Commonwealth OMBUDSMAN

Fair Work Ombudsman

EXERCISE OF COERCIVE INFORMATION-GATHERING POWERS

June 2010

Report by the Acting Commonwealth Ombudsman,
Ron Brent, under the *Ombudsman Act 1976*

REPORT NO. 09|2010

Reports by the Ombudsman

Under the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman investigates the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

The *Ombudsman Act 1976* confers five other roles on the Commonwealth Ombudsman—the role of Defence Force Ombudsman, to investigate action arising from the service of a member of the Australian Defence Force; the role of Immigration Ombudsman, to investigate action taken in relation to immigration (including immigration detention); the role of Postal Industry Ombudsman, to investigate complaints against private postal operators; the role of Taxation Ombudsman, to investigate action taken by the Australian Taxation Office; and the role of Law Enforcement Ombudsman, to investigate conduct and practices of the Australian Federal Police (AFP) and its members. There are special procedures applying to complaints about AFP officers contained in the *Australian Federal Police Act 1979*. Complaints about the conduct of AFP officers prior to 2007 are dealt with under the *Complaints (Australian Federal Police) Act 1981* (Cth).

Most complaints to the Ombudsman are resolved without the need for a formal report. The Ombudsman can, however, culminate an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. A report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory. A report can also be prepared to describe an investigation, including any conclusions drawn from it, even if the Ombudsman has made no adverse findings.

A report by the Ombudsman is forwarded to the agency concerned and the responsible minister. If the recommendations in the report are not accepted, the Ombudsman can choose to furnish the report to the Prime Minister or Parliament.

These reports are not always made publicly available. The Ombudsman is subject to statutory secrecy provisions, and for reasons of privacy, confidentiality or privilege it may be inappropriate to publish all or part of a report. Nevertheless, to the extent possible, reports by the Ombudsman are published in full or in an abridged version.

Copies or summaries of the reports are usually made available on the Ombudsman website at www.ombudsman.gov.au. Commencing in 2004, the reports prepared by the Ombudsman (in each of the roles mentioned above) are sequenced into a single annual series of reports.

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EXECUTIVE SUMMARY

The Commonwealth Ombudsman's office has an interest in the exercise of powers that can have an impact on the rights of the public. The Office of the Fair Work Ombudsman monitors compliance by employers with the *Fair Work Act 2009* (Fair Work Act), as well as relevant awards. One way it does this is by investigating claims made by employees about their employers. To assist it in these investigations, the Office of the Fair Work Ombudsman has certain powers that allow it to obtain information and documents. For the purpose of this report, these powers will be referred to as coercive information-gathering powers.

Our office receives complaints about the Office of the Fair Work Ombudsman from both employers and employees. As employers are often the subject of an investigation by the Office of the Fair Work Ombudsman at the time they complain to us, it can be difficult for us to undertake an investigation without running the risk of intruding upon its investigation.

We decided to undertake our own investigation to gain a better understanding of the Office of the Fair Work Ombudsman's internal processes when using its coercive information-gathering powers during an investigation. In undertaking this investigation, we relied upon a recent report by the Administrative Review Council (ARC) that sets out 20 best practice principles for the exercise of coercive information-gathering powers.

The ARC principles were used as a way of assessing the Office of the Fair Work Ombudsman's practices and procedures. Overall the investigation found that the Office of the Fair Work Ombudsman has practices and procedures that help it to comply with the majority of the ARC principles. The report highlights several positive examples for other agencies seeking to achieve best practice in this area. This is one of the factors that has influenced us to publicly release the report.

The Fair Work Ombudsman should be commended for both the commitment to best practice and the office's achievements in this regard. Nevertheless, as with any complex role, we have identified some opportunities for further developing the practices in the office in the following areas:

- notices issued to employers prior to an investigation
- adequacy of guidance in relation to type and volume of document requests
- absence of formal guidance for determining time frame for compliance with notices
- type of information provided to interviewees before and during an interview
- internal service standards for liaison with employers who are the subject of a claim.

While the report makes recommendations in relation to these issues, the effectiveness of the Fair Work Ombudsman in responding to complaints, and in achieving high standards in the use of its coercive powers is well demonstrated by the dramatic decline in complaints to our office from 665 in 2007–08 to 65 in 2008–09.

PART 1—INTRODUCTION

The Fair Work Ombudsman

1.1 The Office of the Fair Work Ombudsman operates under the Fair Work Act. In broad terms, the role of the Office of the Fair Work Ombudsman is to promote harmonious, productive and cooperative workplace relations, and to monitor, enquire into, investigate, and enforce compliance with relevant Commonwealth workplace laws. The Office of the Fair Work Ombudsman assists employees, employers and outworkers throughout Australia by:

- providing education, assistance and advice on relevant Commonwealth workplace laws
- promoting and monitoring compliance with relevant Commonwealth workplace laws
- enquiring into and investigating any act or practice that may be contrary to relevant Commonwealth workplace laws
- commencing proceedings or making applications to enforce relevant Commonwealth workplace laws and, where appropriate, seeking a penalty for contraventions of relevant Commonwealth workplace laws
- representing employees or outworkers who are, or may become, a party to legal proceedings under relevant Commonwealth workplace laws.[1]

1.2 The predecessor to the Office of the Fair Work Ombudsman was the Office of the Workplace Ombudsman. The *Workplace Relations Amendment Act (A Stronger Safety Net) Act 2007* established the Office of the Workplace Ombudsman, which had similar functions to the Office of the Fair Work Ombudsman, although the latter has an education role and some additional powers (discussed later).

1.3 Although the Office of the Fair Work Ombudsman and its immediate predecessor are relatively new creations, some of the inspectorate functions have been carried out by other agencies for several years.[2]

Fair Work Inspectors and powers

1.4 The Fair Work Ombudsman is appointed by the Governor-General for a period not exceeding five years.[3] The Fair Work Ombudsman is assisted in fulfilling the functions by Fair Work Inspectors (FWI), who are appointed by the Fair Work Ombudsman for a period not exceeding four years.[4]

1.5 FWIs have the power to:

- enter premises (without force) and undertake specified activities; limited to premises where work is being or has been done[5]
- require a person to provide their name and address[6]

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1 Fair Work Ombudsman fact sheet. See **http://www.fairwork.gov.au/Fact-sheets-tools/Pages/FWO-fact-sheet-About-FairWork-Ombudsman.aspx?role=employees**.
2 Section 150 *Workplace Relations Act 1996 and* s 86 *Industrial Relations Act 1988.*
3 Section 687 Fair Work Act.
4 Section 700 Fair Work Act. See also s 701—Fair Work Ombudsman also an Inspector.
5 Section 708 Fair Work Act. See also s 709 sets out powers while on premises.

- require a person to produce a record or document and keep the record or document[7]
- issue compliance notices.[8]

1.6 The extent of a FWI's functions and powers is subject to any conditions and restrictions placed upon them by the instrument of appointment.[9] The Fair Work Ombudsman can also issue general directions that FWIs are required to follow.[10] Section 706 of the Fair Work Act sets out when a FWI may exercise their powers.

> (1) An inspector may exercise compliance powers (other than a power under section 715 or 716) for one or more of the following purposes (***compliance purposes***):
>
> (a) determining whether this Act or a fair work instrument is being, or has been, complied with
> (b) subject to subsection (2), determining whether a safety net contractual entitlement is being, or has been, contravened by a person
> (c) the purposes of a provision of the regulations that confers functions or powers on inspectors
> (d) the purposes of a provision of another Act that confers functions or powers on inspectors.
>
> *Note: The powers in sections 715 (which deals with enforceable undertakings) and 716 (which deals with compliance notices) may be exercised for the purpose of remedying the effects of certain contraventions.*
>
> (2) An inspector may exercise compliance powers for the purpose referred to in paragraph (1)(b) only if the inspector reasonably believes that the person has contravened one or more of the following:
>
> (a) a provision of the National Employment Standards
> (b) a term of a modern award
> (c) a term of an enterprise agreement;
> (d) a term of a workplace determination
> (e) a term of a national minimum wage order
> (f) a term of an equal remuneration order.

1.7 The Minister may give written directions to the Fair Work Ombudsman that relate to the performance of the Fair Work Ombudsman's functions. Any such direction must be of a general nature. The Fair Work Ombudsman is required to comply with the direction, except to the extent that the direction relates to the performance of functions or exercise of powers under the *Public Service Act 1999* (Public Service Act).[11]

Complaints and issues

1.8 The Commonwealth Ombudsman's office receives complaints from employees and employers about the Office of the Fair Work Ombudsman. Since the establishment of the Office of the Fair Work Ombudsman and its predecessor, the

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6 Section 711 Fair Work Act.
7 Section 712 Fair Work Act. See also s 714—*Power to keep records or documents*.
8 Section 714 Fair Work Act.
9 Section 703 Fair Work Act.
10 Section 704 Fair Work Act.
11 Section 684 Fair Work Act.

office has received a number[12] of such complaints. Complaints from employees have generally been about the Office of the Fair Work Ombudsman and Office of the Workplace Ombudsman's decisions to not take any action against an employer. Investigations of this type of complaint have been straight forward, assisted greatly by the Office of the Fair Work Ombudsman's internal review process, which has resulted in a dramatic decline in complaints to our office.

1.9 Complaints from employers have been more difficult to investigate on an individual basis. This is partly because the outcome that an employer often seeks is adjudication by the Commonwealth Ombudsman on their case. Given pathways already exist for determining whether an employer is in breach of an award or the Fair Work Act, it was considered that there would have been limited benefit in our office undertaking an investigation in each case. Having said this, the Commonwealth Ombudsman decided that the issues raised by complainants warranted consideration through an own motion investigation. Some examples of the types of complaints our office has received from employers during the past few years can be found throughout this report. Even though some of the case studies have not been investigated by our office and may not be reflective of current practices within the Office of the Fair Work Ombudsman, they do nevertheless provide practical examples of the various issues that can arise through the course of investigations by the Fair Work Ombudsman.

Case study 1

Mr A complained to our office because he considered the Office of the Workplace Ombudsman had treated him unfairly in its investigation of a claim by a former employee. Mr A explained that since the claim had been lodged, he had sold his business and lost information on his computer that would have helped him to defend the claim. He felt pressured by the Office of the Workplace Ombudsman to settle the claim even though he believed he had complied with his obligations to the employee.

Upon investigation, the Office of the Workplace Ombudsman advised that the underlying issue in Mr A's case was that he had not been able to provide evidence to corroborate his version of events. The investigation revealed that there had been a seven-month gap between the Office of the Workplace Ombudsman's receipt of the claim and its notification to Mr A of the intention to investigate. The case demonstrates the importance of timeliness when initiating an investigation, particularly where a person may be required to provide information.

In response to our draft report, the Office of the Fair Work Ombudsman emphasised that the initial backlog that caused the delay in this case had been fully addressed, highlighting the office's responsiveness to key issues and success in addressing them.

Case study 2

Following receipt of a complaint from a former employee, the Office of the Workplace Ombudsman investigated Mr B's company and finalised the complaint. However, the matter was subsequently re-investigated and closed again. Ten months later, Mr B received notification that the matter was to be investigated a third time.

[12] Commonwealth Ombudsman's office received 665 complaints about the Office of the Workplace Ombudsman in 2007–2008 and 65 in 2008–2009.

As part of the third investigation, documents were requested from Mr B for employees over a period that he alleged would involve the gathering of 15–20,000 records. Mr B complained to our office about the re-investigation and the volume of documents requested by the Office of the Workplace Ombudsman.

We investigated and found that the re-investigations had been the result of the employee having accessed the Office of the Workplace Ombudsman's internal review process, and the reviewing officer's finding that further action could be taken. It would seem that this information was not communicated to Mr B.

We also learned that the new request for documents related to possible systemic issues raised by the complainant but affecting all of the company's employees, which the Office of the Workplace Ombudsman decided warranted investigation. Mr B believed he had not been adequately informed about the reasons for the second and third investigations, as he had been under the impression that the matter related to a single investigation concerning one former employee. This case illustrates that failing to maintain clear communication with a person who is subject to an investigation can cause misunderstanding and potentially have an impact upon their compliance with requests. A significant factor in the dramatic decline in complaints to our office about the Office of the Fair work Ombudsman is improved communication.

1.10 Our office is concerned that agencies which investigate claims and exercise certain powers do so fairly and consistently. The Office of the Fair Work Ombudsman employs more than 800 staff in 26 offices around Australia. This was a key factor in the Commonwealth Ombudsman's decision to investigate. The objective of the investigation was to assess whether or not the Office of the Fair Work Ombudsman's practices and procedures for conducting investigations and exercising its powers are consistent with recognised best practice principles.

PART 2—SCOPE AND METHODOLOGY

2.1 We decided to assess the practices and procedures of the Office of the Fair Work Ombudsman against the principles contained in the Administrative Review Council (ARC) report, *The Coercive Information-Gathering Powers of Government Agencies.*[13] In the report, the ARC considered the practices of six government agencies[14] with coercive information-gathering powers. The ARC concluded that there were 20 best-practice principles that had general application to all agencies. These principles are based on the administrative law values of fairness, lawfulness, rationality, transparency and efficiency.

2.2 The ARC described what it meant by coercive information-gathering powers as follows:

> The Council's report focuses ... on coercive powers relating to the production of information or documents and the provision of information by way of oral examination or hearing. These powers have not previously been the subject of such detailed scrutiny; they are referred to in this report as 'coercive information-gathering powers'.[15]

2.3 To gain an understanding of practices and procedures relied upon by the Office of the Fair Work Ombudsman, we obtained a copy of its Field Operations Manual and reviewed it in light of the ARC principles. We then requested other internal documents and notices used by the Office of the Fair Work Ombudsman, asked the Office of the Fair Work Ombudsman some specific questions regarding its practices and procedures, and conducted a field visit to the Office of the Fair Work Ombudsman in Melbourne. The purpose of the visit was to allow Commonwealth Ombudsman staff to observe, first hand, how the Office of the Fair Work Ombudsman deals with claims and manages investigations.

ARC principles

2.4 The following sets out each of the principles contained in the ARC's report and outlines our views in relation to the Office of the Fair Work Ombudsman's compliance with the principles.

Principle 1

> The minimum statutory trigger for the use of agencies' coercive information-gathering powers for monitoring should be that the powers can be used only to gather information for the purposes of the relevant legislation.
>
> If a coercive information-gathering power is used in connection with a specific investigation, the minimum statutory trigger for using the power should be that the person exercising it has 'reasonable grounds' for the belief or suspicion that is required before the power can be exercised.

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13 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies,* Report no. 48, May 2008.

14 ARC sought submissions from the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Securities and Investment Commission, the Australian Taxation Office, Centrelink, and Medicare Australia.

15 Page 1, footnote (FN) 13.

> If an information-gathering process escalates from monitoring to specific investigation, agency officers should, to the extent operationally possible, inform the subject of the investigation of that change in status.

2.5 This principle concerns the minimum statutory trigger for use of coercive information-gathering powers.

> The trigger is important for maintaining a suitable balance between the statutory objectives of agencies and the interests of those in respect of whom information-gathering powers are exercisable.[16]

2.6 Section 707 of the Fair Work Act states:

> An inspector may exercise compliance powers:
>
> (a) at any time during working hours; or
>
> (b) at any other time, if the inspector **reasonably believes** that it is necessary to do so for compliance purposes. (Emphasis added)

2.7 The term 'reasonable belief' has been judicially considered and requires that there is evidence of a factual basis for the belief.[17] The ARC considers that there is a difference between how that test should be applied where an agency is monitoring a situation, rather than undertaking an actual investigation. Where an agency like the Office of the Fair Work Ombudsman undertakes a specific investigation, it is expected that the 'test should be correspondingly more specific requiring establishment of a requisite state of mind on reasonable grounds'.[18] The ARC highlights that agencies that move from merely monitoring a case to initiating an investigation should take positive steps to inform the subject of the investigation of the change of status.

2.8 The ARC considered that, to the extent it is operationally possible, it is good administrative practice to let a person know if they have become the subject of an investigation.[19] Knowledge that an agency's interest extends beyond general research is crucial to the protection of the individual's rights and interests.

2.9 After considering information and documents provided by the Office of the Fair Work Ombudsman, our office is satisfied that sufficient controls are in place to ensure that FWIs do not exercise compliance powers in the absence of a reasonable belief. In most cases, the existence of a claim by an employee will be adequate evidence to form such a belief. Commonwealth Ombudsman staff also considered the Office of the Fair Work Ombudsman's processes for deciding to use its compliance powers in the absence of an actual claim made against an employer—for example, when concerns arise about practices in a particular industry.[20] In these circumstances, the Office of the Fair Work Ombudsman has a process to ensure that all proposals to audit employers in a particular industry are adequately scrutinised by senior staff.

2.10 Before exercising its compliance powers, the Office of the Fair Work Ombudsman encourages employers and employees to try to resolve their claims

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16 Page 5 FN13.
17 *George v Rockett* (1990) 170 CLR 104, 112 (Referred to page 10 of Report 48).
18 Page 11 FN13.
19 Ibid.
20 Office of the Workplace Ombudsman media release 'Federal Workplace Watchdog continues crackdown on rogue trolley collector employers'. See http://www.fwo.gov.au/Media-centre/2007/Pages/20070925.aspx.

informally through Assisted Voluntary Resolution (AVR). Commonwealth Ombudsman staff examined the AVR process to check that procedures are in place to ensure that employers are properly notified about any transition from AVR to an investigation.

2.11 Our review found that employers who moved from AVR to the investigation stage are given adequate notice about the change in status. However, we were concerned that the initial letter sent to employers about AVR could be seen to place too much emphasis on the potential consequences of an investigation should voluntary resolution of the claim fail. The discussion below illustrates this concern, but also highlights the responsiveness of the Fair Work Ombudsman in dealing with the issue before we raised it with his office.

2.12 Direct negotiation between the parties will often be the most efficient and effective means of achieving resolution in disputes over an alleged non–payment of an entitlement or possible breach of an award. Encouraging employers and employees to resolve claims voluntarily may also limit the volume of claims the Office of the Fair Work Ombudsman is required to investigate, leaving it to use its resources on cases where AVR has not been successful or where there is a history of non-compliance by the employer. AVR is one way the Office of the Fair Work Ombudsman seeks to fulfil its function of encouraging harmonious and productive workplace relations.

2.13 Nevertheless, we were concerned that the notice could lead some employers to settle claims on the basis of excessive or undue concern about the risks of defending a position that they feel is justified, particularly if the amount claimed is not large. This concern is illustrated by the following complaint to our office.

Case study 3

Ms C received a letter from the Office of the Workplace Ombudsman advising that it had received a claim from one of her former employees, who said they had not been paid their correct entitlements. Ms C complained to us that the letter and subsequent contact with the Office of the Workplace Ombudsman left her with the impression that she should settle the claim directly with the employee or risk facing worse consequences.

Ms C was not able to contact the employee, so she sent the Office of the Workplace Ombudsman all the relevant employee documents instead. This allegedly led to the Office of the Workplace Ombudsman finding that the claim had no substance.

Ms C advised that she complained to the Commonwealth Ombudsman's office about her experience because she felt that the Office of the Workplace Ombudsman's approach could cause other employers in a similar situation to settle rather than defend their position.

We elected not to investigate Ms C's specific complaint, given the claim had since been resolved. However, we believed her complaint flagged an issue that warranted consideration during this broader own motion investigation.

2.14 In response to our draft report the Fair Work Ombudsman advised that AVR notices had been reviewed in advance of our draft report being sent to his office. We are satisfied that the changes made to the AVR notice address the concerns raised in this report.

Principle 2

Before using the powers

Before using coercive information-gathering powers agency officers should do two things:

- consider alternative means that could be used to obtain the information sought

and

- weigh up whether the probable importance of information obtained through using coercive information-gathering powers is justified, having regard to the cost of compliance for the notice recipient.

Drafting notices

When drafting information-gathering notices agency officers should seek only the information that is necessary for their current information-gathering requirements.

To the extent operationally possible, it is desirable that agency officers consult proposed notice recipients in order to determine the probable scope and nature of information held.

Exercising the powers

When exercising coercive information-gathering powers agency officers must choose the most efficient and effective means of obtaining the information. For example, if information is held on computer, the issuing of a notice requesting identification of records held on the system could in the first instance be the most effective and efficient course of action. This could then be followed by a notice requesting the production of relevant documents.

2.15 This principle seeks first to ensure agencies consider alternative ways of obtaining information before exercising coercive information-gathering powers. Second, it asks that agencies balance the probable importance of the information requested against the cost of compliance for the notice recipient before issuing the notice. Ensuring that these factors are considered prior to exercise of compliance powers is appropriate, given that failure to comply can lead to civil penalties being imposed.

2.16 Consistent with this principle, an agency is expected to have controls and guidelines in place to ensure that once the threshold trigger has been met, coercive information-gathering powers are not used to get easily obtainable or excessive amounts of information. Guidelines and controls should be geared to encourage FWIs to work with employers (where it is operationally appropriate) to limit requests to necessary information only.

2.17 The importance of this principle is demonstrated by the following complaint made to the Commonwealth Ombudsman's office.

Case study 4

Ms D's business was being investigated by the Office of the Workplace Ombudsman in relation to a claim made by a former employee. As part of its investigation, the Office of the Workplace Ombudsman requested information relating to the employee going back eight years. Ms D complied with the request.

Ms D was served with a second notice to produce documents relating to the employee going back a further eight years. Ms D told the Office of the Workplace Ombudsman that she did not have capacity to sort through the documents that contained the information.

Ms D complained to us because she considered the Office of the Workplace Ombudsman's request unreasonable. We contacted the Office of the Workplace Ombudsman about the matter and were advised that the request had already been reconsidered and a decision made to finalise the matter without the additional information.

This case study highlights the importance of weighing up the probable importance of information requested against the cost of compliance for the recipient, prior to the issue of a notice.

2.18 We reviewed the Office of the Fair Work Ombudsman's *Field Operations Manual* and found that it contains no specific advice to FWIs regarding the principle that the cost of compliance for a notice recipient should be taken into account when issuing a notice. Having said that, the investigation did find that the Office of the Fair Work Ombudsman is working to develop a culture that encourages FWIs to get employers to provide relevant information informally. Further, we noted that steps taken by FWIs are closely monitored by their supervisors. Nevertheless we are concerned that the only official guidance to FWIs regarding requests for documents is that they 'should gather all legally obtainable, potentially relevant material in the first instance, even where there is doubt as to its value or admissibility'.[21]

2.19 We are concerned that this instruction does not reflect the principle that the cost of compliance for a notice recipient should be taken into consideration prior to issuing a notice to produce documents. Therefore, we consider the guidelines should be reviewed to ensure that FWIs are formally made aware that the burden of compliance with any request is a relevant consideration.

2.20 In response to our draft report the Fair Work Ombudsman stated:

> There are possible implications relating to admissibility and discoverability of evidence where records have been requested informally. In some instances an informal request for information may be appropriate (for example where a complaint relates to an employer who has an established history of non-compliance with previous such notices).

2.21 The Commonwealth Ombudsman accepts that there are clear operational and strategic reasons that make it appropriate at times to use formal processes to obtain documents. Nevertheless there would be value in reviewing the formal guidance to FWIs so that the instruction to obtain all 'legally obtainable' information when determining the scope of a notice is balanced by an instruction to take into account the cost of compliance and the need for, or value of, the information sought.

Principle 3

> When an agency uses its information-gathering powers for the purpose of a specific investigation it is good administrative practice for the agency officer concerned to prepare a written record describing the basis on which the threshold trigger for the use of the powers was deemed to have been met.
>
> If the powers are used for monitoring or if an agency regularly issues large numbers of notices, a written record of the fact of the use of the powers is also desirable; it should name the officer who authorised the use of the powers.

[21] FWO Field Operations Manual, version 1.0, s 20.5.

2.22 Written records of decisions made during an investigation are important because they enable people external to the investigation to gain an understanding of why certain actions have been taken. This makes investigators accountable for their actions.

2.23 Our investigation showed that the Office of the Fair Work Ombudsman has effective procedures in place to record the rationale for undertaking an investigation and the reasons for exercising compliance powers. This is in the form of a decision record that FWI supervisors are required to check fortnightly. The Commonwealth Ombudsman's office is satisfied that the Office of the Fair Work Ombudsman complies with this principle.

Principle 4

> To facilitate internal and external scrutiny of the use of coercive information-gathering powers and to engender community confidence in the exercise of those powers, each agency should regularly publish information about its use of the powers. The information provided should be sufficient to allow anyone seeking to assess the use of the powers to do so, yet should not be such as to jeopardise continuing investigations or reveal details of important investigatory methods.

2.24 The importance of this principle is to promote transparency, so that the public has sufficient information to know how and why the powers of an agency are exercised. Such disclosure promotes confidence, by allowing the public to understand how an agency operates and making it accountable for its actions.

2.25 One of the Office of the Fair Work Ombudsman's strengths is that it puts significant effort into educating the public about its role and powers, investigations and prosecutions. One way it does this is by updating its website almost daily. The Commonwealth Ombudsman is satisfied, therefore, that the Office of the Fair Work Ombudsman is working to comply with this principle.

Principle 5

> Agencies should regularly monitor developments in case law relating to contempt of court. In this regard, training and support for officers exercising coercive information-gathering powers are essential.

2.26 Keeping abreast of developments in the law is important for agencies that exercise any form of coercive power. It is particularly important that officers who exercise those powers avoid any risk of an investigation impinging on a related court proceeding. Failing to do so could place the officer in contempt of court. This means it is important that agencies not only monitor case law, but have an effective means of bringing cases to the attention of officers exercising coercive information-gathering powers.

2.27 The Office of the Fair Work Ombudsman has a Legal and Advice Branch, which monitors changes to legislation and makes officers aware of relevant court cases. It provides staff with updates, bulletins and fact sheets in order to disseminate that information to FWIs and the wider office. Managers also provide updates to staff via meetings and emails, and provide additional training when necessary. In addition, FWIs are provided with information through the internal 'Knowledge Bank' system, media releases and subscriptions to online journals. Our field visit to the office revealed that the Office of the Fair Work Ombudsman also maintains a regularly updated intranet site. It is important that agencies develop clear guidelines regarding the preferred method of communicating with staff and encourage the use of that

method where possible. This limits confusion and ensures timely uptake of new information.

Principle 6

> Legislation should specify who may authorise the exercise of an agency's coercive information-gathering powers. If failure to comply with a notice would attract a criminal penalty, the legislation or administrative guidelines should specify the category of officer to whom the power to issue a notice can be delegated.

2.28 When individual officers are given the power to intrude on the private activities of the public, it is essential that information setting out who is able to exercise such power is readily available. A person subject to a request or direction should be able to easily confirm that the person exercising the power has the authority to do so, particularly where the failure to comply with a request or direction carries serious penalties.

2.29 This principle does not strictly apply to the activities of the Office of the Fair Work Ombudsman, as penalties for failure to comply with the Office of the Fair Work Ombudsman's coercive information-gathering powers are civil in nature. Having said that, the Fair Work Act does set out who can be appointed as a FWI.[22] It also allows for FWIs to be subject to certain conditions and requires them to follow general directions. Our investigation did not reveal any specific problems in the Office of the Fair Work Ombudsman's compliance with this principle.

Principle 7

> It is important that an agency has in operation procedures for ensuring that coercive information-gathering powers are delegated only to suitably senior and experienced agency officers.
>
> The officers to whom the powers are delegated should be sufficiently senior and experienced to be able to deal effectively with questions associated with procedural fairness and privilege that can arise in the conduct of examinations and hearings.

2.30 Underlying this principle is that coercive information-gathering powers need to be exercised with care. One way of trying to ensure that powers are exercised fairly is to only appoint and/or delegate powers to suitably qualified and experienced officers.

2.31 Our field visit revealed that, generally, officers in Australian Public Service (APS) Level 4 positions and above can be appointed as FWIs, with APS level 6 officers providing supervision to officers at the lower classifications. Given that the nature of the work undertaken by FWIs is broad and subject to general directions issued by the Fair Work Ombudsman, we consider that the Office of the Fair Work Ombudsman is acting consistently with the intent of this principle.

Principle 8

> If the right to exercise coercive information-gathering powers were linked to training or accreditation programs this would help agency officers exercising the powers to gain the requisite competency.

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22 Section 701 Fair Work Act.

> For an agency with a large number of officers exercising coercive information-gathering powers, development of an accredited training program specific to the agency would represent good administrative practice.

2.32 Ensuring that officers who are given the responsibility of exercising coercive information-gathering powers receive appropriate training is essential for making sure powers are exercised consistently, fairly and in accordance with the law. Such training should not only be focused on the development of skills, but designed to promote understanding about the source and limits of any delegation and/or appointment. Certain training—particularly that related to how and when it is appropriate to exercise coercive information-gathering powers—should be mandatory. It is also good administrative practice to require officers to undertake regular refresher training, so that bad habits or misinformation can be identified and addressed promptly. In a large organisation, this requires careful monitoring of staff attendance at training and a commitment by the executive to provide time and resources for staff to undertake the training. This is particularly important for the Office of the Fair Work Ombudsman, which has a large number of staff in variously sized teams spread across a large geographical area. [23]

2.33 Our investigation showed that the Office of the Fair Work Ombudsman has a sound induction process for its FWIs. The induction comprises two weeks of training, which aims to give FWIs the skills and knowledge necessary to fulfil the role. The Office of the Fair Work Ombudsman also has a training and development area that monitors individual training needs and keeps track of staff attendance at available training. In response to our draft report the Fair Work Ombudsman stated that it 'continue[s] to implement and review the effectiveness of its procedures for improvement of service quality and learning and development', including through the implementation of two new Certificate IV qualifications and an inspectors conference.

Principle 9

> When an agency confers authority to exercise coercive information-gathering powers on people who are not officers of the agency—for example, state officials or employees of agency contractors—the agency should remain accountable for the use of those powers.

2.34 This principle is designed to reinforce that while agencies can contract out functions, they will remain accountable.

2.35 Section 700 of the Fair Work Act enables the Office of the Fair Work Ombudsman to appoint a person employed by a state or territory. However, the Field Operations Manual is silent about how such appointments should be managed and monitored. In response to specific questioning, the Office of the Fair Work Ombudsman indicated that where arrangements are in place with other agencies, conduct and performance are managed through memorandums of understanding. In response to our draft report the Fair Work Ombudsman advised that these set out in clear terms the expectations of conduct and accountability. The Commonwealth Ombudsman is satisfied that there is a process in place that assists in the Office of the Fair Work Ombudsman maintaining oversight of all inspectors.

Principle 10

> Senior officers of an agency should regularly audit and monitor the exercise of coercive information-gathering powers within the agency. In addition to ensuring the continuing suitability and accuracy of delegations, the senior officers should ensure that officers

[23] See page 27, FN13.

> exercising the powers have received the necessary training, possess the requisite skills, and have continuing access to assistance, advice and support.

2.36 Along with standard quality checks designed to detect errors at an early stage, the ARC highlights the importance of regular auditing of information-gathering powers. The advantage of random audits of open or closed cases is that they can highlight problems that may otherwise go undetected. Information gathered from regular random audits can also be used to improve an agency's processes.

2.37 The Office of the Fair Work Ombudsman's Business Improvement Team conducted two audits during 2009. In total, 495 files were audited. The sample represented a cross section of completed files from all states, territories, offices and compliance outcomes based on the relevant percentage of files finalised within the audit period. The purpose of the audits was to monitor compliance with internal processes, such as those set out in the Field Operations Manual.

2.38 The frequency and volume of internal audits an agency conducts will vary depending on the objectives. For example, the potential risks associated with a certain task, as well as the size and complexity of an agency's business will influence the relevant variables. The Australian National Audit Office (ANAO) in its better practice guide *Public Sector Internal Audit* emphasises that agencies should develop an audit plan to support the decisions they make regarding the size and nature of internal audits.[24] The ANAO also sets out other principles it considers important to the integrity of an internal audit process.[25]

2.39 We consider that the Office of the Fair Work Ombudsman, by undertaking audits of its compliance functions, acts in a manner consistent with this ARC principle. The Office of the Fair Work Ombudsman should ensure (if it has not already done so) that the audit process it follows reflects the principles contained in the ANAO's better practice guide.

Principle 11

> Subject to considerations of privacy and confidentiality, agencies are encouraged to share their ideas and experiences in relation to the exercise of coercive information-gathering powers in the following ways:
>
> - establishing an agency network for the exchange of educational materials, including training manuals and ideas. Discussion and circulation of information about relevant cases and the content and upgrading of instructional materials would be useful—especially for smaller agencies
> - establishing an informal peer network within and between agencies for discussion, training and information sharing
> - conducting periodic meetings between 'like agencies'
> - identifying important across-agency or sectoral topics for inclusion in agency training programs and manuals.

2.40 It is important that agencies not only work to ensure internal processes are consistent and fair, but that they also learn from each other through peer review and across-agency training. Such an approach allows agencies to share their knowledge and experiences in a neutral setting.

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[24] See page 23, ANAO *Public Sector Internal Audit* Better Practice Guide, September 2007.
[25] See page 3, FN25.

2.41 It should be noted that the Office of the Fair Work Ombudsman is a relatively young agency. Despite this, our investigation showed that the Office of the Fair Work Ombudsman is working to develop relationships with other government agencies to share information in a way that complies with privacy principles.[26]. It is doing this via an already extensive range of operational meetings between staff and development of memorandums of understanding with agencies like the Department of Immigration and Citizenship. The disclosure of information 'that is likely to assist in the administration or enforcement of a law of the Commonwealth, State or a Territory' is supported by the Fair Work Act.[27]

Principle 12

> Agencies should adopt procedures and offer training aimed at avoiding conflict of interest in relation to the exercise of coercive information-gathering powers.
>
> *Decision Making: natural justice*, guide 2 in the Council's series of best-practice guides for administrative decision makers, provides an overview of the law in this area and of its practical application.

2.42 An awareness of procedural fairness, with an emphasis on conflict of interest, is important for officers exercising coercive information-gathering powers. Therefore, agency staff should receive regular training and updates that reinforce their obligations to identify and disclose situations that could be perceived as involving a conflict of interest. Officers should also understand that when making a decision, parties who might be affected by that decision should be given an opportunity to comment on any adverse claims made about them.

2.43 The Field Operations Manual clearly sets out the obligations of officers employed under the Public Service Act. The Office of the Fair Work Ombudsman also has an internal process for reporting a suspected conflict of interest. Staff must complete an annual disclosure statement. It is evident that the Office of the Fair Work Ombudsman takes seriously its obligations to minimise the potential for conflict of interest situations.

Principle 13

> If face-to-face contact is involved, at a minimum officers or external experts exercising coercive information-gathering powers should carry official photographic identification and produce it on request.
>
> In a formal investigative procedure it is good administrative practice if officers and external experts are also able to produce written evidence of the extent of their authority.

2.44 Officers who are authorised to exercise coercive information-gathering powers must be able to provide the public with evidence of their authority. The use of photographic identity cards is the most common way that agencies comply with this principle. Where an appointment is for a specified period, the expiration date should form part of the identity card. The public should be able to easily confirm the identity of a person purporting to have powers to obtain information and documents from them.

2.45 Section 708 of the Fair Work Act sets out the form of identity cards. The identity cards used by the Office of the Fair Work Ombudsman comply with the Act.

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[26] See paragraphs 2.64 and 2.65 of this report.
[27] Section 718(2) Fair Work Act.

FWIs are appointed for periods of up to four years. The identity cards reflect this, by stating the expiration date of the appointment. Our field visit confirmed that FWIs sometimes take additional information, including the investigation file, when conducting site visits. The Commonwealth Ombudsman's office is satisfied that the Office of the Fair Work Ombudsman complies with this principle.

Principle 14

All coercive information-gathering notices should do the following:

- identify the legislative authority under which they are issued, the time, date and place for compliance, and any penalties for non-compliance
- in relation to specific investigations, set out the general nature of the matter in relation to which information is sought
- consistent with the requirements of the *Privacy Act 1988* (Cth) in relation to personal information, clearly state whether it is the usual lawful practice of the agency to hand information collected in response to notices to another area of the same agency or to another agency
- provide details of a contact in the agency to whom enquiries about the notice can be addressed
- inform notice recipients of their rights in relation to privilege.

Notices to provide information or produce documents

It is good administrative practice to specify how the notice recipient should provide the information or how the document should be produced and to whom.

Notices to attend an examination or a hearing

Notice recipients should be told whether they may be accompanied by a lawyer or third party and, to the extent possible, the name of the person who will be conducting the examination.

The time frame for compliance

Agency legislation should specify a minimum period for the production of information or materials or for attendance for examination or hearing. The legislation should also allow for exceptions to the rule in specified circumstances.

Materials covered by a notice

To facilitate compliance, a notice or its supporting correspondence should clearly identify the sorts of materials covered by the notice, including materials held on computer.

2.46 A notice must not only comply with authorising legislation, but contain sufficient information to ensure that the recipient understands their rights and obligations.[28] It should also be clear how and when the information and/or documents should be provided.

2.47 The Office of the Fair Work Ombudsman issues notices requiring the provision of documents under its legislation. We are satisfied that the template it uses to generate such notices would (if completed correctly) create a lawful notice that is consistent with this principle.

[28] It is not expected that a notice outline the specific nature of the inquiry. Indeed at times there may be operational reasons for not doing so. However, sufficient information needs to be provided to enable the notice recipient to understand the request and their obligations.

2.48 One observation made during the investigation was that it is the Office of the Fair Work Ombudsman's preference for FWIs to issue notices that require compliance within the minimum statutory period of 14 days.[29] The Field Operations Manual provides no guidance about when it would be appropriate to set a longer period in which to respond to a notice. Having said this, consideration can be given to issuing a notice with a longer time frame where an employer makes a reasonable request.

2.49 The Commonwealth Ombudsman notes that the Office of the Fair Work Ombudsman accepts that at times it might be appropriate to set a period longer than 14 days. However, any decision to set a date exceeding 14 days can only be made after a case conference. The absence of any formal written guidance about when FWIs should consider issuing a notice with a longer compliance period increases the risk that FWIs will choose the default position. We consider that the Office of the Fair Work Ombudsman should review the Field Operations Manual so that it explicitly states that FWIs can consider issuing a notice (after consultation with their manager) with a return date longer than 14 days. There would also be some benefit in the Field Operations Manual providing examples of the types of situations that would warrant FWIs seeking further guidance.

2.50 Our investigation also revealed that the Field Operations Manual provides no guidance about what constitutes a reasonable excuse for a notice recipient who is unable to comply with a notice. The Commonwealth Ombudsman considers some general formal guidance should be provided to FWIs to ensure that there is a consistent approach when deciding to commence enforcement action.

2.51 In response to our draft report the Fair Work Ombudsman advised that it is not possible to extend the period for compliance once the notice to produce documents has been issued. The Commonwealth Ombudsman accepts that this is the case and that prior to the issuing of the notice consideration should be given to the period for compliance. It is for this reason that the Commonwealth Ombudsman considers formal guidance should be provided to FWIs about the process for deciding when to provide a longer period than 14 days for notice recipients.

2.52 The Fair Work Ombudsman, in response to our draft report, also stated that:

> By definition, the concept of 'reasonable excuse' is one that cannot be distilled into one particular description, and Fair Work Inspectors will very correctly consider the particular reasons provided by a party for failing to comply with a Notice on a case by case basis. An excuse may be reasonable in one set of circumstances but unreasonable in another, and I am reluctant to effectively limit the discretion of Fair Work Inspectors by being too prescriptive.

2.53 Terms like 'reasonable excuse' cannot be easily described, nevertheless inclusion of examples of factors that might warrant consideration would help in the promotion of greater consistency.

Principle 15

> Compliance would be further encouraged if terms such as 'information in the possession of', 'in the custody of' or 'under the control of' the notice recipient were defined. Pro forma notices can be useful if differences in expression occur in the legislation of a single agency.

[29] Section 712 Fair Work Act.

2.54 It is important that recipients of requests for information understand their obligations in relation to documents they might hold for themselves or on behalf of another person. For this reason, the ARC asserts that compliance would be encouraged if agencies took steps to define the different terms used in their notices.

2.55 Our investigation found that the Office of the Fair Work Ombudsman complies with this principle. The template used by the Office of the Fair Work Ombudsman when making a formal request to an employer to produce records or documents aims to define terms that may cause confusion for the recipient. For example, the template notice requires FWIs to describe the nature of documents and records that need to be produced. Further, the notice defines what is meant by a document using specific examples and sets out what is considered a record.

Principle 16

> Unless there are special reasons to the contrary, examinees should be entitled to:
>
> - a private hearing—subject to the presence of authorised individuals
> - in the absence of exceptional circumstances, the option of having legal (or, if appropriate, other) representation.
>
> The reason for holding a public examination or for denying legal or other representation should be explained and a record of this kept.
>
> Among the matters that should be taken account of in legislation are the taking of evidence on oath or affirmation and the admissibility of the evidence taken at the examination in subsequent proceedings.
>
> Among other matters that may be dealt with *without* legislation are provision for viewing and correction by the examinee of a transcript of proceedings and, where relevant, the circumstances in which a third party may be given a copy of the transcript within the scope of agency privacy and secrecy provisions.
>
> Examinees should be told if legislation precludes subsequent disclosure of information obtained during an examination or hearing. Agencies should clearly differentiate this situation from one in which where there is no such legislative restriction.

2.56 This principle is designed to ensure that agencies that have the power to compel people to provide oral information provide adequate information to interviewees about their rights both during and after an interview.

2.57 The Office of the Fair Work Ombudsman does not have the power to compel anyone to provide oral information, other than their name and address. Having said this, we understand that it is not uncommon for the Office of the Fair Work Ombudsman to interview employers and employees as part of an investigation. Participation in these interviews is voluntary. We reviewed internal procedures used by the Office of the Fair Work Ombudsman to guide FWIs on how to conduct such interviews, including the script used by FWIs when conducting electronically recorded interviews. Our investigation showed that the Field Operations Manual does make it clear that a person's participation in an interview is voluntary.

2.58 However, the Commonwealth Ombudsman has the following concerns with the scripts used by the Office of the Fair Work Ombudsman when conducting interviews. First, the pre-interview script does not include a statement advising that the interview is voluntary and that the interviewee is entitled at any stage to refuse to

answer questions or to terminate the interview. Second, no statement is made on tape seeking confirmation from the interviewee that they understand that their participation in the interview is voluntary. We are concerned that the absence of any reference to the voluntary nature of the interview could cause some interviewees to misunderstand the status of the interview.

2.59 The Commonwealth Ombudsman considers the script currently used by the Office of the Fair Work Ombudsman before and during a recorded interview should be reviewed to ensure that interviewees are both informed of their rights and have an opportunity to confirm that they understand those rights.

2.60 In response to our draft report, the Fair Work Ombudsman advised that a review of the scripts was already underway and that the feedback from this report would be incorporated into the outcome of that review.

Principle 17

> Client legal privilege and the privilege against self-incrimination—including the privilege against self-exposure to penalty—are fundamental principles that should be upheld through legislation. Abrogation of the privileges should occur only rarely, in circumstances that are clearly defined, compelling and limited in scope. Legislation should clearly state whether or not the privileges are abrogated and when, how and from whom the privileges (including a use immunity)[30] may be claimed.
>
> Agencies should keep written records of the situations in which the privileges apply, and especially when they are waived. Agency guidelines to supplement legislative directions should also be developed in relation to privilege; among the topics covered should be the procedures to be adopted by agencies in responding to a claim of privilege and the nature and effect of a waiver of privilege.

2.61 The privilege against self-incrimination and legal professional privilege are important elements designed to protect individuals subject to an investigation. The ARC highlights the importance of agencies maintaining appropriate records to assist in protection of these rights and having established procedures to ensure claims of privilege are dealt with in a transparent and consistent manner.

2.62 Section 713 of the Fair Work Act provides that a person is not excused from producing a record or document on the grounds that the production of the record or document might tend to incriminate or expose them to penalty. However, the Act also states that any such document will not be admissible as evidence in criminal proceedings.

2.63 Our field visit confirmed that the Office of the Fair Work Ombudsman has established procedures and processes in place to deal with claims of privilege. Therefore, we are satisfied that Office of the Fair Work Ombudsman practices comply with this principle.

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[30] Where a person is compelled to provide information, even where it might incriminate them, a degree of protection can be provided by limiting or preventing the use of the information against the person who provided it. This is commonly referred to as 'use immunity'. See also pages 48–49 FN13

Principle 18

> The complexity and inconsistency of agencies' secrecy provisions mean that special care is needed when dealing with inter-agency disclosure of information.
>
> In notices and requests it is necessary to carefully describe the information agency officers require in the exercise of their coercive information-gathering powers and the probable uses of that information.
>
> Agencies should provide to their officers guidance about situations in which the use of information for purposes not reasonably foreseen at the time of collecting the information might be contemplated.
>
> Guidelines and training for agency officers in both these areas and in relation to the effect of and interaction between the *Privacy Act 1988* (Cth) and agencies' secrecy provisions are essential.
>
> It is good administrative practice to develop memorandums of understanding between agencies, clarifying the responsibilities of agency officers in disclosing information obtained through, among other things, the use of coercive information-gathering powers.

2.64 It is incumbent upon an agency that is empowered to obtain documents and information from the public to comply with privacy principles. Therefore, an agency should work to ensure that its officers receive regular training and guidance about those principles. The ARC also highlights that the risk of a breach of privacy increases where there is inter-agency transfer of information. This is because the receiving agency may not fully appreciate the purposes for which the information was originally collected. The development of memorandums of understanding is considered one means of managing this inherent risk.

2.65 Our investigation, including the field visit, revealed that the Office of the Fair Work Ombudsman is taking steps to comply with this principle. For example, the Office of the Fair Work Ombudsman has developed memorandums of understanding with Fair Work Australia and the Department of Education, Employment and Workplace Relations, and is in the process of developing one with the Department of Immigration and Citizenship. The Office of the Fair Work Ombudsman also highlights the importance of privacy provisions in its Field Operations Manual and through staff training.

Principle 19

> Subject to limited exceptions, it is desirable that inter-agency disclosure of information obtained in the exercise of coercive information-gathering powers be subject to a threshold trigger of the same calibre as that governing the initial issuing of a notice (see principle 1). Additionally, privilege and use immunity should be taken into account when the release of information to another agency is being considered.
>
> Examples of situations in which exceptions to the threshold trigger would be apposite are when there is an immediate and serious risk to health or safety and when limited information is required for a royal commission.
>
> As noted, the discretion to disclose information obtained through the use of coercive information-gathering powers should rest with senior, experienced agency officers.

2.66 This principle reinforces that set out by Principle 1, but with an emphasis on the importance of considering the threshold trigger when making an inter-agency

disclosure. The Office of the Fair Work Ombudsman's Field Operations Manual satisfactorily covers the objectives this principle is designed to achieve. For example, the Field Operations Manual sets out arrangements with other government agencies for the release of information and provides examples of situations in which information would be shared.

Principle 20

> Agency strategies and guidelines should operate to ensure the integrity, proper management and accurate recording of information received in the exercise of an agency's coercive information-gathering powers. Wherever possible, receipts should be given for documents and materials furnished to the agency.
>
> An agency that has used its information-gathering powers to obtain information or documents from someone should keep under continuing review the need to keep the person informed, as appropriate, about whether an investigation is still current, when documents can be returned to the person, or whether other arrangements can be made for the person to be given interim access to the documents or a copy of the documents.

2.67 This principle highlights that an agency's responsibilities to a person subject to the exercise of coercive information-gathering powers do not end once the information has been obtained. It emphasises that documents should be properly receipted and that information about when and how a person can access them be made available.

2.68 We reviewed the Field Operations Manual, which showed that the Office of the Fair Work Ombudsman manages documents obtained through the exercise of coercive information-gathering powers consistently with this principle. The Field Operations Manual states that FWIs are expected to keep all relevant parties informed about key developments in an investigation. The Office of the Fair Work Ombudsman advised us that FWIs are expected to liaise regularly with employers who are subject to a claim, although there is no internal guidance that sets a specific time frame within which an FWI should contact an employer. We are aware that all investigations are subject to regular internal review, but consider that the Office of the Fair Work Ombudsman should look at developing an internal service standard that states how often FWIs are to make contact with employers who are subject to an investigation. The importance of this is demonstrated by the following complaint made to our office.

Case study 5

Mr E was notified of an investigation by the Office of the Workplace Ombudsman about a claim lodged by a former employee. Mr E contacted the inspector immediately to provide all the information requested and was advised that he would be informed of the outcome of the investigation in due course.

After more than six months, Mr E contacted the Office of the Workplace Ombudsman for information about the claim. His messages were allegedly passed on to the inspector but weeks passed without a response, so Mr E contacted the Commonwealth Ombudsman's office to lodge a complaint.

Before our office approached the Office of the Workplace Ombudsman, Mr E made a further attempt to contact the inspector. He was then contacted by another Office of the Workplace Ombudsman officer who allegedly advised that the matter had been closed for three months. As the Office of the Workplace Ombudsman had made contact with Mr E, we decided not to undertake an investigation, as it would not

produce a better or different outcome for him. Instead, the complaint was used as input to this investigation.

Although the complaint was not investigated, it highlights the problems that can occur in the absence of a defined internal service standard. We also note that the Fair Work Ombudsman's emphasis on service standards and responsiveness to complaints has been very effective in dramatically reducing complaint numbers to our office.

2.69 In response to our draft report the Fair Work Ombudsman advised that they accept it would be beneficial to develop a service standard for FWIs that specified the time periods within which FWIs should make contact with employers.

PART 3—CONCLUSIONS AND RECOMMENDATIONS

3.1 The Commonwealth Ombudsman's investigation showed that the majority of the Office of the Fair Work Ombudsman's guidelines and procedures comply with the ARC principles. At the same time we identified some areas for further development. In particular, we noted:

- a lack of guidance to assist FWIs to balance the needs of the investigation against any potential burden placed on the employer by the investigation
- the absence of a statement in the Office of the Fair Work Ombudsman's interview script that makes it known that interview participation is voluntary.

3.2 In addition, we noted that the Office of the Fair Work Ombudsman could take steps to ensure that employers are contacted about the status of an investigation on a regular basis.

3.3 The Commonwealth Ombudsman has made the following recommendations to the Office of the Fair Work Ombudsman.

Review of administrative procedures and practices

Recommendation 1

I recommend that the Office of the Fair Work Ombudsman review the Field Operations Manual to ensure that the burden placed on an employer by a notice to produce documents is taken into consideration by FWIs when determining the type and volume of documents that are requested during an investigation.

Recommendation 2

I recommend that the Office of the Fair Work Ombudsman provide explicit guidance to FWIs about when consideration should be given to issuing a 'notice to produce' documents with a compliance period longer than the 14-day minimum statutory period. I also recommend that formal guidance be given regarding what may constitute a reasonable basis for failing to comply with a 'notice to produce' document.

Recommendation 3

I recommend that the Office of the Fair Work Ombudsman review the script used before and during recorded interviews to ensure that it reflects the voluntary status of interviews.

Recommendation 4

I recommend that the Office of the Fair Work Ombudsman develop an internal service standard that specifies the time periods within which contact should be made with employers during the course of an investigation.

3.4 The Fair Work Ombudsman's response to our draft report indicates that his office has now addressed or is working to implement most of the recommendations.

3.5 Although our investigation found that some improvements could be made by the Office of the Fair Work Ombudsman, the Commonwealth Ombudsman notes that there were many more positive examples of compliance with the ARC principles. Therefore, this report may be of assistance to other agencies seeking to create a framework that encourages compliance with the ARC principles.

ABBREVIATIONS AND ACRONYMS

ANAO	Australian National Audit Office
ARC	Administrative Review Council
AVR	Assisted Voluntary Resolution
Fair Work Act	*Fair Work Act 2009*
FWI	Fair Work Inspector
Public Service Act	*Public Service Act 1999*