



**Submission by the
Commonwealth Ombudsman**

**SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND
WORKPLACE RELATIONS**

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

Submission by the Commonwealth Ombudsman, Prof. John McMillan

July 2009

INTRODUCTION AND SUMMARY

This submission is provided to assist the Senate Standing Committee on Education, Employment and Workplace Relations in providing a report to the Senate on the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 ('the Bill').

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

BACKGROUND

At Recommendation 4 of the *Transition to Fair Work Australia for the Building and Construction Industry Report*, Mr Murray Wilcox QC stated that the use of compulsory interrogation should be subject to a number of safeguards, including monitoring by the Commonwealth Ombudsman of proceedings at all compulsory interrogations and reporting to Parliament in respect to that role.

In formulating that recommendation, Mr Wilcox was concerned 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. However, he was also confident that the safeguards he had recommended, if implemented, would minimise the unnecessary use, and the potential for misuse, of the power, without impeding the investigation of suspected contraventions of 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 Commonwealth 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, my functions also include oversight of law enforcement agencies' statutory compliance in respect of:

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

The Committee may also wish to note that the Parliamentary Joint Committee on the Australian Crime Commission (ACC) recommended in their September 2008 report that the Ombudsman be given a role in relation to oversight of aspects of the examination processes of the ACC under the *Australian Crime Commission Act 2002*.

The purpose of these Ombudsman oversight functions is to reassure Parliament and the public that coercive or covert law enforcement powers that impinge significantly on generally accepted rights or are otherwise hidden from public view are being exercised in compliance with legislative requirements. This existing role fits very well with the function proposed for me under the Bill.

RESPONSE TO TERMS OF REFERENCE

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 concurs that the SIM is an appropriate model upon which to base such a function.

Under section 51 of the *Major Crime (Investigative Powers) Act 2004* (Vic), the role of the SIM is to:

- monitor compliance with the requirements of the above Act
- assess the relevance of any questions asked by an examiner
- assess the relevance of any requirement made by an 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

The Bill sets out the Ombudsman's function in respect to the FWBII as:

- review of the exercise of powers under the Division by the Director
- anything incidental or conducive to this function
- report to the Commonwealth Parliament on the above matters accordingly.

I note that the function created by the Bill is less specific than that given to the SIM. That is not necessarily a problem, however, it is important that the scope of the function is properly understood. In my view a qualitative review of the exercise of the Director's powers is required.

I expect that the function, if performed properly, will require us to:

- review each application made by the FWBII to the AAT
- track the status of each notice of examination, variation to notice, conduct of examination, record of examination and report of examination
- review each examination to ensure that:

- the form of the examination satisfies the requirements of the Act
- the examination is held for a relevant purpose
- the questions asked during the examination are relevant to that purpose
- any requirement to produce documents or anything else at an examination is reasonable
- 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
- investigate and resolve (where possible) complaints relating to the conduct of examinations and other actions of the FWBII
- report to Parliament at least once each year on the conduct of examinations under the Act.

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

Resourcing the new function

These additional functions can be performed with comparatively modest additional resources for the Commonwealth Ombudsman's office. As stated by Mr Wilcox in his report, '*Giving the monitoring role to the CO [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 available to my 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, my office is not in a position to absorb any of the costs of the new function even though those costs may not be considered significant by larger agency standards. Further, if my office is to be in a position to commence performing the function in February 2010, it needs to commit resources very soon in order to prepare.

At this stage we have not reached agreement on the resourcing that will be made available to me to perform this function. I 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, I remain concerned to ensure that my office is in a position to undertake our important oversight work from the time that the new arrangements commence.