

## Speech to the Australian Labour Law Association – 10 July 2023

Good morning, I'm Sandra Parker. Before I begin, I would like to acknowledge the Traditional Owners of the land on which I am presenting from today, the Wurundjeri People of the Eastern Kulin Nation, and also the traditional owners of the lands on which you're all joining us from, and pay my respect to Elders past, present and emerging.

It's great to be back speaking with the Australian Labour Law Association, this time to reflect on my experience as the Fair Work Ombudsman. I was appointed Fair Work Ombudsman in July 2018 for five years. Earlier this year in February, I advised Minister Burke that I had decided not to seek reappointment. This means my five-year term ends on Friday.

Last week, Minister Burke announced that Anna Booth has been appointed as the next Fair Work Ombudsman. I'd like to take this opportunity to publicly congratulate Ms Booth and wish her all the best in the role.

Before my appointment, I held the role of Deputy Secretary for Workplace Relations at the Department of Employment. Prior to this I was head of the Policy team in workplace relations under then Minister for Employment and Workplace Relations Julia Gillard and led the policy development and stakeholder consultations for the Fair Work Act.

I also led negotiations with individual states on the referrals of their workplace relations powers, and I led the logistics work that established Fair Work Australia (as it was then called) and the Fair Work Ombudsman (FWO), under the Fair Work Act. I am very proud of this work and I was delighted when I was appointed to be Fair Work Ombudsman as it felt like it was a good fit for my policy knowledge, experience and skills.

Since its inception, the FWO has played a critical role in the IR system, ensuring workers are treated fairly and there is a level playing field for business. As an independent regulator, the FWO has to approach its role impartially and to be effective and to ensure ongoing community confidence, this independence must be fiercely protected.

Having an independent and impartial regulator is a critical balancing factor in the workplace relations regulatory framework. We absolutely welcome referrals of intelligence from stakeholders but the FWO cannot allow itself to get pulled into policy debates, or to be required to consult a particular stakeholder on its approach to a specific investigation, how an Enforceable Undertaking is negotiated or how a litigation is handled.

The Fair Work Act is very specific about the kinds of directions we can be given about how the FWO completes its work. That power rests with the Minister. Formal directions to the FWO can only be general in nature and must occur through the issuing of a legislative instrument. This ensures greater transparency and parliamentary oversight.

I know there will always be different views in the community about what the FWO should be doing more of, or less of, and how we should go about our work, but I am confident that overall, we are seen as fair and impartial. I am extremely proud of what the FWO has delivered for workers and the community during my term, often during challenging times.

We have collectively implemented important reforms and enabled the FWO to deliver high quality assistance, education, compliance and enforcement outcomes for workplace participants across the nation, with a particular focus on the most vulnerable or at risk.

During my time as the Fair Work Ombudsman, recoveries of wages and the number of workers back-paid have significantly grown year-on-year, to a record of \$532 million in the 2021-22 financial year. We are still working through the results for 2022-23, but it looks like we will see another significant amount recovered for workers.

Between when I began in the role and the end of the March quarter this year, we have returned over a billion dollars to more than 600,000 employees and fielded enquiries from 1.7 million workers and businesses regarding their entitlements and obligations.

We have made a significant adjustment from being largely a small and medium business regulator to include the corporate sector. In the past three and a half years we have investigated more than 100 large corporates and universities, leading to litigation against the Commonwealth Bank, Coles, Woolworths, and the University of Melbourne. We have also accepted Enforceable

Undertakings from Crown, Qantas, Westpac, David Jones, and the University of Sydney, to name a few.

These are incredibly impressive results for a regulator that was perhaps once viewed predominantly as a small and medium size business regulator. I commend and thank my staff for their willingness to embrace the change needed to rise to these challenges and help shift the agency from being a regulator whose approach primarily focused on dispute resolution and mediation, to one that takes a much firmer approach.

When I started in the FWO, less than 5% of our matters were resolved through compliance and enforcement. This is now around 20%. It includes an increase in litigation from 23 matters in my first year, to 137 last year in 2021-22.

I consider that this change was needed because the public interest was shifting as I started in the role. There were high profile media exposés of corporate sector and franchise networks ‘ripping off’ of workers, the notion of ‘wage theft’ started to gain momentum in the community, and there was growing concern about migrant worker exploitation. In this context there was criticism of the FWO for focusing more on education and mediation than compliance and enforcement.

I’m really proud of the fantastic work across the FWO to respond to these issues and I’d like to talk about that in some detail today.

### **The perfect storm**

I think it’s useful to reflect on what was going on in the workplace relations landscape in the early days of my tenure. I have referred to this previously as the “perfect storm”. At the time, there were claims in the media and on social media that the FWO was toothless, and there was pressure building for decisive action in response to pay scandals engulfing high profile employers.

This is probably best illustrated by the incredibly strong, and ongoing reaction to George Calombaris underpaying his workers in Melbourne – he became a symbol of everything that the community thought was wrong about employers’ sense of privilege and attitude towards their workers. Wage theft as a term resonated with the community and it really changed the view of how employers should be regulated.

Around the same time, there was increased scrutiny of regulators in the wake of recommendations handed down by the Banking Royal Commission, which highlighted the problems with regulators being too soft or 'friendly' with their regulated community.

The phrase 'why not litigate' gained traction and reflected the community view that unscrupulous employers seemed to be getting away with unacceptable behaviour with a 'slap on the wrist' from regulators. Every regulator asked itself the question – have we got our regulatory posture right? Does it reflect the current public interest?

And in the world of workplace relations, the Report from the Migrant Workers' Taskforce, chaired by Professor Allan Fels, made wide ranging recommendations, including that the FWO was not using its regulatory tools effectively and needed to 'toughen up' its approach to compliance and enforcement. It also recommended an external review of the FWO.

One of my first actions on being appointed as the Fair Work Ombudsman was to commission an independent capability review of the agency. It was led by the former head of the Tax Office in New Zealand, and former Deputy Australian Taxation Commissioner, David Butler. David had also led many capability reviews of New Zealand public sector agencies so was highly qualified to do our review.

He made a series of recommendations about strengthening the FWO's compliance and enforcement posture, and aligning the FWO with community expectations of what a modern workplace regulator should be. We implemented every recommendation. In response, we took a firmer approach to allegations of non-compliance. In practice, this increased the proportion of workplace disputes dealt with by compliance and enforcement to around one-fifth; whereas it was closer to 5% when I started in the role.

We reviewed our use of statutory compliance and enforcement tools and determined that we had been far too cautious in using compliance notices. These are an excellent tool for the FWO's inspectors because they are relatively simple to issue, are legally enforceable and ensure all monies owed to workers are recovered accurately and quickly.

When I started as the Fair Work Ombudsman, we were issuing around 200 compliance notices a year. In 2021-22, we issued more than 2,300. Compliance notices are now the default tool that we use when a matter does not involve systemic or deliberate underpayments.

We use these because they give a business the opportunity to correct their mistakes whilst also having the protection of immunity against further enforcement action from the FWO in that matter, by admitting the error and rectifying any underpayments. However, in the case of businesses that refuse to comply with a compliance notice, I adopted the view that this was unacceptable and should be considered for court action.

As a result, we have taken significantly more matters to court, announcing these publicly each time and therefore sending strong deterrence messages to employers. During my time as the Fair Work Ombudsman, by the end of the March quarter this year we had put more than 340 matters in court.

Some examples of significant outcomes we have achieved over that time include the Hero Sushi matter, where record penalties of \$891,000 were awarded against the operators of three sushi restaurants for underpaying mostly young visa holders more than \$700,000. And the 85 Degrees Coffee matter, where we secured \$475,200 in penalties related to the underpayment of Taiwanese students.

Our lawyers and Inspectors have worked extremely hard to get so many matters into court, and run these matters to achieve strong penalty outcomes. Our media team have very effectively ensured that every matter receives some media attention, to get the message out about the need to comply with the law and the consequence of not doing so.

With the shift to compliance notices as our primary regulatory tool, we ceased mediating disputes. Mediation was our default approach when I started as the FWO. I took the view that wage underpayments should not be 'mediated' as this means compromise, and workers are entitled to full back payment of monies they have earned and are owed. The FWO no longer does any mediation of workplace disputes.

Through these changes, I think that employers and business associations now know that the FWO is firm but fair, and that we will respond very decisively to deliberate non-compliance.

### **Large corporate underpayments**

Over the course of my tenure, we have also been dealing with an influx of underpayments from large employers, many of whom have self-reported to the FWO. We're talking about significant underpayments by many of Australia's largest companies. In the Coles matter that's currently before court for example, we're alleging underpayments in excess of \$100 million.

Added to the steady stream of large corporate underpayments are those coming in from the university sector. Since 1 July 2020, the FWO has recovered nearly \$88 million for employees in the university sector alone.

I've been very clear about my disappointment and frustration with these underpayments. Since I wrote to the CEOs and Chairs of the ASX Top 100 in February 2020 and told them that their boards need to be seeking assurances about their payroll, the reports of underpayments have been flooding in.

These are big matters that routinely date back many years and often involve underpayments in the millions to thousands of workers. The sheer number of these large matters has sometimes been challenging. The additional funding we received to set up our Large Corporates Branch has certainly helped and allowed the agency to become more sophisticated in how it deals with these matters.

I recognise that there has been a perception at times that because a large corporate self-reports to the FWO and says they'll fix the issues, that the FWO's just a rubber stamp and then takes credit for the amounts recovered – but that's simply not the case. The clear message we got from the public, whether through media or direct engagement with stakeholders, is that they don't want us taking self-reports at face-value. I also have the view that the regulator has to provide assurance to workers and the community that entitlements will be met.

We therefore made the decision that we will examine each corporate underpayment matter as necessary to get assurance that the employer's approach is robust and accurate, and that there are systems, people and processes in place to identify and prevent future compliance issues.

We don't always agree with the approach taken in these remediation processes. Our experience is that once we get involved, the quantum of underpayments first reported to us often grows. Woolworths, for example, has had to update the expected total of its remediation program a number of times resulting in multiple market announcements. The FWO has been overseeing every one of these and it is highly complex, time-consuming work for us as the regulator.

We have made the companies themselves pay for extra independent auditing, with reports provided in full to us. The cost for business is not insignificant and adds to the cost of employee goodwill that always goes with underpayments. For anyone who has worked on programs of wage remediation – and I suspect some of you listening in will have – you will know this work is extremely complex, involving large volumes of both hard copy and digital payroll data.

One of the most frustrating things is that many of these underpayments could probably have been avoided had big businesses meaningfully invested in some pretty basic things like regular auditing, properly calibrated payroll and record-keeping systems, and supporting the teams who use them.

I would say that there have been some positive signs of improvement. However, the fact that we're now seeing reports of payroll staff feeling burnt out, under-supported and who are considering leaving their jobs, suggests to me that more investment is needed. Companies can't expect their payroll teams to quickly fix years of accumulated issues on top of all their usual work. In fact, that could just make the issue worse.

Further, payroll systems and teams are not the whole solution if a business does not ensure that its systems and processes reflect the actual practices in the business. Systems are only as good as the information entered into them. Often it is the human decision making and actions that sit around those processes which can have a huge impact on whether a business is compliant or is contravening its obligations. The FWO always seeks to understand this when investigating underpayments.

Working through these large matters has been a challenging space for the FWO. We have had to bolster our capacity through better equipping the FWO with the skills and technology to handle and analyse large volumes of data in-house, calculate underpayments and validate remediation programs at scale.

It's an area worthy of further investment to keep ahead of the game, especially as large corporate sector underpayments continue to roll in. This has been part of the FWO's continuing work to improve the agency's capability in response to the challenge facing all regulators. That is, how to best use available data and intelligence to strategically target resources toward problem areas that will get the best outcomes for the regulated community.

### **Vulnerable workers**

For the past five years, the agency has been using data and intelligence to shape its Compliance and Enforcement Priorities. The priorities, along with the agency's Compliance and Enforcement Policy, guide how the FWO responds to issues brought to us by individual employees and the proactive work initiated by the FWO to monitor compliance.

One of the big problems that we have faced is how to assist workers who are too scared to report bad behaviour or seek help because they are worried about the consequences, or who do not feel anyone will actually help them to address the issue. It's an ongoing area of challenge for the FWO that I will leave with my successor. We know that vulnerable workers, particularly migrant workers, will turn to people or organisations they trust, such as community legal centres and often journalists, but will be apprehensive about seeking our assistance.

The FWO's Engagement and Communications area has worked incredibly hard to break down these barriers to explain, for example, the protections that do exist for visa holders who seek our help, and work closely with stakeholders to promote our services and develop resources and tools for migrants in their own languages.

We have never required workers to identify themselves as a visa holder, and yet migrant workers are overrepresented in our work. In the five years to June 2022, the FWO filed 126 litigations involving visa holders and secured more than \$13.4 million in court ordered penalties. This is an



incredibly complex issue though, and the response needs to be multi-faceted. It cannot just be left to the workplace relations regulator.

In a sector like horticulture, we've been undertaking an Agriculture Strategy as part of our efforts to enhance compliance. Since July 2018, we have completed more than 1,800 investigations in the horticulture sector. We've been visiting multiple hotspot regions that we've identified are at high risk of non-compliance. We're out there on the ground talking to growers, managers, labour hire operators and workers.

Visits are very carefully targeted to businesses that our data tells us are at high risk of non-compliance, because the reality is that we cannot audit a million workplaces across Australia and so we must be strategic in our approach. All regulators have finite resources and there's always going to be a balance between how the FWO responds to issues brought to us by individual employees and proactive work that is targeted and broader in scope.

We've been pleased during our agriculture inspections to have growers show us their new software that tracks productivity and sets them up to be compliant with the Horticulture Award. This has been a positive development, especially given the changes to minimum rates for piece workers in April 2022.

Non-compliance is still problematic in this sector though. Just a few weeks ago we put a matter into court against a farm in Victoria who we're alleging paid two former employees between \$13 and \$14 per hour, provided the FWO with falsified payslips, and made unlawful deductions from one employee's wages.

We have also been targeting the Fast Food, Restaurants and Cafes sector, which typically employs high numbers of young and migrant workers. In 2021-22 alone, the FWO recovered more than \$13 million for more than 4,000 underpaid employees in the sector. Over the past several years we've focussed on popular food precincts across all capital cities and some other major centres nationwide. Inspectors have been going out and making surprise visits to multiple businesses at the same time to speak to managers and employees on the ground and check records.

That all said, I don't think that surprise visits and enforcement action are enough on their own to really get to the heart of why migrants continue to be treated poorly. I think there is an acceptance that the settings in a range of legal frameworks have an impact and regulators have a key role, but so do education providers, industry associations, unions and community legal centres.

I am very pleased to hear of the productive discussions going on between Government and stakeholders at the moment to co-design solutions that seek to remove barriers that migrants face when seeking to enforce their entitlements. I also welcome the passage of the *Protecting Worker Entitlements Act* and the introduction of the Migration Amendment (Strengthening Employer Compliance) Bill 2023, which both seek to address this issue.

### **Upcoming workplace relations changes**

It's fair to say the current workplace relations environment is dynamic. There are now prohibitions on pay secrecy. Breastfeeding, gender identity, and intersex status are new protected attributes under the Fair Work Act, and there's a prohibition of sexual harassment in the workplace.

Flexibility and expanded eligibility changes to the Paid Parental Leave scheme have also just come into effect. And later this year, we will see the introduction of limitations on the use of fixed term contracts. There will be a requirement to provide a Fixed Term Contract Information Statement that the FWO is currently developing.

In thinking about what the enforcement regime looks like in future, the criminalisation of wage theft is clearly a very significant shift, but of course a criminal offence doesn't change the obligations that employers already have to meet their workplace relations responsibilities and pay their workers correctly.

I am very confident that I'm leaving the agency in great shape to support the community to confidently implement the Government's workplace relations reforms. The FWO has incredibly committed staff who are highly professional and very committed to getting the best outcomes for workers, businesses and the community that they serve. Our annual staff survey results are

consistently positive and demonstrate this commitment to public service. I am privileged to have had the opportunity to be the CEO of the FWO.

I would also like to thank my colleagues and leaders in the Australian Public Service who have worked co-operatively and constructively with the agency right through the duration of my term.

And I would like to thank all our stakeholders, including those of you who attended today, who care deeply about what the FWO does and want it to be as effective as possible. I have really valued your advice, support and input over the five years I have been in this role, and prior to that when I was in the department.

I believe we have some time for discussion so I'm happy to take any questions you may have.