Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011

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Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011

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House: House of Representatives

Portfolio: Tertiary Education, Skills, Jobs and Workplace Relations

Commencement: On Royal Assent except for Schedule 1, which will be on Proclamation or within six months of Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 (the 2011 Bill or the Bill) creates the Office of the Fair Work Building Industry Inspectorate to regulate the building and construction industry, replacing the Office of the Australian Building and Construction Commissioner (ABCC). It renames the Building and Construction Industry Improvement Act 2005 (BCII Act) as the Fair Work (Building Industry) Act 2011 and either repeals or amends many of the BCII Act’s provisions. It introduces certain safeguards in relation to the use of the power to compulsorily obtain information or documents pertaining to its regulatory function and creates the Office of the Independent Assessor who may make a determination that the examination notice powers will not apply to a particular project.

Background

On 17 June 2009 Minister Julia Gillard, as then Minister for Education, Employment and Industrial Relations, introduced the predecessor Bill, the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (the 2009 Bill) to the House of Representatives. At the same time, the Minister issued directions to the Australian Building and Construction Commissioner, John Lloyd, concerning the spread of ABCC resources and the conduct of coercive powers and compulsory interviews.1 The directions were disallowed by the Senate on 25 June 2009.


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The Parliamentary Library prepared a comprehensive Bills Digest on the 2009 Bill and that Digest should be referenced for background to the current Bill, including the Digest’s commentary on the 2009 Bill’s significant provisions in light of employer, academic and union submissions on the Bill.\(^2\)

The 2009 Bill was referred to the Senate Standing Committee on Education, Employment and Workplace Relations Legislation Committee on 18 June 2009, which reported on 10 September 2009.\(^3\) Debate on the 2009 Bill was adjourned on 4 February 2010 and lapsed at the proroguing of Parliament for the 2010 Federal Election. During that election campaign, Simon Crean, as Workplace Relations Minister, committed the Australian Labor Party (ALP) to reintroducing the Bill should it win government.\(^4\)

An important change to the regulatory environment includes the introduction of less stringent Construction Code Guidelines which have operated since 1 August 2009. The Guidelines, which were introduced initially by the Commonwealth in 1998, set employer and employee standards relating to the performance of building and construction work and to conditions for bidding for Commonwealth funded construction work.\(^5\)

On 11 October 2010 Mr Leigh Johns, having been appointed as the Australian Building and Construction Commissioner to succeed Mr Lloyd, announced that the ABCC would pursue breaches such as wage underpayments instead of referring these to the Fair Work Ombudsman. Later that month, Mr Johns announced an inquiry into sham contact arrangements in the building and construction industry.\(^6\) In addition, recent reports of the ABCC’s use of coercive powers detail the continuing decline in the use of section 52\(^2\) of the BCII Act since the height of its use in the financial

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\(^6\)Sham contract arrangements in the construction industry manifest where a worker is held to be an employee (by a court or tribunal) when the terms of engagement specified the person as a contractor. Details of the ABCC’s inquiry into sham contracting can be found at: http://www.shamcontractinginquiry.gov.au/page.php?nameIdentifier=about-this-inquiry


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year 2008-09. The decline in the use is consistent with the ABCC’s stated object to only use section 52 as a last resort investigative tool:

The ABCC prefers to obtain evidence by voluntary means and the evidence is that more often building industry participants are doing so. The reduced use of section 52 is also evidence of the increased skill of ABC Inspectors in being able to obtain evidence voluntarily.8

A further development occurred in June 2011, when the Master Builders’ Association of Victoria and the Construction, Forestry, Energy and Mining Union (CFMEU) agreed on pay increases for 30 000 building workers of five per cent per annum for four years plus seven per cent increase in allowances (similar to an agreement struck for the electrical contracting industry in 2010). The recently elected Victorian Government of Premier Ted Baillieu responded to this agreement and other actions on Victorian construction sites. It signalled a review of state's construction industry code of practice9 with an aim of reining in the high costs of projects to the state government, citing industrial action at the Wonthaggi Desalination project as a cause of cost blow-outs and delays.

In summary, these are some of the developments which constitute the background to the introduction of the 2011 Bill.

**Basis of policy commitment**

Prior to the 2007 election, the ALP undertook to maintain a specialist inspectorate division within the (then proposed) Fair Work Australia for certain industries, stating that:

Labor does not believe in separate industrial rules and regulations for different industries. Under Labor all employers, employees and unions across all industries will be required to comply with the rules and will face penalties if they do not do so. Fair Work Australia’s inspectorate will have specialist divisions that can focus on persistent or pervasive unlawful behaviour in particular industries or sectors. The first divisions established will be for the building industry and hospitality industry.10

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Consequently, the Hon. Julia Gillard announced that the Hon. Murray Wilcox QC would consult with stakeholders and report on the transition from the ABCC to a new Building Industry Inspectorate over a 10 month timeframe.\(^{11}\)

**Policy position of non-government parties/independents**

There is no indication that the main protagonists for and against retaining the current ABCC have changed their stances since 2009. On the one hand, the Coalition parties remain steadfast in their opposition to the removal or replacement of the ABCC, with Senator Abetz, the Shadow Minister for Workplace Relations, noting that approaches by the People’s Republic of China to Prime Minister Gillard to allow Chinese companies to build turnkey infrastructure projects in Australia with Chinese labour signalled a warning that the new workplace laws are failing productivity needs.

Labor’s placement of minority interests and union ideology at the centre of our workplace laws has slowed construction projects and actively encouraged untenable wages growth. The Chinese now recognise certain Australian construction projects as failing the productivity challenge and are looking to capitalise. This just goes to show that the unions’ unrealistic pay demands overseen by Labor are now placing the jobs of Australian construction workers at risk.\(^{12}\)

On the other hand, Senator Siewert, for the Australian Greens, introduced the Building and Construction Industry (Restoring Workplace Rights) Bill 2010 into the Senate on 29 September 2010. The Bill (as with its 2008 predecessor Bill) repeals the BCII Act and the *Building and Construction Industry Improvement (Consequential and Transitional) Act 2005*, which would have the effect of returning building industry supervision to the Fair Work Ombudsman. Senator Siewert stated in her introduction to the Bill:

> These laws are some of the most pernicious ever to have passed through this place. They strip away internationally recognised rights of workers in the building and construction industries. This bill is intended to ensure such laws no longer exist in Australia. A consequence of the repeal of the BCII Act is the abolition of the Australian Building and Construction Commissioner (the ABCC). The ABCC has sweeping powers that have no place in the regulation of workplaces.

> It is an affront to democracy to have workplace relations laws that take away the right to silence, deny people their choice of lawyer, provide powers to compel evidence with the possibility of

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11. J Gillard (Minister for Education, Employment and Workplace Relations), *Transition to Fair Work Australia for building and construction industry*, media statement, 22 May 2008, viewed 6 November 2011, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F8H0R6%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F8H0R6%22)


12. Workplace Express, ‘Government announces make-up of equal pay group; and China shows up Australia’s failures, says Opposition’, Workplace Express website, 27 April 2011, viewed 8 November 2011.

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gaol for non-compliance, and impose severe restrictions on the rights of workers to organise and bargain collectively.\textsuperscript{13}

**Industry participants**

It would be fair to say that the major industry groups have not changed their positions in the intervening two years since introduction of the 2009 Bill.

The CFMEU still opposes both the ABCC and its proposed replacement inspectorate on the grounds that the building industry should be treated similar to other industries in respect of its industrial relations, meaning oversight by the Fair Work Ombudsman. In other words the CFMEU position is similar to that of the Australian Greens. According to its Construction National Secretary, Dave Noonan:

> The Parliament will soon have the chance to end the ABCC and restore rights to workers. It is crucial the final legislation not only scraps the ABCC but does not transfer its coercive powers to another organisation. Coercive powers – which give the ABCC the right to secretly interrogate workers – have no place in a free society. The ABCC’s recent admission that it had stepped outside its powers and illegally interrogated 203 people up to November last year should be the final proof it has become a rogue organisation. Construction workers want to be treated the same as all other workers, not subject to the stress of arbitrary interrogations which can hang over their heads for months.\textsuperscript{14}

Master Builders Australia, however argues that retention of the ABCC is vital to retaining productivity gains in the industry. Its CEO, Wilhelm Harnisch, said the ABCC had delivered sustained and substantial productivity gains to the industry and to the community:

> Sadly unlawful industrial behaviour still persists in the commercial building industry and cannot be condoned or accepted as normal. The recent release of the ABCC’s Annual Report showed that courts during the last financial year imposed more than $2.5 million in penalties with the unacceptable practice of coercion accounting for just on two-thirds of the amount imposed during the year. It was noteworthy that the ABCC secured a record workplace relations penalty of over $1.3m in the context of the protracted union demarcation dispute that occurred in 2009 at the Westgate Bridge strengthening project. The Parliament cannot ignore such court findings and convictions and should not agree to any watering down of the current powers.\textsuperscript{15}

\begin{itemize}
  \item \textsuperscript{14} CFMEU Construction and General, ‘ABCC abolition Bill should go further and abolish coercive powers’, CFMEU website, 3 November 2011, viewed 8 November 2011, \url{http://cfmeu.asn.au/news/abcc-abolition-bill-should-go-further-and-abolish-coercive-powers}
  \item \textsuperscript{15} WorkplaceInfo, ‘ABCC ’needed to fight union thugs’: Abetz’, Workplaceinfo website, 4 November 2011, viewed 8 November 2011, \url{http://parlinfo.aph.gov.au/parlinfo/search/display/ display.w3p;query=Id%3A%22library%2Fjrnart%2F1211663%22}
\end{itemize}

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Similarly, the National Electrical and Communications Association (NECA) believes that the ABCC is achieving good results and its powers are needed in the building and construction industry to stamp out unlawful behaviour. Its chief executive officer, James Tinslay, argues:

The ABCC has been effective in cleaning up the building industry and it is a step in the wrong direction if the Government continues with plans to rip it apart. With the sharpening increase of union activity in recent weeks, it is clear that the building industry will not be immune and the regulator still has plenty of work to do. It is worrying for electrical contractors and others in the building industry not to have an independent regulator. Lawlessness is still exhibited in the industry today but the ABCC has been effective in removing the worst instances. Removing the ABCC or emasculating its powers will see increased inappropriate behaviour and this will lead to the costs of projects blowing out and delays in construction.\(^{16}\)

**Key provisions**

The provisions in the 2011 Bill essentially replicate the 2009 Bill provisions. One difference of note is the sunset clause applying to the proposed Building Inspectorate’s compulsory examination powers which is being reduced from five years to three years (proposed section 46).\(^{17}\) This provision is described below. Note again that the reader is referred to the Bills Digest to the 2009 Bill for more substantial comment on the some of the following provisions.

**Item 1** would rename the *Building and Construction Industry Improvement Act 2005* (BCII Act) as the *Fair Work (Building Industry) Act 2011*.

**Objects section of the Act**

**Item 2** repeals and replaces section 3, the objects section of the BCII Act. The change of emphasis in the Bill is reflected in the new objects section. Whereas the current section is focused on enabling building work to be carried out ‘fairly, efficiently and productively’ the new objects is to provide a ‘balanced framework for cooperative, productive and harmonious workplace relations in the building industry’.

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16. Ibid.
17. Workplace Express, ‘Government re-introduces Bill to replace ABCC with new watchdog’, Workplace Express website, 3 November 2011, viewed 8 November 2011.

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Definitions

Items 3 to 47 are definitions provisions. They are mainly consequential—repealing definitions no longer relevant or adding new definitions of concepts to be inserted by the Bill. 18

Definition of ‘building work’

Item 48 amends the definition of ‘building work’ in section 5. The term ‘building work’ is central to the BCII Act as it forms the basis of terms such as building employee and building agreement, and hence terms such as building employer and building association.

The definition of building work in the BCII Act includes a broad range of activities – whether these are traditionally thought of as ‘building’ or not – including fit-out, restoration, repair and demolition, any work ‘part of or preparatory to’ such activities, and ‘pre-fabrication of made-to-order components’. Specific exclusions from the definition of ‘building work’ include mining and extraction activities and domestic building, including alteration or extension, except where this is part of a project including at least five single-dwelling houses.

Item 48 would amend the definition of ‘building work’ at subparagraph 5(1)(d)(iv) to exclude a reference to off-site pre-fabrication of made-to-order components from the definition. The Explanatory Memorandum states that it is intended that the amended definition will exclude manufacturing that takes place in permanent off-site facilities and is separate from the building project but that pre-fabrication of building components that takes place on auxiliary or holding sites separate from the primary construction site(s) will remain covered by the definition of building work. 19

Establishment of the Office of the Fair Work Building Industry Inspectorate

Item 49 repeals Chapter 2 of the BCII Act, and replaces it with a new Chapter 2 containing proposed sections 9 to 26M. The effect is to abolish the Office of the Australian Building and Construction Commissioner and create a new statutory agency called the Office of the Fair Work Building Industry Inspectorate (the Building Inspectorate). The staff of the Building Inspectorate would be engaged under the Public Service Act 1999 (proposed section 26K).

Building Inspectorate Director’s functions and powers

The Building Inspectorate would be headed by a Director appointed by the Minister (proposed section 9). The Director’s functions are set out in proposed section 10 and include the functions of promoting harmonious, productive and cooperative workplace relations in the building industry and

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18. For example: removing terms such as ABC Commissioner, ABC Inspector and inserting terms such as enterprise agreement, Fair Work Building Inspector, nominated AAT Presidential Member.

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promoting compliance with designated building laws\textsuperscript{20} and the Building Code including by providing education, assistance and advice to building industry participants. The Director’s functions are drafted broadly. Amongst other things, he/she may:

\begin{itemize}
\item investigate suspected contraventions of a designated building law, a safety net contractual entitlement or the Building Code
\item institute court proceedings or make applications to FWA regarding building laws or safety net contractual entitlements as they relate to building industry participants
\item refer matters to other relevant authorities
\item provide representation to a building industry participant in court or FWA proceedings if the Director considers that this would promote compliance
\item disseminate information, and provide advice and assistance to building industry participants
\item make submissions and provide information to the Independent Assessor or
\item any other functions conferred on the Director by any Act.
\end{itemize}

A note confirms that the Director also has the functions of an inspector under proposed section 59A.\textsuperscript{21}

These functions correspond in many respects to the ABC Commissioner’s functions, although note the additional function of inquiring into, investigating, and commencing proceedings in relation to safety net contractual entitlements as they relate to the building industry. This provision would enable the Inspectorate to take action in relation to breaches of a modern award or the National Employment Standards.\textsuperscript{22}

**Proposed section 11** provides that the Minister may give directions to the Director about the policies, programs and priorities of the Director and about the manner in which the Director is to exercise his or her powers and functions (although not in relation to a particular case). Such directions by the Minister are disallowable instruments. This section corresponds to existing section 11, although the ability of the Minister to give directions about the ‘policies, programs and priorities of the Director’ is not included in existing section.

**Proposed section 12** authorises the Minister to direct the Director to provide reports on the Director’s functions. **Proposed subsection 12(3)** clarifies that such a direction is not a legislative instrument.

**Proposed section 13** allows the Director to delegate certain of his or her powers and functions to either a Member of the Building Inspectorate staff or to an inspector. A list of all such delegations must be included in the Director’s annual report (**proposed section 14**). The Director’s powers as an

\textsuperscript{20} A designated building law means the BCII Act, the Independent Contractors Act 2006, the FW Act or the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009; or a Commonwealth industrial instrument (section 4).

\textsuperscript{21} Refer below to item 69.

\textsuperscript{22} Explanatory Memorandum, p. 6.

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inspector and some examination powers may not be delegated (proposed subsection 13(2)). The power to conduct examinations may only be delegated to SES employees (proposed subsection 13(3)).

Proposed section 14 deals with annual reporting requirements. The new provision removes some of the existing reporting requirements namely the mandatory requirement to include details of the number, and type of matters investigated by the ABC Commissioner; details of assistance to building employees and building contractors in connection with the recovery of unpaid entitlements; and details of the extent to which the Building Code was complied with during the financial year. It is unclear as to why such detail has been removed as a requirement for annual reporting.  

Proposed sections 15 to 22 deal with the terms and conditions of the Director’s appointment and are very similar to those for the existing ABC Commissioner.

Fair Work Building Industry Inspectorate Advisory Board

Proposed sections 23 to 26H provide for the creation of a Fair Work Building Industry Inspectorate Advisory Board (the Advisory Board). The Advisory Board would be empowered to make recommendations to the Director on policies to guide the performance of the office’s functions and exercise of its powers, its priorities and programs, and any other matter at the request of the Minister (proposed section 24). The Advisory Board would be comprised of the Director, the Fair Work Ombudsman (FWO), and up to five other part-time Members, including one each from a union and employer background, to be appointed by the Minister (proposed sections 25 and 26). Terms and conditions of appointment and the processes regarding the Advisory Board’s role are set out in proposed sections 26 to 26H. There must be at least two meetings in each financial year and a quorum for meetings is to consist of the Chair, the Director and the FWO.  

Removal of different rules and penalties applying to bargaining and industrial action in the building industry

Item 51 is one of the most significant amendments in the Bill. It removes Chapters 5 and 6 of the BCII Act dealing with unlawful industrial action, coercion and the associated civil penalties that are specific to the building industry. The effect of item 51 is that there would no longer be unlawful industrial action and coercion provisions specific to the building and construction industry. Rather, the industrial action control and penalty regime introduced by the FW Act would apply equally in the case of industrial action by building industry participants.

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23. Although, this information may in fact be fully provided by the ABCC/proposed Building Inspectorate website. See footnote 8.
24. Proposed section 26G.

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A major effect of this change is that there will no longer be higher penalties for building industry participants for breaches of industrial law. Maximum penalties will be cut from $22,000 to $6,600 for individuals and from $110,000 to $33,000 for a body corporate.

**Power to compulsorily obtain information—examination notices**

*Item 52* is also a key amendment. It repeals and replaces *Part 1* in *Chapter 7* of the BCII Act. It deals with the powers to obtain information (including through compulsorily requiring a person to attend an examination and answer questions) or documents from a person whom the Director believes has information or documents relevant to an investigation. Importantly, and in contrast to existing provisions, use of the powers is dependent upon a nominated Presidential Member of the Administrative Appeals Tribunal (AAT) being satisfied a case has been made for their use.

The *new Part 1* (*proposed sections 36 to 58*) applies to an investigation by the Director into a suspected breach by a building industry participant of a designated building law\(^{25}\) or a safety net contractual entitlement (*proposed section 36A*). The compulsory examination powers are available where the Director is investigating a breach of a safety net contractual entitlement, provided there is a reasonable belief that an employer or other party has breached a provision of an NES, modern award or other instrument referred to in subsection 706(2) of the FW Act (*new subsection 36A(2)*).

**Independent Assessor and exclusion of compulsory examination notice powers from building projects**

The Bill at *proposed section 36B* (*item 52*) creates the statutory office of the Independent Assessor-Special Building Industry Powers (Independent Assessor). The person is to be appointed by the Governor-General providing the Minister is satisfied that the person has suitable qualifications and experience and is of good character (*proposed section 37*). Given the significance of this role, neither the Bill nor Explanatory Memorandum provide what may be further useful guidance on what may count as suitable qualifications and experience. The terms and conditions of this appointment are set out in *proposed sections 37 to 37G* and include an obligation to disclose all possible personal material interest that may cause a conflict of interest (*proposed section 37E*).

*Proposed section 39* is a key provision setting out the role of the Independent Assessor. The Independent Assessor may on application from an ‘interested person’ make a determination that the compulsory examination notice powers set out in section 45 will not apply to a particular building project or projects. *Proposed subsection 36(2)* defines ‘interested persons’ to be the Minister and any other person prescribed by regulations.

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In determining whether the examination powers will apply the Independent Assessor must be satisfied that:

- it would be appropriate to make the determination, having regard to:
  - the object of this Act
  - any matters prescribed by the regulations, and
  - it would not be contrary to the public interest to make the determination (proposed subsection 39(3)).

In relation to the same provisions in the previous Bill, it was the Government’s intention that the regulations would require the Independent Assessor to be satisfied that the building industry participants in connection with the building project have a demonstrated record of compliance with workplace relations laws, including court or tribunal orders; and that the views of other interested persons in relation to the project have been considered.

Such determinations can only be made in relation to building projects that begin on or after commencement of these provisions (proposed section 38).

Proposed sections 40 to 43 set out the process to be followed in relation to Independent Assessor determinations. Amongst other things:

- applications for a determination may relate to more than one building project and may be made at any time before or after the building project has commenced or after it has been completed (proposed subsection 40(4))
- the Independent Assessor must give the Director a copy of any application and must give the Director a reasonable opportunity to make submissions in relation to an application (proposed section 41)
- determinations must be published in the Gazette and take effect from that date of publication (proposed section 42)
- the Director may request the Independent Assessor to reconsider determinations made in relation to a building project and
- where the Independent Assessor receives such a request he/she must reconsider the original determination and make a determination affirming or revoking the original determination, or varying the original determination as appropriate (proposed section 43).

Examination notices and the role of the AAT Presidential Member

Central to the new arrangements for compulsorily obtaining information is the concept of an ‘examination notice’. Proposed section 45 sets out the requirements for when and how the Director may apply to a nominated AAT Presidential Member for issue of an examination notice requiring a person to attend an examination in relation to an investigation. Proposed subsection 45(1) provides

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26. The Minister nominates an AAT Presidential Member as set out in proposed section 44.

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that the Director may only apply for a notice if he or she believes on reasonable grounds that a
person has information or documents or is capable of giving evidence of relevance to an
investigation. According to the provisions of proposed subsection 45(5), applications to the AAT
Presidential Member must be accompanied by an affidavit by the Director including amongst other
things:

- details of the investigation (or investigations) to which the application relates
- the grounds on which the Director believes the person has information or documents, or is
capable of giving evidence, relevant to the investigation and
- details of other methods used to attempt to obtain the information, documents or evidence.

With respect to the issuing of an examination notice, proposed section 47 requires that the AAT
Presidential Member must be satisfied amongst other things that:

- all other methods of obtaining the material or evidence have been tried or were not appropriate
- the information or evidence would be likely to be of assistance to the investigation
- it would be appropriate, having regard to all of the circumstances, to issue the examination
  notice, and
- any other matter prescribed by the regulations.

Proposed section 46 is a sunset provision affecting section 45. It provides that the power of the
Director to obtain examination notices is to lapse after three years. As noted above the 2009
equivalent provision contained a five-year sunset clause. The Explanatory Memorandum states that
this change reflects the Wilcox Recommendation that the provision be reviewed after a five year
period dating from 2009.27

Proposed section 49 requires the Director to notify the Commonwealth Ombudsman when the
examination notice has been issued and provide the Ombudsman with a copy.

Proposed section 50 sets out the process by which the Director gives an examination notice to the
person to whom it is issued. Amongst other things, it provides the Director with some discretion as
to the timing of compliance with the examination notice. Proposed section 48 describes the form
and content of the examination notice.

Conduct of examination

Proposed section 51 sets out the rules for conducting an investigation or examination. These
include:

- the Director or the SES delegate must conduct the examination
- persons summoned to interview may be represented by a lawyer of their choice
- the Director may require that answers be given under oath or affirmation and

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• the Director cannot require a person to give an undertaking not to disclose or discuss matters relating to the examination.

Criminal offence—failure to comply with an examination notice

Item 55 repeals section 52 and replaces it with a new section 52 that creates an offence of failing to comply with an examination notice. The new subsection 52(1) effectively replicates the existing subsection 52(6) by making it an offence to fail to comply with requirements imposed by an examination notice to produce documents, information or attend to answer questions. It is also an offence to fail to take an oath or affirmation when required to do so or to refuse to answer questions relevant to the investigation when being examined. The new section retains the BCII Act’s six months jail penalty for this offence but adds a note stating that a court can instead of, or in addition to, jail, impose a maximum $3300 fine for breaches, and five times that for a body corporate convicted of an offence.

New subsection 52(2) provides an exemption from the requirement to provide information or answer questions if the person would be required to disclose information that is subject to either legal professional privilege or would be protected by public interest immunity. The public interest immunity does not exist under the existing provisions.

Other safeguards on the power to compulsorily obtain information or documents

Proposed sections 49, 54A, 58 and 59 contain further checks on the use of the compulsory examination powers. These are:

• people summoned for examination will be reimbursed for their reasonable expenses, including, upon application to the Director, reasonable legal expenses (new section 58) and
• the Commonwealth Ombudsman will monitor and review all examinations and provide reports to the Parliament on the exercise of this power (new sections 49 and 54A).

Fair Work Building Industry Inspectors

Item 72 repeals Division 2 of Part 2 of Chapter 7 of the BCII Act (which deals with the appointment and powers of ABC Inspectors) and replaces it with proposed sections 59 to 59G which provide for the appointment and powers of Fair Work Building Industry Inspectors (inspectors).

Under proposed section 59, the Director may appoint employees or office holders of the Commonwealth, or a state or territory as inspectors. The Director may only appoint a person as an inspector if satisfied he/she is of good character. The Director is also an inspector by force of proposed section 59A.
Proposed section 59C provides that an inspector has the same functions and powers as a Fair Work Inspector but may only perform those functions and powers in relation to a building matter and is subject to the conditions and restrictions specified in the instrument of appointment.

Proposed subsection 59C(4) provides that, for the purposes of the performance and exercise of the functions and powers of an inspector in relation to a building matter, an Act has effect as if a reference to a Fair Work Inspector were a reference to an inspector and a reference to the FWO were a reference to the Director. The Explanatory Memorandum elaborates on the effect of this provision. For example, in relation to building matters, an inspector may:

- make applications to FWA in relation to persons who hold entry permits for the purpose of exercising rights of entry
- make applications for orders in relation to contraventions of civil remedy provisions contained in the FW Act
- make applications for orders in relation to safety net contractual entitlements
- exercise compliance powers for the compliance purposes as set out in section 706 of the FW Act (including determining whether the FW Act or a fair work instrument has been or is being complied with or whether a safety net contractual entitlement has been contravened) and
- issue compliance notices where the inspector reasonably believes that a person has contravened one or more instruments as listed in section 716 of the FW Act.

Proposed section 59E provides an additional power for inspectors, namely the power to monitor compliance with the Building Code. The inspector’s powers and functions for this purpose would be the same as those he/she would have in relation to monitoring compliance with a fair work instrument.

Proposed section 59D provides that the Director has the power to accept a written undertaking in relation to a building matter in the same way that the FWO may accept written undertakings under section 715 of the FW Act.

Federal Safety Officers

Disclosure of information

In place of existing section 64, item 77 also inserts proposed new sections 64 and 64A that deal with the disclosure of information.

Proposed section 64 provides the Director may disclose, or authorise the disclosure of, information acquired by the Inspectorate if the Director reasonably believes that it is:

- necessary or appropriate to do so for the purposes of the performance of the Director’s functions and powers, or
- likely to assist in the administration or enforcement of Commonwealth, state or territory laws.

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The section also permits disclosure of information to the Minister, the Departmental Secretary and SES officers in the Department, and the Advisory Board (proposed subsections 64(3) to (5)).

This disclosure provision does not apply to information obtained under an examination notice or an examination (proposed subsection 64(1)). Such information is subject to the more restrictive disclosure provisions in existing section.

**Proposed section 64A** deals with disclosure of information by the Federal Safety Commissioner. The Commissioner’s disclosure responsibilities are similar to those of the Director.

**Intervention**

**Items 91 and 92** amend sections 71 and 72. Their effect is to allow the Director (as opposed to the ABC Commissioner) to intervene in court proceedings and make submissions to FWA in relation to building industry participants or building work.

**Schedule 2—Transitional and consequential provisions**

Schedule 2 allows regulations to be made to:

- deal with matters of a transitional, savings or application nature arising from this Bill (item 1) and
- amend Acts where the amendments are consequential on or relate to the amendments made by this Bill (item 2).

**Item 2** would effectively enable delegated legislation to override earlier legislation. The use of these so-called ‘Henry VIII clauses’ has been a source of concern to the Senate Scrutiny of Bills Committee where provisions are considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny. In this case the Committee did not comment on the equivalent provision in the 2009 Bill.

**Item 3** allows regulations to have retrospective effect. This retrospective application is modified to the extent that subitem 3(2) provides that if a regulation takes effect before it is registered, a person cannot be convicted of an offence or ordered to pay a penalty in relation to conduct contravening the regulation that occurred prior to registration.

**Concluding comments**

The Bill has evinced entrenched positions from both sides of Parliament, with the Coalition parties preferring no change with the BCII Act remaining unamended, while the ALP is committed to aligning regulation of the building and construction industry to the general standards pertaining under the

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28. A ‘Henry VIII’ clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation.


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FW Act, while retaining a specialist Fair Work inspectorate to deal with the building industry and the Australian Greens remaining in opposition to both the ABCC and its proposed replacement. However, the fallout from Qantas Airlines grounding its fleet in October 2011, appears to have won kudos from the Australian public towards the dispute resolution role of FWA.\textsuperscript{30} To put the general and building regulatory systems in perspective, should the Qantas’ actions to ground its airlines be held as illegal industrial action under the Fair Work Act\textsuperscript{31}, the maximum fines it may face (per offence), would be one third the maximum fines (per offence) faced by the CFMEU taking illegal industrial action on building sites. Should public support continue to swing toward the role of tribunals with greater conciliation aims as opposed to having, on balance, greater inquisitional or litigious functions, there may be grounds for the ABCC’s proposed replacement to progress.


\textsuperscript{31} Note that one of the three unions involved in the Qantas dispute of October 2011 has commenced Federal Court action against FWA’s decision to terminate all industrial action. See P Lion, ‘Pilots in legal dogfight’, \textit{Daily Telegraph}, 11 November 2011, p. 13, viewed 14 November 2011, \url{http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F1217303%22}

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Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011

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