



Fair Work

OMBUDSMAN

FWO's Response to the University of Melbourne's Research Report 'The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006-2012'

The Fair Work Ombudsman (FWO) has welcomed the opportunity to engage with the University of Melbourne and expresses gratitude for the comprehensive work undertaken and the findings delivered in the Report titled 'The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006-2012' (the Report).

The FWO continues to look for more effective ways of performing our work. Our focus is on activities that have the broadest and most positive impact on achieving our goals. We must effectively balance the need to ensure compliance with workplace laws, particularly for the most vulnerable in the community, with the need to assist employers in understanding minimum employment standards as well as supporting industry and increased productivity.

External scrutiny of our business, processes and strategies assists the FWO to deliver real value for the public. The FWO recognises that many of the Report's findings provide opportunities and scope for improvement.

The FWO must balance the findings, ideas, views and expectations of all stakeholders and interested parties in a dynamic environment. For instance, the Productivity Commission's recent report on Regulator Engagement with Small Business provided impetus for the FWO to consider its activities against the backdrop of being proportionate and transparent in its compliance work. Similarly, the Government's broader deregulation agenda demands that we consider how we might reduce the regulatory burden of our activities on all businesses and individuals while continuing to achieve effective compliance outcomes.

We intend to use the Report from the University of Melbourne to review processes and procedures and focus on implementing changes that offer the most benefit for all workplace participants.

FWO's Current and Future Direction

In recent years, the FWO has focused heavily on streamlining internal processes and, as a result, has become more efficient. This has led to better outcomes for our clients through improved service delivery.

The FWO now responds to complaints in a more sophisticated way, seeking to be both proportionate and responsive. We do not investigate every matter, reserving this form of intervention for more serious cases. Our focus on alternative dispute resolution methods for the majority of complaints has resulted in better and quicker services for clients.

Importantly, the agency directs resources to people of greater vulnerability. For example, the establishment of compliance teams specialising in particular worker cohorts (youth, overseas) and allegation types (misclassification, industrial action, general protections).

A significant ongoing challenge for the FWO is to develop tools and services that match the needs of our clients and the nature of their circumstances. We recognise for instance, many clients prefer, and are capable

of, resolving matters themselves. Our current website transformation project begins to address this need and will provide appropriate information and tools for those people.

Other clients will continue to rely on us for more tailored assistance and advice to help them in their workplaces. These people may need us to provide a higher level of support, and in some cases, to intervene on their behalf.

It is critical for us to continue to evolve and consider the nature of work and society in coming years. The future of the workplace relations landscape will include a simpler wages system and a growing expectation for self-help tools. The FWO wants to equip people with the information and confidence they need to make good choices in their workplaces. This applies to all workplace participants: employees, employers, business owners or contractors.

The Report Findings

We view the Report findings as largely positive and complimentary about the enforcement activities of the FWO. It recognises the FWO as an Agency that is strategic, sophisticated, dynamic and actively engaged in continuous improvement. We appreciate this feedback and endeavour to continue to be seen in this light.

Our Agency is not immune or oblivious to regulatory challenges and, as stated in the Report '*achieving widespread employer compliance is a major and ongoing challenge in Australia*'. Many of the Report's findings are particularly valuable as we continually monitor our effectiveness and public value. In this light, the FWO has commenced a careful analysis and review of the all of the Report's findings.

The Report contains a Postscript, noting that many of the recommendations have been actioned already. This is evident through the implementation of a strategic enforcement model which rests upon a variety of dispute resolution mechanisms in order to prioritise the more interventionist compliance responses to cases of serious non-compliance.

We have continued to build on the capability of our Agency, evidenced by the widening and strategic use of all the enforcement tools available to us. As the Report highlights, the 'enforcement pyramid' provides for escalating intervention that is targeted where it is most needed. Whilst building and refining our approach to managing complaints we have also strengthened the ability of the Inspectorate to deliver and utilise other sanctions throughout the enforcement pyramid, such as Infringement Notices and Compliance Notices.

In addition, the work of the specialist investigative groups mentioned previously involves observing industry patterns, locating specific issues of interest and engaging with the community to enhance compliance efforts. Similarly, the agency has continued to evolve its targeted and proactive campaign work as well as implementing a strong focus on refining data collection and analysis capabilities.

One strong theme of the Report is the identification and support of vulnerable workers in Australia. The FWO shares these sentiments. The FWO's communication campaigns and strategies specifically target vulnerable groups, highlighted by the Agency's development of a Culturally and Linguistically Diverse (CALD) strategy. The CALD strategy will specifically target and tailor information to those from non-English speaking backgrounds.

The FWO has recently established a dedicated Community Engagement Team tasked with enhancing our work with community organisations. The team is developing a strategy for engaging with these organisations, aiming to build strong relationships and improve our connections with vulnerable workers.

The Report additionally makes a series of recommendations about improving the collection, categorisation and display of FWO data. The FWO has recently established a Strategic Research, Analysis and Reporting branch which has already commenced exploring a variety of improvements to FWO's sophistication and use of a range of data. This is a long-term, important and forward looking task that will evolve over time and with careful planning and analysis of our environment.

As mentioned earlier, the redesign of the FWO website also provides a raft of improvements aimed at helping clients to find answers they need to take action, in a format they trust, at any time. The search functionality will also be improved and these steps should go some way to improving the accessibility of data that FWO already keeps, such as our litigation and enforceable undertaking details.

Next Steps

The FWO will continue its analysis of the Report's recommendations including refining and implementing change where appropriate.

In the pursuit of continuous improvement, part of FWO's future challenge is also to more broadly understand our work's impact; which of our activities have the most positive impact in the community and how do we measure that impact over time, as well as assess how we might most effectively make a difference in the future?

The research from the University of Melbourne plays a part in assisting us with this challenge. This will be further enhanced by the University's upcoming empirical study of the Agency's effects on the regulated community. The FWO looks forward to working with the University throughout this process.



Natalie James

FAIR WORK OMBUDSMAN

29 May 2014

Table of identified recommendations from: 'The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006-2012'

#	Recommendation	FWO Position	FWO Action notes
<i>Reporting</i>			
1.	Capture data using ANZSIC codes at group and class levels (i.e. 3- and 4-digit).	Agreed	FWO has already commenced capturing data to the group and class level recommended. The FWO has also established a Research and Reporting team which provides an opportunity to improve the capture and analysis of data. A key piece of work being led by this team is an agency wide examination of data requirements with a view to further enhance future data quality and our analysis capability.
2.	Collect and record more information regarding complaint investigations and audits with respect to business ownership, management and responsibility for activities at particular worksites.	Agreed	As above.
3.	Improve the extent and quality of publicly available information about litigations to enhance deterrence effects including by: i. Developing a searchable database of finalised litigations, ii. Consider publishing Agreed Statements of Fact, iii. Ensuring information provided about legal cases is accurate, contains useful data (such as both trading and company names) and is properly edited. iv. Improve public litigation data by including details such as how the matter originated (complaint/audit etc.), size of business, industry, type of contravention, number of respondents, discounts applied to penalty and appeal details.	Under consideration	A project is underway currently to establish a new internal database of FWO legal cases. An external version of the database may be considered once the internal version is complete. Additionally, the new FWO website will improve search functionality of all content on our website including that currently available in relation to legal cases.
4.	Build and strengthen relationships with unions, employer associations, community organisations and other government departments and agencies to improve access to useful data on compliance behaviour in target industries.	Agreed	The FWO has committed to increasing our use of Memorandums of Understanding with external organisations and has also recently entered a tripartite local government procurement initiative with relevant employer and employee bodies. The FWO has also recently established a Community Engagement Director whose role will be to enhance our relationships with a range of community organisations and increase our access to vulnerable workers.
5.	Consider engaging a labour economist or sociologist to complement the existing FWO statistical expertise with a view to developing precise labour	Under consideration	It is agreed that better data is important for the FWO to pursue. As mentioned above, the Agency has established a Research and Reporting team which provides an opportunity to improve the capture and analysis of data.

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	market data on compliance rates and the impact of various compliance and enforcement tools.		Ongoing monitoring of staffing capability and Agency needs will occur as this new team develops and the FWO undertakes other identified plans and improvements to our data.
<i>Vulnerable workers</i>			
6.	Adopt a more sophisticated understanding and definition of 'vulnerable' workers to help ensure that FWO services are appropriately provided (such as including those who are low-paid, disabled, working in areas of high unemployment or possess low numeracy or literacy skills).	Agreed	Through varying means, including deeper engagement with community organisations (such as via the implementation of a new Community Engagement Director), it is expected the FWO will better address the intentions behind this recommendation.
7.	Revise the complaint form to capture more specific information in relation to vulnerability so complaints can be better assessed.	Under consideration	<p>In developing a more sophisticated understanding of vulnerable workers as per the recommendation above, the FWO will continue to consider issues such as revising the complaint form and will consider reviews of the complaint form in future.</p> <p>In particular, further consideration about details captured by the complaint form will occur when paperless options are pursued in the future.</p> <p>Improving our ability to best assess and assist those who are vulnerable is important to the FWO. A number of current actions already mentioned in this document are underway that will assist to address this concern.</p>
8.	Amend processes to allow Fair Work Inspectors to actively identify all entitlements owing to vulnerable workers, regardless of what is specified in the complaint form.	Disagreed	FWO agrees with the intention behind this recommendation but does not believe that changed processes are needed. Fair Work Inspectors have discretion to make these assessments currently including determining whether a matter should be progressed to one of our specific compliance teams for certain groups of vulnerable workers including young workers and overseas workers.
9.	Produce and actively distribute information packs to vulnerable workers.	Agreed	The FWO's Communication strategy includes providing accessible, simple information (including in a variety of languages) about workplace rights and enforcing those rights. Additionally, many of our education and communication campaigns focus on vulnerable workers such as recent activities targeting working parents and Korean workers. These programs will continue to be pursued and a range of communication mediums utilised in an attempt to maximise our reach to vulnerable workers.
10.	Carefully consider the impact of small claims referrals on those who are vulnerable.	Agreed	The Litigation Policy specifically emphasises vulnerable workers and our assessment processes attempt to locate those most in need of our services. These activities will be continued and constantly assessed to ensure small claims referrals are made in appropriate circumstances. The FWO has recently established a team of Fair Work Inspectors dedicated to providing tailored small claims assistance – see below.

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11.	When assessing potential enforcement activity, consider the proportionate amount of an employee's overall pay as an indicator of 'seriousness'.	Agreed	<p>FWO considers a range of factors when assessing potential enforcement activity. This includes issues such as worker vulnerability, pay and seriousness of the breach on each occasion. The key factors considered are also set out in the publicly available Litigation Policy.</p> <p>Further, the FWO is currently developing a new and more accessible Compliance and Enforcement Policy. Issues of proportionality will be examined and discussed in this public-facing document.</p>
<i>Enforcement and compliance</i>			
12.	Train or identify senior Fair Work Inspectors with expertise in particular industries and promote to other Inspectors as a specialist available to assist in complex matters.	Agreed	<p>As stated in the Postscript to the Report, the FWO has introduced a number of specialist investigative groups believing it is in our strategic interest to support and develop Fair Work Inspectors, legal and managerial staff who are trained to observe industry patterns, locate specific issues and engage with the community. The FWO is committed to examining industry sub-sectors in detail, for instance, recent inquiries include the Harvest Trail and poultry processing in regional NSW.</p> <p>FWO's Knowledge Solutions area has also been integrated with the Inspectorate adding further technical support and assistance to Fair Work Inspectors.</p>
13.	Invest in the professionalisation of Inspectors, particularly by training and empowering them to make decisions. Literature suggests that more tailored and effective regulatory enforcement can be achieved through such empowerment e.g. teaching inspectors to question the drivers of non-compliance and influence of industry structures.	Agreed	<p>On 1 July 2013 the FWO formally introduced a Continuing Professional Development (CPD) program. The program is aimed at enhancing the skills and capability of the Inspectorate via tailored training and a credit based system. The CPD program reaches in excess of 500 staff across the Infoline and Inspectorate.</p>
14.	Evaluate the centralised decision-making structure of the Inspectorate and whether it is a barrier to achieving the appropriate balance of regulatory mechanisms in the enforcement pyramid.	Agreed	<p>The FWO has reformed its Case Conference Structure and Procedures in order to empower managers to make decisions on cases much earlier. This means that managers overseeing cases (and close to the matter) have authority to direct the matter towards appropriate enforcement tools within the enforcement pyramid.</p>
15.	<p>Caution should be exercised in placing too much emphasis on voluntary compliance at the expense of more formal sanctions, as this can:</p> <ul style="list-style-type: none"> i. lead to creative compliance; ii. weaken the overall regulatory regime; iii. obscure information from the public view; iv. increase likelihood of recidivism; v. overlook the needs of vulnerable workers. 	Agreed	<p>The FWO acknowledges the need to monitor the levels of voluntary compliance, particularly if there are businesses that 'over-use' this strategy.</p> <p>The Postscript to the Report recognises the FWO's implementation of a strategic enforcement model, based largely on the work of Professors David Weil and Malcolm Sparrow, and that FWO has moved away from its traditional approach of investigating every complaint. For example, the Postscript discusses the FWO's growing use of informal dispute resolution mechanisms as well as more formal sanctions throughout the enforcement pyramid such as infringement notices and compliance notices.</p>

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			<p>The FWO is also currently piloting a program regarding repeat offenders which focuses on employers who have had three or more complaints within the past 12 months. Under this pilot, the third complaint acts as a trigger for proactive intervention by the FWO. These matters are currently handled by a specialist team of Fair Work Inspectors who deliver a tailored and proportionate response appropriate to the circumstances.</p> <p>Where FWO's processes do focus on voluntary compliance, it is our view that the gains for clients (in both response times and outcomes) are appropriately balanced with the need to take more stringent action in certain circumstances.</p>
16.	<p>Focus on targeted campaigns as a strategic way of achieving stronger enforcement outcomes, especially in areas and industries characterised by high non-compliance and greater proportions of vulnerable workers. For example, increase the number of litigations and compliance activities originating from audits.</p>	Disagreed	<p>The Postscript to the Report states that FWO has placed renewed emphasis on proactive detection measures and for example, by 2016 aims to devote 50% of inspector resources towards proactive education & compliance. This goes some way to supporting the intentions behind the recommendation, however the FWO does not believe that increased litigation or other enforcement outcomes from audits is necessarily appropriate.</p> <p>It is very important that employers feel they can come to FWO for help and that it is clear to them when we are undertaking educative work versus compliance work. The Agency's audit functions are balanced between education and compliance, but are primarily aimed at educating and advising employers so as to ensure their future compliance.</p>
17.	<p>FWO's use of administrative sanctions, such as Enforceable Undertakings, should aim to reflect theories of responsive regulation. i.e. Ensure that the use of alternative enforcement tools are deployed in greater proportion to litigations and proportionately across business sizes.</p>	Agreed	<p>The FWO's enforcement strategy encourages future compliance through greater use of sustainable monitoring arrangements including Enforceable Undertakings and Proactive Compliance Deeds, which enhance deterrence. It is also important to the FWO that the use of enforcement tools is proportionate along the hierarchy of seriousness as well as appropriately recognising the size of a business. These issues are key areas of focus for Fair Work Inspectors and their managers and will continue to be carefully monitored as cases progress.</p> <p>More accessible information on these compliance tools, and their use, will be available to the public in the new Compliance and Enforcement Policy which is currently being prepared by the FWO.</p>
18.	<p>In relation to Enforceable Undertakings:</p> <ul style="list-style-type: none"> i. Increase transparency about the process of negotiating an Enforceable Undertaking (further than the Guidance Note provides for), ii. Consider whether there are alternatives to the alleged wrongdoer making an admission 	Agreed	<p>The new Compliance and Enforcement Policy mentioned above will provide greater clarity around the FWO's role, intentions and activities, including our approach to offering and agreeing to Enforceable Undertakings.</p>

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	to the contravention.		
19.	<p>Increase the use of compliance notices, potentially by:</p> <ul style="list-style-type: none"> i. Providing greater clarity for Inspectors about the specific circumstances where the sanction may be most appropriate, ii. Simplifying approval processes recognising that the Act gives Inspectors authority to issue them, iii. Using them to build pressure on franchisors to take steps to require compliance in their network, iv. Initiating proceedings more readily against those who fail to comply (as a stand-alone issue if necessary). 	Agreed	As above. The Postscript to the Report also notes that there has already been a stronger focus by the FWO on the use of compliance notices. A number of legal matters have also been before the courts in recent times which have assisted the FWO build general and specific deterrence messages relating to the importance and seriousness of this enforcement tool.
20.	Increase the use of Penalty Infringement Notices by promoting and encouraging their use amongst Fair Work Inspectors and streamlining approval processes.	Agreed	The Postscript to the Report accurately notes that there has already been a stronger focus and use by the FWO on the issuing of Penalty Infringement Notices as a proportionate enforcement response.
Litigations			
21.	Refine the Litigation Policy monetary threshold (currently \$5000) as a proportionate amount of the overall workers' pay in order to account for the disadvantaged, low paid and precarious workforce.	Under consideration	<p>As previously identified, the FWO is always looking at better ways to identify and support vulnerable workers. This recommendation is worthy of consideration as a mechanism to further enhance this goal.</p> <p>However, the FWO also notes that the \$5,000 referenced in the current Litigation Policy is not a set threshold and is one of many factors when considering the appropriateness of a matter for litigation.</p>
22.	Review the FWO's caution with respect to the application of the Litigation Policy as too much emphasis on risks may have a chilling effect on the legitimate use of tools throughout the enforcement pyramid.	Agreed	<p>The FWO is addressing this recommendation by encouraging greater use of alternative enforcement tools and enhancing deterrence through a combination of our litigation, media and communications work.</p> <p>Additionally, as noted above, the FWO is currently developing a new public Compliance and Enforcement Policy to replace many of our current Guidance Notes. This new policy will provide greater clarity around the FWO's role, intentions and activities, including the use of our enforcement tools.</p>
23.	Ensure the FWO doesn't inadvertently privilege employers by focusing too strongly on a need for documentary evidence and the age of the matter when assessing the merits of litigation.	Agreed	<p>FWO agrees with this recommendation and has recently relied more heavily on witness testimony in some important cases, such as <i>Fair Work Ombudsman v Shafi Investments Pty Ltd & Ors</i> [2012] FMCA 1150.</p> <p>Whilst age of a matter is certainly not, by itself, a determining</p>

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			factor in an assessment for litigation, FWO has to consider a range of factors that relate to age when assessing public value of taking a matter to court. For example, the statute of limitations, reliability of witness testimony over time, availability of documentary evidence over time and the length of time that court action legitimately takes.
24.	Use the small claims jurisdiction as a way to strengthen FWO's confidence in relying on witness testimony.	Agreed	<p>FWO's Legal team provide support to the relevant Courts for certain matters that progress through small claims. In doing so, FWO monitors outcomes and court decisions including the ways in which witness testimony are interpreted and decided upon by the courts.</p> <p>As mentioned above, in <i>Fair Work Ombudsman v Shafi Investments Pty Ltd</i> the FWO has also demonstrated its increasing confidence in this form of evidence.</p> <p>As stated earlier, the FWO has also established a Tailored Small Claims Assistance Team that will assist in meeting this recommendation. Their role is to provide guidance and support to parties regarding the small claims application and hearing process.</p>
25.	Explore additional ways to quickly identify potentially serious cases and fast-track them for litigation.	Agreed	The FWO's revised Investigation Strategy empowers managers to make enforcement decisions and recommendations on cases much earlier.
26.	<p>Explore a broader range of remedies sought through litigation to aid a culture of compliance such as:</p> <ol style="list-style-type: none"> i. Pursuing remedial orders, publicity orders, community service orders and corporate rehabilitation orders, in lieu of civil penalties. ii. Considering the pursuit of garnishment orders or Mareva injunctions in order to gain access to assets or property to satisfy compensation orders or penalties. 	Agreed	<p>FWO has been increasingly active in using a broader range of remedies, such as in the cases:</p> <p><i>Fair Work Ombudsman v Foure Mile Pty Ltd & Anor</i> [2013] FCCA 682</p> <p><i>Fair Work Ombudsman v McNiven Holdings Pty Ltd and Anor</i> (orders made in chambers (File no. BRG1189/2013).</p> <p><i>Fair Work Ombudsman v Ramsey Food Processing Pty Ltd</i> [2011] FCA 1176 (Mareva injunction).</p> <p>Enforceable Undertakings have also provided FWO with a mechanism to seek broader remedies including those with a community focus and benefit. FWO will continue to seek to expand the use of this enforcement tool where appropriate.</p>
27.	Use accessorial liability provisions more broadly (such as against HR managers) for solvent businesses to strengthen theirs and others' motivations for compliance.	Agreed	In principle, the FWO agrees that this is a worthy aim. Finding the appropriate cases is important and will be something that the FWO continues to consider when assessing matters for litigation, for example in <i>Fair Work Ombudsman v A Dalley Holdings Pty Ltd & Andrew Dalley</i> [2013] FCA 509.
28.	Run test cases to clarify bounds and provisions of the Fair Work Act.	Agreed	The FWO agrees that this is an important part of our work and it is reflected as a goal in our Litigation Policy. Some recent cases that demonstrate our willingness to do this are: <i>Fair Work Ombudsman v Maritime Union of Australia</i> [2014] FCA 440 <i>Fair Work Ombudsman v Pocomwell Limited (No 2)</i> [2013] FCA 1139.
29.	Ensure media releases at the commencement of litigation are	Agreed	The FWO now ensures the appropriate timing and release of information consistent with this recommendation.

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	appropriate and reflect the possibility of altered, amended or withdrawn allegations at a later date.		