CHAPTER 6

Powers, Safeguards and Oversight

Obtaining Information

6.1 The powers to obtain information in relation to an investigation of a suspected contravention of the bill or a designated building law are set out in Chapter 7. The bill would give the ABC Commissioner the power to issue an examination notice to a person directing them to provide documents or information relevant to the investigation. The person would have 14 days to comply.

6.2 These powers were first introduced in the Building and Construction Industry Improvement Bill 2005. The powers were retained in the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012 but with a requirement to notify the Commonwealth Ombudsman of the issue of an examination notice. This provision has been retained in the bill.

6.3 The Bill enables the Australian Building and Construction Commissioner to compel witnesses to attend an examination or to produce documents where he/she reasonably believes that the person has information or documents relevant to an investigation into a suspected contravention of workplace relations laws.[1]

6.4 Again the question of the building and construction industry being a special case, and whether this was proportionate was raised by submitters. Master Builders Australia were of the view that the powers in the bill were similar to those granted to other regulatory bodies:

> Our submission is that coercive powers are used by other agencies and that coercive powers are not unique.[2]

6.5 The Department's submission also argued that the similar powers applied elsewhere:

> The powers under this act are similar to those granted to a range of other Commonwealth regulatory bodies such as the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Securities and Investment Commission, the Australian Taxation

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1 Minister for Employment, *Submission 1,* Attachment, Department of Employment submission to Senate Education and Employment Legislation Committee's inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, tabled on 2 December 2013. p. 5.

2 Master Builders Australia, *Proof Committee Hansard,* 12 March 2014, p. 32.

Office, Centrelink and Medicare. A comparison of the powers available to Centrelink and Medicare is at Attachment A.[3]

6.6 The ACTU argued strongly that the powers under the Acts cited by the government were not the same as those provided to the ABCC, and furthermore, those Acts provide powers to single regulators in areas where there is no other regulation. The ABCC bill proposes powers in an area that is already heavily regulated and there is no evidence that that regulation is not working. The ACTU submitted their analysis of the Acts the government says are similar, pointing out critical differences:

- Under the *Competition and Consumer Act* 2010, ACCC inspectors are only able to utilise coercive powers to examine on oath where they reasonably believe that goods, services or their misuse poses a risk of injury. The powers do not exist in respect of the whole of the conduct regulated by the legislation. Nor is non compliance with those powers (or powers to ask questions after an authorised entry) subject to imprisonment.
- The Australian Prudential Regulation Authority's powers under section 61 of the *Banking Act* 1959 do not explicitly abrogate the right to silence. Its powers (and those of Medicare, the Commissioner of Taxation and ASIC) under the *Superannuation Industry {Supervision) Act* 1993 and the *Retirement Savings Accounts Act* 1997 to require a person to attend an examination are not punishable by imprisonment for non compliance.
- Failure to comply with a requirement by the Australian Securities and Investment Commission to attend an examination under the *Australian Securities and Investment Commission Act* 2001 is only offence where the non compliance is intentional, reckless, and without reasonable excuse.
- The requirement to attend for an examination before the Commissioner of Taxation is clearly a provision that is central to the protection of Commonwealth funds. It is an offence to not comply with such a requirement, however imprisonment is not available for a first offence and the financial penalty for a first offence is $3,400.
- The powers afforded to the *Social Security {Administration Act)* 1999 to compel persons to attend examinations[41] are also clearly directed to the protection of multi billion dollar Commonwealth programs from fraud. It is an offence to not comply with such requirements,

3 Minister for Employment, *Submission 1*, Attachment, Department of Employment submission to Senate Education and Employment Legislation Committee's inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, tabled on 2 December 2013. p. 6.

> however no offence is committed where there is a reasonable excuse.[4]

6.7 The purpose of the ABCC's compliance powers was questioned by Professor Peetz in his submission. His argument is that if the coercive powers are ultimately supposed to ensure compliance with the legislation, and that legislation is designed to ensure growth in productivity in the industry, then there should be a clear drop in productivity when the ABCC was abolished. He contends that the Independent Economics report relied on by the government does not support this hypothesis:

> Econtech pointed to 'a sharp decline' in 'the use of these powers' in 2010-11 which was sustained in 2011-12, due, it said, to a 'change of investigative technique' and 'shift in agency emphasis' (Econtech 2013:9-10)…

6.8 Professor Peetz analysis the difference in the costs between domestic and construction costs, (one of the key productivity indicators used by Independent Economics), and concludes that changes in these figures do not suggest a link between application of coercive powers and increased productivity:

> If changes in this gap can, as Econtech argues, be attributed to changes in construction industry regulation (a highly dubious proposition), then Econtech has failed to demonstrate that the use of coercive powers leads to any gains in relative costs between commercial and domestic residential building.[5]

6.9 Professor Peetz also contends that multifactor productivity increased substantially after the cessation of the ABCC's coercive powers:

> Only after the virtual abandonment of the ABCC's use of its coercive powers did MFP grow substantially in construction, with a 10 per cent increase recorded in 2011-12, almost sustained in 2012-13, so that, under the FWBC, MFP was 9 per cent higher than it had been in 2009-10, the last year of major use of coercive powers.[6]

6.10 Aside from the effectiveness in terms of raising productivity in the industry, the New South Wales Council for Civil Liberties questioned how appropriate it was for legislation that governs the operation of a regulatory body in a civil jurisdiction to include criminal penalties for non-compliance:

> The practical effect of the proposed ABCC is to be a specialist industrial regulator in civil jurisdiction with, almost exclusively, civil penalties available for punishment. It is extraordinary to provide such a body with coercive powers that force people to appear in front of the Commission, to answer questions and to cooperate under penalty of imprisonment. The proposed powers available to the ABCC are clearly unnecessary and disproportionate to its regulatory role.[7]

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4 Australian Council of Trade Unions, *Submission 14,* p. 31.

5 Professor Peetz, *Submission 8,* p. 4.

6 Professor Peetz, *Submission 8,* p. 9.

7 New South Wales Council for Civil Liberties, *Submission 13,* p. 2.

6.11 The PTEU suggested that the extensive coercive powers available to the ABCC were similar to those applied in terrorism cases, a comparison shared by other submitters[8]:

> The coercive powers proposed to be granted the ABCC infringe on the human rights of a section of society – they are inherently discriminatory and would be in breach of international covenants to which we are not only signatories, but champions of. The ABCC reduces construction workers and their union to the status of terrorists, with their rights diluted in a discriminatory environment.[9]

6.12 The Law Council of Australia also commented on the appropriateness of the legislation in terms of upholding traditional certain law principles, rights and privileges:

> [E]ven from a preliminary consideration of the 2013 Bill, it is clear that a number of features of the Bill are contrary to rule of law principles and traditional common law rights and privileges such as those relating to the burden of proof, the privilege against self-incrimination, the right to silence, freedom from retrospective laws and the delegation of law making power to the executive.[10]

6.13 The issue of safeguards in the context of these powers was considered by the committee. While the committee understands that the Ombudsman would have examination notices provided to it and the Ombudsman would then report to parliament, the bill does not require the ABCC to apply to the Administrative Appeals Tribunal (AAT). The Law Council cites concern from the Ombudsman that this would not provide for effective scrutiny of the coercive powers in the bill:

> While an oversight role for the Commonwealth Ombudsman is provided in the 2013 Bill, for example that requires copies of the examination notice to be provided to the Ombudsman and reports to be provided by the Ombudsman to Parliament, the Ombudsman has submitted that this oversight role would need to be extended effective scrutiny of the coercive powers proposed in the 2013 Bill were to be provided.[11]

6.14 The Australian Mines and Metals Association (AMMA) were strongly supportive of the coercive powers and suggested that the involvement of the AAT as artificial and redundant. [12] Master Builders Australia was of a similar view, terming supervision by the AAT as 'clunky and unwarranted'.[13]

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8 For example New South Wales Council for Civil Liberties; C. Allan, et al, *Submission 8, Attachment A,* p. 61.

9 Plumbing Trades Employee's Union, *Submission 16,* p. 5.

10 The Law Council of Australia, *Submission 17,* p. 2.

11 The Law Council of Australia, *Submission 17,* p. 4.

12 Australian Mines and Metals Association, answer to question on notice, 6 February 2014, p. 14.

13 Master Builders Australia, answer to question on notice, 6 February 2014, p. 12.

6.15 However an example of why this oversight is required was found in Commonwealth Director of Public Prosecutions v. Ark Tribe,[14] the Magistrates Court of South Australia found that the compulsory examination notice issued to Tribe by then Deputy ABC Commissioner Hadgkiss was defective. Mr Hadgkiss had been delegated by then ABC Commissioner Lloyd to issue compulsory examination notices under s.52 of the Building and Construction Industry Improvement Act 2005. However the Court found that the Commissioner had not delegated his functions to his Deputy.[15]

6.16 In the course of the 2011-2012 budget estimates, the ABCC was asked whether it had reviewed other s.52 compulsory examination notices to determine whether or not any other s.52 notices suffered from the same defect as that in the Tribe case and if so, how many?[16]

6.17 The answer to the question revealed that the ABCC had reviewed the s.52 notices it had issued and found that all 203 s.52 notices issued from the time of the ABCC's establishment until 24th November 2010 (the date of the judgment in the Tribe case) were defective.

Committee View

6.18 The Committee is of the view that safeguards such as those that currently govern the issue of compulsory examination notices by the Fair Work Building and Construction, in particular the requirement for an application to be made to the Administrative Appeals Tribunal, are a significant contributing factor to ensuring the integrity of the process.

6.19 It is the Committee's view that it was the lack of oversight over the issue of compulsory examination notices by the ABCC that was a contributing factor to a situation where any and all evidence obtained in compulsory examinations conducted in accordance with the defective notices from 2005 to 2010 was arguably tainted by the defect, prosecutions were prejudiced and the time of the courts potentially wasted.

6.20 It is the Committee's view that before-the-event oversight, such as the current process requiring applications to be made to a presidential member of the AAT, is a necessary feature of the use of powers such as those to be conferred on the ABCC if the integrity of the use of the powers is to be guaranteed.

6.21 The committee does not share the view that safeguards for such extensive powers are artificial, redundant, unwarranted, or otherwise inconvenient. The powers that will be available to the ABCC are extraordinary in the context of being those of an industry regulator. As evidence has shown there is no justification in terms of

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14 Magistrates Court of South Australia, MCPAR-09-216, Whittle SM, 24 November 2010.

15 Magistrates Court of South Australia, MCPAR-09-216, Whittle SM, 24 November 2010, para 127.

16 Australian Building and Construction Commission, *Budget Estimates 2011-2012, answer to question on notice; Question No. EW0119_12.* Senate Standing Committee on Education, Employment and Workplace Relations.

criminality in the industry, or increased productivity that supports the re-introduction of these draconian powers. They not only discriminate against individuals by virtue of their place of employment, but they also blur the lines between civil and criminal jurisdiction that could have far reaching consequences.

Discrimination – Penalties

6.22 The principle of equality before the law is a fundamental legal principle. The committee heard evidence from a number of organisations that supported the principle that a penalty should be applied to an offender on the basis of the offence committed, and not on the basis of the industry that person worked. The ACTU highlighted the view espoused by Justice Wilcox in his 2009 report:

> We […] note that the Hon Mr Wilcox QC, in his 2009 review of the building and construction laws, recommended that there be no differences between building and other employees in relation to penalties. He stressed:
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> *'There is a substantial difference in penalties, between the BCII Act and Fair Work Bill. However, by enacting that Bill, Parliament has recently determined the maximum penalties appropriate for particular contraventions. There is no justification for selecting a different maximum penalty, for the same contravention, simply because the offender is in a particular industry. Of course, both the circumstances of the contravention and the offender's previous contraventions {if any} will be taken into account by the court in determining the actual penalty in the particular case; but that will be so regardless of the offender's industry.'*[17]

6.23 This view that equality before the law was a human right was put to the Minister for Employment who urged caution when discussing what human rights actually are and whether they can be universally applied:

> **Senator Abetz:** What are human rights? One person's human right may not necessarily be another person's human right, so let us be careful in relation to that. Equality before the law: if that is one, then yes, clearly that is an established traditional human right.[18]

6.24 The Minister specifically defended the provisions in the bill to apply different penalties for the same offence in another industry as being analogous to legislation governing assaults on emergency services personnel:

> **Senator Abetz:** Special penalties apply, as I think they should, for people assaulting emergency service personnel. The states all around Australia, I think, have passed legislation—the same punch being thrown, the same degree of violence, but extra penalties applying. Are you saying that is discriminatory? [19]

6.25 However this view was challenged in the basis that in the emergency services legislation it was the person who subjected to the offence, i.e. the emergency services

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17 Australian Council of Trade Unions, *Submission 14*, p. 28.

18 Senator Abetz, *Proof Committee Hansard,* 12 March 2014, p. 51.

19 Senator Abetz, *Proof Committee Hansard,* 12 March 2014, p. 53.

worker that determined the increased penalty which was not the case in this legislation:

> **Senator Wright:** In this case the defendant, the person who is being charged or who is being brought before the commission, is treated differently based on who they are not on the behaviour that they have used. It is based on where they are employed.[20]

6.26 The Minister responded by referring the committee to the election result of 7 September 2013 where he contended that the Australian people supported the principle that special penalties should be applied in cases where the offender works in the construction industry.[21]

6.27 The ACTU argued that the penalties are 'grossly disproportionate to the public harm (if any) that may be occasioned by the taking of unprotected industrial action', and that:

> The level of penalties proposed in the Bill are at around the level associated with people smuggling, unauthorised mining operations in the Antarctic, carrying out electrical work without the requisite qualification/license, and sex offenders loitering around schools.[22]

6.28 The ACTU also pointed out the penalties under the Fair Work Act already provide for judicial discretion to allow the circumstances of an offence to be taken into account:

> We point out that the penalties and civil remedy provisions under the Fair Work Act itself are subject to judicial discretion, so there is already the ability for judicial officers, in ordering penalties, to take account of circumstances. The point—and this is the criticism that was made by the international organisation—is that the availability per se of differential penalties for the same conduct was inappropriate.[23]

6.29 The Department for Employment submitted that Industry Specific Penalties were re-instated as a key recommendation of the Cole Royal Commission but also that the Courts would be informed by considerations of proportionality when deciding cases:

> The Bill provides for higher penalties… These industry specific penalties were a key recommendation of the Royal Commission.
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> The Courts will determine the appropriate penalty to apply within the limits set out in the legislation as informed by considerations of proportionality.[24]

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20 Senator Wright, *Proof Committee Hansard,* 12 March 2014, p. 54.

21 Senator Abetz, *Proof Committee Hansard,* 12 March 2014, p. 53.

22 Australian Council of Trade Unions, *Submission 14*, p. 29.

23 Australian Council of Trade Unions, *Proof Committee Hansard,* 12 March 2014, p. 13.

24 Minister for Employment, *Submission 1,* Attachment, p. 5.

Health and Safety Impacts of the Bill

6.30 While the ABCC does not have a role in the management or administration of health and safety regulation, the Bill does amend how issues of health and safety concerns are raised. Clause 7 specifically defines the meaning of ***industrial action*** and Clauses 7(2)(c) and 7(4) specify the circumstances where action taken due to health and safety concerns determines whether that action is lawful or not:

> (2) However, ***industrial action*** does not include the following:
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> […]
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> (c) action by an employee if:
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> (i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and
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> (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.
>
> (4) Whenever a person seeks to rely on paragraph (2)(c), the person has the burden of proving the paragraph applies.[25]

6.31 Unions NSW was concerned over the power the ABCC will have in relation to health and safety issues raised on sites. Because the health and safety issue must relate to the individual, and the individual is the only person who can raise it, there is a risk that the individual could feel intimidated:

> The problem with this bill is that it creates an atmosphere in which workers are told, 'Do what we tell you, otherwise you are going to lose your job.' The unions are then placed in a position where they do not have OH&S representatives who are game to put their hand up in the workplace and say there is a problem—for fear of getting penalised, losing their job or being the subject of an inquiry. That is the concern we have and that is not anecdotal. [26]

6.32 The Maritime Union of Australia (MUA) was also concerned of the implications of the onus being on the individual to prove that there is a legitimate health and safety concern. According to the MUA this scenario has implications for working in vessels where it may be difficult for employees to prove a safety issue, or to identify 'safe and appropriate' alternative work:

> We have vessels that come out from developing nations that are appalling in terms of the living conditions on board—filthy, water is polluted, soiled water on occasions, air conditioning does not work…when the crew refuse to sail on these vessels because they are filthy and no-one will live in a place like them, how do we prove to the ABCC that that is a safety issue?[27]

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25 Clause 7, **Error! Unknown document property name.**.

26 *Proof Committee Hansard,* 6 February 2014, p. 33.

27 Maritime Union of Australia, *Proof Committee Hansard,* 6 February 2014, p. 20.

6.33 Master Builders Australia had an alternative view. They are fully supportive of the onus of proof being on the employee to show that the industrial action is based on a legitimate health and safety concern:

> Master Builders contends that the reverse onus of proof provision contained in the repealed BCII Act is essential if disruption of work on dubious WHS grounds is to be eliminated. Master Builders therefore strongly supports the provisions contained in clauses 7(2)(c) and 7(4) of the Productivity Bill which essentially forestall the misuse of safety but protect the rights of employees to refuse to perform duties which are genuinely unsafe.[28]

6.34 However they would like the bill to go further and remove the obligation on the employer under Clause 7(2)(c) to provide other available work that is 'safe and appropriate' to perform. Master Builders argue that the appropriateness of the work is not a relevant health and safety issue, and the bill should replicate what was in the original Act that established the ABCC:

> Master Builders submits that clause 7(2)(c) of the Productivity Bill should replicate section 36(1)(g) of the repealed BCII Act; namely, the performance of other available work need only be safe for the employee to perform, not 'safe and appropriate' for the employee to perform. The appropriateness of the work is irrelevant in considering whether the other available work presents a risk to the health or safety of the employee and hence this flawed criterion from the FW Act should not be carried over into the Productivity Bill.[29]

6.35 The onus on the employee under Clause 7(4) to somehow prove that there was other work that was 'safe and appropriate' also drew criticism from the unions on the grounds that identifying alternative work was not something that should be in the purview of the employee. The ACTU spoke of their concerns at the committee's hearing in Melbourne:

> Most particularly, there is a concern about the way the onus provisions work in relation to the exemption from industrial action related to a reasonable concern about health and safety. You have no doubt heard from the submissions that there is a reverse onus provision in relation to that, but where it is extremely inappropriate is insofar as it requires the worker to demonstrate that there is not other work available for them to perform. That is not a matter which is normally peculiarly within the knowledge of the worker. It is peculiarly within the knowledge of the employer. So that second level of reverse onus in relation to the industrial action exemption on health and safety is highly appropriate.[30]

6.36 Submitters also commented on the cultural impact of involving the ABCC in decisions on the safety or otherwise of a workplace. New South Wales Council for

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28 Master Builders Australia, *Submission 3,* Attachment A, p. 18.

29 Master Builders Australia, *Submission 3,* Attachment A, pp 15-16.

30 Australian Council of Trade Unions, *Proof Committee Hansard,* 12 March 2014, p. 11.

Civil Liberties was of the view that the role of the ABCC in health and safety could be intimidating for employees on construction sites:

> There may be areas where, for example, people want to have a meeting about safety because they believe their lives are at risk at work. The construction industry is a very dangerous industry. We have a number of deaths every year, and I do not think it is useful to create a culture where people feel as though they cannot meet and discuss their working environment with other people or where they may be subject to an inquiry by a standing commission.[31]

Committee view

6.37 The legislation provides for the ABCC to take over occupational health and safety. However the inclusion of the reverse onus of proof provisions and the role of the ABCC in deciding whether action is taken as a result of health and safety considerations, politicises the issue in a very dangerous industry. Furthermore the committee does not believe that Clauses 7(2)(c) and 7(4) of the bill appropriately assign responsibility for health and safety concerns and instead abrogates the employer's responsibility to respond to health and safety concerns raised by employees.

Expanding the definition of Building work

6.38 The bill extends the scope of building work to include work that which takes place on 'any resources platform, and to certain ships, in the exclusive economic zone or in the waters above the continental shelf'. The bill also allows for subordinate legislation to extend the Act further.[32]

6.39 The Australian Mines and Metals Association (AMMA) strongly supported the scope of the bill being extended to apply to offshore industry. AMMA emphasised the size of the offshore oil and gas industry and its importance to the Australian Economy:

> Around $170 billion of Australia’s resource industry value lies in offshore hydrocarbons projects. These projects are highly exposed to any unlawful union activities in the supply chain / in construction.[33]

6.40 AMMA's submission cites two court cases as to support the claim that the standards of industrial behaviour in the offshore industry do not meet community expectations:

> [S]tandards of industrial conduct exhibited in the offshore construction sector represent a significant departure from that in the rest of the Australian economy/community expectations; see, for example, *United*

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31 New South Wales Council for Civil Liberties, *Proof Committee Hansard,* 6 February 2014, p. 29.

32 Clause 6(2) and Clause 11, **Error! Unknown document property name.**.

33 Australian Mines and Metals Association, *Submission 2,* Attachment A, p. 37.

Group Resources Pty Ltd v Calabro (No 7) [2012] FCA 432 and *Fair Work Ombudsman v Offshore Marine Services Pty Ltd* [2012] FCA 498.[34]

6.41 However AMMA do have specific concerns around how the extension of the scope of the bill to the offshore oil and gas industry will practically apply. They comment that issues may arise because the legislation in its current form is ambiguous and not detailed enough to provide clarity in terms of how it will interact with current regulation, state and federal laws:

> The clear and precise meaning of terms used is vital to the achievement of the legislative objective of the bill - fairness, efficiency and productivity for the benefit of building industry participants and the Australian economy. It is a principle of legislative drafting that terms should be sufficiently defined, particularly when they may have substantial consequences… Given the complexity and current uncertainty regarding the combined effect and application of all regulatory frameworks applying to offshore hydrocarbons projects, any practical difficulties and concerns arising from the extended geographical application of the bill may take some time to emerge.

6.42 On the other side of the debate, the MUA were confused over why the ABCC would have jurisdiction over the offshore oil and gas industry. They agreed with the AMMA on the point that the application of the bill is unclear and could have unintended consequences:

> In the MUA's submission, the uncertainty surrounding the scope of the BCIIP Bill […] will only lead to increased transactional costs for employees, unions, and union members, as well as employers in the Maritime Industry.[35]

6.43 The MUA suggested that the ambiguity of the bill's scope would increase the need for professional advice to be sought and for the courts to ultimately consider more cases to establish case law on the issue:

> 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.

Committee View

6.44 The committee does not understand why the scope of the ABCC should be extended to cover the maritime and offshore oil and gas industries. The provisions of the bill do not provide any assurance. There appears to be no evidential basis for the scope to be extended, nor does there seem to be any gaps where any sectors of the

34 Australian Mines and Metals Association, *Submission 2*, Attachment A, p. 37.

35 Maritime Union of Australia, *Submission 12*, p. 8.

maritime or oil and gas industries are not subject to industrial regulation. The impact of ambiguous legislation could be a substantial increase in the regulatory burden, for both employers and employees without bringing stakeholders any of the supposed benefits.

Recommendation 1

6.45 The committee recommends that in view of the failure of the government and proponents of the re-establishment of the ABCC to:

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

the Senate not support the re-establishment of the Australian Building and Construction Commission and accordingly, not pass the Building and Construction Industry (Improving Productivity) Bill 2013 and related bill.

Senator Sue Lines

Chair