



Australian Government

Fair Work OMBUDSMAN

1 April 2019

Mr Tony Beech
Chair
Inquiry into Wage Theft in Western Australia
Private Sector Labour Relations Division
Department of Mines, Industry Regulation and Safety
Locked Bag 14
Cloisters Square WA 6850

By email: wagetheftinquiry@dmirs.wa.gov.au

Dear Chair

Thank you for your correspondence of 28 February 2019 to the Fair Work Ombudsman (FWO) advising of the Department of Mines, Industry Regulation and Safety's *Inquiry into Wage Theft in Western Australia (Inquiry)*.

The FWO is pleased to provide the following information in support of the Inquiry.

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 our functions under the *Fair Work Act 2009 (FW Act)*.

There are two separate industrial relations systems that operate in Western Australia, which is relevant to the service that the FWO provides to workplace participants in that state. The FWO is responsible for regulating the national workplace relations system established by the FW Act on 1 July 2009, which covers businesses that are constitutional corporations. Western Australia's State system generally covers the public sector, unincorporated employers and incorporated employers that do not have significant trading or financial activities.

The FWO works in cooperation with the Western Australian Government's Private Sector Labour Relations Division of the Department of Mines, Industry Regulation and Safety to ensure that employees and employers receive the best service possible to assist them with their workplace relations queries or concerns, regardless of which workplace relations system is legally applicable to their circumstances. The FWO welcomes referrals and information from our Western Australian colleagues.

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 Report, which is publicly available at www.fairwork.gov.au.¹

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

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. When determining the best way to help people who seek assistance, the FWO considers their circumstances as well as the particular workplace issues raised. The way in which matters are resolved depends on a range of factual circumstances, and decisions are based on the application of the FWO's Compliance and Enforcement Policy, which is publicly available on our website.²

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

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 report tool enables employees, as well as members of the broader community, to provide information to the FWO anonymously, in 16 languages other than English. The FWO received 15,138 anonymous reports in the 2017-18 financial year, including 1,294 that were in-language, which 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, 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 had 85 litigations on foot, including the commencement of 35 court cases. The FWO obtained a number of significant litigation outcomes, including some of the highest ever penalty decisions for underpayments and record-keeping breaches, the use of accessorial liability laws to hold responsible parties to account, and our first racial discrimination finding.³ A full list of the FWO's litigation outcomes is available on our website.⁴

The Fair Work Ombudsman's work in Western Australia

The FWO has a national presence with a network of offices across Australia in all capital cities and in multiple regional centres. The FWO uses these locations as a base to deliver advice, education and assisted dispute resolution services to employees and employers. Our 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.

The FWO maintains an active local presence in Western Australia, with offices in Perth and Bunbury. Having a range of experienced staff located in Western Australia ensures the FWO is on the ground and can respond to local workplace issues and is well-placed to support compliant, productive and inclusive workplaces across the state.

Of the more than 28,000 workplace disputes the FWO completed in 2017-18, 2,282 involved employees working in Western Australia. Over one third of these disputes were related to underpayment or non-payment of wages, with 13% of employees alleging underpayment of their

² See <https://www.fairwork.gov.au/about-us/our-policies>.

³ See <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180528-yenida-penalty>.

⁴ See <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation/2006-2007-litigation-outcomes>.

hourly rate and 19% alleging non-payment for time worked. Assisting with the resolution of these disputes led to the recovery of over \$2.03 million in unpaid wages and entitlements for employees in Western Australia in 2017-18.

The FWO received 1,389 anonymous reports related to Western Australian businesses during the 2017-18 financial year, which were used to strengthen the design of upcoming proactive compliance activities in Western Australia. Examples of proactive activities in Western Australia the FWO has recently reported on include a campaign across the Southern Perth and Albany - Manjimup geographic regions, which involved 295 businesses being audited. During the course of this campaign, the FWO commenced litigation proceedings against three businesses for serious non-compliance, which resulted in the recovery of more than \$300,000 in back-pay for workers.⁵ The campaign also resulted in other compliance and enforcement outcomes including FWO issuing a number of formal cautions, infringement notices and compliance notices, as outlined in a campaign report released in April 2018.⁶

The FWO also uses Enforceable Undertakings as part of an important compliance tool. A recent example of this was a Western Australian commercial cleaning company which signed up to ongoing scrutiny of its workplace arrangements, following an external audit that found it had underpaid its workforce more than \$447,000.⁷

Since its inception, the FWO has taken a number of litigations in Western Australia against employers and individuals engaging in serious non-compliance. The FWO's 43 litigations in Western Australia have resulted in a number of significant outcomes, including:

- securing record penalties of \$510,840 against a contract cleaning company and its directors for systematic and deliberate underpayment and exploitation of vulnerable local and overseas workers;⁸ and
- a landmark case in the High Court of Australia that clarified the law relating to sham contracting, in the context of underpayments to workers at a South Perth accommodation provider. In the substantive proceedings, the FWO secured penalties in excess of \$60,000 against entities and individuals involved in a sham arrangement misrepresenting two employee housekeepers and a receptionist as independent contractors.⁹

Collaboration with government and community engagement

The FWO actively shares intelligence, data and expertise with other government agencies. The FWO is 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 foreign workers.

⁵ See <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/april-2018/20180410-wa-regional-campaign-report-mr>.

⁶ See <https://www.fairwork.gov.au/reports/western-australia-southern-perth-and-albany-manjimup-regional-campaign-report>.

⁷ See <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/december-2018/20181203-delron-cleaning-eu-media-release>.

⁸ See <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/december-2017/20171205-povey-penalty>.

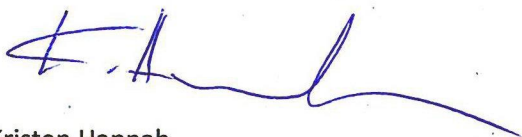
⁹ See <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/june-2017/20170612-quest-penalty>.

The FWO is also active in its engagements with community stakeholders to find solutions to workplace issues. The FWO attends various community events across Western Australia to educate local business owners and recently participated in Small Business Fairs held in South Perth, Ellenbrook, Mandurah and Bunbury in February 2019. The FWO has a strong ongoing relationship with the Employment Law Centre of Western Australia, contributing funding towards the provision of legal advice, education and advocacy for vulnerable workers.

Throughout all of its government and community networks, the FWO responds to the exploitation of vulnerable workers and is focussed on improving outcomes for the community, including for Western Australia.

We trust this information is of assistance. In the course of the Inquiry, you are welcome to contact 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 blue ink, appearing to read 'K. Hannah', with a long horizontal flourish extending to the right.

Kristen Hannah
DEPUTY FAIR WORK OMBUDSMAN
1 April 2019