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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT AMENDMENT
(TRANSITION TO FAIR WORK) BILL 2009**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the
Honourable Julia Gillard MP)

BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT AMENDMENT (TRANSITION TO FAIR WORK) BILL 2009

OUTLINE

The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (the Bill) would create a strong but fair set of compliance arrangements for the building and construction industry.

The Bill implements the following reforms:

- it abolishes the Office of the Australian Building and Construction Commissioner and creates a new agency, the Office of the Fair Work Building Industry Inspectorate (the Building Inspectorate) to regulate the building and construction industry;
- it removes the existing building industry specific laws that provide:
 - higher penalties for building industry participants for breaches of industrial law, and
 - broader circumstances under which industrial action attracts penalties;
- it includes a capacity for the Director of the Building Inspectorate to compulsorily obtain information (including through requiring a person to attend an examination and answer questions) or documents from a person whom the Director believes has information or documents relevant to an investigation;
- it introduces the following safeguards in relation to the use of the power to compulsorily obtain information or documents:
 - use of the powers is dependent upon a presidential member of the Administrative Appeals Tribunal being satisfied a case has been made for their use,
 - persons summonsed to interview may be represented by a lawyer of their choice and their rights to refuse to disclose information on the grounds of legal professional privilege and public interest immunity will be recognised,
 - people summonsed for examination will be reimbursed for their reasonable expenses, including reasonable legal expenses,
 - all examinations are to be videotaped and undertaken by the Director or an SES officer,
 - the Commonwealth Ombudsman will monitor and review all examinations and provide reports to the Parliament on the exercise of this power, and
 - the powers will be subject to a five year sunset clause. The decision on whether the coercive powers will be extended after five years will be made following a review of their use and ongoing need;
- it creates an office, the Independent Assessor, who, on application from stakeholders, may make a determination that the examination notice powers will not apply to a particular project;
- it also retains the provisions that establish the Office of the Federal Safety Commissioner and its related OHS Accreditation Scheme.

Financial Impact Statement

The financial impact of the Bill is budget neutral.

NOTES ON CLAUSES

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

FW Act	<i>Fair Work Act 2009</i>
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
NES	National Employment Standards
SES employee	Senior Executive Service employee
the Act	<i>Building and Construction Industry Improvement Act 2005</i>
the Bill	Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009
WR Act	<i>Workplace Relations Act 1996</i>

Clause 1 – Short title

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

Clause 2 – Commencement

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

Clause 3 – Schedule(s)

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

Schedule 1 – Amendments

Building and Construction Industry Improvement Act 2005

Item 1 – Section 1

4. This item amends the title of the Act to reflect the new Fair Work framework. The new title is the *Fair Work (Building Industry) Act 2009*.
5. This Bill is drafted as though all of the amendments to the *Building and Construction Industry Improvement Act 2005* proposed by the Fair Work (State Referral and Consequential and Other Amendments) Bill 2009 have been enacted.

Item 2 – Section 3

6. This item amends the object of the Act in section 3. The main object of the Act is to provide a balanced framework for cooperative, productive and harmonious workplace relations in the building industry. Section 3 provides for this to be achieved by:
 - ensuring compliance with workplace relations laws by all building industry participants;
 - providing information, advice and assistance to all building industry participants about their rights and obligations;
 - providing an effective means of enforcing those rights and obligations;
 - providing appropriate safeguards on the use of enforcement and investigative powers; and
 - improving the level of occupational health and safety in the building industry.
7. The object of the Act will have particular relevance to the role of the Independent Assessor as set out in proposed Division 2 of Part 1 of Chapter 7 of the Act. The Independent Assessor must have regard to the object of the Act when considering whether to make a determination under section 39(1) that section 45 (allowing the Director to make an application to a nominated AAT presidential member for an examination notice) does not apply in relation to one or more building projects.

Items 3 to 47 – Subsection 4(1)

8. These items amend the definitions in the Act as required because of other amendments. These items insert new definitions of concepts inserted by the Bill, including definitions of:
 - AAT presidential member;
 - Advisory Board;
 - building matter;
 - Commonwealth Ombudsman;

- Director;
- examination;
- examination notice;
- Fair Work Building Industry Inspector;
- Fair Work Inspector;
- Fair Work Ombudsman;
- Independent Assessor;
- inspector;
- investigation;
- lawyer;
- nominated AAT presidential member;
- Office;
- safety net contractual entitlement; and
- this Act

Item 48 – Subparagraph 5(1)(d)(iv)

9. This item amends the definition of building work to exclude a reference to off-site pre-fabrication of made-to-order components. It is intended that the amended definition will exclude manufacturing that takes place in permanent off-site facilities and is separate from the building project but that pre-fabrication of building components that takes place on auxiliary or holding sites separate from the primary construction site(s) will remain covered by the definition of building work. Subsections (3) and (4) provide for the definition of building work to include or not include activities prescribed by the regulations.

Item 49 – Chapter 2

10. This item repeals Chapter 2 of the Act and replaces it with new sections 9 to 26M explained below.

Section 9 – Establishment

11. This section establishes the statutory office of the Director of the Fair Work Building Industry Inspectorate.

Section 10 – Functions

12. Section 10 sets out the functions of the Director. The functions of the Director are broadly similar to the functions of the FWO under the FW Act but relate only to the building industry. While the functions of the FWO do not exclude the building industry, it is expected that the FWO and the Director will work co-operatively to ensure that the Director is solely responsible for building industry matters and will carry out the full range of the Director's functions in relation to the building industry.

13. A function of the Director is to promote harmonious, productive and cooperative workplace relations in the building industry and compliance with designated building laws and the Building Code by building industry participants. A key aspect of this function is to assist building industry participants to understand and comply with their rights and obligations under designated building laws and the Building Code by providing education, assistance and advice. Designated building laws include the FW Act, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and industrial instruments made under the WR Act and the FW Act.

14. Assisting building industry participants to understand and comply with their rights and obligations under designated building laws and the Building Code may involve:

- providing general information (e.g., fact sheets, guides and other guidance materials);
- developing and implementing targeted education campaigns; and
- responding to requests for advice or information (e.g., on the operation of the General Protections provisions in the FW Act).

15. It is also a function of the Director to monitor compliance with designated building laws and the Building Code by building industry participants. The Director also has the function of inquiring into and investigating any suspected contraventions by a building industry participant of a designated building law, a safety net contractual entitlement or the Building Code. Inspectors would be able to exercise various powers to investigate compliance. Part 2 of Chapter 7 sets out the powers that inspectors have and when those powers may be exercised.

16. Safety net contractual entitlement is defined in subsection 4(1) as having the same meaning as in the FW Act. The FW Act defines safety net contractual entitlement in section 12 to mean an entitlement in a contract of employment about any of the subject matters described in subsections 61(2) or 139(1) of the FW Act. This includes, for example, a contractual entitlement to wages in excess of minimum wages set out in a modern award or enterprise agreement. It also includes a contractual entitlement to paid parental leave. Inspectors may only investigate contraventions of safety net contractual entitlements in certain circumstances, as set out in subsection 706(2) of the FW Act. The Director would also be able to apply for an examination notice in relation to an investigation into a suspected contravention of a safety net contractual entitlement subject to subsection 36A(2).

17. The Director will be able to commence proceedings in a court or make applications to FWA (paragraph 10(d)) and may represent building industry participants who are or may become parties to proceedings in a court or to a matter before FWA under a designated building law where such representation would promote compliance with designated building laws (paragraph 10(f)).

18. It is also important that the Director be able to work with other relevant law enforcement agencies including State and Territory occupational health and safety authorities, police, the Australian Tax Office, the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission. The Director may refer matters to relevant authorities (paragraph 10(e)). The circumstances in which the Director may disclose or authorise the disclosure of information (other than information obtained under examination notices) to relevant authorities is set out in section 64 of the Act. Section 65 of the Act sets out the treatment of information obtained under examination notices.

19. The Director also has the function of disseminating information about designated building laws and the Building Code. Information disseminated by the Director can also include other matters that affect building industry participants and can be disseminated by facilitating ongoing discussions with building industry participants such as through an industry forum.

20. The Director may make submissions or provide information to the Independent Assessor in accordance with the Act. This will allow the Director to make submissions to the Independent Assessor as provided for in proposed subsection 41(1) or to provide any information requested by the Independent Assessor under proposed subsection 41(2).

21. Any Act may also confer other functions on the Director (paragraph 10(i)).

Section 11 – Minister’s directions

22. Section 11 permits the Minister to give general directions to the Director about the Director’s policies, programs and priorities and the manner in which the powers and functions of the Director are exercised or performed. For example, the Minister could direct the Director to focus attention on serious rather than minor contraventions. The Minister cannot make a general direction about a particular case.

23. Subsection 11(1) provides that directions given under this section are legislative instruments for the purposes of the *Legislative Instruments Act 2003*. This is consistent with the existing provisions dealing with directions to the Australian Building and Construction Commissioner. The effect of this provision is that any such directions will be required to be lodged with the Federal Register of Legislative Instruments and tabled in Parliament. Subsection 11(4) provides that directions given under this section are disallowable in accordance with section 42 of the *Legislative Instruments Act 2003*.

Section 12 – Minister may require reports

24. This section allows the Minister to direct the Director to provide specific reports relating to the Director’s functions and powers. For example, the Minister may require a report on approaches to improving compliance with fair work instruments in the building industry. As the note to this section explains, any report provided under this section must comply with the requirements in section 66 of the Act which restrict the disclosure of information relating to an individual’s affairs in a report.

Section 13 – Delegation by the Director

25. Section 13 allows the Director to delegate his or her powers to a member of staff of the Office of the Fair Work Building Industry Inspectorate (the Office) or to an inspector. Despite this general rule, the Director cannot delegate the following powers and functions:

- the Director’s powers and functions as an inspector;
- application for an examination notice under section 45; and
- variation of the time for compliance with an examination notice under subsections 50(3) and (4).

26. Subsection 13(3) permits the Director to delegate certain powers and functions only to an SES staff member. These are the conduct of an examination under subsection 51(2) and administering an oath or affirmation at an examination under subsection 51(4).

27. The capacity to delegate most of the Director’s powers and functions will enable the staff of the Office and the inspectors to perform the functions and exercise the powers that are necessary for the day to day operation of the Office. For example, the Director may delegate the notification to the Commonwealth Ombudsman of the issue of an examination notice as required under proposed section 49.

28. Subsection 13(4) requires delegates of the Director to comply with any directions of the Director. The Director must also publish details of any delegations made.

Section 14 – Annual report

29. Section 14 requires the Director to produce an annual report at the end of each financial year on the exercise and performance of the Director’s powers and functions during that year. The report would be presented to Parliament. It is intended that the report would provide details on how the Director has exercised the functions and powers conferred on him or her under section 10. The Director would have discretion as to the content of the report but certain information must be included in accordance with subsection 14(2). The report must include details relating to any directions given by the Minister under sections 11 and 12, delegations made by the Director under section 13 and recommendations made to the Director by the Advisory Board.

30. Two notes refer readers to additional rules that must be considered by the Director when producing the annual report. These additional rules are provided by section 34C of the *Acts Interpretation Act 1901* and section 66 of the Act (disclosure of information relating to an individual’s affairs in a report).

Section 15 – Appointment

31. This section provides for the appointment of the Director. The Director must be appointed by the Minister by written instrument. The Director must be appointed on a full-time basis for a period of up to 5 years. Subsection 15(3) provides that the Minister cannot appoint a person as Director unless satisfied that the person has suitable qualifications and experience and is of good character. The Minister can set terms and conditions for the Director’s appointment that are not covered by the Act.

Section 16 – Acting appointments

32. This section allows the Minister to appoint an Acting Director in specified circumstances. The Acting Director will be able to exercise all the powers and perform all the functions of the Director. Subsection 16(2) provides that the actions of a person purporting to act as the Director would not be invalidated merely due to certain specified defects or irregularities in connection with the appointment.

Section 17 – Remuneration

33. This section provides that the Director is to be paid the remuneration determined by the Remuneration Tribunal. If the Remuneration Tribunal has not made an applicable determination, the Director's remuneration will be as prescribed in the regulations. The regulations may prescribe allowances to be paid to the Director.

Section 18 – Leave of absence

34. This section provides that the Director's recreation leave entitlements will be determined by the Remuneration Tribunal and that additional leave of absence may be granted by the Minister on such terms and conditions as the Minister determines.

Section 19 – Engaging in other paid employment

35. This section provides that the Director must not engage in paid employment outside the duties of his or her position as Director without the Minister's approval. Failure to comply with this requirement will result in termination of the Director's appointment (see paragraph 22(2)(c)).

Section 20 – Disclosure of interests

36. This section requires the Director to give written notice to the Minister of all material personal interests the Director has or acquires that conflict or could conflict with the proper performance of his or her functions. Failure to do so without reasonable excuse will result in termination of the Director's appointment (see paragraph 22(2)(d)). This is to ensure impartiality and avoid any actual or perceived conflicts of interest.

Section 21 – Resignation

37. This section allows the Director to resign his or her appointment by giving the Minister a written resignation. The resignation will take effect on the day it is received by the Minister or on a later day as specified in the resignation.

Section 22 – Termination

38. This section specifies the circumstances in which the Minister may or must terminate the Director's appointment. This section reflects the standard grounds for termination of appointments of statutory officeholders. The Minister also has the power to suspend the Director's appointment by virtue of section 33(4) of the *Acts Interpretation Act 1901*.

Part 2 – Fair Work Building Industry Inspectorate Advisory Board

39. This Part establishes the Fair Work Building Industry Inspectorate Advisory Board and provides for its role, membership, the terms and conditions of members and processes relating to the Advisory Board's role.

Section 23 – Establishment

40. This section establishes the Fair Work Building Industry Inspectorate Advisory Board.

Section 24 – Role

41. This section provides that the role of the Advisory Board is to make recommendations to the Director. These recommendations are to be about:

- policies to guide the performance and exercise of the Director's functions and powers;
- the priorities of and programs to be implemented by the Director; and
- any matter that the Minister requests the Advisory Board to consider.

42. For example, the Advisory Board could recommend that the Director focus on compliance with superannuation obligations or deliver education programs on rights of entry.

Section 25 – Membership

43. This section provides for the composition of the Advisory Board. As well as the Director and the FWO, the Advisory Board may have up to 5 part-time members. At least one of the part-time members must have experience or background in employee representation in the building industry and at least one of the part-time members must have experience or background in employer representation in the building industry.

Section 26 – Appointment of members

44. This section provides that the part-time members of the Advisory Board are to be appointed by the Minister for a period of up to 3 years. The note to this section explains that an Advisory Board member will be eligible for reappointment by virtue of subsection 33(4A) of the *Acts Interpretation Act 1901*.

45. Before a Minister can appoint a part-time member, the Minister must be satisfied that the person has knowledge or experience in a relevant field being workplace relations, law or business, industry or commerce.

Section 26A – Chair

46. This section provides for a Chair of the Advisory Board. The Minister must appoint a member other than the Director or the FWO to be the Chair. This section also provides for the appointment of an Acting Chair in specified circumstances.

Section 26B – Remuneration of members

47. This section provides that members of the Advisory Board who are appointed by the Minister will be paid remuneration as determined by the Remuneration Tribunal. If the Remuneration Tribunal has not made an applicable determination then the members of the Advisory Board will be paid remuneration as prescribed by the regulations.

Section 26C – Leave of members

48. This section allows the Minister to grant the Chair a leave of absence on terms and conditions as determined by the Minister. Leave of other members is to be determined by the Chair. If the Chair grants a period of leave to a member in excess of 6 months, the Chair must notify the Minister.

Section 26D – Resignation of members

49. This section provides that members appointed by the Minister may resign from the Advisory Board by written resignation. The resignation will take effect on the day it is received by the Minister or on a later day as specified in the resignation.

Section 26E – Termination of appointment

50. This section specifies the circumstances in which the Minister may or must terminate the appointment of an Advisory Board member other than the Director or the FWO. This section reflects the standard grounds for termination of appointments of statutory officeholders.

Section 26F – Other terms and conditions

51. This section allows the Minister to set other terms and conditions of a member's appointment in relation to matters not covered by the Act. This section does not apply to the Director or the FWO.

Section 26G – Meetings

52. This section requires the Chair to convene at least 2 meetings of the Advisory Board in each financial year. The Chair may convene additional meetings if the Chair thinks it is necessary for the performance of the Advisory Board's role. A meeting must also be held at the Director's request.

53. Subsection 26G(2) provides that the quorum for a meeting of the Advisory Board is the Chair, the Director and the FWO. This means that a meeting of the Advisory Board may not proceed unless the quorum is present. The Chair must preside at all meetings.

54. Under subsection 26G(3), questions arising from a meeting of the Advisory Board will be decided by a majority of the votes of the members present and voting. If there is an equality of votes the Chair will have the casting vote.

Section 26H – Decisions without meetings

55. This section allows the Advisory Board to make a decision without a meeting and provides rules for the making of such decisions.

Part 3 – Office of the Fair Work Building Industry Inspectorate

56. This Part deals with the establishment and staffing arrangements of the Office of the Fair Work Building Industry Inspectorate.

Section 26J – Office of the Fair Work Building Industry Inspectorate

57. This section establishes the Office of the Fair Work Building Industry Inspectorate.

Section 26K – Staff

58. This section provides that the staff of the Office of the Fair Work Building Industry Inspectorate are to be persons engaged under the *Public Service Act 1999*.

59. Subsection 26K(2) provides that the Director and the staff of the Office together constitute a Statutory Agency for the purposes of the *Public Service Act 1999* and that the Director is the head of that Statutory Agency.

60. Agency Heads have a number of functions under the *Public Service Act 1999* in relation to the operations of their organisations, including responsibility for staffing arrangements as an employer on behalf of the Commonwealth and financial management.

Section 26L – Persons assisting the Director

61. This section allows the Director to be assisted by:

- employees of Agencies within the meaning of the *Public Service Act 1999*;
- officers and employees of a State or Territory;
- officers and employees of authorities of the Commonwealth, a State or Territory.

62. The services of these persons may be made available to the Director in connection with the performance of any of his or her functions.

63. This section ensures that the Director has the ability to draw upon the skills, expertise and experience of these employees or officers to assist in the performance of the Director's functions.

64. The note provides an example of how this may occur, for example, by State or Territory governments offering or agreeing to make their employees' services available to assist the Director in providing education in a particular region. Another example of assistance that may be provided could be responding to requests for advice or information within a region.

Section 26M – Consultants

65. Section 26M allows the Director to engage persons as consultants to the Director. Such persons must have suitable qualifications and experience and would be engaged on terms and conditions as determined by the Director.

Item 50 – Section 28

66. This item repeals existing section 28 of the Act. Section 28 provides that building industry participants may be required, under threat of a civil penalty, to provide a report on compliance with the Building Code issued under the Act.

67. Inspectors or Federal Safety Officers will continue to be able to investigate compliance with the Building Code using their powers under the Act.

Item 51 – Chapters 5 and 6

68. The report ‘Transition to Fair Work Australia for the Building and Construction Industry’ (the Wilcox Report) recommended that the provisions of the FW Act governing the conduct of employers, employees and industrial associations and penalties for contraventions of the FW Act apply unchanged to building industry participants. The Government accepted that recommendation. This item gives effect to that recommendation by repealing the provisions dealing with unlawful industrial action and other building industry-specific workplace relations prohibitions.

Item 52 – Part 1 of Chapter 7

69. Part 1 of Chapter 7 deals with contraventions of civil remedy provisions. As other amendments will repeal all existing civil remedy provisions in the Act, these provisions are no longer required and are therefore repealed by Item 52. This Part will be replaced with a new Part relating to powers to obtain information. This Part contains sections 36 to 58 as explained below.

*Part 1 – Powers to obtain information etc.**Division 1 – Preliminary**Section 36 – Definitions*

70. Section 36 defines the terms building project and interested person for the purposes of this Part.

71. Building project is defined as a project that consists of, or includes building work. Building work is defined in section 5 of the Act.

72. Interested person is defined as the Minister and any other persons prescribed by the regulations.

Section 36A – Application of this Part

73. Section 36A sets out the types of investigations to which this Part applies. This Part applies to an investigation by the Director into a suspected contravention by a building industry participant of a designated building law or a safety net contractual entitlement.

74. Subsection 36A(2) provides that the Director may only exercise powers under this Part in relation to a suspected contravention by a building industry participant of a safety net contractual entitlement if the Director reasonably believes that the building industry participant

has contravened a provision or term referred to in subsection 706(2) of the FW Act. Subsection 706(2) of the FW Act refers to the following:

- a provision of the NES;
- a term of a modern award;
- a term of an enterprise agreement;
- a term of a workplace determination;
- a term of a national minimum wage order;
- a term of an equal remuneration order.

75. The safety net contractual entitlement under investigation does not need to be the same subject matter as the statutory entitlement listed above.

Division 2 – Role of the Independent Assessor

Subdivision A – Establishment and appointment etc. of the Independent Assessor

Section 36B – Establishment

76. This section establishes the statutory office of the Independent Assessor – Special Building Industry Powers.

Section 36C – Functions and powers

77. This section provides that the Independent Assessor has the functions and powers conferred on him or her by or under this Act.

Section 36D – Minister may require reports

78. This section allows the Minister to direct the Independent Assessor to provide specific reports relating to the Independent Assessor's functions and powers. For example, the Minister could require a report about the numbers and types of applications being received by the Independent Assessor.

Section 37 – Appointment

79. This section provides for the appointment of the Independent Assessor. The Independent Assessor must be appointed by the Governor-General by written instrument. The Independent Assessor must be appointed on a part-time basis for a period of up to 5 years. Subsection 37(3) provides that the Minister must be satisfied that the person has suitable qualifications and experience and is of good character before the Governor-General can appoint the person as the Independent Assessor. The Governor-General can set terms and conditions for the Independent Assessor's appointment that are not covered by the Act.

Section 37A – Acting appointments

80. This section allows the Minister to appoint an Acting Independent Assessor in specified circumstances. The Acting Independent Assessor will be able to exercise all the powers and perform all the functions of the Independent Assessor. Subsection 37A(2) provides that the actions of a person purporting to act as the Independent Assessor would not be invalidated merely due to certain specified defects or irregularities in connection with the appointment.

Section 37B – Remuneration

81. This section provides that the Independent Assessor is to be paid the remuneration determined by the Remuneration Tribunal. If the Remuneration Tribunal has not made an applicable determination, the Independent Assessor's remuneration will be as prescribed in the regulations. The regulations may prescribe allowances to be paid to the Independent Assessor.

Section 37C – Leave of absence

82. This clause provides that the Independent Assessor's recreation leave entitlements will be determined by the Remuneration Tribunal and that additional leave of absence may be granted by the Minister on such terms and conditions as the Minister determines.

Section 37D – Engaging in other paid employment

83. This section provides that the Independent Assessor must not engage in any paid employment that conflicts or may conflict with the proper performance of the Independent Assessor's functions. Failure to comply with this requirement will result in termination of the Independent Assessor's appointment (see paragraph 37G(2)(c)).

Section 37E – Disclosure of interests

84. This section requires the Independent Assessor to give written notice to the Minister of all material personal interests the Independent Assessor has or acquires that conflict or could conflict with the proper performance of his or her functions. Failure to do so without reasonable excuse will result in termination of the Independent Assessor's appointment (see paragraph 37G(2)(d)). This is to ensure impartiality and avoid any actual or perceived conflicts of interest.

Section 37F – Resignation

85. This section allows the Independent Assessor to resign his or her appointment by giving the Governor-General a written resignation. The resignation will take effect on the day it is received by the Governor-General or on a later day as specified in the resignation.

Section 37G – Termination

86. This section specifies the circumstances in which the Governor-General may or must terminate the Independent Assessor's appointment. This section reflects the standard grounds for termination of appointments of statutory officeholders.

Subdivision B – Determinations by Independent Assessor

Section 38 – Application of this Subdivision

87. This section provides that the Independent Assessor can only exercise his or her powers if building work on the project begins on or after the commencement of this Subdivision. This means that determinations under section 39(1) may not be made in relation to a building project where building work has already started before the commencement of the Bill.

Section 39 – Independent Assessor may determine that powers to obtain information do not apply in relation to particular building project

88. This section allows the Independent Assessor to determine that section 45 does not apply in relation to a particular building project. Section 45 allows the Director to apply to a nominated AAT presidential member for an examination notice.

89. The effect of a determination would be to prevent the Director from making such an application. It would also prevent a nominated AAT presidential member from issuing an examination notice if a determination has been made in relation to a particular building project to which the investigation is connected.

90. A determination made under subsection 39(1) can apply in relation to more than one building project. The Independent Assessor can only make a determination if there has been an application in accordance with proposed section 40. There is no capacity for the Independent Assessor to act on his or her own motion.

91. A note to subsection 39(1) directs readers to subsection 33(3) of the *Acts Interpretation Act 1901* which gives the Independent Assessor the power to vary or revoke a determination after it is made. The Director may make an application to the Independent Assessor under section 43 to request the Independent Assessor to reconsider the decision.

92. Subsection 39(3) provides that the Independent Assessor must be satisfied that it would be appropriate to make the determination before he or she can make a determination under subsection 39(1). The Independent Assessor must have regard to the object of the Act and any matters prescribed by the regulations when considering whether he or she is satisfied that it would be appropriate to make a determination. Matters prescribed by the regulations might include, for example, a demonstrated record of compliance with workplace relations laws, including court or tribunal orders, in connection with the building project. The Independent Assessor must also be satisfied that it would not be contrary to the public interest to make a determination.

93. A determination made under subsection 39(1) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law and is included to assist readers. It does not amount to an exemption from the *Legislative Instruments Act 2003*.

Section 40 – Interested person may apply for determination

94. This section sets out who may apply for a determination under subsection 39(1) and how and when an application may be made.

95. An application for a determination under subsection 39(1) may be made by an interested person, or by two or more interested persons acting jointly. Section 36 defines interested person to be the Minister and any other person prescribed by the regulations. An application must state the grounds on which it is made and be in the form prescribed by the regulations if there is a prescribed form. The regulations may also provide for any other information to be included.

96. Subsections 40(3) and (4) provide that an application for a determination may relate to more than one building project and may be made at any time before or after the building project has commenced or after it has been completed. This means that applications may be made in relation to future or proposed building projects or projects that have finished.

97. Subsection 40(5) prevents an interested person from making repeated applications in relation to the same building project on the same grounds where there is no new information.

Section 41 – Consideration of application for determination

98. Section 41 provides rules for the Independent Assessor's consideration of an application for a determination.

99. The Independent Assessor must give the Director a copy of any application that is made and must give the Director a reasonable opportunity to make submissions in relation to the application. This is because the Director may have information that may be relevant to the Independent Assessor's decision in relation to the application. For example, the Director may inform the Independent Assessor that the Fair Work Building Industry Inspectorate is investigating a number of suspected contraventions of designated building laws in connection with the relevant building project.

100. The Independent Assessor will also have the capacity under subsection 41(2) to request further information from the applicant or from the Director in relation to the application. The Independent Assessor has the capacity to request information from the Director so that the Independent Assessor may obtain any relevant information even where the Director either decides not to make a submission in relation to the application as provided for in paragraph 41(1)(b) or the information in question was not contained in the submission. Any further information given will need to be taken into account by the Independent Assessor when making his or her decision (see subsection 41(4)) along with the information provided in the application and any submissions made by the Director.

101. The applicant and the Director must be informed of the decision by the Independent Assessor as soon as practicable after it is made.

Section 42 – Publication and period of effect of determination

102. Section 42 requires the Independent Assessor to give a copy of any determinations made to the Director and to the applicant and to publish determinations in the Gazette. The Independent Assessor must do this as soon as practicable after making a determination.

103. A determination takes effect on the day on which it is published in the Gazette.

Section 43 – Director may request Independent Assessor to reconsider determination

104. This section allows the Director to request the Independent Assessor to reconsider a determination he or she made under subsection 39(1).

105. It is not intended that this section apply only where the Director believes that the Independent Assessor made an incorrect decision. It will also apply where the Director believes that there has been a change in the underlying circumstances relating to the building project such that the criteria that were satisfied at the time of the Independent Assessor's original decision to make a determination are no longer satisfied. In reconsidering the determination, the Independent Assessor will only have regard to the same criteria that he or she was required to have regard to under subsection 39(3) when making the determination.

106. The Director may make a request to reconsider a determination at any time after the determination is made. The request must set out the reasons for the request and must be in writing.

107. Subsection 43(3) provides that, if the Director makes a request to the Independent Assessor to reconsider the determination, the Independent Assessor must reconsider the determination and make a determination either affirming or revoking the decision, or varying it as appropriate.

108. As soon as practicable after the Independent Assessor makes such a determination, the Independent Assessor must give written notice of the determination to both the Director and the applicant for the original determination and arrange for a copy of any determination revoking or varying the original determination to be published in the Gazette.

109. A determination revoking or varying the original determination takes effect on the day on which it is published (see subsection 43(6)). However, where no determination is in force, the Director may apply to a nominated AAT presidential member for the issue of an examination notice for the purpose of investigating suspected contraventions of designated building laws regardless of when the suspected contravention occurred (see subsection 45(2)).

Division 3 – Examination notices

Section 44 – Minister may nominate AAT presidential members to issue examination notices

110. This section deals with the process for AAT presidential members to be nominated to issue examination notices.

111. Subsection 44(1) provides that the Minister may, by writing, nominate an AAT presidential member to issue examination notices.

112. However, if the presidential member is a Judge then subsection 44(2) provides that a nomination may only be made if he or she consents to the nomination in writing.

113. Subsection 44(3) sets out when a nomination ceases to have effect.

114. Subsection 44(4) provides that a nominated presidential member will have the same protection and immunity in relation to issuing an examination notice as a High Court Justice has in relation to High Court proceedings.

Section 45 – Director may apply to nominated AAT presidential member for examination notice

115. This section sets out when and how the Director may apply for an examination notice.

116. Subsection 45(1) provides that the Director may only apply for a notice if he or she believes on reasonable grounds that a person has information or documents or is capable of giving evidence relevant to an investigation. An application for an examination notice must be in writing.

117. An examination notice may require a person to either give information or produce documents to the Director or appear before the Director and answer questions relevant to the investigation.

118. Subsection 45(2) provides that the Director may not make an application for an examination notice in relation to an investigation if the investigation is connected with a building project in relation to which a determination of the Independent Assessor is in force under subsection 39(1).

119. Subsection 45(3) enables regulations to prescribe both a form for the application and additional information that may be required beyond that set out in subsection 45(5).

120. An application for an examination notice may only relate to one person (subsection 45(4)). This does not prevent the Director from making simultaneous or later separate applications in relation to other persons in regard to the same investigation.

121. An application may be made to examine a person, or require them to produce information or documents, in relation to more than one investigation. In these circumstances the pre-requisites for granting a notice would need to be satisfied in relation to each investigation. Subsection 47(4) enables the presidential member, in dealing with such an application, to issue a notice only in relation to the particular investigation(s) where those pre-requisites are satisfied.

122. The matters that must be covered in the application are set out in subsection 45(5). It provides that the application must be accompanied by an affidavit. As well as the mandatory matters set out in this subsection, the Director would also be expected, when making an application, to take into consideration the factors of which the presidential member must be satisfied in order to issue a notice (see subsection 47(1)).

123. Consistent with the use of this power as a last resort, the application must set out what alternative methods have been attempted to obtain the information, documents or evidence (paragraph 45(5)(e)).

124. Paragraphs 45(5)(f) and (g) ensure that the presidential member is aware of other applications or likely applications relevant to the investigation(s). The Director must disclose if there have been any previous applications in relation to the person and the same investigation(s) and if any other applications have been, or are likely to be, made in relation to the same investigation. These factors are included as they may be a relevant consideration for the presidential member in determining whether it is appropriate in all of the circumstances to issue a notice (see paragraph 47(1)(f)).

125. A presidential member may request further information in relation to the application. The Director must provide that information in writing and as soon as practicable after receiving the request.

Section 46 – Sunset provision

126. This section implements the Wilcox Report recommendation that the compulsory examination power be subject to a sunset clause. It provides that an application for an examination notice may not be made after the end of 5 years after the day on which proposed section 45 commences. It is intended that, before the end of that period, the Government would undertake a review into whether the compulsory examination powers continue to be required.

Section 47 – Issue of examination notice

127. This section sets out the factors that the AAT presidential member must consider when determining an application. These factors include that the presidential member must be satisfied that:

- the investigation is not connected with a building project in relation to which a determination under subsection 39(1) is in force;
- there are reasonable grounds to believe the person has information or documents or is capable of giving evidence relevant to the investigation;
- all other methods of obtaining the material or evidence have been tried or were not appropriate;
- the information or evidence would be likely to be of assistance to the investigation; and
- it would be appropriate, having regard to all of the circumstances, to issue the examination notice.

128. The requirement to be satisfied that it is appropriate in all of the circumstances is intended to ensure that the presidential member takes into account all of the relevant circumstances when making a decision as to whether the issue of an examination notice is warranted. These could include whether the alleged breach is sufficiently serious or whether being required to comply with a notice would have an undue impact on the person.

129. Paragraph 47(1)(g) allows regulations to prescribe additional matters for the presidential member to be satisfied of before issuing a notice.

130. Subsection 47(2) ensures that a notice could only be issued in accordance with subsection 47(1). This means that the notice could only be issued on application and when the presidential member is satisfied of each of the criteria set out in paragraphs 47(1)(a) –(g) and could not be made in any other circumstances.

131. Subsection 47(3) makes clear that an examination notice may be issued in relation to more than one investigation but must not be issued to more than one person. This does not prevent separate notices being issued to other persons in relation to the same investigation(s).

132. Subsection 47(4) deals with situations where a notice is sought against a person in relation to multiple investigations and the requirements of subsection 47(1) are not met with respect to each of the investigations. It provides that the presidential member must issue a notice in relation to each investigation where those requirements are met. This will ensure that a

application relating to multiple investigations is not dismissed because the legislative criteria are not satisfied in relation to one investigation.

133. A decision by the presidential member to issue or not issue an examination notice will, like all decisions under the Act, be exempt from the *Administrative Decisions (Judicial Review) Act 1977*.

Section 48 – Form and content of examination notice

134. Section 48 sets out what must be included in an examination notice.

135. A form for the examination notice will be prescribed by the regulations. The regulations may also prescribe additional information to be contained in the notice.

Section 49 – Director must notify Commonwealth Ombudsman of issue of examination notice

136. This section is a machinery provision relating to the monitoring of the use of the examination power by the Commonwealth Ombudsman. It requires the Director 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 the material provided to the presidential member to support the application.

Section 50 – Director may give examination notice to person in relation to whom it is issued and vary time for compliance

137. Section 50 provides that the Director is responsible for giving to the relevant person the examination notice issued by the nominated AAT presidential member.

138. The Director has discretion not to give the notice to the relevant person as it would be open to the Director to decide that, notwithstanding that a notice was issued, he or she did not wish to proceed with the examination. If the Director does not give a notice within three months of it being issued by the nominated AAT presidential member, the notice ceases to have effect (subsection 50(2)). This is to ensure that notices are only given in circumstances where the nominated AAT presidential member has had regard to contemporary information about all of the relevant circumstances.

139. The Director will also have the power to vary the time at which a person is required to attend or provide documents (subsections 50(3)-(5)). The Director must vary the time if they give an examination notice to a person and the time in that notice is less than 14 days after the notice was given (for example, because the Director experienced difficulties in giving the notice). The Director may also, at any time after giving a notice, vary the time. In both circumstances, the new time must be at least 14 days after the examination notice is given to the person.

140. This power is necessary to ensure that the person is given at least 14 days notice of their requirement to attend as well as providing flexibility to set an alternate time or date such as where it is desirable to accommodate the wishes of the person subject to the notice.

141. Subsection 50(6) provides that, if notice of a later time is given, the examination notice has effect as if the later time was the time specified in the notice.

142. Subsection 50(7) provides that, if the Director varies the time for compliance with an examination notice, the Director must give a copy of the notice as varied to the Commonwealth Ombudsman as soon as practicable. This is to assist the Commonwealth Ombudsman to review and report on the exercise of the Director's powers to obtain information as provided for in proposed section 54A.

Section 51 – Conduct of examination etc

143. This section sets out the rules for when a person is required to attend before the Director and answer questions.

144. Subsection 51(1) provides that this is to be called an *examination*.

145. The Director is required to conduct the examination (subsection 51(2)). This power may be delegated, but only to an SES employee in the Office of the Fair Work Building Industry Inspectorate. This means that the Director or SES employee would be the person questioning the person being examined.

146. A person who is being examined will be entitled to be represented at the examination by a lawyer of the person's choice (subsection 51(3)). The reference to a lawyer of "the person's choice" is intended to make clear that there is no express or implied power on the part of the Director to refuse a person representation by a particular lawyer because that lawyer has represented or is also representing another person who has been examined. This subsection is intended to displace the decision in *Bonan v Hadgkiss (Deputy Australian Building and Construction Commissioner)* [2006] FCA 1334 which held that there was a discretionary power under the examination provisions in the existing Act to exclude a particular legal practitioner from appearing or acting at an examination.

147. Subsections 51(4) and (5) provide that the Director may require information or answers to be given on or verified by oath or affirmation. As it is possible for an SES employee to conduct the examination under a delegation, this power may also be delegated to an SES employee (see paragraph 13(3)(b)).

148. Subsection 51(6) provides that the Director cannot require a person to give an undertaking not to disclose information or answers given at the examination or to discuss matters relating to the examination with any other person. This will mean, for example, that a person cannot be prevented from discussing their experiences at the examination with family members.

Item 53 – Part 2 of Chapter 7 (heading)

Item 54 – Division 1 of Part 2 of Chapter 7 (heading)

149. Items 53 and 54 delete the headings of Part 2 and Division 1 of Part 2 of Chapter 7 as a consequence of inserting new Part 1 of Chapter 7.

Item 55 – Section 52

150. This item repeals existing section 52 and replaces it with a new section that creates an offence of failing to comply with an examination notice.

151. Subsection 52(1) effectively replicates existing subsection 52(6) by making it an offence to fail to comply with requirements imposed by an examination notice to produce

documents, information or attend to answer questions. It is also an offence to fail to take an oath or affirmation when required to do so or to refuse to answer questions relevant to the investigation when being examined.

152. As with existing subsection 52(6), the penalty for this offence is a maximum of 6 months imprisonment. A note refers to the fact that, pursuant to the *Crimes Act 1914*, a court may impose a maximum fine of 30 penalty units (currently \$3 300) instead of, or in addition to, a term of imprisonment.

153. Subsection 52(2) provides an exemption from the general requirement to provide information or answer questions if the person would be required to disclose information that is subject to either legal professional privilege or would be protected by public interest immunity.

Item 56 – Section 53(1)

Item 57 – Paragraph 53(1)(b)

Item 58 – Paragraph 53(1)(c)

Item 59 – Paragraph 53(2)(c)

Item 60 – Section 54

154. These items make a number of amendments consequential to amendments made by item 55.

155. Items 56 and 60 replace references to section 52 with references to ‘examination notice’.

156. Item 58 repeals paragraph 53(1)(c). This paragraph currently provides that a person is not excused from giving information, producing a document or answering questions on the ground that it would be otherwise contrary to the public interest to do so. This paragraph is no longer required given the express recognition of public interest immunity in proposed subsection 52(2).

157. The other items make necessary technical amendments.

Item 61 – After section 54

158. This item inserts a new section 54A dealing with requirements relating to the oversight of examination notices by the Commonwealth Ombudsman.

159. Subsections 54A(1) and (2) require the Director to provide certain material to the Ombudsman as soon as practicable after an examination has been completed. This material consists of:

- a report, which must include a copy of the relevant examination notice, the time and place at which the interview was conducted and the name of each person who was present;
- a video recording of the examination; and

- a transcript of the examination.

160. The requirement to provide material to the Ombudsman in subsections 54A(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 subsections 54A(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 proposed section 49.

161. Subsection 54A(3) requires the Ombudsman to review the exercise of powers under this Division by the Director or by any person assisting the Director. The Ombudsman's review may extend to the exercise of the Director's powers relating to examination notices requiring a person to produce documents, give information or attend before the Director to answer questions.

162. Subsection 54A(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 Director in relation to proceedings commenced or applications made in relation to a person who was the subject of an examination notice.

163. Proposed subsection 54A(4) allows 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.

164. 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 54A(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.

165. 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.

Item 62 – Subsection 55(1)

Item 63 – Section 55(1)

Item 64 – Paragraphs 55(2)(a) to (d)

Item 65 – Subsection 55(4)

Item 66 – Section 56

Item 67 – Section 56

166. These items generally make a number of amendments to sections 55 and 56 that are consequential to amendments made by other items, namely the replacement of the position of

ABC Commissioner with the Director. Items 63 and 67 replace references to section 52 with references to 'an examination notice'.

Item 68 – At the end of Division 1 of Part 2 of Chapter 7

167. This item inserts new sections 57 and 58.

Section 57 – Secrecy provisions

168. Section 57 provides that the Director's powers to obtain information are not limited by any secrecy provision in any other law unless a secrecy provision expressly excludes the operation of this section. This applies to laws enacted both before and after the commencement of this section.

169. Secrecy provision is defined to mean a provision that prohibits the communication or divulging of information.

170. The Director may only obtain information relevant to an investigation.

Section 58 – Payment for expenses incurred in attending an examination

171. Section 58 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 as well as legal expenses.

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

173. Subsection 58(2) sets out the process for seeking the payment of expenses. The person must apply in writing to the Director within 3 months of the examination being completed and provide sufficient evidence to establish that he or she incurred the expenses.

174. Subsection 58(3) provides that regulations may be made to set out a particular form for the application or require additional information that must be provided.

Item 69 – Division 2 of Part 2 of Chapter 7

175. This item repeals Division 2 of Part 2 of Chapter 7 of the Act (which dealt with the powers of ABC Inspectors) and replaces it with new sections 59 – 59G, which provide for the appointment and powers of Fair Work Building Industry Inspectors.

Part 2 – Fair Work Building Industry Inspectors

Division 1 – Appointment

Section 59 – Appointment

176. Section 59 permits the Director to appoint such Fair Work Building Industry Inspectors (inspectors) as are necessary from time to time. The Director may only appoint persons who have been appointed, or are employed, by the Commonwealth or by a State or Territory. This would include members of a State or Territory police force. Inspectors are authorised to perform certain functions and have certain powers whilst they are inspectors.

177. In order for a person to be appointed as an inspector, the Director must be satisfied that the person is of good character (subsection 59(2)).

178. An inspector is appointed for a period of up to four years as specified in the instrument of appointment. (subsection 59(3)).

179. A person may be re-appointed as an inspector. A note to this subsection alerts the reader that subsection 33(4A) of the *Acts Interpretation Act 1901* which provides that the power in an Act to appoint includes a power to re-appoint.

Section 59A – Director is an inspector

180. Section 59A provides that the Director is an inspector. This provision avoids the need for the Director to appoint himself or herself as an inspector and authorises the Director to perform the functions and exercise the powers of inspectors.

Section 59B – Identity cards

181. Subsection 59B(1) requires the Director to issue an identity card to an inspector. The Minister would be required to issue the Director with an identity card (subsection 59B(2)). Subsection 59B(3) would provide that the identity card is to be in the form approved by the Director and must contain a recent photograph of the inspector.

182. Subsection 59B(4) requires an inspector to carry his or her identity card at all times when performing functions or exercising powers as an inspector. In the ordinary course of performing those functions or exercising those powers, inspectors would be expected to show their identity card to identify themselves. An inspector will be required to show his or her identity card in particular circumstances. This arises because inspectors will have the same powers and functions and be subject to the same conditions as Fair Work Inspectors under the FW Act. These conditions would include subsection 708(3), which imposes a requirement to show an identity card before or as soon as practicable after enter premises .

183. Subsection 59B(5) creates an offence of not returning an identity card to the Director (in the case of an inspector) or the Minister (in the case of the Director) within 14 days of a person ceasing to be an inspector. Identity cards must be returned as soon as practicable after an inspector ceases to be an inspector (e.g., the inspector's appointment ends) in order to prevent the improper use of such cards. The penalty for committing the offence is one penalty unit.

184. Subsection 59B(6) provides that the offence is one of strict liability. It is appropriate that this offence is one of strict liability because of the consequences of a person who is not an

inspector misusing an identity card (e.g., unauthorised exercise of statutory powers, including entry to premises without consent).

185. Subsection 59B(6) includes a note referring to section 6.1 of the *Criminal Code*, which provides that there is no fault element for the physical element of the offence (ie the failure to return the identity card), and that the defence of mistake of fact is available in relation to the physical element of the offence (e.g., the former inspector did not know that the inspector's appointment had ceased).

186. Subsection 59B(7) provides that subsection 59B(5) does not apply if the identity card was lost or destroyed. A note alerts the reader that the defendant bears an evidential burden in relation to this defence in accordance with subsection 13.3(3) of the *Criminal Code*.

Division 2 – Powers

Section 59C – Inspectors' powers under Fair Work and other Acts

187. Proposed section 59C provides that an inspector has the same functions and powers as a Fair Work Inspector but may perform those functions and exercise those powers only in relation to building matters and subject to such conditions and restrictions as are specified in the inspector's instrument of appointment. This ensures that an inspector would have, for example, the same functions and powers of a Fair Work Inspector under the FW Act and also under the *Independent Contractors Act 2006* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

188. Subsection 59C(3) provides that a matter is a building matter if it relates to a building industry participant. Building industry participant is defined in subsection 4(1) to mean:

- a building employee;
- a building employer;
- a building contractor;
- a person who enters into a contract with a building contractor under which the building contractor agrees to carry out building work or to arrange for building work to be carried out;
- a building association;
- an officer, delegate or other representative of a building association;
- an employee of a building association.

189. Subsection 59C(4) provides that, for the purposes of the performance and exercise of the functions and powers of an inspector in relation to a building matter, an Act has effect as if a reference to a Fair Work Inspector were a reference to an inspector and a reference to the FWO were a reference to the Director.

190. Section 59C therefore has the effect of ensuring that, in relation to building matters, an inspector may, for example:

- make applications to FWA in relation to persons who hold entry permits for the purpose of exercising rights of entry under Part 3-4 of the FW Act (see sections 507 and 508 of the FW Act);
- make applications to FWA to deal with a dispute about the operation of Part 3-5 of the FW Act, which deals with stand down (see section 526 of the FW Act);
- make applications for orders in relation to contraventions of civil remedy provisions contained in the FW Act (see section 539 of the FW Act);
- make applications for orders in relation to safety net contractual entitlements (see section 541 of the FW Act);
- exercise compliance powers for one or more compliance purposes as set out in section 706 of the FW Act (including determining whether the FW Act or a fair work instrument has been or is being complied with or whether a safety net contractual entitlement has been contravened);
- issue compliance notices where the inspector reasonably believes that a person has contravened one or more instruments as listed in section 716 of the FW Act.

191. The compliance powers that could be exercised by an inspector would be the same as those that could be exercised by a Fair Work Inspector and would include:

- entering premises in accordance with section 708 of the FW Act;
- exercising certain powers while on premises in accordance with section 709 of the FW Act;
- asking for a person's name or address in accordance with section 711 of the FW Act;
- requiring persons to produce records or documents in accordance with section 712 of the FW Act;
- keeping records or documents in accordance with section 714 of the FW Act.

192. In addition, section 59C ensures that an inspector may be assisted by a person in accordance with section 710 of the FW Act in the same way as a Fair Work Inspector may be assisted by a person. Similarly, section 713 of the FW Act protects a person required to provide a record or a document to an inspector that might tend to incriminate the person or expose the person to a penalty in the same way as that section applies to a person required to provide such records or documents to a Fair Work Inspector.

193. Subsection 59C(5) clarifies that any directions given by the FWO to Fair Work Inspectors under sections 704 and 705 do not apply to Fair Work Building Industry Inspectors.

Section 59D – Director’s powers under Fair Work Act

194. Subsection 59D(1) provides that the Director may accept a written undertaking in relation to a building matter in the same way that the Fair Work Ombudsman may accept written undertakings under section 715 of the FW Act.

195. Subsection 59D(2) makes clear that the Director’s power to accept written undertakings is in addition to the powers that the Director has by virtue of the Director’s appointment as an inspector and the operation of proposed section 59C.

Section 59E – Inspectors’ power to monitor compliance with Building Code

196. Subsection 59E(1) requires inspectors to monitor compliance with any Building Code issued under Chapter 3 of the Act.

197. Subsection 59E(2) ensures that an inspector has the same powers for monitoring compliance with the Building Code that the inspector would have if the Building Code were a fair work instrument. This would mean that, for the purpose of monitoring compliance with the Building Code, an inspector could, for example:

- enter premises in accordance with section 708 of the FW Act; and
- exercise powers while on premises in accordance with section 709 of the FW Act.

Section 59F – General directions by the Director

198. Section 59F provides that the Director may give a written direction to inspectors relating to the performance of their functions or the exercise of their powers as inspectors. The direction must be of a general nature. For example, the Director could direct inspectors to comply with investigation or litigation protocols that would apply to all matters. An inspector would be required to comply with these directions. This will ensure a consistent approach to the way that powers of inspectors are exercised or functions of inspectors are performed.

199. Written directions given by the Director under this section will be legislative instruments for the purposes of the *Legislative Instruments Act 2003*. The effect of this provision is that any such directions will be required to be lodged with the Federal Register of Legislative Instruments and tabled in Parliament.

Section 59G – Particular directions by the Director

200. Section 59G provides that the Director may give a direction to a particular inspector about the performance of that inspector’s functions or the exercise of that inspector’s powers. For example, the Director could direct an inspector to prepare an internal report about a particular matter or to pursue or discontinue litigation. An inspector must comply with these directions.

201. A particular direction given under subsection 59G(1), whether given in writing or otherwise, will not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law and is included to assist readers. It does not amount to an exemption from the *Legislative Instruments Act 2003*.

Item 70 – Division 3 of Part 2 of Chapter 7 (heading)

202. This item repeals the heading to Division 3 of Part 2 of Chapter 7 and replaces it with headings to new Part 3 (Federal Safety Officers) and to new Division 1 (Appointment).

Item 71 – Before section 62

203. This item inserts a new division (Division 2) and a new heading to that division (Powers).

Item 72 – Subsection 62(14)

Item 73 – Subsection 63(14)

204. These items repeal subsections 62(14) and 63(14). This is because refusing or unduly delaying entry to premises by a Federal Safety Officer exercising powers under sections 62 or 63 would fall within the scope of section 149.1 of the *Criminal Code* which deals with obstruction of Commonwealth public officials. The offence is subject to a maximum penalty of imprisonment for 2 years.

Item 74 – Section 64

205. This item repeals section 64 and replaces it with new sections 64 and 64A dealing with disclosure of information by the Director and the Federal Safety Commissioner.

Section 64 – Disclosure of information by the Director

206. Section 64 provides for when the Director may disclose, or authorise the disclosure of, information acquired by persons in the course of performing work within the Inspectorate. This includes information acquired by the Director, inspectors, staff members, consultants and assistants to the Director or inspectors.

207. Section 64 does not apply to information that was disclosed or obtained under an examination notice or at an examination. Such information is subject to the more restrictive disclosure provisions contained in section 65.

208. Subsection 64(2) allows the Director to disclose, or authorise the disclosure of, information if the Director reasonably believes that it is:

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

209. This section is intended to operate in conjunction with relevant provisions in the *Privacy Act 1988*, *Public Service Act 1999* and *Public Service Regulations 1999* (including the APS Code of Conduct).

210. Subsection 64(3) permits the Director to disclose, or authorise the disclosure of, information to the Minister if the Director 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 Act,

the FW Act or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. For example, this provision could enable disclosure to the Minister if the Minister required information for the purposes of responding to a specific complaint that has been made to him or her.

211. Subsection 64(4) allows the Director to disclose, or authorise the disclosure of, information to the Secretary of the Department, or an SES or APS employee in the Department, for the purposes of briefing, or considering briefing, the Minister if the Director reasonably believes the disclosure is likely to assist the Minister to consider a complaint or issue in relation to a matter arising under the Act, the FW Act or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

212. This provision will allow the Department to access relevant information to enable it to provide effective and comprehensive briefing to the Minister in relation to a complaint or issue about a matter under the Act, the FW Act or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

213. Subsection 64(5) allows the Director to disclose, or authorise the disclosure of, information to the Advisory Board if the Director reasonable believes that the disclosure is likely to assist the Advisory Board in performing its role of making recommendations to the Director.

214. Subsection 64(6) clarifies that subsections 64(2) and (4) (relating to disclosure that is necessary or appropriate, or likely to assist administration or enforcement and disclosure to the Department) have effect subject to section 66 of the Act. This means that, despite the disclosure provisions in section 64, information relating to the affairs of an individual must not be included in a report to the Minister under section 12 or 14 except in particular circumstances.

215. This section is consistent with the approach to disclosure of information by the Fair Work Ombudsman in section 718 of the FW Act.

Section 64A – Disclosure of information by the Federal Safety Commissioner

216. Section 64A provides for when the Federal Safety Commissioner may disclose, or authorise the disclosure of, information acquired by persons in the course of performing work for the Federal Safety Commissioner. This includes information acquired by the Federal Safety Commissioner, Federal Safety Officers, APS employees assisting the Federal Safety Commissioner and consultants.

217. Subsection 64A(2) allows the Federal Safety Commissioner to disclose, or authorise the disclosure of, information if the Federal Safety Commissioner reasonably believes that it is:

- necessary or appropriate to do so for the purposes of the performance of the Federal Safety Commissioner’s functions or the exercise of the Federal Safety Commissioner’s powers; or
- likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

218. The Federal Safety Commissioner is also able to disclose, or authorise the disclosure of, information to the Minister or to the Department where the Federal Safety Commissioner reasonably believes the disclosure is likely to assist the Minister to consider a complaint or issue

in relation to a matter arising under the Act. This is the same approach as for disclosure by the Director.

Item 75 – Paragraph 65(3)(a)

Item 76 – Paragraph 65(4)(a)

Item 77 – Paragraph 65(5)(aa)

Item 78 – Subsection 65(8) (definition of *designated ABC official*)

Item 79 – Subsection 65(8) (definition of *designated official*)

Item 80 – Subsection 65(8) (paragraph (b) of the definition of *official employment*)

Item 81 – Subsection 65(8) (paragraph (a) of the definition of *protected information*)

219. These items amend section 65 of the Act as necessary to limit the application of the section only to information that was disclosed or obtained under an examination notice or at an examination. The disclosure of information obtained in other ways is dealt with in proposed sections 64 and 64A. Information disclosed or obtained under an examination notice is subject to stricter disclosure provisions because of the nature of the Director's powers pursuant to an examination notice.

220. Section 65 is also amended to remove references relating to the Federal Safety Commissioner as section 65 would no longer deal with information normally obtained by the Federal Safety Commissioner. The Federal Safety Commissioner would normally be subject to the disclosure provisions in proposed section 64A.

Item 82 – Section 67

221. This item repeals section 67. Section 67 is unnecessary in light of the proposed new disclosure provision in section 64. The proposed new disclosure provision allows disclosure of information in a wider range of circumstances and would likely allow the publication of non-compliance in a similar way as intended by section 67.

Item 83 – Section 68

222. This item repeals section 68 and replaces it with a new section 68. Section 68 would allow the Minister to delegate all of his or her powers under Chapter 3 (relating to the Building Code) to the Director or the Federal Safety Commissioner. This is consistent with the Minister's current powers of delegation in section 68 but with amendments consequential to other amendments to the Act.

Item 84 – Sections 69 and 70

223. This item repeals sections 69 and 70. The repeal of these sections is consequential to other amendments, in particular the repeal of chapters 5 and 6.

Item 85 – Section 71

Item 86 – Section 72

224. These items replace references to the ABC Commissioner with references to the Director.

Item 87 – Sections 73 and 73A

225. This item repeals sections 73 and 73A of the Act. Sections 73 and 73A are no longer necessary because inspectors will have the power to institute proceedings by virtue of proposed section 59C. Subsection 59C(1) gives inspectors the same functions and powers of a Fair Work Inspector. These powers include the power to bring proceedings for a contravention of a civil remedy provision provided in section 539 of the FW Act as well as powers under the *Independent Contractors Act 2006*.

Item 88 – Section 74

226. This item amends section 74 as necessary to require the General Manager of FWA to keep the Director informed.

Item 89 – Section 75

227. This item amends section 75 so that it confers jurisdiction on the Federal Court in relation to any matter arising under the Act. Existing section 75 may be repealed because it is no longer necessary.

Item 90 – Paragraph 75A(1)(a)

228. Section 75A is to be inserted into the Act by the Fair Work (State Referral and Consequential and Other Amendments) Bill 2009. This item repeals paragraph 75A(1)(a), which refers to civil applications under the Act being made to the Federal Court. This paragraph may be repealed because, as a result of the amendments made by the Bill, civil applications will no longer be made to the Federal Court under the Act. Any applications made by, for example, an inspector will be made under the FW Act.

Item 91 – Section 75B

229. Section 75B is to be inserted into the Act by the Fair Work (State Referral and Consequential and Other Amendments) Bill 2009. This item repeals section 75B. Section 75B may be repealed because it is no longer required as the Federal Magistrates' Court no longer has any jurisdiction under this Act.

Item 92 – Section 76

230. This item amends section 76 as necessary to apply to the Director or an inspector as applicants in court proceedings.

Item 93 – Subsection 77(2)(paragraphs (a) to (e) of the definition of *protected person*)

Item 94 – Subsection 77(2)(paragraph (k) of the definition of *protected person*)

Item 95 – Paragraphs 78(2)(a), (d) and (e)

231. These items make amendments to sections 77 and 78 that are consequential to other amendments.

Schedule 2 – Transitional and consequential provisions

Item 1 – Regulations may deal with transitional etc. matters

232. This item allows regulations to be made to deal with matters of a transitional, saving or application nature relating to amendments made by the Bill.

Item 2 – Regulations may make consequential amendments of Acts

233. This item allows regulations to be made to make consequential amendments to other Acts that are necessary because of the amendments made by the Bill.

234. Subitem (2) clarifies that, for the purposes of the *Amendments Incorporation Act 1905*, amendments made by regulations for the purposes of this item are to be treated as if they had been made by an Act. As the note to this item explains, this will ensure that the amendments can be incorporated into a reprint of the Act.

Item 3 – Regulations may take effect from date before registration

235. This item allows for regulations to be made with retrospective effect. This is necessary to prevent unforeseen difficulties that may arise in the transition from the system under the Act before it is amended to the system provided for by the Bill.

236. However, as it would not be appropriate for a regulation to impose retrospective liability under a civil penalty provision, any regulations made under this power may not retrospectively subject a person to civil liability. The reason for this regulation making power is to deal with any issues that have been overlooked in the Bill and not to penalise a person for any potential breaches of a regulation that may apply retrospectively.

237. Subitem (2) provides that, if a regulation takes effect before it is registered, a person cannot be convicted of an offence or ordered to pay a penalty in relation to conduct contravening the regulation that occurred prior to registration.