

## ADDRESS TO AUSTRALIAN LABOUR LAW ASSOCIATION (ALLA)

### VIRTUAL CONFERENCE

**11 NOVEMBER 2021**

**VIDEOCONFERENCE – 11.20 – 11.50 AM**

### FAIR WORK OMBUDSMAN'S REGULATORY RESPONSE TO VULNERABLE WORKERS

#### Introduction

- Thank you for the invitation to speak today about the Fair Work Ombudsman's (FWO) regulatory response to vulnerable workers.
- This is a forum that the agency has participated in before, including in 2016 and 2018, and it provides an important forum for robust conversation on important workplace issues.
- The underpayment and exploitation of vulnerable workers in Australian workplaces is well documented in parliamentary inquiries, academic papers, the media and our own reports.
- The practice of undercutting and exploiting vulnerable workers is detrimental to the functioning of Australian workplaces. It can impact job opportunities for workers and creates an uneven playing field for employers that are trying to do the right thing.
- Employees can be vulnerable to exploitation due to a range of characteristics, including age, disability, ethnic or cultural background and language barriers, which make them less likely to seek assistance from regulators.
- Helping vulnerable workers therefore presents challenges but is at the heart of our role as Australia's workplace regulator, so I'm very happy to be talking to you today about how we address exploitation and support vulnerable workers.

#### 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.
- 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 a pay calculator;
  - an online My account portal;
  - a dedicated Employer Advisory Service for small business; and
  - an Anonymous Reporting Tool to report workplace issues.
- Many of these can be accessed in languages other than English and are offered in accessible formats.
- In 2020-21 we recorded over 21.3 million visits to our website and answered over 420,000 enquiries through our call centre, web enquiry service and social media accounts.
- The FWO also undertakes investigations and inquiries into suspected breaches of the Fair Work Act and fair work instruments, and where necessary, we take enforcement action. How we undertake this work is set out in our public Compliance and Enforcement Policy.
- We are a relatively small regulator with a large remit, so to deploy our resources and use our enforcement tools efficiently, we use quality intelligence, such as anonymous reports, to identify sectors and geographical locations at high risk of non-compliance, including where there are large numbers of vulnerable workers.
- This means we target problem areas rather than undertake random audits. In 2020-21, 80% of the businesses we audited turned out to be non-compliant. While 80% may seem high, it's not unexpected and affords us the opportunity to assist workers who are being underpaid,

educate the businesses that most need our help and utilise compliance and enforcement tools where they are required.

- In the 2020-21 financial year we recovered over \$148 million for over 69,700 employees – 20 per cent more than our record recoveries in 2019-20, and nearly five times those achieved in 2017–18.
- In addition to better targeting, we continue to consider how we can make the biggest impact with the resources and enforcement tools we have. We recently 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 don't comply or choose to ignore us, we have taken them to court and sought penalties as well as repayment of monies owed to workers and penalties.
- Investigating underpayments and issuing compliance notices in response to complaints is a significant part of our reactive work, however we also undertake proactive work which is largely discretionary and targeted toward addressing issues in our agency priority areas.

## **Priorities and Vulnerable Workers**

- Since 2019, the FWO has announced annual priorities, specifying the industries, cohorts and issues that it will focus on in its discretionary education, compliance and enforcement activities.
- 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;
  - fast food, restaurants, and cafes;
  - horticulture;
  - sham contracting;
  - franchising arrangements; and
  - contract cleaning.
- We also continue to prioritise matters that:
  - involve vulnerable workers;
  - are of significant interest or scale;
  - demonstrate a blatant disregard for the law; and
  - can provide guidance on the interpretation of the law.
- Our priorities are based on stakeholder consultation, operational intelligence, experience, data and risk analysis.

- In the case of vulnerable workers, the increased risk of exploitation is clearly demonstrated through our data. Taking migrant workers as an example – while this cohort makes up only 4% of the Australian workforce, in 2020–21 they accounted for:
  - 19% of disputes completed;
  - 20% of anonymous reports received; and
  - 32% of litigations initiated.
- This is why we continue to prioritise supporting vulnerable workers and focus on industries that we know can be vulnerable to exploitation.
- Horticulture is one such industry that is heavily reliant on migrant labour. Despite not being a high employing industry and therefore only resulting in a relatively modest number of disputes each year, there are other risk factors at play, including the low-skilled, seasonal nature of the work and the often remote location of the worksite.
- Recovering wages in this sector can also be challenging due to poor record keeping, the transient nature of the workforce, the use of complex supply chains and the reluctance of vulnerable workers to seek our assistance.
- We have recently set up an Agriculture Taskforce to lead the agency’s future compliance and enforcement efforts in this sector, which we can scale up as the need arises based on our intelligence and disputes received.
- We will also be working with industry and unions to help identify problem areas so that we can design highly targeted activities and secure further enforcement outcomes to deter non-compliance, building on the \$2,082,051 in court-ordered penalties we secured in 2020-21 against employers who underpaid migrant workers.
- Importantly, more than \$1.2 million of these penalties related to contraventions under the Protecting Vulnerable Workers (PVW) provisions introduced in 2017, which has greatly supported the FWO’s enforcement efforts in migrant worker matters.

## Protecting Vulnerable Workers

- Amongst other things, the Protecting Vulnerable Workers (PVW) Act introduced a higher scale of penalties for ‘serious contraventions’ of prescribed workplace laws. Deliberate and systematic contraventions of these laws now carry a penalty of up to \$666,000 per contravention for companies and \$133,200 for individuals, a ten-fold increase on the previous maximum.
- These penalties have the potential to send a very strong message about the importance of workplace compliance.
- As at 30 June 2021, the FWO has commenced 24 litigations using the PVW provisions, including six using the ‘serious contraventions’ provisions in s.557A. We have secured penalties in each of the 10 decisions handed down as of 30 June 2021, totalling \$1,556,090.
- In November 2020, we secured our first penalties under the ‘serious contraventions’, after a former Han’s Café franchisee, Tac Pham Pty Ltd, underpaid vulnerable workers despite having already faced Court for similar conduct. The Court awarded over \$230,000 in penalties against the franchisee. In doing so, the Court reiterated the role of penalties in deterring non-compliance, stating that “the need for general deterrence in this matter is high... some employees were more vulnerable than others and in an industry which has a high number of junior employees, the need to ensure that the rights and entitlements of those more vulnerable are met is particularly high. Employers must be deterred from engaging in similar conduct.”
- In June 2021, we secured our highest penalties to-date in a litigation involving a PVW contravention, totalling \$309,750 against China Bar Buffet (Epping) Pty Ltd, its sole director and bookkeeper. The penalties also related to 24 other monetary contraventions of the FW Act that pre-dated the PVW legislation. The Federal Circuit Court judgment considered that the penalty amounts struck the right balance, as the employer not only failed to provide the employee with his entitlements but also maintained records which the director knew were false and misleading and still provided those records to the FWO.

- We are also applying these provisions to hold employers to account in sectors beyond just those that have a higher proportion of migrants or lower skill jobs. For example, the serious contraventions provisions are a feature of our proceedings in the Federal Court against Australia's largest bank, the Commonwealth Bank of Australia (CBA), and Commonwealth Securities Limited (Commsec).
- These are allegations at this stage and the majority of workers have been repaid. However, our case is that CBA and Commsec contravened clauses of their enterprise agreements by failing 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, and failing to ensure workers paid under IFAs were better off overall than if they were paid under the enterprise agreements. The FWO also makes some other allegations regarding IFAs.
- We allege that altogether, the contraventions resulted in a failure to pay 7,425 current and former employees a total of \$16.44 million between October 2015 and December 2020. We are seeking orders for penalties against CBA and CommSec. It's alleged that the companies knowingly failed to comply with their 'better off overall obligations' under their enterprise agreements and that these breaches meet the 'serious contraventions' threshold inserted by the PVW Act, because of the systematic nature of the alleged conduct.
- For the alleged serious contraventions, the maximum penalties for each company is now up to \$666,000 per breach. For all other contraventions, the companies face penalties of up to \$66,600 per breach. That is in addition to the significant costs of auditing, rectifying underpayments, reputational damage and loss of trust from employees.

#### **FWO's advice and education**

- Our CBA and CommSec litigation is the result of an investigation by our Large Corporates Branch, that the FWO established with additional funding provided by the Government. What has become apparent through our work with large corporates, universities and other major employers is that non-compliance can take root in an organisation and affect all employees regardless of their role, seniority or whether they are permanent or casual.

- The common factor in our experience is where businesses have inadequate oversight and insufficient or non-existent systems for managing their obligations.
- I've spoken already about the strong action we take when employers fail to meet their obligations, but we also support businesses and workers to understand their obligations and rights and take steps to identify and resolve workplace non-compliance early and quickly.
- For any worker, but in particular vulnerable workers such as young or migrant workers, asking questions about pay or entitlements or raising concerns with their employer can be difficult.
- We provide tools and resources for both parties, to demystify these conversations and make identifying workers' entitlements as simple as possible.
- We continue to improve the accessibility of our information, by adding more translated material to our website, as well as working to develop enhanced website content and Auslan resources. This includes:
  - a broad range of professionally translated information and resources and a translator plug-in that allows users to translate our website into over 30 languages;
  - dedicated 'find help' sections on our website for visa holders and migrants, young workers and students, apprentices and trainees, employees with disability and other vulnerable and priority workers and sectors;
  - a visual piece work agreement template tailored to the needs of low literacy workers under the Horticulture Award;
  - a Horticulture showcase on the FWO's website, which provides information for growers and workers in the horticulture industry and includes an automated translator functionality;
  - a smartphone app, Record My Hours, which helps workers keep a record of the hours they work which is available in 17 languages other than English; and



- in-language videos across the website on a range of topics, including storyboards available in up to 25 languages other than English.
- We recently launched a new website, which was developed based on user research and testing. The new website has a cleaner, mobile first design, and improved structure to make it easier to find the information you need.
- We are also improving access to our services by working with the National Relay Service, and working to ensure our online content and resources meet the Australian Government's Web Content Accessibility Guidelines 2.1. level AAA where possible.
- To ensure that our resources are well utilised, we work closely with stakeholders and intermediaries including community organisations, community leaders, education providers, international student leaders, foreign embassies and consulates, and other government agencies. Some of this work includes:
  - providing funding to five (5) not-for-profit organisations who assist vulnerable groups through our Community Engagement Grants Program;
  - giving relevant intermediaries information about workplace rights and obligations, and the FWO's free resources and services to disseminate in their networks;
  - conducting training workshops for relevant stakeholders, who then share the information they've learnt through their networks and communities including guide those with workplace issues to seek assistance from the FWO;
  - publishing a community presentation about working in Australia that intermediaries can use to educate migrant workers about Australian workplace laws; and
  - undertaking direct engagement with vulnerable workers, including young workers, visa holders, apprentices and trainees, as well as employers and their advisers at FWO hosted webinars and stakeholder events.

- We are also running English and in-language social media campaigns to promote our pay and conditions tool, new Casual Employment Information Statement and resources for Aboriginal and Torres Strait Islander employers and employees.
- For example, in May we ran a campaign to promote our new visual piece work agreement template for the horticulture industry on social media digital display and Google search that was seen 4.5 million times.
- Our investment in this space is vital, especially as we see the Australian economy and labour market opening up. Education is key if business operators and new employees are to start off on the right foot.

### **Concluding remarks**

- The FWO will continue to prioritise and assist vulnerable workers, while helping employers build a culture of compliance, particularly in high risk sectors.
- However, we acknowledge that the exploitation of vulnerable workers in Australia is complex and cannot be solved easily, which is why we also take strong action in response to allegations relating to vulnerable workers.
- We will continue to make sure we use our resources effectively and deliver the best service for the community, and we encourage all workers, particularly vulnerable workers, to seek our assistance, whether that be through our website, Infoline or our anonymous report tool.
- Thank you once again for providing me with the opportunity to speak to you today on such an important topic. I would be happy to take any questions you might have.