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Committee Secretary
Senate Select Committee on Job Security
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Dear Committee Secretary,

Thank you for the opportunity to make a submission to assist the Senate Select Committee on Job Security. This submission outlines the role of the Fair Work Ombudsman (**FWO**) as the national workplace regulator and addresses the agency's experience with some of the work arrangements being considered by this Committee, including arrangements within the 'on-demand' or 'gig' economy, as well as the agency's enforcement of sham contacting laws under the *Fair Work Act 2009* (**Fair Work Act**).

Overview of the role of the Fair Work Ombudsman

The FWO provides education, assistance and advice about Australian workplace laws as prescribed under the Fair Work Act and, where appropriate, impartially enforces those laws. The FWO's services are free to the community.

Our statutory functions include:

- promoting harmonious, productive and cooperative workplace relations;
- promoting compliance with the Fair Work Act and fair work instruments;
- monitoring and enforcing compliance with the Fair Work Act; and
- providing education, assistance and advice to employees, employers and other workplace participants¹.

The FWO enforces compliance with Australian workplace laws as prescribed in the Fair Work Act. Our approach to both proactive and reactive work is framed by our annually announced strategic priorities and is supported by our publicly available Compliance and Enforcement Policy².

¹ The functions of the FWO are described in section 682(1) of the Fair Work Act.

² See <https://www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.pdf.aspx>

In addition to supporting businesses that were impacted by the pandemic, the FWO's 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.

The FWO also prioritises matters that involve vulnerable workers (including migrant workers). The FWO priorities reflect industries and regions that pose the highest compliance risk, as indicated by our intelligence, including anonymous reports and requests for assistance.

The FWO's compliance and enforcement approach has consistently achieved significant outcomes for the Australian community. Since the agency's establishment, as at 31 Dec 2020, the FWO has:

- returned over \$490 million in unpaid entitlements to more than 212,000 employees, with around 40 percent of this recovered just in the past 18 months;
- completed more than 290,000 workplace disputes and over 53,000 proactive matters;
- commenced 550 court proceedings and achieved more than \$38.1 million in civil penalties.

In the 2019-20 financial year, we recovered over \$123 million in unpaid wages for more than 25,000 workers. This was four times the amount recovered in 2017-18 and triple the amount recovered in 2018-19. We also responded to over 490,000 phone and digital enquiries, and our website at www.fairwork.gov.au (including our 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.

We are a national organisation with a nationwide presence consisting of a network of 22 offices located in all capital cities and across 14 regional areas.

Applying Fair Work laws

The FWO's jurisdiction is defined by the Fair Work legislation, including the Fair Work Act and the *Fair Work Regulations 2009*, which govern employment conditions for workers covered by the national workplace relations system. They provide a safety net of minimum entitlements, enable flexible working arrangements and contain provisions to protect against discrimination on the basis of specific attributes for employees engaged in all forms of work.

The FWO assesses all its matters on a case-by-case basis and, in line with our Compliance and Enforcement Policy, will take firm action where we have evidence to suggest unlawful conduct and where it is in the public interest to do so, in accordance with our model litigant obligations.

We closely monitor developments in our jurisdiction. This includes the emergence of concerns relating to the ‘on-demand’ economy and workforce, particularly as this section of the economy often intersects with several of our current priority areas, namely fast food, restaurants and cafes and sham contracting arrangements.

The FWO’s approach to resolving issues that arise in the on-demand economy is the same as the approach taken in intervening in all workplace disputes – we seek to apply and enforce Australian workplace laws as they stand. In general terms, the threshold issue for the FWO in the context of gig work is whether the worker is an employee and is covered by the Fair Work Act.

When looking at whether an employment relationship exists, the FWO looks at the specific relationships between individual workers and businesses to determine the nature of the engagement, including by applying the common law indicia test³. Ultimately however, a legal determination that a worker is either an independent contractor or an employee can only be made by the courts.

FWO investigations into on-demand platforms

The FWO receives relatively low numbers of requests for assistance and anonymous reports from individuals in the on-demand economy. Nonetheless, the FWO looks into matters which provide cause for further investigation and we have completed a number of complex and high-profile investigations into some of the leading food delivery platforms in Australia. The agency also has an ongoing investigation related to the Hungry Panda platform.

The individual nature of our assessments means that these findings apply only to the individual workers that are the focus of the investigation and do not apply to the on-demand workforce as a whole. Further, our determinations do not amount to broad findings in relation to other ‘gig work’ models, and do not amount to a vetting or approval of the model adopted by the platforms we have investigated.

In June 2019, the FWO finalised its investigation into Uber Australia Pty Ltd (Uber Australia) and ten of its drivers. As the FWO did not find evidence of an employment relationship between Uber Australia and the ten drivers subject to the investigation, no further action was taken in relation to those drivers. The reasons for the decision are published on the FWO’s website⁴.

The FWO also commenced legal proceedings against Foodora Australia Pty Ltd (Foodora) in June 2018, alleging sham contracting that resulted in the underpayment of workers under the *Fast Food Industry Award 2010*. The proceedings were discontinued after Foodora went into administration and the agency formed the view that it was unlikely that the FWO’s court action would result in any additional

³ The FWO has published information on common indicators that may contribute to determining whether a person is an employee or independent contractor <https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/independent-contractors-and-employees>

⁴ <http://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190607-uber-media-release>

payments being made to workers, or any financial penalty being imposed or recovered from Court proceedings⁵.

While our findings to date are not contrary to conclusions made by the Fair Work Commission and by Australian courts to date (when those bodies have considered the issue of whether gig workers are employees under various legislative schemes⁶), the FWO will continue to monitor all relevant Australian decisions and apply the law in this area.

Misclassification and Sham Contracting

Questions that pertain to the correct classification of workers do not only arise in the platform economy. More broadly, sham contracting remains a priority for the FWO. Where the FWO determines that employment relationships are knowingly or recklessly misrepresented as independent contractor relationships, the FWO will take strong action. Sham contracting matters have been consistently prioritised by the FWO as our experience is that it can occur within industries that employ young or migrant workers, who can be vulnerable to exploitative conduct.

In 2019-20, the FWO was allocated \$9.2 million over four years to establish a sham contracting unit to consider matters relating to potential unlawful misclassification arrangements. The FWO's Sham Contracting Unit aims to increase education, compliance and enforcement activities across all industries and to assess individual complaints from workers who allege they are being misclassified as an independent contractor. Between 1 July 2019 and 31 Dec 2020, the agency completed 479 sham contracting and misclassification disputes and recovered a total of \$396,568 for 288 workers. Further, in the past six full financial years, the FWO has secured over \$2,272,000 in Court-ordered penalties against contravening businesses.

In 2020, the FWO concluded an activity in the security services industry, focusing on sham contracting and misclassification concerns. Between September 2019 and July 2020, the FWO audited 19 security businesses across Queensland following intelligence that suggested businesses in targeted areas may have been incorrectly engaging security guards as independent contractors. This included anonymous tip offs and job advertisements requiring an Australian Business Number (ABN) for role descriptions that were indicative of an employment relationship. At the conclusion of our investigations, the FWO had recovered \$389,982 in unpaid wages for 163 security guards.

Determining whether a worker is an employee or independent contractor has been the subject of numerous FWO litigations. The FWO has taken 33 matters to court since 2009 that relate to misclassification of employment status or breaches of the sham contracting provisions of the Fair Work Act. This includes the FWO's successful appeal to the High Court to determine liability on sham contracting contraventions against Quest South Perth Holdings⁷.

The High Court found that Quest South Perth Holdings contravened sham contracting laws when it purported to convert three employees – two housekeepers and a receptionist – into independent

⁵ <http://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190621-foodora-media-release>

⁶ For example, *Franco v Deliveroo*.

⁷ <http://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/june-2017/20170612-quest-penalty>

contractors using a “triangular arrangement” involving a separate labour hire entity to engage the workers. This was a test case and underlines the FWO’s commitment to taking action to clarify the law where it is in the public interest and we have reasonable prospects of success.

Another recent significant litigation outcome in relation to sham contracting was achieved in January 2019. Two labour-hire companies that provided workers exclusively to a major home care company in Adelaide were penalised a total of more than \$210,000 over a sham contracting scheme that resulted in underpayments and significant hardship for workers. Easttrac Pty Ltd and Klemtrac Pty Ltd were found to have contravened the sham contracting provisions of the Fair Work Act by each recklessly misclassifying two employees as independent contractors and paying them amounts that did not meet their minimum lawful entitlements. Klemtrac’s director and a consultant were also penalised as accessories in this litigation for their involvement in the underpayments.

New Sham Contracting Resources

In February 2021, the FWO published a range of new content and resources on sham contracting to assist our customers to understand the differences between employees and independent contractors. The new information was developed through user research and collaboration across the agency, including insights from our Fair Work Inspectors and their field work. This helped refine and focus the content, including the focus on key industries (for example, security, cleaning and the gig economy) and shape the case studies used.

Our enhanced sham contracting content aims to help consumers to understand the characteristics of independent contractor and employments relationships – and the likely signs of a potential sham contracting arrangement. It includes new case studies, fact sheets and a step-by-step guide as well as a new stand-alone web page on the gig economy. The FWO plans to run a digital campaign to promote the new resources in the first half of 2021, and new education videos will also be released to supplement this material.

Casual Employment

The Senate Select Committee on Job Security has indicated that as part of this Inquiry, it is looking at workplace trends and their impact on employment arrangements. The FWO provides advice and assistance to all workplace participants, whether employed under permanent arrangements or casual arrangements.

The FWO has developed a number of targeted resources for casual employees to assist these workers and their employers to understand their workplace rights. The FWO’s website has a dedicated ‘Casual Employees’ page which provides information about the entitlements of casual workers in one centralised location and is regularly updated to reflect changes in the law.

This material is currently under review and will be updated soon following the recent passage of the *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021* (Amendment Act). On 29 March 2021, in accordance with the Amendment Act, the FWO published a ‘Casual Employment Information Statement’. The Casual Employment Information Statement provides

information on casual employment, including the meaning of ‘casual employee’ under the Fair Work Act, and the process for a casual employee to convert to a permanent employee.


Complementary additional educational materials will also be published and updated across the website to provide advice about casual employment, to comprehensively explain recent changes to the Fair Work Act affecting this type of employment.

The FWO also routinely commences litigations to ensure casual employees’ rights and entitlements are enforced. In February 2021, the FWO secured \$256,000 in total penalties, including for five ‘serious contraventions’ of the Fair Work Act, against IE Enterprises which operated ‘Uncle Toys’ pop-up stores in Melbourne shopping centres and its owner director. IE Toys was found to have paid eight casual workers low hourly rates (including as little as \$6.70 an hour) and did not pay some employees at all for some hours worked. The court also ordered IE Enterprises to back-pay the employees entitlements totalling \$21,748.

Closing remarks

We trust the information included in this submission is of assistance to the Committee. 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
31 March 2020