



Australian Government

Fair Work OMBUDSMAN

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

Dear Mr Harris

I write in relation to the Productivity Commission's *Draft report on the workplace relations framework* (the Draft Report), released on 4 August 2015.

I reiterate our previous offers of assistance to the Productivity Commission as it finalises its Report. In particular, we may be able to provide you with further relevant information and data relating to the activities of our Agency and aspects of the workplace relations system. To that end, Senior Officers and I are available to hold discussions with you and your representatives, if this would assist.

In the interim, this correspondence provides some further information to assist the Productivity Commission as it finalises the Report, about the content and draft recommendations contained in Chapter 21 – Migrant workers and Chapter 6 – General protections. We also provide some information about the intersection between the work of the Office of the Fair Work Ombudsman (FWO) and the *Corporations Act 2001* (Cth) (the Corporations Act) so far as this is relevant to the effectiveness of the FWO's enforcement activities.

Migrant workers – a priority for the FWO

Protecting vulnerable workers, including migrant workers, is a key priority for the FWO. Migrant workers have the same workplace rights and entitlements as other workers in Australia. However, they can be at risk of exploitation in the workplace. There are a number of reasons for this, including; they often don't know their rights and entitlements, may face cultural or language barriers, may be afraid to ask for advice, may be committed to remaining with their employer for a period of time, or may be only be in the country for a short time.

In the past three years, we have dealt with **over 6,000** requests for assistance from migrant workers, and have recovered **more than \$4 million** in outstanding wages and entitlements for them. Requests for assistance from migrant workers have steadily increased over this time, with those received and finalised in 2014-15 accounting for just **under 11%** of all requests. While requests for assistance from migrant workers currently represent **around one in 10** of all requests made to us, matters involving migrant workers are disproportionately represented in our civil penalty litigations and other enforcement activities. For example, in 2014 – 15:

- Of 50 civil penalty litigations filed, 21, or **42%**, involved migrant workers
- Of 42 enforceable undertakings signed, 20, or **just under 48%**, involved migrant workers
- Of 118 compliance notices issued, 37, or **just over 31%**, involved migrant workers
- Of 348 infringement notices issued, 124, or **just under 36%**, involved migrant workers.

Such enforcement action is reserved for serious non-compliance or situations with significant public interest.

Addressing the systemic issues

In response to this, the FWO has commenced a number of inquiries to identify and address the structural and behavioural drivers of non-compliance in supply chains, industries, industry sub-sectors and labour markets in which migrant workers are heavily represented, with a focus on the influence of 'price makers' like head contractors and market leaders.

In August 2013, the FWO launched a three-year Harvest Trail Inquiry, in response to ongoing requests for assistance from employees in the horticulture and viticulture sectors and our own observations of confusion among growers and labour-hire contractors about their workplace obligations. We have made numerous field trips to regions throughout Australia, meeting with growers and their associations, labour hire contractors, hostel operators, industry bodies, councils and unions and workers. As the campaign enters its third and final year, we are focusing on compliance and enforcement interventions to influence the supply and management of labour, reinforcing both specific and general deterrence messages.

In November 2013, the FWO commenced a major inquiry focusing on the labour procurement arrangements and subsequent non-compliance at Baiada's New South Wales poultry processing plants. The findings of the Inquiry were aired on ABC's Lateline on 17 June 2015 and released on 18 June 2015. The Inquiry found non-compliance with a range of workplace laws, very poor or no governance arrangements relating to the various labour supply chains, and exploitation of a labour pool that is comprised predominantly of workers on 417 working holiday visas. A lack of engagement and severe record keeping deficiencies mean further investigation is needed to take matters forward, and FWO is currently progressing five investigations into Baiada and its contractors.

In August 2014, the FWO announced a national inquiry focusing on the wages and conditions of workers in Australia on the 417 visa. The Inquiry is seeking to identify and address vulnerabilities faced by these workers, including difficulties in understanding and exercising their entitlements because of age and language barriers, the remoteness of their working location, and their dependence on employers to obtain eligibility for a visa. We have met with a range of stakeholders including consulates, community and support groups, local government, unions and employer organisations, have undertaken targeted market research to better understand visa holder use of the program, and have visited areas attracting 417 visa holders. This inquiry is currently ongoing.

In mid-2014, on the basis of continuing concerns and intelligence about 7-Eleven, the FWO also began an inquiry into 7-Eleven franchises across Victoria, New South Wales and Queensland. Primarily, we are looking into allegations of systemic non-compliance, particularly underpayment of wages and false record-keeping, but are also keen to learn if the 7-Eleven franchise model is a contributing factor and if there is liability through the supply chain. This inquiry was discussed in the

recent Four Corners program, *7-Eleven – the price of convenience*, aired on the ABC on 31 August 2015, and is currently ongoing.

To complement our enforcement activities and inquiries, the FWO also works with migrant workers and their communities to educate them about their workplace rights, entitlements and obligations, providing a range of online education resources in 27 different languages, a specialist Overseas Workers Team, and trained Community Engagement Officers to establish meaningful, ongoing relationships with multicultural communities. In addition, we have longstanding and formal arrangements with a number of government agencies, including the Department of Immigration and Border Protection, with whom we share information, refer matters and undertake joint activities.

The draft report

The Productivity Commission's Draft Report makes recommendations about migrant workers which are underpinned by an assumption that those who are working in breach of their visa conditions are not entitled to the protections and entitlements contained in the Fair Work framework.¹ We do not agree with this position. The FWO has successfully brought proceedings enforcing the *Fair Work Act 2009 (Cth)* (FW Act) in Court in this very scenario.

For example, in two of our proceedings against 7-Eleven franchisees, *Fair Work Ombudsman v Bosen Pty Ltd & Anor* (unreported, Magistrates' Court of Victoria Industrial Division, 21 April 2011) and *Fair Work Ombudsman v Haider Enterprises Pty Ltd (in liq) & Anor* (Federal Circuit Court, 30 July 2015, not yet published), the Courts ordered back-payments to be made to workers on student visas who had worked hours in excess of those permitted by their visas.

Similarly, in *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA258, the Federal Magistrates Court ordered back-payments to be made to a worker for work performed outside of their sub-class 457 visa, and in *Fair Work Ombudsman v Shafi Investments Pty Ltd & Ors* [2012] FMCA 1150, the Court ordered back-payments to be made to a worker on a sub-class 801 spousal visa who worked in excess of the hours permitted by his visa.

The FWO is only too aware that concerns about a worker's ongoing visa status can operate as a barrier to people approaching us for help. That is why it is critical that the Government makes clear to workers, employers and their advisers that the FWO can and does enforce Fair Work laws with respect to all workers, including migrant workers, irrespective of their visa conditions.

¹ At page 746, the Draft Report notes that the decision of Commissioner Bissett of the Fair Work Commission (FWC) in *Smallwood v Ergo Asia Pty Limited* [2014] FWC 964 (Smallwood) is authority for the proposition that:

- an employment contract entered into contrary to the *Migration Act 1958* (Cth) (the Migration Act) is 'invalid and unenforceable'; and
- by implication, the FW Act cannot apply to migrants breaching the Migration Act.

This proposition underpins Draft Recommendation 21.1 that:

- the FWO is given additional resources for investigation and audits of employers suspected of underpaying migrant workers (including those in breach of the Migration Act); and
- the Migration Act is to be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the Migration Act, in addition to existing penalties under the Act.

Chapter 6: General protections – proposed cap on compensation payments

The Draft Report recommends that the Australian Government introduce a cap on compensation for claims lodged under Part 3-1 of the FW Act.

It appears that this recommendation is focused on issues that arise when applications are made to the Fair Work Commission (FWC) to deal with a dispute about an alleged contravention of Part 3-1 of the FW Act involving dismissal, but not proceedings commenced in the Federal Circuit Court and Federal Court to enforce Part 3-1.

As part of the FWO's role to enforce compliance with Australian workplace laws, the agency commences legal proceedings in the Federal Circuit Court and Federal Court from time to time, to enforce Part 3-1 of the FW Act in matters not limited to the dismissal of workers.

If a compensation cap was to also apply to proceedings commenced in the Federal Circuit Court and Federal Court to enforce Part 3-1 of the FW Act, we are concerned that this could compromise our ability to recover appropriate compensation for employees (or other persons) affected by such contraventions through such proceedings, and the broader deterrent effect our proceedings seek to achieve. Compensation for contraventions of Part 3-1, unlike unfair dismissal cases heard by FWC, can involve the Courts assessing whether components for economic as well as non-economic loss are appropriate.

For example, in *Maritime Union of Australia v FWO* [2015] FCAFC 120 (28 August 2015), the Full Court of the Federal Court ordered the Maritime Union of Australia (MUA) and Skilled Offshore (Australia) Pty Ltd (Skilled) to pay a total of \$330,000 (plus interest) to two prospective employees of Skilled. The prospective employees, Mr and Mrs Love, were compensated for the loss that they suffered when they were unable to obtain lucrative jobs as stewards on offshore vessels because the MUA and Skilled were operating a 'closed shop' and the MUA refused to give them union membership. This amount significantly exceeds the amount that would be payable if a compensation cap similar to that currently applied to applications to the FWC for an unfair dismissal remedy under Part 3-4 of the Act, was applied to proceedings to enforce Part 3-1.

Intersection between the work of the FWO and *Corporations Act*

Illegal phoenix activity presents a serious challenge to the FWO's ability to enforce Australian workplace laws. While there is no legal definition of phoenix activity, the term generally describes the situation that arises where companies are deregistered or liquidated with the intention of avoiding liabilities and continuing the operation of the business.

Many of Australia's employers are incorporated entities as opposed to sole traders or partnerships. In such cases, it is the company that is legally responsible for providing the correct employee entitlements. The FWO generally cannot take or pursue enforcement action against companies that have entered into liquidation.² This was highlighted in the recent Four Corners program, *7-Eleven – the price of convenience*.

² Section 471B of the *Corporations Act 2001* (Cth) provides that, while a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with a proceeding in court against the company or in relation to the property of a company, or enforcement process in relation to such property, except with the leave of the Court and in accordance with the terms imposed by the Court. Similarly, section 440D provides

While there may be legitimate reasons for a company being wound up during the course of our inquiries or Court action, where this occurs with the intention of an employer avoiding enforcement action, it undermines the FWO's compliance work. Practically, it limits the FWO's ability to recover back-payments owed to workers from the company, and leaves employees with limited scope to recover amounts owing to them as creditors through the winding-up process or, as a last resort, the government-funded Fair Entitlements Guarantee scheme. It also means that the FWO cannot obtain penalties against companies that have contravened workplace laws.

The FWO has built strong working relationships with the Australian Securities and Investments Commission (ASIC) and the Australian Tax Office (the ATO) and seeks to work collaboratively with these agencies to reduce the incidence and impact of phoenix activity, as well as participating in a whole-of-government approach to combat phoenix activity through a number of inter-agency forums.

The FWO actively seeks to leverage the existing corporations law framework by referring suspected phoenix activities to ASIC. It is important that there are effective deterrents against Directors deliberately avoiding lawful employee entitlements through the illegitimate use of corporate structures. The FWO has taken creative steps within its own jurisdiction to achieve this.

For example, in *FWO v Trek North & Anor*, the FWO secured freezing orders against Trek North's owner and Director Leigh Alan Jorgensen, after becoming concerned that Jorgensen would strip company assets or place the company in liquidation to avoid paying over \$95,000 in court-ordered penalties and back-pay orders. In the ongoing matter of *FWO v Grouped Property Services & Ors*, the FWO obtained freezing orders against Group Property Services' operators for similar reasons, to prevent them from dispersing the company's assets up to the value of alleged underpayments (which are in excess of \$300,000).

The FWO frequently uses the accessorial liability provisions of the FW Act³ to bring to account Directors involved in contraventions of workplace laws, and to obtain orders for penalties and injunctions against them. It is common practice for the FWO to seek to have penalties against Directors paid to employees who have been underpaid instead of the Commonwealth, where there is no or little prospect of recovery from the corporate employer. This is not always possible, however.

Further, the maximum penalty that can be awarded against an individual is one-fifth of the maximum penalty that can be awarded against a corporation, and often the penalties ordered against a Director are less than the underpayments. For example, in *FWO v Haider Enterprises Pty Ltd (in liquidation) & Anor*, Haider Enterprises had owned and operated several 7-Eleven franchises in Brisbane, and was placed into liquidation shortly after the FWO commenced court action to enforce a compliance noticed issued by the FWO that required the company to pay \$21,298.86 in back-pay to a former migrant worker. In this matter, the Federal Circuit Court ordered the second

that, during the administration of a company, a proceeding in a court (other than a criminal proceeding or a prescribed proceeding) against the company or in relation to any of its property cannot be begun or proceeded with except with the administrator's written consent or with the leave of the Court.

³ See section 550 of the *Fair Work Act 2009* (Cth).

respondent, Mr Haider, to pay a penalty of \$6,120 for his admitted involvement in failing to comply with the Notice to Produce issued by the FWO, and a penalty of \$850 for his admitted involvement in the failure to comply with the Compliance Notice. The FWO obtained orders that the penalties be paid to the employee.

The FWO has recently commenced proceedings that seek orders against Directors who are alleged to be liable as accessories, to rectify alleged underpayments in the event they are not recoverable from the corporate entity, in addition to seeking a penalty.⁴ Should such orders be obtained, the effect would be that underpayments could be recovered from Directors in addition to a penalty being imposed. This would enable workers to receive their minimum entitlements in spite of the corporate employer ceasing to exist in the course of proceedings. There are relatively few decided cases that have considered the Court's discretion to make compensation orders against accessories in these circumstances.

For these reasons, phoenix activity represents an ongoing challenge to the effectiveness of the FWO's enforcement activities, as well as to the overall strength of the workplace and corporations regulatory frameworks.

At present, there is no specific offence for 'phoenix activity' under the Corporations Act, with the main sanctions relating to phoenix activity including:

- section 184 – breaches of director duties;
- section 596 - fraud by officers; and
- section 596AB – entering into agreements or transactions to avoid employee entitlements.

It is ASIC's role to take such enforcement action, and the FWO has no standing to pursue remedies under these laws. We note ASIC's position, set out in its pre- and post-draft submissions to the Productivity Commission's recent *Inquiry into business set-up, transfer and closure*, that there may be 'merit in considering reforms that specifically target the misconduct rather than the symptoms of illegal phoenix activity and make it easier to prove that illegal phoenix activity has occurred,' given that existing provisions, such as section 596AB, have had 'limited effectiveness to date'⁵ due to the requirement to prove, to a criminal standard of proof, that a person subjectively intended to prevent or reduce recovery of employee entitlements.

The FWO supports this position. It is critical that the framework effectively deters deliberate conduct designed to avoid the payment of employee entitlements. There needs to be real and meaningful consequences for those who engage in such conduct, otherwise it becomes an all too easy option for unscrupulous operators to avoid their workplace obligations. As noted above, this undermines the FW Act and the FWO's enforcement activities.

I trust this is of assistance. Please contact me if you would like further information.

⁴ These matters are *FWO v Nobrace & Anor*, filed on 31 August 2015 in the Federal Circuit Court, and *FWO v Step Ahead Security Services (ACN 149 618 397) & Anor*, filed on 14 September 2015 in the Federal Circuit Court.

⁵ See Australian Securities and Investments Commission, [Productivity Commission: Review of Barriers to Business Entries and Exits in the Australian Economy](#), February 2015, p.143; Australian Securities and Investments Commission, [Productivity Inquiry into business set up, transfer and closure: ASIC's supplementary submission](#), July 2015, pp.17 – 18.

Yours sincerely

~~Natalie James~~

FAIR WORK OMBUDSMAN

18 September 2015