

Inquiry into the
Building and Construction Industry
(Improving Productivity) Bill
and the
Building and Construction Industry
(Consequential and Transitional
Provisions) Bill 2013

Submission by the Commonwealth Ombudsman, Colin Neave
September 2016

1. Introduction

On 1 September 2016, the Senate referred the Building and Construction Industry (Improving Productivity) Bill 2013 (the Bill) and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 to the Education and Employment Legislation Committee for inquiry and report by 14 October 2016.

The Bill proposes to re-establish the Australian Building and Construction Commissioner¹ (the Commissioner) and to continue the existence of the body known as the Office of the Fair Work Building Industry Inspectorate under the name of the Australian Building and Construction Commission (ABCC).²

Currently, the Commonwealth Ombudsman (the Ombudsman) reviews and reports on the exercise of coercive information gathering powers by the Director of the Fair Work Building Industry Inspectorate (known as Fair Work Building and Construction, FWBC) under the *Fair Work (Building Industry) Act 2012* (the FWBI Act).

The Bill proposes a potentially broadened scope for our reviews of the exercise of coercive powers to gather information by the Commissioner.

This submission outlines the reviews that the Ombudsman currently undertakes under the FWBI Act. It discusses the possible expansion of the scope of our oversight activities if the Bill is passed. It also outlines the resource implications for the Ombudsman's office in light of the recommendations made in the past and our experiences in obtaining adequate funding for this role to date.³

2. Oversight activities by the Commonwealth Ombudsman

2.1 Oversight activities under the *Fair Work (Building Industry) Act 2012*

Currently, the Ombudsman must review the exercise of coercive information-gathering powers by the Director of FWBC (the Director) and any person assisting the Director.⁴ The Ombudsman must also prepare and present to the Parliament a report about examinations conducted as soon as practicable after the end of each financial year. The report must include the results of reviews conducted during that year.⁵

Under the FWBI Act as originally passed, FWBC's coercive information-gathering powers were subject to a three year sunset provision due to expire on 1 June 2015.⁶ That provision

¹ Clause 15

² Clause 29

³ This submission draws on and is consistent with previous submissions made by the Ombudsman on the Bill in November 2013 and January 2014. It provides updated information in relation to resourcing issues since the expiration of the Memorandum of Understanding with FWBC in June 2015.

⁴ Section 54A(3) FWBI Act.

⁵ Section 54A(6) FWBI Act.

⁶ Section 46 FWBI Act.

was extended by the *Construction Industry Amendment (Protecting Witnesses) Act 2015* and the Director now may not make an application for an examination notice after 1 June 2017.

However, the Ombudsman's role does not necessarily end at that time. An examination notice ceases to have effect if it is not given to the proposed examinee within 3 months after the day on which it was issued.⁷ Under the legislation as it currently stands, our office must continue to review and report on the coercive information-gathering powers until such time as those examinations are completed, which might be in the following financial year. In those circumstances, our office would be required to issue a further report for the 2017/18 financial year.

In conducting reviews, we assess the exercise of the coercive information-gathering powers against the provisions under Division 3, Part 1, Chapter 7 of the FWBI Act, the requirements of the Fair Work (Building Industry) Regulations 2015 (the Regulations), best practice principles set out by the Administrative Review Council in its report *The coercive information-gathering powers of Government agencies*,⁸ requirements under the Australian Government Investigation Standards and any internal guidelines made by FWBC.

We assess FWBC's compliance with the relevant legislation and guidelines against five main criteria:

- Were the applications for examination notices made in accordance with the requirements of the FWBI Act and the Regulations?
- Did the examination notice comply with the requirements of the FWBI Act, the Regulations, and relevant best practice principles set out by the Administrative Review Council?
- Was the examination notice given in accordance with the requirements of the FWBI Act and were claims of privilege properly dealt with?
- Was the examination conducted in accordance with the requirements of the FWBI Act, relevant best-practice principles, standards and FWBC's internal policies and guidelines?
- Where directions were issued by the Minister, were these complied with (s 11)?

2.2 Proposed oversight activities under the Building and Construction Industry (improving Productivity) Bill 2013

The Bill preserves the Ombudsman's oversight of the examination powers on a permanent basis, whilst removing other safeguards such as the requirement to apply to the AAT in order to issue an examination notice.⁹

⁷ Section 50(2) FWBI Act.

⁸ Report no 48 – The Coercive Information-gathering Powers of Government Agencies
<http://www.arc.ag.gov.au/Publications/Reports/Pages/default.aspx>

⁹ CI 61.

Compared to the FWBI Act, the threshold to issue an examination notice appears to have been lowered in the Bill. Under the FWBI Act, the Director's application must address a number of matters before an AAT presidential member issues a notice (s 45). Under s 39 of the FWBI Act, on application by an interested person, the Independent Assessor may determine that the Director cannot apply for examination notices for particular building projects.

The Bill vests responsibility for oversight of the Commissioner's examination powers in the Ombudsman. Clause 61 of the Bill allows the Commissioner to give a written notice to a person if the Commissioner reasonably believes that the person has information or documents relevant to an investigation or is capable of giving evidence that is relevant to an investigation. The Bill retains the FWBI Act provisions that ensure that the examinee has 14 days to respond to the notice and the Commissioner has the power to vary the time for compliance. The right for the examinee to be represented by a lawyer and the requirement to videotape the examination have also been retained in the Bill.

Given these differences, and to ensure effective scrutiny of the use of coercive powers, we anticipate that the scope of our oversight activities would expand under the Bill. We would request records relating to the Commissioner's decision to issue notices to ensure that there was reasonable belief that the person has information or documents relevant to an investigation or was capable of giving evidence relevant to an investigation. We might also review and comment on the ABCC's internal processes to provide reassurance that the power to issue notices and conduct examinations is exercised properly.

3. Resourcing the function

The function cannot be performed without adequate resources being made available. As a small agency, the Ombudsman is not in a position to absorb the costs of this function.

The importance of adequate funding has received support from each Senate committee where the oversight role has been considered.

In September 2009, when the Senate Education, Employment and Workplace Legislation Committee considered the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, the majority report recommended

Recommendation 6

The committee majority recommends that the scope of the Commonwealth Ombudsman function be clearly defined and that the government ensure appropriate resources be made available to undertake the function.¹⁰

¹⁰ September 2009 *Report on the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* Education, Employment and Workplace Legislation Committee p 29

In February 2012, when considering the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011, the Senate Education, Employment and Workplace Legislation Committee repeated that recommendation.¹¹

In December 2013, in its report considering the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, the Senate Education and Employment Legislation Committee observed our submission regarding our expanded role under the Bill and noted that if the Bill was passed, the Ombudsman would work with the ABCC to develop a memorandum of understanding to ensure that its oversight function is appropriately resourced.

The committee majority noted:

The committee expects that if the bill is passed the ABCC and the Commonwealth Ombudsman will work closely to develop a memorandum of understanding that is appropriate in the circumstances.¹²

From 2012 – 13 until 2014 – 15 the Ombudsman’s oversight role was funded by FWBC by a Memorandum of Understanding (the MoU) with FWBC. However, even under the MoU, payments were made late which delayed our ability to undertake timely reviews.

The extension to the sunset provision regarding the Director’s capacity to apply for examination notices consequently extended our review function. When the MoU ceased in June 2015, we requested a further MoU, however the Director considered that discussions on review and funding arrangements should take place when there was greater clarity on the current Bill.

The MoU was not renewed pending the outcome of the Bill and from 1 June 2015, our oversight function has been unfunded.

Nevertheless, under s 54(3) of the FWBI Act, the Ombudsman’s statutory obligation to review the exercise of the coercive examination powers by the Director and any person assisting the Director continues. Under s 54A(6) of the FWBI Act, the Ombudsman must still prepare and present to the parliament a report about examinations conducted each year as soon as practicable after the end of the financial year.

These are mandatory requirements for our office, regardless of whether or not we receive funding. In the absence of a further MoU, we have conducted 17 unfunded reviews during 2015 – 16.¹³ As of 16 September 2016, we have eight more examinations awaiting review in 2016 - 17.

¹¹ February 2012 Report on the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* Education, Employment and Workplace Relations Committee p 25

¹² December 2013 Report on the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* Education and Employment Legislation Committee p 14

¹³ We have provided FWBC with an invoice for the reviews undertaken in the 2015 – 16 financial year.

As the legislated oversight body, it is inappropriate to be conducting funding negotiations with the agency whose powers the Ombudsman oversees. Under the Bill, our review function will be ongoing and, in our view, will require a broadened scope.

To avoid future funding difficulties and to ensure the Ombudsman's independence we request direct appropriation for our oversight role of one full-time equivalent Executive Level 1 officer.