

“Influences – and *influencers* – of workplace compliance”

Address by the Fair Work Ombudsman

2018 Annual National Policy-Influence-Reform Conference

Good morning everyone. It’s a pleasure to be back speaking at the Policy-Influence-Reform Conference.

I would like to start by acknowledging the traditional owners of the land on which we meet, the Ngunnawal (nun-na-wall) people, and pay my respects to Elders both past and present.

Just on two weeks ago, the latest #wagetheft scandal hit our newsfeeds. Not an international franchise operation this time. Nor a national supermarket allegedly ripping off workers. This time, it was a business in the popular Westgarth precinct of Melbourne, a cafe known as Barry.

An employee, Anna, after checking the Fair Work Ombudsman’s website, had learnt that she and her co-workers were being underpaid. She told Melbourne radio that her employer had refused to meet with the workers as a group, before cancelling shifts for a number of them.

Anna wasn’t messing around. She took action. A local protest was organised. Anna became a spokesperson for her co-workers and perhaps, for underpaid workers everywhere, giving voice to a growing sentiment.

She said: “I’m just stunned at how it seems to be more commonplace than not in the hospitality industry” for workers to be underpaid. She hoped that “something can be done so that the problem...can be tackled...instead of one café at a time.”¹

By the time the day was out, the media was reporting the café had conceded it had underpaid workers and would backpay them.

For the Fair Work Ombudsman, the agency responsible for compliance with workplace laws, cases involving underpayment of workers is our everyday – and has been ever since our birth, nearly ten years ago.

In the last five financial years, the FWO recovered \$125 million for workers who were not being paid correctly. Our annual recoveries in this period have ranged between \$22 and \$30 million, with slight increases in the last two years.

Whether underpayment has arisen out of deliberate and calculated conduct on the part of an employer, or failure to check and properly apply the rules, there is a growing intolerance in the community for such cases. Regardless if you’re a big name brand or a local café.

As the headlines have gotten bigger, the stories of exploitation more extreme and shocking, we’ve seen the term ‘wage theft’ enter the vernacular and our twitter feeds. The stories are important, and when viewed alongside data, we can get a picture of some of the dynamics at play in the labour market when underpayments occur.

¹ ABC Mornings, 23 April 2018, Jon Faine interview with Anna Langford.

The data behind the headlines: FWO disputes

The Australian economy is supported by more than 12 million employees, working in over 2.2 million businesses.

While the numbers of workers and businesses has been steadily rising, the number of disputes we receive has remained reasonably consistent at about 25,000 requests for assistance each year.² Most of these disputes are about wages – usually claims of underpayment of the hourly rate, or claims that the individual has not been paid at all for time worked.

Behind each of these disputes is a story, and it is increasingly likely, a vulnerable worker. These days, our dispute forms are much more likely to come from a worker on a visa. In 2012-13, 8 per cent of the disputes we resolved were from visa holders. At 31 March this year, that figure was an astounding 20 per cent. Astounding because this cohort is only 7 per cent of the labour market.³

There are a number of reasons for this group being over represented in our work.

One factor at play is the increase in the number of temporary visa holders with work rights, thanks largely to big increases in international students coming to Australia.⁴ We hope another reason is that we have deliberately sought to encourage this cohort to come to us for help by breaking down some of the obvious barriers that cause them to hesitate.⁵

But let's be blunt – a key reason visa holders are now one fifth of those seeking our help is the most obvious one: being new to the Australian labour market, desperate to hold onto a job and primarily concerned about their visa, this cohort is particularly vulnerable to exploitative practices and there is no shortage of operators all too willing to take advantage of this.

And there is reputable research by academics to support this proposition.⁶

The other significantly overrepresented group featured in our disputes are workers under the age of 25. Although they are around 15 per cent of the workforce,⁷ they have consistently provided us with one quarter of our disputes. And the trend may be on the up. At the end of March this year, it had risen to 28 per cent.

² The FWO completes around 25,000 disputes a year. Exact FWO total disputes data and breakdowns of visa workers and young worker disputes is reported in the agency's annual reports, which can be accessed here: <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports>

³ See the FWO's [Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program](#) for a discussion about this figure.

⁴ See Department of Home Affairs 2018 statistics available at <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics>

⁵ Activities or initiatives to break down barriers faced by visa workers include:

- FWO's protocol with the Department of Home Affairs;
- FWO's international student strategy including targeted use of social media and [Natalie James' Open Letter to International Students](#);
- In-language tools and resources at www.fairwork.gov.au; and
- Launching the Anonymous Tip Off in 16 languages other than English.

⁶ See Berg, L & Farbenblum, B 2017, 'Wage Theft in Australia: findings of the national temporary migrant work survey'; and Wright, C, Clibborn, S, Piper, N & Cini, N 2016, 'Economic migration and Australia in the 21st century', *Lowy Institute*.

⁷ Based on ABS Labour Force Survey (cat. no. 6202.0); derived by dividing the number of employed person aged 15-24 by the number of employed person at the same point in time.

This is why young workers have similarly been the subject of focused campaigns to dispel common myths they encounter in the workplace.

The data behind the headlines: campaign audits

Another source of information about the extent and nature of non-compliance is our campaign data.

Each year for the last five years, the FWO has carried out between four-and-a-half and five-and-a-half thousand audits of workers' records across the country as part of proactive compliance campaigns. These campaigns generally focus on a sector or region with a higher risk profile.

Over the last 5 years, the proportion of audits where the employer was fully compliant has ranged from as high as 66 per cent in 2014-15 to as low as 53 per cent last financial year.

A mark of full compliance is only given where everything is perfect – workers are paid correctly, they get payslips the day after the pay period ends, and those pay slips contain all their statutory requirements like hours worked and superannuation details. If we focus on errors that result in an underpayment, the compliance rate has hovered around 70 per cent and above since we have been disaggregating the data that way.

In every campaign, we find a business that has overlooked the most recent Annual Wage Review, or has misclassified a worker under an award, perhaps as a Level 1 when they should have been a Level 2. Or a business paying flat rates of pay, with variable degrees of checking that the flat rate will be enough to cover each employee's hourly rates of pay taking into account the hours they have worked and the various penalties, overtime and allowances that may be payable under the award.

We find consistently that large businesses are more compliant than small businesses⁸, and members of employer associations are more compliant than businesses that don't join an industry body. It is not a surprise that businesses more likely to have sourced sound advice are more compliant.⁹

Most businesses that are the subject of one of our audits are quick to fix any error we find. In some cases it may have been the first time they have engaged with the FWO or had reliable advice about what they should be doing.

But these campaign outcomes, showing that just under one third of business we audit haven't got pay right, aren't the worst set of numbers.

What exactly does 'high risk' look like?

In our targeted activities, where we focus on a sector or business based on specific intelligence, we've seen some alarming indications of non-compliance which are indicative of broader cultural issues. Here are three examples contained in some of the reports we have released so far this year.

Our recent Western Sydney audits found 64 per cent of the 200 businesses we audited were not complying with workplace laws. In one suburb, the non-compliance figure was even higher – a dismal 85 per cent. Western Sydney has a very high number of migrant workers and businesses, well

⁸ In 2016-17, large business recorded a compliance rate of 67% compared to 52% for small businesses.

⁹ In 2016-17, members of employer organisations recorded a compliance rate of 65% compared to 49% for non-members.

above the national average, and a fast growing accommodation and food services sector.¹⁰ We will be returning to West Sydney to provide this sector with further information and support about compliance with work laws.

If we travel south to Tasmania, our Inquiry found indications of non-compliance with cleaning contractors at a shocking 90 per cent of 31 Woolworths Tasmanian supermarket sites.¹¹ The levels upon levels of subcontracting we found in some instances made it difficult to identify the true employer of some workers in the vulnerable cleaning workforce. As a result, Woolworths has agreed to enter into a partnership with us covering its contracted cleaners throughout the country to ensure they are paid correctly.

Or we can examine the results of our compliance activity focusing on the Caltex network, which audited 25 stores across Melbourne, Brisbane, Sydney and Adelaide, finding that 76 per cent were non-compliant.¹² Half of the 194 workers were under the age of 24, and 60 per cent were on a visa.

Caltex ran its own audits after seeing what happened at 7-Eleven, with the company's CEO saying the level of non-compliance found was "shockingly high".¹³ He also described the revelations as a "black swan moment".¹⁴ We look forward to continuing our conversation about what's gone on in the Caltex network and what the appropriate compliance response might be.

Time and time again, we see low skilled workers, often vulnerable cohorts such as young workers or visa holders, lose out where there are multiple 'layers', 'levels' or 'networks' that distance those who control the systems and set the prices, from the low skilled workers sweeping the floors or pumping their petrol.

Academics call this a 'fissuring' of the relationship between those doing the work and those benefiting from the labour.¹⁵ Legitimate business models like franchising and contracting create an environment for such exploitation to take root if businesses are not active in preventing it.

After some of the cases we've brought to light, this should not be a surprise to any business relying on a large, low skilled and potentially vulnerable workforce. And unless they have actively worked to manage this risk, it is naïve to, on the one hand, squeeze more from their supply chain or the network to enhance their takings, and on the other hand, claim to be puzzled when they find the ones who are paying for it are the workers, carrying out this low skilled, hard yakka.

So any discussion about underpayment, its prevalence, causes and its solutions, must contemplate this reality: in certain sectors and certain circumstances underpayment of workers will arise unless there is intervention – from the regulator or from business leaders, or some other party such as a union, community organisation or the media.

¹⁰ See FWO's [Western Sydney Campaign Report](#)

¹¹ See FWO's [Inquiry into the procurement of cleaners in Tasmanian supermarkets](#)

¹² See FWO's [Caltex Compliance Activity Report](#)

¹³ Macdonald-Smith, Angela, "Caltex CEO takes aim at regulator on wage issue", *Australian Financial Review*, 13 April 2018, p15.

¹⁴ Korporaal, Glenda, "Free wheeling", *The Deal, The Australian*, 20 April 2018, p1

¹⁵ David Weil, *The Fissured Workplace* (Harvard University Press, 2014).

Is something rotten in the state of hospitality?

Another sector that features again and again in the headlines is hospitality. So let's return to Anna, the articulate and action oriented ex-employee of the Barry café in Northcote, whose experience is that underpayment is 'more commonplace than not' in this industry.

Does the FWO's data support her experience?

Our last national-level stocktake of compliance in the hospitality sector occurred more than three years ago. The campaign had three separate waves reflecting the different parts of the industry.¹⁶ Pubs and bars overall did relatively well, recording compliance rates of 70 per cent¹⁷, above average for our campaign audits.

Unfortunately, it was much different for restaurants, café and catering employers, recording a compliance rate of 42 per cent. And the worst results were in the take away sector with a compliance rate of just 33 per cent. Both subsectors were well below the average compliance rates at the time¹⁸ and in both sectors, we found that nearly half of the audits showed workers were being underpaid.

Our most recent data doesn't get better.

While workers in this sector make up 7.2 per cent of the labour market¹⁹, in 2016-17 hospitality constituted 17 per cent of our requests for assistance. Especially worrying is that this industry is responsible for 39 per cent of the Anonymous tip offs we receive.

And the complaints are ones of substance. In 2015-16, one in five workers who received back pay with our assistance was in the hospitality industry. So far in this current financial year, that number is now more than 1 in 4.

Consistent with our campaign results, the bigger challenge appears to be in cafes and restaurants.

One in ten disputes resolved by FWO last financial year involved a restaurant, café or takeaway food outlet, and a whopping 29 per cent of the FWO's litigations in 2016-15 and 2016-17 involved such an employer. It is astonishing that nearly one third of the most serious cases that end up in court involve this one sector.

We do not see such a high number of disputes coming from workers in accommodation and pubs²⁰, nor does this part of the industry feature as strongly in our enforcement action.²¹ The data suggests that the persistent problems in hospitality are to be found in restaurants, cafes and fast food.

¹⁶ The National Hospitality Campaign: Wave 1, Accommodation/Taverns & Bars; 2012-13; Wave 2, Restaurants, Cafés and Catering; 2013-14; Wave 3, Takeaway Foods: 2014-15.

¹⁷ See the FWO's Hospitality campaign (Accommodation, pubs, taverns and bars) report.

¹⁸ In 2013-14 (when Restaurants, Cafés and Catering was audited) the average compliance rate was 61%; in 2014-15 (when Takeaway Foods was audited) the average compliance rate was 66%.

¹⁹ Based on the Accommodation and Food services Industry Division, Source: Department of Employment, Accommodation and Food Services Industry Page, industry sector, November 2017.

²⁰ In 2016-17, *Accommodation*, and *Pub, taverns and bars*, made up around 3% of disputes forms completed.

²¹ In 2016-17, the proportion of disputes in *Accommodation*, and *Pub, taverns and bars*, resolved via Compliance and Enforcement was lower than the average for all industries.

Anna is right when she says we can't fix this problem 'one café at a time'. Whichever way you look at these numbers, what we are seeing is not acceptable. Not for the Fair Work Ombudsman, not for the community, and not for business. Certainly not for the employers doing the right thing. That is not a level playing field. It is not sustainable. And it is clearly not fair.

What's the solution? It might sound simple but getting the right information into the hands of workers and businesses is integral, and so is getting them to act on it. More easily said than done perhaps.

So what are we doing?

The right information is there – for free @www.fairwork.gov.au

Over the last 5 years, we have significantly expanded our suite of accessible online tools. Online calculators, videos, templates, online training, fact sheets, our Small Business Helpline.

I acknowledge the system is complex – over 100 awards, and dozens of pay rates in each of them. I appreciate that there are many regulatory headaches for business, especially small business. But there has never been more advice and assistance.

We have greatly enhanced our In-Language support. Our website now automatically translates into 40 languages, and our Record My Hours smart phone app and In-Language Anonymous Report tool are available in over 15 languages in addition to English. Businesses and workers whose preferred language is not English have more free resources than ever before.

To support small business owners, we recently launched the Small Business Online Showcase, an intuitive online one-stop-shop to make it even simpler for small businesses to navigate information about their workplace obligations. If you have feedback on this new tool, I'd love to hear it.

I'm confident that the support and information is there – we just need to keep bringing people to it.

In 2016-17, my Advisers responded to over 450 000 enquiries.²² And we had over 16 million visits to our website fairwork.gov.au. This is the most visits in a single year and we think across our combined channels we are reaching more workers and businesses than ever before. We also think we are getting to some harder to reach sectors with our In-language resources.

But I understand that we're still not getting to everyone. Otherwise we wouldn't still be finding employers who are poorly advised or failing to keep up to date.

Not everyone knows who the 'Fair Work Ombudsman' is. Short of a million dollar advertising campaign, I'm reliant on other ways of getting the message out that people should come to us for help to access these world class education resources.

Even if you haven't heard of us – if you google 'wage rates', you are immediately directed to our Pay Calculator. You don't have to try very hard to at least get on the pathway to compliance. Too often though, we find businesses that have not even made the most basic of inquiries – or worse, have been the beneficiary of tailored advice from the FWO or some other adviser and chosen to ignore it.

Like the business owner of two Hans Café franchises in Western Australia who, as the Judge put it:

²² In 2016-17, the FWO answered 385,745 calls to the Fair Work Infoline, including 100,677 calls to the Small Business Helpline, and 67,118 digital enquiries. See the FWO's [2016-17 Annual Report](#) for more.

“simply chose to disregard her dealings with the FWO in November 2013 and continued to operate the defective wages payment system which she had inherited, recklessly indifferent as to whether she was, thereby, compliant with the Restaurant Award conditions.”²³

Getting people to act on the right advice - are they scared enough of being caught?

So this brings me to the second component of the solution – getting people to act on the information that is available to them. Whether it is out of diligence to do the right thing or fear of getting caught, businesses need to be motivated to work out the rules and abide by them. They are unlikely to be highly motivated to do the right thing if they think everyone else around them is ‘getting away with it’.

FWO’s enforcement activity is critical in overcoming this attitude.

We currently have just under 100 cases before the courts. We have filed 242 matters in the last five years and last year we used more enforcement tools than ever before.²⁴

Our strategic enforcement program has achieved record penalties, with the five highest ever handed down between June 2016 and December 2017²⁵, with the upmost seeing \$660,000 total penalties against individuals and the company involved in exploiting an Afghani refugee working at a fruit market who worked for lengthy periods for no pay at all.²⁶

Some will say this isn’t enough.

The Government thought this too, which is why we now have new higher penalties introduced by the Protecting Vulnerable Workers Act.²⁷ The new laws include maximum penalties for serious contraventions that are 10 times higher - \$630,000 for a corporation and \$126,000 for an individual.

I would venture that a large number of the nearly 100 cases we currently have in court could involve conduct eligible to be considered ‘serious contraventions’ had the behaviour arisen after the commencement of these new higher penalties.

It will take a while for matters subject to the higher penalties to come through to the courts. On average, a case that is resolved by court action takes four-and-a-half years to complete from the day on which we begin an investigation.

Influences – and influencers – of compliance

Looking beyond unscrupulous operators, the FWO’s litigation program alone will not prompt sustained behavioural change where there is an entrenched culture of non-compliance. We need to

²³ *Fair Work Ombudsman v Tac Pham Pty Ltd* [2018] FCA 120 (20 February 2018)

²⁴ 952 enforcement tools were used in 2016-17; almost four times as many that were used in 2012-13.

²⁵ These matters are:

- *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 (total of \$447,300 awarded)
- *Fair Work Ombudsman v Mhoney Pty Ltd* [2017] FCCA 811 (total of \$660,020 awarded)
- *Fair Work Ombudsman v Rubee Enterprises Pty Ltd* [2016] FCCA 3456 (total of \$532,910 awarded)
- *Fair Work Ombudsman v Commercial and Residential Cleaning Group Pty Ltd & Ors* [2017] FCCA 2838 (total penalties of \$510,840 awarded)
- *Fair Work Ombudsman v MAI Pty Ltd* [2016] FCCA 1481 (total of \$408,348 awarded)

²⁶ *Fair Work Ombudsman v Mhoney Pty Ltd & Anor* [2017] FCCA 811

²⁷ *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*

disrupt non-compliant models and in this, the media is as much a weapon in our armoury as enforcement action.

We do not step back from informing the community of deliberate and shameful exploitation of workers. Condemnation of businesses who exploit workers is strong and fast, as awareness continues to grow about non-compliance with work laws and the role the consumer can play in doing something about it.

People are asking questions, like –

- Is it good that my meal is so cheap? What might the workers be getting paid?
- If I'm paying a 10% public holiday surcharge, is it going towards the cooks and cleaners and wait staff's penalty rates, or is it going straight into the owner's pocket?
- And what about these strawberries? If they're \$3 a punnet, how much did the workers who picked them get paid? Did the farmers get a fair price for their produce?

Community campaigns using a mix of traditional and social media driven protests have powerfully tapped into community concern about the treatment of workers. What better way to incentivise otherwise recklessly indifferent employers to check the rules and fix problems. It must be clear that simply doing 'what others do' is not acceptable.

And we need industry leaders to similarly send this message.

Some large corporates like Coles, Woolworths, 7-Eleven and Baiada have heeded this advice, stepping up and taking moral responsibility, and in so doing not just cleaning up their own backyard but acting as industry leaders adopting best practice supply chain management.

Coles acknowledged its ethical and moral responsibility for its trolley collection supply chain in 2014, after we sought to hold them liable as an accessory to the breaches of the law by their contractors. They entered into an enforceable undertaking with us, and this lay the ground-work for our Compliance Partnership with Woolworths²⁸, which set a new benchmark in the supply chain governance of trolley collecting.

It has been a ten-year campaign to shift compliance in trolley collecting, but it's working, with requests for assistance coming from workers in this sector significantly down. Our partnerships with Baiada and 7-Eleven have also caused significant reductions in complaints received about those brands.

It doesn't happened overnight, but it shows that co-operation and partnership can shift culture over time. Our Compliance Partnerships are a reasonably new approach for FWO, but we're pleased at these early signs of success and we are looking at options to further improve the model to ensure they will work for any business that wants to take responsibility for its supply chain or network. We look forward to hearing from the Australian Industry Group and other key stakeholders on this question.

²⁸ See the FWO's [Proactive Compliance Deed with Woolworths signed September 2017](#)

It's time for everyone to take compliance seriously

We need to make it clear that paying workers correctly is not optional or a 'value-add'. Relying on 'what's done' in a sector or region is not responsible and not enough.

Those who take this approach risk being caught out – by FWO or by others. They may find themselves in the centre of a media storm – like the Barry Café last week. Community campaigns are raising awareness and we hope, prompting all businesses to take responsibility and actively engage with their obligations.

And this is where we look to business leaders to work with us – to help raise awareness and spur employers to take action, and to stand with us in shifting culture in these sectors where underpayment of wages has become the norm.

Because the ultimate goal is to build sustainable and conscious compliance with work laws throughout Australian business.