

“It takes more than wanting to do the right thing - The Fair Work Ombudsman’s approach to accessorial liability”

Lander and Rogers Seminar Presentation

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Introduction

Good morning everyone. Thank you for inviting me to speak here today.

I would like to begin by acknowledging the Kulin people who are the Traditional Custodians of this land upon which we meet. I would also like to pay respect to the elders past and present of the Kulin Nation and extend that respect to other Aboriginal and Torres Strait Islanders who are present.

I’m pleased to have so many advisers here today. You all play an important role in helping your clients and your business to understand the regulatory environment and the risks involved when you are seen to be involved in breaches of workplace laws.

Most employers want to do the right thing

We at the Fair Work Ombudsman know most employers want to do the right thing. We talk to businesses every day, working their way through what can be a complex system of workplace instruments and laws.

I often begin with this statement because, while so much of our publicity focuses on those doing the wrong thing, many of them quite deliberately, they do not represent the majority.

This assumption is at the heart of how we approach our work. We encourage self-resolution by intervening early in workplace disputes to help parties find their own solutions for workplace issues and keep the employment relationships intact. Most of the disputes that come to us are resolved through our early intervention strategies or alternative dispute resolution, such as mediation.

In fact, last financial year 9 in every 10 disputes were resolved without using formal compliance action, let alone enforcement tools. No infringement notices, formal evidence gathering or dragging businesses into court.

You are employers or advisers to employers who I imagine, want to do right thing. That’s a good start.

But today I am going to take this ethos a little further - because it takes more than wanting it. The mere intention, on its own, is not enough. Employers need to take tangible action on an ongoing basis to ensure they are paying the right rates and keeping appropriate records to demonstrate this.

We know that workplace laws can be complex - and they aren’t the only regulatory obligations businesses are dealing with. Issues can arise out of error or mistake.

But help is available to navigate the complexities of the workplace relations system. Plainly businesses that engage the assistance of professional advisors, such as you in this audience, are way ahead of the curve.

Every business in Australia has access to free and expert help via the Fair Work Ombudsman through:

- our Fair Work Infoline or dedicated Small Business Helpline;
- our website;
- our Pay and Conditions Calculators;
- our online MyAccount portal;
- or via other channels and resources - such as our online Library which contains over 450 articles of advice that our advisers and inspectors rely upon!

What the 'right thing' really means

Checking the rules is more important than ever. In recent times we've observed dynamics in the labour market that can lead to systemic and cultural underpayment of workers in some industries and sectors.

We have been saying for some time that some businesses that choose to outsource certain work or seek to expand their brands' reach – through contracting or franchising arrangements for example- need to consider their moral and ethical responsibilities with respect to their supply chains and networks.

Our counsel is based on an increased awareness in the community that established brands have been associated with the underpayment, and sometimes deliberate exploitation, of vulnerable workers.

It is not uncommon for us to be met with responses that reflect a very narrow and technical view of their responsibilities - typically that it is the entity that directly employs a workforce who is responsible for fulfilling obligations with respect to those employees and that is all.

Such a narrow view overlooks the possibility of a Court judging the business to in fact be an accessory to the actions of the direct employer. It also overlooks being judged in the court of public opinion – the risk of overloaded twitter and Facebook feeds and reputational damage.

The simple reality is '*Doing the right thing*' means taking on greater responsibility in certain higher risk labour markets where low skilled, often migrant or young, labour is involved.

Extending responsibility through accessorial liability

So how did this start? Let's go back to basics. The law.

As you may have heard, the Fair Work Ombudsman has been making the most of the accessorial liability provisions in the Fair Work Act for some years now. The law extends responsibility to others ‘involved in’ a contravention through section 550 of the Fair Work Act.

Provisions extending liability for contraventions of the law to people ‘involved’ in the relevant conduct have been a feature of workplace relations legislation for a decade now.

We use accessorial liability to reinforce the critical roles and responsibilities of the key personnel involved in the breach—whether they are company directors or advisers, such as accountants or HR advisers, or other entities benefiting from the labour.

In 46 of 50 matters filed by the FWO in 2015-16, 92% involved accessories, and this year is tracking along similar lines.

We use all of the avenues available to us to put unpaid wages back into the hands of underpaid employees. When the wrong thing has been done by workers, we are prepared to seek a broad range of orders from the courts to right those wrongs and to prevent them being repeated. We consider issues such as the liquidity of the direct employer, the degree of involvement of the accessory and the degree of control or influence the accessory had over the situation.

We need to prove both the primary breach and provide evidence of the accessory’s involvement. This is not a case of innocent bystanders ending up in Court.

Courts have agreed to our submissions to make orders for accessories to pay penalties,¹ to freeze their assets² and to restrain future contraventions.³ We have obtained orders to make accessories, including individual directors, jointly and severally liable to pay the underpayments⁴ – making them directly responsible for the outcome of their involvement – especially when there is a real risk the underpayments won’t be paid by the business.

And while it’s a lot to do with securing monies rightfully belonging to the workers – our goal is greater than addressing the symptoms of non-compliance with workplace laws. We are looking to address the conditions that underlie the disorder that is cultural non-compliance. Disorder represented by systems where, unfortunately, unlawful, black market rates of pay for vulnerable workers are the norm.

¹ For example: *Fair Work Ombudsman v WY Pty Ltd, Chong Yew Chua and Ning Yuan Fu* [2016] FCCA 343; *FWO v Rubee Enterprises Pty Ltd & Anor* [2016] FCCA.

² *Fair Work Ombudsman v Trek North Tours & Anor (No.2)* [2015] FCCA 1801

³ *FWO v James Nelson Pty Ltd & Anor* [2016] FCCA 531 (17 March 2016); *FWO v Step Ahead Security Services Pty Ltd & Anor* [2016] FCCA 1482 (17 June 2016); *FWO v AIMG BQ Pty Ltd & Anor* [2016] FCCA 1024 (31 May 2016)

⁴ *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd & Anor* [2016] FCCA 1482; *FWO v Rubee Enterprises Pty Ltd & Anor* [2016] FCCA

The orders we have obtained in those circumstances are designed to address the cause of the problems, namely:

- orders for employers to commission training on workplace obligations; or
- orders requiring a business to audit their network and rectify any anomalies identified.⁵

For those who did not start out by doing the right thing, or turned a blind eye for several years, the consequences can be dire, and the challenges in turning things around significant.

Responsibility to do the right thing in supply chains

When a Board and CEO engage with the question as to what is the culture within its network, we invariably find the moment of truth hits with some impact – whether this be 7-Eleven or Caltex.

While some businesses may be slow to come to the realisation that they need to step up and take responsibility, it can have a powerful impact when it occurs. Sustainable change requires a genuine commitment at the highest level of a business to tackle the culture of non-compliance.

It is early days, but we can say the path 7-Eleven is taking to do the right thing, beyond what the law requires of them, presents the opportunity to turn around the culture in their franchise network.

Others are further down this path.

It all started with trolleys...

Coles became the first major supermarket chain to publicly declare it has an “ethical and moral responsibility” to stamp out exploitation of vulnerable trolley collectors in its labour supply chain when it signed an Enforceable Undertaking with the FWO in October, 2014. As you may know, this happened after we commenced court proceedings against all three levels of the Adelaide-based Coles trolley collection supply chain, including Coles itself, using the accessorial liability provisions.

Our argument was that Coles knew the cost of their contract for trolley collecting services was not sufficient to cover minimum wage increases for those performing the work. If you are a price taker receiving the benefit of underpaid workers and turning a blind eye to the impact of the labour sourcing arrangements– you are rolling the dice, especially in high risk labour markets like cleaning, trolley collecting and security.

We also pursued the contractors in the middle of the supply chain because they had the capacity to control, direct and influence the conduct of the employers. And despite the contractors having

⁵ *Fair Work Ombudsman v Yogurberry World Square Pty Ltd, YBF Australia Pty Ltd, CL Group Pty Ltd & Soon Ok Oh* (NSD1049/2016).

knowledge of the award and entitlements – they took no effective action to ensure the employers had complied with their obligations.⁶

Under the Enforceable Undertaking, Coles repaid over \$260, 000 to trolley collectors and committed to ongoing audits of its contractors.⁷ In their first-year report, released last year, Coles detailed how they have now brought almost 72% of trolley collection services in-house. For those still employed by contractors – Coles has been actively auditing wages of these workers to ensure they're being paid correctly.

Although this commitment arose out of our legal action against them, the work that Coles has done is industry leading, and it speaks to the possibilities for fair and ethical supply chains across corporate Australia. We're pleased that these results have been sustained and we will have more to say about this when we release our second annual report into Coles, coming soon.

We continue to work productively with Woolworths towards a similar arrangement. This follows our Inquiry Report showing extensive compliance problems in its trolley collecting supply chain. This would take us a long way to sorting out a notoriously non-compliant sector of the labour market.⁸

And it continued with chickens...

Another example is Baiada – more commonly known for its brands, Lilydale and Steggles. You may recall our Inquiry into Baiada's labour procurement processes at its three New South Wales sites. Baiada sourced labour through a range of different arrangements. The Inquiry findings included wide-scale exploitation of overseas workers by contractors – including a lot of cash payments - and very poor, or no governance arrangements, by parties in the various labour supply chains.

To make things more difficult, Baiada refused consent for Fair Work Inspectors working on this Inquiry to access the factory floor at its worksites, denying them an opportunity to observe work practices, as

⁶ As a result of the proceedings, the FWO obtained:

- Declarations against the subcontractors who directly employed the trolley collectors; and
- Penalties of \$188,100 against the director and general manager of the business contracting directly to Coles – 75% of the maximum penalty.

⁷ Under the Enforceable Undertaking, Coles also:

- Repaid \$41,000 to seven trolley collectors identified in the proceedings, and a further \$220,000 to other affected workers;
- Audited the wages of 400 trolley collectors working for 15 of their contractors
- Delivered workplace relations training to relevant Coles team members
- And they also provide us with quarterly updates about their ongoing efforts to ensure compliance within their supply chains

⁸ *Inquiry into trolley collection services procurement by Woolworths Limited*, June 2016

<https://www.fairwork.gov.au/ArticleDocuments/763/inquiry-into-trolley-collection-services-procurement-by-woolworths-limited.docx.aspx>

well as the opportunity to talk to employees about conditions, policies and procedures. While Baiada was paying enough to its contractors to cover wages, the money simply wasn't getting to the workers. We did not, in the course of our Inquiry, obtain sufficient evidence to support an allegation of Baiada's 'involvement' as an accessory to the standard required of section 550. But the court of public opinion nevertheless judged. It didn't care about who the direct employer was, only that workers on the company's sites were being ripped off.

In 2015, after many years of working towards a way forward, Baiada also agreed to enter into a formal compliance deed with us, publically committing to take responsibility for its contractors. One year on and counting with Baiada, there are a number of positive signs from their first year report:

- Workers underpaid prior to the changes had the chance to make claims to Baiada and be back paid;
- \$218,768.79 was paid to 91 workers, mostly by the relevant contractors who were the employers. A small amount not able to be recovered from the contractors was paid by Baiada.
- Baiada also made an ex-gratia donation to charity of \$450,000;
- Incidents of underpayment identified through claims or detected via audits have been low and quickly rectified;
- New technology based systems backed up by Baiada management's on-site checking makes it hard for contractors who continue to do the wrong thing to avoid detection;
- Cases where contractors have sought to circumvent the system, for example by demanding workers' pay-back part of their wages, or swipe off the electronic system timekeeping system but continue to work for below award wages, have been identified and addressed through additional measures imposed by Baiada; and
- Contractors have been terminated where concerns have arisen about their compliance with the new systems and sufficient measures were not forthcoming to address those concerns.

These are positive signs and indications of the sorts of steps that businesses sourcing labour can take to ensure those workers are paid correctly. And it is pleasing to hear Baiada now advocating for supply chain responsibility more generally. Their view of 'doing the right thing' has evolved.

This is what it takes to change culture – on a site, in a network or across a sector or industry. It takes industry leaders like Coles and Baiada to step up and take responsibility. To do more than what the narrow view of responsibility requires.

And it puts them ahead of the game. Because the rules of the game may be changing.

New legislation so businesses do the right thing

Last week the Government introduced a Bill into Parliament to enhance the penalty framework for breaches of workplace laws. The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 would introduce new penalties, 10 times the current levels, for 'serious contraventions' where the conduct was deliberate and part of a systematic pattern.

The Bill also proposes to increase penalties with respect to failures in record keeping. A doubling of penalties for failure to keep proper records and failure to issue pay-slips⁹ and a three-fold increase to penalties for record keeping failings that are deliberate and misleading.¹⁰

Proper record keeping is the 'bedrock of compliance'

We are conscious that record keeping can be quite involved, especially in industries where irregular hours are worked and where different rates of pay apply for work at different times of the working week. But it has been acknowledged by the Courts that record-keeping is "the bedrock of compliance with the (Fair Work) Act and the minimum standards under a modern Award"¹¹ – because without it, it is very difficult to be sure workers have been paid correctly.

And if it seems an underpayment may have arisen, it is extremely challenging to calculate the amount of the shortfall and fix it. Unless workers have meticulously kept their own records or copied rosters, it is sometimes impossible to be certain what they should have been paid.

A company that understands the cost of this is 7-Eleven, where false records were created by franchisees to cover up underpayment of workers throughout the franchise network. Head office had perfect sets of records, it's just they didn't reflect the actual hours worked. Now 7-Eleven has found itself in a situation where it has paid out, to date, \$78 million to nearly 2000 workers, based on estimations provided by the workers of hours worked, going back many years. They've also had to spend many more dollars to improve systems and record keeping in their network. Not asking questions about what was going on early has been a very costly exercise for 7-Eleven – both in terms of money and reputation.

Doing the right thing when it comes to records protects employers as well as employees. They ensure that everyone can check that the pay a worker receives corresponds with the hours worked. And that the right pay rate has been paid.

⁹ Current maximum: 30 penalty units (\$5,400) for individuals, 150 (\$27,000) penalty units for bodies corporate
Proposed maximum: 60 penalty units (\$10,800) for individuals, 300 (\$54,000) penalty units for bodies corporate

¹⁰ Current maximum: 20 penalty units (\$3,600) for individuals, 100 (\$18,000) penalty units for bodies corporate
Proposed maximum: 60 penalty units (\$10,800) for individuals, 300 (\$54,000) penalty units for bodies corporate

¹¹ *Fair Work Ombudsman vs Dosanjh* [2016] FCCA 923

As a sign that inadequate or false records has been an increasing concern in our work, 24 of the 50 court cases - nearly half of all commenced last financial year - involved allegations of record keeping failings. And 16 of those – almost a third – included allegations of false or misleading records.

Proportionate approach to record keeping issues

We only take the most serious matters to court. We have a graduated approach to our work, especially when it comes to record keeping failures.

Our first response is to help an employer understand what they need to do. We have a number of online tools to help – that includes template pay slips and employee records which cover off on all of the details that the regulations require an employer to keep. And we are continuing to explore new ideas for resources to make things easier – with a particular focus on new technologies and guides to setting up good businesses systems from the very start.

We want to give businesses the tools to help them proactively take responsibility for their workers – not just those they directly employ, but those workers in the supply chain.

We do not lightly use the penalties and powers against businesses who are trying to do the right thing, or who have genuinely tried to do the right thing but get it wrong. If it is more serious or we've already provided advice to the business, we may issue an Infringement Notice (as we did on 573 occasions last year) – a penalty for non-compliance with regard to keeping records or issuing payslips

It is only in the case of what appears to us to be serious and deliberate failings – perhaps designed to disguise underpayments – that we resort to that most serious of all outcomes, court action. And in these more serious matters, we have seen the court prepared to order penalties close to the current maximum, noting the broader impact of the failure to keep proper records.¹²

Record and Resources Campaign

That most employers are doing the right thing when it comes to records is borne out when you consider our report last year on our Records and Resources Campaign. A campaign focused on checking on the record keeping practices of almost 1400 businesses across the country.

¹² *FWO v Rubee Enterprises Pty Ltd & Anor [2016] FCCA*, in this decision, the court found that “the creation of false and misleading employment records – is extremely serious and warrants condemnation from the Court in the strongest terms”

FWO v Mai Pty Ltd and Anor [2016] FCCA 1481, the Courts imposed a penalty of more than \$400,000, in part because of “a sophisticated system of data manipulation and false record keeping” The judge stated that *It is difficult to resist the conclusion that the business model implemented by Mai under M[the employer’s] direction for the operation of the West End 7-Eleven was deliberately designed around underpaying Mai’s employees and was designed to conceal that practice. The deception continued when [the employer] attempted to deceive the FWO by providing bank records evidencing payment of underpayments to employees and initially denied that these amounts had been subsequently returned to his, or his wife’s, accounts.*

One of the main aims was to ensure employers are aware of their workplace responsibilities and to update businesses on how the FWO can assist them to access, understand and apply information to build a culture of compliance.

72% of the businesses we checked were doing the right thing when it came to the record-keeping rules.

\$620,000 was recovered for workers as part of the campaign – over \$500,000 of that was paid back by one employer who had misunderstood the award and applied the wrong rate over several years. The business quickly repaid the employees and with advice and assistance from my Fair Work Inspectors, introduced a payroll system capturing all time worked and automatically applying the correct rates of pay.

This shows the importance of having all your records and systems updated and in order. Other problems were fixed without the need for us to reach for any of our enforcement tools. There was certainly no need to take any of these businesses to court.

We'll be reauditing the businesses we found to be non-compliant as part of our ongoing National Compliance Monitoring Campaign. Equipped with the right information about their obligations, we hope they are now doing the right thing.

If not, we will at that point, need to consider more formal action. As we have with respect to the former operator of a Canberra café who, just this week, we've taken to court for allegedly failing to keep proper records. A situation he could easily have avoided if he'd listened to us the first time around in 2015 when we audited his business. This particular former director is facing penalties (as an accessory) because we are alleging that the limited availability of the time and wage records prevented my inspectors from assessing whether four young workers were paid correctly.

Getting your house in order

Whether it's your business, your client's business, or the operators your clients have outsourced their cleaning or security or trolley services to, you should be asking whether accurate records are being kept.

It is a very good test of the credentials of your labour supplier. If not - how can you be satisfied that workers are being paid correctly?

The Government's Protecting Vulnerable Workers Bill will no doubt be carefully considered by the Parliament and be the subject of considerable community scrutiny and debate. This is right and proper. We welcome it.

But regardless of the outcomes of that process the proposed changes are an important signal – doing the 'right thing' has never been so critical. And you are on notice. It's time to get your house in order. Whether it's record keeping practices or your approach to procuring labour in low skill markets.

The community will not stand for deliberate and ongoing exploitation of workers. And it will judge you by association with no care for the technicalities of which entity is the employer at law. The only question is whether we will find out before or after the media publish a story about it.

It's time to make sure you're not just 'wanting' to do the right thing, but that you 'are' doing the right thing, and that doing the 'right thing' extends beyond your front door.