

# Chapter 3

## Employment portfolio

3.1 This chapter summarises certain key areas of interest raised during the committee's consideration of additional estimates for the 2016-17 financial year for the Employment portfolio.

3.2 On 2 March 2017, the committee heard evidence from Senator the Hon Michaelia Cash, Minister for Employment, along with officers from the Department of Employment (the Department) and agencies responsible for administering employment and workplace policy, including:

- Fair Work Commission (FWC);
- Fair Work Ombudsman (FWO);
- Australian Building and Construction Commission (ABCC);
- Safe Work Australia;
- Workplace Gender Equality Agency (WGEA); and
- Asbestos Safety and Eradication Agency (ASEA).

3.3 On 30 March 2017, the committee held a spill over hearing. On this occasion the committee heard further evidence from Senator the Hon Michaelia Cash, Minister for Employment, along with officers from the Department of Employment and the Fair Work Commission, including its President, Justice Iain Ross.

### Fair Work Commission

3.4 The committee asked for an update on the approval of workplace agreements in the construction industry and how the Commission would cope with an influx of proposed agreements. Ms O'Neill, General Manager, advised that:

[w]e will continue to monitor the resources needed and make adjustments to the extent that we can. For example, rather than not being able to deal with the applications, it may lead to some increase in the timeliness within which agreements are approved, but that happens over time in the normal course of events.<sup>1</sup>

3.5 The committee inquired about the process for terminating workplace agreements. Ms O'Neill outlined various aspects of the process, including in what circumstances protected action would not be permitted and the mechanisms both parties may use to persuade the other to adopt proposed variations.<sup>2</sup>

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1 Committee Hansard, 2 March 2017, p. 9.

2 Committee Hansard, 2 March 2017, pp. 10–12.

3.6 Committee members inquired about investigations into the Australian Workers' Union's membership reporting.<sup>3</sup> Mr Enright informed the committee that the General Manager was conducting inquiries, and that if any irregularities were found, the FWC may commence action against a member or an official of a registered organisation in the Federal Court.<sup>4</sup>

3.7 There was examination of the application process for right-of-entry permits. In particular, information relating to the application of an individual who had a history of domestic violence was sought.<sup>5</sup> Mr Enright elaborated on the procedure for managing a non-routine application, such as the one in question, and on the safeguards that have been put in place to ensure applicants and those who sign off on applications are fit and proper people.<sup>6</sup>

3.8 There was discussion of the tests used by the FWC in assessing agreements for employees who have gone through a bargaining process, particularly the better-off-overall test. Ms O'Neill stated:

[i]t is very common in the fast food sector, in the retail sector and in many sectors affected, that agreements are negotiated where penalty rates are reduced either for a loaded rate or some other benefit.<sup>7</sup>

3.9 The committee sought clarification whether the better-off-overall-test was applicable to the workers who would be affected by the FWC's recent decision to reduce penalty rates. Ms O'Neill clarified that the test was not applicable because the decision related to the award, not to an individual agreement.<sup>8</sup>

3.10 There was examination of Justice Ross' involvement in the Victorian Country Fire Association's enterprise bargaining dispute with the United Firefighters' Union.<sup>9</sup> Justice Ross outlined the extensive correspondence, meetings and phone calls he had been party to in the lead-up to hearings conducted by the FWC.<sup>10</sup>

3.11 There was also discussion about the statutory retirement age and pensions of FWC members.<sup>11</sup> Justice Ross tabled a prepared statement, which detailed the retirement ages and entitlements of recently retired members, and paraphrased it for the committee.<sup>12</sup>

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3 *Committee Hansard*, 2 March 2017, pp. 13–17.

4 *Committee Hansard*, 2 March 2017, p. 17.

5 *Committee Hansard*, 2 March 2017, pp. 19–21.

6 *Committee Hansard*, 2 March 2017, pp. 20–21.

7 *Committee Hansard*, 2 March 2017, p. 30.

8 *Committee Hansard*, 2 March 2017, p. 31.

9 *Committee Hansard*, 30 March 2017, pp. 2–4.

10 *Committee Hansard*, 30 March 2017, pp. 3–8.

11 *Committee Hansard*, 30 March 2017, p. 8

12 *Committee Hansard*, 30 March 2017, pp. 8–9.

3.12 Committee members sought further information about FWC members' remuneration and pension entitlements, especially in relation to taxation concerns influencing a member's decision to retire before they are eligible for the maximum pension. Ms Leon, Secretary, undertook to provide relevant correspondence on notice.<sup>13</sup>

3.13 There was discussion about the appointment process for replacing senior members, particularly in relation to replacing Deputy President Acton with Commissioner Jones.<sup>14</sup> Justice Ross advised the Senator:

I did consider making an appointment purely based on seniority. That would have been perhaps the conservative and safe course to adopt. But I deliberately chose not to do so. I chose to make the appointment on merit. Commissioner Jones had had 10 years experience in litigation at the bar, and this was a role that called for expertise in case management of litigation. I was also conscious of the fact that, if I had gone on seniority, a male would have been appointed, which would have given rise to a predominantly male based leadership group within the organisation. The subsequent performance of the commissioner in her role vindicated my decision to appoint her. I have continued a pattern of appointment based on merit, not seniority.<sup>15</sup>

3.14 Further to this, the committee examined the responsibilities of senior members. Justice Ross elaborated on the more onerous aspects of being a senior member, including presiding over a full bench, hearing appeals, and presiding over particular panels, such as the termination of employment panel.<sup>16</sup>

## **Fair Work Ombudsman**

3.15 Senator McKenzie expressed her appreciation for the FWO's engagement with farmers,<sup>17</sup> which was discussed during the Supplementary round.<sup>18</sup>

3.16 Committee members sought information regarding activities arising from the FWO's 2015 national construction campaign report on apprentices.<sup>19</sup> Ms McAlary-Smith, Executive Director, Proactive Compliance and Regulation, detailed the FWO's actions, including the development of educational resources and social media campaigns, and undertook to provide more information about enforcement actions on notice.<sup>20</sup>

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13 *Committee Hansard*, 30 March 2017, pp. 15–16.

14 *Committee Hansard*, 30 March 2017, p. 9.

15 *Committee Hansard*, 30 March 2017, p. 9.

16 *Committee Hansard*, 30 March 2017, p. 23.

17 *Committee Hansard*, 2 March 2017, p. 33.

18 *Committee Hansard*, 19 October 2016, p. 155.

19 *Committee Hansard*, 2 March 2017, p. 33.

20 *Committee Hansard*, 2 March 2017, pp. 33–34.

3.17 There was examination of the transfer of functions from the FWO to the Australian Building and Construction Commission. The Ombudsman, Ms James, tabled correspondence in relation to her discussions with the ABCC Commissioner.<sup>21</sup>

3.18 Committee members pursued questions relating to the referral of complaints to the ABCC by the FWO.<sup>22</sup> Ms James and Mr Campbell, Deputy Fair Work Ombudsman, explained the delineation of each agency's functions,<sup>23</sup> and reiterated their commitment to ensuring the parliament's intentions in re-establishing the ABCC were fulfilled.<sup>24</sup>

3.19 Ms James was asked about the recent decision of the Fair Work Commission on penalty rates. Ms James advised that the FWO's priority in the period after this decision was to update their online pay tools.<sup>25</sup>

3.20 The funding of working women's centres was examined, in particular the rationale underpinning decisions in the new funding program and why the Queensland Working Women's Centre had not received funding. Ms James replied that the criteria for awarding funding had changed and that, in the view of the FWO, an organisation that provided services for employees in the horticultural sector had a stronger application.<sup>26</sup> Mr O'Shea, Executive Director, Migrant Worker Strategy and Engagement, also detailed the organisations that made successful funding applications, and the FWO and the Minister agreed to investigate whether the Queensland Working Women's Service was facing closure as a result of not receiving funding.<sup>27</sup>

3.21 There was also mention of allegations of underpayment of employees by Domino's. The FWO undertook to provide information about their ongoing investigations on notice.<sup>28</sup>

3.22 There was discussion about the FWO's contract with the Transport Workers Union and the Australian Road Transport Industrial Organisation to develop an app. Ms James stated that ultimately the app was never provided and that this was a 'suboptimal outcome' for taxpayers.<sup>29</sup> Ms James agreed to provide further information on notice about the performance of the parties' contractual obligations.<sup>30</sup>

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21 *Committee Hansard*, 2 March 2017, p. 36.

22 *Committee Hansard*, 2 March 2017, p. 49.

23 *Committee Hansard*, 2 March 2017, p. 50.

24 *Committee Hansard*, 2 March 2017, p. 51.

25 *Committee Hansard*, 2 March 2017, p. 38.

26 *Committee Hansard*, 2 March 2017, p. 39.

27 *Committee Hansard*, 2 March 2017, p. 44.

28 *Committee Hansard*, 2 March 2017, p. 41.

29 *Committee Hansard*, 2 March 2017, p. 45.

30 *Committee Hansard*, 2 March 2017, p. 46.

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3.23 Committee members probed the FWO about their role in the Migrant Workers' Taskforce.<sup>31</sup> Mr O'Shea and Ms James provided an overview of the taskforce's funding and work. The FWO committed \$50 000 to the taskforce, and are creating an online tool which will be translated into 15 languages and which will allow migrant workers to anonymously report exploitation.<sup>32</sup>

### **Australian Building and Construction Commission**

3.24 The Commissioner, Mr Hadgkiss, made an opening statement in which he thanked Ms James and the rest of the Fair Work Ombudsman for their assistance in transitioning functions under the ABCC Act.<sup>33</sup>

3.25 There was examination of the ABCC's timeframes for assessment of enterprise agreements in the commercial construction sector.<sup>34</sup> Ms Cato, National Manager Building Code, informed the committee that the ABCC was building the capacity of the assessment team and may require additional staff. Furthermore, Ms Cato stated that the ABCC was investigating an appropriate model for computerised assessment,<sup>35</sup> and that they were also in the process of engaging lawyers from the firm Alternative Legal Services to assist with the enterprise agreement approval process.<sup>36</sup>

3.26 Committee members inquired about the strength of the Building Code's (the Code) provisions for the protection of sub-contractors in the event of a building company becoming bankrupt.<sup>37</sup> Mr Hadgkiss advised that the new Code had more protections than the previous Code, and Ms Cato elaborated on the new Code's protections for security of payments.<sup>38</sup>

3.27 There was discussion about the percentage of prosecutions relating to the Construction, Forestry, Mining and Energy Union (CFMEU). Mr Hadgkiss informed the committee that the CFMEU was involved in 57 out of 62 cases, and that 110 CFMEU officials were facing 1078 contraventions in the court system.<sup>39</sup>

3.28 Committee members pursued questioning relating to Mr Hadgkiss's salary and allowances.<sup>40</sup> Mr Hadgkiss and Minister Cash emphasised that Mr Hadgkiss's salary was set by an independent arbiter.<sup>41</sup> There was much discussion about Mr Hadgkiss's

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31 *Committee Hansard*, 2 March 2017, p. 51.

32 *Committee Hansard*, 2 March 2017, p. 52.

33 *Committee Hansard*, 2 March 2017, p. 55.

34 *Committee Hansard*, 2 March 2017, pp. 57–62.

35 *Committee Hansard*, 2 March 2017, p. 60–61.

36 *Committee Hansard*, 2 March 2017, p. 62.

37 *Committee Hansard*, 2 March 2017, p. 64.

38 *Committee Hansard*, 2 March 2017, p. 65.

39 *Committee Hansard*, 2 March 2017, p. 69.

40 *Committee Hansard*, 2 March 2017, pp. 68, 72–81.

41 *Committee Hansard*, 2 March 2017, pp. 68–69.

fuel allowance. Mr Hadgkiss advised that he sometimes drives to interstate meetings rather than flying, and in these cases he cannot make a claim for petrol expenses that is more expensive than the cost of an airfare.<sup>42</sup>

3.29 Inquiries were raised about Mr Hadgkiss's diary keeping arrangements. Mr Hadgkiss advised that he did not keep a formal diary, but that his appointments were listed in an Outlook calendar. After much discussion, he agreed to attempt to make the calendar available on notice.<sup>43</sup>

### **Safe Work Australia**

3.30 Committee members questioned the agency's role in investigating the death of a worker at the Royal Adelaide Hospital site in 2014. Ms Baxter informed the committee that the matter came under the responsibility of state regulators and she was unable to provide comment.<sup>44</sup>

3.31 The committee also questioned Safe Work Australia's oversight role in relation to the work health and safety regulations of other states. Mr Edwards, the Federal Safety Commissioner, advised the committee that his office approves the work health and safety practices of any builder or construction worker that wishes to undertake Commonwealth funded work. In addition, Mr Edwards detailed his investigative role, which 'is to engage with the company at the highest levels' and to 'look at the work that was being undertaken at the time, looking into the company's safety systems around that work that was being undertaken and their practices to see if there are any opportunities to work together to improve them.'<sup>45</sup>

### **Workplace Gender Equality Agency**

3.32 Senator Marshall asked: '[w]ould you characterise the work done in female dominated industries, such as child care or health work, as undervalued?'

3.33 Ms Paterson, Advice and Reporting Executive Manager, agreed that such work was undervalued, and Minister Cash added:

[t]here has to be a massively concerted effort on getting more males into female dominated roles, because of what the evidence shows, which is that, if you get males into female roles, there is the resultant effect of a lift in salary. That is why, when we look at a number of the government's priorities, for example investment in STEM—which is, obviously, science, technology, engineering and mathematics—a lot of that is driven by knowing that the higher-paying occupations need women, but at the same time you do need to focus on getting more men into those other roles.<sup>46</sup>

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42 *Committee Hansard*, 2 March 2017, pp. 72, 74–76.

43 *Committee Hansard*, 2 March 2017, pp. 82–88.

44 *Committee Hansard*, 2 March 2017, p. 110.

45 *Committee Hansard*, 2 March 2017, p. 110.

46 *Committee Hansard*, 2 March 2017, p. 113.

3.34 The effectiveness of the WGEA's campaigns to improve gender pay equity was examined. Ms Paterson and Ms Clifford, Operations Executive Manager, provided an overview of their campaign work, noting that Equilibrium Man was a particular success.<sup>47</sup>

3.35 Ms Paterson also noted that targets are often a driver of change towards pay equity within organisations, particularly in relation to women attaining leadership positions:

...for an employer to be an employer of choice for gender equality they have to have in place a target for women in leadership as well as women on their boards. As part of that process we interview CEOs to make sure that, from the top, gender equality is driven through the culture. Certainly those CEOs say that targets, on numerous occasions, have been the sole driver around not only women in leadership positions but also the pay gaps within their organisations. They have reached their target ahead of the endpoint of the target. It has been a key factor in driving that change.<sup>48</sup>

### **Asbestos Safety and Eradication Agency**

3.36 The committee asked ASEA for an update regarding efforts to combat the importation of products containing asbestos.<sup>49</sup> The CEO, Mr Tighe, detailed the measures in place across the whole of government, which include:

- ASEA and the Australian Border Force cooperating with each other and with stakeholders in the industry to apply a zero tolerance policy in relation to asbestos-containing materials;
- an interdepartmental committee looking at the issue; and
- the broadening of the terms of reference of a Senate Economics Committee inquiry to include the issue.<sup>50</sup>

3.37 There was also discussion of specific cases, such as the discovery of products containing asbestos at the Fiona Stanley Hospital site in Perth. Mr Tighe suggested that case involved a supply chain issue, and that a holistic approach was needed to prevent future incidents.<sup>51</sup>

3.38 Committee members asked ASEA about its survey work in relation to stakeholders and the agency's operational plan. Mr Tighe detailed work done in these areas and undertook to provide further information on notice.<sup>52</sup>

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47 *Committee Hansard*, 2 March 2017, p. 115.

48 *Committee Hansard*, 2 March 2017, pp. 115–116.

49 *Committee Hansard*, 2 March 2017, pp. 116.

50 *Committee Hansard*, 2 March 2017, pp. 116–117.

51 *Committee Hansard*, 2 March 2017, p. 117.

52 *Committee Hansard*, 2 March 2017, p. 119.

## Department of Employment

### *Outcome One*

3.39 Committee members inquired about the safeguards and assurance monitoring for the PaTH program.<sup>53</sup> Ms Leon elaborated about the safeguards in relation to the 'recycling' of program participants:

[w]e monitor the use of the program by employers. We also put in place up-front requirements on them that are meant to draw to their attention the significance of what they are agreeing to and the requirements they have to fulfil in order to participate in the program, including signing an agreement that they are not displacing existing workers in order to take on the intern and that they are taking on the intern with a reasonable prospect of there being a job at the end of it... if there appears to be a pattern of an employer taking on interns and then not offering them a job at the end then that employer would no longer be permitted to use the program.<sup>54</sup>

3.40 Mr Hehir, Deputy Secretary, also advised that young people who are participating in internships will be covered under insurance taken out by the Department,<sup>55</sup> however Ms Leon was unable to confirm whether the Department's insurance would result in an intern being better or worse off under the Department's scheme than if they were covered under a state or territory scheme because the outcomes depend on the unique circumstances of each case.<sup>56</sup>

3.41 The committee investigated matters relating to the safety of Work for the Dole sites. The Senator raised the issue of a Work for the Dole participant who was potentially exposed to asbestos at a site in Adelaide.<sup>57</sup> Ms Leon informed him that an investigation had taken place which confirmed that the material was asbestos, and that the Work for the Dole activity at the site had ceased.<sup>58</sup> Committee members asked further questions about a safety audit of all the sites conducted by Ernst and Young.<sup>59</sup> Ms Leon assured the Senator that most of the sites deemed non-compliant had minor issues that could be rectified with little difficulty, but acknowledged that work had to be stopped at two sites because of safety concerns arising from the audit.<sup>60</sup>

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53 *Committee Hansard*, 2 March 2017, p. 136.

54 *Committee Hansard*, 2 March 2017, p. 136.

55 *Committee Hansard*, 2 March 2017, p. 137.

56 *Committee Hansard*, 2 March 2017, pp. 138–139.

57 *Committee Hansard*, 30 March 2017, p. 24.

58 *Committee Hansard*, 30 March 2017, p. 25.

59 *Committee Hansard*, 30 March 2017, p. 28.

60 *Committee Hansard*, 30 March 2017, p. 28.

3.42 Committee members inquired into the release of the report into the death of a Work for the Dole participant. Minister Cash and Ms Leon advised that the report had not been released to avoid prejudging the outcome of ongoing inquiries.<sup>61</sup>

3.43 There was examination of the effectiveness of the Work for the Dole program in moving participants off welfare and into employment. Minister Cash informed the Senator that 'the point of Work for the Dole is not to get an employment outcome as such...[i]t is an activation activity.'<sup>62</sup> Ms Leon reinforced this point, advising the committee: '[a]s the minister says, the principal purpose of Work for the Dole is around activation of jobseekers, and the valuations that we have done indicate that it is very effective in that respect and in increasing their confidence and motivation to get a job.'<sup>63</sup>

3.44 Committee members also sought information relating to the incorrect disposal of confidential records by Sarina Russo, an agency that is contracted under the Jobactive program. Mr Hehir advised that an investigation had taken place, and the Department was satisfied it was not a systemic error so a financial penalty was not applied. The agency was however required to improve their practices in this area.<sup>64</sup>

### ***Outcome Two***

3.45 Committee members pursued questions about the progress of establishing the Registered Organisations Commission and appointment of a Commissioner. Legal Counsel, Mr O'Sullivan, advised that the position had been advertised and that a merit selection process was underway.<sup>65</sup> In addition, Ms Leon informed the committee that, even though the Registered Organisations Commission will be within the Fair Work Ombudsman, '[t]here will not be any reduction in services. It is simply a transfer to the Fair Work Ombudsman of the functions and resources that go with those functions.'<sup>66</sup>

3.46 Senator Cameron also inquired about staffing arrangements to support the Registered Organisations Commission. Ms Anderson, Branch Manager, Workplace Relations Policy Group, advised the committee that:

...the process of a machinery of government is basically that any staff that are working on that function transfer with that role. Through negotiations between the Fair Work Commission and Fair Work Ombudsman they have identified 18 ASL, but 16 people have been identified out of that branch to follow the work of Registered Organisations Commission.<sup>67</sup>

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61 *Committee Hansard*, 30 March 2017, p. 27.

62 *Committee Hansard*, 30 March 2017, p. 29.

63 *Committee Hansard*, 30 March 2017, p. 29

64 *Committee Hansard*, 30 March 2017, p.34.

65 *Committee Hansard*, 2 March 2017, p. 120.

66 *Committee Hansard*, 2 March 2017, p. 120.

67 *Committee Hansard*, 2 March 2017, p. 121.

3.47 There was also considerable discussion about the Department's response to the Fair Work Commission's decision that weekend penalty rates be reduced. Dr Morehead spoke about measures to protect workers' take home pay,<sup>68</sup> and advised that the FWC's reasoning for the decision was because 'of the concept of disutility of working on a Sunday.'<sup>69</sup>

3.48 The committee also examined the potential impact of a reduction in penalty rates on women.<sup>70</sup> Dr Morehead advised there was no evidence before the FWC that a reduction in penalty rates would disproportionately affect women.<sup>71</sup>

**Senator Bridget McKenzie**

**Chair**

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68 *Committee Hansard*, 2 March 2017, pp. 122–123.

69 *Committee Hansard*, 2 March 2017, p. 125.

70 *Committee Hansard*, 2 March 2017, p. 128.

71 *Committee Hansard*, 2 March 2017, p. 130.