

Address by the Fair Work Ombudsman

Australian Human Resource Institute - NSW ER/IR Network Forum 2019

Good morning to you all and thank you to AHRI for inviting me to speak with you today.

The Fair Work Ombudsman has always had a strong relationship with the Institute and I am grateful for the opportunity to continue our engagement through these forums.

The work of the Fair Work Ombudsman has a natural affinity with the work that you all undertake as Human Resources professionals. People and the systems in which they work are the fundamental components of harmonious and productive workplaces. It falls to us to ensure that these systems are operating effectively and protecting those working within them.

The system that my agency is primarily concerned with is the framework of industrial laws established by the *Fair Work Act 2009*, the award system and other industrial instruments. We appreciate that this framework can be tricky to navigate, so we provide free assistance to the community, to educate them on their rights, entitlements and obligations in the workplace.

I'm extremely proud of the work that our frontline staff do every day, resolving workplace disputes through education, advice and assistance. In 2018-19, our free Infoline answered more than 380,000 calls and our online resources continue to grow in popularity.

There were nearly 18 million visits to our website in the last financial year, not to mention the advice and assistance we provide to people through our social media channels and our online portal, MyAccount. At the back end, intelligence from the community and more sophisticated risk-modelling is being used to target the underlying drivers of non-compliance, with the ultimate goal of driving cultural change.

We conducted over 2,800 workplace audits nationally in 2018-19, strategically targeting high-risk sectors and we recovered over \$40 million for nearly 18,000 workers. This is the highest amount of total recoveries in several years. But back-payments are only part of the story.

Of course, we continue to encounter serious or deliberate breaches of workplace law and are empowered to enforce compliance when we do. As a result of our litigations, courts imposed penalties totalling \$4.4 million over the course of the year. What these results reflect – in particular the recoveries – is the value of an evidence and intelligence-led approach to setting priorities and targeting non-compliance.

Earlier this year, I announced the release of the FWO's *Compliance and Enforcement priorities for 2019-20*¹. These priorities are selected based on evidence and designed to guide the Agency's compliance and enforcement work.

The areas of focus we have identified are:

- Fast food, restaurants and cafes;
- Horticulture and the Harvest Trail;

¹ 'FWO launches 2019-20 priorities', 3 June 2019, available at: <http://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190603-aig-pir-media-release>

- Supply chain risks;
- Franchisors; and
- Sham contracting.

Vulnerable workers will continue to be a priority, as will matters that:

- are of significant public interest;
- demonstrate a blatant disregard for the law;
- are of significant scale or impact on workers or the community; and
- can test the law or use new laws.

Each year, we'll consider our priorities again and determine what the evidence and intelligence tells us about where we should be directing our proactive compliance and enforcement activities.

As well as reviewing evidence and intelligence, we are also listening intently to the Australian community. What we hear is a steadfast expectation that employers must meet their obligations to their workers and should face serious consequences if they fail to do so.

The community has also been clear in what it expects of Australian regulators. There is a mandate for regulators to take a firmer stance, particularly where vulnerable members of the community are involved, to uphold standards across the whole labour market. Our strengthened [Compliance and Enforcement Policy](#) reflects this expectation, which was released publically in July this year.

Self-Disclosures: poor governance and corporate regulation

This sentiment is rippling through the business community, too. In the past 12 months, you would have seen the upsurge in the number of large-scale businesses disclosing non-compliance to the Fair Work Ombudsman.

While these admissions show that businesses are treating our warnings about the need to comply seriously, time and time again, the driver of this non-compliance has been ineffective governance and in some cases, complacency. The framework is complex and, as the daughter of a small business owner, I understand that small and medium business owners often need greater support from us to ensure they are getting it right.

But lately, we are seeing a disturbing number of large corporates publicly admitting that they have failed to ensure staff are receiving their lawful entitlements. Some go back many years and many comprise millions of dollars owed to workers. This is simply not good enough.

After we put these corporates under the microscope – corporates, mind you, who have extensive and sophisticated human resources capacity – the contributing factors become increasingly concerning. Many have had enterprise agreements in place, which they have negotiated, but then failed to properly uphold the minimum standards they had voluntarily agreed to provide.

It is concerning that the diligence of these companies in responding to a downturn in share prices or profit does not seem to extend to ensuring that the central cog in their profit-generating machine – their people – is paid correctly.

At the end of the day, isn't this the ultimate measure of corporate integrity? Being accountable for the obligations to which you have committed? I intend to be taking this issue up with Boards around the

country, because frankly, that is the level within organisations that should be taking an active leadership role on this issue and setting a culture of compliance for their managers to embody.

It also makes good business sense. These sorts of missteps by business can be costly, often running up into the millions of dollars across an entire workforce. And they take significant resources and time to fix, particularly where companies do not have accurate records of times worked and wages paid. It is not surprising that workers lose trust in their company when this happens.

The sheer scale and complexity of these matters pose a new regulatory challenge for the FWO, one which has prompted us to think carefully about how we best fulfil our statutory functions in this environment.

As the regulator, we'll be looking very carefully at the big corporates that sit behind this non-compliance. I encourage them to cooperate with us to rectify breaches, but they must understand that admission is not absolution.

Our position is clear: a court enforceable undertaking is required as a minimum, and court proceedings are never off the table.²

Enforceable Undertakings

An enforceable undertaking is a serious enforcement tool and our expectations of those entering into one are just as serious. They were provided to us by the Parliament, and carry with them significant legal obligations.

It's important for those advising businesses, like yourselves, to understand our expectations, particularly if you find yourself dealing with our inspectors to resolve a case involving underpayments. You may also find yourselves having to be the bearer of ongoing bad news to your executive and board. You must be fearless in telling them the full extent of the issues, even where they don't want to hear this.

Enforceable undertakings provide the unique ability to secure substantial, ongoing commitments to both rectify past breaches and change future behaviour. The commitments we require are stringent, ranging from improvements to governance frameworks, to quarterly, independent audits, paid for by the company and supervised by FWO. When determining whether to enter into an undertaking with a company, we assess whether the company has genuinely and effectively:

- rectified breaches in full plus interest
- admitted all contraventions;
- demonstrated contrition for failing to uphold their obligations; and
- verified underpayments with an independent auditor.

These conditions are not negotiable, especially independent verification.

² The FWO highlighted the the Agency's stronger approach to compliance in a speech to the Australian Industry Group Policy-Influence-Reform Conference in June 2019, which includes a greater use of Compliance Notices and mandating Enforceable Undertakings as a minimum for large corporates disclosing non-compliance. The full speech is available at: <https://www.fairwork.gov.au/ArticleDocuments/764/aig-pir-speech-2019.pdf.aspx>

The total cost of this kind of remediation can be significant, but we think it is only fair that the compliance costs of these sophisticated businesses – who should know better - are not subsidised by the taxpayer.

Compliance costs – and making a significant financial investment in getting the settings right – are the responsibility of the business. It also highlights the need to check that those systems are accurate on a regular basis. It is your job to convince your Executive and boards of the importance of this.

One further feature of a FWO enforceable undertaking is our expectation that companies make a separate and significant financial gesture of contrition, to demonstrate to the community that they understand the gravity of breaching their legal obligations.

Proportionality guides us in our determination of these payments to ensure that the quantum reached is appropriate for the nature of non-compliance engaged in by the company, and the genuineness of the business in engaging with us to fix the problem once it has come to light.

But it is important to note that we must also afford attention to business viability. We are responsible for promoting both *harmonious* and *productive* workplace relations, and do not accept that setting contrition payments at a punitive level that threatens the ongoing employment of workers ultimately serves the community.

Case study: Sunglass Hut

A good example of where an enforceable undertaking can be highly effective is the recent self-disclosure made by well-known retailer, Sunglass Hut.³ The company came to us in early 2017 after undertaking an internal audit, in which they identified underpayments to 620 employees between 2010 and 2016.

Again, it was poor governance that led to non-compliance, but in this instance – and relevant to today's audience – the underpayments stemmed directly from failing to have put in place adequate written agreements that clearly outlined the days and hours of work of part-time workers. The result was that Sunglass Hut failed to pay these employees their overtime penalty rates for hours worked outside their ordinary hours.

This administrative failure resulted in \$2.3 million in underpayments across the network of stores. That is a lot of money, especially given how easily the issue could have been prevented.

Sunglass Hut fully admitted to all contraventions, cooperated with us throughout our investigation and readily committed to back paying all affected workers in full – despite some payments falling outside the six-year limitation period in the Fair Work Act.

Our assessment of the matter showed that the underpayments were careless, but not deliberate. While we do not excuse carelessness, the company publically admitted to wrongdoing and agreed to all the stringent conditions we required in the subsequent enforceable undertaking. Those requirements included full back-payment within three months, committing to external audits until 2022, issuing a letter of apology to all affected workers and making a gesture of contrition.

³ 'Sunglass Hut to back-pay 620 workers', published 24 September 2019, available at: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/september-2019/20190924-sunglass-hut-eu-media-release>

This matter highlights the importance of putting in place compliant frameworks, both in terms of the broader Fair Work system, but also the day-to-day administrative and recruitment systems used by the business.

Having required Sunglass Hut to ensure sustained compliance into the future through our Enforceable Undertaking, we will of course be checking they follow through.

Enforcing Enforceable Undertakings

A commonly overlooked feature of such undertakings is their enforceability. Where a company fails to adhere to the terms of an undertaking, we take legal action. Simple as that. The court can then award compensation to those who have suffered as a result of the breach, and make orders to enforce compliance with all of the requirements set out in the undertaking.

This is not an idle threat. The FWO has recently commenced litigation against Pristine Employment Solutions⁴ for allegedly failing to comply with the terms of an enforceable undertaking that they entered into in May 2017. The onus is, therefore, on the employer to agree to stringent measures and cooperate with us in a genuine and transparent manner, if they don't want to find themselves before the Court.

Remember that the *Protecting Vulnerable Workers* amendments have given us increased powers and penalties to deal with non-compliance. These include new maximum penalties for 'serious contraventions' and higher penalties for providing false and misleading employment records to the FWO. For a body corporate, the maximum penalty for each serious contravention is now \$630,000. We now have three matters⁵ in court alleging serious contraventions of the Fair Work Act.

As I mentioned earlier, there is a clear community expectation about the need for regulators to hold wrong-doing to account and my agency intends to do that. It is crucial for advisors, like yourselves, to ensure that the businesses you work for are also working to uphold their commitments to their people.

Don't wait for someone to notice something is wrong before you come to us. Go to our website. Undergo training in our Online Resource Centre. Access our free factsheets and wage calculator, PACT. Or seek our advice, where necessary. If you have boards, help them to do their job by providing them with oversight and assurance about pay roll systems compliance. And do the same with your Executive team. In my view, your roles should be given much more prominence – take the opportunity to take up that space in your organisation. Tell them about this speech as a start! I'm sure you would not like to see your company in the papers for underpaying its staff.

It is safe to say that the financial and reputational impact for businesses that get it wrong is much greater than what they might have spent in getting it right from the outset.

The message I would like to leave with you today is to tell your employers and clients about the expectations we have of business. If you notice a problem, engage with us and ensure your house is in order before it costs your company its reputation – and possibly much more.

⁴ FWO v Pristine Employment Solutions Pty Ltd

⁵ FWO v IE Enterprises & Anor; FWO v Mashnicisa Pty Ltd & Anor; FWO v Blue Sky Kids Land Pty Ltd & Ors