

National PIR Group Conference

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Michael Campbell

Acting Fair Work Ombudsman

The FWO's Approach to Compliance and Enforcement

**** [Slide 1 – The Fair Work Ombudsman's approach to compliance and enforcement]**

I begin by respectfully acknowledging the traditional owners of the land on which we meet today and pay my respects to Elders both past and present.

Thank you [insert name of person who has introduced MC]

I would like to thank the Ai Group for the opportunity to speak today in my capacity as the Acting Fair Work Ombudsman. The views I express are my own and do not necessarily reflect Government policy. I take responsibility for any errors in the text.

As the title of this speech suggests, I want to share some insights of the FWO's current compliance and enforcement approach with you.

I am particularly conscious that many of you, in your roles as senior business leaders, industrial and employment relations professionals, or as employees of important peak organisations, have a particular interest in the compliance and enforcement work of the FWO.

I understand that your interest goes both to our operational policies, but also to our regulatory activities and the impact these have on your day-to-day work or that of your membership or those you represent.

**** [Slide 2 – The journey]**

The journey

The FWO has come a long way as a Regulator since its humble beginnings as the Executive Agency that was the Office of Workplace Services.

As an Agency we are very aware that most employers attempt to do the right thing, and in fact most do, and we recognise that the greatest good comes from the provision of tools and resources that assist employers and employees to resolve workplace issues in their own workplace.

We are also well acquainted with those workplace participants that seek to gain advantage by deliberately flouting their obligations. Our enforcement model ensures that we make appropriate use of our available resources to deter and penalise those that show blatant disregard for workplace laws.

The FWO has made a fundamental shift away from what I will call the traditional inspectorate approach, that is, the intensive, detailed investigation of each and every workplace complaint lodged with us. We have moved from a focus on reactive complaint investigation to a model of strategic enforcement.

We have established various alternative systems and pathways to identify non-compliance and resolve workplace complaints. This strategic approach seeks to resolve matters at a workplace level between the parties. In turn, the FWO is able to focus our efforts where they are most needed.

Much of this evolution has been in direct response to what employers and employees and their representatives have been telling us about our investigation process, and what we know about those who most need, or seek out, our assistance.

**** [Slide 3 – Complainant demographics]**

As part of our approach to reshaping our complaints process, we undertook an analysis of our complaint data for the 2011/12 financial year.. The analysis found that the typical profile for a female complainant was aged between 21 and 30 years and likely to be employed in the Health Care and Social Assistance industry, Accommodation and Food Services, Retail Trade, and Hair Dressing and Beauty. Typical male complainants are aged between 21 and 40 years and likely to be

engaged in the domestic Construction industry or Transport, Postal and Warehousing industries. Across all industries analysed, complaints received are more likely to be from male complainants. Of note, the only industry where there is a significantly higher representation of female complainants is the Health Care and Social Assistance industry, with 85% of complainants identified as female¹.

In addition to analysing our data, we have also made it a priority to listen to our key stakeholders, such as the Ai Group, during this process of change. The feedback we receive about the way we go about our work has shaped our current regulatory approach which I will talk about today.

**** [Slide 4 – What changes have we made]**

What changes have we made?

Australia has almost 11.6 million employees². The FWO receives complaints from only a small number of them but on a wide range of workplace issues, from underpayment of wages, non-provision of leave entitlements through to general protections including discrimination.

Last financial year, we received more than 26,000 complaints, and provided responses to over 770,000 inquiries to the Fair Work Infoline. These figures demonstrate that as a regulator we continue to play an important role in the delivery of advice, assistance and compliance outcomes for the Australian community.

As I mentioned earlier it wasn't that long ago that the FWO, like its predecessor agencies, took a traditional approach to investigating and resolving workplace complaints.

Our experience under this model was that the vast majority of employers sought to do the right thing, and that matters were resolved more often than not, through

¹ Internal Fair Work Ombudsman document – 'The Nature of Complaints 2011/12' – to be published later this year.

²At March 2013, ABS, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0>

assistance and education rather than through the use of statutory powers and a detailed linear investigation.

This same experience tells us that each case is not the same and they do not all require the same deployment of resources, or use of statutory powers, to achieve a quality outcome.

In the majority of our underpayment complaints, the cause of the error is an oversight on behalf of the employer. This statement is born out when you look at the quantum of underpayments recovered in the majority of cases. An analysis of complaints data for 2011/12 financial year found that 50% of monies recovered were for amounts of less than \$1,200. A total of 86% of all recoveries made last financial year were for amounts less than \$5, 000³.

So along our journey we have recognised that it is critical to continue to evolve as a regulator. In the continual improvement of our practises we endeavour to adapt and integrate world's best practice approaches from other regulators, along with feedback and suggestions from experts in the field such as you.

The FWO has invested significantly in the development of educative resources and programs that seek to resolve potential workplace issues before a complaint form is even filled out. These initiatives are aimed at both employers and employees.

We provide a large range of educative tools and resources freely to employers to assist promote and ensure compliance. Large employers and franchises can, for example, get involved in our National Employer Program or our National Franchise Program.

Employers can also enter into a 'Pro-active Compliance Deed' with the FWO. This Deed is akin to a self-audit agreement that helps the business ensure that its staff are receiving their minimum entitlements. A business can voluntarily enter into one of these agreements. Often such a deed is a solution to a compliance issue that has already been identified by the FWO.

³ Internal Fair Work Ombudsman document – 'The Nature of Complaints 2011/12' – to be published later this year.

By way of example, in April 2012 Spotless agreed to self audit the employment records of 1500 of its employees. This pro-active compliance deed was agreed to after the FWO investigated approximately 200 complaints, over the preceding 6 years, from employees of Spotless owned companies, and recovered back payments of nearly \$200,000⁴.

In signing such a deed an employer recognises the opportunities that voluntary compliance gives it for continuous improvement in relation to its workplace practices. In accepting responsibility for maintaining on-going compliance, employers also make significant headway towards setting themselves apart as industry leaders. Spotless is to be commended for this.

Where an employee needs to make a complaint about their employer, the process usually begins with a call to the Fair Work Infoline. Where a caller wishes to discuss a workplace complaint, advisers will endeavour to equip the caller with sufficient information to resolve the matter with their employer directly without FWO intervention.

Where circumstances do result in a complaint being lodged with us, there are now a number of processes that are used before the matter is formally investigated by an inspector.

I will now take you for a journey through our complaint resolution pathway...

**** [Slide 5 – Dispute resolution pathway]**

Registration & Assessment

Our complaint processes start within 48 hours of a complaint being received. The first step is an assessment and decision about how and if the complaint should be treated. We find approximately 10% of all complaints are closed at this point because they are outside of our jurisdiction, unmeritorious or it is evident that entitlements have been met.

⁴ <http://www.fairwork.gov.au/media-centre/media-releases/2012/04/pages/20120412-spotless-deed.aspx>

Assisted Voluntary Resolution

For most complaints that pass through the initial assessment, the next stage will involve what we refer to as assisted voluntary resolution (or AVR for short). Assisted voluntary resolution involves educating parties about their workplace rights and entitlements and helping them to reach an agreed and appropriate solution to the complaint.

I will take you to a recent example. We received a complaint from an employee in NSW who alleged that they were being underpaid their hourly rate of pay. Our assessment team identified the complaint as one that was suitable for assisted voluntary resolution.

During the process, an inspector assisted each party to tell their version of events and to provide all relevant information. The process provided the parties with a neutral forum to tell their story and helped to ensure that they were comfortable with the way the complaint was progressing.

Once all the relevant information had been gathered, the inspector was able to determine the appropriate industrial instrument and rate of pay. The inspector provided this information to both parties and explained how the interpretation had been reached. The parties were then given an opportunity to consider the materials for themselves.

When this information was provided to the employer they realised that they hadn't understood their obligations correctly and were potentially underpaying all of their employees. The employer felt comfortable enough to bring this to the attention of the inspector, who offered to work with them to determine where they had not met their obligations. Over the course of some weeks, the inspector worked with the employer to resolve the initial complaint, as well as rectifying underpayments to other employees.

By explaining their obligations to the employer, the inspector was able to assist them to correct underpayments that could have led to future complaints. With the cooperation of the parties this result was achieved without the need for a lengthy investigation or the use of our statutory powers or enforcement mechanisms.

We expect that about 10,000, or a third of all complaints received by the FWO can be resolved through assisted voluntary resolution in any given year.

I believe we can increase this proportion by providing more information to the parties upfront.

We understand that employers need to know, almost as soon as we do, about the workplace complaint that has been made to us and the nature of the allegations made.

That is why last week I announced ⁵ a change to our processes in this regard. As of now, when we assess a complaint received is within our jurisdiction we will provide a copy of the employee's complaint to the employer. I believe that this new process offers greater procedural fairness and reinforces that the FWO is an impartial regulator, taking a neutral role in resolving the complaint.

Mediation

For the majority of complaints that are not successfully resolved by assisted voluntary resolution, mediation will be the next step. By providing mediation at this point parties (usually small and medium enterprises and unrepresented complainants) are assisted to resolve the workplace complaint in a non-adversarial manner and to take ownership of solutions.

Resolution is typically achieved after a 90 minute to two hour telephone mediation with one of our trained accredited mediators. We are achieving about an 84% resolution rate in our mediations.

Whilst assisted voluntary resolution and mediation are similar processes, there are some key differences. Mediation is a more formal process with parties having a specific date and time allocated to undertake their mediation. The parties also deal directly with each other, with the assistance of a trained mediator, as opposed to assisted voluntary resolution, where all communication occurs through the inspector.

⁵ Media release 2 May 2013 – [Changes to complaint handling process to improve co-operative resolutions](#)

Our role in mediation is to provide a genuine opportunity for both parties to be heard and to assist those parties to resolve their disputes by agreement. It is an opportunity for the parties to not only resolve the issue at hand but to gain knowledge about the relevant workplace laws that govern the workplace.

Our mediators provide access to technical assistance during the mediation process. If required, parties are able to speak directly with a technical liaison officer, to assist them to understand their legal obligations and entitlements. Mediation only succeeds if both parties make an informed decision and agreement within the boundaries of what is lawfully owed to the employee.

** [Slide 6 –Dispute resolution pathway cont'd]

Investigation

A large proportion of the complaints we receive will be resolved at one of these pre-investigation stages. For those complaints that have not been resolved or where a matter is assessed as significant, the complaint will then proceed to investigation⁶.

Our highly trained inspectors and legal team continue to play a crucial role in resolving and enforcing complex matters and complaints relating to serious non-compliance.

⁶ Matters will not be considered suitable for AVR (and mediation) and therefore will need to proceed to investigation when:

- The employer is actively resisting and / or unwilling to engage in the compliance process
- The nature of the complaint indicates that the matter is likely to be considered for litigation (eg employer history, sham contracting, vulnerable employees or significant underpayments suggesting deliberate, systematic exploitation)
- Contraventions that have a high impact on the general public or workplace participants eg high underpayments, significant unlawful industrial action, contravention of orders, sham contracting and failure to comply with NTPs, compliance notices & EUs.

In developing our compliance pathway, we reviewed the lessons learned from regulatory agencies across the world. As part of this, we determined that the model of subject matter investigative groups was something that had merit. Where inspectors are trained to observe industry patterns, locate specific issues and to engage with the community to enhance strategic compliance efforts.⁷

Our inspectors work with specific groups within the community or focus on specific types of complaints. Including:

- Young workers
- Overseas workers
- Misclassification and Sham contracting
- Regional services
- General protections and industrial action, and
- Targeted campaigns

A range of enforcement options are available to our inspectors. Some of these approaches include voluntary resolution aspects, while others involve more traditional compliance and enforcement mechanisms, or a combination of these elements.

Our enforcement options include:

- Letters of caution
- Compliance notices
- Penalty infringement notices
- Small claim proceedings, and
- Enforceable Undertakings.

In cases of significant non-compliance, these tools can be an effective alternative to litigation because they avoid the expense and time associated with court proceedings

⁷ See Weil, David, 'Improving Workplace Conditions Through Strategic Enforcement' – A Report to the Wage and Hour Division, US Department of Labor, Boston University, May 2010.

for all concerned. They can also provide the opportunity to ensure continued compliance.

A recent example of where we have used one of these enforcement tools concerned a case of pregnancy discrimination. Our investigation of a company, Shawna Pty Ltd, determined that the business had breached the *Fair Work Act* by reducing a worker's hours after she fell pregnant. The dispute was resolved through the use of an Enforceable Undertaking (which is available on our website).

Under the terms of the Enforceable Undertaking, the company was required to:

- Ensure compliance with the Act by developing and implementing policies and processes that related to discrimination and workplace rights
- Obtain broader industrial workplace relations advice and workplace relations training
- Send a letter to the employee advising her of the Enforceable Undertaking and apologising for the conduct
- Publish a workplace notice and a notice in a local newspaper advising of its contraventions, and
- Pay \$2,000 compensation to the employee.

As the requirements of this Enforceable Undertaking demonstrate, these tools provide the ability to tailor the compliance outcome to the contravention promote and promote ongoing compliance in the workplace.

**** [Slide 7 – Litigation]**

Litigation

Whilst we endeavour to resolve the majority of complaints voluntarily, this does not mean that we won't use litigation as a means of enforcing workplace laws.

The Fair Work Ombudsman commenced 51 civil litigation proceedings in the courts last financial year. We will have commenced about the same number of proceedings by the end of the current financial year.

Litigation remains a crucial enforcement option that we reserve for those workplace participants that engage in deliberate and systemic non-compliance.

In other words, litigation is used when specific or general deterrence is required in the public interest⁸.

I will now detail some examples that demonstrate the type of situations where we deemed litigation to be an appropriate enforcement mechanism.

The FWO commenced Federal Court proceedings against MacLean Bay P/L⁹ who operated a resort on the Tasmanian coast. The company embarked on a course of unlawful conduct aimed at converting the resort's employees into contractors in order to cut costs.

This conduct included dismissing four housekeepers because they received a range of entitlements as employees, entering into sham contracts with three employees, one of whom has an intellectual disability, and dismissing two employees because of their entitlements to award conditions. The employer also failed to pay thousands of dollars in superannuation and annual leave entitlements to a number of employees.

In his judgement, Justice Marshall was particularly critical of the company director, who he described as the 'driving force and guiding hand' behind the conduct. He also found that she had lied to the workplace inspectors who were investigating the matter. Overall he said that the employer's 'conduct was nothing short of disgraceful.'

He further described the conduct of the company as 'a cost cutting exercise', 'exploitation', 'blatant', 'abhorrent', 'shameful', 'victimisation', 'breathhtaking arrogance by an uncaring employer', 'an appalling abuse of power' and 'conduct of a rogue employer which deserves to be met with the full force of the law'.

Justice Marshall also said:

MacLean Bay needs to have it driven home that its conduct was unacceptable by community norms of decency and respect for fellow human beings, as well as being a breach of this country's labour laws.

⁸ Enforcement Strategy 2012-2016 pg. 2

⁹ [2012] FCA 10; [2012] FCA 557

Justice Marshall drove home this point by imposing a fine of \$280,500 against the company, with a further penalty of \$13,860 against the owner.

The matter was recently appealed to the Full Federal Court. The Full Court reduced the penalty against the Director to \$4,460 as a result of setting aside two of the contraventions in which she is alleged to have been involved in. The penalty against the company stood at \$280,500 and the core factual determinations as mentioned earlier were not overturned.

The second example I want to refer to is our proceedings against the Henna Group in the Melbourne Federal Magistrates Court.

The Henna Group operated a chain of retail shoe stores in Melbourne. The business had underpaid four employees their minimum hourly rates, penalty rates, leave entitlements and wages in lieu of notice. In addition to this the employee's wages were paid on an irregular basis and they did not always receive appropriate meal breaks.

Litigation was commenced because of the amount of the underpayments (approximately \$16,000 in total) and because of the employer's failure to fully rectify this. During the investigation, Henna's group manager told an inspector that the FWO wouldn't be able to 'touch him' because he would wind up the Henna Group. The Federal Magistrate hearing the case said that there was no evidence of contrition on the employer's behalf.

In his decision the Federal Magistrate found, and I quote:

The history of the matter indicates a deliberate disregard of industrial obligations. The lack of co-operation with the Fair Work inspectors also suggests that the Respondents have a complete disregard for the entitlements of their employees¹⁰

the Federal Magistrate also noted:

¹⁰ FWO v. Henna Group & Ors [2012] FMCA 244

[t]here is a need for general deterrence and to send a message to the community, and in particular small employers, that employers must make steps to ensure correct employee entitlements are paid.¹¹

The federal magistrate imposed a penalty of \$220,000 on the Henna Group and its Directors¹². A penalty that might have been avoided if the business had cooperated during the earlier stages of the investigation.

These cases demonstrate our continued commitment to using litigation for both specific and general deterrence against serious non-compliance.

I can't imagine that anyone in this room would want the kind of behaviour to go unpunished. It is these types of employers that look to realise a competitive advantage and make margins through exploiting their employees; this is ultimately unfair to those employers that do the right thing. It is these types of cases we take to court because of the strong public interest in us doing so.

Conclusion

By expanding our complaints resolution offerings we continue to deliver compliant Australian workplaces by encouraging the parties to be actively involved in resolving complaints at the workplace level.

Our new dispute resolution pathway provides the parties with an opportunity to have significant input into the complaint process during the initial stages. At the assisted voluntary resolution stage the employer and employee have discretion as to the resolution of the matter. At Mediation the parties still have ultimate control over the resolution but we are involved in refining issues and in raising matters that need to be addressed.

However, once these dispute resolution processes have been exhausted and a matter remains unresolved the course of the matter is largely directed by us. Our role from this point becomes one of investigation, evidence gathering and enforcement.

¹¹ Ibid.

¹² \$160,000 for the Henna Group and \$30,000 each for the director and group manager.

The full value of these changes to our regulatory approach is yet to be realised but I am confident that as the FWO moves forward the benefits will be evident.

Our journey towards a strategic compliance and enforcement model is a process of continual evolution. It will continue to reshape the FWO as a regulator and we will continue to adapt and refine our dispute resolution pathway.

For instance, by 2016 it is our aim to devote 50% of our inspectorate resources toward pro-active education and compliance activities. Activities which we believe are the best use of taxpayer resources to secure lasting compliance outcomes.

This will be coupled with our continuing reliance on litigation to send a clear message to those in the community that fail to take seriously their obligations under workplace laws.

Your engagement with our compliance and enforcement strategies, as employment and industrial relations professionals, continues to be pivotal to the FWO's capacity to solve workplace issues quickly, effectively and efficiently. I look forward to continuing to work with you to create compliant and fair Australian workplaces.

**** [Slide 8 – Questions and contact details]**

I am happy to take questions.