

6 May 2024

ASX Corporate Governance Council

By electronic submission

Dear Council Members,

Corporate Governance Council Principles and Recommendations – Fifth Edition Consultation Draft

The Fair Work Ombudsman (**FWO**) welcomes the opportunity to make a submission on the Consultation Draft of the proposed fifth edition of the *Corporate Governance Council Principles and Recommendations (Principles and Recommendations)*.

The Fair Work Ombudsman (**FWO**) is the Australian workplace regulator. The FWO regulates all businesses and workers covered by the *Fair Work Act 2009* (Cth), approximately one million employing businesses and nearly 13 million workers.

Noting the remit of the FWO, we do not propose to address each of the questions posed in the Background Paper and consultation questions. This submission is set out in two parts:

1. Information for the Council to contextualise the FWO's role and recent regulatory experience with ASX Listed Entities self-reporting large scale underpayments.
2. Submissions limited to the following discrete aspects of the proposed amended Principles and Recommendations that the FWO believes will assist to address the common corporate governance failings observed in our regulatory activities:
 - a. Recommendation 3.2 - Code of conduct and culture;
 - b. Recommendation 3.3 – Interests of key stakeholders;
 - c. Recommendation 7.2 – Review of risk management and internal control frameworks; and
 - d. Recommendation 7.4 – Disclosure of material risks.

As you will see from the below, the FWO supports these proposed amendments to the Principles and Recommendations and sees these as a positive opportunity for enhanced corporate governance in the area of workplace compliance and preventing underpayments.

PART 1 – BACKGROUND INFORMATION

Large scale underpayments by ASX Listed Entities

In February 2020 the (former) Fair Work Ombudsman wrote to Chief Executive Officers and Boards of the ASX Top 100 calling for immediate action to assure themselves, their shareholders, workers and the community that their companies were meeting lawful workplace obligations.

The FWO raised the issue with Boards of Australia's largest companies and employers to encourage

them to take an active leadership role on workplace compliance and to set a culture of compliance for management, and to urge them not to be complacent or over-confident about their organisation's capacity to meet obligations under the *Fair Work Act 2009*.

Between 2020 and 2024 the FWO has had dealings with 35 corporate groups in the ASX Top 100¹ that involve self-reported non-compliance with workplace laws, involving remediation programs for underpaid entitlements in excess of \$1.7 billion (excluding superannuation, interest and on-costs). Programs in this cohort remain ongoing and underpayments are continuing to be quantified beyond this figure. In addition to the Top 100 listed entities, the FWO has and continues to deal with a number of other listed entities involving further substantial underpayments in addition to the above.

Large corporate underpayments continue to be one of the FWO's regulatory priorities in 2023-24, given the ongoing number of organisations self-reporting non-compliance, the impact on workers in terms of unpaid entitlements and the commonality of underlying corporate governance failings in entities referred to above. The FWO also has ongoing civil penalty litigations against ASX listed entities including Woolworths, Coles and Super Retail Group, and a number of ongoing investigations and assurance processes covering remediation programs spanning many years.

Observations on corporate governance failings in underpayment matters

Our recent experience has identified that underpayments have often become systemic, prolonged, and requiring time consuming and expensive remediation programs due to corporate governance failings in three common areas:

1. A failure to identify workplace compliance risks in an entity, and no or inadequate internal controls, monitoring and accountability for ensuring compliance with the *Fair Work Act 2009*;
2. Poor line of sight between senior management and Boards and the culture or practices at the workplace level that lead to non-compliance, with emerging risks or cultural problems not being escalated or otherwise assessed and tested; and
3. Little or no formal Board or committee role in setting a culture of compliance with workplace laws or mechanisms to oversight and monitor workplace compliance risks.

The FWO's recent experience is that a gap exists where workplace compliance is a matter inadequately dealt with, or not dealt with at all, in most corporate governance frameworks of listed entities based on the current requirements and best practice principles. For example:

- Save for when a large-scale underpayment is identified and a remediation program is occurring, Boards are not routinely or regularly receiving reports on workplace compliance risks or issues. The IAG example below highlights that this gap needed to be addressed through regulatory response to achieve a good practice outcome.
- Payroll or other workplace law non-compliance risks are generally not identified as risks or material under current frameworks, and not otherwise within scope of the Charters or terms of reference for Audit and Risk Committees – that is until a problem has become so systemic and serious the financial implications require internal audit or risk oversight. By then it is often too late to prevent the issue occurring on a widespread scale.

¹ Some of the 35 corporate groups have changed status between 2020 and 2024, e.g., one Top 100 entity has been delisted from the ASX due to an acquisition and some entities' market capital now places them outside this cohort. The FWO also often receives multiple separate self-reports of non-compliance for subsidiaries that operate within a listed entity corporate group.

- Remuneration Committees do not otherwise consider compliance with workplace laws as within the remit of the committee, despite often including other “people” related areas such as remuneration policies, talent management, human capital metrics and associated risks.

Two enforcement outcomes involving ASX Top 50 listed entities in 2024 highlight non-compliance with workplace laws going unidentified and unaddressed for substantial periods of time in listed entities due to inadequate risk identification, internal controls and Board oversight of workplace law compliance.

Commonwealth Bank of Australia

- In February 2024 the FWO obtained civil penalties of over \$10.3 million against Commonwealth Bank of Australia and its subsidiary CommSec², the highest workplace relations penalties ever (prior to the increased penalties in the *Fair Work Act 2009* taking effect).
- The proceedings related to \$16 million of underpayments, a small portion of the broader underpayments reported and remediated by the Group. Some of the contraventions were ‘serious contraventions’, with CBA and CommSec admitting to expressly, tacitly or impliedly authorising systemic conduct that occurred over ten years.
- The Federal Court found that senior officers of the Bank were aware of compliance issues with the Bank’s enterprise agreements from 2015 and failed to act in a timely or thorough way. Justice Bromwich, in handing down the penalties made the following observations about the conduct:

“70. The simple fact is that the obligations were readily able to be complied with, and proper checks to ensure that was taking place were not hard to implement. That did not happen, and the message needs to be loud and clear that this is not good enough and will not be tolerated...”

71. These were substantial and prolonged contraventions by large and wealthy financial institutions who were amply able to prevent anything of this nature occurring in the first place, let alone over such a substantial period of time ... What needs to be deterred is a system being left in place that allows for basic errors to be made without an adequate system of checking or detection and thereby correction, and as a result erroneous assumptions made and untenable beliefs held with serious consequences for a large number, if not proportion, of employees.

...

73. The problem with the arguments advanced by CBA and CommSec is that they focus in key parts on the nature of the errors and misunderstandings that led to the contraventions taking place, rather than focussing on the systems and processes that allowed that situation to arise in the first place, and the apparent lack of audit and other checking systems to ensure compliance on an ongoing basis. It is that lack of adequate systems that allowed the contraventions to take place and to continue for so long. While an absence of a culpable state of mind accompanying the contraventions means that the FWO cannot establish such a culpable state of mind as aggravation, that is not what the FWO seeks to achieve. Rather, the nature of the FWO argument is that the quest for and focus upon competitive advantage in terms of employee benefits meant that there were wholly inadequate systems in place and serious failures to ensure compliance with the relatively simple and explicit legal obligations attending upon the choice to depart from the default of an award and the EA, and FWA obligations arising upon that departure.”

² [Fair Work Ombudsman v Commonwealth Bank of Australia](#) [2024] FCA 81.

Insurance Australia Group Limited

- In March 2024 the FWO entered into an [enforceable undertaking](#) with two employing entities within Insurance Australia Group Limited (**IAG**). In 2020 IAG commenced a review of its payroll compliance for employees across the group entities. That historical review spanning 2013 to 2022 identified over \$21 million of underpayments within the FWO's jurisdiction. The underpayments were caused by:
 - basic shortcomings in the IAG entities' systems and processes, including not having time and attendance systems in place to record actual hours of work of employees leading to underpayments;
 - failing to undertake reconciliations and top up payments required under three successive enterprise agreements to ensure that entitlements paid to employees under the enterprise agreements were no less beneficial than employees' minimum entitlements under the applicable Awards.
- In 2022 IAG implemented a continuous compliance monitoring program to identify and remedy underpayments occurring after the comprehensive review completed. Since implementing that program, further remediation payments of \$1.5 million plus superannuation and interest have been made and the number of impacted employees has steadily reduced from 3,592 underpaid employees in June 2022 to 175 employees by October 2023.
- In addition to a range of corrective actions and improvements in systems and processes, the enforceable undertaking requires IAG to review and, where necessary, amend internal processes for reporting to IAG's Board to ensure that the Board is appropriately notified in relation to the IAG entities' compliance with workplace obligations and has oversight of corrective programs being implemented to ensure future compliance through regular reporting.

Legislative response to large underpayments and focus on corporate culture

As the emergence of large-scale wage underpayments has demonstrated, there is substantial community concern about underpayments of workers and the Government has responded by introducing through the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* increased civil penalties for body corporates, a lower threshold of recklessness for serious contraventions, and a new criminal offence provision for intentional underpayments to commence from 1 January 2025.

The corporate criminal responsibility provisions of the *Criminal Code* apply in relation to determining the intention of a corporation in relation to the new criminal offence provisions. Under the Criminal Code intention will exist if a corporation expressly, tacitly or impliedly authorises or permits the offence. These provisions can extend to the conduct of high managerial agents of a corporation, a corporate culture that directed, encouraged, tolerated or led to non-compliance, or failing to create and maintain a corporate culture requiring compliance.

The FWO is engaging with stakeholders and regulated entities to call on Boards to reflect on their corporate culture and assess whether there are attitudes, policies, rules, conduct or practices that tolerate or tacitly encourage non-compliance with payment obligations to employees, and if so, reset a culture of compliance.

PART 2 – SUBMISSIONS ON DRAFT PROPOSALS TO THE PRINCIPLES AND RECOMMENDATIONS

Recommendation 3.2 – Code of conduct and culture

The FWO supports the inclusion of commentary and indicators of healthy organisational culture

including a “speak up” culture that promotes listening to staff and appropriate escalation of issues from management to the Board or relevant committee including patterns of behaviour that may be material when *taken as a whole*.

In conjunction with the proposed amendments to considerations of material risk in Recommendation 7.4, the escalation of patterns of behaviour that may be material when taken as a whole could make a significant impact on workplace compliance risks and issues being identified and addressed before they become systemic or material financial, social or governance risks for an entity.

The FWO also supports the suggestion in Box 3.2 that codes of conduct include provisions requiring an entity to have regard to the interests of key stakeholders, as an example of acting in the best interests of the entity, and to report misconduct or improper state of affairs or circumstances in relation to the entity not just code of conduct breaches. We note this complements whistleblower regimes and fills a gap between strict code of conduct issues and whistleblower regimes; to capture potential corporate culture or compliance issues occurring in the workplace that could impact the interests of security holders.

Recommendation 3.3 – Interests of key stakeholders

The FWO supports the recommendation to have regard to the interests of key stakeholders and processes to engage with them and report material issues to the Board. The FWO also welcomes in the Commentary on Recommendation 3.3, the recognition of employees and their representative organisations as key stakeholders of an entity and the benefits that their perspective, insights and participation in decision-making can provide the entity.

The FWO strongly believes that entities that embrace the voice of workers and their representative organisations, in ways that promote open and productive relationships, will be far more successful embedding compliant practices, fostering productive and cooperative workplaces and delivering on business outcomes.

The proposed amendments to recognise the interests of this stakeholder group and engage with them are especially relevant to good corporate culture in the context of the criminalisation of intentional underpayment provisions that commence from 1 January 2025 and recently increased civil penalties for serious contraventions under the *Fair Work Act 2009*.

The FWO notes that in many entities work is performed by a range of people who are not always directly employed by the entity under a contract of employment, for example labour hire workers and independent contractors.

FWO Recommendation 1: The FWO recommends that the term “worker” instead of “employee” in the Commentary to Recommendation 3.3 would better achieve the intent of the amended recommendation to ensure that the perspective, insights and appropriate participation in decision making encompasses all workers who contribute to the outcomes of the entity.

The inclusion in the Commentary of suggested Board activities including “requiring information on serious or systemic workplace incidents or customer complaints” is also supported, however the FWO believes this could be framed to also capture workplace compliance issues or risks, not just workplace incidents.

As identified in Part 1 above, the absence of compliance monitoring and escalation of workplace compliance issues to either Board level, Audit and Risk or Remuneration Committees, has contributed in our experience to issues becoming systemic. Like reporting on workplace health and safety incidents, or incidents involving serious conduct breaches, the reporting on compliance issues involving underpayment risks or compliance with workplace laws would in our view lead to faster detection,

redress and prevention of non-compliance and should be embedded into the reporting frameworks of listed entities.

FWO Recommendation 2: The FWO recommends that the list of examples of board activities in the Commentary to Recommendation 3.3 include a reference to requiring information on underpayment risks and/or workplace compliance risks or issues.

Recommendation 7.2 – Review of risk management and internal control frameworks

The FWO supports the enhancement of recommendation 7.2 to:

- specifically identify internal control frameworks as essential to managing an entity’s material risks, and
- annually review the effectiveness of risk management, including internal control, frameworks.

Together with the proposed changes to Recommendation 7.4, the FWO believes that a stronger focus on internal controls being implemented, tested and reviewed regularly will increase the likelihood of workplace compliance risks being identified as risks that could impact the entity’s sustainability over a period of time, and being better identified and eliminated or mitigated.

Recommendation 7.4 – Disclosure of material risks

The FWO welcomes the proposal to elevate governance risk, given highly publicised corporate governance failures because of conduct, compliance and operational risk failures, to assist entities to more holistically consider risks that can evolve from a governance risk to a financial one, or span multiple categories of risk at the same time.

The FWO suggests that the commentary to Recommendation 7.4 specifically highlight underpayment risk, payroll compliance and/or workplace law compliance examples of risks that can span governance, social and financial risk. This could be achieved by substituting the reference to “workplace health and safety issues” to “workplace compliance issues” to encompass a broader range of workplace risks, or preferably by including an additional specific reference to underpayment risk, payroll compliance and/or workplace compliance issues.

FWO Recommendation 3: The FWO recommends that the Commentary to Recommendation 7.4 include a reference to underpayment risk, payroll compliance issues and/or workplace compliance issues as examples of governance or social risks that may develop into financial risks.

Should the Council require further information or have any questions about this submission, please contact me on (03) 9954 2654 or michelle.carey@fwo.gov.au.

Yours sincerely,



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