



Australian Government

Fair Work

OMBUDSMAN

GPO Box 9887 Melbourne VIC 3001 | 414 LaTrobe Street Melbourne VIC 3000

Mr Peter Harris AO
Chairman
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

Dear Mr Harris

I write in relation to the Productivity Commission's Inquiry (the Inquiry) into Australia's workplace relations framework, announced by the Government on 19 December 2014.

Our staff have had productive preliminary discussions and we look forward to meeting with you on Friday 20 February 2015.

I would also like to extend an offer of assistance to the Productivity Commission with its Inquiry more broadly. We may be able to provide you with relevant information and data relating to the activities of our Agency and aspects of the workplace relations system. Myself and my senior staff are also available to hold discussions with you and your representatives face-to-face to assist the Inquiry.

As a first step, this correspondence provides an overview of the role of the FWO, our current work program and our future priorities.

The statutory role of the FWO

The Fair Work Ombudsman (FWO) is the independent statutory authority, established by the *Fair Work Act 2009* (the Fair Work Act), responsible for providing education, assistance and advice about the Commonwealth workplace relations system. The FWO is also responsible for enforcing compliance with the Fair Work Act and fair work instruments¹.

I was appointed as the Fair Work Ombudsman on 15 July 2013 for a five year term. The position is that of a statutory office holder. Key operational results from the 2013-14 financial show the range of activities the FWO engaged in, including:

- responding to more than 595,000 enquiries through our Fair Work Infoline services (approximately 30% of all calls are answered through our dedicated Small Business Helpline);
- receiving more than 11 million visits to our website fairwork.gov.au;
- finalising 25,650 complaints and recovering more than \$23 million for 15,483 workers;
- finalising 4,567 targeted campaign audits recovering more than \$4 million for 7,541 workers;

¹ The FWO also has a formal role under the *Migration Act 1958* to conduct visa monitoring activities to ensure 457 visa holders are employed in their nominated position and receiving their nominated salary as approved in their visa. Where we identify concerns that obligations are not being met, the matter is referred to the Department of Immigration and Border Protection (DIBP) for consideration.

- commencing 37 civil penalty litigations to address serious, wilful and repeated non-compliance; and achieving court ordered penalties of more than \$3 million in 39 cases decided.

Key information on FWO Resources

The FWO's total appropriation for recent, current and future financial years is:

- 2012-13: \$125 262 million
- 2013-14: \$112 685 million
- 2014-15: \$111 259 million
- 2015-16: \$108 555 million
- 2016-17: \$106 404 million

At 31 December 2014, the FWO had 794 employees (744.05 FTE). Of these employees, there are 253 Fair Work Inspectors and 106 Fair Work Infoline Advisors. I have included a copy of our most recent annual report (for the 2013-14 financial year) for your reference.

The FWO's head office is in Melbourne at 414 Latrobe Street. The Agency has a strong regional presence with 23 offices across Australia including all capital cities.

The FWO's Strategic Intent

The FWO has recently settled its Strategic Intent. The Strategic Intent captures the FWO's current operational model which has evolved significantly in the last 18 months. It also captures the direction our innovation continues to take us in, which is focussed on meeting the needs and expectations of the community and supporting productive and sustainable employment relationships. We are confident the focus of our activities and priorities reflect the needs of business, the community and those most in need of our help.

A key part of this review was consulting with our stakeholders to understand community needs and gain valuable feedback about their experiences with us. The FWO places significant importance on maintaining strong relationships with our stakeholders, including the small businesses community, industry, community groups and government. We engage with them regularly to expand our reach in the community and ensure a whole of government approach to service delivery, where possible.

Our Strategic Intent is guided by the following five main principles:

1. Provide practical advice that is easy to access, understand and apply;
2. Encourage and empower employees and employers to resolve issues in their workplace;
3. Build a culture of compliance with workplace laws;
4. Work with stakeholders to find solutions to workplace issues and opportunities to collaborate; and
5. Be a high performing, capable and responsive agency that delivers exceptional customer service.

I have enclosed a copy of our Strategic Intent for your reference and it will be available on our website shortly.

The FWO approach to resolving workplace disputes

As a newly formed independent regulator in 2007 (as the Workplace Ombudsman) our focus was on responding to workplace complaints from workplace participants (mostly employees). Our primary

response to such complaints was to commence an investigation, often at a point where the workplace relationship had already broken down.

This was a formal and detailed process that proved to be inefficient and very time consuming for all parties involved. Where the employee who had asked for our assistance was still employed, on many occasions, our investigation process also contributed to the deterioration of the employment relationship.

In our experience, the vast majority of employers want to comply with the law. Often, workplace issues arise from employers not understanding their obligations or being confused by the complexity of the workplace relations system. In the past 18 months, the FWO has focused on delivering practical workplace relations advice and on resolving disputes earlier and more efficiently.

We encourage self-resolution by intervening early in workplace disputes, particularly in situations involving employees who are still employed. Our focus is on resolving the dispute as quickly as possible and maintaining the employment relationship. Often, this will involve the FWO directly assisting both the employee and the employer and/or offering a mediation service.

The FWO is also focused on being proportionate and risk based in our approach to compliance and enforcement. While the vast majority of requests for assistance are resolved through effective and efficient dispute resolution techniques, we continue to conduct investigations and use compliance notices, enforceable undertakings and litigations in cases of serious non-compliance. Specifically, the FWO directs these efforts where we can deliver the greatest impact and benefit, including situations where there is the exploitation of vulnerable employees, significant public interest concerns, blatant disregard for the law, the deliberate distortion of a level playing field to gain a commercial advantage or an opportunity to provide an educative or deterrent effect.

In line with this evolution, the FWO will soon also publically release its new Compliance and Enforcement Policy (a draft is enclosed for your information). The Policy clearly explains how the FWO will ensure compliance with workplace laws and deal with allegations of non-compliance. Importantly, the Policy describes the Agency's risk based and proportionate approach to framing our responses to cases of non-compliance.

The Policy is a clear public statement on agency priorities and explains the differences between compliance and enforcement tools.

Providing advice and education

A key aspect of the FWO's role is providing workplace relations advice and assistance to employers and employees that is easy to access, understand and apply. This education and advisory service is designed to ensure that employers and employees have easy access to tools, resources and advice so they can understand their obligations and comply with them. We find that this helps people solve problems in the workplace before they arise and helps the community understand best practice workplace relations.

The FWO's advice and education is primarily delivered through engagement with people on our Fair Work Infoline (including the specialist Small Business Helpline), and via the online learning portal and the tools and resources on our website.

Last year, we introduced a new website, with increased functionality and mobile accessibility that enables the community to access information when they want in a way that meets their needs.

The FWO regularly conducts proactive education and compliance activities at workplaces across Australia in priority industries and locations. Each year we undertake four national campaigns and two additional campaigns in each State and Territory which involve field visits to conduct face to

face education and compliance activities. We focus on regions and industries with a history of non-compliance.

The FWO also designs and conducts risk based enforcement activities to gain greater insight into the reasons for systemic non-compliance and to explore new ways to affect behavioural change. Such activities are informed by data and intelligence and focus on high risk areas and sectors. In August 2013, the FWO commenced a three year project following the regional Harvest Trail (in the horticultural and agricultural sectors) to better understand the drivers of non-compliance in these important industries and to work with industry partners to improve awareness of workplace relations issues and improve compliance.

Currently, the Agency is also conducting a wide-ranging enforcement activity to better understand the drivers of non-compliance in relation to overseas workers in Australia on a 417 working holiday visa. This long-term proactive initiative commenced in August 2014 and will link closely with the Harvest Trail initiative.

The FWO's focus on assisting small business

The FWO places an emphasis on providing small business owners with dedicated services and assistance, most notably through our prioritised Small Business Helpline and our commitment to provide callers with advice they can rely on. This commitment recognises the complexity that remains in the workplace relations system and the need for small business to have certainty.

The FWO understands that small businesses in particular feel the burden of regulation and do not have access to professional workplace relations advice. That is why we have established a specialist small business unit to work directly with this important cohort to better tailor our services to these duty holders.

The FWO has undertaken significant research and consultation to understand the issues faced by the small business community, the barriers to achieving compliance with workplace laws, and the best methods for interacting with this time-poor employer group.

In 2014, the FWO co-hosted two Small Business Roundtable events with the Australian Small Business Commissioner and industry stakeholders. These have assisted us to build a strong small business network, identify opportunities to collectively reduce the regulatory burden and ways to improve the exchange of information.

The FWO's commitment to reducing complexity and the regulatory burden

The FWO is committed to reducing the regulatory burden on the regulated community through the continued improvement of our operations. As outlined above, our commitment to reducing the regulatory burden is clearly demonstrated through the redesign of our complaint handling procedures, adopting a risk-based approach and placing a greater focus on alternative dispute resolution.

We are also currently reviewing and redesigning our existing Key Performance Indicators (as provided in the FWO's Portfolio Budget Statements) to ensure they align with the published whole-of-government *Regulator Performance Framework*.

The FWO is also participating in the Fair Work Commission's (FWC) modern award review process. Despite the end of transition to modern awards from 1 July 2014, the workplace relations framework can still sometimes be complex for those who are not experts.

As a regulator who has extensive contact with millions of employers and employees each year, the FWO is uniquely placed to assist the FWC to simplify and clarify how awards operate. Our

involvement is focussed on providing the FWC with information to clarify aspects of awards that, in our experience, cause complexity and ambiguity for business. We have also worked with the FWC to introduce simple wage tables into modern awards to increase clarity around the applicable rates of pay for all classifications working at different times. The FWC has been very welcoming of the FWO's assistance through this ongoing process.

The FWO submitted research papers to the Commission on three key common award issues which relate to: *clarity around overtime and penalties, clauses that appear inconsistent with the NES and coverage clauses that can be confusing*. The FWO has also submitted two research papers in relation to award specific issues on Group 1 and Group 2 awards and another two research papers are due for submission on 2 March 2015.

Measuring our regulatory impact

The FWO is committed to continuous improvement and delivering value to the community. Independent research into our work by the University of Melbourne has assisted us to assess and improve our performance as an effective regulator.

The University's report titled '*The Transformation of Enforcement of Minimum Employment Standards in Australia*' examining the FWO's activities from 2006 to 2012 identified the FWO as a regulator that is strategic, sophisticated, dynamic and actively engaged in continuous improvement.

As part of our continuous improvement and in building a culture of compliance, we are seeking to better understand the impact of our work on those we regulate. This will be further enhanced by the University's current empirical study of FWO's effects on changing behaviour within the community.

The University of Melbourne's report and the FWO's response is available on our website, www.fairwork.gov.au. I have also included a hard copy of the report for your reference.

Key FWO contacts

Please contact me if you would like further information.

Yours sincerely

Natalie James
Fair Work Ombudsman
16 February 2015