

5 February 2021

Senator the Hon James McGrath
Chair
Senate Standing Committee on Education and Employment
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Chair,

Thank you for the correspondence of 18 December 2020, in relation to the Senate Education and Employment Legislation Committee's (**Committee**) inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (**Bill**).

The Fair Work Ombudsman (**FWO**) welcomes the funding announced by the Government to support non-legislative measures and the proposed amendments to assist the FWO with achieving better workplace compliance.

Overview of the role of the Fair Work Ombudsman

The FWO is an independent statutory office established in 2009 to provide education, assistance and advice about Australian workplace laws prescribed under the *Fair Work Act 2009* (**FW Act**) and to impartially enforce compliance with these laws. The FWO has a nationwide presence with a network of 22 offices located in all capital cities and 14 regional areas.

The FWO's functions include: promoting harmonious, productive and cooperative workplace relations through education, advice and assistance; monitoring compliance with workplace laws; inquiring into and investigating breaches of the FW Act; and taking appropriate enforcement action when necessary.

Our strategic priorities are announced annually to inform the community of the key issues the regulator is focussing on. The FWO's approach to both its proactive and reactive work is framed by these priorities and supported by a publicly available Compliance and Enforcement Policy. The FWO works closely with all stakeholders including employees, employers, their representatives, the community and relevant public sector agencies including other regulators.

The FWO's proportionate compliance and enforcement approach has consistently achieved significant outcomes for the Australian community. Since the agency's establishment, the FWO has:

- returned over \$412 million in unpaid entitlements;
- completed more than 280,000 workplace disputes and over 50,000 proactive matters; and
- commenced 513 court proceedings and achieved more than \$36.6 million in civil penalties.

In 2019-20, the FWO recovered the highest yearly total amount of unpaid wages in its history, returning more than \$123 million to over 25,000 workers. In addition to requests for assistance from individual workers and proactive audit work, the FWO's investigation of large corporate entities contributed significantly to this outcome. In 2019-20, the FWO also achieved over \$4.3 million in court-ordered penalties.

The FWO provides an extensive range of free information, advice and online tools and resources through its website, as well as operating telephone advice helplines (the Fair Work Infoline, Small Business Helpline and Coronavirus Hotline) to help workplace participants understand their rights and obligations. Our online tools and resources include pay and conditions calculators, templates, factsheets, interactive infographics, best practice guides, industry-specific showcases, online learning courses, a smartphone app and education videos. Our online content can be translated into over 30 different languages using an automated translation plug-in, and professionally translated resources are numerous and continue to be expanded.

In 2019-20, the FWO responded to over 490,000 enquiries via its telephone and digital services. In addition, the FWO's website (including a dedicated coronavirus website) was viewed over 21.8 million times, with the online pay and conditions tool viewed over 4.5 million times, processing more than 5.7 million workplace entitlement calculations. The FWO also invests in a range of community engagement activities and provides regular updates to more than 590,000 active subscribers to the FWO's employer newsletter, email and advice update services.

Strategic priorities

In March 2020, the FWO established a Coronavirus Hotline and a dedicated coronavirus website in response to the major impact of the COVID-19 pandemic on Australian workplaces and the subsequent significant increase in demand for the FWO's services. Supporting workplaces through the COVID-19 pandemic and the recovery phase, and regulating elements of the JobKeeper scheme is the FWO's main strategic priority for 2020-21.

The FWO is mindful that its regulatory efforts should take into account the difficulties faced by workers and businesses that are impacted by the pandemic. While the FWO will consider prevailing business conditions when addressing non-compliance, those engaging in systemic or exploitative conduct will continue to be held to account. The FWO's approach is detailed in its published Compliance and Enforcement Policy.

The FWO's other strategic and evidence-based compliance and enforcement priorities in 2020-21 are:

- underpayments by large corporates;
- fast food, restaurants and cafes;
- horticulture;
- sham contracting; and
- franchising arrangements.

In addition, the FWO prioritises matters that involve vulnerable workers (including migrant workers), are of significant public interest, demonstrate a blatant disregard for the law and/or present an opportunity to test the law.

Proposed changes to the Fair Work Act 2009

The Bill contains a number of important provisions that would amend the FWO's statutory framework and enhance the agency's strong efforts to achieve compliance. The elements of the Bill that most directly impact on the FWO's regulatory role are those dealing with compliance and enforcement.

Notably, the Bill increases the maximum penalties available for a range of contraventions and available enforcement tools. In particular, the 50 per cent increase in maximum penalties for non-compliance

with a Compliance Notice will support the FWO's significantly increased use of this enforcement tool. While 96 per cent of Compliance Notices were complied with in 2019-20, the FWO will not hesitate to enforce them through litigation. The FWO recognises the role court-imposed penalties can play in deterring non-compliance and expects that an increase in available penalties for non-compliance with Compliance Notices would further enhance compliance.

The Bill also proposes a new 'benefit obtained' approach for corporations other than small business employers, whereby the maximum penalty may be determined by courts referring to the value of the benefit obtained by the employer through contravening the FW Act. The FWO believes this change will enhance our ability to achieve greater deterrence, particularly in cases involving large underpayments with relatively few contraventions of civil penalty provisions. The FWO will continue to take a proportionate approach to compliance and enforcement, utilising all available compliance and enforcement powers, including consideration of any amended penalties where appropriate.

Passage of the Bill would also expand the FWO's jurisdiction by introducing new criminal penalties to the FW Act for dishonest and systemic underpayments. If these provisions of the Bill are enacted by parliament, the FWO expects that pursuing criminal penalties would be reserved appropriately for the most serious instances of non-compliance, where the criminal burden of proof can be met utilising the framework agreed by parliament.

The FWO also recognises the potential benefits of the proposed increase to the small claims threshold from \$20,000 to \$50,000, and the new conciliation and arbitration role for the Fair Work Commission within this jurisdiction. Small claims is an important pathway for employees to recover money, and the proposed changes address barriers that the FWO has observed when assisting employees to use this channel for recovering wages.

Funding measures

The FWO welcomes funding provided by the Government for non-legislative measures aimed at minimising the risk of non-compliance through raising awareness, creating better education services for small businesses and enhancing compliance efforts. This includes \$11.3 million to enhance the FWO's communication and education activities to improve community awareness of the FWO's role and available services.

An additional \$12.9 million has been provided for the establishment of an Employer Advisory Service. This service will provide small businesses with tailored advice on the application of the National Employment Standards and provisions relating to pay and employee entitlements.

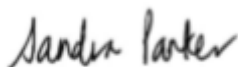
Work and consultation is underway to implement these measures, which complement the FWO's existing advice and information services.

The FWO also welcomes the \$22.3 million for the establishment of a dedicated Corporate Sector Assurance team. The FWO has received a number of self-reports of non-compliance from large corporate and other entities in the past 18 months, most of which are complex and involve intricate wage assessments, often spanning multiple years and involving thousands of employees. The emergence of these large matters and the scale of impact on employees has required a shift in agency focus and approach that is reflected in our publicly announced 2020-21 strategic priorities. The additional funding will assist the FWO to address this developing area of work.

The introduction of the Employer Advisory Service and the Corporate Sector Assurance team are supported by provisions in the Bill that set out factors the FWO may take into account when deciding whether to accept an enforceable undertaking. These provisions would also require the FWO to publish information about when the FWO will commence or defer commencing litigation of underpayment matters. The FWO will review its Compliance and Enforcement Policy to reflect any amendments to the current regulatory framework.

We trust this information is of assistance and thank the Committee for the invitation to make a submission. For further communications between the Committee and the FWO, you are welcome to contact Mr Anthony Fogarty, Executive Director of Policy, on (03) 9954 2746 or via Anthony.Fogarty@fwo.gov.au.

Yours sincerely,



Sandra Parker PSM
Fair Work Ombudsman
5 February 2021