

## **Address by the Fair Work Ombudsman**

### **2019 Annual National Policy-Influence-Reform Conference**

Good afternoon everyone. It is great to be here at the PIR conference in 2019.

My name is Sandra Parker and I've been Australia's Fair Work Ombudsman for roughly one year now. It's been fascinating getting to know the business and the people of the Fair Work Ombudsman. As an agency, we've been full of activity.

Since July last year, we have recovered more than \$32 million for workers and conducted over two and a half thousand audits nationally. Our website, [fairwork.gov.au](http://fairwork.gov.au), had 14.5 million hits, with a further 3.7 million visits to our online Pay Tools. In addition to this, advisers at the FWO spoke with 300,000 callers to our Fair Work Infoline and Small Business Hotline about all kinds of workplace issues and entitlements. These numbers are significant and they are a credit to my staff.

I would also like to note the work of my predecessors to modernise the services offered by the FWO – especially our digital and online presence. As an incoming CEO, I was amazed at the breadth and quality of services the FWO provides to Australian workers and businesses.

The feedback I have received about the Fair Work Ombudsman is overwhelmingly positive. I personally have met with a number of employer and business groups, including the head of Ai Group, Innes Willox, and a broad range of unions and government bodies.

These relationships are crucial to all of the work that we do.

There is another side, though, to being the regulator and that is hearing the stories of exploitation first-hand. You would have heard them too, I'm sure. As employers who take their obligations seriously, I imagine you are appalled by this exploitation and the effect it has on business and community confidence.

After hearing these stories myself, as someone outside of the agency, I came to the conclusion that I would like to help make a difference in Australian workplaces by leading an organisation like the Fair Work Ombudsman if I were given the opportunity.

Today I would like to talk to you about what my vision for the agency is and what we aim to achieve in the coming year.

I was appointed for a five-year term that commenced on 15 July last year. My most recent job was as Deputy Secretary at the Department of Jobs and Small Business and its predecessor departments for eight years, advising on, and overseeing the implementation of, the Government's policies for workplace relations, jobs growth, participation and health and safety.

Before that, I worked in both Commonwealth and State Governments, but I started my career as a secondary teacher, mainly in humanities and social sciences. In my teaching days, I saw plenty of conflict in the classroom, and workplace relations is not dissimilar, in that it can be a theatre of passionate debate as well, as I am sure you would all agree.

This debate can regularly turn into outright disagreement and sometimes results in legal disputes between employers and workers.

### **A transforming workplace and regulatory environment**

This is one of the reasons that a strong regulator is important if we are to have a system of harmonious, productive and co-operative workplace relations. That is a central tenet of my agency's mandate and it's important that we don't lose sight of that. We are also charged with the responsibility of holding wrongdoers to account; although this is not an easy task by any means, when you consider that there are 12 million workers and 2 million businesses that we regulate.

Changing business conditions also have an impact on the task before us, as do changes in the labour market, consumer behaviour and workplaces themselves. These factors can change the regulatory environment in both obvious and subtle ways. Just to touch on a few:

- Staff turnover rates are at a ten year high of around 18% - the rate is much higher for young people, with more than half of them leaving their employer each year.<sup>1</sup> The bulk of those staff are working in small and medium businesses who employ around 70% of workers in Australia.
- Union membership is now at 9 per cent of the private sector<sup>2</sup> with many of the small and medium sized businesses not being highly unionised workplaces.
- Many companies utilise labour hire arrangements and franchising is a common business model.<sup>3</sup>
- We also know that migration is the largest single contributor to employment growth,<sup>4</sup> meaning that the experience of vulnerable workers is at the forefront of our minds.

There is now much greater community awareness about the need to uphold standards across the whole labour market. When I think about what it was like when I first entered the labour force, being a young person, you accepted work was tough and that you might be underpaid, but viewed this as a rite of passage. Thankfully the community now rightly expects better.

A key question for me, as the Fair Work Ombudsman, is whether we have the right capability to discharge our role in this environment. Like all incoming senior leaders tend to do, I've taken stock of where my organisation is at in this respect.

Previous reviews have generally been positive about the Fair Work Ombudsman, like the one conducted by the Productivity Commission in 2015. But Australian workplaces are changing, as are the community's expectations of its regulators charged with holding an industry or function of the economy to account. Consider for instance the findings of the Banking Royal Commission and Professor Fels' Migrant Worker Taskforce report. Professor Fels, in particular, has formed the view

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<sup>1</sup> See Australian HR Institute, *Turnover and Retention Research Report*, August 2018.

<sup>2</sup> See ABS Characteristics of Employment (cat. no. 6333.0).

<sup>3</sup> See Parliamentary Joint Committee on Corporations and Financial Services, Australian Senate, *Fairness in Franchising*, March 2019, p.11.

<sup>4</sup> See Department of Home Affairs statistics available at <https://www.homeaffairs.gov.au/research-and-stats/files/migration-trends-highlights-2017-18.PDF>.

that the Fair Work Ombudsman increasingly risks being viewed as a mediator rather than a regulator and that we have been too cautious in our use of enforcement tools.<sup>5</sup>

I'm extremely proud of the work that our frontline staff do everyday, resolving disputes through education and conversations, returning millions of dollars to underpaid workers every year in an average of just seven days, while preserving employment relationships along the way. That work will always be important, but I do understand Professor Fels' argument, especially when I reflect on the agency's role as it is written into the Fair Work Act.

While it can be difficult as a regulator to find the right balance between using enforcement tools and getting a timely outcome, I am conscious that Parliament has given us increased powers and more resources, so it's on us to send a strong message of deterrence to would-be lawbreakers. The Prime Minister and the new Minister for Industrial Relations have also said that a priority for the Government is on law enforcement and adherence with Australia's industrial relations laws.

I think it is good to have the role of the regulators highlighted in this way because it gives my agency more opportunities to talk about the work we are doing. We now have five Protecting Vulnerable Workers Act matters in the courts. This is a fantastic outcome. These matters involve allegations of false and misleading information being provided to a Fair Work Inspector<sup>6</sup>, as well as one matter where we are attempting to use the 'reverse onus' provisions where a company and its three directors completely failed to keep records or issue payslips.<sup>7</sup>

Our most recent matter involves allegations of 'serious contraventions' and is the first where we have sought the new higher penalties, with maximums up to ten times higher than normal.<sup>8</sup> Employers now face penalties of \$630,000 for a company and \$126,000 for an individual per serious contravention.

If we are successful in these matters, which I believe we will be, it will underline the strong message that underpaying workers and falsifying or failing to keep records will not be tolerated and penalties will be sought through the courts.

### **A firm but fair approach to non-compliance**

Commissioner Hayne and Professor Fels both exhorted regulators to toughen up. A more complex and changing workplace environment indeed creates more opportunity for unscrupulous employers to evade detection. This is particularly the case if they employ migrant workers who often don't want to rock the boat.

Taking a firmer stance on non-compliance, does not, however, give regulators licence to be draconian or irresponsible. The FWO still operates according to an enforcement pyramid that looks

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<sup>5</sup> The four statutory enforcement tools available to the FWO are described in detail in the agency's *Compliance and Enforcement Policy*. They are:

- Compliance Notices;
- Enforceable Undertakings;
- Infringement Notices; and
- Litigation.

<sup>6</sup> *Fair Work Ombudsman v Desire Food Pty Ltd & Chern Ming Lee*; *Fair Work Ombudsman v Pulis Plumbing Pty Ltd & Anor*; and *Fair Work Ombudsman v China Bar Buffet (Epping) Pty Ltd & Ors*.

<sup>7</sup> *Fair Work Ombudsman v A & K Property Services Pty Ltd & Ors*.

<sup>8</sup> *Fair Work Ombudsman v IE Enterprises & Anor*.

at the seriousness and deliberateness of the behaviour we regulate. It's a fact that mistakes happen, and this can lead to underpayment.

The Fair Work Act isn't light reading; so I know I can't expect everyone to be an expert but I do think it's a reasonable proposition that you do not ignore your obligations completely. My father was a small business owner and his view was: "just let me know what I need to do and I'll do it".

There are lots of employers in this camp, no doubt, who do the right thing if it's clear what they need to do. Luckily, the tools are there on our website to help them.

If you are a small business, much of what you need can be found in our Small Business Showcase. The Showcase has information most commonly sought after by small businesses, including hiring employees, pay, recordkeeping, termination and how to keep up to date with workplace law.

We also have resources for larger businesses, who might need advice about how to ensure they are outsourcing responsibility, or information about what to do if they're part of a franchise. Our Pay and Conditions Tool, which we call PACT, is also there for employers struggling to find a rate in an award, and will guide you through the process and help you calculate penalties and loadings as well. The FWO teams are updating these tools as we speak, to reflect the Annual Wage Review decision that was made by the FWC on 30 May, to apply from 1 July 2019.

So while I sympathise with employers who are finding it hard, what we can't have, is a situation where owning up to your mistakes and making good on what you owe your employees is negotiable.

If an employee comes to us and says they haven't been paid and their employer is giving them the run around, we have the power to compel records. If these records are deficient in some way, we can issue a penalty infringement notice, and if an Inspector forms a reasonable belief that there's been an underpayment, the Inspector can issue a compliance notice.

Compliance notices were one tool in particular that Professor Fels said we should use more.<sup>9</sup>

So far this financial year, we've issued 176 compliance notices. Moving forward, there is certainly a bigger role for compliance notices to address underpayments, breaches of awards and the National Employment Standards, where lesser tools might have been reached for in the past.

Where an employer is issued with a compliance notice, the onus will be on them to get their house in order. We are going to simplify these notices so it's easy for employers to understand what they need to do, but if they don't comply with the terms of our compliance notice, the Fair Work Ombudsman won't resile from taking them to court to seek penalties. Our public *Compliance and Enforcement Policy* will be updated shortly to reflect our approach.

Now I think the bar should be higher again for larger, high-profile businesses that self-report non-compliance to us, which has been occurring quite frequently of late. This might be the result of better corporate governance arrangements following the Banking Royal Commission, and while this is a good thing, the law still needs to be upheld.

Our default position now is that a court enforceable undertaking with the FWO will be required, as a minimum, and those enforceable undertakings will require the employer to meet the cost of getting

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<sup>9</sup> See Department of Jobs and Small Business *Report of the Migrant Workers' Taskforce*, March 2019, p.7

their underpayments verified by experts contracted to the FWO, so that the burden of calculating what is owed is not put onto the taxpayer.

Employers that self-report should also expect to make a contrition payment reflecting the seriousness of their contravening conduct, because it is simply not acceptable for businesses to throw their hands up when they've been underpaying workers and expect to move on without consequences once the back pay is in the workers' accounts.

For anyone that considers our approach in those circumstances to be too tough, I can assure you that the consequences for those businesses that see a problem but don't come forward will be far more significant. This new model will ensure that the sanctions we use as an alternative to litigation, like enforceable undertakings, will play their part in building a culture of compliance with workplace laws.

### **Targeting and priorities**

The flow on effect of requiring employers to take responsibility in this way, is that we can direct our finite resources to strategic matters or industries where we want to be extremely active and use the additional funding the FWO has received in the budget.

With this funding we can certainly do more but we still can't be in every workplace and nor should we be. We still operate under a strategic enforcement model where our efforts are directed at sustainable behavioural change.

To this end, each year, we will determine priorities and our proactive compliance work and enforcement will align with these.

In 2019/20, the priority industries or issues we will focus on are:

- Fast food, restaurants and cafes;
- Horticulture and the Harvest Trail;
- Supply chain risks;
- Franchisors; and
- Sham contracting.

Vulnerable workers will continue to be a priority, as will matters that:

- Are of significant public interest;
- Demonstrate a blatant disregard for the law;
- Are of significant scale or impact on workers or the community; and
- Can test the law or use new laws.

We will also use our new powers and publicly name employers who break the law to get the message out that it is not acceptable to underpay workers or deprive them of their entitlements. Employers who do this will get caught.

So if you are in one of these industries, operate a franchise system or employ large numbers of migrant workers, you should expect to hear from us.

Particularly, if you are in what we call the FRAC industry - Fast Food, Restaurants, and Cafes.

Intelligence, experience and external data shows that non-compliance rates remain high in the FRAC sector, featuring as the highest ranked industry group for disputes across the last five financial years.

To put that in context, we have issued more than five times the amount of compliance notices and more than six times the amount of infringement notices to the FRAC sector alone than the second highest ranked industry. One quarter of our all litigations and a third of our enforceable undertakings in that period have involved FRAC businesses.

And since the launch of our Anonymous report tool, we have received almost 10,000 tip offs about the Hospitality industry. This is almost three times more than the second highest ranked industry.

This is an industry where you can see many of the economic factors I mentioned earlier having a huge impact on the way work is performed, who is performing that work and how much they're getting paid for it.

Our research shows there are many barriers to addressing these high-levels of non-compliance. Extreme competition and low barriers to entry for new businesses lead to high business turnover. Add to this the high concentration of young, vulnerable workers, many of whom are on visas, the number of casual workers and the projected rise in employment levels in this industry, and we can only anticipate a rise in disputes as a result.

The FWO will do its part by targeting hospitality workplaces and focusing on franchises especially. Our FRAC strategy is an important component to FWO's pursuit of success in this area.

Through the strategy, we will seek to engage, educate and influence the industry. As just one example, we have recently launched our second communications campaign in the industry, focused on social media and highlighting our new interactive infographics. The infographics have been user-tested to provide easy to understand information to help employees and employers understand relevant awards.

But as you know, building a culture of compliance takes time. It involves education like this, information, sustained messaging and evidence. It took decades of repeated messaging for the dangers of cigarette smoking to take hold and it took decades of repeated messaging for the issue of workplace safety to cut through into mainstream business operating procedures, backed-up by strong health and safety regulations.

We have already come a long way with respect to changing community attitudes to workplace non-compliance. The conditions for a cultural shift are in place and there is an opportunity to promote improved behaviour through strong action to uphold the law.

The FWO will do its part but we also need consumers to put pressure on businesses through their choices. We are keen to empower consumers in the same way we wish to empower workers and business owners. I hope you will work with us to achieve that vision.

Thank you