

Fair Work Ombudsman

Submission to the Senate Inquiry into the unlawful underpayment of employees' remuneration

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Australian Government

Fair Work
OMBUDSMAN

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Introduction

1. The Fair Work Ombudsman (**FWO**) provides this submission to the Senate Economics References Committee Inquiry into the unlawful underpayment of employees' remuneration to assist the Committee to understand:
 - the FWO's role as the national workplace regulator, including its current operations and priorities; and
 - changes occurring within the regulated environment, which are impacting the way that the FWO delivers its statutory functions.

Overview of the Fair Work Ombudsman

Establishment and functions

2. The FWO is an independent statutory office, responsible for providing education, assistance and advice about Australian workplace laws as set out in the *Fair Work Act 2009* (Cth) (**Fair Work Act**) and, where appropriate, impartially enforcing compliance with these laws. The FWO was established on 1 July 2009 with the passage of the Fair Work Act, replacing the pre-existing agencies responsible for these functions.
3. Ms Sandra Parker PSM was appointed as the Fair Work Ombudsman on 15 July 2018 for a five-year term. The position is that of a statutory office holder pursuant to section 681 of the Fair Work Act.
4. The FWO works with employees, employers, registered organisations and the community to fulfil its statutory functions, which include promoting:
 - harmonious, productive, and cooperative workplace relations;
 - compliance with the Fair Work Act and fair work instruments; and
 - providing education, assistance and advice to employees, employers and more.¹

Budget and staffing

5. The FWO maintains a nationwide presence with a network of 22 offices across Australia in all capital cities and 14 regional centres. These locations are used as bases from which to deliver local and national services.

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

6. As at 30 June 2019, the FWO had a total Average Staffing Level (**ASL**) of 704 (excluding the Agency head).
7. In comparison to other Australian regulators, the FWO is moderately sized² with total operating expenses of \$129.168 million as per the 2019-20 Portfolio Budget Statements.
8. The FWO's 2019-20 appropriation incorporates new funding for measures that include the expansion of the Seasonal Workers Programme, the introduction of a dedicated sham contracting unit and measures following recommendations from the Migrant Workers' Taskforce Report.

Operational outcomes

9. As the workplace regulator for nearly 13 million Australian workers³ and more than 2 million businesses⁴, the FWO adopts a risk-based, cost-benefit approach to its use of regulatory tools to ensure it has the greatest impact on workplace compliance.
10. The FWO's operating model is designed to deal effectively, efficiently and ethically with the full spectrum of community needs regarding workplace relations matters. The FWO provides an extensive range of services to the public such as information, advice and education on all aspects of the workplace relations system and services such as dispute resolution for employers and workers. For example, the FWO operates a number of telephone advice helplines (the Fair Work Infoline and the Small Business Helpline), and provides a range of information on the FWO's website aimed at assisting employers, workers and others with workplace relations issues that arise from time to time (including, over the last several months, information on bushfires⁵ and the coronavirus outbreak⁶). The FWO also has a significant program of compliance and enforcement that ranges from evidence-based proactive auditing of sectors that are the highest risk, investigations of complaints received directly from the community, through to the use of compliance and enforcement tools including litigation.
11. A comprehensive overview of the FWO's most recent activities during 2018-19 is available in the agency's annual report at www.fairwork.gov.au.

² E.g. the 2019-2020 budget appropriation for the FWO is \$122.013 and 704 ASL; budget appropriation for the Australian Competition and Consumer Commission (ACCC) is \$235.161 million with an ASL of 1,022; \$187.044 million and an ASL of 738 for the Australian Prudential Regulatory Authority (APRA); and \$402.219 million with an ASL of 2,002 for the Australian Securities and Investments Commission (ASIC). See relevant Portfolio Budget Statements available at treasury.gov.au.

³ Australian Bureau of Statistics (ABS) Labour Force, Aug 2019, cat No. 6202.0.

⁴ ABS Count of Australian Businesses, including entries and Exists, June 2014 to June 2018, cat No. 8165.0.

⁵ <https://www.fairwork.gov.au/about-us/news-and-media-releases/website-news/bushfires-across-australia>

⁶ <https://www.fairwork.gov.au/about-us/news-and-media-releases/website-news/coronavirus-and-australian-workplace-laws>

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

13. Use of tailored education and assisted dispute resolution services enable the FWO to focus its resources on more serious matters warranting general and specific deterrence such as systemic, widespread non-compliance or exploitation, or matters where there is a significant public interest or risk factors.

14. In the decade between the FWO's establishment in July 2009 and July 2019, the FWO achieved many significant outcomes for the Australian community, including by:

- returning \$289 million in underpaid entitlements to more than 155,000 employees;
- responding to more than a quarter of a million workplace disputes, undertaking more than 52,000 proactive audits, inquiries and other activities; and
- taking 458 legal proceedings to court and achieving more than \$32.2 million in pecuniary penalties against those individuals and organisations that have most seriously contravened the workplace laws, as well as testing and clarifying the law where it was unclear.⁷

15. The *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* amended the Fair Work Act to increase penalties for certain contravening conduct, introduce new contraventions and otherwise make reforms designed to better prevent the exploitation of workers.⁸ The FWO has been working to test and embed the new laws, and has commenced 13 litigations relating to serious contraventions, keeping or providing false or misleading records, giving false or misleading payslips, hindering or obstructing a Fair Work Inspector, and the reverse onus of proof provisions where records are not kept or pay slips not issued.⁹

⁷ See for example - Fair Work Ombudsman v Mhoney Pty Ltd & Anor [2016] FCCA 2959 <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/august-2017/2017-08-02-mhoney-penalty-release>;

Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (No 4) [2015] HCA 45 <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/june-2017/20170612-quest-penalty>

Fair Work Ombudsman v Step Ahead Security Services Pty Ltd [2016] FCCA 1482 <https://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/june-2016/20160620-step-ahead-penalty>

Fair Work Ombudsman v Yenida Pty Ltd & Ors [2018] FCCA 1342 <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180528-yenida-penalty>

Fair Work Ombudsman v Yogurberry World Square Pty Ltd & Ors [2016] FCA 1290 <https://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/november-2016/20161103-yogurberry-penalty-release>

⁸ All amendments came into force on 15 September 2017, except the franchisor and holding company liability provisions, which took effect from 27 October 2017. The provisions were not retrospective in application and, therefore, applicable only to contraventions occurring from the date the relevant provision came into force.

⁹ There have been three decisions on the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* to date: *Fair Work Ombudsman v A & K Property Services Pty Ltd & Ors* [2019] FCA 2259 (16 August 2019), *Fair Work Ombudsman v Desire Food Pty Ltd & Anor* [2019] FCCA 2979 (15 November 2019) and *Fair Work Ombudsman v Pulis Plumbing Pty Ltd & Anor* [2019] FCCA 3192 (15 November 2019).

16. In the same period between July 2009 and July 2019, the FWO's free tools, guides and resources that assist all workplace participants to understand their obligations and entitlements were in constant demand. In particular:

- the FWO answered more than 6.1 million enquiries from employees, employers and other representatives, providing tailored help and advice about workplace issues online and via the Fair Work Infoline and Small Business Helpline (importantly, callers can also access a free translating and interpreting service in their own language);
- the FWO's website www.fairwork.gov.au was visited nearly 117 million times; and
- online Award verification tools and pay calculators that help workplace participants understand entitlements, were accessed more than 32 million times.

17. The FWO's extensive suite of free online resources is increasingly popular. Website visits increased from 3.65 million in 2009-10 to nearly 18 million in 2018-19 (including more than a quarter of a million views in 2018-19 using the website's plug-in translator that, in addition to an extensive suite of in-language resources, allows users to select their preferred language). The pay calculators alone were accessed more than 4.55 million times in 2018-19 compared to just 108,000 times in 2009-10.

18. The FWO recognises that, in some circumstances, employees may not wish to identify themselves when raising concerns about workplace issues. As at December 2019, the community has provided anonymous information via the FWO's online anonymous report tool almost 55,000 times. This includes over 3,100 reports made in-language (16 languages other than English are available).

19. This information provides valuable intelligence used to inform the FWO's proactive compliance activities, a number of which have drawn public attention to concerning systemic and industry-wide practices. The FWO's reports have informed debate and influenced change around these important issues, including:

- identifying and addressing the drivers of non-compliance in the 7-Eleven network;
- inquiring into workplace arrangements on the Harvest Trail;
- inquiring into the procurement of cleaners in Tasmanian Supermarkets; and
- inquiring into the wages and conditions of people working under the 417 Working Holiday Visa Program.¹⁰

¹⁰ Inquiry reports are available at <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports>.

Responding to emerging challenges

Adapting and prioritising

20. Notwithstanding a strong track record of delivering outcomes for the community, the FWO recognises that the changing environment in which it operates demands regular reconsideration of its role and regulatory approach. In 2019, the recommendations and commentary arising from the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* and the Government's *Migrant Workers' Taskforce* presented a valuable opportunity for the FWO to re-examine and refine its compliance and enforcement priorities and posture.

21. Accordingly, the FWO updated its publicly available *Compliance and Enforcement Policy*¹¹ to increase its effectiveness in using all the compliance and enforcement tools at its disposal. One significant element of the change was a decision to significantly increase the FWO's use of compliance notices.¹² Compliance notices require persons who are reasonably believed to have breached their employment obligations to rectify those contraventions (including by undertaking the necessary wage calculations) and prove their compliance to the FWO. In practice, this allows the FWO to get underpayments back in the pockets of employees quickly, and to litigate against parties who ignore or fail to comply with the notices and continue to underpay workers. In the first six months of this financial year, the FWO issued 602 such notices resulting in more than \$3.4 million in unpaid wage recoveries, which is more than double the 274 notices issued for the whole of the preceding twelve-month period. The FWO has also commenced 20 litigations since July 2019 relating to employer failures to comply with compliance notices, which should leave no doubt about the FWO's expectations that such notices are to be taken seriously.

22. Also in 2019, the FWO for the first time publicly announced compliance and enforcement priorities, specifying the industries, cohorts and issues that the FWO will proactively focus on where significant and persistent non-compliance exists. These evidence-based priorities formally recognise areas where the FWO has identified an opportunity to have more impact by strategically allocating resources or undertaking comprehensive strategies across sectors to create sustainable behavioural change.

¹¹ FWO policies are available at <https://www.fairwork.gov.au/about-us/our-policies>.

¹² Section 716 of the Fair Work Act.

23. The FWO's 2019-20 priorities are:

- the Fast Food, Restaurants and Cafés and Horticulture sectors;
- supply chains and franchisors;
- sham contracting; and
- vulnerable workers, specifically migrant workers, young workers and the low paid.

24. In addition, the FWO will continue to prioritise matters that:

- are of significant public interest;
- demonstrate blatant disregard for the law or repeat offending;
- are of significant scale or impact on workers or the community; or
- present an opportunity to test unclear or new parts of the law.

25. Priorities for future years will continue to be announced annually after consultation with key stakeholders and based on the best evidence and intelligence available, to assist the FWO to target its work.

A shift towards large-corporate regulation

26. The employers that have typically required the most assistance from the FWO are those in Award reliant sectors or industries – often small to medium enterprises. This is not surprising, given that small businesses made up almost 94% of Australian businesses as at 30 June 2018,¹³ and in many cases do not have access to specialist human resources or payroll systems and advice common to larger enterprises.

27. Just as smaller businesses have a greater need for clear, inexpensive advice about their workplace obligations, they are also more likely to be non-compliant, either inadvertently or deliberately. Accordingly, FWO's compliance and enforcement resources have traditionally been focused on Award reliant sectors and industries, and assisting vulnerable cohorts such as Award-covered workers, young workers and migrant workers, and workers who have been exposed to deliberate exploitation.

28. Recently however, there has been a significant increase in the number of large corporate entities disclosing large and complex underpayments totalling tens of millions of dollars and affecting

¹³ Australian Bureau of Statistics, 8165.0 - ABS Counts of Australian Businesses, including Entries and Exits, June 2014 to June 2018.

thousands of employees, many of which involve contraventions of enterprise or collective agreements.

29. The scale of this non-compliance is extremely disappointing. Underpayments reported to the FWO by corporate entities have thus far ranged from \$1 million to upwards of \$300 million and the period of non-compliance for most disclosures spans multiple years, sometimes going well beyond the statutory limitation periods for which the FWO can litigate. The impact on employees is significant and business rectification costs are enormous.

30. Large corporate entities are generally well accustomed to seeking out and investing significant resources in advice and systems relating to risk, governance and corporate assurance programs. It is not through lack of capacity that these “payroll errors” have been occurring, and the issue demonstrates that, at best, Boards, CEOs and CFOs around the country have been failing to undertake due diligence to Fair Work Act compliance, notwithstanding their ability to ensure that other aspects of the business remain profitable.

31. Increasingly, each new large corporate disclosure of non-compliance has the effect of shifting the FWO’s focus further into regulating the non-compliance of large corporations – a focus not prioritised when the FWO’s powers, functions and funding were established in 2009.

32. The workplace regulator was given the title of “Ombudsman” in 2009. In the Explanatory Memorandum to the *Fair Work Bill 2008*, significant primacy was given to the educative and dispute resolution functions of the FWO as it was envisaged to operate:

Clause 682 – Functions of the Fair Work Ombudsman

2549. *The functions of the FWO are set out in this clause.*

2550. *The broad function of the FWO is to promote: harmonious and cooperative workplace relations and compliance with this Act (defined in clause 12 to include the regulations) and fair work instruments (defined in clause 12 to include modern awards, enterprise agreements and orders of FWA such as national minimum wage orders).*

2551. *A key aspect of this function is to assist employers, employees and organisations to understand and comply with their rights and obligations under this Bill and fair work instruments by providing education, assistance and advice to employees, employers and organisations. This may involve:*

- *providing general information (e.g., fact sheets, guides and other guidance materials);*
- *developing and implementing targeted education campaigns for a particular industry or class of employees (e.g., juniors, employees in hospitality, foreign workers);*
- *assisting parties to access ‘self-help’ remedies (e.g., by providing information about the small claims procedure); and*
- *responding to requests for advice or information (e.g., about the NES or a particular employee’s entitlements under a modern award).*

2552. *It is also a function of the FWO to monitor compliance, inquire into and investigate contraventions of this Bill and fair work instruments (paragraphs 682 (b) and (c)). Inspectors will be able to exercise a range of powers to determine compliance. Subdivision D of Division 3 of this Part sets out the powers that inspectors have and when those powers may be exercised.*

2553. ...

2554. *The functions of the FWO emphasise preventative compliance (e.g., through education and advice) and co-operative and voluntary compliance (e.g., through enforceable undertakings). However, in some circumstances it will be necessary for the FWO to enforce compliance more formally, through compliance notices or court proceedings.*

33. The FWO's current regulatory model still reflects this context, with most matters resolved through education, advice, co-operative and voluntary compliance rather than through statutory compliance and enforcement tools.

34. Like every labour inspectorate in Australia's history, and the Parliaments that created them, the FWO's model has assumed that people and businesses make mistakes and that the regulator should use its enforcement tools as a last resort. In addition to compliance and enforcement, core functions under the Fair Work Act include to educate, assist and guide employers, employees, outworkers and organisations as well as to promote and monitor compliance with workplace laws. Policing large corporate entities for systemic payroll non-compliance does not sit easily within this framework.

35. The penalty provisions available under the Fair Work Act since its introduction also support the view that wage underpayments were considered to be significantly less serious than misconduct by large corporations under other legislation. By way of example, the highest penalty available in the Fair Work Act for a company that breaches a minimum entitlement contravention (such as breach of the National Employment Standards, an Award or an enterprise agreement, etc.) is \$63,000.¹⁴ In contrast:

- under the *Competition and Consumer Act 2010* (Cth), regulated by the Australian Competition and Consumer Commission (ACCC), the maximum civil penalties for a company that breaches laws relating to restrictive trade practices or the *Australian Consumer Law* (for example unconscionable conduct or making false or misleading representations about goods or services) is the greatest of \$10 million; or three times the

¹⁴ Or \$630,000 if it can be demonstrated to be a "serious contravention" within the meaning of section 557B of the Fair Work Act, introduced as part of the 2017 Protecting Vulnerable Workers reforms.

value of the benefit received because of the contravention; or 10% of the company's annual turnover in the 12 month period leading up to the contravention;

- under the *Corporations Act 2001* (Cth), regulated by the Australian Securities and Investments Commission (ASIC), the maximum civil penalties for a company that breaches laws relating to directors/officers' duties, financial reporting requirements and financial services contraventions (such as insider trading or market manipulation) is the greatest of \$10.5 million; or three times the value of the benefit received or detriment avoided because of the contravention; or 10% of the company's annual turnover in the 12 month period leading up to the contravention, up to \$525 million; and
- under the *Banking Act 1959* (Cth), regulated by the Australian Prudential Regulatory Authority (APRA), the maximum civil penalties for an Authorised Deposit Taking Institution that breaches the Banking Executive Accountability Regime is \$10.5 million to \$210 million (depending on the size of the Authorised Deposit Taking Institution).

36. There have been more than 40 self-disclosures of non-compliance to the FWO by large corporations in the past 12 months alone. Many of the matters that have been disclosed involve hundreds or thousands of affected employees, a period of non-compliance of up to 10 years and hundreds of thousands or even millions of payroll records and other items of evidence to consider. Large corporate business structures can be complex, with networks of related entities, subsidiaries and trusts and multiple industrial instruments setting the relevant allowance, loadings and rates of pay.

37. Investigating and proving contraventions in such a setting is extremely complex. FWO officers must investigate and prove each employee's underpayment, pay period by pay period, often extending over the course of many years. Efforts to then achieve proportionate sanctions can be confounded by the structure of the maximum penalties available under the Fair Work Act, which are firstly limited by the number of different types of contraventions (e.g., different provisions of an Award) regardless of the size of the underpayment or the size of the offender. Further, the statutory course of conduct and double jeopardy provisions in the Fair Work Act, along with common law principles covering these issues, may further provide a mechanism to reduce available penalties for contraventions where they cover multiple employees or deal with similar conduct.

38. While this protects small and medium-sized businesses from excessive penalties for inadvertent errors, it can reduce the deterrent effect for large, well-resourced corporate entities.

39. While the FWO is occupied in dealing with companies that should have used their own considerable resources to get their payroll settings right, there are other aspects of the FWO's core work, relating to small businesses and vulnerable workers, advice and assistance, that are increasingly coming under pressure.

40. The FWO is therefore working on a comprehensive regulatory response to deal with corporate entities that self-disclose non-compliance. Further, Sandra Parker has recently written to the Chairs and CEOs of the top corporates operating in Australia to seek their assurance that they are taking their obligations as employers seriously, and are backing that commitment with appropriate resourcing and internal governance mechanisms to ensure the companies they represent are compliant with workplace relations laws.

41. In serious cases of underpayment, the community rightly expects that businesses meet a standard above baseline compliance with workplace law. Strong action is necessary to send a clear message of deterrence to all businesses. Taking matters to court will always be an active consideration, where it is in the public interest to do so. However, for the reasons set out earlier, under the current framework, the outcome of proceedings may leave that public interest unsatisfied. Public commentary suggests a misunderstanding of the penalty regime applicable to underpayments under the Fair Work Act, where it is the number of contraventions rather than the value of the underpayments that is most relevant to the penalty imposed.

42. Where appropriate, the FWO will require large corporate businesses to offer the FWO a court-enforceable undertaking to rectify all contraventions with interest, ensure systems are in place to avoid future non-compliance, and bear some additional cost, through contrition payments or other mechanisms, to ensure that underpaying workers is not considered the price of doing business. These enforceable undertakings will continue to be published on the FWO's website to ensure transparency and accountability.

Continuing to deliver

43. In spite of the emerging challenges set out in this submission, the FWO will continue to deliver for the Australian community. In the first six months of the 2019-20 financial year:

- the FWO's mobile-friendly website www.fairwork.gov.au has already been visited nearly 9.4 million times;
- there are now more than half a million total active subscribers who regularly rely on the FWO's employer newsletter, email and advice update services; and

- the FWO resolved more than 13,000 requests for assistance, returned more than \$34 million to 8,600 employees, and commenced 34 new litigations in the courts.

44. This is to say nothing of the significant investment the FWO continues to make into other important facets of its work including community engagement and outreach, educational resource development, and tailored communications campaigns.

45. The FWO will continue to refine its operational model and priorities to ensure that reliable and timely advice, education and compliance outcomes can continue to be delivered in the face of a rapidly changing regulatory environment.