

Ms Leslie Guy
Secretary to the Select Committee on Wage Theft in South Australia
Parliament House
North Terrace
ADELAIDE SA 5000

Via email: leslie.guy@parliament.sa.gov.au

Dear Secretary

I write in reply to your correspondence of 31 July 2019 to Ms Sandra Parker, Fair Work Ombudsman (FWO), inviting Ms Parker or her representatives to give evidence before the Select Committee on Wage Theft in South Australia (Committee).

Ms Parker has asked me to reply on her behalf and to thank the Committee for the invitation. Unfortunately neither Ms Parker nor her representatives will be able to attend to give evidence before the Committee. The FWO is, however, pleased to provide the following information to assist the Committee.

Overview of the role of the Fair Work Ombudsman

The FWO's purpose is to promote harmonious, productive, cooperative and compliant workplace relations. The FWO works closely with employees, employers, other regulators and the community to deliver its functions under the *Fair Work Act 2009*.

The FWO's operating model is designed to respond effectively and efficiently to the full spectrum of compliance with workplace laws, ranging from the provision of information and advice, to education and dispute resolution services, through to compliance and enforcement activities. For a comprehensive overview of the FWO's work and priorities you may wish to review the FWO's 2017-18 Annual Report¹.

In the 2017-18 financial year, the FWO completed 28,275 requests for assistance involving a workplace dispute and recovered more than \$29.6 million for more than 13,000 employees across Australia. When determining the best way to assist those who come to us for help, the FWO considers their individual circumstances and the workplace issue/s raised. The way in which a given matter is resolved depends on all the circumstances of that matter, with decisions based on the application of the FWO's publically available Compliance and Enforcement Policy².

In most of the matters that come to the FWO, tailored education and assisted dispute resolution services are offered, including early intervention, to quickly resolve workplace issues (generally within seven days), return monies owed to employees, and ensure that employees and employers understand their

¹ Available at <https://www.fairwork.gov.au/annual-reports/annual-report-2017-18/default>

² Available at <https://www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.docx.aspx>

workplace rights and obligations in the future.

The FWO recognises that, in some circumstances, employees may not wish to identify themselves when raising concerns about workplace issues. The FWO's online anonymous reporting tool enables employees, as well as members of the broader community, to provide information to the FWO anonymously, in 16 languages other than English. In the 2017-18 financial year, the FWO received 15,138 anonymous reports, including 1,294 that were in-language. These reports provided valuable intelligence that was used to inform the FWO's proactive compliance activities.

The FWO focuses its compliance and enforcement activities, including formal investigations and Court action, on serious non-compliance. Through this, the FWO aims to address exploitative conduct, create a level playing field, and send a strong message of deterrence to the community. In the 2017-18 financial year, the FWO succeeded in obtaining a number of significant litigation outcomes, including some of the highest ever penalty decisions for underpayments and record-keeping breaches. The FWO was also successful in its use of accessorial liability laws³ to hold responsible parties to account, and its first racial discrimination finding⁴. This month the FWO secured penalties of \$125,700 against the operators of two sushi outlets using the Protecting Vulnerable Workers laws, which increased penalties for record keeping and pay slip breaches. A full list of the FWO's litigation outcomes⁵ is available on our website.

The Government accepted, in principle, all of the recommendations of the Fels' Migrant Worker Taskforce including those relating to the FWO. Part of the Government's response to the work of the Taskforce was the *Protecting Vulnerable Workers Act 2017*, which gave increased investigatory powers to the FWO, imposed stronger requirements on employers to meet their obligations and increased penalties for non-compliance. The FWO also received additional funding to establish a sham contracting unit, establish a national labour hire registration scheme and to regulate an expansion of the Seasonal Worker Programme and the Pacific Labour Scheme.

The FWO recently announced the outcomes of a review of its compliance and enforcement policy. Changes to its regulatory approach will include significant increases to the FWO's use of Compliance Notices and a *minimum* requirement of a Court-enforceable undertaking for companies that self-disclose underpayments to the regulator. Where breaches of compliance notices or Court-enforceable undertakings occur, the FWO will litigate, seeking full redress for underpayments workers and penalties.

While the FWO assists every member of the community who contacts the Agency for assistance, like any regulator we have finite resources, and cannot be in every workplace. Accordingly, the FWO needs to carefully target its efforts to where it can have the biggest impact. In June of this year, the FWO announced for the first time its annual compliance and enforcement priorities for the 2019-20 financial year. These priorities are:

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

³ See <https://www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.docx.aspx>

⁴ See <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180528-yenida-penalty>

⁵ See <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation/2006-2007-litigation-outcomes>

Vulnerable workers will also 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.

These priorities are informed by analysis of data and intelligence, and build on the Agency's existing work. They will direct the Agency's compliance work and enforcement outcomes, and will be targeted in an effort to create sustainable behavioural change in Australian workplaces. Every year going forward, the FWO will determine its priorities and align them with its program of proactive compliance and enforcement. Of course, the FWO will also continue to monitor compliance more broadly and take action where needed, including on emerging and unforeseen issues.

The Fair Work Ombudsman's work in South Australia

The FWO has a national presence with a network of offices across Australia in all capital cities and in numerous regional centres. The FWO uses these locations as a base to deliver advice, education and assisted dispute resolution services to employees and employers. Compliance activities are also undertaken on both a national and regional basis, with Fair Work Inspectors working in local communities as well as on campaigns and activities across Australia.

In South Australia, the FWO's offices are located in the Adelaide central business district and in Mount Gambier. Staff at these locations respond to local and national workplace issues and actively support productive and inclusive workplaces that comply with Australian workplace laws.

Of the more than 28,000 workplace disputes completed by the FWO Australia-wide in the 2017-18 financial year, 1,336 involved employees working in South Australia. Over one third of these disputes related to underpayment or non-payment of wages, with 16% of employees alleging underpayment of their hourly rate and 19% alleging non-payment for time worked. A further 15% of disputes related to termination of employment. Assisting with the resolution of these disputes led to the recovery of more than \$720,000 in unpaid wages and entitlements for employees in South Australia during this period.

The FWO also received 858 anonymous reports relating to South Australian businesses in the 2017-18 financial year. These reports strengthened the design of upcoming proactive compliance activities undertaken across South Australia. Recent examples of proactive activities conducted in South Australia include:

- Audits of 125 businesses across Adelaide's CBD and surrounding suburbs, which recovered \$54,701 in wages and entitlements for 113 workers⁶.
- A proactive campaign in the Barossa, Two Wells and Gawler region with a focus on Nurioopta, Williamstown, Angaston and Lyndoch, which recovered a total of \$11,438 for 12 employees⁷.
- Audits of 600 workplaces in remote and regional Australia, including locations in the Mid-North,

⁶ See <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/june-2018/20180606-adelaide-city-campaign>

⁷ See <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/march-2018/20180322-barossa-gawler-two-wells-campaign-mr>

Outback North and East of the State, which recovered \$20,390 for 38 employees from 15 South Australian businesses⁸.

Since its inception, the FWO has taken legal action in South Australia against employers and individuals engaging in serious non-compliance. The FWO's 44 litigations in South Australia have resulted in a number of significant outcomes, including:

- Securing penalties of \$196,000 against a network of retirement villages across metropolitan Adelaide and Mount Barker in respect of \$2.3 million in alleged underpayment of wages, casual loadings, various penalty rates and annual leave entitlements to 35 employees, many of them over 60 years of age. Of note, eight employees had been underpaid more than \$100,000 and the largest individual underpayment was \$264,725⁹.
- Securing penalties of \$90,000 against contractors who paid their trolley collectors, mainly overseas workers in their 20s from Korea, Nepal, Burma and India, as little as \$8 an hour at shopping centres in Marion, West Lakes, Elizabeth, Kurrulta Park and Fairview Park between February, 2009 and November, 2010. This included a personal penalty of \$44,350 against a company director who deliberately underpaid the workers¹⁰.
- Securing penalties of \$93,000 against an Adelaide transport company and a back-pay order of more than \$374,000 for 10 truck drivers for following FWO audits in 2011 and 2012¹¹.

Court-enforceable undertakings also represent another important statutory enforcement tool used by the FWO to address non-compliance. The FWO has entered into a number of enforceable undertakings with large national companies that have operations in South Australia, as well as with local businesses including Adelaide restaurant Ding Hao¹² and mobile phone accessories chain Happytel Retail Group¹³.

Collaboration with government and community engagement

The FWO actively shares intelligence, data and expertise with other government agencies and has been a member of the Black Economy Taskforce, the Phoenix Taskforce and the Migrant Workers' Taskforce. Additionally, through Taskforce Cadena, the FWO works with the Department of Home Affairs and the Australian Border Force to disrupt criminals involved in organising visa fraud, illegal work and the exploitation of vulnerable workers.

The FWO actively engages with state and local governments and industry and community stakeholders to educate the community about workplace laws and find solutions to workplace issues. Recently, the FWO met with business advisors from the Adelaide City Council to discuss workplace laws and the free tools and resources available through the FWO to help businesses comply. These advisors will pass this information on to the businesses they meet with on a day-to-day basis. The FWO also recently presented to a cohort of international students at UniSA regarding workplace rights and responsibilities and participated in a further six face-to-face events across South Australia.

⁸ See <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/january-2019/20190125-remote-and-regional-campaign-report-media-release>

⁹ See <https://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2014-media-releases/october-2014/20141031-lifestyle-sa-penalty-decision>

¹⁰ See <https://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/july-2016/20160726-jin-penalty>

¹¹ See <https://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/july-2016/20160726-jin-penalty>

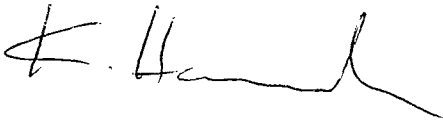
¹² See <https://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2014-media-releases/august-2014/20140815-sing-kv-eu>

¹³ See <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/february-2017/20170203-happytel-eus-release>

The FWO also maintains a strong relationship with SA Working Women's Centre, contributing funding towards the provision of legal advice, education and advocacy for vulnerable workers.

We trust this information is of assistance. As the Committee progresses its inquiries, please feel free to direct any further questions to Mr Anthony Fogarty, Executive Director - Policy, Analysis, Intelligence and Reporting, on (03) 9954 2746 or via anthony.fogarty@fwo.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'K. Hannah', with a long horizontal flourish extending to the right.

Kristen Hannah
DEPUTY FAIR WORK OMBUDSMAN
23 August 2019