

Keynote Speech

Association Executive Services Conference 2022

Introduction

Thank you for the invitation to provide the keynote address at the Association Executive Services conference today.

I'm delighted to be here with you all, as it is an opportunity for me to speak to individuals that represent a diverse range of associations, spanning a number of sectors – including education and research, retail, and local government. The associations that you represent provide trusted advice to member organisations, who depend on you to steer them through their regulatory and other professional obligations.

Today, I am going to talk with you about the role of the Fair Work Ombudsman (FWO), and the resources and services that we provide to assist employers to comply with their obligations under the *Fair Work Act 2009* (FW Act). I will also talk a little about our compliance and enforcement posture, including our experiences with the not-for-profit sector.

Our role

Some of you may have members with substantial workforces and will be familiar with the work of the FWO, and some of you may have members who are less familiar with us and our work.

For those that are less familiar, the FWO is the impartial national workplace relations regulator. The agency was established with the passage of the FW Act to:

- provide advice and education to employers and employees about their rights and obligations, chiefly regarding pay and conditions;
- to promote and monitor compliance;
- to investigate breaches of the FW Act, and:

- to take appropriate enforcement action when required.

The majority of individuals who contact the FWO, whether they be workers or businesses, are seeking advice about their entitlements and obligations regarding pay and conditions. We have a comprehensive website that we have co-designed with employers and workers to make this as easy as possible. We also have a Pay and Conditions Tool that is simple to use and allows users to calculate what they should be being paid along with conditions such as leave, penalty rates and rest breaks, depending on the relevant sector and award. Further, we have call centre with a priority line for small business, with FWO staff responding to more than 400,000 calls each year.

Usually, where issues arise in a workplace, they can be dealt with via education, and we strongly encourage all employers and employees to educate themselves about their obligations and rights so that disagreements don't escalate simply because of misinformation or misunderstanding. However, we also have a very active and targeted compliance monitoring and enforcement role under the FW Act. This includes both responding to requests for assistance and proactive audits, and investigations based on our intelligence-gathering, work with stakeholders and analytics.

There is a strong expectation from the community that the regulator takes a 'tough stance' with employers who deliberately or wilfully, underpay workers and, in the time I have been the FWO, this expectation has grown.

The FWO has strong compliance and enforcement tools which are designed to address non-compliance and deter employers who may be tempted to break the law. However, I want to assure you that our approach is applied proportionately, and we understand that employers make mistakes. Our approach recognises this and has enabled us to achieve strong results for the community, while remaining sufficiently flexible to respond to emerging challenges.

In the 2020-21 financial year, the FWO recovered over \$148.3 million in unpaid wages for over 69,700 workers. This our highest ever recovery within a financial year. It's a 20% increase on our previous highest recovery during 2019/20, and nearly five times the recoveries achieved in both 2017-18 and 2016-17. Since our inception in 2009, we've recovered well over half a billion dollars in entitlements for workers.

I am proud of what my agency has achieved, but also frustrated that underpayments are so prevalent when being paid correctly is so important to workers and their families, and something every one of them should expect.

Our annual priorities

In addition to responding to many thousands of requests for assistance from workers about pay and conditions each year, the FWO sets annual priorities that guide our education activities, proactive audits and investigations across that year. I announce these publicly at the beginning of each financial year so that the community knows what we will be targeting. Yesterday, I announced our compliance and enforcement priorities for the 2022-23 financial year.

The FWO's 2022-2023 priorities focus on industries that are at significant risk of non-compliance and emerging issues that are of considerable public interest and concern. The FWO also prioritises cohorts identified as vulnerable or requiring additional assistance.

For 2022-23, supporting workers and businesses, particularly small businesses, as they recover from the impacts of COVID-19 remains one of our priorities. This is in recognition of the huge impact that the pandemic has had on employers, including in the business and not-for-profit sector.

Over the last almost two and a half years, we've provided relevant and up to date information to the public as events unfold. Given we are a national organisation, this has included provision of information on requirements for workplaces on a state and territory basis, on issues such as lockdowns, stand-downs, use of leave, requirements for vaccinations, mask wearing, social distancing. We provided case studies and scenarios to assist employers to navigate the rapidly changing circumstances, and we worked very closely with employer peak bodies and state and territory work health and safety regulators to share information and seek their feedback on the advice we were providing. We also had a role in the regulation of JobKeeper payments.

Our Coronavirus website, a subsite of the FWO website, is our centralised point of information about rights and responsibilities at work during COVID-19. Information continues to be regularly updated on this site to provide practical information for those navigating their responsibilities.

Alongside our COVID assistance, in 2022-23 we will prioritise non-compliance in a number of sectors and industries that present continuing enforcement challenges. These are:

- fast food, restaurants and cafes
- agriculture
- large corporates and universities
- contract cleaning; and
- sham contracting.

The FWO has had a long-running focus on horticulture and agriculture. This sector is a priority given its reliance on visa holders, who can be at greater risk of exploitation, and its often-complex labour supply chains. The community is very focused on this sector and we work closely with relevant government departments like the Departments of Foreign Affairs and Trade and Home Affairs, as well as industry stakeholders, on education, compliance and enforcement.

The FWO has also added the universities sector as a new compliance and enforcement priority for 2022-23, following regular self-reports from universities of significant underpayments, including of casual workers. The prioritisation of universities sits alongside our investigations into large corporate entities self-reporting non-compliance, as well as many not-for-profits and other businesses of varying profiles. We currently have approximately 50 investigations underway into large corporates that have self-reported non-compliance. This includes some of Australia's largest companies and represents a significant and ongoing body of work for the FWO.

In addition to our priority sectors, the FWO will continue to prioritise 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; or
- can provide guidance on the application of the law.

We also have what we call our 'enduring priorities'. One is protecting vulnerable workers, who have particular attributes that may increase their vulnerability in the workplace, such as being young, and/or speaking English as a second language. The other is our commitment to assisting small business employees and employers. These employers rely on our advice and educational resources to understand their obligations, and often don't have sophisticated payroll, human resources or in-house expertise. We have co-designed resources for small business and there is no doubt that employers who access these, realise how practical and helpful they are, and are much more confident that they are meeting their obligations under the law.

Our tools and resources

While you are undoubtedly also providing necessary advice to your members, I'd like to highlight some of our own tools and resources that can assist. These include:

- The FWO's Small Business Showcase, which is an online site housing a suite of information, tools and resources to assist small business operators to understand workplace rights and obligations throughout the lifecycle of their business, including hiring employees, paying employees, managing employees and ending employment. In 2021-2022, this site has been viewed more than 185,000 times. The Showcase is complemented by a dedicated small business helpline which has answered over 50,000 calls this financial year to the end of May.
- The FWO's Pay and Conditions Tool – known as 'PACT' – which calculates base pay rates, allowances, penalty rates and overtime. Our pay calculator is an online tool which guides customers through a series of eligibility questions, and is the tool used by our Fair Work Infoline. So far this financial year, the pay calculator has been accessed more than 5.1 million times.
- Finally, the FWO's Employer Advisory Service, which provides eligible small businesses with free, tailored written advice about their employees' pay and entitlements under the National Employment Standards and modern awards. We have detailed information about accessing the service in our Small Business Showcase. So far this financial year, this service has provided more than 1000 tailored written advices to eligible small businesses.

Our approach to non-compliance

As a regulator, we expect that businesses, large and small, will equip themselves with the tools and information they need to understand and comply with workplace laws. Prevention is better than cure when it comes to workplace compliance, and there have never been as many tools and resources freely available to assist businesses in this regard.

Making efforts to get it right from the outset, and reviewing compliance regularly, can and will prevent serious non-compliance. Beyond not needing to have to remediate underpayments, making proactive efforts to ensure compliance can also mean that an organisation can avoid both preventable damage to its reputation or brand, and preventable damage to staff morale and engagement levels.

In addition to ensuring that your own house is in order, I hope that you will also direct your efforts to ensure that your members are meeting their lawful workplace requirements. Some of the things an organisation can do to reduce the risk of workplace non-compliance are to:

- Secure the appropriate level of assurance that is needed to be satisfied that staff are being paid correctly under the law. This includes bringing workplace compliance to the attention of an organisation's board, executive management committee, or senior leaders, where relevant.
- Invest appropriately in payroll systems, expertise and auditing. Organisations that do not have these capabilities 'in-house' should seek appropriate external advice and services. We certainly find that employers who are members of associations that assist them with workplace relations support, are far more compliant than those that try to manage on their own.
- Resist being complacent or over-confident about compliance with legal obligations under the FW Act and applicable industrial instruments. Once you have the correct systems in place, it is important to ensure that this does not become a 'set and forget' exercise. We've seen what can happen when organisations do this. Periodic reviews of how well these systems are working and proactive assurance efforts will assist to tease out any issues early, before significant underpayments add up.

- As I have already discussed, free resources are also available on the FWO's website. Assistance can also be sought by calling us on 13 13 94 or contacting us online.
- And, of course, where an organisation believes it has got it wrong, or indeed needs assistance meeting their lawful obligations, it should contact the FWO. Outcomes will generally be better where we are involved early in the piece.

Dealing with non-compliance

While the FWO takes non-compliance with workplace laws seriously, we are proportionate in how we respond to breaches. This means that we understand that genuine mistakes can happen, and that we consider the circumstances of the matter when deciding what enforcement outcomes might be appropriate.

The enforcement tools we draw on in responding to non-compliance will reflect the individual circumstances of the investigation, as well as the extent to which an organisation seeks to rectify and remedy the non-compliance. The factors that we may take into consideration in a particular matter are published in our publicly available Compliance and Enforcement Policy, and include things like:

- Whether the matter demonstrates a blatant disregard for the law, or repeat offending;
- The scale of the matter, and its impact on the workers or the community;
- Whether the employment relationship is ongoing, or how long ago the employment ended;
and
- The vulnerability of the workers involved.

The FW Act provides the FWO with a number of enforcement tools to deal with less serious contraventions of the FW Act quickly and efficiently. These include the issuing of infringement notices, contravention letters or compliance notices, which require businesses to rectify the contravention that we have found.

For larger underpayments or more substantial contraventions, we may consider entering into an enforceable undertaking with an entity, or commencing litigation.

An enforceable undertaking, or an EU for short, is a written undertaking detailing the contravention and setting out what a party will do to rectify the contravention, as well as any contrition payment that may be agreed during the course of resolving the matter. If a person fails to comply with an EU, the FWO may commence proceedings in Court to seek orders directing the person to comply, seeking compensation, or any other appropriate order. In 2020-2021, we entered into 19 separate EUs with employers, recovering \$81.7 million in underpayments for workers.

An example of a recent EU we have entered into was with ParaQuad in December 2021. ParaQuad is a large charity employing about 334 staff in the disability services sector, providing specialist clinical services, personal care, telehealth and supported accommodation to people with paralysis and associated health conditions in NSW, the Northern Territory and Queensland. Prompted by a pay query, ParaQuad identified underpayments of a forklift allowance under the Paraplegic and Quadriplegic Association of NSW Collective Agreement 2009-2012. Following this issue being identified, ParaQuad's Board endorsed a comprehensive review of employee entitlements relating to 1,137 current and former staff. External consultants who conducted the review found minimum pay rates were not applied correctly for employees covered by several awards relevant to ParaQuad staff.

After self-reporting the underpayment to the FWO in November 2020, ParaQuad signed an EU with the FWO, committing to fully rectify underpayments totalling \$763,000. In this case, an EU was appropriate because of the employer's clear willingness to remedy the issue as well as their willingness to ensure future compliance. Also, under the EU, ParaQuad committed to implementing stringent measures going forward, including engaging an independent auditor at certain junctures to ensure future compliance. The organisation also had to publish a notice about its breaches on its website. As usual, we published a media release upon the signing of the EU. In this case, by working diligently to resolve the matter to our satisfaction, the employer avoided ending up in court over the underpayments.

We reserve litigation for matters at the more serious end of the spectrum. We are more likely to litigate in cases involving employers who have deliberately or repeatedly contravened the FW Act or have failed to cooperate with the FWO and have not fixed contraventions after being given

the opportunity to do so, particularly where businesses have not complied with a compliance notice.

We have been steadily increasing our use of compliance notices, which are now our default tool for routine wage underpayment matters. In 2020–21, we issued 2,025 compliance notices and recovered more than \$16.5 million in unpaid wages using this tool; we will eclipse those results this financial year. To illustrate the impact of this change, in 2017-18 we issued 220 compliance notices and recovered \$950,000.

Compliance notices are actually good news for small businesses as they 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 contravention 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.

We are also scaling up our use of litigation for more serious matters. In 2020-2021, we took 76 entities to court. So far this year, we have commenced more than 126 proceedings, demonstrating the FWO's commitment to ensuring that people obtain their rightful entitlements.

Concluding remarks

Again, I would like to thank you for inviting me to speak at your conference. I hope I've helped you to understand what it is that we do, and what our priorities are. We, like you, are navigating our way out of the pandemic phase of operations, and are looking to see that organisations are similarly turning their minds to their core business, including that of meeting their legal responsibilities in the workplace. Again, the FWO has resources and tools on offer that can be accessed by businesses, and by those advising businesses, to assist in getting compliance with workplace laws right.

Thank you once again for providing me with the opportunity to speak to you today. I'd be happy to take any questions that you might have.