THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

BUILDING AND CONSTRUCTION INDUSTRY (CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2013

EXPLANATORY MEMORANDUM

(Circulated with the authority of the
Minister for Employment,
Senator the Hon Michaelia Cash)
BUILDING AND CONSTRUCTION INDUSTRY (CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2013

OUTLINE

The Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (the Bill) deals with consequential and transitional matters relating to the re-establishment of the Australian Building and Construction Commission and other matters set out in the Building and Construction Industry (Improving Productivity) Bill 2013 (the BCI (IP) Bill). The Bill will ensure a smooth transition from the institutions, functions and powers created by the Fair Work (Building Industry) Act 2012 (the FWBI Act) to the new regime established by the BCI (IP) Bill. The Bill also deals with residual operation of the Building and Construction Industry Improvement Act 2005 where necessary.

This Bill:

- repeals the FWBI Act
- makes minor consequential amendments to Commonwealth legislation that are relevant to the operation of the BCI (IP) Bill, and
- makes transitional provisions for:
  - changes of names of institutions and offices;
  - preserving the appointments of senior position holders;
  - preserving the employment entitlements of staff of affected organisations;
  - preserving the confidentiality of certain information;
  - the timing of reports;
  - preserving the existing safety accreditation scheme;
  - preserving examination notices and their effect;
  - legal proceedings, and;
  - other related matters.

The Bill makes it clear that section 7 of the Acts Interpretation Act 1901, which sets out a number of rules for the preservation of investigations, liabilities, proceedings and orders, is not limited by the operation of this Bill.

FINANCIAL IMPACT STATEMENT

The financial impact of the Bill is budget neutral.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

See Statement of Compatibility with Human Rights at the end of this explanatory memorandum.
NOTES ON CLAUSES

In these notes on clauses, the following abbreviations and terms are used:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ABC Commission</td>
<td>Australian Building and Construction Commission</td>
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<td>ABC Commissioner</td>
<td>Australian Building and Construction Commissioner</td>
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<tr>
<td>BCII Act</td>
<td>Building and Construction Industry Improvement Act 2005</td>
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<tr>
<td>FW (RO) Act</td>
<td>Fair Work (Registered Organisations) Act 2009</td>
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<tr>
<td>FWBI Act</td>
<td>Fair Work (Building Industry) Act 2012</td>
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<tr>
<td>the BCI (IP) Bill</td>
<td>Building and Construction Industry (Improving Productivity) Bill 2013</td>
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<tr>
<td>the Bill</td>
<td>Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013</td>
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<tr>
<td>the new Act</td>
<td>Building and Construction Industry (Improving Productivity) Act 2013</td>
</tr>
<tr>
<td>the old Act</td>
<td>Fair Work (Building Industry) Act 2012</td>
</tr>
<tr>
<td>the old Office</td>
<td>Office of the Fair Work Building Industry Inspectorate</td>
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</tbody>
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Clause 1 – Short Title

This specifies the short title of the Bill as the Building and Construction Industry (Consequential and Transitional Provisions) Act 2013.

Clause 2 – Commencement

The table in this clause sets out when the Bill’s provisions will commence.

Clause 3 – Schedules

This clause provides that an Act that is specified in a Schedule is amended or repealed as set out in that Schedule and any other item in a Schedule operates according to its terms.
Schedule 1—Repeal and Amendments

Part 1—Repeal of the Fair Work (Building Industry) Act 2012

Fair Work (Building Industry) Act 2012

Item 1 – The whole of the Act
1. This item provides that the FWBI Act is to be repealed in its entirety.

Part 2—Consequential amendments

Administrative Decisions (Judicial Review) Act 1977

Item 2 – Paragraph (a) of Schedule 1
2. This item contains amendments to Schedule 1 of the Administrative Decisions (Judicial Review) Act 1977 (the ADJR Act) that are consequential upon the enactment of the BCI (IP) Bill.
3. Paragraph (a) of Schedule 1 to the ADJR Act excludes certain classes of decisions from administrative review under the ADJR Act. This currently includes decisions under the Fair Work Act 2009, the FW (RO) Act, the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, and the FWBI Act.
4. This item will add a reference to the Building and Construction Industry (Improving Productivity) Act 2013 to paragraph (a) of Schedule 1 to the ADJR Act and will remove the redundant reference to the FWBI Act. This means that decisions made under the Building and Construction Industry (Improving Productivity) Act 2013 will be excluded from the application of the ADJR Act.

Fair Work (Registered Organisations) Act 2009

Item 3 – Subparagraphs 337A(b)(iii) and (iv)
5. Subparagraphs 337A(b)(iii) and (iv) of the FW (RO) Act are about disclosures by whistleblowers and lists which disclosures will be protected. Substituting the ABC Commissioner, Deputy ABC Commissioner and the Australian Building and Construction Inspector for the existing equivalent officers in the FWBI Act will update this list.

Item 4 – Saving provision
6. This item provides that despite the repeal of provisions in the FW (RO) Act as provided in item 3, those subparagraphs in that Act will continue to apply after this item commences in relation to disclosures to the Director or a Fair Work Building Industry Inspector before this item commences. This will ensure that the information disclosed to those officials before this item commences will continue to be protected under the whistleblower provisions.

Jurisdiction of Courts (Cross-Vesting) Act 1987

Item 5 – Paragraph 4(4)(aba)
7. Paragraph 4(4)(aba) of the Jurisdiction of Courts (Cross-Vesting) Act 1987 is about conferring extra jurisdiction on particular courts. Subsection 4(4) lists exceptions to those jurisdiction provisions, and included on that list is the FWBI Act. This item will substitute the FWBI Act with the Building and Construction Industry (Improving Productivity) Act 2013.
Part 3—Amendments relating to privacy

Building and Construction Industry (Improving Productivity) Act 2013

Item 6 – Subsection 106(7)

8. This item will amend the relevant reference to the Privacy Act 1988 in the Building and Construction Industry (Improving Productivity) Act 2013 when Privacy Principles relating to that Act are amended and come into effect.
Schedule 2—Transitional provisions

Item 1 – Definitions

9. This item provides definitions of terms that are used in Schedule 2. To aid with reading this Schedule, it is particularly useful to know that:

- **Commission** means the ABC Commission (previously named the Office of the Fair Work Building Industry Inspectorate) as continued in existence after the Building and Construction Industry (Improving Productivity) Act 2013 commences. Section 29 in the new Act provides that the Office of the Fair Work Building Industry Inspectorate continues under the new name of the ABC Commission. This will keep active things such as bank accounts because the old Office has not been effectively abolished.

- **new Act** means the *Building and Construction Industry (Improving Productivity) Act 2013*.

- **old Act** means the FWBI Act.

- **transition time** means the commencement of section 3 of the new Act.

Item 2 – Application of Act

10. This item provides that:

- The new Act applies (subject to this item and this Schedule) in relation to any building work that is performed, any action taken, or any omission that occurs, after the transition time.

- Section 59 of the new Act (project agreements not enforceable) applies in relation to agreements entered into after the transition time.

- Chapter 7 of the new Act (powers to obtain information), and any other provision of that Act to the extent that the provision relates to that Chapter, apply in relation to any contravention or alleged contravention of the BCII Act or the old Act that occurs before the transition time. This means that the full suite of investigation powers in the new Act (including examination notices) may be used in investigations related to the BCII Act or the old Act. It also means that inspectors will have clarity in relation to their powers, and will not be prevented from exercising their powers because conduct being investigated occurred at a particular point in time.

11. A table is provided to ensure that where an investigation is run in accordance with Chapter 7 in the new Act the terms ‘designated building law’ and ‘building work’ are read as intended in relation to the act under which the relevant conduct occurred. For example, ‘building work’ would not include supply to a site because the BCII Act and the FWBI Acts did not apply in this way.

12. Subitem 2(5) is an avoidance of doubt provision, which clarifies that inspectors may exercise their investigation powers under BCI (IP) Bill where an investigation has been initiated under the old Act.

13. Subitem 2(6) clarifies for avoidance of doubt that sections 109 and 110 of the new Act apply in relation to any proceeding before a court or the Fair Work Commission, even if the proceeding began before the transition time. Sections 109 and 110 provide that the ABC Commissioner may intervene in certain court proceedings and may participate in matters or
make submissions to the Fair Work Commission where a matter involves a building industry participant or building work.

Item 3 – Annual reports

14. This item deals with the preparation and giving to the Minister, by the Director, of an annual report on the Director’s functions and powers.

15. It ensures that the report will be provided at the time required (which is as soon as practicable after the end of each financial year in both the old Act and the BCI (IP) Bill) regardless of when the new Act commences. The report will deal with relevant matters under both the old Act and the new Act if the first financial year under the new Act spans the commencement date.

Item 4 – Continuation of appointment of Director

16. This item provides that the person who holds the office of Director immediately before the transition time will continue as the ABC Commissioner after the transition time. The appointment instrument and determinations made under Remuneration Tribunal Act 1973 applying to the Director will continue to apply to the ABC Commissioner after the transition time.

Item 5 – Termination of appointments of certain persons

17. This item applies to a person who, immediately before the transition time, holds office as either a member of the Fair Work Building Industry Inspectorate Advisory Board (including the Chair of the Board) or the Independent Assessor.

18. These persons will cease to hold that office at the transition time, but nothing in this item prevents the person being appointed to an office under the new Act.

Item 6 – Staff of old Office

19. This item provides that staff of the Office of the Fair Work Building Industry Inspectorate before the transition time will continue to be employed as staff of the ABC Commission after the transition time. The transition will not affect the continuity of the employment, or terms and conditions of employment (including under any enterprise agreement) of the staff.

Item 7 – Consultants to Director

20. This item provides that consultants to the Director engaged under the old Act will continue to be engaged under the new Act. Their engagements, and the terms and conditions of their engagements, will continue unaffected by the transition time.

Item 8 – Continuation of designation of Federal Safety Commissioner

21. An instrument that is in force under section 29 of the old Act immediately before the transition time and that designates a position in the Department as the position of Federal Safety Commissioner, is taken after the transition time, to have been made under clause 37 of the new Act. In effect this item preserves the position of the current Federal Safety Commissioner.

Item 9 – Preserving regulations relating to the Federal Safety Commissioner

22. Item 9 preserves Chapter 4 of the Building and Construction Industry Improvement Regulations 2005. Chapter 4 provides for an additional function for the Federal Safety Commissioner and matters relating to delegations. A table translates certain terms to ensure that terms used in the regulation are adapted to be consistent with the new Act.
Item 10 – Consultants to old Federal Safety Commissioner

23. This item provides that consultants to the Federal Safety Commissioner engaged under the old Act will continue to be engaged under the new Act. Their engagements, and the terms and conditions of their engagements, will continue unaffected by the transition time.

Item 11 – Preserving the accreditation scheme

24. Under this item, the accreditation scheme will be preserved by the continuation of the regulation that was made to implement the scheme. A table translates certain terms to ensure that the scheme is adapted to be consistent with the new Act. For example, a reference to ‘building work’ in the regulations will be read as a reference to ‘building work’ within the meaning of section 6.

25. The effect of this item is that decisions, approvals and other actions that are in force immediately before the transition time will continue in force after that time. For example, applications for accreditation and a decision that a person is accredited are preserved.

Item 12 – Examination notices issued before commencement

26. The repeal by this Bill of section 47 of the old Act does not affect the continuity of any examination notice issued under that section before the transition time.

Item 13 – Reports by Commonwealth Ombudsman

27. This item is a transitional provision that deals with the preparation and giving to the Parliament, by the Commonwealth Ombudsman, of an annual report about examinations that have been conducted.

28. It ensures that the report will be provided at the time required (which is as soon as is practicable after the end of each financial year in both the old Act and the BCI (IP) Bill) regardless of when the new Act commences. The report will deal with examinations conducted under both the old Act and new Act if the first financial year under the new Act spans its commencement date.

Item 14 – Payment for expenses incurred in attending an examination

29. Payments for expenses incurred in attending an examination will continue unaffected by the transition to the new Act. This item, however, also ensures the continuation of the regulations made for this purpose. A table translates certain terms to ensure that terms used in the regulation are adapted to be consistent with the new Act.

Item 15 – Continuation of appointment of Federal Safety Officers

30. The appointments of Federal Safety Officers will, under this item, continue unaffected by the transition to the new Act.

Item 16 – Identity cards for Federal Safety Officers

31. Under this item, identity cards issued to Federal Safety Officers under the old Act will continue as if they were issued under the new Act.

Item 17 – Disclosure of information by the ABC Commissioner or the Federal Safety Commissioner

32. Item 17 preserves the confidentiality and protection of certain information obtained before the transition period, by reference to the people who acquire it. Those who acquire information in the course of performing functions or exercising powers are also required under the new Act to keep it confidential and to not disclose it unless permitted to do so by a relevant provision.
33. Item 17 provides that if information was acquired under the old Act by particular persons in the course of performing functions or exercising powers, then for the purposes of the new Act, the information will be taken to have been acquired by the relevant persons specified in the BCI (IP) Bill. For example information obtained by the Director is deemed to be information obtained by the ABC Commissioner.

**Item 18 – Protected information**

34. This item provides that what was protected information under the old Act will continue to be protected information under the new Act. Protected information may only be disclosed in limited circumstances.

**Item 19 – Legal proceedings**

35. This item provides that if any proceedings to which the Director is a party (including as a result of section 71 of the old Act) are pending in a court or tribunal immediately before the transition time, the ABC Commissioner is, after the transition time, the party to those proceedings.

**Item 20 – Settled matters**

36. Subitem (1) provides that the ABC Commissioner (or an inspector) may begin or continue to participate in a building proceeding (within the meaning of section 73 of the old Act) even if the proceeding relates to a matter that was settled (as referred to in that section) before the transition time.

37. Subitem (2) provides that the ABC Commissioner (or an inspector) may institute a building proceeding (within the meaning of section 73A of the old Act) even if the conduct giving rise to the proceeding was the subject of a matter that was settled (as referred to in that section) before the transition time.

38. The effect of these provisions is that the ABC Commissioner will not be prevented from participating in or initiating proceedings in relation to matters settled before commencement.

**Item 21 – Director etc. not liable for conduct in good faith**

39. This item provides that, despite the repeal by this Act of section 77 of the old Act, that section continues to apply, after the transition time, in relation to anything done, or omitted to be done, before that time by a protected person (within the meaning of that section). This ensures that protection from liability is preserved.

**Item 22 – Assets and liabilities of old Office**

40. This item provides that the assets and liabilities of the old Office will be preserved when that Office transitions to the ABC Commission, and that there will be no need for conveyance, transfer or assignment. Assets will include information obtained as part of an investigation or under an examination notice. This will ensure that information gathered during an investigation may be used by the ABC Commission after the transition time as though it had obtained the information.

**Item 23 – References in instruments to old Office and Director**

41. This is a transitional provision for references in instruments. Subitems (1) and (2) provide that a reference to the old Office or the Director, in an instrument that is in force immediately before the transition time, has effect, after the transition time, as a reference to the ABC Commission or the ABC Commissioner.
Item 24 – Effect of things done by, or in relation to, the old Office
42. Item 24 preserves the effect of things done by or in relation to the old Office. The things will have effect after the transition time as if they had been done by, or in relation to, the ABC Commission.

Item 25 – Effect of this Schedule on the operation of section 7 of the Acts Interpretation Act 1901
43. Item 24 makes it clear that the transitional provisions in this Schedule are not intended to limit the operation of section 7 of the Acts Interpretation Act 1901.

Item 26 – Rules
44. Item 26 permits rules to be made in relation to matters required or permitted by the Bill to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to this Bill.
45. Rules may also be made in relation to repeals or amendments made by this Bill or the enactment of this Bill or the new Act, of an application, transitional or saving nature.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011


This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Outline

The Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (the Bill) deals with consequential and transitional matters relating to the re-establishment of the Australian Building and Construction Commission and other matters set out in the Building and Construction Industry (Improving Productivity) Bill 2013 (the BCI (IP) Bill). The Bill will ensure a smooth transition from the institutions, functions and powers created by the Fair Work (Building Industry Act 2012) to the new regime established by the BCI (IP) Bill. The Bill also deals with residual operation of the Building and Construction Industry Improvement Act 2005 where necessary.

Human Rights Implications – Right to Privacy

Item 22 of Schedule 2 of the Bill engages the prohibition on unlawful and arbitrary interference with privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR) insofar as it deals with the transmission of potentially personal or private information collected under the old Act by the old Office to the ABC Commission.

Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. In order for an interference with the right to privacy not to be ‘arbitrary’, the interference must be for a reason consistent with the ICCPR and reasonable in the particular circumstances. Reasonableness, in this context, involves notions of proportionality, appropriateness and necessity.

Under clause 105 of the BCI (IP) Bill the ABC Commissioner will have powers to disclose certain information. Clause 106 of the BCI (IP) Bill will also impose restrictions on the disclosure of ‘protected information’ which is information obtained under an examination notice (see also item 18 of Schedule 2 of this Bill) which preserves the protected status of information obtained under the Fair Work (Building Industry) Act 2012.

While personal information will be held by the ABC Commission and will be able to be disclosed under clauses 105 and 106 of the BCI (IP) Bill in certain circumstances, the information that is to be transferred is essential to the functions being performed by the ABC Commissioner and the ABC Commission. For example, information that relates to an investigation which is on foot at the time of commencement must transfer to the new ABC Commission to ensure that there is continuity in enforcement activities and regulation of the building and construction industry.

Further, the important safeguards in clauses 105 and 106 of the BCI (IP) Bill will apply to personal information that is transferred. Clause 105 provides that information can only be disclosed for the lawful purposes prescribed, which include furthering the administration and enforcement of State and Commonwealth laws and in assisting the Minister to consider a complaint or issue. Clause 106 restricts permitted disclosure to cases where the disclosure is for the purpose of assisting in building industry law enforcement and other very limited circumstances. In this way, any limitation is a proportionate limitation, as disclosure of information is only permitted to the extent that it is necessary for the purposes of performing legislated functions and enforcing relevant laws.
Holding personal information, and in some case disclosing personal information, is an essential part of the work of the ABC Commission and the ABC Commissioner. In this case, any limitation on the right to privacy is proportionate to the need to hold information, and is neither unlawful nor arbitrary when weighed up against the imperatives of enforcing the new Act and designated building laws in the building and construction industry. Accordingly, the proposed Bill is compatible with the right to privacy in Article 17 of the ICCPR.

Conclusion

The Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Minister for Employment, Senator the Hon Michaelia Cash