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Wilcox Consultations Secretariat
Department of Education, Employment and Workplace Relations
Location code 10M32
GPO Box 9879
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Dear Secretary

I refer to the Discussion Paper on a *Proposed Building and Construction Division of Fair Work Australia* and, in particular to the Checklist Question 14 about external monitoring of the proposed Division's exercise of its coercive powers.

I attach a response by my office that provides information on the role of the Commonwealth Ombudsman and suggests that the oversight role is one which could be performed by my office.

Our contact officer for this matter is Mr Paul Bluck (02 6276 0155, paul.bluck@ombudsman.gov.au).

Yours sincerely

Prof. John McMillan
Commonwealth Ombudsman

**Submission by the
Commonwealth Ombudsman**

**Discussion Paper: Proposed Building and
Construction Division of Fair Work Australia**

*Wilcox Consultations Secretariat
Department of Education, Employment and Workplace
Relations*

*Submission by the Commonwealth Ombudsman, Prof John McMillan
5 December 2008*

Introduction

The Discussion Paper, *Proposed Building and Construction Division of Fair Work Australia*, proposes that 'a high status independent person' be appointed on a part-time basis as the External Monitoring mechanism to oversight the exercise of powers by the Specialist Division of Fair Work Australia (at [124]-[131]). The Discussion Paper implicitly dismisses the option of this role being discharged by the Ombudsman, by focusing only on the Ombudsman's complaint function (at [125]).

The discussion does not fairly represent the functions of the Ombudsman. This paper outlines the functions of the Ombudsman so that better consideration can be given to this option.

Background

The office of the Commonwealth Ombudsman comprises the Ombudsman, two Deputy Ombudsmen and over 160 staff. The national office is in Canberra, and it is represented in other States and the Northern Territory.

The Ombudsman's main roles arise under the *Ombudsman Act 1976*, which also provides for the Ombudsman:

- to perform functions as the Defence Force Ombudsman and the Postal Industry Ombudsman
- to be called the Taxation Ombudsman, the Immigration Ombudsman and the Law Enforcement Ombudsman.

The Ombudsman is also the ACT Ombudsman, under the *Ombudsman Act 1989*.

Under the Ombudsman Act, the Ombudsman responds to complaints about actions taken or deemed to have been taken by Commonwealth and ACT agencies. In 2007-08, almost 20,000 approaches and complaints were received about agencies which are in the Ombudsman's jurisdiction with almost 5,000 of these being investigated. Most were investigated on an individual basis.

The Ombudsman also conducts "own motion" investigations that enable the Ombudsman to respond to important questions, even where there has been no complaint.

The agencies in jurisdiction that may be relevant to the Discussion Paper include the Department of Employment, Education and Workplace Relations, the Australian Industrial Registry, the Australian Fair Pay Commission, the Australian Building and Construction Commission and the Workplace Ombudsman (but not the Australian Industrial Relations Commission).

The Ombudsman annually conducts and reports on a number of investigations that deal with systemic issues in government.

Other enactments give the Ombudsman the role of inspecting records or providing oversight in areas such as:

- telecommunications interception by Commonwealth law enforcement agencies
- access to stored communications by Commonwealth, State and Northern Territory enforcement agencies
- use of surveillance devices by Commonwealth law enforcement agencies
- controlled operations by Commonwealth law enforcement agencies
- immigration detention that extends for more than two years
- access to the ACT Sex Offender Register.

Those inspection functions are conferred on the Ombudsman in respect of the Australian Commission for Law Enforcement Integrity (ACLEI). To that extent, the Ombudsman performs a function in the Commonwealth system that is similar to the function performed in State systems by the statutory inspector or public interest monitor. The Ombudsman is required to provide an annual briefing to a joint parliamentary committee in respect of the oversight of controlled operation powers by ACLEI (see *Law Enforcement Integrity Commissioner Act 2006* s 219). This similarity in function between the Commonwealth Ombudsman and independent State inspectors is not acknowledged in the Discussion Paper.

The Ombudsman was, for a time, responsible for overseeing records of the Building Industry Task Force (see former Part VA, *Workplace Relations Act 1996* which was in operation from January 2005 and March 2006, until the establishment of the ABCC). A report of this activity appears at:

http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/publications_buildingindustry

For the purpose of conducting investigations, the Ombudsman is equipped with powers that can be used to compel the provision of documents and information, including on oath or affirmation. Because of the size of its workload, the Ombudsman's office prefers to use these powers only when necessary, otherwise relying on cooperation from complainants, agencies and other people who have relevant information. The Ombudsman Act provides considerable protection to complainants, witnesses and the Ombudsman and staff. For example, a person providing information in good faith that has been requested by the Ombudsman or that the person reasonably considers relevant to an investigation:

- is not subject to civil action
- does not breach the Information Privacy Principles
- does not compromise legal professional privilege
- may not have evidence of the disclosure used in proceedings
- is not liable to a penalty under another enactment.

The Ombudsman has power to report, with recommendations, to an agency and, if the agency does not resolve the matter, to inform the Prime Minister and report to the Parliament. These powers do not often need to be exercised, as agencies are usually open to be persuaded that their actions could have been different. In most cases, the Ombudsman or delegate makes comments and suggestions that the agency can consider whether to adopt.

To suggest, as does the Discussion Paper at [125] that the Ombudsman is limited to preventing repetition of maladministration rather than instigating remedial action, considerably understates the role of the Ombudsman.

The Ombudsman and oversight bodies

The Ombudsman already deals with a number of areas related to Commonwealth oversight, regulation and law enforcement, including the Australian Taxation Office, the Australian Customs Service, the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority and the Australian Competition and Consumer Commission as well as the Australian Federal Police and the Australian Crime Commission.

The Ombudsman's usual approach when dealing with complaints about regulatory and oversight bodies is to recognize that they have been created by Parliament for an express purpose and provided with powers for that purpose. As a general rule, the Ombudsman's office will:

- accept that the agency is entitled to act and make decisions within its area of competence, relying on its assessment of priorities and its overall policies
- expect that the agency will create and apply some clear principles against which those matters can be assessed and that it will create a credible and practicable internal complaint management system
- assess the agency's administrative performance in, for example, dealing with complaints, applying its express priorities and policies to its core work and communicating its actions to its client group.

A developing agency

The Ombudsman's office has frequently shown itself to be able to adapt to new functions as they become priorities. It has the advantages of:

- a national network of offices and information technology systems
- expertise and a solid sense of its own role and the issues that arise in investigation and oversight functions, and in administration more generally
- experience in a wide range of work including, for example, staff who specialize in the performance of oversight work rather than complaint investigation
- sufficient size and scalability to enable staff to be applied to specialist functions as demand varies
- a sound and considerable public profile and a reputation for discretion and balance within the public sector.

Examples of these roles include the inspection and oversight functions listed above. In addition, proposals of the following kinds have from time to time been made by governments and parliamentary committees:

- It was proposed that the Ombudsman discharge a special case review role under the (now-defunct) Access Card legislation

- The Ombudsman was to undertake joint oversight with the NZ Ombudsman of the the Trans-Tasman regulation of therapeutic products (this overall regulatory scheme did not go ahead after lack of support process was later terminated by the NZ Government)
- The office was to provide an Ombudsman service and Code of Conduct functions for Norfolk Island (see December 2003 report on NI Governance by Parliamentary Joint Committee on National Capital and External Territories, recommendations 4 and 13)
- It was proposed that the office specifically oversight the use of intrusive quarantine inspection powers by the Australian Quarantine and Inspection Service (see June 2006 report on Citrus Canker outbreak)
- It was proposed that the office have an expanded oversight role in relation to the exercise of search, seizure and entry powers by Commonwealth agencies generally (see Senate Scrutiny of Bills Committee report on Entry, Search and Seizure Powers).

In order to facilitate the conferral of new functions of this kind, the Ombudsman has proposed the inclusion in the Ombudsman Act of template inspection powers that could be applied whenever legislation requires or permits the Ombudsman to oversight an activity or to inspect specific records. At present, those functions are performed in a range of ways, some directly referable to Ombudsman Act powers and some based on powers contained within the legislation itself.

The Discussion Paper proposes that the Specialist Division would exercise significant intrusive powers. Given the sensitivity that surrounds such a function, there is a need for oversight that goes beyond reacting to complaints. In summary, the Ombudsman already has functions similar to those suggested by the OPI model and has the powers to carry out those functions. The Ombudsman has considerable experience in the oversight of intrusive and contentious agency activity, including covert or discreet activity of which the individual subject to it is not be aware.