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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

BUILDING AND CONSTRUCTION INDUSTRY (IMPROVING PRODUCTIVITY) BILL 2013

EXPLANATORY MEMORANDUM

(Circulated with the authority of the
Minister for Employment,
Senator the Hon Michaelia Cash)

Table of abbreviations and common terms

Abbreviation or common term	Full term or description
ABCC	Australian Building and Construction Commission
ABC Commissioner	Australian Building and Construction Commissioner
Acts Interpretation Act	<i>Acts Interpretation Act 1901</i>
APS	Australian Public Service
BCII Act	<i>Building and Construction Industry Improvement Act 2005</i>
Criminal Code	<i>Criminal Code Act 1995</i>
EEZ	exclusive economic zone
FW Act	<i>Fair Work Act 2009</i>
FW(BI) Act	<i>Fair Work (Building Industry) Act 2012</i>
FW Transitional Act	<i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
PS Act	<i>Public Service Act 1999</i>
WHS	work health and safety

BUILDING AND CONSTRUCTION INDUSTRY (IMPROVING PRODUCTIVITY) BILL 2013

OUTLINE

The Building and Construction Industry (Improving Productivity) Bill 2013 (the Bill) fulfils the Government's election commitment to re-establish the Australian Building and Construction Commission (ABCC).

The Bill has two predecessor Acts upon which it is built. The first of these was the *Building and Construction Industry Improvement Act 2005* (the BCII Act). This Act was established in response to the workplace relations recommendations of the Royal Commission into the Building and Construction Industry, which reported in 2003. The Royal Commission established that building sites and construction projects were hotbeds of intimidation, lawlessness, thuggery and violence.

The BCII Act was aligned with the *Workplace Relations Act 1996*, by mirroring its relevant provisions. Its most significant provisions, however, were directed at the unique nature of the building industry, and addressed specific inappropriate and unlawful behaviour which the Royal Commission found was prevalent in the building industry. The objects of the Act were furthered by the inclusion of appropriate penalties and the establishment of an effective regulator which had a full suite of powers available to it.

While the ABCC existed, the performance of the building and construction sector improved. For example, industry productivity improved, Australian consumers were better off and there was a significant reduction in days lost through industrial action.

The BCII Act was replaced by the *Fair Work (Building Industry) Act 2012* (FW(BI) Act), which abolished the Office of the Australian Building and Construction Commissioner and created a new agency, the Office of the Fair Work Building Industry Inspectorate, to regulate the building and construction industry with restricted powers. It also removed the building industry specific laws that provided higher penalties for building industry participants for breaches of industrial laws and broader circumstances under which industrial action attracts penalties.

Under the FW(BI) Act standards of behaviour in the industry have declined. The industry has returned to the 'bad old days' where disputes are violent and there exists thuggery and disregard for the rule of law. Some examples of this lawlessness include:

- In August 2012, the CFMEU / Myer Emporium dispute saw violence in city streets, militant protestors intimidating the community and attacks on police horses.
- In November 2012, the Little Creatures brewery site in Geelong suffered a violent dispute where picketers were accused in court documents of making throat-cutting gestures, threats of stomping heads in, workers being told they were dead and of shoving, kicking and punching motor vehicles. On social media, a union member also threatened to boycott a local store for providing food to the workers on site.
- In February 2013, City West Water in Werribee was subject to a dispute where protestors threatened people with 'Columbian neckties' and the dispute was so heated that workers had to be flown in by helicopter.

The Bill re-establishes the ABCC by replacing the Office of the Fair Work Building Industry Inspectorate and putting in place a regulator with powers that proved strong and effective under the BCII Act. Like the BCII Act, Chapters 5 and 6 of the Bill include building industry specific provisions relating to unlawful action and coercion and restores the higher penalties for contraventions of those provisions.

The Bill comprises 9 Chapters.

Chapter 1 contains the objects of the Bill and sets out definitions of terms used in the Bill. It also gives the meaning in detail of 3 key definitions which are essential to interpreting the provisions of the Bill; they are building work, industrial action and protected industrial action. Finally the geographical scope of the Bill is clarified.

Chapter 2 establishes the Australian Building and Construction Commissioner (ABC Commissioner). The ABC Commissioner is appointed under this Chapter, and included are the terms and conditions of the Commissioner, the staff of the Commission, and the people who assist the Commissioner. Many of the functions and powers in the Bill are conferred on the ABC Commissioner and those who are part of the Australian Building and Construction Commission such as inspectors. These functions and powers will assist the regulator to monitor compliance with relevant laws by the industry, take enforcement action where necessary, and promote appropriate standards of conduct by building industry participants.

Chapter 3 allows the Minister to issue a Building Code. This is a code of practice that persons such as building industry participants and the Commonwealth must comply with in respect of building work. The ABC Commissioner can require a person to report on his or her compliance with the Building Code.

A Building Code is currently in force, and it prescribes the standards which building industry participants who undertake Commonwealth funded building work are expected to comply with.

Chapter 4 deals with the appointment and functions of the Federal Safety Commissioner, who holds an SES position in the Department. The Commissioner has two main functions; one in relation to work health and safety in the building industry, and the other in relation to the accreditation scheme. The scheme is prescribed by the rules, and any person who wishes to carry out work funded by the Commonwealth or a Commonwealth authority must be accredited by the Federal Safety Commissioner in accordance with the scheme.

Chapter 5 prohibits unlawful industrial action, which includes bans on working, employees failing to attend work or employers locking out employees. This Chapter applies only if the unlawful action or unlawful picket has a connection to a constitutionally-covered entity. Any person is able to apply for an injunction to restrain a person from organising or engaging in unlawful industrial action or an unlawful picket in relation to building work.

The provisions of the *Fair Work Act 2009* (FW Act) relating to strike pay also apply in relation to unlawful industrial action.

Chapter 6 is designed to eliminate action which is taken with intent to coerce a person, or to apply undue pressure, and discrimination in the industry. It prohibits the coercion of persons in relation to the engagement of contractors and employees or choice of superannuation fund, and coercion or undue pressure in relation to Commonwealth industrial instruments. It is also

unlawful to take action against a building employer because building employees are or are not covered by a Commonwealth industrial instrument. Orders can be made by a court under Chapter 8 if a person is alleged to have taken unlawful action.

Chapter 7 is about the powers of the ABC Commissioner to obtain information. The Commissioner may require a person to give information, produce documents or answer questions relating to an investigation of a suspected contravention of this Bill or a designated building law by a building industry participant.

The ABC Commissioner requires the person to do this by giving the person an examination notice, which the person must comply with. The Commonwealth Ombudsman oversees the exercise of these powers.

Australian Building and Construction Inspectors, and Federal Safety Officers, (who together are called authorised officers) are appointed in accordance with this Chapter. Powers are conferred on these authorised officers. The powers include the power to enter premises, the power to ask a person's name and address, and the power to require persons to produce records or documents. It is an offence to intentionally hinder or obstruct an authorised officer who is exercising any of these powers.

Chapter 8 deals with enforcement. An authorised applicant, who includes an inspector or a person affected by the contravention, may apply to certain courts for an order relating to the contravention. The courts may issue injunctions, order damages, and impose a civil penalty. The Chapter also sets out rules relating to, multiple contraventions, civil proceedings and criminal proceedings and admissibility of evidence. Enforceable undertakings and compliance notices are also provided for.

Chapter 9 deals with miscellaneous matters, including the following:

- self-incrimination;
- protection against liability of officials for conduct in good faith;
- records and documents not admissible in criminal proceedings not taken under this Bill;
- the protection and disclosure of information and confidential information;
- the power of the ABC Commissioner to intervene in court and Commission proceedings; and
- jurisdiction of courts, particularly in relation to unlawful industrial action.

FINANCIAL IMPACT STATEMENT

The Government committed to providing an additional \$35 million over four years for the re-established ABCC.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

NOTES ON CLAUSES

Chapter 1 – Preliminary

Clause 1 – Short Title

1. This specifies the short title of the Act as the *Building and Construction Industry (Improving Productivity) Act 2013*.

Clause 2 – Commencement

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

Clause 3 – Main object of this Act

3. Subclause 3(1) provides that the main object of the Bill is to provide an improved workplace relations framework for building work so that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.
4. Subclause 3(2) sets out how the Bill would aim to achieve its main object. These aims are: improving the bargaining framework to encourage genuine bargaining at the workplace level; promoting respect for the rule of law; ensuring respect for the rights of building industry participants; ensuring that building industry participants are accountable for their unlawful conduct; providing effective means for investigating and enforcing the Act; improving work health and safety in building work; encouraging the pursuit of high levels of employment in the building industry; and providing assistance and advice to building industry participants about their rights.

Clause 4 – Simplified outline of this Act

Clause 5 – Definitions

5. This clause sets out definitions of terms used throughout the Bill. Many definitions replicate those contained in the BCII Act and FW(BI) Act.

Clause 6 – Meaning of *building work*

6. This definition is integral to the understanding and application of the Bill. It determines the scope of the Bill by forming the basis of terms such as building industry participant, building employee, building employer and building association. The coverage of all provisions of the Bill, like those in the predecessor BCII Act, is ultimately determined by reference to the definition of building work.
7. In order to ensure appropriate coverage for the legislation the definition of building work is broad. It is defined to mean any of the activities listed in paragraphs (1)(a) to (e).
8. Paragraph (a) covers the following building activities: the construction, alteration, extension, restoration, repair, demolition or dismantling of buildings, structures or works that form, or are to form, part of land, whether or not the buildings, structures or works are permanent.

9. To avoid doubt, paragraph (b) lists the same activities in relation to railways and docks but makes it clear that such activities in relation to railway rolling stock are excluded.
10. Paragraph (c) covers building activities that relate to the fit-out of buildings such as the installation in any building, structure or work of fittings including: heating; lighting; air-conditioning; ventilation; power supply; drainage; sanitation; water supply; fire protection; security; and communication systems.
11. Paragraph (d) covers all activities that are necessarily preparatory to or for the purpose of rendering complete any of the activities listed in paragraphs (a) to (c). Specific examples are provided, but the coverage of paragraph (d) is not limited to those examples.
12. Paragraph (e) provides that building work includes the transporting or supplying of goods to be used in work covered by paragraph (a), (b), (c) or (d) to sites (including any resource platform) where that work is being or may be performed is building work. This provision was not part of any predecessor Acts, and has been included in the Bill to ensure that the supply and transport of building goods to be used for building work fall within the scope of the Act. It is not intended to pick up the manufacture of those goods.
13. Paragraphs (f), (g) and (h) set out exceptions to the definition of building work.
14. Paragraphs (f) and (g) exclude activities where the purpose of those activities is to extract minerals, oil or gas.
15. To avoid any doubt, paragraphs (1)(f) and (g) do not prevent the Act from applying to building work that is performed on land in which there is an interest relating to the mining of oil, gas and minerals e.g. a mining or exploration licence or lease however described (subclause (2)).
16. A note reminds the reader that this Bill extends to any resource platform in the exclusive economic zone (EEZ) or in the waters above the continental shelf, as provided in clause 11. This is a reminder of the new provision that provides coverage of the Bill to the EEZ and waters above the continental shelf. Subclause 6 clarifies that in this Bill, land includes land beneath water.
17. Paragraph (h) excludes activities associated with domestic building. The Bill intends, as far as possible, to exclude the domestic housing sector from the coverage of the Bill. Any work that is part of a project for the construction, repair or restoration of a single-dwelling house or a building, structure or work associated with a single-dwelling house is excluded from the definition of building work (subparagraphs (1)(h)(i) and(ii)).
18. Alteration and extension activities will also be excluded from the definition of building work, where those activities are performed on a single-dwelling house and the resulting structure remains a single-dwelling house (subparagraph (1)(h)(iii)).
19. Dismantling and demolition activities will also be excluded from the definition of building work, where they are part of a project for the construction or repair etc. of a single-dwelling house.
20. The domestic building sector exception does not apply where the activities are performed as part of a project that is part of a multi-dwelling development consisting of, or including the construction of, at least 5 single-dwelling houses (subclause (3)).

21. Subclause (4) allows rules to be made to include additional activities. Subclause (5) allows activities to be excluded from the definition. It is intended that rules will be made where it is not clear whether or not a particular activity falls within the definition of building work.

Clause 7 – Meaning of *industrial action*

22. This clause is in similar terms to the FW Act and defines the term *industrial action* to mean any action of the following kinds:

- the performance of building work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to building work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
- a ban, limitation or restriction on the performance of building work by an employee or on the acceptance of or offering for building work by an employee;
- a failure or refusal: by an employee to attend work, where that work is building work; or to perform any building work at all by employees who attend work, where that work is building work;
- the lockout of employees from their work, by their employer, where that work that is building work.

23. Section 19(1) of the FW Act does not explicitly require an industrial context for industrial action. A note, therefore, refers the reader to the case of *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*, PR946290, in which the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of disputation and bargaining.

24. Subclause (2) sets out what is not included in the definition of industrial action. It does not include:

- action by employees that is authorised or agreed to in advance and in writing by the employer of the employees;
- action by an employer that is authorised or agreed to in advance and in writing by, or on behalf of, the employees of the employer;
- action by an employee based on a reasonable concern of the employee about an imminent risk to his or her health or safety. This exception applies as long as the employee does not unreasonably fail to comply with a direction to perform other available, safe and appropriate work. The other available work can be at the same or another workplace.

25. Subclause (3) is about when there is a lockout. There is a lockout of employees from their work by an employer if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts.

26. Subclause (4) provides that for the purposes of paragraph 2(c), which relates to health and safety actions, a person who seeks to rely on that paragraph has the burden of proving the paragraph applies. This subclause is in similar terms to that contained in the predecessor BCII Act. It means an employee will be required to prove their concern and its

reasonableness as it relates to their own safety (i.e. not the safety of others). It does not require the employee to prove that there is in fact an imminent risk.

Clause 8 – Meaning of *protected industrial action*

27. Subclause (1) provides that action is protected industrial action if the action is protected industrial action within the meaning of the FW Act.

28. Subclause (2) sets out exceptions to the meaning in subclause (1). It provides that action is not protected industrial action if the action is protected industrial action (within the meaning of the FW Act) but:

- the action is engaged in in concert with one or more persons who are not protected persons for the action; or
- the organisers include one or more persons who are not protected persons for the action.

29. Subclause(3) provides that the following persons are *protected persons*:

- an employee organisation that is a bargaining representative for the proposed agreement;
- a member of such an organisation who is employed by the employer and who will be covered by the proposed agreement;
- an officer or employee of such an organisation acting in that capacity;
- an employee who is a bargaining representative for the proposed agreement.

30. This clause is in similar terms to that contained in the predecessor BCII Act.

Clause 9 – Meaning of *ancillary site*

31. Clause 9 provides a definition of ancillary site for the purposes of the unlawful picketing prohibition in clause 47.

Clause 10 – Extension of Act to Cocos (Keeling) Islands and Christmas Island

32. Clause 10 provides that this Bill extends to the territory of Christmas Island and Cocos (Keeling) Islands and applies in relation to those territories with such modifications as are prescribed by the rules.

Clause 11 – Extension of Act to EEZ and waters above continental shelf

33. This clause provides that this Bill extends to or in relation to any resources platform and certain ships in the EEZ or in the waters above the continental shelf. This is an additional provision that was not included in the predecessor BCII Act. It is included to ensure that the Act extends to building work carried out in the EEZ and waters above the continental shelf e.g. on resource platforms.

34. The Bill will apply to any ship in the EEZ and continental waters that operates to or from an Australian port.

35. Subclause (2) allows rules to be made in relation to further extensions of the Bill, but only in relation to the EEZ or to the waters above the continental shelf.

Clause 12 – Geographical application of offences

36. This clause provides that Division 14 (standard geographical jurisdiction) of the Criminal Code does not apply in relation to an offence against this Bill.
37. A note refers to clause 11 of the Bill, which clarifies that the extended geographical application that clause 11 gives to this Bill will apply to the offences under this Bill.

Clause 13 – Act to bind Crown

38. This clause provides that the Bill applies to the Crown in right of the Commonwealth and each of the States and Territories, but that this does not mean that the Commonwealth or a State or Territory can be prosecuted for an offence under the Bill. It is intended, however, that the Commonwealth might be liable for a civil penalty.

Chapter 2—The Australian Building and Construction Commissioner

Part 1—Simplified outline of this Chapter

Clause 14 – Simplified outline of this Chapter

39. Clause 14 provides a simplified outline of Chapter 2.

Part 2—The Australian Building and Construction Commissioner

Clause 15 – ABC Commissioner and Deputy ABC Commissioners

40. Clause 15 provides that there is to be an ABC Commissioner. The ABC Commissioner will be assisted by the number of Deputy ABC Commissioners appointed from time to time.

Clause 16 – Functions of ABC Commissioner

41. Clause 16 sets out the ABC Commissioner’s broad functions. These are to:

- monitor and promote appropriate standards of conduct by building industry participants, including by monitoring compliance with this Bill, designated building laws and the Building Code; and referring matters to other relevant agencies and bodies;
- investigate suspected contraventions, by building industry participants, of this Bill, designated building laws or the Building Code;
- institute, or intervene in, proceedings in accordance with this Bill;
- provide assistance and advice to building industry participants about their rights and obligations under this Bill, designated building laws and the Building Code;
- provide representation to a building industry participant who is, or might become, a party to proceedings under this Bill, a designated building law or the Building Code where he or she considers that this would promote enforcement; and
- disseminate information relevant to building industry participants.

Clause 17 – Minister’s directions to ABC Commissioner

42. Clause 17 allows the Minister to give written directions, by legislative instrument, to the ABC Commissioner. The directions may specify the manner in which the ABC Commissioner must exercise the powers or perform the functions of the ABC Commissioner under this Bill. Clause 17 only permits the Minister to give general directions.

43. The Minister must not give a direction in relation to a particular case (subclause (2)).

44. The ABC Commissioner must comply with a direction under subclause (1) (subclause (3)).

45. Directions by the Minister are disallowable instruments under the Legislative Instruments Act (subclause (4)).

Clause 18 – Minister may require reports

46. Clause 18 allows the Minister, in writing, to direct the ABC Commissioner to provide specified reports relating to the ABC Commissioner's functions.
47. A note refers the reader to clause 107, which restricts the disclosure of personal information in a report.
48. The ABC Commissioner must comply with the direction (subclause (2)).
49. A direction for the purpose of this clause is not a legislative instrument (subclause (3)). This subclause is included to assist readers, by pointing out that the instrument would not be a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Clause 19 – Delegation by ABC Commissioner

50. Clause 19 allows the ABC Commissioner to delegate (in writing) his or her powers and functions, other than his or her functions or powers as an inspector. His or her powers can be delegated to a Deputy ABC Commissioner, an inspector, an SES employee (or acting SES employee) in the Australian Public Service (APS) or a person prescribed by the rules.
51. The ABC Commissioner's powers or functions in relation to examination notices under clause 61 may only be delegated to a Deputy ABC Commissioner, or if no Deputy has been appointed an SES employee (subclause (2)).
52. In exercising delegated powers or functions the delegate must comply with any directions given by the ABC Commissioner (subclause (3)). Subclause (5) provides that the ABC Commissioner may give directions for this purpose.
53. Details of delegations made under this clause are to be published as soon as is practicable after the delegation occurs (subclause (4)).
54. To assist the reader, subclauses (6) and (7) clarify that a written direction under subclause (5) that is of general application is a legislative instrument.
55. If the direction relates to a particular case, however, a written direction will not be a legislative instrument (subclause (7)). This subclause is included to assist readers, by pointing out that the instrument would not be a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Clause 20 – Annual report

56. Clause 20 requires the ABC Commissioner to provide an annual report for each financial year. The report must be prepared as soon as practicable after the end of the financial year (subclause (1)).
57. The report must contain details of the number, and type, of matters that were investigated by the ABC Commissioner during the financial year and details of assistance and advice provided to building industry participants. It must also contain details of the extent to which the Building Code was complied with during the financial year (subclause (2)).

58. The report must also include details of directions given under clauses 17 and 18, and details of delegations under clause 19 (subclause (3)).
59. Subclause (4) provides that the Minister may notify the ABC Commissioner in writing of particular work health and safety matters that need not be covered in the part of the report that relates to the Building Code.
60. Subclause (5) requires the Minister to cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of receiving it.

Clause 21 – Appointment

61. Clause 21 provides for the Minister to appoint the ABC Commissioner and Deputy ABC Commissioners by written instrument.
62. Subclause (2) provides that the ABC Commissioner is appointed on a full-time basis and that Deputy ABC Commissioners can be appointed on either a full-time or part-time basis.
63. Before appointing a person as a Commissioner, the Minister must be satisfied that the person has suitable qualifications or experience, and is of good character (subclause (3)).
64. The length of an appointment is to be specified in the instrument of appointment, but cannot be longer than 5 years (subclause (4)).
65. A Commissioner holds office on terms and conditions (if any) in relation to matters not covered by this Bill that are determined by the Minister (subclause (5)).

Clause 22 – Acting appointments

66. This clause provides for the appointment by the Minister, by written instrument, of an Acting ABC Commissioner when necessary.

Clause 23 – Remuneration

67. Clause 23 provides for the Remuneration Tribunal to determine the remuneration of Commissioners or, in the absence of a determination, the regulations can set the remuneration. In addition, Commissioners are to be paid any allowances prescribed by the rules.
68. Subclause (3) provides that this clause has effect subject to the *Remuneration Tribunal Act 1973*. This will ensure that general provisions of the Remuneration Tribunal Act are not displaced by this clause.

Clause 24 – Leave of absence

69. The Remuneration Tribunal is to determine the recreation leave entitlements for full-time Commissioners (subclause (1)).
70. Subclause (2) allows the Minister to grant a full-time ABC Commissioner leave of absence, other than recreation leave, on such terms and conditions as he or she determines.

71. Subclause (3) allows the Minister to grant a part-time ABC Commissioner leave of absence, including recreation leave, on such terms and conditions as he or she determines.

Clause 25 – Engaging in other paid employment

72. Clause 25 requires a full-time Commissioner to obtain approval from the Minister before engaging in other paid employment. A part-time Commissioner must not engage in other paid employment that could result in a conflict with his or her duties as a Commissioner.

73. These arrangements are complemented by clause 28 which allows the Minister to terminate a Commissioner's appointment if the requirements of clause 25 are contravened.

Clause 26 – Disclosure of interests

74. Clause 26 requires that a Commissioner must give written notice to the Minister of all material personal interests that the Commissioner has or acquires and that conflict or could conflict with the proper performance of the Commissioner's functions.

Clause 27 – Resignation

75. Clause 27 provides that a Commissioner may resign by written notice given to the Minister.

Clause 28 – Termination

76. Subclause (1) allows the Minister to terminate the appointment of a Commissioner:

- for misbehaviour; or
- if the Commissioner is unable to perform the duties of his or her office because of physical or mental incapacity.

77. Subclause (2) provides that the Minister must terminate the appointment of a Commissioner if the Commissioner becomes bankrupt or takes specified steps related to insolvency.

78. The Minister must terminate the appointment of a full-time Commissioner:

- if the Commissioner is absent from duty without leave for 14 consecutive days or for 28 days in any 12 month period;
- if the Commissioner engages without the Minister's approval in paid employment outside the duties of office.

79. The Minister must terminate the appointment of a part-time Commissioner if the Commissioner engages in paid employment that conflicts or could conflict with the proper performance of duties.

80. In any case if the Commissioner fails, without reasonable excuse, to comply with clause 26 (disclosure of interests).

Part 3—The Australian Building and Construction Commission

Clause 29 – The Australian Building and Construction Commission

81. This clause applies to the body known as the Office of the Fair Work Building Industry Inspectorate that was established by section 26J of the *Fair Work (Building Industry) Act 2012* (as in force before the commencement of this clause).
82. Subclause (2) provides that the name of the Office of the Fair Work Building Industry Inspectorate will change to the ABCC. It also ensures that even though the name of that body has changed, the body continues in existence by force of this clause.

Clause 30 – Staff

83. The staff of the Commission are to be engaged under the PS Act.
84. The ABC Commissioner and the staff of the Commission together constitute a Statutory Agency for the purposes of the PS Act. The ABC Commissioner is the head of that Statutory Agency.

Clause 31 – Persons assisting the ABC Commissioner

85. The ABC Commissioner may also be assisted by employees of Agencies (within the meaning of the PS Act), by officers or employees of a State or Territory, or by officers or employees of authorities of the Commonwealth, a State or a Territory. These assistants will be persons whose services are made available to the ABC Commissioner in connection with the performance of any of his or her functions.
86. A note points out an example to assist the reader. The example is that State or Territory employees could be made available to assist the ABC Commissioner in providing education in a particular region.
87. Section 71 of the PS Act makes provision for State employees to perform services in an Agency as a State employee (as defined in that Act).

Clause 32 – Consultants

88. This clause provides that the ABC Commissioner may engage consultants with suitable qualifications and experience on behalf of the Commonwealth (subclause (1)). The terms and conditions of engagement of consultants are to be determined in writing by the ABC Commissioner (subclause (2)).

Chapter 3—The Building Code

Clause 33 – Simplified outline of the Chapter

89. Clause 32 provides a simplified outline of Chapter 3.

Clause 34 – Minister may issue Building Code

90. Clause 34(1) provides that the Minister may issue one or more documents that together constitute a code of practice that is to be complied with by persons in respect of building work. The Minister may issue this code by legislative instrument.

91. A note points out that the code is called the Building Code, as provided by clause 5 of the Bill.

92. Subclause (2) specifically authorises the Minister to issue one or more documents under subclause (1) that relate to work health and safety matters in respect of building work (the current work).

93. Subclause (3) provides that the Building Code cannot require a person to comply with the Code unless the person is:

- a building contractor that is constitutional corporation; or
- a building industry participant and the current work is to be carried out in a Territory or Commonwealth place; or
- the Commonwealth or a Commonwealth authority.

Clause 35 – Building industry participants to report on compliance with the Building Code

94. Clause 35(1) provides that the ABC Commissioner may give a written notice to a person who is required to comply with the Building Code in respect of particular building work.

95. A note refers the reader to subclause 34(3) for persons who are required to comply with the Building Code.

96. The notice may direct a person to give a written report to the ABC Commissioner containing specified information about the extent to which the person complied with the Building Code in respect of that building work (subclause (2)).

97. The person must comply with the notice within the period specified by the notice, which must be at least 14 days (subclause (3)). A note points out that this is a Grade B civil penalty.

98. A notice under subclause (1) is not a legislative instrument (subclause (4)). This subclause is included to assist readers, by pointing out that the instrument would not be a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Chapter 4—The Federal Safety Commissioner

Part 1—Simplified outline of this Chapter

Clause 36 – Simplified outline of this Chapter

99. This clause provides a simplified outline of Chapter 4.

Part 2 – The Federal Safety Commissioner

Clause 37 – Federal Safety Commissioner

100. Subclause 37(1) creates the statutory office of the Federal Safety Commissioner. This position existed under the predecessor BCII Act and the FW(BI) Act. The Secretary must, by writing, designate a position in the Department as the position of Federal Safety Commissioner. A note refers to section 77 of the PS Act, which deals with the creation of positions.

101. The position can only be occupied by an SES employee (or acting SES employee) who is the Federal Safety Commissioner (subclauses (2) and (3)).

102. An instrument under subclause (1) is not a legislative instrument (subclause 4). This subclause is included to assist readers, by pointing out that the instrument would not be a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Clause 38 – Functions of the Federal Safety Commissioner

103. Clause 38 sets out the Federal Safety Commissioner's functions. These are to:

- promote work health and safety in relation to building work;
- perform functions as the accreditation authority for the purposes of the WHS Accreditation Scheme;
- promote the benefits of, and disseminate information about, the WHS Accreditation Scheme;
- refer matters to other relevant agencies or bodies;
- perform any other functions conferred on the Federal Safety Commissioner by this Bill or another Act.

Clause 39 – Minister's directions to Federal Safety Commissioner

104. Subclause 39(1) allows the Minister to give written directions, by legislative instrument, to the Federal Safety Commissioner. The directions must specify the manner in which the Federal Safety Commissioner must exercise the powers or perform his or her functions under this Bill.

105. Clause 39 only permits the Minister to give general directions. The Minister must not give a direction in relation to a particular case (subclause (2)).

106. Subclause (3) provides that the Federal Safety Commissioner must comply with a direction under subclause (1).

107. Directions by the Minister are disallowable instruments under the Legislative Instruments Act (subclause (4)). This is despite anything in section 44 of that Act.

Clause 40 – Delegation by Federal Safety Commissioner

108. Subclause 40(1) allows the Federal Safety Commissioner to delegate his or her powers and functions to a Federal Safety Officer, an SES employee or acting SES employee, or a person (whether or not an SES employee) prescribed by the rules.

109. In exercising delegated powers or functions the delegate must comply with any directions given by the Federal Safety Commissioner (subclause (2)). The Federal Safety Commissioner may give a direction under this subclause (subclause (4)).

110. Details of delegations made under this clause are to be published as soon as practicable after the delegation occurs (subclause (3)).

111. A written direction under subclause (4) that relates to a particular case is not a legislative instrument. This subclause is included to assist readers, by pointing out that the instrument would not be a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Clause 41 – Acting Federal Safety Commissioner

112. This clause provides for the appointment of an SES employee or acting SES employee as an Acting Federal Safety Commissioner when necessary.

Clause 42 – Consultants

113. Clause 42 allows the Federal Safety Commissioner to engage consultants.

Part 3—WHS Accreditation Scheme for Commonwealth building work

Clause 43 – WHS Accreditation Scheme for Commonwealth building work

114. Clause 43 provides for an accreditation scheme (to be known as the WHS Accreditation Scheme) and provides that the details of this scheme will be contained in the rules.

115. The rules will provide for an accreditation scheme for persons who wish to carry out building work funded by the Commonwealth or Commonwealth authorities (subclause (1)).

116. The rules must provide that the Federal Safety Commissioner will be the accrediting authority under the scheme (subclause (2)).

117. Fees may be imposed for applications under the accreditation scheme (subclause (3)).

118. The Commonwealth or a Commonwealth authority must not fund building work unless:

- contracts for the building work will be entered into with builders who are accredited persons, and

- at the time of funding, the Commonwealth or Commonwealth authority takes appropriate steps to ensure that builders will be accredited persons when they carry out the work.

119. The rules may provide exceptions to this subclause (subclause (4)).

120. Subclause (5) provides that the Commonwealth or Commonwealth authority funds building work if it pays for or finances the building work. They will also fund the work if they facilitate the carrying out of the work by entering into a pre-construction agreement that relates to the work. They will also fund the work if they fund or finance pre-construction agreements.

121. Subclause (8) sets out relevant definitions.

Chapter 5 – Unlawful action

Clause 44 – Simplified outline of this Chapter

122. This clause provides a simplified outline of Chapter 5.

Clause 45 – Action to which this Chapter applies

123. This clause sets out actions to which Chapter 5 applies. Those actions are action:

- taken by a constitutionally-covered entity as defined;
- that affects (or is capable of affecting) or taken with intent to affect the activities, functions, relationships or business of a constitutionally-covered entity;
- that consists of advising, encouraging or inciting, or action taken with intent to coerce, a constitutionally-covered entity to take (or not take), or threaten to take (or not take), particular action in relation to another person.

Clause 46 – Unlawful industrial action prohibited

124. This clause provides that a person must not organise or engage in unlawful industrial action. A similar prohibition was included in the BCII Act. A note points out that this is a Grade A civil penalty.

Clause 47 – Unlawful picketing prohibited

125. This clause provides that a person must not organise or engage in an unlawful picket. Unlawful pickets were not a feature of any of the predecessor Acts and has been included in this Bill to address the disruptions to the building industry caused by picketing.

126. Subclause (2) describes what an unlawful picket is. An unlawful picket is action that:

- has the purpose of preventing or restricting a person from accessing or leaving a building site or an ancillary site. This would operate irrespective of whether someone is actually accessing (or leaving) a site.
- directly prevents or restricts a person accessing or leaving a building site or an ancillary site. This is to deal with persons who are intentionally blocking access to building work but is not intended to capture unintentional blockages.
- would reasonably be expected to intimidate a person accessing or leaving a building site or an ancillary site. This would mean that it would not be necessary to prove that the person attempting to access was intimidated but that a reasonable person would be intimidated.

127. Subclause (2) also provides that action is not an unlawful picket action unless it is also motivated for a particular purpose.

128. Such motivation is motivation for the purpose of:

- supporting or advancing claims against a building industry participant in respect of the employment of employees or the engagement of contractors (subparagraph (2)(b)(i)); or

- advancing industrial objectives of a building association, then that action will also be an unlawful picket action (subparagraph (2)(b)(ii)); or
- is unlawful (apart from this section).

129. A note provides that this is a Grade A civil penalty.

130. A second note refers the reader to Division 2 of Part 2 of Chapter 6 of the Bill (reason for action).

Clause 48 – Injunction against unlawful industrial action or picket

131. This clause allows any other person to apply to a relevant court for an injunction under this clause.

132. The Court may grant an injunction in the terms the court considers appropriate if the court is satisfied that unlawful industrial action or picket is:

- occurring; or
- threatened, impending or probable; or
- being organised.

133. The court will be able to grant an interim injunction, pending its determination of the application for the injunction (subclause (3)).

134. The power of the court to grant an injunction restraining a person (the defendant) from engaging in conduct may be exercised whether or not:

- it appears to the court that the defendant intends to engage again, or continue to engage in conduct of that kind; and
- has previously engaged in conduct of that kind; and
- there is an imminent danger of substantial damage to any person if the defendant engages in conduct of that kind (subclause (4)).

Clause 49- Payments relating to periods of industrial action

135. This clause provides that Division 9 of Part 3-3 of the FW Act (payment relating to periods of industrial action) applies in relation to industrial action relating to building work with modifications.

136. References in that Division to industrial action are to be read as references to industrial action under this Bill and to which Chapter 5 of this Bill applies (paragraph (a)). Likewise references to protected industrial action are to be read as references to protected industrial action within the meaning of this Act (paragraph (b)).

137. If the person contravenes a civil remedy provision specified in the FW Act for payments relating to periods of industrial action and the person is a body corporate, the pecuniary penalty must not be more than 1,000 penalty units. The maximum penalty under the FW Act is 60 penalty units.

Chapter 6—Coercion, discrimination and unenforceable agreements

Part 1—Simplified outline of the Chapter

Clause 50 – Simplified outline of this chapter

138. This clause provides a simplified outline of Chapter 6.

Part 2—Coercion and Discrimination

Clause 51 – Action to which this Part applies

139. This clause provides that the Part applies to the following action:

- action taken by a constitutionally-covered entity as defined;
- action that affects (or is capable of affecting) or taken with intent to affect the activities, functions, relationships or business of a constitutionally-covered entity;
- action that consists of advising, encouraging or inciting, or action taken with intent to coerce, a constitutionally-covered entity to take (or not take), or threaten to take (or not take), particular action in relation to another person.

Clause 52 – Coercion relating to allocation of duties etc. to particular person

140. This clause provides that a person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person to:

- employ, or not employ, a particular person as a building employee; or
- engage, or not engage, a particular independent contractor as a building contractor; or
- allocate, or not allocate, particular duties or responsibilities to a building employee or building contractor; or
- designate a building employee or building contractor as having, or not having, particular duties or responsibilities.

141. Actions with intent to coerce include those against third persons.

142. This clause is in similar terms to that contained in the predecessor BCII Act. Similar prohibitions are also contained in the FW Act.

143. A note refers the reader to Division 2 (reasons for action and coercion). A second note points out that this is a Grade A civil penalty.

Clause 53 – Coercion relating to superannuation

144. This clause provides that a person must not coerce another person in relation to superannuation.

145. Subclause (1) provides that a person must not take or organise any action (or threaten to take or organise) or refrain from taking (or threaten to refrain from taking) action with the intent to:

- coerce a building employee to nominate a particular superannuation fund or scheme to receive the employee's superannuation contributions; or
- coerce a building employer to pay the employer's superannuation contributions in respect of building employees to a particular superannuation fund or scheme.

146. This clause is in similar terms to that contained in the predecessor BCII Act. A similar prohibition is also contained in the FW Act.

147. A note refers the reader to Division 2 (reasons for action and coercion). A second note points out that this is a Grade A civil penalty.

148. Subclause (1) does not apply to protected industrial action (subclause (2)).

Clause 54 – Coercion of persons to make, vary, terminate etc. enterprise agreements etc.

149. This clause provides that coercion must not take place in relation to enterprise agreements.

150. Subclause (1) provides that a person must not take or organise any action (or threaten to take or organise) or refrain from taking (or threaten to refrain from taking) action with the intent to coerce or apply undue pressure to:

- agree or not agree to make, vary, extend or terminate a building enterprise agreement; or
- approve to make, vary, extend or terminate a building enterprise agreement.

151. A note refers the reader to Division 2 (reasons for action and coercion). A second note points out that this is a Grade A civil penalty.

152. Subclause (1) does not apply to protected industrial action (subclause (2)).

153. An employer must not coerce (or attempt to coerce) an employee in relation to who will be the employee's bargaining representative (subclause (3)). A note points out that this is a Grade A civil penalty.

154. An employer must not apply (or attempt to apply) undue pressure to an employee in relation to who will be the employee's bargaining representative (subclause (4)). A note points out that this is a Grade A civil penalty.

155. This clause is in similar terms to that contained in the predecessor BCII Act.

156. Similar prohibitions are also contained in the FW Act. Subclause (5) states that section 343 of the FW Act, to the extent that it relates to making, varying or terminating an enterprise agreement, or to the appointment or termination of a bargaining representative, will not apply if the agreement is a building agreement.

Clause 55 – Coverage by particular instruments

157. This clause provides at subclause (1) that a person must not take action against a building employer because building employees are, or are proposed to be, covered or not covered by a Commonwealth industrial instrument.
158. This clause is in similar terms to that contained in the predecessor BCII Act. A similar prohibition is also contained in the FW Act.
159. A note refers the reader to Division 2 (reasons for action and coercion). A second note points out that this is a Grade A civil penalty.
160. Subclause (1) does not apply to protected industrial action (subclause (2)).

Division 2—General provisions

Clause 56 – Multiple reasons for action

161. Clause 56 deals with the extent to which a person's action must be motivated by a particular reason to establish a contravention of clause 47 and Part 2 of Chapter 6. Like section 360 of the FW Act, this clause provides that a person takes action for a particular reason if the reasons for the action include that reason.

Clause 57 – Reason for action to be presumed unless proved otherwise

162. Clause 57 reverses the onus of proof applicable to civil proceedings for a contravention of clause 47 (unlawful picketing prohibited) and Part 2 of Chapter 6.
163. Generally a civil action places the onus on the complainant to establish on the balance of probabilities that the action complained of was carried out for a particular reason or with a particular intent.
164. Like section 361 of the FW Act, this clause provides that once a complainant has alleged that a person's actual or threatened action is motivated by a reason or intent that would contravene the relevant provision, that person has to establish on the balance of probabilities that the conduct was not carried out unlawfully. This is because in the absence of such a clause, it would be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason.
165. Subsection (1) does not apply in relation to an interim injunction. This is also consistent with the FW Act and is intended to address the problems that can arise from the interaction of the reverse onus with the 'balance of convenience' test that applies to interim injunctions.

Clause 58 – Advising, encouraging, inciting or coercing action

166. This clause sets out the circumstances in which a person will contravene this Part in relation to advising, encouraging, inciting or coercing a second person. It ensures that the second person will not be contravening this Part. Like section 363 of the FW Act, it is intended to ensure that a person cannot avoid being subject to the prohibitions in section 47 and Part 2 of Chapter 6 by getting another person to carry out the prohibited conduct.

167. Subclause (1) provides that if:

- for a particular reason (the first person's reason), a person advises, encourages or incites, or takes any action with intent to coerce, a second person to take action; and
- the action, if taken by the second person for the first person's reason, would contravene clause 47 (unlawful picketing prohibited) or a civil remedy provision in this Part;

the first person is taken to have contravened the provision.

168. Clause 58 makes clear that it is the reason motivating the first person (and not the incited or coerced person) that is relevant for the purposes of the prohibition.

169. A note refers the reader to clause 97 (capacity, state of mind etc. of the person being coerced etc.).

170. Subsection (1) does not limit the general ancillary liability provision contained in clause 92 (subclause (2)).

Part 3—Unenforceable agreements

Clause 59 – Project agreements not enforceable

171. Under subclause (1), an agreement is unenforceable to the extent it relates to building employees if certain conditions are met.

172. The conditions are that:

- the agreement is entered into with the intention to secure standard employment conditions for building employees at a particular site; and
- not all the employees are employed by a single enterprise; and
- either a party to the agreement is an organisation or a constitutionally-covered entity and at least some of the employees are its members.

173. Subclause (2) defines a single enterprise for the purpose of subclause (1).

Chapter 7—Powers to obtain information

Part 1—Simplified outline of this Chapter

Clause 60 – Simplified outline of this Chapter

174. This clause provides a simplified outline of Chapter 7.

Part 2—Examination notices

Clause 61 – ABC Commissioner may give examination notice

175. This clause allows the ABC Commissioner to give written notice to a person who has documents or who may give evidence in relation to an investigation of a suspected contravention of this Bill or a designated building law.

176. The ABC Commissioner may give a notice to a person that the Commissioner reasonably believes has information or documents, or is capable of giving relevant evidence, about an investigation referred to above (subclause (1)).

177. The notice may require a person to give information, to produce documents or attend before the Commissioner (or an assistant) at a time, manner and if applicable, place specified in the notice. The time must be at least 14 days after the notice is given (subclause (2)).

178. The ABC Commissioner may vary a notice given to a person by specifying, in writing, a later time which is at least 14 days after the notice is first given to the person (subclause (3)).

179. A person attending before the ABC Commissioner (or an assistant), may, if the person so chooses, be represented by a lawyer (subclause (4)).

180. The ABC Commissioner, or an assistant, may require the information or answers to be verified by, or given on, oath or affirmation, and either orally or in writing. For that purpose, the ABC Commissioner, or an assistant, may administer the oath or affirmation (subclause 5)).

181. The oath or affirmation is an oath or affirmation that the information or answers are or will be true (subclause (6)).

182. Subclause (7) clarifies that this clause is not limited by any other law that prohibits the communication of information, unless that law expressly excludes this clause from operating.

Clause 62– Offence for failing to comply with examination notice

183. This clause creates an offence for failing to comply with an examination notice.

184. It will be 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.

185. The penalty for this offence is a maximum of 6 months imprisonment.

186. A similar offence was contained in the BCII Act.

Clause 63 – Payment for expenses incurred in attending an examination

187. Clause 63 provides that a person who attends an examination as required by an examination notice is entitled to payment for reasonable expenses incurred by the person in attending the examination. Reasonable expenses will cover matters such as travel and accommodation expenses.

188. The method for calculating the fees and allowances a person may be paid will be prescribed by the rules. A person will only be entitled to reasonable expenses. To that end, the rules will prescribe maximum amounts that are payable in relation to travel or accommodation expenses rather than guaranteeing payment of all expenses actually incurred by a person.

189. Subsection 63(2) sets out the process for seeking the payment of expenses. The person must apply in writing to the ABC Commissioner within 3 months of the examination being completed and provide sufficient evidence to establish that he or she incurred the expenses.

190. Subsection 63(3) provides that rules may be made to set out a particular form for the application or require additional information that must be provided.

Clause 64 – ABC Commissioner must notify Commonwealth Ombudsman of issue of examination notice

191. This section is a machinery provision relating to the oversight by the Commonwealth Ombudsman of the use of the examination power. It requires the Commissioner to notify the Ombudsman that a notice has been issued as soon as practicable after the notice has been issued and provide the Ombudsman with a copy of the notice and any later variation of the notice.

Clause 65 – Review and report by Commonwealth Ombudsman

192. Subclauses 65(1) and (2) require the ABC Commissioner to provide certain material to the Ombudsman as soon as practicable after an examination has been completed. This material consists of:

- a report about the examination, which must include a copy of the examination notice, the time and place at which the examination was held and the name of each person who was present at the examination and any information prescribed by the rules;
- a video recording of the examination; and
- a transcript of the examination.

193. The requirement to provide material to the Ombudsman in subclauses (1) and (2) relates only to an examination of a person in accordance with an examination notice. It does not

relate to an examination notice requiring the person to produce documents or information. This is because the information that must be provided to the Ombudsman under subclauses (1) and (2) is only relevant to an examination of a person and not where a person is required to produce documents or give information. The Ombudsman will be given a copy of all examination notices, including those that require a person to produce documents or give information in accordance with clause 62.

194. Subclause (3) requires the Ombudsman to review the exercise of powers under this Part by the ABC Commissioner or by any person assisting the ABC Commissioner. The Ombudsman's review may extend to the exercise of the Commissioner's powers relating to examination notices requiring a person to produce documents, give information or attend before the Commissioner to answer questions.

195. Subclause (3) also enables the Ombudsman to do anything incidental or conducive to the performance of his or her review function. This could include, for example, requesting further information from the ABC Commissioner in relation to proceedings commenced or applications made in relation to a person who was the subject of an examination notice.

196. Subclauses (4) and (5) allow the Ombudsman to use the same powers he or she has when conducting a review under the *Ombudsman Act 1976* in relation to a review under this section.

197. The Ombudsman must prepare a report as soon as practicable after the end of each financial year on examinations conducted during that year (see subsection (6)). The report must include the results of reviews conducted under this section during the year but can also include any other information that the Ombudsman considers appropriate. The Ombudsman must present the report to the Parliament.

198. The Ombudsman may also provide additional reports about the results of reviews conducted under this section to the Parliament at other times if he or she considers it appropriate. This is intended to allow the Ombudsman to deal with any significant concerns he or she may have about a particular examination or examinations without having to wait for the mandatory annual report.

Part 3—Powers of Australian Building and Construction Inspectors and Federal Safety Officers

Division 1—Appointment of Australian Building and Construction Inspectors

Clause 66 – Australian Building and Construction Inspectors

199. Clause 66 provides that the ABC Commissioner may appoint persons as ABC Inspectors. The only persons who can be appointed as ABC Inspectors are:

- employees of the Commonwealth, a State or a Territory;
- a person who is appointed or holds office under a Commonwealth, State or Territory law; and
- consultants engaged under clause 32.

200. In relation to consultants, the ABC Commissioner must be satisfied that the person is an appropriate person to be appointed as an ABC Inspector (subclause (2)).

201. Subclause (3) provides that the ABC Commissioner is also an ABC Inspector.

202. ABC Inspectors must comply with any direction of the ABC Commissioner (subclause (4)). An ABC Commissioner may give directions for the purpose of subsection (4) (subclause (5)). A written direction under subsection (5) that is of general application is a legislative instrument.

203. A written direction under subsection (5) that relates to a particular case is not a legislative instrument. This subclause is included to assist readers, by pointing out that the instrument would not be a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Clause 67 – Identity cards for inspectors

204. Clause 67 requires the ABC Commissioner to issue ABC Inspectors with identity cards containing a recent photograph (subclause (1) and (3)). These cards must be carried when exercising powers or performing functions as an ABC Inspector (subclause (7)).

205. The Minister is also required to issue the ABC Commissioner with an identity card (subclause (2)).

206. Subclauses (5) to (6) require identity cards to be returned within 14 days of ceasing to be an ABC Inspector, unless the person has a reasonable excuse for not doing so. Failure to comply with this requirement is an offence, with a maximum penalty of 1 penalty unit.

207. A note refers to a defendant bearing an evidential burden in relation to subclause (6) and refers the reader to subsection 13.3(3) of the Criminal Code.

Division 2—Appointment of Federal Safety Officers

Clause 68 – Federal Safety Officers

208. Clause 68 provides that the Federal Safety Commissioner may appoint persons as Federal Safety Officers. The only persons who can be appointed as Federal Safety Officers are:

- employees of the Commonwealth, a State or a Territory;
- a person who is appointed or holds office under a Commonwealth, State or Territory law; and
- consultants engaged under clause 42.

209. In relation to consultants, the Federal Safety Commissioner must be satisfied that the person is an appropriate person to be appointed as a Federal Safety Officer (subclause (2)).

210. Subclause (3) provides that the Federal Safety Commissioner is also a Federal Safety Officer.

211. Federal Safety Officers must comply with any direction of the Federal Safety Commissioner (subclause (4)).
212. The Federal Safety Commissioner may give directions for the purpose of subsection (4) (subclause (5)).
213. A written direction under subsection (5) that is of general application is a legislative instrument (subclause (6)).
214. A written direction under subsection (5) that relates to a particular case is not a legislative instrument (subclause (7)). This subclause is included to assist readers, by pointing out that the instrument would not be a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Clause 69 – Identity cards for Federal Safety Officers

215. Clause 69 requires the Federal Safety Commissioner to issue Federal Safety Officers with identity cards containing a recent photograph (subclause (1)). These cards must be carried when exercising powers or performing functions as a Federal Safety Officer (subclause (4)).
216. The Minister is also required to issue the Federal Safety Commissioner with an identity card (subclause (2)).
217. Subclauses (3) to (6) require identity cards to be returned within 14 days of ceasing to be a Federal Safety Officer, unless the card was lost or destroyed. Failure to comply with this requirement is an offence, with a maximum penalty of 1 penalty unit.
218. A note refers to a defendant bearing an evidential burden in relation to subclause (6) and refers the reader to subsection 13.3(3) of the Criminal Code.

Division 3—Powers of authorised officers

Clause 70 – Purposes for which powers of authorised officers may be exercised

219. Subclause (1) allows an inspector to exercise compliance powers (other than a power under section 98 or 99) in relation to a building matter for one or more of the following purposes:
- ascertaining whether this Bill, a designated building law or the Building Code is being, or has been, complied with;
 - ascertaining whether a court order relating to this Bill, a designated building law or the Building Code has been complied with, or is being complied with, by a building industry participant;
 - a purpose provided for in rules or another Act that confers functions or powers on inspectors.
220. A note refers to the powers in clauses 98 (enforceable undertakings) and 99 (compliance notices) which may be exercised for the purpose of remedying the effects of certain contraventions.

221. Under subclause (2) a Federal Safety Officer may exercise compliance powers for one or more of the following purposes:

- ascertaining whether a constitutional corporation, the Commonwealth or a Commonwealth authority that is an applicant for accreditation meets the accreditation requirements;
- ascertaining whether a constitutional corporation, the Commonwealth or a Commonwealth authority that is an accredited person has complied, or is complying, with conditions of the accreditation;
- ascertaining whether an accredited person has complied, or is complying, with conditions of the accreditation in respect of building work in a Territory or Commonwealth place.

222. The functions and powers of an authorised officer are subject to any conditions and restrictions specified in his or her instrument of appointment (subclause (3)).

223. A note points out that inspectors and Federal Safety Officers are authorised officers (see the definition of authorised officer in clause 5).

Clause 71 – When powers of authorised officers may be exercised

224. This clause provides that an authorised officer may exercise compliance powers:

- at any time during working hours; or
- at any other time, if the authorised officer reasonably believes that it is necessary to do so for compliance purposes.

Clause 72 – Power of authorised officers to enter premises

225. This clause makes provision for authorised officers to enter premises for compliance purposes.

226. Subclause (1) provides that an inspector may enter premises, without force, if the inspector reasonably believes that:

- this Act, a designated building law or the Building Code applies or applied to building work that is performed on the premises; or
- a breach by a building industry participant of this Act, a designated building law or the Building Code has occurred, is occurring or is likely to occur; or
- Subclause (1) also provides that an authorised person can enter business premises, if the inspector reasonably believes that:
- there are records or documents relevant to compliance purposes on the premises, or accessible from a computer on the premises; or
- a person who ordinarily performs work or conducts business at the premises has information relevant to compliance purposes.

227. A note points out that a person may commit an offence if the person hinders or obstructs an inspector (see clause 78).

228. Under subclause (2), a Federal Safety Officer may, without force:

- enter premises, if the officer reasonably believes that building work is being carried out, or has been carried out by an applicant or accredited person referred to in subclause 70(2); or
- enter business premises, if the officer reasonably believes that there are records or documents relevant to compliance purposes on the premises, or accessible from a computer on the premises, or a person who ordinarily performs work or conducts business at the premises has information relevant to compliance purposes.

229. A note points out that a person may commit an offence if the person hinders or obstructs a Federal Safety Officer (see clause 78).

230. There are special provisions relating to residential purposes. An authorised officer must not enter a part of premises that is used for residential purposes unless the officer reasonably believes that the work is being performed on that part of the premises (subclause (3)).

231. Another special provision is made for certain persons who are not at a premise. An authorised person must not enter premises or business premises because of a person having relevant information, if the officer reasonably believes that the person concerned is not at those premises (subclause (4)).

Clause 73 – Showing identity card before entry

232. This clause provides that an authorised officer must, before or as soon as practicable after entering premises, show his or her identity card to the occupier, or another person who apparently represents the occupier, if the occupier or other person is present at the premises.

Clause 74 – Powers of authorised officers while on premises

233. An authorised person who enters premises, except for the reason of a person having relevant information, may exercise one or more of the following powers while on the premises:

- inspect any work, process or object;
- interview any person;
- require a person to tell the authorised officer who has custody of, or access to, a record or document;
- require a person who has custody of, or access to, a record or document to produce the record or document to the authorised officer either while the authorised officer is on the premises, or within a specified period;
- inspect, and make copies of, any record or document that is on the premises or is accessible from a computer that is on the premises;
- take samples of any goods or substances in accordance with any procedures prescribed by the rules.

234. A note refers the reader to clauses 79 (power to keep records or documents), 102 (self-incrimination) and 104 (certain records and documents are inadmissible).

235. Subclause (2) provides that an authorised officer who enters premises under subparagraph 72(1)(b)(ii) (which is about entry to premises by an inspector if a person who ordinarily works there has relevant information) or (2)(b)(ii) (which is about entry to premises by a Federal Safety Officer if a person who ordinarily works there has relevant information) may interview the person concerned while on those premises.

236. A refusal or failure by a person to participate in an interview under this section is not to be treated as conduct covered by section 149.1 of the Criminal Code (subclause (3)).

Clause 75 – Persons assisting authorised officers

237. Subclause (1) provides that a person may accompany an authorised officer onto premises to assist the authorised officer if the ABC Commissioner or Federal Safety Commissioner (as the case requires) is satisfied that:

- the assistance is necessary and reasonable; and
- the person assisting has suitable qualifications and experience to properly assist the authorised officer.

238. The person assisting:

- may do such things on the premises as the authorised officer requires to assist the authorised officer to exercise compliance powers; but
- must not do anything that the authorised officer does not have power to do (subclause (2)).

239. Anything done by the person assisting is taken for all purposes to have been done by the authorised officer (subclause (3)).

Clause 76 – Power to ask for person’s name and address

240. This clause provides at subclause (1) that an authorised officer may require a person to tell the authorised officer the person’s name and address if the officer reasonably believes that the person has contravened a civil remedy provision.

241. If the authorised officer reasonably believes that the name or address is false, the officer may require the person to give evidence of its correctness (subclause (2)).

242. The person must comply with a requirement under subsection (1) or (2) if:

- the authorised officer advises the person that he or she may contravene a civil remedy provision if he or she fails to comply with the requirement; and
- the authorised officer shows his or her identity card to the person (subclause (3)).

243. A note points out that this is a Grade B civil penalty.

244. Subsection (3) does not apply if the person has a reasonable excuse (subclause (4)).

Clause 77 – Power to require persons to produce records or documents

245. Subclause (1) provides that an authorised officer may require a person, by notice, to produce a record or document to the authorised officer.

246. A note refers the reader to clauses 79 (power to keep records or documents) and 102 (self-incrimination).

247. The notice must be in writing, be served on the person, and require the person to produce the record or document at a specified place within a specified period of at least 14 days. This does not apply if the person has a reasonable excuse.

248. Notices may be served by fax or by other electronic means if the person receiving the notice has provided contact details. This is because the *Electronic Transactions Act 1999* applies to the service of notice under this section.

Clause 78 – Hindering or obstructing authorised officers

249. This clause provides that a person must not intentionally hinder or obstruct an authorised officer in exercising his or her compliance powers, or induce or attempt to induce any other person to do so.

250. A note points out this is a Grade A civil penalty.

Clause 79 – Power to keep records or documents

251. If a record or document is produced to an authorised officer in accordance with this Division or Part 2 (examination notices), the authorised officer may:

- inspect, and make copies of, the record or document; and
- keep the record or document for any period that is necessary (subclause (1)).

252. It is important to note that the period of retention of any personal information, as defined in the *Privacy Act 1988*, is strictly as necessary for the period of investigation. Personal information should not be disclosed unnecessarily, collected or used for purposes other than the original purpose, or retained for periods when it is no longer needed.

253. While the authorised officer keeps a record or document, he or she must allow the following persons to inspect, or make copies of, the record or document at all reasonable times:

- the person who produced the record or document;
- any person otherwise entitled to possession of the record or document;
- a person authorised by a person referred to immediately above (subclause (2)).

254. Subclause (3) provides that a person otherwise entitled to possession of the document is entitled to be supplied, as soon as practicable, with a copy that is certified, by one of the following persons, to be a true copy:

- the ABC Commissioner or a Deputy Commissioner;

- an inspector;
- a member of staff of the Commission;
- a person assisting the ABC Commissioner or a consultant engaged by him or her;
- the Federal Safety Commissioner or a Federal Safety Officer;
- an APS employee assisting the Federal Safety Commissioner or consultant engaged by him or her.

255. The certified copy must be received in all courts and tribunals as if it were the original (subclause (4)).

Chapter 8—Enforcement

Part 1—Simplified outline of this Chapter

Clause 80 – Simplified outline of this Chapter

256. This clause provides a simplified outline of Chapter 8.

Part 2—Orders for contraventions of civil remedy provision

Division 1—Obtaining an order for contravention of civil remedy provision

Clause 81 – Penalty etc. for contravention of civil remedy provision

257. An authorised applicant may apply to a relevant court in respect of a contravention of a civil remedy provision.

- an authorised applicant is: an inspector, a person affected by the contravention, or a person prescribed by the rules (see definition in clause (5)).
- a relevant court means the Federal Court, the Federal Circuit Court, a State or Territory Supreme Court or a District Court or County Court of a State.

258. Subclauses (1)-(3) set out the orders that a court can make against a person who contravenes a civil penalty provision.

259. The court may order a pecuniary penalty. The maximum pecuniary penalty that may be ordered is 1,000 penalty units if the defendant is a body corporate and otherwise 200 penalty units. By operation of section 4AA of the *Crimes Act 1914*, the value of a penalty unit is currently \$170.

260. The court may also order:

- damages payable to a specified person;
- any other order the court thinks appropriate (including an injunction or an order for the sequestration of assets).

261. If a person contravenes clauses 46 or 47 of the Bill (which prohibit unlawful industrial action and picketing), then subclause (4) sets out the circumstances in which the court can grant an injunction restraining a person from engaging in such conduct.

262. A pecuniary penalty ordered under this clause is payable to the Commonwealth or some other person if the court so directs. The penalty may be recovered as if it were a judgment debt (subclause (5)). Subclause (6) sets out what the court must take into account in determining a pecuniary penalty.

263. Subclause (7) provides that the Consolidated Revenue Fund is appropriated for the purposes of a debt due to a person other than the Commonwealth in relation to a penalty under paragraph (1)(a). The *Financial Management and Accountability Act 1997* does not apply in relation to those amounts.

Clause 82 – Interest up to judgement

264. Subclause 82(1) applies to an order (other than a pecuniary penalty order) under this Division in relation to an amount that a person was required to pay to, or on behalf of, another person under this Bill.

265. Under subclause (2) the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary. The words ‘on application’ are intended to make it clear that the court is not required to order interest if a party does not apply for interest. Similarly, where the parties file consent orders in court and the orders do not provide for the imposition of interest it is intended that the court would not award interest on the amount of its own motion.

266. Subclause (3), without limiting subclause (2), provides that in determining an amount of interest the court must take into account the period between the day the course of action arose and the day the order is made. It allows the court to award interest on an amount prior to the filing of proceedings in court.

Clause 83 – Conduct contravening more than one civil remedy provision

267. Clause 83 clarifies that a person’s conduct may contravene more than one provision under the Bill. In such circumstances, proceedings may be instituted relating to any or all provisions allegedly contravened by a person’s conduct, although a person may only be held liable for one pecuniary penalty for the same conduct (subclause (2)).

Clause 84 – Multiple contraventions

268. Clause 84 clarifies that a relevant court may issue a single penalty for multiple contraventions of the civil penalty provisions of the Bill and is not required to issue separate penalty instruments. This provision is intended to minimise court administration and consolidate legal proceedings.

Clause 85 – Proceedings may be heard together

269. Clause 85 clarifies that a court may hear two or more proceedings for civil penalty orders simultaneously. This will streamline the process for civil proceedings, remove the need for a person to be subject to multiple proceedings, and thereby reduce legal costs for the person and the Commonwealth.

Clause 86 – Civil evidence and procedure rules for proceedings relating to contraventions of civil remedy provisions

270. Clause 86 clarifies that civil rules of evidence and procedure apply when hearing proceedings for civil penalty orders. This clause ensures that criminal rules of evidence and procedure are not applied during proceedings for civil penalty orders.

Division 2—Civil proceedings and criminal proceedings

Clause 87 – Civil proceedings after criminal proceedings

271. Clause 85 provides that a court cannot issue a civil penalty order against a person who has previously been convicted of a criminal offence for the same conduct.

Clause 88 – Criminal Proceedings during civil proceedings

272. Clause 88 stays civil proceedings if criminal proceedings exist and relate to the same conduct, to prevent any information that arises during criminal proceedings prejudicing civil proceedings. If the criminal proceedings result in a conviction, clause 88 will ensure that civil proceedings related to the same conduct are dismissed and costs for the civil proceedings are not awarded.

Clause 89 – Criminal proceedings after civil proceedings

273. Clause 89 clarifies that criminal proceedings may commence after civil proceedings, even in the event that the civil proceedings result in a civil penalty order. This recognises the importance of criminal proceedings and criminal penalties in dissuading and sanctioning contraventions and ensures that criminal remedies are not precluded by earlier civil action.

Clause 90 – Evidence given in civil proceedings not admissible in criminal proceedings

274. Clause 90 provides that evidence given by an individual during civil proceedings cannot be used in any criminal proceedings, against the same individual relating to the same conduct. This ensures that information or documents produced during civil proceedings are not relied upon to support subsequent criminal proceedings, unless they are criminal proceedings relating to falsifying evidence in civil proceedings. While it is appropriate to allow criminal proceedings after civil proceedings have ended, given the overriding importance of the criminal justice system, criminal proceedings not related to falsifying evidence must rely upon evidence gathered during independent investigations, not evidence from prior civil proceedings.

Clause 91 – Civil double jeopardy

275. This clause applies the double jeopardy principle to pecuniary penalties under the Bill. Under this clause, where a person is ordered to pay a pecuniary penalty under the Bill in relation to particular conduct, the person is not liable to pay a pecuniary penalty under another law of the Commonwealth relating to the same conduct.

276. A note refers the reader that a court may make other orders, such as an order for compensation, in relation to particular conduct even if the court has made a pecuniary penalty order in relation to that conduct.

Division 3—Miscellaneous

Clause 92 – Ancillary contravention of civil remedy provisions

277. Clause 92 supports the enforcement regime by ensuring that conduct ancillary to the contravention of a civil remedy provision is considered to be a contravention of the

provision itself. Ancillary conduct includes any attempt to contravene a provision that does not succeed, aiding or inducing a contravention of a civil remedy provision, and any conspiracy to contravene a civil remedy provision.

Clause 93 – Exceptions etc. to civil remedy provisions—burden of proof

278. Clause 93 provides that if a person wishes to rely on a defence, that person bears the evidential burden of proving the defence.

Clause 94 – Liability of bodies corporate

279. Clause 94 provides that a body corporate is responsible for the actions of an employee, agent or officer of a body corporate, acting in the legitimate scope of their employment.

280. Similarly, it is sufficient to show the state of mind of an officer, employee or agent (or of a person acting at the direction or with the consent or agreement of the officer, employee or agent), to establish the state of mind of the body corporate.

Clause 95 – Actions of building associations

281. This clause clarifies what actions of building associations are for the purposes of this Bill. This recognises that there can be difficulty in identifying whether actions taken by persons associated with an industrial association (such as members and officers) are attributable to the association irrespective of whether or not the association is a legal person.

282. It provides at subclause (1), that each of the following is taken to be action of a building association:

- action taken by the committee of management of the building association;
- action taken by an officer or agent of the building association acting in that capacity;
- action taken by a member, or group of members, of the building association if the action is authorised by the rules of the association; or the committee of management of the association; or an officer or agent of the association acting in that capacity, unless all reasonable steps, as set out in subclause (2), have been taken to prevent the action;
- action taken by a member of the building association who performs the function of dealing with an employer on behalf of the member and other members of the association, acting in that capacity, unless all reasonable steps, as set out in subclause (2), have been taken to prevent the action;
- if the building association is an unincorporated building association that does not have a committee of management—action taken by a member, or group of members, of the association.

283. There can also be difficulty in establishing whether a body corporate or unincorporated body (such as an industrial association) has the requisite state of mind to be liable for a contravention. Subclause 95(3) provides, in effect, that the association's state of mind is taken to be the state of mind of the member who took the relevant action or of a person in a group which took the action.

284. Subclause (4) provides that subclauses (1) to (3) have effect despite subsections 92(1) and (2) which make similar provision to deal with the liabilities of bodies corporate more generally under this Bill.

Clause 96 – Unincorporated building associations

285. This clause clarifies that for the purposes of this Bill, a reference to a person includes a reference to an unincorporated building association.

Clause 97 – Capacity, state of mind etc. of person being coerced etc.

286. Clause 97 provides that in applying a provision of this Act that refers to coercing, encouraging, advising or inciting a person to do a particular thing, whether or not the person is able, willing or eligible to do that particular thing is not a relevant consideration. The conduct of coercing, encouraging etc can be established even if the person being coerced, is not able, willing or eligible to do that particular thing.

Part 3—Other powers of enforcement for inspectors

Clause 98 – Enforceable undertakings relating to contraventions of civil remedy provisions

287. This clause applies if the ABC Commissioner reasonably believes that a person has contravened a civil remedy provision. It deals with undertakings, orders and compliance notices.

288. The ABC Commissioner may accept a written undertaking given by the person in relation to the contravention, except when a person has been issued a compliance notice under clause 99 for the contravention (subclauses (2) and (5)).

289. The person may withdraw or vary the undertaking at any time, but only with the ABC Commissioner's consent (subclause (3)).

290. An inspector must not apply for an order under Division 1 of Part 2 relating to a contravention of a civil remedy provision by a person if an undertaking given by the person under this section in relation to the contravention has not been withdrawn.

291. A note points out that a person other than an inspector who is otherwise entitled to apply for an order relating to the contravention may do so.

292. Subclause (6) provides that if the ABC Commissioner considers that the person who gave the undertaking has contravened any of its terms, the ABC Commissioner may apply to a relevant court or a relevant State or Territory court for an order under subsection (7).

293. Subclause (7) provides that if the court is satisfied that the person has contravened a term of the undertaking, the court may make one or more of the following orders:

- an order directing the person to comply with the term of the undertaking;
- an order awarding compensation for loss that a person has suffered because of the contravention;

- any other order that the court considers appropriate.

Clause 99 – Compliance notices

294. This clause deals with compliance notices. It applies if an inspector reasonably believes that a person has contravened this Bill, a designated building law or the Building Code to the extent that the contravention relates to building work.

295. The inspector may (subject to subsection (4)) give the person a notice requiring the person to do either or both of the following within any reasonable time specified in the notice:

- take specified action to remedy the direct effects of the contravention;
- produce reasonable evidence of the person's compliance with the notice.

296. Subclause (3) specifies what the notice must also set out.

297. Subclause (4) explains the relationship between a compliance notice and an enforceable undertaking. It provides that if a person has given an undertaking under clause 98 and it has not been withdrawn, an inspector must not give a person a compliance notice in relation to the same contravention.

298. An inspector must not apply for an order under Division 1 of Part 2 relating to a contravention of a civil remedy provision by a person if:

- the inspector has given the person a notice relating to the contravention; and
- either of the following subparagraphs applies:
 - (i) the notice has not been withdrawn, and the person has complied with the notice;
 - (ii) the person has made an application under clause 100 (review of compliance notices) relating to the notice that has not been completely dealt with.

299. A Note points out that a person other than an inspector who is otherwise entitled to apply for an order relating to the contravention may do so.

300. Under subclause (6), a person who complies with a notice relating to a contravention of a civil remedy provision is not taken:

- to have admitted to contravening the provision; or
- to have been found to have contravened the provision.

301. A person must not fail to comply with a notice given under this section. This is a Grade B civil penalty (subclause (7)).

302. Subsection (7) does not apply if the person has a reasonable excuse (subclause (8)).

Clause 100 – Review of compliance notices

303. A person who has been given a notice under clause 99 (compliance notices) may apply to a relevant court or a relevant State or Territory court for a review of the notice on either or both of the following grounds:

- the person has not committed a contravention set out in the notice;
- the notice does not comply with subclause 99(2) or (3).

304. At any time after the application has been made, the court may stay the operation of the notice on the terms and conditions that the court considers appropriate (subclause (2)).

305. The court may confirm, cancel or vary the notice after reviewing it (subclause (3)).

Chapter 9—Miscellaneous

Part 1—Simplified outline of this Chapter

Clause 101 – Simplified outline of this Chapter

306. This clause provides a simplified outline of Chapter 9.

Part 2—Provisions relating to information

Division 1— Provisions relating to requirements to provide information

Clause 102 – Self-incrimination etc.

307. Under this clause, a person is not excused from giving information, producing a record or document or answering a question under an examination notice, or when an authorised officer enters premises under paragraph 74(1)(d), or under a notice under subclause 77(1), on the grounds that to do so would contravene another law or that it might tend to incriminate the person. However, a person will be protected from liability for contravening another law, as provided by subclause 103.

308. The effect of this provision is to abrogate the common law privilege against self-incrimination.

309. However, documents produced and any information or thing obtained during an examination notice as a direct or indirect consequence will not be admissible as evidence against the individual in proceedings except proceedings for an offence against:

- clause 62 (failure to comply with examination notice); or
- section 137.1 or 137.2 of the Criminal Code that relates to this Bill (false or misleading information or documents); or
- section 149.1 of the Criminal Code that relates to this Bill (obstruction of Commonwealth officials).

310. Subclause (3) provides a use immunity and derivative use immunity in relation to information provided by individuals under paragraphs 74(1)(d) or subsection 77(1). It provides a protection against criminal prosecution where a person is compelled to produce a document. This means that:

- the use of any information obtained directly or indirectly by an inspector would not be admissible in evidence against a person in any criminal proceedings (limited use immunity); and
- any information, document or thing obtained as a direct or indirect result of producing the information, document or thing, is not admissible as evidence in criminal proceedings against an individual if, but for this subclause, the privilege against self-incrimination could have been claimed for the information, document or thing (derivative use immunity).

Clause 103 – Protection from liability relating to examination notices

311. A person who, in good faith gives information or produces a record or document or answers a question when required to do so under an examination notice is not liable to:

- any proceedings for contravening any other law because of that conduct; or
- civil proceedings for loss, damage or injury of any kind suffered by another person because of that conduct.

Clause 104 – Certain records and documents are inadmissible

312. This clause clarifies other records and documents that are inadmissible in criminal proceedings against an individual, other than proceedings listed in clause 102 above.

313. The inadmissible records and documents are those inspected or copied by authorised officers who have exercised a power entered premises, or records or documents obtained as a direct or indirect consequence of that inspection or copying.

Division 2—Protecting information acquired for the purposes of this Act

Clause 105 – Disclosure of information by the ABC Commissioner or Federal Safety Commissioner

314. This clause sets out to whom and under what circumstances an ABC Commissioner or a Federal Safety Officer can disclose information acquired by them while performing their functions or exercising powers. It also specifies other persons to whom these information provisions apply.

315. Subsection (1) provides that this clause applies to information that is acquired by any of the following persons in the course of performing functions or exercising powers:

- the ABC Commissioner or a Deputy Commissioner;
- an inspector;
- a member of staff of the Commission;
- a person assisting the ABC Commissioner or an inspector or a consultant engaged by him or her;
- the Federal Safety Commissioner or a Federal Safety Officer;
- an APS employee assisting the Federal Safety Commissioner or consultant engaged by him or her.

316. The ABC Commissioner or Federal Safety Commissioner may disclose, or authorise the disclosure of, the information under subclause (2) if the Commissioner reasonably believes:

- that it is necessary or appropriate to do so for the purposes of the performance of the Commissioner's functions or the exercise of the Commissioner's powers; or
- that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

317. They may also disclose information to the Minister if it is likely to assist the Minister with a complaint or issue arising under this Bill, or for the ABC Commissioner under the FW Act or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (FW Transitional Act) (subclause (3)).

318. Information can also be disclosed to the Secretary, an SES employee or an APS employee in the Department for briefing purposes, if it likely to assist the Minister with a complaint or issue arising under this Bill, or for the ABC Commissioner under the FW Act or the FW Transitional Act (subclause (4)).

319. Information cannot be disclosed by the ABC Commissioner in reports or annual reports if it relates to an individual's affairs. More detail about individual's affairs not being in reports is in clause 107.

Clause 106 – Confidentiality of information obtained under an examination notice

320. This clause deals with protected information. Under clause 5, protected information means information that:

- was disclosed or obtained under an examination notice or at an examination; and
- was obtained by the entrusted person, or by any other person, in the course of official employment; and
- relates to a person other than the entrusted person.

321. This clause restricts what an entrusted person can do with protected information. An entrusted person is someone that has obtained protected information in the course of official employment. A note points out to the reader that the obligations apply after the person ceases to be in official employment.

322. Subclause (2) sets out the core provision, which is that the entrusted person must not make a record of protected information or disclose protected information. The penalty is imprisonment for 12 months.

323. Subclause (3) sets out exceptions to the offence in subclause (2). If the entrusted person is a designated official at the time of the recording or disclosure, then each of the following will be exceptions to the offence:

- the recording or disclosure is for the purposes of the performance of the ABC Commissioner's functions or the exercise of his or her powers;
- the recording or disclosure happens in the course of the performance of the duties of the entrusted person's official employment;
- in the case of a disclosure—the disclosure is to a person appointed or employed by the Commonwealth, a State or Territory or an authority of any of these for the purpose of assisting in building industry law enforcement;
- the recording or disclosure is in accordance with rules made for the purposes of this paragraph.

324. A note points out that a defendant bears an evidential burden in relation to the matter in subclause (3) and refers the reader to subsection 13.3(3) of the Criminal Code.

325. Subclause (4) sets out exceptions to the offence for entrusted persons who are not designated officials. They are that the recording or disclosure:

- is for the purposes of the performance of the ABC Commissioner’s functions or the exercise of his or her powers;
- happens in the course of the performance of the duties of the entrusted person’s official employment, being duties relating to building industry law enforcement;
- is in accordance with rules made for the purposes of this paragraph.

326. A note points out that a defendant bears an evidential burden in relation to the matter in subclause (3) and refers the reader to subsection 13.3(3) of the Criminal Code.

327. It will not be an exception under subclause (3) if protected information is disclosed to any Minister and the disclosure is not authorised by clause 18 (Minister may require reports relating to the ABC Commissioner’s functions and powers) or clause 20 (annual reports) (subclause (5)).

328. It will not be an exception under subclause (3) if protected information is disclosed in a report mentioned above and includes information relating to an individual’s affairs (subclause (6)).

329. Subclause (7) provides that a disclosure of personal information is taken to be authorised for the purposes of paragraph (1)(d) of Information Privacy Principle 11 in section 14 of the *Privacy Act 1988* if the information is protected information and is disclosed in accordance with subclauses (3) or (4).

330. Two terms are defined for the purposes of clause 106. They are ***building industry law enforcement*** and ***official employment***.

Clause 107 – Reports not to include information relating to an individual’s affairs

331. This clause provides that information relating to the affairs of an individual must not be included in a report under sections 18 (Minister may require reports) or 20 (annual reports) if the individual is as the individual to whom the information relates or it is reasonably likely that people would be able to work out the identity of the individual.

Part 3—Powers of ABC Commissioner etc.

Clause 108 – ABC Commissioner may publicise non-compliance

332. This clause provides that if the ABC Commissioner considers that it is in the public interest to do so, the ABC Commissioner may publish details of non-compliance with the Building Code, and non-compliance by a building industry participant with this Bill or designated building laws. The names of those who have not complied can also be published.

Clause 109 – ABC Commissioner may intervene in court proceedings

333. The ABC Commissioner may intervene in the public interest in a civil proceeding before a court in a matter that arises under this Bill or arises under the *Independent Contractors*

Act 2006, the FW Act or the FW Transitional Act and involves a building industry participant or building work.

334. Subclause (2) provides that if the ABC Commissioner intervenes in a proceeding under subsection (1), the ABC Commissioner is taken to be a party to the proceeding and has all the rights, duties and liabilities of such a party.

Clause 110 – ABC Commissioner may make submissions in FWC proceedings

335. The ABC Commissioner may intervene or make a submission in a matter before the FWC that arises under the FW Act or the FW Transitional Act if the matter involves a building industry participant or building work. The Commissioner makes a submission by giving written notice to the General Manager of the FWC (subclause (3)).

336. Subclause (2) provides that if the ABC Commissioner intervenes in a proceeding, the ABC Commissioner is taken to be a party to the proceeding and has all the rights, duties and liabilities of such a party.

Clause 111 – ABC Commissioner and other inspectors may institute proceedings under the FW Act, etc.

337. If a provision of the FW Act, the FW Transitional Act or of an instrument under either of those Acts, authorises a Fair Work Inspector (within the meaning of the FW Act) to make an application to the FWC or make an application to, or otherwise institute proceedings in, a court, the provision is also taken to authorise an inspector to make such an application, or institute such proceedings, if it relates to a building industry participant or building work

338. Subclause (2) provides that if the inspector makes an application, or institutes proceedings, the Acts and instruments mentioned immediately above have effect as if the inspector were a Fair Work Inspector (within the meaning of the FW Act).

339. Directions under section 704 or 705 of the FW Act do not apply to the inspector in relation to the application or proceedings (subclause (3)). These sections relate to directions to inspectors by the Fair Work Ombudsman.

Clause 112 – General Manager of the FWC must keep ABC Commissioner informed

340. This clause provides that the General Manager of the FWC must, as soon as practicable, notify the ABC Commissioner of:

- every application lodged with the FWC, or the General Manager of the FWC, under the FW Act or the FW Transitional Act, where the application relates to a matter that involves a building industry participant or building work; and
- the outcome of each application.

Part 4—Provisions relating to Courts

Clause 113 – Jurisdiction of the Federal Court

341. Clause 113 confers jurisdiction on the Federal Court in relation to any matter arising under the Bill. This includes both civil and criminal matters.

342. This replicates section 75 of the FW(BI) Act.

Clause 114—Exercising jurisdiction in the Fair Work Division of the Federal Court

343. This clause replicates section 75A of the FW(BI) Act. It requires the jurisdiction conferred on the Federal Court by the Bill to be exercised by the Fair Work Division of the Federal Court in certain circumstances, including where:

- a writ of mandamus or prohibition or an injunction is sought in the Federal Court against a person holding office under this Bill;
- a declaration is sought under section 21 of the *Federal Court of Australia Act 1976* in relation to a matter arising under this Bill;
- an injunction is sought under section 23 of the *Federal Court of Australia Act 1976* in relation to a matter arising under this Bill;
- a prosecution is instituted in the Federal Court under this Act;
- an appeal is instituted in the Federal Court from a judgment of the Federal Circuit Court or a court of a State or Territory in a matter arising under this Bill;
- proceedings in relation to a matter arising under this Act are transferred to the Federal Court from the Federal Circuit Court;
- the Federal Circuit Court or a court of a State or Territory states a case or reserves a question for the consideration of the Federal Court in a matter arising under this Bill;
- the High Court remits a matter arising under this Bill to the Federal Court.

Clause 115 – No limitation on Federal Court’s powers

344. This clause is included to avoid doubt that nothing in this Bill limits the Federal Court’s powers under section 21, 22 or 23 of the *Federal Court of Australia Act 1976*.

Clause 116 – Appeals from relevant State or Territory Courts

345. This clause replicates section 565 of the FW Act.

346. This clause provides that the Federal Court has jurisdiction to hear an appeal from a decision of an eligible State or Territory court exercising jurisdiction under the Bill. It is not necessary for a party to obtain leave of the court to hear the appeal. The Federal Court’s appellate jurisdiction will be exclusive. No appeal will lie to other State and Territory courts, or to the High Court, from an eligible State or Territory court exercising jurisdiction under the Bill.

347. Where the eligible State or Territory court is a court of summary jurisdiction (e.g., a magistrates court), a single judge will be able to exercise the Federal Court’s appellate jurisdiction (see subsection 25(5) of the *Federal Court of Australia Act 1976*).

348. The clause does not limit the Federal Court’s appellate jurisdiction under section 24 of the *Federal Court of Australia Act 1976* (including its jurisdiction to hear appeals from the Federal Magistrates Court).

Clause 117 – Court not to require undertakings as to damages

349. This replicates section 76 of the FW Act.

350. If the ABC Commissioner or any other inspector is an applicant in court proceedings under this Act, the FW Act or the FW Transitional Act, the court cannot require the ABC Commissioner, the inspector or another person, as a condition of granting an interim injunction, to give undertakings as to damages.

Part 5—Miscellaneous

Clause 118 – ABC Commissioner etc. not liable for conduct in good faith

351. This clause ensures that persons, listed in subclause (2), exercising their powers and functions under this Bill and other related Acts are protected from civil proceedings for loss, damage or injury suffered by another person.

352. Civil proceedings do not lie for loss, damage or injury of any kind suffered by a person as a result of anything done, or omitted to be done, in good faith and without negligence:

- in the exercise, or purported exercise, of functions, powers or duties under, or in relation to, this Bill; or
- in the exercise, or purported exercise, of functions, powers or duties under, or in relation to, the Independent Contractors Act 2006, the FW Act or the FW Transitional Act, where the exercise, or purported exercise, of the function, power or duty relates to a matter that involves a building industry participant or building work.

353. The persons are a designated official (which is defined in clause 5 and includes the ABC Commissioner), the Federal Safety Commissioner, a Federal Safety Officer, an APS employee assisting the Federal Safety Commissioner and a person engaged as a consultant.

Clause 119 – Delegation by Minister

354. Subclause (1) provides that the Minister may, in writing, delegate all or any of the Minister’s functions or powers under Chapter 3 (the Building Code) to the ABC Commissioner.

355. In performing functions or exercising powers delegated under subclause (1), the ABC Commissioner must comply with any directions of the Minister (subclause (2)).

356. A note refers the reader to sections 34AA and 34AB of the Acts Interpretation Act, which contain more details about delegations generally.

357. The Minister may give a direction to the ABC Commissioner for the purposes of the delegation under the Building Code (subclause (3)).

358. A written direction under subsection (3) that is of general application is a legislative instrument (subclause (4)).

359. A written direction under subsection (4) that relates to a particular case is not a legislative instrument (subclause (5)).

Clause 120 – Rules

360. Subclause (1) provides that the Minister may, by legislative instrument, make rules prescribing matters:

- required or permitted by this Act to be prescribed by the rules; or
- necessary or convenient to be prescribed for carrying out or giving effect to this Act.

361. The rules may make provision for, and in relation to, the following:

- the manner in which, and the time within which, applications under this Act may be made and dealt with;
- the form of notices that are required or permitted to be given under this Act.

362. Despite subsection 12(2) of the Legislative Instruments Act, which is generally about when legislative instruments can commence, the first rules made for the purposes of subclauses 6(4) or (5), which deal with prescribing rules for activities that are or are not building work, or subclause 9(2), which deals with prescribing rules for modifications to the extensions of this Bill, may be expressed to take effect from the commencement of the subsection for which the rules are made, if those rules are made within 120 days after this subsection commences (subsection (3)).

363. The Governor-General may make regulations prescribing:

- penalties for offences against the rules, not exceeding a fine of 10 penalty units; or
- civil penalties for contraventions of the rules, not exceeding 25 penalty units for a body corporate or in any other case 5 penalty units (subclause (4)).

Statement of Compatibility with Human Rights

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

Building and Construction Industry (Improving Productivity) Bill 2013

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*.

Overview of the Building and Construction Industry (Improving Productivity) Bill 2013

The Building and Construction Industry (Improving Productivity) 2013 (the Bill) fulfils the Government's election commitment to re-establish the Australian Building and Construction Commission (ABCC).

The Bill is intended to substantially replicate the *Building and Construction Industry Improvement Act 2005* (the BCII Act). The BCII Act responded to the workplace relations recommendations of the Royal Commission into the Building and Construction Industry (the Royal Commission), which reported in 2003.

The Royal Commission was established to conduct an inquiry into unlawful or otherwise inappropriate practices and conduct in the building and construction industry in Australia. The inquiry focused on the commercial building and construction industry which includes non-residential building and engineering construction sectors and was worth \$46 billion at the time.

The final report of the Royal Commission provided compelling evidence of the need for reform in this industry. Central to the Royal Commission's findings was industry lawlessness. This was manifested by criminal conduct, unlawful and inappropriate conduct, including breaches of the relevant workplace relations and work health and safety legislation and a disregard for Commonwealth and State revenue statutes. Inappropriate conduct was defined by the Royal Commission as behaviour that infringes the (then) *Workplace Relations Act 1996*, a person's right of choice or other conduct which departs from recognised norms of civility and behaviour.

Relevantly, the Royal Commission concluded that there is a conflict between the short-term project profitability focus of building contractors and clients on the one hand, and the long-term aspirations of the union movement to control and regulate the industry for the benefit of its members. The short-term focus driven by profitability means that quick-fix commercial expediency can supplant insistence on legal rights, adherence to ethical and legal norms and the pursuit of legal remedies. This inequality of bargaining power is sometimes exploited, resulting in high levels of unlawful or inappropriate conduct.¹

The Government has moved to establish the ABCC at this time because the findings of the Royal Commission are as relevant today as they were in 2003.

¹ *Royal Commission into the Building and Construction Industry* (2003), Volume 3, Page 10

The Bill seeks to address systemic breaches of workplace relations legislation by re-establishing the ABCC with its full suite of enforcement powers. It is considered that strong and effective powers, including examination powers, are essential to deal with the closed culture of the industry and to allow the regulator to act rapidly when disputes arise. The Bill also introduces industry specific requirements that build on the existing framework of workplace regulation in the *Fair Work Act 2009* (the Fair Work Act). The provisions in the Bill dealing with industrial action, coercion and discrimination are tailored to address specific behaviour in the building industry and are intended to operate alongside other more general provisions in the Fair Work Act.

Matters of reasonableness and proportionality are discussed below in detail in relation to each right that is engaged by the legislation however it is submitted that the findings of the Royal Commission and recent evidence of lawlessness in the building and construction industry provide important context for the measures in the Bill. There is a demonstrated need for effective industry specific regulation to ensure the rights and obligations of building industry participants are respected.

Human Rights Implications

The Bill engages the following rights:

- the right to freedom of association in Article 22 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 8 of the *International Covenant on Civil Economic Social and Cultural Rights* (ICESCR);
- the right to just and favourable conditions of work under Article 7 of the ICESCR, including the right to safe and healthy working conditions, and the right to protection of health and to safety in working conditions;
- the right to a fair trial contained in Article 14 of the ICCPR;
- the right to peaceful assembly under Article 21 of the ICCPR;
- the right to freedom of expression under Article 19 of the ICCPR; and
- the right to privacy and reputation under Article 17 of the ICCPR.

1. Right to Freedom of Association

Freedom of association – general

The right to freedom of association is enshrined in Article 22 of the ICCPR. Article 8(1) of the ICESCR also supports this by providing that States Parties to that Covenant undertake to ensure the right of everyone to form trade unions and join the trade union of his or her choice, and not place restriction on the exercise of this right. Article 8 also provides that the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society for, inter alia, the rights and freedoms of others. Finally, Article 7 of the ICESCR interacts with this right by providing the right of everyone to the enjoyment of just and favourable conditions of work, including the right to fair wages.

The Bill will enhance workers' right to freedom of association by prohibiting certain action that may be taken against a person because of their decision to join, or not join, a trade union.

Clause 52 of the Bill will provide that it is unlawful for a person to do something (or threaten to do something) with intent to coerce another person to employ a person, engage a contractor or allocate duties or responsibilities relating to building work. In effect, this provision prohibits a third party from seeking to coerce an employer or a contractor to engage or not engage persons on the basis of their union membership.

Clause 53 of the Bill will provide that it is unlawful for a person to do something (or threaten to do something) with intent to coerce another person in relation to superannuation. This protection relates to freedom of association to the extent that a person may be attempting to coerce a person to join, or not join, a union affiliated superannuation fund.

Clause 54 of the Bill will provide that a person must not take any action with intent to coerce another in relation to the making, variation or termination of a building enterprise agreement. The provision also provides that an employer must not apply undue pressure to an employee regarding who is to be the employees' bargaining representative for a proposed enterprise agreement. This provision aims to ensure that employees have the freedom to choose who represents them, and ensure that the employee may choose to be represented by their union if they wish.

Freedom of association – Collective bargaining

The Bill provides at clause 58 that certain project agreements will be unenforceable to the extent that they are made with the intention of securing standard employment conditions for building employees working on multi-employer sites. The provision is intended to prevent the application of project or site-wide agreements (excluding agreements that are Commonwealth industrial instruments) to subcontractors and their employees who may already be covered by existing agreements or who may want to enter into their own agreements.

This prohibition was included in the former BCII Act in response to the findings of the Royal Commission, which identified the problem as follows:

On many major sites the unions and head contractors involved will also have entered into a site or project agreement. Subcontractors wishing to work on the project are required to adopt and comply with the terms of the project agreement even if they differ from the provisions of the union-endorsed EBA...The result is that all significant terms and conditions of the employment relationship between subcontractors and their employees are determined by processes to which they have not been privy and which make it pointless for them to engage in genuine enterprise level negotiations with their employees.^[1]

To the extent this provision will restrict the application of site-wide agreements in the building and construction industries, the Bill limits the right to collectively bargain. However, the measure is appropriate to Australia's collective bargaining framework in that the provision is not intended to limit, nor does it prevent, collective bargaining at the level of

^[1] *Royal Commission into the Building and Construction Industry* (2003), Volume 5, Page 7

particular enterprises. Rather, in implementing this recommendation of the Royal Commission, this provision supports the right to bargain collectively by protecting the rights of employees to negotiate their terms and conditions of employment with their employer and by ensuring that such terms and conditions contained in enterprise agreements cannot be undermined by site-wide agreements.

Industrial Action

The Bill recognises that employees and employers in the building industry can engage in protected industrial action (within the meaning of the Fair Work Act) in support of claims for an enterprise agreement provided that certain requirements are satisfied. However, the Bill limits the right to strike by:

- removing the protected status of industrial action in the building industry in circumstances where action is engaged in concert with persons or is organised by persons who are not connected to bargaining for an enterprise agreement (i.e. who are not ‘protected persons’), and
- requiring industrial action to be authorised or agreed to in advance and in writing by either an employer or employees (the Fair Work Act does not require agreement in advance or in writing).

Under the Bill, industrial action that is not protected is unlawful industrial action. The Bill provides for remedies and penalties when unlawful industrial action occurs. Contravention of the prohibition on unlawful industrial action is a Grade A civil penalty, which attracts a maximum penalty of 1,000 penalty units for a body corporate, otherwise 200 penalty units.

It is considered that while the provisions limit the right to strike, the limitation is reasonable, necessary and proportionate to legitimate aims including that:

- employers in the building industry are not pressured to agree to industrial action retrospectively, as this undermines the integrity of the industrial action framework; and
- sympathy action (i.e. by persons not directly engaged in bargaining for an enterprise agreement) is not used as a means to place unreasonable pressure on employers in the building industry during enterprise bargaining.

These provisions are based on recommendations that were made by the Royal Commission.² The Commission recommended that adjustments to the standard industrial action rules that apply generally under the workplace relations framework be made in light of evidence suggesting that the undesirable practices the provisions seek to address were more common in the building industry than in other industries.³ Addressing these practices is vital to maintaining the integrity of the bargaining and industrial action framework under Australia’s workplace relations system. It is considered both reasonable and proportionate to target specific behaviours in the building and construction industries directly, so as to ensure

² *Royal Commission into the Building and Construction Industry* (2003), Volume 11, Pages 70-73

³ *Royal Commission into the Building and Construction Industry* (2003), Volume 11, Chapter 6

compliance with the rule of law and to modify practices associated with enterprise bargaining and workplace disputes generally.

While the penalties for contravention may be considered high under the Bill, they are justified based on the Royal Commission's findings. Protected industrial action will not be subject to these penalties. Penalties in relation to unlawful action, including unlawful industrial action, are discussed further below in the context of the right to be presumed innocent and other guarantees.

While these provisions also limit the right to freedom of association, for the reasons outlined above it is considered that the limitation is reasonable, necessary and proportionate to the provisions' legitimate aim.

2. Right to just and favourable work conditions, including the right to safe and healthy working conditions

Article 7 of the ICESCR requires that State Parties to the Covenant recognise the right of everyone to the enjoyment of just and favourable working conditions, including safe and healthy working conditions.

The right to safe and healthy working conditions is primarily underpinned in Australia by work health and safety legislation at the Commonwealth, State and Territory levels. A consistent element of these frameworks is the ability of workers to cease, or refuse to carry out, work if the worker has a reasonable concern that to carry out the work would expose the worker to a serious risk to the workers' health or safety. This right to cease work is supported by the Fair Work Act which provides that a worker is not taking 'industrial action' if the employee's action was based on a reasonable concern about an imminent risk to his or her health or safety and the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work that was both safe and appropriate.

The exception to the definition of industrial action where action is taken by an employee based on a reasonable concern about an imminent risk to health or safety is replicated in the Bill. In its consideration of this provision, however, the Royal Commission noted that:

Misuse of non-existent occupational health and safety issues for industrial purposes is rife in the building and construction industry. Genuine occupational health and safety hazards are also rife. When industrial action is taken allegedly because of occupational health and safety concern by workers or unions, the onus of establishing the legitimacy of the concerns should be on those taking that action on that basis. Individual workers know when occupational health and safety issues are, and are not, justified. The onus should therefore be on workers to establish that occupational health and safety concern justified industrial action, and that they did not unreasonably refuse their employer's direction to perform other safe available work.⁴

The Bill requires the person seeking to rely on the imminent risk to health or safety exception to bear the onus of proving that it applies because there are concerns that abuse of the right to cease work is being abused. This restriction serves the legitimate purpose of ensuring that the

⁴ Royal Commission into the Building and Construction Industry (2003), Volume 11, Page 73

exception only applies in situations where the worker genuinely takes action based on a reasonable concern about the imminent risk to his or her health or safety. In proving this, the employee will not be required to demonstrate that there was in fact an imminent risk to his or her health or safety, just that they reasonably held that concern. The employee will also be required to demonstrate that they did not unreasonably fail to comply with a direction of his or her employer to perform other available work that was safe and appropriate. The wording of this provision restricts the type of work that the employer can require the employee to undertake to work that is ‘appropriate’. This ensures that an employee is not required to undertake tasks for which they are not reasonably able to perform. Overall, it is considered that the approach taken by the Bill is a reasonable and proportional limitation on this right that is based on the approach taken by the Fair Work Act with modifications to take into account considerations that are unique to the building and construction industry.

More generally, the Bill positively engages the right to safe and healthy working conditions. The object of the Bill includes providing an improved workplace relations framework to ensure that building work is carried out fairly for the benefit of all building industry participants. This includes by promoting the improvement of work health and safety in relation to building work. This is primarily achieved by the creation of the position of Federal Safety Commissioner who, along with Federal Safety Officers, is responsible for promoting work health and safety in relation to building work. This is underpinned by the Work Health and Safety Accreditation Scheme, which is a scheme prescribed by rules made under the Bill for accrediting persons who carry out building work funded by the Commonwealth and Commonwealth authorities. Through this scheme, the Government aims to utilise its position as a client and provider of capital to foster and encourage best practice work health and safety practices in the building and construction industry.

3. Right to the presumption of innocence and other guarantees

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. This protection also applies to a civil charge and persons facing a civil penalty are entitled to a fair process and Article 14 protections.

Article 14(2) provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law.

Article 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.

Reverse onus provisions

The right to a presumption of innocence is limited in a number of instances, particularly in relation to the civil remedy provisions contained in Chapter 6 – coercion, discrimination and unenforceable agreements. Under clause 57 of the Bill, where an application has been made regarding contravention of a provision in Chapter 6, and it is alleged that a person took action for a particular reason or with a particular intent, that allegation is presumed to in fact be the intent of the person, unless the person proves otherwise. Clause 57 also applies to clause 47 which prohibits unlawful picketing.

Chapter 6 is based on the General Protections in Part 3-1 of Chapter 3 of the Fair Work Act and those provisions also require the person to lead evidence regarding their intent. Like section 361 of the Fair Work Act, this clause provides that once a complainant has alleged that a person's actual or threatened action is motivated by a reason or intent that would contravene the relevant provision, that person has to establish on the balance of probabilities that the conduct was not carried out unlawfully. This is because in the absence of such a clause, it would be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason. A reverse onus is necessary in this context because the reasons for the person's action are a matter peculiarly known to them.

This presumption can be rebutted by the person on the basis that their conduct was motivated by another purpose. Whether the alternative motivation is accepted by the court will be determined on the balance of probabilities. It is therefore submitted that these restrictions are reasonable in the circumstances and are proportional, legitimate and necessary.

Privilege against self-incrimination

Clause 102 of the Bill provides that a person is not excused from giving information, producing a record or document, or answering a question under an examination notice, or as the result of an inspector exercising their relevant powers, 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 the right not to be compelled to testify against him or herself or to confess guilt.

This power was considered necessary by the Royal Commission on the grounds that the ABCC would otherwise not be able to adequately perform its functions due to the closed culture of the industry. In recognition of the seriousness of displacing the right not to answer questions on these grounds, however, the Bill provides for use/derivative use indemnity in relation to information obtained in this way. This ensures that information obtained through these provisions cannot be used in criminal proceedings against the person (with a very small number of exceptions, e.g. where the person provides misleading information). In the case of information obtained through the examination notice process, the information cannot be used in civil proceedings against the person either. These protections will work to ensure that the Bill's engagement of the rights contained in Article 14 are not arbitrary as they are reasonable, necessary and proportionate limitations in the pursuit of a legitimate policy objective.

Characterisation of the civil penalties in the Bill

With the exception of two criminal penalties, all penalties in the Bill are civil rather than criminal in nature. Prosecutions for the criminal penalties contained in clauses 62 and 106 will be required to be undertaken as criminal prosecutions. This will ensure that the guarantees contained in Article 14 of the ICCPR are complied with. As such, these criminal penalties do not limit human rights.

Guidance by the United Nations Human Rights Committee on the distinction between civil and criminal penalty provisions is limited. The *Practice Note 2 (Interim)* of the Parliamentary Joint Committee on Human Rights (the Committee) notes the Committee's view that civil penalty provisions may engage criminal process rights under Article 14 of the ICCPR on the basis that the term 'criminal' has an autonomous meaning in human rights law and may still therefore apply to civil penalty provisions. The three criteria for assessing whether a penalty

is a ‘criminal’ penalty for the purposes of human rights law that have been highlighted by the Committee are:

- the classification of the penalty in domestic law;
- the nature of the penalty; and
- the severity of the penalty.

In relation to the classification of the penalties at domestic law, the ‘civil’ nature of the provisions provides context for the evaluation of these penalties and is strongly persuasive that they should be viewed as civil penalties. Failure to comply with the civil penalty provisions in the Bill does not result in a criminal conviction, the person will not have a criminal conviction recorded against them and a breach of the civil penalty provisions will never attract the penalty of imprisonment.

The second consideration is the nature of the penalty. While the penalties in the Bill are clearly designed to act as a deterrent to particular forms of conduct in the building and construction industry, the Australian Law Reform Commission’s discussion paper *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation* notes that the prevention of public harm is a standard characteristic of civil penalty provisions.⁵ The Practice Note also notes that ‘a finding of culpability [preceding] the imposition of a penalty’ is a feature of criminal penalties. This is not a feature of the penalties in the Bill.

In examining the nature of civil penalties in Australia, the Australian Law Reform Commission noted that:

*In criminal law, wrongful acts are punished because they violate some kind of collective interest, and will apply even if no individual suffered a direct injury. Civil remedies, on the other hand, apply to conduct that has directly harmed an individual’s interest.*⁶

The penalties contained in the Bill, particularly those around unlawful action and coercion, discrimination and unenforceable agreements contain elements of both in that they affect the public interest while at the same time harming the interest of individuals. When examined as whole, however, it is considered that the more appropriate characterisation is that of a civil penalty. An object of the Bill is to improve productivity for the benefit of the Australian economy as a whole by ensuring that building work is carried out fairly, efficiently and productively. This involves providing a framework for ongoing cooperation between individual building industry participants. The penalties in the Bill are aimed at the various participants in the building and construction industry only and are activated when a building industry participant acts in such a way as to directly harm the interests of another participant. In this way the provisions operate in a regulatory manner which is a hallmark of civil penalty provisions.

The civil nature of the penalty provisions in the Bill is further reinforced by the fact that the ability to seek orders relating to contraventions of a civil remedy provisions in the Bill does

⁵ ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, para 2.46

⁶ ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, para 2.19

not rest solely with the regulator. Under clause 81 of the Bill, an ‘authorised applicant’ is able to seek orders in a relevant court for a contravention of a civil penalty provision. Clause 5 defines ‘authorised applicant’ to include ‘a person affected by the contravention’. This is in contrast to criminal proceedings which are the prerogative of the state. This approach strongly supports the view that the penalties in the Bill should be viewed as civil rather than criminal.

The final element for consideration set out in the Committee’s Practice Note is the severity of the penalty. One of the primary drivers behind industry specific legislation for the building and construction industry is the need for higher penalties to apply. Despite this, the Courts act independently in determining the appropriate penalty to apply within the limits set out in the legislation and are informed by considerations of proportionality. While the Courts will have the ability to apply high penalties, this will only be applied to the most severe cases.

It is submitted that the civil penalty provisions in the Bill do not constitute ‘criminal’ penalty provisions for the purposes of Article 14 of the ICCPR.

4. Right to freedom of peaceful assembly

Article 21 of the ICCPR provides that the right of peaceful assembly shall be recognised and that no restrictions may be placed on this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protections of the rights and freedoms of others. Commentary on this right has suggested that limitations to freedom of assembly must be proportional and must comply with minimum democratic principles.⁷

The right to freedom of peaceful assembly is limited by the prohibition on unlawful picketing that is contained in clause 47 of the Bill. This provision prohibits action that:

- has the purpose of preventing or restricting a person from accessing or leaving a building site or an ancillary site;
- directly prevents or restricts a person accessing or leaving a building site or ancillary site; or
- would reasonably be expected to intimidate a person accessing or leaving a building site or ancillary site.

This prohibition is limited to picketing action that is either motivated by an industrial purpose or is otherwise unlawful.

This limitation pursues the legitimate aim of prohibiting picketing activity that is designed to cause economic loss to building industry participants for industrial purposes. Although infrequent, this type of action is almost entirely unique to the building and construction industry and can have a severe impact on participants in this sector. The most high profile example of this came in August 2012 when members of the Construction, Forestry, Mining and Energy Union engaged in protests and obstructed free access and egress to building sites

⁷ *Commentary to the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*, para 56

in Melbourne that were operated by Grocon Pty Ltd. This action did not involve workers from the sites in question but was undertaken in connection with an industrial dispute, such that the primary remedies available were in common law. Given the explicitly industrial nature of this type of action, it is considered appropriate that this behaviour be encompassed by the Bill.

The primary safeguard is that picketing activity that is not motivated by an industrial purpose or that is otherwise lawful will not be prohibited. This will ensure that in cases where picketing action is lawful, the purpose of the action is the key determinant of whether it is prohibited. Action that seeks to draw attention to a social, environmental or community issue, for example, will not be unlawful unless the action involves unlawful behaviour such as trespass. As such, it is considered that the limitation is a reasonable and proportionate approach to achieving this legitimate objective.

5. Freedom of expression

Article 19(2) of the ICCPR protects individuals' freedom of expression in any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. The right protects not only the ability to impart information or ideas but also the ability to receive them. Freedom of expression may be limited under Article 19(3) only where provided for by law and when necessary to protect the rights or reputations of others, national security, public order or public health or morals.

Limitations in Chapters 5 and 6 of the Bill

Several provisions of the Bill engage this right, including:

- Clause 46, which prohibits a person from 'organising' particular actions in relation to unlawful industrial action;
- Clauses 52 and 54, which prohibit 'threatening to organise or take' action relating to coercion; and
- Clause 58, which provides that advising, encouraging, inciting or coercing action in relation to certain provisions of the Bill is also deemed to be a breach of the provision;

These provisions operate in such a way that they may restrict the freedom of expression contained in Article 19 of the ICCPR. Limitations of these rights are permissible if they are necessary to protect the rights and freedoms of others.

The legitimate aim of these provisions is to support the workplace relations framework established by the Bill to ensure that building work is carried out fairly, efficiently and productively. The prohibitions in Chapter 5 (Unlawful action) and Chapter 6 (Coercion, discrimination and unenforceable agreements) are important elements of this framework as they encourage genuine collective bargaining, ensure respect for the rights and freedoms of other building industry participants and ensure that participants are accountable for their unlawful conduct.

These limitations are necessary in order to prohibit conduct through which parties may attempt to infringe the rights and freedoms of other building industry participants. The

organisation of unlawful industrial action, threatening to organise or take coercive action and advising or encouraging others to take such action is often used as a means of preventing other building industry participants from fully exercising their rights and freedoms. This is particularly the case in the building and construction industry where complex supply structures, tight deadlines and the inter-connectedness of the participants mean that the mere threat of action can bring significant coercive pressure to bear. Where a building industry participant seeks to evade liability by encouraging, advising or inciting others to take action on their behalf it would severely undermine the effectiveness of the prohibitions to allow that party to escape the consequences of their actions.

As with the majority of provisions in the Bill, these clauses are modelled on the provisions of the Fair Work Act. It is also noted that the framing of the provisions requires action beyond merely talking about such matters. This sets a high threshold that must be met before a person will be found to have breached these prohibitions. It is therefore submitted that these restrictions are necessary to protect the rights and freedoms of others and reasonable and proportionate to the legitimate aim they pursue.

Limitations in Chapter 7 of the Bill

Clause 78 of the Bill prohibits ‘inducing or attempting to induce’ any person to hinder or obstruct authorised officers. This provision limits the right to freedom of expression contained in Article 19 of the ICCPR.

The aim of this provision is to ensure that inspectors are free to perform their functions and exercise their powers without undue interference by others. In light of the history of unlawful behaviour in the building and construction industry, it is submitted that this prohibition also serves to protect public order.

This limitation is necessary to ensure that a person who induces another person to hinder or obstruct an official is also accountable for the breach even though they did not perform the action themselves. The limitation is reasonable as the term ‘induce’ requires an intention to bring about a particular state of affairs. This ensures that the prohibition does not extend to mere expressions of opinion or theoretical discussions between parties. In light of these considerations, it is submitted that this restriction is necessary, reasonable and proportionate to the legitimate aim it pursues.

6. 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.

The *UN Human Rights Committee, General Comment 16* makes the following comments in relation to the right to privacy and reputation:

The term "home" in English...as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual

*occupation... Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment.*⁸

Inspector powers

Compliance with the Bill by building industry participants will be monitored and enforced by the ABC Commissioner with the support of Australian Building and Construction Inspectors (ABC Inspectors). A separate Commission and inspectorate was a recommendation of the Royal Commission, which recommended that the Commission have responsibility for investigating all forms of unlawful and inappropriate conduct which occur in the building and construction industry unless there is an agency better equipped by way of legislative power, experience, resources and expertise.⁹ For example, the Royal Commission noted that breaches of revenue laws are best dealt with by the Australian Taxation Office.

ABC Inspectors are granted a range of investigative and enforcement powers under the Bill. These have been modelled on the powers granted to Fair Work Inspector powers contained in the Fair Work Act with a number of modifications to reflect additional powers that were granted to inspectors under the BCII Act. Broadly identical powers and functions are also granted to Federal Safety Officers for the purposes of monitoring compliance with the Accreditation scheme for Commonwealth building work.

The right to privacy and reputation is engaged by the powers granted to inspectors to enter premises. Inspectors are restricted to exercising compliance powers during either work hours or at another time if they reasonably believe that it is necessary to do so for compliance purposes. Inspectors are able to enter business premises without force if they have the reasonable belief that there are records or documents relevant to compliance purposes on the premises, or are accessible from a computer on the premises, or if a person who ordinarily performs work or conducts business at the premises has information relevant to compliance purposes. Both of these grounds of entry are restricted to situations where the inspector has a reasonable belief that there is information or a person relevant to a compliance purpose present at the premises. If the inspector was aware that the person they were seeking to interview was not at the business premises, for example, they would not be able to exercise their entry powers.

Inspectors are also able to enter premises, whether residential or business, in a narrower range of circumstances; namely if they reasonably believe that a provision of the Bill, a designated building law or the Building Code applies to work that is being done, or applied to building work that has been, performed on the premises, or that a breach by a building industry participant of those same laws is occurring, has occurred or is likely to occur. These restricted circumstances recognise the special status of a person's home and imports an appropriate degree of proportionality by only allowing entry where either building work is or was occurring at the premises, or where a breach of a specific law was or has occurred.

Once an inspector has entered premises under the Bill, they are able to interview any person, require a person with custody of, or access to, a record or document to produce that record or

⁸ Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994).

⁹ *Royal Commission into the Building and Construction Industry* (2003), Volume 11, Page 32

document, inspect and make copies of any record or document, and take samples of any goods or substances in accordance with any procedures prescribed by the rules made under the Bill. Inspectors are also authorised to ask for a person's name and address if they reasonably believe that the person has contravened a civil remedy provision contained in the Bill, and to require a person, by written notice, to produce a document or documents.

Clause 104 of the Bill provides that any record or document that is inspected or copied by an inspector upon entering a premises of which the individual had custody, or to which the individual had access, when it was inspected or any information, document or thing obtained as a direct or indirect consequence of inspecting or copying that record will not be admissible in evidence in most criminal proceedings against the individual (excluding proceedings for an offence in relation to providing false or misleading information or documentation, or the obstruction of Commonwealth officials). Similar immunity is provided for in clause 102(3) of the Bill in relation to documents that an inspector requires a person to produce either after exercising their power to enter premises (clause 74(1)(d) of the Bill) or their more general power to request the production of documents (clause 77 of the Bill).

The power of inspectors to enter premises and the actions that powers they may exercise upon entering premises are tightly controlled and restricted to obtaining necessary evidence in support of a compliance purpose. Information that is provided as the result of these powers is also subject to strict use/derivative use immunities. As such, the engagement of the right to privacy is not arbitrary as it is reasonable, necessary and proportionate to a legitimate objective of the Bill.

Examination powers

In order to obtain information relevant to an investigation into a suspected contravention of the Bill or a designated building law by a building industry participant, the ABC Commissioner has the power to issue a written notice to a person requiring them to give information, produce documents or attend before the ABC Commissioner. 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.

In light of these considerations, it is submitted that this power limits the right to privacy contained in Article 17 of the ICCPR.

This power was considered necessary by the Royal Commission on the grounds that the ABCC would not be able to adequately perform its functions without it, due to the closed culture of the industry. In making this recommendation, the Royal Commission noted that:

I recommend that the ABCC should be given the same powers as those possessed by the ACCC under ss155 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.*¹⁰

As noted above, the power was based on the former provisions of the *Trade Practices Act 1974* which only provided use and derivative use immunity in relation to criminal matters. The Royal Commission's recommendation provided that this immunity should be extended to both criminal and civil matters as this had been a useful tool during the conduct of the Commission to encourage witnesses who were initially reluctant to assist the Commission to give evidence.¹¹ This approach has been adopted in the current Bill, which provides that neither the information or answers given or the record or document produced, nor any information, document or thing obtained as a direct or indirect consequence of giving the information or answers or producing the record or document is admissible in evidence against the individual in most proceedings. A number of exceptions to this immunity are provided for relating to administrative matters around the conduct of the examinations (such as providing false or misleading information or documents). In light of this immunity, a person is not excused for providing information on the basis that to do so would contravene any other law, or might tend to incriminate the person or otherwise expose the person to a penalty or other liability.

Because of the scope of these powers, the Bill contains a number of safeguards to ensure that the examination notice regime is implemented appropriately. Firstly, in light of the careful consideration that should be given to the use of this power and the scrutiny that it should entail, the ABC Commissioner's power to give a written notice to a person can only be delegated to a Deputy Commissioner or, if none have been appointed, an SES employee. This will ensure that the application of this power is only undertaken by the people most accountable for its use. Where a person has been required to attend before the ABC Commissioner or before an assistant, the person may be represented by a lawyer if the person chooses. This ensures that the person in question is not disadvantaged and is able to be appropriately represented. The time for an examination to take place must be at least 14 days after the notice is given, ensuring that the person on whom the notice is served will have an adequate opportunity to seek advice and arrange legal representation if they so choose. Finally, 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 (other than 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.

An additional level of oversight of the examination notice regime is provided for by the oversight of the Commonwealth Ombudsman. When the ABC Commissioner issues an examination notice, he or she is also required to notify the Commonwealth Ombudsman that the examination notice has been issued and provide the Ombudsman with a copy of the examination notice. As soon as practicable after the examination of a person takes place, the Commissioner must provide the Commonwealth Ombudsman with a report on the examination, a video recording of the examination and transcript of the examination. The Commonwealth Ombudsman is required to review the exercise of powers in relation to examination notices and provide a report to Parliament as soon as

¹⁰ *Royal Commission into the Building and Construction Industry* (2003), Volume 11, Page 38

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

practicable after the end of each financial year about the examinations conducted during that year.

In light of these extensive safeguards for individuals and oversight of the process as a whole, it is concluded that while the Bill does restrict the right to privacy and reputation by providing the ABC Commissioner with the ability to issue examination notices requiring a person to provide information, this restriction is not arbitrary as it has been adopted in the pursuit of a legitimate purpose and is a reasonable and proportional limitation.

Disclosure of information

The investigative powers provided for in the Bill are likely to result in the collection of personal information. Recognising this fact, Division 2 of Part 2 of Chapter 9 of the Bill places stringent restrictions on the use of information that is obtained in the course of performing functions, or exercising powers under the Bill. However, the Bill does authorise disclosure of personal information in a limited number of circumstances and therefore engages the right to privacy and reputation contained in Article 17 of the ICCPR.

Clause 105 sets out the situations in which the ABC Commissioner or the Federal Safety Commissioner may disclose, or authorise the disclosure of information obtained by a person in the course of performing functions or exercising powers under the Bill. This does not include information obtained through the examination notice process (referred to as ‘protected information’). These situations arise where the ABC Commissioner or Federal Safety Commissioner reasonably believes that:

- it is necessary or appropriate to disclosure information for the purposes of the performance of the ABC Commissioner’s functions or the exercise of his or her powers; or
- the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or Territory.

Disclosure of information may be made to the Minister where the ABC Commissioner or Federal Safety Commissioner reasonably believes that the disclosure is likely to assist the Minister to consider a complaint or issue in relation to a matter arising under the Bill or, for the ABC Commissioner, the Fair Work Act or the Fair Work Transitional Act.

Finally, clause 105 provides that the ABC Commissioner or Federal Safety Commissioner may disclose information to the Department for the purposes of briefing, or considering briefing, the Minister if the Commissioner reasonably believes the disclosure is likely to assist the Minister in consider a complaint under the legislation mentioned above.

Clause 106 sets out the restrictions on what a person may do with ‘protected information’ that the person has obtained in the course of their official employment. The use of this information is heavily restricted due to the ability of the ABC Commissioner to compel a person to answer questions or provide information through the examination notice process.

The general rule set out in clause 106(2) of the Bill is that an ‘entrusted person’ must not make a record of protected information or disclose protected information. The penalty for

breaching this provision is imprisonment for 12 months. The severity of this penalty provides a strong deterrent to the unauthorised use of information through the examination notice process.

A number of specific exceptions are made to this over-arching prohibition to support the operation of the Bill (including the exercise of powers and performance of functions by the ABC Commissioner) and law enforcement activities more generally.

Finally, clause 108 provides that the ABC Commissioner may, if he or she considered that it is in the public interest to do so, publish details of non-compliance with the Building Code, including the name of the person who failed to comply, and non-compliance by a building industry participant with the Bill or a designated building law, including the name of the participant who failed to comply. The ability of the ABC Commissioner to publicise non-compliance is an important enforcement tool and provides an opportunity to encourage compliance with the Building Code, the Bill and designated building laws by persons and building industry participants.

Apart from the exceptions listed above, information obtained through the operation of the Bill will be collected, stored and disclosed in accordance with relevant Commonwealth privacy legislation. In light of these extensive safeguards 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 proportional limitations.

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