



Australian Government

Fair Work
OMBUDSMAN

KEY NOTE ADDRESS FOR THE SMALL BUSINESS FORUM 2015

Trusted advisers and regulators – roles, responsibilities, opportunities

10 November 2015, Melbourne

Thank you Lynda and thank you all for being here today. Welcome back to our longstanding partners and welcome to some new faces.

Today we are focussing on your role as a trusted adviser to small business.

And why are we doing that? Because we appreciate the critical role trusted advisers play in supporting small businesses. You help time poor and often overwhelmed businesses navigate the complexities of the workplace relations system, and other systems. But more than that, you provide reassurance, strategic and business advice; help them make good choices, choices that are right for their business.

You help your clients, customers, members and constituents comply with their obligations, so they can get on with running their businesses with confidence, and if they get into trouble – it's a complex system after all – you help them navigate that situation to resolve the issue.

We find that employers that are well advised, especially members of registered organisations, are far less likely to be the subject of a complaint to us, and if a dispute does arise, we are far more likely to resolve it quickly and cooperatively.

Alice Springs

Let me illustrate this through two of our most recent examples.

You may have seen some media last week about some cases we resolved in Alice Springs. Two restaurants had underpaid workers. In both cases, the businesses fully rectified these underpayments without the need for any formal action being taken, and in both cases, trusted advisers played a critical role in helping us work with the business to sort the issues out.

One had underpaid 14 staff \$15,000 over a year. They had relied on an accountant's advice. Unfortunately the accountant hadn't understood the phasing of penalties in the modern award. It's hard to hold that against them given the complexity of this transition.

The employer fixed the problem promptly. But the accountant also responded positively: she assisted my inspectors, audited the employer to identify any other problems; and unprompted, undertook self-audits of her other clients to make sure they were doing the right thing. Though she had initially got it wrong, she took steps to make good.

The second case involved nearly 50 workers being underpaid small amounts because the employer had applied the wrong award (restaurant vs hospitality). The Northern Territory Chamber of Commerce played a central role in helping us and the employer sort this situation out.

The employer showed, in the words of my Inspector:

'an outstanding willingness to rectify and compensate those employees affected'

And the NT Chamber of Commerce was:

'extremely proactive in working with FWO and their client in order to rectify these errors and ensure the employer has been provided with the relevant information and education to avoid a recurrence.'

We see here that even when things go wrong, trusted advisers have a positive role to play in helping us sort things out.

Now, it's a critical part of my role to educate and assist people to understand workplace laws. I also, where necessary, enforce workplace laws. Inevitably, the context of a regulator giving advice is very different to the relationship a business has with a trusted adviser.

As the Regulator, I am impartial. I am here to help employers and employees, and when they are in dispute, to help them work through that. I am not and cannot be 'on your side'.

Trusted advisers, on the other hand, are firmly in the corner of their client or member - and are in a unique position to assist a business, especially if they are worried they may have got something wrong. So it helps me if, as the trusted adviser, you are supported to give reliable advice on workplace laws. Or, if you can't, you refer that person to someone who has the expertise to do so. And if you understand how we work, you can help an employer get the best result for them.

Risks and mutual interest

It doesn't help anyone if your clients or members end up in trouble with us; end up with a back-pay bill, being one of the handful of matters we take to court each year; or named in our media releases for the wrong reasons.

It's not in any of our interests if the competitors of the businesses you advise get away with undercutting lawful wage rates – when your clients or members are doing the right thing. Whether inadvertent or a deliberate strategy, this gives such businesses an unfair competitive advantage. This is not fair to those who are doing the right thing and hardly a level playing field on which all businesses can lawfully compete.

And there are risks for you and your clients if they are doing the wrong thing.

So we have mutual interests in spite of our quite different roles and responsibilities – me as regulator accountable to the public under statute and you as trusted adviser, accountable in accordance with professional and ethical rules.

Now I know you all want to do the right thing. You wouldn't be here if you didn't. And you want your clients to do the right thing.

But another reason we are here today is because we do see cases, more often than I would like, of advisers who are not as diligent as you and your members; an adviser who has overreached, who perhaps held themselves out as an expert when they were not or who might

even have been professionally negligent. Perhaps even be legally culpable – involved in a breach of workplace laws and themselves liable to legal action and penalties.

Theravanish

To illustrate this I am going to talk to you about another matter. One that did end up in court, where the adviser did not play a role as positive as the one identified in our Alice Springs examples from earlier.

The employer, Theravanish Investments Pty Ltd, ran restaurants on the Gold Coast. The worker in this matter was a waiter. Almost 65 years of age. He had been working there for 15 years.

Then it went wrong. There were letters and allegations. And then the employee was terminated by letter.

Theravanish – the termination

The letter included the following:

“... it is the policy of the company that we do not employ any staff that attains the retirement age which in your case is 65 years.”

“We believe that you will attain that age on 5th September 2011 at which time your employment will cease because of your age.”

This matter was our first age discrimination matter and it attracted a lot of media attention at the time.

Theravanish – the accountant

What we didn't know at the time we investigated this matter, even at the time of filing this matter in court, was that the letter had been written by an accountant. A trusted adviser of 20 years.

His services included “*general employment advice*”.

It was not until the company filed their defence, some way into the proceedings, that it became apparent that they had relied on some questionable advice.

Now of course the employer is responsible for their conduct. But as the Judge hearing the matter observed:

“...but I comprehend that it is difficult for small businesses to keep abreast of workplace and other regulation, particularly given the proliferation of regulation in recent years.

Accordingly, business people are now more dependent than ever on advisers, such as accountants, to assist them.”

20 years is a long time: a lot of trust naturally builds up over such a period of time. His Honour accepted that:

“Small businesses rely heavily on the advice of financial advisors in all matters”. His honour expressed the view that in this matter the *“accountant has overreached”*.

Theravanish – what happened

The dispute actually started as a request to take long service leave.

Not an everyday request perhaps for a small business. But it should not have been an unexpected one given the tenure of this employee. The employee asked about his entitlement to take long service leave; the employer undertook to find out; the employee had to ask twice more in the months that followed. Having not received a response his son then contacted the employer on his behalf. 13 weeks of long service leave was subsequently approved.

When the employee returned from leave, he was told that he would no longer be a full time employee. He was now part time, and he would not be rostered for work for a week.

The employee questioned these unilateral changes to his employment conditions in writing. The company engaged the assistance of their accountant and announced their intention to terminate their employee’s employment because he is too old.

Theravanish - outcomes

And how did this story end?

Well, it ended in court. It ended with \$30k fines and unfavourable media. Not to mention all that lost time and legal costs for the employer.

For the accountant, it involved having to make a sworn affidavit to the court about his role in these events.

What would you have done?

What approach would you have adopted if Theravanish was your client?

Perhaps as your client, the company might have understood long service leave obligations because you would have explained to them how it accrues. You may have even talked to them about doing some planning around the leave liability –and encouraged him to take some of it over the years. If it had got to that point, you might have cautioned the employer about unilaterally changing his status to part time and removing him from the roster.

While this was not part of our case, you might see that in these circumstances, absent of other reasons for this decision, this could look a bit like it was being done to punish the employee for accessing his long service leave. And the risk? That could amount to adverse action for a prohibited reason - and therefore risk of being in breach of the General Protections provisions of the Fair Work Act.

If the employer had been advised by you, you might have warned them about the operation of discrimination laws. You almost certainly would not have drafted a letter providing a patently discriminatory reason for a termination. And you probably wouldn't have recommended the adversarial and formal approach adopted by the employer to their worker or to us.

Of course a person is entitled to robustly defend an action taken against you in Court. But this sort of posture – refusing to engage with the regulator – in a serious matter – makes it very difficult for us to resolve things without recourse to enforcement outcomes.

What if?

There are many ways in which this story may have ended differently.

What if this employer had been a member of a registered or representative organisation? What if the accountant had been better informed, or referred the employer to someone who had more expertise?

There are 'what ifs' for FWO to consider here too.

Now focusing on section 550

What if we had sought to rope the accountant into the litigation, as a party knowingly concerned or involved with the breaches?

Given the strong statements from the Judge: while he found the employer responsible, his Honour accepted that they had reasonably relied on their accountant. One might ask, is the accountant not at least partially, legally to blame? Section 550 of the Fair Work Act recognises this concept. It enables penalties to be imposed on an accessory.

You will hear more about this from my Chief Counsel, Janine Webster, after lunch. She will tell you about how we have been actively and successfully pursuing accessories for some time now. Directors of employer companies in contravention of the Fair Work Act are included in our matters more often than not. But we've also been concerned about the role of key personnel, such as accountants or HR professionals, sometimes in serious and deliberate contraventions.

Acting within your expertise

We know how heavily small businesses rely on your advice. The Theravanish matter illustrates this.

If you hold yourself out to be an expert in the complex area of workplace laws, should those who pay for your services not be entitled to assume you are operating within the boundaries of your expertise? I would have thought so.

If a trusted adviser gives incorrect or 'bad' advice that is reasonably relied upon, should they not be held accountable? Does the public interest not demand this?

Name and shame

And so here's another what if?

What if we had named the accountant in the media release?

Their involvement is a matter of public record – named in proceedings before the court. Don't other clients of this trusted adviser have a right to know of his role in breaches of workplace laws? He may still be providing 'general employment advice'.

We do on occasion name parties in media releases that are not the direct employer but are associated with the matters, where it is in the public interest to do so. The 7-Eleven franchise, Myer, Cadbury and Mars, Coles, Woolworths and KFC as retailers of Baiada chicken, have all been associated with the controversy of exploited workers in the media. Not one of these was the direct employer of the workers. But as established and profitable enterprises with significant market share, the public expects more of them than a response that they are not directly responsible for those workers.

This becomes an entry point for us to talk with these companies about their supply chain and networks, and how we can help them take steps to ensure compliance with workplace laws.

Now we haven't taken to naming advisers in media releases at this stage. And I'd prefer not to go down that path. Certainly not as a first response.

Work with us

I'd prefer to work with trusted advisers such as your good selves. To partner with you so that, between us, we help business obtain good, professional advice from those who know what they are talking about.

We see that there are many opportunities for us to draw on our mutual interests: to see employers do the right thing, avoid a back-pay bill, stay out of court and out of the headlines, ensure a level playing field for all businesses, and to build a culture of compliance where we

don't tolerate businesses that deliberately undercut their competitors by paying 'black market' wage rates.

You can help us reach businesses that may not want to directly approach the regulator. And we can support you and be supportive of you, enabling you to confidently advise business.

I look forward to hearing from you throughout the day about your ideas on how to leverage these opportunities. And perhaps, through leveraging our strengths and yours, we can turn trusted advisers into Trusted Partnerships.