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## **Accountability and the Fair Work Ombudsman**

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# ACCOUNTABILITY AND THE FAIR WORK OMBUDSMAN

## INTRODUCTION

In politics, strangely enough, the best way to play your cards is to lay them face upwards on the table.

H G Wells

The importance of accountability has long been sheeted home to the Office of the Fair Work Ombudsman (FWO), the federal statutory agency responsible for enforcement of minimum employment standards under the *Fair Work Act 2009* (Cth). In the immediate aftermath of Work Choices,<sup>1</sup> the activities of the regulator were mired in controversy. In particular, the agency's involvement in a number of high profile and hotly contested cases led to accusations that one of its predecessor agencies, the Office of Workplace Services (OWS), was politically motivated and acting as the Howard Coalition Government's "secret police".<sup>2</sup> The then Opposition Leader, Kim Beazley, vowed to axe the agency should his government come to power. Greg Combet, who was secretary of the Australian Council of Trade Unions at the time, stated that any standing the agency had "has been shot to ribbons".<sup>3</sup>

In light of the agency's rather harrowing experiences in the wake of Work Choices, it is not surprising that the FWO now places a heavy emphasis on the importance of independence, transparency and accountability. Indeed, the political controversy outlined above was no doubt a factor in the subsequent replacement of the OWS, which was an executive agency under Work Choices, with a statutory authority, the Workplace Ombudsman (WO), under amendments passed by the Coalition government in 2007.<sup>4</sup> More recently, a review by the Commonwealth Ombudsman has had the effect of testing various accountability measures the FWO has since put in place.<sup>5</sup> However, despite these developments and with reference to the opening quote, the question remains: has the FWO laid all of its cards on the table? Drawing on an extended concept of accountability, this article will undertake a preliminary assessment of the various accountability mechanisms which currently apply to the FWO and question whether these checks are adequate to guard against the criticisms previously levelled at the organisation.

## SCOPE, STRUCTURE AND POWERS OF THE FWO

The Office of the FWO is, like its immediate predecessor the WO, a statutory authority that derives its power from the *Fair Work Act* and the *Fair Work Regulations 2009* (Cth). Amongst other things, it is charged with responsibility for monitoring compliance with and ensuring enforcement of the relevant federal workplace laws. To facilitate the agency in this role, the *Fair Work Act* provides the FWO with wide investigatory and information-gathering powers. Further, Fair Work Inspectors have standing to seek civil penalties against alleged wrongdoers, as well as impose administrative sanctions in the form of infringement notices and enforceable undertakings.<sup>6</sup> It is arguable that the

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<sup>1</sup> *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The Work Choices amendments to the Workplace Relations Act made a number of significant changes to the Australian system of employment relations and were extremely controversial. See generally the various articles in the special issue of the *Australian Journal of Labour Law* (2006) 19(2) AJLL).

<sup>2</sup> "ALP to axe OWS, as unions outraged over unfair dismissal investigation", *Workplace Express*, 26 July 2006. For further comment, see Gourley P, "Time for the minister to let the OWS stand on its own 'independent' feet", *The Public Sector Informant*, 5 September 2006, p 6; Goodwin M and Machonachie G, "Political Influence and the Enforcement of Minimum Employment Standards in the Australian Federal Industrial Relations Jurisdiction" in Stanton P and Young S (eds), *Proceedings of the 22nd Conference of AIRAANZ* (Melbourne, 2-6 February 2008).

<sup>3</sup> "ALP to axe OWS", n 2.

<sup>4</sup> *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth).

<sup>5</sup> Commonwealth Ombudsman, *Fair Work Ombudsman: Exercise of Coercive Information-Gathering Powers*, Report No 9 (2010) (Commonwealth Ombudsman Report).

<sup>6</sup> See generally Hardy T and Howe J, "Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia" (2009) 22 AJLL 306.

increased breadth of the FWO's jurisdiction and its expanded discretionary powers under the *Fair Work Act* strengthens the need for proper accountability mechanisms.

## CONCEPTUALISING ACCOUNTABILITY

The traditional definition of accountability generally refers to the formal duties of public agencies to account for their actions to the Parliament and to the courts. However, this narrow rendering has been largely discarded in favour of an extended concept of accountability, or "the duty to give account for one's actions to another person or body".<sup>7</sup> The broader approach properly recognises that there are multiple strategies of accountability "involving both public and private actors in both horizontal and vertical relationship with public decision-makers".<sup>8</sup> Government is now more complex and fragmented than originally conceived, and there is a wide range of possible mechanisms by which these diverse regulatory actors may be held accountable.

In developing an extended concept of accountability, Scott posits three key questions: who is accountable, to whom and for what?<sup>9</sup> In this article, we focus on the second of these questions, and ask to whom is the FWO accountable in light of the more nuanced perspective outlined above.

## ACCOUNTABILITY MECHANISMS

Scott argues that accountability may be rendered to a higher authority (upward accountability), to a broadly parallel institution (horizontal accountability), or to lower level institutions, groups and the public (downwards accountability).<sup>10</sup> Upward accountability generally refers to traditional mechanisms of accountability, such as the Parliament, Treasury and courts and tribunals. Horizontal accountability is where an agency is rendered accountable to external and internal audit committees, such as the Commonwealth Ombudsman. Finally, agencies can be held accountable to members of the public directly, known as downward accountability.

The ways in which these different types of accountability apply to the FWO will be explored in turn below.

### Upwards accountability

The establishment of FWO as a statutory authority ensures a formal division between the authority and the relevant Minister so that the FWO is legally separate from, and operates independently of, the Minister. It also means that the FWO is more directly accountable to Parliament than an executive agency. Indeed, it seems that one of the primary reasons for reconfiguring the regulator from an executive agency to a statutory authority was to address concerns that even as an executive agency, the regulator was nevertheless subordinate to the Minister, and not accountable to those outside government.

The formal division between statutory authorities and the Minister is intended to ensure that the agency is more independent of the executive, while the Minister can distance him or herself from the agency's decisions without necessarily jeopardising the political standing of the government. That is, as a statutory authority, not only is the agency less subject to control by the executive, the Minister is in a better position to hold the agency to account than in the circumstances of an agency within a department. However, although the FWO is theoretically independent from the Minister, it is also clear that the activities of the agency can be shaped by requests emanating from the Minister.<sup>11</sup> Further, it seems that, despite the FWO's public statements to the contrary, it has been alleged by

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<sup>7</sup> See Scott C, "Accountability in the Regulatory State" (2000) 27(1) J Law & Soc 38 at 40.

<sup>8</sup> Morgan B and Yeung K, *An Introduction to Law and Regulation: Text and Materials* (1st ed, 2007).

<sup>9</sup> Scott, n 7. See also Braithwaite J, "Accountability and Governance under the New Regulatory State" (1999) 58(1) AJ of Public Admin 90.

<sup>10</sup> Scott, n 7 at 42.

<sup>11</sup> *Fair Work Act 2009* (Cth), s 684. This provision states that the Minister may give written directions to the FWO about performance of his or her functions, however, such directions must be 'of a general nature only'.

some that the Minister continues to exercise a level of informal political influence over the activities of the FWO.<sup>12</sup>

As a statutory authority, the FWO is directly accountable to the Parliament through a number of mechanisms. One is the statutory requirement for FWO to table an annual report.<sup>13</sup> The FWO also reports separately against the outcome structure of the Education, Employment and Workplace Relations portfolio and prepares and submits its own Budget Portfolio Statements. FWO is also accountable to the Minister through an additional statutory obligation to provide specified reports to the Minister at his or her written request.<sup>14</sup> Further, the *Fair Work Act* also expressly sets out the circumstances in which other information held by the FWO may be disclosed to the Minister and the department.<sup>15</sup>

In addition, the FWO is obliged – as a statutory agency to appear before the Senate Estimates Committee as required. Some believe that the accountability powers of parliamentary committees are weak, given that they have limited capacity to direct the agency to address any criticisms raised as part of this process. Others argue that parliamentary committees hold a level of underlying power in their ability to bring forth evidence and air critical judgments. In recent years, the FWO has been subjected to rigorous questioning and criticism concerning its activities in Senate Estimates hearings. Indeed, this approach was clearly in evidence at the most recent hearing. For example, Mr Nicholas Wilson, the current FWO, said that the agency would consider adopting a formal policy on providing indemnities to witnesses involved in litigation on the back of heavy questioning from Shadow Workplace Relations Minister Senator Eric Abetz.<sup>16</sup>

The key mechanisms by which government is upwardly accountable under administrative law, however, are the avenues of merits review and judicial review. That said, there are very limited options for external review available to aggrieved persons who wish to challenge the decisions made by the FWO. Decisions made under the *Fair Work Act* are expressly excluded from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Further, the *Fair Work Act* does not provide for external merits review. Orr has observed that the exclusion of external review has been historically justified on the basis that the industrial relations jurisdiction is exceptional. Moreover, there are other protective mechanisms which apply to the industrial umpire – the Fair Work Australia (FWA) – including that it is made up of specialist and expert members; there is an avenue for appeals; and the proceedings are generally open.<sup>17</sup> That said, the parliamentary accountability of the members of the FWA has been the subject of heated debate.<sup>18</sup>

The justification for the blanket exclusion from administrative law review is, however, far less potent when applied to the FWO given that the regulatory agency shares few of the accountability features of the FWA. Indeed, commentators have previously pointed out that while the arbitral tribunals have been able to maintain a level of independence from the government of the day, enforcement agencies “have been very vulnerable to changes in their political environment”.<sup>19</sup>

There are only two instances in which external review of the FWO’s decisions is possible. First, a recipient of a compliance notice can apply to an eligible court for review of the notice on two, limited

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<sup>12</sup> For example, Senator Mary Jo Fisher has previously sought to imply that the FWO’s decision to investigate a number of Hungry Jack’s stores in Western Australia was influenced by information provided by a WA state politician. The FWO confirmed that it had received an allegation from Mr John Kobelke MLA that Hungry Jack’s was underpaying foreign student employees. In the circumstances, the FWO decided it was appropriate to undertake an audit of 12 Hungry Jack’s stores. Ultimately, the FWO found no evidence to substantiate the allegation. . See Evidence to Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 21 October 2009, p 69 and Questions on Notice, DEEWR Question No: EW632\_10

<sup>13</sup> *Fair Work Act 2009* (Cth), s 686.

<sup>14</sup> *Fair Work Act 2009* (Cth), s 685.

<sup>15</sup> *Fair Work Act 2009* (Cth), s 718.

<sup>16</sup> Evidence to Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 23 February 2011, pp 27-28.

<sup>17</sup> Orr G, “Work and employment: Reviewability of employment decisions under Australia’s hybrid workplace law” (2009) 16 *AJ Admin L* 196 at 197.

<sup>18</sup> See, eg, “Guidice warns of ‘serious risk’ to FWA’s independence”, *Workplace Express*, 2 June 2010.

<sup>19</sup> Bennett L, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (1994).

grounds.<sup>20</sup> Second, if a person does not agree with the FWO's decision regarding an FOI request, they can seek a review of this decision by the Australian Information Commissioner. In all other instances, the only option available is for the aggrieved person to seek that a decision of the FWO be reviewed by the Commonwealth Ombudsman or to go down the long and winding path of a prerogative writ action.

To some degree, the FWO has sought to address concerns about review of decisions through improvements to internal review mechanisms, which are discussed below as horizontal accountability mechanisms. Nevertheless, the lack of external review mechanisms is concerning. It is generally accepted that the availability of external review mechanisms results in better decision-making and administration and helps maintain public confidence in the agency. Independent third party review can also strengthen the regulator's claim to legitimacy and credibility as the decision-making process is made more fair and transparent by allowing its decisions to be tested in a public forum. Indeed, it has been argued in that no matter how strong the internal review processes, it can never be a substitute for external review as the former cannot fully avoid conflicts of interest or totally guard against abuse of power. In short, to achieve true accountability it is necessary that both internal and external review is available. If cost and efficiency dictates a choice between the two, then external review should prevail.<sup>21</sup>

### **Horizontal accountability**

Recognition of the horizontal accountability provided by the powers of inquiry of auditors, audit committees and ombudsman offices is an important aspect of the extended concept of accountability. Like parliamentary committees, auditors and the Commonwealth Ombudsman have been accused of being "toothless tigers" in that they can do no more than demand the provision of information and make recommendations. Notwithstanding the fact that such recommendations are not binding, bodies such as the Commonwealth Ombudsman can still act as important agents of accountability in that "[o]fficials know that failure to adapt their policies and procedures in the light of justifiable public criticism of their decisions will rebound badly on themselves, their departments and ultimately their minister".<sup>22</sup>

These powers of influence were recently evidenced by the Commonwealth Ombudsman's "own motion" investigation into the FWO's use of coercive information-gathering powers. This investigation was partly prompted by the number of complaints the Commonwealth Ombudsman had received regarding the activities of the FWO. As part of its investigation, the Commonwealth Ombudsman made a number of preliminary recommendations regarding the processes adopted by the FWO. Most, if not all of these preliminary recommendations, were adopted by the regulatory agency prior to the publication of the final report in June 2010.<sup>23</sup>

A number of the Ombudsman's recommendations concerned the FWO's internal review process – which is itself another form of horizontal accountability. In light of the paucity of external review options, it is significant that in the last financial year, the FWO has made various efforts to improve its internal merits review and appeal avenues. There is now a formal two-tiered internal merits review process, which involves an initial review by an "impartial officer" and a further second review by an independent review team, in the event that the party is not satisfied with the outcome of the primary review. While this review process may not necessarily accord with the Best Practice Guide outlined

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<sup>20</sup> *Fair Work Act 2009* (Cth), s 717.

<sup>21</sup> Hyland M, "Is ASIC sufficiently accountable for its administrative decisions? A question of review" (2010) 28 C&SLJ 32 at 49.

<sup>22</sup> Mulgan R, "The Processes of Public Accountability" (1997) 56(1) *AJ of Pub Admin* 25 at 32.

<sup>23</sup> See Commonwealth Ombudsman Report, n 5.

by the Administrative Review Council,<sup>24</sup> it has been successful insofar as it has resulted “in a dramatic decline in complaints to [the Ombudsman’s] office”.<sup>25</sup>

The FWO is also subject to both internal and external audit committees. As a statutory authority, FWO has sought to entrench clear lines of accountability by adopting various corporate governance practices overseen by an Executive Board with support from a range of specialist committees, including an Audit Committee and a Contracts Committee. The external audit committee is stated to ensure that expenditure of public money is appropriate, financial statements are accurate and the internal audit function is operating properly. For example, in the last financial year, the external audit committee was involved in developing a Fraud Control Plan in order to ensure that the agency was complying with the Australian Government’s requirements relating to fraud prevention, detection and investigation.<sup>26</sup>

### **Downwards accountability**

One way that those exercising public power can demonstrate downwards accountability is by being transparent in decision-making. Transparency generally requires that the public has a clear sense of what they should expect from the regulatory authority. In this sense, transparency is often measured by assessing the way in which a regulator applies and enforces regulation and conveys any such regulatory decisions, including through the publication of enforcement policies, activities and outcomes, and the communication of the review and appeals process. Such information allows stakeholders to evaluate the regulator’s performance against their own policy objectives and subjects the regulator to greater scrutiny by the public. It can also improve consistent and fair decision making.

The Commonwealth Ombudsman found that transparency was of the FWO’s greatest strengths in that: “it puts significant effort into educating the public about its role and powers, investigations and prosecutions”.<sup>27</sup> For example, the FWO has published a Customer Service Charter which clearly outlines its objectives, services and working principles. The agency has also published eight Guidance Notes which set out the agency’s policy on matters ranging from the circumstances in which the FWO would consider commencing litigation to the investigation and appeal processes. In addition, the FWO has an internal Operations Manual which serves to limit the discretion exercised by its inspectors. This Manual is also designed to ensure that the decision-making processes are sound and transparent.

For instance, as part of its standard investigation procedure, the FWO commits to notifying parties as soon as practicable regarding significant developments in the investigation, providing written advice as to the outcome of the complaint and ensuring that each party is afforded natural justice where a FW Inspector intends to take action that may affect the rights or interests of a party. The FWO also prepares and makes available a summary of litigation outcomes and maintains a database of previous enforceable undertakings.

Finally, it is important to note that unions and employer associations can also play an important accountability role in constraining the activities of the enforcement agency and preventing regulatory capture. One of the primary objectives of the agency last year was to work more collaboratively with industry organisations.<sup>28</sup> Shared compliance programs have been launched in the horticulture and retail industries and the FWO has worked with its industry partners in developing industry-specific guidance. The extent of any consultation and/or collaboration is, however, in the hands of the agency. There are no formal mechanisms in place which mandate the involvement of industry organisations. There have been recent efforts by the FWO, however, to improve contact with employer

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<sup>24</sup> For example, the ARC Best Practice Guide recommends that there is only one layer of official review within the an agency. See Administrative Review Council, “Internal Review of Agency Decision Making” (Report to the Attorney-General, Report No 44, November 2000) p 67.

<sup>25</sup> The Commonwealth Ombudsman’s office received 665 complaints about the Office of the Workplace Ombudsman in 2007-2008 and 65 in 2008-2009: see Commonwealth Ombudsman Report, n 5, 4.

<sup>26</sup> FWO, Annual Report 2009-2010, p 57.

<sup>27</sup> Commonwealth Ombudsman Report, n 5, p 11

<sup>28</sup> FWO, n 26, p 40.

organisations and unions after both sides of the regulatory divide were critical of the FWO for failing to engage in sufficient consultation about their activities and approach.<sup>29</sup>

## **CONCLUSION**

While the concept of accountability is still the source of much theoretical debate, it is clear that this principle, and its application to regulatory agencies such as the FWO, is critical. Although the FWO has worked hard to establish its credibility and legitimacy since its controversial beginnings as an executive agency, and is held to account in a variety of ways and by a range of actors, there are still some chinks in its accountability armour. Foremost among them, is the lack of any external review mechanism – albeit reform in this area rests in the hands of the Parliament. While the introduction of external review could serve to reduce the administrative efficiency of the FWO, such drawbacks must be balanced against the overwhelming public interest in ensuring that there are adequate accountability mechanisms to guard against any arbitrary exercise of power.

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<sup>29</sup> See, eg “FWO apologised to employer group over consultation breakdown”, *Workplace Express*, 21 October 2010.