

Address by Janine Webster, Chief Counsel of the Fair Work Ombudsman to the Workplace Relations Committee of the Australian Chamber of Commerce and Industry

Thank you for this invitation to speak to the Workplace Relations Committee of the Australian Chamber of Commerce and Industry.

For those of you that do not know me, my name is Janine Webster and I am the Chief Counsel of the Fair Work Ombudsman. I have responsibility for the Fair Work Ombudsman's litigations you hear about in the media all the time.

However, as a member of the Agency Executive Committee, I have a much broader role with respect to setting the Agency's strategic direction and developing and maintaining relationships with important stakeholders such as those of you in the room today.

Our relationship with the chamber

Our Agency has a long and strong relationship with the Australian Chamber of Commerce and Industry and its members, which we value. We have open and honest dialogue with respect to a number of matters.

Some of these are highly technical issues important to workplace relations in Australia. These are important interactions and open communication with the Chamber, helps us to understand the view of a large number of Employer Associations and businesses in Australia.

But what I want to talk to you about today is much bigger and more important than a technical interpretation of an aspect of a Modern Award.

If you remember nothing else from what I say today, remember that when the Chambers says it wants to "*make Australia a great place to do business in order to improve everyone's standard of living.*" the Fair Work Ombudsman wants that for Australia as well.

Our interests are aligned much more than you might initially think.

Today, I want to talk to you about where the Fair Work Ombudsman is headed and how we might work together to achieve our common interests.

I also want to talk to you about why we got involved in the Four Yearly Modern Award review, because I know not all participants were happy that we did.

I want to talk to you about our supply chain strategy and why we are joining managers, directors and others to our court proceedings, not just employers.

Finally, I want to talk about how we can build a better Australia for businesses together.

So what is the FWO really about?

We don't think it is fair that businesses doing the right thing, many of which would be members of your organisations, are undercut by those that are not.

We don't think it is fair or appropriate that the tax payer is required to investigate and chase down monies when the workers involved in these matters are actually involved in providing labour or delivering profits to very big businesses.

Similarly, we think that Franchisors should support and monitor the workplace relations of their Franchisees, not just the quality of their "muffins" or product they sell.

We also don't think it is fair that an individual can personally profit from underpaying employees, only to fold it up with an expectation of impunity, when regulation comes knocking.

Household names, such as 7-Eleven, Baiada Chickens, Coles and Woolworths to name a few have all been subject to our Fair Work Ombudsman Inquiries and/or litigations.

This has been achieved through a number of important initiatives and campaigns, the most notorious relating to the publication of our Report and related litigations in respect of the widespread underpayment of employees working for 7-Eleven Franchisees.

Powers and Penalties

The use of the 'inquiry methodology' is relatively new to the Fair Work Ombudsman. We adopted this new approach because of the inherent complexities and at times obstinate recalcitrance of some pretty significant

pockets of non-compliance. We identified limitations with our existing approach, relying solely on our powers under the *Fair Work Act 2009*, and have sought to leverage public opinion against reputational risk, to affect positive change in individual businesses, franchise networks, industries and regions.

This approach has been very successful for us but a couple of ‘influential’ people were also noticing some of the limitations to our powers, especially when facing complex systems designed to conceal serious non-compliance. And so ‘new powers’ became a term that was kicked around a fair bit before the last federal election. It wasn’t the most reported on or the most spoken about, but rest assured we were taking note. And I expect that many of you were too.

In a time of celebrated de-regulation it may seem odd, even disconcerting, that new and stronger powers be bestowed on a regulator. There may also be concern among yourselves and your members about the intentions of a newly emboldened and empowered Fair Work Ombudsman. But you and your members can rest assured that we will wield any new powers, as well as our existing powers, responsibly with restraint and with measure.

We care about employees: about their entitlements and the fairness with which they are treated. But just so, we care about employers: about their ability to meet their obligations and run their business. Like the Chamber, we want to: *make Australia a great place to do business in order to improve everyone's standard of living.*

We say that can only be achieved if everyone is playing by the same set of rules.

And so business that is doing the right thing, business that seeks to do the right thing, does not need to hold apprehension about our powers – existing or new.

Our approach will not change; we want to work with you and we want to help you get it right. If we discover a problem we will tell you what you need to do to get it right. And if you listen to us and work with us, you will get it right.

What ‘new powers’ will mean for us is an ability to take stronger action with employers who seek to flout the law, to hide non-compliance in complex webs, to seek unfair, unlawful and ultimately unsustainable competitive advantage

over those employers who are genuinely trying to meet their obligations and compete fairly.

We don't want your members to be disadvantaged because they are observing the law. When a regulator says that they are here to help; it can sound trite in the ears of the regulated. But we genuinely do want to *make Australia a great place to do business in order to improve everyone's standard of living.*

Earlier this year the Fair Work Ombudsman put a new page on our website; we're calling it anonymous tipoff. It is not based on any new power, but it is a good example of a new approach and of how we can help you and you can help us.

One thing I can assure you of is the Fair Work Ombudsman has the attention of many at the present time. We are more relevant than we have ever been.

The topic of relevance is one close to my heart.

As a young graduate vying for a position in the private sector, I remember being interviewed by a very senior executive, of a very well established employer association. Many years later, I still remember parts of that interview, but there was one line of questioning I don't think I will ever forget. I was asked, "What do you think is the biggest challenge facing our organisation at this time?" I don't recall how I answered, but I remember the rhetorical response: *"Relevance. How do we demonstrate our value and our relevance to our existing and future members?"*

I won that job, but turned down that offer and instead took up a much better one, working with Dick Grozier as client at Australia Business Lawyers in this very building.

At that time, workplace relations looked very different to how it does now. To begin with, my first appearance was in the New South Wales Industrial Relations Commission, which was bustling with industrial relations practitioners.

Where once you could hear dozens of slap downs in one sitting from Justice Marks in the Unfair Contracts Directions List (deservedly so of course), I understand the halls in Phillip Street, Sydney are much quieter these days.

We have a national system of workplace relations with the vast majority of workplace covered by it.

Certainly, it has not been that long that the Fair Work Ombudsman has been around. Since the middle of 2009, and prior to that the Workplace Ombudsman since 27 March 2006, the date the Workchoices legislation commenced.

Prior to this, Regulation of workplace relations was not really the domain of the Federal Regulator and it was up to the individual or their Union to enforce workplace laws in Australia.

For a range of reasons, the downward trajectory of Union coverage has continued in Australia, so that now just over 10 per cent of private sector employees are members of a Union.

The need for a Federal Regulator is stronger than it has ever been.

Increasingly, employees do not get advice in respect of workplace relations from their Union. They get it from us.

We speak to all of you, the employer associations, Unions and individual businesses and employees. In fact, 15.3 million hits were received on our website last financial year. In addition, we received almost 400,000 phone calls seeking advice.

We advise on every Award in the country and we have a view on how many of these are to be interpreted.

That is why we decided some time ago, to assist the Fair Work Commission in respect of the Four Yearly Modern Award Review. But not everyone welcomed our appearance. I personally appeared at the first directions hearing and was on the receiving end of quite a few parties effectively asking “what is the Regulator doing here?”

The fact of the matter is that we have highly valuable and relevant contribution to make to the Modern Award Review process.

Awards have always been living documents. But now they have scheduled reviews, not just of wages but all provisions; all stakeholders can make

submissions, not just to seek clarity but also to seek fairness, to update provisions to adapt to change, to keep modern awards truly 'modern'.

Where once we had mainly Unions seeking to enforce Awards, we now have a Regulator.

Where once we had Unions providing advice, that same Regulator is providing that advice.

Where once business could only rely on their association or independent advisors, we now have a Regulator that impartially supports employers as well as employees.

Where once the creation and amendment of Awards was the domain of employer organisations, Unions and the Commission, now there is another perspective being brought to the table - ours.

The Fair Work Ombudsman is much like you in this regard; we didn't write these Modern Awards, but we do have to work with them. One of the differences between our contributions and yours and that of Unions is that we don't represent either employees or employers. We are impartial. We represent the public interest. Many of the people that contact us are not members of industrial associations and their experiences working under Modern Awards will not otherwise be known to the Commission.

We don't get to make a call the same way that the Commission does – but we do have to make a call. And because we do that, day in day out, we know where there is ambiguity in Awards and where things could be set out in a way that is much easier to understand.

That makes our contribution highly relevant in respect to the Modern Award Review objective of creating a Modern Award system that is simple for all workplace participants to understand.

We have an important perspective, an important job to do and that is why we are involved in the Modern Award Review and will continue to contribute where appropriate to the Modernisation process.

And of course, as a Regulator, we have an important role in clarifying the role in the Courts as well.

That role took the agency to the High Court twice last year where we were successful on both occasions.

But the vast majority of our matters do not present novel issues of law. The ones that make it into my office most often involve flagrant breaches of the law.

Accessorial Liability

As you know, the Fair Work Ombudsman uses a range of enforcement options in order to regulate Workplace Relations in Australia. Most employers do the right thing. Most matters that now come to our attention will be resolved by a method other than an investigation with an enforcement outcome.

To put this into perspective, we file just 50 matters a year, while receiving some 25,000 requests for assistance from the 15 million workers in Australia. Needless to say, the employers we take to Court have usually offended the *Fair Work Act 2009* in a very significant way.

As a recent example, the Fair Work Ombudsman secured a penalty of over \$50,800 against an individual, Mr Farok Shaik who was formerly involved in running three Indian Restaurants in Victoria. The matter involved a complete non-payment of wages to an Indian couple, Ms Mangat and Mr Sharma who were living in Australia pursuant to a Regional Sponsored Migration Scheme Visa (with Mr Sharma as the dependent spouse). The couple were dependent on their employment to remain in Australia, in the hope that they would eventually achieve permanent residency.

The Court found that Mr Shaik acted in a calculated and deceitful manner, threatening to have the couple deported if they complained about the non-payment of wages and that he would in fact kill Ms Mangat. The Court found that Mr Shaik never had an intention to pay the employees who were underpaid over \$80,000. Moreover, he created false and misleading records to support his claim that the employees were paid in cash. In this matter, the company that employed the couple had gone into liquidation and so there were no orders made against that company for the wages to be paid back. However, the Fair Work Ombudsman was able to secure from the Court, orders that the accessories penalties be paid to the employees.

This case highlights why for some time, the Fair Work Ombudsman has been seeking penalties against accessories as well as employers in appropriate matters.

There is clearly a need for specific and general deterrence in cases such as this against the individuals involved.

In many respects, this matter is representative of the trends in the Fair Work Ombudsman's filings last year. It involved overseas workers, as did about 75% of all filed matters. It also involved serious allegations of the making of false and misleading records to hide underpayment from our office – as did over 30% of matters filed last year.

The test contained in our Litigation Policy for bringing an accessory is the same for an employer – we need to be able to demonstrate sufficient prospects as well as public interest.

Last year 46 out of 50 matters, or 92% of proceedings commenced, included an accessory. Most often this is a Director, someone personally benefiting from the rip-off. But increasingly, we have been looking to join others who are culpable, such as Human Resource Managers and companies within a supply chain.

Significantly, we recently sought, for the first time, that not only penalties be imposed upon an accessory, but that they actually make good, personally, the underpayments. The particular case was called Step Ahead Security, a matter heard in the Federal Circuit Court in Queensland. It was one of about six matters that were commenced seeking these types of orders, because the factual scenarios supported them. In this matter, the Director who was made jointly and severally liable for the underpayments had a track record of putting companies into liquidation that had underpaid employees and he was the guiding mind of the operation that provided for the deliberate exploitation of security guards.

We will not be seeking these orders in all cases, only where we think it is appropriate and within the Court's discretion to do so.

The Shaik matter I just described is exactly the type of matter where we will seek these orders, noting the penalties of about \$50, 000 fell well short of the more than \$80, 000 of underpayments owed to the employees.

This change in approach, in combination with the joining of companies within a supply chain, signals another evolution in workplace relations in Australia.

The effect of these developments is that Australian directors need to ensure that their companies have proper governance arrangements in place to secure appropriate wages and conditions for people who are working in their business. No more hiding behind corporate veils.

Similarly business may be able to outsource labour, but that doesn't necessarily mean they will not be liable for the wrong doing of the contractor who actually employs the people working in their business.

I am not sure all Australian businesses are across these developments and this is where I see opportunity for us to work together.

I think a very relevant contribution Employer Associations can make to Australian businesses is to educate their members with respect to these and other developments – that individuals can now be made personally liable for underpayments, that the Ombudsman conducts Inquiry's into supply chain and Franchising arrangements and if your ship is not in order, the outcome can be devastating. Business models that provide for the outsourcing of workplace relations are now riskier than ever.

Working closely with business already, I think there is an opportunity to show your members how to avoid liability and risk to reputation. In my experience, businesses want that advice and they are ready and waiting to hear it. At this time, advice on how to avoid a damning Inquiry Report is highly relevant to many businesses and if it isn't, it should be. Their business models needs to evolve to keep up with these changes.

The Fair Work Ombudsman values the contributions that employer associations and the Australian Chamber of Commerce and Industry make towards creating a prosperous Australia. We look forward to continuing to forward our relationships so we can support each other in the attainment of our joint aspirations.