EXPLANATORY STATEMENT

Select Legislative Instrument No. 150, 2015

Issued by the authority of the Minister for Employment

Subject – Fair Work (Building Industry) Act 2012
Fair Work (Building Industry) Regulation 2015

The Fair Work (Building Industry) Act 2012 (the Act) provides a framework that aims to ensure cooperative, productive and harmonious workplace relations in the building industry.

Subsection 78(1) of the Fair Work (Building Industry) Act 2012 (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 33(3) of the Acts Interpretation Act 1901 provides that where an Act confers a power to make regulations the power shall, unless the contrary intention appears, be construed as including a power to repeal, rescind, revoke, amend or vary the regulations.

The Fair Work (Building Industry) Regulation 2015 (the 2015 Regulation) repeals and replaces the Fair Work (Building Industry) Regulations 2005 (the 2005 Regulations). The 2005 Regulations were due to sunset on 1 October 2015 in accordance with Part 6 of the Legislative Instruments Act 2003 (the Legislative Instruments Act).

The 2015 Regulation has the same substantive effect as the 2005 Regulations, subject to technical amendments and machinery provisions that:

- repeal the 2005 Regulations;
- ensure a smooth transition to the 2015 Regulation; and
- update the terminology and structure of the 2005 Regulations consistent with current drafting practices.

Chapter 4 of the Act sets out the functions and powers of the Office of the Federal Safety Commissioner and provides for the establishment of an occupational health and safety accreditation scheme to be administered by the Federal Safety Commissioner.

The 2015 Regulation prescribes:

- recording information about the work health and safety performance of an accredited person or a person that has applied for accreditation as an additional function of the Federal Safety Commissioner for the purposes of paragraph 30(h) of the Act; and
- an Australian Public Service employee engaged for the purposes of the Office of the Federal Safety Commissioner as a person to whom the Federal Safety Commissioner may delegate all or any of his or her powers and functions for the purposes of paragraph 32(1)(c) of the Act.
Chapter 7 of the Act provides for an investigatory and enforcement regime and sets out the compliance powers of the Director of the Fair Work Building Industry Inspectorate, Fair Work Building Industry Inspectors and Federal Safety Officers.

The 2015 Regulation prescribes:

- the form and content requirements for applications for examination notices for the purposes of subsection 45(3) of the Act, and the form and content requirements for examination notices themselves for the purposes of section 48 of the Act;
- additional matters that a nominated Administrative Appeals Tribunal presidential member must be satisfied of before issuing an examination notice for the purposes of paragraph 47(1)(g) of the Act;
- the allowances payable to a person required to attend an examination in accordance with an examination notice for the purposes of subsection 58(1) of the Act;
- the form and content requirements for identity cards issued to Federal Safety Officers and the Federal Safety Commissioner for the purposes of section 61 of the Act; and
- the form of a notice to produce a document and the requirements that must be complied with before a Federal Safety Officer may take samples of any goods or substances from a premises for the purposes of sections 62 and 63 of the Act.

Details of the 2015 Regulation are set out in Attachment A.

A Statement of Compatibility with Human Rights has been completed for the 2015 Regulation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011. The Statement’s assessment is that the 2015 Regulation is compatible with human rights. A copy of the Statement is at Attachment B.

The 2015 Regulation is a legislative instrument for the purposes of the Legislative Instruments Act.

Consultation on the 2015 Regulation was not required as, in accordance with section 18 of the Legislative Instruments Act, it is of a minor or machinery nature and it does not substantially alter existing arrangements.

The Office of Best Practice Regulation has advised that no Regulation Impact Statement is required (OBPR ID 15335).

The 2015 Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.
Details of the *Fair Work (Building Industry) Regulation 2015*

**Part 1—Preliminary**

**Section 1 – Name**

Section 1 provides that the title of the regulation is the *Fair Work (Building Industry) Regulation 2015* (the 2015 Regulation).

**Section 2 – Commencement**

Section 2 provides that the 2015 Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.

**Section 3 – Authority**

Section 3 specifies that the 2015 Regulation is made under the *Fair Work (Building Industry) Act 2012* (the Act).

**Section 3A – Schedules**

Section 3A provides that each instrument that is specified in a Schedule to the 2015 Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

**Section 4 – Definitions**

Section 4 sets out defined terms used in the 2015 Regulation. It notes that a number of terms used in the 2015 Regulation are defined in the Act.

**Part 2—Federal Safety Commissioner**

**Section 5 – Additional functions of Federal Safety Commissioner**

Section 5 of the 2015 Regulation confers on the Federal Safety Commissioner the additional function of recording information about the work health and safety performance of accredited persons and persons who have applied to be accredited under the *Fair Work (Building Industry – Accreditation Scheme) Regulations 2005*.

**Section 6 – Delegation by Federal Safety Commissioner**

Section 6 of the 2015 Regulation prescribes Australian Public Service employees who are engaged for the purposes of the Office of the Federal Safety Commissioner for the purposes of paragraph 32(1)(c) of the Act. This allows the Federal Safety Commissioner to delegate all or any powers and functions under the Act to these staff to support the effective administration of the Accreditation Scheme.
Part 3—Powers to obtain information etc.

Division 1—Determinations by Independent Assessor

The Act establishes the role of the Independent Assessor—Special Building Industry Powers (the Independent Assessor) who may, on application from interested persons, make a determination that the examination notice process contained in the Act will not apply to a specified project (an exemption determination).

Section 7 – Interested persons

Section 7 of the 2015 Regulation prescribes, for the purposes of paragraph 36(2)(b) of the Act, a building industry participant who is involved in a building project, or who has a member involved in a building project as an interested person.

This means that all employers, employees, their respective associations and the client(s) who have a direct connection to a building project could apply to the Independent Assessor for an exemption determination.

Section 8 – Determining that powers to obtain information do not apply

Subsection 39(3) of the Act sets out the matters that the Independent Assessor must be satisfied of before issuing an exemption determination.

Section 8 of the 2015 Regulation prescribes two additional matters that the Independent Assessor must be satisfied of:

- the views of other interested persons in relation to the building project; and
- whether a building industry participant who is an interested person has complied with workplace laws (as defined by section 12 of the Fair Work Act 2009) in relation to the building project, including orders of a court or tribunal made in relation to the workplace laws.

Division 2—Examination notices

Section 9 – Application for examination notice

Section 45 of the Act sets out when and how the Director of the Fair Work Building Industry Inspectorate (the Director) may apply to a nominated Administrative Appeals Tribunal (AAT) presidential member for an examination notice.

Section 9 of the 2015 Regulation prescribes an additional application content requirement for the purposes of paragraph 45(3)(b) of the Act. It requires an application for an examination notice to include information about the likely impact of complying with the examination notice on the person who is the subject of the application.

Section 10 – Issue of examination notice

Section 47 of the Act prescribes the factors that a nominated AAT presidential member must consider when determining an application for an examination notice.
Section 10 of the 2015 Regulation provides, for the purposes of paragraph 47(1)(g) of the Act, that a nominated AAT presidential member must also be satisfied that:

- the nature and seriousness of the suspected contravention justifies the issue of the examination notice; and
- complying with the examination notice will not have an unreasonably detrimental impact on the person who is the subject of the application in as far as the impact is known.

The use of the words 'in as far as the impact is known' reflects the fact that there may be limited information before the nominated AAT presidential member upon which to base such an assessment.

These additional requirements ensure that the examination notice process is only used where the matter under investigation is sufficiently serious and the effect of complying with the notice on the proposed recipient is appropriately considered.

**Section 11 – Form of examination notice**

Section 11 of the 2015 Regulation provides that an examination notice must be in the appropriate form prescribed by forms 1 to 3 of Schedule 1 to the 2015 Regulation.

**Section 12 – Information included in examination notice**

Section 12 of the 2015 Regulation provides, for the purposes of paragraph 48(a) of the Act, that if an examination notice requires a person to produce documents to the Director, the examination notice must specify the documents or the kinds of documents that the person must produce.

**Division 3—Expenses incurred in attending an examination**

Section 58 of the Act provides that a person who attends an examination is entitled to be paid fees and allowances, fixed or calculated in accordance with the regulations, for reasonable expenses (including legal expenses) incurred by the person in attending the examination.

**Section 13 – Operation of this Division**

Section 13 of the 2015 Regulation provides that, for the purposes of section 58 of the Act, Division 3 sets out the allowances that are payable to a person who attends an examination as required by an examination notice.

**Section 14 – Travelling allowance**

Subsection 14(1) of the 2015 Regulation provides that a person who is required to attend an examination is entitled to a payment towards expenses incurred travelling between the person's work or residence and the examination place.

Subsection 14(2) sets out the amount of travel allowance that a person attending an examination is entitled to. In recognition of the varying levels of accessibility of different locations from which people may have to travel to attend an examination, the amount payable
depends on the availability of public transport and the reasonableness of air travel in the circumstances. The maximum amount payable for travel is $2,000 (subsection 14(3)).

Subsection 14(4) provides guidance for determining whether public transport is available. It requires consideration of whether there was an operating public transport system that the witness could conveniently use to travel between the person’s place of work or residence and the examination place in a reasonable time.

The term public transport is be defined by section 4 of the 2015 Regulation to include any form of passenger transport available for use by the public on payment of a fare.

Section 15 – Accommodation allowance

Subsection 15(1) of the 2015 Regulation provides that a person who is required to attend an examination will be entitled to a payment towards meeting expenses incurred for accommodation when the person is necessarily absent overnight from his or her residence to attend the examination.

Subsection 15(2) provides that the amount of accommodation allowance is the amount calculated at the accommodation rate for the lowest salary range that is payable under the Determination that sets out the amount that the Commissioner of Taxation considers reasonable for the substantiation exception in Subdivision 900-B of the Income Tax Assessment Act 1997.

When determining whether an accommodation allowance is necessary, regard must be had to the time of the earliest public transport that the person could have conveniently used to:
- travel to the place of the examination on the day that the examination is scheduled to occur; and
- return to the person's workplace or residence after the examination.

Section 4 of the 2015 Regulation defines public transport as any form of passenger transport available for use by the public on payment of a fare.

Section 16 – Attendance allowance

Subsection 16(1) of the 2015 Regulation provides that a person who is required to attend an examination is entitled to a payment towards meeting any loss of earnings incurred when he or she is necessarily absent from work to attend the examination.

Subsection 16(2) provides that the amount of the attendance allowance payable is the amount that the person would otherwise have been entitled to receive for performing his or her normal duties for the relevant period. This includes amounts such as loadings.

Subsection 16(3) requires the person to provide evidence that confirms his or her usual pay and that he or she did not receive that full amount for the period that he or she was necessarily absent to attend the examination.

This requirement ensures, for example, that a person who took paid annual leave for the relevant period does not also receive an attendance allowance. However, a person who was paid only his or her base rate of pay for the period is entitled to be paid an amount to cover any allowances or loadings that would have been payable had the person actually attended work.
Section 17 – Legal allowance

Subsection 17(1) provides that a person required to attend an examination is entitled to a payment towards meeting the legal costs and disbursements reasonably incurred in engaging a lawyer to represent him or her at the examination.

Subsection 17(2) provides that the amount of the legal allowance is to be calculated using the costs set out in the *Federal Circuit Court Rules 2001*.

Part 4—Federal Safety Officers

Section 18 – Identity Cards—Federal Safety Officers and Federal Safety Commissioner

Section 18 of the 2015 Regulation sets out the information to be shown on the identity cards issued to the Federal Safety Commissioner and Federal Safety Officers.

Section 19 – Taking samples of goods and substances—Federal Safety Officers

Section 19 of the 2015 Regulation sets out the notice requirements Federal Safety Officers must comply with before taking a sample of any goods or substances from premises when exercising powers under section 62 or section 63 of the Act. It requires the written notice to be in accordance with form 4 of Schedule 1 to the 2015 Regulation.

Section 20 – Notice requiring production of document—Federal Safety Officers

Section 20 of the 2015 Regulation provides that a notice to produce a document given by a Federal Safety Officer under subsection 62(6) or 63(6) of the Act must be in accordance with form 5 of Schedule 1 to the 2015 Regulation.

Part 5—Transitional matters

Part 5 of the 2015 Regulation ensures a smooth transition from the *Fair Work (Building Industry) Regulations 2005* (the 2005 Regulations) to the 2015 Regulation.

Section 21 – Things done under the *Fair Work (Building Industry) Regulations 2005*

Section 21 of the 2015 Regulation ensures that things done for a particular purpose under the 2005 Regulations before they were repealed (including giving a notice or making an application or instrument) continue to have effect as if the thing had been done under the 2015 Regulation.

Section 22 – References to provisions of the *Fair Work (Building Industry) Regulations 2005*

Section 22 of the 2015 Regulation provides that any reference to a provision of the 2005 Regulations in any Act or instrument made under an Act is taken to be a reference to the corresponding provision of the 2015 Regulation.
Schedule 1—Forms

Schedule 1 to the 2015 Regulation prescribes forms 1 to 5 referred to in sections 11, 19 and 20 of the 2015 Regulation.

Schedule 2—Repeals

Schedule 2 to the 2015 Regulation repeals the 2005 Regulations, which are due to sunset on 1 October 2015 in accordance with Part 6 of the Legislative Instruments Act 2003.
Statement of Compatibility with Human Rights

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

Fair Work (Building Industry) Regulation 2015

This Regulation 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 Regulation

The Fair Work (Building Industry) Act 2012 (the Act) provides a framework that aims to ensure cooperative, productive and harmonious workplace relations in the building industry.

The purpose of the Fair Work (Building Industry) Regulation 2015 (the 2015 Regulation) is to repeal and replace the Fair Work (Building Industry) Regulations 2005 (the 2005 Regulations), which support the operation of the Act. The 2005 Regulations would, in the absence of this repeal, sunset on 1 October 2015 in accordance with Part 6 of the Legislative Instruments Act 2003.

The 2015 Regulation has the same substantive effect as the 2005 Regulations, subject to technical amendments and machinery provisions that would:
- repeal the 2005 Regulations;
- ensure a smooth transition to the 2015 Regulation; and
- update the terminology and structure of the 2005 Regulations consistent with current drafting practices.

Chapter 4 of the Act sets out the functions and powers of the Office of the Federal Safety Commissioner and provides for the establishment of an occupational health and safety accreditation scheme (the Accreditation Scheme) to be administered by the Federal Safety Commissioner.

The 2015 Regulation prescribes:
- recording information about the work health and safety performance of an accredited person or a person that has applied for accreditation as an additional function of the Federal Safety Commissioner for the purposes of paragraph 30(h) of the Act; and
- an Australian Public Service employee engaged for the purposes of the Office of the Federal Safety Commissioner as a person to whom the Federal Safety Commissioner may delegate all or any of his or her powers and functions for the purposes of paragraph 32(1)(c) of the Act.

Chapter 7 of the Act provides for an investigatory and enforcement regime and sets out the compliance powers of the Director of the Fair Work Building Industry Inspectorate, Fair Work Building Industry Inspectors and Federal Safety Officers.

The 2015 Regulation prescribes:
- the form and content requirements for applications for examination notices for the purposes of subsection 45(3) of the Act, and the form and content requirements for examination notices themselves for the purposes of section 48 of the Act;
• additional matters that a nominated Administrative Appeals Tribunal presidential member must be satisfied of before issuing an examination notice for the purposes of paragraph 47(1)(g) of the Act;
• the allowances payable to a person required to attend an examination in accordance with an examination notice for the purposes of subsection 58(1) of the Act;
• the form and content requirements for identity cards issued to Federal Safety Officers and the Federal Safety Commissioner for the purposes of section 61 of the Act; and
• the form of a notice to produce a document and the requirements that must be complied with before a Federal Safety Officer may take samples of any goods or substances from a premises for the purposes of sections 62 and 63 of the Act.

Human rights implications

The 2015 Regulation engages the following rights:

• the right to just and favourable conditions of work under Article 7 of the International Covenant on Civil Economic Social and Cultural Rights (ICESCR), including the right to safe and healthy working conditions;
• the right to privacy and reputation under Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

The right to just and favourable conditions of work, including the right to safe and healthy working conditions

Article 7 of the ICESCR provides that the right to just and favourable conditions of work includes the right to 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. The Act supplements this framework by creating 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.

Functions of the Federal Safety Commissioner

The functions of the Federal Safety Commissioner include being the accrediting authority for the purposes of the Accreditation Scheme established by the Fair Work (Building Industry—Accreditation Scheme) Regulations 2005. The Accreditation Scheme seeks to raise safety standards by using the Commonwealth Government’s purchasing power to promote best practice in the building and construction industry.

Paragraph 30(h) of the Act provides that the regulations may also confer additional functions on the Federal Safety Commissioner. Section 5 of the 2015 Regulation prescribes recording information regarding the work health and safety performance of persons who are accredited or who have applied for accreditation under the Accreditation Scheme as an additional function of the Federal Safety Commissioner. This promotes the right to safe and healthy working conditions as set out in Article 7 of the ICESCR as this additional function will assist the Federal Safety Commissioner in assessing whether a person has complied with work health and safety requirements under the Accreditation Scheme.

Section 6 of the 2015 Regulation allows the Federal Safety Commissioner to delegate any or all of his or her powers to Australian Public Service employees engaged for the purposes of the Office of the Federal Safety Commissioner. This delegation power promotes the right to safe and healthy
working conditions in Article 7 of the ICESCR by providing for the more efficient and effective administration of the Accreditation Scheme.

The right to privacy and reputation

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

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

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

Recording of information by the Federal Safety Commissioner

Section 5 of the 2015 Regulation provides that it is a function of the Federal Safety Commissioner to record information about the work health and safety performance of an ‘accredited person’ or a person who has applied to become an ‘accredited person’ under the Fair Work (Building Industry—Accreditation Scheme) Regulations 2005. Both individuals and bodies corporate can apply to become an accredited person.

Recording information relating to work health and safety performance by the Federal Safety Commissioner may result in the collection of personal information if it is an individual rather than a body corporate seeking to become an accredited person. To the extent that it does so, the 2015 Regulation engages the right to privacy and reputation contained in Article 17 of the ICCPR.

Recording information relating to work health and safety performance is necessary for the administration of the Accreditation Scheme as this information is used to assess whether a person meets the criteria for accreditation or, if they have already been accredited, is continuing to meet the criteria. The type of information that is expected to be recorded includes evidence of the implementation of appropriate workplace health and safety policies, procedures and safe work practices.

As part of a recent review of the Accreditation Scheme that was undertaken by the Department of Employment, the Department undertook an online survey of accredited companies to obtain information about their experience of the Accreditation Scheme and the accreditation process. Almost 80 per cent of accredited companies that responded to the survey stated that the Accreditation Scheme has improved safety standards of their organisation beyond the level they would have been had they not undertaken the accreditation process. More than 94 per cent of small companies (1-19 employees) held that view. Over 70 per cent of large companies (200+ employees), that could be assumed to have had safety systems in place, also stated that the Accreditation Scheme had improved workplace safety in their organisation.

This measure is considered reasonable, necessary and proportionate in pursuit of the legitimate objective of improving work health and safety outcomes in the building and construction industry. The type of information that can be recorded by the Federal Safety Commissioner is clearly specified and directly linked to the legitimate objective. In particular, this information can only be recorded if it relates to the work health and safety performance of an accredited person or a person who has
applied to be accredited. Finally, the information will be collected and stored in accordance with
relevant Departmental privacy policies and Commonwealth privacy legislation.

As a result, it is considered that there is a small number of circumstances in which the recording of
information about individuals could engage the right to privacy and reputation. To the extent that the
rights contained in Article 17 of the ICCPR are limited in these circumstances, the limitation is
reasonable, necessary and proportionate in the pursuit of the legitimate policy objective of improving
work health and safety outcomes in the building and construction industry. As noted above, the
implementation of this policy objective promotes the right to safe and healthy working conditions as
set out in Article 7 of the ICESCR.

Examination powers

The Act includes provisions that enable the Director of the Fair Work Building Industry Inspectorate
(the Director) to exercise compulsory information gathering powers in certain limited circumstances
through the examination notice process. The exercise of these powers is subject to oversight
mechanisms and a number of other safeguards that ensure the right to privacy is limited only to the
extent necessary to support the Fair Work Building Industry Inspectorate’s compliance and
enforcement functions.

Section 45 of the Act sets out when and how the Director may apply to a nominated Administrative
Appeals Tribunal (AAT) presidential member for an examination notice. Section 47 of the Act
prescribes the factors that a nominated AAT presidential member must be satisfied of before issuing
an examination notice, including that any other method of obtaining the information, documents or
evidence has been attempted and has been unsuccessful or is not appropriate.

Section 10 of the 2015 Regulation promotes the right to privacy by prescribing two additional
matters that a nominated AAT presidential member must be satisfied of before issuing an
examination notice:

- the nature and seriousness of the suspected contravention justifies the issue of the
  examination notice; and
- that complying with the examination notice will not have an unreasonably detrimental impact
  on the person who is the subject of the application in as far as the impact is known.

These additional requirements provide further guidance to nominated AAT presidential members
about the circumstances in which examination notices should be issued. This will ensure that they are
only issued where the matter under investigation is sufficiently serious and the effect of compliance
on the proposed recipient is appropriately considered. As such, it is considered that the 2015
Regulation promotes the right to privacy within the examination powers framework established by
the Act.

Conclusion

The 2015 Regulation is compatible with human rights and freedoms recognised or declared in the
international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.
To the extent that it may limit human rights and freedoms, those limitations are reasonable, necessary
and proportionate in the pursuit of legitimate objectives.

Senator the Hon. Eric Abetz, Minister for Employment