



Australian Government

Fair Work OMBUDSMAN

GPO Box 9887
Sydney NSW 2001

2 May 2018

Mr Tim Watling
Committee Secretary
Senate Legal and Constitutional Affairs Committee

Dear Mr Watling

Response to Adverse Comment Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017

Thank you for your correspondence of 19 April 2018, in which the Senate Legal and Constitutional Affairs Committee invited the Fair Work Ombudsman (**FWO**) to respond to comment contained in the submission of Mr Kia Silverbrook to the above inquiry. The FWO does not object to the Committee publishing this response.

The FWO does not agree with much that Mr Silverbrook asserts in his submission, which largely draws from decisions of the Federal Circuit Court which have now been set aside, either in-whole or in-part, following successful appeals by the FWO to the Federal Court (see [Fair Work Ombudsman v Priority Matters Pty Ltd \[2017\] FCA 833](#)).

Following the FWO's successful appeals, Mr Silverbrook unsuccessfully sought special leave to appeal to the High Court. The proceedings have been now remitted to the Federal Circuit Court (differently constituted) for further hearing on a number of discrete issues, including the liability of Mr Silverbrook pursuant to section 550 of the *Fair Work Act 2009* (Cth) (**FW Act**). In the circumstances, it would be inappropriate for the FWO to comment in any great detail on individual assertions made in Mr Silverbrook's submission while proceedings are still before the Court.

Federal Circuit Court proceedings

By way of background, the FWO commenced five proceedings during 2013 and 2014 alleging various contraventions of the FW Act by five companies stemming from the non-payment of wages and entitlements to 43 employees. The proceedings also alleged Mr Silverbrook (in each of the five proceedings) and Ms Janette Lee (in one of the proceedings) were involved, within the meaning of s.550 of the FW Act, in the companies' contraventions.

In June 2016, the Federal Circuit Court found that Priority Matters Pty Ltd, Superlattice Solar Pty Ltd, Geneasys Pty Ltd, Silverbrook Research Pty Ltd and Mpowa Pty Ltd contravened workplace laws. The Court ordered more than \$1.15 million in back-payments (plus interest), and imposed \$115,000 in penalties as follows:

- Priority Matters Pty Ltd was ordered to back-pay 15 employees a total of \$452,998 (plus interest) and was penalised \$45,000;

- Superlattice Solar Pty Ltd was ordered to back-pay one employee \$55,969 (plus interest) and was penalised \$5,000;
- Mpowa Pty Ltd was ordered to back-pay 14 employees \$649,840 (plus interest) and was penalised \$65,000; and
- Penalties and back-pay orders could not be obtained against Geneasys Pty Ltd and Silverbrook Research Pty Ltd because the companies had been placed into liquidation.

The back-pay ordered was subsequently paid to the FWO for distribution to the affected employees.

The Court dismissed the FWO's allegations against Mr Silverbrook and Ms Lee. Although the FWO was successful against the corporate respondents (the employers), the Court made a costs order against the FWO.

Federal Court proceedings

In November 2016, the FWO appealed against parts of the Federal Circuit Court's decisions on liability, penalty and costs.

In July 2017, the Federal Court delivered its decision on the FWO's appeal (see [Fair Work Ombudsman v Priority Matters Pty Ltd \[2017\] FCA 833](#)). In summary, the Federal Court:

- set aside the findings of the Federal Circuit Court that Mr Silverbrook and Ms Lee were not involved, within the meaning of s.550 of the FW Act, in the companies' contraventions;
- set aside the findings of the Federal Circuit Court regarding the conduct and functions of the FWO, and as a result set aside the costs orders;
- upheld the Federal Circuit Court's findings of liability of the companies, by rejecting the entirety of Mr Silverbrook's cross appeal and other applications; and
- remitted the matter back to the Federal Circuit Court (differently constituted) for findings to be made on accessorial liability, declarations and penalty.

High Court proceedings

In August 2017, Mr Silverbrook and the other Respondents in the proceedings lodged applications seeking special leave to appeal to the High Court. In November 2017, the High Court refused special leave to appeal, dismissing the applications with costs in favour of the FWO (see [Priority Matters Pty Ltd & Anor v Fair Work Ombudsman \[2017\] HCASL 308](#)).

Following the dismissal of the special leave applications, the Federal Circuit Court has listed the proceedings for four days of further hearing in August 2018 on the liability of Mr Silverbrook and Ms Lee for their involvement, within the meaning of section 550 of the FW Act, in the employing companies' contraventions.

Office of Legal Services Coordination

Pursuant to its obligations under the *Legal Services Directions 2017*, the FWO has continually reported to the Office of Legal Services Coordination regarding allegations it has breached its obligations to act as a model litigant in this matter, and the steps taken in response to those allegations.

Yours sincerely

Janine Webster | Chief Counsel
Fair Work Ombudsman

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