



18 February 2019

Improving protections of employees' wages and entitlements: further strengthening the civil compliance and enforcement framework

Industrial relations can play an important role in contributing to the strength of the Australian economy. Potential reform to, or changes within, the Australian industrial relations system should be measured against three criteria; driving jobs and wages growth, boosting productivity and strengthening the economy, while ensuring protection of employees' rights.

Importantly, an effective industrial relations system should strive to achieve the best overall balance, having regard to the needs of both employees and employers, including those engaged in small business.

The Prime Minister has asked the Attorney-General, in his capacity as Minister for Industrial Relations, to take a fresh look at the industrial relations system to identify how it is operating and where there are impediments to shared gains for employers and employees.

Request for public submissions

This paper seeks input from the community (by way of written submissions) about the operation of the current compliance and enforcement framework relating to protection of employees' wages and entitlements. It follows a paper issued on 19 September 2019, titled *Improving protections of employee's wages and entitlements: strengthening penalties for non-compliance*, which considered the penalty framework in the *Fair Work Act 2009* (Cth). Discussion questions are included to guide feedback; however, stakeholders may also provide further information and suggestions relevant to the matters discussed. Submissions can be made by email to IRconsultation@ag.gov.au.

The closing date for submissions is 3 April 2020.

Submissions will be made public (by being published on the Attorney-General's Department website) unless an express statement is included in the submission requesting confidentiality. If you request that your submission remain confidential, you are encouraged to consider whether the whole submission is confidential or whether some parts of the submission may be made public.

Background

Wage underpayment and employee exploitation deny employees their legal entitlements and have the further effect that there is not a level playing field for employers, such that the overwhelming majority of employers who are trying to do the right thing are competing against those that underpay or exploit workers. The Government considers it unacceptable that there is a persistence of underpayment and exploitation behaviours by a small number of employers and considers there to now be a strong case that the current penalty, compliance, and enforcement framework for breaches of the *Fair Work Act 2009* (Fair Work Act), established over a decade ago now, needs to be improved.

Many of these issues were highlighted in the Migrant Workers' Taskforce Report released in 2019.¹ The report made a number of recommendations directed at reducing employee exploitation through changes to elements of the Fair Work Act. In broad terms, those recommendations focused on:

- (i) the adequacy of the existing penalty framework
- (ii) the introduction of criminal sanctions for the most serious forms of exploitative workplace conduct
- (iii) the adequacy of compliance and enforcement tools available to workplace regulators and the courts
- (iv) mechanisms to recover unpaid wages.

This discussion paper is focussed on items (iii) and (iv). As noted above, the Government issued a separate discussion paper focusing on items (i) and (ii) on 19 September 2019. Submissions closed on that paper on 25 October 2019.

Part I: Fair Work Ombudsman compliance and enforcement tools

The Fair Work Ombudsman (FWO) is the primary workplace relations regulator responsible for ensuring compliance with national industrial relations laws. The Government recognises the benefit of a capable and resourced regulator, and has invested over \$60 million in additional funding for the FWO in recent years. In 2019-20, the FWO received an additional \$20 million over four years specifically to conduct more investigations relating to underpayments, establish a dedicated sham contracting unit, take action to deter non-compliance, and raise migrant workers' awareness and understanding of their rights under Australian workplace laws. Last financial year, the FWO reported significant improvements in the amount of money recovered for employees.

As an independent statutory agency, the FWO performs a range of compliance and enforcement functions under s 682 of the Fair Work Act. The FWO's approach to enforcement is outlined in its *Compliance and Enforcement Policy*.² When deciding how to respond to allegations of non-compliance, the FWO makes an assessment of jurisdictional authority, and whether use of its investigative powers is in the public interest

¹ Australian Government, *Report of the Migrant Workers' Taskforce*, March 2019.

² Fair Work Ombudsman, *Compliance and enforcement policy*, July 2019, <<https://www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.pdf.aspx>>.

(including assessing whether a proposed compliance activity would be an efficient, effective and ethical use of public resources).

The FWO will assess each matter before deciding how to respond by drawing on the range of tools and powers at its disposal which are most appropriate for the particular situation, including:

- providing education, advice, and dispute resolution services
- commencing an investigation or inquiry into the potential non-compliance
- exercising compliance powers to enter premises or require production of information or documents
- exercising enforcement tools, including issuing a compliance notice or an infringement notice, entering into an enforceable undertaking, or commencing legal proceedings.

This model is consistent with theories on responsive and risk based regulation and concepts such as the 'compliance and enforcement pyramid' that allow the regulator to escalate its response in line with the severity of the non-compliance.³ The FWO also takes account of public interest considerations, its annual compliance and enforcement priorities, and its resourcing.

In 2017, in the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) (Protecting Vulnerable Workers Act) the Government introduced a higher scale of 'serious contraventions' of prescribed workplace laws, including a ten-fold increase on the maximum penalty for deliberate and systematic contraventions of workplace law.

In 2019, the FWO's *Compliance and Enforcement Policy* was reviewed, simplified and updated in response to changing community expectations about how regulators use their statutory enforcement tools.⁴

The FWO has announced its intention to send a strong message of deterrence to would-be lawbreakers through striking the right balance between using enforcement tools, and getting a timely outcome for those employees who have been underpaid.⁵ This entails a significant increase in its use of Compliance Notices,⁶ and court enforceable undertakings being the minimum requirement for companies that self-disclose workplace contraventions. Litigation is considered where companies do not self-disclose underpayments, do not cooperate fully with the regulator, or for a number of other reasons such as the impact of litigation on general and specific deterrence. The FWO has also stated that self-disclosure alone does not absolve companies that have contravened workplace law, and that companies found to have broken the law should expect a public enforcement outcome.⁷

³ See Ayres and Braithwaite re "Responsive Regulation". The FWO operating model builds on Professor David Weil's USA Department of Labour model, discussed in '*A Strategic Approach to Labour Inspection*', 1 May 2008. The paper discusses four major principles of prioritization, deterrence, sustainability, and systemic effects that labour inspectorates should integrate into framing enforcement policies as part of a strategic approach to the complex regulatory environment.

⁴ For example, the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* and the Migrant Workers' Taskforce Report.

⁵ Fair Work Ombudsman, *FWO launches 2019–20 priorities*, 3 June 2019, <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190603-aig-pir-media-release>>.

⁶ Between 1 July 2019 and 30 September 2019, the FWO had already issued 294 compliance notices, compared to 57 compliance notices issued during the same period the previous year.

⁷ Fair Work Ombudsman, *FWO responds to Woolworths' self-disclosure*, 31 October 2019, <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/october-2019/20191030-ww-mr>>.

The FWO's existing compliance and enforcement tools are outlined in the following section, and a summary table is provided in [Attachment A](#) of this paper.

Existing compliance and enforcement tools

Information gathering powers and FWO notices

Fair Work Inspectors within the FWO have a range of powers under the Fair Work Act to gather information when assessing or investigating workplace compliance. These powers enable inspectors to enter and inspect premises, conduct interviews, and require production of records.⁸ The FWO takes a risk-based approach to the use of its compliance and enforcement tools, prioritising effort based on the number of requests for assistance, reports received about non-compliance, and the intelligence gathered through research, and through working with stakeholders.⁹

Recently, as part of the Protecting Vulnerable Workers Act; the Government provided the FWO with additional powers to give a written notice (FWO notice) to a person that requires them to give information, produce documents, or answer questions relevant to an investigation.¹⁰ These new evidence-gathering powers are important in cases where no relevant documents appear to be available (e.g. employment records or payslips), and where existing powers are ineffective or other attempts to obtain evidence have been unsuccessful. Failure to comply with a FWO Notice may result in a court ordering penalties of up to \$126,000 against an individual (600 penalty units) or \$630,000 for bodies corporate (3,000 penalty units).¹¹

These powers include safeguards that limit the use of the powers to cases where there are reasonable grounds to believe that there has been a contravention of a specified provision of the Fair Work Act. The FWO must also apply to an Administrative Appeals Tribunal (AAT) presidential member for the issue of a FWO notice, and demonstrate that the proposed FWO notice is appropriate.¹² The Commonwealth Ombudsman also has independent oversight of the issuing and exercise of FWO notices.¹³

Compliance notices

Under the Fair Work Act, a Fair Work Inspector can give a compliance notice to a person requiring them to take specified action to remedy the direct effects of the identified contraventions and/or require the person to produce reasonable evidence of compliance.¹⁴

Evidence of compliance could include bank records showing the relevant amount has been transferred to the underpaid employee or employees.

Compliance notices can only be used for certain contraventions specified in the Fair Work Act, which relate to employee entitlements.¹⁵ A person who complies with the compliance notice is not taken to have admitted

⁸ *Fair Work Act 2009* (Cth), sections 708–709.

⁹ Ms Sandra Parker, *Senate Education and Employment Legislation Committee Estimates – Proof Hansard*, 23 October 2019, p. 84.

¹⁰ *Fair Work Act 2009* (Cth), sections 712AA–712F.

¹¹ *Fair Work Act 2009* (Cth), sections 539, 546.

¹² *Fair Work Act 2009* (Cth), sections 712AA–AB.

¹³ *Fair Work Act 2009* (Cth), sections 712E–F.

¹⁴ *Fair Work Act 2009* (Cth), section 716.

¹⁵ *Fair Work Act 2009* (Cth), subsection 716(1).

the contraventions, and cannot be separately penalised by the FWO for the underlying underpayment. In 2018–19, the FWO recovered more than \$1 million in unpaid wages through 274 compliance notices.

Failure to comply with a compliance notice (without reasonable excuse) is a contravention of the Fair Work Act and in addition to requiring full rectification of underpayments owed to workers, a court can impose penalties of up to \$6,300 for an individual (30 penalty units) or \$31,500 for a body corporate (150 penalty units).¹⁶

The Migrant Workers Taskforce recommended the FWO make greater use of compliance notices as a means of resolving disputes quickly, returning money to underpaid workers and giving clear direction to business on how to rectify non-compliance. The FWO has accepted this recommendation. Between 1 July 2019 and 31 December 2019, the FWO has issued 602 compliance notices resulting in recoveries of \$3.4 million, compared to 274 compliance notices issued during the entire previous financial year.

Infringement notices

The Fair Work Act also empowers Fair Work Inspectors to issue an infringement notice if they reasonably believe that a person has contravened record keeping or payslip obligations. An infringement notice issued under s 558 is similar to an on-the-spot fine, with maximum penalties of one-tenth of the penalty a court could impose.¹⁷

Under the Fair Work Act, the current maximum amount for an infringement notice is set at \$1,260 for an individual (6 penalty units) and \$6,300 for a body corporate (30 penalty units). In 2018–19, the FWO issued 563 infringement notices with \$479,900 in on-the-spot fines.

Unlike compliance notices, failure to pay an infringement notice is not a breach of the Fair Work Act or *Fair Work Regulations 2009* (Fair Work Regulations). A person issued with a notice may opt to dispute the notice, in which case the FWO may take the person to court for the alleged breaches outlined in the notice if the matter remains unresolved. If the matter goes to court, higher penalties could apply.

Along with compliance notices, the FWO is making greater use of its power to issue infringement notices. Between 1 July 2019 and 30 September 2019, the FWO has issued 216 infringement notices, compared to 82 infringement notices issued during the same period of the previous year.

Enforceable undertakings

Enforceable undertakings are court-enforceable written agreements between the FWO and employers who are ‘reasonably believed’ to have contravened the Fair Work Act. Employers may offer a written commitment in relation to rectifying the contravention and the FWO can choose to accept it. If a person fails to comply with the undertaking, the FWO may commence proceedings in court to seek orders directing the person to

¹⁶ *Fair Work Act 2009* (Cth), sections 539, 546.

¹⁷ The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a general overview of the types of things to be considered when developing or amending offences and enforcement powers, including infringement notices, <<https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffences>.
InfringementNoticesandEnforcementPowers.aspx>.

comply, for compensation, or any other appropriate order. In 2018–19, the FWO entered into 17 enforceable undertakings.

According to the FWO's *Compliance and Enforcement Policy*, court enforceable undertakings provide a simple mechanism for the FWO to deal with contraventions of the Fair Work Act,¹⁸ without attracting the considerable delays, lack of certainty and costs associated with court proceedings. The FWO takes into account a number of matters in entering into an enforceable undertaking, such as whether the contravening individual or business has self-disclosed and their willingness to rectify the suspected contravention and ensure ongoing compliance.

An enforceable undertaking typically contains public admissions that the party has contravened the Fair Work Act, as well as obligations on the employer to rectify the contraventions and undertake future initiatives for the purpose of building long-term compliance and capability, with workplace laws. The FWO publishes all enforceable undertakings on its website, and issues media statements to inform the community when an enforceable undertaking has been accepted. Additional obligations the FWO typically includes in an enforceable undertaking are:

- full rectification of underpayments, including superannuation, with interest
- engaging independent auditors to verify underpayment calculations (at the company's expense, and overseen by the FWO)
- public apology and individual apologies to affected employees
- commitment to implementing systems and governance structures that ensure future compliance, such as:
 - regular external audits, paid for by the business and overseen by FWO;
 - review of payroll systems; and
 - training for managers and staff.¹⁹

The FWO has stated that employers should also expect to make a contrition payment reflecting the seriousness of their contravening conduct.²⁰ Contrition payments are additional to the many other obligations included in enforceable undertakings and reflect the community expectation that a company should do more than simply rectify their contraventions. Like all elements of an enforceable undertaking, the contrition payment must be agreed by both the employer and the regulator. In deciding the quantum of a contrition payment, the FWO considers a number of factors, such as any previous incidences of non-compliance, the size and scale of the underpayment, whether the underpayment was deliberate, the level of cooperation with the regulator, and any risks to the solvency of the company and ongoing employment of its workers.

The FWO generally requires contrition payments to be paid to the Commonwealth Consolidated Revenue Fund, however in some instances payments have been made to other relevant bodies.²¹ This compares with

¹⁸ Fair Work Ombudsman, *Compliance and enforcement policy*, July 2019, <<https://www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.pdf.aspx>>.

¹⁹ Fair Work Ombudsman, *Enforceable Undertakings*, <<https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/enforceable-undertakings>>.

²⁰ Fair Work Ombudsman, *FWO launches 2019–20 priorities*, 3 June 2019, <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190603-aig-pir-media-release>>.

²¹ Luxottica Retail Australia Pty Ltd, trading as Sunglass Hut, entered into a court-enforceable undertaking which required a gesture of contrition through a \$50,000 payment to the National Association of Community Legal Centres.

contrition payments that form part of the Australian Securities and Investments Commission (ASIC)'s enforceable undertakings, which can require a party to perform a community service, such as through payment to affected consumers, funding an education program or paying money to a charity or community organisation.

Litigation

In determining whether to commence legal proceedings, the FWO considers a number of factors, such as whether the actions of the employer were deliberate or repeated, the seriousness of the allegations (for example, whether vulnerable workers were exploited), the deterrence value of taking a matter to court, the likely penalty that a court would impose compared to what could be achieved through alternative mechanisms, whether the employer has failed to comply with a legal requirement of the FWO in the past or whether the employer has failed to comply with a FWO compliance notice or enforceable undertaking.

Litigation generally has the effect of promoting both general and specific deterrence, including to demonstrate the various obligations and rights arising from Commonwealth workplace laws.²² In 2018–19, the FWO secured \$4,400,772 in court ordered penalties (\$3,487,585 against companies and \$913,187 against individuals).

The Fair Work Act allows courts to make a wide range of orders if a person (including an accessory) is found to have contravened a workplace law. For example, on application by the FWO, the courts have made orders requiring an employer to:

- pay compensation to underpaid employees to rectify underpayments
- engage a suitably qualified third party to undertake an audit of the employer's compliance with workplace laws and provide a copy of the audit report to the FWO
- engage a suitably qualified person or organisation to provide workplace relations training to management personnel
- undertake FWO education courses designed for employers
- provide the FWO with evidence of compliance with workplace laws
- display a workplace notice containing information on the minimum rates of pay, casual loading and penalty rates under the applicable award.

The FWO can bring enforcement proceedings to enforce a court order (including an order to pay a penalty), if the order is not complied with. Under the section 571 of the Fair Work Act, a court may not order a person serve a sentence of imprisonment if the person fails to pay a pecuniary penalty imposed under the Fair Work Act.

Injunctions

The courts are also empowered to impose an injunction against a person that restrains them from doing something, for example discriminating against an employee.²³ Under the Fair Work Act, a court may exercise its discretion to grant an injunction to stop or remedy the effects of a contravention. If a person who is the

²² Fair Work Ombudsman, *Compliance and enforcement policy*, July 2019, <<https://www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.pdf.aspx>>.

²³ Fair Work Ombudsman, *Litigation*, <<https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation>>, page reference no. 2356.

subject of an injunction breaches the injunction, they may be held in contempt of court, which is punishable by fines and/or imprisonment.

Compliance partnerships

The FWO may enter into a compliance partnership with a business by establishing a formal Proactive Compliance Deed.²⁴ A Proactive Compliance Deed is a collaborative arrangement negotiated by the FWO with businesses who want to publicly demonstrate their commitment to creating compliant and productive workplaces within their business structures or supply chains. These businesses are often not primary 'duty holders' under the Fair Work Act, and may not have breached the Fair Work Act. Compliance partnerships can be a way for businesses to demonstrate their commitment to rectifying supply chain governance issues.

Issues

The Migrant Workers' Taskforce raised a number of issues with the FWO's existing enforcement and compliance regulatory toolkit, particularly with regard to information-gathering powers, enforceable undertakings and injunctions.

The Migrant Workers' Taskforce Report stated that the FWO's oversight requirements for gathering information are 'unduly complex and burdensome', particularly when investigating wage exploitation. While the Protecting Vulnerable Workers Act significantly strengthened the FWO's evidence-gathering powers, the requirement for the FWO to apply to an AAT Presidential member before giving a 'FWO Notice' was criticised in the Migrant Workers' Taskforce Report. The Australian Building and Construction Commission is also subject to this oversight requirement, but the Australian Competition and Consumer Commission (ACCC) and ASIC are not.

Enforceable undertakings and court-ordered injunctions provide additional enforcement mechanisms to the regulator. However, there are differences in the way these tools work in the Fair Work Act, compared to the standard provisions available under the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers legislation), which were developed after the Fair Work Act came into effect in 2009.

For example, under the Fair Work Act the FWO can accept an enforceable undertaking 'in relation to' a contravention if the FWO reasonably believes that a person has contravened a civil remedy provision. In contrast, the standard provisions in the Regulatory Powers legislation do not explicitly require reasonable belief that a contravention has occurred before an undertaking may be accepted.

Additionally, under the current provisions of the Fair Work Act, the FWO is somewhat limited in its ability to seek civil remedies where there is ongoing non-compliance with an enforceable undertaking. Adopting the standard provisions in the Regulatory Powers legislation could clarify that the FWO has the power to unilaterally cancel an undertaking, rather than the present power which requires the other party to initiate a withdrawal and the FWO to consent. The FWO could then be empowered to pursue litigation in relation to underlying contraventions.

²⁴ All current and past Proactive Compliance Deeds are published on the FWO's website: <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/compliance-partnerships/list-of-proactive-compliance-deeds>.

While adopting the standard provisions would bring the Fair Work Act in line with the Regulatory Powers legislation, the explanatory memorandum for the Regulatory Powers legislation noted that there may be some cases where the standard provisions ‘will not be appropriate or sufficient for the requirements of particular regulatory agencies’.²⁵

Additionally, a number of recent underpayment cases have revealed a concerning lack of attention or negligence by many large, sophisticated corporate businesses in relation to basic compliance obligations under workplace law. These developments suggest that the existing tools and powers of the FWO could be improved to better deter and address non-compliance.

Reform options

Recommendations about FWO’s compliance and enforcement tools

The Migrant Workers’ Taskforce made a number of recommendations in relation to the FWO’s existing compliance and enforcement tools. In particular, the Taskforce suggested that the FWO be provided with the same information-gathering powers as other business regulators such as the ACCC (**Recommendation 9**). As noted above, the main difference between the current information-gathering power of the FWO and those provided to the ACCC and ASIC is the requirement for the FWO to apply to an AAT Presidential member for the issuance of a ‘FWO Notice’.

FWO notice provisions are also subject to protections to ensure that self-incriminating evidence obtained from an individual under a notice cannot be tendered against that individual in a criminal proceeding.

Additionally, the Taskforce recommended that the Fair Work Act provisions relating to enforceable undertakings and injunctions be amended to adopt the model provisions from the Regulatory Powers legislation (**Recommendation 8**). While an enforceable undertaking can already require an employer to rectify past contraventions, adopting the model provisions would clarify that the FWO may accept an undertaking that a person will take specified action directed towards preventing future contraventions. The model provisions would also give the FWO the power to unilaterally cancel an undertaking and instead pursue litigation in relation to underlying contraventions.

The Taskforce also recommended that the Government consider amending the Fair Work Act to provide that the FWO can enter into compliance partnership deeds and that these be made generally transparent (**Recommendation 11b**). A compliance partnership with the FWO is a public commitment by businesses to create a compliant and productive workplace or supply chain, usually for two to three years. The partnership is voluntary and formalised through a Proactive Compliance Deed signed by both parties but does not have a specific legislative basis. The FWO executed three new proactive compliance deeds in 2018-19. Deeds are published on the FWO’s website.

Discussion questions

1. Are compliance notices and infringement notices fit for purpose? Could these be utilised in a broader range of circumstances? Is the penalty for breaching a compliance notice, and are the fines that may be specified in an infringement notice, set at an appropriate level?

²⁵ Explanatory memorandum, Regulatory Powers (Standard Provisions) Bill 2014, p. 3.

2. Should there be a specified minimum penalty for non-compliance with an enforceable undertaking? If so, what should it be?
3. Are the consequences for not complying with an exercise of the FWO's compliance tools appropriate?
4. What are the benefits and risks of providing a legislative basis for compliance partnerships? What changes, if any, are required?
5. Are enforceable undertakings (including the utility of contrition payments) and injunctions fit for purpose? Should contrition payments be given a legislative basis? What changes, if any, are required?
6. Could there be any unintended consequences if the standard provisions in the Regulatory Powers legislation are adopted for enforceable undertakings and injunctions?
7. Is there evidence that the FWO's information-gathering powers (i.e. FWO notices) could usefully be aligned with those of other corporate regulators? If so, how?

Other Fair Work Act recommendations

Section 545 of the Fair Work Act states that the courts may 'make any order the court considers appropriate' if it is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision. While this is a very broad power, the courts have taken the view that this power only allows preventative, remedial or compensatory orders.²⁶

Further, there are a small number of examples of orders the courts have considered, but not made (for example, director disqualification orders),²⁷ on the basis that they are not expressly provided by the Fair Work Act.

The Migrant Workers' Taskforce Report recommended that courts be given 'specific power to make additional enforcement orders, including adverse publicity orders and banning orders, against employers who underpay migrant workers' (**Recommendation 7**). The Government's March 2019 response accepted this recommendation in principle.

A brief overview of the additional enforcement orders to be considered are outlined in the following section.

Adverse publicity order

- An adverse publicity order is an order that requires a person to disclose or publish certain information in accordance with that order.
- Adverse publicity orders are sometimes used in consumer law, and work, health and safety laws to address unlawful conduct.²⁸
- In the industrial relations context, adverse publicity orders could, for example, require an employer to display a notice admitting to having underpaid their employees.

While they may be effective in some circumstances, adverse publicity orders are likely to affect businesses differently, for example a café business compared to an online store. The discretion granted to a court would need to be broad enough to capture the various industries that could be affected.

²⁶ Australian Building and Construction Commission v the Construction, Forestry, Mining and Energy Union & Anor [2018] HCA 3.

²⁷ See *Transport Workers' Union of Australia, NSW Branch v No Fuss Liquid Waste Pty Ltd* [2011] FCA 982.

²⁸ See *Competition and Consumer Act 2010* (Cth), section 86D and *Work Health and Safety Act 2011* (Cth), section 236.

Banning order

- A banning order prevents individuals or companies from operating in a specific way or for a prescribed period, in prescribed circumstances.
- Banning orders are used in corporations law to prohibit a person from providing any financial services or specified financial services in specified circumstances or capacities. Similar provisions have also been made in the context of consumer laws.
- Under New Zealand migration law, new immigration instructions stop employers who do not comply with or have breached employment laws from recruiting migrant workers for a prescribed period.²⁹

Consistent with the recommendations made in the Migrant Workers' Taskforce Report, consideration could be given to adopting these kinds of measures into industrial laws to, for example, prevent an employer from employing vulnerable workers in certain circumstances. In making such an order, the courts would need to take into account the length of time during which the ban would apply and related matters.

Director disqualification

- Director disqualification orders are currently used in corporations and consumer law to prevent certain persons from managing a corporation.
- Under corporations laws, directors can be automatically disqualified in some circumstances, disqualified by ASIC without any court action for certain matters and disqualified by the court upon application from ASIC in proceedings relating to certain criminal and civil penalty provisions.³⁰
- Under consumer law, directors can be disqualified by the court upon application by the ACCC in relation to certain criminal and civil penalty provisions.³¹

While the Fair Work Act does not specifically empower courts to order disqualification of directors, the FWO has previously applied under section 545 to have such an order made where a business has been found to have breached their workplace obligations. However, the courts have demonstrated some reluctance to make such an order, taking the view that such a coercive power cannot be implied into the Fair Work Act merely by virtue of the broad wording of section 545.³²

Other proposals

The Migrant Workers' Taskforce additionally recommended that the Fair Work Act be amended to prohibit employers from advertising jobs with non-compliant pay rates (**Recommendation 4**). Currently, while the employment and payment of a person on non-compliant rates would breach industrial laws, the initial advertisement itself is not prohibited under the Fair Work Act. The Migrant Workers' Taskforce found that these sorts of advertisements are prevalent, and particularly target migrant workers. While this amendment could create an incentive for employers to check the legal minimum pay rate before advertising a position, it would be difficult to implement in practice. Some employers may also opt not to advertise the rate at all.

²⁹ Employment New Zealand, *Employers who have breached minimum employment standards*, 27 March 2019, <<https://www.employment.govt.nz/resolving-problems/steps-to-resolve/labour-inspectorate/employers-who-have-breached-minimum-employment-standards/>>.

³⁰ *Corporations Act 2001* (Cth), sections 206A-206GAA.

³¹ *Competition and Consumer Act 2010* (Cth), section 86E.

³² See *Transport Workers' Union of Australia, NSW Branch v No Fuss Liquid Waste Pty Ltd* [2011] FCA 982.

Finally, the Migrant Workers' Taskforce noted that there is confusion among stakeholders as to the legislative coverage of temporary visa holders under the Fair Work Act (**Recommendation 3**). The Taskforce therefore recommended that the Fair Work Act be amended to clarify that temporary migrant workers working in Australia are entitled at all times to protections under workplace law.

Discussion questions

8. Should the FWO be expressly empowered to make certain orders and should the courts be expressly empowered to make certain orders (such as banning orders, adverse publicity orders, or director disqualification orders)? In what circumstances should these orders be available? Are there any other orders that should be considered?
9. Would explicitly listing additional compliance and enforcement tools like adverse publicity orders encourage their use? Would they be effective in further deterring non-compliance?
10. Should the Fair Work Act be amended to prohibit the advertisement of non-compliant pay rates? What impact would this have on employer behaviour?
11. Are there any additional compliance and enforcement tools that should be included in workplace relations legislation?
12. Are there any unintended consequences that may arise from introducing the enforcement tools mentioned here?
13. Is the Fair Work Act sufficiently clear in its coverage of national system employees in Australia, including temporary migrant workers?

Part II: Wage redress mechanisms for recovering underpayments

Section 548 of the Fair Work Act makes provisions for certain proceedings to be dealt with as small claims proceedings in a state or territory court or the Federal Circuit Court. The small claims process is designed to be quick, cheap and informal, and deal specifically with underpayments of \$20,000 or less.³³ The aim is to settle disputes quickly and fairly, with minimum expense to the parties. Matters are usually resolved during the preliminary stage or with only one hearing, and without the involvement of lawyers. The Fair Work Act sets out that legal representation requires leave of the court, with leave only granted if no party is unfairly disadvantaged. Industrial representation also requires leave of the court and, if in a state or territory court, the law of the state must allow for the party to be represented in this way.

When dealing with small claims, the courts are not bound by the usual rules of evidence and procedure, which allow monetary claims to be dealt with more efficiently and expeditiously than regular court hearings. The legislative framework for small claims process remains largely unchanged since it was first introduced in 2009. A diagram of the process is at [Attachment B](#).

Applicants can lodge a small claims application in the Federal Circuit Court or the relevant state or territory court. Final and compulsory determination of an underpayment claim, or the making of binding orders, requires the exercise of judicial power, which is why these matters must be dealt with by courts.

The FWO may provide applicants with assistance in lodging small claims matters, including discussing different options, explaining the process, preparing and presenting calculations, completing court application and response forms, and filing and serving court documents.

The Migrant Workers' Taskforce found that commencing small claims proceedings can be a 'powerful incentive' to negotiate a settlement. In 2018–19, the FWO assisted over 1,000 people through the small claim process, recovering \$1,123,616 in unpaid entitlements. The FWO also attended small claims hearings as a 'friend of the court' in over 400 matters.

Issues

Evidence suggests only a small number of workers utilise the small claims process, although filings in the Federal Circuit Court have been increasing: 406 filed in the small claims jurisdiction in 2016–17, 456 in 2017-18 and 513 in 2018-19 – up from 210 in 2011–12.

In considering low utilisation of the small claims process, the Migrant Workers' Taskforce report identified a number of barriers to justice affecting the small claims process and noted that only a small number of affected workers are aware of the option to lodge a claim in this way. Accordingly, the Taskforce suggested a review of the small claim process to examine how it can become a more effective avenue for wage redress (**Recommendation 12**).

³³ See also *Fair Work Regulations 2009*, regulation 4.01.

This included considering a number of issues: court rules and procedures; filing fees, cost orders, and the \$20,000 threshold; and potential adaptation of the claims process. The Government's March 2019 response to the Taskforce report accepted this recommendation in principle.

Reform options

Court rules and procedures

The Fair Work Act prescribes that, in small claims proceedings, the court is not bound by any rules of evidence and procedure, and may act in an informal manner and without regard to legal forms and technicalities.³⁴ This allows the courts to be pragmatic and flexible in their approach to small claims matters.

The Taskforce put forward some potential changes to court rules and procedures (for example, waiver of fees, simpler pre-hearing processes, prioritisation of small claims matters and strict time frames for dealing with small claims) and asked whether costs can or should be awarded in small claims matters.

Currently, many courts have discretionary powers to specify rules and procedures for resolving small claims matters in their jurisdiction, subject to certain legislative limitations such as those in the Fair Work Act. For example, each court has specific practices around applications, serving court papers, and pre-hearing and hearing processes. In addition, some courts provide mediation and conciliation services facilitated by court registrars, with varying degrees of delegated authority.

Legal representation in small claims proceedings has purposely been limited on the basis that it increases legalistic processes and costs, and can be a significant barrier to people making claims. On the other hand, providing parties with a right to legal representation can improve efficiency, by speeding up court processes and making sure parties understand their rights and responsibilities in court. The option of allowing the courts to award costs in these matters would need to be further considered.

Filing fees, cost orders, and the \$20,000 cap

When a small claim is lodged with a court, an application or filing fee generally needs to be paid. Filing fees are set by, and vary between, each jurisdiction. In the Federal Circuit Court, filings fees currently stand at \$210 for claims less than \$10,000 and \$245 for claims between \$10,000 and \$20,000. In state and territory magistrates' courts, filing fees range between \$0 and \$500. The Migrant Workers' Taskforce noted that application fees can act as a disincentive to claimants and suggested that filing fees be waived in some circumstances. Currently, fees can be waived in certain circumstances, such as when the applicant is under 18 years of age, or can demonstrate financial hardship.

The Fair Work Act is generally a 'no costs' jurisdiction, which means the unsuccessful party will only be ordered to pay the legal costs of the other side in very limited circumstances.³⁵ As a result, basic costs typically incurred by a claimant cannot be recovered as part of a small claims action, which may further act as a disincentive against bringing a claim. To address this, the Migrant Workers Taskforce suggested

³⁴ *Fair Work Act 2009* (Cth), subsection 548(3).

³⁵ *Fair Work Act 2009* (Cth), section 570.

consideration be given to enabling costs (including filing fees) to be awarded to successful applicants in small claims matters.

A number of stakeholders have suggested increasing the \$20,000 maximum claim cap that applies to the small claim process. Increasing the cap would open the small claims process up to more underpayment claims, enabling a greater proportion of monetary claims to be resolved quickly and expeditiously and helping to maintain the real value of the monetary cap.³⁶ However, there is limited evidence the \$20,000 cap is a barrier to claims, or that a meaningful proportion of applications are adjusting their claim to fall within the cap. The FWO's increased use of compliance notices (outlined above) is expected to result in more instances of underpayments being rectified, meaning fewer employees need to access the small claims jurisdiction.

Adaptation of the claims process

To increase utilisation of the small claims process, the Migrant Workers' Taskforce suggested that consideration be given to applying the Fair Work Commission's non-adversarial processes, which are currently utilised for general protections, unfair dismissal and bullying applications, to the small claims jurisdiction.³⁷ Additionally, consideration should be given to the role of the FWO in supporting small claims applications.

The FWO currently provides assisted dispute resolution services in an effort to resolve problems before they escalate into formal disputes. This involves providing advice, education and resources, facilitated discussions, and/or dispute resolution. Around 95 per cent of all disputes are finalised in an average of seven days through these FWO services. If an individual wishes to commence a small claim, the FWO may then provide assistance to lodge the matter with the courts.

In an adapted small claims process, the Fair Work Commission could be used to perform registry functions, before ultimately referring unresolved matters to the courts as a final resort.

For example, small claims matters commenced independently, or with assistance from the FWO, could be required to be referred to a Fair Work Commission member (or conciliator) for conference in the first instance. If an issue is unresolved following conciliation, the applicant could have the matter heard by the court where the matter was lodged. The Fair Work Commission could also be required to advise the parties if there are no reasonable prospects of success.

It is important to note that the Federal Circuit Court (and courts in most other jurisdictions) already can, and do, refer proceedings for mediation, facilitated by a judge, a registrar, or another person appointed by a judge.³⁸ However, creating an additional step in which the Fair Work Commission provides case management assistance, facilitated conciliation or similar services, could reduce the number of disputes escalating to a formal court hearing. The availability of non-adversarial processes provide a more accessible, less

³⁶ The threshold has been \$20,000 since commencement of the Fair Work Act in 2009, when the threshold was increased from \$10,000 [para 2166 of the Fair Work Bill Explanatory Memorandum].

³⁷ The Fair Work Commission is not a court, and as such it is unable to exercise judicial power by finally and compulsorily determining underpayment claims and make binding orders. It can however (if conferred with jurisdiction to do so) utilise less formal, non-adversarial procedures, including case management, facilitated conciliation, or other forms of assisted dispute resolution.

³⁸ Federal Circuit Court Rules 2001, Division 45.4A.

intimidating setting compared to formal hearings, particularly for those who are self-represented.³⁹ Involving the Fair Work Commission at an early stage, and drawing on any assistance, could help to ensure that, prior to matters coming before the courts, there would have already been several attempts at reaching a resolution.

Discussion questions

14. Are conciliation and mediation appropriate processes for resolving underpayment matters? Could any elements of the Fair Work Commission's existing approaches to conciliation or mediation be adapted or modified to operate more effectively in this context?
15. How should redress for unpaid wages and regulatory action against employers be considered?
16. Do any court rules and procedures present unnecessary barriers to using the small claims process? If so, what are they?
17. Which court processes, if any, best facilitate resolution of small claims matters?
18. Should legal representation in the small claims jurisdiction remain limited?
19. Is there any evidence that the \$20,000 cap is a barrier to the small claims process? If the cap is increased, what should it be?
20. Should the Fair Work Commission be provided with the ability to exercise a non-binding small claims power for wage underpayment? I.e. Should a formal role for conciliating or mediating underpayment claims be conferred on the Fair Work Commission, for example as a compulsory first step in the small claims process? Would this role allow for conciliation and/or mediation of disputes about underpayments? Would this result in faster and more effective resolution of payment disputes? What are the risks of this approach? Should the FWO be able to offer assistance to the FWC in its consideration of small claims, as the FWO currently can when small claim matters are heard by a court?
21. Are there any ways the various assisted dispute resolution services offered by the FWO, Federal Circuit Court, and state and territory magistrates' courts could be improved? How can they be overcome, simplified, harmonised, and/or rationalised?
22. Are there other ways to improve access to the small claims process?

³⁹ The FWO also expects that its increased use of compliance notices will significantly assist in resolving disputes over alleged underpayments, particularly in relation to small and medium businesses. An inspector can issue a compliance notice if they form a reasonable belief that there has been an underpayment. These notices are court enforceable and will have reasonable timeframes for compliance.

ATTACHMENT A: FWO enforcement tools and Fair Work Act penalties

Table 1: FWO Enforcement Tools

Enforcement tool*	Description
Compliance Notice	Requires a person to take specified action to remedy the direct effects of the identified contraventions and/or require to person to produce reasonable evidence of compliance.
Infringement Notice	Similar to an on-the-spot fine and can be issued by a FWO inspector where there is reasonable belief that a person has contravened record keeping or payslip obligations.
Enforceable Undertaking	A written undertaking given by an employer who is 'reasonably believed' to have contravened the Fair Work Act and accepted by the FWO. Can include any agreed undertaking in relation to the contravention.
Litigation	The FWO will only commence proceedings if it considers that there is sufficient evidence to do so and it would be in the public interest.

*See the FWO's 'Compliance and Enforcement Policy' for guidance on when the FWO will use a particular compliance tool.

Table 2: Penalties available in the Fair Work Act

Contravention	Current maximum penalty level (\$) per individual/ body corporate
Record keeping failure (i.e. payslip requirements, timesheet)	<ul style="list-style-type: none"> • 1,260/6,300 for a contravention of the Fair Work Act • 420/2,100 for a contravention of the Fair Work Regulations
	<ul style="list-style-type: none"> • 12,600/63,000 for a contravention • 126,00/630,000 for a serious contravention
Underpayment (i.e. base rates, overtime, penalty rates)	<ul style="list-style-type: none"> • 12,600/63,000 for a contravention • 126,000/630,000 for a serious contravention
Failure to pay wages in full, etc.	<ul style="list-style-type: none"> • 12,600/63,000 for a contravention • 126,000/630,000 for a serious contravention

Unreasonable requirements to spend or pay amount ('Cash-back arrangements')	<ul style="list-style-type: none"> • 12,600/63,000 for a contravention • 126,000/630,000 for a serious contravention
Hindering or obstructing the FWO and inspectors etc.	12,600/63,000
Failure for a person to provide a FWO inspector with the person's name or address if requested	6,300/31,500
Providing false or misleading documents to the FWO	12,600/63,000
Failure to comply with an Enforceable Undertaking	<p>A court can make an order to:</p> <ul style="list-style-type: none"> • direct a person to comply with the undertaking • award compensation for loss that a person has suffered because of the contravention <p>or</p> <ul style="list-style-type: none"> • any other order that the court considers appropriate.
Failure to comply with compliance notice	6,300/31,500
Failure to comply with notice to produce records or documents to a Fair Work Inspector	12,600/63,000
Failure to comply with FWO Notice (compelling a person to provide information, produce documents, or attend and answer questions)	126,000/630,000

ATTACHMENT B: Diagram of the Fair Work Act small claims process

1. Small claims process flow chart (Guide only as processes vary in different courts)

