

Senate Standing Committees on Education and Employment
Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

QUESTION ON NOTICE
Date of hearing: 11 November 2022

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ22-000369

Senator Jacqui Lambie on 11 November 2022, Proof Hansard page 76

Difference in powers ABCC and FWO

Question

Senator LAMBIE: I just have one follow-up question because we're on the ABCC. It has a tremendous amount of powers. What is the difference between their powers and what's being passed over to the ombudsman

and the fair work? What is the difference between the powers?

Ms Sheehan: It might assist, we took a question on notice at estimates to put it in a simple table form—

Senator LAMBIE: Okay. That's great.

Answer

Power	Provision BCIIP Act	Provision FW Act	Differences/Comments
Purposes for which powers may be exercised	70	706	Minimal difference. ABC inspectors have powers to ascertain compliance with court orders relating to the BCIIP Act, a designated building law ¹ or the Building Code.
Conditions and restrictions on functions and powers	70(3)	703	No difference.
Directions relating to the exercise of functions and powers	66(4)	704, 705	No substantive difference.
When powers may be exercised	71	707	No substantive difference.
Power to enter premises	72	708	Both Acts permit inspectors to enter business premises if they have a reasonable belief there are records or documents relevant to compliance purposes on the premises, or accessible from a computer on the premises. Both Acts permit inspectors to enter premises (which include residential premises) if they have a reasonable belief that the Act applies to work that is being, or applied to work that has been, performed on the premises. The BCIIP Act also permits inspectors to access premises (which include residential premises) if a breach has occurred, is likely to occur, or occurring, even when work is not being performed on the premises which the FW Act does not. The BCIIP Act additionally permits inspectors to enter business premises if they have a reasonable belief that a person who has information relevant to compliance purposes is at those premises.
Powers of authorised officers/inspectors while on premises	74	709	No substantive difference.
Persons assisting authorised officers/inspectors	75	710	No substantive difference.
Powers to Obtain Information under the BCIIP Act and FW Act			
Power to ask for person's name and address	76	711	No substantive difference.
Power to require persons to produce records or documents	77	712	Minimal difference. The FW Act also permits inspectors to serve a notice to produce documents by sending the notice to the person's fax number.
Application for examination/FWO notice	61B	712AA	Both Acts empower the Minister to nominate an Administrative Appeals Tribunal presidential member to issue examination/FWO notices (BCIIP Act, s 61A; FW Act, 712A).

¹ This term is defined in s 5 of the BCIIP Act to include the *Independent Contractors Act 2006*, FW Act, or *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* or a Commonwealth industrial instrument.

Power	Provision BCIIP Act	Provision FW Act	Differences/Comments
			A FWO notice can only be issued in relation to a more limited set of suspected contraventions under the FW Act, a fair work instrument or a safety net contractual entitlement (s 712AA).
Issue of examination/FWO notices	61C	712AB	No substantive difference.
Form and content of an examination/FWO notices	61D	712AC	No substantive difference.
Giving an examination/FWO notice to the person in relation to whom it is issued, and varying time for compliance	61E	712AD	No substantive difference.
Conduct of examination	61F	712AE	Minimal difference. The BCIIP Act requires the ABC Commissioner to conduct the examination. The FW Act permits examinations to be conducted by the FWO or an SES staff member.
Requirement to comply with examination/FWO notice	62	712B	Section 62 is a criminal offence provision, punishable by up to 6 months imprisonment and or up to a maximum of 30 penalty units. Section 712B is a civil remedy provision. The BCIIP Act specifies additional exceptions to the requirement to provide information under an examination notice where the information: (a) would be protected by public interest immunity; or (b) is the subject of legal professional privilege. Section 713AA of the FW Act provides a general exception for disclosures of information that would be the subject of legal professional privilege.
Payment for expense incurred in attending an examination	63	712C	No substantive difference.
Requirement to notify the Commonwealth Ombudsman of issue of examination/FWO notice	64	712E	No substantive difference.
Review and report by Commonwealth Ombudsman	65	712F	No substantive difference.
Power to keep records or documents	79	714	The BCIIP Act provides that a person otherwise entitled to possession of a document is entitled to be supplied a certified copy.
Self-incrimination	102	713	Both Acts provide that a person is not excused from giving information on the ground that to do so might tend to incriminate the person or expose them to a penalty or other liability. The BCIIP Act also provides that a person is not excused from giving information on the ground that to do so would contravene another law. However, if the person gives information under an examination notice, the person is protected by s 103 from liability for contravening the other law. Both Acts provide that information that is provided, whether under a FWO/examination notice or otherwise, cannot be used against an individual except in relation to proceedings for contraventions of certain information

Power	Provision BCIIP Act	Provision FW Act	Differences/Comments
			gathering provisions of the Acts and/or Criminal Code (relating to failure to comply with the FWO/examination notice, false or misleading information or documents, and obstruction of Commonwealth officials)
Protection from liability relating to examination/FWO notices	103	712D	No substantive difference.
Inadmissibility of certain records and documents	104	713A	Both Acts provide that information obtained by inspecting or copying records or documents from a premises are inadmissible in criminal proceedings against an individual. However, there are two exceptions to this under the BCIIP Act – where the proceedings are for an offence under: (a) ss 137.1 or 137.2 of the Criminal Code that relates to the BCIIP Act ((relating to false or misleading information or document); or (b) s 149.1 of the Criminal Code that relates to the BCIIP Act (obstruction of Commonwealth officials).
Disclosure of information by the ABCC/FWO	105	718	Substantial similarities. Disclosures of information by the ABC Commissioner in reports under s 18 or s 20 of the BCIIP Act cannot include information relating to an individual's affairs (s 105(5)).
Confidentiality of information obtained under an examination notice	106	-	The BCIIP Act contains restrictions on what a person can do with protected information obtained under an examination notice.
Reports not to include information relating to an individual's affairs	107	714A	No substantive difference.
Enforcement Powers under the BCIIP Act and FW Act			
Accept enforceable undertakings relating to contraventions of civil remedy provisions	98	715	The BCIIP Act provision only applies to civil remedy provisions under that Act (but not to any other designated building law).
Issue compliance notices	99	716	Both Acts provide a reasonable excuse defence for failure to comply with the notice requirement. The FW Act power is limited to certain entitlement-related provisions only (e.g. modern awards and enterprise agreements).
Review of compliance notices	100	717	No substantive difference.
Publication of non-compliance	108	-	The ABC Commissioner has an express power to publish details of non-compliance with relevant (building) laws (including the name of the building industry participant who has failed to comply) if the ABC Commissioner believes it is in the public interest to do so.
Power to intervene in court proceedings	109	-	The ABC Commissioner may intervene in the public interest in a civil proceeding before a court in a matter that arises under the BCIIP Act or

Power	Provision BCIP Act	Provision FW Act	Differences/Comments
			designated building law and involves a building industry participant or building work. Section 569 of the FW Act enables the Minister (but not the FWO) to intervene in matters arising under the FW Act if the Minister believes it is in the public interest to do so.
Power to make submissions in FWC proceedings	110	-	The ABC Commissioner may intervene or make a submission in a matter before the FWC that arises under the FW Act or the FW Transitional Act if the matter involves a building industry participant or building work. Section 597 of the FW Act enables the Minister (but not the FWO) to make submissions in matters before the FWC if the matter is before a Full Bench and it is in the public interest to do so, or the matter involves public sector employment. However, the FWC has broad powers to inform itself under section 590 of the FW Act.

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Department of Employment and Workplace Relations Question No. IQ22-000367

Senator Jacqui Lambie on 11 November 2022, Proof Hansard page 69

Consultations | List of people and association

Question

Senator LAMBIE: Would you be able to give the committee a list of all those people, associations and whatever else you met with?

Ms Anderson: Yes, we have a question on notice, and we can provide the answer to the committee on that.

Answer

Prior to introduction of the Bill on 27 October, the Department conducted more than 50 consultations with a variety of stakeholders. This list does not contain consultations led by the Minister's office.

NWRCC and jurisdictional consultations

- 1 July – the Department consulted state and territory Senior Officials Meeting.
- 5 July – the Department supported the Meeting of Ministers (State and territory Workplace Relations Ministers) chaired by the Hon Tony Burke MP, Minister for Employment and Workplace Relations (the Minister).
- 19 July - the department supported the Minister chair a National Workplace Relations Consultative Council (NWRCC) meeting.
- 20 October - the Department supported the Minister chair a second Meeting of Ministers to discuss the Bill.
- 20 October - the Department held a Committee on Industrial Legislation (COIL) meeting, inviting NWRCC members and COSBOA, to review a confidential draft of the Bill and discuss with the Department.
- 21 October - the Department provided a confidential draft of the Bill to State and territory officials to review and discuss.

August-October 2022

Business and industry representatives

The Department consulted with:

- BCA on 25 August, 30 August, 6 September, 8 September, 16 September, and 13 October. In addition, the BCA participated in the NWRCC meeting on 19 July 2022, and the COIL on 20 October 2022.
- COSBOA on 26 August, 6 September, 7 September, 8 September, 13 October, and 17 October. In addition, COSBOA participated in the NWRCC meeting on 19 July 2022, and the COIL on 20 October 2022.

- Ai Group on 26 August, 29 August, 6 September, 8 September, 15 September, and 14 October. In addition, Ai Group participated in the NWRCC meeting on 19 July 2022, and the COIL on 20 October 2022.
- ACCI on 24 August, 30 August, 6 September, 8 September, 15 September, and 13 October. In addition, ACCI participated in the NWRCC meeting on 19 July 2022, and the COIL on 20 October 2022.
- Australian Constructors Association on 23 August 2022.
- The Minerals Council of Australia on 24 August and 8 September 2022.
- Housing Industry Association on 25 August and 16 September 2022. In addition, HIA participated in the NWRCC meeting on 19 July 2022, and the COIL on 20 October 2022.
- The Australian Retailers Association on 26 August 2022.
- Master Builders Association on 24 August (with ACCI), 8 September (with ACCI). In addition, the MBA participated in the NWRCC meeting on 19 July 2022, and the COIL on 20 October 2022.
- Australian Resources and Energy Employer Association on 16 September 2022. In addition, AREEA participated in the NWRCC meeting on 19 July 2022
- Clubs Australia on 16 September 2022.
- National Farmers Federation on 16 September. In addition, participated in the NWRCC meeting on 19 July 2022, and the COIL on 20 October 2022.
- Australasian Convenience and Petroleum Marketers Association on 19 September 2022.
- Community Child Care Australia on 20 September 2022.
- HVAC Manufacturing and Installation Association on 20 September 2022.

Individual businesses

The Department consulted with:

- Qantas on 15 September 2022.
- DP World and Team Global Express on 19 September 2022.
- Woolworths Group on 17 October 2022.

Unions

The Department consulted with representatives of the ACTU on 29 August, 5 September, 8 September, 14 September, and 13 October. In addition, the ACTU and their affiliates participated in the NWRCC on 19 July 2022, and the COIL on 20 October 2022.

Academics

The Department consulted with:

- Professor Anthony Forsyth and Professor Shae McCrystal on 25 August 2022.
- Professor Andrew Stewart, Professor Shae McCrystal and Associate Professor Tess Hardy on 15 September 2022.
- Professor Anthony Forsyth, Associate Professor Tess Hardy, Professor Shae McCrystal and Mr Josh Bornstein (employment lawyer) on 14 October 2022.

National Women's Alliances

The Department consulted the National Women's Alliances which comprise representatives of groups representing women with a disability, rural women, migrant women and others, on 19 September and 11 October 2022.

The Women's Economic Equality Taskforce

The Department consulted the Women's Economic Equality Taskforce on 10 October 2022.