



Fair Work

OMBUDSMAN

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Committee Secretary
Senate Education and Employment Legislation Committee
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Dear Committee Secretary

Thank you for the opportunity to make a submission to the Senate Education and Employment Legislation Committee (Committee) Inquiry into the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 (Protecting Worker Entitlements Bill)*.

Overview of the role of the FWO

The Fair Work Ombudsman (FWO) is an independent statutory office that promotes harmonious, productive and cooperative workplace relations, through providing education, assistance and advice about Australian workplace laws as prescribed under the *Fair Work Act 2009* (Cth) (FW Act). The FWO's functions also include monitoring compliance with those workplace laws, inquiring into and investigating breaches of the FW Act, and impartially taking appropriate enforcement action when necessary.

The FWO has a nationwide presence with a network of 22 offices located in all capital cities and 14 regional areas. Ensuring that workers receive their lawful entitlements is a priority for the FWO. Since the agency's establishment in 2009, the FWO has recovered more than 1.1 billion dollars in unpaid entitlements for nearly 680,000 employees and completed over 326,000 disputes and more than 55,000 proactive audits. The FWO also takes strong enforcement action where necessary and has commenced 764 litigations, the overwhelming majority relating to unpaid entitlements, or where employers have failed to comply with a compliance notice requiring taking action to fix a breach of an Australian workplace law.

The FWO also provides an extensive range of free information, tools and resources to help workplace participants understand their workplace rights and obligations. Our website includes professionally translated in-language resources available in over 30 languages and an automated translation plug-in tool. Translation and interpreter services are also available for conversations with FWO staff. Since 2009, the FWO's website has been visited nearly 194 million times and advice and information on workplace rights and obligations has been provided in response to 6.7 million phone calls and more than 845,000 digital enquiries.

In undertaking its functions, the FWO works closely with a wide range of stakeholders including employees, employers, their organisations and representatives, the broader community and relevant public sector agencies including other regulators.

Communicating changes to the FW Act

As part of our role, the FWO provides advice and education to workplace participants about changes in Australian workplace laws. The FWO is committed to ensuring our extensive suite of free online information, tools and resources is up-to-date and relevant for our audiences. This can include consulting with interested stakeholder groups or undertaking testing to ensure that our materials are useful and fit for purpose.

The FWO's education and advice information can take the form of communications, tailored resources for particular cohorts, or information in multiple languages, to assist audiences to understand and comply with legislative changes. For example, following the passage of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Secure Jobs, Better Pay Act)* the FWO:

- commenced a series of communications campaigns, including in-language content for culturally and linguistically diverse audiences, to alert the community to the changes and to encourage people to visit the FWO's website for more information;
- published a timeline of the key changes to assist stakeholders to easily understand when certain measures take effect;
- established dedicated webpages providing access to updated tools and resources, which were viewed around 80,000 times in December 2022 alone, and which continue to be updated as changes come into effect;
- provided comprehensive training to staff on our Fair Work Infoline, as well as our Small Business Helpline and our Employer Advisory Service for small business, to help ensure the provision of accurate and timely advice to employees and employers;
- ran a series of public webinars outlining the key changes; and
- issued multiple alerts to our subscribers reminding them of upcoming changes.

Consultation across employer, employee and community organisations and government partners informed the development of the FWO's Secure Jobs, Better Pay Act education and communication materials.

Any changes brought about by the passage of the Protecting Worker Entitlements Bill would be promoted and communicated to employees and employers by the FWO in a similar way.

Proposed changes to the FW Act

Passage of the Protecting Worker Entitlements Bill would create new entitlements and amend provisions of the FW Act where the FWO has an existing regulatory role. These changes include clarifying that migrant workers are entitled to the protections under the FW Act, amendments to the unpaid parental leave provisions, enshrining a right to superannuation in the National Employment Standards (NES), and expanding the circumstances in which employees can authorise deductions from wages. We have commented on each of these matters below.

The Bill also clarifies how workplace determinations interact with enterprise agreements and makes changes in relation to long service leave entitlements for casual employees in the black coal mining industry.

Superannuation in the NES

The FWO understands that the intent of inserting an entitlement to superannuation into the NES in the FW Act is to:

- ensure more (and most) employees covered by the FW Act would have an enforceable right to take action in court to recover unpaid superannuation or for an employee organisation or the FWO to do so for the employee's benefit;
- align the entitlement with relevant superannuation legislation which sets out the substantive requirements of the superannuation framework (and would have the effect that there would be no NES contravention where an employer complies with those laws);
- ensure the Australian Taxation Office (**ATO**) retains primary regulatory responsibility for compliance with relevant superannuation legislation; and
- enable the FWO to continue referring matters involving unpaid superannuation to the ATO and to pursue unpaid superannuation in a complementary role to the ATO in appropriate circumstances, under the new NES entitlement as well as the terms of an applicable fair work instrument (except that action could not be taken where the ATO has already started legal proceedings).

Recognising the need for strong compliance with superannuation laws to ensure positive outcomes for employees in retirement, the FWO and the ATO have implemented a memorandum of understanding, under which the FWO shares instances of suspected unpaid superannuation with the ATO through regular reporting.

Tax secrecy legislative provisions limit the information that the ATO can provide the FWO regarding an employer's compliance with their superannuation obligations. To ensure that the activities of the ATO and the FWO are complementary, the FWO has standing to commence enforcement action only where there has been non-payment of superannuation under the terms of modern awards and enterprise agreements, and is likely to pursue enforcement only as part of proceedings involving unpaid wages. In addition, the FWO can also seek orders for the payment of outstanding superannuation where the Court otherwise makes an order to backpay wages.

The FWO provides workplace participants with advice about making a claim to recover entitlements through the small claims court, should they wish to take that action. We have a range of resources available, including two comprehensive guides (one tailored for employers and the other for employees) and a 6-part video series on the small claims process, all available on our dedicated small claims webpage at www.fairwork.gov.au/smallclaims.

Protection for migrant workers

Assisting vulnerable workers, including visa holders and temporary migrant workers, is an enduring priority for the FWO. The FWO's long-standing position is that the FW Act applies to all national system employees including migrant workers, regardless of their visa type or whether they are working in breach of their visa conditions under the *Migration Act 1958* (**Migration Act**).

We find that concerns about visa status can be one barrier that migrant workers face when deciding whether to report issues to the FWO and, accordingly, workers are not required to provide information about their visa status to the FWO when requesting assistance with a workplace matter. While the FWO's visa holder data therefore underrepresents the assistance we provide migrant workers, we know that in

2021-22, despite making up about 4% of the Australian workforce, visa holders accounted for at least 18% of anonymous reports made to the FWO, 26% of litigations commenced, and 65% of all court ordered penalties.

We understand that the proposed amendments in the Protecting Worker Entitlements Bill are intended to expressly clarify that all migrant workers are covered by the FW Act, regardless of whether Migration Act provisions relating to work-related employment conditions, work rights or the right to be in Australia have been breached.

This intention is consistent with the FWO's existing and long-standing approach that temporary migrant workers are entitled to the same workplace rights and protections, and the same minimum rates of pay, as other national system employees.

Employee authorised deductions

Regarding the changes to authorised deductions, the FWO notes that while the proposed provisions provide an increased degree of flexibility, the proposed provisions would not negate the important legal requirements that a deduction authorised by an employee must be authorised in writing and principally for the employee's benefit (unless the deduction is otherwise authorised by the employee in accordance with an enterprise agreement or authorised by or under an award, FWC order or other law).

The provisions would also not disturb the reasonableness requirement in section 326 which applies to terms of modern awards, enterprise agreements and contracts of employment that permit deductions. These safeguards are important protections to help reduce exploitative arrangements and ensure employees receive their full wages and entitlements. In the FWO's experience, exploitative arrangements are more likely where there is an absence of documentation or proper authorisation.

Where a purported authorisation does not meet all the legal requirements set out in the FW Act, the deduction would be unauthorised and the resulting failure to pay the employee in full would likely constitute a breach of the FW Act. This would remain unchanged under the proposed amendments in the Protecting Worker Entitlements Bill.

Unpaid Parental Leave

The proposed unpaid parental leave provisions would provide increased flexibility in how families are able to take the leave, including for consistency with recent changes to the paid parental leave scheme made under the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2022*.

Following these recent changes to the paid parental leave scheme, the FWO updated our website information and public advice regarding the paid entitlement to ensure employees and employers can prepare. As the paid parental leave scheme is managed by Services Australia, our content also assists employers and employees by providing direct links to Services Australia's web content as appropriate for further information about the scheme.

The FWO would provide further updated advice to reflect any amendments made to the unpaid parental leave provisions brought about by passage of the Protecting Worker Entitlements Bill. Any amendments would be incorporated into the FWO's existing materials and communicated accordingly.

Concluding remarks

The FWO is monitoring the progress of the Protecting Worker Entitlements Bill through the Parliament to ensure we are well-placed to support Australian workplaces to navigate any legislated changes. As with the Secure Jobs, Better Pay Act changes, the FWO will provide and promote practical information,

education and advice, and work closely with stakeholders to assist employees, employers and other workplace participants to understand and comply with any new rights and obligations.

We trust the information included in this submission is of assistance to the Committee. For further communications between the Committee and the FWO, you are welcome to contact Mr Anthony Fogarty, Executive Director of Policy,

Yours sincerely

Sandra Parker PSM

Fair Work Ombudsman

19 April 2023