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8 May 2023

Professor Mary O'Kane AC
Chair, Australian Universities Accord Panel

VIA: Ms Kate Chipperfield
Assistant Secretary
Australian Universities Accord

By Email: Kate.Chipperfield@education.gov.au

Dear Professor O'Kane,

Thank you for meeting to discuss the work being undertaken by the Australian Universities Accord Panel (the Panel) and the opportunity to provide input on areas where it intersects with the work of the Fair Work Ombudsman (FWO). As discussed during the meeting, the FWO has significant experience in working with large organisations to ensure compliance with their workplace relations obligations and welcomes the opportunity to share some of our insights with the Panel. My apologies for the delay in sending this correspondence.

Underpayment trends in the university sector

As discussed during our meeting, and outlined in our previous correspondence, the university sector is one of the FWO's Compliance and Enforcement Priorities for 2022-2023. Following my November 2020 letter to all Australian universities urging them to ensure their compliance with workplace laws, the FWO has had some form of contact with 27 out of 42 institutions. We have open investigations in relation to several universities and have commenced two separate court proceedings against the University of Melbourne. We have also entered into Enforceable Undertakings with Charles Sturt University and University of Newcastle, which are available on our website. These Enforceable Undertakings are concerned both with ensuring payments to affected workers is made in an expedient manner (including in relation to the back payment of superannuation and interest) and also with ensuring that investment is made in systems and processes to ensure that such underpayments are not repeated going forward.

We have observed that compliance issues within universities are not specific to certain disciplines or types of employees, with payroll reviews being conducted by universities revealing underpayments across both professional and academic staff, and across faculties. However, **we are seeing a pattern of repeated and often entrenched non-compliance** particularly in relation to casual staff, with unpaid work (primarily unpaid time for marking, lecture attendance and tutorials/other student interactions), work (such as lectures, student consultations and marking) being incorrectly classified (and therefore incorrectly paid) under the applicable enterprise agreement, and failure to pay correct entitlements being commonly identified. **The FWO's investigations to date demonstrate that the lack of certainty regarding future engagement, particularly for casual academic staff, has led to a culture where**

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underpayment matters are rarely raised directly by underpaid employees, and when they are raised, a systematic approach to reviewing the claims is not adopted.

From our investigations, we have identified several trends leading to non-compliance in the university sector. Some of these include:

1. **Failure to comply with the universities' own enterprise agreement provisions with regard to the engagement of staff or payment of entitlements**
 - Examples of this include misclassifying the duties or roles of casual academics and the use of payment per item (e.g. exam and/or essay) marked where the relevant enterprise agreement provides for hourly rates of pay (and where the assigned time per item is insufficient).
 - In some instances, this is accompanied or facilitated by non-compliant record keeping practices which give effect to these alternative arrangements.
2. **Poor governance and management oversight practices**
 - Corporate governance arrangements that do not prioritise or consider workplace relations risks or compliance, often with little or no line of sight over how work is undertaken at the business level. For instance, inadequate reporting to and oversight by governing boards including audit and risk committees, resulting in a single point of failure.
 - No systems for identifying compliance risk, such as reporting on payroll issues or complaints to identify red flags, areas for audit or trends.
3. **Lack of centralised human resources functions across faculties/schools**
 - Human resource functions are devolved to the schools/faculties, including many that have operated independent of any overarching oversight and without any expertise in managing employees and ensuring entitlements and workplace relations compliance (for example, often academic staff are responsible for HR and pay-related issues).
 - The adoption of a decentralised approach has led to schools/faculties adopting different recruitment and remuneration practices within the same university, resulting in non-compliance with applicable enterprise agreements.
 - Low awareness among managers of new or changed obligations in new enterprise agreements.
4. **Lack of investment in appropriate and compliant payroll and time-recording systems**
 - Poor implementation of new enterprise agreement obligations into payroll systems.
 - Lack of investment in payroll and time-recording systems has resulted in poor or inadequate record-keeping, which has significantly impacted the capacity to assess and quantify underpayments.

Universities' obligations under the Threshold Standards and general requirements for good corporate governance

As you would be aware, under the *Higher Education Standards Framework (Threshold Standards) 2021* (Cth) (Threshold Standards), universities must create a 'formally constituted governing body' that 'exercises competent governance oversight of and is accountable for all of the higher education provider's operations in or from Australia' (Standard 6.1.1). Further, the governing body must attend to 'governance functions and processes diligently and effectively' (Standard 6.1.3). Universities' enabling legislation provides for the establishment of these governing bodies, with some including that the body has the responsibility of approving and monitoring systems of control and accountability of the university (for example, see section 8(3)(e) of the *University of Melbourne Act 2009* (Cth)). We also note that Standard 6.2.1.a of the Threshold Standards provides that the provider is to demonstrate, and the governing body is to assure itself, that the provider is operating effectively and

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sustainably, including that 'the governing body and the entity comply with the requirements of the legislation under which the provider is established, recognized or incorporated, any other legislative requirements and the entity's constitution or equivalent'.

As large organisations with a range of statutory duties, the FWO considers that universities should ensure that their corporate governance structures and models elevate workplace relations compliance to the same status as compliance with other duties which have historically been prioritised.

Given the issues we have seen in relation to inadequate corporate governance arrangements in the university sector, we welcome the Panel's considering the enhancement of regulatory and workplace relations settings to support universities to meet their obligations to both staff and students in its Terms of Reference (item 4). To that end, we would propose the following as features of good corporate governance models:

- Risk frameworks and risk appetite statements that include payroll compliance are developed and rigorously applied in practice and incorporate a direct line of sight between what occurs at a workplace level and at a corporate governance level;
- A strong culture of internal challenge where internal audit teams are regularly including workplace relations and payroll compliance as part of their program;
- Processes in place which encourage Boards and/or Committees being notified of compliance risks that are occurring at the school level. This could include direct feedback loops between the schools and/or faculties to the executives on the Board and/or Committees;
- Appropriate thresholds for reporting on non-financial risks to ensure that Boards and Committees are apprised of early warnings that have the potential to become significant over time;
- Priority being given to fixing problems when they are identified, rather than allowing them to continue until broader reviews or upgrades are conducted, even where this may require a manual or interim approach to do so;
- Organisational structures where industrial/workplace relations functions and expertise are not quarantined from remuneration/payroll functions; and
- Remuneration structures where non-compliance is not indirectly incentivised, for example, not rewarding meeting labour budgets where the work required to be done objectively requires more human effort than budgeted leading to an increased likelihood of non-payment of hours worked or overtime.

Support for international students

As noted in our previous correspondence, migrant workers, including international students, continue to be overrepresented in our compliance and enforcement work.

In correspondence to stakeholders in the university sector, we have encouraged participants to provide education and support to international students on their workplace rights and the avenues available should they have questions or concerns about their workplace entitlements. We note that universities offering courses to international students must meet the requirements of the *National Code of Practice for Providers of Education and Training to Overseas Students 2018*, which requires providers to include information about 'services students can access for information on their employment rights and conditions, and how to resolve workplace issues, such as through the Fair Work Ombudsman' (Standard 6.1.9) as part of their orientation program. Under the Threshold Standards, universities are also required to ensure '[t]imely, accurate advice on access to personal support services is available, including for access to...legal advice' (Standard 2.3.3).

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Our experience is that whilst some universities are proactive at reaching out to the FWO for information about workplace rights and obligations, there is the opportunity for many universities to do more to increase awareness of international students' workplace rights, particularly as universities are the main point of contact and support for international students in Australia. The FWO engages with stakeholders in a range of ways, including through information on our website, social media, email updates and newsletters, and presentations and webinars. We would be happy to provide the Panel with more information on how universities can engage with the FWO to better support international students.

Again, thank you for the opportunity to engage with you on this important work. If you would like to discuss the matters raised in this letter further, or to arrange a further meeting, please contact Kate Anderson, Executive Director (A/g) – Industrial Compliance at kate.anderson@fwo.gov.au or 0499 912 369.

Yours sincerely,



Rachel Volzke
Deputy Fair Work Ombudsman – Large Corporates and Industrial Compliance

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