

Dear Committee,

We refer to our correspondence of 6 June 2018 and the submission it enclosed as prepared by Master Builders Australia.

A typographical error has been brought to our attention contained within the final recommendation of this submission. This recommendation is contained on both pages 4 and 33 of the submission.

Although we do not consider that the error has any effect on the utility of the original recommendation (as its intention is clear notwithstanding), in the interests of clarity we write to both bring it to the attention of the Committee and correct it.

For clarity, the original phrasing of the final recommendation was:

‘The introduction of industrial manslaughter provisions into the Model WHS Act (or any other legislation) is warranted as the existing penalty regime is appropriate’.

This recommendation should have read:

‘The introduction of industrial manslaughter provisions into the Model WHS Act (or any other legislation) is **not** warranted as the existing penalty regime is appropriate’

Accordingly, please find **attached** an amended version of this submission. We confirm that no other changes have been effected on the document.

Yours faithfully,

Sam McGregor
Policy & Industry Adviser – Safety, Contracts, Workplace Relations

Master Builders Australia

Submission to the Parliamentary Inquiry into Industrial Deaths in Australia

6 June 2018



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Introduction

1. This submission is made on behalf of Master Builders Australia Ltd ('Master Builders').
2. Master Builders is the nation's peak building and construction industry association, which was federated on a national basis in 1890. Master Builders members are the Master Builder State and Territory Associations. Over 128 years, the movement has grown to over 33,000 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.
3. The building and construction industry ('BCI') is an extremely important part of, and contributor to, the Australian economy and community. It is the second largest industry in Australia, accounting for 8.1% of gross domestic product, and around 9% of employment in Australia. The cumulative building and construction task over the next decade will require work done to the value of \$2.6trillion, and for the number of people employed in the industry to rise by 300,000 to 1.3million.
4. The building and construction industry:
 - Consists of over 340,000 business entities, of which approximately 97% are considered small businesses (fewer than 20 employees);
 - Employs over 1 million people (around 1 in every 10 workers) representing the third largest employing industry behind retail and health services;
 - Represents over 8% of GDP, the second largest sector within the economy;
 - Trains more than half of the total number of trades-based apprentices every year, being well over 50,000 apprentices; and
 - Performs building work each year to a value that exceeds \$200 billion.

Summary of Submission

5. Ensuring workplaces are safe and productive is the number one policy priority for Master Builders and our 33,000 members. The BCI is a significant part of the economy and community and is forecast to grow larger over the coming decade. Safe workplaces are a key element for our future success as an industry.

6. Safety outcomes in the BCI have consistently improved in recent years, with fatality and serious incident data trending downwards, there is more work to do and the BCI retains the definition of a 'priority industry' by Safe Work Australia (SWA).
7. It is stated at the outset that it is Master Builders' contention that negative safety outcomes and fatalities across all sectors are inextricably linked and it is not possible to differentiate or extract the framework governing industrial fatalities from the framework that governs industrial safety. Therefore, where this submission makes statements with respect to improvements in safety outcomes, sufficiencies and shortfalls in the legislative framework, these statements apply equally to industrial fatalities; the phrases are used interchangeably throughout.
8. In saying this, Master Builders recognises that the BCI has a number of attributes and nuances that make it unique. While these are both current and historical, they are important to understand in context of this submission and its content. A brief overview of these attributes is annexed hereto and marked 'A', including analysis of the BCI employment profile from a WHS perspective. This overview contains more information with respect to the use of statistical data as also discussed.
9. However, while recognising that significant WHS improvements have been achieved in the BCI in recent years, Master Builders' key focus is to continue to address areas of underperformance in WHS by striving for improvements through quality education and facilitating strong relationships between workers and employers.
10. It is Master Builders' position that Regulatory settings should be balanced, sensible and practical and, wherever appropriate, limit the burden of red-tape. Nationally consistent WHS regulation is essential in improving safety outcomes and assisting businesses operating across multiple jurisdictions.
11. Improvements in WHS can only occur within a policy framework that focuses on practical safety outcomes where a safety-oriented workplace culture is prioritised. WHS is a shared responsibility and WHS laws should reflect the nature of the multitude of relationships that co-exist on a construction site.
12. In addition, the overlap between WHS and industrial relations laws creates unnecessary confusion and complexity, with the concept of workplace safety being increasingly sullied by organisations who use safety as a tactic to achieve industrial outcomes. Modification of the current framework is necessary to prohibit those organisations using unsubstantiated safety concerns to gain unlawful entry to and disrupt construction sites.

These abuses undermine WHS laws, lead to costly disputes and detract resources from initiatives that attain genuine safety improvements.

13. Master Builders has addressed the terms of reference of the Inquiry directly in the submission herein and makes the following recommendations in no apparent order of priority:

RECOMMENDATION:

Wherever possible, matters that are ostensibly WHS are homed within the WHS framework and that it is clear that this is the primary and overriding source of obligation wherever a conflict arises.

RECOMMENDATION:

The Inquiry should examine and identify the extent to which jurisdictions are diverging from the model WHS framework and recommend strategies for the Commonwealth Government to pursue in arresting such divergence.

RECOMMENDATION:

Allocation of regulatory, investigatory and enforcement resources on the basis of industrial risk and in accordance with historical data is essential to improving industrial outcomes.

RECOMMENDATION:

A nationally consistent regime for reporting requirements of regulators should be established to facilitate increased awareness and understanding of the safety risks and associated issues within the BCI.

RECOMMENDATION:

The Inquiry should find that despite an increase in the use of temporary and labour hire workers, safety outcomes continue to improve and therefore no intervention is required.

RECOMMENDATION:

So far as is possible, avenues for exploitation of the WHS framework are closed and any recommendations for change do not create further avenues for such conduct.

RECOMMENDATION:

The introduction of industrial manslaughter provisions into the Model WHS Act (or any other legislation) is not warranted as the existing penalty regime is appropriate

Background

14. The BCI is considered to be a 'priority industry' by SWA and has a number of unique attributes that are relevant to both safety and this Inquiry, particularly with respect to the function of the regulatory environment. These unique attributes involve both the physical, regulatory and cultural environment.
15. There are a number of WHS relevant regulatory obligations that exist with unique application to the BCI. Broadly speaking, these include:
 - The *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act) which applies to all persons designated as 'building industry participants' engaged in 'building work' as defined;
 - The *Code for the Tendering and Performance of Building Work 2016* (the 2016 Building Code), compliance with same is mandatory to achieve and retain eligibility to tender for Commonwealth funded building work; and
 - The *Australian Government Work Health and Safety Accreditation Scheme* (the Scheme), compliance with same is a precondition for undertaking building work that is funded directly or indirectly by the Commonwealth.
16. The functions and requirements of the above items are overseen by several BCI specific agencies:
 - The *Australian Building and Construction Commission* (ABCC) that aims to promote an improved workplace relations framework to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants, without distinction, and for the benefit of the Australian economy as a whole;
 - The *Office of the Federal Safety Commissioner* (OFSC) is part of the Department of Jobs and Small Business. The OFSC aims to promote and improve WHS in the BCI, by providing administrative support to the functions of the Federal Safety Commissioner.
17. There are also a number of WHS regulations that have specific application to the BCI in addition to the general obligations provided under the *Work Health and Safety Act* (the

WHS Act) and *Work Health and Safety Regulations* (the WHS Regulations). These include:

- The *Code of Practice for Construction Work* (Construction Code) being an approved code of practice under section 274 of the WHS Act aiming to provide a practical guide to achieving the standards of health, safety and welfare required under the WHS Act and WHS Regulations;
- Other BCI related Model Codes of Practice including:
 - Abrasive blasting
 - Confined spaces
 - Construction work
 - Demolition work
 - Excavation work
 - First aid in the workplace
 - Hazardous manual tasks
 - How to manage and control asbestos in the workplace
 - How to manage work health and safety risks
 - How to safely remove asbestos
 - Labelling of workplace hazardous chemicals
 - Managing electrical risks in the workplace
 - Managing noise and preventing hearing loss at work
 - Managing risks of hazardous chemicals in the workplace
 - Managing the risk of falls at workplace
 - Managing the risks of plant in the workplace
 - Managing the work environment and facilities

- Preparation of safety data sheets for hazardous chemicals
 - Preventing falls in housing construction
 - Safe design of structures
 - Spray painting and powder coating
 - Welding processes, and
 - Work health and safety consultation, coordination and cooperation.
18. In addition, each State and Territory maintains its own system of relevant Codes that are developed by that jurisdiction in relation to a specific obligation that exists therein. For example, in the ACT there are Codes that deal with:
- Cooling Towers, Evaporative Condensers and Warm Water Storage Specialised Systems;
 - Preventing and Responding to Bullying;
 - Formwork; and
 - How to Safely Remove Asbestos (which contains reference to the mandatory asbestos training requirements required pursuant to r.445 of the ACT Work Health and Safety Regulation 2011).
19. Further, each State and Territory has legislative and regulatory requirements that are relevant to building work and the built environment. For example, the ACT maintains the following Acts and Regulations containing provisions directly relevant to WHS:
- Architects Act 2004
 - Architects Regulation 2004
 - Boilers and Pressure Vessels Regulation 1954
 - Building (General) Regulation 2008
 - Building Act 2004
 - Construction Occupations (Licensing) Act 2004

- Construction Occupations (Licensing) Regulation 2004
 - Dangerous Goods (Road Transport) Act 2009
 - Dangerous Goods (Road Transport) Regulation 2010
 - Dangerous Substances (Explosives) Regulation 2004
 - Dangerous Substances (General) Regulation 2004
 - Dangerous Substances Act 2004
 - Electricity Safety Act 1971
 - Electricity Safety Regulation 2004
 - Environment Protection Act 1997
 - Environment Protection Regulation 2005
 - Fuels Control Act 1979
 - Gas Safety Act 2000
 - Gas Safety Regulation 2001
 - Machinery Act 1949
 - Machinery Regulation 1950
 - Road Transport (Safety and Traffic Management) Act 1999
 - Road Transport (Safety and Traffic Management) Regulation 2000
 - Scaffolding and Lifts Act 1912, and
 - Scaffolding and Lifts Regulation 1950
20. There are also several other general regulatory sources that contain WHS related obligations. These include:
- The Fair Work Act 2009; and
 - Fair Work Regulations 2009.

21. Specifically, we refer to the Bullying and Adverse Action provisions contained within the above legislative framework.
22. The Fair Work laws further provide for the creation of additional sources of WHS obligations, in the form of Modern Awards and Enterprise Agreements. Despite a common and conventional view to the contrary, the extent to which these types of instruments provide a further source of WHS obligation is significant.
23. For example, the most commonly applied Modern Award in the BCI is the *Building and Construction Industry (On-Site) Award 2010 (On-Site Award)*. The On-Site Award contains approximately 175 separate and distinct provisions that are relevant to, or affect, WHS obligations including climactic conditions, hazardous work types and the provision of PPE. One current clause even sets obligations for employers in respect of employees undertaking building work in tuberculosis hospitals, a type of institution that has not existed in Australia for over 35 years.
24. Another example involves WHS obligations that exist in Enterprise Agreements. Master Builders has examined a range of agreements that receive common use in the sector, and these can include up to 45 separate additional WHS obligations and responsibilities. These include matters such as election of WHS representatives, entry for unions on WHS matters, WHS dispute resolution, PPE, inclement weather, hot work, etc.
25. In addition, Industry Enterprise Agreements commonly incorporate further sources of WHS obligations, commonly listed by way of appendix. As they form part of the Agreement, these obligations are legally enforceable by virtue of their incorporation by reference, irrespective of whether or not they have standing otherwise. The appendix attached to one such Enterprise Agreement promoted by building unions in Victoria lists a series of WHS related Acts, Regulations, Codes, Guidelines and Standards replicated below:
 - Accident Compensation Act 1985
 - Accident Compensation (Occupational Health and Safety) Act 1996, Electricity Safety Act 1998
 - Workers Compensation Act 1958, Occupational Health and Safety Act 2004, Dangerous Goods Act 1985
 - Equipment (Public Safety) Act 1994

- Road Transport (Dangerous Goods) Act 1995
- Road Transport Reform (Dangerous Goods) Act 1995, Mines Act 1958
- Workplace Injury Rehabilitation and Compensation Act 2013
- Accident Compensation Regulations 2001, Dangerous Goods (Explosives) Regulations 2000, Dangerous Goods (HCDG) Regulations 2005
- Dangerous Goods (Storage and Handling) Regulations 2000, Dangerous Goods (Transport by Rail) Regulations 1998, Electricity Safety (Installations) Regulations 1999, Equipment (Public Safety) Regulations 2007
- Magistrates Court (Occupational Health and Safety) Rules 2005, Occupational Health and Safety Regulations 2007
- Road Transport (Dangerous Goods) (License Fees) Regulations 1998, Road Transport Reform (Dangerous Goods) Regulations 1997, Workers Compensation Regulations 1995
- Workplace Injury Rehabilitation and Compensation Regulations 2014
- Workplace Injury Rehabilitation and Compensation (Savings and Transitional) Regulations 2014
- Communicating occupational health and safety across languages Workplace amenities and work environment
- Confined spaces
- First aid in the workplace
- Prevention of falls in general construction Foundries
- Managing asbestos in workplaces
- Removing asbestos in workplaces
- Electrical Installations on Construction Sites Concrete Cutting and Drilling
- Precast and Tilt-up Concrete for Buildings Concrete Pumping

- Construction and Erection of Bridge Beams
- VARICC Standard Specification for Asbestos Removal from Buildings, Structures, Ships, Plant & Workplaces
- AS/NZS 4576 - Guidelines for Scaffolding AS/NZS 1576 Parts 1-4 - Scaffolding
- AS 1577 - Solid timber scaffold planks
- AS 1578 - Laminated timber scaffold planks
- AS/NZS 1891.4 - Industrial Fall Arrest Devices - Selection, Use and Maintenance
AS 3828 - Guidelines for the erection of building steelwork
- AS/NZS 3012 - Electrical Installations - Construction and Demolition sites
- AS 3000 - Electrical Installations
- AS 2294 - Protective structures for operators of earthmoving machines
- AS 2550 - Parts 1-16 - Cranes - safe use of
- AS 1418.1 - Cranes, Hoists and Winches
- AS 1418.4 - Cranes - Tower Cranes
- AS 1768 - Lightning Protection
- AS2601 -The Demolition of Structures
- AS1873.1 - Power Actuated (PA) Hand Held Fastening Tools, Part 1 Selection, Operation, and Maintenance.
- AS2436 - Guide to noise control on construction, maintenance and demolition sites
- AS 3745 - Emergency control organisation and procedures for buildings
- AS 3850 - Tilt up concrete construction
- AS 3610 - Formwork for concrete
- AS 1270 - Acoustics - Hearing protectors

- AS/NZS 1800 - Occupational Protective Helmets - selection, care and use
- AS/NZS 1336 - Recommended practices for occupational eye protection
- AS /NZS 1337 - Eye Protection
- AS/NZS 4501.2 - Occupational protective clothing - General requirements
- AS 1715 - Selection, use and maintenance of respiratory protective devices
- AS 1716 - Respiratory Protective Devices
- AS/NZS 2210 - Occupational protective footwear - guide to selection, care and use
- AS 1674.1 - Safety in Welding and allied processes
- AS 1674.2 - Safety in Welding and allied processes - Electrical
- AS 4603 - Flashback Arrestors - safety devices for use with fuel gases and oxygen or compressed air
- AS 4839 - safe use of portable and mobile oxy fuel gas systems for welding, cutting, heating and allied processes.
- AS 2727 Chainsaws - Guide to safe working practices
- AS 2772.1 Radiofrequency radiation
- AS 2397 - Safe use of lasers in the construction industry
- AS/NZS - Risk management
- AS 1892 - Portable ladders
- AS /NZS ISO/IEC 1702 - General criteria for the operation of various types of bodies performing inspection
- AS 1657 - Fixed platforms, walkways, stairways and ladders - Design, construction and installation.
- AS 1216.1 - Classification, hazard identification and information systems for dangerous goods Part 1 - Classification and class labels for dangerous goods

- AS 1216 .2-4 Classification, hazard identification and information systems for dangerous goods Part 2 - HAZCHEM emergency action code, Part 3 - NFPA hazard identification system Part 4 - UN substance identification numbers
- AS 1319 - Safety signs for the occupational environment
- AS 1318 - SAA Industrial safety Colour Code
- AS 2986 - Workplace atmospheres - Organic vapours sampling by solid adsorption techniques AS 1473 - Guarding and safe use of woodworking machinery
- AS 1735 - Lifts, Escalators and moving walks.
- AS 1755 – Conveyors
- AS 1788 (Parts 1 & 2) - Abrasive wheels
- AS 2359 - Industrial Trucks
- AS 3509 - LP (Liquefied Petroleum) Gas fuel vessels for automotive use
- AS 3533 Amusement Rides and Devices
- AS 3788 - Boiler and Pressure Vessels - in service inspection
- AS 3837 - Boiler and Pressure Vessels - Operation and maintenance
- AS 3920 - Pressure equipment Manufacture Assurance of Quality
- AS/NZ 4360:2004 - Risk Management

26. In terms of these regulatory obligations and their application, the following approach extrapolated from the BCIIIP Act provide guidance.

27. A 'building industry participant' is someone involved with 'building work'. 'Building industry participant' and 'building work' are terms defined by the BCIIIP Act. The BCIIIP Act defines a 'building industry participant' to be any of the following:

- a 'building employee';
- a 'building employer';
- a 'building contractor';

- a person who enters into a contract with a building contractor where building work is carried out or arranged;
- a 'building association' (e.g. union or employer association); or
- an officer, delegate, or other representative of a building association.

28. The BCIP Act contains a relatively broad definition of 'building work', which encompasses a number of things:

- Any of the following activities, in so far as they relate to buildings, structures or works that form, or will form, part of land (including land beneath water), whether permanently or temporarily, being:
 - construction;
 - alteration;
 - extension;
 - restoration;
 - repair;
 - demolition; or
 - dismantling.
- The same activities listed above, in so far as they relate to railways (not including rolling stock) and docks.
- The installation of fittings, such as:
 - heating;
 - lighting;
 - air-conditioning;
 - ventilation;
 - power supply;

- drainage;
 - sanitation;
 - water supply;
 - fire protection;
 - security; and
 - communications systems.
- Any operation that is part of, in preparation for, or in completion of, any of the work described above, including:
 - site clearance, earth-moving, excavation, tunnelling or boring;
 - the laying of foundations;
 - the erection, maintenance or dismantling of scaffolding;
 - the on-site or off-site prefabrication of made-to-order components; and
 - site restoration, landscaping or the provision of roadways and other access works.
 - The transportation or supply of goods to be used for any of the work mentioned above, directly to building sites (including any resources platform) where that work is being, or may be, performed.
29. In contrast to the Model WHS laws, however, the BCIIIP Act does not have general application to the following types of construction work, which usefully also assists in defining residential building work, and other non-civil or general building work:
- activities associated with drilling and excavation, namely the drilling for, or extraction of, oil or natural gas;
 - the extraction of minerals, including tunnelling and boring, or construction of underground works for, the extraction of minerals;
 - activities associated with domestic housing, namely:
 - the construction, repair, or restoration of a single-dwelling home;

- the construction, repair, or restoration of a building, structure, or work associated with a single-dwelling home (e.g. a shed, or a pool);
 - the alteration and extension of a single-dwelling home, which remains so after the activity is completed; or
 - a multi-dwelling development involving the construction of four single-dwelling homes or fewer.
30. The conclusion to be drawn from the above overview of WHS related regulatory background is that participants in the BCI experience what could be described as a 'smothering' of WHS related obligations that arise from a wide array of sources – more often than not, sources that are ostensibly non-WHS focussed.
31. In broad terms, a BCI participant is likely to be covered at any one time by WHS obligations that exist in:
- 29 separate Acts of Parliament; and
 - over 35 distinct Codes.
32. A participant who is covered by an Enterprise Agreement to which the union is a party will (by virtue of that agreement and irrespective of whether they would ordinarily otherwise apply) have WHS obligations incorporated by reference to:
- 13 Acts of Parliament;
 - 8 Codes; and
 - 53 distinct and referenced Australian Standards.
- *in addition* to the obligations existing in the conventional WHS framework.
33. The Inquiry should be conscious of these circumstances when undertaking its work. While the central focus will be the model WHS framework, the existence of other sources of WHS obligation should also be considered.

RECOMMENDATION:

Wherever possible, matters that are ostensibly WHS are homed within the WHS framework and that it is clear that this is the primary and overriding source of obligation wherever a conflict arises.

Terms of reference

34. The terms of reference are:

The framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia, with particular reference to:

- a) The effectiveness and extent of the harmonisation of workplace safety legislation, between the states, territories, and Commonwealth;
- b) Jurisdictional issues surrounding workplace investigations which cross state and territory boundaries;
- c) Issues relating to reporting, monitoring and chains of responsibility between states, territories and the Commonwealth;
- d) Safety implications relating to the increased use of temporary and labour hire workers;
- e) The role of employers and unions in creating a safe-work culture;
- f) The effectiveness of penalties in situations where an employer has been convicted of an offence relating to a serious accident or death; and
- g) Any other related matters.

35. Each term of reference is addressed below adopting the above referencing for clarity.

a. The effectiveness and extent of the harmonisation of workplace safety legislation, between the states, territories, and Commonwealth

36. Master Builders' policy priority in the safety space is to ensure that this framework is as effective and efficient as possible, being facilitated by a harmonious state-based framework which is adopted by and adhered to by all states.

37. Master Builders strongly supported the creation of model national WHS laws and the related framework now established.

38. Amongst the many reasons for this support and our core policy position, key items were:

39. The high likelihood of working across borders;
40. Increased understanding by, and compliance of, BCI participants;
41. Increased capacity to examine and adopt best-practice approaches from other jurisdictions; and
42. To reduce compliance burden while maintaining appropriate protections for workers.
43. While there were minor nuanced differences, Master Builders was pleased to note the consistent adoption of model laws by all jurisdictions save for WA and VIC. Since that time, Master Builders Australia has maintained the view that WA and VIC ought to adopt the model framework to deliver better outcomes in terms of safety and productivity.
44. More recently, Master Builders has expressed concern at the growing tendency for jurisdictions to deviate from the model WHS framework as initially adopted. Examples of this include the introduction of industrial manslaughter and building product laws in Queensland, creating a range of WHS considerations that do not exist elsewhere¹.
45. The existence of widely varying obligations for BCI participants dependent upon geography is undesirable and inconsistent with the underpinning basis for the current WHS framework. It serves only to erode the positives giving rise to Master Builders support for such a framework.
46. Inconsistency is significant in the construction industry because of the number of companies that operate across state borders. While estimates have varied, the number of businesses operating across jurisdictions represents around 1 per cent of all businesses and about 30 per cent of all employees. Businesses employing more than 200 employees accounted for 99 per cent of all businesses operating across jurisdictions.
47. Previous studies undertaken by Master Builders found that while medium to large companies dominate the employment share, smaller employers are still affected. Those studies indicated that, for example, only 31 per cent of Victorian companies operating in NSW and Queensland are larger companies. Consequently, national inconsistency is a price paid by all, but disproportionately by smaller construction companies.

¹ For example, manslaughter offences carry \$10 million fines and 20-year jail terms, safety measures in Codes of Practice are mandated, and the role of workplace health and safety officer (WHSO) is re-introduced.

48. Another example of where inconsistencies diminish safety outcomes is in relation to Safe Work Method Statements (SWMS). The format and quality of content included in SWMS, as required under the model laws, is vastly divergent in terms of formatting and quality of content.
49. Increasingly, SWMS are being drafted in a legalistic manner and include a substantial amount of information that is often difficult to digest and not relevant to the risks it seeks to address.
50. SWA's Construction CoP includes both a template for and an example of a SWMS². This document is very useful to PCBUs and their workers to ensure that their own SWMS are compliant with the WHS law and regulations where the harmonised system has been introduced and in Victoria.
51. Master Builders urges the Inquiry to consider the adoption, under the model WHS Regulations in some form, of the SWMS template referenced within SWA's CoP. Such an approach would not only ensure that hazards and risks on site have been addressed clearly and appropriately but would eliminate the broad inconsistencies that currently exist in relation to SWMS.
52. SWMS need to be presented in accessible format to ensure that those responsibilities are clear and do not confuse or alienate the workers SWMS are drafted to protect.
53. Master Builders contends that the degree of consistency amongst obligations in each jurisdiction has decreased and that this will likely deliver adverse safety outcomes unless addressed.

RECOMMENDATION:

The Inquiry should examine and identify the extent to which jurisdictions are diverging from the model WHS framework and recommend strategies for the Commonwealth Government to pursue in arresting such divergence.

**b. Jurisdictional issues surrounding workplace investigations
which cross state and territory boundaries**

54. Master Builders has identified various core issues surrounding workplace investigations across state and territory boundaries.

² <https://www.safeworkaustralia.gov.au/system/files/documents/1705/mcop-construction-work-v2.pdf> - Appendix D

55. WHS regulators, while administering what is a reasonably consistent legislative framework, may take differing approaches in terms of the operation of the law and efforts to enforce compliance.
56. While the framework is generally consistent, particularly in states that have adopted the Model WHS Laws, it remains the case that a construction employer operating in several jurisdictions could experience quite different approaches to enforcement in each one.
57. An analysis of enforcement patterns shows that all jurisdictions place resources and enforcement activity into the construction industry that are disproportionately high in relation to its share of injury claims. If that effort was based on the higher risk profile of the industry the lack of consistency in regulation and enforcement becomes even more problematic for the industry.
58. Master Builders recognises that steps have been taken to achieve greater national consistency. However, while steps are being taken to close the legislative inconsistency gap, equal effort must go into achieving a national perspective on compliance and enforcement.
59. Master Builders supports the consistent application of WHS duties to all BCI participants and that the model WHS laws provide the opportunity for this consistency to be better realised.

RECOMMENDATION:

Allocation of regulatory, investigatory and enforcement resources on the basis of industrial risk and in accordance with historical data is essential to improving industrial outcomes.

c. Issues relating to reporting, monitoring and chains of responsibility between states, territories and the Commonwealth

60. Master Builders has for some time held and raised concerns with respect to the collection, classification, collation and publication of WHS related statistics.
61. These concerns centre around what might be described as a desire to include incidents that are tangentially related to the workplace, classify incidents incorrectly, or double count incidents.

62. Master Builders does not oppose the publication of WHS related statistics – in fact we emphatically support it as one further method by which workplaces and industries can improve safety outcomes. However, statistics of this type must be presented in a clear and consistent way that is accurate and representative; and not used to increase or reduce emphasis on particular issues, instances or industries.
63. While this is an issue that could attract significant written commentary in and of itself, an example for background is set out hereunder.
64. This example is based on a 2016 publication of construction industry fatalities published by a state regulator. The publication stated that there were 7 fatalities in the building and construction industry for that state.
65. Upon closer examination, of the 7 fatalities:
 - One was represented to be an electrocution while working on external lighting. We are aware it involved a suburban retail premises and was not a construction site or involved construction work.
 - One was represented to be a concrete truck driver crushed by a pumping truck. We are aware the incident occurred on a public road en-route to a construction site and involved a driver failing to apply a handbrake before exiting the vehicle. Police classified this as a motor vehicle accident but it was categorised as a construction fatality.
 - One was represented to be an electrocution of an apprentice electrician installing an alarm. We are aware the individual was undertaking the work out of hours installing the alarm on a friend's premises at the request of the friend. It was classified as a construction fatality.
 - Another instance was represented to be a worker struck on the head by an excavator bucket causing fatal injury. We are aware the incident took place at a council works depot and not a construction site, the major injuries occurred when falling after being struck, and the fatality was not immediate occurring several days later. It was classified as a construction fatality when the only link to construction was the type of equipment involved.

66. While we in no way wish to detract or undermine the tragic circumstances the report referenced, we are concerned when they are categorised incorrectly and attributed to the BCI.
67. The general public will read the report and conclude that 7 people died when undertaking construction work on a construction site – whereas more than half of these involved circumstances unrelated to construction work or construction sites, or even the construction industry as a general concept.
68. The above examples clearly highlight the broader issue that the monitoring and reporting of safety incidents and fatalities on construction sites is inconsistent across the states and territories, and precludes regulators, industry bodies and the public from understanding performance, and therefore the appropriate action to improve safety outcomes for workers.

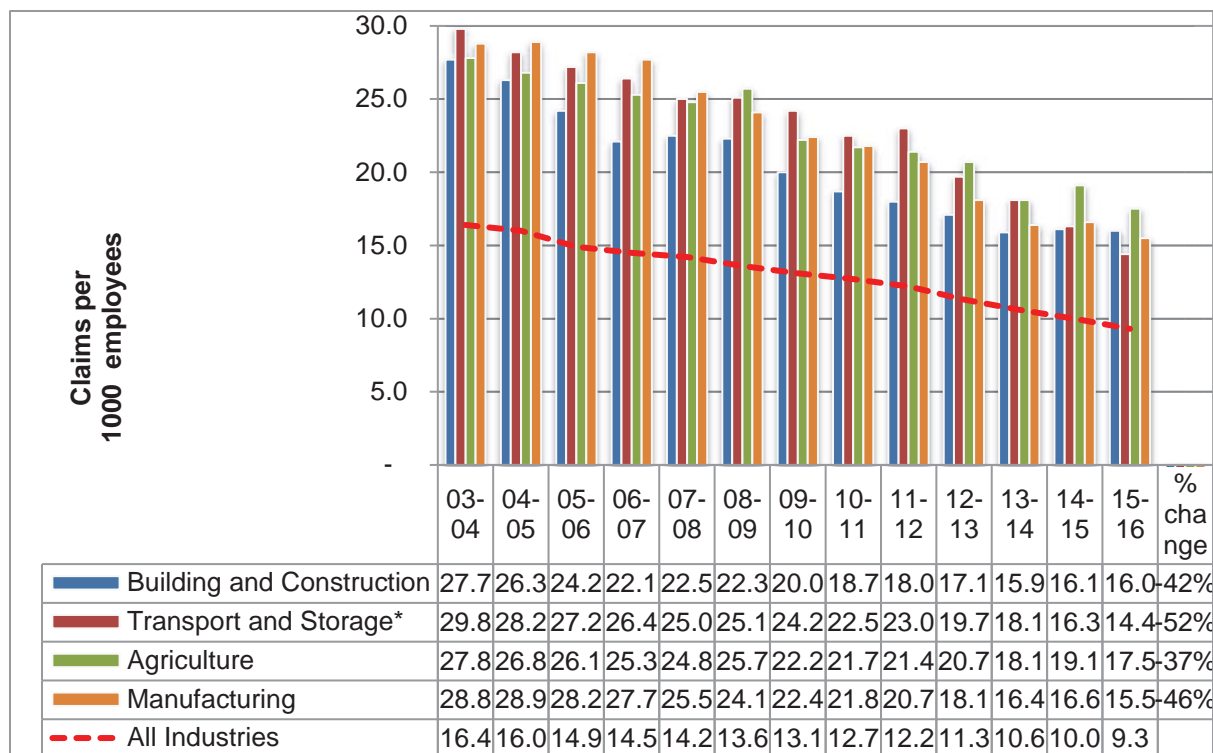
RECOMMENDATION:

A nationally consistent regime for reporting requirements of regulators should be established to facilitate increased awareness and understanding of the safety risks and associated issues within the BCI.

d. Safety implications relating to the increased use of temporary and labour hire workers

69. Master Builders has conducted thorough research, including discussions with the Australian Bureau of Statistics, however has been unable to locate data to support the assertion that there is an increased use of temporary or labour hire workers.
70. However, for the purpose of the submission, Master Builders does not expressly accept nor deny the assertion; simply, our response to this term of reference refutes the hypothetical assumption that the assertion is correct.
71. Master Builders has assessed publicly available data provided by Safe Work Australia and submits that from this data it is clear that the BCI has adequate safeguards in place to address any level of increased risk posed by the use of temporary and labour hire workers.

Figure 1: Rates of Serious per 1000 employees (data from Safe Work Australia reports)



72. If it is accepted that there is an industry-wide increase in the use of temporary and labour hire workers, then this figure clearly illustrates that, as the use of temporary and labour hire workers has increased, safety outcomes have also done so.

73. One of two conclusions must be reached:

- At its highest, the increased use of temporary and labour hire workers may be a catalyst for improved safety outcomes; or
- At its lowest, there is no direct correlation between the use of temporary and labour hire workers and decreased safety outcomes.

74. Inarguably, both possible outcomes illustrate that the issue canvassed by this term of reference does not requires any level of intervention.

75. In making this submission, Master Builders acknowledges that literature exists that indicates a higher level of risk exists for temporary and labour hire workers – the validity of that research is debatable.

76. It is our view that obligations of companies that employ or engage temporary and labour hire workers are aware of, and adequately administer their obligations under relevant legislative schemes that have been enacted to mitigate the potential risks.
77. For example, the Labour Hire Licensing Act 2017 (Qld) mean that if labour hire is used, that company must be licensed. The licensee must comply with extensive reporting requirements, including reporting on the arrangements between the licensee and workers, the locations and accommodation of workers, and any disciplinary action or enforcement action taken against the licensee by the regulatory body.
78. Inspectors have broad powers to enter a labour hire provider's workplace and will have a wide array of powers once at the premises, including searching the premises, taking equipment to the premises and removing things or documents from the premises. Reports are published online – and include details of any health and safety incidents workers are involved in, or applications for workers' compensation made by workers.
79. Again, if particular requirements are not met or breached, the labour hire company will lose its license, effectively removing the capacity to operate as an ongoing business concern.
80. In addition to comments elsewhere in this submission, Master Builders believes that the existing penalty regime, particularly when considered alongside potential ramifications from a non-monetary perspective (e.g. licence loss) is such that it does not warrant change.

RECOMMENDATION:

The Inquiry should find that despite an increase in the use of temporary and labour hire workers, safety outcomes continue to improve and therefore no intervention is required.

e. The role of employers and unions in creating a safe-work culture.

81. Master Builders believes that WHS is WHS – a seemingly trite but crucially important proposition.
82. This proposition is founded on a notion that safety law should deal with safety – and other matters/issues that are only tangentially or indirectly linked to safety should be

contained in the most relevant place or law for that matter/issue. Likewise, other laws that are not conventional 'safety' law should not contain WHS matters.

83. Master Builders would observe that it is common for BCI workplaces to have legal obligations:
- arising from separate and distinct sources that, by and large, mimic each other; or
 - that are found properly in one source but are re-stated in separate laws or regulatory frameworks.
84. For example, obligations regarding workplace consultation, dispute resolution and right of entry are found in both WHS and industrial relations laws – the requirements of which are largely the same. The aim of ensuring workplaces are safe and without risk appears as a stated object in over a dozen separate legislative Acts – many of which underpin regimes that exist to achieve a purpose or policy outcomes that is not primarily safety.
85. More frequently, obligations in one law are repeated or re-stated in another. As already noted, BCI participants experience frustration in determining the source of a particular WHS obligation and the duplication of these throughout various laws execrates this frustration.
86. There is also a very high risk that the problem above vastly increases the chance that various obligations can become conflicting in nature. For example, a mandated process to consult about workplace change in safety law could conflict with related obligations in industrial relations laws, creating a situation where compliance with one causes a breach of the other.
87. A further obvious issue is the existence of provisions within the FW Act that deal with bullying and adverse action – areas that commonly have associated WHS implications or ramifications. The complexities this creates are obvious – for example, how can an employer determine if a worker's representative seeks right of entry on the grounds of an imminent risk to safety (arising from bullying) or to hold discussions with a worker about rights, legal options and future representation?
88. It should be noted that the problem we describe usually arises from nothing more than the good intentions of policy and law makers who are keen to ensure workplaces are safe; but not exclusively. This however does mean that these laws are open to abuse

by parties who have an ulterior agenda; and such abuse is damaging to the maintenance of a 'safe-work culture' and the improvement of WHS outcomes.

89. The most crucial concern for Master Builders and the BCI generally is the need to ensure that WHS laws contain no capacity for exploitation, abuse or misuse.
90. Master Builders cannot overstate the importance of this requirement. The extent to which WHS is abused, exploited or mis-used for purposes that are unrelated to safety is significant and a common (yet entirely unfortunate) feature of the BCI.
91. This feature is of serious and grave concern to Master Builders and our members, as it:
 - Creates a barrier to improving BCI safety outcomes;
 - Undermines genuine WHS matters when they arise;
 - Reduces productivity and increases construction costs for consumers and taxpayers; and
 - Blurs the line between safety law and non-safety related laws, reducing compliance levels and increasing confusion amongst BCI participants.
92. Just as the duplication matter noted above, avenues to exploit and abuse WHS laws for unrelated purposes exist as a result of well-intentioned policy makers whom assume employee representatives always hold genuine motivations. This is not always the case.

RECOMMENDATION:

So far as is possible, avenues for exploitation of the WHS framework are closed and any recommendations for change do not create further avenues for such conduct.

93. Master Builders refers to the Inquiry's comments earlier herein with respect to the culture and history of the BCI and its participants.
94. The specific role of HSRs is one that is particularly important to the BCI in context of this culture and history. There are a number of HSR specific matters to which the attention of the Inquiry is drawn in an effort to contextualise our comments.
95. First, the BCI is renowned for the common practice where HSRs are determined by persons and entities that are not parties in the workplace, such as workers. To the contrary, it is common for building unions to 'nominate' a particular individual to be a site

HSR and this is frequently a person not familiar with a particular worksite nor actually employed by the company.

96. There has been a myriad of instances where BCI participants have been involved in lengthy and protracted industrial action caused by disagreement related to a HSR nomination. The highly publicised Myer Emporium dispute in Melbourne CBD in which police horses were punched by union protesters (and which lead to a protracted dispute and secondary boycott action involving Boral) had its genesis in a dispute involving a HSR. In simple terms, the workers at the worksite had sought to nominate their HSR whereas the union wanted persons nominated by them to fulfil these roles. The employer's failure to concede to the union's demands lead to unlawful action that closed not only the building site in question, but the entire vicinity of the Melbourne CBD.
97. Second, the role and functions given to HSRs under WHS law is often the reason why a building union considers it crucial to determine who fills such a role. One such role is the capacity for a HSR to invite a building union official into the worksite to deal with an issue related to WHS.
98. The capacity for a HSR to extend such an invitation is seen to be crucial by building unions as this is seen to provide a mechanism that subverts usual right of entry processes and procedures.
99. The frequency by which tactics noted above are deployed in the BCI is astounding – it is considered by BCI participants to be the 'norm' and instances where the rules are observed are disappointingly rare.
100. Master Builders was therefore disappointed by the decision in *Director of the Fair Work Building Industry Inspectorate v Powell* [2016] FCA 1287. The case involved an application by (ABCC predecessor agency) FWBC seeking orders that a CFMEU official had breached right of entry laws.
101. The official had entered a workplace at the request of, and to provide assistance to, a workplace health and safety representative (HSR) and would normally be required to have a right of entry permit. The court found that this was not the case, and that officials have a right to be in a workplace without a permit or following entry rules, if they are there at the invitation of a workplace HSR.
102. At the time of this decision, Master Builders warned of the danger the decision would pose to rules governing how, when and why a union official can enter a workplace were

not applicable if they've been invited to attend the site. We considered it to be nonsensical to have a situation where the rules only apply to a union official if they request entry, but if a HSR invited them in, no rules apply and the official could be free to engage in whatever conduct they desired.

103. Master Builders was concerned that union organisers who have had entry permits taken away, never applied for a permit, or have failed a 'fit and proper person' test can get into any workplace at any time if they are invited to do so by a HSR. In the case referenced above, the official was known to associate with outlaw motorcycle gangs, protested against the deportation of people with links to organised crime, wore Rebels Outlaw Motorcycle Gang badges, and had a track record of ignoring entry laws. In 2007, the same official was reported to have abused a site manager calling him a "f..king maggot", a "piece of sh*t", a "c.ckhead" and a "f..king idiot" and had previously had entry permits suspended and received counselling for 'renegade' behaviour.
104. Master Builders does not believe union officials should be banned to assist workplace representatives, however giving someone associated with bikies and a history of abusive and illegal behaviour the green light to be anywhere they want if invited, was not appropriate.
105. The above decision was subsequently appealed to the Federal Court of Australia who overturned the first instance decision. The CFMEU subsequently appealed to the High Court of Australia who refused leave and dismissed the application.
106. This outcome was welcomed by Master Builders. The Court outcome means the decision of a Federal Court Full Bench³ to overturn an earlier decision⁴ remains, meaning union officials cannot bypass normal rules upon entering a workplace if invited by a health and safety representative.
107. The Federal Court Full Bench previously determined that:

“There is no reason of policy or common sense why one would distinguish between differently worded conditions that by their operation provided a right to enter premises for occupational health and safety reasons, to require a permit if the official has a reasonable suspicion of a contravention of a State or Territory or Commonwealth law about occupational health and safety, but not to require a permit if the official is asked

³ (*Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89)

⁴ (*Director of the Fair Work Building Industry Inspectorate v Powell* [2016] FCA 1287)

to assist an HS representative deal with an issue about occupational health and safety, which may or may not have a connection with such a contravention.”⁵

108. Master Builders agrees with the above observation and was pleased that the High Court outcome enables the previous ‘common sense’ position of the Full Bench to remain. The Courts decision to not hear the case meant the loophole remains closed and is a welcome outcome that will assist in improving safety on worksites and ensure that building unions, already renowned for unlawful behaviour only following the law when it suits, play by the rules so that building sites can be just like every other workplace.

f. The effectiveness of penalties in situations where an employer has been convicted of an offence relating to a serious accident or death.

109. Master Builders submits that the current penalty regime under the model WHS laws is appropriate and there is no need for new offence types.

110. Recent amendments to the Queensland WHS Act have resulted in the introduction of a new offence of industrial manslaughter. Unions have argued that such a penalty should be included in all State/Territory legislation when a workplace death arises as a result of reckless breach of duty.

111. Contrary to those who argue that a change to the laws, akin to those recently enacted in Queensland, is necessary, existing offences under the model laws for reckless conduct remain appropriate.

112. The offence of reckless conduct under the Model WHS Act provides that a person who has a health and safety duty (i.e. not just an employer) that, without reasonable excuse, engages in conduct that exposes a person to whom that duty is owed, to a risk of danger of death or serious injury or illness; and is reckless as to the risk, is guilty of an indictable offence. The offence carries a maximum five years imprisonment or substantial financial penalties applicable under the Act.

113. In the alternative, under the QLD legislation, the offence of industrial manslaughter requires that the person’s conduct (be that the PCBU or its officers) must cause the death of the worker and they must also be negligent in causing the death of the worker

⁵ (Australian Building and Construction Commissioner v Powell [2017] FCAFC 89)

by their conduct. This is a much tougher offence to prove than reckless conduct, currently provided for under the model legislation.

114. The marked difference between the QLD industrial manslaughter provisions and the existing penalties under the model WHS Act, is that the QLD provisions are aimed solely at the employer.
115. The offence of industrial manslaughter in QLD provides for 10 years imprisonment and a \$20m maximum penalty. We are unaware of any evidence that suggests such a penalty will actually lead to improved safety outcomes.
116. It is important to note that a WHS offence differs from a breach of the general criminal law.
117. Firstly, a breach of a WHS duty occurs whether or not harm is caused. It is the failure to provide a safe working environment which constitutes the breach. Secondly, proof of a breach of duty does not depend upon proof of a relevant state of knowledge or intent, as opposed to the offence of manslaughter.
118. The introduction of the offence of industrial manslaughter is also unwarranted as the enactment of the Model WHS Act brought with it new duties for officers who now have a legal responsibility to exercise due diligence. Due diligence requires them to take a proactive role in ensuring that their business complies with its duties. Failure to ensure due diligence attracts significant personal liability.
119. In announcing the QLD industrial manslaughter laws, the Government stated “companies won’t be able to hide behind elaborate corporate structures to evade their responsibilities.” Officer due diligence provisions exist for that exact reason – to ensure that officers can be held accountable for the failings of their organisations, reinforcing the point that there is no legislative gap in the model WHS laws.
120. Master Builders considers that the existing model WHS laws provide an appropriate framework for dealing with workplace deaths. A breach by a duty holder where the person, without reasonable excuse, engages in conduct that exposes an individual to a risk of death or serious injury or illness and the person is reckless as to the risk to an individual of death or serious injury or illness could result in substantial penalties of up to \$3 million for a body corporate and fines and/or 5 years imprisonment for individuals. There can be no doubt about the deterrent effect of such significant penalties. This

notion is reinforced in the light of the scope for courts to deal appropriately with the most serious breaches of model WHS laws.

121. The existing legislation also achieves a balance between prevention and punishment. As mentioned above, of particular importance is the duty of officers. This additional duty was seen by WHS experts as one of the most important reforms made during OH&S harmonisation as officers are now required to take positive and proactive steps to ensure that their business or undertaking has the systems and procedures in place to meet its WHS obligations.
122. The focus should be on prevention of workplace injuries and deaths rather than taking punitive action after the event. A punitive approach is counterproductive and less effective than encouraging employers and workers to work together.
123. It is Master Builders' view that the current penalty regime is adequate, and the introduction of the offence of industrial manslaughter is out of step with the intent of WHS harmonisation and therefore unwarranted.

RECOMMENDATION:

The introduction of industrial manslaughter provisions into the Model WHS Act (or any other legislation) is not warranted as the existing penalty regime is appropriate

Annexure A: Employment Profile of The Building and Construction Industry

Summary of the industry in 2018

1. To the extent that national statistics can adequately describe the state of WHS performance in the construction industry, the following points are clear.
2. In nearly all respects the construction industry has continued to improve performance:
 - The incidence rate for serious claims per 1000 employees is down 42 per cent since 2003, consistently holding a steady downtrend.
 - The incidence rate for fatalities within the construction sector is down by 43 per cent since 2003.
 - The incidence rate for compensated fatalities per million hours of work completed is down 35 per cent since 2003 consistently holding a steady downtrend. This indicates that periods of high demand have no discernible effect on fatalities.
 - The incidence rate of fatalities by industry of employer in key industries indicates a gradual downtrend overall, though highlights volatility in the agricultural industry.
 - Disease related fatalities such as asbestosis and mesothelioma from exposures to asbestos many years ago continue to influence WHS statistics in the BCI, however less so than they have in previous years.
 - The BCI is outperforming in key indicators and is on track to meet the National OHS strategy targets.
3. However, construction is still well behind the all industry rate:
 - Claims incidence rates in construction are still much higher than the national average.
 - Compensated fatality incidence rates are still twice the rate of the national average.
 - Construction tradespersons have higher incidence rates than tradespersons working in all other industries.
4. Some other features are also evident:
 - The level of injury does not seem related to the level of construction activity, suggesting that risks are generated mainly by the operating practices of companies not the pressure of economic activity.
 - The injury profile of the industry is dominated by manual handling and falls; there has been no evidence to suggest a change in this profile over the period.

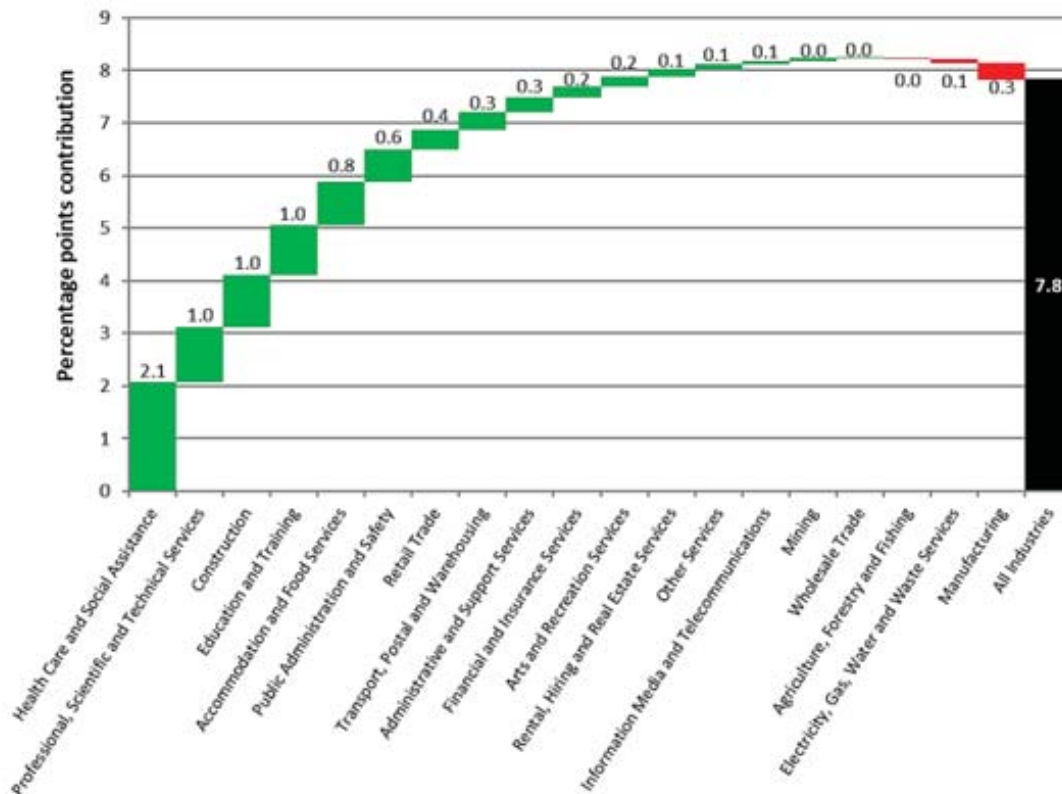
- The non-building construction sector (i.e. infrastructure projects) has the highest incidence rates compared with other categories in the construction industry.
- Survey data indicates both young and older workers are exposed to greater risk of injury.
- Survey data indicates that while contract work and non-employees represent a higher proportion in the construction workforce their experience of injury is similar to that of employees.

5. Construction is the third largest employing industry in Australia, employing 1,159,000 people (or 10.7 per cent of the total workforce) as at February 2018. The construction industry is strongly influenced by economic cycles and can be susceptible to skill shortages as well as oversupply for some skills. Consistently for at least the last 10 years, the construction industry, in line with Australia's strengthening economy, has experienced sustained and robust employment growth.

6. The Department of Jobs and Small Business has projected employment growth for the construction industry for the next five years, although it should be noted that some risk is attached to this outlook, particularly in light of the changing economic environment. Over a five-year period, employment in the construction industry is expected to grow at an average rate of 2.18 per cent per annum, which equates to around 64,800 new jobs (see figure). This compares with an average annual growth rate of 1.56 per cent across all industries over the same period. The projected job growth 'locks in' the much higher employment level reached in recent years, and anticipates further employment gains, albeit at a lower growth rate into the future.

Projected employment growth (%pa) by industry contribution

Department of Jobs and Small Business – Labour Market Information Portal, 2018



7. The Australian workforce is becoming skewed to older age groups as a result of an ageing population. However, the construction industry has a higher share of prime aged workers between the ages of 20 years and 44 years in comparison with all other industries⁶. Broadly, the Construction industry has a relatively young workforce, with 43.3 per cent of workers aged 15 to 34 years, compared with 38.8 per cent across all industries. By contrast, older workers are underrepresented in the Construction industry, likely due to the manual labour roles dominant in the industry, with 35.4 per cent aged 45 years or over, compared with 39.3 per cent across all industries. The median age of workers in the industry was 38 years in 2014, slightly below the median age of 40 years recorded across all industries.

8. In recent years, the construction industry has, unlike many other industries, experienced an influx of workers in all age groups and may be better placed to adapt to workforce ageing. Strong infrastructure investment and non-residential building activity, along with continuing high levels of residential construction (albeit more in line with population growth) are expected to support strong projected employment growth in the

⁶ <https://cica.org.au/wp-content/uploads/2015-Construction-Industry-Outlook.pdf>, fig. 5.

Construction industry (up by 120,700 or 10.9 per cent). The reality of this data is that 1 in 12 new jobs in Australia will be created within the construction industry.

9. Notwithstanding, the construction industry faces a real issue; census data indicates that attrition and retirement will account for the loss of over 120,000 workers over the next 5 years, which, along with the forecast growth, indicates that training of over 220,000 new workers will need to occur. The challenge will be to boost current levels of new skilled entrants over the same period, or the industry will suffer an increasing skills gap and ageing worker effect.
10. This changing dynamic means that training for WHS and engendering a culture that integrates WHS in all aspects of work is a priority, especially for young people entering the industry. WHS must be a vital component of education for all industry participants. This stance on education is the best way of changing the culture of the industry so that WHS becomes integral to all workplace tasks.

WHS Performance in the Industry is Improving

11. The BCI's WHS performance remains a matter of concern to all industry participants. However, the industry has responded to the various pressures for improved work health and safety management. According to the data analysed here, WHS performance is improving and has maintained a steady trend of improvement for the past 15 years.
12. The data is drawn primarily from the National Data Set for Compensation based statistics (NDS), census information, labour market information from the Department of Jobs and Small Business Labour Market Information Portal, and public reports produced by Safe Work Australia. Some elements of the data have been tracked by Master Builders Australia and updated over the preceding 15-year period.

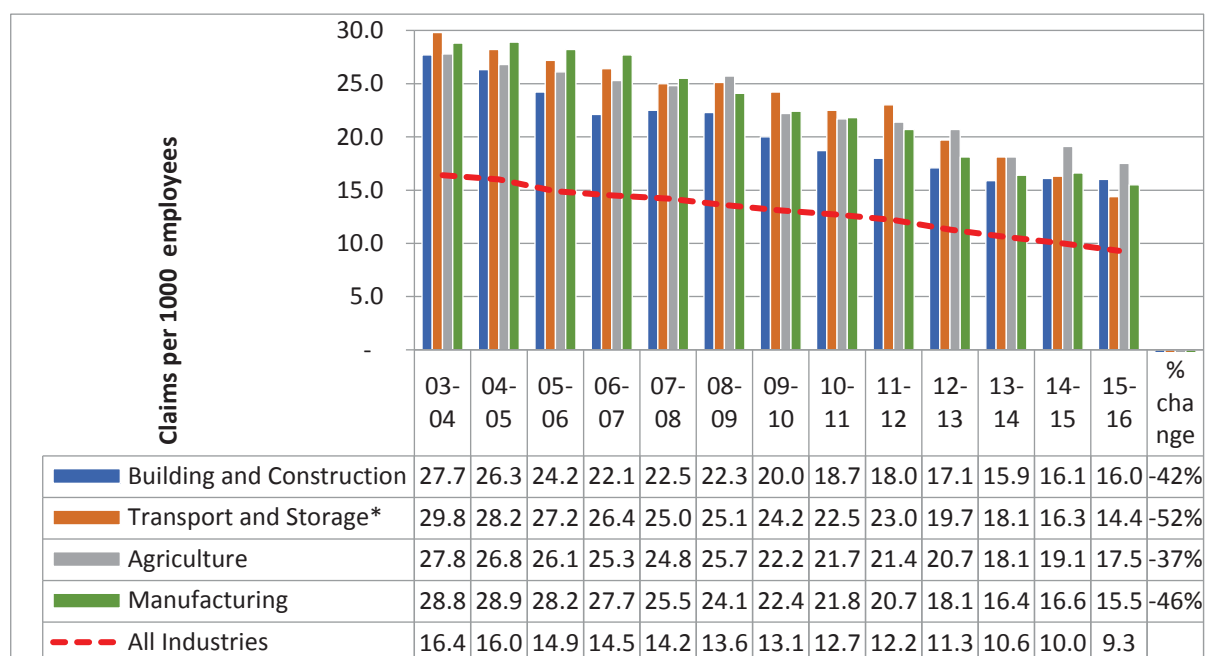
Incidence and Frequency Rates Reducing but Slowing

13. **Figure 1** below shows that:

- The industry's incidence rate has fallen by 22 per cent in the period 2003-04 to 2007-08, a much higher rate of decrease than in the manufacturing, transport and storage and agriculture industries
- From 2008 onwards, the industries incidence rate followed this downward trend until reaching an all-time low in 2014 and plateauing in 2015 and 2016.

14. Agriculture, manufacturing, and transport and storage have been adopted as high-risk benchmark industries for use in comparison to the industry throughout the below discussion.

Figure 1: Incidence rate of serious claims⁷ per 1,000 employees (CPM 11th edition)



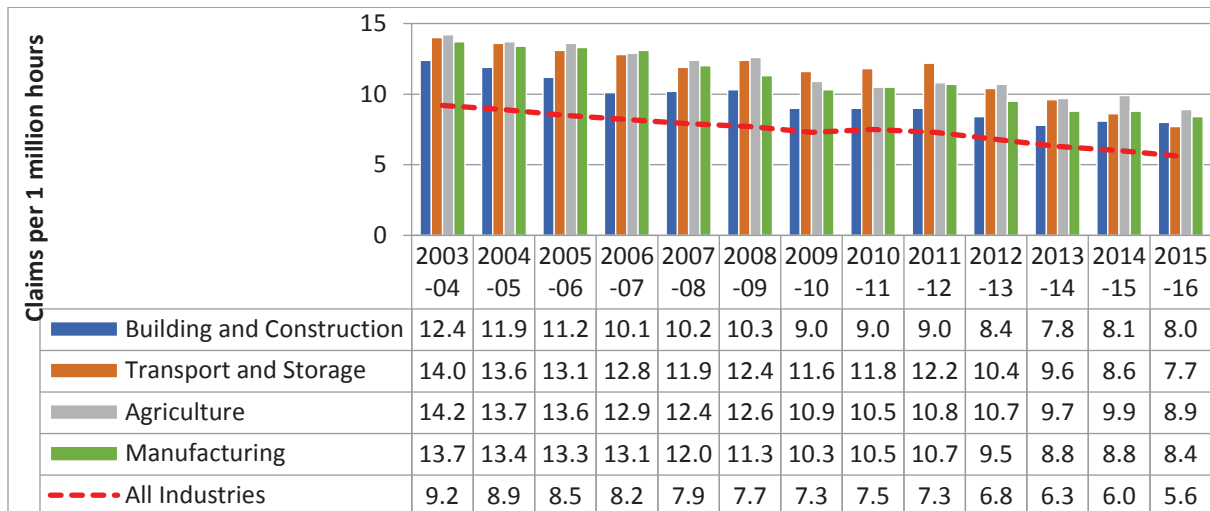
15. The BCI maintained a reduction in its incidence rate (27.7 to 16.0, being a 42% reduction from 2003-16), but it is still much higher than that for all industries (9.3 in 2016).

16. In **Figure 2** (using data drawn from Safe Work Australia reports) the frequency rate shows a similar trend, with building and construction outperforming the three high risk benchmark industries for the period 2003 – 2015, noting that Transport and Storage outperformed the BCI in 2016. It is pertinent that the BCI maintains a significantly

⁷Serious claims include all fatalities, all permanent incapacity claims (as defined by the jurisdictions) and temporary claims for which one or more weeks of time lost from work has been recorded.

higher rate of frequency than the ‘all-industries’ rate (being 8.0 in 2016, compared with 5.6 for all industries).

Figure 2: Frequency rate of serious claims per 1 million hours



Fatalities Still a Major Concern

17. Understanding fatality data in the construction industry is a complex matter. It is accepted that compensated fatality data is likely to understate disease-related deaths, and that the construction industry, having a significant percentage of self-employed workers, is also likely to underestimate fatality numbers and rates. Further, it should be noted that in the past a broad-brush assessment of statistics has led to development of policy that has failed to consider industrial nuances, leading to incorrectly tailored policy that can prove to have little effect on industrial safety outcomes especially in with respect to disease management and control.

18. According to the most recent publicly available data from SWA (**Fig. 3.1**), working fatalities in key industries have steadily decreased between 2003 and 2016. Of note, Transport and Storage has reduced fatalities by 49% when compared to 2003 and Building and Construction has reduced fatalities by 43%⁸, in line with the all industry rate of 44%. Notwithstanding the significant improvement in outcomes, both industries are significantly underperforming when compared to the ‘all industry average’, where BCI remains over 200% higher, and Transport and Storage remains 500% higher.

⁸Although the data reflects a 62% reduction across the manufacturing sector, this is not as statistically significant as the reductions in these two key industries as manufacturing maintained a significantly lower rate of fatalities (approximately 300% lower than the BCI, and 650% than Manufacturing) over the entire period, as well as maintaining a rate within 0.1 of the ‘all industry’ average over the period.

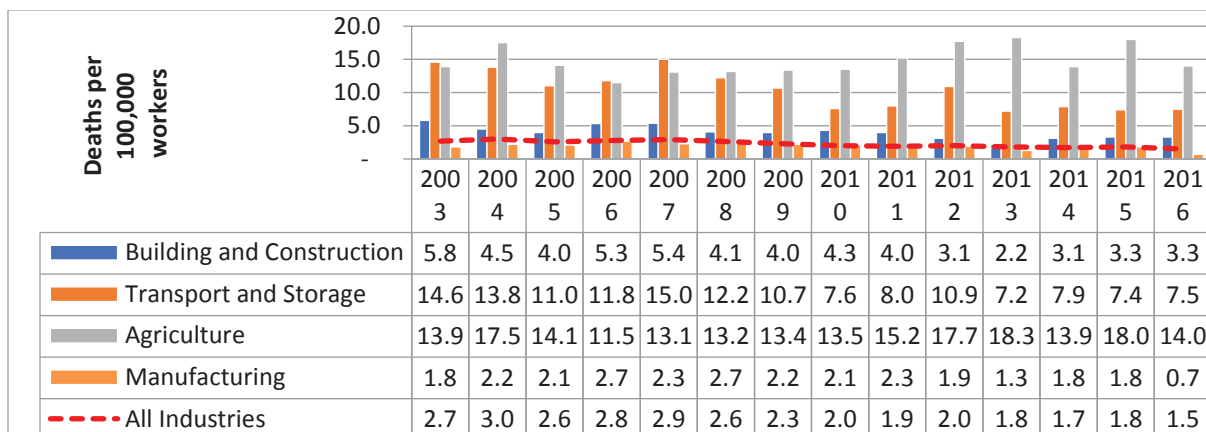
Figure 3.1 Working Fatalities: Changes in rates of fatalities by industry of employer, 2003-2016

Industry	% change
Construction	-43%
Transport	-49%
Agriculture	-12%
Manufacturing	-62%
All industries	-44%

19. These figures highlight two points. First, the number of fatalities in construction remains high – even where consistent reduction is evident. While the long-term reduction is encouraging, the significant human and economic cost associated with fatalities means that this area needs to be given the highest order of priority.

20. Second, from a statistical standpoint, the numbers do not allow much confidence in predicting sustainable trends into the future.

Figure 3.2 Working fatalities: Fatality rate by industry of employer, 2003 to 2016



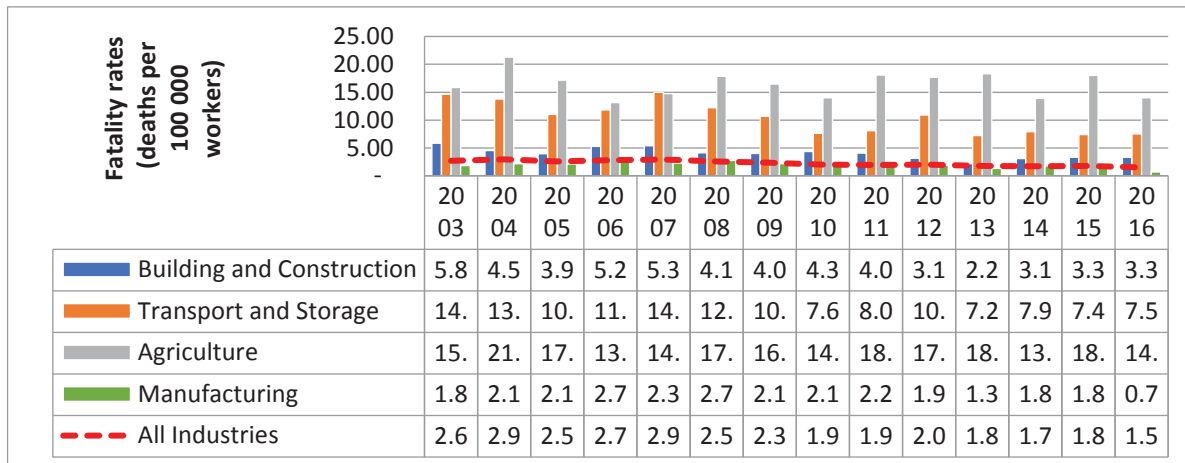
21. In terms of the fatality rate (deaths per 100,000 workers) agriculture (14.0) and transport and storage (7.5) had the highest fatality rate. The BCI rate was lower, at 3.3, however remains more than double the all industries rate of 1.5.

22. In this period the fatality rate has reduced consistently in all selected industries with the exception of Agriculture, which remains both high and volatile.

23. Data for the period 2017-18 is not yet available from SWA, however compensated fatality data also allows an examination of the difference between traumatic and gradual onset fatalities which may be useful in directing effort to achieve a reduction in fatality rates. The traumatic fatality cases directly reflect conditions in the period shown, whereas gradual onset fatalities may indicate the results of exposure to substances, materials and practices used in previous time periods. A disease such as

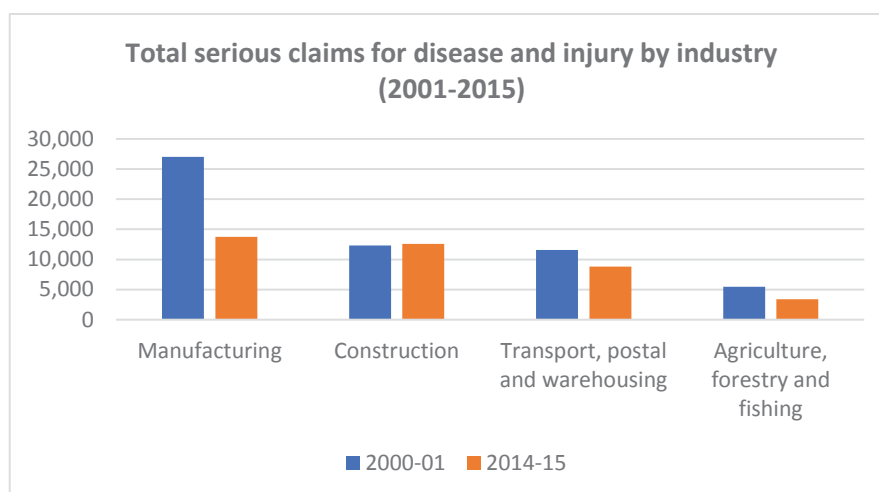
asbestosis is an example. This data has been drawn from SWA and is noted in Figure 4 below.

Figure 4: Compensated Fatalities Incidence Rate (compensated fatalities per 100,000 employees) by industry of employer, 2003 to 2016



24. **Figure 5** shows fatalities related to immediate causes (injury and poisoning) and excludes disease-related fatalities. The BCI has reduced its rate by 14 per cent in the period, compared with 5 per cent for all industries. There has been improvement in all sectors but transport, but the rate of improvement is skewed by the underdeveloped numbers in 2007-08.

Figure 5: Serious claims for disease and injury by industry (change from 2001-2015)



25. The equivalent series for disease related fatalities shows significant reductions in all the selected industries with the exception of building and construction. Manufacturing maintains the highest rate (13,725 in 2015) of all industries, representing 12.8% of all claims across all industries (where the total amount of claims in 2015 was 107,355,

from 133,115 in 2000-01⁹). The BCI representing the second highest number of claims, totalling 12,575 and representing 11.7% of all claims.

26. Body stressing accounted for at least a third of all construction industry compensated injuries in the since 2014 (37%)¹⁰, where falls, trips and slips, and hits by moving objects account for a total of a further 42% of (28% and 14% respectively). Main causes of fatalities were falls from height (28%), vehicle incidents (16%), and contact with electricity (15%).

27. Within the disease related fatalities category, asbestosis and mesothelioma cases were represented significantly less than in previous years, where the most recent Construction-industry specific data recorded that 'less than five claims for asbestosis and no claims for mesothelioma [were] recorded for diseases over [the period of 2008-2013]'¹¹.

28. Between 2014 and 2016 (the most recent data held by SWA) the most common causes of fatality in across all industries were:

- vehicle collisions, accounting for 42% of fatalities,
- falls from a height, accounting for 14% of fatalities and
- being hit by moving objects (9%) and being hit by falling objects (9%)¹².

29. Another perspective on fatality data is to compare numbers and trends with an exposure denominator such as the level of building activity (**Figure 6**). One of the intuitive responses to fatalities is that they are more likely to occur when time pressures and labour supply shortages lead to poor practices; data shows however that this is not the case.

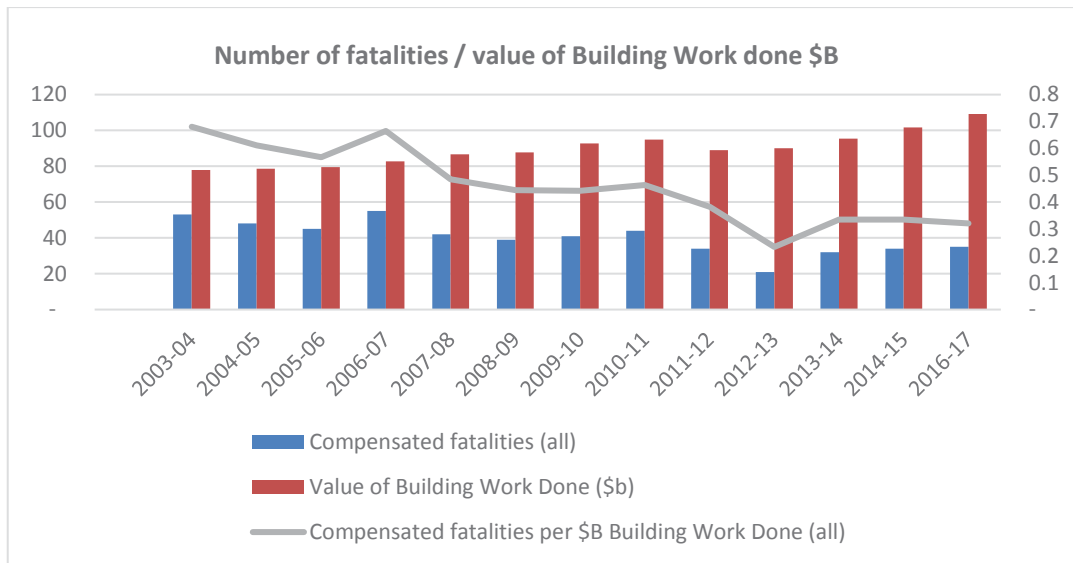
⁹ <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics>

¹⁰ <https://www.safeworkaustralia.gov.au/system/files/documents/1702/construction-industry-profile.pdf>

¹¹ Noting from 2012 the Australian Government agency Asbestos Safety and Eradication Agency was established and took over the collection of key data in this field, construction industry specific data is difficult to obtain.

¹² <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics>

Figure 6: Number of compensated fatalities per \$billion building work done



30. **Figure 6** shows the relationship between the level of building activity and the number and rate of fatalities¹³. The raw numbers suggest there is no relationship between the level of building activity and fatality numbers and rates: as activity has increased the number of fatalities has decreased. Further highlighting improvements in fatality rates in the BCI.

31. This suggests there is no relationship between the two variables and indicates that the reasons for fatalities may be more to do with practices unaffected by activity peaks.

Performance Varies Across Jurisdictions

32. The variation in performance across jurisdictions can be a basis for trying to identify success factors or barriers to improvement. The most recent jurisdiction-based comparison can be found in the latest SWA Information Sheet for Construction.¹⁴ SWA data from previous reports is reproduced below in **Figure 7.1**; the most recent data is reproduced below in **Figure 7.2**.

¹³ The data are drawn from the Statistical Compendium and the Australian Bureau of Statistics report number 8752 (Building Activity Australia, September quarter 2009 released January 2010).

¹⁴ 2012-2016 Source: Indicator 1 - https://www.safeworkaustralia.gov.au/system/files/documents/1710/comparative-performance-monitoring-report-19th-edition-part-1_1.pdf

Figure 7.1: Serious claims: Incidence rates by jurisdiction (2003-2011)

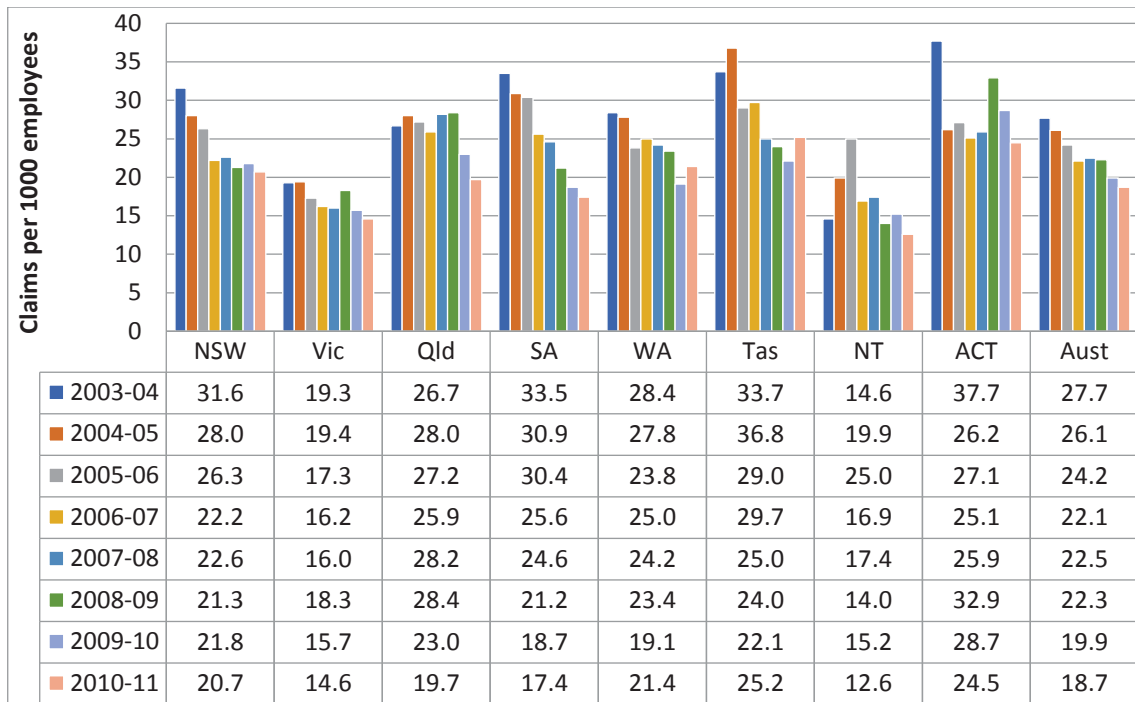
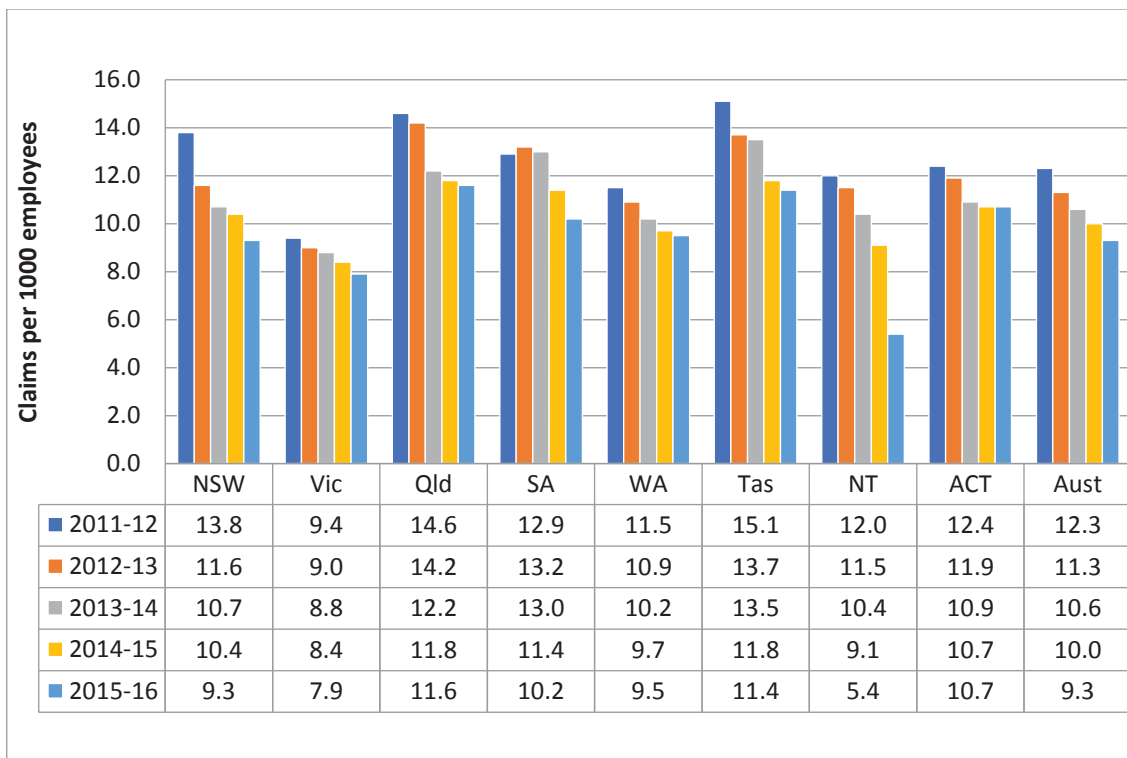


Figure 7.2: Serious claims: Incidence rates by jurisdiction (2012-2016)



33. Victoria has been consistently below the national incidence rate for the 13-year period. Queensland's rate has significantly reduced, after maintaining a steady performance from 2003-2010, and reduced significantly for the first time since in 2011. New South Wales, ACT, Tasmania and South Australia have all achieved reductions in the

incidence rate of at least 65% over the total period, although three of those jurisdictions (SA, Tasmania and ACT) are still performing worse than the Australian average rate.

Performance Varies Within Different Building and Construction Sectors

34. The BCI is diverse and represents many different types of construction activities and their attendant hazards. For statistical purposes the industry is classified into two groups, each with a number of sub-divisions as described below:

41 General Construction

411: *Building Construction*: covers the construction, alteration and repair of housing and other residential buildings; and non-residential buildings such as hotels, hospitals and prisons.

412: *Non-Building Construction*: covers the construction and repair of structures such as roads and bridges, railways, harbours, dams and pipelines.

42 Construction Trade Services

421: *Site Preparation Services*: covers activities such as earthmoving, excavating and trench-digging, and the hire of excavation equipment with operators.

422: *Building Structure Services*: covers activities such as concreting, bricklaying, roofing services and structural steel erection services.

423: *Installation Trade Services*: covers activities such as plumbing, electrical, air conditioning and heating services and fire and security system services.

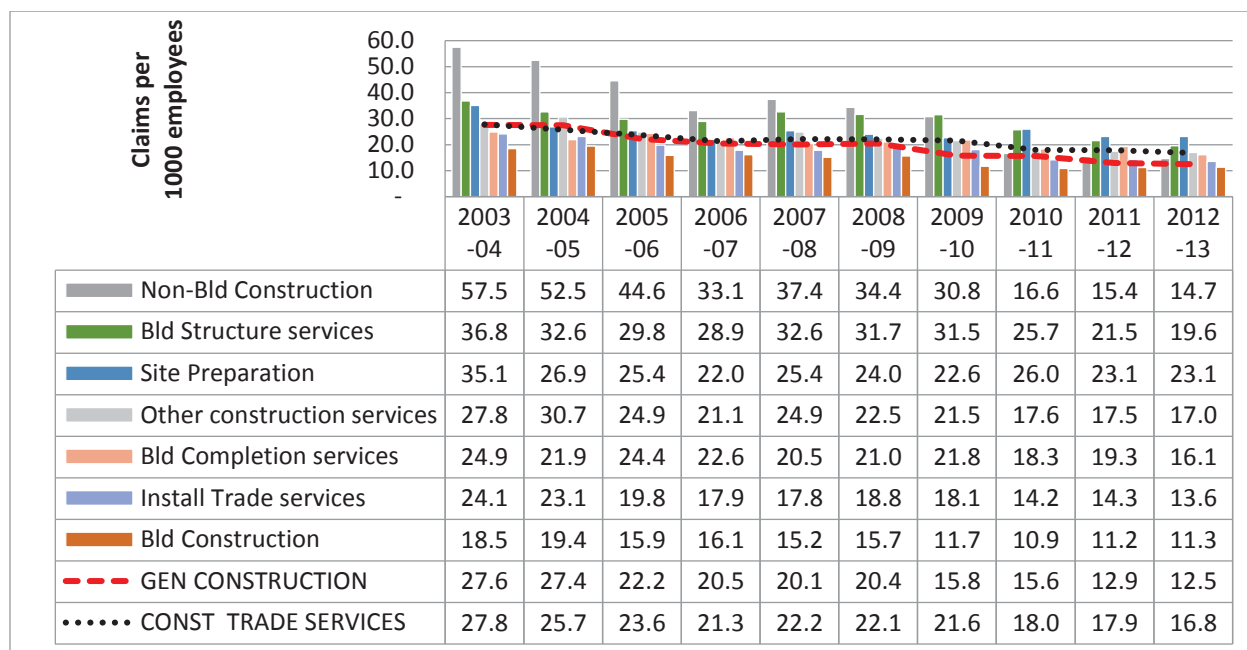
424: *Building Completion Services*: covers activities such as plastering and ceiling services, carpentry, tiling, painting and decorating and glazing services.

425: *Other Construction Services*: covers activities such as landscaping and other special services such as sand blasting and scaffold construction.

35. Differences in risk exposure are found in these industry sub-groups, and these may influence claims performance.

36. **Figure 8** shows that these two groups had similar incident rates over the period. The real differences are in the sub-divisions, with non-building construction having the highest rate and building construction the lowest rate. Nearly all subdivisions have reduced their rate by 25%-33% up to 2006-07.

Figure 8: Incidence rate of serious claims per 1,000 employees for industry group and subdivisions



Injury Profile Has Not Changed Significantly

37. Although there is evidence of reductions in the number and rate of claims, the profile of injury has not changed significantly. The most recent data shown in **Figure 9.1** illustrates the profile as represented between the period of 2003-2008; **Figure 9.2** represents the most current data from SWA, being the average figures from 2010-2015. The figures illustrate how rigid the profile is, with little change in the relative importance of the major mechanisms of injury revealed.

Figure 9.1: Percentage serious claims by mechanism of injury or disease – 2003-08

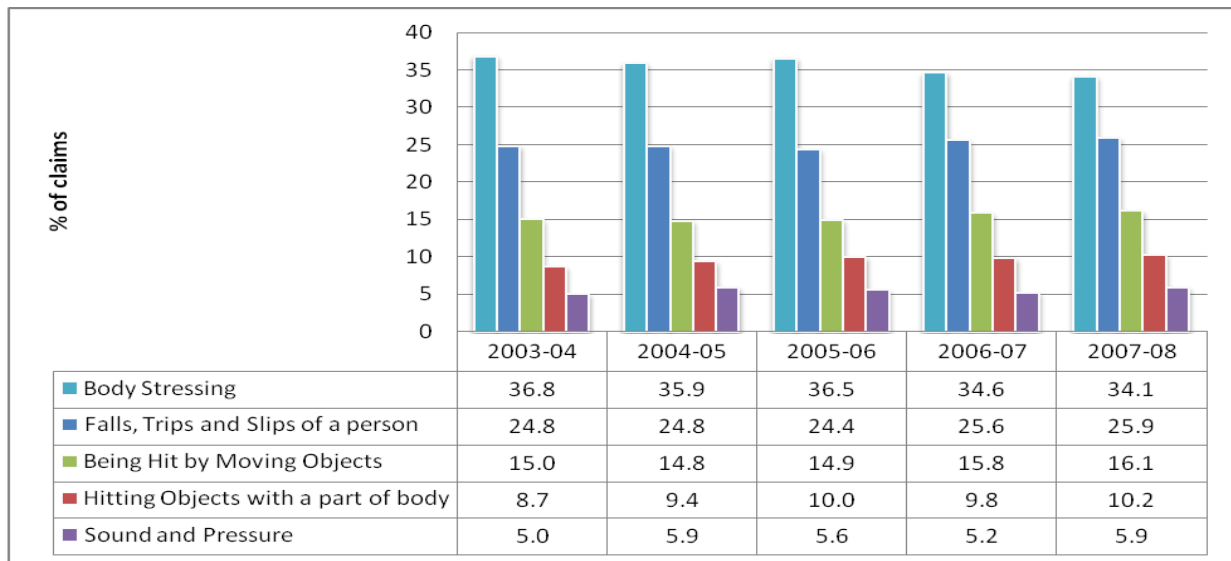
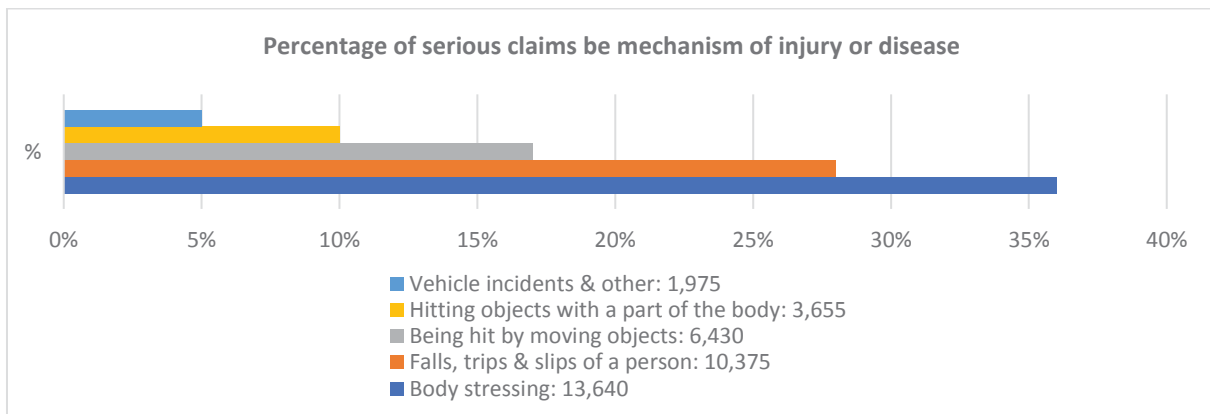


Figure 9.2: Percentage of serious claims by mechanism of injury or disease – Average 2010-15



38. Body stressing remains the major source of serious claims (at 36%), where falls, trips and slips of a person were responsible for 28% of serious claims. Unfortunately, crucial data highlighting correlations between occupations and injury classifications is no longer publicly available (for example, historical data has been able to establish correlations between height injuries such as falls occurring in higher proportions in painting and decorating services, body stressing claims were double the overall rate in Concreting services and well above average in Glazing services, Bricklaying services and Tiling & carpeting services¹⁵).

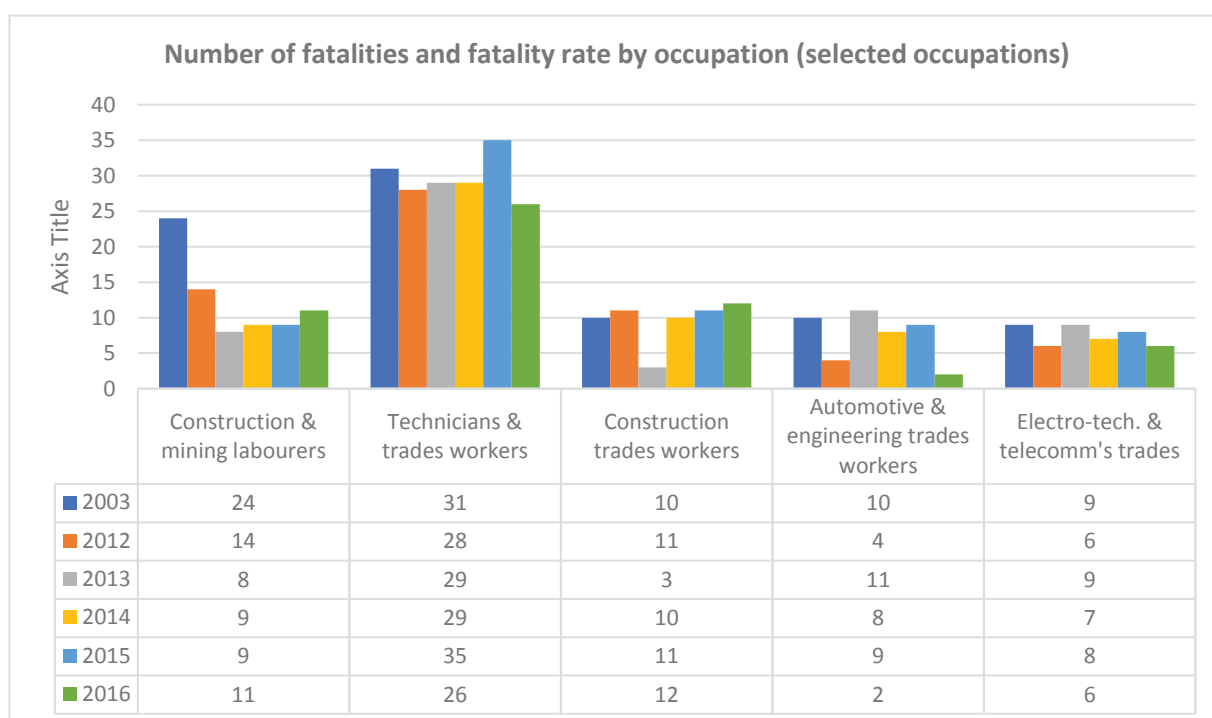
¹⁵ *Ibid*, p.52.

Other Factors: Size, Occupation, Age and Employment Status

39. Not all jurisdictions collect data about the size of company, but in those that do, the pattern is that very small organisations have higher incidence rates than larger firms.¹⁶ This factor influences Master Builders' focus on the need for small business and owner/builders to be an important target group in efforts to promote better WHS performance.

40. Reliable data about occupational experience in the BCI are difficult to find, as statistical collections do not disaggregate the data into meaningful classifications.

Figure 10: Number of fatalities and fatality rate by occupation (selected occupations)



41. Using the limited data available from SWA, **Figure 10** shows incidence rates for selected tradespersons across the BCI (noting that not all work by these tradespersons will have been carried out within the BCI). This data is not benchmarked against a weighting factor (such as per 1000 employees or compared to output of hours within the sector).

42. Technicians and trades workers have the highest incident rate and have remained steady between 2012 and 2016 compared to 2003. Construction and mining labourers

¹⁶ See, for example, Bahn, S, Size does matter: the influence of business size on incident rates, *Journal of Occupational Health and Safety*, Volume 24(4), August 2008, p.343.

have the second highest incident rate; however, the average rate has halved since 2003.

43. Previously, Tradespersons in the construction industry had higher incidence rates than that for all tradespersons working in all industries (28.6 compared to 25.0 in 2007-08¹⁷). This has reduced and is overtaken by technicians and general trades workers (16% of the 10-year average), however remains high (5% of the 10-year average; 7% of fatalities in 2016).
44. The influence of age on injury in the construction industry varies depending on the source of data used. SWA data shows older workers (55-64) have the highest incidence rates, and younger workers (under 25) have the lowest rates¹⁸.
45. NDS data also shows older workers (55-64) have the highest incidence rates and younger workers (15-24) have the lowest incidence rates.¹⁹ By contrast the survey-based data from the latest ABS Work-Related Injuries Survey (WRIS) (from 2014) shows that younger workers have the highest injury rates²⁰. This difference may be due to the number of low severity cases captured in the survey data and therefore a lower propensity to lodge compensation claims. In the case of older workers SWA data picks up longer term diseases more comprehensively than survey data.
46. The survey data shows that while the age distribution of the construction workforce is similar to the workforce average, incidence rates were consistently higher, particularly amongst young workers and the middle aged (45-54).
47. The structure of the construction workforce has attracted comment in relation to contract workers and the self-employed. According to the WRIS data, about 90% of injuries were incurred by employees and 10% employers or owner managers.

¹⁷ Safe Work Australia, *Compendium of Workers Compensation Statistics*, op. cit, p.51.

¹⁸ https://www.safeworkaustralia.gov.au/system/files/documents/1709/em17-0212_swa_key_statistics_overview_0.pdf

¹⁹ *Ibid*, p.51.

²⁰ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6324.0>