

Australian Industry Group National Employment Conference 2013

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FWO – an engaged and balanced regulator

I begin by respectfully acknowledging the traditional owners of the land on which we meet today, the Gadigal people of the Eora Nation; and pay my respects to elders both past and present.

Good morning everyone. I would like to thank Ai Group and Peter Nolan in particular for the opportunity to speak with AiG members for the first time in my role as the Fair Work Ombudsman.

I was very pleased to be appointed to the position of Fair Work Ombudsman in mid-July of this year.

Some of you might be curious about who I am, and what my background is.

Immediately prior to my appointment, I was responsible for managing the Victorian office of the Department of Education, Employment and Workplace Relations (as it then was). I oversaw the delivery of a range of programs throughout Victoria, including employment services (for example: Job Services Australia) and skills and youth programs.

As some of you may know, I am no stranger to workplace relations regulation. I had a bit to do with the creation of workplace laws over some ten years – starting as a junior lawyer in 2000 and eventually finding myself in the position

of Chief Counsel of the workplace relations legal group in the Department - now known as the Department of Employment.

As someone who oversaw the 'making of the laws', I gained a strong appreciation of the value of engaging with 'the regulated'.

Far from resisting consultation, I relished the opportunity to work through the how the laws might operate, and the different contingencies that might arise in practice. How could I, a lawyer in Canberra, possibly comprehend the impact of draft laws across so many industries and business types and arrangements without the insight of practitioners and advocates such as many of you in this room?

I learnt a lot from overseeing the 'COIL' consultations over draft workplace laws, in which AiG was very well represented by the likes of Stephen Smith, a man with a reputation for an excellent eye for detail and an ability to make strong arguments on behalf of his constituents.

How we strike the balance

Likewise, as the Fair Work Ombudsman, I consider that feedback is essential. It helps us know whether what we propose is necessary, or the best way forward. Or whether it will work at all. To understand the impact of what we propose on the people affected by it. We interact with thousands of people across lots of different channels.

In the last financial year alone, we assisted more than six hundred thousand people through our Infoline and received over 10 million visits to our website.

We resolved over 26,000 workplace complaints. We took legal action in 50 matters.

Feedback and engagement helps us balance the different perspectives and imperatives – such as the need to support those who want to do the right thing, with the need to deter deliberate and wilful non-compliance.

Regulatory intervention should be reserved to cases where there is a clear public need.

The Productivity Commission's recent report into Regulator Engagement with Small Business offers a useful 'roadmap' to achieving the right balance. The report talks about taking 'a facilitative and educative posture' towards business.

AiG is an important partner for FWO in helping us work through how to achieve this balance. In recent times we have consulted with AiG on our dispute resolution pathway, that is, our complaint handling process. We've also consulted with AiG on unpaid work arrangements and how these apply in practice; and the content for our online learning modules. Last week we also sat down with AiG representatives to gather insights to help inform the requirements for our new website to be launched next year.

Working in partnership with stakeholders helps FWO equip workplace participants with the information they need to navigate the regulatory framework. It, gives them the confidence to take control of their own workplace responsibilities and rights. To set their own business and career agendas. And in so doing build fair and productive workplaces.

The independent workplace relations regulator now known as the Fair Work Ombudsman was originally created in March 2006. Since then, we have

recovered more than \$200 million in unpaid wages. This has been achieved through the deployment of a range of enforcement tools and processes. From voluntary compliance to litigation.

Our litigation tends to attract the most attention in the media. We make no apologies for using the media to promote our successful outcomes. The media is one of our most important compliance tools.

Where there is wilful and deliberate failure to comply with workplace laws, or engage with our investigations, it is entirely appropriate that there are visible consequences.

It also, we hope, encourages those who are unsure about their obligations to seek advice – whether it be from us or an employer organisation – to ensure they are doing the right thing. And we know most employers do want to do the right thing.

However I appreciate there is a need to balance the message that there are serious consequence for those who refuse to comply with the **‘we’re here to help’** message. That people come to us for help with confidence that, in seeking our advice, they will not become the subject of an investigation. We hear the advice from the Productivity Commission about the importance of being clear about when we are engaged in education work and when we are interacting with a business in a compliance context.

Today, I will spend most of my time talking about things other than our litigation program.

Because although that gets attention, most people with whom who we engage do not end up in court.

50 matters in court each year is a very small number when you consider we receive more than 25, 000 complaints, answer more than half a million phone calls and receive some 10 million visits to our website.

Finding the right balance between education and compliance responses is critical in creating and maintaining fair and productive workplaces and ensuring a level playing field for business.

Our ultimate aim is to equip workplace participants to make decisions about their businesses and about their jobs. To give them confidence to manage their relationships in the workplace without the need for intervention from us. To embed good workplace practices and bring about a culture of compliance.

To achieve this, we need to provide accessible, credible and reliable information to the range of workplace participants – from the overseas worker whose language skills might be limited and whose main source of information might be their own community, to the workplace relations practitioner or organisation struggling to help a client or a member work out which classification of the award applies, or indeed, which award.

It is important that we are deliberate and purposeful in deciding how to prioritise and focus our resources. It is important that we focus on sectors that most need assistance in accessing the right information and advice.

Small business

Providing advice to time-poor businesses with minimal workplace relations support or expertise is a high priority for the Fair Work Ombudsman. Alongside vulnerable employees, they are the group that I would suggest most needs help from an authoritative source to help them navigate the legal framework.

Small business is entitled to credible and reliable information about their obligations in a way that makes sense to them, and via channels that they can access quickly and easily. Whether it be advice provided over the phone, or information on our website, it needs to be accessible to this cohort.

These businesses, often family businesses, engage in a wide range of tasks every day. And as part of an already busy workload, they need to interact with lots of different regulatory frameworks. They must navigate workplace health and safety, workers compensation, taxation, fair trading and licencing laws and industry frameworks as well as workplace laws. All this detracts from the time they can spend getting on with running and growing their business.

Some would benefit from extra assistance to step through payroll and human resources issues in the workplace.

To help us to position and deliver our work effectively to small businesses, we have formed a specialist Small Business Team that has set about gaining valuable insight into the needs of small business.

With reference to the Productivity Commission's recommendations, they are looking at the Fair Work Ombudsman's operations through the eyes of small business - at how we can improve the way in which we interact with small business across all of our operations.

The team is currently consulting with small business and their representatives, engaging with those in the community with a direct understanding of small business.

We are developing new resources, mobile solutions and web based communication designed to help small businesses understand their obligations.

Recognising the breadth of experience that AIG has in assisting and guiding employers on all manner of workplace relations matters; the Small Business Team will be consulting with AIG.

Some of our specific objectives for small business come directly from the election commitments of the Australian Government. These include:

- The creation of a dedicated small business helpline,
- Better access to accurate, real time information for small businesses via a wages app, and
- The creation of a Small Business Guide to hiring its first employee.

We will launch a dedicated small business helpline before the end of this year.

This service will enable small business people to select an option to be streamed into a prioritised service queue where they will be answered by the next available adviser.

This prioritised service will reduce waiting times for small business. Our operators will step them through what we need to know about their business so that we can give them reliable advice. They will be able to refer small

businesses to relevant material on our website to supplement advice provided over the phone.

Small businesses are entitled to advice they can rely on. They are entitled to seek out advice without fear that, as a result of coming to us for help, they will be the subject of an investigation.

The Small Business Helpline is here to help people who want to do the right thing. It is an education and advisory service. It is not a compliance tool.

If, in good faith, callers to our Small Business Helpline follow our advice, they will not be the subject of future penalty proceedings by the Fair Work Ombudsman should it turn out that advice was wrong. They did the right thing by coming to us for help. They shouldn't suffer loss as a result. We will work with them to help them understand and meet their obligations.

Simpler wages

We expect that the main issue that people will call our new Small Business Helpline about will be wages.

One of the reasons for this I suggest, is that right now, working out rates of pay is not as straight forward a proposition as it will be next year.

Modern Awards commenced on 1 January 2010, but most Awards contain transitional arrangements. These arrangements have 'phased' the movement from the old to the new rates of pay, including loadings and penalty rates, over 4 years.

As many of you have no doubt experienced firsthand, this means that you need to carry out several calculations to work out rates of pay. You need to know a number of things before you can even start the maths:

- whether the employer is a constitutional corporation,
- whether the employer was, at the relevant point in time, a member of an employer organisation,
- what 'old' award and classification applied,
- what state the employer is in,
- details about the time period the business has operated.

FWO has not, during this transition, been in a position to provide simple wages information, such as wages tables setting out award classifications and corresponding rates of pay.

We have provided a number of online tools to step people through these questions and calculate rates of pay.

The end of the transition process presents the opportunity to provide simpler information and advice about the nationally consistent wages after 1 July 2014.

To assist with this, we are developing new tools that will make accessing pay rates much easier. This includes a new online wages tool to provide simple and accurate, real time wage information.

This tool will be easily accessed through our new website and on mobile devices. I hope it will be a tool that can be used by someone who has never even heard of an award – modern or otherwise!

And yes, we will also be able to publish simple wages tables, for those of you who know awards and which ones apply to you only too well, and just want a handy reference you can stick up on the wall of the office.

I acknowledge there may still be issues that need to be worked through. Questions about award coverage, or which classification a person falls within, for example.

I note that the Fair Work Commission is due to review Modern Awards soon. As a regulator, we are of course interested in there being clarity around the operation of the instruments we advise on and enforce.

If there are scenarios where the scope of a Modern Award is unclear in its application to certain types of work, or where the terms are ambiguous, we hope that the Modern Award Review provides an opportunity to remedy this situation.

Clarity is good for everyone. It reduces the need for people to seek advice, reduces risk, and enables employers to get on with running their business.

Equipping employers with information and confidence

Most people are doing the right thing, or are attempting to do so. We want to support them by providing pathways and reliable resources to make compliance easier.

Greater use of self-help technologies and a focus on resolving matters early and constructively means we can focus the use of enforcement tools to the most serious of cases.

A new website will be the key vehicle for this.

Our vision is to have a website that takes our customers logically through our information and tools so they can resolve their workplace issues and find the answers to their questions online.

With the launch of MyPortal on 11 June 2012, this vision began to come to life. MyPortal is a self-service online tool where registered clients are given a secure profile and login that allows them to find their award, calculate pay rates and save their search results.

MyPortal users also have access to tailored information and resources, recommended by us, based on their industry and location. They can ask us questions, save advice given and bookmark favourite fairwork.gov.au pages.

This platform has the potential to provide a more meaningful and ongoing engagement with businesses. It means we can target our services to their needs. A business owner would be able to access this information at any time and won't need to wait on hold.

We are keen to build the functionality of MyPortal and to hear feedback from users.

We also recently released our first online learning module on conducting difficult conversations in the workplace. There are three more courses currently in development.

Each of the courses is designed to teach people skills and strategies to equip them to make good decisions and resolve issues in the workplace as they arise.

Each of these objectives contributes to an overall goal of instilling confidence in those who seek advice from us, that they can act on our information achieve a compliant and productive workplace.

Intervention when there is a public need

Last year, we resolved over 26, 000 complaints.

This tells us that there is a large number of people who, in spite of our efforts, were either unable, unwilling or ill equipped to resolve their problems in the workplace.

We first and foremost aim to resolve matters voluntarily. This is consistent with the Productivity Commission's recommendations. We have developed and refined a range of alternative dispute resolution services to facilitate early and amicable resolution of workplace issues. 65% of complaints in the last financial year were resolved through processes like mediation and assisted voluntary compliance.

We provide guidance to both parties on options for voluntarily and cooperatively resolving the complaint. We provide employers with information about the nature of their workplace obligations and steps they might take to ensure they are complying with them.

In some cases, where voluntary compliance is not achieved, we encourage complainants to enforce the matter themselves through small claims processes.

We direct matters to the more resource intensive and serious investigation process in cases where there is a strong public interest to do so.

For example, where:

- There is evidence of serious systemic non-compliance – in an industry or location,

- where very vulnerable workers are involved, or
- to achieve a level playing field for businesses.

A recent example of where these three factors intersect can be observed in our work involving seasonal workers in and around Caboolture.

60% of Queensland's strawberries are grown in Caboolture; attracting thousands of seasonal workers to the region each year.

In August, some overseas workers went to the media with a story that they were being paid less than half the adult minimum weekly wage of \$622.20.

The story that initially aired on Today Tonight on 7 August 2013 focused on the experience of two Korean workers who claimed that they were underpaid and treated poorly. The story outlined that workers on this particular farm earned approximately 90c per kilogram of strawberries picked. When questioned, the employer featured in this story advised that the workers signed an agreement with an agency to be paid this amount. This was disputed by the workers. Other allegations related to poor living conditions were also raised.

I will now show you a clip of this story.

Following a number of complaints made by visa holders; the Fair Work Ombudsman made unannounced visits to 9 strawberry farms in the Caboolture region.

Fair Work Inspectors provided employers with information and advice and specifically highlighted concerns including failure to pay minimum hourly rates to keep records and to enter into proper piece work agreements, as required by the relevant award.

Employers were then afforded an opportunity to fix the problems prior to a second visit by Inspectors.

At the same time, Fair Work Inspectors engaged with overseas workers - providing information to the general public at an information stand setup in a local shopping precinct.

We also dedicated a social media campaign to educate seasonal overseas workers. This campaign reached almost 300,000 people.

We held a 2 hour Q&A session for overseas workers on Facebook; and a dedicated Facebook page generated 6,500 clicks for more information.

In September, the Inspectors made their second visits and while some matters are still ongoing; we have recovered over \$25,000 for just over 100, mostly overseas, workers.

Most employees we came across were paid between \$1 and \$2.50 per punnet for packing and/or \$0.50 to \$2.25 per kg for picking.

There were some more formal compliance outcomes – we issued 10 letters of caution and 3 infringement notices including fines for failing to meet payslip and record keeping obligations.

In addition to 150 online news articles; traditional media also played an important role in our education campaign with 29 articles in print media, 83 radio segments and five television mentions.

It's fair to say that the focus of the media was on the potential contraventions more than the detail of our educative work. Part of my role is to make sure the full story of FWO's work is told.

FWO's role in building and construction

Not all media about FWO is generated by our activities. Last week, our sister regulator, the Fair Work Building Industry Inspectorate, attracted some attention through the Senate Estimates process.

The Government has asked the Fair Work Building Industry Inspectorate to re-align its strategic direction and resources in line with current government priorities.

The Director of the Fair Work Building Industry Inspectorate referred to this in his evidence at Estimates as a return to “core business”, that is, “discrimination, freedom of association, coercion, adverse action”.

To enable the Fair Work Building Industry Inspectorate to focus on its “core business”, the FWO will take responsibility for wages and conditions complaints in the commercial building industry.

I am of the view that FWO is very well equipped to do this work. We have done it before, as recently as October 2010.

We already deal with significant numbers of complaints arising from employees in the domestic building and construction industry. In the last financial year the FWO completed 2,431 complaints relating to the Construction industry which made up almost 11% of all complaints completed.

We have strong brand recognition across all industries as the institution that helps employees understand and enforce workplace entitlements.

We have good relationships at an operational level with the Fair Work Building Industry Inspectorate and will ensure that matters are referred promptly, and

that there is good communication with complainants about what is going on with their matter.

Complaints from this sector will be given the same treatment as matters that come from any other industry. This means that we will apply our alternative dispute resolution processes that I referred to earlier.

Conclusion

And so in concluding my presentation to you today, I hope that you have heard my commitment to continuing to connect with stakeholders across industry and government to ensure our work responds to the community we serve.

Together, with AIG and other industry bodies, with unions, and trusted advisors, with the community and with government counterparts, we are all part of an aspiration to deliver fair and productive workplaces to Australians.

The Fair Work Ombudsman is Australia's independent workplace relations regulator, -the authoritative source of advice, working hard to get the balance right between providing help and support and showing that there are consequences for wilful non-compliance. We want employers in businesses of all sizes to have the confidence to make informed decisions and equip all participants to contribute to fair and productive workplaces.

Thank you.