

ADDRESS TO AUSTRALIAN LABOUR & EMPLOYMENT RELATIONS ASSOCIATION

VIRTUAL CONFERENCE

15 OCTOBER 2021

VIDEOCONFERENCE – 10.45 – 11.15 AM

Introduction

- Thank you for your invitation to speak today at this important conference.
- As the pandemic continues to impact Australian workplaces, it's imperative that Australia's regulators are responsive and continue to adapt to ensure both employees and employers are supported. This has been the Fair Work Ombudsman's focus since the start of the pandemic.
- Throughout, we have adjusted our approach in response to the unprecedented impact on Australia's workplaces. A crucial part of this has been investing heavily in our advice function to provide the Australian community with up-to-date, accurate and relevant information on workplace laws during periods of lockdown, quarantine and other scenarios.
- As the workplace regulator, we must be agile and continue to adapt our approach as we come out of the pandemic.
- Forums like this provide important opportunities to discuss current and emerging workplace issues, and I welcome the chance to contribute to the discussion.

Overview of the FWO

- As many of you would be aware, the FWO is an independent statutory agency established to regulate the national workplace relations system. This includes the minimum entitlements contained in the Fair Work Act and related industrial instruments.

- We provide an extensive range of information, advice and education to workers, employers and their advisers on their minimum workplace rights and responsibilities through
 - a call centre for enquiries;
 - information, tools and resources on our website (including fact sheets and best practice guides);
 - an online My Account portal;
 - a dedicated Employer Advisory Service for small business;
 - an Anonymous Reporting Tool to report workplace issues;
 - a Pay and Conditions Tool to calculate minimum pay rates; and
 - a Record My Hours app for employees.
- The FWO also undertakes a range of compliance activities, including investigations and inquiries into potential breaches of the Fair Work Act and fair work instruments, and we take enforcement action.
- With finite resources and a large national jurisdiction, the FWO uses research, analysis and intelligence to help us target parts of the economy or industries where we know there is likely to be poor compliance.
- In the 2020-21 financial year we recovered over \$148 million for over 69,700 employees – this was a 20 per cent increase on our record recoveries in 2019-20, and nearly five times the recoveries achieved in 2017–18. This significant achievement is despite the fact that COVID public health orders across many states and territories have limited our ability to have inspectors in workplaces. The strong recoveries reflect our shift in recent years to stronger compliance and enforcement, with a focus on getting money that is owed to workers back into their hands as quickly as possible. More on this shortly.

- In 2020-21 we also recorded over 21.3 million visits to our website and answered over 420,000 enquiries through our call centre, web enquiry service and our social media accounts. During the pandemic, we have seen a clear shift toward increased engagement with our online services.

New challenges for the FWO

- As a regulator, it is crucial that we continue to evolve to meet new challenges. Workers and employers, especially small businesses, rely on our advice and educational resources to understand their obligations and it is critical that we are responsive to their needs and the expectations of the community.
- A key part of this is finding the right balance between taking strong action in the most serious cases and supporting compliance through education, advice and intervention at the less serious end of the spectrum.
- In 2019 we made a decision to shift the FWO's enforcement posture, in response to community expectations and commentary about the role of from the Banking Royal Commission.
- We are a relatively small regulator with a large remit and we have a significant responsibility to the community that we serve. We considered how we can make the biggest impact with the resources and enforcement tools we have. We determined that increasing our use of compliance notices helps us to meet this responsibility – it is the most efficient and effective way of enforcing the law and getting more money back in the hands of workers. These are now the primary enforcement tool used to respond to underpayment matters.
- In 2020–21, we issued 2,025 Compliance Notices and recovered more than \$16.5 million in unpaid wages using this tool. To illustrate the impact of this change, in 2017-18 we issued 220 Compliance Notices and recovered \$950,000.
- Compliance Notices give businesses a chance to make things right with their affected employees without receiving an additional penalty. If an employer complies, there is no

longer a breach and we cannot take further enforcement action with respect to those allegations. However, where employers choose not to comply or ignore us, we have taken them to court and sought repayment of monies owed to workers and penalties.

- We also revised our approach to self-reported non-compliance, aiming to encourage employers to report underpayments and work productively with the FWO to avoid the need for the use of statutory evidence gathering powers or litigation.
- In 2020, the COVID-19 pandemic created a new major challenge for workers and businesses in Australia and we have had to demonstrate a degree of flexibility in our approach. While supporting workplaces through the COVID-19 pandemic and recovery phases, and prioritising high-risk sectors and issues, the FWO's approach has been to:
 - prioritise assistance to vulnerable workers;
 - provide and promote the FWO's education, advice, tools and resources;
 - support small businesses and those sectors hardest hit by COVID-19; and
 - monitor and enforce compliance.
- In light of COVID, we again reviewed our Compliance and Enforcement Policy to make clear that the FWO would consider a business' sophistication, financial position and viability as relevant public interest factors when deciding on appropriate enforcement action.
- In appropriate cases during the pandemic, the FWO has also been willing to negotiate longer time periods for responding to its enforcement tools, so as not to threaten business viability, whilst still ensuring timely repayment of employee obligations.
- At the same time, we have continued to pursue the most serious cases through the courts, filing 76 matters in the court in 2020-21, compared with 54 in 2019-20 and 23 in 2018-19.

Priorities

- Since 2019, the FWO has set and announced annual priorities to guide our work, specifying the industries, cohorts and issues of significant non-compliance that the FWO will focus on in its education, compliance and enforcement activities.
- Our priorities are based on consultation with stakeholders, operational intelligence, experience, data, technology and risk analysis. This ensures they reflect the contemporary labour market environment and are responsive to the changing needs of the community.

The FWO's 2021-22 Priorities

- Our main priority in 2021-22 is to support workplaces as they recover from the impacts of COVID-19. Other priority areas are:
 - underpayments by large corporates, due to the large increase in self-disclosed underpayments over the last few years;
 - fast food, restaurants, and cafes, as we continue to identify high levels of non-compliance and receive significant complaints and enquiries from industry participants;
 - horticulture, due to the industry's reliance on visa workers and complex supply chains;
 - sham contracting, as it remains an area of significant complexity and concern among stakeholders and the broader community;
 - contract cleaning, given the growth in demand for these services during the pandemic; and
 - franchising arrangements.
- In addition, the FWO is continuing to prioritise matters that:
 - involve vulnerable workers,;

- are of significant interest or scale;
 - demonstrate a blatant disregard for the law; and
 - can provide guidance of the interpretation of the law.
- With respect to large corporate underpayments, we have been seeing increasing self-disclosures of underpayments from large corporates, not-for-profits, universities and other businesses over the last few years.
- As a regulator that has traditionally focused on small to medium size businesses, we have had to adapt and build our capability to investigate large corporate entities, including by enhancing our use of technology and data analytics.
- In December 2020, the Government announced funding of \$22.3 million that has allowed the FWO to establish a Large Corporates Branch. This branch is responsible for delivering targeted compliance and enforcement outcomes in matters involving large corporate entities.
- Our recovery figures really put this in perspective – in the 2016 financial year, we recovered \$30.6 million for workers. In the past two financial years, our investigation of self-reports alone has led to the repayment of over \$190 million in unpaid wages.
- I acknowledge that workplace laws can be complex, particularly if an organisation is navigating multiple awards, classifications, and at times – different jurisdictions. However, our experience is that underpayments are avoidable when companies invest and prioritise compliance with workplace laws, as they do with other aspects of their business. We are asking companies to engage with us early and co-operate with us to address any non-compliance. Where they do and we are satisfied the matter is not serious or deliberate we may use other enforcement tools and avoid taking the matter to court.
- While many of these self-reports may be resolved without the need to go to court, where we feel it is necessary, we will not hesitate to litigate. Earlier this year, we filed a case against Woolworths in relation to major underpayments of salaried managers.

- We are seeking court orders requiring Woolworths to rectify the outstanding underpayments in relation to the managers who were assessed and apply those calculation methodologies to all other affected managers, plus interest and superannuation, as well as penalties against both companies.
- And just last week we commenced proceedings in the Federal Court against Commonwealth Bank of Australia (CBA) and Commonwealth Securities Limited (Commsec). The FWO alleges that Australia's largest bank failed to undertake reconciliations to ensure that employees were not paid less overall compared to the applicable industrial instruments, and make top-up payments for any shortfall.
- The FWO alleges that altogether, the contraventions resulted in a failure to pay 6,500 current and former employees a total of \$16 million between October 2015 and December 2020. The FWO is seeking orders for penalties against CBA and CommSec. For the alleged serious contraventions, the maximum penalties for each company is \$660,000 per breach. For all other contraventions, the companies face penalties of up to \$66,000 per breach. That is in addition to the significant costs of auditing, rectifying underpayments, reputational damage and loss of trust from employees.
- This highlights that large companies can face serious consequences if they do not prioritise compliance with workplace laws among other aspects of their business. It underscores the importance of the governance and the systems needed to support compliance and I am encouraging all employers to keep this front of mind if they are considering more flexible work practices or more innovative use of technology.

The impact of COVID and the FWO's response

- The pandemic has altered how employees and employers experience the workplace. State-wide lockdowns, restrictions, reopening roadmaps and changing settings mandated by both the national and state governments have an ongoing impact on businesses and their workers.

- That is why supporting Australia’s businesses and workforce through the pandemic and recovery phase continues to be our overarching priority. It is crucial that workers and businesses receive accurate advice and we have been working hard to ensure we provide this.
- The onset of the pandemic saw a sustained increase in demand for our services, with employees and employers contacting the FWO to seek advice to clarify their workplace rights and responsibilities.
- In response, we established a coronavirus subsite (available at coronavirus.fairwork.gov.au), and dedicated coronavirus hotline to help employers and employees navigate issues related to coronavirus in the workplace. Our subsite has been viewed over 9 million times and our hotline has answered over 109,000 calls since it was established in March 2020.
- We continually review and update our online material and guidance based on current circumstances. These updates are guided by applicable laws and judicial decisions, enforceable government directions (such as public health orders) and advice, including those issued by relevant Commonwealth, state and territory agencies.
- Our website can be translated into over 34 languages and information using the translator has been used more than 17,000 times. We also use our social media channels and stakeholder networks to disseminate information and reach vulnerable workers.
- Tailored tools and resources we have developed to support workplaces during the pandemic are available on the website including:
 - our ‘returning to the workplace – interactive employer tool’ with tailored information for employers on returning to the workplace, scaling up operations and adapting to workplace change;
 - templates to help employers manage their obligations during coronavirus; and
 - our virtual assistant ‘Frankie’, which is regularly updated and can respond to more than 250 coronavirus-related questions and has had over 83,000 sessions since launch in June 2020 to 31 August 2021. Our interactive website tool for employers also cross-

promotes other government COVID-19 resources, including Safe Work Australia's COVID-19 business planning tool.

- In addition, we host a Workplace Legal Advice Program that offers eligible employers and employees access to free independent legal advice to help them deal with workplace issues arising from the coronavirus outbreak.
- Common inquiries relating to coronavirus issues in the workplace that we've been receiving recently include vaccinations in the workplace, standdown, directions to attend the workplace or managing staff impacted by geographic restrictions, and access to leave.
- Both employers and employees have been enquiring about their rights and entitlements relating to vaccinations in the workplace. We encourage employers and employees to work together to find solutions that suit their individual needs and workplaces. A range of information is available on our website to help workers and businesses do this.
- Where workplace disputes arise throughout this period, we are continuing to focus on supporting vulnerable workers, small businesses and industries hardest hit, while prioritising allegations of serious non-compliance with Australian workplace laws.
- We approach disputes in the workplace in a proportionate manner, consistent with our publicly available Compliance and Enforcement Policy.

Concluding remarks

- Moving forward, as an agency we will continue to respond and adapt as the pandemic transitions and new issues emerge in Australia's workplaces.
- We will also continue to invest in new technologies to make sure we use our resources effectively and deliver the best service for the community.
- For example, we are in the process of refreshing our website to provide an improved experience to our customers, taking into account feedback received from workers, businesses and other key stakeholders.

- We are also in the process of rebuilding our Pay and Conditions Tool (PACT) to make it more efficient, secure and reliable. PACT is used extensively internally and by the public via the FWO's website. During 2020-2021, PACT was viewed over 4.7 million times and processed close to 6 million calculations.
- I'm confident we have the balance right in our approach to regulating Australia's workplace relations system. But if the last couple of years has taught us anything, it is that we need to remain responsive and ready to adapt to meet new challenges and emerging issues.
- Thank you once again for providing me with the opportunity to speak to you today and I would be happy to take any questions you might have.