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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**CONSTRUCTION INDUSTRY AMENDMENT (PROTECTING WITNESSES)
BILL 2015**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment, Senator the Honourable Eric Abetz)

**CONSTRUCTION INDUSTRY AMENDMENT
(PROTECTING WITNESSES) BILL 2015**

OUTLINE

The Construction Industry Amendment (Protecting Witnesses) Bill 2015 (the Bill) amends the *Fair Work (Building Industry) Act 2012* (Fair Work (Building Industry) Act) to extend the period during which the Director of the Fair Work Building Industry Inspectorate can apply to a nominated Administrative Appeals Tribunal presidential member for an examination notice by a further two years.

FINANCIAL IMPACT STATEMENT

Nil

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Construction Industry Amendment (Protecting Witnesses) Bill 2015

The Construction Industry Amendment (Protecting Witnesses) Bill 2015 (the 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*.

Overview of the Bill

The *Fair Work (Building Industry) Act 2012* (Fair Work (Building Industry) Act) creates an industry-specific workplace relations compliance regime for the building and construction industry.

Under the Fair Work (Building Industry) Act, the Director of the Fair Work Building Industry Inspectorate (the Director) may apply to a nominated Administrative Appeals Tribunal (AAT) presidential member for the issue of an examination notice in order to obtain information relevant to an investigation into a suspected contravention of the Fair Work (Building Industry) Act or a designated building law by a building industry participant. An examination notice may require a person to give certain information or documents to the Director, or to attend before the Director to answer questions relevant to an investigation not less than 14 days after the examination notice is given to the person.

Section 46 of the Fair Work (Building Industry) Act currently has the effect that the Director cannot apply for an examination notice after 1 June 2015.

The Bill amends the Fair Work (Building Industry) Act to extend the period during which the Director can apply to a nominated AAT presidential member under section 45 for an examination notice by two years. It also inserts a note explaining that the effect of section 46, as amended, is that applications cannot be made under section 45 after 1 June 2017.

Human rights implications

The definition of ‘human rights’ in the *Human Rights (Parliamentary Scrutiny) Act 2011* relates to the core seven United Nations human rights treaties.

The Bill engages the following rights:

- the right to a fair trial contained in Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR); and
- the right to privacy and reputation under Article 17 of the ICCPR.

Right to a fair trial

Article 14 of the ICCPR provides that all persons shall be equal before the courts and tribunals, and that in the determination of any criminal charge against a person, that person is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Subarticle 14(3) sets out a range of guarantees that everyone shall be entitled to in the determination of any criminal charge against them. This includes the right not to be compelled to testify against himself or herself or to confess guilt.

Right to privacy and reputation

The right to privacy in Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation.

As noted in the *UN Human Rights Committee, General Comment 16*:

As all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant.

Examination powers

The Royal Commission into the Building and Construction Industry (the Cole Royal Commission) considered that coercive information gathering powers were necessary on the grounds that the regulator would not be able to adequately perform its functions without them due to the closed culture of the industry. In making this recommendation, the Cole Royal Commission stated that:

I recommend that the ABCC should be given the same powers as those possessed by the ACCC under ss 155 to 156 of the Trade Practices Act 1974...This is because the ABCC will need to penetrate the veil of silence behind which many decisions to take unlawful industrial action are hidden. Those who will be best placed to give information concerning breaches of the civil law will often, even usually, be complicit in those breaches.¹

The 'Transition to Fair Work Australia for the Building and Construction Industry Report', prepared by the Honourable Murray Wilcox QC (the Wilcox Report) also confirmed the ongoing need for coercive information gathering powers. Justice Wilcox noted that anecdotal evidence demonstrated that 'it would be unwise not to endow [the new regulator] with a coercive interrogation power' in light of the ongoing significant degree of contravention of the relevant industrial laws in the industry.²

As a result of these findings and recommendations, the Fair Work (Building Industry) Act includes provisions that enable the Director to exercise coercive information gathering powers in certain limited circumstances. The exercise of these powers is subject to oversight mechanisms and a number of other safeguards that ensure the right to privacy is limited only to the extent necessary to ensure that building industry participants observe the applicable workplace relations laws.

If the Director believes on reasonable grounds that a person has information or documents, or is capable of giving evidence, that is relevant to an investigation into a suspected contravention of the Fair Work (Building Industry) Act or a designated building law, the Director may apply to a

¹ *Royal Commission into the Building and Construction Industry* (2003), Volume 11, Page 38

² *Transition to Fair Work Australia for the Building and Construction Industry Report*, (2009) paragraph 5.98

nominated AAT presidential member for the issue of an examination notice. Such an application must include certain information so as to enable the AAT presidential member to assess, among other matters, the necessity of issuing the notice. Before issuing an examination notice, the AAT presidential member must be satisfied, for example, that:

- there are reasonable grounds to believe that the person has information or documents, or is capable of giving evidence, relevant to the investigation;
- that any other method of obtaining the information, documents or evidence has been attempted and has been unsuccessful or it not appropriate; and
- that the information, documents or evidence would be likely to be of assistance in the investigation.

The Fair Work (Building Industry) Act also requires the Director to notify the Commonwealth Ombudsman of the issuing of an examination notice and provide him or her with a copy of the notice and any materials that accompanied the application. As soon as practicable after the examination of a person is completed, the Director must also give the Commonwealth Ombudsman a report on the examination, along with a video recording and transcript of the examination.

The Commonwealth Ombudsman is required to review the exercise of the examination powers and to provide an annual report to the Parliament about examinations conducted during the year, as well as any other reports about the results of reviews into the exercise of the examination powers that the Ombudsman considers appropriate.

The Fair Work (Building Industry) Act also provides that:

- A person may, if he or she chooses to do so, be represented at an examination. This ensures that the person in question is not disadvantaged and is able to be appropriately represented.
- An examination must not take place until at least 14 days after the notice is given to the relevant person, ensuring that that person will have an adequate opportunity to seek advice and arrange legal representation if he or she so chooses.
- A person who attends an examination as required by an examination notice is entitled to be paid fees and allowances, fixed by or calculated in accordance with the rules, for reasonable expenses (including legal expenses) incurred by the person in attending the examination. This will ensure that the person is not financially disadvantaged as a result of being required to attend an examination.

The Bill amends the Fair Work (Building Industry) Act to extend the period during which the Director may apply to a nominated AAT presidential member for the issue of an examination notice by a further two years (i.e. until 1 June 2017).

It is considered that the examination notice powers remain essential to allow the regulator to act rapidly when required. This is particularly so in light of the interim report of the Royal Commission into Trade Union Governance and Corruption (the Heydon Royal Commission) released by Commissioner Heydon in December 2014. In this report the Heydon Royal Commission recommended that the interim report and any other relevant materials be referred to

the relevant authorities to consider whether criminal or civil proceedings should be brought against named persons or organisations, or whether other investigations should be undertaken. This included allegations against certain Construction, Forestry, Mining and Energy Union (CFMEU) officials for such things as:

- intimidation and coercion;
- blackmail; and
- breaches of the *Corporations Act 2001*.

The Heydon Royal Commission concluded that there is a ‘culture of wilful defiance of the law which appears to lie at the core of the CFMEU’.³

The information obtained through examination notices allows the regulator to determine whether breaches of the law have occurred and to make an informed judgment about whether to commence proceedings or take other steps to ensure compliance with the law. The Fair Work Building Industry Inspectorate has advised that information obtained through the examination notice process has been important in around a quarter of its decisions to initiate proceedings. In other cases, the information obtained through the notice has led to a decision not to proceed with court action, thereby sparing the proposed respondent from the burden of court proceedings and avoiding unnecessary use of the regulator’s and the court’s resources.

Therefore it is considered that to the degree that extending the period in which the Director may apply for an examination notice limits the right to privacy contained in Article 17 of the ICCPR, it is a reasonable, necessary and proportionate limitation in the pursuit of the legitimate policy objective of seeking to ensure that building industry participants observe applicable workplace relations laws.

Disclosure of information

Information obtained under an examination notice (referred to as protected information) is likely to include personal information. Section 65 of the Fair Work (Building Industry) Act contains a general prohibition on recording or disclosing protected information. However, there are limited exceptions to this rule which engage the right to privacy and reputation contained in Article 17 of the ICCPR.

Protected information may only be recorded or disclosed:

- for the purposes of the performance of the Director’s functions or the exercise of the Director’s powers;
- in the course of performing the duties of official employment; or
- to the Commonwealth, a state or a territory (or an authority of the same) for the purpose of assisting in building industry law enforcement.

These exceptions to the prohibition on recording or disclosing protected information are necessary to support the operation of the Fair Work (Building Industry) Act and law enforcement activities more generally. Any recording or disclosure of protected information that does not fall

³ *Interim Report of the Royal Commission into Trade Union Governance and Corruption* (2014), Volume 1, Page 26

within one of the exceptions attracts a maximum penalty of imprisonment for 12 months. The severity of this penalty provides a strong deterrent to the unauthorised use of information through the examination notice process.

In addition, section 66 prohibits information relating to the affairs of an individual from being included in an annual report or a report to the Minister if the individual is named or identified or it is reasonably likely that people generally could identify the individual from the information provided.

In light of this and the limited range of circumstances in which information may be recorded or disclosed, it is considered that the limitations on the rights contained in Article 17 of the ICCPR are reasonable and proportionate limitations.

Privilege against self-incrimination

Subsection 53(1) of the Fair Work (Building Industry) Act provides that a person is not excused from giving information, producing a document, or answering a question under an examination notice on the grounds that to do so might tend to incriminate the person or otherwise expose the person to a penalty or other liability. This limits a person's right not to be compelled to testify against himself or herself or to confess guilt.

The abrogation of the privilege against self-incrimination was considered necessary by the Cole Royal Commission on the grounds that the building industry regulator would otherwise not be able to adequately perform its functions.⁴ After examining the necessity of the examination notice process, the Wilcox Report concluded that a new regulator should be invested with powers similar to those contained in the *Building and Construction Industry Improvement Act 2005*.⁵

In recognition of the seriousness of displacing the right not to answer questions on these grounds, however, subsection 53(2) of the Fair Work (Building Industry) Act provides a use and derivative use indemnity in relation to information obtained in this way. This ensures that information obtained under an examination notice cannot be used in proceedings against the person (except in very limited circumstances, for example, in proceedings for failure to comply with an examination notice).

The privilege against self-incrimination is clearly capable of limiting the information that may be available to the Fair Work Building Industry Inspectorate, compromising its ability to monitor and enforce compliance with the law. The approach adopted in the Fair Work (Building Industry) Act is consistent with the approach in section 713 of the *Fair Work Act 2009*, as well as the *Work Health and Safety Act 2011* and the *Competition and Consumer Act 2010*.

Therefore it is considered that to the extent that the rights contained in Article 14 are limited, the limitation is reasonable, necessary and proportionate in the pursuit of the legitimate policy objective of seeking to ensure that building industry participants observe applicable workplace relations laws.

⁴ *Royal Commission into the Building and Construction Industry* (2003), Volume 11, Pages 37-39

⁵ *Transition to Fair Work Australia for the Building and Construction Industry Report*, (2009), Recommendation 3

Conclusion

The amendments to the Fair Work (Building Industry) Act contained in the Bill are compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that the amendments may limit human rights and freedoms, those limitations are reasonable, necessary and proportionate in the pursuit of legitimate objectives.

Minister for Employment, Senator the Hon. Eric Abetz

NOTES ON CLAUSES

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

Fair Work (Building Industry) Act	<i>Fair Work (Building Industry) Act 2012</i>
AAT	Administrative Appeals Tribunal
the Bill	Construction Industry Amendment (Protecting Witnesses) Bill 2015

Clause 1 – Short title

1. This is a formal provision specifying the short title of the Bill.

Clause 2 – Commencement

2. This clause sets out when the provisions of the Bill commence.

Clause 3 – Schedules

3. This clause provides that legislation that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule, and any other item in a Schedule operates according to its terms.

SCHEDULE 1 – AMENDMENT

Fair Work (Building Industry) Act 2012

Item 1 – Section 46

4. Section 45 of the Fair Work (Building Industry) Act sets out the requirements for when and how the Director of the Fair Work Building Industry Inspectorate may apply to a nominated AAT presidential member for an examination notice in relation to an investigation into suspected breaches of the Fair Work (Building Industry) Act or a designated building law.

5. Section 46 of the Fair Work (Building Industry) Act provides that an application for an examination notice may not be made after the end of three years after the day on which section 45 commences. Section 45 commenced by proclamation on 1 June 2012.

6. This item amends section 46 of the Fair Work (Building Industry) Act to extend the period during which the Director can apply for an examination notice under section 45 by a further two years.

Item 2 – At the end of section 46

7. This item inserts a note after section 46 that explains that the effect of section 46, as amended, is that the Director may not make an application for an examination notice under section 45 after 1 June 2017.