



Submission by the Acting Commonwealth Ombudsman

SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT AMENDMENT (TRANSITION TO FAIR WORK) BILL 2011

Submission by the Acting Commonwealth Ombudsman, Ms Alison Larkins

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1 INTRODUCTION

This submission responds to the current inquiry by the Senate Standing Committee on Education, Employment and Workplace Relations (the Committee) on the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 (the Bill).

This submission primarily relates to clauses 49 and 54A of the Bill, which outline the proposed role of the Commonwealth Ombudsman ('the Ombudsman') in overseeing the Fair Work Building Industry Inspectorate (FWBII) and its use of coercive powers to obtain information.

2 BACKGROUND

In the *Transition to Fair Work Australia for the Building and Construction Industry Report* ('the Wilcox Report'), Mr Murray Wilcox QC stated that it is essential to subject coercive powers, like those currently available to the Australian Building and Construction Commission (ABCC), to external monitoring.

Recommendation 4 of the Wilcox Report recommended that the use of compulsory interrogation by the ABCC (or its successor) be subject to several safeguards, including monitoring by the Ombudsman of proceedings at all compulsory interrogations and reporting to Parliament in respect to that role.

In formulating that recommendation, Mr Wilcox noted that the power to compel people to attend for interrogation and answer questions under threat of imprisonment is, by Australian standards, an extraordinarily intrusive power. He was confident that the safeguards recommended, if implemented, would minimise the unnecessary use, and potential for misuse, of the power; without impeding or significantly delaying investigations of suspected contraventions of federal industrial law in the building and construction industry.

In recommending that the function of oversight be given to the Ombudsman, he stated that *'the Commonwealth Ombudsman's Office is well-respected in the community. It is readily accessible, with a call-centre and offices in every State and Territory. It is staffed by people who are experienced in monitoring the performance of sensitive duties by public officials'*.

The Ombudsman has a range of functions and significant powers of investigation under the *Ombudsman Act 1976*. Apart from complaint handling and general oversight of Commonwealth government administrative action, the Ombudsman's functions also include oversight of law enforcement agencies' statutory compliance in respect of:

- covert telecommunications interceptions by Commonwealth law enforcement agencies
- covert access to stored communications by Commonwealth, State and Territory law enforcement and other enforcement agencies
- covert use of surveillance devices by Commonwealth law enforcement agencies and ACT Policing
- controlled (undercover) operations by Commonwealth law enforcement agencies and ACT Policing

- management of the ACT Child Sex Offender Register by ACT Policing.

These oversight functions provide assurance to Parliament and the public that covert law enforcement powers that impinge on generally accepted rights, or are otherwise hidden from public view, are being exercised in compliance with legislative requirements. The proposed function for the Ombudsman under the Bill fits well with this office's existing functions.

The then Ombudsman made a submission to the Committee on the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (the 2009 Bill). The scope of the Ombudsman's function in the Bill is the same as the 2009 Bill.

3 RESPONSE TO TERMS OF REFERENCE

3.1 Scope of the Ombudsman's function

In recommending a role for the Ombudsman, Mr Wilcox envisaged a role very similar to that undertaken by the Special Investigations Monitor (SIM) of Victoria. This office agrees that the SIM is an appropriate model upon which to base the proposed function.

Under s 51 of the *Major Crime (Investigative Powers) Act 2004* (Vic) and s 114 of the *Police Integrity Act 2008* (Vic), the role of the SIM is to:

- monitor compliance with the requirements of the above Acts
- assess the relevance of any questions asked by the examiner
- assess the relevance of any requirement made by the examiner for a person to produce a document or other thing
- investigate any complaints made to the Special Investigations Monitor in respect to these matters and report to the Victorian Parliament on the above matters accordingly.

Section 54A of the Bill sets out the Ombudsman's function in respect to the FWBII as to:

- review the exercise of powers under the Division by the Director of the FWBII and any person assisting the Director
- do anything incidental or conducive to the performance of this function
- report to the Commonwealth Parliament on the above matters.

The proposed function under the Bill is less specific than that given to the SIM, giving the Ombudsman discretion to determine the scope of oversight of the FWBII. As was noted in our submission on the 2009 Bill, the lack of specificity is not necessarily a problem. However, in our view a qualitative review of the exercise of the coercive powers is required. We expect that the scope of the function, if performed properly, would require us to:

- review each application made by the FWBII to the Administrative Appeals Tribunal for the issue of examination notices
- check that the form and service of the examination notice satisfy the requirements of the Act
- review each record of examination to ensure that:
 - the format of the examination satisfies the requirements of the Act
 - the examination is held for a relevant purpose
 - the questions asked during the examination are appropriate and relevant to that purpose
 - any requirement to produce documents or other things at an examination is reasonable and satisfies the requirements of the Act
 - any objections on the basis of relevance by the examinee or his or her legal representative are properly dealt with
 - any claims of privilege made by the examinee or his or her legal representative are properly dealt with
 - any submissions made by the examinee or his or her legal representative at the conclusion of an examination are properly dealt with
- report to Parliament at least once each year on the conduct of examinations under the Act
- investigate complaints relating to the conduct of examinations and other actions of the FWBII.

This is generally consistent with the way that the SIM exercises its functions.

3.2 Resourcing the new function

The proposed oversight function under the Bill can be performed with comparatively modest additional resources for the Ombudsman's office. As stated by Mr Wilcox in his report, *'Giving the monitoring role to the Commonwealth Ombudsman avoids both the duplication of resources and the delay that inevitably attends the establishment of a new agency'*.

That said, the new function cannot be performed without adequate resources being made to this office. The SIM experience suggests that oversight of the extraordinary powers of the type to be given to the FWBII is complex and time consuming.

As a small agency, this office is not in a position to absorb the costs of the new function, even though those costs may not be considered significant by larger agency standards. If this office is to be in a position to perform this function, it needs to commit resources prior to the passage of legislation (for example, to recruit and train staff and set up review methodologies).

At this stage, we have not reached agreement on the resourcing that will be made available to the Ombudsman's office to perform this function. We understand that this stems partly from the fact that the final form of the Bill cannot be guaranteed until the legislation passes the Parliament. However, we note that the Ombudsman's proposed function under the Bill is unchanged from the function proposed for us in the 2009 Bill and that the Committee majority recommended in its report on that Bill that the government ensure appropriate resources be made available to the Ombudsman to undertake the function.

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