

Corporate malfeasance in Australia

There is no database in Australia that gives an overall view of corporate wrong-doing. This report addresses that gap by examining some of the administrative data collected by Commonwealth agencies and finds that wrong-doing is endemic in Australia.

Discussion paper

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Summary

This paper estimates the extent of corporate wrong-doing in Australia, based on data published by:

- Australian Competition and Consumer Commission (ACCC)
- Australian Securities and Investments Commission (ASIC)
- Australian Tax Office (ATO)
- Fair Work Ombudsman
- Fair Work Commission
- Australian Bureau of Statistics (ABS)

There are fewer cops patrolling the corporate beat than there were three years ago. The regulators and other government agencies that monitor corporate malfeasance have had staffing cut by 3,926 people (or 14.9 per cent) between the numbers budgeted for in 2013-14 and that for the present year, 2015-16.

It is difficult to understand the rationale for these cuts, given the official publications of the relevant agencies show that corporate wrongdoing is widespread in Australia.

The **Australian Competition and Consumer Commission (ACCC)** is responsible for promoting competition and protecting consumers and small businesses against other businesses. Based on its press releases, over the last 10 years the ACCC has taken action against 669 companies: 167 for competition issues, 489 safeguarding consumers and against unfair trade and 13 others.

We examined the top 50 Australian listed companies which accounted for 29 of the court appearances. Of those Wesfarmers (Coles) was top of the list and involved in seven cases closely followed by Woolworths (6), Telstra (4), AGL (4) and Origin (3). However, if other out-of-court actions are included Woolworths tops the list being the subject of 29 issues identified in the press releases.

The **Australian Securities and Investments Commission's (ASIC)** performance was also examined over the four and a half years to December 2015 during which it successfully concluded 3,115 cases against corporations, of which 2,095 were criminal matters. This is unlikely to represent the full extent of non-compliance by corporations with relevant legal requirements because ASIC, like most regulators, has limited resources and a reluctance to take formal proceedings unless there is a very high prospect of success and other cheaper enforcement options have been exhausted. Recently ASIC reported on the special case of the construction industry and reported incidents of alleged

misconduct. This is a much wider category than the cases already referred to. Nevertheless ASIC reports a large number of incidents with 10,667 cases over those five years.

The **Australian Tax Office (ATO)** annual reports were examined to determine the extent of tax evasion and avoidance. Overall the ATO figures and discussion suggest that in the ATO's normal course of business it recovers huge amounts from companies and other businesses that attempt to conceal their liability for taxation. In earlier years the ATO was prosecuting over 500 companies a year and still prosecutes 300 a year, the downward trend possibly reflecting the staffing reductions. It settles with many more and as a result recovers some \$3.5 billion in tax from companies attempting to hide their profits. Companies also try to underpay the GST and other indirect taxes as well as PAYG on behalf of their employees; those amounted to \$6.3 billion in the latest year for which there is complete data. One of their compliance programs, the taxable payments reporting system' specifically targets building and construction firms and has recovered \$2.3 billion for the year 2012-13 alone. Similar successes have been recorded in relation to the other specific target groups such as the international profit shifting program.

The **Fair Work Ombudsman** recovers payments for employees and takes enforcement action where necessary. In the nine years to 2014-15, the Fair Work Ombudsman recovered a quarter of a billion dollars for over 174,000 employees with an average of \$1,471 per employee. It finalised 217,000 complaints from employees, while targeted investigations or campaign audits resulted in repayment of over \$46.6 million to 47,000 employees from 2006-07 to 2014-15. That amounts to \$991 per employee. In some cases it pursues enforcement action for serious, wilful and repeated breaches and those totalled 1,051 instances over the period.

The **Fair Work Commission** deals with breaches of workplace laws and especially unfair or unlawful dismissal. In the six years to 2014-15 there were a total of 71,106 claims lodged for unfair dismissal and some 80 per cent of those tend to be settled at conciliation. Around 50 per cent of those dismissals that go to arbitration tend to be ruled as unfair. On the latest figures problems such as unfair dismissal claims are not so much an issue for small employers but 81 per cent of cases involve substantial or large employers.

The **Australian Bureau of Statistics (ABS)** reports that every year some 5,000 matters are brought to court involving organisations (mainly companies) as defendants and on average around 4,000 are found guilty. Unfortunately the ABS national data cannot be broken down further. In addition to the number found guilty there would be a substantial number that settle out of court.

This report concludes by remarking on the large number of companies apparently involved in corporate malfeasance, in particular, the widespread problems among companies and businesses in the building and construction industry.

The publications of official agencies demonstrates that malfeasance by the private sector is widespread in Australia. The staff and resources needed to reduce this wrongdoing and to enforce corporate and workplace laws must be restored to the relevant regulators and government agencies.

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Introduction

On Tuesday the 5th of April 2016 *The Australian Financial Review* published nine stories on wrong-doing or alleged wrong-doing on the part of the Australian corporate sector:

1. Banks considering legal action against the board of Arrium (a listed company) for drawing down a loan while simultaneously seeking to negotiate offloading debt at a large discount (page 1 and 11),
2. Panama leaks suggest BHP's many British Virgin Island companies established to create profits appear on the British side of the company (p. 1),
3. WIN alleged Nine Entertainment broke its supply agreement with a streaming service (p. 2),
4. Ken Henry (NAB chair) supported calls for Australian companies to take more responsibility for misdeeds and ASIC wanting to make boards criminally responsible for bad conduct (p. 6),
5. BHP threatening to fire a law firm in Panama for wanting to undertake due diligence on BHP's operations.
6. Queensland Nickel likely to go into liquidation without making provision for workers' entitlements (p. 8),
7. ASIC to 'nail' a second among the big four banks following court proceedings against ANZ (p. 12),
8. Rate rigging probe to investigate other big four banks (p. 15), and
9. CBA facing senate inquiry into charges, inter alia, that it overlooked three whistle-blower claims, ANZ had been examined over links with corruption scandal in Malaysia (p. 15).

A casual check of the front page the previous day suggested this is not unusual, with the lead story of the ATO targeting 800 wealthy individuals using corporations and other structures in tax havens and involving 'suspected money laundering, arms and drug deals, and tax avoidance'. This of course referred to the suspect activities organised by the law firm Mossack Fonseca and largely operating out of Panama.¹ Another page one story refers to the takeover of Asciano, which was supposed to

¹ For background see The Economist (2016) 'The lesson of the Panama papers', *The Economist*, 9 April.

involve three independent entities but suggests that common ownership will thwart that independence against the deal negotiated with the ACCC. On Thursday the AFR's lead story was 'Turnbull tells banks to clean themselves up'. That story continued: 'Prime Minister Malcolm Turnbull slammed what he said was the banks' culture of greed as political pressure mounted for a royal commission into the scandal-plagued industry'.²

The April 5 articles involved five of the top 10 listed companies in alleged wrong-doing in just one day of news, suggesting such malfeasance is rife among Australia's leading companies. That impression gave rise to this paper which attempts to provide some estimate of the magnitude of the problem. To that end the paper examines various data sources that give a more complete picture of corporate behaviour in Australia.

In generating a database of misbehaviour it has to be appreciated that regulators are inclined to settle with corporate wrong-doers. The compliance pyramid used by many regulatory agencies is specifically designed to begin with activities such as education and negotiation and ending with legal proceedings. Usually the number of cases diminishes rapidly as the government agency moves up the compliance pyramid.

There are charges that many of the regulators do not have the resources necessary to pursue court action and so are inclined to settle out of court whenever they can. For example, the Australian Tax Office has been particularly hard hit with staff cuts. Senator Sam Dastyari has made the point that the government cannot cut 4,000 jobs from the tax office and pretend it has the resources to handle such things as the Panama revelations.³ That of course goes to the question of whether there are enough 'cops on the beat' to protect society from corporate wrong-doing.

ASIC chair, Greg Medcraft, has complained that the cuts associated with the first Abbott Government budget meant ASIC would have to cut 'proactive surveillance' and become 'more reactionary and reliant on complaints and reports of misconduct'.⁴ We now turn to examine the staffing figures in some of the regulatory bodies and how they have changed in recent times.

² Coorey P and Durkin P (2016) 'Turnbull tells banks to clean themselves up', *The Australian Financial Review*, 7 April.

³ AAP (2016) 'Concerns over tax office job cuts', *The Australian*, 5 April.

⁴ Coorey P (2016) 'PM offers extra money to watch banks', *The Australian Financial Review*, 12 April.

Less cops on the beat

Examination of the 2013-14 Budget Papers show that the budget provided for 22,022 staff at the ATO. By 2015-16 that number had fallen to 18,482. Those figures are shown in Table 1, which compares the last Labor budget with the 2015-16 budget. Table 1 also shows how staffing levels have changed in regulatory and related government agencies with responsibility for parts of the corporate sector.

Table 1: Average Staffing Levels; Selected corporate regulatory and related agencies.

	2013-14 budget	2015-16 budget	Staff lost	Change (%)
Australian Competition and Consumer Commission (ACCC)	802	725	-77	-9.6
Australian Prudential Regulation Authority (APRA)	609	590	-19	-3.1
Australian Securities and Investments Commission (ASIC)	1,834	1,569	-265	-14.4
Australian Taxation Office (ATO)	22,022	18,482	-3,540	-16.1
Fair Work Commission, Office of the Fair Work Ombudsman	1,046	1,021	-25	-2.4
Total	26,313	22,387	-3,926	-14.9

Source: Australian Government, Budget Papers various issues.

Table 1 shows that all of the regulators and related government agencies listed have seen reductions in their staffing ranging from a 3.1 per cent reduction in APRA to a 16.1 per cent reduction in the ATO.

Overall there was a 14.9 per cent reduction in staff in the regulators and related government agencies listed in Table 1, or a total cut of 3,926 staff. These figures make it clear that resource constraints are an issue for the corporate regulators

Notice APRA is included in Table 1 although it plays a different role to other regulators. APRA's role involves monitoring the lending standards of the banks—for example to ensure that bank lending is prudent and not so as to put the banking system at risk – rather than wider corporate regulation.

It is also interesting to contrast the figures in Table 1 with those of the Office of the Fair Work Building Industry Inspectorate which saw its staff increase from a planned 100 in the last Swan budget to 155 for 2015-16.⁵

Staffing by the corporate regulators and related government agencies like the ATO is a very serious issue. Some of the banking scandals have brought to light a problematic culture within the sector. Despite the rhetoric of the bank CEOs and others, this is not a culture that will be easily fixed.

While banks have been in the news lately, they are far from alone. Whenever there is a financial incentive for wrong-doing we find corporations and their agents engaging in criminal activity or operating in the grey area of the law. When the corporate regulators are hobbled the threat of punishment for those who break the law is lessened and so the more likely we are to see wrong-doing. The remainder of this paper reports on the statistics involved in order to get a feel for the amount of wrong-doing taking place in Australia.

⁵ Australian Government (2015) *2015-16 Budget Papers*.

ACCC

The Australian Competition and Consumer Commission (ACCC) aims to ensure competition, fair trading, adequate consumer protection and regulating monopoly powers. According to its website:

The ACCC promotes competition and fair trade in markets to benefit consumers, businesses, and the community. We also regulate national infrastructure services. Our primary responsibility is to ensure that individuals and businesses comply with Australian competition, fair trading, and consumer protection laws - in particular the *Competition and Consumer Act 2010*.⁶

The ACCC has the power to enforce the *Competition and Consumer Act 2010*. The organisation is a vital part of the Australian market as it is one of the main organisations that deal with crimes and malfeasance committed by corporations (and in some cases individuals).

TOP 50 LISTED COMPANIES

The Australia Institute has examined ACCC media releases over the last ten years (from 2006). A total of 92 matters covered by media releases were published relating to ACCC action against companies included in the top 50 listed corporations. On 29 occasions the ACCC took legal action and gained either a ruling in its favour or an out of court settlement. On the other 63 issues, the ACCC did not proceed with litigation, but made administrative proceedings, recommendations or expressed concern.

Of the 92 issues the ACCC took some action on, three companies were involved in 56 of them – the Woolworths, Wesfarmers (parent company of Coles) and telecommunications giant, Telstra.

Table 2: Woolworths, Wesfarmers, Telstra and the ACCC

Company	Court decision or settlement	Other action	Total
Woolworths	6	23	29
Wesfarmers	7	7	14
Telstra	4	9	13

Source: Analysis of ACCC media releases

⁶ ACCC 'About us' at <https://www.accc.gov.au/about-us> accessed 22 April 2016.

Woolworths have more engagement with the ACCC than any other company, across a range of competition and consumer issues. In the last six months alone:

- The Federal Court ordered Woolworths to pay over \$3 million in penalties for engaging in misleading and deceptive conduct relating to the safety of its house brand drain cleaner, safety matches, items of furniture and a deep fryer.⁷
- Federal Court proceedings by the ACCC against Woolworths, BP, Caltex, 7-Eleven and a smaller company resulted in petrol price information being given earlier to consumers.⁸
- ACCC has begun Federal Court proceedings against Woolworths for seeking payments from 821 of its smaller 'Tier B' suppliers in contravention of the Australian Consumer Law.⁹

In the last three years Wesfarmers (the owner of Coles) has;

- Paid \$2.5 million for making false or misleading representations and engaging in misleading conduct in claiming products were promoted as 'Baked Today, Sold Today' and in some cases 'Freshly Baked In-Store', when they were in fact partially baked and frozen off site by a supplier, transported and 'finished' at in-store bakeries within Coles supermarkets.¹⁰
- Been ordered by a court to pay \$10 million for engaging in unconscionable conduct in its dealings with certain suppliers. The court found the misconduct was serious, deliberate and repeated. Coles misused its bargaining power and demanded payments from suppliers to which it was not entitled by threatening harm to the suppliers that did not comply. Coles withheld money from suppliers it had no right to withhold.¹¹
- Paid six infringement notices totalling \$61,200 for alleged misleading representations about the country of origin of fresh produce made in five of its stores. Coles placed imported produce under 'Helping Australia Grow' signs with the triangular 'Australian Grown' symbol.¹²

Telstra:

⁷ <http://www.accc.gov.au/media-release/woolworths-misled-consumers-over-product-safety-hazards-%E2%80%93-ordered-to-pay-over-3-million-in-penalties>

⁸ <http://www.accc.gov.au/media-release/petrol-price-information-sharing-proceedings-resolved>

⁹ <http://www.accc.gov.au/media-release/accc-takes-action-against-woolworths-for-alleged-unconscionable-conduct-towards-supermarket-suppliers>

¹⁰ <http://www.accc.gov.au/media-release/coles-to-pay-25m-for-misleading-baked-today-and-freshly-baked-in-store-bread-promotion>

¹¹ <http://www.accc.gov.au/media-release/court-finds-coles-engaged-in-unconscionable-conduct-and-orders-coles-pay-10-million-penalties>

¹² <http://www.accc.gov.au/media-release/coles-pays-infringement-notices-for-alleged-misleading-country-of-origin-claims>

- Telstra has been alleged to be involved in misleading and deceptive conduct by refusing to allow rivals access to parts of its network. Telstra claimed they were capped but the ACCC alleges that there was capacity available, or that could have been made available.¹³
- A judge found that certain representations that Telstra made about its next G network were dishonest and the advertising was misleading or deceptive.¹⁴

Beyond the largest listed companies in Australia, the ACCC takes court action or other administrative action to pursue its two main goals, to:

- ‘Maintain and promote competition and remedy market failure’ and
- ‘Protect the interests and safety of consumers and support fair trading in markets’¹⁵

AGGREGATE ACCC FIGURES

This section begins by examining the matter pursued by the ACCC against companies, other entities and individuals in Australia. The majority of these cases have been against companies that have appeared to have infringed or threatened to infringe the law as it stands in relation to competition or in protecting consumers and others such as small business. The results of ACCC litigation and other proceedings, as well as a list of *Undertakings accepted and infringement notices paid* are provided in the appendices of the regulator’s annual reports. Because of the way the data are collected they do include many of the top 50 listed companies. These results over the last ten years are summarised in the table below:

Table 3: ACCC litigation and other action 2005-06 to 2014-15

	Competition and market failure	Consumer safety and fair trading	Other	Total
Litigation	68	189	7	264
Undertakings and infringements	99	300	6	405
Total	167	489	13	669

Source: Analysis of ACCC annual reports

¹³ <https://www.accc.gov.au/media-release/accc-institutes-proceedings-against-telstra-for-alleged-breach-of-standard-access>

¹⁴ <http://www.accc.gov.au/media-release/court-orders-against-telstra-for-misleading-next-g-claims>

¹⁵ <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc>

All numbers in Table 3 represent events where companies have either lost to the ACCC in court, settled with them out of court, acknowledging some degree of wrongdoing, undertaken to change their conduct, or paid an infringement notice due to their conduct. We see that almost 700 times in the past ten years companies have acknowledged a breach or potential breach of laws and regulations or have had an adverse ruling in court.

During the period covered in Table 3 the ACCC accepted 405 undertakings. These undertakings can be a way of avoiding legal action, but may arise without the ACCC necessarily threatening legal action. They are a large part of the ACCC's work. For example, in February of 2012 the ACCC accepted an undertaking in relation to alleged price-fixing by All Homes Pty Limited in relation to 'concerns that All Homes had attempted to induce real estate agents to arrive at an understanding where they would not charge less than two per cent of the sale price of a property for the supply of real estate agents services'.¹⁶

Another example involved APA Group, which operates gas transmission pipelines. APA Group accepted an undertaking in the same year that they divest from Moomba Adelaide Pipeline System. The ACCC was concerned that a takeover of the owner of the Moomba pipeline would mean insufficient competition if APA did not divest itself of that asset.¹⁷

¹⁶ ACCC (2013) 'All Homes Pty Ltd' Public Register Doc No D13/25886 at <http://registers.accc.gov.au/content/index.phtml/itemId/1104251>

¹⁷ ACCC (2012) 'ACCC to not oppose acquisition by APA of HDF subject to divestiture', Media Releasenumber NR 144/12 19 July at <https://www.accc.gov.au/media-release/accc-to-not-oppose-acquisition-by-apa-of-hdf-subject-to-divestiture>

ASIC

The Australian Securities and Investments Commission (ASIC) is a statutory authority that regulates company and financial services in Australia. It regulates laws that protect consumers, investors and creditors and as it describes itself:

ASIC is Australia's corporate, markets and financial services regulator. [It contributes] to Australia's economic reputation and wellbeing by ensuring that Australia's financial markets are fair and transparent, supported by confident and informed investors and consumers.¹⁸

ASIC has the power to commence prosecutions, usually through the Director of Public Prosecutions. In the four and a half years to December 2015 it successfully concluded 3,115 cases against corporations.

ASIC reports on enforcement activities every six months.¹⁹ These include only cases that have been successfully concluded. The areas of enforcement include market misconduct, corporate governance misconduct and financial services misconduct for both large and small businesses. The types of enforcement include criminal and civil proceedings, administrative remedies and enforceable undertakings and negotiated outcomes.

These reports go back four and a half years and have been aggregated into Table 4.

¹⁸ ASIC (2016) 'What we do' at <http://www.asic.gov.au/about-asic/what-we-do/our-role/>

¹⁹ ASIC enforcement outcomes: All reports from July 2011 to December 2015 <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/>

Table 4: ASIC enforcement July 2011 to December 2015

	Criminal	Civil	Administrative remedies	Enforceable undertakings /Negotiated outcome	Total
Insider Trading	38	2	0	2	42
Market manipulation	10	0	2	1	13
Continuous disclosure	0	3	20	1	24
Market integrity rules	0	8	34	0	42
Other market misconduct	6	3	1	5	15
Action against directors	55	25	11	2	93
Action against auditors	0	0	7	13	20
Action against liquidators	1	5	11	13	30
Insolvency	2	1	14	0	17
Other corporate governance misconduct	1	1	29	2	33
Unlicensed conduct	4	7	0	2	13
Dishonest conduct, misleading statements	33	51	72	26	182
Misappropriation, theft, fraud	16	2	28	5	51
Credit	14	8	131	39	192
Other financial services misconduct	4	18	100	75	197
Action against directors – Small Business	1830	0	235	0	2065
Efficient registration and licensing – Small business	81	2	3	0	86
Total	2095	136	698	186	3115

Source: ASIC enforcement reports from July 2011 to December 2015

These reports show that ASIC has taken action against 3,115 businesses and individuals in the last four and a half years. Table 5 shows the number of enforcement activities by financial year including the first half of 2015-16.

Table 5: ASIC enforcement by financial year

Year	Successful Enforcements
2011/12	656
2012/13	805
2013/14	592
2014/15	665
2015/16 (first half only)	397

Source: ASIC enforcement reports from July 2011 to December 2015

While the number of enforcements by ASIC is large there is a sense in some quarters that ASIC is reluctant to use its powers against large businesses. Commonwealth Bank informer, Jeff Morris, is reported as saying ‘ASIC was a complicit non-participant, not interested in taking on the big players, not really interested in doing their job at all’.²⁰ They have been called a toothless tiger on many occasions.²¹ Alan Fels came out suggesting ASIC was ‘too cautious’ and is reported to have said that ‘if a parliament had passed legislation outlawing something, the job of the regulator was to ensure those laws were complied with – not to strike EUs where there had been serious breaches of the law’.²² While the enforcement pyramid suggests it is normal for the numbers going to prosecution to be much lower than other actions of a regulator, the concern about ASIC is that it is not pursuing the cases it should.

There have also been calls for ASIC to have enhanced powers²³ including from the chairman of ASIC Greg Medcraft.²⁴ Mr Medcraft wanted new powers to be able to pursue civil cases against corporations that had cultures that encouraged or tolerated wrong-doing. Governments have typically been very slow in considering new or expanded powers for ASIC and very little change has occurred.

²⁰ Ferguson A et al (2014) ‘We can rebuild it: the plan to transform toothless tiger ASIC’, *Sydney Morning Herald*, 28 June, <http://www.smh.com.au/business/we-can-rebuild-it-the-plan-to-transform-toothless-tiger-asic-20140627-3az4m.html>

²¹ Ferguson A et al (2013) ‘Scrutinising ASIC: Is it a watchdog or a dog with no teeth?’ *Sydney Morning Herald*, 23 November <http://www.smh.com.au/business/scrutinising-asic-is-it-a-watchdog-or-a-dog-with-no-teeth-20131122-2y1s0.html>

²² Williams R (2016) ‘“Tough cop” ASIC too timid on enforcement: Allan Fels’, *The Sydney Morning Herald*, 15 April.

²³ Danckert S (2015) ‘Government considers more power for ASIC to stop poor financial products’, *Sydney Morning Herald*, 20 October. <http://www.smh.com.au/business/banking-and-finance/government-considers-more-power-for-asic-to-stop-poor-financial-products-20151020-gkdjul.html>

²⁴ Danckert S (2015) ‘ASIC asks for more powers to pursue corporations over rotten culture’, *Sydney Morning Herald* 3 June <http://www.smh.com.au/business/asic-asks-for-more-powers-to-pursue-corporations-over-rotten-culture-20150602-ghfgfq.html>

The current coalition government has cut \$120 million from ASIC's budget and the chairman of ASIC recently admitted that this had led to less surveillance. Mr Medcraft said:

Seventy per cent of our resources are devoted to surveillance and enforcement and when you have cuts in the budget what happens is actually you reduce the level of proactive surveillance because proactive surveillance is discretionary.²⁵

This is not a recent concern. ASIC's 2014-15 annual report said

ASIC allocates its resources to achieve the greatest market impact. With less resources, we are generally unable to conduct random sampling-based surveillance. Instead, we focus on strategically important gatekeepers to direct surveillance resources towards the risks that pose the greatest threat.²⁶

Further budget cuts will only further reduce ASIC's ability to pursue corporate wrongdoing.

Construction industry

ASIC's January to June 2015 enforcement outcomes report had a special look at misconduct in the construction industry.²⁷ Table 6 has been taken from that report.

²⁵ Medhora S (2016) 'Asic chief: Coalition's cuts reduced our capacity to investigate' *The Guardian*, 12 April <http://www.theguardian.com/australia-news/2016/apr/12/asic-chief-coalitions-cuts-reduced-our-capacity-to-investigate>

²⁶ ASIC (2015) *Annual report, 2014-15*, <http://download.asic.gov.au/media/3437945/asic-annual-report-2014-15-full.pdf>

²⁷ ASIC (2015) *ASIC enforcement outcomes: January to June 2015*, Report no 444, August <http://download.asic.gov.au/media/3315413/rep444-published-5-august-2015.pdf>

Table 6: ASIC reports of alleged misconduct in the construction industry

Section of the Corporations Act	2009–10	2010–11	2011–12	2012–13	2013–14
Duty to exercise powers with care and diligence (s180)*	314	339	518	513	507
Duty to act in good faith (s181)*	167	144	215	274	280
Duty not to use position for improper purpose (s182)*	122	118	172	184	196
Duty not to improperly use information (s183)*	33	43	46	53	73
Duty to act in good faith, not use position dishonestly or use information dishonestly (s184)^	57	48	44	39	42
Duty to prevent the company from trading while insolvent (s588G)*	896	901	1,101	1,218	1,220
Duty to prevent the company from trading while insolvent (s588G)^	169	164	125	109	75
Offences by officers of certain companies in external administration (s590)^	32	31	37	23	25

* Civil standard.

^ Criminal standard.

Source: ASIC enforcement outcomes: July to December 2014

Table 6 shows extensive allegations of misconduct in the construction industry. While there has been considerable political discussion of wrong doing of unions involved in the construction industry there has been little discussion of wrong-doing by construction businesses. This is surprising given the number of allegations documented by ASIC.

The information that can be gathered from ASIC reports shows considerable corporate malfeasance. There is also real concern that ASIC is not being given the powers or resources to adequately pursue corporate wrong-doing. This leads to the conclusion that these figures are likely to significantly underreport the true scale of corporate malfeasance in the area that ASIC regulates.

Australian Taxation Office

The Australian Taxation Office (ATO) provides a useful summary of its compliance activities in its annual reports. However, the material is not organised in such a way that comparisons from report to report are possible. Going back through annual reports it was possible to determine the number of company prosecutions in each year back to 2011-12. Those figures are reproduced in Table 7. Prior to 2011-12 the annual reports gave total prosecutions without breaking them down into individuals and companies.

Table 7: company prosecutions

	2011-12	2012-13	2013-14	2014-15	Average
Company prosecutions	523	550	330	300	426

Source: ATO Annual Reports.

Table 7 suggests there are a large number of companies prosecuted each year for tax offences although there seems to be a downward trend over the four years for which we have data. That is consistent with the view documented above that reduced staffing levels are limiting the ATO's ability to undertake prosecutions. Recall from Table 1 above that the ATO suffered a 16.1 per cent fall in staff numbers since the last Labor Budget.

In addition to actual prosecutions most disputes are settled out of court. We cannot derive a complete set for the last decade but Table 8 sets out the recoveries from settlements reached with enterprises. Note separate figures are not kept for companies and so would include entities such as trusts. However, these figures do exclude individuals.

Table 8: Settlements reached with companies; revenue raised \$ million

	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15
Settlements with enterprises	940	1,077	1,255	278	1,826	1,929	3,509

Source: ATO Annual Reports.

Table 8 suggests a rather strong performance in the amount recovered through settlements. Nevertheless, the figures suggest that companies in 2014-15 settled for \$3.5 billion as a contribution towards the amounts they attempted to withhold from the ATO by misrepresenting their affairs to try to keep money to which they are not entitled.

There is very little other information on a consistent basis that we can extract from the ATO annual reports to throw light on companies trying to minimise/avoid/evade or otherwise escape tax. Nevertheless the latest annual report makes for interesting reading.

Highlights of the ATO 2014-15 Annual Report

Table 9 gives the ATO estimates for the difference between that which should be collected under various taxes and the actual collections and refers to the difference as the 'tax gap'. All of these taxes are theoretically payable by businesses but unfortunately there are many gaps in the table and we only get a full picture for the year 2010-11. The figures included in Table 9 are the sort of taxes for which only businesses would normally be liable.

Table 9: Tax gaps, \$million.

	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
GST	3,100	1,420	2,700	3,120	2,890	2,700
Petrol and diesel excise and duty			130		305	260
wine equalisation tax			25	45	35	
Beer excise and duty	5	10	20	20		
Luxury car tax		20	25	20	20	15
PAYG withholding	2,340	2,500	2,910	3,080		
Fuel tax credits			55	60	55	70

Source: ATO Annual Reports.

Table 9 suggests that in the last year for which we have a full set of estimates there is a gap of some \$6,345 million between the actual and theoretical tax collections by business. Note that this figure is obtained without taking account of company tax itself. The actual amount recovered is likely to be a small fraction of the gap and of course that gap would have been much larger without the activities of the ATO in chasing undeclared taxes.

Businesses are required to meet certain obligations towards their workers including collecting pay-as-you-go (PAYG) tax and making superannuation contributions. During 2013-14 the ATO reviewed 26,000 businesses 'raising liabilities of \$910 million' or in other words, finding \$910 million was unpaid. Compliance activities associated with scrutiny of businesses in the cash and hidden economy raised tax and penalties of over \$220 million. The ATO also claimed it 'completed more than 9,400 compliance activities on privately-owned and wealthy groups, raising over \$2.1 billion in liabilities'. This refers to companies and other business entities that organise themselves in non-transparent ways that involve a host of inter-related companies.

The ATO also reports that company directors are liable for the superannuation guarantee charge where their companies have not paid the charge on behalf of employees. These resulted in 597 director penalty notices being issued in relation to 399 companies. As a result of the ATO activities substantial sums of unpaid employer super contributions were raised as is shown in Table 10.

Table 10: Superannuation guarantee charge recoveries and penalties, \$million

	2013-14	2014-15
Collected	395.1	379.2

Source: ATO Annual Reports.

The figures on missing PAYG collections and super contributions as well as the role of company directors need to be borne in mind when thinking about the data included under the Fair Work Australia figures.

The taxable payments reporting system was introduced in 2012 and resulted in additional tax and GST liabilities of \$2.3 billion in respect of 2012-13. This system was introduced to counter under-reporting in the building and construction industry and requires entities in the industry to report on payments to contractors for building and construction services.²⁸ These figures suggest there had been quite a substantial under-reporting in the building and construction industry.

In 2014–15, the ATO’s program of audits and reviews of large business, including the risk program for public groups produced liabilities ‘of around \$2.5 billion’. This program applies to corporations and other entities set up as a set of inter-related companies.

The relatively new ‘international and profit-shifting program’ applies to companies that have undertaken international restructures or have significant levels of cross-border related-party arrangements. In the first two years the ATO claimed to have raised \$400 million under this program.

The ATO reports on its litigation program but does not give aggregate figures. However, it does report on the settled disputes with businesses that have arranged their affairs to avoid or minimise their tax. In 2014-15 there were 694 cases with a total of \$3,509 million raised in settlements of which \$2,934 million or 84 per cent came from 81 large businesses. These amounts will have been included in some of the sums mentioned earlier. Large businesses are defined as having a turnover of \$250 million or more.

²⁸ Australian Taxation Office (2016) ‘Taxable payments reporting – building and construction industry’. <https://www.ato.gov.au/Business/Building-and-construction/In-detail/Taxable-payments-reporting/Taxable-payments-reporting---building-and-construction-industry/>

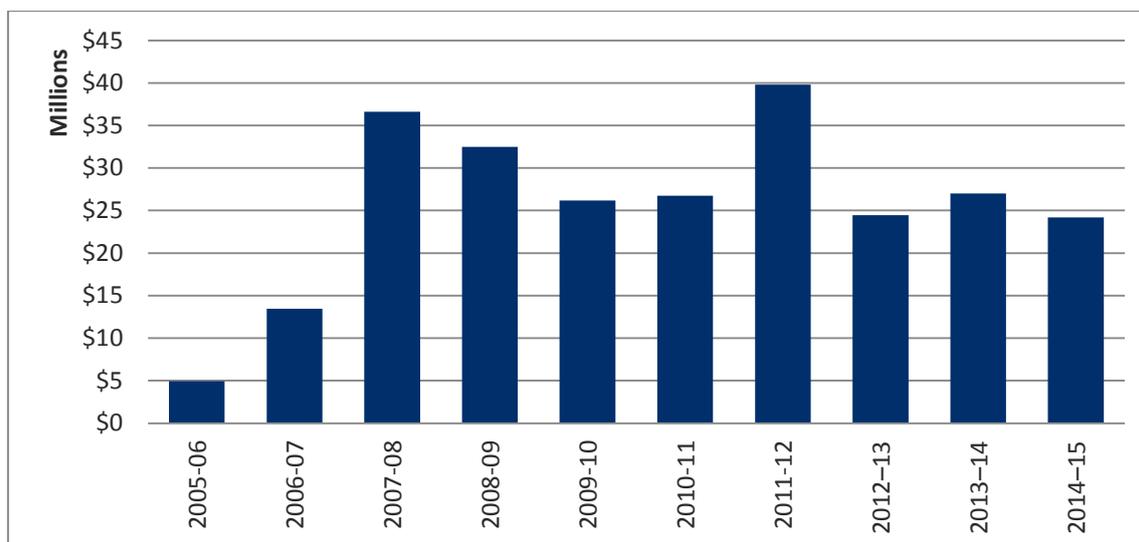
Fair Work Ombudsman

The Fair Work Ombudsman is a federal agency that administers and enforces aspects of workplace law. One of its main functions is dealing with breaches of employment conditions, such as underpayment of employees, being denied leave or other entitlements.²⁹ The Ombudsman recovers payments for employees and also undertakes enforcement action, including litigation. The latter is unusual for an ombudsman, but is provided for under the *Fair Work Act 2009* which provides for the Fair Work Ombudsman ‘to commence proceedings in a court, or to make applications to the FWC [Fair Work Commission], to enforce this Act [Fair Work Act 2009], fair work instruments and safety net contractual entitlements’.

Annual Reports between 2005-06 and 2014-15 report various data. The various data are here compiled to the extent possible to outline workplace condition breaches rectified through the Ombudsman over the period.³⁰ The data is not broken down by type of employer.

In the nine years to 2014-15, the Fair Work Ombudsman recovered a quarter of a billion dollars, \$256 million for over 174,000 employees or an average of \$1,471 per employee. Recovered payments over the period are shown in **Figure 1**.

Figure 1 - Fair Work Ombudsman total payments recovered



Source: Fair Work Ombudsman Annual Reports, totals or derived (complaints + audits)

²⁹ This was previously the function of the Workplace Ombudsman.

³⁰ Fair Work Ombudsman (Various years) *Annual Reports*, <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports>

Most of the Ombudsman’s cases come from complaints. Between 2005-06 and 2014-15 the Ombudsman finalised 217,000 complaints from employees. In years where data was available, finalised complaints accounted for around 70 percent of all individual payments to employees,³¹ and around 85 percent of the total dollar amount of payments recovered was due to complaints.³²

The Ombudsman also undertakes ‘targeted investigations’ or ‘campaign audits’ aimed at certain industries or regions. Targeted investigations or campaign audits resulted in repayment of over \$46.6 million to 47,000 employees from 2006-07 to 2014-15.³³ That amounts to \$991 per employee.

Reflecting the philosophy of the enforcement pyramid the Ombudsman says it prefers to resolve breaches without litigation or other enforcement action. It highlights the role of oversight or misunderstanding of complex legislation.³⁴ In some cases it pursues enforcement action for serious, wilful and repeated breaches. Table 11 shows the breakdown of enforcement actions over the past three years, totalling 1,051 instances over the period.

Table 11: Use of enforcement tools³⁵

	2012–13	2013–14	2014–15	Total
Infringement notices issued	124	116	348	588
Compliance notices issued	74	65	118	257
Enforceable undertakings executed	12	15	42	69
Litigations commenced	50	37	50	137
Total	260	233	558	1,051

Source: Fair Work Ombudsman Annual Reports

Litigation is the most serious enforcement action. Over the nine years to 2014-15 the Ombudsman commenced litigation 493 times. Litigation cases concluded in this period resulted in \$16.4 million in penalties. From 2009-2010 onwards, the average penalty from litigation was around \$50,000.

³¹ Years were 2005-06 to 2008-09, and 2011-12 to 2014-15, where separate figures reported for both total payments and complaints, or for both complaints and audits (allowing derivation of total). Note complaints may lead to more than one individual receiving payment.

³² Between 2011-12 and 2014-15.

³³ Figure not available for 2005-06.

³⁴ Fair Work Ombudsman, 2015, *Annual Report 2014-15*, page 3

³⁵ Fair Work Ombudsman, 2015, *Annual Report 2014-15*, page 34

Litigation resulted in \$7.1 million in recovered payments over the full nine year period. Note this represents just three percent of all payments recovered by the Ombudsman in this period. It is unclear if this includes monetary settlement out of court.

The 2014-15 Annual Report highlights the following examples of enforcement action:

Coles admitted ethical and moral responsibility for subcontracted trolley collectors who were underpaid by their employers. Ten employees were back-paid \$220 000, and a fund was created to protect future trolley collectors found to be underpaid. ...

We released the findings of our inquiry into significant exploitation at Baiada Group's poultry processing sites, ... Discussions are continuing with Baiada to ensure that it takes significant steps to change its labour supply governance arrangements and avoid future exploitation of workers. ...

We continued examining employment arrangements of working holiday visa holders and seasonal workers along the harvest trail. More than \$250 000 was recovered for 870 workers. ...³⁶

The 2014-15 Annual Report also highlights action regarding young workers, those under 25. A quarter of all dispute claims were lodged by young people, resulting in \$2.9 million in repayments. The Annual Report gives this example:

In 2014–15, a 16-year old school-based apprentice came to us for help after working 18 days without payment. A findings [sic] of contravention letter was sent to the employer, but they didn't comply with our requests. We then issued a compliance notice and the young worker was back-paid \$1178. To support future compliance, the employer was issued with a letter of caution and referred to tools and resources on fairwork.gov.au.³⁷

³⁶ Fair Work Ombudsman, 2015, *Annual Report 2014-15*, page 3

³⁷ Fair Work Ombudsman, 2015, *Annual Report 2014-15* page 42

Fair Work Commission

The Fair Work Commission is a separate federal agency dealing with breaches of workplace laws. The Fair Work Commission describes itself as ‘Australia’s national workplace relations tribunal’ and is ‘responsible for maintaining a safety net of minimum wages and employment conditions, as well as a range of other workplace functions and regulation’.³⁸

One of the core functions of the Fair Work Commission is dealing with workplace unfair or unlawful dismissal. Dismissal from employment is *unfair* when it is ‘harsh, unjust or unreasonable’.³⁹ Dismissal is *unlawful* where it is for a prohibited reason. This could include being dismissed for raising a concern about work conditions or on discriminatory grounds.

Prior to 2009-10 these claims were dealt with by the Australian Industrial Relations Commission. Fair Work Australia took over these functions from 2009-10; it was subsequently split into the Fair Work Commission and the Fair Work Ombudsman. The Commission also deals with other ‘adverse actions’ relating to breaches of workplace rights, and bullying.

While the Commission Annual Reports, or those of its predecessors, do not provide data broken down by type of employer, the data compiled here show substantial allegations, settlement and arbitration relating to breaches in workplaces across Australia every year.

UNFAIR DISMISSAL

People who think they have been dismissed from work unfairly can lodge an ‘application for unfair dismissal remedy’ with the Commission. Unfair dismissal claims are around two in five of all applications received by the Commission. The Commission first assesses claims for eligibility, for example that they are not a genuine redundancy or are within the required time limit since dismissal. Most applications received are eligible.

³⁸ Fair Work Commission (2014) *Overview* at <https://www.fwc.gov.au/about-us/overview> accessed 22 April 2016.

³⁹ Fair Work Commission (2015) *Resolving issues, disputes and dismissals*, <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/what-unfair-dismissal>

The Commission attempts conciliation where the employer and employee negotiate with help of a trained facilitator. Some applications are dropped before conciliation. Most applications that go to conciliation are settled, around four in five, making up around three quarters of all lodgements. Settlement can involve:

- monetary terms (around 1 in 5 cases),
- non-monetary terms (close to 3 in 5 cases),
- or both (around 1 in 5 cases);
- in a small number of cases settlement involves re-instatement in work.⁴⁰

Applications not settled through conciliation can be listed before the Commission for arbitration. Many are withdrawn or settled before arbitration. The Commission dismisses unfair dismissal applications on various 'jurisdictional' grounds and hears objections. In three years from 2012-13, the number of objections being put each year has tripled to 1,156; objections dismissed has increased, but objections upheld has increased by more, up from 68 percent to 77 percent.⁴¹

If the case gets to substantive arbitration, the Commission then decides if the dismissal was fair or unfair. Dismissal deemed unfair usually results in compensation but can also result in reinstatement, lost remuneration, or no remedy.

Table 12 - Unfair dismissal claims - Fair Work Commission shows key data on unfair dismissal claims compiled from the six annual reports for the Fair Work Commission.

Table 12 - Unfair dismissal claims - Fair Work Commission

	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	TOTAL
Total lodgements	11,116	12,840	14,027	14,818	14,797	14,624	71,106
Settled at conciliation	8,897	9,869	9,064	8,843	8,659	8,788	54,120
Settlement rate	80%	77%	65%	60%	59%	60%	76%
Finalised by substantive arbitration	87	316	325	402	367	349	1,846
Dismissal unfair	52	151	110	146	192	188	839
% decided unfair	60%	48%	34%	36%	52%	54%	45%

Source: Fair Work Australia, Annual Reports; Fair Work Commission, Annual Reports

⁴⁰ Proportions as at 2014-15,

Fair Work Commission (2015) *Annual Report*, p73

https://www.fwc.gov.au/documents/documents/annual_reports/fwc-ar-2015-web.pdf

⁴¹ Fair Work Commission (2015) *Annual Report*, p74

https://www.fwc.gov.au/documents/documents/annual_reports/fwc-ar-2015-web.pdf

Table 12 shows there were 71,106 lodgements for unfair dismissal over the six years to 2014-15. Of those 54,120 cases or 76 per cent were settled at conciliation, another 1,846 or three per cent went to arbitration and of those, 45 per cent were decided as unfair. These are large numbers of people who feel the need to make an unfair dismissal claim.

While most cases are decided at conciliation it is important to note that almost half or 47 per cent of matters involve quite large employers with 100 or more workers, 28 per cent involve substantial employers with 15 to 99 workers and a relatively low 19 per cent involve small employers with 1-14 staff.⁴² So problems such as unfair dismissal claims are not so much a problem for small employers but 81 per cent of cases involve substantial or large employers.

Annual Reports for the Australian Industrial Relations Commission do not report consistently on cases relating to 'employment termination', typically presenting figures for unfair and unlawful dismissal together.

UNLAWFUL DISMISSAL

Dismissal can be unlawful in one of two ways: under 'general protection provisions' or 'unlawful termination' provisions.

They are designed to:

- protect workplace rights
- protect freedom of association
- provide protection from workplace discrimination, and
- provide effective relief for persons who have been discriminated against, victimised, or have experienced other unfair treatment.⁴³

In addition 'unlawful termination' is maintained as a separate category, for technical legal reasons. Unlawful termination captures a small number of cases that fall outside of the general protection provisions.⁴⁴

In 2014-15 there were only 114 applications lodged and 120 matters finalised.

⁴² TAI calculations based on data from Fair Work Commission (2015) *Annual Report*, https://www.fwc.gov.au/documents/documents/annual_reports/fwc-ar-2015-web.pdf

⁴³ Fair Work Commission (2015) *Resolving issues, disputes and dismissals*, <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/workplace-issues-disputes/general-protections>

⁴⁴ The category is maintained for constitutional reasons, allowing the Commonwealth to give effect to international treaties. See Fair Work Commission (2015) *Annual Report* https://www.fwc.gov.au/documents/documents/annual_reports/fwc-ar-2015-web.pdf page 64

OTHER ADVERSE ACTIONS IN THE WORKPLACE

General protection provisions relate to all aspects of workplace relations, not only dismissal. They can apply to a wide range of other 'adverse actions', including:

- not giving [employees] their legal entitlements
 - changing their job to their disadvantage
 - treating them differently than others
 - not hiring them
- offering them different (and unfair) terms and conditions, compared to other employees.⁴⁵

⁴⁵ Fair Work Commission (2015) *Resolving issues, disputes and dismissals*, <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/workplace-issues-disputes/general-protections>

ABS figures

The ABS crime and justice data collections mainly address individuals as either victims or perpetrators of crime. However, ABS figures do identify court dealings with organisations as the defendant. Unfortunately the data does not distinguish between corporations and other organisations. However, according to ABS officials contacted for this research organisations are predominantly incorporated entities. Court dealings with organisations are presented in Table 13 and go back as far as the ABS data permit.

Table 13: Court dealings with organisations

	2010–11	2011–12	2012–13	2013–14	2014–15
Defendants finalised	5,305	5,850	4,818	5,198	5,677
Proven guilty	3,912	4,208	3,437	3,743	4,210

Source: ABS (2016) Criminal Courts, Australia, 2014-15, Cat no 4513.0, 1 March.

Table 13 shows that there tend to be over 5,000 matters brought to court involving organisations as the defendant and that on average almost 4,000 are found guilty. Unfortunately the figures are not broken down by the type of offence. Nevertheless, given the ABS figures are comprehensive and we would expect these to potentially include everything from overcharging consumers to bribing foreign officials. We expect that in addition to the numbers in Table 13 there would be a substantial number of companies that have allegations made against them but settle any matter out of court. Alternative enforcement action may be taken to address the wrong-doing consistent with the compliance pyramid mentioned above. Administrative data to be reported below suggests that is indeed the case.

In addition to these figures, there are many individuals taken to court for their part in some sort of corporate wrong-doing. However, people engaged in wrong-doing as agents of corporations are not separately identified. The issue here is when an employee of a corporation is acting within the scope of their employment and therefore their actions and state of mind can be sheeted back to the corporation. This is distinct from actions taken outside the scope of their employment (and therefore it is not the corporations fault). An extreme example is of an employee who murders someone. While the ABS crime and justice figures relating to individuals are quite detailed, little is reported that might include the offences of interest to us in this paper.

- The ABS figures for people include division 09 'Fraud, deception and related offences' and a component of that is:
- Item 0931 'Fraudulent trade practices' which includes 'Actions carried out as part of trade or commercial activity that are intended to deceive consumers, stakeholders or other interested parties'.

While this does not exactly meet our needs corporate crime incidents resulting in the prosecution of an individual should be included in this item. The ABS will not release these figures for the 0931 item because of quality problems, but in discussions with ABS staff we learned that the annual numbers are small and volatile from year to year. We would recommend that the ABS gather more and better information on corporate crime. In that regard we also note that the latest Institute of Criminology publications on corporate crime go back to the early 1990s.⁴⁶

⁴⁶ For example there was a publication on the proceedings of a conference on commercial fraud. See Grabosky PN (ed) (1992) *Proceedings of a conference held 20-23 August 1991*, Canberra: Australian Institute of Criminology, January at <http://www.aic.gov.au/publications/previous%20series/proceedings/1-27/10.html>

Conclusions

Most people would be aware that there are examples of impropriety or worse in the case of the Australian corporate and business sectors. This report is an attempt to get a feel for the magnitude of the problem. We are aware that, like any undesirable practices, we are only likely to uncover a small proportion of the totals. However, the extent of wrong-doing among Australian companies and businesses is surprisingly high.

Given that this report relies on the administrative data obtained by the regulators and other related government agencies in the course of their work we were also aware of the problems the regulators were having with their budgets. There were suggestions that budgetary cuts hindered their activities and encouraged them to settle or otherwise go 'timid on enforcement' as former ACCC Chairman Alan Fels put it. Data from the budget papers was presented showing that indeed there was a large (14.9 per cent) reduction in the staffing in the relevant areas.

The ACCC over the last ten years has taken action against companies on 669 instances. There were multiple complaints against some of the top listed companies with Woolworths the subject of 29 separate issues.

Over the last four and a half years ASIC concluded 3,115 cases against corporations of which 2,095 were criminal matters. Using a broader definition of its activities, over five years ASIC took action against building and construction firms in 10,667 cases.

The ATO has been prosecuting about 500 companies per annum, although that has fallen to 300 for the most recent year, possibly due to the staffing and other resource constraints. ATO reports on recoveries and liabilities raised from companies that do not fully disclose their affairs. Settlements alone raise some \$3.5 billion a year on the latest figures. It separately reports that it targets the building and construction industry and for 2012-13 it has recovered \$2.3 billion.

The Fair Work Ombudsman, over the nine years for which we have data, recovered a quarter of a billion dollars for over 174,000 employees and finalised 217,000 separate complaints. In the six years to 2014-15 the Fair Work Commission saw a total of 71,106 claims lodged for unfair dismissal and some 80 per cent of those were settled at conciliation. Around 50 per cent of those dismissals that go to arbitration tend to be ruled as unfair. The data show that unfair dismissal claims are not so much a problem for small employers with 81 per cent of cases in conciliation involving substantial or large employers.

Where the building and construction industries were specifically identified, the data were separately reported in the relevant sections of this report. Building and construction are included in the 'construction' industry defined by the ABS and that industry accounts for eight per cent of the Australian economy using 2014-15 figures.⁴⁷ On the evidence in this paper the businesses in this industry seem to be disproportionately involved in undesirable practices and disproportionately attempt to conceal their taxable income.

⁴⁷ ABS (2015) *Australian System of National Accounts, 2014-15*, Cat no 5204.0, 30 October.