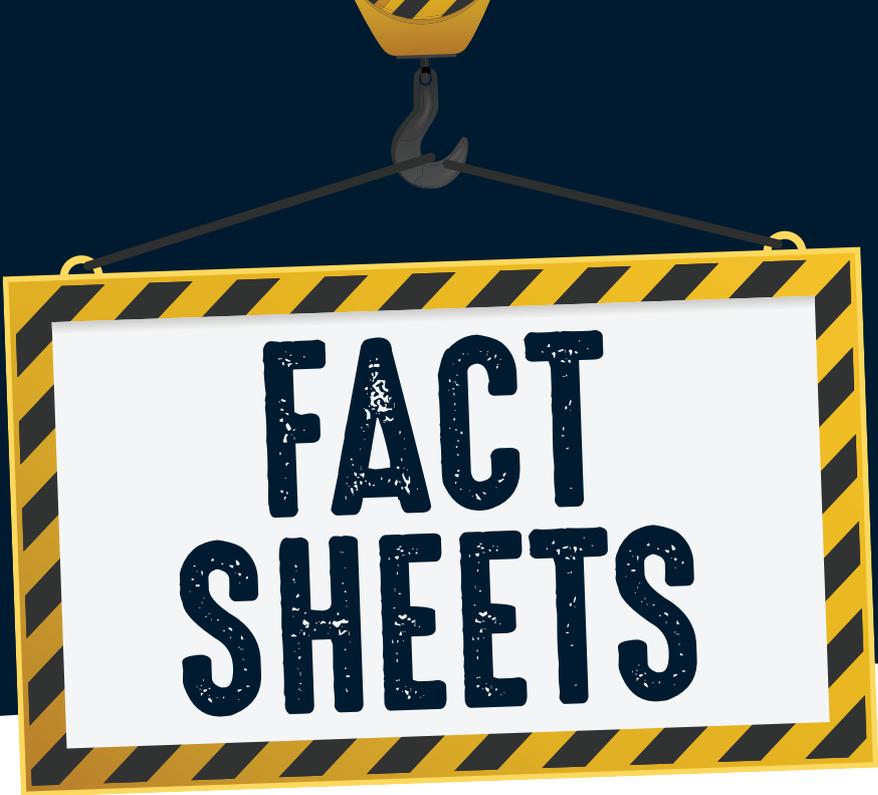
- Additional experts have also criticized the study, including Toner (2003) . Former Federal Court judge Murray Wilcox said *“The 2007 Econtech report is deeply flawed. It ought to be totally disregarded”*

– Econtech eventually admitted their errors in a 2008 version of the report stating: “some data was inadvertently juxtaposed in manually extracting it from [hard copy publications]”. A 2009 version of the report, commissioned by the Master Builders of Australia, stated that the earlier report “contained an error”.

- Despite the obvious errors, in each of its following reports, Econtech has claimed the 9.4 percent increase in construction industry productivity arising from the establishment of the ABCC. In a submission to the Senate inquiry into the Government’s approach to reestablishing the ABCC, Professor David Peetz states that “*despite the discrediting of the original calculation, Econtech has repeated the number in reports since then*”. The Government has also continued to use and inflate this figure.
- In 2014, the Productivity Commission also questioned the claims by the Government. It stated “*higher productivity growth rates in the aggregate construction industry do not appear to be associated with the construction-specific IR arrangements that commenced in 2002.. the evidence that the ABCC stimulated material improvements in aggregate productivity or achieved cost reductions is weak.*” In fact, the Productivity Commission’s 2014 inquiry report into

public infrastructure shows that labour productivity in the Construction Industry was near zero during the period of the ABCC, except for a burst of productivity improvement in 2011-12 which lifted the average over timeframe. This surge occurred in a period in which former ABCC chief John Lloyd said the powers of the ABCC had been “neutered”.

- The figures the Government are using are false and misleading. The Government is using these figures to try and sell regulation that has no underlying purpose except union bashing.



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## Factsheet 5:

### FWBC BUILDING WATCHDOG METHODS CRITICISED BY COMMONWEALTH OMBUDSMAN

We already have a construction industry 'watch dog', it is called Fair Work Building and Construction (FWBC). The construction industry watch dog was never abolished, it was simply renamed from the ABCC to the FWBC in 2012 as part of changes made by the previous Government following a review by former Federal Court judge, Hon. Murray Wilcox QC.

The FWBC is the federal office that investigates breaches of workplace laws in relation to the construction industry. Under the Fair Work (Building Industry) Act, the Director of FWBC Nigel Hadgkiss, can inquire into and investigate any act or practice by a building industry participant that may be contrary to a designated building law, a safety net contractual entitlement or the Building Code. The Government is currently trying to replace the FWBC with the Australian Building and Construction Commission (ABCC) and a new Building Code.

The FWBC's function is to promote and monitor compliance with designated building laws by building industry participants – including employers in the industry. However, the FWBC chooses to focus on unions and workers rather than on employers.

From October 2005 until June 2011 the ABCC brought a total of 86 prosecutions against unions and union officials. This compared to a mere 5 prosecutions against employers in the same period. In the period 1 July 2009 to 30 June 2010 there were 29 prosecutions brought against unions and union officials and *none* against employers. On his appointment in October 2013, and despite the clear terms of the Act, Nigel Hadgkiss announced that, just like the original ABCC, the FWBC would no longer pursue breaches by employers of industrial awards and agreements such as underpayment of wages and entitlements to employees. He told Senate Estimates these employer breaches of the industrial law, were not the FWBC's 'core business'.

The FWBC has concluded prosecutions against hundreds of construction workers, many of which have been overturned on appeal. For example, in 2013, the FWBC concluded a prosecution against 117 construction workers in Western Australia over an industrial dispute that took place in 2008. The workers were fined in excess of \$1 million in total. The findings of contraventions against unions and officials were overturned on appeal. In at least four matters

to date, the FWBC has commenced proceedings against approximately 145 individual workers, only to discontinue the case against those workers at a later date.

Observance of awards and enterprise agreements by employers is a serious problem in the construction industry. The failure of the ABCC/FWBC to pursue employee entitlements and prosecute employers who engage in breaches of industrial law, and the Government's failure to direct them to do so directly contradicts the recommendations of the Cole Royal Commission. Cole recommended that the ABCC adopt a *greater* role in the enforcement of employee entitlements provide representation for employees who had been underpaid and even monitor and report on mechanisms that would improve this process for employees. None of that has happened.

The methods used by FWBC industry investigators office have also recently been criticised by the Commonwealth Ombudsman. The criticisms include breaching confidentiality of the people it is examining and using questionable interviewing methods. It was also criticised for its delays in examination times and stated that the FWBC needs to review its current processes.

Specifically, the report found problems with the manner of questioning used: *"there were instances where questions posed to the examinee appeared to require the examinee to speculate rather than to recount his or her own experiences. At times, FWBC representatives also completed the examinee's sentences rather than allowing the examinee to finish."*

The Ombudsman also found that investigating officers had breached the confidentiality of examinees by serving three examination notices at the same place and time: *"it appears that the confidentiality of examinees was not considered when serving the three examination notices... the service of the notices at the same time and at the same place did appear to breach the confidentiality of the examinees."*

The many cases against union officials and workers which have subsequently been dropped, the serious problems with the FWBCs investigative methods and the FWBC's failure to pursue breaches by employers all demonstrate the biased approach of the FWBC. The FWBC should be independent and politically neutral – it should prosecute employers too. The new ABCC is just a further attack on unions and workers.

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## Factsheet 6:

### THE ABCC WILL WORSEN THE SAFETY OF AUSTRALIAN CONSTRUCTION SITES

The ABCC will worsen safety and fatalities on construction sites as workers avoid attending safety meetings and speaking out about safety concerns and unions are prevented from inspecting unsafe workplaces.

In the 10 years from 2003 to 2013, 401 construction workers died from injuries sustained at work. Although construction has about 9% of the national workforce, it accounts

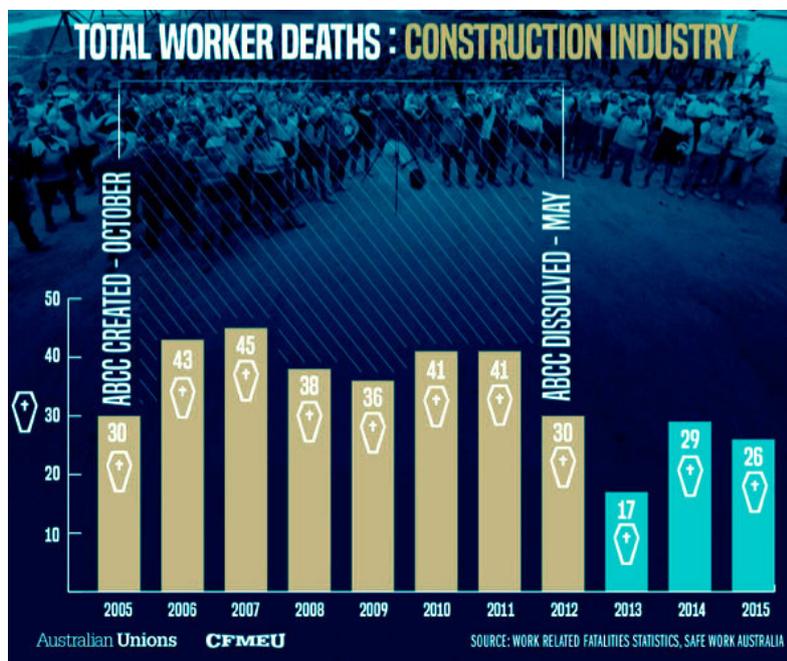
for 15% of all workplace fatalities. Prior to the introduction of the ABCC, the fatality rate for workers in the construction industry had been falling. In the year the ABCC was introduced, 2005, the fatality rate was 3.51 fatalities per

100,000 workers. In 2006, the fatality rate increased to 4.70 and again to 4.73 in 2007. The fatality rate has exceeded the 2005 rate every year until 2012 when the ABCC was replaced.

The ABCC and associated Building Code puts workers safety at risk. Firstly, it prevents unions from including clauses in EBAs that restrict unlimited working hours. The construction industry can be a dangerous industry if construction workers are

required to work long hours. Fatigue will set in which will lead to increased workplace accidents.

Existing research has found that long hours of work and work scheduling contribute to



workplace accidents. A report by Safe Work Australia on work related fatigue outlined a study in the United States construction industry that found that workers working greater than 8 hours a day had 50% higher injury rates than those working less than 8 hours a day. The injury rate increases steadily with increasing hours of overtime. When hours increase above 50 hours per week, the risk of injury almost doubles.

In addition, the ABCC will make it harder for workers to speak out about safety concerns. The ABCC Bill puts the legal burden of proof on workers to prove that any action they are involved in is not industrial action, but rather based on health and safety concerns. As it is often difficult for workers to prove a safety breach, many workers will avoid discussing health and safety issues or attending safety meetings out of fear of prosecution.

In 2008 under the former ABCC, legal proceedings were commenced against rigger Ark Tribe for attending a meeting relating to safety breaches and safety concerns of workers regarding a construction site in Adelaide. Tribe was called to a secret interview by the ABCC to discuss the meeting and when he refused, he was prosecuted over an 18 month period. Tribe was cleared of the charges against him in 2010.

Workers facing huge fines and a politically motivated 'watchdog' that prosecutes workers and unions, but not employers, will think twice about taking action to fix safety problems. If

workers are hesitant to speak out about safety, workplace accidents and fatalities will increase. Australian construction sites will be less safe.

The ABCC will also make it more difficult for unions to get on site to ensure they are safe. This is already a problem that the ABCC will make worse. For example, last year two Irish workers were killed by a falling concrete panel in Perth on a Jaxon construction site. The CFMEU had previously had concerns about safety at the site but were prevented from getting on site to inspect safety issues.