

HR Summit – 2 April 2014

View from the Top: Insights from the Fair Work Ombudsman

I would like to respectfully acknowledge the Cammeragal (**Cam-mer-a-gal**) people who are the traditional owners and custodians of the land on which we meet.

I would also like to pay respect to the elders past, present and future of the Cammeragal people and extend that respect to other Aboriginal and Torres Strait Islander peoples here today.

Thank you for inviting me to attend this summit and share some thoughts.

I wanted to take this opportunity to share some of the Fair Work Ombudsman's experiences with businesses.

This Government has a significant focus on small business. **Small business** has some very **distinct needs** and tend to be very **reliant** on government agencies such as the Fair Work Ombudsman for advice and support.

But we at the Fair Work Ombudsman also have plenty to do with larger and **more established businesses**. We know that you have **just as many challenges**, but tend to rely on **internal expertise** and experience, or advice and support from employer organisations.

INTRODUCE SELF

Perhaps, first, a little bit about me and my role.

I was appointed as the Fair Work Ombudsman in July last year.

Before that I worked in the Department of Education, Employment and Workplace Relations where I had a decade or so's experience in framing workplace legislation – **from WorkChoices to the Fair Work Act!**

In that role, I saw it from the point of view of the 'rule maker'. Now I get to work with the rules I helped make.

Immediately prior to my appointment as the Fair Work Ombudsman, I oversaw the delivery of a range of programs throughout Victoria, including employment services and skills, and youth programs.

Working in this area and delivering programs like Job Services Australia has taught me a lot.

Job Services Australia is an employment services program. It helps job seekers find **sustainable employment**.

I've seen firsthand the challenge people face in **getting and holding onto a job**. And how important it is to job seekers.

And I've also seen the importance and challenge as a manager of **getting and holding onto good staff**.

My role at the FWO touches on both sides of this equation.

We are both an educator and regulator.

We help business comply with their lawful obligations.

We help you get things right.

And to build productive workplaces.

VALUE OF REPUTATION

Our legislated mandate is to promote harmonious, productive and cooperative workplaces.

Such a workplace goes beyond paying staff properly and issuing them with payslips on time. These are workplaces that **go beyond basic compliance**.

Workplaces that **aspire to do more** than meet the minimum requirements.

They know what is **below the line** – what they have to do.

But they're also interested in what's **above the line**.

The things they can do to be better.

More productive.

More cooperative.

To be employers of choice.

They enjoy benefits of an **engaged workforce**.

They can more easily attract and retain talented staff.

Workplaces that aspire to get themselves 'above the line' are less likely **find themselves entangled** with us at the Fair Work Ombudsman. Less likely to have to spend time and money resolving problems with a **regulator looking over their shoulder**.

This '**remedial**' space is costly and distracting.

And uncomfortable. Even unpleasant.

It also puts reputation at risk.

Stories about underpaid workers grab headlines.

It is an issue of public interest that quickly gets the attention of journalists and readers around the country.

We recently put out a media release about a case where an **Adelaide grocery store** underpaid staff **more than \$23,000** – some of those staff were **vulnerable international students**.

[SHOW SLIDE WITH COPY OF THE ARTICLE]

This story made front page of the **Adelaide Advertiser** on a Saturday.

The Advertiser has **more than 500,000** readers on this day.

The story was also reported in the Daily Telegraph, the Australian and on news.com.au.

As I'm sure you appreciate, reputation may well be one of your company's **biggest assets**.

Reputation **isn't 'owned' by the company**. It's owned by your customers. Your suppliers. Your staff. And how they perceive you.

It's fragile. It can be destroyed in an instant. This can have a significant impact on a business's **bottom line**.

Poor hiring and employment practices can have a dramatic impact on reputation.

Cases that illustrate this include **Nike's treatment of factory workers**. And more recently the conditions of **garment workers in Bangladesh**.

These are extreme examples. They **did not happen within our borders**. But their links to popular clothing brands available here **were noticed**.

In both instances these situations attracted a lot of attention and media coverage. And placed **pressure on Australian companies**.

When these stories break overseas the next obvious step is to consider our own practices. People start to ask questions about **our own backyard**.

Your business may not be scrutinised directly. But **industry practices** might be. Or your **supply chain**.

I'm sure your companies put a lot of work into **building and maintaining your reputation**.

And you probably already strive for harmonious, productive and co-operative workplaces ...

Why wouldn't you?

It makes good business sense.

HOW WE HELP BUSINESS

We at the Fair Work Ombudsman actively encourage and **promote best practice**.

We have free information available on our website to assist those striving for it.

Not just about obvious ‘below the line’ things like complying with minimum wages, but also on topics such as balancing **work and family** and hiring **young workers**.

Last year more than **10 million people** used our website and our fact sheets and templates were downloaded more than **1.5 million times**.

Over a **million people used our pay tools**.

So we know that our information and advice is accessed but it’s up to businesses to decide how they use it.

People spend a lot of time at work.

And, the reality is that workplace relationships are like any other relationship – they can become strained.

There can be problems.

Communication breakdowns.

Misunderstandings.

And personality clashes.

It’s at this point that people often come to the Fair Work Ombudsman.

They come to us when a workplace issue has boiled over.

When the relationship is quite strained or has even broken.

I have often listened in on the conversations my **staff have over the phone** as they work through an inquiry or help resolve a complaint. This ‘remedial’ action often takes place after a person has **left the workplace**.

There is always a story. A subterranean thread sitting just below the surface of a complaint.

We often get involved as the story is reaching a **dramatic crescendo**. But there was bound to be a point where the story might have ended up differently.

With a thoughtful and early intervention from the employer, perhaps it might have remained sotto voce. And not needed our involvement to try and restore the even, gentle melody.

We always try to work with the parties to **help find a resolution**. But if issues were addressed earlier, in the workplace, **our intervention** may not be necessary at all. We've developed tools to assist people to do this.

For example, we have an **online training program** for employers and employees that has tips and strategies for having difficult conversations in a constructive way.

Let me show you a short video of this.

[PLAY VIDEO]

You can access this from the Fair Work Ombudsman website.

We have also recently launched a **guide to hiring new employees**. It has straightforward advice about hiring staff, as well as tips and hints to make the process easier.

We also promote Best Practice workplaces by talking to people such as yourselves.

By sharing stories that I hope will assist you and motivate you to check something or do something differently.

In our experience, most employers want to do the right thing.

But we also know that mistakes do happen.

I can appreciate that the Fair Work framework is not always an easy one to navigate.

I'm not only talking about small businesses – that may not have dedicated HR support.

Larger businesses are not immune from making mistakes.

We have seen this first-hand.

RISKS OF COMPLACENCY

There are risks in being **complacent** about compliance.

For these reasons I think our experience is worth sharing.

They may help you consider areas where you may have become complacent. Or where there may be ways to do things better.

Things often go wrong in larger and more established businesses when **complacency has crept in**.

It can occur in any businesses – despite wanting to get it right or believing obligations are being met.

Most of us take for granted that we are paid properly. And that the HR department keeps tabs on something like that.

Larger employers generally have infrastructure in place to ensure staff are paid correctly. Systems that take care of this most fundamental, ‘below the line’ requirement.

This infrastructure might include HR teams and expertise as well as **policies, systems, procedures and programs** that **appear to take care** of the basics.

But not always.

In **2011 Super-A-Mart** – a large furniture chain store – back-paid **\$1.3 million** to almost nine hundred (**900**) staff. This was the result of a mistake by the business, which initially came to our attention by a complaint.

Most of the Super-A-Mart stores required staff to begin work earlier than their rostered shift and stay back after their shift had finished.

Yet they failed to pay staff for this time spent opening and closing the stores.

In **2012, Rentokil** – owner-operator of Pink Hygiene Solutions and one of the world’s biggest business services company – back paid **over \$1 million** to employees after a complaint was made about overtime payments.

The complaint led to a full self-audit, which subsequently identified the overtime **error was widespread** ... and ultimately costly in terms of a hefty back-payment bill.

Last year, **Camp Australia** – a provider of school camp and activities programs – identified a defect in its payroll system.

Likewise, it instigated a detailed audit of its books.

The result?

More than three thousand (**3000**) employees had been underpaid **over \$2.6 million**.¹

Now, I have not shared these stories in order to scare you. I also don't want you to think that everyone we talk to is breaking the law!

The message I want to share is that there are things you can do to ensure you are compliant and that you maintain your compliance.

And there are always things you can do to be better ...

If you are not doing these things,

if you are assuming that the infrastructure you have in place **is taking care of everything**

and you **un**intentionally contravene;

We will not be apologetic about enforcing the law.

We will not accept complacency as an excuse.

We expect, and in the majority of cases see, larger and established businesses role modelling compliant practices.

SELF-AUDITS

Getting into the habit of conducting self-audits to **monitor** your own compliance could avoid these types of issues.

You can do this to ensure your **pay systems are working** in the way you intend.

You can also use them to make sure you're not relying on **incorrect interpretations or assumptions**.

If you find mistakes we encourage you to **seek out our assistance**.

¹ All of these 3 example cases were resolved via Enforceable Undertakings

An increasing area of our work with established business is done through what we refer to as **Proactive Compliance Deeds**.

I think they carry a great deal of value for both the company and the employees.

They require the **heavy lifting to be done on your side**. But we support and assist those businesses that want to take this proactive and positive step.

These deeds or agreements are tailored to the needs of individual businesses.

They are **not a legislated enforcement tool**, such as an enforceable undertaking. They need not be a remedial tool.

They are more in the realm of a **public commitment** made by you to your employees and the Fair Work Ombudsman about systems you intend to put in place to ensure your workplace is meeting its obligations.

These systems might involve:

- Self-auditing of wages and record keeping
- Self-auditing of supply chain and franchise relationships
- Businesses engaging with their employees to improve compliance.

Such initiatives give business **assurance** that they are meeting their 'below the line' obligations and send a great **message to staff and clients** about taking this seriously.

Hays Specialist Recruitment is a recent example of an employer we have partnered with in this way.

Hays approached us last year with a goal of being an Employer of Choice that is ethical and compliant with workplace laws.

As part of their proactive compliance deed, Hays appointed a **dedicated staff member** to handle any workplace complaints received and to provide regular updates on how they handled these situations.

The company also provided workplace relations training for key managers.

These deeds recognise that there are always opportunities for **continuous improvement** of your workplace practices.

And they also allow businesses to **publically demonstrate** that they are striving to operate at **best practice**.

In addition to Hays, we currently have 7 other Proactive Compliance Deeds in place, with companies such as **McDonald's, Red Rooster and Spotless Services**.

Outcomes of the deeds are reported on our website and often receive positive media attention.

COLES EXAMPLE

I'm going to share another story that underlines why the practice of self-auditing is so important.

A couple of years ago, the Fair Work Ombudsman received a complaint from an employee working as a **fresh produce manager** at Coles.

She made the complaint after she was moved to a **different job whilst pregnant**.

During our enquiries, Coles **conceded it had contravened** workplace laws when it transferred this employee to the role of service assistant.

The new role paid more than sixty dollars (**\$60**) **a week less** than the employee had previously received.

Coles had taken this step on the basis that it was a "safe job" - as the employee had medical restrictions associated with her pregnancy that impacted her produce manager position.

Coles had relied on its Collective Agreement to do this.

But, the Collective Agreement was made **prior to the start** of the Fair Work legislation. It was **not consistent** with new requirements about transferring jobs in these situations.

When we alerted Coles to the issues, the company was **responsive** and admitted the error.

Importantly, Coles also took steps to conduct an **audit** of all impacted employees.

Coles **apologised** to, and **back paid**, those who were negatively impacted.

Coles also undertook to **train** all line managers with supervisory responsibilities about the rights of pregnant employees.

And in a good faith gesture, Coles also provided twenty thousand dollars (**\$20,000**) to a community organisation to fund educational activities for pregnant employees.

These actions demonstrated that Coles wanted to ensure similar problems didn't occur in the future.

It decided to improve systems and processes to ensure ongoing compliance.

The positive response from Coles had a **range of benefits**, not just ensuring it was meeting its 'below the line' obligations.

This story demonstrates the benefits of self-auditing – and from continuing to do so to future-proof your business

Your audits may reveal that you are compliant from year to year – and that's great.

You may find inconsistencies with the law in your policies, as Coles did.

Your audit might reveal that whilst your policy has an error, no one has actioned anything yet and you can prevent future breaches occurring.

You may also discover other opportunities for improvement.

Such as training particular staff or developing new systems.

You might also consider how your systems are perceived internally by your staff.

If they don't work, and they result in errors – how does this affect your internal reputation?

Reputation isn't just external.

How **your staff view** your organisation is important.

These are things that go beyond compliance and create greater cooperation and productivity.

Coles did this by training managers about the type of day-to-day things they face so they could quickly, confidently and appropriately respond in those situations.

This is a specific example of big business **getting it wrong** but finding **positive ways forward** that help **build better practice**.

It's also an example of a business taking proactive steps to protect its **reputation**.

You can achieve this by making your own commitment and plan for regular self-auditing.

Or entering into a Proactive Compliance Deed with us. With the advantage that you have taken steps **before any problems** are found by either an employee or my inspectors. These are indications of an **employer of choice**.

ISSUES BIG BUSINESSES FACE

In our work, we have also learnt about some general issues larger and more established businesses seem to struggle with.

For example, one of the most interesting things we've found through our work with larger organisations is that many HR departments are **relatively small** in light of the number of employees in the company.²

I imagine many of you agree.

We've also seen many HR departments that don't have a detailed understanding of the industrial relations and **legal aspects** of the workplace relations system.

² This finding, and the others referenced in this section, come from reports outlining findings of the National Employer Program.

These two factors combined, may **leave businesses vulnerable** to compliance issues, even around seemingly simple things.

I suspect this would also make it difficult to work towards best practice.

Let me share a couple of the issues established businesses often seem to have difficulties with.

Workplace flexibility and parental leave are important entitlements that seem to be frequently misunderstood and misapplied.

Some employers appear to be embracing **the concept** of flexible working arrangements. But sometimes it can happen in an informal manner and not necessarily in line with legislation. And sometimes, through gritted teeth.

This can make it unclear whether the employer is complying – unclear to both us as the regulator and also unclear to employees.

It can also **undermine the positive intentions** the employer has in aiming to provide a flexible work environment.

We have also come across larger businesses with **limited knowledge of the formal requirements** associated with requests for flexible working arrangements.

And a lack of appropriate mechanisms for making, approving or rejecting requests.

Similarly, we have come across large employers that have **out-of-date** policies or procedures.

Coles was one such example.

In many of these cases, the intent of the employers is to provide the correct minimum entitlements, but **outdated entitlements and outdated wording can undermine attempts to go above and beyond minimum obligations.**

Having sound policies it to be encouraged. But they are no good if they are just put on a shelf. They need to be **maintained**, and line managers need to understand and implement them. This takes support and training. And for senior managers **to walk the talk.**

FLEXIBLE WORKING ARRANGEMENTS

In worst case scenarios, these deficiencies might amount to serious non-compliance such as discrimination.

I am always overwhelmed by the stories I hear about discrimination against workers who are **pregnant or who have caring responsibilities**.

There is some terrible conduct that workers have faced when they have told their boss they were pregnant or when they have returned to work after parental leave.

Some of these stories are just extraordinary.

The **Sex Discrimination Commissioner** has a **review** going on around pregnancy discrimination at the moment.

If you have a look at some of the submissions that she has received, the examples of discrimination faced by both women and men is astonishing.

There's one submission which talks about a man working for a university. He flagged with his employer that he might not be able to teach in the final week of the term because his partner was expecting a child.

He lost his job over it.

As it happened, the baby was late and in reality he could have taught anyway.

Instead of being a responsible employee and giving the employer all that notice he could have just called in sick that week. But he was trying to do the right thing.

This demonstrates that some larger employers, that should be doing better, are a long way off harmonious, productive and cooperative workplaces. **They are well below the line.**

There is no way this situation only impacted the employee who was sacked.

Others would have seen and heard about it. And undoubtedly this would have had a negative impact on their own output and engagement.

Potentially the employer could also be spending time and money dealing with government departments or legal action.

In any event, the reputational damage for the university could go far beyond any of these other issues.

BUSINESS COUNCIL'S REPORT

Of course there are also really positive examples of businesses undertaking innovative and proactive programs around **gender diversity, workplace flexibility, parental leave and discrimination**.

The Business Council of Australia, in its report titled '**Increasing the Number of Women in Senior Executive Positions**' has some great recommendations for businesses wanting to develop a diverse culture free from gender bias.

The **basic premise** is that **simply waiting** for a critical mass of women **complete relevant qualifications** and move into the workplace is not enough to get an equal number of women into senior jobs. We **need to do more** than let time run its course, if business to access the **full talent pool** available to it for senior positions.

The report suggests that appointing women to leadership roles cannot be viewed as a separate process or initiative.

It must be integrated into the overall talent identification and development strategy.

As a first step, the report suggests the **CEO declare** the achievement of gender diversity as a significant strategic objective of the organisation.

He or she should invest **personal and reputational capital** in reaching the objective.

They should be the **chief advocate and storyteller** about diversity and inclusion.

The report also suggests **training across all levels** – from the CEO to frontline managers.

In the value of diversity.

Against conscious and unconscious bias.

And how to think through, discuss and decide about talent, potential, development, performance and retention.

The report talks about the benefits of companies implementing a **clear talent management philosophy that is merit-based and free from gender bias.**

To avoid a **reliance on existing norms** – such as the majority of leadership roles being occupied by men.

It recommends setting **targets** to achieve equal representation across departments.

As well as the **sharing of data** so everybody has the facts, rather than hearsay and assumptions.

It also recommends minimising informal network practices among executives that exclude one gender or the other.

I don't have time to talk about all the recommendations today, so I have shared a few that I believe will be of interest.

I recommend that you have a read yourself. It's available on the Business Council of Australia's website.

And it's certainly a fantastic point of reference for those interested in creating a diverse workplace culture.

I'm sure you appreciate that a culture free from gender bias is appealing to employees and attracts talented staff.

BECOMING A PARENT

If business wants to access the **full talent pool** available, it needs to ensure that people don't suffer **disadvantage for having caring responsibilities**.

Having children inevitably **impacts most directly on women**. As a manager, colleague and friend, I have had countless conversations with women who agonise over their **decision to have a child**.

When is a good time?

How will my employer react?

How will I be treated when I return to work?

Will I be judged for asking for part-time hours?

A workplace that wants to be an **employer of choice** should be striving for a culture **where women are not worried** that having children will **harm their career prospects**. Or that their **job or status** will be downgraded when they return from parental leave.

It should also be a culture that **supports men** in accessing entitlements.

For **women to step up** in the workplace, it's inevitable that men also need to feel they can **step into the space** of caring for their children.

I wonder if you saw the article in The Age in mid-March, about the **benefits of shared parenting** in the first year after the baby is born.

The author spoke about **strengthened family relationships** and improved child wellbeing.

Shared responsibility seems to help **mothers to get on with their career** if they choose to.

He also spoke about something he called the '**father quota**'.

This is where fathers are offered a decent entitlement that is theirs alone.

Since **Norway** introduced and then extended a father quota in the 1990s, the proportion of men taking leave increased **from 4 per cent to 89 per cent**.

In **Iceland**, the mother and father both get three months of leave each and a final three months to be shared between them.

Again, eighty four per cent **(84%) of dads take leave**, with the number continuing to rise.

Germany, Italy, Sweden and Finland also have a good story to tell – which is that, if you target the right incentives at fathers and they will eventually take parental leave they are entitled to.

Under the **Fair Work Act** both men and women are entitled to twelve (12) months unpaid parental leave –and paid parental leave in many cases – and to ask for flexible working arrangements to care for a child when they return to work.

But there is **little paid leave quarantined for Dads**.

Social norms seem to drive women taking a greater proportion of the available leave, and accessing part time arrangements on return.

This **slows their progress** in the workplace. Their employers are disadvantaged by this as much as the individuals. They are depriving themselves of accessing the full benefit of their talent.

We do not often hear **discrimination complaints from fathers** about their parental leave entitlements or family responsibilities. But I suspect many of them are **not attempting to access the full range of entitlements** because of expectations in the workplace and social norms.

You may have policies and procedures in place to support women leaving for and returning from, parental leave. But **do they support fathers** who want to take time off?

I encourage you to consider your own culture in this regard.

If you look around your organisation, do you see **men and women accessing** parental leave and flexible work arrangements?

Is parental leave encouraged in the workplace by line managers?

Do employees know what their leave entitlements are?

Are they requesting to take this leave?

Do people call it parental leave, or is it feminised as “maternity leave”?

Providing **real choice** to employees to access leave entitlements, or work hours that balance the needs of their family and the workplace is not only good practice – it makes business sense.

An inclusive and flexible culture has a range of benefits.

It can help to retain **skilled and valued** staff members.

It can decrease **absenteeism** and reduce **staff turnover**.

It can also increase the number of people who **return to work** after parental leave.

It can improve staff morale, engagement and productivity.

ENFORCEMENT

I haven't spoken about the court action that the Fair Work Ombudsman initiates today. This is not because it isn't a central feature of our work.

It is certainly headline grabbing and we achieve compliance through publicising the serious consequences that flow from not meeting your 'below the line' obligations.

Compliance is not optional. Ignorance is not an excuse.

But let me put our **litigation program in context**. We provided more than six hundred thousand (**600, 000**) people with information through our **Infoline** last year and received over ten (10) million visits to our website.

In the same year, over twenty six thousand (**26,000**) **workplace complaints** were resolved mostly through **informal** and simple voluntary assistance processes such as **mediation**. Through this work we recovered more than **24 million dollars** for about **17,000** underpaid workers across the country.

We put fifty (**50**) **matters into court** – this is less than a quarter of one percent of all our matters.

They grab headlines. But they are a **tiny proportion** of our interaction with community.

We appreciate they do have a lot of **impact**, particularly if you are involved in one. I don't apologise for taking these matters to court though, or for the media attention they get.

We **reserve formal enforcement action**, especially litigation, for the most serious cases. Cases where employers **refuse to 'make good'**. Cases where employers **refuse to engage** with inspectors to resolve the matter.

We need to put the worst of the worst matters to court to ensure a **level playing field** for everyone who is competing fairly and lawfully.

So my advice to you is – if you find a problem, engage with us. Don't be one of these case studies. Don't become an **example of what not to do**.

ENGAGEMENT

However, I hope you take more from the positive messages I have shared. We know most employers want to get it right and we know it isn't always easy. –

That's what we are here to help with: Seek advice if you need to.

Whether it be from us, an employer organisation or another qualified expert. **Do your due diligence**. Be confident you have taken care of your 'below the line' obligations.

I hope you're also encouraged to consider whether you sufficiently self-audit.

And if you don't, to consider how you can be sure you are compliant.

If you have a system for self-auditing or positive stories of how it is has helped you, I would be really interested in learning about these.

Feedback and information sharing help me as the regulator to gain insight into the issues concerning you, and how I can then assist.

It's important for us to be balanced – to balance **helping someone understand** the law and the need to **remedy a breach**.

A balance between **resolving a complaint** and getting individuals back to work.

It's really important to me that I **understand the impact** of our work on the people affected by it so that we can strive to **get the balance right**.

As HR practitioners you are all very connected to the issues that I've discussed today and I consider your **feedback highly valuable**.

If you have any I would really like to hear it, whether it be in just a moment when I take questions, or another time in the future.

Thank you.

[Open the floor for questions] *[approx. 26-27 mins speaking time + video clip time]*