

DM7- 40999 Monday 21 September, 2009

8th Annual Workforce Conference “Fairer for who? How the industrial relations laws are impacting on Australian workplaces.”

9.10am Practical Impacts of the Fair Work Ombudsman’s combined agency powers and new discrimination jurisdiction

SLIDE 1: INTRODUCTION

Good morning

Firstly, I wish to acknowledge the traditional owners of the land on which we meet, the Wurundjeri People.

Secondly, may I extend sincere apologies from Nicholas Wilson, who regrets he is unable to be with you this morning.

I’m representing him here today in my current role of Chief Counsel of the Fair Work Ombudsman on secondment from my permanent position of Chief Counsel in the Department of Education, Employment and Workplace Relations (DEEWR).

In that role I’ve been closely involved in the development of Australia’s most recent and most comprehensive industrial relations legislative reforms – the Work Choices amendments to the Workplace Relations Act ... and then the Fair Work Act, which established a new workplace relations legal framework.

Of course, the views I express here today reflect my current position.

It is now almost three months since the Workplace Ombudsman and the Workplace Authority merged on July 1 with the creation of the new Fair Work Ombudsman.

I am very pleased to be working with the Fair Work Ombudsman at this critical time - at the beginning of this new era in workplace relations.

We have enthusiastically seized the opportunity now afforded us to encourage more harmonious, productive and co-operative Australian workplaces.

We hope that in a couple of years we will have forged a strong reputation for doing just that and for making a real difference in the workplace.

SLIDE 2: COMBINED AGENCY FOCUS

Workplace relations compliance, advice and education now come from a single organisation.

The Fair Work Ombudsman has been charged with a new educative role to ensure as many of us as possible – workers and employers alike - understand their respective rights and obligations.

And we will consolidate our previous experience to become even more effective.¹

Education and assistance, particularly for small to medium size enterprises, will be a priority.

Our new national workplace relations system comprises two arms - Fair Work Australia and the Fair Work Ombudsman.

In short, Fair Work Australia varies awards, makes minimum wage orders, approves agreements, hears unfair and unlawful dismissal claims and makes orders on matters including good faith bargaining and industrial action.

The Fair Work Ombudsman continues to monitor compliance and investigate breaches of workplace law and litigates where appropriate ... but now also produces Best Practice Guides and publishes other information to assist workers and employers alike, offering, as I say, a specialist service for smaller businesses.

In any one of our 26 offices, people can talk to us about workplace matters that concern them, including keeping the correct records or lodging an unfair dismissal complaint.²

The Fair Work Act defines our core role as that of promoting and encouraging *harmonious, productive and cooperative workplace relations*.

¹ Nick Wilson, “Speech: Creative Compliance”, Fair Work Australia Summit, 8 May 2009, 3

² Nick Wilson, Radio Interview ABC, 6:15pm 3 July 2009,
<http://www.abc.net.au/rn/nationalinterest/stories/2009/2616434.htm>

SLIDE 3: POWERS OF THE FWO (3 Things You Need To Know About The FWO)

Compliance, education and advisory functions are now combined to enable the community to come to a single point for advice and assistance.

And we can now do far more than simply provide rates of pay through our national contact centre ... we can offer more specific advice about how you actually operate within the new Fair Work Act.

How do I operate at best practice?

What do modern awards mean for me on 1 January 2010?

What are my options if I have been dismissed, and where do I go if I am concerned I have been terminated for a discriminatory reason?

These are questions we can help with.

An employer or employee can now seek and receive advice and localised assistance in one place – a benefit we believe will help to ensure wider legislative compliance.³

When he was appointed a couple of months ago, Nick Wilson observed that the Fair Work Ombudsman now had an unprecedented opportunity to implement a truly creative and comprehensive suite of compliance activities.

We can now strategically coordinate services, resources and powers in compliance, advice and education.

We are excited about the opportunity to link information, education and our inspection powers and the potential that offers.

A challenge, yes, but an opportunity we relish.

³ Office of the Fair Work Ombudsman, Media Release, “New Era in Workplace Relations” 1 July 2009, see: [http://www.Fair Work Ombudsman.gov.au/Media-centre/Pages/20090701.aspx](http://www.FairWorkOmbudsman.gov.au/Media-centre/Pages/20090701.aspx)

The opportunity for the Fair Work Ombudsman is to provide clear, simple and well targeted information and advice about the operation of the new laws...

...because fairness in the workplace means employers, employees and unions understanding their respective rights and obligations - and complying with them.

It's an opportunity to take our activities to the next level – to encourage more harmonious, productive and cooperative workplaces.

We will be looking at opportunities to move beyond compliance and into encouraging best practice in workplaces – helping employers, employees and unions work creatively to achieve happier, fairer and more productive workplaces.

SLIDE 4: NO CHANGE (The FWO In Action)

There are of course some functions that have not changed.

The Fair Work Ombudsman is delivering the same high level of service that the Australian community have come to expect from its predecessor agencies.

We have 26 offices across Australia, including offices in each capital city and 18 regional locations.

Our workforce numbers around 850, comprising more than 300 Fair Work Inspectors and more than 200 Fair Work Advisers.⁴

As well as providing advice and assistance, we continue to inquire into and investigate any act or practice that may be contrary to Commonwealth workplace laws - and where appropriate, litigate and seek court-imposed penalties.

For those of you who like facts and figures, we estimate we have responsibility for ensuring compliance with up to 40 billion workplace obligations every year for eight million employees working for half a million employers in about one million workplaces.⁵

Clearly, we can't be in every workplace.

⁴ Fair Work Online, Fair Work Ombudsman, Our Key People
<http://www.Fair-Work-Ombudsman.gov.au/About-Fair-Work-Ombudsman/Our-Key-People/Pages/default.aspx> and Fair Work Ombudsman Summary of Executive Meetings, 11 August 2009

⁵ Nick Wilson, "Speech: Creative Compliance", Fair Work Australia Summit, 8 May 2009, 2

And nor should we need to be.

But we have developed a number of creative activities that have significantly increased our effectiveness as a regulator.

By no means an exhaustive list, these include proactive targeted campaigns, education, use of the media, working closely with stakeholders and, where appropriate, prosecution.

Last financial year (08-09) we recouped \$32.4 million for around 28,000 workers.

A total of 78 matters went to court, resulting in penalties of \$1.6 million.⁶

SLIDE 5: LITIGATION

The courts are taking a dim view of wrong-doers.

We have achieved some pretty high penalties, including \$288,000 against a small cleaning company and its director in Adelaide for underpaying two employees less than \$4000.

No need to remind this audience of how many floors one needs to clean to pay off such a significant amount.

It should send a very strong message to all employers that complying with their legal responsibilities to their workforce is an obligation, not an option – even in times of financial difficulty.

Over the next 12 months, we expect to:

- complete around 26,000 investigations;
- respond to 1.4 million telephone inquiries;
- undertake 5500 audits;
- lodge up to 80 matters in court, and
- record up to 1.6 million hits on our website.

⁶ Office of the Fair Work Ombudsman, “Brief to Nick Wilson re ABC radio interview”, 14 August 2009, 1

SLIDE 6: NEW LEGISLATION

July 1 saw the introduction of a framework for good faith bargaining, broad general protections in employment (including protection against discrimination in the workplace) and an increase in compliance powers.

January 1 next year will see the commencement of Modern Awards and the National Employment Standards.

This will create a modern safety net that contains universal minimum entitlements in the NES – entitlements which will apply to each and every employee from January 1, 2010.

Nevertheless it will recognise the different needs of Australian industry by creating simple, flexible modern Award entitlements which may be the subject of bargaining, subject to employees being better off overall.

The AIRC's recent decision will phase in new wages, penalty rates and other wage increases under the Modern Awards until 1 July 2010.

The decision stipulates that wage increases will be phased in over five years (from 1 July 2010) in five equal amounts.

The reduction of the number of Awards in our system, and the modernisation of the entitlements contained in them, means the safety net will be easier to understand and apply for employers.⁷

The National Employment Standards are a key component of the Government's objective to create fair Australian workplaces and provide advanced legislated minimum standards.

SLIDE 7: DISCRIMINATION

Another major and exciting legislative change is our new anti-discrimination jurisdiction.

Australia ratified the International Labour Organisation Convention No 111 - which deals with discrimination in Employment and Occupation – back in 1973.

⁷ s576A of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* states that must be simple to understand and easy to apply, and must reduce the regulatory burden on business. They must also be simple to understand and easy to apply, and must reduce the regulatory burden on business.

From that point on, national policy was to promote equal opportunity and eliminate discrimination.⁸

However, the Fair Work Act represents a significant milestone in anti-discrimination protections.

For the first time, all employment-based discrimination matters may be dealt with by the national employment regulator...

...a national employment regulator which has inspectors with investigatory powers and the ability to prosecute contraventions of the legislation and obtain a broad range of remedies.⁹

The Fair Work Ombudsman is empowered to investigate allegations of discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin – and initiate legal proceedings.¹⁰

We are now better equipped to deal with multifaceted complaints¹¹ and to work with other regulators in the discrimination law arena.

In the past, the Workplace Ombudsman has had not had the power to investigate discrimination in the workplace and referred these matters to federal and state or territory anti-discrimination bodies.¹²

While individuals had certain remedies against certain types of discriminatory conduct in the Workplace Relations Act - for example, discrimination that resulted in dismissal, or discrimination for being a union member - there was no general capacity for the employment regulator to operate in this space.

The FWO has established a specialist anti-discrimination team to handle all discrimination enquiries and register complaints.

⁸ Leigh Johns, 'Anti-discrimination has a new watch-dog...with some real bite'

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¹⁰ *Fair Work Act 2009*, s351

¹¹ Nick Wilson, "Speech: The Challenges and Opportunities of Education, Assistance and Compliance in an Entirely New System", Workplace Relations Summit 2009, 10 June 2009, 12

¹² Nick Wilson, "Speech: The Challenges and Opportunities of Education, Assistance and Compliance in an Entirely New System", Workplace Relations Summit 2009, 10 June 2009, 12

Using our public reputation as a strong regulator we intend to provide advice and education about discrimination.¹³

We will not only investigate complaints, but educate businesses how to avoid discrimination in the workplace.¹⁴

Our objective is to work towards eliminating systemic workplace discrimination, particularly the more insidious forms that impact on vulnerable employees.

Discrimination occurs when a person, or a group of people, are treated less favourably than another person or group.¹⁵

Under the Fair Work Act, it is unlawful for an employer to take adverse action against an employee or a prospective employee because of the matters I referred to a moment ago.

We are finding we are assisting people with enquiries that fall outside our jurisdiction as they relate to matters which occurred before July 1 or they do not constitute unlawful discrimination.

Of course, not all unfair or unfavourable treatment will amount to adverse action under the Fair Work Act.¹⁶

Bullying and harassment are serious issues and completely unacceptable in the workplace.

However, we can only investigate these complaints if they fall within the scope of the Fair Work Act.

Currently, our discrimination team is receiving an average of 30 calls a week.

SLIDE 8: FIXING DISCRIMINATION

We have established an accessible complaint process where complaints can be made online or through the post.

¹³ Nick Wilson, "Speech: The Challenges and Opportunities of Education, Assistance and Compliance in an Entirely New System", Workplace Relations Summit 2009, 10 June 2009, 12

¹⁴ Nick Wilson, "Speech: The Challenges and Opportunities of Education, Assistance and Compliance in an Entirely New System", Workplace Relations Summit 2009, 10 June 2009, 12

¹⁵ Fair Work Ombudsman Field Operations Manual. Part C, Chapter 15, s15.3.1

¹⁶ Fair Work Ombudsman Field Operations Manual. Part C, Chapter 15, s15.3.1

To date, we have had over 90 complaints, of which we are investigating more than 40.

The most common complaints have related to disability, family and carer's responsibilities and race.

Under the Act, if a worker makes a complaint alleging discrimination, it is up to the employer to prove that they did not take action for discriminatory reasons.¹⁷

We have a number of remedies for dealing with discrimination ranging from a letter of caution to Enforceable Undertakings or ultimately litigation.

If we go to court, the maximum penalty is \$6600 per breach for an individual and \$33,000 per breach for a company.

I can reveal that we are currently investigating a number of serious allegations and gathering evidence about complaints.

We will be proactive in informing employers about discrimination in the workplace and how to avoid it.

Our recently released Best Practice Guides deal with topics such as Work & family and Gender pay equity.

These are relevant and easy-to-use documents that can help employers avoid discrimination and operate at best practice.

We also see that the Enforceable Undertakings provide an opportunity to address not only the complainant's needs, but also the broader issues of employer education.

To complement our reactive work, we are currently evaluating what can be done to incorporate discrimination investigations into our targeted audit programs and our new educational services.

SLIDE 9: DISCRIMINATION CASE STUDY (Pregnancy)

I am concerned by the intelligence we are receiving on the number of women whose employment is being terminated during maternity leave.

¹⁷ *Fair Work Act 2009*, s783(1).

Our early case studies suggest some employers are attempting to avoid their obligations to women when they return to work after the birth of a child.

In one case, a female employee alleged that when she requested maternity leave, her employer refused, and stated she had no entitlement as he intended to sell the business.

After she questioned her legal rights with the employer, he agreed to allow her to take the maternity leave.

Eight months into her maternity leave, the woman claimed her job was advertised in the paper. The advertisement did not state that the role was temporary.

Concerned by this, she contacted her employer and claims she was told her position was no longer available – despite co-workers telling her no-one else was filling the role.

After discussing the allegations with the complainant, a Fair Work Inspector spoke to the employer and explained that if the woman was prevented from returning from maternity leave this was likely to contravene the pregnancy discrimination protections of Section 351 of the Fair Work Act and other provisions relating to parental leave.

The Inspector also explained the general principles relating to unlawful termination and redundancy.

The employer promptly made an agreement with the Inspector to telephone the employee and make arrangements for her return to work.

She was very relieved and has since started back at work.

Likewise, we are pleased this matter was resolved voluntarily and have written to the employer to reinforce his relevant responsibilities.

In a separate case, we had a complaint from a person with carer and family responsibilities.

A mother with young children was facing a drastic change in her weekly roster that would require her to work four 10-hour days instead of five 8-hour days because this suited the majority of the workforce.

This change was impossible for her to accommodate as she could not drop the children at childcare early enough to come in at the new start time.

The complainant advised us that the employer's response was to say that her only option was to resign.

As a result of our intervention the employer and employee have made an arrangement for her to continue working 8-hour days.

We recognise that our entry into this new field is early days and we will need to grow into the jurisdiction.

SLIDE 10: EDUCATION

The legislation charges us with providing '*education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices*'.¹⁸

In April, the Deputy Prime Minister launched the Fair Work Education and Information program, which is targeted at providing assistance to employees, employers and small businesses to better understand the changes to the workplace relation system.¹⁹

The Government has committed \$12.9 million in funding to the program to enable *selected community, employee, employer and small business organisations* to deliver a targeted education and information program which is open to everyone.²⁰

Initially, the program will educate employers on legislative changes affecting them, such as *The Small Business Fair Dismissal Code* through seminars, workshops and online assistance.

The Fair Work Ombudsman has supported DEEWR in the development of this program.

¹⁸ Fair Work Act 2009, s679

¹⁹ Hon. Julia Gillard MP, Deputy Prime Minister, Media Release, "Launch of Fair Work Education and Information program" 13 April 2009, see:

http://www.deewr.gov.au/Ministers/Gillard/Media/Releases/Pages/Article_090414_114136.aspx

²⁰ Hon. Julia Gillard MP, Deputy Prime Minister, Media Release, "Fair Work Education and Information program grants" 29 June 2009, see:

http://www.deewr.gov.au/Ministers/Gillard/Media/Releases/Pages/Article_090630_075128.aspx

Previously, the Workplace Ombudsman used its compliance functions to provide educational services to employers via targeted investigations, presentations at educational institutions and audit campaigns and through the media to create community awareness of the agency and the legislative obligations.

The Workplace Authority also provided educational services through the Workplace Infoline and dedicated Knowledge Services areas.

The media – including Workforce Daily – is a strong motivator to our objectives of education, advice and compliance and a tool we use aggressively in order to spread our message to communities in every corner of the country.

Earlier this year, our Targeting team commenced a National Hair and Beauty Campaign and wrote to a total of 2114 employers and key stakeholders to inform them of our plans and provide information packs.

To complement that effort, we also issued a Media Release.

It was published in 26 separate newspapers throughout the country with a combined circulation of 1.5 million copies.

Our Media Release was also broadcast by 60 radio stations ... with a known combined listening audience of at least 778,000 people.

And it was published on a number of major Internet news sites – sites with monthly browsers that run into the millions.

Every day – via our response to Infoline calls, email contacts, our response to investigations, our targeted campaigns and our external communications, including presentations such as this – we are proactively informing, educating and assisting the community toward better workplaces.

SLIDE 11: FAIR WORK ONLINE

Fair Work websites are an important portal for employers to access relevant materials, including fact sheets, best practice guides and templates for record keeping and payslips.

Complementing this is the information service of the Fair Work Infoline.

As has been the case for some years now, I see the Fair Work Infoline as the central point of contact for all Australians to access accurate and timely information and assistance regarding the federal workplace relations system.

The highly skilled advisers on the Infoline provide comprehensive information to hundreds of thousands of workers and employers alike.

We estimate we will field 1.4 to 1.6 million calls this financial year.

SLIDE 12: EDUCATION (SMALL BUSINESS)

As I mentioned a moment ago, the Fair Work Ombudsman now has a dedicated Education Team.

The team is charged with designing and delivering educative solutions to Australian workers and employers to make complying with workplace laws easier and to promote better workplace relations practices.

The Education function is the newest part of the FWO family and is currently focused on researching and developing practical resources to assist small and medium sized enterprises (SMEs).

It is envisaged that this activity will also assist FWO service delivery by equipping operational staff with high quality, effective and practical resources to provide to, and support, SME operators when in the field or on the phones.

These resources will also be made available publicly through the FWO website.

Work that has already been going on in this space includes the development of the FWO's first suite of 11 recently-published Best Practice Guides.

The guides have been prepared for employees and employers working in small to medium sized businesses.

They are targeted at those the FWO believes are largely inexperienced in the field of workplace relations, have limited understanding of workplace relations or human resource management best

practice concepts and who may not have previously interacted with industrial participants or government agencies.

The guides have a dual purpose.

Firstly, they are intended to inform the reader about key rights and obligations and explain relevant aspects of the new workplace relations system and who they can turn to for help and further information.

Secondly, to inform the reader about and encourage them to operate at best practice and demonstrate the positive benefits of doing so.

We believe that the work we do in the Education space, coupled with the core agency compliance and advisory functions, will go a long way to assisting the FWO deliver on its legislative mandate of promoting harmonious, cooperative and productive workplace.

SLIDE 13: RESPONSES TO NON-COMPLIANCE

We do not insist there is only one way to achieve compliance.

We have been working with Enforceable Undertakings for a couple of years now, but only recently within a legislated framework.

We now have the opportunity to say to a wrongdoer that if they enter into a binding agreement with us, we will either not proceed to Court, or that we will proceed to Court only within limited circumstances.

The policy decision we have taken with Enforceable Undertakings is that there has to be admissions to our contended breaches, that the admissions have to be public and that both the Undertaking and the duties which flow from the agreement are made public.

We will be looking to using undertakings where they offer a more effective regulatory outcome, and where it offers opportunities to ensure continuing compliance that may not be available from a court.

SLIDE 14: CONCLUSION (What Should I Pay Attention To?)

Clearly, we are in a period of significant change.

Think carefully about preparing your organisation for the period ahead.

Pay attention to what you want your workplace to be and where your workplace strategy is going to take you.

Think about that as you ponder which parts of the Fair Work Act you engage with.

At the very least, you ought to consider auditing your compliance with the legislation and the instruments that sit under it.

It's an ongoing task that HR and Payroll probably won't like, but it's important if you are to understand and comply with your obligations.

Every business needs to make sure it documents very well the whole chain of employment from its decision to engage and the point at which they make an offer to the point at which the employee is inducted.

The more a business can illustrate good record keeping, the better it will be able to make live its claim of compliance.

But don't just tick the boxes.

How do you want to retain the employees you have, or grow their abilities?

How do you want to grow your business?

Take up the broader question of what you want the workplace to be.

Thank you for your attention and I trust the remainder of this two-day conference enthuses and inspires each of you.

SLIDE 15: CONTACTING US