

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment

Subject – *Building and Construction Industry (Improving Productivity) Act 2016*
Building and Construction Industry (Improving Productivity) Regulations 2017

The *Building and Construction Industry (Improving Productivity) Act 2016* (the Act) creates a compliance regime that applies to the building and construction industry. It establishes the Australian Building and Construction Commissioner (ABC Commissioner) as a specialist workplace relations regulator with functions that include investigating and enforcing compliance with workplace relations laws by building industry participants.

Subsection 120(4) of the Act enables the Governor-General to make regulations prescribing matters required or permitted by the Act to be prescribed by the regulations or matters 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 an instrument of legislative character (including 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 Act provides that a nominated Administrative Appeals Tribunal (AAT) presidential member, upon application by the ABC Commissioner, is to issue an examination notice if satisfied of certain matters. An examination notice is issued in relation to a person where there are reasonable grounds to believe that the person can assist with an investigation into a suspected breach of the Act or designated building law, and directs that person to give information, produce documents or answer questions.

The examination notice process in the Act broadly replicates a similar process set out in the *Fair Work (Building Industry) Act 2012* (the old Act). The old Act and its regulations were repealed by the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (C&T Act). To assist the transition from the old Act to the new regime, regulations relating to the examination notice process made under the old Act were continued in force by the C&T Act (the old regulations).

The purpose of the *Building and Construction Industry (Improving Productivity) Regulations 2017* (the 2017 Regulations) is to substantially replicate the old regulations with changes to terminology and other technical amendments to reflect the provisions of the Act. This removes the need for transitional provisions. The 2017 Regulations:

- prescribe the content requirements for applications for examination notices and the form and content requirements for examination notices themselves;
- prescribe additional matters that a nominated AAT presidential member must be satisfied of before issuing an examination notice; and
- provide that the regulations preserved by item 14B of Schedule 2 to the C&T Act cease to be in force.

Details of the 2017 Regulations are set out at Attachment A.

The Australian Building and Construction Commission was consulted during the drafting of the 2017 Regulations.

The Office of Best Practice Regulation has advised that no Regulation Impact Statement is required as the 2017 Regulations are minor and machinery in nature [OBPR ID 21844].

A Statement of Compatibility with Human Rights has been completed for the 2017 Regulations in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the 2017 Regulations are compatible with human rights. A copy of the Statement is at Attachment B.

The 2017 Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The 2017 Regulations commence on the day after they are registered on the Federal Register of Legislation.

Details of the *Building and Construction Industry (Improving Productivity) Regulations 2017*

Part 1 – Preliminary

Section 1 – Name

1. This section provides that the name of the Regulations is the *Building and Construction Industry (Improving Productivity) Regulations 2017* (2017 Regulations).

Section 2 – Commencement

2. This section provides that the 2017 Regulations commence on the day after they are registered on the Federal Register of Legislation.

Section 3 – Authority

3. This section provides that the 2017 Regulations are made under the *Building and Construction Industry (Improving Productivity) Act 2016* (the Act).

Section 4 – Definitions

4. This section sets out defined terms used in the 2017 Regulations. The note explains that a number of terms used in the 2017 Regulations are defined in the Act.

Part 2 – Powers to obtain information

Section 5 – Application for examination notice

5. Section 61B of the Act sets out when and how the Australian Building and Construction Commissioner (ABC Commissioner) may apply to a nominated Administrative Appeals Tribunal (AAT) presidential member for an examination notice.
6. Section 5 of the 2017 Regulations prescribes an additional application content requirement for the purposes of paragraph 61B(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 6 – Issue of examination notice

7. Section 61C of the Act prescribes the factors that a nominated AAT presidential member must consider when determining an application for an examination notice.
8. Section 6 of the 2017 Regulations provides, for the purposes of paragraph 61C(1)(f) 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.

9. 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.
10. 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 7 – Form of examination notice

11. Section 7 of the 2017 Regulations provides, for the purposes of paragraph 61D(a) of the Act, that an examination notice must be in the appropriate form prescribed by forms 1 to 3 of Schedule 1 to the 2017 Regulations.

Section 8 – Information included in examination notice

12. Section 8 of the 2017 Regulations provides, for the purposes of paragraph 61D(f) of the Act, that if an examination notice requires a person to produce documents to the ABC Commissioner, the examination notice must specify the documents or the kinds of documents that the person must produce.

Part 3 – Transitional matters

Section 9 – Application of Part 2

13. Subsections 9(1) to 9(3) set out the application of Part 2 to the examination notice process. Those subsections provide that:
 - section 5 applies in relation to an application made on or after the commencement of this item.
 - section 6 applies in relation to issuing an examination notice on or after the commencement of this item, whether the application for the examination notice was made before, on or after that commencement.
 - sections 7 and 8 apply in relation to an examination notice issued on or after the commencement of this item, whether the application for the examination notice was made before, on or after that commencement.
14. Subsection 9(4) provides that any regulations continued in force by item 14B of Schedule 2 to the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* cease to be in force on the commencement of section 9.

Schedule 1—Forms

15. Schedule 1 to the 2017 Regulations prescribes forms 1 to 3 referred to in section 7 of the 2017 Regulations.

Statement of Compatibility with Human Rights

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

Building and Construction Industry (Improving Productivity) Regulations 2017

The *Building and Construction Industry (Improving Productivity) Regulations 2017* (2017 Regulations) are 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 2017 Regulations

The *Building and Construction Industry (Improving Productivity) Act 2016* (the Act) creates a compliance regime that applies to the building and construction industry. It establishes the Australian Building and Construction Commissioner (ABC Commissioner) as a specialist workplace relations regulator with functions that include investigating and enforcing compliance with workplace relations laws by building industry participants.

The Act provides that a nominated Administrative Appeals Tribunal (AAT) presidential member, upon application by the ABC Commissioner, is to issue an examination notice if satisfied of certain matters. An examination notice is issued in relation to a person where there are reasonable grounds to believe that the person can assist with an investigation into a suspected breach of the Act or designated building law, and directs that person to give information, produce documents or answer questions.

The examination notice process in the Act broadly replicates a similar process set out in the *Fair Work (Building Industry) Act 2012* (the old Act). The old Act and its regulations were repealed by the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (C&T Act). To assist the transition from the old Act to the new regime, regulations relating to the examination notice process made under the old Act were continued in force by the C&T Act (the old regulations).

The purpose of the *Building and Construction Industry (Improving Productivity) Regulations 2017* (the 2017 Regulations) is to substantially replicate the old regulations with changes to terminology and other technical amendments to reflect the provisions of the Act. This removes the need for transitional provisions. The 2017 Regulations:

- prescribe the content requirements for applications for examination notices and the form and content requirements for examination notices themselves;
- prescribe additional matters that a nominated AAT presidential member must be satisfied of before issuing an examination notice; and
- provide that the regulations preserved by item 14B of Schedule 2 to the C&T Act cease to be in force.

Human Rights Implications

The 2017 Regulations engage the right to privacy and reputation under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

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.

The Act includes provisions that enable the ABC Commissioner 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 ABC Commissioner's compliance and enforcement functions.

Section 61B of the Act sets out when and how the ABC Commissioner may apply to a nominated AAT presidential member for an examination notice. Section 61C 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 6 of the 2017 Regulations 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 2017 Regulations promote the right to privacy within the examination powers framework established by the Act.

Conclusion

The 2017 Regulations are compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Senator the Hon. Michaelia Cash, Minister for Employment