

Chapter 4

Powers of the Fair Work Ombudsman

4.1 This chapter turns to issues relating to the strengthening of the evidence-gathering powers of the FWO proposed in Part 4 of Schedule 1 of the bill.

Current framework

4.2 The FWO is the national workplace relations regulator, responsible for ensuring compliance with Australian workplace relations laws. Fair Work inspectors have a range of powers under the Fair Work Act to gather evidence when assessing or investigating workplace compliance. These powers are set out in sections 708–716 of the Fair Work Act.¹

4.3 Examples of these powers include:

- s. 708, which provides that a Fair Work inspector may enter premises, without force, in certain circumstances;
- s. 709, which provides that a Fair Work inspector with a range of powers that they can exercise while on premises;
- s. 711, which provides a Fair Work inspector may require a person to tell the Fair Work inspector their name and address in certain circumstances;
- s. 712, which provides that a Fair Work inspector may require a person to produce a record or document to the Fair Work inspector (i.e. a Notice to Produce); and
- s. 714, which provides that a Fair Work inspector may inspect, copy and keep a record or document produced to the Fair Work inspector.²

4.4 The FWO stated that although formal evidence-gathering powers are only used in approximately six per cent of the workplace disputes it handles each year, the powers are critical to the FWO's compliance and enforcement work, particularly relating to investigations of serious and complex allegations of non-compliance.³ The FWO also noted that although in the majority of cases the current powers afforded to Fair Work inspectors are sufficient (as for the most part individuals are willing to engage), in situations where cooperation is not forthcoming, formal compliance powers, such as those outlined in the bill, are necessary.⁴

1 Department of Employment, *Submission 1*, p. 8.

2 Fair Work Ombudsman, *Submission 4*, p. 16.

3 Fair Work Ombudsman, *Submission 4*, p. 16.

4 Fair Work Ombudsman, *Submission 4*, p. 17.

Proposed amendments

4.5 Part 4 of Schedule 1 would amend the Fair Work Act to grant the FWO new evidence-gathering powers similar to those already available to corporate regulators like the Australian Securities and Investment Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC).⁵

4.6 The new provisions will work to:

- enhance the FWO's ability to gather evidence where proper records do not exist or are being withheld; and
- deter employers, employees and other witnesses from hindering or obstructing the FWO and Fair Work inspectors in the exercise of their duties.⁶

4.7 Proposed section 712A will enable the FWO or specified senior FWO officers to issue a written FWO notice if it is reasonably believed that a person has information or documents relevant to an investigation, or is capable of giving evidence relevant to such an investigation. The notice can require the person to produce documents or attend before the FWO to answer questions.⁷ This power would enable the FWO to 'secure positive investigation outcomes where there is no paper trail, and no cooperation'.⁸

4.8 According to the EM, the new evidence-gathering powers will give the FWO enforceable powers of questioning for the first time, an amendment which will be particularly important in cases where no relevant documents appear to be available and subsequently the investigation has stalled.⁹

4.9 The Department of Employment affirmed that there would be appropriate safeguards in place to regulate the exercise of the stronger powers, and that these safeguards are standard for corporate regulators with similar powers.¹⁰

4.10 Examples of such safeguards include that:

- before exercising the new powers, the FWO must have reasonable grounds to believe a person can help with an investigation (i.e. suspicion is not enough);

5 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 14.

6 Department of Employment, *Submission 1*, p. 8.

7 Fair Work Ombudsman, *Submission 4*, p. 22.

8 Department of Employment, *Submission 1*, p. 9.

9 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 14.

10 Department of Employment, *Submission 1*, p. 9.

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- the power to issue an FWO notice may only be exercised by the FWO personally, or by a delegate who is a substantive or acting Senior Executive Service (SES) staff member;
 - an interview conducted under the new powers may only be conducted by the FWO personally, or by a substantive or acting SES staff member;
 - an FWO notice must be in writing and in the form prescribed by the regulations (if any);
 - a recipient of an FWO notice has a guaranteed minimum of 14 days to comply with the notice;
 - a person attending a place to answer questions may be legally represented, and is entitled to be reimbursed for certain reasonable expenses, up to a prescribed amount;
 - there is protection from liability relating to FWO notices; and
 - self-incriminating information, documents or answers given in response to an FWO notice cannot be used against the person who gave the evidence in any proceedings.¹¹

4.11 The FWO emphasised that the new powers would be critical to enabling it to obtain evidence required to pursue action under other new provisions in the bill, which, unlike the 'underpayment' provisions of Fair Work Act, would require proof of a range of things that are generally within the mind of the person or entity, such as intent. The FWO further stated:

Without such powers, and absent clear documentary 'smoking guns' it would be particularly challenging to establish:

- that conduct was deliberate for serious contraventions;
- the degree of influence of control exercised by a franchisor and what they knew or ought reasonably to have known and when; and
- whether a person knew that records, payslips or information provided in an investigation was false or misleading.¹²

4.12 The EM also detailed the need for the expanded powers:

New examination powers will provide the Fair Work Ombudsman with a greater suite of options to investigate potential non-compliance with workplace laws. This will help achieve positive investigation outcomes where existing powers to require the production of documents fall short because there are no employee records or other relevant documents. This will enable the most serious cases involving the exploitation of vulnerable workers to be properly investigated—even if no documents are produced.

11 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, pp. 14–15.

12 Fair Work Ombudsman, *Submission 4*, p. 22

The bill will also give the Fair Work Ombudsman new avenues to pursue those who hinder or obstruct investigations, or provide false or misleading information to the regulator.¹³

Submitter views

4.13 Submitters presented a range of views, both for and against, the proposed strengthened evidence-gathering powers.

Support for the new powers

4.14 Professor Stewart informed the committee that he supported the proposals in the bill to strengthen the evidence-gathering powers of the FWO. Professor Stewart also noted the related protections contained within the bill:

The proposed limitations and safeguards on the use of those powers appear to strike an appropriate balance between the objective of detecting breaches of labour standards and the protection of individual freedoms.¹⁴

4.15 7-Eleven informed the committee that it had no concerns with the provisions granting the FWO additional powers.¹⁵ Similarly, the submission from the Justice and International Mission Unit, part of the Synod of Victoria and Tasmania of the Uniting Church in Australia, supported the proposals.¹⁶

4.16 Anti-Slavery Australia also supported the strengthening of the evidence-gathering powers of the FWO and acknowledged that the powers would assist in the effective investigation of cases of labour exploitation.¹⁷

4.17 The FCA also indicated that it supported enhancing the powers of the FWO to collect evidence, as outlined in the bill.¹⁸ The NRA also stated that it supported the proposed amendments giving the FWO strengthened powers to obtain evidence.¹⁹

4.18 JobWatch noted that although it welcomed the move to increase the FWO's powers, any increase in powers would be futile if not accompanied by a corresponding increase in resources.²⁰

13 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. ii.

14 Professor Andrew Stewart, *Submission 3*, p. 2. See also Professor Andrew Stewart, private capacity, *Proof Committee Hansard*, 12 April 2017, p. 12.

15 7-Eleven, *Submission 28*, p. 4.

16 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 15*, p. 3.

17 Anti-Slavery Australia, *Submission 29*, p. 6.

18 The Hon Bruce Billson, Executive Chair, Franchise Council of Australia, *Proof Committee Hansard*, 12 April 2017, p. 36.

19 National Retail Association, *Submission 7*, p. 3.

20 JobWatch, *Submission 27*, p. 8.

4.19 QLS also observed that any increase in FWO powers required a significant investment in training, culture and capacity to ensure that all powers were managed appropriately.²¹

Concerns about the new powers

4.20 A number of organisations expressed concerns about the expansion of the FWO evidence-gathering powers.

4.21 The ACTU stated that it opposed giving the FWO any additional coercive powers, as such powers could 'further frighten workers and stop them from reporting abuse'.²² The ACTU also argued that the new investigative powers created notably different use and derivative use immunities for the two different types of coercive powers, creating a potential for regulatory error and confusion.²³

4.22 The Ai Group also informed the committee that it was not convinced that the FWO needed the compulsory examination powers:

As we understand the rationale for those powers, it has been more around using those powers to force, if you like, people to submit to interview. If the purpose is around the use of them with employees, then we do not think the powers are warranted. If it is about employers, we do not think there is any evidence that in any widespread way employers are failing to provide information or participate in interviews.²⁴

4.23 ACCI stated that the EM for the bill did not adequately make the case for increasing the powers of the FWO, and that without such evidence, employers 'cannot see that there is a basis for additional investigatory and examination powers'.²⁵

4.24 Additionally, ACCI compared the proposed FWO notice framework to the examination notices that the Australian Building and Construction Commission (ABCC) may issue under the *Building and Construction Industry (Improving Productivity) Act 2016*. ACCI stated that employers would prefer to see the FWO notices 'brought into line with the strictures and restrictions' on the comparable notices issued under the ABCC legislation.²⁶ The Ai Group also suggested a similar approach.²⁷

21 Queensland Law Society, *Submission 30*, p. 6.

22 Australian Council of Trade Unions, *Submission 8*, p. 11.

23 Australian Council of Trade Unions, *Submission 8*, p. 11.

24 Mr Stephen Smith, Head of National Workplace Relations Policy, Australian Industry Group, *Proof Committee Hansard*, 13 April 2017, p. 13. See also Australian Industry Group, *Submission 6*, pp. 5–6.

25 Australian Chamber of Commerce and Industry, *Submission 5*, pp. 20–22.

26 Australian Chamber of Commerce and Industry, *Submission 5*, p. 22.

27 Australian Industry Group, *Submission 6*, p. 3.

4.25 HIA also put forward a similar viewpoint, noting that under the ABCC legislation, examination notices must be issued through the Administrative Appeals Tribunal. HIA argued that it was problematic that no such equivalent check on FWO notices was included in the bill.²⁸

4.26 HIA also emphasised that in its experience, the FWO's focus to date had been on working collaboratively with businesses to resolve workplace issues. HIA argued that the inclusion of coercive powers of regulation displaces this 'responsive' approach to regulation.²⁹

4.27 The Department of Employment provided the committee with a clear comparison of the proposed new evidence-gathering powers of the FWO and the existing powers of the ABCC:

Table 4.1—Comparison of safeguards for ABCC powers and proposed FWO powers³⁰

SAFEGUARD	ABCC	FWO (Bill)
<p>Trigger for use of power</p> <p>The decision-maker must have '<i>reason to believe</i>' a person has information or documents relevant to an investigation</p>	✓	✓
<p>Notice to attend</p> <p>The legislation requires that a person required to attend to answer questions is given at least 14 days written notice, subject to extension</p>	✓	✓
<p>Express right to legal representation</p> <p>The legislation includes an express entitlement for an attendee to be represented by a lawyer during the examination</p>	✓	✓
<p>Reasonable expenses reimbursed (examinations only)</p> <p>A person who attends an examination is entitled to be reimbursed for prescribed, reasonable expenses</p>	✓	✓

28 Housing Industry Association, Submission 10, p. 8.

29 Housing Industry Association, Submission 10, p. 8.

30 Department of Employment, answers to questions on notice, 12 April 2017 (received 1 May 2017).

SAFEGUARD	ABCC	FWO (Bill)
<p>Attendees cannot be required to give a confidentiality undertaking</p> <p>The examiner is expressly prohibited from requiring an attendee to give a confidentiality undertaking in relation to their examination</p>	✓	X—there is no express prohibition in relation to ASIC or the ACCC, the corporate regulators
<p>Additional Commonwealth Ombudsman oversight</p> <p>The legislation requires the Commonwealth Ombudsman to:</p> <ul style="list-style-type: none"> • be notified when an examination notice is issued • be provided with a recording/transcript of all examinations, and • report to Parliament at least annually on the exercise of the powers 	✓	<p>X—</p> <p>based on powers given to ASIC and the ACCC, the corporate regulators.</p> <p>The FWO will be subject to the general oversight of the Commonwealth Ombudsman</p>
<p>AAT oversight</p> <p>The legislation:</p> <ul style="list-style-type: none"> • requires examination notices to be issued by a nominated AAT presidential member, upon application, and • provides a notice (which is not served) expires within 3 months of issue 	✓	X—based on powers given to ASIC and the ACCC, the corporate regulators

4.28 It is clear from this table that the majority of the safeguards contained in the bill are equivalent to those prescribed for the ABCC. Furthermore, it is clear that, as is articulated in both the explanatory memorandum and the second reading speech,³¹ the proposed expanded evidence-gathering powers are similar to those already available to the corporate regulators ASIC and the ACCC.

4.29 In response to the concerns raised by several submitters, the FWO provided further information about how the provisions would operate within the broader context of its enforcement work:

With the examination powers, we would see them as a power of last resort because, in particular, there is this issue about wanting to ensure that we are able to use the evidence against the appropriate target, so to speak. The way

31 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 14; and the Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 1 March 2017, p. 1874.

the immunity provisions work is, if we ask you to attend an examination, the information you give us effectively cannot be used against you unless you lie to us, in which case we can use it against you in an action around the lying. So we would need to consider very carefully who might be the subject of an examination, and what we would really be looking to is witnesses – people who can help us build a case against a primary target – not the primary targets themselves. There would be almost no utility, I think, in bringing in a person who was our primary target, because then we would not be able to use that information against them. We would also see it as something that we would reach for once we had done quite a bit of work in an investigation and we were very much convinced there was a serious breach of the law going on and an inability to get the evidence we needed through other means.³²

4.30 In addition, Mr Michael Campbell, Deputy Fair Work Ombudsman outlined how the FWO would approach the new powers available to it should the bill be passed:

We would not reach to use this [strengthened evidence-gathering power] at the commencement of an investigation. This is something that is going to assist us in the most difficult and complex cases, where witnesses are unwilling to work with us for fear of retribution or some other feature, where you can see within a company that there is an attitude to noncompliance which is getting to a point where managers are refusing to talk to us because there is some pressure being put on them by the directors of the company, or where the directors of a company are choosing not to involve themselves in our investigations. This is to crack the hardest of nuts, and we have seen plenty of those cases over the last 12 months.³³

4.31 When questioned by the committee as to what experience the FWO had in handling interrogative powers, Mr Campbell answered:

We have a lot of experience with compulsory evidence gathering powers. While we have not had the ability to require someone to attend an examination, we have had the power to compel the production of documents since the agency was effectively established in 2006. I am pretty sure the Commonwealth Ombudsman did an own-motion inquiry into our use of compulsory evidence gathering powers maybe three or four years ago, which indicated that we are pretty good at it. I would suppose that I would offer, in terms of any powers that this bill might ultimately see this agency have, that we would take the same approach that we do with all of our other compulsory evidence- gathering powers: we would put processes

32 Ms Natalie James, Fair Work Ombudsman, *Proof Committee Hansard*, 12 April 2017, pp. 63–64.

33 Mr Michael Campbell, Deputy Fair Work Ombudsman, *Proof Committee Hansard*, 12 April 2017, p. 65.

and policies in place around how they are to be used, when they are to be used and who they are to be used on.³⁴

Committee view

4.32 The committee acknowledges the concerns raised regarding the expansion of the FWO's evidence-gathering powers. Indeed, the committee treats with caution any proposal for additional or strengthened powers of coercion.

4.33 The committee also notes the various safeguards set out in the bill such as the:

- reasonable grounds requirement;
- authorising officer constraints;
- need for FWO notices to be in a prescribed form and in writing;
- guaranteed minimum timeframes;
- right to legal representation and finally;
- prohibition on use of self-incriminating evidence.

4.34 Furthermore, the committee notes the FWO's evidence about its historically low use of its existing coercive powers (in six per cent of cases annually) and of its previous record of appropriate use of coercive powers, as demonstrated by a Commonwealth Ombudsman audit.³⁵

4.35 Regarding the prospective use of its expanded powers, the committee is satisfied with the FWO's evidence that it would use these as a last resort and only for most difficult and complex cases where the FWO is 'convinced there was a serious breach of the law going on and an inability to get the evidence we needed through other means.'³⁶

4.36 If the bill passes, the committee expects the FWO to detail the use of its expanded evidence-gathering powers in its annual report, and that the government will closely monitor the appropriateness of the use of these powers.

Franchise diversity

4.37 As flagged in chapter 3, although recognising the important role of a national workplace regulator, the committee is concerned that the FWO may be underestimating the diversity of business models across the franchising spectrum.

34 Mr Michael Campbell, Deputy Fair Work Ombudsman, *Proof Committee Hansard*, 12 April 2017, pp. 64–65.

35 Commonwealth Ombudsman, *Fair Work Ombudsman: exercise of coercive information-gathering powers*, June 2010, p. 1.

36 Ms Natalie James, Fair Work Ombudsman, *Proof Committee Hansard*, 12 April 2017, pp. 63–64.

Comments made by the Fair Work Ombudsman appear to indicate that the FWO does not fully appreciate the multiplicity of franchisor-franchisee relationships and models, or that there is not always a direct line of sight between a franchisor and a franchisee. For example, during remarks at the National Franchise Convention in October 2016, the Fair Work Ombudsman, Ms Natalie James stated:

If a franchise can ensure that the hamburger I purchase at Melbourne Central is identical to the one I purchase in Townsville in look and taste; or that I get the same friendly service from the gardener I hire in Canberra as in Adelaide – if the franchising system can deliver such uniformity of product and service throughout all outlets, then claims that it cannot also ensure that its workforce is properly paid, do not stack up.³⁷

4.38 The committee understands that some franchisors do not have any, or only very limited business systems or control of their franchisee's business.³⁸ For small business franchisors this is a particularly pertinent distinction. As the FCA informed the committee:

It is unsafe to presume that there is a single model of franchising and that high profile cases are typical of the commercial arrangements between two separate businesses that characterises the franchisor-franchisee relationship.³⁹

4.39 On this matter, the committee is supportive of the bill's intent as expressed by the Department of Employment:

The Department recognises that franchising in Australia includes a diverse range of businesses and business models. For this reason the proposed amendments [in the bill relating to liability of franchisors and holding companies] do not impose a one-size-fits all requirement for franchisors and holding companies. The new requirements are flexible (not prescriptive) about what needs to be done. What is reasonable will depend on factors such as the size and resources of the franchisor or holding company.⁴⁰

4.40 The committee is concerned that the FWO may be misinterpreting the intent of the bill and therefore seeking to extend the provisions into spaces where they were not intended. As such, the committee strongly urges the FWO to remain mindful of the diversity amongst franchises, and take a reasonable and measured approach to its compliance activities.

37 Ms Natalie James, Fair Work Ombudsman, *'Getting ahead of the curve on franchise regulation' - Opening remarks - Keynote Panel Session, National Franchise Convention 2016*, 10 October 2016, p. 3, www.fairwork.gov.au/about-us/news-and-media-releases/speeches (accessed 5 May 2017).

38 Franchise Council of Australia, *Submission 9*, p. 24.

39 Franchise Council of Australia, *Submission 9*, p. 6.

40 Department of Employment, *Submission 1*, p. 7.

Recommendation 3

4.41 The committee recommends that the government consider amending the bill to ensure that its reach and intent, as articulated in the Explanatory Memorandum and second reading speech, is clarified.

4.42 The committee encourages the FWO to take an appropriately targeted and measured approach to overseeing the measures within the bill once passed.

