

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 80

Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012

Building and Construction Industry Improvement Act 2005

Financial Management and Accountability Act 1997

Building and Construction Industry Improvement Amendment (Transition to Fair Work) Regulation 2012

The *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (the Act) creates a strong set of compliance arrangements for the building and construction industry. In particular, it abolishes the Office of the Australian Building and Construction Commissioner and creates a new agency, the Office of the Fair Work Building Industry Inspectorate to regulate the building and construction industry. It also renames the *Building and Construction Industry Improvement Act 2005* (BCII Act) as the *Fair Work (Building Industry) Act 2012* (FWBI Act). The regulation provides the necessary transitional and consequential arrangements to ensure a smooth transition from the institutions, functions and powers created by the BCII Act to those established under the FWBI Act.

Item 1 of Schedule 2 to the Act provides that the Governor-General may make regulations dealing with matters of a transitional, saving or application nature relating to amendments made by the Act.

Item 2 of Schedule 2 to the Act provides that the Governor-General may make regulations amending Acts being amendments that are consequential to, or that otherwise relate to, the amendments made by the Act.

The amendments made by the Act, particularly the creation of a new agency to replace the Office of the Australian Building and Construction Commissioner, require a number of transitional arrangements to be made to ensure the continuity of regulatory activities and functions. In addition to amending Acts as provided for by Item 2 of Schedule 2 to the Act, the proposed regulation amends the *Building and Construction Industry Improvement (Accreditation Scheme) Regulations 2005* and the *Financial Management and Accountability Regulations 1997*. The power for the Governor-General to make amendments to these regulations is provided for by their respective enabling Acts.

In addition to amending Acts as provided for by Item 2 of Schedule 2 to the Act, the regulation:

- Ensures the smooth transfer of Staff and Inspectors from the old regime to the new;
- Provides for the continuation of the BCII Act in relation to conduct occurring prior to commencement of the Act;
- Provides for the transfer of assets and liabilities from the Office of the Australian Building and Construction Commissioner to the Office of the Fair Work Building Industry Inspectorate; and

- Makes consequential amendments to a number of other Acts and Regulations.

Details of the regulation are set out in Attachment A.

A Statement of Compatibility with Human Rights has been completed for the regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the measures in the Regulation are compatible with human rights. A copy of the Statement is at Attachment B.

The Act specifies no conditions that need to be satisfied before the power to make the regulation may be exercised.

The regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The regulation commences on 1 June 2012.

The Administrative Appeals Tribunal, the Commonwealth Ombudsman, the Office of the Australian Building and Construction Commissioner, and industry employee and employer representative organisations were consulted about the making of these Regulations.

Authority: Items 1 and 2 of Schedule 2 to the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012*
Subsection 78(1) of the *Building and Construction Industry Improvement Act 2005*
Subsection 65(1) of the *Financial Management and Accountability Act 2007*

Details of the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Regulation 2012*

Section 1.1 – Name of Regulation

This section provides that the title of the regulation is the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Regulation 2012*.

Section 1.2 – Commencement

This section provides for the regulation to commence on the commencement of Schedule 1 to the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012*

Section 1.3 – Definitions

This section defines common terms used throughout the regulation including 2005 Act, ABCC Office, Act and FWBI Act.

Section 2.1 – Inspectors and staff

This section facilitates a smooth transition of inspectors from the Office of the Australian Building and Construction Commissioner (OABCC) to the Office of the Fair Work Building Industry Inspectorate (OFWBII) by ensuring that the appointment of Australian Building and Construction Inspectors (ABC Inspectors) continues under the *Fair Work (Building Industry) Act 2012* (FWBI Act) for the remainder of the term of their appointments under the *Building and Construction Industry Improvement Act 2005* (BCII Act).

Subsection (2) provides that for the remainder of the person's appointment, an identity card issued to the person under the BCII Act is treated as though it was an identity card issued under the FWBI Act. This subsection would not apply if a new identity card is issued to a person under the FWBI Act.

It is not intended that this saving provision would preclude revocation or suspension of that person's appointment by the Director where necessary (see subsection 33(4) of the *Acts Interpretation Act 1901*).

This section also provides continuity and certainty in relation to the terms and conditions of employment for staff transferring from the OABCC to the OFWBII.

Staff will be transferred under section 72 of the *Public Service Act 1999* which deals with the transfer of employees arising from machinery of government changes. This section preserves the operation of the enterprise agreement that applied to staff immediately prior to the commencement of this regulation as if the agreement had been made with the Director of the Fair Work Building Industry Inspectorate (FWBII).

Section 2.2 – Notices under subsection 52(1) of 2005 Act to obtain information

This section ensures that from commencement of the regulation, where a notice to obtain information had been issued under subsection 52(1) of the BCII Act and the time for complying with that notice has not expired, the notice will continue to have effect as if it were an examination notice issued under section 47 of the FWBI Act. As the notice will be taken to be an examination notice, the Commonwealth Ombudsman will need to be informed of the existence of such notices under section 49 of the FWBI Act and the safeguards attached to the conduct of examinations under the FWBI Act will apply.

The section does not extend the time for complying with the notice.

Section 2.3 – Proceedings

This section ensures that proceedings and conduct that occur before commencement of the FWBI Act remain subject to the provisions of the BCII Act. Specifically, the section ensures the commencement, continuation and completion of applications, proceedings, appeals and other action (for instance, investigations by ABC Inspectors) under the BCII Act.

Conduct that occurred prior to commencement of the FWBI Act will generally remain subject to the provisions of the BCII Act, whether or not a proceeding in relation to that conduct was commenced before the FWBI Act commenced. For example, the specific prohibition in section 44 of the BCII Act on coercion in relation to the making of enterprise agreements will continue to apply to conduct that occurs before commencement of the FWBI Act.

In relation to building proceedings (within the meaning of the FWBI Act) that start after the regulation commences, the section provides that the Director of the FWBII cannot continue the proceeding if the preconditions in subsections 73(1) or 73A(1) of the FWBI Act are met. Broadly, these sections of the FWBI Act prevent the Director of the FWBII from participating in certain proceedings where the parties have reached a settlement and discontinued the matter. For example, where a building proceeding is commenced after 1 June 2012 between a union and an employer that relates to conduct that occurred prior to 1 June 2012 and the Director of the FWBII intervenes and the matter is subsequently settled and discontinued, the section would operate to prevent the Director from further participating in the proceeding to the extent it relates to the settled matter(s). Similarly, if the Director of the FWBII had not intervened in the original proceedings, (s)he would also be prevented from bringing any subsequent proceedings if the conduct giving rise to the original proceeding was the subject of the settled matter(s).

The section also ensures that Inspectors in the new OFWBII are able to bring proceedings and take any other action that could have been brought by or taken by an ABC Inspector. Similarly, the Director of the FWBII is able to take any action that could have been taken by the Australian Building and Construction Commissioner.

The section also provides that Inspectors are only able to exercise compliance powers outlined in the FWBI Act and the *Fair Work Act 2009* in relation to conduct that occurred before the commencement of this regulation, whether or not a proceeding was commenced before the commencement of this regulation. Similarly, the Director is not able to obtain information as the Australian Building and Construction Commissioner could under

Division 1 of Part 2 of Chapter 7 of the BCII Act. Instead, the Director is limited to obtaining information in accordance with the provisions of the FWBI Act.

Section 2.4 – Decisions

This section ensures that any decisions that are made and in force prior to the commencement of the regulation continue as if they had been made under the FWBI Act. It is intended that ‘decisions’ could include things such as formal delegations made by the ABC Commissioner, for example, to ABC Inspectors.

Section 2.5 – Previously acquired information

This section ensures that any information that was acquired by an ABC Inspector or the OABCC prior to the commencement of the regulation is taken to be information acquired by the Director for the purposes of the FWBI Act. This includes any documents or other records held by the OABCC. The new disclosure provisions in the FWBI Act apply to this information from the date of commencement. For clarity and to ensure consistency with the new disclosure regime established under the FWBI Act, the section specifies that any information obtained under section 52 of the BCII Act can only be disclosed in accordance with section 65 of the FWBI Act. Information not obtained under section 52 of the BCII Act can be disclosed in accordance with section 64 of the FWBI Act.

Section 2.6 – Annual Report

This section requires the annual report for the year ending 1 July 2012 to include a report that complies with section 14 of the BCII Act and covers the period from 1 July 2011 to the date immediately before the regulation commences.

Section 2.7 – References to 2005 Act

This section ensures that references in documents to the BCII Act or certain provisions of the BCII Act, as well as references to a number of positions created under the BCII Act, are taken as references to the FWBI Act or comparable provisions or positions in the FWBI Act. This section ensures that documents such as memoranda of understanding that have been entered into by the OABCC and other entities under the BCII Act will not need to be remade upon commencement of the FWBI Act.

Section 2.8 – Assets and Liabilities

This section transfers the assets and liabilities of the OABCC to the OFWBI on commencement of the regulation. The section also requires the Director to make arrangements to transfer these assets, such as by arranging for monies to be transferred from accounts in the name of the OABCC to an account in the name of the OFWBI.

Section 3.1 – Amendment of Acts

This section provides for the consequential amendment of the *Administrative Decisions (Judicial Review) Act 1977*, the *Fair Work (Registered Organisations) Act 2009* and the *Jurisdiction of Courts (Cross-vesting) Act 1987* as specified in the respective schedules.

Section 3.2 – Amendment of regulations

This section provides for consequential amendments to the *Building and Construction Industry Improvement (Accreditation Scheme) Regulations 2005* as detailed in Schedule 4 and to the *Financial Management and Accountability Regulations 1997* as detailed in Schedule 5.

Schedule 1 – Amendment of *Administrative Decisions (Judicial Review) Act 1977*

This section includes a reference to the FWBI Act for the purposes of Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977*. This will mean that decisions made under the FWBI Act are not of a class reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.

Schedule 2 – Amendments of *Fair Work (Registered Organisations) Act 2009*

This section removes definitions of *Australian Building and Construction Commissioner* and *Australian Building and Construction Inspector* as well as removing references to those positions in the list of positions to which disclosure of information will be protected under the whistleblowers provisions contained in the *Fair Work (Registered Organisations) Act 2009*. The section inserts the Director of the FWBI as well as a FWBI Inspector into the list of positions to which disclosure of information will be protected under whistleblowers provisions contained in the *Fair Work (Registered Organisations) Act 2009*.

Schedule 3 – Amendment of *Jurisdiction of Courts (Cross-vesting) Act 1987*

This section removes a reference to the BCII Act and inserts a reference to the FWBI Act to ensure that a Supreme Court of a State or Territory is not conferred with jurisdiction to hear matters arising under the FWBI Act.

Schedule 4 – Amendment of *Building and Construction Industry Improvement (Accreditation Scheme) Regulations 2005*

This section removes a reference to the *Building and Construction Industry Improvement (Accreditation Scheme) Regulations 2005* and replaces it with a reference to the *Fair Work (Building Industry-Accreditation Scheme) Regulations 2005*. The section also replaces the definition of *Act* so that it refers to the FWBI Act rather than the BCII Act.

Schedule 5 – Amendment of *Financial Management and Accountability Regulations 1997*

This section removes the OABCC and inserts the OFWBI as a prescribed agency for the purposes of section 5 of the *Financial Management and Accountability Act 1997*.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Building and Construction Industry Improvement Amendment (Transition to Fair Work) Regulation 2012

This Legislative Instrument 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*.

Overview of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Regulation 2012 (the proposed Regulation)

The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012 amended the *Building and Construction Industry Improvement Act 2005* (the BCII Act) to create a new Act, the *Fair Work (Building Industry) Act 2012* (FWBI Act) which creates a strong set of compliance arrangements for the building and construction industry. In particular, it abolishes the Office of the Australian Building and Construction Commissioner and creates a new agency, the Office of the Fair Work Building Industry Inspectorate to regulate the building and construction industry.

The purpose of the proposed Regulation is to provide the necessary transitional and consequential arrangements to ensure a smooth transition from the institutions, functions and powers created by the BCII Act to those established under the FWBI Act.

The proposed Regulation would:

- Ensure the smooth transfer of Staff and Inspectors from the old regime to the new;
- Provide for the continuation of the most of the BCII Act in relation to proceedings and conduct that occur before commencement of the new regime;
- Provide for the transfer of assets and liabilities from the Office of the Australian Building and Construction Commissioner to the Office of the Fair Work Building Industry Inspectorate; and
- Make consequential amendments to a number of other Acts and Regulations.

Human Rights Implications – Right to Privacy

Section 2(5) of the proposed Regulation engages with the prohibition on unlawful and arbitrary interference with privacy (in Article 17 of the International Covenant on Civil and Political Rights) insofar as it deals with the transmission of potentially personal or private information collected under the BCII Act to the Director of the Office of the Fair Work Building Industry Inspectorate (the Director of the FWBII).

Under proposed section 2(5), information previously acquired by certain persons under the provisions of the BCII Act will be taken to be information acquired by the Director of the FWBII in the course of the performance of the Director's functions or in the exercise of the Director's powers.

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 s 64 of the FWBI Act, the Director of the FWBII has powers to disclose certain information (set out in subsection 64(1)) in certain lawful circumstances (each of which is set out in subsections 64(1)-(6)). Section 65 of the FWBI Act also imposes restrictions on the disclosure of 'confidential information' which is information obtained under an examination notice issued under the legislation (including relevantly the BCII Act). In this way, the prohibition on interference with privacy is limited in that personal information obtained under the BCII Act can only be shared with other government agencies and the Minister. Therefore, there is no incompatibility with the prohibition on interference with privacy as the provisions are proportionate, reasonable and necessary.

While personal information will be held by the Director and may be disclosed under s 64 and s 65 in certain circumstances, the information that is to be transferred is essential to the functions being performed by the Director of the FWBII. For example, information that relates to an investigation which is on foot at the time of commencement must transfer to the Director of the FWBII to ensure that there is continuity in enforcement activities and regulation of the building and construction industry.

Further, the important safeguards in s 64 and s 65 of the FWBI Act will apply to personal information that is transferred. The information can only be disclosed for the lawful purposes prescribed by the FWBI Act which include furthering the administration and enforcement of State and Commonwealth laws and in assisting the Minister, the Department and the FWBII advisory board to carry out certain lawful functions. 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 FWBII and the Director of the FWBII. 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 promoting and supporting harmonious, productive and cooperative workplaces, and enforcing designated building laws in the building and construction industry. Accordingly, the proposed Regulation is compatible with the right to privacy in Article 17 of the ICCPR.