



Australian Government

Fair Work OMBUDSMAN

414 La Trobe Street
Melbourne, VIC 3000

18 May 2017

Mr Patrick Hodder
Acting Secretary
Parliamentary Joint Committee on Corporations and Financial Services
patrick.hodder@aph.gov.au

Dear Mr Hodder

Answers to Questions on Notice from Senator Xenophon

On Friday 28 April 2017, the Fair Work Ombudsman (**FWO**) appeared, via teleconference, before the Parliamentary Joint Committee on Corporations and Financial Services to provide evidence to the Inquiry into Whistleblower protections in the corporate, public and not-for-profit sectors.

Please find attached the FWO's response to written questions on notice from Senator Xenophon, provided to the FWO on 5 May 2017.

Yours sincerely

Anthony Fogarty
Executive Director
Policy, Analysis and Reporting Branch
Fair Work Ombudsman



Question 1: *The committee has heard evidence from various witnesses regarding the merits or otherwise of incentives and rewards being offered to encourage potential whistleblowers to report malpractice (see in particular, Hansard from the hearing of 27 April 2017 in Melbourne). The committee understands that the FWO has an understanding with the Department of Immigration and Border Protection with respect to temporary work visa holders that report alleged breaches of the Fair Work Act to the FWO and who may themselves have also breached their visa conditions.*

- a. *Can the FWO explain how this arrangement with the DIBP works, what it involves, and whether it is on a formal basis?*
- b. *What other, if any, whistleblower protections is the FWO able to offer potential whistleblowers?*
- c. *In the FWO's experience, how important are incentives such as reduced liability (as distinct from monetary rewards) in encouraging greater reporting of breaches of the Fair Work Act by whistleblowers to the FWO?*
- d. *In the FWO's experience, would reduced liability for whistleblowers be likely to encourage whistleblowing by parties other than employees, for example, franchisees?*

Answer:

a. The FWO works closely with the Department of Immigration and Border Protection (DIBP). Our agencies share information, refer relevant matters and undertake joint activities, including through Taskforce Cadena and the Migrant Workers Taskforce.

Our agencies have signed a Memorandum of Understanding (MoU) that establishes an agreed framework for information sharing and referral of matters. The MoU is publically available and can be accessed on the FWO website at www.fairwork.gov.au/about-us/our-policies.

The agreement between FWO and DIBP in relation to migrant workers who report employment issues has occurred in the context of these existing information sharing arrangements.

To support and encourage migrant workers to report workplace issues, DIBP has agreed that it will generally not cancel temporary visas, detain or remove individuals from Australia where those individuals have:

- a work entitlement attached to their visa;
- been exploited; and
- reported their circumstances to the FWO.



This agreement is dependent on the visa holder committing to abide by their visa conditions in the future and there being no other basis for visa cancellation.

This arrangement was announced on 15 February 2017 by the Migrant Worker Taskforce. Information about the arrangements is available from the websites of both agencies:

- **FWO:** www.fairwork.gov.au/find-help-for/visa-holders-and-migrants
- **DIBP:** <http://www.border.gov.au/Trav/Work/Work/workplace-rights>

b. Persons who wish to make protected disclosures within the meaning of the *Fair Work (Registered Organisations) Act 2009* (FWRO Act) may do so to a member of the Staff of the Fair Work Ombudsman.

While not a statutory protection, the FWO provides a channel for members of the community to anonymously alert the FWO to potential non-compliance with workplace laws through our online anonymous report tool, launched on 11 April 2016.

As part of the Migrant Worker Taskforce the FWO is now building a new anonymous reporting tool, which will be tailored and marketed to migrant workers and which will be available in 16 languages. Importantly, the tool will help to assist people fearful of contacting Government agencies while also assisting Taskforce agencies to better understand the issues faced by migrant workers.

c. The FWO has limited experience with respect to whether incentives such as reduced liability increase the likelihood that whistleblowers will report non-compliance with workplace laws, noting that the agreement between the FWO and DIBP only came into effect in February this year.

Anecdotally we know that some workers may be hesitant to engage with the FWO on the record, including because they may be concerned about their visa or employment status. It is anticipated that the new anonymous reporting tool, being developed as part of the Migrant Worker Taskforce, will further enable the FWO to assist workers in that situation.

d. The FWO is unable in its experience to provide a comment on this question.



Question 2: *Several witnesses, including ASIC, have suggested that it would be preferable to incorporate all whistleblower protections in the private/corporate sphere into a single piece of legislation (harmonised but not necessarily uniform to reflect any differences between, for example, the Corporations Act and other relevant Acts such as the Fair Work Act). In the experience of the FWO, would the consolidation of whistleblower protections in a single Act for the corporate sphere assist the FWO in its work, for example with respect to ensuring employer compliance with the Fair Work Act?*

Answer:

The FWO does not have a view about whether whistleblower protections should be incorporated into a single piece of legislation.



Question 3: *Witnesses have expressed various views on when a whistleblower should attract protection and the criteria required to qualify for protection. For example, in evidence to the committee on 28 April 2017 in Canberra, the Australian Institute of Company Directors suggested that while it was preferential that a whistleblower protection scheme encourage internal reporting of malpractice or maladministration, a whistleblower should be able to report to an external regulator at the same time as, or instead of, reporting internally. Following on from this, a question also arises as to when a whistleblower should be able to disclose information to the media and attract protection.*

- a. *In the FWO's experience, if the FWO receives a report from a whistleblower who has not reported their concerns internally, is there a period of time during which it would be valuable for the FWO to commence investigations without the corporate entity necessarily being made aware of the disclosure by the media?*

Answer:

The FWO does not take a specific view as to whether such a time period would assist, as the circumstances of each investigation are unique. We note that in order to progress any investigation and to afford procedural fairness to all parties, it is typically necessary to engage with the subject of the allegations early in an investigation in any event.