SUBMISSION TO THE SENATE STANDING COMMITTEE ON EDUCATION AND EMPLOYMENT INQUIRY INTO GOVERNMENT'S APPROACH TO RE – ESTABLISHING THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION
BY THE MARITIME UNION OF AUSTRALIA

INTRODUCTION

1. This submission to the Senate Standing Committee on Education and Employment Inquiry (the Inquiry) into the Government's approach to re – establishing the Australian Building and Construction Commission (ABCC) is provided by the Maritime Union of Australia (MUA) and specifically addresses the terms of reference, with a particular focus on the proposed extension of special industrial laws designed to apply to workers in the Building and Construction Industry, to workers in the Maritime Industry, including the offshore oil and gas industry.

2. In this regard, the MUA is particularly concerned by the extension of the definition of "building work" in sub clauses 6(1)(e), (2) and (6) of the Building and Construction Industry (Improving Productivity) Bill 2013 (the BCIIP Bill) to the transport or supply of goods to be used in building work, as defined, directly to building sites (including any resources platform) where that work is being or may be performed.

3. In the MUA's submission, the proposed extension of the definition of "building work" in this manner will lead to the misapplication of the BCIIP Bill to workers on vessels and/or resources platforms in the offshore oil and gas industry performing work that is not properly characterised as building work, and even stevedoring work if it is ultimately found that the loading and unloading of certain cargo is the supply of goods to be used in building work directly to building sites.

4. Similarly, the MUA is also particularly concerned about the proposed extension by clause 11 of the BCIIP Bill of the geographical application of the proposed BCIIP Act, and concomitant proposed extension of the jurisdiction of the ABCC, to any resources platform in the Exclusive Economic Zone or in the waters above the

continental shelf and any ship, in the Exclusive Economic Zone or in the waters above the continental shelf, that is travelling to or from an Australian port.

5. In the MUA's submission, the proposed extension of the ABCC's jurisdiction in this manner reveals a failure on the part of the Commonwealth to appreciate the jurisdictional complexities and transactional costs associated with attempting to extend Australian employment and industrial regulation to workers in the offshore, and highlights the inappropriateness of extending the reach of a re – established ABCC into the Maritime Industry.

6. More generally, in the MUA's submission, the proposed re – establishment of the ABCC is fundamentally unwarranted and unjustified and should be rejected outright.

7. The 'merry go round' approach to regulation of the Building and Construction Industry adopted by the Commonwealth and previous Governments of the same persuasion, is an anathema to cost reduction, efficiency and productivity improvements.

8. Finally, note that the MUA also supports and adopts the submissions of the Construction, Forestry, Mining and Energy Union (CFMEU), and the Australian Council of Trade Unions (ACTU).

TERMS OF REFERENCE

The potential impact of the re – establishment of the Australian Building and Construction Commission on the Building and Construction industry

9. In the MUA's submission, there is no theoretical justification, or evidentiary basis upon which to sustain the claim that the re – establishment of the ABCC will have a positive impact on the Building and Construction Industry.

10. Indeed, in the MUA's submission, the re – establishment of the ABCC will impose upon the Building and Construction Industry a wholly unnecessary layer of

employment and industrial regulation which will impact adversely on all industry participants, particularly trade unions and trade union members.

11. As noted at the outset, the proposed extension of the definition of "building work" in sub clause 6(1)(e) of the BCIIP Bill to the transport or supply of goods to be used in building work (as defined in sub clauses 6(1)(a) to (d)), directly to building sites (including any resources platform) where that work is being or may be performed, will lead to the misapplication of the Bills to work performed on vessels in the Maritime Industry and more particularly, to work performed on vessels in the offshore oil and gas industry, work that is not properly characterised as building work.

12. There is even the potential for application to stevedoring workers where it is found that the loading and unloading of certain cargo is the supply of goods to be used in building work directly to building sites. Such work is clearly not "building work" performed in the Building and Construction Industry, but stevedoring work performed in the Maritime Industry, with basic terms and conditions of employees performing stevedoring work appropriately governed by the *Fair Work Act 2009* (Cth) (FW Act) and the *Stevedoring Industry Award 2010* made under it.

13. Putting the proposed application of the BCIIP Bill to the offshore oil and gas industry beyond doubt, subclause 6(2) provides:

"*To avoid doubt, paragraphs (1)(f) and (g) do not prevent this Act from applying to building work (within the meaning of paragraphs (1)(a) to (e)) that is performed on land in which there is an interest relating to the mining of oil, gas or minerals.*

Note: This Act extends to any resources platform, and to certain ships, in the exclusive economic zone or in the waters above the continental shelf".

14. Further, sub clause 6(6) provides:

"*In this Act:*

***land** includes land beneath water*".

15. Vessels in the offshore oil and gas industry conduct predominantly seismic analysis for possible traces of hydrocarbons, and are in no way involved in building work.

16. Similarly, vessels that supply seismic vessels with food, water and fuel, diving support vessels, and vessels that are involved in repositioning larger vessels, are all involved in the offshore oil and gas industry, but again, are not involved in building work.

17. Whilst such vessels might supply vessels involved in construction of resources platforms, for example a fixed resource platform, the fleeting manner of such supply does not justify the application of the Bills to them. Such vessels are typically also simultaneously providing supplies to a diving vessel, or a seismic vessel, or some other vessel that is not involved in building work, and might spend two or three days day in a swing of four of five weeks or more supplying a vessel involved in the construction of resources platforms.

18. In the MUA's submission, the nature of the work performed on board the type of vessels described above, including vessels involved in the construction of resources platforms, which are in no way "building sites" properly defined, neither justifies or supports the application of the proposed BCIIP Act to such work. If enacted, the proposed BCIIP Act will inappropriately blur the lines between the Building and Construction Industry and the Maritime Industry, as well as the Transport, and even potentially the Manufacturing and Warehousing industries.

19. Additionally, the proposed extension by clause 11 of the Bill of the geographical application of the proposed Act, and concomitant proposed extension of the jurisdiction of the ABCC, to any resources platform in the Exclusive Economic Zone or in the waters above the continental shelf, and any ship in the Exclusive Economic Zone or in the waters above the continental shelf that is travelling to or from an Australian port, is rejected outright by the MUA. Persons who work on fixed and floating resources platforms, and on the vessels that supply them, for whatever purpose, are in no way performing building work on building sites, nor are they

otherwise in the Building and Construction Industry, objectively and properly defined. They are working in the Maritime Industry and the regulation of their basic terms and conditions of employment by the FW Act, and the *Maritime Offshore Oil and Gas Award 2010* and *Seagoing Award 2010* made under it, reflect this proper characterisation of the nature of their work, and the industry in which they perform it.

20. Furthermore, in the MUA's submission, such proposed extension highlights the triumph of regulatory zeal over good public policy. The Commonwealth should be keenly aware of the difficulties associated with domestic employment and industrial legislation, and even migration legislation which seeks to extend its application to the Exclusive Economic Zone and/or to the waters above the continental shelf.

21. Additional complications arise when the sufficient jurisdictional nexus is some connection with the Australian seabed, as is the case with the extension of the Migration Zone under the *Migration Act 1958* (Cth), or, as is the case in accordance with clause 6(6) of the BCIIP Bill, building work on "land beneath water".

22. In this regard, the MUA notes the failure of the Fair Work Ombudsman in *Fair Work Ombudsman v Pocomwell* (No 2) [2013] 1139 to establish a sufficient jurisdictional nexus for the application of the FW Act to the employment of foreign nationals working on board vessels operating in the Exclusive Economic Zone, and the inability of the Minister for Immigration to establish a sufficient jurisdictional nexus for the extension of the application of the *Migration Act 1958* (Cth) to foreign nationals working on board vessels laying pipeline on the Australian seabed in *Allseas v Minister for Immigration* [2012] FCA 529.

23. Such difficulties involve careful consideration of the interaction of a coastal State's rights, jurisdiction and obligations in its Exclusive Economic Zone, and the rights, jurisdiction and obligations of a foreign flagged ship's State under applicable international Conventions.

24. For example, consider Article 56 of the *United Nations Convention on the Law of the Sea 1982* (UNCLOS) which deals with the rights, jurisdiction and duties of the coastal

State in the exclusive economic zone, and Article 56(2) which relevantly provides "in exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention".

25. In the MUA's submission, there is enough ineffective Commonwealth regulation of Australian employment and industrial regulation in the offshore oil and gas industry, and the attempt to extend the reach of a reintroduced ABCC to that sphere of economic activity will only lead to more confusion, further uncertainty, and ultimately, costly litigation in the name of unwarranted and unjustified additional employment and industrial regulation.

The need or otherwise for a specialist industrial regulator in the Building and Construction industry

26. The proposed introduction of another layer of employment and industrial regulation with its centrepiece, the re – established ABCC focused squarely on costly prosecutions and enforcement actions, flies in the face of the Commonwealth's own pronounced aversion to regulation.

27. In this regard, the MUA notes the Commonwealth's intention to cut $1 billion in red and green tape each year to benefit business and not-for-profit organisations as announced by the Leader of the House, the Hon Christopher Pyne MP, and Parliamentary Secretary to the Prime Minister, the Hon Josh Frydenberg MP, on 13 January 2014.

28. Like all other industries, the Building and Construction Industry and the Maritime Industry are already subjected to significant, ongoing and recently expanded employment and industrial regulation under the FW Act, the *Fair Work (Registered Organisations) Act 2009* (Cth) (FW RO Act) and associated legislation.

29. It must be remembered that the 'back to the future' like proposal to re – establish the ABCC will result in a significant initial budgetary cost to the Australian taxpayer, not

to mention the ongoing costs associated with re - establishing the ABCC for which there is no justification or need.

30. The ABCC was established in 2005 by the *Building and Construction Industry Improvement Act 2005* (Cth). The ABCC was then abolished in 2012 by the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (Cth), and replaced by the *Fair Work (Building Industry) Act 2012* (Cth) with the Office of Fair Work Building Industry Inspectorate, an autonomous statutory agency working in parallel with, but independently of, the Fair Work Ombudsman.

31. In the circumstances, effectively abolishing the Office of Fair Work Building Industry Inspectorate and replacing it with a re – established ABCC is a monumental waste of taxpayer funds.

32. Such a 'merry go round' approach to regulation of the Building and Construction Industry is an anathema to cost reduction, efficiency and productivity improvements. The Commonwealth would be better served abolishing the existing Office of Fair Work Building Industry Inspectorate and transferring its operations to the Fair Work Ombudsman which is already vested with powers to conduct investigations and prosecutions in relation to all other industries. Such an approach would not only reduce the Commonwealth bureaucracy and save taxpayer funds, consistent with the Government's stated objective of removing unnecessary regulation, but more fundamentally, help to ensure that Australian employment and industrial regulation does not infringe on the basic tenant of the rule of law, equal treatment of all citizens living and working in accordance with laws that apply equally to all.

The potential impact of the bills on productivity in the Building and Construction industry

33. Whilst proponents of the re - establishment of the ABCC cite supposed productivity improvements in the Building and Construction Industry following the introduction of the ABCC in 2005, such claims appear to be politically motivated and the analysis relied upon to justify them easily refuted.

34. In the MUA's submission, the uncertainty surrounding the scope of the BCIIP Bill explained above will only lead to increased transactional costs for employees, unions, and union members, as well as employers in the Maritime Industry.

35. Faced with a layer of potential employment and industrial regulation in addition to that in place under the FW Act, FW (RO) Act and associated legislation, as part and parcel of any basic due diligence regime, Maritime Industry participants will be required to seek professional advice regarding whether there is a sufficient nexus between their activities and "building work" as defined in the BCIIP Bill.

36. Furthermore, additional transactional costs will also be incurred if, once having received professional advice that there may be, or is, a sufficient nexus, compliance measures will be implemented in circumstances in which it remains uncertain whether the proposed BCIIP Act applies.

37. Whilst case law will no doubt develop around these issues over time, uncertainty and confusion will reign for a significant period of time as the proposed legislation is implemented at the cost of increased transactional costs. Increased transactional costs will potentially lead to a corresponding drop in productivity in the Maritime Industry and other industries placed on the cusp of the 'dividing line' artificially imposed by clause 6 of the BCIIP Bill.

38. Finally, note that the MUA also agrees with and supports the CFMEU and ACTU's analysis of the Independent Economics Report (EconTech) and its predecessors, which underpin the claims of proponents of the proposed legislation to the effect that the ABCC previously lead to increases in productivity and reduced costs for consumers in the Building and Construction Industry.

Whether the bills are consistent with Australia's obligations under international law

39. As noted by the ACTU in its submission to the Inquiry, the BCIIP Bill is based on the former *Building and Construction Industry Improvement Act 2005* (Cth) which first

established the ABCC. As much is acknowledged in the outline of the Explanatory Memorandum to the BCIIP Bill.

40. Further, as noted by the Labor Senators' dissenting report of the Senate Education and Employment Legislation Committee Inquiry into the BCIIP Bill in December 2013, the International Labour Organisation (ILO) previously found that a number of substantive provisions of the former *Building and Construction Industry Improvement Act 2005 Act* (Cth) contravened Australia's obligations under international law including:

- *The Labour Inspection Convention 1947 (no. 81);*
- *The Freedom of Association and Protection of the Right to Organise Convention 1947 (no. 87); and*
- *The Right to Organise and Collective Bargaining Convention 1949 (no. 98).*

41. Even more disturbing to the MUA is the fact that the Bills have not yet been considered by the Parliamentary Joint Committee on Human Rights.

42. In this regard, the MUA is highly concerned by the Statement of Compatibility with Human Rights to the BCIIP Bill which purports to engage with the following rights:

- the right to freedom of association in Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the International Covenant on Civil Economic Social and Cultural Rights (ICESCR);
- the right to just and favourable conditions of work under Article 7 of the ICESCR, including the right to safe and healthy working conditions, and the right to protection of health, and to safety in working conditions;
- the right to a fair trial, both criminal or civil, contained in Article 14 of the ICCPR;

- the right to peaceful assembly under Article 21 of the ICCPR;
- the right to freedom of expression under Article 19 of the ICCPR; and
- the right to privacy and reputation under Article 17 of the ICCPR.

Freedom of Association

43. The BCIIP Bill limits the right to take protected industrial action in a number of ways discussed more fully below. For present purposes however, of great concern to the MUA is the restriction placed on free citizens by clause 8 of the BCIIP Bill effectively prohibiting involvement with workers taking protected action in the Building and Construction Industry.

44. Clause 7 of the BCIIP Bill defines "industrial action" in much the same way as section 19 of the FW Act.

45. Further, sub clause 8(1) defines protected industrial action as action which "is protected industrial action within the meaning of the FW Act".

46. Clause 5 defines "unlawful industrial action" as industrial action within the meaning of clause 7 of the Bill that is not "protected industrial action" within the meaning of clause 8. In this regard, sub clause 8(2) of the BCIIP Bill modifies the definition of "protected industrial action" as found in Division 2 of Part 3 – 3 of the FW Act, and in doing so, limits the right to strike, as follows:

"(2) However, action is not ***protected industrial action*** *if the action is protected industrial action (within the meaning of the FW Act) for a proposed enterprise agreement but:*

(a) the action is engaged in concert with one or more persons who are not protected persons; or

(b) *the organisers include one or more persons who are not protected persons*".

47. As much is acknowledged in the Statement of Compatibility with Human Rights which provides that clause 8 of the BCIIP Bill limits the right to strike by:

    - removing the protected status of industrial action in the building industry (defined in clause 8 as protected industrial action within the meaning of the FW Act) in circumstances where protected action is engaged in concert with persons or is organised by persons who are not connected to bargaining for an enterprise agreement (ie. who are not protected persons).

48. In the MUA's submission, this provision, not found in the FW Act, is oppressive, and infringes upon Article 22 of the ICCPR and Article 8 of the ICESR in that it will restrict and penalise workers in the Building and Construction Industry taking lawful or protected industrial action, for associating with free citizens taking otherwise lawful action in the nature of a community picket in support of those workers. The provision should be rejected.

49. Also of concern is sub clauses 54(1) and (5) of the BCIIP Bill which prohibit a person taking any action with intent to coerce another into the making, variation or termination of a building enterprise agreement, and is expressed to operate to the exclusion of section 343 of the FW Act. This may deprive disputants access to the dispute resolution procedures under Subdivision B, Div 8, Part 3 -1 of the FW Act which can hardly be said to foster the resolution of disputes concerning the rights or otherwise of trade union members subject to proceedings brought under the proposed BCIIP Act to bargain collectively.

50. Further, the Statement of Compatibility with Human Rights expressly acknowledges that to the extent clause 59 makes unenforceable project agreements, the clause "will restrict the application of site – wide agreements in the building and construction industries, the Bill limits the right to collectively bargain".

Safe and Healthy Working Conditions

51. As noted above, clause 7 of the BCIIP Bill defines "industrial action" in much the same way as section 19 of the FW Act. As is the case in sub section 19(2)(c) of the FW Act, sub clause 7(2)(c) of the Bill excludes from the definition of "industrial action" action by an employee if:

"*(i) the action as based on a reasonable concern of the employee about an imminent risk to his or health or safety; and*

(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform".

52. However, sub clause 7(4) effectively alters the definition of industrial action in the FW Act for the purposes of the BCIIP Bill by placing the onus on an employee to make out his claim that the safety exception applies:

"*(4) Whenever a person seeks to rely on paragraph (2)(c), the person has the burden of proving the paragraph applies*".

53. The attempt in sub clause 7(4) of the BCIIP Bill to place the onus on an employee being prosecuted for "unlawful industrial action" (see clause 46 and 48) who claims in accordance with sub clause 7(2)(c) that the action taken is based on a reasonable concern about an imminent risk to his health or safety, is draconian in the extreme.

54. Whilst the Statement of Compatibility with Human Rights provides that such "restriction" on the right to the enjoyment of just and favourable working conditions, including safe and healthy working conditions, is justified because "there are concerns that abuse of the right to cease work is being abused", no doubt a reference to the operation of the corresponding safety exception in sub section 19(2) of the FW Act, the proposed solution in sub clause 7(4) of the BCIIP Bill appears to misconceive the

nature of the practical application of the corresponding safety exception in the FW Act.

55. Under the FW Act, an application for orders under section 418 prohibiting unprotected industrial action is determined by the Fair Work Commission, an administrative tribunal with quasi - judicial functions and powers. That determination is made absent the requirement that the Rules of Evidence apply to proceedings before it.

56. Accordingly, notions such as which party bears the onus of proof are not relevant to the Fair Work Commission's determination.

57. Conversely, clause 46 of the BCIIP Bill prohibiting unlawful industrial action is a civil remedy provision enforceable in a Court of pleading, where inter parte disputes are resolved according to the Rules of Evidence (see clause 86 of the BCIIP Bill in this regard) and in the normal course, the Applicant or Plaintiff in a civil proceeding bears the onus of proving facts in issue, or making good her claim on the balance of probabilities. In the case of clause 46, the claim is that industrial action is unprotected industrial action and therefore unlawful industrial action within the meaning of clause 5 of the BCIIP Bill.

58. Whilst the onus of proof can be revered by statute (see for example section 361 of the FW Act), placing a reverse onus squarely on an employee to make out their claim to a safety exception, as opposed to making the prosecutor, presumably an ABCC inspector, prove that alleged unlawful industrial action is unprotected industrial action, and not otherwise subject to the safety exception, is contrary to the general rule in civil proceedings that it is for an applicant to make out her case on the evidence.

59. Similarly, clause 93 provides that a person wishing to rely on "any exception, exemption, excuse, qualification or justification provided by the law creating the civil remedy provision" bears an evidential burden in the matter.

60. In the MUA's submission, these reverse onus provisions, especially in relation to an employee's reasonable concern about an imminent risk to health or safety, will make employees hesitant to raise legitimate risks to health and safety, thereby placing their health and safety at risk.

61. Further, Article 14 of the ICCPR protects the right to be presumed innocent before being declared guilty according to law, and the placement of the onus on an employee claiming the safety exception in clause 7 of the Bill, or any other exception vis a vis clause 93, fundamentally interferes with this right. Indeed, the protection of the presumption of innocence is infringed upon elsewhere on the BCIIP Bill.

62. The provisions are draconian, display the overly zealous approach taken by the Commonwealth to enforcement in the Building and Construction Industry, and should be rejected.

Right to a Fair Trial - Presumption of Innocence

63. Article 14 of the ICCPR protects the right in a criminal proceeding, to be presumed innocent before being declared guilty according to law. Whilst proceedings under the proposed BCIIP Act are civil, at least one penalty under sub clause 62 involves imprisonment. Further, given the unprecedented harshness of penalties proposed under the BCIIP Bill, in the MUA's submission, the right to a fair trial, including the presumption of innocence, should be accorded the same status when assessing the human rights implications of the BCIIP Bill.

64. Under clause 57 of the BCIIP Bill, where an application has been made regarding contravention of a provision in Chapter 6 concerning coercion and discrimination, and it is alleged that a person took action for a particular reason or with a particular intent, that allegation is presumed to in fact be the intent of the person, unless the person proves otherwise. Clause 57 also applies to clause 47 which prohibits unlawful picketing. This reverse onus again fundamentally interferes with the right to be presumed innocent before being declared guilty according to law, protected by Article 14 of the ICCPR, and should be rejected outright.

65. In addition to protecting the right to be presumed innocent before being declared guilty according to law, Article 14 of the ICCPR also protects the right of persons not to be compelled to testify against him or herself, or to confess guilt.

66. Under sub clause 61(1) of the BCIIP Bill, the ABCC Commissioner is empowered to issue an examination notice requiring any person to provide information or documents in relation to an investigation of a suspected contravention of the BCIIP Bill or a designated building law.

67. Further, under sub clause 61(2), the ABCC Commissioner is also empowered to require a person to attend before the Commissioner or an assistant at a specified time and place and "answer questions relevant to the investigation", that is, to be interrogated.

68. Compounding this draconian power is a penalty under clause 62 of imprisonment for six months for failure to comply with an examination notice issued under clause 61 through non attendance or even worse, refusal to answer questions relevant to the investigation in complete abrogation of the right to silence: see sub clause 62(iv). Whilst it is perhaps arguable that such coercive powers are apt to some serious criminal offences, their application to investigation of civil offences is totally inappropriate, undemocratic and outrageous.

69. Additionally, clause 102 provides that a person is not excused from giving information, producing a record or document, or answering a question under an examination notice, or as a result of an inspector exercising their relevant powers, on the grounds that to do so might tend to incriminate the person or otherwise expose the person to a penalty or other liability.

70. Again, in the MUA's submission, this interference with the privilege against self incrimination in clause 102 of the BCIIP Bill is not justified by the use/derivative use immunity afforded in the clause, and should be rejected outright.

Freedom of Peaceful Assembly

71. The right of freedom of peaceful assembly is limited by the prohibition on unlawful picketing in clause 47 of the BCIIP Bill which prohibits "unlawful picketing action" that:

    - has the purpose of preventing or restricting a person from accessing or leaving a building site or an ancillary site;

    - directly prevents or restricts a person accessing or leaving a building site or ancillary site; or

    - would reasonably be expected to intimidate a person accessing or leaving a building site or ancillary site.

72. Sub clause 47(2)(b) of the BCIIP Bill provides that the prohibition applies to such action that is either motivated by an industrial purpose, or that "is unlawful (apart from this section)". For example, this could conceivably capture a homeless person requesting money in front of a building site entrance pursuant to section 49A of the *Summary Offences Act 1966* (Vic).

73. In this regard, the MUA notes that the category of "is unlawful (apart from this section)" may capture alleged "unlawful industrial action", defined in clause 5 as "unprotected industrial action", which in turn is defined in clause 7 and sub clause 8(2) of the Bill as including action that is in truth nothing more than a community picket conducted by union members taking protected action, supported by other citizens participating in the community picket (recalling that sub clause 8(2) effectively extends the concept of unprotected industrial action under the FW Act to circumstances where protected action is engaged in concert with persons or is organised by persons who are not connected to bargaining for an enterprise agreement).

74. Whilst clause 91 of the BCIIP Bill on its face prevents such 'civil double jeopardy', or two remedial orders for the same action – one for a contravention of the civil remedy provision in clause 46 prohibiting "unlawful industrial action" and one for contravention of the civil remedy provision in clause 47 prohibiting "unlawful picketing", the legislative drafting of clauses 7, 8, 46 and 47 may mean that a respondent may face multiple actions for contraventions allegedly arising out of the same set of facts in issue.

75. The MUA opposes these restrictions on the freedom of peaceful assembly outright.

Freedom of Expression

76. Several provisions of the BCIIP Bill restrict this right:

- Clause 46 which prohibits a person from organising or engaging in "unlawful industrial action" as defined in clause 8;

- Clauses 52 and 54 which prohibit threatening to organise or to take action relating to coercion; and

- Clause 58 which provides that advising, encouraging, inciting or coercing a second person to take unlawful picketing action or action that would otherwise contravene a civil remedy provision in Part 2 of Chapter 6 of the BCIIP Bill dealing with prohibition on coercion and discrimination, is a contravention in and of itself.

77. The MUA rejects these restrictions outright noting in relation to "unlawful industrial action" as defined, that the unnecessary and capricious extension of this definition by the BCIIP Bill discussed at paragraph [74] and [75] above, renders any restrictions on the freedom of expression in its name disproportionate and unjustified.

Right to privacy and reputation

78. The MUA opposes outright the power of ABCC inspectors in accordance with sub clauses 72(1)(a)(i) and (3) to enter any premises, but in particular the power to enter residential premises, simply because they reasonably believe that a provision of the BCIIP Bill, a designated building law or the Building Code applies to work that is being done, or applied to building work that has been performed on the premises.

79. The ability of an ABCC inspector to enter residential premises unencumbered by nothing more than a subjective "reasonable belief" that a law of the Commonwealth applies in some way to work performed or being performed on the residential premises, is a totally unwarranted intrusion into the privacy of citizens wholly unconnected with the Building and Construction Industry, other than as a consumer of its services.

80. The unwarranted nature of such power is magnified in light of the ability of an ABCC inspector, once they have entered residential premises, to interview any person, or require a person with custody of or access to a record or document to produce that record or document etc: see clause 74.

The potential impact of the bills on employees, employers, employer bodies, trade and labour councils, unions and union members

Industrial Action

81. Several provisions of the BCIIP Bill relating to industrial action are of great concern.

82. As outlined above, sub clause 8(2) limits the right to strike by removing the protected status of industrial action in the Building and Construction Industry (defined in clause 8 as protected industrial action within the meaning of the FW Act) in circumstances where protected action is engaged in concert with persons or is organised by persons who are not connected to bargaining for an enterprise agreement (ie. who are not protected persons).

83. In the MUA's submission, the provision, not found in the FW Act, is oppressive in that it seeks to restrict and penalise the association of free citizens with workers in the Building and Construction Industry taking lawful or protected industrial action.

84. Also of concern are clauses 47 and 48 which introduce a wide prohibition on "unlawful pickets" not found in the FW Act.

85. As outlined above, clause 47 of the BCIIP Bill which prohibits "unlawful picketing action" that:

- has the purpose of preventing or restricting a person from accessing or leaving a building site or an ancillary site;
- directly prevents or restricts a person accessing or leaving a building site or ancillary site; or
- would reasonably be expected to intimidate a person accessing or leaving a building site or ancillary site.

86. Sub clause 47(2)(b) of the BCIIP Bill provides that the prohibition applies to such action that is either motivated by an industrial purpose or that "is unlawful (apart from this section)".

87. In this regard, the MUA notes that the category of "is unlawful (apart from this section)" may capture alleged "unlawful industrial action", defined in clause 5 as "unprotected industrial action" which in turn is defined in clause 7 and sub clause 8(2) of the Bill as including action that is in truth nothing more than a community picket conducted by union members taking protected action, supported by other citizens participating in a community picket (recalling that sub clause 8(2) effectively extends the concept of unprotected industrial action under the FW Act to circumstances where protected action is engaged in concert with persons or is organised by persons who are not connected to bargaining for an enterprise agreement).

88. Again, whilst clause 91 of the BCIIP Bill on its face prevents such 'civil double jeopardy', or two remedial orders for the same action – one for a contravention of the civil remedy provision in clause 46 prohibiting "unlawful industrial action" and one for contravention of the civil remedy provision in clause 47 prohibiting "unlawful picketing", the legislative drafting of clauses 7, 8, 46 and 47 may mean that a respondent may face multiple actions for contraventions allegedly arising out of the same set of facts in issue.

89. The MUA opposes these restrictions on the freedom of peaceful assembly outright and notes that the existing secondary boycott provisions of the *Competition and Consumer Act 2010* (Cth) provide adequate remedies, along with the common law, to the type of 'sympathy' action with which these provisions appear to be concerned.

90. Clause 48 of the BCIIP Bill which allows any person to apply to a Court for an injunction against unlawful industrial action or an unlawful picket is also an unnecessary extension of standing to persons who potentially might not even be effected by what is alleged to be unlawful action. Additionally, sub clause 48(4), which provides that a court may grant an interlocutory injunction "whether or not it appears to the Court that the defendant intends to engage again, or continue to engage, in conduct of that kind" unnecessarily interferes with the Court's discretionary exercise of the power to grant an interlocutory injunction by effectively weighing the 'balance of convenience' consideration undertaken by a court when considering whether to grant an interlocutory injunction, in favour of the applicant for such an injunction: as to the 'balance of convenience' test that would otherwise apply under the FW Act, see *Bullock & Ors v Federated Furnishing Trade Society of Australasia and Others* (1984) 58 ALR 364.

Coercion

91. In the MUA's submission, the general protections provisions in Part 3 -1 of Chapter 3 of the FW Act already provide adequate prohibitions on coercion: see especially sections 343, 344 which deal with coercion and undue influence in relation to the

making of enterprise agreements, or other agreements or arrangements (and section 348 more generally regarding coercion relating to the taking of industrial action) of the FW Act.

92. The relevant provisions of the FW Act include access to the dispute resolution functions of the Fair Work Commission in disputes concerning alleged coercion in accordance with Subdivision B of Division 8 of Part 3 -1 of the FW Act.

93. As noted above, the provisions of Chapter 6 of the BCIIP Bill concerning coercion provide no such access to the dispute resolution functions of the Fair Work Commission and indeed, clause 54 dealing with coercion relating to the making of enterprise agreements etc excludes the provisions of the FW Act: see sub clause 54(5).

Project Agreements

94. As noted above, the Statement of Compatibility with Human Rights to the BCIIP Bill expressly acknowledges that to the extent clause 58 makes project agreements unenforceable, the clause "will restrict the application of site – wide agreements in the building and construction industries, the Bill limits the right to collectively bargain".

95. Furthermore, given that protected industrial action in support of such agreements is unavailable under the FW Act (see subsection 409(4) and section 412 of the FW Act), this provision is wholly unnecessary.

Penalties

96. The MUA rejects outright the penalties proposed for unlawful action contravening the civil penalty provisions of the BCIIP Bill.

97. Maximum penalties under clause 81 of the BCIIP Bill are 200 penalty units for an individual ($34,000) and 1000 penalty units for a corporation ($170,000),

significantly higher than corresponding penalties available under the FW Act, and completely unnecessary.

98. There is no evidence of any causal link between higher penalties and reductions in industrial action, and such reasoning ignores the position under the FW Act, which does not prevent a party seeking redress for alleged unprotected industrial action to have recourse to the common law industrial torts in any event.

The extreme and heavy – handed proposed powers of the Australian Building and Construction Commission, including coercive powers, conduct of compulsory interviews, and imprisonment for those who do not cooperate

99. Chapter 7 of the BCIIP Bill deals with coercive powers of the ABCC to obtain information.

100. As noted above, under sub clause 61(1) of the BCIIP Bill, the ABCC Commissioner is empowered to issue an examination notice requiring any person to provide information or documents in relation to an investigation of a suspected contravention of the BCIIP Bill or a designated building law.

101. Further, under sub clause 61(2), the ABCC Commissioner is also empowered to require a person to attend before the Commissioner or an assistant at a specified time and place and "answer questions relevant to the investigation", that is, to be interrogated.

102. Compounding these draconian powers is a penalty under clause 62 of imprisonment for six months for failure to comply with an examination notice issued under clause 61 through non attendance or even worse, refusal to answer questions relevant to the investigation in complete abrogation of the right to silence: see sub clause 62(iv). Whilst it is perhaps arguable that such coercive powers are apt to some serious criminal offences, their application to investigation of civil offences is totally inappropriate, undemocratic and outrageous.

103. Elsewhere, clauses 109 and 110 of the BCIIP Bill give the ABCC the right to intervene in any civil proceedings under the FW Act or the *Independent Contractors Act 2006* (Cth) if the matter involves a building industry participant or building work. The repository of such untrammelled power in an independent statutory authority to intervene in an inter parte dispute in a court of pleadings, or a private dispute in the Fair Work Commission, is unparalleled in Australian employment and industrial law and wholly unjustified.

104. Similarly, the ability of the ABCC as prosecutor to reagitate "building proceedings" instituted under section 73 and 73A of the repealed *Building and Construction Industry Improvement Act 2005* (Cth), or the *Fair Work (Building Industry) Act 2012* (Cth), and settled before the proposed commencement of the proposed BCIIP Act, is gobsmacking. Such power is in contradiction of the principle of privity of contract and will lead to uncertainty in business dealings: see Item 20 of Schedule 2 to the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (BCICTP Bill).

105. ABCC inspectors are also able to exercise all powers available under Chapter 7 of the BCIIP Bill in relation to any contravention or alleged contravention of the repealed *Building and Construction Industry Improvement Act 2005* (Cth) and the *Fair Work (Building Industry) Act 2012* (Cth), that occurred prior to the commencement of the proposed BCIIP Act: see sub Item 2(3) of Schedule 2 to the BCICTP Bill.

106. Additionally, clause 102 provides that a person is not excused from giving information, producing a record or document, or answering a question under an examination notice, or as a result of an inspector exercising their relevant powers, on the grounds that to do so might tend to incriminate the person, or otherwise expose the person to a penalty or other liability.

107. Again, in the MUA's submission, this interference with the privilege against self incrimination in clause 102 of the BCIIP Bill is not justified by the use/derivative use immunity afforded in the clause, and should be rejected outright.

108. The MUA also repeats its outright opposition to the power of ABCC inspectors in accordance with sub clauses 72(1)(a)(i) and (3) to enter any premises, but in particular the power to enter residential premises, simply because they reasonably believe that a provision of the BCIIP Bill, a designated building law or the Building Code applies to work that is being done, or applied to building work that has been performed on the premises.

109. The ability of an ABCC inspector to enter residential premises unencumbered by nothing more than a subjective "reasonable belief" that a law of the Commonwealth applies in some way to work performed or being performed on the residential premises is a totally unwarranted intrusion into the privacy of citizens wholly unconnected with the Building and Construction Industry, other than as a consumer of its services.

110. The unwarranted nature of such power is magnified in light of the ability of an ABCC inspector, once they have entered residential premises, to interview any person, or require a person with custody of or access to a record or document to produce that record or document etc: see clause 74.

The provisions of the bills relating to requirements to provide information to the Australian Building and Construction Commission during interviews including provisions that interviewees have no right to silence

111. The MUA relies on its submissions at paragraphs [100] to [103] above.

The provisions of the bills that introduce the law of conspiracy into the industrial regulation of the Building and Construction industry

112. As noted by the ACTU in its submission to the Inquiry, civil conspiracy in Australia is dealt with by common law torts which require proof of damage to be made out and that the damage was the result of the agreement of two or more persons to do an unlawful act, or a lawful act by unlawful means where the predominant purpose of the conspirators was to injure the applicant.

113. Some provisions of the Bill appear to embrace the concept of civil conspiracy.

114. As noted above, sub clause 8(2) of BCIIP Bill limits the right to strike by removing the protected status of industrial action in the building industry (defined in clause 8 as protected industrial action within the meaning of the FW Act) in circumstances where protected action is engaged in concert with persons or is organised by persons who are not connected to bargaining for an enterprise agreement (ie. who are not protected persons).

115. Further, clause 47 of the BCIIP Bill which prohibits "unlawful picketing action" action:

- has the purpose of preventing or restricting a person from accessing or leaving a building site or an ancillary site;
- directly prevents or restricts a person accessing or leaving a building site or ancillary site; or
- would reasonably be expected to intimidate a person accessing or leaving a building site or ancillary site.

116. As also noted above, sub clause 47(2)(b) of the BCIIP Bill provides that the prohibition applies to such action that is either motivated by an industrial purpose or that is "is unlawful (apart from this section)".

117. Combined with the ability under clause 48 of "any person" to apply to the court for an injunction against unlawful industrial action or an unlawful picket, and the prohibition in clause 58 on advising, encouraging, inciting or coercing action, these provisions attempt to 'cover the field' to facilitate the penalising of free citizens for literally any involvement in otherwise protected industrial action in the nature of a community picket, by what appears to be a statutory presumption that any such involvement must be part of a civil conspiracy. Such action could not be a civil conspiracy at common

law, because it does not require damage to constitute a contravention of the proposed BCIIP Act, mere involvement is the threshold, because the acts of the independent parties are otherwise lawful (protected industrial action and peaceful assembly), and because there is no requirement of an intention to injure, again, mere involvement is the threshold.

118. Furthermore, clause 92 of the BCIIP Bill prohibits a person attempting to contravene a civil remedy provision, or aiding abetting, counselling, procuring, inducing, being in any way directly or indirectly, knowingly concerned in, or party to, a contravention of a civil remedy provision, or conspiring with others to effect a contravention of a civil remedy provision. Again, unlike the common law civil conspiracy, this prohibition requires no proof of agreement between two or more persons, and no damage or intention to injure is required for contravention of such prohibition to be made out.

119. The introduction of the law of conspiracy by the BCIIP Bill is draconian, has no place in Australian employment and industrial regulation by statute, and is adequately dealt with, if and when necessary, by the common law.

Whether the provisions of the bills relating to occupational health and safety in the building and construction industry are adequate to protect the health and safety of employees and contractors in the industry

120. Performing work in the Maritime Industry is extremely dangerous.

121. The MUA has grave concerns that the Government's approach to re-establishing the Australian Building and Construction Commission will impact adversely on safety in the Maritime Industry.

122. As outlined above, MUA members perform a range of work which may fall within the purported reach of the extended definition of "building work" in clause 6 of the BCIIP Bill, including in the offshore oil and gas industry, and even potentially the Stevedoring industry onshore.

123. The Building and Construction Industry is well known to be a hazardous industry, with statistics indicating that it is the third most hazardous industry for fatalities from traumatic injuries.[1] The Maritime industry adds a whole number of new hazards, ranging from exposure to extreme weather in remote environments, to drowning, to the fatigue from shiftwork and living on board a vessel for extended periods of time.

124. For example, cyclones are common in north-western Australia. In December 2008 two separate incidents occurred during Cyclone Billy involving the Karratha Spirit and the Castoro Otto.[2]

125. Furthermore, in stevedoring, rates of death and injury have reached crisis levels. During the last six years alone Australian stevedoring workers have suffered an average death rate of 14.3 workplace deaths per 100,000 workers.[3] The rate of serious injuries is equally disproportionate: 51.9 serious claim injuries per 1,000 workers.[4] The carnage is alarming and cannot be allowed to continue.

126. Each death has a devastating and traumatic impact on workers' families, friends, and co-workers. Co-workers must continue to contend with the same risks in the same workplaces after the fatality has taken place. For families, research suggests that traumatic workplace death 'has serious and enduring health, social, and financial ramifications for families and significant effects that extend beyond families to friends', including long-term behavioural effects on children.[5] Serious injuries can also have a disruptive and traumatic effect on co-workers, friends and families.

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[1] Safe Work Australia, *Work-related traumatic injury fatalities Australia 2012* (2013) at 10.

[2] Bills, K and Agostini, D, *Offshore Petroleum Safety Regulation: Marine Issues* (2009) Canberra: Department of Resources, Energy and Tourism.

[3] The death rate of stevedore workers was calculated based on the following information: 6 deaths per 41,888 workers-years over 6 years (2007-2012 inclusive – see list in footnote above) = 14.3 deaths per 100,000 workers per year. It is appropriate to average the fatality rate over a number of years due to the small size of the workforce which means large annual fluctuations. See Appendix 1.

[4] Based on figures from Safe Work Australia, *Consultation Regulation Impact Statement for the Draft Model Code of Practice: Managing Risks in Stevedoring* at 23. Calculated as follows: 2,175 serious claim injuries per 41,888 workers - years 2007-2012 inclusive.

[5] Matthews, L R, Bohle, P, Quinlan, M, Rawlings-Way, O, "Traumatic Death at Work: Consequences for Surviving Families", *International Journal of Health Services* (2012) 42(4) at 663.

127. Other Australian industries do not suffer anywhere near this rate of workplace deaths. The average across the Australian workforce is just 1.05 workplace fatalities per 100,000 workers.[6]

128. Shockingly, the rate of death suffered by workers in stevedoring is more than double that of permanent members of the Australian Defence Force,[7] including personnel who served in Afghanistan. These statistics are summarised in Appendix 1.

129. The lack of detail in the BCIIP Bill regarding the steps that will be taken by the ABCC and/or the Federal Safety Commissioner in this regard is most disconcerting and totally inadequate and inappropriate for the Building and Construction Indusrty and Maritime Industry where safety is a constant challenge which if not met, can lead to disastrous results, impacting people's lives in horrific ways.

A high-fear environment will not enhance safety

130. The MUA is gravely concerned that the Government's approach to the reintroduction of the ABCC will foster a culture where workers feel afraid to raise issues and fear being victimised for voicing a safety concern. Laws which cause workers to fear raising safety issues have the potential to seriously undermine safety on the job.[8]

Consultation and communication would better achieve safety

131. A better approach would be to emphasise consultation and communication rather than infringe upon the right to freedom of association as outlined above.

132. Consultation is an essential part of managing health and safety risks. A safe workplace is more easily achieved when everyone involved in the work

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[6] Safe Work Australia, *Notified Fatality Statistical Report 2010-11* (2012) at 7.

[7] The death rate of permanent members of the Australian Defence Force was calculated based on the following information: 38 ADF deaths 2007-2012, all in Afghanistan. Average of 6.3 deaths per year. The ADF has a permanent force of 58,000 (*Department of Defence Annual Report 2011-12*, p.20). Calculation: (6.3 deaths / 58,000 permanent members of the ADF) x 100,000 = 10.9 deaths per 100,000 permanent ADF members per year.

[8] Rozen, P, "But It's Not Safe: Legal Redress for Workers who are Victimised for Raising A Safety Issue at Work" (2013) 26 AJLL 326

communicates with each other to identify hazards and risks, talks about any health and safety concerns, and works together to find solutions.[9]

133. Workplace representatives including unions have an important and legitimate role to play as a vehicle for workplace consultation. Employers make better, more informed decisions about how to safely carry out work when the views of those doing the work are taking into account.

134. Any measures which curtail the capacity of workers and their representatives to meet, communicate, and establish structures for consultation will certainly lead to detrimental safety outcomes.

Workplaces with union involvement are safer workplaces

135. Studies have established time and again that cooperative health and safety regulation, with union involvement, leads to safer workplaces. Joint arrangements and trade union representation at the workplace are associated with better health and safety outcomes than when employers manage work health and safety without representative worker participation.[10]

136. The role of Health and Safety Representatives (HSRs) is embedded in Australian health and safety legislation and in Australian workplace safety systems. The evidence shows that the effectiveness of health and safety representatives depends on the presence of independent worker organisation at a workplace level and support from unions.[11] This is because the need for health and safety representatives to be actively engaged at a workplace level and have training and support to carry out their functions effectively. Unions provide critical information, training, have representation and advice for HSRs, as well as protection in case of a dispute with employers over a safety matter. It is an important part of the support systems which

[9] Safe Work Australia, *Work Health and Safety Consultation, Cooperation and Coordination* (2011).
[10] Johnstone, R and Tooma, M, *Work Health and Safety Regulation in Australia: The Model Act* (2012) Sydney: Federation Press.
[11] Walters, D and Nichols, T, *Workplace Health and Safety: International Perspectives on Worker Representation* (2009) Basingstoke: Palgrave MacMillan.

enable health and safety representatives to perform their role. Any restriction on unions playing a representative role in the workplace will damage safety.

137. If improved health and safety is truly an objective of the BCIIP Bill and BCICTP Bill, then provision should be made to ensure that workers have the ability to access information, advice and support from unions and other organisations. Workers should be free to organise themselves collectively to promote better safety in a positive and constructive way, without threats of fines, intimidation and interrogation.

CONCLUSION

138. In the MUA's submission, the BCIIP Bill and BCICTP Bill should not be proceeded with and rejected outright.

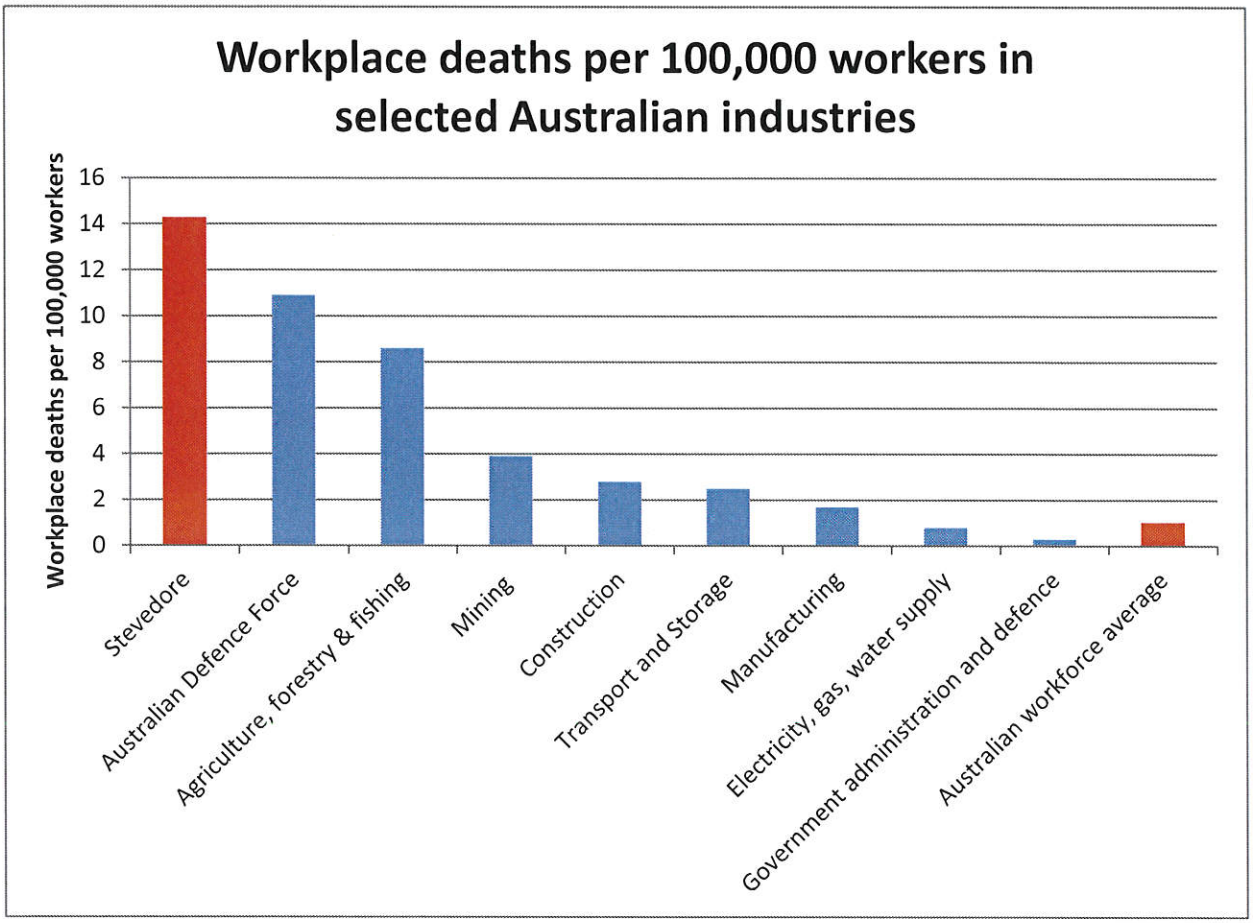
139. The abrogation of fundamental rights of free citizens by the Bills, and lack of any real empirical or other proportional justification for the re – establishment of the ABCC, demand that the Parliament of the Commonwealth of Australia reject the Bills in the name of democracy and its fundamental tenant, the rule of law.

MARITIME UNION OF AUSTRALIA

31 JANUARY 2014

APPENDIX 1: WORKPLACE DEATH RATES IN SELECTED INDUSTRIES

Figure 1: Comparision of workplace death rates in selected Australian industries.



Sources:

Stevedoring: The death rate of stevedore workers was calculated based on the following information: 6 deaths per 41,888 workers-years over 6 years (2007-2012 inclusive) = 14.3 deaths per 100,000 workers per year. It is appropriate to average the fatality rate over a number of years due to the relatively small size of the workforce which means large annual fluctuations.

Australian Defence Force: 38 deaths 2007-2012, all in Afghanistan. Average of 6.3 deaths per year. The ADF has a permanent force of 58,000 (*Department of Defence Annual Report 2011-12*, p.20). Result is 10.9 deaths per 100,000 ADF members per year.

Selected other industries: From: Safe Work Australia, *Notified Fatality Statistical Report 2010-11* (2012) at 7.

APPENDIX 2: WORKPLACES WITH UNION INVOLVEMENT ARE SAFER WORKPLACES

Further support for this position was provided by a recent authoritative study published in a globally-respected peer-reviewed academic journal which demonstrated the importance of effective trade union participation to lowering the rate of serious workplace injuries (such as bone fracture, amputation, a loss of sight, or leading to unconsciousness or requiring resuscitation etc).[12]

The study was based on a survey of 590 UK firms where both the management and the union were independently surveyed about the level of employee participation in OHS management (on a scale ranging from negotiation, to consultation, information, and none). The responses were compared with the rate of injury at the firm, alongside with the density of union membership. Statistically significant differences were found, both in testing how likely it was that no injuries would occur, and how likely it was for one injury to occur.

The study concluded that 'structures that do facilitate meaningful union participation in OHS decision making do achieve benefit in the form of lower injury rates'. The study also found that in firms where management did not consult on OHS issues, workplaces with higher union membership density had lower injury rates. [13] This demonstrates that unionisation itself contributes to a safer working environment. Conversely, obstacles to unionisation lead to a higher likelihood of injury in workplaces.

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[12] Robinson, A and Smallman, C, "Workplace injury and voice: A comparison of management and union perceptions", *Work, Employment and Society* (2013) 27 (4) at 674-693.
[13] Ibid at 689.