

‘The good’, ‘the bad’ and ‘the ugly’ – navigating the road to compliance

Address to Australian Industry Group PIR Conference by

Natalie James, Fair Work Ombudsman

Monday, 2 May 2016

‘The good’, ‘the bad’ and ‘the ugly’

Most employers want to do the right thing.

I like to start these sorts of events off by emphasising this, because it’s true. You wouldn’t all be here listening to me if you weren’t trying to do the right thing. But I’m here to tell you, not everyone is like you.

We at the Fair Work Ombudsman (the FWO) come across the full range of human behaviour. And while it’s always a bit dangerous to over-simplify, it’s possible to categorise what we see into three broad types: ‘the good’; ‘the bad’; and ‘ugly.’

So let’s start from the top – with ‘the good’.

‘The good’

‘The good’ set out to understand and comply with workplace laws. If ‘the good’ aren’t sure what the law is or how to apply it, they seek advice – either from their industrial organisation, a qualified professional or from us. If a problem still arises, such as a suggestion that perhaps someone hasn’t been paid correctly, a good business fixes it. And if for some reason an employee comes to the FWO with a concern, ‘the good’ will work with us to get to the bottom of what’s happened – without the need for us to take any formal action.

Now, ‘the good’ might not always get everything right – the system can be complex, after all. But their default is to comply.

‘The good’ don’t often make the headlines – at least, not for the wrong reasons. That’s reserved for ‘the bad’ and most often, ‘the ugly’...

‘The ugly’

So what does ugly look like? Well, it can look like this:

- Gross underpayment of international students at 7-Eleven stores, falsification of records, intimidation and threats.
- Underpayment of working holiday visa holders at Baiada poultry plants—producers of the Lilydale and Steggles brands—excessive working hours and overcrowded, overpriced accommodation.
- Sham contracting of cleaners at Myer department stores.
- Massive underpayment of trolley collectors at big brand supermarkets.

In each of these cases, which represent just a few of the many, we have seen the deliberate exploitation of highly vulnerable, often migrant, workers.

Now, if you are wondering about whether lots of our court cases involve migrant workers, the answer is yes – they do. While just over 5% of the total Australian workforce is made up of visa workers, so far this financial year 73% of the matters that we filed in court involved visa workers. This is up from 42% in the previous financial year, and 32% the year before. In the same period, 13% of all dispute form lodgements that we completed involved visa workers. Again, this is up from 11% the previous financial year, and 10% the year before.

Both these figures are trending upwards. This may prompt some may wonder whether every migrant worker in Australia is being exploited. The answer, of course, to this question is ‘no’. But, it is fair to say that some of the conduct we see with respect to this cohort is at the ugliest end of the spectrum, which is why they feature so highly among the matters that we take to Court. This is our most serious enforcement outcome, which can result in stiff penalties. In many of these cases, we see the deliberate exploitation of migrant workers with limited English skills and understanding of Australia’s workplace laws. Workers who are often in low-skilled work in highly competitive labour markets, and whose vulnerability is compounded by their concerns about their visa status.

We can’t stand by and let this happen. And when I say ‘we’, I don’t just mean ‘we at the Fair Work Ombudsman,’ I mean me and you and other industry leaders and others within Government. After all, the impact of such exploitation extends beyond the individuals involved. It affects the reputation of our towns, regions and indeed the whole country. It distorts our labour market, creating a race for

the bottom. And it undermines the integrity of our laws –not just our workplace laws, but also our corporate, tax, criminal and immigration laws.

I'm sure you'd agree that all of this looks pretty ugly. And you might be thinking – well, there's no risk that this sort of thing is going on in my business. You're all trying to be good. Members of employer organisations, like the Ai Group, are less likely to come across my desk, and very unlikely to end up in court. This is because you are generally well advised, and if problems do arise, you work with us to fix them.

The employers in these cases I've just referred to, on the other hand, were not trying to be good. Theirs was deliberate, calculated conduct. They knew they were being bad, and that's why it got ugly when they got caught out. But how does ugly happen?

Ugly – it's not just about you

Let's have a closer look at the ones that got ugly.

It's probably not lost on you that the businesses I referred to before were not generally the direct employers of the exploited workers:

- 7-Eleven is a franchisor – it doesn't employ the workers, its franchisees do.
- Baiada was just the head contractor – a web of nearly 40 labour hire companies hired the workers.
- Myer and Coles had outsourced non-core aspects of their companies' operations.

In each of these cases, the direct employers of the workers are clearly responsible for making sure that those workers receive their minimum wages and other entitlements. However, the law can extend responsibility through accessorial liability to others 'involved in' the conduct. We have been extending our use of this mechanism and look to it to ensure that someone is held to account when we find deliberate exploitation of vulnerable workers. In fact, so far this financial year, 94% of the matters that we have filed in court seek to hold someone other than the employer to account.

One of the reasons these cases got ugly is because the immediate response from the brands involved was 'I'm not responsible'. However, the reaction from the community and the media begs to differ.

When it comes to established and profitable brands, 'I'm not responsible' from the head honcho doesn't wash – the community expects more, and your customers expect more. To cite Warren Buffett, '[i]t takes 20 years to build a reputation and five minutes to destroy it. If you think about that, you'll do things differently.' And the longer that the business attempts to rely on a narrow legal response, the angrier the community reaction becomes.

These businesses may be correct on the question of legal liability. Or they might not be. But if that is all you are concerning yourself with, you have missed the key point. By this stage, the issue will have become a PR crisis for the business, not a legal risk management question.

When we conducted our Inquiry into Baiada Poultry's operations, they started with a common script, 'the workers are not our employees', and initially said they would cooperate. However, they quickly became non-cooperative, refusing us access to the factory floor and failing to engage with us about what we were seeing and finding.

But when 4 Corners got a hold of the story, in the media storm that followed, Aussie Farmers' Direct terminated their contract with Baiada. Coles, a major customer, demanded an explanation, and sent in the auditors. In fact, the Senate Education and Employment Committee's Inquiry into the Impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders (the Senate Visa Inquiry) closely scrutinised Coles about whether they had done enough to be satisfied that the people plucking the chickens that ended up in their freezers weren't being exploited.

Eventually, after the release of our Inquiry Report and more media coverage, Baiada signed an agreement with us where they agreed that they had moral and ethical responsibility to stamp out their contractors' unlawful practices. As part of their agreement with us, Baiada committed to a range of important changes to their business to ensure that they, and their contractors, fully comply with all workplace laws going forward. They also put in place processes to backpay their contractors' workers and audited their contractors. At this stage, Baiada has returned approximately \$140,000 to its contractors' workers under the terms of the agreement, and has sacked one of its remaining seven contractors over compliance issues.

How 7-Eleven got ugly

Another one that got real ugly was 7-Eleven, the 2012 Franchise Council of Australia franchisor of the year and Australia's largest petrol and convenience retailer.

FWO commenced our Inquiry into allegations of significant underpayment of wages and falsification of employment records across the 7-Eleven network in June 2014. This followed scrutiny between 2009 and 2012 that involved audits and a court action over false records and underpayments.

During the course of our work, the media got a hold of the story. We were a considerable way into unearthing evidence of widespread and systemic non-compliance with workplace laws when Adele Ferguson and her camera crew started looking into what was going on.

For some time, we'd been dealing with middle management at 7-Eleven head office. They'd been cooperative but didn't seem to appreciate the scale or seriousness of what we were finding, even after we provided them with the preliminary outcomes of our 'raids' on 20 stores. Their approach changed when Adele Ferguson came along. The day that the story aired on 31 August 2015, my office received several communications from the then-CEO of 7-Eleven. He urgently wanted to speak with me. But where was he when my Inspectors told his people about our findings? Where was the urgency? The desire to act?

The reaction to the airing of the 4-Corners program was swift and strong. It eventually culminated in 7-Eleven's Chairman, the CEO and the Operations Manager resigning. The company instituted the Fels Wage Fairness Panel process to repay exploited workers. In mid-April, the Panel announced that it had hit \$11 million in underpayment determinations and received 3100 claims from workers.

Things had gone beyond the franchisees and their workers 'not being their responsibility' and the company had to act. They reframed their franchising agreements and payroll practices. They commenced a number of reforms aimed at stamping out unlawful conduct and regaining control of their network. And they started genuinely engaging with us at the highest level.

At his first appearance before the Senate Visa Inquiry, former 7-Eleven Chairman Russell Withers spoke of his board's surprise at learning of the extent of the non-compliance within the network. While Mr Withers repeatedly stated head office's commitment to make things right, the Senate Visa Committee did not appear to be convinced. I think this says a lot about the governance and risk management practices in this business. What if the company had noticed the signs—and there were many, right back to 2009—and responded to them? What if they had engaged with us more seriously? What if they had practices in place to check on what the workers were being paid? So many 'what ifs'... But if they had, then this situation may have never got so ugly: eight matters in court; screaming headlines; a costly wage repayment process.

Just last Friday, we saw the latest development in our work on 7-Eleven when the Federal Circuit Court handed down its penalty decision in one these matters, that of FWO v Amrītsaria Four Pty Ltd and Harmandeep Singh Sarkaria. The underpayment of two migrant workers of almost \$50,000 and creation of false timesheet records provided to Fair Work Inspectors in an attempt to mislead them resulted in significant penalties from the Court: \$178,500 against the company running the business and \$35,700 against the individual director. In ordering these penalties, the court observed that '[t]he contraventions were not accidental but rather part of a deliberate scheme aimed at maximising the financial benefit to the respondents. In other words, this was part of the respondents' business model.' There are still five more 7-Eleven matters before the Courts, which means five more potential penalty decisions to come, and each will attract its own media attention. Notwithstanding the positive steps 7-Eleven has taken in the meantime, these matters have a long tail.

If 7-Eleven had responded to the signals along the way, seen things starting to go bad, they may have been able to avoid all this ugliness. They might have put a stop to the practices, now part of the culture in the network, before they grabbed hold. This is a company that wanted to be seen as 'good', and outwardly looked 'good', but it has ended up pretty ugly.

The road back to 'good' is long. As we said in our Inquiry report, it will require the ongoing commitment of senior management to shift the culture in their network. We are hopeful that an agreement with us in the form of a robust and transparent compliance partnership, currently under discussion, should help 7-Eleven move in the right direction.

How to deal with ugly

So, how can you avoid ugly? There are a number of things we have noticed in going about our work.

Compliance posture: what do you do when a problem surfaces?

Ugly is avoidable. A critical decision point for a business is how it first responds when a problem arises. Let me give you an example of one that was 'bad' but never turned 'ugly'.

You might recall the case of Aged Care Services Australia, a subsidiary of the ASX listed company Japara Healthcare. Last year, they owned-up to inadvertently underpaying almost \$5 million in overtime entitlements to more than 2,000 employees. This arose out of a systems failure – they were trying to be good.

Crucially, Japara and Aged Care Services identified the underpayment themselves, notified the FWO, as well as the relevant union and the ASX, and took immediate responsibility by entering into an enforceable undertaking with the FWO to begin the process of repaying the employees, and to put systems in place to fix the problem moving forward.

So on second thought, you might actually not recall Japara or Aged Care Services, because the angry public response didn't happen here. And that is entirely down to the way they responded to the problem when it arose: they took responsibility; they were open with us; they were cooperative. A very different compliance posture to Baiada or 7-Eleven pre-4 Corners.

I suggest you might want to consider your business' 'compliance posture'. Do you have an agreed approach to responding to concerns about workers' pay and entitlements in your business? Is this in your risk management plan or discussed by your Board? Because there isn't much time to decide what path to take. And if you decide to take a narrow, legal approach of rejecting responsibility, then it's much harder to recover your public position after a consumer backlash.

The road back from ugly: redemption is possible

However, even if bad or ugly happens, redemption is possible.

I am pleased to report that Coles Supermarkets has adopted an active program of robust supply chain management. It wasn't that long ago that Coles' contracted trolley collectors had ended up in court over the exploitation of vulnerable migrant workers – and so too had Coles, via accessorial liability. But Coles chose to assume responsibility for its role in the labour supply chain and enter into an Enforceable Undertaking with us. They agreed to backpay their contractors' employees and rolled out an ongoing sustainable self-audit program of their outsourced trolley collectors. Indeed, Coles is now in-sourcing a significant percentage of its trolley collectors. Coles deserves credit for cleaning up its act and working with us to put a stop to non-compliance in its supply chain. Independent, we are conscious that Coles has also actively assisted us in our work with Baiada, leveraging their relationship with their supplier to ensure minimum standards are met, so that they can reassure their customers and the public. This is how a responsible, profitable and established company that cares about its reputation behaves.

Now all this is helpful to those who find themselves dealing with something bad about to turn ugly. But a sensible business should surely be looking to avoid this sort of thing happening in the first place.

How to be good: know your supply chain

Of course, you can't control everything, especially in your supply chain, and outsourcing is a legitimate and common business decision. So what can you do, given the complexity of modern business arrangements?

This is what the manager of a luxury car dealership asked when my Inspectors arrived to serve a Notice to Produce. Our concern was not his business directly. We wanted to secure documents that would assist us with an investigation into the underpayment of workers who cleaned his showroom. The dealership had of course outsourced this work. The manager was happy to cooperate with us, but he was worried. He had a copy of one of our media releases about Myer and its cleaners sitting on his desk. He said, 'I don't want to end up with this happening to me! But – how do I prevent it? I pay the going rate for cleaners. I ring around. These prices are standard!' Fair question. My inspectors suggested that he ask some questions. Do you know the award rates? Do you know if your contractor does? Do you know how long it takes for your cleaners to do their work? They explained how the FWO could help, and provided information to help the manager determine whether their contractors were invoicing amounts that were enough to cover their operating costs. We took court action against the cleaning contractor, which is still before the Courts. At last contact, we understand that the dealership was reviewing its cleaning contractors. This business understood the warning signs before it turned ugly.

But how confident are you about the governance of your supply chains? About your security contractors? About your cleaning contractors? Both of these are problem industries. What 7-Eleven and other cases like it show is that it's never a good idea for a business, any business, to be complacent about compliance or to think it can outsource its responsibility.

I would suggest that making compliance your business not only makes you a good business, but is good business – and there are a range of simple, practical steps that you can take to get there.

Firstly, consider your procurement practices, and the terms of your contracts. Make sure you are paying your contractors at least enough to cover the legal wages of the labour. If you aren't, you need to ask, 'how is the company I'm contracting to making a profit?' You should also include requirements in your contracts that your contractors comply with workplace laws and regularly and frequently report to you that they are indeed complying with the law, and spell out carefully the consequences if they don't.

FWO can help you be good – work with us

We have a range of free tools and resources on our website www.fairwork.gov.au that can help you do this, including:

- Our Pay and Conditions Tool, which can provide you with the relevant minimum rates of pay.
- A range of resources designed to help businesses improve their supply chain management practices, including a questionnaire for potential contractors and sample clauses for your contracts. These resources were designed for our Harvest Trail Campaign and Local Government Procurement Initiative. However, these resources are of general application so I commend them to you.

Those of you who want to take a leadership role in the market may wish to go the next step and consider a formal compliance partnership with the FWO. Compliance partnerships help businesses to make sure that their systems and processes are working effectively to build a culture of compliance across your businesses, including your supply chains, with a clear plan setting out what to do if problems arise, build positive relationships with your community, employers and customers, and protect your brand. We have current partnerships with a number of large Australian businesses, and you can find out more about them on the compliance partnerships section of our website. By signing up to a compliance partnership you too can join brands like McDonalds who have now signed up to a second round of partnership and indeed we are working on version three!

So the choice is there, for you and your business. Do you want to be good? Because it takes more than wanting it.

But we are here to help. Because in the end, it's not in your business' interests or my interests to be bad, or to get caught up in ugly. It's not fair on 'the good' if the bad are allowed to get away with undercutting lawful wages to gain a competitive advantage – a level playing field is one where everyone complies with workplace laws.

So work with me, to build a culture of compliance together. Because compliance with workplace laws is everyone's business, and it's good business.