

Speech

Ai Group – PIR Conference – 8 August 2022

Thank you for the invitation to speak to you today on behalf of the Fair Work Ombudsman (FWO), Ms Sandra Parker.

It's fair to say a lot has happened in the workplace relations space since Sandra last spoke to you in person back in 2019, and it's been no different for the Agency. I'm really pleased to have the opportunity today to fill you in on what's been happening at the FWO during this time, in particular how we've been approaching our role as Australia's independent workplace regulator, and how our strong efforts across all activities led to the recovery of another record amount of unpaid wages for Australian workers in the last financial year. But before we get to that, I think it's also fair to say that, as 2022 progresses, we will continue to see many changes in the workplace relations space.

New Government agenda and the FWO

As you all know, the Government is currently progressing its workplace relations agenda and I think we would all agree that there are some important reforms on the horizon, many of which will be relevant for the FWO.

As has been widely reported, the Government intends for the Australian Building and Construction Commission's (ABCC's) role in enforcing the Fair Work Act in the building and construction industry to transfer to the FWO. While the details of this transition are ultimately a matter for government, the FWO looks forward to working constructively with the Government and our stakeholders to implement this important reform.

Of course, advice and education is one of our core functions, and we are working hard to ensure that our advice, information and resources are up-to-date, so that the industry can prepare for these changes. As is our usual practice, we will consult with stakeholders to ensure the advice and information we provide is as helpful as possible, tailored to industry needs and is effective in promoting compliance.

The Government has also already acted swiftly to introduce another important reform piece – the Fair Work Act Amendment (Paid Family and Domestic Violence Leave) Bill 2022, which was introduced into the Parliament in its first sitting week in July. There is already information on our website about unpaid family and domestic violence leave, and assuming passage of the Bill, I would encourage employers and workers to visit our website (www.fairwork.gov.au) to find updated information and advice about the new paid entitlement.

There will also be other roles for the FWO under the Government's other policy commitments, which span a range of other workplace relations issues, from regulating 'employee-like forms of work', to the criminalisation of wage theft, to name just a few. Obviously, the protection of wages and entitlements is at the core of what we do at the FWO, so we welcome any reforms that aim to ensure workers are paid correctly and treated fairly.

As the national workplace relations regulator, we are always looking for opportunities to exercise our statutory functions in a way that ensures the greatest impact on workplace compliance for the nearly 13 million Australian workers and one million employing businesses that we serve. Across our broad remit and priorities, ensuring workers receive their lawful pay and entitlements is one area where we will always remain fully committed – and this brings me to our recent results.

2021-22 Results

Today, I want to reflect on the last financial year, 2021-22, because the FWO as an agency achieved some significant milestones.

The work of our Large Corporates Branch is a particular highlight. In the last 12 months, we commenced legal action against some of Australia's very largest employers, which I will touch on a little later.

We have also supported small business employers to understand and comply with their obligations by providing over 1200 written pieces of tailored technical advice through our Employer Advisory Service; and our website, fairwork.gov.au, remains the authoritative source

of free workplace relations advice with over 22.6 million hits in 2021-22 – the most in a single year.

Most significantly, though, the FWO's strengthened compliance and enforcement approach has seen another record amount of backpaid wages for Australian workers in the last financial year.

In 2021-22, I am pleased to tell you—and you're the first to hear—that **over \$532 million** in unpaid wages and entitlements were recovered for **over 384,000** workers. This marks another record year for backpayment of workers across the nation. In 2021-22, the recoveries sum was more than **three times** the previous record of **\$148.3 million** in 2020-21, and benefited five times the number of workers. This is a great result for the workers who have been reunited with their unpaid wages, and also for the businesses that pay correctly and are no longer at a disadvantage as a result.

Many of the investigations and compliance and enforcement work that has led to these recoveries extends back a number of years, as do the underpayments themselves, which in some cases reflect persistent non-compliance issues that have only recently been uncovered.

The last financial year's record recoveries mean that, since July 2009, **more than one billion dollars** of unpaid wages have been returned to workers in matters dealt with by the FWO.

We also continued to send a strong message about the need for compliance by continuing to increase our use of enforcement tools. In the last financial year:

- We issued **2,345** Compliance Notices, which is the most this tool has been utilised in a single year;
- We also commenced a record **137** litigations, almost doubling the matters put into court the year before. We also secured **almost \$2.7 million** in court-ordered penalties.

This reflects our focus on using Compliance Notices as our primary tool for addressing wage underpayment, and it has been quite successful. Compliance Notices give employers a chance to make good on their underpayment without further sanctions – however where employers ignore

our notices or refuse to comply, those businesses should expect to be litigated, which our litigation results attest to.

The FWO has embraced the use of behavioural economics to understand how and when people make decisions that affect their likelihood to comply with the law and, with this expertise, developed a cover letter to accompany our Compliance Notices that is designed to make compliance as easy as possible for the recipient.

We have also just launched a new online course to increase awareness of how to respond to a Compliance Notice, which can be found on our website at www.fairwork.gov.au/learning. The short interactive course provides:

- Step-by-step guidance on responding to a Compliance Notice;
- Video scenarios and real-life case studies to illustrate the consequences of non-compliance;
- Learning checks to help employers identify and rectify underpayments; and
- A toolkit with links to our calculators and resources.

This approach, along with media coverage of FWO litigation outcomes, has also helped to raise the Agency's profile across the broader community, and has likely contributed to the growing number of businesses of all sizes self-reporting non-compliance.

Self-reports and large corporate non-compliance

Self-reported non-compliance is a significant contributor to the record recoveries and across all categories, our work with large corporates accounted for almost **\$279 million** of recoveries by **37 employers**, just over **six times** the **\$44.7 million** we recovered in 2020-21.

This is the result of the hard work that our agency has done over a long time to create an environment that encourages large corporates to prioritise compliance, and ensures unpaid wages get back into the pockets of workers.

Our experience continues to be that large-scale corporate non-compliance is often driven by ineffective governance, a lack of investment in payroll systems, expertise and auditing and, in some cases, by complacency or the adoption of high-risk workplace relations strategies without adequate controls in place.

The FWO started to receive an increasing number of self-reported underpayments from large corporates in 2019. In response, Sandra Parker wrote to all CEOs and Boards of the top 100 listed companies across Australia in February 2020. The letter called for these CEOs and Boards to assure themselves, their stakeholders, workers and the community, that their companies were meeting their lawful obligations. We still believe it is CEOs and Boards that must be taking the lead in setting a culture of compliance in their companies.

The number of self-reports of underpayments from large corporates has grown significantly since then. Our self-report work includes some of Australia's largest companies, and has now expanded to include universities and not-for-profits, among others.

We currently have about 50 investigations underway into large corporates that have self-reported underpayments. Our examination of non-compliance by large corporates is often highly complex, dates back several years and involves thousands of employees and millions of dollars in underpayments.

This work has brought new challenges that aren't a feature of our traditional compliance work regulating predominantly small businesses, but we've been responsive and adapted to this change, including by putting in place a dedicated Large Corporates Branch. As well as investigating some of the most high-profile and complex matters involving large corporate entities, I am very proud of the work the Large Corporates Branch is doing in developing enhanced tools and technical capabilities for large scale wage assessments, data analytics and evidence review using machine learning and automation, to increase efficiency, reduce the FWO's reliance on higher cost external providers and protect many thousands of workers.

This investment is well worth it, because investigations of large corporate non-compliance requires complex wage assessments, specialist expertise in industrial instruments, and calculations to interrogate complex payroll and employment data. This requires significant

resourcing and collaboration across the agency to ensure accurate and timely assessments of underpayments to recover wages and, importantly, to validate remediation programs.

In the case of these large-scale corporate underpayments, the FWO focuses on areas of concern and more serious conduct. This will generally involve undertaking an assurance process to satisfy ourselves that the employer's remediation is robust and adopts a methodology that is consistent with FWO's interpretation of the law.

Where we cannot obtain an appropriate level of assurance, either due to lack of cooperation to help us to understand the employer's approach in sufficient detail, or where the remediation process is not adequate to ensure that employees receive their lawful entitlements, we will conduct more intensive investigations with a view to enforcement, particularly where we suspect deliberate or serious non-compliance.

As a result of our investigations into large corporate non-compliance, we commenced a number of significant litigations in 2021. These include litigations against:

- Coles, in relation to the alleged underpayment of almost 8,000 employees by over \$115 million, and
- The Commonwealth Bank and CommSec, in relation to the alleged underpayment of over 7,000 employees by more than \$16 million.

We also continue to progress our litigation against Woolworths for the alleged underpayment of salaried managers, which we commenced in June 2021.

I won't talk to these three matters in any further detail today, as they are all before the Federal Court, but their existence is significant.

All in all, 2021-22 has been a big year, and these are results the FWO is proud of, and I would expect that the reforms being pursued by the Government will positively impact on our ability to continue delivering strong outcomes for the community, whether that be through compliance and enforcement activities or providing support to businesses to deal with the continuing disruptions caused by COVID.

FWO's 2022-23 compliance and enforcement priorities

This financial year, as for last financial year, supporting businesses through difficult economic conditions remains a key focus for the Agency.

Over the last two years, a critical role of the FWO has been helping employers make sense of an ever-changing workplace relations landscape, which has meant ensuring we aren't heavy-handed in the face of clear struggles for some employers, while also ensuring workers receive their correct wages and entitlements.

The FWO's compliance and enforcement work continues to be informed by our annual, evidence-based strategic priorities. These priorities focus on industries and sectors that are at significant risk of non-compliance, as well as emerging issues that are of considerable public concern. The priorities guide our proactive education and compliance activities, as well as our reactive work responding to requests for assistance from workers. Our priorities also consider public interest factors, and are guided by our publicly available Compliance and Enforcement Policy.

In June, Sandra announced our priorities for the 2022-23 financial year. In addition to supporting businesses through the impacts of COVID-19, the five industries, sectors and issues that we are prioritising this year are:

- Fast food, restaurants and cafes (FRAC);
- Agriculture;
- Large corporates and universities;
- Contract cleaning; and
- Sham contracting.

We also have what we call our 'enduring priorities'. One is vulnerable workers, who have particular attributes that may increase their vulnerability in the workplace.

The other is our commitment to assisting small business employers and their employees. These employers rely heavily on our advice and educational resources to understand their workplace obligations, as often they don't have sophisticated payroll, HR or in-house expertise.

We also continue to focus on 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.

This year we have added the universities sector as a new priority sector following regular self-reports from universities of significant underpayments, including of casual workers. The prioritisation of universities sits alongside our ongoing prioritisation of large corporate entities.

Finally, including the agriculture sector as a priority this year extends upon the FWO's long-running focus on the horticulture sector. 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.

In December 2021, the FWO commenced its Agriculture Strategy. This Strategy will see the FWO target over 300 businesses in 15 regions over two years, across the viticulture, horticulture, meat processing and agriculture sectors. Our compliance teams have already conducted several site visits which will continue through to 2023 as we focus on an industry that is critical for our economy, food security and international reputation. The FWO also supported employers, workers and other industry participants to better understand their rights and entitlements under the Horticulture Award through comprehensive resources and information that explain piece rate changes that came into force on 28 April 2022.

I would also note that while it is not a priority in its own right, insecure work, broadly defined, is a common feature of many of our priority sectors – for example, FRAC, cleaning and agriculture are all characterised by casual employment arrangements, multiple levels of supply chain contracting, a reliance on labour hire arrangements, and the employment of visa holders, people

who do not have English as a first language, and young people. High levels of casualisation are also evident in the university sector.

Secure work is another Government policy priority area where the FWO as an agency has a significant interest. Clearly there will be further work for us in this space arising out of the Government's foreshadowed reforms, and we stand ready to assist to ensure that all workers are treated lawfully.

Concluding remarks

In conclusion, 2021-22 has been a highly successful year for the FWO, as demonstrated by our record recoveries.

These successes show the benefits of the FWO's evidence-based approach to setting annual compliance and enforcement priorities. We're also seeing the benefits of our strengthened compliance and enforcement approach, including building our capacity to respond to large corporate non-compliance and increasing our use of Compliance Notices.

Looking forward, the FWO will continue to strive to respond effectively to challenges as they emerge in 2022 and beyond, and to support businesses and their workers through these challenges, and evolve and look for opportunities for how we can discharge our statutory functions in a way that can deliver the best outcomes for Australian workplaces.

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