

Submission to the Attorney-General's Department in response to the September 2019 Discussion Paper titled: Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance

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25 October 2019**

Thank you for the opportunity to make this submission to aid the Attorney-General's assessment of the operation of the Fair Work system in relation to business compliance with employment laws. It is encouraging that the Government is giving attention to this issue in light of the weight of evidence confirming the serious state of employer non-compliance in Australia. Submissions received by this current inquiry will no doubt add to the submissions to, and reports of, numerous relevant inquiries from the past four years.

It is unfortunate that issues of penalty and enforcement are being considered in separate discussion papers. To consider legislative changes in isolation from their implementation, in particular penalty from enforcement, risks inefficient review and unintended consequences. For this reason, I will submit now in relation to just one aspect of the current discussion paper, requesting that the Attorney-General provide specific information in the second discussion paper to facilitate the most useful submissions from the public.

The current discussion paper appears to be based on the premise (largely shared by the report of the Migrant Workers Taskforce commissioned by the Government) that the Fair Work Ombudsman (FWO) should be solely responsible for enforcing employment laws. I respectfully submit that this is a flawed premise and one that will no doubt be explored in submissions on enforcement following the release of the second discussion paper.

In this regard, I note that the current discussion paper states:

*"the Government has invested over \$60 million in additional funding for the FWO in recent years"*¹

For those making submissions in response to the forthcoming discussion paper regarding enforcement, it will be necessary to understand the FWO's current and planned funding. Unfortunately, this is very difficult to determine based on available financial disclosures.

This submission is therefore a request that the Attorney-General include in the second discussion paper full disclosure of Government funding of the FWO at present and estimated for the near future so that the effectiveness of proposed penalties and enforcement can be properly assessed by all stakeholders.

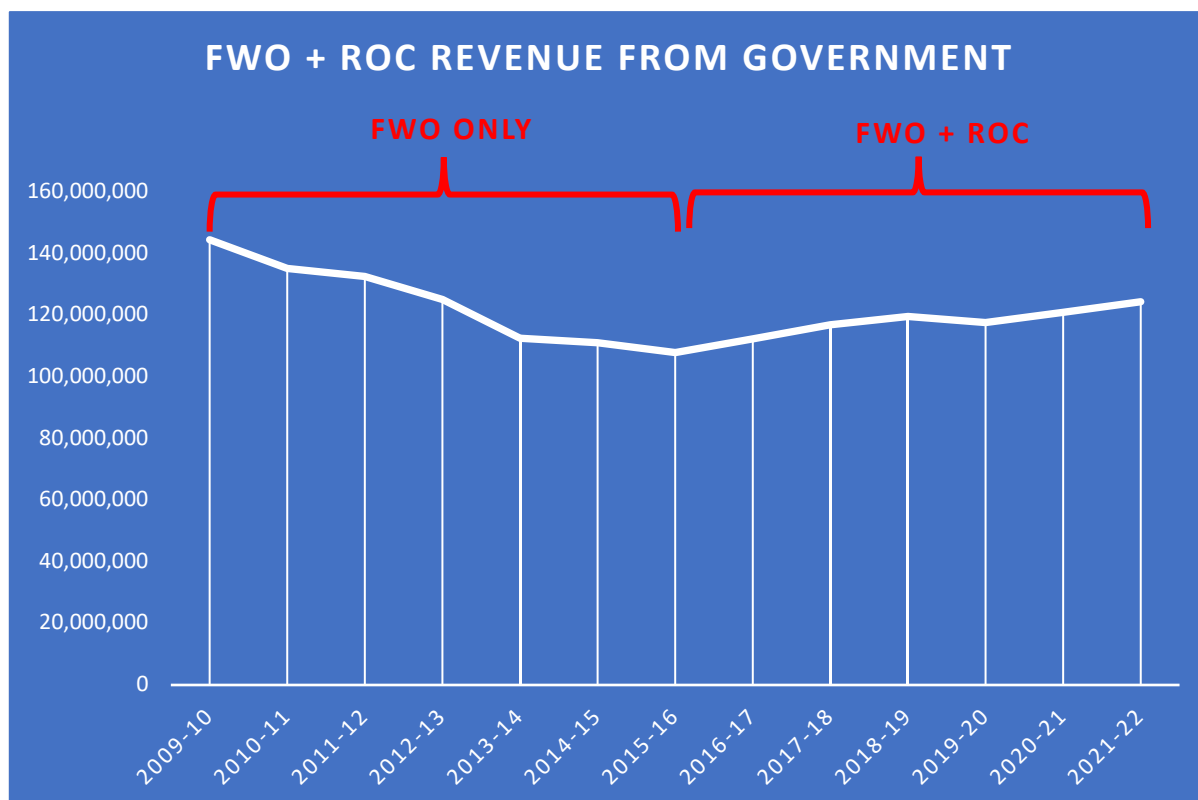
Given the briefing paper's implicit premise that the FWO is to be solely responsible for enforcement, an examination of the FWO's actual capabilities and resourcing is warranted. Following is a summary of the FWO's 'Revenue from Government', since it commenced operation under its current name in 2009, as disclosed in the FWO's annual reports and the Government's 2019-2020 Budget.

¹ Australian Government, Attorney-General's Department (2019) 'Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance, September 2019, p.3

**Table 1: FWO and Registered Organisations Commission (ROC)
Revenue from Government**

FY	Revenue from Government \$	Recipient of Revenue
2009-10	144,645,000	FWO
2010-11	135,341,000	FWO
2011-12	132,702,000	FWO
2012-13	125,262,000	FWO
2013-14	112,685,000	FWO
2014-15	111,184,000	FWO
2015-16	107,995,000	FWO
2016-17	112,395,000	FWO + ROC
2017-18	116,976,000	FWO + ROC
2018-19	119,612,000	FWO + ROC
2019-20	117,755,000	FWO + ROC
2020-21	121,030,000	FWO + ROC
2021-22	124,489,000	FWO + ROC

Figure 1: FWO and ROC Revenue from Government



(Both Table 1 and Figure 1 above are based on the following: 2009/10 - 2018/19 are sourced from FWO Annual Reports; 2018/19 - 2021/22 are sourced from the 2019-2020 Budget - Additional Estimates Statements, 3.2.2 Budgeted Financial Statements)

In relation to these disclosures of the FWO's Revenue from Government, I make the following observations:

1. Since the FWO's first year of operation under its current name in 2009/10, its Revenue from Government dropped every year to 2015-16 by a total of \$36,650,000 (just over 25% reduction).
2. Since the FWO's budget was combined with that of the ROC in 2016/17, their combined Revenue from Government has increased from the low point in 2015/16 to \$119,612,000 in 2018/19 by a total of \$11,617,000 (just under 11% increase).
3. Further, there has been a large drop in funding of the FWO in real terms when calculated on a per employee basis. In 2009/10 there were approximately 10,778,300 employed persons in Australia² and the FWO's Revenue from Government was therefore about \$13.42 per employed person. At present there are approximately 12,915,200 employed persons in Australia³ and the FWO's (and ROC's) Revenue from Government is therefore about \$9.26 per employed person. This represents a 31% cut in FWO funding per employed person (without taking into account that the FWO now shares its Revenue from Government with the ROC).
4. The FWO and ROC's Revenue from Government is projected to increase by an additional \$4,877,000 to a total of \$124,489,000 in 2021/22.
5. Projected 2021/22 Revenue from Government for the combined FWO and ROC is at about 2012/13 levels for the FWO alone.
6. The picture is complicated somewhat by the 2018/19 Budget announcement that the ROC would receive:

*"an additional \$8.1 million over four years from 2018-19 (including \$1.0 million in capital funding in 2018-19) to the Registered Organisations Commission (the Commission), to allow it to perform the additional functions conferred on it by the Fair Work (Registered Organisations) Amendment Act 2016 and the Fair Work Amendment (Corrupting Benefits) Act 2017"*⁴

and by the 2019/20 Budget announcement that the FWO would receive :

"\$26.8million over four years from 2019-20 (and \$6.2 million per year ongoing), including \$1.0 million over four years in capital funding, to establish a National Labour Hire Registration Scheme (the Scheme) to protect vulnerable workers, including migrant workers"

and:

² 6202.0 - Labour Force, Australia, July 2009 -

<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/6202.0Main%20Features1Jul%202009?opendocument&tabname=Summary&prodno=6202.0&issue=Jul%202009&num=&view=>

³ 6202.0 - Labour Force, Australia July 2019 -

<https://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/6202.0Main%20Features1Jul%202019?opendocument&tabname=Summary&prodno=6202.0&issue=Jul%202019&num=&view=>

⁴ 2018-19 - Budget - Budget Paper No. 2, 2018-19 - <https://archive.budget.gov.au/2018-19/bp2/bp2.pdf> , p.150

\$9.2million over four years from 2019-20 (and \$2.3 million per year ongoing) to establish a dedicated sham contracting unit within the Fair Work Ombudsman.”⁵

However, these forward estimates have not appeared on published ‘Revenue from Government’ figures unless offset against other reductions.

7. It is difficult to observe where “the Government has invested over \$60 million in additional funding for the FWO in recent years” even allowing for the combined funding for the FWO and ROC.
8. Given that the FWO and ROC’s funding are now combined, and that the additional budget measures, noted in point 6 above, do not appear in ‘Revenue from Government’ disclosures, we need transparent details of the FWO’s resourcing in order to make useful submissions regarding enforcement.

Finally, related to the FWO’s funding is its capacity to undertake litigation. This is not a true measure of the totality of the FWO’s achievements in light of its proactive strategic enforcement measures, of which litigation is a small part. However, it is an important indication of the potential applicability and effectiveness of any new maximum fines and, if the FWO is to be responsible, criminal sanctions. This is because both maximum fines and criminal sanctions will likely only be imposed by a court and not by employers’ agreement. Based on the FWO’s annual reports, the FWO has commenced between 23 and 55 litigations each year as follows:

Table 2: FWO Litigations Commenced per Year

FY	Litigations Commenced
2009/10	53
2010/11	55
2011/12	37
2012/13	50
2013/14	37
2014/15	50
2015/16	50
2016/17	55
2017/18	35
2018/19	23

(Table 2 is based on data reported in FWO, and FWO+ROC, Annual Reports)

Therefore, I request that the Attorney-General provide the following information, relating to the FWO alone (separate from the ROC), in the second discussion paper so that stakeholders can make informed submissions regarding enforcement:

1. What is the FWO’s current total Revenue from Government?
2. What is the FWO’s projected total Revenue from Government over the next four years?

⁵ 2019-20 Budget - Budget Measures Budget Paper No. 2 2019-20 - <https://www.budget.gov.au/2019-20/content/bp2/download/bp2.pdf> , p.147

3. How many inspectors, working on business compliance with employment laws, does the FWO currently have in the field?
4. What is the projected number of inspectors, working on business compliance with employment laws, the FWO will have in the field in each of the next four years?
5. What is the projected number of civil litigations that the FWO will have resources to commence in each of the next four years?
6. What is the projected number of criminal litigations that the FWO will have resources to commence in each of the next four years?