Australian Government

Fair Work
OMBUDSMAN

Submission to the Parliamentary Joint Committee on Law Enforcement Inquiry into the *Regulatory Powers (Standard Provisions) Bill 2012*

Background

1. The Fair Work Ombudsman (FWO) is established by the *Fair Work Act 2009* (the FW Act) and is responsible for providing education, assistance and advice about the Commonwealth workplace relations system. In addition, the FWO is responsible for impartially enforcing compliance with the FW Act and fair work instruments.

2. During the 2011/12 financial year, the FWO:

   - finalised 28,412 complaints and 6,547 audits, recovering more than $39 million for 18,497 employees;
   - achieved court ordered penalties of more than $1.5 million in 37 matters decided in 2011-12;
   - provided education, assistance and advice for more than 772,409 clients through enquiries to the Fair Work Infoline; and
   - provided information and resources to more than 3.6 million visitors to fairwork.gov.au.

3. The *Regulatory Powers (Standard Provisions) Bill 2012* (the Bill) was introduced to Parliament on 10 October 2012, and referred to the Parliamentary Joint Committee on Law Enforcement for inquiry and report on 11 October 2012.

4. The Bill provides a framework of standard regulatory powers for exercise by agencies across the Commonwealth. Key features of the Bill include monitoring and investigation powers, and enforcement provisions through use of civil penalty, infringement notices, enforceable undertakings and injunctions. The monitoring and investigation powers are based on those found in existing Commonwealth legislation.

5. The Bill allows for the progressive roll-out of the legislation. New Acts or Regulations that require investigation or enforcement powers of the kind available under the Bill would be drafted to trigger the relevant provisions. Where the powers are considered appropriate for current legislation, amendment would be required to incorporate the Bill's provisions.

6. The FWO was not consulted during the drafting of the Bill or prior to its introduction, but would welcome any further discussions about the proposed Bill and its implications.

Current powers under the *Fair Work Act 2009*

7. The powers of Fair Work Inspectors are prescribed by the FW Act. Pursuant with section 700 of the FW Act, the FWO can appoint a person as a Fair Work Inspector for up to four years, provided the FWO is satisfied that that person is of good character.

8. The FWO deals with over 25,000 complaints each year, and conducts over 6,000 proactive audits. The significant majority of complaints relate to allegations of underpayments of wages and employment entitlements, or contraventions of workplace rights.

9. In particular, Fair Work Inspectors rely heavily on the powers to obtain documentary evidence, for example employment records required to be kept under the FW Act, to ensure compliance with Commonwealth workplace laws.

10. Fair Work Inspectors may exercise compliance powers for specific compliance purposes, which relate to determining whether the FW Act, a fair work instrument, or a safety net contractual entitlement is being, or has been, complied with.

11. The powers of Fair Work Inspectors include:

Section	Summary of power
s708	To enter a premises without force, where the Inspector reasonably believes that the FW Act or fair work instrument applies to work that is being or has been performed on the premises.
S709	While on a premises to: • inspect any work, process or object • interview any person • require a person to tell the inspector who has custody or access to a record or document • require a person, who has custody of or access to a record or document, to produce the record or document either while they are on the premises or within a specified period • inspect and make copies of any record or document that is kept on the premises or is accessible from a computer kept on the premises • take samples of any goods or substances in accordance with the regulations.
S710	Direct a support officer to accompany and assist them at a workplace.
S711	Require a person to tell them their name and address if the Inspector reasonably believes that the person has contravened a civil remedy provision under the Act.
S712	Require a person by notice to produce a record or document to the inspector. Note, s713 provides that a person is not excused from producing a record or document if it might tend to incriminate the person or expose them to a penalty.
S714	Inspect, make and keep copies of the record of document produced to the inspector in accordance with the above.
S715	Enter into an enforceable undertaking.
S716	Issue a compliance notice.
Reg 4.04	An Inspector can issue a penalty infringement notice (PIN) if they reasonably believe that a person has committed one or more contraventions of a particular civil remedy provision.

12. The FWO provides Fair Work Inspectors with detailed operational guidance (including material which is publicly available on fairwork.gov.au) in relation to exercising legislative powers, and has measures in place to ensure those powers are exercised appropriately.

13. Furthermore, the FWO considers these powers are necessary to perform legislated functions and responsibilities effectively and submits that they should remain unamended.

Review of powers under the *Fair Work Act 2009*

14. On 22 July 2009, the Commonwealth Ombudsman commenced an own-motion investigation into the FWO's use of coercive information gathering powers.

15. The Commonwealth Ombudsman assessed the FWO's practices and procedures against the principles contained in the Administrative Review Council (ARC) report, *The Coercive Information-Gathering Powers of Government Agencies*[1].

16. In June 2010, the Commonwealth Ombudsman published a report[2], concluding that the FWO's practices and procedures help it to comply with the majority of ARC principles. The report commended the FWO to its commitment to best practice and it's achievements in this regard.

Implications of the Bill

Implementation

17. It is unclear whether the FW Act is intended to be amended to enact the provisions of the Bill. However, the investigative and monitoring powers under the Bill are distinctively different from those afforded under the FW Act.

Investigation powers

18. While the Bill contains provisions broadly similar to the FW Act, there are some significant differences which may impact the FWO's investigative capacity. In particular, the removal of a number of current powers and penalties may significantly impede the FWO's ability to regulate the national workplace relations system.

19. The Bill does not contain an equivalent section 712 of the FW Act, which provides the power to require the production of records or documents (a civil penalty provision). Section 713 of the FW Act provides that a person is not excused from producing a record or document if it might tend to incriminate the person or expose them to a penalty. Provisions regarding self incrimination do not appear to be contained in the Bill.

20. The ability to quickly and easily acquire documentary evidence to determine whether contradictions of workplace laws have occurred is essential to the FWO's compliance responsibilities. Any amendment to these powers is likely to significantly affect investigation and service timeframes.

21. Furthermore, the Bill places additional restrictions on the ability of Inspectors to enter premises, including the requirement to have a reasonable belief that there may be evidential material on the premises, and that entry is on the consent of the occupier or made under a warrant.

22. However, Part 7 of the Bill provides a framework for the use of injunctions. As it appears that the certain parts of the Bill can be triggered individually, the FWO believes this would be a useful addition to the current powers under the FW Act. For example, FWO could seek an interim injunction to prevent an employer paying their employees below the minimum wage.

23. In addition, Part 5 of the Bill establishes a framework for the provision of PINs. The most significant difference to the PIN provisions under the FW Act is an increase to the maximum penalty permissible under a PIN. There are also a range of technical differences in relation to issuing, varying and withdrawing notices.

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[1] Administrative Review Council, *The Coerive Information Gathering Powers of Government Agencies,* May 2008. Available at: http://www.arc.ag.gov.au/Documents/a00Final+Version+-+Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf

[2] Commonwealth Ombudsman, *Fair Work Ombudsman – Exercise of Coercive Information-Gathering Powers,* June 2012. Available at: http://www.ombudsman.gov.au/files/fair_work_omb_coercive_info_gathering.pdf

Civil remedy provisions

24. The civil remedy provisions under the Bill also differ from those under the FW Act in some instances, including:

- FWO would only have 4 years to apply for a pecuniary penalty order rather than the 6 years currently allowed (section 85 of the Bill);
- the Bill does not contain an ability for courts to make 'any order the court considers appropriate' (section 545 of the FW Act);
- penalties will only payable to the Commonwealth (not others such as an employee affected by the contravention); and
- the involvement provisions of the Bill are broader than those contained in section 550 of the FW Act as section 96 of the Bill includes "attempts" to contravene provisions.

FW Act mechanisms not adopted

25. There are a number of FW Act mechanisms that are not replicated in the proposed Bill, specifically the Bill does not contain:

- a small claims procedure;
- compliance notice provisions; and
- an ability for the courts to provide compensation orders or to suspend penalties.

26. In particular, compliance notices and small claims procedures comprise a significant component in the FWO's compliance strategy.

7 November 2012