



# Fair Work

## OMBUDSMAN

Level 14, 414 La Trobe Street  
MELBOURNE VIC 3000

Committee Secretary  
Senate Education and Employment Legislation Committee  
PO Box 6100  
Parliament House Canberra ACT 2600  
[eec.sen@aph.gov.au](mailto:eec.sen@aph.gov.au)

Dear Committee Secretary,

Thank you for the opportunity to make a submission to the Senate Education and Employment Legislation Committee (the Committee) Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (the Bill).

The Fair Work Ombudsman (FWO) welcomes the Government's October 2022-23 Federal Budget announcement of additional agency funding of \$75.2 million and 86 average staffing level over four years, to support the FWO to implement the measures in the Bill.

This funding comprises \$69.9 million to more comprehensively regulate the *Fair Work Act 2009* (Cth) (FW Act) in the commercial building and construction industry, \$3.1 million to implement the express prohibition on workplace sexual harassment in the FW Act, and \$2.2 million to support small businesses understand and implement the newly legislated entitlement to 10 days of paid family and domestic violence leave.

### Overview of the role of the FWO

The FWO is an independent statutory office that provides education, assistance and advice about Australian workplace laws as prescribed under the FW Act and, where appropriate, impartially enforces those laws.

The FWO's functions include: promoting harmonious, productive and cooperative workplace relations through education, advice and assistance; monitoring compliance with workplace laws; inquiring into and investigating breaches of the FW Act; and taking appropriate enforcement action when necessary.

The FWO has a nationwide presence with a network of 22 offices located in all capital cities and 14 regional areas. Since the agency's establishment in 2009, the FWO has recovered more than one billion dollars in unpaid entitlements for nearly 639,000 employees, completed over 317,000 disputes and more than 50,000 proactive audits, and commenced 726 litigations.

The FWO also provides an extensive range of free information, tools and resources to help workplace participants understand their workplace rights and obligations. Our website includes professionally translated in-language resources available in over 30 languages and an automated translation plug-in tool. Translation and interpreter services are also available for conversations with FWO staff. Since 2009, the FWO's website has been visited more than 181 million times and advice and information on workplace rights and obligations been provided in response to 6.5 million phone calls and 826,000 digital enquiries.

In undertaking its functions, the FWO works closely with a wide range of stakeholders including employees, employers, their organisations and representatives, the community and relevant public sector agencies including other regulators.

### **Proposed changes to the FW Act**

As the national workplace relations regulator, the FWO supports workplace participants to understand their workplace rights and obligations through the provision of practical information and advice. In accordance with this function, assuming passage of the Bill, the FWO would engage with stakeholders to ensure the new workplace rights and obligations in the Bill are understood and applied. The FWO's online educational and advice materials would also be updated and promoted to increase workplace participant awareness of the changes.

The Bill would introduce a range of new or expanded civil remedy provisions, which the FWO would have a role in enforcing. Some of these would amend existing civil remedy provisions to expand their application, and others would add new contraventions capable of being enforced by the FWO. This includes:

- New restrictions on pay rates that can be included in job advertisements.
- The General Protections in Part 3-1 of the FW Act would be expanded to protect employees from adverse action because they have asked about, shared, or chosen not to share, information related to remuneration. Employers would also be prohibited from including or enforcing clauses in contracts of employment that are inconsistent with these new protections.
- A new guarantee of entitlements available in certain circumstances where an enterprise agreement has been terminated.
- New limitations on the use of fixed term contracts.

A further expansion of the FWO's role would include publishing a 'Fixed Term Contract Information Statement' (the **Statement**) containing information about the fixed term contracts changes and new process for disputes. Employers would be required to provide the Statement to employees commencing employment by way of a fixed term contract. Failing to do so would attract a civil penalty, which the FWO would be able to enforce.

One of the FWO's current functions is to promote and enforce compliance with orders of the Fair Work Commission (**FWC**). The Bill would include new types of matters in which the FWC may make orders that the FWO could enforce. For example, the FWC would have an expanded role in resolving disputes about

requests for flexible work arrangement, including the power to make a range of specified orders. Similarly, measures that introduce an express prohibition of workplace sexual harassment (giving effect to Recommendation 28 of the Respect@Work Report), would provide a new FWC dispute resolution framework including the ability to make orders to stop sexual harassment and orders for compensation<sup>1</sup>.

The FWO will continue to work closely with the FWC to ensure processes are clear and efficient. The \$3.1 million allocated to the FWO to implement the express prohibition on workplace sexual harassment would support the FWO's education and compliance functions in this respect.

### **Regulation of the commercial building and construction industry**

The Bill would give effect to the Government's commitment to abolish the Australian Building and Construction Commission (**ABCC**).

From early 2017, the FWO and ABCC operated under an arrangement, facilitated by an exchange of letters, through which the two agencies managed the overlapping FW Act jurisdiction in the commercial building and construction industry. Under this arrangement, compliance and enforcement of the FW Act in the commercial building and construction industry rested exclusively with the ABCC.

Following the introduction of the Bill and the accompanying allocation of additional funding to the FWO in the 25 October Budget to more comprehensively regulate the FW Act in the commercial building and construction industry, I wrote to the ABC Commissioner, Mr Stephen McBurney, to rescind the arrangement with effect from 10 November 2022. From this date, the ABCC's role in enforcing the FW Act transferred to the FWO, with the FWO assuming responsibility for new investigations involving alleged FW Act contraventions across the commercial building and construction industry, including underpayments of wages and entitlements, sham contracting and general protections.

The rescission does not extend to the ABCC's responsibility for carriage of existing litigation matters, which would remain the exclusive responsibility of the ABCC until commencement of the relevant provisions in the Bill (see items 323 and 324 in Part 3 of Schedule 1).

The FWO's approach to regulating the commercial building and construction industry will be guided by our strategic priorities and publicly available Compliance and Enforcement Policy, in the same way as we regulate all other industries. This includes assessing public interest and deterrence considerations in the use of public resources.

The FWO has already begun engaging with the commercial building and construction industry, including by providing a number of dedicated online resources to support the industry. I have also written to industry stakeholders, including both employer and employee organisations, providing information on the role of the FWO and the recent changes.

Following the Government's announcements to abolish the ABCC, the FWO began a process to assist those ABCC staff looking for other roles with the FWO prior to the abolition of the ABCC. All ABCC staff have had

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<sup>1</sup> The FWO notes that only a person affected by a contravention of an order for compensation made by the FWC in dealing with a sexual harassment dispute may commence court proceedings to enforce that order.

the opportunity to apply for, and be considered for, FWO roles through an expression of interest process and the FWO formally commenced transitioning staff following the confirmation of additional resources through the Budget on 25 October 2022.

So far, 16 staff with skills aligned with the FWO's role have either taken up a role with the FWO or will begin shortly, by way of an agreed transfer under section 26 of the *Public Service Act 1999* (Cth). A significant number of ABCC staff took other opportunities or are not seeking to transfer to the FWO. Recruitment activities are underway to fill remaining vacancies, to bolster the number of Fair Work Inspectors and legal staff to support the FWO's inspectorate.

With the additional funding the FWO has received, the agency has restructured our operations functions to ensure we deliver the best service to the community. The FWO has established a Corporate and Industrial Compliance Group by expanding the remit and resourcing of the FWO's Large Corporates Branch to include industrial matters, such as industrial action and freedom of association related protections, along with its current focus on large corporate and university matters.

The Large Corporates Branch was set up with funding from the Mid-Year Economic and Fiscal Update 2020-21, and since its establishment the FWO has commenced litigation against Coles Supermarkets Pty Ltd<sup>2</sup>, Commonwealth Bank of Australia and Commonwealth Securities Limited<sup>3</sup>, Woolworths Group Limited and Woolworths (South Australia) Pty Limited<sup>4</sup> and the University of Melbourne<sup>5</sup>, signed enforceable undertakings with the University of Newcastle and Charles Sturt University<sup>6</sup> and recovered \$279 million from large corporates in 2021-22.

Wages and conditions matters in the commercial building and construction industry, including sham contracting, that do not involve large corporates, will continue to be undertaken by the FWO's existing Compliance and Enforcement Group, which is highly experienced in building related matters from our work in the domestic building sector.

### **Registered Organisations Commission (ROC)**

The Bill would also give effect to the Government's commitment to abolish the ROC and transfer its regulatory responsibilities to the General Manager of the FWC. While the FWO and the ROC are separate statutory offices that are operationally independent of each other, the two offices are one entity under the *Public Governance, Performance and Accountability Act 2013*. The FWO will therefore work closely with the Government to facilitate changes relating to the ROC and its functions.

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<sup>2</sup> <https://www.fairwork.gov.au/newsroom/media-releases/20211202-coles-media-release>

<sup>3</sup> <https://www.fairwork.gov.au/newsroom/media-releases/2021-media-releases/october-2021/20211011-cba-litigation-media-release>

<sup>4</sup> <https://www.fairwork.gov.au/newsroom/media-releases/2021-media-releases/june-2021/20210618-woolworths-litigation-media-release>

<sup>5</sup> <https://www.fairwork.gov.au/newsroom/media-releases/2022-media-releases/august-2022/20220811-uni-of-melb-litigation-media-release>

<sup>6</sup> <https://www.fairwork.gov.au/newsroom/media-releases/2022-media-releases/august-2022/20220830-newcastle-university-and-charles-sturt-university-eu-media-release>

### **Concluding remarks**

The FWO is monitoring the progress of the Bill through the Parliament to ensure the agency is well placed to support Australian workplaces navigate the changes. This would include working closely with stakeholders to assist employees, employers and other workplace participants to understand and comply with their new rights and obligations.

We trust the information included in this submission is of assistance to the Committee. For further communications between the Committee and the FWO, you are welcome to contact Mr Anthony Fogarty, Executive Director of Policy, on

Yours sincerely,

Sandra Parker PSM

**Fair Work Ombudsman**

14 November 2022